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

June 3, 1991Hearing Room 357 3:00 p.m.Tapes 142 - 143

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

MEMBER EXCUSED: ?Sen./Rep. Name

VISITING MEMBER:Senator Bob Shoemaker, District 3

STAFF PRESENT: Holly Robinson, Committee Counsel Jeff Steve, Committee Assistant

MEASURES HEARD:HB 2451 WS SB 494 WS

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TAPE 68, SIDE A

002 CHAIR CLARK: Opens Subcommittee on Family Justice at 3:40 p.m.

HB 2451 - WORK SESSION

011 HOLLY ROBINSON: Speaks to proposed changes on HB 2451 (EXHIBIT A). *Under current Oregon law, if an individual is found unable to aid and assist in their own defense, they're committed to the state mental hospital, pending their regaining competence. *With current statutes, if 5 years pass and individual no longer gains competency, then criminal charges pending against the defendant must be dismissed; they remain in mental health system but the ability to bring charges against them disappears at that point. *Has been heard in 2 different forms: (1) HB 2451, introduced at the request of former Governor Goldschmidt; (2) HB 3417, introduced by REP. BELL, which addressed a similar issue but dealt specifically with persons convicted or charges with sex offenses and homicides. *Discussion has been raised about the constitutionality of maintaining someone in a mental hospital before they are, in fact, convicted of a crime. *Discussion about whether they can be maintained if they're not provided treatment. *Discussion about whether they may be maintained in a hospital with criminal charges pending, for a period of

time longer than they might otherwise be sentenced.

040 CHAIR CLARK: Instructs the committee to mark the document (EXHIBIT A) HB 245 1-1 for reference.

043 HOLLY ROBINSON: Walks committee through the amendments.

058 CHAIR CLARK: Instructs committee to refer to paragraph 1 as "1"; the 2nd 2 paragraphs (2 & 3) as "2"; 3rd 2 paragraphs (4-6) as "3".

063 HOLLY ROBINSON: Continues to walk them through the amendments. *Amendment proposes to reinsert the language from the original statute which would continue to say that the person remains committed for a period of time equal to the maximum term of the sentence, or 5 years, whichever is less. *Amendment ensures that there's a mental health/competency hearing at some point.

086 REP. MASON: Asks if counsel is comfortable with the current drafted amendments.

088 ROBINSON: By reinserting that language and forcing the hearing, I think it complies. There are other ways to get at the same issue, but it's the simplest way given this bill. *Indicates that "4" would be a procedural item, having to do with the preservation of evidence so that in a significant delay, there is a mechaniSMby which that could be done. *"5" inserts "or psychologist" to be consistent with paragraph 2.

108 CHAIR CLARK: Indicates that "4" is the remainder of page 1 and that all of page 2 is "5". Closes the work session on HB 2451 and opens a work session on SB 494.

SB 494 - PUBLIC HEARING Witnesses:Ted Falk Sen. Shoemaker, District 3 Jeffrey J. Brown, Oregon Health Sciences University Barbara Coons, Senate Health Insurance Committee

136 TED FALK: Refers to the definition of "health care" on page 1, line 22. Says there would be no change in the meaning of the bill if the phrase "withdrawal or withholding" was deleted. *Turning to Section 7 of SB 494--the form for the power of attorney for health care. Adds the word substantially so if there are minor variations made, it would not create risk of invalidating the form.

161 SENATOR SHOEMAKER, DISTRICT 3: Section 7 is an important portion of SB 494 ; it makes a number of changes. *Form is now a recommended form rather than a required form. *7-year expiration period called for under present law is now made optional and given as one of the choices of the duration of the form--"my entire life; 7 years; other period." *Present form delegates authority to make decisions regarding life-sustaining procedures and feeding tubes but provides no direction. The present law creates a presumption that everyone would consent to feeding tubes unless they clearly and specifically have stated that they would not consent. Many people believe feel they have dealt with that problem--that the holder of the power would know, when the time comes, that they would want feeding tubes removed. A delegation is not a clear, specific statement that a patient would not consent to those tubes.

225 REP. PARKS: Asks what page the specific direction is specified.

227 SHOEMAKER: Beginning on page 4 and continuing over on page 5.

229 REP. PARKS: Doesn't feel that the lines are giving specific directions.

233 SHOEMAKER: SB 494 also does away with the presumption; we would no longer have to have "a clear and specific statement" that I would not consent to artificially administered nutrition and hydration. If the presumption is maintained, perhaps the directions within the form ought to be even more clear and specific. *There are other lines in which you can describe other medical conditions, in your own words, where you'd want your representative to act to withdraw such procedures. *Person may choose to indicate that they may not withhold/withdraw life-sustaining procedures; can be sustained as long as possible. *Give them the full range of choices.

