HOUSE COMMITTEE ON JUDICIARY FAMILY JUSTICE January 28, 1991 Hearing Room 357 3:00 p.m. Tapes 11 -12 MEMBERS PRESENT:Rep. Kelly Clark, Chair Rep. Judy Bauman Rep. Marie Bell Rep. Jim Edmunson Rep. Kevin Mannix Rep. Tom Mason Rep. Del Parks Rep. Ron Sunseri STAFF PRESENT: Holly Robinson, Committee Counsel Jeff Steve, Committee Assistant MEASURES HEARD: HB 2368 - Modification of Child Support, PH/WS HB 2177 - Monitoring of Nurses, PH/WS HB 2380 - Orders and Decrees in Dissolution, PH/WS HB 2099 - Student Records, PH/WS

WITNESSES: D. Michael Wells, Hutchinson Anderson Cox Parrish and Coons (HB 2380) Greg McMurdo, Dept. of Education (HB 2099) Alan Tresidder, Oregon School Board Association (HB 2099) Eve Miller, Oregon Trial Lawyers' Association (HB John Ellis, Department of Justice (HB 2368) Katherine Brown, Women's Rights Coalition (HB 2368) Brad Swank, State Court Administrator's Office (HB 2368) Susan King, Oregon Nursing Association (EIB 2177) Judy Colligan and Mary Amdall-Thompson, State Board of Nursing (HB 2177)

These minutes contain materials which paraphrase and/or summarlze statements made during this session. Onlv text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. , . House Judiciary Committee January 28, 1991 Page 2 TAPE 11, SIDE A

004 CHAIR CLARK: Calls meeting to order at 3:09 P.M. -We will revisit two bills 2380 and 2099. -Oregon history presentation.

HB 2380 - MODIFICATION OF CHILD SUPPORT - PUBLIC HEARING

034 D. MICHAEL WELLS, HUTCHINSON ANDERSON COX PARRISH & COONS, P.C.: EXHIBIT A -Conducted an informal poll of the family practitioners at the Family Law Conference this past Friday. No one he spoke with supports the Bill. Part of the substantial concern that the Family practitioners have is that de novo review does provide a means by which a decision by a trial judge can be reexamined. It provides some means of checking arbitrary and capricious decisions. De novo review has a long history in the court system and I oppose HB 2380. 055 REP. MASON: Why is there such a division in opinion on this Bill between the courts and the practitioners? 064 WELLS: In practical experience the Court of Appeals will reexamine the facts in a divorce case when the court looks at it and says that the decision is wrong, even in the absence of legal error. Without that possible check, we believe that many of the decisions in this area could go unreviewed. This bill will not serve the interests of clients in a divorce proceeding. 079 REP. MASON: Do you see any political content issues in this bill? 085 WELLS: Yes. There could be a disproportionate impact on women. There is impact on litigants, especially women in divorce cases in which most of the judges are men and have grown children and where the standard of review is limited solely to errors of law, it may prevent women from receiving a fair appeal. 102 REP. PARKS: How many of the judges that you spoke of have been divorced? 104 WELLS: One. HB 2099 - STUDENT RECORDS - PUBLIC HEARING

123 ROBINSON: EXHIBIT B and EXHIBIT C Summarizes HB 2099 and its amendments. The Bill specifically defines "directory information" for purposes of student records and brings Oregon statutes regarding release of elementary, secondary, and ESD student records into compliance with federal law. It specifies procedures regarding transfer of student

records to other schools or educational institutions.

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House Committee On Judiciary January 28, 1991-Page3 161 GREG McMURDO, DEPARTMENT OF EDUCATION: The proposed HB 2099-1 amendments take care of the problems: See Exhibit B. -The word aptitude on line 14, page 1 of printed HB 2099 does not belong there and should be moved. Aptitude records are more properly "behavioral records." We believe that if you leave it in, the bill will run afoul of federal law. See Exhibit B. -The other amendment appears on page 3 after line 1. That was to address COSA's concern that often times the student and parent show at school together and have a chance to review the record. See Exhibit B. -With respect to Rep. Mannix's amendments, the parents of a minor cannot waive a minors rights in a criminal proceeding. Rep. Mannix's amendments do that and it would be in violation of U.S. Supreme Court case law. See Minutes of Family Justice Subcommittee on January 23, 199 1, Tape 6A at 355.

