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House Judiciary Committee
Written Testimony

**Re: HB 2570 (formerly LC 456): Relating to Attorney Compensation In Protective Proceedings**

My name is Madelynne Sheehan. I am an attorney practicing in Columbia County, Oregon. My principal area of practice is elder law, which has led me to handle a number of cases involving protective proceedings (guardianships and conservatorships). I have served as an attorney for Legal Aid Services of Oregon and am on the Board of Directors for Columbia County Legal Aid, for which I have handled a number of cases involving low income respondents in protective proceedings. In fact, most of my protective proceeding cases have focused on the needs of low income elderly people. I am also a member of the Executive Committee of the Elder Law Section of the Oregon State Bar, which has submitted a proposal for amendment of HB 2570 *with which I concur in part*.

I understand HB 2570 has been sent to the Judiciary Committee for review, and it is scheduled for public hearing tomorrow, Wednesday, February 6, at 11 a.m. While I am unable to testify in person, I submit the following testimony for your consideration because I feel strongly that passage of this legislation as written *and as amended by the Elder Law Section's Executive Committee,* would have a chilling effect on the willingness of attorneys to take guardianship/conservatorship cases, to the particular detriment of low income elderly and disabled people, especially in rural counties where judges are less familiar with protective proceedings and more dependent on legislative guidelines than on courtroom experience.

As the newest member of the Elder Law Executive Committee, whose tenure just began January 1 of this year, I raised the issues set forth below with my colleagues on the committee, but in regards to Issues 2 and 3, I was unable to sway my colleagues from their belief that courts would understand the intention behind the legislation (as amended), even if the legislation itself did not clarify my areas of concern. As a practitioner in a rural county, I have less confidence that this will be so, and ask this Judiciary Committee to consider the following and amend the Executive Committee's amendment accordingly.

SUMMARY OF ISSUES:

1. While dealing with the issue of "factors to be considered by the court" relative to attorney fees in protective proceedings, HB 2570 fails to address an important related issue raised in the recent case *In re. Derkatsch*; failure to address this issue in such closely related legislation may be interpreted by future courts as intentional support of the misunderstanding raised by the Derkatsch court. If HB 2570 is not amended to address the Derkatsch issue, HB 2570 should be pulled till a later time when the Derkatsch issue can be addressed. The amendment submitted by the Elder Law Section Executive Committee properly addresses this issue and should be adopted as submitted in regards to this issue.

2. The amendment to HB 2570 proposed by the Executive Committee of the Elder Law Section of the Bar, inappropriately includes "the size of the protected person's estate relative to attorney fees" as a factor the court should consider when reviewing a request for payment of attorney fees from the protected person's funds. This inclusion could have significant negative effect on representation of vulnerable people. The judiciary committee should delete this factor from the Elder Law Section's proposed amendment, particularly in the light of the following Issue #3.

3. Both HB 2570 and the amendment submitted by the Executive Committee of the Elder Law Setion state that the factors listed "shall" be considered by the court. The Executive Committee understood that use of the word "shall" was preferred by legislative counsel to "may," even though the Executive Committee intended the factors to be merely guidelines for the court. *PGE v. BOLI* makes it clear that these two words are not interchangeable, and legislation will be interpreted as if legislators intended the consequence of their choice of either one word or the other. Since the factors listed in HB 2570 as amended by the Elder Law Executive Committee were intended by the authors to be guidelines for the court and not mandatory considerations, the proper word to use in this legislation is "may," not "shall."

**ISSUE #1: HB 2520 as written does not address an important issue raised by *In re Derkatsch*, which would limit the availability of funds for paying attorneys who participate in a protective proeeding to work performed after the respondent actually becomes a "protected person:" this which could have a chilling effect on attorneys' willingness to represent parties in protective proceedings.**

As written and presented to the Judiciary Committee, this legislation addresses an issue that has troubled some judges, that being, what factors a court should consider when judging the appropriateness of attorney fees in a protective proceeding (guardianship to protect the physical well being of the principal, and conservatorship to protect the financial well being of the principal).

