

Senate Committee on Judiciary March 18, 1991 - Page

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.

Measures Heard SB 133, WS SB 568, PH SB 221, PH SB 219, PH

SENATE COMMITTEE ON JUDICIARY

March 18, 1991Hearing Room C 1:00 p.m.Tapes 65 - 67

MEMBERS PRESENT:Sen. Joyce Cohen, Chair Sen. Jim Hill, Vice-Chair
Sen. Peter Brockman Sen. Jim Bunn Sen. Jeannette Hamby Sen. Bob
Shoemaker Sen. Dick Springer

STAFF PRESENT: Ingrid Swenson, Committee Counsel Bill Taylor,
Committee Counsel Kate Wrightson, Committee Assistant

WITNESSES: David Heynderickx, Legislative Counsel
Colleen Sealock, Department of Justice David Phillips, Department of
Revenue Benjamin Karlin, Oregon Trial Lawyers Association Kate Brown,
Women's Rights Coalition John Ellis, Department of Justice Duane
Halbleib, District Attorneys Association James Geyer, Genetic Design
Inc. Stephen Main, Department of Justice Lawrence Gorin, Keller,
Gottlieb, & Gorin Judy Snyder, Oregon Trial Lawyers Association

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TAPE 65, SIDE A

002 CHAIR COHEN: Calls hearing to order at 1:14 p.m.

SB 133, PERMITS CHILDREN'S SERVICES DIVISION TO BE HELD LIABLE FOR
CERTAIN DAMAGES, WORK SESSION

004 CHAIR COHEN: Reviews need to reconsider SB 133 and additional
amendments.

016 SEN. HILL: Moves to reconsider committee vote on SB 133.

019 HEARING NO OBJECTIONS, CHAIR COHEN SO ORDERS, SEN. BUNN EXCUSED.

020 SWENSON: Submits -3 amendments and hand-engrossed version of SB 133
(Exhibits A & B). -Reviews intended purpose of bill.

064 SEN. SHOEMAKER: These amendments do address my concerns. -Is there
redundancy on page 2, between line 10 and lines 26-27? -Would it be

possible for line 10 to start with "damages done by a foster child shall be the responsibility of the Division, subject to the following conditions"?

079 CHAIR COHEN: Is Dave Heynderickx here, to tell us why there are redundant references?

085 SWENSON: We will call Mr. Heynderickx and have him explain the reasoning. -I also think this is redundant.

139 SEN. SHOEMAKER: Even this way, it's still cumbersome.

141 CHAIR COHEN: It's not our mission to clear up cumbering.

144 DAVID HEYNDERICKX, LEGISLATIVE COUNSEL: Reviews problem of redundancy. -It is redundant. -I had considered deleting much of line 10 when I drafted the bill.

156 CHAIR COHEN: Restates Sen. Shoemaker's proposed amendment.

161 HEYNDERICKX: That would be a good solution.

163 SEN. SHOEMAKER: I am troubled whether this bill will work at all. -Subsection 1 says "CSD may be found liable for damages to other persons or property done by a child while" and then it gives the conditions under which the child may be under the jurisdiction of CSD. -It then says "The Division's liability for damages is subject to the following conditions," one of which is that the damage be done intentionally. -This seems inconsistent with subsection 4.

186 CHAIR COHEN: Except when under A and C.

187 SEN. SHOEMAKER: I understand that. -There is still redundancy, and there is a question of where the child has to be, in order for CSD to be liable.

198 HEYNDERICKX: I would have liked to rewrite the whole statute. -What is now subsection 4 should have been a new statute. It deals with liability of the Division to the parents. Subsection 1 deals with liability to anyone, in terms of intentional acts.

207 SEN. SHOEMAKER: Anything under subsection 1 would include the foster parents.

208 HEYNDERICKX: It might. -Subsection 4 imposes some limitations on that liability.

227 SEN. SHOEMAKER: As long as subsection 1 includes foster parents, it is a problem to have another statute that contradicts that.

