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Regarding HB 2570 (formerly LC 456)

To Whom it May Concern:

Executive Summary:

- HB 2570 as submitted by Legislative Counsel is fatally flawed and should be rejected.

- Proposed amendments to be put forward by the Elder Law Section of the Oregon State Bar should be supported. They fix many real and existing legal problems, and they fix many of the very significant new problems that would be created if HB 2570 as submitted by Legislative Counsel were to be adopted.

- The proposed amendments to be put forward by the Elder Law Section of the Oregon State Bar should themselves be amended, such that the link between the size of the estate (assets) of the protected person, and the amount of attorney fees that can be paid from the assets of the protected person, should be deleted. The work necessary to protect a person relates to the problems faced by the person, not to the size of the person's estate. Failing to remove this linkage will deprive citizens who are in need of protection from the protections that they need.

The current version of HB 2570, from Legislative Counsel, is severely flawed.

I am a former Chair of the Elder Law Section of the Oregon State Bar. I write in my capacity as a private attorney, who practices in the area of guardianships and conservatorships, not in any official capacity, however.

The Elder Law Section, which is the requestor for this bill, clearly agrees that the current version from Legislative Counsel is severely flawed.

The Elder Law Section is, I understand, submitting a substitute bill, that is almost a complete re-write.

I will also attach what I believe will be substantially the text of the proposed substitute bill. I do this so that it will be clear what I am referring to in this written testimony.

The current version of HB 2570 (formerly LC 456), from Legislative Counsel, must not be allowed to pass. It creates problems where none exist, and fails to resolve problems that it

was supposed to address - chiefly those problems created by ***Derkatsch v. Thorp, Purdy, Jewett, Urness & Wilkinson, P.C. (In re Derkatsch),*** 248 Or.App. 185, 273 P.3d 204 (Or. App., 2012).

The chief existing problem is that, under one interpretation of ***Derkatsch***, attorneys cannot be paid from the assets of the protected person for work they do prior to the court actually declaring the person in need of protection. i.e. Attorneys can't be paid from the estate of the protected person for researching the facts, drafting the paperwork, filing it, and, if necessary, participating in a trial to determine the competency of the respondent, even if the person is ultimately declared to be in need of protection.

It is patently obvious that funds of a protected person should be available to pay for legal and other expenses incurred in a protective proceeding prior to the date that the respondent is found to be in need of protection, and shifts from being a "respondent," to being a "protected person."

If this is not done, no one will be willing to bring such proceedings (unless, of course, the petitioner is willing to pay privately for all such services), and, similarly, no one will be willing to appear in such a proceeding as an objector.

Indeed, if this issue is NOT cleared up, I expect significant numbers of lawyers will simply cease representing anyone at all, until someone else has taken on the uncompensated work of transforming a respondent into a protected person. The statute must be changed so that it is clear that the lawyer for the petitioner (for example) will be compensated for actually bringing the case, and (if necessary) taking the matter to trial.

I would submit that this is the single most significant and most necessary change to the existing statutory scheme. The original version of HB 2570 (formerly LC 456) does not even address this issue. The amended version that I understand will be submitted by the Elder Law Section of the Oregon State Bar does address this issue, and successfully resolves the issue.

The current version of HB 2570 is fatally flawed, and should not be passed out of committee.

I write with the assumption that the current version of HB 2570 will be rejected, and the amended version to be proposed by the Elder Law Section will be passed out of committee.

In general, I support the amended version of HB 2570 that is to be submitted by the Elder Law Section.

However, both this amended version, and the current version share one crucial flaw.

Both contain a provision stating that the court *shall* consider "The amount of the attorney fees requested relative to the protected person's estate, whether or not the protected person's estate is subject to the direct or indirect control of a conservator."

This language is inappropriate.

Guardianships

Guardianships are frequently required for people who have very small "estates" (i.e. who have few savings or other assets - this has nothing to do with a probate estate).

A guardianship is needed where a person is a danger to himself or others, and is cognitively or mentally unable to properly provide for his own care and safety. People who suffer from Alzheimer's disease, mental illness and other such conditions may fall into this class of protected people.

It can be very expensive to seek a guardianship. It is expensive even if the person does not fight the guardianship. If the person, or someone who is benefitting improperly from that person, fights the guardianship, the court proceedings can become extremely expensive.