Legislative Counsel and a committee of interested attorneys and judges apparently have wrestled for some five years with how to address the judges' concerns. In the meantime, last year a decision was handed down by the Court of Appeals that addresses an issue relative to attorney

fees in protective proceedings (In re Derkatsch, 248 Or.App. 185, 273 P .3d 204 (Or. App., 2012). The issue addressed was whether or not attorneys can be paid out of the funds of the principal for services provided *before and after* the protective proceeding (hereafter, my reference to "protected person" will include the principal before, during, and after a court proceeding). Based on the decision in Derkatsch**,** a court can now rule that such services (performed *before or after* the case is decided) *may not be paid* out of the funds of the protected person – even though practitioners know that much legal work is required to bring a protective proceeding to court, and more is often required after protection is established.

This would cause serious harm to many elderly and disabled people who would benefit from protection. Often in these cases, the funds of the protected person are the only source available to pay attorneys (since the individuals who shine a light on the situation are often caring neighbors, or low income relatives). Not allowing attorney fees (for initiating the necessary proceedings) to be paid out of the estate of the protected person would have a chilling effect on these concerned individuals seeking protection for elderly and mentally disabled people in our communities.

My colleagues and I in the Elder Law Section of the Oregon State Bar believe that if the Legislature passes legislation addressing this area of the law (attorney compensation in protective proceedings) *without acknowledging and clarifying the issue raised by Derkatsch,* subsequent courts will take that omission to signal that the Legislature supports the Derkatsch decision in this related matter. This would be a great detriment to low income elderly and disabled people. As an attorney practicing in elder law in Columbia County, past president and sitting member of the board of Columbia County Legal Aid, former attorney with Legal Aid Services of Oregon, and a member of the Board of Directors for Columbia County's Community Action Team, I assure you that pro bono services for guardianship/conservatorship proceedings are not readily available. Therefore, it is important to preserve *the opportunity* for attorneys willing to take these cases to be paid for their time from the resources of the protected person. A judge may always find attorney fees unreasonable under the particular circumstances of a case—but to serve this vulnerable popualtion, the opportunity for adequate compensation should be preserved .

*RECOMMENDATION #1: If HB 2570 is not amended so as to address the issue raised by Derkatsch, HB 2570 as presented to the Judiciary Committee should be pulled.*

**ISSUE #2: The amendment to HB 2570 which was voted on by the Executive Committee of the Elder Law Section of the Bar, while adequately addressing Derkatsch, inappropriately includes "the size of the protected person's estate relative to attorney fees" as a factor the court should consider when reviewing a request for payment of attorney fees from the protected person's estate.**

The amendment to HB 2570 submitted to Legislative Counsel by the Executive Committee of the Elder Law Section of the Oregon State Bar was passed over my dissent (I am a member of that Committee). In that dissent, I was representing the concerns and experience of a number of other attorneys who are active members of the Elder Law Section, have modest law practices in small communities (like mine in Scappoose), and frequently represent modest-to-low income parties in guardianships and conservatorships. The primary error in the Section's

amendment is listing the "size of the protected person's estate" as a factor to be considered by the court in determining whether attorney fees shall be paid out of the protected person's assets.

I believe this factor may have been included at the request of some judges, as the result of a few high profile cases that were extremely complex, messy, and costly—that drew a lot of negative, anti-court public attention (*The Oregonian)*, and that made some judges extremely uncomfortable. Those few judges asked for specific statutory direction to allow them to disallow what might appear to some to be "excessive" attorney fees. In fact, there is already a statute on the books that allows courts to disallow "unreasonable" attorney fees. But these judges seem to have wanted additional "support" for their decisions. They wanted specific direction to weigh the size of the protected person's estate relative to attorney fees" when making the determination whether fees could be paid out of the protected person's funds. While judges experienced in protective proceedings might read such a statute and understand that new language merely to give them "cover" to make such a determination—courts with less experience in protective proceedings (such as Columbia County, where judges handle a much wider variety of cases) could read the new statute as a directive to automatically disallow attorney fees where the protected person's funds are small relative to legal costs.

