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.

HOUSE COMMITTEE ON JUDICIARY FAMILY JUSTICE

May 31, 1991Hearing Room 357 2:00 p.m.Tapes 139 - 141

MEMBERS PRESENT:Rep. Kelly Clark, Chair Rep. Marie Bell Rep. Jim Edmunson Rep. Kevin Mannix Rep. Tom Mason Rep. Del Parks Rep. Ron Sunseri

MEMBER EXCUSED: Rep. Judy Bauman

VISITING MEMBERS: Sen. Bob Shoemaker, District 3

STAFF PRESENT: Holly Robinson, Committee Counsel Kathy Neely, Committee Assistant MEASURES CONSIDERED: SB 494 PH (Health Care) SB 222 WS (Child Support)

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 139, SIDE A

001 REP. MASON, CHAIR: Calls the meeting to order at 2:00 p.m.

SB 494 - PUBLIC HEARING Witnesses:Robert F. Newbold, Salem Cheryl Smith, Eugene Betty Niven, Eugene Sen. Shoemaker, District 3 Jody Ann Noon Ted Falk Barbara Koons

012 ROBERT NEWBOLD, SALEM: Gives testimony in favor of SB 494 (EXHIBIT A).

050 NEWBOLD: Gives testimony of Gerald & Mary Ann Gage in favor of SB 494 (EXHIBIT B).

079 CHERYL SMITH, EUGENE ATTORNEY: Testifies in favor of SB 494 (EXHIBIT C).

135 BETTY NIVEN, EUGENE: Supports SB 494. She and her huSB and live in a retirement home. *Says committee has responsibility to maintain separation of church and state and should be careful not to be influenced by arguments presented by people because they hold to a particular religious faith. *Stresses freedom of choice. *Has had a living will for 30 years. *Urges support of SB 494.

157 CHAIR CLARK: Asks how the church/state issue is involved in SB 494.

159 NIVEN: It is if committee members were to be influenced by

witnesses who argue on the basis of a particular faith. I understand that in the last session there were such arguments made and they influenced the committee.

164 CHAIR CLARK: Shouldn't we consider testimony from people of religious faiths?

166 NIVEN: Of course, but consider too that they have option of making whatever choice they want. They shouldn't have the option of making a choice for me.

169 CHAIR CLARK: Are you familiar with an organization that would not be considered a religious organization, The Hemlock Society? NIVEN affirms. Would you consider that a religious organization?

173 NIVEN: No. The Hemlock Society is an organization that is based on choice. So is the religious group I happen to belong to. This is the question--whether or not we have a choice.

178 CHAIR CLARK: My question is, should we disregard a philosophy or weight one philosophy more heavily than another because one is or is not grounded in a traditional belief as opposed to a non-traditional philosophical belief?

184 NIVEN: You will have that answer looking into the laws regarding separation of church and state.

199 CHAIR CLARK: Asks SEN. SHOEMAKER to come forward to help walk through the bill along with BARBARA KOONS, TED FALK and JODY ANN NOON. *Explains that panel will walk through the bill in detail and that he's asked SHOEMAKER to hold the Alzheimer's provision and the "Cruzan" provision until the end so that volatile issues will be saved for last and more technical aspects can be addressed first. *Committee will have decision in terms of approach--whether or not to amend an existing law, piecemeal or whether to take SB 494 and use that as the vehicle.

235 SENATOR BOB SHOEMAKER: States the overall purpose of SB 494. *SB 494 provides, the rules that will be applied when the person is not capable of giving informed consent to his or her health care, helps determine who makes decisions in those circumstances and tells how patient is protected from decisions he/she would not make. *Provides for the autonomy of the patient so that people can make decisions when they are able so when the time comes that they are not capable, they will have already exercised their own judgement. *Picks up situations to help make decisions appropriate to the patient when autonomy is not possible. *Two statutes on the books: (1) directive to physicians (living will), 197 7; and (2) power of attorney for health care, 1989. Partly due to time difference of enactment and legislative climate at those 2 times, those 2 bills are inconsistent and inharmonious in a number of ways. *Many problems exist partly because of these inconsistencies.