230 CHAIR COHEN: You have to have that.

233 SEN. SHOEMAKER: Can we flip it? -First, allow liability to the foster parents, in a no-fault context, subject to the conditions here. -Second, in all other cases of liability, the following conditions apply; then, subsection 1. -Would that work?

240 HEYNDERICKX: That is a good suggestion. -I feel that the statute should begin by listing the children under consideration; we are discussing a small number of children. -The scope of liability, in respect to foster parents, should be next.

279 CHAIR COHEN: Asks committee's pleasure on bill.

305 SEN. HAMBY: Would like to have bill rewritten.

309 CHAIR COHEN: Clarifies request. -Should foster parents be allowed to take the \$5000 no-fault decision in any case (intentional or not), and then have the option of subsection 1 still available to them?

326 SEN. SHOEMAKER: I think that the foster parents should make a choice. Either they take the no-fault \$5000, or they sue for intentional damages. -It might be fairer if the foster parent could proceed with litigation, to try and prove intent, but not lose their right to the \$5000. -I don't want it set up so that the foster parent could get the \$5000 and then decide to sue. It would have to be the other way around.

360 SEN. HILL: The second option is more desirable to me. -I don't think that they should be foreclosed.

367 SEN. BROCKMAN: The foster parent should choose between the \$5000 and a lawsuit.

373 SEN. SPRINGER: I was against the bill earlier, and I am still against it. -I don't want to see the foster parents limited if it later becomes necessary for them to sue in tort.

381 SEN. SHOEMAKER: You think they should be able to get the \$5000 and then still be able to sue for more?

383 SEN. SPRINGER: Yes. I want them to have the same opportunity to recover as anyone else.

389 HEYNDERICKX: There is only one other no-fault law, the PIP law. There, one can take the settlement, and that amount is subtracted from any future judgment.

412 SEN. SHOEMAKER: The middle position is the fairest. If a parent wants to litigate, but the final outcome is that the no-fault \$5000 is the best they can do, then they should have that option.

419 CHAIR COHEN: If they want to take the \$5000 for medical expenses, we could include something that allows them to pay it back in the event of a larger judgment.

435 SEN. HILL: I think that is reasonable.

TAPE 66, SIDE A

010 SEN. BROCKMAN: Do the requestors have anything further to add?

011 CHAIR COHEN: I am ready to table this.

012 SEN. BROCKMAN: Who would it hurt, if we did table it?

013 CHAIR COHEN: It would hurt the foster parents who presently have recourse only for non-property offenses. -I don't think they should be penalized for poor comments from the agency about how to do this.

020 SEN. SHOEMAKER: My objections are not strong enough for me to stop the bill's progress. -I think they should be able to recover non-economic damages, regardless of fault.

027 CHAIR COHEN: We will allow \$5000 no-fault, and if the parents wish

to go into further remedies, then they will be entitled to them.

030 HEYNDERICKX: They will be able to collect the \$5000 if they meet the stated criteria. If they wish to pursue the matter further, they will be covered by subsection 1.

035 SEN. SHOEMAKER: There will be no double recovery.

037 HEYNDERICKX: That is correct. It will have to be an intentional act on the part of the child, not negligence.

OVERVIEW OF SUPPORT ENFORCEMENT DIVISION'S CHILD SUPPORT PROGRAM

054 COLLEEN SEALOCK, DEPARTMENT OF JUSTICE: Submits and reviews testimony for overview of Support Enforcement Division's role (Exhibit C). -SED has three major programs: (1) establish paternity; (2) establish child support orders; (3) enforce those orders.

198 CHAIR COHEN: Who does this record-keeping?

201 SEALOCK: The Recovery Services Section.

223 CHAIR COHEN: How much does the Recovery Services Section deduct from each check, for the accounts which they handle?

226 SEALOCK: One dollar.

SB 568, ALLOWS COLLECTION OF PAST DUE CHILD SUPPORT FROM TAX AND OTHER REFUNDS DUE TO OBLIGOR, PUBLIC HEARING

243 DAVID PHILLIPS, COLLECTION DIVISION, DEPARTMENT OF REVENUE: Provides information about Department policy. -We collect debts owed to 91 state agencies. -This bill may cause impact on our operations.

