

HOUSE COMMITTEE ON JUDICIARY - CIVIL LAW

June 16, 1999 Hearing Room 357

4:00 p.m. Tapes 191 - 192

MEMBERS PRESENT: Chair Shetterly, Chair

Rep. Uherbelau, Vice-Chair

Rep. Williams, Vice-Chair

Rep. Backlund

Rep. Edwards

Rep. Lowe

Rep. Walker

Rep. Wells

Rep. Witt

STAFF PRESENT: Bill Taylor, Counsel

Patsy Wood, Administrative Support

MEASURE/ISSUES HEARD:

HJR 4 ñ Work Session

SB 408A ñ Work Session

SB 1115 ñ Work Session

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

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TAPE/#	Speaker	Comments
Tape 191, A		
004	Chair Shetterly	Calls meeting to order at 4:10 p.m.
<u>HJR 4 WORK SESSION</u>		
006	Chair Shetterly	Introduces the ñ3 amendments to HJR 4 which proposes an amendment to the Oregon Constitution requiring Legislative Assembly to establish laws that recognize, enhance and support marriage (EXHIBIT A). Discusses the committee report and the minority report on HJR 29 that was tabled by the House. Explains his intent to bring back a resolution that defines marriage, but does not otherwise implicate, limit, or repeal the constitutional rights as enunciated in the <u>Tanner vs. Oregon Health Sciences University</u> case.
065	David Schuman	Deputy Attorney General The ñ3 amendments to HJR 4 prevent the Legislature, or people from the initiative process, from adopting any statutory definition of marriage that would permit same sex marriage and prevents a court from declaring that the existing Oregon Constitution requires the state to permit same sex couples to marry. HJR 4 does not prohibit a future constitutional amendment permitting same sex marriage and does not permit the state to discriminate on the basis of sexual orientation in any respect other than in marriage. HJR 4 also does not permit the state to undo the results of Tanner or of any future case holding that the state must treat same sex couples the same as married couples. HJR 4 says who is a member of a class; in this case the class of married people. It says nothing about the ability or the inability to discriminate on the basis of that class.
112	Greg Chaimov	Legislative Counsel I agree.
118	Rep. Witt	Cites a letter Mr. Chaimov sent to all legislators dated 12-10-98 regarding the <u>Tanner vs. OHSU</u> case (EXHIBIT B). Is our marriage statute, as it currently exists, vulnerable to the logic of the Tanner decision?
129	Chaimov	Yes.
130	Rep. Witt	Could you explain in what way it is vulnerable?
132	Chaimov	The state is allowed to base a law based upon a personís sexuality if there is genuine reason for doing that. In the past, marriage laws between people of opposite sex have been upheld because of the societal value of having a committed relationship. If that reason was not sufficient to limit benefits to spouses in the Tanner case, it will not be sufficient to limit marriage to persons of the opposite sex.

146	Chair Shetterly	Is that concern addressed by this constitutional amendment?
147	Chaimov	Yes.
148	Rep. Lowe	Is there anything in the ñ3 amendments to HJR 4 that would prohibit a homosexual couple from going to their church and having a religious marriage ceremony conducted?
155	Chaimov	No.
156	Rep. Lowe	And upon doing that, this couple could present themselves as married to their community?
157	Chaimov	Yes.
158	Rep. Lowe	Would the ñ3 amendments allow a homosexual domestic partner to receive benefits as required in the Tanner decision?
163	Chaimov	Yes.
166	Rep. Uherbelau	I agree that this language does not undo Tanner, but there is case law where you can discriminate if there is a stated, important, public policy reason. Are we trying to make a public policy statement that this amendment goes any further than stating that "a man and a woman is a marriage"?
179	Schuman	There is nothing in the ñ3 amendments to HJR 4 that would compel a court to conclude that there is a compelling state interest in permitting discrimination in anything other than the marriage context.
191	Rep. Uherbelau	I want the record to show that the intent of this legislation is very narrow to say that a man and a woman constitute a marriage in Oregon and there is no other implied intent.
200	Schuman	I can't speak to the intent of the drafters, but the courts will say the best evidence of the intent are the words of the enactment itself. The words of this enactment are strictly limited to the marriage context.
213	Rep. Uherbelau	What do you consider the intent of HJR 4?
218	Chair Shetterly	This was intended to define the institution of marriage, but doesn't implicate, limit, or repeal the Tanner case and the rights enunciated under the Tanner case.

