Oregon
Kate Brown, Governor

Oregon Public Guardian & Conservator
3855 Wolverine NE, Suite 6
Salem, OR 97305-1251
503.378.6848
Toll Free 1.844.656.6774
FAX 503.373.0852

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The Honorable Floyd Prozanski
Chairman, Senate Committee on Judiciary
Oregon Senate
Salem, Oregon

Re: Senate Bills 501 and 502

Dear Chairman Prozanski and members of the Senate Committee on Judiciary:

My name is Travis Wall. I am the Oregon Public Guardian and Conservator. My position was established by the legislature in 2014, and our program has been building the foundation for public guardian and conservator services statewide since early 2015.

ORS 125.683 provides that the Oregon Public Guardian and Conservator "make recommendations to the Legislative Assembly for policy and legislation regarding implementation, improvement and expansion of public guardian and conservator services in this state." Please accept this testimony as a recommendation that if either Senate Bill (SB) 501 or SB 502 are enacted it will improve public guardian and conservator services in Oregon, in particular the rights of persons subject to protective proceedings.

My views on SB 501 and SB 502 are informed by the experience and knowledge that my staff and I have acquired in serving as fiduciaries for protected persons, and many years of other related service. Prior to moving to Oregon, I directed the Utah Office of the Public Guardian and Conservator. I have also led rights protection and advocacy organizations and initiatives for people with disabilities, seniors and other vulnerable persons in Oregon and three other states.

SB 501 and SB 502 would increase the due process protections afforded adults for whom guardianship or conservatorship is sought, or who are already subject to guardianship and conservatorship. These protections are greatly needed and long overdue.

SB 501 and SB 502 essentially create the same new requirements for appointment of counsel in protective proceedings, they differ only on which cases they apply to. SB 501 applies to all adult guardianship proceedings in Oregon and mandates the appointment of counsel for protected persons with only narrow exceptions, like where there is no objection to guardianship, where the protected person is already represented by counsel, or objects to the appointment of counsel. SB 502 contains the same requirements for counsel as SB 501, but only applies to cases where the state or a county public guardian is involved as the guardian or proposed guardian.

The importance of adequate, statutorily required due process protections in protective proceedings and the infrequency with which rights of protected persons have been upheld, has long been a major concern. Congress, national and local media, advocates for seniors and people with disabilities, bench and bar reform groups and others have documented the problems and sought redress through litigation and legislation. Considerable progress has been made since the late 1980s. Today most states at least have statutes that address the fundamentals. Unfortunately, Oregon is not among them, and may actually deserve the unenviable distinction of having the fewest such protections of any state.

There are several types of due process protections in protective proceedings, the appointment of counsel for protected persons, mandatory hearings in all cases, requiring at least a minimal amount of medical or psychological evidence or testimony, the utilization of a guardian ad litem during the legal process, and standardized training and educational requirements for court visitors are protections that exist in various combination across the country. Oregon is fundamentally lacking in providing most or all of these protections.

- In 49 states, hearings are mandatory before the imposition of guardianship on continuing basis (and in at least 24 states, proposed protected persons are entitled to a jury trial upon request).

- In most states, appointment of counsel for respondents is mandatory or assured.

- In all but several states some level of medical or other expert evidence of incapacity is required.

The need for such protections is directly related to the severe limitation of basic rights that can occur as a result of the imposition of guardianship or conservatorship. Imagine living the rest of your life without being able to choose where you live, whether you can come and go from that place, who can visit you, what medical procedures will be performed on you, and even what you can eat and how you organize your day. Those restrictions are the reality for many adults under guardianship in Oregon today.

Guardianship requires a finding that the protected person is "incapacitated" before a guardian can be indefinitely appointed. Being incapacitated involves cognitive impairment to such a significant extent that a person is unable to meet the essential requirements for the their physical health or safety. This is a high standard, as it should be, considering the extreme deprivation of rights involved.

A problem unique to guardianship proceedings compared to most other legal proceedings is that in almost every case the respondent will have some level of cognitive impairment. What the court determines is whether that level of impairment has reached the level of "incapacitated." The fact that almost every respondent will be in some way cognitively impaired, dramatically

increases the need for counsel to represent his or her interests. Expecting such persons to be responsible for representing their own interests without the benefit of counsel is fundamentally unfair and can result in inappropriate and unnecessary guardianships.

When a court grants a guardianship, the state of Oregon is removing the protected person's rights to self-determination. While the guardian may or may not be a state entity, it is still the power of the state removing someone's rights. Appointment of counsel before that can occur should be recognized as a fundamental due process right.

For the reasons stated above, we ask the upmost consideration be given to SB 501 and SB 502.

Sincerely,

S. Travis Wall
Oregon Public Guardian and Conservator