271 CHAIR COHEN: Have we received a fiscal impact statement?

275 TAYLOR: No, we have not.

280 PHILLIPS: I will see that you get the statement.

286 BENJAMIN KARLIN, OREGON TRIAL LAWYERS ASSOCIATION: Submits and reviews written testimony (Exhibit D). -A provision in the bill would allow the Department of Revenue to collect a fee amounting to the actual cost of paying these funds over to the obligees. -The use of private attorneys would relieve a part of the burden from the Department of Justice.

321 CHAIR COHEN: Is that a theoretical point of view?

322 KARLIN: Reviews provision which would enable cost collection. -The second part of my statement was theoretical and does not relate to a specific part of the bill.

338 SEN. SHOEMAKER: The last change made in this law involved subsection 6 of section 2: "notwithstanding any other law relating to the confidentiality of tax records, the Department of Revenue shall send to the Department of Human Resources," (you would add "or the obligee or the obligee's attorney") "the obligor's home address and Social Security number." -Why do you need that information?

350 KARLIN: It's difficult to collect support if you can't find the obligor.

357 SEN. SHOEMAKER: The Department of Human Resources knows where they are.

359 CHAIR COHEN: And so does the Department of Revenue.

361 KARLIN: I am talking about cases where a private attorney has been retained, instead of a public attorney.

364 SEN. SHOEMAKER: If the obligee doesn't know where the obligor is, can't you work with the state to achieve your goals without disclosing that confidential information?

377 KARLIN: I don't know whether the Department of Revenue would honor a specific request for that information.

379 SEN. SHOEMAKER: They wouldn't honor it. That is confidential information. They would act as your conduit, so that you could contact the obligor without access to the address.

389 KARLIN: I'm not sure how that would work.

390 SEN. SHOEMAKER: Neither am I.

395 KATE BROWN, WOMEN'S RIGHTS COALITION: Submits and reviews written testimony (Exhibit E). -Testifies in support of bill.

422 SEN. SHOEMAKER: What do you think of the potential availability of addresses and Social Security numbers to obligees?

424 BROWN: It seems to me that they should be available, because one of the problems we find in collecting child support is that we have to find the obligor. This would make it a little easier.

439 CHAIR COHEN: Should it be the other way with respect to visitation?

441 BROWN: Yes, if there is a visitation order.

TAPE 65, SIDE B

SB 221, REVISES PROVISIONS DEALING WITH AUTOMATIC WITHHOLDING OF SUPPORT OBLIGATIONS, PUBLIC HEARING

014 COLLEEN SEALOCK, DEPARTMENT OF JUSTICE: Submits and summarizes written testimony (Exhibits F, G, & H). -Testimony is drafted to reflect -2 amendments (Exhibit I). -Section 3 clarifies that the Department of Revenue may release information to the District Attorney or to the Department of Justice in both public assistance and non-public assistance cases. Currently, they release information to us on public assistance cases. Release of information in non-public assistance cases has been standard practice, though it is unclear whether statutes permit this release.

088 CHAIR COHEN: You are not proposing to go as far as SB 568 goes.

089 SEALOCK: That is correct. -Continues to review written testimony.

106 SEN. SHOEMAKER: Is this de novo hearing on the record, or is it de novo starting at the beginning?

108 SEALOCK: De novo starting at the beginning. This is consistent with all our reviews. -Continues to review written testimony.

128 CHAIR COHEN: Which amendments are you referring to?

130 SEALOCK: The -1 amendments are included in the -2 amendments.

148 SEN. HAMBY: It might be a good idea to include lottery payments in section 2, which concerns pro rata payments.

157 JOHN ELLIS, DEPARTMENT OF JUSTICE: We have spoken with several people who are interested in this, including Sen. Hamby's office.

163 SEN. HILL: What is your opinion of SB 568?

167 ELLIS: The Department of Justice does not have a position on SB 568. -Reviews background of SB 568, and practice under current law.

