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February 28, 2017

STATEMENT IN OPPOSITION TO SB503

Presented by Heather O. Gilmore

- Attorney in Private Practice for more than 25 years
- Founding member of the Oregon State Bar Elder Law Section
- Chair, Marion County Visitor Improvement Project
- Member, Marion County Indigent Guardianship Fund Committee
- Frequent Volunteer Attorney for the Court and Charitable Organizations
- Frequent Author and Faculty for Oregon State Bar and Oregon Law Institute Continuing Legal Education
- 2004 Arc of Oregon's Sylvia Mann Capper Memorial Award for Commitment and Dedication to Oregonians with Developmental Disabilities, Recipient
- See Attached for Additional Credentials and Experience

Senator Floyd Prozanski
Chair Oregon Senate Judiciary Committee
and Members of the Oregon Senate Judiciary Committee

I. SUMMARY OF THE BILL.

A. Section 1 of SB503 does the following:

1. Eliminates the authority of the presiding judge in each county to establish the qualifications for serving as a visitor and the qualifications set forth in ORS 125.150(2) and ORS 125.165. The existing qualifications require a visitor to:
 - * Have no personal interest in the proceeding
 - * Have no financial interest in the proceeding
 - * Training and Expertise adequate to allow the person to appropriately evaluate the functional capacity and needs of a person.
 - * Training and expertise adequate to allow the person to conduct the interviews and make the recommendations required by ORS 125.150 and 125.155
 - * Communicate with, assess and interact with respondents and protected persons and to perform other duties required of a visitor (typically imposed by the court in the order appointing the visitor)
 - * Demonstrate sufficient knowledge of the law so as to be able to inform a respondent of the nature and effect of a protective proceeding
 - * Inform a respondent of the rights of the respondent in the protective proceeding
 - * Answer questions of a respondent or a protected person
 - * Inform fiduciaries concerning their powers and duties.

2. Transfers to the Judicial Department the authority to establish uniform visitor policies, including standards, protocols and procedures to be used by visitors in the performance of their duties.
3. Establishes the following qualifications for visitors:
 - * Be licensed and in good standing as a
 - Physician
 - Physician's Assistant
 - Psychologist
 - Marriage and Family Therapist
 - Professional Counselor
 - Clinical Social Worker
 - Registered Nurse
 - Nurse Practitioner
 - * Have at least two years relevant experience in the range of protective proceeding case types, including but not limited to experience in professionally working with people with mental health conditions, intellectual disabilities, developmental disabilities, and geriatric concerns.

AND

- * Successfully complete a mandatory training to be prescribed by the Oregon Judicial Department that includes education on:
 - Guardianships
 - Conservatorships
 - Decision Making Capacity
 - Fundamentals of Abuse and Neglect of vulnerable adults
 - The function of visitors for the court
4. Requires the court to oversee the visitors appointed by the court and ensure that the visitor meets the following requirements:
 - * The current requirements for visitors under ORS 125.150, 125.155, and 125.165
 - * Maintains any professional license or certification in good standing
 - * Immediately notifies the court of any change in status, including any certification or license investigation
 - * Undergoes a criminal background check
 - * Requires the Oregon State Police to furnish information to the court
 - * With the approval of the Oregon State Police, allows local law enforcement agencies to furnish information on the visitor to the court
 - * Requires the Oregon State Police to conduct a nationwide criminal records check through the FBI with fingerprints and a report to the court
 - * Addresses the issues with the fingerprint card
 - * Requires the criminal records check to be submitted to the court and keep them confidential, except that such records are allowed to be inspected by any party or attorney to a proceeding where the visitor has been appointed.

However the court may issue an order allowing the public to see the records after a showing of good cause.

- * The visitor must disclose to the court criminal convictions that occur after the criminal records check.

B. *Section 2 of SB503 does the following:*

1. Continues the mandate that a visitor be appointed in all guardianship cases.
2. Changes the current provision that the court, in its discretion, or any party upon request to the court, may request a visitor in a conservatorship case to mandate the requirement of a visitor in all conservatorship cases.
3. Continues the option of allowing the court to appoint a visitor during any guardianship or conservatorship proceeding. The current provision is found at ORS 125.160.
4. Prohibits the court from delegating the responsibility of selecting a visitor to an attorney or any other person than court staff. Imposes the additional responsibility on the court for the court to find the visitor.

C. *Section 3 of SB503 does the following:*

1. Details the list of things a visitor can do under ORS 125.160 to include tasks already authorized by ORS 125.160.

II. BACKGROUND REGARDING THE LAW AND PRACTICE.

A. *Acknowledgment of a Problem with the Current Visitor System.*

1. **Differences from County to County.** There are significant differences from county to county regarding the appointment of visitors. It is necessary to contact each county an attorney practices in to determine the court's process for appointing a visitor. In the larger metropolitan counties, the information is often on the court's website. In the smaller counties, it requires a phone call to court staff. In several smaller counties, court staff cannot call you back if it is a long distance call so attorneys have to repeatedly call. In some larger counties, including Marion County, the probate office does not have voice mail and emails are not accepted, except in specialized circumstances. This is to reduce the work load burden on court staff. It can be difficult to get answers to questions about the visitor appointment process. In this regard, some action from the trial court administrator's office would be helpful.
2. **Prior Attempt to Standardize Qualifications and Process.** Under ORS 125.165, presiding judges of each county were required to establish qualifications for visitors and standards and procedures to be used. This statute has been in place since 2003.

More than a year after the statute was implemented, some counties had still not implemented the order called for under ORS 125.165(1).

3. **Prior Attempt to Standardize the Form of Report.** Uniform Trial Court Rule 9.4 was adopted in approximately 2009. The rule provides:

“ 9.400 COURT VISITOR’S REPORT

A court visitor must file the court visitor’s report in an adult guardianship in substantially the form of UTCR 9.400.1 unless the judicial district in which the report will be filed has adopted another form by SLR or by Presiding Judge Order pursuant to ORS 125.165(1)(b) and the form adopted by that judicial district includes all of the information required by UTCR Form 9.400.1.

Attached is the UTCR Form 9.400.1 for your reference. More than a year after the UTCR was adopted, many non-metropolitan counties were still not using the mandated form of visitor’s report.

4. **Recognition that the Abilities of Metropolitan Counties Varies Greatly from the Abilities in Less Populated Counties.**

- a. **Marion County.** Some counties wanted a more comprehensive report for the visitor so by presiding judge order, those counties adopted a better form than the UTCR form. Attached for your reference is the mandated form of Visitor’s Report adopted in Marion County. It is a better form that was adopted due to the volunteer work of visitors, professional fiduciaries, judges, court staff and attorneys experienced with protective proceedings. Contemporaneously, by order of the presiding judge, Marion County established a process for the appointment, training and compensation of visitors. The current range of the hourly rate for Marion County visitors is \$60 to \$100. The visitors typically charge half their hourly rate for travel time and charge the IRS rate for mileage. The average visitor’s report will range in cost from \$400 to \$700. (If the facts of the case warrant a report that will cost in excess of the \$750, the visitor is expected to notify the Petitioner’s attorney of this with a courtesy call.) Filed with this statement is the video training Marion County requires all visitors to complete. In addition, there is a separate Marion County Handbook for Court Visitors. This handbook is available on the web at: <http://www.courts.oregon.gov/Marion/Services/pages/visitors.aspx>. Several medium sized counties including Polk County simply adopted Marion County’s process, training and report. Several mid valley counties use the Marion County Visitor’s List as a resource for their own visitors.

