WARREN C. DERAS
15853 NW CLUBHOUSE DR.
PORTLAND, OREGON 97229-8726
TELEPHONE 503-515-8031 *E-MAIL warrenderas@comcast.net*

Testimony on Senate Bill 30

I appear here today to testify 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.

During the 2017 session HB 2630 was enacted. It added a number of protections for those who become subject to protective proceedings. There are no apparent issues with most of those changes.

However, one of the changes was to expand upon the long-standing requirement that a guardian file notice in the court before moving a protected person to a mental health treatment facility, a nursing home or other residential facility ***and to add a similar requirement for any change of abode of the protected person***. In other words what was once a required court filing only for moves to very restrictive living environments became a required court filing for any move of a protected person to a new residence. I don't believe that is good policy. SB 30 is aimed at softening that change; I brought a draft bill that goes further.

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 court-notification process that can be routine for a professional guardian will be a major event for a family guardian.

There is a significant cost involved for family guardians in bringing these matters before the courts. Even if the law requires nothing more than the filing and service of a notice, for most family guardians that will mean a trip or two to the lawyer's office and payment of a legal fee.

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. 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. When a move occurs it is the whole family that is moving, not just the protected person. I don't think you see many disputes in these situations that justify a court filing.

I am proposing that the requirement for prior notice of a change of abode of the protected person be replaced with a general requirement that guardians, to the extent practicable, consult with and inform protected persons regarding significant decisions. I also add a provision allowing the protected person to orally move the court to review any decision of a guardian. In other words, instead of a universal requirement for a court filing whenever a protected person moves to a new home, I would simplify the process of bringing actual disputes over the move or other dispute before the court. That is in section 2 of my proposal.

I adopt the approach of SB 30 of moving the provisions regarding placement in a facility to a separate ORS section with some exceptions. That is section 3 of my proposal. The language is a bit different from the SB 30 language. I eliminate entirely the need for notice in some situations, as when the petition has already disclosed the specific facility to be used, so there is no need to repeat the information in a separate notice.

My bill includes some other minor changes. Section 4 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 intentional for this type of filing. I changed the reference to ORS 21.145, which governs 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 5 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 6 amends ORS 125.225 to conform to the other changes in the proposal, similar to section 3 of SB 30.

Section 7 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 lots of orders and judgments out there not specifying powers, even though ORS 125.300 seems to say they must.

Section 8 is a conforming amendment to ORS 125.320 similar to section 4 of SB 30.

Section 9 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.