

OREGON LAW COMMISSION

Date February 18, 2015
9:30 a.m.

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

MEMBERS PRESENT:

Lane Shetterly, Chair
Prof. Bernie Vail, Vice Chair (on phone)
Judge Stephen Bushong (on phone)
John DiLorenzo, Jr.
Hardy Myers
Scott Shorr
Dean Curtis Bridgeman
Julie McFarlane
Mark Comstock
Justice Martha Walters (for Chief Justice Thomas Balmer)

MEMBERS EXCUSED:

Sen. Floyd Prozanski

STAFF PRESENT:

Jeffrey C. Dobbins, Executive Director
Philip Schradle, Interim Deputy Director
Caitlynn Dahlquist, Law Clerk
Brett Smith, Law Clerk
Chris Strum, Assistant

GUESTS:

Samantha Benton
Brenda Wilson

MEASURE/ISSUES HEARD:

Review and Approval of Minutes
Review and Approval of Legislative Concepts and Reports
Executive Director and Deputy Director's Report

Speaker	Comments
Shetterly	Confirmed the presence of a quorum. Called meeting to order of Oregon Law Commission February 18, 2015 and welcomed commissioners present and also Professor Vail and Judge Bushong on phone. Asked staff to proceed with the agenda beginning with introductions.
Jeff Dobbins	Phil Schradle has joined us as Interim Deputy Director. Many of you have worked with him from his time at the Department of

Shetterley

Justice and at the Supreme Court. We are very lucky to have him come out of retirement and helping us out. It is also worth pointing out that we are very lucky to have Caitlynn Dahlquist who has come to rejoin us. She was here as an undergraduate office assistant and worked at Senator Close's office for two sessions. She has returned to the university as a law school student in the three plus three program and the OLC as a law clerk who knows the legislative process. Brett Smith is one of our law clerks whom many of have met and Chris Strum is our administrative assistant. We will follow up with the process of replacing Wendy Johnson later with the staffing report.

I want to extend my welcome and thanks to Phil in particular. We got the word late in the year from Wendy and it was not welcome but good for her to move on to a position that advances her career. Jeff contacted Phil and it worked out well for him to join us and I want to extend my welcome and thanks for stepping in and helping us out for this session. Welcome Dean Curtis Bridgeman to the Law School and his first meeting of the commission. Norman Williams attended the previous meeting. Introductions are over so let's move on to minutes. We have two sets of minutes before us, May 28th and September 19th commission meetings. Are there any additions or corrections to the minutes otherwise I would accept a motion to approve them both.

Vail

So move.

Shetterly

Is there any objection? All right, that motion is carried. Thank you very much. Next we're going to do is move through the reports of two Work Groups. This will be the meeting at which we advance two of our bills this session. We have another meeting coming up next month where we'll have more bill introductions. Those bills aren't quite ready yet for prime time but these are so we wanted to go ahead and get them into the mix. I should mention that it will be at our next meeting as well that we will honor Wendy.

First is the amendments to the Oregon Probate Code. Jeff would you go ahead and take that? I am chairing this Work Group. Phil, do you have some comments you want to make first?

Phil Schradle

The only thing I wanted to make sure of was that all the commissioners received the updated, revised version of the report. Prof. Susan Gary oversees this and we're working with her to get everything in final form. That got sent out later, there is an earlier version of the report and a revised version of the report that came along a little bit later. That revised version of the report still has highlighted in it a few comments along the way that relate to the suggested changes that she has also

Shetterly

submitted to the commission for its consideration and Chair Shetterly you may be more familiar with those than I am and those are suggested changes that she sees in developing the report that she views would be good additions and modifications to the bill draft that you currently have before you as well.

What she's done is she's highlighted in her report in yellow language that suggests conceptual amendments to the bill draft. They are not major substantive changes. I think as she was drafting the report she was realizing that there were some places that the bill draft didn't quite track the direction the drafting Work Group had given and wasn't consistent with the approach with the rest of the bill. She has highlighted a couple of those. I think because of that what I'm going to do is not walk section by section but I will address my comments to her report rather than to the bill itself. I think her report is easier to follow and track what's going on. Then we'll touch on those highlighted changes that she's suggesting as conceptual amendments for the bill going forward. Also, assuming that we've all read the report, take a look at the bill I won't go entirely section by section but will touch on the sections that I think are probably the most significant changes that the Work Group is proposing and then be happy to answer any questions that commission members might have about those and any other sections I may not touch on in my opening comments.

Just briefly, this is Phase One of this Work Group's effort as the Probate Modernization's Work Group. This session the Work Group focused on primarily intestacy and wills. We did not get into the probate process, that will be the next phase and so we are focused primarily on Chapter 112 which deals with those subjects, intestacy and wills and a few other related things. If I could draw your attention to section six of the report, we are making a change here. I will do this and try not to use "per stirpes" terminology, Susan fairly well explains it on the second page that discusses section six. Basically, I think her example is a good one. If a decedent had three children, died intestate, and those three children (assuming no spouse) would inherit the decedent's estate one-third each. If one of the three children died leaving two surviving issue, then that child's share would be divided so that the issue would each take one-sixth and then the surviving children of the decedent would each take their one-third. That's all pretty straight forward. Then she draws the further illustration of what's really changing here. Let's say that all three of the children are deceased and child one had one child, child two had two children, and child three had five children so we have eight grandchildren. Under the statute now, and this came as a surprise to many of the practitioners in the

Work Group, the way representation works is if all of the decedent's children were gone you would divide the estate in equal shares at the next generation. That is, under current law, all eight of the grandchildren under that scenario would each take one-eighth of the decedent's estate. The practitioners on the Work Group mulled this at great length and felt that what most people understood and what they dealt with was that those shares would continue to be divided according to the children just as if child one had received his or her share and then left it to his child, child two had received his or her share and left it to his/her children. They believed that most clients understand that the division would be that each of the grandchildren would take the parent's share and then divide it among them at that level. Susan says here child one's child would take a full third because it was an only child, child two's children would each take one-sixth because that's half of child two's, and likewise child three's children would share child three's one-third share. So, believing that that is the more common understanding of how representation works in intestacy in their context with clients, the members of the Work Group, and I don't think there was any dissent among the Work Group members, that we would make this change to how representation works in our intestacy statute. Any questions about that?

Vail

I'd like to make one comment on that. The email we got from Caroline Forell notes that the only actual empirical evidence on that point is a couple studies that came to the conclusion that although a good number of attorneys think that that's what clients want, but when you ask the client that's not what they want. What they want is what we've currently got. Here's one of the problems with intestacy statutes is they're generally inaccurate without any kind of empirical research, without ever asking "What do you want done with your estate when you die?"

Shetterly
Justice Walters

Okay. Judge Walters?

I had a similar question and I don't know at what level we make these decisions. To me, if I died and none of my children were left but all I had left were grandchildren I'd want them to be treated equally. I'd want the current rule and it looks like Prof. Forell said that's the majority rule.

Shetterly
Walters

It is.

And it's been our rule and that's the rule in the UPC. So to change it based on a small sampling of the practitioners just doesn't fit but I don't know what the appropriate action is.

