

OREGON LAW COMMISSION

Date January 12, 2016
11:00 a.m.

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

MEMBERS PRESENT:

Lane Shetterly, Chair
Bernie Vail, Vice-Chair (phone)
Chief Judge Erika Hadlock (phone)
Judge Stephen Bushong (phone)
John DiLorenzo, Jr. (phone)
Hardy Myers
Dean Curtis Bridgeman
Mark Comstock
Julie McFarlane (phone)
Prof. Susan Gary (phone)
Aaron Knott (for Attorney General Ellen Rosenblum)(phone)
Senator Floyd Prozanski
Representative Jennifer Williamson (phone)

MEMBERS EXCUSED:

Chief Justice Balmer

STAFF PRESENT:

Jeffrey C. Dobbins, Executive Director
Laura H. Handzel, Deputy Director
Jenna Jones, Student Office Assistant
Bealisa Sydlik, Legislative Counsel

GUESTS:

Susan Grabe, Oregon State Bar
Nancy Cozine, Office of Public Defense Services

MEASURE/ISSUES HEARD:

Review and Approval of Legislative Concepts and Related Reports

Speaker	Comments
Shetterly	Good Morning. The primary purpose of this meeting is to approve legislation for this coming short session. We'll get to those in just a minute. First, welcome Judge Hadlock. She is on the phone, but she is the newest member of the Commission by virtue of her appointment to the Oregon Court of Appeals as Chief Judge. We have also lost a member, Scott Shorr. He was recently appointed to the Court of Appeals. We will be working

with the Oregon State Bar to replace him. With that, let's get started.

For timing purposes, what is the deadline for bill introduction?

Handzel

January 19, 2016.

Shetterly

Will there be any opportunity for amendments?

Handzel

Yes. We will be able to make amendments, but we'll talk about that later with our Juvenile Court Records bill. Our deadline for amendments will be February 1st, because the bills have to drop by February 8th.

Shetterly

It is important to remember that there are quick deadlines because this session is a Short Session. The bills that we will be reviewing are ones that our Work Groups have been working on for the last six months or so. With that we will start with probate modernization. I'll go ahead and take that. I chair that Work Group. I'll lead you through the Probate Report (Report) and then answer any questions that you have. In front of you, you have a hand engrossed edition. Just yesterday, we found out that they had accepted these edits to be part of the LC draft. Unfortunately, we do not have a copy of a clean draft yet. However, all these changes will be accounted for in the latest draft of the bill. Before I start, I want to thank Professor Susan Gary for writing our Report. Also, thank you to BeaLisa Sydlík from LC, who is in the room. She comes to every Work Group meeting and takes copious notes and is so quick about giving us drafts back. Prof. Gary please chime in if you want to add anything.

Let's start with Section 1 and what we have done with "advancement". This was a term we decided to modernize. The term "advancement" was developed to indicate when a gift received during life would reduce the share the donee would otherwise receive in intestacy. The terms "satisfaction" and "ademption by satisfaction" were used for a similar situation when the decedent died testate. We decided to make the change to the definitions so it would be clear. ORS Chapter 111 uses the term "advancement" for intestate situations and Chapter 112 uses the term "satisfaction" for testate situations. "Advancement" now also deals with things that are non-probate.

We made a few non-substantive changes to the term "decedent." The next term we modified and modernized was "descendant." Prof. Gary can you please explain what we did there?

Gary

Yes. People increasingly use “descendant” when they are drafting documents. We realized that when we are dealing with the term “issue,” it refers to “lineal descendants” or descendants descended from an ancestor. Thanks to Laura, we found out that there is also something known as “collateral descendant” or someone descended from a collateral relative. No one in the Work Group was familiar with the distinction of lineal and collateral. Thus we believed it would be less confusing if we just left the term “descendant” by itself. There are also changes throughout the bill that change the word “issue” to the word “descendant” or “descendants.”

Shetterly

Thank you very much, Susan. Let’s skip ahead to “devisee.” We’ve just gotten rid of some old fashion language there. With the term “funeral” we’ve made a change there. In the current statute “funeral” relates to a disposition of the body and the plot. Practitioners and most people relate “funeral” to a service as well. We agreed that this was common practice to include a service or memorial in addition to the disposition of the body. There was some discussion on the reasonableness of a funeral and there are statutes later on low asset estates that address limitations on the scope of a service being plain and decent. There are limitations on the personal representative on how much of the estate they can spend for things like a funeral. We just wanted to update the definition of “funeral,” not the procedures around it.