272 REP. CLARK: Asks SHOEMAKER to highlight the major differences between this form and current law. *First difference is that this form is to be "substantially" like this.

276 SHOEMAKER: The current form in the statute has two blanks that can be checked: (1) withholding/withdrawal of life-sustaining procedures with the understanding that death may result; (2) withholding/withdrawal of artificially administered hydration or nutrition or both, with the understanding that dehydration, malnutrition and death may result. *All the other choices in the bill are new.

290 CHAIR CLARK: And making 7 years an optional is a difference.

291 SHOEMAKER: That's correct.

293 REP. MASON: Is there any reference in the bill to the situation where a hospital or care-giver-- prior to allowing admittance of a patient--might require that a patient fill this out.

298 SHOEMAKER: No. There is a bill in the Legislature now that calls upon the hospitals to advise patients of the availability of the forms. That bill would have required a decision from the patient whether or not to fill it out. That was changed so that now the bill requires the provider to call the patient's attention to those forms and to provide them to him.

310 FALK: Says to refer to Section 15(2), page 11--"no health care provider shall condition the provision of care or otherwise discriminate based on whether or not an individual has executed a document," which is also part of current law.

319 REP. BAUMAN: If someone wanted to give this authority right now, could they do that under existing law?

327 SHOEMAKER: There is language in the present law that says it does not supersede other laws that might permit such things. When we call for a specific form, certainly anything else need not be honored. The present form does have a blank for additional instructions and limitations. That blank may be used to provide for specific instructions.

352 CHAIR CLARK: That is consistent with the policy determination that there is a presumption that everyone would want the provision unless

they specifically state otherwise; they can overcome the presumption but you have to do it specifically.

362 REP. BAUMAN: Most of us have no cause to anticipate being in this circumstance. Wonders if the instructions of people who do anticipate these circumstances would be followed under current law without passage of this act.

376 SHOEMAKER: If they did it in connection with the form and made reference to additional instructions, yes. If they tried to do it by an independent document, they might have a problem.

384 REP. MASON: Why would someone, under your bill, fill out a health care power-of-attorney and check the box saying that they want their attorney-in-fact not to withhold or withdraw food?

395 SHOEMAKER: Presumes that some people would want that.

397 REP. MASON: Why would you need to fill out a health care power-of-attorney to get that kind of treatment under your bill?

399 SHOEMAKER: The holder of the power is exercising all kinds of health care judgements. The most dramatic is withdrawing life-support systems or feeding tubes. But, in number, that's the least; the holder of the power-of-attorney is supposed to act for the patient whenever the patient is not capable of making health care decisions. *Examples would be: operations, surgery, medications that come up. *An Alzheimer's patient who has slipped beyond the point of competence, has a long time to live. If that person appoints an agent before becoming incompetent, there are a host of decisions to be made.

420 CHAIR CLARK: So even a person in an automobile accident, the decision of whether or not to have brain surgery is made by that person.

424 HOLLY ROBINSON: In answering REP. MASON's question further: the intent is that any time an individual is facing any kind of medical procedure and there's a likelihood that certain medical decisions are going to have to be made--which may be simple surgery--the law does not allow anybody else to make that decision. What is in existence now is a "limbo" where doctors are required to get a form consent from somebody but there's nobody there to give it. *The forms can be used as a way to guide in unexpected events such as accidents.

TAPE 143, SIDE A

007 REP. MASON: Suppose somebody were incapacitated but not terminal; if they checked the power-of-attorney box saying they wanted to be kept alive, what would be an example of a decision to be made by the attorney where he or she might say no.

016 CHAIR CLARK: Understands that the box is used in the close call situations, where surgery is recommended but the possibility exists that the problem could right itself.

023 BARBARA COONS, COMMITTEE ADMINISTRATOR, SENATE HEALTH INSURANCE: Many situations may arise in which the patient would normally be given a series of choices by the attending physician.

030 REP. MASON: If the Alzheimer's patient had not designated a power-of-attorney, how would those health care decisions be made?

033 FALK: If no guardian is appointed, the current law does not provide any statutory solution; they just try to find the closest person--usually a family member.

039 SHOEMAKER: There comes a time shortly before death when, by consensus, the decision is made to withdraw life support--that there's no hope; it is ethically proper to do that. This blank will allow a patient to direct that this not be done. Then they'll keep him/her going until death despite everything.

055 REP. MASON: When was it decided that that behavior is considered ethical?

058 FALK: This committee passed out a bill in 1989, which allowed the withdrawal of nutrition and hydration in at least some circumstances; that implies a determination that that was appropriate. So, in this state, those are lawful forms of withdrawal of health care. I'm not aware of a medical or religious organization that opposes these decisions entirely.

