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Representative Jeff Barker, Chairman
Oregon House Judiciary Committee
900 Court Street NE, H-480
Salem, OR 97301

Re: HB 2570

Mr. Chairman:

I write to you today to express my opinion regarding the text of House Bill 2570 regarding the payment of attorney fees in protective proceedings. I have been a member of the Oregon State Bar since 1994. The primary focus of my practice is elder law issues, including contested protective proceedings, and has been for the better part of a decade.

In 2012 the Oregon Court of Appeals issued a ruling in the what has become known as the Derkatch case (*In the Matter of the Guardianship of Erna Derkatsch*, 248 Or. App. 185, 273 P.2d 204 (2012)). In that case the Court of Appeals, because of the text of ORS 125.095, limited the payment of attorney's fees to those fees incurred by a potential protected person because the statute specified "protected person" rather than respondent or some other label. It is my understanding that HB 2570 attempts to address this issue for the betterment of all those involved in protective proceedings.

Although I generally support the clarification of the existing law, I have two specific concerns regarding the text of HB 2570 as it currently stands. First, although Section One amends ORS 125.095 to apparently expand the ability of the Court to approve fees incurred, it does so in a way which leaves the provision open to interpretation consistent with *Derkatsch* (and thus limit the approval of fees) rather than clarifying that the intention is to expand the Court's ability to approve fees. I would support language which would clarify this issue.

Second, and more problematic in my opinion, is the provision contained in Section 2 (3)(f) of HB 2570. This provision requires the Court to consider the amount of attorney fees requested relative to the size of the protected person's estate. While at first glance this provision may seem to be rooted in common sense, it is an unfortunate truth of protective proceedings that common sense frequently does not play the role that many wish. For example, it is entirely possible that an individual's overall estate is quite minimal, yet they wish to very strenuously resist an attempt at a guardianship. Usually this resistance is rooted in highly personal determinations that the individual has made regarding their preferences for placement and overall control of their life. Their instructions to their attorney, which the attorney is ethically required to follow, may therefore have little regard to their overall financial picture and everything to do with their desire to maintain their freedom. In a situation in which a person is determining where they may well spend the

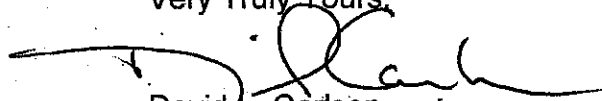
rest of their life, and under what conditions, limiting their ability to pay their attorney in the way proposed by Section 2 (3)(f)'s provisions seems very problematic.

Similarly, instances arise in which a petitioning individual may be seeking to protect a loved one essentially from that loved one's own poor decision making. In many cases that poor decision making results in danger to the proposed protected person. The costs involved in protecting that individual's life are miniscule compared to that life, but may be huge in relation to their overall estate.

In addition, it poses a significant conflict of interest for the lawyer involved in the case. If I am aware that my client wishes to strenuously oppose a petition, but that such a defense would simultaneously deplete a significant portion of the client's estate and thus a court may not approve my fees, what then should I do? The ethical answer is obvious once the lawyer has already accepted the case, however, I fear that such a decision would never be reached. The prudent lawyer would simply decline to take the case, thereby leaving the respondent without counsel. It would seem that the terms of the proposed bill therefore run counter to the goal that the legislature seems to have in mind; namely, that individuals retain the ability to pay their legal counsel in order to obtain appropriate representation in such important proceedings.

As a result I ask that the committee address the *Derkatsch* issue in Section One with explicit language authorizing the Court to approve payment for fees regardless of whether the respondent is a "protected person" or not. Second, I also believe that the committee should amend HB 2570 to remove the relativistic weighing of the size of the person's estate versus the fees incurred in the action.

Very Truly Yours,



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cc: file