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Testimony on Senate Bill 683

I cannot attend the hearing, but I submit this written testimony based on my experience as guardian for my adult daughter, who has a learning disability. I also want to share my experience from 40 years of law practice, during which I helped several friends in the Special Olympics community establish guardianships for their adult disabled children. My practice before I retired was not primarily focused on protective proceedings, but on estate planning and probate. In that field I once served as legislative chair for the Oregon State Bar Estate Planning and Administration Section, and over the years I had primary responsibility for re-writing several parts of the Probate Code. So I have some experience with legislation.

Guardians are appointed in a wide variety of situations. ORS Chapter 125 recognizes differences between guardianships for minors and guardianships for adults, but all guardianships for adults receive the same statutory treatment. However, there are significant differences among adult guardianships, and I don't believe the same protections are appropriate for all of them.

One difference relates to the type of guardian. There are professional guardians, and there are family-member guardians. A procedure directed by statute and involving the court can be routine for a professional guardian, but will be a major event for a family guardian.

I expect that most disputes in adult guardianship center around situations in which self-determination rights individuals had previously enjoyed are taken away from them on account of age-related dementia or the onset of a new disability. In most of those cases the protected person will not be living with the guardian.

However a major societal change has spurred growth in another type of adult guardianship. The change has been the de-institutionalization of persons with intellectual impairment. We now have living in the community a significant population that needs the supervision of medical and personal care that guardianship provides. Very commonly in my experience with Special Olympics families these individuals remain in the homes of their parents for the lifetime of the parents. When a guardianship is needed it is usually the parents who initially become guardians. In most such cases where a guardianship is appropriate, however, the cost of securing a guardianship today makes it impossible. I believe it important to minimize these costs. Complicating or micro-managing the process does not help reduce costs.

I believe that Senate Bill 683 is flawed in a number of respects:

1. In the situation in which a family member is guardian for the guardian's adult intellectually disabled child there are recurring situations in which the guardian needs to restrict contact on account of such problems as sexual or financial predators. The proposed statutory language is overly weighted toward the idea that cutting off associations is usually wrong. The consequences of a judge disagreeing with the guardian's decision one time are too severe, including potential removal of the guardian. The one-way attorney fee award is particularly inappropriate (page 2, line 15). If the judge determines the guardian was right and an associate of the protected person is actually a sexual predator, why should only the guardian be exposed to the

risk of attorney fees and costs? I do not believe this is a situation that justifies any award of attorney fees. Being a guardian involves assuming significant obligations, usually with no compensation for family member guardians. Exposure to attorney fees in this situation adds an inappropriate burden. Commonly in the cases in which I am familiar the guardian is already advancing costs for the guardianship.

2. I believe the focus on issues over associations with the protected person is misplaced. I recommend a broader approach to smoothing out the rough patches in guardianships by requiring (section 2 of my alternate proposal) that the guardian consult with and inform the protected person on a wide range of issues. In this section I also picked up the proposed new language of ORS 125.315(1)(g)(A) of the bill requiring a guardian to maintain close contact with the protected person. Those provisions address the underlying causes of many disputes.

3. Some of the proposed language of ORS 125.315(1)(g) in section 5 of the bill is redundant with language already in ORS 125.300(1). The concepts involved should not be scattered around the statutes like this. In addition the proposed new language in section 5 is unnecessarily detailed. This is not a place for legislative micro-managing.

My alternate bill includes some other minor changes. Section 3 would amend ORS 125.060(4) to reduce the fee for requesting notice in a protective proceeding from $265 to $117. Until 2011 there was a nominal fee of $19 for these requests with this statute referring to the fee payable under former ORS 21.310(5). In 2011 there was a general revision of the court fee structure, ORS 21.310(5) was repealed and the reference here was changed to the present ORS 21.135, which is the statute governing the "standard filing fee" in circuit court. I can't believe that was intended for this type of filing. I changed the reference to ORS 21.145, which governs appearances in guardianship proceedings generally. $117 is the fee to file or appear in a guardianship petition. I think $117 is also excessive for just filing a request for notice when the court really doesn't have to do anything, but it's more reasonable than $265. There is no longer a really small fee to reference in ORS Chapter 21 similar to the old $19 fee.

Section 4 of my alternate proposal amends ORS 125.075(4) to correct an erroneous cross reference. ORS 21.170 is the filing fee for probate matters; ORS 21.175 is the correct one for guardianships. This is a very minor correction, not a substantive change.

Section 5 of my alternate proposal amends ORS 125.085 to establish a procedure under which a protected person may make oral objections to a decision or other action by a fiduciary. Current law provides a procedure in ORS 125.075(2) for a protected person to make oral objections to motions by other persons, but there is no similar procedure in the statute for a protected person to initiate a motion against a decision or other action by the fiduciary. Senate Bill 683 would establish such a procedure (section 2(4) at page 1, line 19 to page 2, line 9), but that language is flawed for two reasons: It only applies to one type of decision, and it requires a protected person making an oral motion to give formal notice in accordance with the statute. Adding that level of burden makes the simplified oral motion procedure worthless. My proposal applies to all decisions and actions, not just association issues, and it requires the court to give notice of the filing to the fiduciary, who is the person designated to give the statutory notice to file objections and of any hearing.

Section 6 of my alternate proposal addresses an inconsistency between ORS 125.300(3) (which says a "protected person retains all legal and civil rights provided by law except those * * * specifically granted to the guardian by the court") and ORS 125.315 (which states that the

guardian has various specific powers without reference to what the court has specifically granted). I resolved that inconsistency by amending ORS 125.300(3) to add an exception for powers granted to the guardian by ORS 125.315, but making it clear the court can limit those powers. I believe it was in the past common practice to not specify any powers in the appointing order, relying on those in ORS 125.315. As a result there are probably many orders and judgments out there not specifying powers, even though ORS 125.300 seems to say they must, and the recent statutory trend has been more toward "designer" guardianships. This proposal is intended to accommodate the appointments already made and avoid any need to re-visit them.

Section 7 amends ORS 125.325 to change the form of the annual guardian's report. First, it adds language intended to give the guardian an annual reminder of the duty to consult with and inform the protected person. Second, it clarifies that only the protected person can use oral notice to the court to object to a motion. That is what the 2017 amendment to ORS 125.075 provides. Third, it clearly notifies the protected person each year that he or she can orally initiate an objection to a guardian's decision and do so without paying a fee.