071 REP. BAUMAN: Seems there's no compulsion here that says that everybody who signs a will has to sign one of these. We're providing recognition of a capacity of a healthy, competent person to make a choice about the course of their life, and have that choice honored. As it is now, given a dispute, we are not sure if this would be honored.

094 SHOEMAKER: Correct. There is no clear direction if you haven't executed a document. This is done compassionately and with love; it is not done cruelly or conveniently for the wrong reasons.

107 REP. BAUMAN: I'm finding it difficult to extricate the philosophy from the technique.

109 CHAIR CLARK: From the first hearing I understood that the sense of the committee was support for the sensitive portions of the bill; my hope in working through the bill section by section was to be able to look at it technically so that when we make decisions we could make them intelligently as to whether or not we wanted to tackle the controversial part.

123 SHOEMAKER: At that hearing, there was considerable amount of concern about whether or not we are really able to know whether someone is permanently unconscious. Introduces JEFFREY BROWN to discuss this issue.

135 JEFFREY J. BROWN, ASSISTANT PROFESSOR OF NEUROLOGY, OREGON HEALTH SCIENCES UNIVERSITY: Gives educational background.

150 CHAIR CLARK: Asks about terms in the bill--"unconscious" and "permanently unconscious." Can we ever know that someone is unconscious within that definition?

157 BROWN: Must first define whether we can know anything for sure. We have levels of probability. We can not know for sure if someone has absolutely no conscious awareness. We can arbitrarily define it and then answer that arbitrary definition. Absolute certainty is impossible.

168 CHAIR CLARK: What would be a solid public policy for someone "completely lacking in awareness of self and external environment."

174 BROWN: It is possible to answer, to my satisfaction, with enough certainty to make a decision about someone's life, whether or not there is conscious awareness. Diagrams nervous system on blackboard. *Superior/inferior levels of the nervous system; we are talking about superior levels--levels which can comprehend language, initiate actions and come up with new actions. *Addressing the question of where conscious life begins and ends: if there are no cortex or brain stem reflexes--i.e., no respiration if taken off the respirator--we say that person is "brain dead." With the cortex out, you have "persistent vegetative state"--i.e., no real decision-making capabilities but basic functions present. "Lock-in syndrome" means there is a break between the upper and lower part of the brain stem, so messages can't get through (these people can make voluntary vertical eye movements). *In order to establish where person is functioning, you have to examine the patient and know something about their history, age, setting, etc. You have to make sure that condition is not going to change. *"Awareness" is "the ability to interact with your environment in a meaningful way."

246 REP. PARKS: Refers to an article he read on PVS (persistent vegetative state). The chance of making a recovery would depend on a whole host of things. Most people should not be counted out for some period of time; what is that time period?

260 BROWN: That is individualized. For instance, they're likely to get better if they're younger. Using population statistics to make decisions about individual patients is meaningless.

273 REP. PARKS: There don't seem to be any minimal standards in the bill about time periods.

281 BROWN: It has to be an individualized. When the decision is difficult, a good doctor will admit he does not know enough and will wait. I'm not sure you can legislate the decision by saying "x" number of days, "x" number of signs, etc. You have to surrender the decision-making process to an ethical individual who is trained in the field and who has experience, good judgment and humanity.

302 REP. SUNSERI: Confirms with BROWN that even good judgements can be wrong. We've had testimony from people who were advised to disconnect, refused, and those people came back functioning.

308 BROWN: Points out that there are also many cases where people see what is not there--see patients are responding because that is what they want to see. A good doctor would never say to a patient that there is "absolutely no chance of recovery." Miracles do occur.

326 CHAIR CLARK: Another definition that has caused some problems is that of "terminal condition"--"a condition of health caused by injury, disease, degenerative condition or illness in which death is imminent irrespective of treatment..." The drafters of the bill chose not to put a time line on that. Is assuming "imminent" means "at any time" a reasonable way to go about that problem?

341 BROWN: Yes, because it is individual. Confirms that "imminent" could mean days or weeks away.

350 REP. MANNIX: When it comes to medical services and the provision of medical services with government assistance, we're beginning to prioritize medical care. It seems that from a medical ethics perspective, the difficulty is in trying to legislate something which

can mean different things to different people--sometimes differing from town to town. Views are constantly changing and it's hard to know what's going to happen if you end up in a permanent vegetative state in one town as opposed to another.

381 BROWN: Since medicine began, we have let patients die unconsciously. Once there's recognition on the ward that a disease is fatal or irreversible, I feel there is an unconscious denial of care to that patient. This has happened for years, and it's not explicit. Now we're trying to make it explicit--trying to set limits and definitions which is very difficult.