186 REP. MANNIX: Who can waive the rights of the minor?

187 McMURDO: The minor.

189 REP. MANNIX: My amendments require that the students and the parents consent. See Minutes of Family Justice Subcommittee on January 23, 1991, Tape 6A at 355.

192 McMURDO: It is the "and" that bothers me. Considers that the court views the law as rep. Mannix does.

199 ROBINSON: Concurs with Mr. McMurdo.

205 REP. MANNIX: The parent cannot waive the right. That is right. All I have done is that when the student waives the right the parent must also waive the right. I am adding to the protections. The reason for this is because I have not seen any Supreme Court decision which says that we cannot be "more" protective. 215 ALAN TRESIDDER, OREGON SCHOOL BOARD ASSOCIATION: OSB A supports HB 2099 and the adoption of the HB 2099-1 amendments proposed by us and drafted by Legislative Counsel. The genesis of HB 2099 was to obtain an Oregon statutory definition for "directory information." -As I read federal law, lines 11-15, page 1, that are the concerns of Rep. Mannix, are virtually a direct quote from existing federal law. This body may not be able to change the federal definition or the intent of the United States Supreme Court. 236 REP. MANNIX: Asks for copies of any Supreme Court decisions that uphold that.

239 REP. PARKS: Agrees that the witnesses are right.

HB 2099 - STUDENT RECORDS - WORK SESSION

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VOTE: No objections. Motion passes

259 MOTION, REP. MANNIX: Moves for "Mannix" Amendments to delete lines 11-15 on p. 2. Explanation. -This was designed to provide an appropriate balance for juveniles as well as the rights of parents. If the student is 18 or older then the student can consent to the release of behavioral records. Here parents are not given the right to waive rights. This is an extra protection. -There is an alternative: -The subpoena to both the parents and children DISCUSSION TO THE MOTION 302 CHAIR CLARK: "If I understand you, if the minor consents but the parent doesn't that is an added protection." 307REP. BELL: What if the students consented and the parents did not? 310 REP. MANNIX: No consent and they will have to use a subpoena. 330 REP. BELL: So you have taken away that student's right to consent if it null)fies the consent. 336 REP. MANNIX: An individual's right to consent is still there. Before, the Supreme Court said that a parent may not waive the rights of a youngster, but they did not say that a parent may not prevent a youngster from waiving those rights. "The reason for that is, I am concerned about juveniles who will be put under unnecessary pressure by authorities to release their rights. I think they can be pressured and I think a parent or legal guardian ought to be required to also consent and if they don't consent then the alternative is subpoena. Then let a judicial authority decide whether or not to quash a subpoena." 350 VOTE: 5-2 Motion passes.

Aye: Bell, Mannix, Mason, Parks, Sunseri, No: Edmunson, Clark Excused: Bauman

370 MOTION, REP. MANNIX: Moves HB 2099 as amended to Full Committee with a "do pass" recommendation. 378 VOTE: 7-0 Motion passes. Rep. Mannix to carry.

Aye: Bell, Edmunson, Mannix, Mason, Parks, Sunseri, Clark

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380 CHAIR CLARK: Asks Counsel to research this issue for the Full Committee.

HB 2380 - ORDERS AND DECREES IN DISSOLUTION PROCEEDINGS - WORK SESSION

386 EVE MILLER, OREGON TRIAL LAWYERS ASSOCIATION: Opposes HB 2380 on the basis that there is not very much statutory law on this issue of giving up marital property and also setting support for various tax issues. Over a period of time you get to know certain judges leanings, but you cannot always count on a uniform decision from judge to judge and county to county. Therefore, we as practitioners rely a great deal on the Court of Appeals and the Oregon Supreme Court to fill those gaps. For example, the Smith formula came out of an appellate court decision and for a long time that formula was the basis for determining what the appropriate level of child support would be for families in Oregon. We could not go to the statute to rely on that. -Referring to women's issues, practitioners would continue to allow the appellate courts to hear the cases when spousal support is denied.