Shetterly

It's up to us, that's why I highlighted it because we could move this forward with the conceptual amendment basically to restore the current definition of representation. There might still be some wording changes, but if we were to make a conceptual amendment back to our current modern per stirpes definition of representation we would approve the bill with that conceptual amendment to section six. And I think that's a fairly discrete amendment that would be easy to do without creating a lot of problems. Caitlynn is agreeing with me. Phil?

Schradle

The only comment that comes to my mind that I'd like to share is that, if I understand things correctly, the rules of intestacy simply set the default and if you want it on an individualized basis to have a different result you can certainly do that through a will.

Shetterly

And that's true, like Bernie says the intestacy really presumes what someone would have done if they'd made a will but they didn't make a will and so it does take a guess at what most people would want. Again, that's the reason I highlighted it to make sure that we had this kind of conversation at the commission level and it is the commission's recommendation to move this bill forward in whatever form we approve.

Vail

If I could make one more comment. Assuming that the attorneys on the group were correct, in that their clients really want common law per stirpes I assume that when they draft a will for these clients they put in the appropriate language to divide it at the level of the kids. And if that's the case, then I don't see why we need to change the statute to give that effect when everybody else is using the statute and drafting with that statute in mind. I think changing the common law per stirpes is going to cause nothing but confusion. The only difference it's going to make is that the attorneys who have clients who want to divide at the level of children are now not going to have to draft anything particular, they can say "Oh gee, per stirpes" and let the court guess as to what they mean.

Shetterly

Anybody else want to weigh in on this?

Shorr

I had the same impression. I share (chaired?) with the equities would seem to be that the second generation would share equally and I'd be concerned about flipping the old English rule without a lot of evidence.

Shetterly

That's exactly why I wanted to raise it, and I don't have any particular passion about it. It's what the commission wants to do. I'm getting a sense that this is a section that we would propose to conceptually amend. Do you do wills?

Shorr

I do not.

Shetterly

Do you think about wills? [Laughter]

DiLorenzo	Mr. Chair, in this matter I will follow in your lead.
Shetterly	I'm going to follow the commission's lead.
[?]	Mr. Chair, if you are wondering what should be done with unclaimed funds you might want to provide that they go to the legal aid fund. [Laughter]
Shetterly	Only half to legal aid and half to another charity. I guess I would invite a motion to conceptually amend section six to restore the definition of representation to reinstate modern per stirpes.
Vail	So move.
Shetterly	Is there any..? Jeff?
Dobbins	I just want to make sure that I'm clear that everybody's clear on where the work group was because it seems like it was a relatively significant change coming out of the work group and just before we flip it back the other way. Mark, were you on the work group too?
Comstock	No. I was on the work group at times as my schedule allowed.
Shetterly	And Bernie was on the work group and as he spoke I remember I am remiss to say there was no dissent because I think Bernie did dissent in the committee.
Vail	I did.
Shetterly	You did. Help me out, was there any other dissent? I'm not trying to advocate but to fairly represent the work group. Were you pretty much the lone voice on this one?
Vail	My recollection is that everybody else seemed to conceive that the attorneys were right that that's what their client wants, but it strikes me that changing statutes is not the answer to that problem. The answer to that problem is drafting the will.
Shetterly	I will say that there was some recognition that there was an irony in that the name of the work group is Probate Modernization where we were here proposing to restore the old English rule. Probate Modernization with an asterisk. But again it is our product ultimately, the work group makes a recommendation to the commission and we move the bill forward with our stamp on it.
DiLorenzo	Mr. Chair? Just an idea for the commission, if we had a concern about showing the utmost respect for the members of the work group who prepared this product, one option would be for us to make the change and then submit a very brief minority report that would provide the legislature with a choice. A rationale if that's something that we were concerned about.

Shetterly

I think I would, rather than submit our own minority report with the bill, what we will do when we finish today is send out an email to the work group members and there are state section members on the work group and if any of them want to individually propose an amendment they can certainly do that. If this is what the commission wants to do I'd be inclined to move it forward unless there is dissent here among this group.

Dobbins

I would just say that I'm sure that Susan Gary can lay out the choice and we can articulate this decision and if the legislature decides they want to go back the other way that's certainly an option.

Shetterly

I would say that I don't know that this represents what the work group members would die on. [Laughter] I have Bernie's motion to conceptually amend section six to restore modern per stirpes and I guess without further discussion I would ask if there's any objection to that motion? Hearing none then we'll make that amendment to the bill as we go forward and email a note to the work group members.

I want to pick up going forward here. Section 11, this ties closely with section 29 of the bill which was another major change. Section 11 sets out the formalities of execution. I want to point you to the next to the last paragraph of Susan's report under section 11 where she's highlighted language clarifying the witness can sign as a witness within a reasonable time before the testator's death. The witness's signature should be on the will before the testator dies and she cites the Rogers v. Rogers case that reflects current common law and make that explicit in the statute. That's one change. The other one and I'll jump to section 29 and talk about it. We had the discussion in will formalities, what about holographic wills and we had discussion about wills left on ipads and iphones. I think there's an Australian case of someone who committed suicide and left a will on their phone. Was that it Bernie?

Vail

Yes.

Shetterly

I'll have to say I have an estate where we have a will but the decedent was working on his own will at the time on his ipad. There was a will on the ipad. It was not completed but he was working that way. We decided that we were a little bit too fearful of technology to go so far as to acknowledge iphone and ipad wills but we did add in section 29 the Harmless Error and this is a modern development where a will that has not otherwise been executed with the testamentary formalities may be admitted to probate and so this could include a holographic will if there is clear and convincing evidence. So this requires basically formal admission of the will with notice to heirs and

beneficiaries. So you can't just submit this Harmless Error will with a petition and get an ex parte order the way you can with a will that's been executed according to the formalities. The sense here was to at least leave open the prospect that somebody may have fully satisfied the expression of their intent but otherwise have missed on the testamentary formalities and give them with section 29 the opportunity to have that will acknowledged by the court after notice to all of the affected parties and after a hearing and a determination by clear and convincing evidence. The sense was that something less than that would open the door where the exception swallows the rule where we would basically acknowledge holographic wills if we made the hurdle too low. The sense of the work group was to at least leave open that opportunity on these wills that have been executed without complete adherence to the formalities. If there is comment on that I welcome that because that was another significant change by the work group. Bernie, did I get that right, do you have anything to add on that?

Vail

Not really. I'm just think it's a very simple approach to the common mistake, that may be a law office mistake where the attorney is not careful and has the parties sign the wrong documents. The signature appears on the affidavit but not on the will and the common law says "Oh gee I'm sorry too bad no will. You didn't comply with that." I think that strict compliance law is long due for repeal and I think the harmless error rule makes a lot of sense.

Shetterly

Okay. Any discussion on that? All right, then I'll move on. Section 12 we did pick up the doctrine incorporation by reference which allows a will to identify another document and make its provisions part of the will, that as long as the other document is in existence when the will is executed we have incorporated that from the Uniform Probate Code and also reference to the doctrine of acts or events of independent significance making that a part of our will statute. We spent a lot of time on in terrorem clauses. The discussion fairly well fleshes that out. In section 16 I wanted to mention that, and this was an interesting point that we made where we have a statute right now where marriage after a will has been executed revokes the will. Recognizing that we have people who entered into registered domestic partnerships under the statute and may have made wills as domestic partners and may then have gotten married. Once same sex marriage became legal in Oregon the concern was that those wills could inadvertently be rendered void or revoked by a marriage after entering into this domestic partnership relationship, and so we have acknowledged that in section 16 so that a registered domestic partner who marries that

partner after having made a will will not affect the revocation of the will in favor of that domestic partner. In section 17 we got to talk about the rule in Shelly's case, whatever that is.

