



Disability Rights Oregon

TO: Senate Committee on the Judiciary
FROM: Disability Rights Oregon (DRO)
DATE: January 26, 2023
RE: SB 528 and DRO's Guardianship Reform Bill

Chair Prozanski and members of the Committee,

What Does SB 528 Do:

Starting with section 2 (1) of SB 528 aims to clarify in greater detail existing law ORS 125.300 as it relates to the requirements needed to obtain a guardianship.

*125.300 In general. (1)(a) Except as provided in paragraph (b) of this subsection, a guardian may be appointed for an adult person only as is **necessary** to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of **maximum self-reliance and independence** of the protected person and may be ordered **only to the extent necessitated** by the person's actual mental and physical limitations.*

Yet Disability Rights Oregon receives approximately 100 pleadings per month and over the course of the past decade, we rarely see petitions or guardianship orders other than for full guardianships. Further, the petitions oftentimes have a perfunctory statement regarding any actual exploration of and trial with less restrictive alternatives. SB 528 lays out in statute what some of the myriad of alternatives to guardianship are that should be tried if possible before seeking to take a protected person's rights away from them.

Section 2 (2) of SB 528 clarifies that someone who is providing supported decision-making assistance does not have legal authority to make the decisions on behalf of the individual they are assisting. This language is added to clarify a fundamental difference between supported decision making and a guardianship.

Section 3 (1) of SB 528 requires every five years for a fiduciary or guardian to file a motion to continue the protective proceeding. Currently the vast majority of guardianships last for the protected person's lifetime unless a protected person directly reaches out to the court and successfully has their case re-examined. This is not a process that is easy to do, especially without the help of a lawyer. We have worked with protected persons who have written to the Court with no response. The court has the

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obligation to make sure a protected person is not deprived of liberty when their need for a guardian has materially changed. Like wise that court must ensure that it periodically checks in on a guardianship to ensure the best interest of the protected person is being carried out and not solely rely on the report a guardian submits to the court. Periodic review of guardianships are a necessary protection and are lacking in our current system.

Section 5 (1) of SB 528 only relates to the the Oregon Public Guardian and Conservator program housed in the office of The Long Term Care Ombudsman established under ORS 125.678 and does not apply to family members. This section of the bill would require state employees working as Public Guardians through the office of The Long Term Care Ombudsman to have professional certification.

Section 6(11) provides a definition for "supported decision-making".

Section 7(8) and section 8(3) of SB 528 is again an effort to flush out existing law that seems to not be what happens in practice.

125.305 Order of appointment. (2) The court shall make a guardianship order that is no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the person. In making the order the court shall consider the information in the petition, the report of the visitor, the report of any physician, naturopathic physician or psychologist who has examined the respondent, if there was an examination, and the evidence presented at any hearing.

In fully keeping with the intent of the statute, SB 528 establishes a requirement that a petition address the need for each type of decision making authority requested individually using the already established clear and convincing standard currently in statute. The language is needed to prevent a protected person from losing their rights over decisions they are capable of making for themselves. These sections require that if a petition seeks appointment of a guardian with plenary authority (full guardianship), the factual information demonstrating, by clear and convincing evidence, that the presumption in favor of a limited guardianship has to be overcome.

Section 8(2i) requires the petition for a fiduciary to describe what alternatives have been explored (*a change from current language that says considered*) and why those alternatives are inadequate and why the appointment of a fiduciary is still necessary.

Section 8(3) requires that a petitioner state the factual basis for exercising medical decision-making, residential placement decision-making as well as for other care, comfort and maintenance decision-making. Again, this accords with ORS 125.305 requiring the least restrictive taking of a person's decision-making rights.

Section 10(2) requires that notices to Disability Rights Oregon (DRO) be provided electronically in the manner prescribed by DRO if a person giving notice is represented

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by counsel or by mail or in DRO's method prescribed for electronic delivery if the person giving notice is not represented by counsel.

Section 11(2B) adds a requirement for notice of the right to have an attorney appointed by the court. This right was already established in 2021 under SB 578 now found in ORS 125.080(7b). This is just reiterating that right in this section of the statute. It is not creating a new right.

Section 11(6) adds the requirement that a respondent be told of their right to have an attorney appointed to represent them in the proceedings and inform them how to make that request.

Section 13(4) requires that if a hearing is being held due to an objection to a petition or a motion in the guardianship proceeding, the respondent or protected person must appear at the hearing in person. This removes the language that a respondent or protected person may appear at the hearing "by counsel". The intent of this change is the protective proceeding hearing most greatly impacts the respondent or protected person and it is fundamental that they appear to have their voice heard.