- i. At the time Marion County was working on the visitor process, the Visitor Improvement Project Committee asked the court

administration for assistance with the collection and payment of the visitor's fees. The court administration understood the issue, but did not believe that they had adequate resources to manage the matter.

ii. At the time Marion County was working on the visitor process, the Visitor Improvement Project Committee asked the court administration for assistance with selling/distributing the training video for visitors. The court administration understood the issue, but did not believe that they had adequate resources to manage the matter. At this time, I am in possession of the training CD's, the proceeds from the sale of the CD's are in my client trust account. I regularly report to the primary probate judge on the status of the account. It would be helpful for the court to take over this process, but they simply did not have the resources to assist. The fact that the court does not provide assistance is a problem. However, the lack of assistance is due to lack of funding.

iii. At the time Marion County was working on the visitor process, the Visitor Improvement Project Committee asked the court administration to consider delegating the responsibility for locating and assigning a court visitor in each guardianship case. The court administration in Marion County did not have the manpower to handle this time consuming job. Marion County does have a probate department that has more than one employee. The number of employees has varied based on budget restraints. Most counties outside of the metropolitan areas only have one person in the records section who acts as the probate clerk. Although the Metropolitan counties do provide this service, it is substantially easier for them because there are so many cases filed that the number of visitors is very small and those visitors treat the work like a full time job. Marion County did not have the volume of cases necessary to have two qualified persons available that could treat the role of a visitor like a full time job.

b. **Washington County.** The visitor is selected and appointed by the court. Attorneys are prohibited from communicating with the visitor. The visitor's fees are standardized and relatively inexpensive. The number of visitors is limited. However, due to the volume of cases, there is sufficient work for those visitors to keep them busy enough to make a living from the job which also makes them more readily available.

c. **Multnomah County.** The court coordinates the appointment of the visitor. The number of visitors is limited. The visitor's fees are paid to the court. It

is a flat fee of \$550. The visitor may request the court to increase the compensation for good cause.

- d. **Lane County.** Lane County helps with the assignment of the visitor and caps the visitor's fee at \$350.
- e. **Clackamas County.** The Clackamas County Circuit Court's website reflects that they have four persons approved as visitors. Some of the court approved visitors are the same people as the approved visitors in Multnomah and Washington Counties. The Clackamas County Court's website does not contain obvious information about the process for the appointment of the visitor or the fees of the visitor.

5. **Difficulties Locating Qualified Visitors Outside of the Metropolitan Areas.** The process of finding a visitor can be time consuming and there is a short window to locate and appoint a visitor. The visitor's report must be filed within 15 days after appointment in a regular guardianship. In a temporary guardianship used for true emergencies, the visitor is required to conduct the interview of the respondent within 3 days and file the visitor's report within 5 days. Court staff in most counties do not have the time or flexibility to call around and find visitors available for the time frames set forth in the statute. This has to be done before the petition is filed or immediately subsequent to the filing of the petition because the visitor is typically appointed contemporaneously with the filing of the petition or shortly thereafter. Unless there is the potential for full time employment, it is necessary to have several choices to select from because those persons identified and appointed as visitors need to act promptly. In many counties outside the metropolitan area, they have only one or two persons to select from and those persons may have sporadic availability.

III. FINANCIAL IMPACT STATEMENT FOR SB503.

The financial impact statement for the bill needs to take into consideration the below factors that require action by the employees of the judicial department, the Oregon State Police and the trial court for each county in Oregon.

- A. **Costs to the Court System.** The services that the court is required to perform are outlined in I.A.4 above and I.B.2. above. This includes soliciting qualified professionals to serve as visitors for the limited cost, within the time restrictions, who are willing to participate in the mandatory training and comply with the police background checks. It also includes the expenses of bookkeeping for the fees, coordinating the appointment and availability of visitors within the statutory time frames, and determining that the visitors are in compliance and continue to be in compliance with the qualifications set forth in the statute. Where will the funding for this additional responsibility on the courts and court staff come from?

- B. Costs to the State Court Administrator.** The Oregon Judicial Department (assumed to be the state court administrator's office) is required to establish uniform visitor policies, including standards, protocols and procedures to be used by visitors in the performance of their duties. In addition, the judicial department is charged with the obligation to prepare materials for and conduct mandatory training statewide which includes training on Guardianships, Conservatorships, Decision Making Capacity, Fundamentals of Abuse and Neglect of vulnerable adults, and the function of visitors for the court. If the state court administrator's office is required to establish the protocol, train and set the plan in motion, is there funding for the project so that the state can accomplish this mandate?
- C. Costs to the Oregon State Police.** Background checks will be required for anyone who wants to serve as a visitor. Then, nationwide background checks will be required. The state police will also need to coordinate with court staff. Is funding available to the state police that can be sufficiently restricted to accomplish these tasks?
- D. Financial Impact to Others.** In addition to the costs to the state, there are other financial consequences associated with this legislation. The qualifications required under the statute do, in theory, provide extra protections, but qualified professionals also increase the cost of the services of the visitor.
1. **Cost to Parties.** Currently, the cost of a visitor is paid by the petitioner. The petitioner may ask the court for reimbursement of the visitor's fee from the assets of the protected person - IF the protected person has assets.
 - a. In conservatorships where the respondent has assets, the cost is of limited concern. However, for cases in smaller counties where there may not be persons with the appropriate qualifications able and willing to serve, the cost of travel to bring of out of area qualified visitors in will increase the expense to non-metro citizens.
 - b. In guardianships of adult intellectually disabled persons or developmentally disabled persons, the cost is typically shifted to the family. Many families do not have the resources for the attorney fees, court filing fees and current visitor costs. Will these families be prevented from accessing the assistance of a protective proceeding due to the additional cost? Or, will these families attempt to shift the cost by increasing social services time in ISP's to work around the problems, requests for court commitment under the OAR's, or the costs to society of not assisting the person.
 2. **Increased Burden on the Pro Bono System.** The proposed statute adds a requirement that visitors be appointed in all conservatorships. This will increase the number of visitors required. The courts in many counties are

already literally begging the professionals to donate their time for those petitioners and respondents in cases where persons are at physical and financial risk and who cannot afford the cost of the proceeding. It is true that a conservatorship estate will generally have income or resources, but often times the purpose of the conservatorship is to assist the person to utilize what little funds they have to pay for the cost of care and then apply for Medicaid. In other cases, the respondent cannot effectively manage a limited monthly income like PERS. In those cases, the income may be enough to protect, but not enough to pay for the cost of obtaining the protection. The current system is already in crisis in finding funds for visitors for low income and indigent persons for guardianships alone.

IV. SB503 DOES NOT RESOLVE THE PROBLEM WITH THE VISITOR SYSTEM. SB503 EXACERBATES THE PROBLEM.

- A. An Unfunded Mandate is Designed to Fail.** First, there is no question that Due Process protections for the respondent--particularly in light of the civil liberties at stake are important. Currently, if a Petitioner requests a guardian to be appointed, assuming the visitor's report reflects no issues with the proposed guardian and no one objects, the guardian generally will be appointed by the Judge. The sole "actual review" comes from the Court Visitor. There is also no question that there should be assurance that respondents throughout our state meet with Court Visitors who are qualified to perform the function needed. The current ORS 125.165 has vested this responsibility with the presiding judge of each county. If a presiding judge is not complying with the statutory mandate under the current statute, then raising the bar on visitor qualifications and requiring the court to have even more responsibility without funding for the services for the statutory mandate is a plan designed to fail.
- B. Lack of Resources in Non-Metro Counties.** If Curry County does not have a visitor that meets the qualifications of the new statute, the court system is going to have to figure out how to meet the needs of the Curry County residents. Where will the funding come from to create this resource? If the funding is not provided, how will residents of Curry County, with or without resources, be able to utilize the benefits of protective proceedings. Setting the bar too high on the qualifications for a visitor may eliminate the ability to effectively use protective proceedings in all areas of the state.
- C. No Money.** The goals of providing higher standards and qualifications for visitors is not a bad idea. It's just impractical and unrealistic. There is just no money from the state or many needy clients that can support the cost. If the legislature is going to adopt unfunded mandates to provide protections for respondents in protective proceedings, the legislature should also finally recognize the need for court appointed counsel for each respondent in a protective proceeding to provide true, effective assistance in proceedings where civil liberties are at issue.