[Laughter] Looking at things that really merit significant discussion, we did spend a lot of time on the slayer statutes, that's sections 22 – 25. That turned out to be less significant than the conversation. I'm trying to get to one change I want to get to and that is in section 27. That is truly a modernization in that it deals with heirs that are conceived after a decedent's death, something that the probate code doesn't even consider currently because I think the technology probably just wasn't developed.

DiLorenzo
Shetterly

What was the common law?

The old English common law would fall in the category of miracle, or suspicion. [Laughter] So we have created in section 27 a means by which posthumously conceived children can be heirs of a decedent. We put some sideboards around that requiring written intent by the parent, also notice within four months by the person who has possession of the genetic material and then two years for that posthumously conceived child to be in utero. The concern there that technology is such that this genetic material can be kept for years and how do you ever administer an estate and close it out if that genetic material is always going to be available for implantation. That was the sideboards the work group put on this but otherwise a first foray for us into the recognition of posthumously conceived children as heirs or potential heirs of a decedent.

Walters

In this email we got from Professor Forell she says that under federal law these children can't get Social Security benefits unless they can take under intestacy provisions and that our bill requires a will or a trust in order for these children to take. Does she have that right, and is there a way we could give them? I agree that there need to be these limits that you've put around it but is there a way that they could at least get Social Security benefits even if they don't get other assets of the estate?

Shetterly

Bernie, do you remember that conversation? We did have that conversation.

Vail

The way the feds are doing it now you can't get Social Security benefits unless you are eligible to inherit by intestacy under state law. I think that's the simple statement.

Walters

And you said there has to be a written indication of intent but does there actually have to be a will or a trust set up?

Shetterly

Looking in section 27

Dobbins	Page 17 line 22
Shetterly	Decedent's will or trust provides for posthumously conceived children <u>and</u> a writing that material may be used for posthumous conception. There was discussion about that and I'm trying to recollect what that discussion was.
Walters	I was wondering with regard to this one and the other ones that Professor Forell raised, you said you've already discussed them.
Shetterly	Yes
Walters	Okay because I was going to suggest that maybe we send it back to the committee.
Shetterly	No, in the interest of time I wouldn't do that.
Walters	Not now, go ahead and send this forward and ask them to keep looking at some of these things that people might have an interest in.
Shetterly	And I'm very comfortable to do that especially around that point because I know we did talk about the Social Security issue. If you're comfortable what I would suggest is that we do is go ahead and move this forward but then invite some further discussion among the work group members to see if we want to make an amendment to, or if we think it's possible. It seems to me there were some issues around that the work group was concerned about and it may be just the sidebars and clear intent. But if you're comfortable with that I will commit to inviting that discussion in the work group.
Walters	That would be great, thank you.
Shetterly	And that I think really highlights the most significant issues, although I would point out the last comment just for the conclusion that we are deleting a transitional section that provided for the exploration of dower and courtesy. We killed that long ago but the bones remaining in the statutes and now we can the bones out because the dower and courtesy have long been gone.
Shorr	So I would ask based on that walk-through and your own review of the bill draft if there are any other comments or questions.
Shorr	This is a tremendous amount of work obviously and I really appreciate it. One question on section 11. There was a decision not to permit a notary to be a witness or to substitute for a witness and usually I think of a notary as more substantial verification than a witness but maybe there's a reason. Last line of section 11. "The work group decided not to adopt the UPC provision that permits a will to be notarized as a witness."
Shetterly	Yes, Bernie do you remember that?
Vail	Yes, I remember that and if I can speak to that I was opposed to

that conclusion because one of the things that leads to the invalidation of so many home drafted wills is that people don't know the realities of the requirement of notarization. They're taught since childhood that when you have an important legal document that you're going to sign the way to make it effective is to get it notarized. So people go and get a notary and sign in front of the notary and then the court says sorry, your will is invalid. I'm firmly in favor of allowing notarization as a substitute for two witnesses. I think two witnesses is a historical anachronism that probably has long since served its purpose.

Shetterly

As I recall the work group was more inclined to leave the two witness requirement because it is historic and commonly understood, with the recognition that a will which has been signed in the presence of a notary but not two witnesses would otherwise be capable of administration under the harmless error rule. So the door is left open for that will to go through as a harmless error rule, rather than creating an alternative to execution in the presence of two witnesses. They felt that was the fail safe for that kind of an execution.

Shorr

I would think a notary that's in addition to two witnesses.....

Shetterly

This is notary without two witnesses.

Shorr

But could you have both possibilities in the statute? And would that be something, unless there was a risk in just having a notary active in the law firm. I think having both options might be helpful.

Shetterly

What is the commission's pleasure?

Walters

I feel like I haven't heard all the long discussion of it.

Shetterly

I guess on this one my preference would be to leave it as the work group drafted it because they did consider it at some length. The judges might have been the ones who felt more that they two witness requirement did have some salutary effect but recognizing that the harmless error exception that we have built into it would not invalidate that will outright but just would require that it go through the other process for proof and administration. I think they just thought that was a good way to drive down the middle of the issue.

Walters

The UPC allows for the notary and what about the majority of the states? I'm just thinking about people who live elsewhere.

Shetterly

If it's valid elsewhere it's recognized in Oregon. If it's valid where it's executed it would be recognized here.

Shorr

My other question was effective clauses and was there much discussion about how that works with wills that have been previously.

Shetterly

Yes, and I think now that we've recommended going back to the modern per stirpes, that was the one that probably had the biggest potential impact in terms of effective date or affecting wills already adopted. I don't know that the other changes we've made are that significant in terms of undoing what somebody's testamentary intent would have been.

Comstock

There is a provision in section 11 that seems to change fairly recent law and that is to allow the witnessing of the will after the decedent's death and that comes from Prof. Gary's subsequent comments. I wasn't present for that discussion I'd like to hear a little bit what you recall about whether Prof. Gary's notes are correct and do we want to make that change?

Walters

The second sentence looks like it's inconsistent.

Comstock

That's my point. I didn't recall a discussion that went back to the witnessing both before and after. It was to try to stay consistent with existing law which is the Rogers case that's cited in the -2 report.

Shetterly

Bernie, do you remember? You always have the prospect of that deathbed execution where the last thing the person does is sign their will and they expire before the signatures actually get affixed to the witnessing. Bernie, do you remember what the work group's conversation was about that?

Vail

I really don't. I have a vague recollection of discussing the issue but I don't remember the specifics of the discussion. It's just my take on the question of what happens when the deathbed will is executed and as the signature is completed the heart attack occurs and now we have the will with a dead testator and two witnesses standing by ready to sign what do we do? It seemed to me perfectly reasonable to allow the signature to take place.

Walters

It looks like harmless error is expected to take care of that problem but that the committee wanted to recognize that if you recognize the problem before the testator dies you can fix it before but after you would use harmless error to deal with it.