224	Rep. Uherbelau	Or future cases?
225	Chair Shetterly	This is not intended to have a future-reaching effect except in the marriage context.
229	Rep. Witt	Asks if the meaning of "may" on page 1, line 9 of the ñ3 amendments, has a different meaning than "shall"?
236	Chaimov	They would be the same. Discusses that "shall" is generally used in statute when the assembly is specifically directing a person to take an action, and "may" is used when describing the limit of authority.
244	Chair Shetterly	Clarifies that "may consist only" was used in place of "shall" for stylistic and drafting purposes.
247	Chaimov	That is correct.
250	Rep. Walker	The fiscal impact of HJR 29 was over \$1 million. Is there a fiscal impact for HJR 4?
255	Chair Shetterly	It would be the same since the cost is related to the cost of an election.
261	Rep. Walker	Why arenit we sending it to Ways and Means with this kind of fiscal impact?
267	Counsel Taylor	There are separate bills in Ways and Means that pay for the special election.
273	Chair Shetterly	HB 2354 is the election bill that has the funding attached to it.
285	Rep. Lowe	Does any state in the nation recognize same sex marriages?
287	Chaimov	Hawaii may, but I am not aware of any others.
289	Rep. Lowe	I believe that was defeated in Hawaii. Is any state legislative body considering legislation that would allow same sex marriage?
294	Chaimov	I donit know.
295	Rep. Lowe	Are there any court cases pending to recognize same sex marriage?
299	Chaimov	I believe there are, but I donit know for sure.

302	Rep. Lowe	Is there any litigation pending in Oregon to recognize same sex marriage?
304	Chaimov	Not to my knowledge.
307	Rep. Witt	There is no state in the country that recognizes same sex marriages. Discusses the Hawaii court case and a court case in Vermont that is considering same sex marriages. Discusses how the logic of the Tanner decision brought the issue of defining marriage before the Legislature.
330	Rep. Williams	MOTION: Moves to ADOPT HJR 4-3 amendments dated 06/15/99.
335	Rep. Witt	Discusses how combining the issue of marriage and benefits in HJR 29 caused concern among legislators. The ñ3 amendments to HJR 4 make it clear that HJR 4 is talking only about marriage and limits the implications to marriage.
370	Rep. Walker	Would HJR 4 violate the U. S. Supreme Court ruling in Romer v. Evans [Colorado]?
374	Schuman	I would say it would not.
381	Rep. Walker	Describes the Romer v. Colorado case concerning the denial of rights to a particular class of people.
386	Rep. Uherbelau	Would you distinguish between what we're doing with this legislation and the Romer case?
389	Schuman	The Romer case was based upon the conclusion by the court that the amendment to the Colorado Constitution totally disabled a particular identifiable group from having access to the political process through which they might seek any rights whatsoever.
415	Rep. Witt	Was there a federal law passed in 1995 or 1996 that recognized marriage as one man and one woman?
420	Schuman	Yes, there is a federal Defensive Marriage Act.
424	Rep. Uherbelau	Isn't that a statutory enactment and not a constitutional enactment?
427	Schuman	Yes.
431	Rep. Lowe	What are the ramifications of putting this legislation in the Oregon Constitution rather than in statute?

TAPE 192, A

002	Schuman	There are three consequences: 1) the Legislature can't change it through the normal process of enacting a statute; 2) the people, through the initiative process could not achieve that result as a statute, and 3) a court could not construe another part of the constitution to require the state to do what this part of the constitution prohibits it from doing.
010	Rep. Williams	Is whatever we do statutorily subject to an Article 1, Section 20 analysis?
018	Schuman	Yes. Statutes must conform to the constitution, but other parts of the constitution don't have to conform to the constitution. Later enacted parts of the constitution supersede an earlier conflicting part.
034	Rep. Lowe	If HJR 4 becomes part of the constitution, does it open the door for future legislatures to enact laws under that article of the constitution that do restrict benefits or will that not happen because that was not the intent?
042	Schuman	This legislation would not permit the legislature to enact statutes that discriminate on the basis of sexual orientation with the exception of the marriage statute.
047	Rep. Uherbelau	It doesn't permit discrimination, but does it prohibit us from drafting laws that would attempt to discriminate on the basis of different subjects?
051	Schuman	Article 1, Section 20, as interpreted by the Tanner decision does that. This amendment to the constitution would have no relevance to the legislature's ability to enact discriminatory statutes with respect to sexual orientation, except for marriage.
055	Rep. Uherbelau	Is that because of the intent voiced by the drafter?
056	Schuman	Yes.
059	Rep. Uherbelau	Could it be argued that a certain class of people would not be able to seek redress on this issue, through their legislature, because you shut a door to a certain class of people? If it were put in statute, anyone could come to us and ask that it be changed, but that would not be possible if it is put in the constitution.
077	Schuman	The court decided the case of Romer v. Evans on the variety of different rights that would be affected not on the basis of constitution v. statute.
083	Rep. Witt	Will HJR 4 with the ñ3 amendments pass constitutional muster with the federal constitution?