- D. Equal Protection.** If the civil liberties and protections at stake are so great, then the legislature cannot fail to provide a remedy for the needs of all its citizens. Legislation should not be adopted that only provides a remedy for citizens who can afford the cost of accessing the justice system and the fees of a visitor. The advocates for the bill agree that a fund should be created for those who are most vulnerable and destitute. There is no discussion of this need for the fund in the bill. If the advocates recognize the need for this fund, the bill should include options to pay for this and the financial impact statement should include this factor.

V. ALTERNATIVES AND POTENTIAL WAYS TO IMPROVE SB503

- A. Less Expensive Alternative - Allocate Funds to Address the Current Mandate.** It would be a less expensive act for the legislature to fund the state court administrator's office to follow up with presiding judges and provide them with assistance to implement the current standards. It's a less than perfect system. However, until there is funding available for this less expensive mandate, additional more expensive mandates should not be adopted.

B. Modify the Qualifications.

1. Allow Retired and Professionals Not Practicing to Serve as Visitors. Section 1, (2)(a) - lines 13 to 15 require the visitor to be in good standing with the professional board for the professional. The cost of remaining active in a professional practice is significant. Modify line 13 to allow retired or professionals no longer practicing to serve as visitors.
2. Expand the Types of Professionals Qualified to Serve. Allow appropriately experienced attorneys retired or active to serve as visitors. In conservatorship cases, allow appropriately experienced, trained accountants to serve as visitors. In reality, many attorneys or accountants are far better educated and skilled at identifying financial abuse than a marriage and family therapist or a RN. Attorneys with proper experience are better able to explain the impact of the guardianship or conservatorship to both respondents and fiduciaries. Many attorneys have substantial experience in dealing with the factors listed in Section 1.(2)(b).

C. Modify the Language regarding Court Oversight and the Recommendations of the Visitor.

Allow the Local Courts Clear Discretion in the Persons Appointed and the Conduct of the Visitor.

1. **Judicial Discretion.** A person who meets the qualifications under the proposed bill can have poor judgment, lack insight or come to conclusions or fail to come to conclusions that are obvious. A diploma, work experience and a class are not sufficient to ensure that visitors appointed are worthy of the trust of the court or the parties.
 2. **Clarify Ambiguous Language.**
 - a. **Removal of Visitors.** Include a provision in the bill that allows the local court to remove a visitor from service in the particular county. The language mandating that the court “oversee” visitors appointed is ambiguous about what authority the local court has. If the court can “oversee” the visitor, but not fire the visitor, what good is the oversight function.
 - b. **Clarify that the Visitor Makes Recommendations and Expresses Opinions.** Section 3.(2)(a) and (c) of the bill provides that the visitor is to “*determine*” certain ultimate facts that are reserved to the court in other provisions of Chapter 125. Modify the language at Page 4, line 41 to state: “*Provide an opinion*” in lieu of the word “*Determine.*” Page 4, line 44 should be modified to read: “...of a fiduciary *and make a recommendation as to whether* the fiduciary remains suitable and qualified to serve as the fiduciary of the protected person.” Page 5, line 1 should be modified to replace the word “*Determine*” with the phrase “*Provide an opinion on...*”
 - c. **Establishment of Policies.** On page 1, line 8-10, it is unclear who or how the bill envisions the establishment of policies. In reading the bill, it is important to include the idea that the State Court Administrator and a committee should work on this issue. Currently, there is no probate or protective proceeding committee within the areas of practice identified by the trial court administration. There is a subcommittee of the Family Law group that is pegged to be the probate committee. Probate and divorce are different. The priorities and goals of the probate and protective proceeding area of the law take a regular back seat to family law issues. There is a clear problem because the prior attempts to address visitor issues have not been properly implemented. The probate section should have its own standing committee to develop policies and procedures in probate practice, including the policies and procedures related to visitors.
- D. Modify the Bill to Permit the Court to Exercise Discretion on Whether to Appoint a Visitor for Conservatorships of Minors.**

If a conservatorship is requested for a minor child, it is typically because the minor has been injured or the minor has inherited assets. The mandated form of the visitor’s report, the questions for the respondent minor, and the issues raised, are not

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applicable or relevant to conservatorships for minors. The current form of report is a waste of time and money for minor conservatorships. The qualifications under the bill do not take into consideration training or knowledge regarding financial issues affecting minors. The court should be able to take into consideration in the decision of whether to appoint a visitor for a minor respondent the amount of money at issue, the potential for restrictions on the funds, and the needs of the minor. For example, if a minor is injured in a car accident and the settlement is \$50,000 that the minor does not currently need, the funds are restricted by court order and the proposed conservator is the minor's parent, the cost of the visitor's report that is not relevant to the issues is something the court should be able to waive.

I have significant experience on working on legislation in committee. I am willing to serve on a workgroup to help identify the actual fiscal impact of this bill, revisions for clarity and addressing the needs of counties outside of the metropolitan area.

Sincerely,



HEATHER O. GILMORE

HG: gh
Encls.

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Heather O. Gilmore's practice is dedicated to estate planning, estate administration, probate, and elder law. Her practice emphasizes complex estate administration, representation of corporate, professional and individual fiduciaries, and practical problem solving for complex issues that arise in guardianships, conservatorships, estates and trust administration. Ms. Gilmore is a frequent speaker and author on guardianships, estate planning, estate administration, trust administration, and elder law for the Oregon State Bar, Willamette University College of Law, Oregon Law Institute, and charitable organizations.

Education

Institute for European Studies, Vienna, Austria	1985-1986
University of Redlands, BA, Political Science and History Redlands, California	1987
Willamette University College of Law, JD. Salem, Oregon	1990

Articles, Publications and Presentations

Planning Issues for Couples with Modest Estates, Oregon State Bar Elder Law CLE, Portland, Oregon, October 2, 1992.

Planning Ahead, Elder Law Oregon State Bar Desk Book (Lake Oswego: Oregon State Bar), 2000.
Supplement, Planning Ahead, Elder Law Oregon State Bar Desk Book (Lake Oswego: Oregon State Bar), 2005.

Administering Alternatives to Probate, Oregon Law Institute Probate CLE, Portland, Oregon, February 23, 2001.

Using Revocable Living Trusts in Estate Planning, Oregon State Bar Estate Planning CLE, Portland, Oregon, December 5, 2002.

Revocable Trusts Revisited, Multnomah County Bar Association CLE, Portland, Oregon, January 28, 2003.

Late Night Drafting Errors with Gilmore and Smith; Errors Generally Made Between the End of Letterman and Before Dawn, Willamette Valley Estate Planning Council, Salem, Oregon, April 2005.

