

SENATE COMMITTEE ON
JUDICIARY

Hearing Room
Tapes 13,14

MEMBERS PRESENT:

Sen. Neil Bryant, Chair
Sen. Ken Baker
Sen. Jeannette Hamby
Sen. Randy Miller
Sen. Peter Sorenson
Sen. Dick Springer
Sen. Shirley Stull

STAFF PRESENT:

Bill Taylor, Committee Counsel
Diane Dussler, Committee Assistant

MEASURES HEARD: SB 61 - Public Hearing

SB 92 - Public Hearing
SB 89 - Public Hearing
SB 90 - Public Hearing

These minutes contain materials which paraphrase and/or summarize
statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings,
please refer to the tapes.

TAPE 13, A

Witnesses: Bob Shoemaker, Former Oregon State Senator
Alice Pickard, President, United Seniors of Oregon
Chuck Sheketoff, representing United Seniors of Oregon and The Oregon State
Council of Senior Citizens
Gary Beagle, President, Guardianship/Conservatorship Assn.
Ron Bailey, Legislative Chair, OSB Estate Planning Section
Scott McGraw, Attorney
Maxine Bush, Representing the American Association of Retired Persons
Lee Johnson, Circuit Court Judge, Multnomah County, Chief Probate Judge
Carol Kyle, Attorney and Circuit Court Judge Pro-Tem, Multnomah County

015 CHAIR BRYANT: Calls meeting to order.
- Announcements

044 CHAIR BRYANT: Bill introductions?

045 BILL TAYLOR, COMMITTEE CO-COUNSEL: We have none.

046 Opens PUBLIC HEARING on SB 61.

051 BOB SHOEMAKER, FORMER OREGON STATE SENATOR: Gives overview of
previous attempts to formulate legislation dealing with guardianships, and
conservatorships.

101 - protecting a person from his/her own incapacity.

130 SEN. BAKER: Is there a standard uniform guardianship/conservatorship
bill that was used as the basis for this or is the structure just your own
origination?.

134 SHOEMAKER: I think it's pretty much the working groups origination.

144 SEN. SORENSON: Besides combining the procedure for the temporary and
permanent guardianship and conservatorship does the bill make any changes
in the criteria upon which a court makes decisions about guardianship and
conservatorship? 171 LEE JOHNSON, CIRCUIT COURT JUDGE, MULTNOMAH COUNTY:
Submits written

testimony on SB 61. (EXHIBIT A) I don't think so, with some reservation.
There is some language in the bill which I would suggest should be changed.

Suggests that "clear and convincing evidence" language should be amended.

203 CHAIR BRYANT: Asks for clarification on "clear and convincing evidence."

205 SHOEMAKER: Guardianship is a serious business and to do that you need
to have strong evidence.

211 CAROL KYLE, CIRCUIT COURT JUDGE PRO-TEM, MULTNOMAH COUNTY: Recalls
clear and convincing evidence is the standard in the current existing
Chapter 126.

222 CHAIR BRYANT: States that on the temporary order, "clear and convincing"
may be inappropriate.

226 KYLE: In the absence of an evidentiary hearing I'm not sure what "clear and convincing" threshold can be met.

231 CHAIR BRYANT: Your concern is that even under current law, it's a tough standard to meet.

232 KYLE: It is

233 CHAIR BRYANT: Asks for suggestion on preferred standards.

234 JUDGE JOHNSON: At that stage we don't even have a visitors report, we have the statement of the petitioner, and a doctor's report.

254 CHAIR BRYANT: And the length of time that the temporary order usually stays in effect.

255 JUDGE JOHNSON: Well it can't stay, under the bill, longer than 30 days.

257 CHAIR BRYANT: And as a practical matter do you usually take the full 30 days before you set a hearing?

259 JUDGE JOHNSON: No.

261 KYLE: A visitor came in with a recommendation contrary to my position, and the other counsel and I were in front of the court within 5 minutes for a hearing.

267 JUDGE JOHNSON: Certainly in my court I would set it down immediately.

268 CHAIR BRYANT: Other questions?

270 SEN. SORENSON: Outside of the Legislative Assembly what were the concerns that brought this issue up in the first place? What is the public policy problem that's driving this, and my next question is does Measure 16 have anything to do with it?

285 SHOEMAKER: I don't think Measure 16 had anything to do with this.

295 JUDGE JOHNSON: The present law was modeled on the Model Probate Code, enacted in 1973, but over the years the legislature made changes. The process of making those changes have created conflicts and is now a very difficult statute to comprehend.