Gary

We decided to take out the term “generation.” Right, Susan?

Shetterly

Yes, that is correct.

There were some concern that people think of generation as Generation X or Generation Blank. Susan can you talk about what we did with the term “heir”?

Gary

Yes. The changes to “heir” are to clarify that the term can be used with reference to a certain decedent or in determining the intestate shares of a decedent by referring to an heir of someone else. This comes into play when someone dies without a spouse or children for example. If there are no children or parents, you would then have to go to the grandparents to decide who was an heir. We wanted to be clear that “heir” had multiple meanings and could be used to describe both heirs for the living and the person who died intestate.

Shetterly

Susan, do you mind speaking to Sections 2 through 5.

Gary

Sure. The intestacy provisions all use this term “representation” as a method of determining how intestate share are distributed among different generations. The revisions here fix a glitch that practitioners had. The statute being changed defined representation in the context of the decedent, which limited its usefulness in intestacy provisions where representation may be used to distribute shares to descendants of collateral relatives of the decedent. There is a good example in the Work Group Report, if you need more information. We just wanted language that is clear and easy to apply.

Shetterly

Thanks, Susan. The example in the Report is very good. Section 7 just conforms with the changes we made to “advancement.” Section 8 brings together the three circumstances that we have advancement in testate estates, intestate estates, and now in non-probate transfers as well, like transfer on death deed. We have incorporated lifetime non-probate transfers.

Gary

I would add that there was some concern from the Work Group that this could open the doors to many arguments about advancements. I think that the application should be limited because advancement has been in statute since 1969. The advancement rules state that there are certain writing requirements that a donor must meet. The Work Group retained the written requirements to address this issue.

Shetterly

Thanks, Susan. Can you talk about Section 9 as well?

Gary

Yes. Section 9 is the calculation section. We added a provision that allows for the donor to provide a different time or processes to evaluation of advancement. Currently, statute provides that advancement is valued at the time the heir comes into the possession or enjoyment of those shares or at the decedent’s death, whichever comes first. The default time, however, will remain as the time of decedent’s death as statute provides now because that makes the most sense. We clarified that the donor can direct what time is appropriate for an heir to have a share of the estate and that it will be valued at that time. In short, the Work Group’s changes now cover testate estates.

Shetterly

Section 9 is amending ORS 112.145.

Let’s skip to Section 12. It removes transitional rules from 1969 that are no longer relevant.

Sections 13 and 14 the Work Group modernized some language,

but made no substantive changes. Sections 15 and 16 deal with Probate Commissioners and Deputy Probate Commissioners for courts. We clarified that the appointing authority should be from a rule or order from a judge. The limitations and description of the appointment of a Probate Commissioner should be in writing within that rule or order from the judge. Did we make any more substantive changes?

Gary

No.

Shetterly

Section 17 is an amendment to our bill last session (SB 379). We addressed harmless error under the strict will guidelines that could forfeit a good will, because of a harmless oversight. We decided that wills with harmless errors need to go before a judge and have clear convincing evidence that it preserves the intent of the testator. This section sets up the process for harmless error wills. It identifies who gets notice and other technical changes.

Gary

There were some questions from practitioners, because there was a subsection had been inadvertently added and it did not belong there. It was added by mistake so, our fix is technical to get rid of it.

Shetterly

I think that covers the probate bill. I would like to mention that there is an emergency clause that only applies to Sections 4 and 17 to make those effective immediately. The rest of the bill is effective January 1, 2017. We didn't want to surprise practitioners.

Any questions?

Thanks to Rep. Barton, who gave the Commission a bill vehicle for the Short Session.

Handzel

I just wanted to note that Rep. Williamson has joined us on the phone. I also want to point out there will be an amendment to the Probate Report. This amendment will explain the emergency clauses more clearly.

Shetterly

That works. Otherwise the engrossed version looks like the bill we will be going with into the Legislative Session.