Palliative Care and Legal Issues, Salem Hospital Kinsman Conference, Salem, Oregon, October 2005.

Oops, I Didn't Think of That: UTC Provisions Applicable to Disability Planning; Oregon Law Institute Estate Planning CLE, Portland, Oregon, December 1, 2006.

The Oregon Uniform Trust Code: Happy Anniversary Baby, Got You on My Mind, Willamette Valley Estate Planning Council, Salem, Oregon, February 15, 2007.

The Big What If's. . . ., Rett's Syndrome Conference, Seaside, Oregon, August 14, 2007.

What Rules Control the Process of Setting Attorney Fees in Probate Matters and Are They Good Rules, Oregon Law Institute Probate CLE, Portland, Oregon, March 14, 2008.

Communicating Effectively with Impaired Clients and Beneficiaries, Oregon State Bar Elder Law CLE, Portland, Oregon, October 3, 2008.

UTC Provisions as They Apply to Disability Planning, Oregon Law Institute Estate Planning CLE, Portland, Oregon, October 24, 2008.

Is Your Client Losing It? Willamette Valley Estate Planning Council, Salem, Oregon, April 20, 2010.

Trust Repair, Oregon State Bar Elder Law Un-CLE, Eugene, Oregon, May 2010.

Trust Repair, Oregon State Bar Estate Planning Annual CLE, Portland, Oregon, November 18, 2011.

Trust Repair, Modifications and Conversions, Part I, co-authored with Kathleen Evans, Oregon State Bar Estate Planning and Administration Section Newsletter, Portland, Oregon July 2012.

Trust Repair, Modifications and Conversions, Part II, co-authored with Kathleen Evans, Oregon State Bar Estate Planning and Administration Section Newsletter, Portland, Oregon January 2013.

Trust Distribution Issues, Oregon State Bar Elder Law UnCLE, Eugene, Oregon, May 2, 2014.

Ethics and Elders: Confidentiality and Conflicts, Co-authored with Sam Friedenberg and Mark Williams, Oregon State Bar Elder Law Annual CLE, Portland, Oregon, October 3, 2014.

Guardianships and Mental Health, Oregon State Bar Elder Law UnCLE, Eugene, Oregon April 24, 2015.

Planning Ahead, Elder Law Oregon State Bar Desk Book (Lake Oswego: Oregon State Bar), 2016, *Planning Ahead*, Elder Law Oregon State Bar Desk Book (Lake Oswego: Oregon State Bar), Publication Pending.

Trust Modifications and Terminations, Oregon State Bar Annual Estate Planning CLE, Portland, Oregon Scheduled November 2015, Publication Pending.

Professional and Volunteer Activities

Oregon State Bar, Member since 1990

Oregon State Bar, Estate Planning Section, Member since 1990

Oregon State Bar, Elder Law Section, Executive Committee *Charter Member*

Oregon State Bar, Elder Law Section Executive Committee, Past Member

Oregon State Bar, Elder Law Section Legislative Committee, Past Member

Oregon State Bar, Elder Law Section Continuing Education Committee, Past Chair and current Member

Oregon State Bar, Oregon Uniform Trust Code Study Committee, Formation, Modification and Creditors Subcommittee, Member

Willamette University College of Law, Adjunct Professor Trusts and Estates, Spring 2015

Joint Work Group for Power of Attorney Legislation, Oregon State Bar & Oregon Bankers Association, Member

Joint Task Force for Natural Resource Credit for Inheritance Tax, Oregon State Bar and Oregon Board of Accountancy, Member

Oregon Law Commission, Probate Modernization Work Group, 2013 to current, Member

Marion County Bar Association, Member

Marion County Court, Visitor Improvement Project, Chair

Marion County Bar Association and Bench, Bench Bar Practices and Procedure Committee, Member

Willamette Valley Estate Planning Council, Member

Arc of Oregon, Guardianship, Advocacy and Protection Committee, Past Member

Arc of Oregon, Oregon Special Needs Trust Committee, Past Member

Mary Leonard Legal Society, Lawyers Against Hunger, Volunteer

Marion Polk Food Share, Sustainer Campaign, Volunteer

Marion Polk Legal Aid Society, Volunteer

Marion County Probate Practice Group, Chair

Marion County Bar Association, 1992 Volunteer of the Year, Recipient

2004 Arc of Oregon's Sylvia Mann Capper Memorial Award for Commitment and Dedication to Oregonians with Developmental Disabilities, Recipient

Representative Clients*

Bank Trust Companies in Oregon and Washington

Professional Fiduciaries

Large Quasi-Governmental Trust Administrator

Certified Public Accountants named as Fiduciaries for Clients

Numerous Private Individuals

Incapacitated or Financially Incapable Persons for Whom the Court on its Own Motion Appoints

Counsel in Complex Contested Matters

*Names available upon request

Professional References

Jennifer B. Todd, Former Pro-Tem Judge for Probate, Marion County Circuit Court and Former Professor of Legal Research and Writing, Willamette University College of Law, Salem, Oregon

Barbara Smith, Managing Partner, Heltzel Williams Law Firm, Salem, Oregon

Richard Trout, CFO West Coast Trust Company, Portland, Oregon (retired)

Charlie Flanagan, CFO Mallorie's Dairy, Inc., Silverton, Oregon (retired)

Thomas McGirr, Senior Vice President of West Coast Trust Company, Salem, Oregon

John English, CPA, Salem, Oregon

Karen Lord, CPA and Professional Fiduciary, Salem, Oregon

Hobbies and Interests

Swimming, Wake Surfing, Wake Boarding, Cooking and Kids.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR _____ COUNTY
Probate Department

In the matter of the Guardianship of: _____) Case No _____
 _____)
 Respondent.) **COURT VISITOR'S REPORT**
) **ADULT GUARDIANSHIP**

I, _____, have been appointed as court visitor in the above-mentioned proceeding.

I. EXPRESSED WISHES OF RESPONDENT / PROCEDURAL RIGHTS **Yes** **No**

- A. Does the Respondent object to the appointment of a fiduciary?
- B. Is the Respondent willing to attend any hearing that may be scheduled?
- C. Does Respondent prefer that another person act as fiduciary?
 The name, address, telephone number, and proposed role of the person of preference is:

- D. Does the Respondent wish to be represented by counsel?
 If so, comment on whether Respondent has named an attorney or wishes the court to appoint an attorney.

- E. If Respondent objects to the appointment of a fiduciary, does the Respondent understand that a hearing will be held? Not Applicable

- F. If a hearing is scheduled, is the Respondent willing to attend a hearing or to talk to the judge by telephone during the hearing?

- G. Does the Respondent wish for the visitor to interview particular individuals?

If so, please list the individuals' names, whether they were interviewed, and the visitor's reason for not interviewing, if applicable:		
Name & Relationship	Interviewed?	If no, visitor's reason:
	Yes No	
	<input type="checkbox"/> <input type="checkbox"/>	
	<input type="checkbox"/> <input type="checkbox"/>	
	<input type="checkbox"/> <input type="checkbox"/>	

- H. Visitor's comments or any expressed communication of Respondent that related to any of the above questions:

II. CAPACITY

A. Discuss any inability of the Respondent or impairments of the Respondent which might impact their ability to provide for their needs with respect to physical health:

B. Discuss any inability of the Respondent or impairments of the Respondent which might impact their ability to provide for their needs with respect to food/clothing concerns:

C. Discuss any inability of the Respondent or impairments of the Respondent which might impact their ability to provide for their needs with respect to shelter:

D. Please comment if the investigation has determined that the Respondent is unable to resist fraud or undue influence:

E. Are these findings as indicated in "A" and "B" above part of an overall pattern of inability? If YES, please describe: Yes No

III. EVALUATION OF RESIDENCE, HEALTH CARE, AND SOCIAL SERVICES RECEIVED IN PAST YEAR

A. In what type of residence does Respondent live and how long has he / she lived there? Describe:

B. Is the Respondent able to live at this residence while under guardianship?

C. As per the petitioner, what health and social services or alternatives to guardianship have been provided to the Respondent during the year preceding the filing of the petition (if known)?