283 JODY ANN NOON: Summarizes legal-technical implications of SB 494 (EXHIBIT D). *No reciprocity for out of state directives. *Requests use of statutory forms that use confusing and highly technical language. *There are confusing differences in the procedural requirements of the two laws. *Power of attorney for health care law contains a 7-year time limit which, if not executed, makes it invalid.

351 REP. MASON: May be giving the wrong impression that these things are inadvertent and yet 2 of the provisions you've talked about were

intentional acts of the committee in drafting the last bill--the no reciprocity and the 7-year limit were intentional.

365 CHAIR CLARK: Need to understand where there are technical problems with the way the system is working and keep these separate from the policy decisions.

382 NOON: Committee had a difficult time distinguishing between technical and substantive problems. *7 years limitation was purposeful but confusion exists with people drafting these forms in terms of what they can and can't do in waiving the limitation on the form. *Confusion exists between a directive to physicians and power of attorney for health care. Need to clarify if they can have both or one over the other. *Ambiguities exist regarding requirements or limitations involved in terminating life-sustaining procedures when a patient has not executed an advance directive. Subsection C (EXHIBIT D) addresses this. *SB 494 is highly technical and fragile. Merely changing a word or altering a section could crumble the entire bill in terms of creating more ambiguities. Need to take a close look at any substantive changes made.

447 CHAIR CLARK: When this subcommittee dealt with SB 523, it was a two-week process and we had to continually bring the bill back and look at it after changes were made.

TAPE 140, SIDE A

019 REP. MASON: Sounds like an "all or nothing approach"; almost afraid to look at amendments.

021 NOON: Not suggesting that at all, just offering to act in reviewing the language for technical problems in making changes.

024 REP. MASON: It's hard to do with only one meeting.

027 NOON: Substantive changes are up to the committee and then our committee acts on the "spur of the moment."

031 CHAIR CLARK: Hoping to be walked through the bill section by section on the legislation itself. If the committee is then interested in working on the bill, then we will schedule 3 or 4 work sessions, if that's required.

043 REP. MASON: If this committee amends it after 3 or 4 sessions, would your committee be willing to go through it and send it back to us for a final review?

047 NOON: We'd be happy to. We want to change this law to remove the ambiguities that exist.

050 REP. MASON: Your committee would probably want to look at any final version coming out of conference committee too. We would probably need to defer to you and give you some time to do that.

053 NOON: We're happy to work closely with this committee.

054 SEN. SHOEMAKER: Starts with Section 2 of SB 494.

066 REP. PARKS: Asks SHOEMAKER to point out what is different in the present bill.

068 SEN. SHOEMAKER: Isn't sure he can spot all those areas but will point out ones he remembers. Invites others with him to help.

073 CHAIR CLARK: There are significant policy issues wrapped up in the definitions which are in Section 1--would like to hear about those before moving onto Section 2.

079 SEN. SHOEMAKER: Goes back to Section 1, Subsection (1). *Appointment defines documents.

085 HOLLY ROBINSON: That is a new definition than the concept was in the old law.

087 SHOEMAKER: Continues with Subsection (2). *Note that it says "such as" so that it's not an exclusive list.

096 TED FALK: Although this is a new definition, in substance, it is only a minor modification of what already exists in ORS 127.580.

099 CHAIR CLARK: My recollection is that it's very similar the way that concept was hammered out last session--drawing the distinction between straw, hand, etc. and fancy devices.

102 SHOEMAKER: Continues with Subsection (3). *No change there. *(4)--no change.

107 REP. BELL: Does "adults" mean anyone over 18?

109 SHOEMAKER: Yes.

110 REP. MASON: Seems inconsistent that "adult" should also include an emancipated minor.

112 SHOEMAKER: That's a good point. That could be a good amendment.

117 CHAIR CLARK: There's a different policy issue perhaps. An emancipated minor may make health care decisions for him/herself but says nothing that an emancipated minor may serve as an attorney-in-fact.

119 FALK: The word adult is defined generally for Oregon law as "a person 18 years or older or married."

123 ROBINSON: Currently in Oregon, minors 15 and older can consent to medical care. So, this is in conflict with other parts of Oregon statute. If it's just a policy statement about the ability to consent, it's more limited than current law is which creates a conflict in Section 2.