086	Schuman	A straight forward application of existing U. S. Supreme Court case law applied to HJR 4, as articulated in the ñ3 amendments, would not result in a declaration of unconstitutionality.
095	Rep. Walker	What is the failure rate of marriages between a man and a woman in Oregon?
098	Schuman	I donít know.
099	Rep. Lowe	It is 50%.
107		VOTE: 5-4 AYE: 5 - Backlund, Wells, Williams, Witt, Shetterly NAY: 4 - Edwards, Lowe, Uherbelau, Walker
	Chair Shetterly	The motion CARRIES.
138	Rep. WILLIAMS	MOTION: Moves HJR 4 be sent to the floor with a BE ADOPTED AS AMENDED recommendation.
141	Rep. Backlund	Discusses the precedent for moving a law into the constitution using the example of the 14 th Amendment to the U. S. Constitution.
155	Rep. Witt	States his reasons for supporting HJR 4.
187	Chair Shetterly	Discusses his reasons for supporting HJR 4.
213		VOTE: 5-4 AYE: 5 - Backlund, Wells, Williams, Witt, Shetterly NAY: 4 - Edwards, Lowe, Uherbelau, Walker
	Chair Shetterly	The motion CARRIES. CHAIR SHETTERLY will lead discussion on the floor.

215	Rep. Uherbelau	Notice of possible minority report with Rep. Walker and. Rep. Lowe.
222	Chair Shetterly	Closes the work session on HJR 4.
<u>SB 1115 WORK SESSION</u>		
248	Chair Shetterly	Discusses the ñ6 amendments to SB 1115 that modifies the scope of public policy in statutes relating to organized labor and labor disputes (EXHIBIT C).
255	Tim Bernasek	Oregon Farm Bureau Testifies in support of SB 1115. Discusses the changes proposed by the ñ6 amendments.
297	Commissioner Jack Roberts	Bureau of Labor and Industries Testifies in support of SB 1115 and the ñ6 amendments.
299	John McCulley	Tree Fruit Growers Testifies in support of SB 1115 and the ñ6 amendments.
304	Rep. Walker	Are we going to hear from the farm workers and if they concur with the ñ6 amendments?
311	Michael Dale	Oregon Law Center (representing the farm workers) Testifies in opposition to SB 1115 and the ñ6 amendments stating that the scope of protected activity for farm workers is only made worse by this legislation.
353	Rep. Walker	Where in the bill does it specify that workers cannot say "no" to employers without reprisal?
364	Dale	Lines 9 through 13 on page 1 of the ñ6 amendments state that a refusal to work would constitute a "substantial job interruption".
379	Rep. Witt	Canit any employee who refuses to do something their employer asks them to do be dismissed?
384	Dale	Nearly every worker in the American economy can refuse to work when engaged in collective bargaining activity, and that right is protected by the National Labor Relations Act or by analogous state law. However, minority farm workers are excluded from that law.
402	Rep. Witt	Are you talking about refusing to work during an officially declared strike?