Myers

Mr. Chair, I move that LC 61 as conceptually amended be presented to the 2016 Legislative Assembly, with recommendation of the Oregon Law Commission. I also move

Shetterly

that the Oregon Law Commission adopt the Probate Modernization Report prepared by Professor Susan Gary to accompany LC 61.

Thanks for the motion. I wanted to put on the record that the conceptual amendments are in the engrossed form. They are just not officially in the LC format.

Any discussion on the motion?
(No discussion)

Any objections on the motion? – Hearing none, the motion carries.

Myers

One question, does this complete the work of the Probate Modernization Work Group.

Shetterly

No. Now we move into ORS Chapter 113 and the procedure statutes.

Myers

Will the same Work Group be kept in place and continue to work?

Shetterly

Yes.

Now I would like to hear from Laura and Commissioner McFarlane about LC 73 and the Juvenile Court Records project.

Handzel

Thank you, Chair Shetterly. I think most of you are familiar with this project, but I wanted to go through the history briefly. This year the Juvenile Court Records Work Group was tasked with clarifying “any other person” language. This language stemmed from a catch-all provision in the Commission’s juvenile court records bill from 2013 (SB 622) that referenced “any other person allowed by the court.” Many delays happened due to that language because it was not fully vetted. The opportunity to vet that language was further delayed because of a *writ of mandamus* issued by the court. Then by the time that was resolved there wasn’t enough time for the Work Group to address it before the 2015 Legislative Session. This language has been delayed three times. Currently, the language goes into effect September 30, 2016, if this bill doesn’t pass through the Legislature. The Work Group wanted ample time to work through the language and get feedback from various judges because juvenile court records are a complicated matter. I want to thank our Work Group for being fantastic. There were countless hours spent by each member.

With that, I'll guide you through the report. Section 1 adds the "or entity" after the "any other persons" language. That is crucial because it is not just persons, but also different agencies like DHS.

If you move to page 8, line 21, of LC 73 version 3, there is currently a reference to audio and visual recording. I gave everyone an additional document on potential minor changes that could happen to the bill. This is one of them. We went back and forth on whether we wanted to include this. We wanted to have consistency with ORS 419A.256, which also addresses that. We have come to the conclusion that including this language may make things less clear and less consistent, so we will be taking it out.

If you go to subsection (16)(a), you see we have clarified who is able to inspect or copy the records of the case pursuant with subsection (1)(b) and (c). We wanted to make sure that those entitled to inspect or copy the records maintain that right after jurisdiction has been terminated. So we talk about the term "parties," which is explained on page 5 of the Report. This includes parents whose rights have been terminated. They maintain rights to the records up until their parental rights have been terminated. There had been a question about what happens when youth offenders reach the age of majority and no longer have access to their records. We clarified that in the language on lines 14 and 15 of page 10. Although statute has defined the terms, this helps clarify that youth offenders indeed should have access to records after the age of majority.

Subsection (17) clarifies that there is no requirement to redact names of or information about siblings or other persons contained in the record of the case or the supplement confidential file. This is current practice, but there was some question as to whether redaction was required. This subsection clarifies that indeed it is not required. It is bad for judicial efficiency to redact everything.

I'll move on to Section 3. It outlines the process of the "any other person or entity" language. We had great input from Judge McKnight, who brought draft language to a conference of judges. We were able to get feedback from many judges on this language. The Work Group felt that this process was the appropriate balance between open courts and protecting juvenile interests. The process requires any person or entity not included in ORS 419A.255 as a person or entity entitled to inspect or

copy the record of the case or the supplemental confidential file to motion the court to inspect or copy the record of the case or the supplemental confidential file. The motion must include a sworn affidavit or declaration under penalty of perjury that are included on page 4 of the report: 1) A statement detailing the reasons why the person or entity would like to inspect or copy the record; 2) Any relevancy of the inspection or copying to the juvenile proceeding. Relevancy is not required; and 3) How the inspection or copying will serve the balancing of the interests in subsection (6) of this bill.

Subsection (2)(a) outlines the notice requirements. It states that the person or entity filing the motion must serve all parties to the juvenile court proceeding with a copy of the motion and affidavit or declaration. If they are unable to identify who or where people are, the court is required to serve notice to the party at their last known address. The notice must be mailed within 14 days. We did allow some flexibility in the timeline in subsection (2)(c). We are trying to get a standardized timeline.