TAPE 12, SIDE A

008 EVE MILLER: We don't have any definition in our statute as to what a "long term marriage" is as opposed to a "short term marriage." That decision is left up to the to the trial judge. In those situations where a trial judge may have a bias or lack of experience, there is no backup system to enable the parties and practitioners in the case that they are going to get a fair result. We want to keep open the opportunity for appellate review.

045 REP. MASON: Custody determinations are also appealable under the present standard. It seems to me that while the complaint on the part of a lot of women has to do with spousal support and erroneous rulings in spousal support, the other side of the coin on the part of a lot of men is the court's traditional bias toward women in the awarding of custody.

057 EVE MILLER: Most people approach the area of custody as gender neutral. Where the bias comes in is one from the standpoint that a lot of women are the first caretakers if not the primary caretakers. A backup system, such as appellate review, would allow for the de novo review process.

068 REP. MASON: We have had no opposition of HB 2380 on the side of custody.

074 EVE MILLER: Spousal support is not the only issue. It is one issue that involves women a lot.

081 REP. SUNSERI: Do you have any idea how many cases are reviewed and reversed? . .

f These minutes contain rnaterisIr which paraphrase and/or summarize staternonta made during thia sossion. Only text enclosed in quotation marl report a speaker's exact words For complete contents of the proceedings, please refer to the tapes House Committee On Judiciary January 28, 1991-Page6 088 EVE MILLER: There are probably a very small minority of cases that come up on appeal.

HB 2368 - MODIFICATION OF CHILD SUPPORT - PUBLIC HEARING

096 ROBINSON: In 1989, the Legislature enacted child support guidelines. This was a significant revision to the way child support orders would be calculated. In 1989, most states moved in the direction of implementing child support guidelines which use a formula based upon the combined income of the joint parents and then determines, on the basis of custody, what the amount of child support is. Whereas there is a two year review cycle of orders issued by the Department of Human Resources regarding the amount of child support, there is an unresolved issue regarding previous child support orders that were in existence at the time the child support guidelines went into effect. Some courts are considering the enactment of child support guidelines as what is called "significant change of circumstances" which would warrant a change in the support order. The questions before the Committee are 1) what to do with those orders in terms of whether or not application of them if you have a preexisting order is in fact a "change in circumstance" that warrants this; 2) how often should they be reviewed. 120CHAIR CLARK: Can you explain the meaning of "substantial change in circumstances?"
124 ROBINSON: Now, private practitioners have to show to the court, that the condition of the party from whom more support is sought has had a "significant change in circumstances," i.e., ,a significant increase or decrease in income or other conditions that would

significantly modify the person's ability to pay either more or less. The issue is, there may be no change in the position of the parties, but because child support guidelines are now in effect, that in and of itself may warrant a "significant change of circumstances."

137 CHAIR CLARK: We are being asked to decide whether the application of the child support guidelines constitutes a "significant change of circumstances..

155 JOHN ELLIS, DEPARTMENT OF JUSTICE: The traditional standard in Oregon for modifying a child support order has been to prove a "continuing unanticipated change in circumstances." This is a hard standard. Before 198 9, it was very hard in some courts to prove the standard to get a change in support. In 1988, Congress required all states to have two things: 1) a child support guideline and 2) the state had to amend and modify preexisting orders using child support guidelines and you need not be tied to the old "material change in circumstances" standard. Chapter 811 of 1989 Laws did the following: -It created child support guidelines and it created a process by which preexisting child support orders could be mod)fied using only the guideline as a standard. You did not need to prove "material change in circumstances.. -It limits the change using the "material change in circumstances" standard to no more frequently than once every two years and; -It provided that these motions to modify child support orders based on the new child support guidelines can only be brought by the state Child Support Program (SED) and the district

