

Submitter: Matthew Whitman
On Behalf Of:
Committee: Senate Committee On Judiciary
Measure: SB528

I am an attorney entering my 25th year of practice. I am a past chair of the Estate Planning Section of the Oregon State Bar and a longtime member of the Elder Law Section. I have handled many, many protective proceedings. I oppose this bill. It will impose huge burdens on an already struggling court system and will impose enormous costs on the families of folks who need protective proceedings. By increasing these burdens, it will make it more likely that some people who desperately need the court's intervention in their affairs simply won't get it.

I can tell by reading the measure that someone was motivated by a horror story to bring this bill. But hard cases make bad law.

Protective proceedings, by their nature, are the judicial recognition that incapacitated and financially incapable people no longer have the ability to safely exercise all the civil rights that we are permitted. I am acutely aware of this; so too is every judge before whom I regularly appear. We as a legal community already detail, in every petition we file under ORS Chapter 125, the less-restrictive alternatives that we have already considered, and exhausted. ORS 125.055(2)(i)(A). If there are judges who are simply rubber-stamping guardianships and conservatorships without considering whether those tools are too powerful for the situation, I have not met them. In that respect, the bill addresses a nonexistent problem. So what problems would this well-intentioned measure create? Off the top of my head:

1. It mandates regular, substantive judicial review of cases. And oversight is good! But before the Committee refers this further it MUST consult with OJD regarding the fiscal impact. The bill would essentially require every protective proceeding to be considered anew every five years -- with the burden being on the fiduciary to justify continued appointment. Find out how many cases this would cover! Find out what percentage of the Court's workload are already consumed with protective proceedings -- which are already some of the most fraught and traumatizing of the cases before the courts. Now multiply that burden. If this Bill does not come with funding for more judges and court staff to handle the increased burden (and of course it doesn't!) it's just another unfunded mandate the courts must bear.

2. It creates a new right to counsel for respondents in protective proceedings. But who pays? I have been appointed as counsel for respondents in many cases, and have not been paid; I am not complaining. But by making counsel a right to which every respondent is entitled it will result in the court appointing lawyers on an unpaid basis more often. In that respect this new right to counsel would shift costs to the Bar

as a whole. Again, the judges I know and appear before are not shy about making sure that respondents have counsel where the need appears -- but that need does not appear in every protective proceeding. Judges are better at responding to the specific circumstances of a case than a one-size-fits-all mandate.

3. This bill will create much more work for lawyers, both at the outset of a proceeding and then every five years afterward. That will impose much greater costs on the families of people with disabilities who need court-appointed fiduciaries. Lawyers already cost too much, and frequently people who need fiduciaries have families who already are suffering under the distorting emotional and financial weight their family member's disability imposes. This would increase the burden on those families. Some can't afford it. They won't get the help they need.

Again, I do not doubt that this bill's sponsor, and the constituents who urged it, must be motivated by some distressing story. But that story, whatever it is, would be better used in education, not encouraging legislation that will create unforeseen burdens across the community of judges, lawyers, and ordinary citizens who encounter protective proceedings every day.

Matt Whitman