404	Dale	No. I am talking about any collective activity; it does not have to be an officially declared strike.
407	Rep. Witt	Uses the example of two employees who want to talk to their employer about overtime or lunchroom conditions. They are told "not at this time" and are asked to go back to work. If they refuse to go back to work, can they be dismissed for refusing to work?
419	Dale	States it would depend upon whether or not there is a collective bargaining agreement in effect or if a collective bargaining agent is recognized in the facility. If there is no collective bargaining agreement in effect and no bargaining agent has been selected for those workers, they can be replaced, but they cannot be fired because they are asserting collective interests. Discusses the difference in labor laws between being fired and being replaced.
TAPE 191, B		
021	Rep. Witt	Does replacing them mean I do not have to hire them back to work?
024	Dale	If the strike was because of violation of the labor law, you would have to hire them back even if they had been replaced. If it was an economic strike for purposes of raising working conditions, you would not have to hire them back if you had replaced them. We have offered compromise language that would recognize those principles with respect to the Oregon Roses decision, but the Farm Bureau has not been interested in that legislation. If there had been a collective bargaining agent, the individual workers would have to bargain through their designated representative.
042	Bernasek	Discusses the need to look more in depth at the complex issue of collective bargaining for agriculture, perhaps during the interim.
075	Chair Shetterly	States that this legislation addresses the Oregon Roses case and the concerns of the Governor's veto of SB 1205 during the 1997 session. This does not end the debate of farm worker issues in Oregon, but I am committed to further discussions in the future.
109	Dale	We were willing to discuss negotiations last winter and the Farm Bureau walked away.
123	Bernasek	In my defense, I was not part of the discussions during the interim. SB 1115 clarifies a situation when employees come together to discuss concerns about wages and working conditions in the work place.
156	Rep. Uherbelau	Discusses how hard everyone has worked toward resolving labor issues of farm workers in Oregon and urges letting go of the past and moving into the future.

		This whole process depends upon good faith and the chair has stated he will be involved in the continuing process of addressing these issues.
200	Rep. Williams	MOTION: Moves to ADOPT SB 1115-6 amendments dated 06/16/99.
		VOTE: 9-0
	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
209	Rep. Williams	MOTION: Moves SB 1115 to the floor with a DO PASS AS AMENDED recommendation.
214	Rep. Walker	States reasons for having to vote "no" on SB 1115.
228	Rep. Witt	I appreciate how the farm bureau has worked on SB 1115 to protect the workers.
236	Rep. Lowe	Expresses reasons for having to vote "no" on SB 1115.
250	Chair Shetterly	VOTE: 7-2 AYE: 7 - Backlund, Edwards, Uherbelau, Wells, Williams, Witt, Shetterly NAY: 2 - Lowe, Walker
	Chair Shetterly	The motion CARRIES. CHAIR SHETTERLY will lead discussion on the floor.
252	Rep. Walker	Serves notice of a possible minority report.
257	Rep. Lowe	Also serves notice of a possible minority report.
261	Chair Shetterly	Closes the work session on SB 1115.
<u>SB 408A WORK SESSION</u>		

265	Taylor	Discusses the ñA10, ñA11 and ñA12 amendments to SB 408A that authorizes State Office for Services to Children and Families to enter into interstate compacts regarding provision of assistance to adoptive families who are parties to adoption assistance agreements (EXHIBITS D-F). The ñA10 amendments are to resolve conflicts to SB 387.
293	Tim Travis	Oregon Judicial Department Are the ñA9 amendments still before the committee (EXHIBIT G)?
296	Taylor	No.
301	Travis	We want the ñA12 amendments to replace the ñA9 amendments because there is a fiscal impact with the ñA9 amendments. Discusses the ñA12 amendments. The ñA11 amendments specify that the court "may inspect the case plan", but not that they can do anything about it. Reads a RULE OF CONSTRUCTION from Title IV-E of the Social Security Act (11/19/97) regarding the discretion of the courts (EXHIBIT H).
TAPE 192, B		
038	Chair Shetterly	Do the ñA12 amendments move the court's inquiry to the permanency hearing under Section 15 on page 12 of SB 408A?
053	Travis	Yes.
058	Chair Shetterly	The initial determination of whether to file or not to file a petition on behalf of the child remains exclusively with the agency under Section 21 on page 15 of SB 408A. However, the case plan becomes subject to review by the court when the child is before the court at the permanency hearing?
063	Travis	Yes.
066	Rep. Walker	Does that happen with the ñA12 amendments?
066	Travis	Yes.
074	Bob Mink	Deputy Director, Department of Human Resources Discusses the ñA11 and ñA12 amendments to SB 408A. (EXHIBITS E & F) and that Sections 15 and 21 still seem ambiguous.
106	Linda Guss	Assistant Attorney General, Department of Justice Testifies and submits written testimony in opposition to the proposed amendments to SB 408A (EXHIBIT I). Describes when permanency hearings might occur. If a petition to terminate parental rights in juvenile court is denied, a

