Submitter: David Carlson

On Behalf Of:

Committee: Senate Committee On Judiciary

Measure: SB528

SB 528 is an answer in search of a problem. As a Certified National Guardian and a lawyer who routinely represents professional fiduciaries, lay fiduciaries and respondents alike, it is my opinion that there is very little positive to this bill and it will only serve to worsen the situation for many people. Here's a few reasons to not pass this bill:

A professional fiduciary is already required by our professional ethics to take into account less restrictive alternatives. Adding this adds only an additional layer of bookkeeping and "wordsmithing" that does not advance the position of the protected person in the slightest. It only makes the situation more complex and thus more expensive.

Second, "supported decision-making" and "less restrictive alternatives" are all well and good but by the time people require a fiduciary there are precious few alternatives to be pursued. If, for example, the respondent had the capacity to sign a power of attorney (and would do so) they would not need a fiduciary. Moreover, the fact that someone appoints an agent under a power of attorney does NOT require that agent to act, nor does the Court have oversight of that person's actions. In other words, this is not a useful requirement. If that were an option it would have been explored under existing law.

In addition, while there are some limited situations in which people who are developmentally disabled (for example) may qualify for a guardian and are capable of meaningful participation in a discussion about their future care and decisions, that is the rare circumstance. Instead, it is far more likely that the respondent/protected person in a guardianship is suffering from a dementia or a stroke induced dementia. Unless and until we have a treatment or cure for both of those conditions there is no purpose to further requiring a fiduciary to "re-file" a petition for the fiduciary's appointment. The current law already requires the guardian justify why the guardianship should continue when they file their annual report. In addition, any professional fiduciary is ethically required to disclose to the court if the person no longer requires a fiduciary and to take steps to remove the guardianship or conservatorship. Moreover, anyone can petition to remove the fiduciary at any time at the same burden of proof and persuasion. Requiring the refiling of the petition every five years advances nothing. Additionally, for those situations in which a guardian is appointed without a conservator the odds are that the person does not have the ability to pay for that petition. It would not be uncommon for someone receiving Medicaid to have a guardian but no funds.

Third, by layering additional requirements onto the existing law SB528 would dramatically increase the costs of guardianship proceedings. As a lawyer that may be beneficial for me, but as a fiduciary I can say that is not in the best interests of the respondent. Increasing the costs will do two things. For one it will make it harder for people to obtain representation (both the respondent and the lay fiduciary). It will increase the amount of effort, pleadings, recordkeeping, etc. for no purpose that cannot be met by existing law. Perhaps worse, it will make professional fiduciaries even less likely to agree to take guardianships except when the respondent has substantial funds. The increased requirements from the last two legislative sessions has already started this decline as more professional fiduciaries are refusing to take guardianship cases, especially where funds are limited. This will accelerate that decline. Soon you will not have professional fiduciaries willing to take guardianships. I know I will not.

If the legislature really wants to address protective proceedings and help people- fund representation for indigent people who need guardianships. Fund court visitors and the public guardian program. Don't do this.