While it is to be hoped that a friend, parent, sibling, or child will step up and pay the necessary attorney fees if no other source of funding is available, sometimes no such person can be found who will spend their own money. Other times, no such person has the necessary funds. Even where a relative or friend has the money, it is not fair to require that person to advance the funds, if the person who is in danger has these funds.

Often, the best investment that can be made in the safety and the future of the person is to get a guardianship or other protective proceeding. This is true, even if it substantially exhausts the resources of the person who is at risk.

Often the most contentious cases are the ones where there are the least assets.

The provision linking the payment of attorney fees from the assets of the protected person to the size of the protected person's assets makes NO sense, when applied to guardianship proceedings.

The relevant question is what work was necessary to obtain appropriate protections for the person.

Conservatorships

Some conservatorships are also necessary in situations where there are small amounts of money involved.

Examples include people who suffer strokes or other sudden onset brain injuries, and who have ongoing business which needs to be transacted, or who have small amounts of income that will continue to come in from pensions, or the like. This can be particularly true where the person in need of protection has small children. This business must be handled. However, if there is no adequate power of attorney, the only path forward is a conservatorship.

As with a guardianship, while it is to be hoped that a friend or relative will step forward, sometimes the friends or relatives do not have sufficient funds to carry out this task. Even if they do have such funds, it is fundamentally unfair to ask that they assume this financial burden if it could be met (or at least reduced) by using the existing assets of the protected person. As with a guardianship, often a conservatorship or other protective proceeding is the best investment that can be made in the safety and the future of the person.

As with a guardianship, a provision linking the payment of attorney fees from the assets of the protected person to the size of the protected person's assets makes little sense, even when applied to conservatorship proceedings.

As with a guardianship, the relevant question is what work was necessary to obtain appropriate protections and financial powers for the person.

Finally, it appears, based on information provided by the Oregon State Bar Legislative Liaison person, that there is a concern that Legislative Counsel will not allow the use of the word "may." Apparently Legislative Counsel demands that "may" be changed to "shall."

This goes against the teaching of PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-12, 859 P.2d 1143 (1993). This case essentially says that the legislature is presumed to be able to write English, and to mean what they write.

The words "may" and "shall" are entirely different. It means something entirely different when the legislature directs a judge or a court that the judge or court "shall" consider something, as opposed to directing that the judge or court "may" consider a particular factor.

The phrase "*shall* consider the following factors" which appears in both Section 2 (2) and Section 2 (3) of both the original or Legislative Counsel version of HB 2570 (former LC 456), and the amendments that will be put forward by the Elder Law Section, should be replaced

by the phrase, "*may* consider the following factors."

In addition, a clause ought to be added to Section 2 (2) and to Section 2 (3) of both the original or Legislative Counsel version of HB 2570 (former LC 456), and the amendments that will be put forward by the Elder Law Section, stating "No single factor shall be dispositive," in determining whether to award attorney fees, or in determining the size of the attorney fee to be paid from the assets of the protected person.

In sum:

1) The current version of HB 2570 (formerly LC 456) should be rejected in its entirety. The amended version of HB 2570 that is to be submitted by The Elder Law Section of the Oregon State Bar should be adopted, but should be further amended as follows.

2) The section linking attorney fees to the size of the estate of the protected person should be deleted. This section is Section 2 (3)(f) in both the current version and the expected amended version. This section lists, as a factor to be considered in awarding attorney fees, "The amount of the attorney fees requested relative to the protected person's estate, whether or not the protected person's estate is subject to the direct or indirect control of a conservator."

3) The word "shall" that appears in Section 2 (2), and in Section 2 (3) should be changed to "may," and a clause should be added that no single factor shall be dispositive in determining whether to award attorney fees, or in determining the size of the attorney fees to be awarded.

Primary Point: The section linking attorney fees to the size of the estate of the protected person [Section 2 (3)(f)] in both the current version and the expected amended version] should be deleted. This section reads, "The amount of the attorney fees requested relative to the protected person's estate, whether or not the protected person's estate is subject to the direct or indirect control of a conservator."

Assuming the current version of HB 2570, as proposed by Legislative Counsel, is replaced by new language as proposed by the Elder Law Section of the Oregon State Bar, then this last change is the single most crucial change - and this change is crucial to obtaining protections for persons who need them. Failure to make this change will result in hardship on relatives and friends, and will often result in persons who need a guardianship or a conservatorship not receiving these protections.