129 SHOEMAKER: Continues with (5).

130 REP. MASON: That's not much of a definition; it's a double negative.

133 SHOEMAKER: Except that incapable is defined. *(6)--is a new word defining an old concept. "Directive" to physicians is the present law; "directive" here is "a written instruction substantially complying with Section 19..." New concepts are tied up in this. In 1977, "directive to physicians" was conceived as a set of instructions that you gave to your doctor regarding life-sustaining procedures and not including feeding tubes. This bill proposes a broader application--a document on which you

indicate your wishes, regarding a number of things including life-sustaining procedures and feeding tubes. Would be used in conjunction with a power of attorney. Instructions not only to physician but to attorney in fact and anyone else who has reason to consult that document.

158 CHAIR CLARK: So a directive would take precedence over an attorney in fact.

161 SHOEMAKER: They would work together.

164 FALK: There is a detailed section in the bill that discusses precedence.

167 SHOEMAKER: Continues with (7).

175 FALK: This is an amended definition. In the existing law, life-sustaining procedures were excluded and treated as a separate category. The change is that life-sustaining procedures are considered a form of health care--not a policy judgement, just simply a matter of terminology. *Existing power of attorney law, ORS 127.505, sub. 4, it does include withholding or withdrawal of life-sustaining procedures.

187 CHAIR CLARK: So this definition reverses that presumption?

188 FALK: Yes.

188 REP. BELL: I don't understand how the withdrawal of them is part of health care.

191 SHOEMAKER: It is recognized by the AMA and other health care groups that withdrawal of life support is a medical--a health care decision.

194 REP. BELL: A medical decision, but I don't know how you can call it health care.

196 CHAIR CLARK: This is a key issue in the bill. In the larger sense, as health care is used in this bill, includes the decision to withdrawal (medical decisions).

203 REP. MASON: The term "care" is an old, understood word but here "care" means "not care."

212 FALK: Believes that withholding life-sustaining procedures is a form of medical care. This bill would not permit withdrawal of comfort support that is frequently associated with health care or nursing care. Withdrawal of life-sustaining procedure is often a carefully considered medical procedure, not just pulling the plug and walking out of the room.

221 SHOEMAKER: Withdrawal of life support is almost always a very caring decision; it's done by people who love the patient, so it is care in my view.

227 FALK: Also, the main function of the term "health care" in this bill is to act as the predicate for health care decision; what we're really concerned with here is what people are allowed to make decisions about. It doesn't matter whether or not you call it "health care."

236 CHAIR CLARK: Perhaps at some point we could use some other word

besides "care."

239 REP. BELL: Suggests "health care decisions." We shouldn't try to fool anybody. If we're talking about removing health or nutrition, this is not "health care."

246 SHOEMAKER: I would have no problem with those kinds of changes. It was not written in an effort to mask what we're doing. This legislation is very up-front about what it's doing.

250 CHAIR CLARK: The question is about the language being used, not about the policy.

252 REP. SUNSERI: Comments on page 6, discussing Power of Attorney warning. If someone just read the heading, they might not think "for health care" includes withdrawal. We really do have a reversal of terms.

261 SHOEMAKER: Within the definition (Subsection (7)), it includes "withdrawal or withholding...and of artificially administered nutrition and hydration." Those two concepts are dealt with separately throughout this bill. Feeding tubes are a life-sustaining procedure because the bill makes a distinction between feeding tubes and other life-sustaining procedures. We have chosen to keep the two separated. So life-sustaining procedures in the bill do not include feeding tubes. *(8)--"including...facility" is new language, done to facilitate the use of that concept.

290 REP. MASON: Why does "discharge from a health care facility" suddenly come into play?

302 SHOEMAKER: The decision entrusted to the guardian or power of attorney is to make health care decisions, including admission to or withdrawal from a facility, so this makes it clear that that is within that person's authority.

311 CHAIR CLARK: That issue arises later in the bill.

313 SHOEMAKER: Continues with (9). Definition is unchanged except to add hospice programs, to allow the attorney-in-fact or guardian to be involved in the hospice situation.