319 SEN. SORENSON: Did you peruse the issue of any standardized forms?

333 SHOEMAKER: There are letters of guardianship in Section 29, a standard guardians report in Section 32, letters of conservatorship in Section 34, inventory of property in Section 48. There is no standard visitors report.

351 JUDGE JOHNSON: I like forms at times, but we don't want to put everything into forms.

353 SEN. SORENSON: Thinks having these types of forms in the Statute is helpful if there are routine and standard information that each Judge should have.

362 KYLE: Section 7 is the blue print for petitions and protective proceedings. We have tried to make that as detailed as possible.

381 SEN. SORENSON: Agrees that's the problem with putting the form in there.

384 SEN. BAKER: Points out that Carol Kyle was a probate commissioner for many years, and is highly respected in the legal community. Asks who was involved in the working group.

392 KYLE: Yes, the original Senate Bill 287 was authored by Meg Nightingale, Scott McGraw and I were on the committee, along with Cindy Barrett, Sam Friedenber, Judge Johnson, Judge Rita Cobb, and Judge Wykoff.

404 JUDGE JOHNSON: We had representatives from AARP.

405 KYLE: Yes.

406 TAYLOR: We had a mailing list of about a hundred. We had all the senior groups present at every meeting, and from that group we developed a smaller work group.

417 JUDGE JOHNSON: There were a initially a lot of practicing lawyers and they dropped out, I think, because of exhaustion.

440 ALICE PICKARD, PRESIDENT, UNITED SENIORS OF OREGON. Introduces herself to the committee to let them know she follows conservatorship and guardianship issues carefully.

453 CHUCK SHEKETOFF, ATTORNEY, MULTNOMAH COUNTY LEGAL AID SERVICE, REPRESENTING UNITED SENIORS OF OREGON, AND THE OREGON STATE COUNCIL OF SENIOR CITIZENS: Testifies and submits written testimony of Jennifer Wright, an attorney with Oregon Legal Services, practicing only in elder law, and briefly outlines her comments in support of the bill. (EXHIBIT B)

476 -Outlines recommendations that have to do with limitations on temporary guardianships. The bill does have the 30 day limit. Current law says that

it can be extended for good cause for another 30 days, this bill states simply that it can be extended for good cause, and we would like the second 30 day cap added.

483 CHAIR BRYANT: What section is that?

484 SHEKETOFF: Section 63, and on the first page of the testimony. It's the only negative change from current laws that affects our work on behalf of senior's.

TAPE 14, A

041 -States Ms. Wright recommends an amendment that would require a petitioner for guardianship to disclose intent to institutionalize in the petition. Also recommends check list to list powers the guardian has, current law states it should be least restrictive alternatives.

065 GARY BEAGLE, PRESIDENT OF THE GUARDIANSHIP, CONSERVATORSHIP ASSOCIATION OF OREGON: Speaks in support of SB 61 with recommendation for amendments.

087 CHAIR BRYANT: Asks that Mr. Beagle's comments be submitted in written form.

089 BEAGLE: Testifies on benefits of temporary fiduciary statute contained in the bill, is on a county by county basis under current law, standardization would be of great benefit to those in the field.

100 -Recommends that some type of training statute be placed in the bill that would require a person serving as guardian and conservator to go through a minimum amount of training. Problems are created when attorney does not fully explain the duties to family member or individual serving as

guardian and conservator. Agrees with the bill overall.

123 SEN. BRYANT: Calls additional witnesses.

127 RON BAILEY, ATTORNEY PRACTICING IN PORTLAND, AND LEGISLATIVE CHAIR FOR THE ESTATE PLANNING SECTION: Speaks in support of SB 61, and offers services to the committee or any subcommittee that may review the bill.

147 SCOTT McGRAW, ATTORNEY: Speaks in general support of SB 61.

176 SEN. BRYANT: Requests Mr. McGraw's written comments get to Mr. Taylor so they can be considered before the committee goes into a work session.

187 MAXINE BUSH, REPRESENTING THE AMERICAN ASSOCIATION OF RETIRED PERSONS: AARP cannot take a position on SB 61 until their legal counsel has had an opportunity to study the bill.