 attorneys. It excluded private litigants from using this new easier standard. We agree that that is a problem. HB 2368 attempts to solve the problem by saying that a discrepancy between what the child support order is and what it "should" be constitutes a material change in circumstance. It has joined those two standards and obliterated the distinction. The problem the Department of Justice has with that approach is that in considering HB 2455, which you acted favorably on, the problem with that easier standard is that without some kind of a regulator you allow everyone into court every two months every time they get a $10 raise in their salary. Chief Justice Peterson suggested that we regulate this by the two year provision and so we propose the following: -If you want to go into court to use this easier standard in modifying your child support that is fine, but you can only do that every two years. If you want to use the old "change in circumstances" standard you can get into court anytime. I would suggest that you consider doing this in the same manner as the Department of Justice has done in SB 220. SB 220 would allow anybody to go into court once every two years to use this new easier standard. We simply codify what has become the practice of some trial courts in this area.

230 CHAIR CLARK: Is unclear as to what the language in SB 220 does for us.

235 ELLIS: The reference to ORS 25.080 says that only district attorneys and the Support and Enforcement Division can get into court using this easy standard. 247 REP. MANNLY: Have you seen an alternative that sets- some sort of minimum common denominator of change that would be required if the total amount of support for the child under the current order varies by 10% or $25 which ever is greater from

the amounts set forth in the guidelines? 252 ELLIS: "I have not seen that language.' However, that is how the Department of Justice informally decides whether to prosecute cases because obviously we cannot take cases based on a couple of dollars here and there. 257 REP. MANNIX: If that were put in the statute would that serve some purpose in terms of avoiding the change in circumstances? 258 ELLIS: Yes. 263 REP. PARKS: Do you try these yourself in trial court? 266 ELLIS: The Department of Justice administers an ORS chapter 416 Administrative process which is an APA process in addition to going to court. There are two kinds of child support orders in this state: 1) Administrative orders administered under ORS 416 that can be mod)fied administratively, 2) the Department also enforces preexisting judicial orders and decrees and those have to be mod)fied judicially. The Department of Justice attorneys make appearances on

These n~inuter contain nuterialr which paraphrase and/or rumnarize ~temenu de during tbir eeeelon Only text enebeed in quotation marks report a speaker's exact words For complete contents of tbe procecdi Igs, please refer to tbe tapes House Committee On Judiciary January 28, 1991-Page8 the judicial cases and lay people appear on the administrative cases.

276 REP. PARKS: Do you actually try these yourself?

279 ELUS: If you don't have some kind of two year standard that you are going to get requests for mod)fication more frequently than the system can stand based on very short term changes in circumstances.

287 REP. MANNIX: Worst case scenario: "I am on unemployment compensation and we go through the whole thing. Next day I win a million dollars in the lottery. With the two year approach it's too bad. I have to wait two years to do something about it. Is that correct?"

291 ELLIS: That is correct. But, there is also a continuing "material change in circumstances" standard that could be employed in that case.

294 REP. MANNIX: You can use a "material change in circumstances" standard from another provision?

296 ELLIS: Yes. There are two standards that stand side by side.

298 REP. PARKS: Could counsel comment on line 9 pertaining to the two years? 313 ROBINSON: It is my understanding that I would have to apply it as a different part of the ORS. That can be found in ORS 416. 319 REP. MASON: There is another alternative. Get rid of the two year standard per se. For instance, say if it hasn't been at least two years you don't get any attorneys' fees. 326 D. MICHAEL WELLS, APPEARING ON BEHALF OF THE OREGON STATE BAR FAMILY AND JUVENILE SECTION: EXHIBIT D This is a Bar sponsored bill. We make "substantial change in circumstances. equal application of the guidelines. Mr. Ellis did not have the benefit of my testimony and the amendment that we are proposing namely, what Rep. Mannix talked about: 10% or $25/whichever-is-greater requirement for any change. The courts right now are treating this situation differently. Lane County courts, for example, say, "No, substantial change in circumstances must be shown regardless of application of the guidelines." It is not enough to simply apply the guidelines and get a different number. You have to show a change in the respective incomes of the parents or the expenses of the child in part in order to successfully get a mod)fication. As a private practitioner, it is not a simple matter to go in and modify an order. There are costs

involved. It takes about 6 months to go to trial on a mod)fication in Lane County. -We ask that the Committee adopt the legislation as amended providing for application of the child support guidelines as a "substantial change in circumstances," but limit it with regard to the language which we propose. See Exhibit D, page 5 That amendment language is a little