229 SEN. SHOEMAKER: How does the tax offset program work?

231 ELLIS: The state has a computer record which monitors arrearage in child support. Our cases are reviewed by tax personnel every year, to intercept refunds in cases which are in arrears. -DHRtapes are matched to Revenue tapes, and those who owe support show up as matched cases.

280 SEN. HILL: Is this a reliable process? What is the identifier which matches the records?

284 SEALOCK: It's done by Social Security number, and it is very reliable. The timing can be problematic, though. We do our original tape in September, but withholding is not done until the beginning of the next year.

303 SEN. HILL: Isn't there a way to avoid this, by getting another Social Security number? How do you allow for this?

310 SEALOCK: That is a common occurrence. We do our best to track them down.

338 SEN. SHOEMAKER: What about the reverse situation? Assume that the two tapes match, and the Social Security numbers correspond. Does that mean the tapes do not record a match if the numbers do not correspond for any reason?

348 SEALOCK: The records do not match. We do miss those cases.

353 SEN. SHOEMAKER: How often does that occur?

355 SEALOCK: We don't know.

356 CHAIR COHEN: There are people who don't file income tax, for a variety of reasons. Those people wouldn't be matched, either.

373 SEN. HAMBY: If Revenue and DHRaren't aware of the obligor's location, the police do know where they are. Would you be willing to work with them?

380 SEALOCK: We have access to the police databanks. -In fact, we have access to information which the criminal justice system cannot receive.

392 SEN. HAMBY: Do you have access to dollars confiscated by the police during a drug arrest?

397 SEALOCK: It depends on how access was gotten to the dollars. -We

ask our attorneys to review each case. -We usually don't have access to those sorts of funds.

422 DUANE HALBLEIB, DISTRICT ATTORNEYS ASSOCIATION: Supports SB 221.

438 SEN. SHOEMAKER: Do you have an opinion of SB 568?

440 HALBLEIB: Yes. We have taken no position on the bill, but we share John Ellis's concerns. -Now, the money collected goes either to the obligee or to the state debt. Once you open it to the Bar, you are taking funds away from the obligee because legal costs will be assessed.

TAPE 66, SIDE B

SB 219, REMOVES PARTIES RIGHTS TO JURY TRIAL ON ISSUE OF PATERNITY,
PUBLIC HEARING

041 SEALOCK: Submits and summarizes written testimony (Exhibits J, K, & L).

104 SEN. SHOEMAKER: How can you tell the difference between 95% and 99%? Is there a truly objective standard?

125 JAMES GEYER, GENETIC DESIGN INC.: The numbers represent the rarity of blood groups potentially shared between an alleged father and a child. The rarity can be quantitated in instances where blood group alone cannot exclude someone from paternity. The rarer the blood group, or the more complete the testing, the higher the percentage.

160 SEN. HILL: If the finding is contested, does the contestor hire his own expert?

163 GEYER: Yes. In states such as California and Wisconsin, where rebuttable presumption statutes exist, the alleged father and his attorney may hire another laboratory to do additional testing.

168 SEN. HILL: Why is a judge a better trier of fact than a jury? Is this so clear-cut that the decision stands for itself?

177 SEALOCK: We wish that it was 100% evident. We would like to remove juries because many such decisions are based on emotion, and this takes away from the state's role, which is to determine the child's biological parent.

208 STEPHEN MAIN, DEPARTMENT OF JUSTICE: If you do enough paternity tests, one of two things happens: either you exclude the alleged father from paternity, or you increase the probability that he is the father to almost a virtual certainty. -The alleged father must either accept the test results, or ask for additional tests. -No test will prove, to scientific certainty, that one person is the child's father.

230 SEN. SHOEMAKER: The bill says that "at least 99% as compared to the probability that a random man is the father, based upon a prior probability of 0.5". -What does that mean?

235 GEYER: The 0.5 refers to a neutral unbiased assessment of the other evidence in the case. -In doing the probability calculation, although the scientific evidence is what we want to consider, the equation requires other evidence.

249 SEN. SHOEMAKER: If the 0.5 is a "prior probability," does that refer to evidence which existed before the scientific testing?