199 CHAIR BRYANT: When do you think you might hear from them?

200 BUSH: I'm hoping within the next few days.

201 CHAIR BRYANT: SB 61 won't be re-scheduled in the next few days.

204 Closes PUBLIC HEARING on SB 61

Opens PUBLIC HEARING on SB 92

Witnesses: Bob Shoemaker, Former Oregon State Senator
Chuck Sheketoff, Attorney, representing United Seniors of Oregon and The Oregon State Council of Senior Citizens
Maxine Bush, Representing the American Association of Retired Persons
Carol Kyle, Attorney and Circuit Court Judge Pro-Tem, Multnomah County
Lee Johnson, Circuit Court Judge, Multnomah County, Chief Probate Judge

210 BOB SHOEMAKER, FORMER OREGON STATE SENATOR: Outlines provisions of SB 92, Section 1.

231 -Places a burden on the petitioner which is often very hard to meet and impedes process of appointing someone guardian or conservator.

240 JUDGE JOHNSON: Discusses sub-section 2.

253 CAROL KYLE, ATTORNEY, CIRCUIT COURT JUDGE PRO-TEM, MULTNOMAH COUNTY: Discusses the requirement in SB 61 as to who must be named and notified on a petition for a protective proceeding and those are going to be the heirs at law.

297 CHAIR BRYANT: Asks if Ms. Kyle would have a problem with listing the names, relationships and addresses of the respondents heirs at law.

300 KYLE: I have no objection.

311 SHOEMAKER: Explains Section 1 of SB 92 requirements.

333 Explains Section 2.

348 CHAIR BRYANT: Asks for an example.

349 SHOEMAKER: Differs to Judge Johnson.

350 JUDGE JOHNSON: You have a change of guardian or you have a proceeding to remove the guardian, and you have a person who's severely incapacitated,

but would have an emotional reaction to the proceedings.

361 KYLE: Feels that it is a constitutionally protected due-process requirement that notice be given at all times.

379 JUDGE JOHNSON: Disagrees.

399 KYLE: Discusses notice under Sub-Section 3.

405 SHOEMAKER: Discusses his perception of Sub-Section 3.

409 KYLE: Believes there is then an inconsistency SB 61

420 CHAIR BRYANT: So its post appointment you have reservations on.

421 KYLE: I would leave it discretionary with the court to waive notice on post-appointment proceedings

425 JUDGE JOHNSON: I think we're all three in agreement on that.

429 SHOEMAKER: I'm really not an advocate one way or the other.

434 CHAIR BRYANT: Section 3.

435 SHOEMAKER: Explains provisions of Section 3 regarding the visitors report. The questions is whether the visitors report should be a part of the court record and should be admissible in evidence without being subject to hearsay objections.

459 KYLE: If there's no jury there the court can hear anything it wants to hear and makes it's decision.

461 CHAIR BRYANT: Weigh the evidence according to the judgment of the court.

462 KYLE: Usually all of the people that have made the hearsay comments that were contained in the visitors reports are going to be the witnesses.

If they're there to give direct testimony it doesn't matter if they're in the visitors report.

472 JUDGE JOHNSON: The visitor is an expert. Under the hearsay rule he can rely on hearsay in making his opinion, because as a professional that is the kind of information he relies on. It's admissible, but can't consider its for the purpose of proving the fact in dispute.

TAPE 13, B

42 JUDGE JOHNSON: Most visitor's reports do say who they have interviewed and they interview the doctor.

49 SHOEMAKER: On the other side of the issue if you have a contested hearing and somebody is testifying opposite of the visitor and the visitor's hearsay is given undo weight without being able to get to the truth of the matter you do upset the balance that the hearsay rule is supposed to protect. There are good arguments on both sides.

54 -Continues discussing Sections 4 and 5 regarding right of protective person to contact and retain counsel and to have personal records.

71 JUDGE JOHNSON: Discusses Sections 4 and 5.

82 KYLE: Prefers section 27 as proposed in SB 61.

84 SHOEMAKER: Discusses Section 6.

93 SHOEMAKER: Discusses Section 7.

100 JUDGE JOHNSON: Discusses Section 7.

104 KYLE: Discusses Section 7.

111 SHOEMAKER: Section 7 includes a requirement that the petition must contain a statement of immediate and serious danger which does not otherwise apply.