324 FALK: There are also several immunity provisions that apply to health care facilities; by putting language in they are able to take advantage of those organizations.

328 HOLLY ROBINSON: Another reason for adding it is, because when the statute is as specific as this is, one could argue that it's not applicable to hospices.

332 CHAIR CLARK: Do we want 2 different definitions in the statute for health care facility? In the context of this bill, it includes the definition from ORS 442.015 and others.

345 FALK: There are considerably more than 2 on the books; there probably are 10-15 right now. It's not really a term with a standardized meaning.

353 SHOEMAKER: Continues with (10)--same definition except for inclusion of health care facility. This is one of the problems with current law:

there are places in the statute where you read health care provider but the definition doesn't include the facility.

369 CHAIR CLARK: Did we look at that last session?

370 HOLLY ROBINSON: It was discussed. Some concerns involved who was making the decisions.

382 CHAIR CLARK: The first part of the definition of health care provider discusses the person and then we address the facility. *Could this definition have the effect of taking difficult decisions from the person to a panel or committee.

392 SHOEMAKER: I would suggest we hold that thought and see how it works as we encounter "health care provider" throughout the bill.

396 REP. BELL: Bothered that health care facility is defined as an adult foster home.

402 SHOEMAKER: Moves on to (11).

413 CHAIR CLARK: An earlier draft of the bill included family members and others.

415 SHOEMAKER: Right. The bill last time addressed surrogate decision-making when there was no document so it included family members. We've moved from that concept, so it's limited. *(11b)--did not want to exclude the possibility of a court making a special appointment under some circumstances; this is not critical if some are uncomfortable with that.

TAPE 139, SIDE B

010 CHAIR CLARK: That's a factual matter. If you took the current laws off the books and there is a difficult health care decision to make, the family goes to court and asks for--what?

013 FALK: Appointment of a guardian.

014 CHAIR CLARK and FALK briefly discuss court authority in these cases.

026 FALK: Later in the bill, many of the provisions which are now worded using the term "attorney- in-fact," have been re-worded to use this broader concept of a health care representative.

041 SHOEMAKER: Continues with (12)--notes that it includes both mental incapacity and inability to communicate and it doesn't just mean speaking.

059 CHAIR CLARK: Asks for an example.

060 SHOEMAKER: Blink of an eye would be considered communication.

063 BARBARA KOONS: There was significant concern in the developmentally disabled community that unless we added this sort of a qualification to the communication aspect, the situation frequently develops between a developmentally disabled person and a single caretaker where the caretaker is able to discern communication that is not discernable to others.

070 REP. MASON: Refers to line 12 (page 2) and the mention of the attending physician in determining who is considered incapable; the people who are most familiar with this individual may be their care providers. We should allow for the opinion of the other care providers.

085 FALK: The bill is simply following existing law here; that's worth considering.

095 SHOEMAKER: It probably has to do with diagnosis of incapacity--of inability to make decisions which would be a medical diagnosis. Your point is good because the ability to communicate is something different from a medical diagnosis.

104 FALK: Most cases of incapability relate to some form of psychological or neurological incapability and the physician is the only one comprehensibly trained to deal with those sorts of things. If the language read "principals attending health care provider," that would include dentists--anyone else who can perform a health care service but not necessarily someone trained in determining incapacity. It doesn't have to be so restrictive if you can find a more careful way of expressing it.

116 CHAIR CLARK: It raises the issue of "attending physician" definition (3). If there are several physicians, who is considered the "attending physician?"

124 SHOEMAKER: The bill requires the principal to select or, if the principal is incapable, the health care representative would designate the attending physician.

132 CHAIR CLARK: So if the principal hasn't had a chance to designate the attending physician, then the guardian or attorney-in-fact designates who is the "attending physician."

136 REP. MANNIX: There is always supposed to be one physician who is primarily responsible for someone's care. Regarding these definitions, there is the greater policy question of how all these pieces fit together.

149 HOLLY ROBINSON: In SB 525 the definition of incapable (12) parallels the definition of guardianship statutes. This definition is modified but in the language "in the opinion of a court..." you're asking individuals to use basically two definitions at the same time. Was there a reason to back off from the guardianship definition and then create a conflict within in the definition?