254 GEYER: You could substitute the words "not taken into account or assessing the other evidence in the case" for the 0.5.

266 SEN. SHOEMAKER: Why is no testimony of the mother required?

269 SEALOCK: We require an affidavit from the mother, naming the father.

273 MAIN: That language is found in the original version of the bill. Our proposed amendments change that. -A case stands now both on test results and on an affidavit from the mother.

306 SEN. BUNN: Under the status quo, the courts weigh all the information and make their decision.

309 SEALOCK: The alleged father has the right to choose either a jury, or to have the court weigh the evidence.

311 SEN. BUNN: Whether it is the court or a jury, all the facts are weighed. -Under the proposal, the 0.5 language is really saying "all other things equal." -If you are at that point, if the test shows that an individual is the father, you have now shifted the burden onto the alleged father.

323 SEALOCK: That is correct.

325 SEN. BUNN: Is a 99.9% rate possible, which would be even more conclusive than 99%?

329 GEYER: Yes. You would have to add more tests to the screening, but such a level of accuracy is possible.

334 SEN. BUNN: What difference would there be in cost to the state?

348 GEYER: The cost is about \$75 per person, for a 95% probability, and is evidence "beyond a reasonable doubt." -For a 99% probability, the cost is about \$100. Such evidence is strongly collaborative of any other evidence heard. -To consistently reach a 99.9% accuracy, the cost could be as high as \$150 to \$200 per person.

367 SEN. BUNN: If there is no information on either side, then the 99% rate becomes enough to prove the case.

373 SEALOCK: With the mother's testimony.

374 SEN. BUNN: If we double the cost, we could potentially increase our certainty by tenfold.

381 SEALOCK: That is true, but we have not negotiated such a cost. I would have to rely on Dr. Geyer to tell you the approximate cost to the state. -It would also take longer to get the results.

390 SEN. BUNN: You testified that, in a two-year period, you had only twelve trials but that you had prepared for fifty trials. -How many tests did you do during that same two-year period?

395 ELLIS: Genetic Design, Inc. performs about 150 triad tests per month, which is about 450 individuals. -We spent about \$1.3 million in the current biennium for testing costs. We are funded at that level for the next biennium.

412 CHAIR COHEN: We are talking about the ability to take away a jury trial under certain conditions?

417 SEALOCK: We want to take away jury trials under all conditions. -We would also say that when we have a 99% probability test and testimony from one parent, then the burden of proof shifts. -These tests exclude more people than they include.

TAPE 67, SIDE A

005 SEN. SHOEMAKER: I see that testimony of a parent may be presented by affidavit. I trust that is without prejudice to the right of cross-examination.

008 MAIN: Yes. We are trying to create a faster procedure, where we give the testimony and test results to the other side. If they don't object, then a judgment is made. If there is an objection, they retain their rights to court trial, with full right to cross-examination.

016 SEALOCK: We tried to be careful about due process rights.

018 SEN. SHOEMAKER: Another alternative would be to remove right to jury trial, if the probability rate was over 99%.

023 MAIN: I hadn't considered that type of approach. It might work. We really don't see parentage test results that are less than 99%. -Our contract with Genetic Design states that they will either give us a result better than 99%, or exclude the defendant.

033 SEN. HAMBY: As I see it, the purpose of the bill is to get away from the emotionalism of the jury trial. -Are there any other states that have taken the approach of having a blood test first, and if the probability is greater than 75%, then moving to the more costly DNA testing?

040 SEALOCK: I don't think so. All the states we know of require probabilities of 95% or greater.

049 SEN. BUNN: Agrees with Sen. Shoemaker's proposal to remove jury trials if probability is over a certain level. -It would save costs.

057 SEALOCK: All the test results which we receive from Genetic Design are at least 99%.

060 SEN. BUNN: You are asking us to deny right to a jury if the evidence is greater than 99%. -If we set a higher standard, at 99.9%, we could meet both what you want and what we want. -You could send those cases which might go to court back for stricter testing, in order to avoid jury trials.