Very truly yours,

Steven A. Heinrich

Likely Text of Amended or Substituted HB 2570
As Expected To Be Submitted by the Elder Law Section
As of February 1, 2013

(Not an official version - just the version on which comments of Steven A. Heinrich were based - provided only for the purpose of putting remarks of Steven A. Heinrich into context.)

SECTION 1. ORS 125.095 is amended to read:

125.095. (1) Funds of a person subject to a protective proceeding may be used to pay reasonable fees, costs and disbursements to any visitor, attorney, physician, fiduciary or temporary fiduciary for services related to the protective proceeding, or for services provided on behalf of a fiduciary**,** respondent**,** petitioner**,** cross-petitioner**,** objector or protected person.

(2) Prior court approval is required before the payment of fees from the funds of a person subject to a protective proceeding when the payment is to:

(a) Any physician if the fees are incurred for services relating to proceedings arising out of the filing of an objection to a petition, cross-petition or motion.

(b) Any appointed fiduciary, except that prior court approval is not required before payment of fees to a conservator if the conservator is a trust company that has complied with ORS 709.030, or if the conservator is the Department of Veterans' Affairs.

(c) Any attorney who has provided services relating to a protective proceeding, including services provided in preparation or anticipation of the filing of a protective proceeding.

(3) Subject to ORS 125.495-125.520, prior court approval is not required before:

(a) Payment of attorney fees incurred prior to the filing of a protective proceeding for services unrelated to the protective proceeding.

(b) Payment for services provided by an attorney that is hired as a mediator for mediation services related to the protective proceeding.

(4) A pleading that alleges a basis for payment of attorney fees is not required before payment of attorney fees is approved or made under this section.

(5) A party or attorney may file a motion or petition requesting court approval and payment of attorney fees under this section at any time over the course of a protective proceeding but no later than two years after the date on which the services for which fees are requested were provided. Requests for approval of fees for services provided more than two years before court approval is sought may be granted upon a showing of good cause for the delay.

SECTION 2. (ORS 125.097 is added) (1) As used in this section, "party" means a person represented by an attorney where a request for court approval and payment of the attorney's fees has been made relating to a protective proceeding under ORS 125.095.

(2) A court shall consider the following factors in determining whether to award attorney fees under ORS 125.095:

(a) The benefit to the person subject to a protective proceeding by the party's actions in the proceeding.

(b) The objective reasonableness of the positions asserted by the parties.

(c) The Parties' self interest in the outcome of the proceeding.

(d) Whether the relief sought by a party was granted in whole or in part, subject to the respondent's right to contest the proceeding.

(e) The conduct of the parties in the transactions or occurrences that gave rise to the need for a protective proceeding, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

(f) The extent to which an award of an attorney fee in the case would deter others from asserting good faith positions in similar cases.

(g) The extent to which an award of an attorney fee in the case would deter others from asserting meritless postitions.

(h) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.

(i) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.

(j) Such other factors as the court may consider appropriate under the circumstances of the proceedings.

(3) A court shall consider the factors specified in subsection (2) of this section in determining the amount of an award of attorney fees under ORS 125.095. In addition, the court shall consider the following factors in determining the amount of an award of attorney fees:

(a) The time and labor required in the proceeding, the novelty and difficulty of the issues involved and the skill needed to provide the legal services.

(b) The likelihood that the acceptance of the employment on behalf of the party by the attorney would preclude the attorney from other employment, where the likelihood should be apparent or was made apparent to the party.

(c) The fee customarily charged by an attorney in the locality for similar legal services.

(d) The time limitations imposed by the party or the circumstances of the proceeding.

(e) The experience, reputation and ability of the attorney providing the legal services.

(f) The amount of the attorney fees requested relative to the protected person's estate, whether or not the protected person's estate is subject to the direct or indirect control of a conservator.

(4) In an appeal from the award of or denial of a request for attorney fees under ORS 125.095 and this section, the court reviewing the award may not modify the decision of the court below in making or denying an award, or the decision of that court as to the amount of the award, except upon a finding of an abuse of discretion.

SECTION 3. Section 2 of this 2013 Act is added to and made a part of ORS chapter 125.