Shetterly

Sec. 11 line 20 the bill does not acknowledge or allow execution after death. Her notes there indicate that additional language that she thought reflected the discussion of the work group. I guess I would ask the Commission, right now the bill as it is drafted does not expressly acknowledge or permit witnessing after testator's death. What's the commission's sense? Whether we want to allow that witnessing to occur within a reasonable time after the testator's death? That would be the additional language that Susan points out on her first comment on that additional page. Again, it seemed reasonable in the conversation in the work group about that deathbed scenario in

	the sense that does it really suggest the opportunity for fraud if a witness's signature is placed on the will within a reasonable time after death as long as they did in fact witness the will. Should death be the cutoff for that execution of a witness's signature and I think the work group felt that if in a reasonable time was a good safe harbor without having to kick it into the harmless error will.
Walters	Chair Shetterly, doesn't she have it written within a reasonable time <u>before</u> ?
Shetterly	Yes, but that reflects the draft and that's why she's highlighted it is because that would be a change to be made based on her comment.
DiLorenzo	If a witness is allowed to sign a reasonable period of time after the will is executed, most witnesses don't read the will.
Shetterly	Right.
DiLorenzo	So let's say, the will is signed by the testator, the testator dies, and a day later the people who were witnessed the signing of the will, affixed their signatures on some document that somebody says was the will. Now they saw the testator sign a will, but they haven't read the will so how would they know whether that's the will that the testator signed.
Shetterly	Good question.
DiLorenzo	And in my mind, I think that raised the harmless error to be used in court and in fact this is the document the decedent signed before death. Then you have the higher standard of clear and convincing, you prove that it's that so you potentially get there through harmless error. I would say stay with the bill as drafted for this section.
Comstock	That makes sense.
Shetterly	That works for me.
Myers	There are a couple or three other points that I think Prof. Forell mentioned that I don't think we've touched on and I wondered if it would be advisable to send a few moments looking at those. We have dealt with some of them. Near the bottom of the first page of her comments, she notes "Section 5 changes 112.055 regarding the ability to recover escheated funds if a missing heir shows up. I recommend that like the UPC, Oregon put a time limit on this such as four, six or eight years." Did the work group discuss a time limit?
Shetterly	No, that wasn't even discussed, that was a change that wasn't even presented to or discussed by the work group so that's totally new.
Comstock	There was a subsequent email that indicated there was a statute

Schradle	in 116 that sets a limit for challenging escheated funds. I believe commissioner Comstock is referring to an email from Gretchen Merrill that cites ORS 116.253. It says that it provides the timelines for recovering property escheated to the State.
Myers	So there is a timeline in place.
Shetterly	Yes there is. Gretchen Merrill was a member of the work group and she works with state lands so she is up on that. That one is covered.
Myers	I question the need for adding in registered domestic partners under section 8. Now that same sex marriage is recognized in Oregon it just adds words and they eventually lead to confusion.
Shetterly	I think it's a valid point to address where we are still at this point where we are at point where the transition from registered domestic partnership to marriage is still fresh and you may have wills made under the domestic partnership that by a strict reading of the statute would be invalidated by a subsequent marriage. My sense is that another modernization work group may take that out because it is outdated. For now I think it's currently useful.
Myers	Which prompts a question on my part. I gather the work group is satisfied that it fully addressed whatever provisions might be needed that pertained to the fact of one or another kind of relationship between persons of same sex. The work group felt any issues arising from that in the context of chapter 112 had been addressed.
Shetterly	I think so.
Myers	I'm not suggesting they weren't.
Shetterly	That's another area we discussed at length.
Myers	Then Prof. Forell says "Third I wish that under Section 16, we would go further re the impact of marriage on a will, and follow the vast majority of jurisdiction in only the new spouse his or her spousal share instead of revoking the entire will."
Shetterly	I don't think that was even proposed in the work group. Do you remember any of it?
Vail	No, I don't think that was even proposed but I think it's a sensible idea because I don't see any reason to revoke the entire will when the substance ... is protected by the elective share statute. What that does is revoke all the gifts to charity and other members of the family that are over and above the spouse's elective share.
Walters	Is that something we could ask the group to take a further look at and propose an amendment if they think it appropriate later on?

Shetterly

Okay, let's do that. I would hate to jump on that one because it wasn't a point of discussion with that work group so let's do that, we'll add that to our comments to them.

Myers

Her next comments are those related to section 27 and after conceived children which we've discussed. She says "Finally, I wish that Oregon would be consistent of reformation when there is a scrivener's error. For trusts we allow reformation so long as there is clear and convincing evidence of the mistake and what the settlor actually intended. For wills we follow the old rule that a will can only be reformed if there is an ambiguity; otherwise you need to sue the lawyer for malpractice. Why the difference? And what happens when the scrivener's is in a testamentary trust? Seems like if reformation is good enough for trusts, it should be good enough for wills."

Shetterly

Maybe in keeping with our earlier response to her comments, this was not an issue that was even discussed by the work group so let's forward that to the work group for consideration.

DiLorenzo

Mr. Chair, on section 5, "if after diligent search and inquiry that is appropriate to the circumstances, taking into account the value of the decedent's estate, no person takes under ORS 112.025 to 112.045, the net intestate estate escheats to the State of Oregon." How do you administer that? How do you know when a diligent search takes place? Are there any time limits in another statute that we don't have in this bill draft that would provide some direction? It seems to be difficult to administer and someone could probably keep an estate open for a long, long time if there were no diligent search.

Shetterly

That is an issue and the work group did talk about that. I think it's hard to draw a bright line because what the intent here is if you have an estate that's a small estate of \$30,000 you're not going to hire a private investigator and Interpol to search the world for heirs. So under that scenario the extent of search should be reasonable taking into account the value of the estate. A one million or two million dollar estate is going to take a bit more effort but how to define that with any more clarity I don't know. I suppose where it would come would be finally in the judgment of escheat having to satisfy the court at that point that the search has been diligent and outlines the steps taken to locate the heirs. Your concern is in terms of time.

DiLorenzo

First of all, who would initiate that? Would the state have standing to initiate? Let's say it's a reclusive billionaire and for the sake of this example the value of the shares is \$1,000,000 and nobody can find the heir. I imagine the state land board would have an interest in getting that. But how would that work?

Shetterly

I'm not sure that's necessarily a new issue under this draft because even if you take out that language that says "if no person takes.....it escheats to the state." It does require some sort of investigation and search in order to determine that no person takes. And so this really was intended to put some sideboards around how extensive that search needs to be before a determination is made that no person takes.

Walters

I think I see what John's getting at. Maybe it escheats but the heir who shows up, if the heir can show that you didn't do a reasonable search could get it back. Does it escheat and if there wasn't a reasonable search the heir can say it's still mine I want it back. That would make sense. But to say that it doesn't even escheat to begin with until something happens there's no process for deciding that it's happened.

DiLorenzo

I'm unaware as to how that works. Maybe commissioner Myers when he was Attorney General had an opportunity. What happens if something escheats to the State Land Board and then the proper owner is found, can they get it back?

Shetterly

Does it go into unclaimed funds?

Walters

How does it escheat?