In my experience and that of a number of my colleagues, the parties who initiate or otherwise wish to participate in protective proceedings are often or low or modest income. The person in need of protection often has some assets. Using much (or even all) of the protected person's assets to establish protection for them going forward is often the best use of their funds. See below three real life examples of cases where this was so:

Case No. 1: A mentally disabled young man loves trucks, and buys them on contract; he is unable to manage his own finances, but is otherwise able to go forward in the world; he doesn't need a guardianship but he does need to be "sheltered" from his lack of understanding of his financial means and from the consequences of his mistakes. He needs a conservatorship so any contracts he makes can be disavowed; he needs someone to make sure his limited income os available to pay his rent rather than purchase goods he doesn't need. The amendment as written could prevent an attorney from representing this person because the cost to set up the protection would be considerably greater than the protected person's estate. Yet, this one-time cost to the protected person could allow that person to live within the community.

Case No. 2: A person who has episodic mental illness requires lots of attorney involvement because the law insists that this person be dealt with in the "least invasive" manner possible – not in the least expensive manner. This person's estate is likely to be small relative to the attorney fees necessary to establish a guardianship that would allow someone to act on behalf of the mentally ill person to get them the health services they need (checking them in and out of mental health facilities as needed).

Case No. 3: An elderly woman goes out walking in the winter in her night clothes, and doesn't perceive that this is unhealthy. She needs someone to make sure she is placed in a secure environment (a guardian). She has perhaps $4,000 in the bank—enough to cover attorney costs to get a guardian appointed – at which point she will be eligible for Medicaid. This amendment as written could prevent payment of attorney fees because they would "wipe out" the protected person's savings. Yet, spending the $4,000 to secure her safety is arguably the best way for her to spend-down her assets toward Medicaid eligibility.

*RECOMMENDATION #2: Eliminate the factor directing the court to consider the size of the protected person's estate relative to attorney fees.*

**ISSUE #3: Legislative Counsel apparently insists that language in the statute use the words "shall consider," when attorneys who practice in this area really want judges to understand that judges "may consider" the listed factors.**

I have been told that Legislative Counsel as a matter of course replaces the word "may" with "shall," in proposed legislation – as if these two words were interchangeable. In this case, I understand my colleagues on the Executive Committee intended the factors a judge would consider to be "suggestions" for consideration by the court. That being the intent, I suggested we recommend the use of the words "may consider" rather than "shall consider," but my suggestion was rejected because our liaison with Legislative Counsel warned that Legislative Counsel would simply replace "may" with "shall" regardless of our committee's recommendation. As you know, individual words in the law are extremely important. "Shall" has a much different meaning than "may," and as the court found in *PGE v. BOLI*, the Legislature is presumed to know the difference between the two. To have Legislative Counsel routinely override recommended language in this way—is reprehensible. As a book author (*Fishing in Oregon)* and publisher myself, I understand the utility of a "style sheet"—but "style" should *never* take precedence over "substance," particularly in a matter as serious as this in its possible effect.

*RECOMMENDATION#3: Substitute "may consider" for "shall consider" in the recommended amendment of HB 2570.*

IN SUMMARY:

HB 2570 as submitted by legislative counsel should be pulled if it is not amended to address the issue raised by *In Re. Derkatsch*. The amendment submitted by the Elder Law Executive Committee should be adopted by the Judiciary Committee with the two changes recommended above: (1) the factor addressing the size of the protected person's "estate" is not relevant to the appropriateness of attorney fees and should be deleted from the list of factors for the court to consider; and (2) the factors listed are guidelines provided to the court, but are not mandatory considerations; therefore, the appropriate word to use in this legislation is "may" not "shall."

Respectfully,

/s/

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