Subsection (3) allows the court to summarily deny the motion if the requirements contained in subsections (1) and (2) are not met. The court may set a hearing to consider the motion. Notice of the time and place is required to be sent to all parties.

Moving on to subsection (5). Subsection (5) requires the court to conduct an *in camera* review, taking into account any responses or objections made by a party during the process. The court must weigh four factors in determining whether to allow inspection or copying of the record of the case or supplemental confidential

file. The first factor is the privacy interest of the child, ward, youth, or youth offender or his or her family members. The family has to be addressed because it could get at half siblings and various other sensitive information. Then, the interests of the other parties of the proceeding or the victims in the proceeding. The next factor is the interests of the person or entity filing the motion. And lastly, the interests of the public. The public is crucial to consider in avoiding problems in past litigation.

Subsection (7) allows the court to limit inspection or copying to particular parts of the record of the case or the supplemental confidential file. It also states that the court may specify the timing and procedure for allowing inspection or copying. Subsection (7)(d) includes the requirements that they allow inspection or copying only as necessary and that they make

protective orders governing the use of the materials inspected or copied. This is a crucial aspect of the bill because it ensures that confidentiality is maintained.

We might make this effective immediately. However, practitioners are on notice because of the looming September 2016 effective date. We just wanted to be clear that this needs to take effect immediately. I'll go ahead and stop for questions now, but first I wanted to make clear the potential changes the Work Group might make going forward.

Shetterly

Laura, this was sent out by you via email this morning, correct?

Handzel

Yes.

Shetterly

Those on the phone, if you want to pull that up it may be helpful.

Handzel

We are hoping that all of these changes will be made before the Session starts.

Shetterly

Good.

Handzel

First, the Office of Public Defense Services (OPDS) and the Oregon State Bar (OSB) have an explicit need for access to juvenile court records. Both offices serve important public policy functions. These changes make it harder for both OPDS and OSB to get access. It would help if there was an exception explicitly in the statute that both OPDS and OSB could point to in order to validate their authority to gain access. We just got this proposed language for the OPDS exception, which is the first bullet in my document. It is important to note that the confidentiality of juveniles is tied to federal funding under Title 4E of the Social Security Act. There are other folks who have explained this in much more detail, but it is important that confidentiality is maintained by any entity who has access to these records so as not to compromise federal funding.

Shetterly

Is Title 4E of the Social Security Act child support services?

McFarlane

No, it is foster care. The last time I checked they were paying 45 percent of our foster care budget.

Shetterly

We want to make sure that this language is approved by Region X because they control the purse strings?

Handzel

Yes. I want to make it clear. If something happened with

compliance, funding isn't cut immediately, but it is more of a process. However, we are taking our language very seriously and are trying to have Region X approval, which we got approval for OPDS so far. I want to thank Nancy Cozine and Carmen Brady-Wright for working directly with a Region X representative to get us the language we need. We are asking that the Commission approve this amendment to be added to the draft bill.

Shetterly

It will have to be a conceptual amendment and the LC will have final say on the drafting.

Handzel

Yes, that is fine. This is a great point to remind the Commission that this is not a stand-alone bill. The House Judiciary Committee has been gracious enough to introduce a bill on our behalf. It is being housed with LC 211, which relates to juvenile sex offenders. In fact, our LC 73 will now be folded in with LC 211 and be known as LC 211. Having talked to Legislative Counsel, this bill is intended to be amended. We have one chance to amend the bill during session. February 1st is the last day we can accept language, because the last day to amend is February 8th. We want an exception for OSB as well, but we are under very tight time restraints. The same Region X issues may apply. We are currently working with Region X to find language that complies with federal laws. I already discussed audio and visual recordings which was another issue on my list. We will probably take it out of subsection (11). We may make non-substantive changes as well like a comma here, a comma there. In short, we are asking the Commission to approve these conceptual amendments today so the bill is ready to go.

Shetterly

Commissioner McFarlane, do you want to add anything?