Dobbins

The statute that had been referenced before by Gretchen, 116.253, does talk about "Recovery of escheated property: Within 10 years after the death of a decedent whose estate escheated in whole or in part to the state, or within eight years after the entry of a judgment or order escheating property of an estate to the state, a claim may be made for the property escheated, or the proceeds thereof, by or on behalf of a person not having actual knowledge of the escheat or by or on behalf of a person who at the time of the escheat was unable to prove entitlement to the escheated property."

Shetterly

I thought there was a reclamation process. Good.

Dobbins

What happens to the property in between I have no idea.

Shetterly

It funds schools or something like that. Excellent discussion. Anything else?

Dobbins

Mr. Chair, in reference to both the point that Susan Gary made regarding witnesses signing after death as well as to the notary point. I think that the response on both of those we'll let the harmless error provision deal with that. It strikes me that it may be worthwhile to add a sentence into the report following those sections that says in these situations the harmless error provision may deal with it just to make sure it's clear for purposes of the legislative history.

Shetterly

So I think where we are with the bill draft amended by Susan Gary's comments that are reflected in the report except for her

	first comment to section 11 which we are not going to accept as an amendment to the bill. [needs better language] And then we also have the commission's own amendment to section 6 restoring the definition of representation to its current status reflecting the modern per stirpes rule. Am I tracking all of that correctly? Jeff says yes.
Schradle	I think that Susan Gary's comments about section 6 would be irrelevant as well wouldn't they because the commission is going back.
Shetterly	Yes, right. Let me look back through.
Walters	But the report should continue to lay out the two options.
Shetterly	Yes, right. Because that is all part of our old common English per stirpes. Where I think we would have amendments in section 6 and I think I mentioned in earlier comments we refer in the stricken language, the italicized language, to degree of kinship and I think we're using different generations. As you see above in the bold language so that degree of kinship language would be amended consistent with the amendments which you see on line 13 rather than talking about kinship but generations in relation to the decedent. But otherwise it would still restore the modern per stirpes rule.
	So, Hardy are you tracking this?
Myers	But could I also ask something? Could we get a quick recap of what issues are being sent back to the work group for further analysis and assessment?
Shetterly	Yes.
Dobbins	I think that the things we were going to send back were Caroline Forell's point three regarding section 16 and whether to further regarding the spousal share or the impact of a marriage on a will. And then also the fourth point that she makes regarding the question of posthumously conceived children and Social Security benefits.
Shetterly	Point five on reformation was not discussed. So those are the three issues that will go back to the committee for further consideration as the bill goes forward with possible amendment. Maybe we could even get a committee meeting before the next full commission meeting, we could have those and a response to the commission so if there any amendments proposed by the committee we could have those approved by the commission.
	All right.
Myers	Mr. Chair, I move that Senate Bill 379 as conceptually amended be presented to the 2015 Legislative Assembly with the recommendation of the Oregon Law Commission and that the Law Commission also adopt the Probate Modernization report

Shetterly

prepared by Prof. Gary to accompany SB379 but with the changes to that report that would be appropriate in light of the conceptual amendments discussed today. If I may I would further move that we send to the work group the three issues enumerated a few moments ago by Director Dobbins with a request that the work group provide further assessment of them to the commission prior to the commission's March 10th 2015 meeting.

Very good. You have heard the motion, is there any discussion on the motion? [Silence] Any objection? Hearing none, that motion is carried, the bill will go forward with those amendments and conditions. Thank you, that is a good conversation.

McFarlane

Let's move on to LC2561, this is Collateral Consequences of Conviction. It is the first half of the Uniform Collateral Consequences Act. Who's going to take the lead on this one?

I chaired this work group and this bill comes out of a Uniform Laws Commission bill. The bill contains the first half of the Uniform Laws proposal which is the notice provision, so providing notices to defendants and used at various stages in the proceedings of the collateral consequences and providing a resource for a detailed inspection by the youth counsel of collateral consequences that may apply in specific cases. So we had complete agreement in the work group about the notice provisions. I'm not sure that we'll have that kind of agreement when we get to part two where we're looking at relief from some of these collateral consequences but everyone on the work group recognized the benefits solved by having defendants, both youth and adult, informed about these collateral consequences. One of the big changes that we made to the Uniform Law was to add in juvenile law. The Uniform Law was for adults only, adult criminal defendants, adults convicted of crimes and we thought it was important to add in juvenile delinquents as well to get the same notice. The Uniform Laws Commission draft referred to the Court Security and Improvement Act of 2007 which is also in our bill and that's an act that provides for the collection of collateral consequences information for adults on state by state basis across the country. That collection has been done by the American Bar Association Criminal Law section and the same section of the American Bar Association recognizing that juveniles were not included in the Uniform Law also have compiled the same list. In the case of Oregon's Juvenile Collateral Consequences there are about 200 collateral consequences. So including juveniles is very consistent with the uniform laws provision and most of the cases that we see from the Uniform Law draft are basically to make that change to

adding juveniles in the various places where that's appropriate. I know that Chair Shetterly got an email from the Legislative Council for the Uniform Law Commission to use the draft bill with Lindsay Beaver (Baker?) and the comment is that to the extent changes to the uniform text, i.e. special provisions for youth offenders. These provisions did not appear to me to do anything inconsistent with the underlying policies of the UCCA. I outlined the changes for Rich and he agreed that they did not appear troubling. So I think we were able to come up with a draft that is consistent with the UCCA and also made that one significant change to adding juveniles. There were, in my final review of LC2561/HB2367, a few corrections. Basically minor additions, nothing really substantive that I recommend be added with conceptual amendments.

Shetterly Do you want to take us through those?

McFarlane On page one line 21, I would recommend deleting the word "or". On page six line 32 I would recommend inserting the word

[Question in background re process]

Shetterly We're deleting the word "or" on page one line 21, it looks like an extraneous word there, grammatical error.

McFarlane And then on page six line 31 insert the word "parole" after "probation".

Shetterly Line 31, page six, what are we inserting?

McFarlane The word "parole" after the word "probation".

Shetterly Incarceration, probation, parole and fines.

McFarlane Yes. On page seven line 10, insert the word "to" after unable.

Shetterly On page seven line 10 after "unable" insert the work "to"

McFarlane And then on page nine, line 4 after the word "commitment" insert "to a Youth Correctional Facility". This is necessary to courts because the Juvenile Court makes a number of different types of commitments of juveniles. They can commit to Oregon Youth Authority for placement that's not at a youth correctional facility. Also commit to Department of Human Services so we wanted to be clear that here we're talking about a youth that gets committed to a correctional facility for a substantial period of time after which when they're exiting they are going to get the notice.

Shetterly All right, so again that's page nine, line 4 after "commitment" we would insert "to a youth correctional facility".

Questions or comments for Commissioner McFarlane?

DiLorenzo I have to confess that I am troubled with the notion of this proposed legislation and so I have a couple of 50,000 foot

Shetterly

questions I'd like to address.

DiLorenzo

Sure.

Maybe the members of the commission here can assuage some of my concerns. First of all, why isn't apprising a criminal defendant of collateral consequences that are attendant to a plea or conviction not the responsibility of their defense counsel?

McFarlane

Chair Shetterly, they are and the bill states it does not take away the ethical duty of an attorney to do that, however when we see that we have a list of 200 collateral consequences and more for adults, the ability of the defense attorney to do that can be limited. This gives both the attorneys and the defendants the opportunity to go to this list that's going to be maintained of these collateral consequences and look through it and determine whether any apply.