159 SHOEMAKER: It is the court that decides whether a guardian is needed. So, it's the court then, who determines incapacity.

164 HOLLY ROBINSON: The words on lines 13-15 are different from the definition of incapacity for the purposes of the guardianship statutes. It has been modified and changed so that they are not the same now. The communication is key to the underlying decision but there are some words taken out of the definition that cause confusion.

177 CHAIR CLARK: What happens if there is an attending physician designated by principal previously and is now incapable and a family member makes a petition to be appointed as a guardian. What happens if a family member thinks that the principal is incapable and the attending

physician does not--or vice versa?

190 SHOEMAKER: Thinks the court would make that appointment because it is finding incapacity.

199 HOLLY ROBINSON: There is a provision in the revised court challenge procedures of the bill and one of the specific issues on which you can file a petition--and it may end up being different than the guardian petition--is whether or not the principal is incapacitated. So there are procedures in the bill that would give you a way to resolve that issue.

204 CHAIR CLARK: Asks about when the guardian is the attorney-in-fact and there is disagreement between the attending physician and the attorney-in-fact.

214 REP. BELL: I would like to know if, under this definition of "incapable," a strong, healthy adult who is severely mentally retarded would be considered incapable for these purposes.

220 FALK: That person might be considered incapable.

227 SHOEMAKER: In that case, they would never be able to appoint an attorney-in-fact.

228 REP. BELL: I see the need for making health care decisions but I don't know if I want them to be in on the same package as the kinds of decisions we're talking about here.

230 FALK: Follows through that case--a mentally retarded person is not capable so could not appoint an attorney-in-fact. Then decisions would be made by a guardian. Guardianship proceedings would then have the person appoint someone that the court believes is best situated and most appropriate to make those decisions.

237 REP. BELL: I was thinking of cases that might be less than terminal where a decision might be made.

241 SHOEMAKER: This entire bill is intended to apply to the whole range of health care decisions and the focus on terminal illness is only an isolated and more dramatic kind; this should apply to an appendectomy. *Reads through (13).

268 REP. MASON: By definition, food and hydration is a life-sustaining procedure.

274 SHOEMAKER: The difficulty is with working with the two concepts in the bill. *Make one set of decisions regarding feeding tubes and another set of decisions regarding other life-sustaining procedures. We felt it was important to distinguish those two.

290 NOON: There are added protections in the bill for making a determination on whether artificial nutrition and hydration can be removed. At first it was included within life-sustaining procedures and when tracking through the bill, it was difficult to separate it out where it needed to be. If additional constraints are added onto a decision to remove artificial hydration and nutrition that it should have its own definition. It's essentially a subset of life-sustaining procedures. Ambiguities were caused when they were combined.

310 CHAIR CLARK: This issue is the same as "health care"--not something that is automatically associated with life-sustaining procedure; life-sustaining procedure would not include ANY kind of nutrition and hydration.

317 REP. BELL: What about insulin or heart medicine?

318 SHOEMAKER: Those can be life-sustaining procedures. *(14)--medical confirmation for artificial feeding and hydration must be by a neurological specialist with expertise in making diagnoses of permanent unconsciousness.

345 CHAIR CLARK: Is there any relationship between the definition of "medically confirmed" and "incapable"? Does the bill later require that the determination of incapacity be medically confirmed?

354 SHOEMAKER: I don't believe that it does. Before you can do anything drastic to someone who is incapacitated, you must have medical confirmation of the condition.

358 FALK: There is not a general requirement that incapacity be confirmed. For surgery, incapacity would not have to be confirmed. On page 8, line 12, in that case the incapacity would have to be confirmed by second opinion.

368 CHAIR CLARK: Not only does the decision have to be confirmed but the determination of incapacity itself has to be made.

370 FALK: So the short answer is that it has to be confirmed in the event of a life-or-death decision.

372 REP. SUNSERI: Looks at definition of "unconscious" (20). How do we know that a person who is unconscious is not aware of self?

376 SHOEMAKER: First I want to explain why we chose this definition. The present law refers to a permanently comatose state and doesn't really speak of persistent vegetative state (PVS). There may be cases where a PVS person is not completely lacking in awareness of self and external environment, so to be on the safe side, we defined this to be the condition; what is the condition of the patient?