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House Committee On Judiciary January 28, 1991-Page 9 different than an administrative rule which is currently in effect that Support and Enforcement uses in its two year review. Actually, their Administrative rule says, "25% or $25 which ever is greater." Our legislation committee said that that could in essence bar a lot of legitimate changes that would need to be made.

379 CHAIR CLARK: Are we trying to take care of an ambiguity because we enacted guidelines last session and there has arisen a question of what happened to child support orders before that, or are we saying, as a policy matter, that we want the guidelines to apply to pre-1989 child support orders? 389 WELLS: We want to clarify and set policy. There currently is differing treatment in different circuit courts. We wanted to clarify that and make it a uniform rule, but in doing so you are adopting policy. 400 CHAIR CLARK: You could do the housekeeping simply by clarifying it to say that it is not, as a matter of policy, a change in circumstances across the board across the state, that we will consider a changed circumstance under any circumstances.

TAPE 11, SIDE B 004 REP. MANNIX: What kind of dollar amounts are we usually talking about in child support orders?

007 WELLS: It varies greatly based upon the income of the parents. For example, in a preguideline situation, if the obligor non-custodial parent is earning approximately $2000 net income per month and has two children aged about 5 and 10, we are looking at about $800/ month total child support. In a post guideline situation, you simply have to plug in the numbers to get the amount. Prior to the most recent amendments to the guidelines this past year there existed a low income floor. If you got below $1300 in gross income for the obligor parent and there was lower child support paid by that parent. At the higher income levels, there was substantially greater child support paid. The low income amount has been eliminated. Generally, the support that is ordered under the guidelines is greater. 020 REP. MANNIX: My concern is this $25 dollar trigger. In a lot of these cases, that sounds like a marginal figure in terms of sign)ficance. The 10% I could see as valid. Are we talking about cases where there is $100 in child support a month? 022 WELLS: There can be, but generally not on a mod)fication. Not when a suit is brought by private litigants who have to pay their attorneys' fees. Attorneys' fees are not commonly granted in mod)fication requests unless there is "really" a substantial change. 024 REP. MANNIX: How would you react to $50 as opposed to $25 as a trigger?

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those particular numbers or percentages."

031 REP. MASON: What would the typical child support be where the net income of the obligor is perhaps $4000 a month? 034 WELLS: When using the guidelines, the courts would look at the gross income of the custodial parent and the number of children. You would then get the basic child support obligation. There are other factors such as, health care costs and child care related costs that would be factored in. Stepchildren are now eliminated as a part of the calculation, but other children for which the parent has an obligation are included as a credit against the gross income. 044 KATHERINE BROWN, WOMEN'S RIGHTS COALITION: One of the major congressional goals behind the Family Act of 1988 was to stop the rising tide of the feminization of poverty. Most of the custodial parents in Oregon are women. Those women are receiving little if no child support. The purpose of the guidelines was to increase the support awards to increase the amount of money going to the children of these women and to promote the consistency within the state and across the states. We support HB 2368 as it promotes the Congressional goals of increasing the support awards. Current law provides that people seeking to modify child support orders must show a "substantial change in circumstances.. Under HB 2368, that is no longer the case. It is my experience that the guidelines promote consistency and increase the amount of child support over all. By removing this legal barrier, by passing HB 2368 I believe that we will promote the congressional goal of increased child support to families.

070 REP. MANNIX: How do you feel about the threshold definition of 10% or $25 dollars whichever is greater? 071 BROWN: The regulating factor is the cost of bringing a mod)fication to court. In Multnomah County it takes only a few weeks to get into court, but it will cost you $300 to $500 in attorneys' fees to do that. 076 REP. MANNIX: Would this low threshold prevent someone from playing any harassing games? 080 BROWN: That would help any harassment.