McFarlane

That was very thorough. Thank you, Laura. I just want to make sure that we are clear; our Sections in LC 211 are Sections 7, 8, 9, 11, and 12. I think we should be voting to approve those Sections of LC 211 before we recommend it to the Legislature.

Handzel

I just want to mention that we got the new LC 211 today. I didn't want to confuse anyone by sending it out earlier. We will make it clear before the Legislature which Sections are ours.

Shetterly

Laura, can you put on record what will happen if OSB cannot get an exception in time?

Handzel

Yes, if for some reason we cannot get language by the deadline to address OSB's needs this session, we will address them next

session.

Shetterly

Great. Nancy or Susan, would you like to say something?

Cozine

We very much appreciate the Committee's work on granting OPDS an exception.

Shetterly

Susan Grabe?

Grabe

Thank you, Chair Shetterly. Susan Grabe from the Oregon State Bar. As Commissioner McFarlane knows, I have been working on juvenile code rewrites for a very long time. OSB would be very grateful if we could get an exception in the bill. OSB has a statutory mandate to regulate attorneys. We only need access to juvenile court records under a protective order so that we can investigate potential misconduct. We don't want to jeopardize funding for the Foster Care Program. We do not need as much access as OPDS. I think it is something we can do, if the Commission supports that. I am happy to answer any questions.

Shetterly

I think the OSB issue needs to be recirculated to the Commission if it gets added in.

Grabe

I do agree we need approval from Region X, but I know it is harder to add language after a bill has passed, because the Legislature will ask why we didn't add an amendment the first time.

Shetterly

I think it would be appropriate to have a motion approving the Sections 7, 8, 9, 11, and 12 of LC 211 or Sections 1 through 5 of LC 73 with conceptual amendments. Please circulate the OSB language to the Commission when it is done.

Myers

I move that LC 73 as conceptually amended be presented to the 2016 Legislative Assembly, with recommendation of the Oregon Law Commission. I also move that the Oregon Law Commission adopt the Juvenile Court Records report prepared by Caitlynn Knopp to accompany LC 73.

I did have one question. Are we waiting for a sign off from OSB or Region X?

Shetterly

Region X.

Handzel

We want to make sure all relevant parties have been consulted like Department of Justice, OSB, and Region X.

Myers	How long will it take Region X?
Handzel	Carmen Brady-Wright is our conduit between Region X. Shouldn't take too long.
Shetterly	There is a reasonable possibility that we'll get language.
Myers	Are we going to approve the language before Region X comments?
Handzel	I think we want to have Region X sign off before we introduce an amendment. We will introduce the bill as is now and then do one amendment in the first weeks of session, but we will get input from the Work Group and the Commission prior to new language being put in the bill.
Shetterly	Any other discussion? The amendments can be circulated by email.
Grabe	We hope that OSB doesn't trigger any federal funding violation.
Shetterly	Any objection to the motion? Hearing none, the motion carries. Anything else Laura and Jeff?
Handzel	Yes. I would like to update the Commission that we are involving more students and it makes me so happy. We have two externs coming in for the next semester. Cody Hack, a 2L, and Nita Kumar, a 3L. I am hoping to have them testify and be really involved in the Legislative process. Caitlynn (Dahlquist) Knopp has left the Commission in her official capacity as a Law Clerk, but she has agreed to do <i>pro bono</i> work for the Commission. We are thankful for all of her hard work at the Commission. We have a meeting this week to determine if there will be an Oregon Law Commission Legislative Clinic that will involve so many more students in our work. We hope to get them excited and exposed to the process of legislation. We have been invited to do an Informational Legislative Hearing this Friday in Hearings Room C. I also have meetings with almost all of the members of Judiciary this week so they are familiar with our bills.
Shetterly	I guess after February we will continue on with the rest of our Work Groups. With that we are adjourned.

Submitted By,

Reviewed By,

Jenna Jones,
Student Office Assistant

Laura H. Handzel,
Deputy Director

EXHIBIT SUMMARY

January 12, 2016 Oregon Law Commission Meeting Agenda
LC Draft 61
Accompanying Probate Modernization Work Group Report
LC Draft 73, Version 3
Accompanying Juvenile Court Records Work Group Report
Juvenile Court Records LC 73 – Additional Changes