

**Testimony in Support of HB 2570
Before the House Judiciary Committee
on behalf of the OSB Elder Law Section**

February 6, 2013

Dear Chair Barker and Members of the Committee,

By way of introduction, I am a lawyer in Portland. My firm specialized in probate and trust litigation; contested conservatorship and guardianship cases fall under that general umbrella. For several years I have had a professional and academic interest in the issue of attorney fees in protective proceedings brought under ORS Chapter 125. My senior partner, James R. Cartwright, and I helped prepare the section of the Bar's bench book on protective proceedings relating to the award of attorney fees. In that context, we spoke to many judges about their criteria in deciding whether to make attorney fee awards from the funds of protected persons, and how to scale those awards. In those conversations, and in our own litigation practice, we were struck by the lack of criteria available to judges to determine such fee requests; the judges, too, complained about the lack of guidance the current statutes provide them. Further, the procedural and substantive rules governing attorney fee awards in adversarial civil litigation – breach the contract actions, for example – are ill-suited to making attorney fee determinations in protective proceedings, where the role of the court itself is to protect people who cannot protect themselves, and the only statutory authorization for any award of fees is from the funds of the protected person.

HB 2570 is designed to make attorney fee awards in protective proceedings more transparent, predictable, and fair to the bench, bar, and parties. Since receiving the draft from Legislative Counsel, the Elder Law Section of the bar, which requested the bill, has continued to work on it in light of comments received from members. The section has produced proposed amendments, and my comments are based on those and not the printed bill.

Procedurally, *current* ORS 125.095 provides for the payment of attorneys fees from the funds of the person protected by the proceedings, but only if the fees are approved by the court prior to payment. Protective proceedings are presumptively subject to the Oregon Rules of Civil Procedure, and attorney fee requests are presumptively subject to the pleading and procedural rules of ORCP 68.¹ See ORCP 1A and ORCP 68C(1). This mode of pleading and procedure is at best problematic in protective proceedings; the result is that judges and parties, officially or unofficially, agree that ORCP 68 doesn't apply, though by its terms it does. For example:

- ORCP 68C(2)(a) requires a person seeking an award of fees to make such a request in a pleading filed by that party. It is at best awkward and at worst ethically fraught for an attorney representing

¹ The Committee should be aware that the Council on Court Procedures has this session approved amendments to ORCP 68 which clarify that specific types of proceedings, such as protective proceedings, may be statutorily “de-coupled” from the default procedure prescribed by ORCP 68. See ORCP 68, Draft Amendment Published by Council 9/8/12. HB 2570 proposes to do just that.

a respondent in a protective proceeding to plead his or her right to recover fees from his or her client if the client is later determined to be in need of a guardianship or conservatorship. This bill obviates that pleading requirement for protective proceedings, at proposed ORS 125.095(4).

- ORCP 68C(4)(a) requires a request for attorney fees to be filed within 14 days after entry of judgment. This timeline for requesting approval of attorney fees does not work in protective proceedings, because a protective proceeding is usually an on-going case, with a guardian or conservator serving for several years. It is not like a civil case that concludes through a general judgment that provides that “plaintiff prevails” or “defendant prevails”. Often, the only judgment entered a protective proceeding for several years is the limited judgment which appointed the guardian or conservator. Yet legal services on behalf of the protected person or the fiduciary usually continue through the life of the case. In many protective proceedings it is impractical to submit a request for attorney fees within 14 days after entry of the judgment appointing the fiduciary because of legal matters which require attention, such as the issuing of a conservator’s bond, preparation of the conservator’s inventory, or the need for court approval for the sale of property. Proposed ORS 125.095(5) makes it clear that such fee requests need not be tied to the entry of any particular judgment, so long as they are made within two years of the services provided, unless good cause is shown for a longer delay.

Section 2 of the bill sets criteria for the award and amount of attorney fees protective proceedings which are better related to the real-world dynamics of these cases. Under current law, ORS 20.075 controls the award of attorney fees “in any case in which an award of attorney fees is authorized by statute.” This includes protective proceedings under ORS Chapter 125. However, the factors set forth in ORS 20.075 are expressly suited for adversarial civil litigation, not protective proceedings. For example, petitions seeking guardianships or conservatorships do not state “claims for relief” as that term is used in civil litigation, nor do objections to those petitions state “defenses.” As a result, practitioners in protective proceedings struggle to couch their arguments for or against attorney fee awards in language that both adheres to ORS 20.075’s mandate, and makes sense in light of the special role that the court plays in protecting those subject to conservatorship and guardianships; courts likewise struggle to justify decisions on attorney fee requests on the grounds ORS 20.075 requires. Section 2 of the bill exactly mirrors the familiar structure of ORS 20.075, in that the first subsection sets forth criteria that courts should use in determining whether or not to award fees payable from the protected person’s funds in the first instance, but once the court has determined that some award of fees is appropriate, it must consider the factors listed in both the first and second subsections. In other words, the methodology required by Section 2 looks just like the methodology required by ORS 20.075(1) and (2) as applied in general civil litigation, but frames that methodology around the unique issues that arise in protective proceedings.

Matthew Whitman
Cartwright Whitman Baer PC
1000 SW Broadway, Suite 1750
Portland, OR 97205
(503) 226-0111
mwhitman@cart-law.com