407 REP. SUNSERI: How do you know if they are not aware if you cannot communicate with them? Mentions cases where comatose individuals come back to consciousness and report an aware state.

419 SHOEMAKER: To do the best that we can, this would require a neurological specialist to make a diagnosis.

429 CHAIR CLARK: What sort of scans or monitoring go on now to determine whether a person is lacking in awareness of external environment? Do those situations show up in these procedures?

TAPE 140, SIDE B

007 BARBARA KOONS: Early in our consideration, a neurologist testified before our committee that these distinctions were subtle enough and that newly described syndromes are capable of being confused with PVS. The distinction is this awareness of self. People can be in locked-in syndrome for weeks or months and then awakened. It is not a difficult

distinction to make by someone who is an expert in the examination of unresponsive individuals. *Not an anatomical event; not revealed on EEG's. *Neurologist explained to our committee that it is not a difficult distinction but it does require expertise and a specific independent examination.

027 REP. SUNSERI: I called 2 neurologists and received 2 opposing answers: one said there's no way an expert can know for sure; the other said, "We could probably know." I'm very confused about it.

033 REP. BELL: Surprised that such a generic term would be used. Fainting could be considered unconscious.

038 CHAIR CLARK: If a person was asleep and hooked up to the scans, could they in some way be considered unconscious under this definition?

040 KOONS: No. It has to do with neurological responses of various portions of the brain and various levels of response. It's not a question of scans, it's a question of examination--attempts to provoke a response and analyzing quality and quantity of that response.

044 FALK: The unconscious state alone has no significance in this bill; it only factors in if the patient is "permanently unconscious." So a sleeping person will have a reasonable expectation of returning to a conscious state.

048 REP. MASON: There are no scans, then.

049 KOON: We're saying that this is not an anatomical entity.

050 REP. MASON: Then there are no scans to determine this?

051 KOON: A neurologist should answer that; I do know it's not an anatomical entity.

054 CHAIR CLARK: So the EEG doesn't have a part in this?

055 KOON: An EEG will not be flat in a permanently unconscious individual.

057 CHAIR CLARK: So this is a question of examination on the part of the neurologist. I assume longitudinal studies have been done as to the reliability of these examinations. What was the percentage of reliability?

063 KOON: The testimony we heard is that there is outcome data and longitudinal data that is extremely event-specific. That goes into play in determining permanence. If a young person almost drowns, you really can't make a diagnosis of permanent unconsciousness until that person has been in this kind of deep, unconscious, unaware state for sometimes months or even years because the data tells us that there's an ability to regain consciousness even after a long period of time for the young person who has almost drowned. *However, an anoxic event in a 65-year-old man who has had a cardiac arrest--the data shows that if that person has been unconscious for a month, the chance of their regaining consciousness is extremely small. *Data is patient-specific and trauma-specific.

087 CHAIR CLARK: Temporarily recesses the public hearing on SB 494 and opens work session on SB 222.

SB 222 - WORK SESSION

092 MOTION, REP. MANNIX: Moves inserting the A-5 amendments (EXHIBIT F) to SB 222.

100 REP. MANNIX: To the motion. The A-5 amendments are an exact replication of HB 2722 which passed the House. They clean up procedural language and allow permanent partial disability and permanent total disability benefits and workers compensation to be reachable garnishment for support obligations. HB 2722 to be set for hearing. Supporters of SB 222 have no problem adding this amendment to the bill and we could quickly get this to the Senate.

118 REP. EDMUNSON: I was one of the "No" votes on the floor, however, I can see that this is a consistent subject, and appropriately part of this bill, and I intend to support the motion.

122 HOLLY ROBINSON: HB 2722 had an emergency clause. The request that the counsel limit the emergency clause to the new language that's being inserted into what is now considered Section 3. However, in looking at the -5 amendments, it appears that the emergency clause applies to the entire bill. So the question is whether to retain or remove the clause--having it apply to the entire bill or just limiting it.