IV. FINDINGS AND RECOMMENDATIONS

Yes No

- A. Are the facts stated in the petition substantially correct?
- B. Have alternatives to guardianship/conservatorship been considered? E.g., Advance Directive for Health Care, Revocable Trust, Family Assistance, and/or a Durable Power of Attorney? If YES, please describe:

- C. Is the Respondent so impaired that he/she is unable to make reasoned decisions about his/her safety?
- D. Is the appointment of a fiduciary necessary?
- E. Is it appropriate to limit the scope of the fiduciary's appointment? If YES, for what limited purpose(s) is a fiduciary necessary? Not Applicable

- F. Is the nominated fiduciary(ies)
- 1. Qualified to serve?
 - 2. Suitable to serve?
 - 3. Willing to serve?

If NO, please describe:

- G. Is there is an objection to the petition from parties other than the Respondent? If yes, please describe the issues?

- H. If you have identified anyone else you believe is more appropriate for appointment as guardian and/or conservator, please provide the name and reasons for the conclusion:

- I. If the Respondent does not wish to be represented, is counsel recommended to protect Respondent's interests or to help resolve issues in the case?

If YES, please describe:

J. Should there be any limitations to the scope or duration imposed on the proposed fiduciary(ies)? If YES, please describe: Yes No

K. Additional comments that might assist the court and all persons interested in this matter:

V. All of the people interviewed by the visitor while compiling this report are listed below:

Name	Address & Phone	Relationship	Date Interviewed

I hereby declare that the above statement is true to the best of my knowledge and belief and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Court Visitor Name

Signature of Court Visitor

Date

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IN THE CIRCUIT COURT OF STATE OF OREGON
FOR MARION COUNTY

In the Matter of Establishing Qualifications)
and Standards for Court Visitors) PRESIDING JUDGE ORDER
) 17MARPJO No. 17-30
)
)

Pursuant to ORS 125.165 and 125.170(2),

IT IS HEREBY ORDERED THAT:

- 1) Visitors shall have the following qualifications:
 - A) A license in good standing in any state as any of the following: licensed professional counselor, licensed marriage and family therapist, licensed clinical social worker, registered nurse, or attorney; or
 - B) Post-graduate degree (e.g. MSW, MSN, other master's degree, J.D.) and at least two years of relevant experience.
 - C) The presiding judge or his or her designee may determine whether the proposed visitor's experience is sufficient.
 - D) No felony convictions and no misdemeanor convictions for crimes involving truth or veracity.
- 2) Visitors shall have the following training:
 - A) Visitors shall view the Marion County Visitor Improvement Project DVD and read the Marion County Handbook for Visitors. After viewing the DVD and reading the Handbook, the visitor shall certify to the court, in a form provided by the court, that he or she has done so.
- 3) The presiding judge and his or her designee shall have the sole or absolute discretion to place a person on the approved visitor's list or remove a person from the approved visitor's list.

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- 4) Visitors shall utilize the following standards and procedures in the performance of their duties:
- A) Visitors shall interview persons deemed by the visitor to possess relevant information;
 - B) Visitors shall review relevant records regarding the respondent; to the extent such records are available;
 - C) Visitors shall comply with ORS 125.150(3) - (10);
 - D) The visitor's report shall comply with ORS 125.1522(2);
 - E) The visitor's report shall be in the form prescribed by the Marion County Circuit Court; and
 - F) The visitor shall be present at any hearing on objections to the appointment of a fiduciary as required by ORS 125.55(5). The visitor's fee for testifying shall not exceed the visitor's normal hourly rate.
- 5) Visitors may charge an hourly rate for conducting interviews and preparing visitor's reports. The hourly rate shall not exceed \$125.00. In addition, visitors may charge mileage at the IRS rate and may charge for travel time in an amount not to exceed one-half of their normal hourly charge.
- 6) This order supersedes all prior Presiding Judge Orders regarding Court Visitor's Qualifications and Standards.

Signed: 2/13/2017 10:33 AM



Circuit Court Judge Tracy A. Prall

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
MARION COUNTY
Probate Department**

[Insert caption from Petition]

Case No. [Insert case number from
Petition]

COURT VISITOR'S REPORT

The undersigned, [insert Visitor's name], was appointed as Court Visitor on [insert date of order appointing visitor] in the above-named proceeding. *Select one of the following options:*

Option A: The Visitor does not recommend that a fiduciary be appointed for the Respondent.

Option B: The Visitor recommends that [insert names of all persons nominated in Petition] be appointed as [insert titles of all fiduciaries requested in Petition] for the Respondent, as proposed in the Petition.

Option C: The Visitor recommends that a [insert titles of all fiduciaries the Visitor recommends to be appointed] be appointed for the Respondent, but does not recommend the appointment of [insert names of persons nominated in the Petition] as proposed in the Petition.

Option D: [Describe other recommendations besides those listed, as appropriate.]

1. EXPRESS WISHES OF RESPONDENT AND PROCEDURAL RIGHTS

For each question in this section, fully describe any express communication made by the Respondent. Also include observations about the communication.

1(a) Does the Respondent object to the appointment of a fiduciary? Unk* No Yes

1(b) Does the Respondent object to any nominated fiduciary? Unk* No Yes

1(c) Does the Respondent prefer that another person act as fiduciary?

*Unk—Respondent is unable to respond, or response is inconsistent, so the answer is unknown.

Unk* No Yes

Provide below the name, address, telephone number, and proposed role of any person preferred by the Respondent.

1(d) Does the Respondent wish to be represented by counsel? Unk* No Yes

If the Respondent wishes to be represented by counsel, give the name of any attorney the Respondent has retained, or the Respondent wishes to retain.

If the Respondent has not retained counsel, describe whether the Respondent desires the Court to appoint counsel.

1(e) If the Respondent does not plan to retain counsel and has not requested the appointment of counsel by the Court, does the Visitor believe that appointment of counsel (1) would help to resolve the matter or (2) is necessary to protect the interests of the Respondent?

N/A No Yes

If the answer is yes, explain.

1(f) If the Respondent objects to the appointment of a fiduciary, does the Respondent understand that a hearing will be held? Unk * N/A Yes No

1(g) Is the Respondent able to attend a hearing? Unk * Yes No

If the answer is no, explain.

If the Respondent is able, is the Respondent willing to attend a hearing?

Unk * Yes No

If the Respondent is unable or unwilling to attend a hearing, is the Respondent able and willing to talk to the Judge by telephone during the hearing? Unk * Yes No

*Unk—Respondent is unable to respond, or response is inconsistent, so the answer is unknown.

1(h) State below the Visitor's comments, observations, concerns, and suggestions regarding the above questions. Note any needed accommodations or security concerns that may be an issue if a hearing occurs.

2. BACKGROUND AND INTERVIEWS WITH INTERESTED PERSONS

2(a) **Brief social history.** Provide Respondent's age and date of birth, and a brief history of Respondent's education, work experience, locations, marriages, children, family, and so on.