085 BRAD SWANK, STATE COURT ADMINISTRATOR'S OFFICE: Our concern is that HB 236 8 would: -Eliminate entirely the "change of circumstances" standard as we know it as the method for awarding child support. -If you look in line 9, page 1 of HB 236 referring to ORS 25.285, that is where the two year standard ["material change in circumstance"] is established for those determinations that are made under the easier standard. On line 13 it states, "Nothwithstanding the provisoins of this section, proceedings may be initiated at any time to modify a support obligation based upon a 'substantial change in circumstances' under any other provision of law." These are the two

 - House Committee On Judiciary January 28, 1991-Pagel 1 standards that are established. In our reading of this Bill, any time you vary from the guidelines, that in itself is a substantial change of circumstance which means that overtime pay could cause somebody to be allowed to come in and file for a change in the award. Our concern is the inundation of the courts with monthly litigation about whether or not somebody made enough last month to change the child support amount.

120 CHAIR CLARK: What do you expect in terms of workload on the court?

, HB 2177 - MONITORING OF NURSES - PUBLIC HEARING

131 SUSAN KING, OREGON NURSING ASSOCIATION: EXHIBIT E. -Reads from Exhibit E. -The Oregon Nursing Association supports HB 2177.

168 JUDY COLLIGAN AND MARY AMDALL ,THOMPSON, STATE BOARD OF NURSING: Exhibit F. -Reads from Exhibit F. -The State Board of Nursing supports HB 2177.

189 REP. PARKS: It seems like this is discretionary. It says, "the Board may abstain from taking formal disciplinary action" rather than "shall" Is that intended to be that way?

206 COLLIGAN: That is true. Part of the perception that we are trying to enhance is that the Board is a board that looks for treatment and desires to rehabilitate nurses. Up to this point in time it was the policy of the Board to publish names of nurses which we found to have a chemical dependency problem. This inhibited people from coming forward. . 221 ROBINSON: It is my understanding that the Board of Medical Examiners and the Board of Pharmacy have similar programs.

227 REP. MANNIX: Is there a provision for confidential reporting to see if the Board will abstain from instigating formal disciplinary proceedings?

235 MARY AMDALL-THOMPSON: In subsection 5, the Board would be authorized to establish a rule under which nurses would enter into the monitoring program.

240 REP. MANNIX: What if we say that criteria would include criteria for confidentiality in approaching the Board on this issue.

247 REP. PARKS: On line 8, page 1, can you change the word "may" to "shall". Can you live with that?

253 COLLIGAN: Yes.

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257 ROBINSON: This provision pertains only to the Board of Nursing. 266 CHAIR CLARK: In section 2, when a person licensed to practice, voluntarily seeks treatment for chemical dependency or an emotional or a physical problem, is that a voluntary treatment for those issues alone? In other words, the question of whether or not to take disciplinary action for other nursing conduct, perhaps related, is a separate determination.

277 COLLIGAN: Yes.

278 REP. MANNIX: My concern with putting the word "shall" in there is that a person could abuse that by claiming the protection of the monitoring system when they know that they would otherwise be subject to discipline. Prefers to have some provision that allows the person to confidentially approach the Board, outline the scenario to some individual, then the individual is authorized to give the advanced approval to abstain.

287 COLLIGAN: One of the successes of these programs is in the monitoring system. With a good monitoring system you pick up people who are in their heart of hearts not going to follow through with that. I think that is the safety net. 292 CHAIR CLARK: Adjourns Subcommittee on Family Justice at 4:30 P.M.

Submitted by: Reviewed by: J. Kennedy
Steve, Assistant David Harrell, Office Manager

EXHIBIT LOG:

A Testimony on HB 2380, D. Michael Wells, 3 pages B Proposed Amendments HB 2099-1 - 1 Page C Testimony on HB 2099, Kathleen Beaufait, 11 pages D Testimony on HB 2368, D. Michael Wells, 5 pages E Testimony on HB 2177, Susan King, 1 page F Testimony on HB 2177, Judy Colligan, 3 pages

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