DiLorenzo

Did anybody consider maybe requesting that the Professional Liability Fund consider assembling such a list or taking on this kind of project for benefit of defense counsel who are placed in that position?

McFarlane

There was not a specific recommendation although there were similar discussions of having the Public Defense Services Commission take on the task of creating this list. I think that there was objection to it coming from one side and wanted to have a more impartial group develop and maintain the list.

Shetterly

And you also have the notices given at various times and points in the process, including on release from incarceration or commitment to a youth correctional facility where you may not have counsel involved so there's that as well.

DiLorenzo

And maybe my concern should be separated from juvenile proceedings vs. the normal criminal proceedings. Especially with respect to the normal criminal proceedings I view this bill as an attempt at a consumer protection statute and I frankly do not regard those who accept pleas or are convicted as customers. Or like a prospectus. I noticed in section four, that the work group took care to make sure that no mistake or no collateral consequence or omission could be used to set aside a conviction but that only applies to state law, and I'm wondering if anyone in that work group investigated whether there would be federal claims that could be made, suggesting that these notices lured someone in and provided them the wrong impression as to what the collateral consequence would be. They accept the plea and then discover that's not correct and might there be some federal ground to overturn the conviction. Are we writing a prospectus and making disclosures that then come back to haunt us in some way or another?

McFarlane

There was discussion about the possibility of federal claims and it was thought that the provisions in section four keep provisions of the act from providing a basis for that as well.

Shetterly

Justice Walters.

Walters

Chair Shetterly, as I understand these concerns, one hope that this act will do is protect not the people who are convicted but also help the courts. Right now there is an argument under Federal law that if the defendants are not told of these consequences that it's a basis for post-conviction relief which means that it helps the courts if they advise and we think this complies with current law that if they're told there are consequences that eliminates the grounds for post-conviction relief. So we're not having these proceedings having to be done over again. And also notifying the defendants at the time they are released that keeps them from violating the law in the future and getting put back into prison which is another cost to society. When I was at the conference of Chief Justices recently as a representative of the Uniform Law Commission, the ABA has taken on this issue as an important issue re-entry that we're trying to keep people out of re-entering the system and this is important. That's why they've prepared their entire list of these consequences and they're very much promoting this act as a way of doing that. The Chief Justices were very interested in anything we can do with re-entry. I think the idea is not as a consumer protection act solely, it's really to have a good system of justice as a whole. I know that the people who drafted the Uniform Act involved included attorneys general and district attorneys who also view this as being of benefit to them in the system.

McFarlane

I can just add that our work group had significant participation from DAs and the Attorney General's office and my perception is that a large part of their interest in this is having the notice provision of this law enacted.

DiLorenzo

Help me understand how a state statute, say a portion of section four, can in any way impact or ward off a federal claim. That's what I don't get, how that can provide security. We have a state statute that says nothing in this notice can be used to overturn a conviction, but that's a state law. I don't understand how what we write in a state statute could impact that.

McFarlane

I think that if you're looking at habeas corpus, you're looking at ineffective legal counseling and I think that's a more global look than just what was the advice of counsel on this matter.

Shetterly

Were you going to weigh in on this, Jeff?

Dobbins

My understanding was that there is this problem that Justice Walters identified in the existing law in federal court that might

allow an individual to make a claim of ineffective assistance based on failure to notify them of one of these collateral consequences and so under existing law that is certainly a risk. Part of what the goal of the uniform act was to make it a very straight-forward mechanism and in fact to lay out for the defendant what the associated consequences might be. You may be right that that doesn't necessarily forestall every possible federal claim based on a due process argument. At least in theory what this does by gathering everything together and making it accessible not only to counsel who still have the duty as well as to courts who insert this into the course of the plea colloquy and so forth will reduce the incidence of any possible effective claims in federal court as well as saying that it doesn't give rise to individualized claims in state court.

Schradle

The comment that I would add for the commission's consideration too is that I understand that there will be a number of other proposals submitted in this legislative session that touch upon possible relief from collateral consequences and I think that one of the things that this bill does is provide a framework for that further discussion down the line for all interested parties that have an understanding of what the collateral consequences are and the more substantive policy discussions about should there be relief afforded and what the mechanisms are for it. Those are different policy questions that this doesn't touch on but this gives the backbone for that kind of discussion.

Shetterly

If you have a federal claim based on the fact that you were not informed of a collateral consequence, I don't think this bill creates a greater liability. I think it does reduce the liability because if that due process claim exists it exists today because someone was not informed of a collateral consequence. Here I think the risk is: Is the list complete? Did they miss one? I suppose that could expose a claim if that collateral consequence becomes an issue. Otherwise it seems to me it's still narrowing even for federal purposes the bases for which someone could claim ineffective assistance of counsel or lack of due process.

DiLorenzo

Unless the list understates.

Shetterly

Is that still worse than no list and no advice today? I don't think it would be.

McFarlane

The list that the ABA developed does in fact contain fairly detailed summaries but then there are links to the actual statutes or administrative rules so you have the option of looking at actual rule.

Shetterly

Anything else? Does anybody else have any questions?

Myers

I have two or three, primarily are editorial. On page two in describing the commission composition, a reference starts

	appearing referring to “voting members” versus just “members”. I don’t know if that’s an OLC convention. Sometimes I get concerned that when there is reference to voting members it’s suggesting that the majority requires a majority of those who are voting, a quorum being present as opposed to a majority of all members. I think it’s important to be unambiguous about what vote is required for action by a particular public body. Can you address that at all, Julie?
McFarlane	I don’t really know, I think that is in Uniform Law but since we’re not distinguishing who are voting when we’re not indicating any non-voting members.
Shetterly	That’s an interesting point because I don’t think the list of members excludes anyone as a voting member so maybe what we need to do is strike “voting”.
Myers	I don’t think there are two categories of members. There may have been in the uniform draft so maybe some ex-officio non-voting members but we clearly don’t have that. Good catch, suggest we strike “voting” on page two lines 25 and 29 and page three line 6.
Myers	Occurs later also so maybe we can have an understanding that we’ll make that change wherever it occurs.
Shetterly	Yes.
Myers	In setting forth various mandates to the commission starting on page three line 13 and thereafter. At the bottom of three it says “shall consult as needed with representatives of the following agencies or groups”. And I wondered if the omission of the Oregon Department of Justice was something that the work group discussed and decided there was no need to include. I’m not saying there necessarily was, I’m just wondering.
McFarlane	This actually was one of the last editions made by the work group and so there were certain assumptions made about the composition of the commission would include certain people because of who is allowed to appoint members so the Attorney General shall appoint two members, Public Services commission appoints two members, Oregon Department of Administrative Services appoints a member, Oregon Criminal Justice provides staffing and so on the final day we were meeting there were concerns that some groups might not be heard and this was actually raised by the Oregon District Attorneys association so we decided to put in ones where we didn’t feel it was really obvious.
Shetterly	Okay. This is a list of others who don’t have appointing authority but that we still want to leave in the group.
McFarlane	The original group that put together the list of who is going to

