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Senator Floyd Prozanski
Senate Committee On Judiciary
900 Court St. NE, S-413
Salem, OR 97301

Re: Senate Bill 503 regarding Qualifications for Court Visitors

Dear Senator:

I write to you today to express my concerns about SB 503, which would create new law regarding court visitors in protective proceedings. By way of background, I am an attorney in private practice here in Salem and have been since 1994. The primary focus of my practice is protective proceedings and probate work. I am also certified as a National Guardian by the Center for Guardianship Certification and as such am a professional fiduciary under Oregon law. In short, the bulk of my practice is representing people in protective proceedings or being the fiduciary and appointed by the Court in such a proceeding.

There are different procedures for obtaining a court visitor depending on the county in which the proceeding is filed. In Marion County the presiding judge has established qualifications for potential visitors as well as a training process that the visitors must complete before being placed on the approved list. When a guardianship is filed the petitioner's attorney selects an individual from the list and requests that the Court appoint that individual. Usually the petitioner's attorney has contacted the proposed visitor to ensure that person's availability since the timing of a protective proceeding can be very tight compared to other court proceedings. Polk County has adopted Marion County's list and follows the same procedure. In contrast, Linn County has two individuals used as visitors and the Court collects a modest fee at the filing of the petition and assigns one of the two individuals. Lincoln County uses the visitors from Linn County. Other counties have different procedures depending on the needs of those counties. In my experience, generally speaking the larger the county the more likely that county is to have a deeper pool of visitors with a wider range of experience.

Senate Bill 503 would have consequences that I believe would negatively impact the very people that we are seeking to protect. First, by setting the qualifications for a visitor as SB 503 does the legislature would remove a significant amount of flexibility from the presiding judges. The presiding judges know both the needs and limits of their counties and

presumably take this into account when setting their policies. Currently, for example, the Marion County visitor's list includes lawyers as visitors. SB 503 would remove this. Lawyers with experience in elder law issues have valuable insights into both the process and the individuals involved. SB 503 would eliminate this by allowing only medical or mental health professionals to serve as court visitors. Moreover, it seems to me that there are few instances in which having a full fledged medical doctor as a visitor would provide any additional insight into the respondent's situation or the abilities of the proposed fiduciary. For those instances the current statute provides that the visitor can request that a full examination by a doctor (or a limited examination) be conducted to investigate the identified issue. Similarly, the Court can always require such a process. In other words, the statute already provides a way to address concerns regarding the need for a medical professional's involvement.

Second, it is unrealistic to expect physicians, physicians assistants, and psychologists to be visitors as a regular matter. Marion County, for example, has one psychologist on its list. The remainder are lawyers, counselors or social workers. In other words, people with that type of qualification are scarce on the ground. Moreover, those people, if they wanted to be on the list of approved visitors could easily do so, but they have generally chosen not to. In my opinion that is because there is more money to be made with a traditional practice than one in which you are completing reports for the Court. Short of allocating a considerable amount of funding to paying for court visitors, something notably absent from SB 503, it seems unlikely that this will change.

In addition, the cost associated with having a physician or psychologist complete a visitor's report would be huge. I traditionally hire expert witnesses in a variety of different cases. I have yet to have a medical doctor or psychologist render an opinion in a case for less than $6,500.00. In contrast, the average cost of a visitor in Marion County would be closer to 10% of that. Increasing the cost of a visitor's report by restricting who can be appointed would not serve to protect the people most in need of the court's assistance. Quite to the contrary. It would make such proceedings cost prohibitive and shut people out of the system. That is especially true for those individuals who have no funds but do have an acute need for protection. That assumes, of course, that you could get that qualification level interested in doing it in the first place. In other words, you may well have a gold plated Cadillac of a system that renders highly qualified opinions but which is never taken out of the garage. If the goal is to get people to a certain point then it is far better to have the a more modest vehicle that actually functions properly 99.9999% of the time.

Third, getting a visitor in smaller counties is already hard to do. Candidly, it is frequently hard to do even in Marion County because, although there are 17 people on the list, it is not uncommon to call nearly every one of the people on the list before finding someone who is available, especially if you need an emergency evaluation. Further restricting the pool of individuals that the presiding judge can call upon would not make more people available as visitors, it would make fewer people available.