133 MOTION, REP. MANNIX: Moves to amend the A-5 amendments so that the emergency clause applies only to this language.

136 No objection. Motion passes.

138 MOTION, REP. MANNIX: Moves SB 222 as amended to the full committee, do pass.

141 VOTE: Motion

AYE: REP. BELL, REP. EDMUNSON, REP. MANNIX, REP. MASON, REP. PARKS, REP. SUNSERI, CHAIR CLARK NO: EXCUSED: REP. BAUMAN

145 CHAIR CLARK: REP. MANNIX and REP. BAUMAN to carry the bill. Closes work session on SB 222. Recessed at 3:40 p.m.; Reconvened at 3:45 p.m. Re-opens public hearing on SB 494 .

SB 494 - PUBLIC HEARING

180 SHOEMAKER: Brings to committee's attention articles submitted on persistent vegetative state diagnosis (EXHIBIT E). *Continues with the bill, page 2, (16)--one minor change. *(17)--this is confined to those who execute the power of attorney under this act. *(18)--(a), only change is addition of emancipated minor; (b), new language which brings the guardianship into this; (c), this is to facilitate the working of the bill. *(19)--specifically adds "imminent"; the present definition is confusing and we tried to fix that.

226 REP. BELL: Does "imminent" mean right away or inevitably?

227 SHOEMAKER: It means right away or soon. If issue is raised about whether something is imminent, you can go to court.

232 CHAIR CLARK: So where the physician is saying "Anytime now."

237 SHOEMAKER: Right. Moves on to Section 2.

244 REP. MASON: What is the definition of the emancipated minor?

250 FALK: There is an emancipation procedure in ORS chapter 109. It does not mean a teenager who is off living by themselves; they have gone to court and obtained a determination.

260 REP. MASON: So a kid out on the street who gets injured and is under 18, would not be an emancipated minor.

262 CHAIR CLARK: The only way a person under 18 would be a principal is if they were married or if they were emancipated.

265 REP. MASON: Confirms with CHAIR CLARK that marriage statutes apply equally to both males and females and that a 16-year-old married to a 16-year-old are both considered adults.

273 FALK: This is one of the sections where that "incapable" comes into play. The difference between this and the common law right of self-determination is the use of this term "incapable." *Does not say that a person is automatically incapable because they are under 18. *This doesn't change any of the statutes applying to minors; this just says if you're over 18, then "incapable" term is used for determining whether you have the right to consent to decisions.

296 REP. BELL: Is the parent of a minor considered their health care representative?

298 SHOEMAKER: Not by virtue of being a parent; they would have to be appointed a legal guardian, which is, in fact, fairly routine.

311 CHAIR CLARK: It would be a legitimate policy discussion as to whether a parent ought to be guardian.

317 HOLLY ROBINSON: As natural guardians of the children, they would have the rights to make these decisions.

319 SHOEMAKER: They wouldn't be a health care representative under this bill.

320 HOLLY ROBINSON: Because they already are by virtue of being parents and therefore guardians of their minor children.

322 CHAIR CLARK: They're automatically a guardian of a minor child.

324 HOLLY ROBINSON: So none of this applies there.

325 CHAIR CLARK: If you're an adult child, then you could go and get the appointment.

326 REP. BELL: But they said yes, if you're making this kind of health care decision.

329 SHOEMAKER: But I was talking about the adult child.

330 FALK: Section 2 is the only substantive provision in this bill that I would describe as totally new statute. Everything else is derived from existing ORS provisions.

334 SHOEMAKER: Responds more to REP. BELL'S question. Cited a case of a 6-year-old who nearly drowned and became permanently unconscious. During his minority, they were unable to disconnect him from feeding tubes. Under this bill, the mother could have been appointed guardian and then, as guardian, made that decision under supervision of the court. The parent couldn't operate on own with this bill.

356 REP. BELL: Can a judge deny or allow the request?

362 SHOEMAKER: I suppose. Moves on to Section 3.

378 CHAIR CLARK: In the absence of a designation of an alternative attorney-in-fact, there isn't one?

379 SHOEMAKER: Right. Begins addressing Section 3(2). The present law puts a 7-year time limit on it; this takes that out.