Myers	appoint members of the commission felt that the Attorney General's office would surely appoint a DA and someone from their office. That wasn't really clear so we added that they would consult as needed with representatives from these other groups, all of whom have opinions and should be included. Final question. In certain places, for example bottom of page 5 where the text of the notice in the context of the arraignment, if there's a string recital of various consequences and it says "may include" and then it lists 6. I'm always concerned that that form of reference seems to be understood that that's all of them. I'm wondering if, unless it's a drafting convention that's been interpreted by the courts to permit others to be dealt with, I'm wondering if that kind of reference should more appropriately be phrased "may include among others" or something that makes explicit that it's not necessarily exhaustive.
Shetterly	I think that's a good point. It seems to me that it's one thing to have a convention for interpretation of a statute. Here where this is notice to people who may not be privy to LC conventions and court interpretations, language "including but not limited to" would be certainly clarifying to somebody who might be seeing this as a lay person.
Myers	Here's an example: Looking at this list of six things, say you're a contractor and you plead guilty to a felony of some sort, you may be debarred from bidding on government contracts. Where's that here? From the contractor's standpoint, no one told him that. I think there are all kinds of problems when you provide a list that appears to be inclusive and then you leave something out, potentially it tends to get nothing but trouble. I don't know what the most appropriate form of addressing this issue is, but I could leave it as a conceptual point to be dealt with by OLC if that's agreeable to the commission.
McFarlane	My recollection is that the numbering was not in the Uniform Law. So that was inserted by Legislative Council and I did not ask the question of why it's not immigration consequence number seven.
Shetterly	You could wind up with a list of 200.
McFarlane	Give notice that there are a lot of potential consequences and hope we get people routed to the internet website of the collection.
Myers	I'm certainly not contending that the list should have to be here but that we not imply that all of them are captured.
Shetterly	That would be a conceptual amendment there on page five line 31 and also on page seven line 1 because there you have the same issue.

McFarlane
Shetterly
Bushong

Julie are you suggesting that we also recommend deleting the Arabic numbers there, 1-6?

I think I would like that.

Okay. Not suggest even more a closed set.

I have a question. I noticed that the bill provides for certain notification to be made at the time of arraignment. I was wondering what is the thinking behind that because at least in our county, arraignments move very quickly and we may do 60-80 arraignments in an afternoon. Normally it's a matter of informing the person of the charges, entering a not guilty plea at that juncture, and getting them a lawyer. Most of the notifications that this bill talks about are things that we would do at plea call not at arraignment.

McFarlane

The plea calls we have also a point under section six at which they also go through this. So it's anticipated that either the youth or adult defendant is going to get this written notice of initial legal consequences at the initial appearance or whatever that is and that they're also going to be asked if they received that and told that they can discuss that with their attorney at that point. Not necessarily that they're going to go through that or answer questions at that stage.

Shetterly

So it's intended that this be provided in written form at the arraignment?

McFarlane
Bushong

Right.

To give them a piece of paper to have them talk to their lawyer about this before they enter the plea stage.

McFarlane

Correct. For the juveniles it's being included in the summons because they receive the summons at that stage and in the summons there's already advice about your legal rights, concerning your right to counsel. This list is going to be included in the summons and I'm not really sure how it's going to be done for adults but the concept is that there's going to be this piece of paper. The courts have assured that. At the plea or trial there'll be a colloquy that we've included with a little more discussion of this.

Shetterly
McFarlane
Myers

But it's not a colloquy at arraignment.

Right.

I have one other question. On page nine line 8 under section nine it says "Note: This section has an SA note." Is that statutory annotation?

McFarlane

As that was explained to us by Legislative Counsel that means that there is something else being amended in this section during this session. In 419c303 where we have a very little

Shetterly

amendment to that section and in some other bill there's an amendment to it as well. That's a note to them that they'll merge if both of these bills pass.

Anything else? If not, then let me review what we've done here for purposes of anticipating a motion. We've made conceptual amendments deleting the word "or" on page 1 line 21, first four; we made a conceptual amendment to delete "voting" with respect to voting members in each instance in which that occurs; we've made a conceptual amendment on page 5 line 31 after the word "include" to add language to signal that this is not an exclusive list, we've made a conceptual amendment by deleting the Arabic numbers 1 through 6 on lines 1 through 9 of page 6; at the bottom of page 6 another conceptual amendment after "probation" on line 31 to add a comma and then the word "parole"; line 7 page 1 also the conceptual amendment to add language to signal that this is not a closed list; and then also deleting the Arabic numbers 1 through 6 on lines 2 through 10; and on line 10 after the word "unable" inserting the word "to" on page seven and then finally on page 9, line 4 after the word "commitment" insert "to a youth correctional facility". Did I miss any conceptual amendments?

Myers

Mr. Chair, I move that HB 2367 as conceptually amended in the way you have just summarized be presented to the 2015 legislative assembly with recommendation of the Oregon Law Commission and that the Law Commission adopt the consequences report prepared by Brett Smith and Phil Schradle to accompany HB 2367 with any amendments or changes that would be needed in light of the conceptual amendments if any.

Shetterly

Is there any further discussion? Any objections?

DiLorenzo

I object, Mr. Chair.

Shetterly

All right, we have one objection otherwise the motion carries.

DiLorenzo

Mr. Chair, may I explain my vote?

Shetterly

You sure may.

I voted no on this proposal because I believe that the task this bill attempts to undertake is the primary responsibility of defense counsel and potentially the judiciary. I think they would be better served by either the professional liability fund or a bar CLE which in book form would prepare something similar to the Uniform Jury Instructions, that they could utilize for their purposes. I am very concerned that what appears to be an all-inclusive list would be utilized by enterprising defense counsel to find a federal claim that would then be used to overturn conviction. For that reason, I object.

Shetterly

Well stated and your objection is noted in the records.

Dobbins

All right, next we have an update on staffing, budget and work group updates so Jeff or Phil I'll turn it over to you.

Thank you, Mr. Chair, members of the Commission. In addition to the obvious staffing changes we've had I wanted to let the Commission know what the plan is with respect to finding a permanent replacement for the Deputy Director position. This folds in with the budget report issue. The concern and the reason we decided to go with finding an interim Deputy Director was while the budget remains to some degree uncertain it seemed unlikely to be able to get the best possible candidates to replace Wendy on a permanent basis. We reached out to Phil to fill the position for the period of time until we know that we're going to have a relatively stable budget, at which point in time we will reopen advertisements for a permanent Deputy Director to replace Wendy. So that's the plan at the moment and we'll talk further with respect to the budget issue but we haven't yet reopened it. I know I've already gotten a couple of emails from people who have asked what is happening with that position? I know there's definitely interest out there and we're likely to be able to find some good candidates and replace Wendy at least to the degree that's possible. With respect to the budget, just to remind the Commission, the last three biennia including this one the Law Commission budget has been a pass-through in the judiciary budget. This year and every year before it's at about \$220,000. Over the course of the last several months Dean Bridgeman and Associate Dean Williams and myself have been reviewing the Willamette budget and we've reached the conclusion that the Law School has been bearing not only the indirect costs of the Commission but also a substantial part of the direct costs as well. We're getting about \$220,000 but spending out of pocket closer to about \$450,000. This is primarily a matter of successful mission creep; the job had originally been planned for the work of Wendy and the administrative assistant to be part-time work. As the Commission has taken on more projects and more complicated projects that work has expanded and so we've been ending up doing about double that work as far as the assigned FTE. We have talked with Lane and Representative Williamson about this problem and we have approached Representative Williamson who is Chair of the Public Safety subcommittee of the Ways and Means Committee about seeking an increase in the Law Commission budget. We're asking not only for making sure that the Law School is not spending directly out of pocket and sending student tuition dollars over to purposes of work for the state, but also to try and seek an additional staff attorney. This is something that we've talked about many times over the course of the years. There have been

times we've had an additional staff attorney to help maintain the capacity and the ability to absorb the projects. The Law School continues to be very enthusiastic about supporting the Commission but try and bring the numbers the state has been contributing over the years up to some degree is important to match with the work over the course of the years. We're continuing to talk with sub-committee members; there are sub-committee hearings on the judiciary budget the week of March 2nd. It's possible we might call on some of you to come and participate in such hearings if you are so inclined. We will stay in touch about the status of that request. Any questions or comments?