Section 14 (2g) again requires that a protected person be made aware of their right to ask the court to appoint an attorney and how to make that request. This is not establishing a new right to an attorney it is just adding a notification requirement.

Section 15(1d, 1e) directs the court to appoint a visitor for the 5-year review and requires that the Court not consider the preferences or recommendations of any party. This is to promote the independent review and report from the court visitor.

Section 15(7c) requires the court visitor to look at the less restrictive alternatives to guardianship that have been explored and see if those alternatives do or do not eliminate the need to appoint a guardian entirely or as to any area of decision-making authority.

Section 16(2) again establishes the need for a court visitor to be independent to function as the eyes and ears of the court.

Section 17(2) in keeping with ORS 125.305 establishes the presumption that a limited guardianship is needed until the presumption is overcome by clear and convincing evidence that a full guardianship is the least restrictive option that will serve the best interests of the adult person.

Section 18(2) This clarifies what the order will say in regards to the limitations of a guardianship and if a full guardianship is ordered, the court shall include a statement of its findings.

Section 20 addresses ORS 125.315(3) that states:

(3) A guardian may consent to the withholding or withdrawing of artificially administered nutrition and hydration for a protected person only under the circumstances described in ORS 127.580 (1)(a), (b), (d), (e) or (f) and, if the protected person has a medical condition specified in ORS 127.580 (1)(b), (d), (e) or (f), the condition has been medically confirmed. [1995 c.664 §30; 1997 c.472 §12; 2007 c.230 §1; 2007 c.681 §27; 2019 c.198 §5]

This section of the bill states that a protected person's life sustaining measures can only be withdrawn if the conditions and requirements for all people as found in ORS chapter 127. Given that all human lives are valued, any end of life decisions need to comply with the requirements.

Section 20(1e) states the right of a protected person to speak privately to a mental health professional without their guardian present. ORS 125.300 states that protected persons retain all civil rights, which having a patient-counselor relationship is included. This is designated in SB 528 because we are aware that some protected persons are being thwarted from engaging in counseling which is fundamental to their health and well-being.

Section 20(3b) expands what must be in the statement provided to the court when a guardian is changing a protected person's place of abode. This accords with ORS 125.315(g)-(i) that includes in guardian duties speaking with the protected person to assess their choice. Where one calls home is key and can cause disruption when protected persons have little or no input to changing homes..

Section 21(1) requires that the guardian before filing their annual report with the court, must provide the protected person with an opportunity to contribute to and comment on the report. Likewise, this accords with the guardian's duties under ORS 125.315(g)-125.315(i).

Section 22(3) requires that if a conservator is going to sell a protected person's principal residence they must consult with the protected person, provide that protected person a range of alternative options and an opportunity to participate in the decision-making, and take the protected person's preferences into consideration when deciding to sell the residence. Whether a person is a protected person or not, sale of their home is oftentimes a major event—one that the protected person should be a participant.

Section 23(2g) again specifies the need to demonstrate what efforts have been made to maximize a protected person's self-determination by requiring a conservator to give examples of ways they tried to explore and engage in supported decision-making during the conservatorship.

About Disability Rights Oregon

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Disability Rights Oregon is the Protection and Advocacy System for Oregon

Since 1977 Disability Rights Oregon has been the State's Protection and Advocacy System.¹ We are authorized by Congress to protect, advocate, and enforce the rights of people with disabilities under the U.S. Constitution and Federal and State laws, investigate abuse and neglect of people with disabilities, and "pursue administrative, legal, and other appropriate remedies".² We are also mandated to "educate policymakers" on matters related to people with disabilities.³ Further, Disability Rights Oregon, as the system described in ORS 192.517(1), receives notice of pleadings regarding respondents and protected persons when they are or may be a resident of a mental health treatment facility or residential facility for individuals with developmental disabilities, or if there is an intent to place the respondent or protected person in such a facility. See ORS 125.060(7)(c) and ORS 125.070(8)(c).

If you have any questions regarding DRO's position on this legislation, please call Meghan Moyer at 503-432-5777 or email her at mmoyer@droregon.org.

¹ See ORS 192.517.

² See 42 U.S.C. § 15041 et seq; 42 U.S.C. § 10801 et seq.

³ See 42 U.S. Code § 15043(a)(2)(L).