Fourth, one provision of SB 503 would expand the visitor's duties to conservatorships in addition to guardianships. If the goal is to render the system unusable then mandating a visitor's report in a conservatorship would substantially increase the caseload of the available visitors and further slow down an already overburdened process. The Court always has the authority to order a visitor for a conservatorship if that is necessary and I have requested that the Court do so on a number of occasions. But perhaps it is worthwhile to recall why we have visitors in guardianships rather than in conservatorships. In a conservatorship we are talking about protecting a person's funds. In a guardianship we are talking about protecting the person. Or, to put it in terms relative to the respondent or protected person, in a conservatorship we're talking about locking up the person's money. In a guardianship we're potentially talking about locking up the person. There's a higher liberty interest at stake when talking about locking up a person, thus the higher scrutiny that should come with judicial action to limit that person's individual liberty. While it would be a wonderful safeguard to have a visitor in every conservatorship case it is not, in my opinion, a safeguard that is worth creating such a problem in the system that no cases can be dealt with. Nor is it a necessity for constitutional protections.

Fifth, the current bill prohibits anyone other than court staff from selecting the visitor. As I mentioned above, in Marion and Polk counties the practice is to have the attorney submit to the Court an order appointing a visitor from the pre-approved list. I know many, if not most, of the individuals on that list and I know that they each have certain skill sets that make their contribution more or less valuable under specific circumstances. Some have counseling experience, some have experience with mental health issues, some with medical issues and others with legal issues. For example, the "typical" guardianship case involves an elderly person with dementia. But frequently we have guardianship cases for individuals who are not elderly but rather have a mental health/psychiatric issue or a traumatic brain injury rather than dementia. A person with experience in those issues, rather than geriatric issues, would have more insight and thus more to offer to the Court regarding the situation than a geriatrician. More to the point, if the Court's staff were to have to make that call (or, as it frequently happens, multiple calls) to find a visitor for the case I am quite certain that there are days that the entire probate department would spend

the entire day on the telephone looking for visitors to appoint. If the legislature chose to delegate funding to the hiring of qualified individuals to be court employees and visitors, the sole function of whom would be to act as court visitor, then this would not be an issue. But so long as the funds to hire dedicated court staff to fill that role are absent then this will continue to be an issue.

Lastly, the third section of the bill adds several responsibilities to the Court visitor's duties under ORS 125.160. Crucial to the language used is the word "determine." Traditionally the word "determine" is used to distinguish the role of the finder of fact from other obligations. In other words, the Court makes determinations on issues of fact and/or the law. Thus, when ORS 125.305 indicates that the court determines that the conditions for the appointment of a guardian have been established and then determines whether there is clear and convincing evidence for specific findings, that language triggers specific obligations on the part of the Court and grants the Court the authority to take action. Although the word is used elsewhere in the statutes pertaining to visitors it is not used to describe the ultimate issue. By using the word "determine" in the amendment to ORS 125.160 the implication is that the legislature has taken the fundamental legal issue away from the Court and placed it in the hands of the court visitor. That creates due process problems when the finder of fact is also the investigator with no obligation to consider multiple viewpoints as does the Court. It seems unlikely that is the legislature's true intention and more likely that the true intention is to have the visitor investigate those issues and provide an opinion to the Court on those questions. If the legislature wants the visitor's mandate to be to investigate and opine to the Court on the specified issues then that should be made clear. If the legislature wishes to create a potential for future conflict with the Court's authority and the appropriate due process requirements then keep the language as is.

Although Oregon's protective proceedings are not perfect I can say that having talked to practitioners from throughout the country we are far better than the majority and are the leading edge of protection in many instances. We take the protection of people with diminished capacity very seriously and our system reflects that. That proud tradition is one that should continue. But in our haste to provide even more protection we should not create a system that would be unusable or so expensive that the very people it is designed to serve cannot avail themselves of that protection. That, I believe, would be the result of enacting SB 503. In truth, if we wanted to ensure that the vulnerable are protected in our system we would need one fundamental reform: the appointment of counsel for every respondent in every protective proceeding.

There will always be situations that are unexpected or situations in which people prey upon the vulnerable. The best we can do is be aware and vigilant. Fortunately, I have had the privilege to work with good judges, lawyers, fiduciaries and visitors over the course of my career and although there are some bad situations that have occurred, those situations are usually sorted out quickly. That is primarily because of the intervention of the Court and the lawyers involved in the matter. I expect that will continue regardless of what happens with SB 503, but I do ask that you do not move forward with SB 503 and focus instead on providing meaningful assistance to the respondents and protected persons for whom the system exists to serve.

Very Truly Yours,

David L. Carlson
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