2(b) **Brief legal history.** Provide name of Petitioner, name and date of appointment of any court-appointed fiduciary, and name of each fiduciary nominated in the Petition.

2(c) **Background of nominated fiduciary.**

- (1) Has any person nominated to be a fiduciary been convicted of a crime?
No Yes
- (2) Has any person nominated to be a fiduciary filed for or received protection under the bankruptcy laws?
No Yes
- (3) Has any person nominated to be a fiduciary had a license revoked or canceled that was required by the laws of any state for the practice of a profession or occupation?
No Yes

If the answer to any question is yes, explain.

Describe below the age, employment, and recent interaction with Respondent for each nominated fiduciary.

2(d) **Chronological summary.** Provide a chronological summary of the circumstances leading up to the alleged need for the appointment of a fiduciary. The summary should include a description of interviews with interested persons, including the Petitioner and each nominated fiduciary.

*Unk—Respondent is unable to respond, or response is inconsistent, so the answer is unknown.

3. CAPACITY

3(a) Describe the interview with the Respondent. Include the setting, who was present, and the Respondent's physical appearance and demeanor. Identify and describe any tools used in the assessment.

3(b) Provide a summary of the Visitor's impressions from the interview that are not described elsewhere.

3(c) Describe any inability of the Respondent to provide for his or her needs with respect to physical health, food, clothing, and shelter.

3(d) Describe any inability of the Respondent to resist fraud or undue influence.

3(e) Is the Respondent's inability to provide for his or her needs an isolated incident of negligence or improvidence? No Yes

Does a pattern exist regarding Respondent's inability to provide for his or her needs?

Yes No

Explain the answers.

4. EVALUATION OF RESIDENCE, HEALTH CARE, AND SOCIAL SERVICES RECEIVED IN PAST YEAR

4(a) Describe the residence where the Respondent has lived most recently and how long the Respondent has lived there. Also provide available information about any other residence where

the Respondent lived during the year preceding the filing of the Petition and how long the Respondent had lived there.

4(b) Is the Respondent able to live at the current residence while under guardianship? Yes No

Comments:

4(c) Describe the Respondent's current location, if different from the answer given in 4(a) about Respondent's current residence. N/A

4(d) Describe the health or social services provided to the Respondent during the year preceding the filing of the Petition (if the Petitioner or others have information as to those services).

4(e) Describe the alternatives to guardianship considered by the Petitioner for the Respondent, and the reasons why those alternatives are not available.

4(f) State below the Visitor's comments, observations, concerns, and suggestions regarding the place of residence and health or social services.

5. FINDINGS AND RECOMMENDATIONS

5(a) Are the allegations stated in the Petition substantially correct? Yes No

If the answer is no, explain.

5(b) **Incapacity.** Is the Respondent's ability to receive and evaluate information effectively or to communicate decisions impaired to such an extent that the Respondent presently lacks the capacity to meet the essential requirements for the Respondent's physical health or safety? ("Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, and other care without which serious physical injury or illness is likely to occur.) Yes No

If the answer is yes, describe (1) the impairment and its likely cause, and (2) the actions the Respondent is unable to take to provide for his or her health care, food, shelter, clothing, personal hygiene, and other care.

5(c) **For temporary guardianship (immediate and serious danger).** In addition to answering "yes" to the previous question, is there an immediate and serious danger to the life or health of the Respondent, and does the welfare of the Respondent require immediate action?

N/A Yes No

If the answer is yes, describe (1) the immediate and serious danger, and (2) why the Respondent's welfare requires immediate action.

If the answer is no, explain why.

5(d) **For temporary guardianship (purpose and duration).** Describe below the specific purpose for the appointment of the temporary guardian and the recommended duration of the appointment (not to exceed 30 days). N/A

5(e) **For conservatorship (financial incapability).** Is the Respondent unable to manage his or her financial resources effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance? ("Manage financial resources" means those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.)

N/A Yes No

If the answer is yes, describe (1) the reason why the Respondent is unable to manage financial resources, and (2) the financial management actions the Respondent is unable to take.

If the answer is no, explain why.

5(f) **For temporary conservatorship (immediate and serious danger).** In addition to answering “yes” to the previous question, is there an immediate and serious danger to the estate of the Respondent, and does the welfare of the Respondent require immediate action?

N/A Yes No

If the answer is yes, describe (1) the immediate and serious danger to the Respondent’s estate, and (2) why the Respondent’s welfare requires immediate action.

If the answer is no, explain why.

5(g) **For temporary conservatorship (purpose and duration).** Describe below the specific purpose for the appointment of the temporary conservator and the recommended duration of the appointment (not to exceed 30 days).

N/A

5(h) **Necessary.** Is the appointment of a fiduciary necessary as a means of providing continuing care and supervision of the Respondent?

Yes No

If the answer is no, explain why.

5(i) **Suitability of fiduciary.** Is each nominated fiduciary suitable, qualified, and willing to serve?

Yes No

If the answer is no, explain why.

5(j) If the Visitor is aware of an Objection to the Petition filed by parties other than the Respondent, describe the issues, if known to the Visitor.

5(k) If the Visitor has identified anyone else the Visitor believes is more appropriate for appointment as a fiduciary than any person nominated in the Petition, provide the name and reasons for the conclusion.

--

5(l) Regarding the requirement that the guardianship order be no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the person, does the Visitor recommend any limitations to the scope or duration of the authority of any proposed fiduciary?

N/A No Yes

If the answer is yes, explain why and describe the recommended limitations.

--

5(m) Is there any need for further evaluation? No Yes

If the answer is yes, explain why and recommend the scope and timing of future evaluation.

--

5(n) State below additional comments that might assist the Court and persons interested in this matter.

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6. SOURCES OF INFORMATION

6(a) All of the people the Visitor interviewed while compiling this report are listed below.

Name of Respondent	
Address	
Phone Number	
Relationship to Respondent	Self
Date Interviewed	

Name of Petitioner	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name of Nominated Guardian	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name of Nominated Conservator (if any)	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

6(b) The Visitor also reviewed the documents or records described below.

--

STATE OF OREGON)
) ss.
 County of Marion)

Affirmation pursuant to UTCR 2.120

I am the Court Visitor in the above entitled matter. I declare that the foregoing Court Visitor's Report is true and accurate to the best of my knowledge and belief and I understand that it is made for use as evidence in court and is subject to penalty for perjury.

DATED this _____ day of _____, 2009.

Court Visitor

cc:

HR 343

Senate Bill 503

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Judiciary)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Directs Judicial Department to establish uniform visitor policies. Specifies qualifications and requirements for visitors appointed in protective proceedings. Requires visitors to undergo criminal records check before appointment. Prohibits court from delegating responsibility for selection of visitor to attorneys, parties and other persons.