074 SEALOCK: That is certainly an option, but we would have to research it.

085 SEN. SHOEMAKER: Does the alleged father's expert ever disagree with you, even at 99%?

089 SEALOCK: We have not had many experts testify in opposition to us.

091 MAIN: In the last 18 months, we have had two trials where experts testified for the defense. Those experts agreed with our experts in both cases.

101 SEN. SHOEMAKER: If the experts don't agree, I think there is a problem. This says "if the experts disagree, the question shall be submitted upon all the evidence." That would include all experts, not just the plaintiff's.

108 MAIN: That statutory language probably dates from the 1950s.

110 SEN. SHOEMAKER: I'm talking about the language in your proposed amendment. -I think we are creating a problem here.

126 MAIN: I agree with your conclusion, but the situation is inconceivable to me, based on my experience.

137 SEALOCK: We will look at this again.

153 LAWRENCE GORIN, KELLER, GOTTLEIB, & GORIN: Submits and summarizes written testimony (Exhibit M).

192 CHAIR COHEN: Requests clarification.

196 GORIN: Of the twelve paternity cases heard in court during the last two years, the state won eleven of those cases and the alleged father won one. -Continues to review written testimony.

269 CHAIR COHEN: Why not let the court do it, rather than a jury trial?

276 GORIN: A jury is in the best position to make the necessary assessment of the witness's credibility. -Twelve jurors are better than one single finder of fact, the judge.

283 CHAIR COHEN: There are lots of cases where we don't have jury trials.

286 GORIN: That is true. -The establishment of paternity has significant ramifications.

293 CHAIR COHEN: Do we have jury trials on termination cases?

294 GORIN: No. The evidentiary standard in termination cases is "clear and convincing" evidence. The evidentiary standard in paternity cases is a mere preponderance of the evidence. -In some cases, the "real" evidence outweighs the scientific evidence. A man may have had a vasectomy, yet the test results do not exclude him from possible paternity.

319 CHAIR COHEN: I don't think you need a jury for that. -The committee understands that genetic evidence is designed to eliminate possibilities, but doesn't affirmatively make the case.

326 GORIN: That is the problem. -In a U.S. Supreme Court decision, Chief Justice Rehnquist wrote that blood tests don't prove paternity; they prove non-paternity. -A jury is in the best position to assess a witness's credibility.

354 SEN. HILL: Requests witness to return for future hearing.

356 GORIN: Agrees to return.

357 JUDY SNYDER, OREGON TRIAL LAWYERS ASSOCIATION: Testifies in opposition to SB 219. -Submits and summarizes written testimony (Exhibit N). -If a putative father is ordered to pay child support of \$400 per month for a newborn child, that leads to a minimum of \$100,000. It is

not inconceivable that payment amounts will increase, so that the total may well be \$250,000. -Weigh these numbers against the twelve jury trials in the last two years. That is an insignificant number, when such large amounts of money are at stake.

388 CHAIR COHEN: Adjourns hearing at 3:33 p.m.

Reviewed by: Reviewed by:

Bill Taylor Ingrid Swenson Counsel Counsel

Submitted by:

Kate Wrightson Assistant

EXHIBIT LOG:

A - Amendments to SB 133 - Staff - 2 pages
B - Hand-engrossed version of SB 133 - Staff - 2 pages
C - Testimony for overview - Colleen Sealock - 4 pages
D - Testimony on SB 568 - Benjamin Karlin - 2 pages
E - Testimony on SB 568 - Kate Brown - 1 page F - Testimony
on SB 221 - Colleen Sealock - 2 pages G - Amendments to SB 221 -
Colleen Sealock - 1 page H - Testimony on SB 221 - Colleen Sealock
- 1 page I - Amendments to SB 221 - Colleen Sealock - 1 page
J - Testimony on SB 219 - Colleen Sealock - 2 pages
K - Amendments to SB 219 - Colleen Sealock - 5 pages
L - Testimony on SB 219 - Colleen Sealock - 1 page
M - Testimony on SB 219 - Lawrence Gorin - 22 pages
N - Testimony on SB 219 - Judy Snyder - 8 pages