Shetterly

I would say that in the conversations we've had with four sub-committee members generally very favorable reception and reflecting the Commission is held in very high regard in the building.

Myers

Which committee has jurisdiction?

Dobbins

It's Public Safety. With respect to Work Group updates...

Schradle

I'll step in on Adoption. Commissioner DiLorenzo is chairing that Work Group. I think substantial progress has been made on "the more non-controversial issues" before the Adoption group. There are a set of issues that most likely will need to be kicked over for consideration for next legislative session about consent, notice to putative fathers and advertisement. We have a Work Group session scheduled for tomorrow afternoon to reach finality on the more non-controversial issues and will intend to bring a bill draft and report to the Commission at its March 10th meeting.

Dobbins

The other continuing project that's out there is the Appellate Judicial Selection. This is something that is on my plate that has been full for the last few months. There was a classical draft report that we offered to the full Judicial Selection Work Group. The last marching order from the Work Group was that in the absence of consensus about a direction to move forward, we wanted to draft a comprehensive summary of research and findings of the Work Group which might serve as a touch point for further work in this area. There's unlikely to be any particular recommendations coming out of the Work Group. I'm working on that, I hope to have it available for you this session for other work that Common Cause has ongoing with respect to revisions to potential changes to the process for Appellate Judicial Selection in the state. That's where we are at the moment. The Standing Modernization project has been actively meeting. We had our last meeting last Friday, Chair Myers is chairing this group. We're pretty close to consensus.

There are a couple of Work Group members that remain a little skeptical. The question is Should we have a mechanism in place for insuring that there is defense of an inactive and enacted initiative provision if the Attorney General declines to defend such initiative provisions. Essentially we have a legislative draft that has a few more tweaks to be done, we have a report that is in the process of being drafted to accompany the final version of that bill, and what it would do and we will hopefully bring it back to the full commission at the March 10th meeting, is use the process of intervention to solve the problem at the state court level by mandating intervention as of right for chief petitioners and then having a different and somewhat more complicated process for dealing with the problem in federal court which would be creating circumstances under which the Attorney General would be called upon to appoint a special Assistant Attorney General to serve in that defensive role if the Attorney General's Office decides not to do that. More on that at the next Commission meeting.

Schradle

On Election law that Work Group has been formulated and Commissioner DiLorenzo and also Commissioner Williamson are co-chairing that. With circumstances in the Secretary of State's office it might be more propitious that this hasn't gotten off the ground yet. The first order of business there will be to take a review of the vote by mail provisions and try and clean those up and bring them into better form. Then there might be more difficult issues to undertake at a later date.

Shetterly

That's one Work Group we have in mind for the extra staff attorney position who could be tasked because it's a monumental effort.

Schradle

As I understand, it was a very broad proposal that came to the Commission.

Shetterly

We were going to ask Secretary Brown for some money from the Secretary of State's budget.

DiLorenzo

Have we been keeping in touch with Secretary of State's Office so they know what we are doing?

Schradle

We had a conversation with former Secretary of State Brown and Gina Zejdlik.

On Juvenile Delinquency Judgments, that Work Group is to be formulated. This came from a proposal from Josh Nasbe over with the Oregon Judicial Department wanting to bring some clarity to the expiration and enforceability of juvenile delinquency judgments. Commissioner Comstock has graciously agreed to be Chair of that Work Group. We have not established it yet and in conversation with Josh Nasbe and the Oregon Judicial Department, looking at the 2016 session will be

just fine.

On Juvenile Records, this is a follow up to a couple of other Work Groups that have been over the last couple of legislative sessions. There is an inquiry that was sent out to the Work Group members about a provision that had a delayed effective date in the latest iteration of the statutes that were enacted about the court being able to authorize any other person allowed by the court to receive juvenile records. That had an effective date of September, 2015 and the question was that had been delayed during some pending litigation. The litigation has unfolded and now that could be gone forward with. The inquiry went out, Is there any reason to delay that any further and are there any other suggested modifications to juvenile court record statutes that should be considered. We have received some input that there some concerns about the statutes and we have a Work Group meeting scheduled for Friday, Feb. 20th to address those and see if we can reach a conclusion real quickly on those. There may be something that comes before the Commission on March 10th meeting. If there's not going to be a consensus that might need to be pushed to another session too.

Dobbins

The only other thing I might add is that at our September meeting the bankers, in a bill that has been pre-session filed with the Senate Judiciary committee have opted to seek an amendment to Article 9 that would adopt the Option A proposal as opposed to the Option B. We don't need to rehash that. We have our orders from the last commission meeting with respect to that issue.

Shetterly

We have a meeting set up with the Judiciary Committee members.

Shorr

On Appellate Judicial Selection we're sharing information that we've obtained with Common Cause?

Dobbins

All of the information that was part of the Work Group work is all information that is available to all public records. It's a matter of pulling it all together in a comprehensive report that we can then present to the Work Group and the Commission to be formally forwarded if we want to. All the information is available for their access

Shorr

Common Cause is a very specific bill that they're proposing which might reflect one side of the debate.

Dobbins

That's part of the deal here is it's one of the reasons that the priority on my work is that there was no consensus coming out of the Work Group. An interesting question is whether that changes in light of the new individual in the Governor's Office because that was one of the sets of individuals that had more resistance to moving forward with a specific reform proposal.

Shetterly

Is there anything else?

Myers

One comment, this bill is coming earlier about the governor's new counsel. Has that been officially announced?

Schradle

That's my understanding, and I do not know the gentleman but it's Benjamin Souede from Portland. That has been announced as the new governor's legal counsel.

Shetterly

How about Secretary of State? If there's nothing further I thank you for a very good meeting and good discussion and we'll plan on seeing everybody on March 10th and with that we are adjourned.

Submitted By,

Reviewed By,

Chris Strum
Administrative Assistant

Jeff Dobbins
Executive Director and General Counsel

EXHIBIT SUMMARY

OLC Meeting Agenda February 18, 2015

Minutes of May 28, 2014 Commission Meeting

Minutes of September 19, 2014 Commission Meeting

SNG Comments on SB 379-2 Revised

SB 0379-2: Probate Modernization Work Group Bill Draft

Probate Work Group Report to Oregon Law Commission

HB 2367: UCCCA Work Group Report Bill Draft

UCCCA Work Group Report to Oregon Law Commission

Staff Suggested Motions for Oregon Law Commission

Caroline Forrell Comments on Probate Bill