A BILL FOR AN ACT

1
2 Relating to visitors in protective proceedings; amending ORS 125.150, 125.160 and 125.165.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 125.165 is amended to read:

5 125.165. (1) [*A presiding judge shall by court order establish:*]

6 [*(a) Qualifications for persons serving as visitors for the court, in addition to those qualifications*
7 *established by this section; and]*

8 [*(b) standards and procedures to be used by visitors in the performance of their duties]* **The Ju-**
9 **dicial Department shall establish uniform visitor policies, including standards, protocols and**
10 **procedures to be used by visitors in the performance of their duties.**

11 **(2) A visitor must have the following qualifications in addition to the requirements set**
12 **forth in subsection (4) of this section:**

13 **(a) Be licensed and in good standing as a physician, physician assistant, psychologist,**
14 **marriage and family therapist, professional counselor, clinical social worker, registered**
15 **nurse or nurse practitioner;**

16 **(b) Have at least two years of relevant experience in the range of protective proceeding**
17 **case types that arise under this chapter, including but not limited to experience in profes-**
18 **sionally working with people with mental health conditions, intellectual disabilities, develop-**
19 **mental disabilities and geriatric concerns; and**

20 **(c) Have successfully completed a mandatory training as prescribed by the Judicial De-**
21 **partment that includes education on guardianships, conservatorships, decision-making ca-**
22 **capacity, the fundamentals of abuse and neglect of vulnerable adults and the function of**
23 **visitors for the court.**

24 [(2)] **(3) A visitor may be an employee of the court. The visitor may not have any personal in-**
25 **terest in the respondent or protected person, or any pecuniary or financial interest in the**
26 **proceedings, *if those interests could compromise or otherwise affect the decisions of the visitor. A***
27 ***visitor may not receive compensation for services rendered as a fiduciary for two or more protected***
28 ***persons at the same time who are not related to the fiduciary].***

29 [(3)] **(4) [*A visitor must*] The court shall oversee visitors appointed by the court and ensure**

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

1 **that the visitor meets all of the following requirements:**

2 (a) *[Have]* **Has** the training and expertise adequate to allow the person to conduct the interviews
3 and make the recommendations required under ORS 125.150 and 125.155, to communicate with, as-
4 sess and interact with respondents and protected persons[,] and to perform the other duties required
5 of a visitor; *[and]*

6 (b) *[Demonstrate]* **Demonstrates** sufficient knowledge of the law so as to be able to inform a
7 respondent or protected person of the nature and effect of a protective proceeding, to inform a re-
8 spondent or protected person of the rights of the respondent or protected person in the protective
9 proceeding, to answer the questions of a respondent or protected person and to inform fiduciaries
10 concerning their powers and duties[.];

11 (c) **Maintains any professional license or certification in good standing and immediately**
12 **notifies the court of any change in status, including investigations of the visitor by the au-**
13 **thority that issued the license or certification; and**

14 (d) **Undergoes a criminal records check as described in subsection (5) of this section and**
15 **provides the results of the criminal records check to the court before appointment by the**
16 **court.**

17 (5)(a) **Upon the request of the court, and in compliance with procedures adopted by the**
18 **Department of State Police under ORS 181A.230, the Department of State Police shall furnish**
19 **to the court such information on a prospective visitor as the Department of State Police**
20 **may have in its possession, including but not limited to manual or computerized criminal**
21 **offender information. With the approval of the Department of State Police, a local law**
22 **enforcement agency may furnish the information described in this subsection to the court.**

23 (b) **Subsequent to furnishing the information required under paragraph (a) of this sub-**
24 **section, the Department of State Police shall conduct a nationwide criminal records check**
25 **of the prospective visitor through the Federal Bureau of Investigation by use of the pro-**
26 **spective visitor's fingerprints and shall report the results to the court. In accordance with**
27 **the procedures of the Department of State Police, a local law enforcement agency may con-**
28 **duct the criminal records check described in this paragraph if the local law enforcement**
29 **agency has received approval under paragraph (a) of this subsection.**

30 (c) **The Department of State Police or local law enforcement agency may not transfer the**
31 **fingerprint card used to conduct a criminal records check under this subsection unless the**
32 **public agency or person receiving the fingerprint card agrees to destroy the fingerprint card**
33 **or to return the fingerprint card to the Department of State Police or local law enforcement**
34 **agency.**

35 (d) **If a public agency or person returns a fingerprint card to the Department of State**
36 **Police or local law enforcement agency, the Department of State Police or local law**
37 **enforcement agency shall destroy the fingerprint card or return the fingerprint card to the**
38 **prospective visitor. The Department of State Police or local law enforcement agency may not**
39 **keep a record of the fingerprints.**

40 (e) **Results of criminal records checks submitted to the court are confidential and shall**
41 **be subject to inspection only by the parties to the proceedings and their attorneys, and are**
42 **not subject to inspection by members of the public except pursuant to a court order entered**
43 **after a showing of good cause.**

44 (f) **A visitor must disclose to the court any criminal conviction of the visitor that occurs**
45 **after the criminal records check was performed.**

1 **SECTION 2.** ORS 125.150 is amended to read:

2 125.150. (1)(a) The court shall appoint a visitor upon the filing of a petition in a protective
3 proceeding that seeks the appointment of:

4 (A) A guardian **or conservator** for an adult respondent;

5 (B) A guardian for a minor respondent who is more than 16 years of age, in cases where the
6 court determines there is the likelihood that a petition seeking appointment of a guardian for the
7 respondent as an adult will be filed before the date that the respondent attains majority, in ac-
8 cordance with ORS 125.055 (6), or as an adult; or

9 (C) A temporary fiduciary who will exercise the powers of a guardian for an adult respondent.

10 (b) The court may appoint a visitor:

11 (A) In any other protective proceeding; *[or]*

12 (B) In a proceeding under ORS 109.329; **or**

13 (C) **At any time during a guardianship or conservatorship proceeding under ORS 125.025**
14 **(3).**

15 (c) **The court may not delegate the responsibility for selecting a visitor to be appointed**
16 **in a protective proceeding to an attorney, a party to the proceeding or any other person**
17 **other than court staff.**

18 (2) A visitor may be an officer, employee or special appointee of the court. The person appointed
19 may not have any personal interest in the proceedings. The person appointed must have training or
20 expertise adequate to allow the person to appropriately evaluate the functional capacity and needs
21 of a respondent or protected person, or each petitioner and the person to be adopted under ORS
22 109.329. The court shall provide a copy of the petition and other filings in the proceedings that may
23 be of assistance to the visitor.

24 (3) A visitor appointed by the court under this section shall interview a person nominated or
25 appointed as fiduciary and the respondent or protected person, or each petitioner and the person to
26 be adopted under ORS 109.329, personally at the place where the respondent or protected person,
27 or each petitioner or the person to be adopted under ORS 109.329, is located.

28 (4) Subject to any law relating to confidentiality, the visitor may interview any physician or
29 psychologist who has examined the respondent or protected person, or each petitioner under ORS
30 109.329, the person or officer of the institution having the care, custody or control of the respondent
31 or protected person, or each petitioner under ORS 109.329, and any other person who may have
32 relevant information.

33 (5) If requested by a visitor under subsection (4) of this section, a physician or psychologist who
34 has examined the respondent or protected person, or each petitioner under ORS 109.329, may, with
35 patient authorization or, in the case of a minor respondent, with the authorization of the minor's
36 parent or the person having custody of the minor, or in response to a court order in accordance
37 with ORCP 44 or a subpoena under ORCP 55, provide any relevant information the physician or
38 psychologist has regarding the respondent or protected person, or each petitioner under ORS
39 109.329.

40 (6) A visitor shall determine whether it appears that the respondent or protected person, or each
41 petitioner or the person to be adopted under ORS 109.329, is able to attend the hearing and, if able
42 to attend, whether the respondent or protected person, or each petitioner or the person to be
43 adopted under ORS 109.329, is willing to attend the hearing.