397 CHAIR CLARK: I thought that we just did away with the term of appointment.

400 SHOEMAKER: You could designate a term of appointment. A blank on the form that designates 7 years. If you check that, and you are at that point incapable, your attorney-in-fact would continue to have authority.

419 REP. BELL: What do you mean by competent adult in Subsection 1?

420 SHOEMAKER: An adult is someone over 18, and competent--

425 FALK: That's not defined within the scope of this bill; it should have a common meaning of a person with a sound mind.

TAPE 141, SIDE A

005 CHAIR CLARK: Someone might not be competent, for reasons of alcoholiSM for example, and would still be capable.

008 SHOEMAKER: We had the same question and decided not to do it for the same reason.

010 CHAIR CLARK: Recalls question from last session about the case where the attorney-in-fact falls to alcoholiSMor drug problems after getting appointed. We determined, at that point, that the person is no longer competent.

014 SHOEMAKER: Section 12(e) allows you to disqualify a health care representative upon determination that they are unable to perform duties. Stuck with the word "capable," you'd have a much lower standard. *Reads through Section 4 (1)--purpose of including nonresident of the state is to allow someone, for instance, in Washington to be governed by an Oregon power of attorney to execute documents under this act. *Section 4, (2)(a)

045 REP. MASON: Expresses concern that people might come to Oregon just because of this law being "better" than their state's.

048 FALK: This is one of the more restrictive laws in the country; people will not be coming to our state because our laws; many states have far more liberal laws.

052 REP. MASON: The question is, what is out-of-state law? You can't have an out-of-state directive without that state's law being consistent with Sections 10-21.

055 FALK: There are variations among states as to technical matters; it does seem that if it's validly executed in the other state, there isn't a real policy reason to deny the court here. Would use the other state's test for whether it's a valid document but then use Oregon's test in terms of the most important medical decisions.

062 SHOEMAKER: If the other state just had a check-off, Oregon would make sure that Section 10 standards are met. Moves on to Section 4, (2)(b). *(3)(a)

078 FALK: The only change in (3)(a)-(d) is that it's applying the same standards to the directive as are now applied to the power of attorney.

080 CHAIR CLARK: How does this compare with the requirements with executing a will?

083 SHOEMAKER: It's very similar. The important point is that it harmonizes the witnessing requirements for the two different documents which are not now in harmony. *Continues on with Section 4.

101 FALK: (3)(e) is part of the directive statute but not the power of attorney.

104 SHOEMAKER: Reads through Section 5.

118 REP. MASON: Under Section 5, line 44, the attending physician can't be the health care representative.

122 SHOEMAKER: It's provided in Section 21 which would permit that. *Section 21--except for the addition of the attending physician on the list--is the same as existing law. And the addition of feeding tubes as among the procedures that may be withdrawn. *On line 3, page 4--emancipated minor should be added; it was an oversight when amending the bill. *Goes over Section 5, (3), (4), (5) *Reads Section 6.

153 FALK: This (Section 6) is verbatim from existing law.

155 CHAIR CLARK: Lines 15 and 16 probably should require written notice. *Discusses example--a tense night at hospital, attorney-in-fact walks out--what does that mean? The provider thinks it means one thing and then the attorney-in-fact shows up the next day having decided what to do when they've already acted upon their decision.

166 SHOEMAKER: Good point.

169 CHAIR CLARK: The 24-rule on Monday will be suspended. Plans to schedule SB 494 for Monday afternoon. Wants to make sure committee has understanding of the bill. Closes work session on SB 494. Adjourns meeting at 4:15 p.m.

Transcribed by: Reviewed by:

Darcie Jackson Office Manager

EXHIBIT LOG:

A -Testimony on SB 494 - Robert Newbold - 1 page B - Testimony on SB 494 from Gerald & Mary Ann Gage - Robert Newbold - 1 page C -Testimony on SB 494 - Cheryl K. Smith - 1 page D -Health Law Section Legislative Committee Report on A-Engrossed SB 494 - Jody Ann Noon - 17 pages E -Council Report: Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support - Sen. Shoemaker - 5 pages F -Proposed Amendments to SB 494 - Staff - 1 page G -Proposed Amendments to SB 222 (-A4 & -A5) - Staff - 3 pages