115 TAYLOR: Discusses Section 7.

123 SHOEMAKER: Recommends more work be done on Section 7.

128 SEN. SORENSON: Does appointment of guardianship apply to runaways?

132 KYLE: Refers to Exclusive Jurisdiction Statute in 109 in the Juvenile Code.

146 SEN. SORENSON: Asks question regarding possibility for an adult to seek a guardianship of a child when that child has parents, but the child is not living with the parents?

151 KYLE: Yes. Discusses issue.

159 SEN. SORENSON: Asks whether statute would have to be amended to allow a person, other than the parent, responsibility over a minor child.

166 KYLE: Responds regarding a parent delegating responsibility over a minor child.

195 CHUCK SHEKETOFF, MULTNOMAH LEGAL AIDE SERVICE, REPRESENTING UNITED SENIORS OF OREGON AND THE OREGON STATE COUNCIL OF SENIOR CITIZENS: Submits and reviews written testimony of Jennifer Wright. (EXHIBIT F) The Oregon State Council of Seniors oppose SB 92. Discusses opposition.

240 SEN. SORENSON: Asks for clarification regarding differences between SB 61 and SB 92.

243 SHEKETOFF: SB 61 cleans up statute. SB 91 makes amendments to the statute and would return guardianship law to the pre Grant vs. Johnson era.

248 SEN. SORENSON: What parts of SB 92 do you oppose?

249 SHEKETOFF: The entire bill.

260 SEN. SORENSON: Discusses Section 2.

267 SHEKETOFF: Discusses the language in Section 2.

277 SEN. SORENSON: Referring to Ms. Wright's letter -- asks which provisions of the Constitution is she talking about?

280 SHEKETOFF: Due process.

285 CHAIR BRYANT: Asks Bill Taylor to examine the case and report back in the work session.

287 SEN. SORENSON: Asks for clarification regarding the Constitution.

291 SHEKETOFF: The US Constitution.

303 Closes PUBLIC HEARING on SB 92
Opens PUBLIC HEARING on SB 89 and SB 90

Witness: Ann Christian, Office of State Court Administrator

309 ANN CHRISTIAN, DIRECTOR OF INDIGENT DEFENSE SERVICES, OFFICE OF STATE COURT ADMINISTRATOR: The Oregon Judicial Department is taking no position on any of the policy matters associated with SB 61 at this time. The Department is reviewing potential work load impact that SB 61 would have. The Oregon Judicial Department is not taking a position on policy matters involved with SB 89 and SB 90.

335 -Continues, discussing indigent defense funds.

342 CHAIR BRYANT: Has the Court of Appeals case been appealed to the Oregon Supreme Court?

345 CHRISTIAN: Petition for review was denied.

349 CHAIR BRYANT: Was that based on the Oregon Constitution?

350 CHRISTIAN: Yes.
-Continues on parental rights and equal privilege.
-Discussed The Oregon Judicial Department's preliminary review of the provisions of SB 89 and SB 90.

390 -Discusses fiscal impact of SB 89 and SB 90.
-Discusses fiscal impact of SB 61.

442 CHAIR BRYANT: It is my direction from the Ways and Means Committee, that because of our budget crisis, we won't be expanding indigent defense costs.

473 SEN. SORENSON: Is there a state or constitutional right to counsel when the state assists in issuing orders to guardians?

479 CHRISTIAN: There is no case law that would say there is a right to counsel in those circumstances.

486 SEN. SORENSON: What about nationally?

TAPE 14, B

038 CHRISTIAN: The only case law I would be familiar with is US Supreme Court. There is due process right at some level in a guardianship proceeding.

044 SEN. SORENSON: Would you be willing to write a letter to us about guardianship?

051 CHRISTIAN: Yes.

054 CHAIR BRYANT: Suggests Ms. Christian also ask Oregon Advocacy for research information on guardianship.

059 CHAIR BRYANT: Closes PUBLIC HEARING on SB 89 and SB 90.
Meeting adjourned.

Submitted by,

Reviewed by,

Diane Dussler
Committee Assistant

Bill Taylor
Committee Counsel

EXHIBIT LOG:

- A - Testimony on SB 61, Judge Lee Johnson, 4 pages
- B - Testimony on SB 61, Jennifer L. Wright, 4 pages
- C - Testimony on SB 61, 92, 89, 90, Ritz Batz Cobb, 1 page
- D - Testimony on SB 61, Kingsley W. Click, 1 page
- E - Testimony on SB 61, 89, 90, 92, Bob Joondeph, 3 pages
- F - Testimony on SB 92, Jennifer L. Wright, 3 pages