44 (7) If a petition is filed seeking the appointment of a guardian for an adult respondent, a visitor
45 shall investigate the following matters:

1 (a) The inability of the respondent to provide for the needs of the respondent with respect to
 2 physical health, food, clothing and shelter;

3 (b) The location of the respondent's residence and the ability of the respondent to live in the
 4 residence while under guardianship;

5 (c) Alternatives to guardianship considered by the petitioner and reasons why those alternatives
 6 are not available;

7 (d) Health or social services provided to the respondent during the year preceding the filing of
 8 the petition, when the petitioner has information as to those services;

9 (e) The inability of the respondent to resist fraud or undue influence; and

10 (f) Whether the respondent's inability to provide for the needs of the respondent is an isolated
 11 incident of negligence or improvidence, or whether a pattern exists.

12 (8) If a petition is filed seeking the appointment of a fiduciary, a visitor shall determine whether
 13 the respondent objects to:

14 (a) The appointment of a fiduciary; and

15 (b) The nominated fiduciary or prefers another person to act as fiduciary.

16 (9) If a petition is filed seeking the appointment of a conservator in addition to the appointment
 17 of a guardian, a visitor shall investigate whether the respondent is financially incapable. The visitor
 18 shall interview the person nominated to act as conservator and shall interview the respondent per-
 19 sonally at the place where the respondent is located.

20 (10) A visitor shall determine whether the respondent or protected person, or each petitioner
 21 or the person to be adopted under ORS 109.329, wishes to be represented by counsel and, if so,
 22 whether the respondent or protected person, or each petitioner or the person to be adopted under
 23 ORS 109.329, has retained counsel and, if not, the name of an attorney the respondent or protected
 24 person, or each petitioner or the person to be adopted under ORS 109.329, wishes to retain.

25 (11) If the respondent or protected person, or each petitioner or the person to be adopted under
 26 ORS 109.329, has not retained counsel, a visitor shall determine whether the respondent or protected
 27 person, or each petitioner or the person to be adopted under ORS 109.329, desires the court to ap-
 28 point counsel.

29 (12) If the respondent or protected person, or each petitioner or the person to be adopted under
 30 ORS 109.329, does not plan to retain counsel and has not requested the appointment of counsel by
 31 the court, a visitor shall determine whether the appointment of counsel would help to resolve the
 32 matter and whether appointment of counsel is necessary to protect the interests of the respondent
 33 or protected person, or each petitioner or the person to be adopted under ORS 109.329.

34 **SECTION 3.** ORS 125.160 is amended to read:

35 125.160. (1) At any time after the appointment of a fiduciary, the court may appoint a visitor.
 36 The court may require the visitor to perform any duty the visitor could have performed if appointed
 37 at the time the fiduciary was appointed, including interviewing relevant persons, examining relevant
 38 records, reporting in writing to the court and being present at any hearing.

39 (2) **In addition to the duties specified in subsection (1) of this section, the court may ap-**
 40 **point a visitor to:**

41 (a) **Determine whether a protected person is no longer incapacitated and whether the**
 42 **protected person remains in need of a fiduciary;**

43 (b) **Assess the condition and welfare of the protected person;**

44 (c) **Evaluate the action or inaction of a fiduciary in order to determine if the fiduciary**
 45 **remains suitable and qualified to serve as the fiduciary of the protected person; and**

1 **(d) Determine whether a fiduciary should be removed for any reason, including that re-**
2 **moval is in the best interests of the protected person.**

3

To the Oregon Senate Committee on the Judiciary.

Statement in Support of SB 501, 502 and 503
Presented by Senior Judge Elizabeth Welch

Chief Probate Judge, Multnomah County Circuit Court,
1994-2006.

Co-Chair, Supreme Court Task Force on Protective
Proceedings, 2007- 2008

Chair, Legislative Task Force on Public Guardianship, 2009-
2013

Member, Residential Facilities Advisory Committee, 2014-
2016

**PERSONS WHO ARE THE SUBJECT OF A GUARDIANSHIP
PROCEEDING NEED LAWYERS AND SHOULD BE
ENTITLED TO A HEARING BEFORE GUARDIANSHIP IS
IMPOSED:**

The persons who are subject to such proceedings are incapacitated by reason of old age, dementia or other severe mental or physical disabilities or who are mentally ill or developmentally delayed.

Some Respondents have families who can act on their behalf, but with Office of the Public Guardian clients, such family members are either unwilling, unable or inappropriate to act as protectors. The individuals involved may be unable to discern that those around them are dangerous to them or are "ripping them off."

If a proposed protected person is agreeable to Guardianship, arrangements may be made voluntarily.

Thus, Respondents are opposed to the Guardianship for a variety of reasons or are unable to communicate any objections.

It is my experience that very few people going through the Guardianship process have any comprehension of why they need a lawyer. I have heard innumerable times, " I haven't done anything wrong! Why do I need a lawyer?"

Guardianship is a very profound intrusion into the freedoms and fundamental choices that an individual has. Respondents may be deprived of desired relationships, placed in a setting where they don't know anyone, lose their home, or be placed in a locked facility, and more. Guardianships are usually permanent. People are frightened, confused, and most of all, out of touch with their own circumstances.

The difference between the circumstances of persons who are the subject of petition for civil commitment and those who face Guardianship are not significant. The potential loss of self determination and of liberty is actually greater in Guardianships than with Civil Commitments. Civil commitments are not permanent; yet the threat to liberty has been the basis for automatic appointment of counsel at State expense in Civil Commitments in Oregon for decades.

In my experience, the overwhelming majority of petitions for Guardianship are well founded. The financial and emotional burdens of filing a petition, providing unfavorable information about family members, confronting family dynamics are so great that cases with reasonable alternatives to guardianship rarely make their way to formal proceedings.

Thus the real issue in hearings regarding the establishment of Guardianships is the suitability of the proposed Guardian.

Lawyers representing respondents speak for the client in general about what is happening to them, respondents need an advocate to participate in the selection of the guardian. The proposed

Guardian may well be the person who is abusing, stealing from or neglecting the Respondent.

When a Petition for Guardianship has been filed, that document together with a Blue Form objection sheet is served upon the respondent. If the respondent indicates an objection to the process and requests hearing, current law requires the hearing be held. Is the individual able to comprehend the Blue Form and its implications? Who is present at the time of receiving the Blue Form who may interfere with the Respondent's use of this form? The Respondent's incapacities may cause numerous changes of heart about what they want. They are subject to undue influence if there is a "bad guy" in the picture.

All of the above explain why a hearing should occur in all cases, **AS ITS DOES IN EVERY OTHER STATE IN THE US.**

Even where no Objections are filed, the Court has a role to safeguard the interests of the Respondent. Hearings require the Petitioner to prove to the Court that the legal requisites for Guardianship are present in the case, that no lesser alternative is appropriate, and that the proposed Guardian is suitable to exercise such power over the individual.

OREGON IS ONE OF FIVE STATES THAT HAS NO LAW ALLOWING FOR COUNSEL IN GUARDIANSHIPS AT PUBLIC EXPENSE.

Finally, State Office of the Public Guardian is a state agency and thus the parallel of OPG instituted guardianships to civil commitments is clear. When the State initiates proceedings to deprive a person of their liberty, counsel is required.

SB503 relating to Court Visitors: This very important. Court Visitors are the greatest safeguard against abusive treatment of and

overreaching intrusion into the life of incapacitated persons. While the law requiring Court Visitors is of long standing, the process is without clear guidelines regarding the ethical boundaries in the selection of a Court Visitor or the qualifications of those who perform this vital function.

The Court Visitor is a tremendous asset to the Court in ferreting out undue influence by others, and in identifying family dynamics that directly impinge on the welfare of the respondent. It's through the work of highly qualified Court Visitors that the challenges of Guardian selection are learned and fully addressed.

March 1, 2017