		new petition could be subsequently filed to revisit the issue if additional facts come forward.
138	Mink	Discusses his desire for clarity in these issues so all parties know what is expected in the future. I feel the Department should make the determination on whether or not to file the permanency proceeding, and the proposed language in these amendments has the court making that decision.
150	Chair Shetterly	I don't see that happening. Section 21 of SB 408A leaves the determination of whether or not to file a petition to terminate parental rights up to the agency. The 12 amendments give the court a chance to review the case plan at the permanency hearing, but the initial determination is made by the agency.
170	Rep. Uherbelau	Page 16, line 6 gives instances of when filing a petition for termination of parental rights may not be in the best interest of the child. If the petition is never filed, how does the case plan come before the court to be reviewed?
181	Chair Shetterly	Because the child is still under jurisdiction of the court, there are periodic hearings at which time the court would have the opportunity to review the case.
190	Rep. Lowe	Asks for clarification on the difference between "inspect" and "review".
200	Guss	In the amendments we were trying to articulate that the court does have a role in reviewing the case documentation. But the Judicial Department's intent was to give to the court the authority to say "you must proceed to file because there is not a compelling reason not to file the petition". Or, the court might find that it is in the child's best interest not to file a petition to terminate parental rights. If that were the case, I would not want to litigate a case that was not in the child's best interest to file in the first place.
286	Rep. Lowe	Would you like to limit the court to simply inspecting the agency case plan?
291	Guss	For 20 years the State Office for Services to Children and Families (SCF) has been making the decision to file termination of parental rights petitions, in cases where they have been granted custody of children, in compliance with federal and state law. The Adoption and Safe Families Act (ASFA) did not give that discretion to the courts.
349	Rep. Uherbelau	MOTION: Moves to ADOPT SB 408A-12 amendments dated 06/16/99.
		VOTE: 9-0
	Chair Shetterly	Hearing no objection, declares the motion CARRIED.

355	Rep. Uherbelau	MOTION: Moves to ADOPT SB 408A-10 amendments dated 06/10/99.
		VOTE: 9-0
	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
359	Rep. Uherbelau	MOTION: Moves SB 408A to the floor with a BE ADOPTED AS AMENDED recommendation and the SUBSEQUENT REFERRAL to the committee on WAYS and MEANS BE RESCINDED.
		VOTE: 8-0-1 AYE: In a roll call vote, all members present vote Aye. EXCUSED: 1 - Rep. Edwards
	Chair Shetterly	The motion CARRIES. REP. LOWE will lead discussion on the floor.
370	Chair Shetterly	Closes the work session on SB 408A.
371	Chair Shetterly	Adjourns the meeting at 5:55 p.m.

Submitted By, Reviewed By,

Patsy Wood, Sarah Watson,

Administrative Support Office Administrator

EXHIBIT SUMMARY

- A - HJR 4, ñ3 amendments (LC 2338), dated 6/15/99, Rep. Lane Shetterly, 1 pg.
- B - HJR 4, memo to all Legislators from Greg Chaimov, Legislative Counsel, dated 12/10/98, 2 pgs.
- C - SB 1115, ñ6 amendments (LC 3884), dated 6/16/99, Oregon Farm Bureau, 4 pgs.
- D - SB 408A, ñA10 amendments (LC 620), dated 6/10/99, staff, 6 pgs.
- E - SB 408A, ñA11 amendments (LC 620), dated 6/16/99, staff, 1 pg.
- F - SB 408A, ñA12 amendments (LC 620), dated 6/16/99, staff, 1 pg.
- G - SB 408A, ñA9 amendments (LC 620), dated 6/3/99, staff, 1 pg.
- H - SB 408A, written testimony submitted by Tim Travis, Judicial Dept. , 1 pg.
- I - SB 408A, written testimony submitted by Linda Guss, DOJ, dated 6/16/99, 2 pgs.
- J - SB 408A, written testimony submitted by Connie Gallagher, DHR, 1 pg.
- K - SB 408A, written testimony of Carol Overbeck, submitted by Connie Gallagher, DHR, dated 6/15/99, 2 pgs.
- L - HJR 4, written testimony submitted by Lawrence Hall, dated 6/16/99, 1 pg.
- M - HJR 4, written testimony submitted by Candace Steele, 1 pg.