414 REP. BAUMAN: This is a decision by the patient, not the physician. If we pass this bill, then everyone has this power--in the "hopeless" cases, you'd be allowed to unplug them and walk away. It's a doctor's opinion at that point. If a person did not fill out one of these, is that going to change your behavior towards the person as well as the quality of what's left of that person's life?

TAPE 142, SIDE B

014 BROWN: It depends on how well you know the patient. If a patient says "I want to live under any circumstances; go to the limit," I will fight with them. If they ask me to make a decision for me and I have a piece of paper supporting me, that's nice; it's not the end-all or be-all. *The problem is when no one knows the patient and you have to make decisions for them.

023 REP. MASON: Surprised by the statement that patients have been allowed to die for years. *This bill is asking society to make that explicit; but if you make that explicit, you're going to overtly state something that was never overtly stated.

042 BROWN: If you're suggesting a "license to kill", it is hard to know if shedding light on something changes it; I'm not sure that bringing all this out into the open will cause people to act inappropriately.

054 REP. MASON: It seems that moving the unstated "action" into the stated will cause it to move a little to extremes, one way or the other.

060 BROWN: Personally, no. I have to live with my decisions; for me it won't change anything. I doubt it will change for other physicians.

074 REP. MASON: Didn't you say that physicians should be given this power because they were particularly ethical?

081 BROWN: Doctors are not particularly more ethical than anyone else, they just have more experience in making ethical decisions.

087 CHAIR CLARK: You have to make those decisions every day. Thanks BROWN for his help. I see four options with SB 494--need the committee's input: *(1) Let it die. *(2) Pass it as it is. *(3) Amend it. *(4) Take a different approach and attempt to address the problems it raises by amending existing law; doesn't think they'd be that successful with this--would take a number of work sessions to do.

116 REP. MANNIX: The proponents have raised substantial issues. Leans towards choice (3). *Thinks issues have been raised so that, with substantial support of the committee to try to address the issues through amendments--some substantial amendments dealing with PVS

decision- making process and other issues--he'd be willing to address the issues. *This is not a topic that will go away so he's willing to deal with it.

148 REP. PARKS: There are few like him with true sympathy for the bill as is. *Would be in favor of addressing the issue as an up or down; wants to address the whole issue or leave it the way it is. *Is more comfortable doing it this way than with doing nothing. *Don't want to spend time on it if committee has decided not to change the law right now.

170 REP. SUNSERI: Has a great deal of sympathy for the situation that deals with the mechanics of keeping people alive. *Still feels personally that to withdraw food and water is tantamount to murder. *Feels maybe decision shouldn't be made at all because everyone wants to draw the line at a different place. *Feels bill keeps moving more towards the taking of life and is not convinced these decisions should be made. *Wants (1)--let the bill go.

198 REP. BAUMAN: The Committee has heard a lot of testimony about the bill. *Feels that there should be some amendments presented to move closer to what they wanted. *Is personally terrified of potential injury from this law--the case of the over-anxious heir, the case of being incoherent but not able to communicate--but finds the thought of being kept alive in a condition that she did not want to be in even more frightening. *Given the choice, she is not very enamored with high-tech medical intervention; it's intrusive and humiliating. Would like to have the choice to avoid that.

283 REP. MASON: This is a significant bill. This will be the burning health care issue of the 199 0's. *It's hard to let the bill die although that would be his choice. *We have found several instances of existing law that need attention. For instance, the current version of Section 21 which gives permission to withdraw life support in certain situations astounds him--that there is no procedure to approve of that action. *Wants to work on existing law.

352 REP. MANNIX: Doesn't believe in working on bills unless they can make it out of subcommittee. Disagrees that nothing substantial would get out of the subcommittee. *Shares concerns but is willing to work.

368 CHAIR CLARK: Would like to create a working group and look at coming up with amendments. *The essence of whether or not we are good legislators is in our ability and willingness to make distinctions. *Shares concerns and recognizes the issues are making people nervous. *Comments that this bill is one of the most internally consistent and carefully thought-through bills. The drafting of the bill is not what the concern is but rather some of the policy decisions wrapped up in the bill. *Asks for volunteers for the working group. Asks REP. PARKS and REP. MANNIX to be part of the group to work with SEN. SHOEMAKER and committee counsel. Wants them to look at the problems with existing law, the current system and look at coming up with amendments to address those problems. Wants issues and sub-issues clarified.

442 SHOEMAKER: Would be very pleased to work with the group.

445 CHAIR CLARK: Adjourns Family Subcommittee at 5:05 p.m.

Transcribed by: Reviewed by:

Darcie Jackson Office Manager

EXHIBIT LOG:

A -HB 2451 Proposed Amendments - Staff -