



TO: Senate Committee on the Judiciary
FROM: Jan E. Friedman, Senior Staff Attorney with Disability Rights Oregon (DRO)
DATE: January 26, 2023
RE: SB 528, "Oral" Testimony

Good afternoon Chair Prozanski & Members of the Committee:

I am Jan Friedman, a Senior Staff Attorney with Disability Rights Oregon ("DRO"). Thank you for giving me this opportunity to speak on behalf of people who are under guardianships and conservatorships (or "protective proceedings") for whom SB 528 is critical.

I apologize that I am not in person, but I have been recently exposed to Covid.

1. Why SB 528 is Needed:

DRO has submitted written testimony explaining the provisions of SB 528. My testimony supplements this written testimony. I plan to cite the portion of the bill and then add to what DRO has previously submitted. I will have time to address some of these provisions.

Hopefully, to make this written "oral" testimony more readable, I have included *in italics* the portions of our prior SB 528 explanation that I am further supporting here. My additional testimony is stated below in 14-point font.

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

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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.

DRO has found through directly advocating for individuals and reviewing pleadings that: The vast majority of petitions request full as well as permanent guardianships. This combination of a full guardianship that is permanent results in the protected persons losing decision-making in the fundamental areas of their lives for their entire lifetime.

DRO reviews guardianship terminations—the vast majority of these are because the protected person has died with a very small segment of protected persons who have their rights restored during their lifetime.

This bill supports the use of limited guardianships and that people not have their rights taken away unnecessarily. Less restrictive alternatives should be vigilantly explored prior to guardianship being put in place and throughout the course of a person's guardianship.

As an example, DRO represented a respondent who had a severe and persistent mental illness and received a large unexpected inheritance. This respondent was functioning fine and with DRO's assistance, was able to object successfully to the protective proceeding and get a Special Needs Trust rather than a guardian or conservator.

There may be cost savings through ensuring that people are not put or remain under any unnecessary guardianships. Petitions may not be filed and people may have their rights restored, thereby eliminating any requirement for Annual Guardian Reports or late notices from the Court.

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 obligation to make sure a protected person is not deprived of liberty when their need for a guardian has materially

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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 nessassary protection and are lacking in our current system.

Guardianship is a serious infringement on a person's civil rights. DRO has represented people in guardianship terminations to restore their rights. One protected person went from having had a long-term stay in a group home without any privileges to leave without 1:1 supervision, with no ability to look for work or join a gym. Once this person's rights were restored, this person found an apartment, got a near full time job, joined a gym, socialized with friends and enjoyed going places without any supervision. There are other people like this protected person who do not need a guardian and languish for years. DRO's clients have expressed that they feel that they are being unlawfully (civil) imprisoned and did not commit any crime.

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.

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There should be much greater attention to what rights must be taken away from a protected person. Each area of restricted rights—residence, health care, and other—is huge for the protected person. For example, someone with an episodic mental health condition may not need decision-making support from a guardian in any area other than health care, or depending on the individual circumstance, may meet the criteria for a Declaration For Mental Health Treatment.

In addition, some people who become protected people have set up less restrictive alternatives to guardianship for their decision making, prior to any guardianship petition being filed. If so, these less restrictive alternatives such as an Advanced Health Care Directive should be recognized rather than a full guardianship being imposed.

DRO hears from protected persons who say they “agreed” to guardianship for a specific helpful purpose at the time and are tremendously dismayed when they discover the vast decision-making scope and that it lasts for their lifetime.

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.

In DRO’s review of pleadings and discussion with clients, the petition requirement for identifying less restrictive alternatives that have been tried is a cursory/ perfunctory consideration rather than a rigorous exploration for less restrictive alternatives that may be viable.

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 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.

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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.

Guardians have a duty to listen to their protected person in terms of their choice and give this consideration. ORS 125.315(g)-(i). Protected persons retain all of their civil rights. ORS 125.300.

A protective proceeding court hearing in most instances affects the protected person dramatically. Any legal representative of people under guardianship proceedings must comply with Rules of Professional Conduct, 1.14 that mandates treatment of protected persons like other clients. The rule should be that the protected person appears in court.

Section 14 (2g) again requires that to 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.

DRO is aware that many respondents and protected persons want legal representation in their protected proceedings. Many cannot afford an attorney. SB 578 is the 2021 law and requires that respondents and protected persons may get an attorney appointed by the Court and paid for by the State if they qualify. People under protected proceedings need to know about this right as well as how to exercise it.

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 alternative 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.

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The Court Visitor must be independent as an agent of the Court. They are a key component of ensuring that Oregon's guardianship process functions. DRO has heard of counties where the parties choose the Court Visitor—this is counter to independence.

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.

Presuming that a guardianship should be limited rather than full is in complete accordance with the least restrictive alternative requirements in Oregon's guardianship law.

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.

All Oregonians are subject to the stringent requirements for life-sustaining measures found in ORS 127. This applies whether they are protected persons or not.

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.*

DRO hears from protected persons who are seeking mental health counseling, but it's entirely thwarted by their guardian sitting in on sessions without their consent. This is counter-therapeutic and exceeds the role of a guardian to support independence and self-reliance. ORS 125.300.

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.

DRO hears from protected persons who are planted in new places that are not their home or their community, without discussion or notice with their guardian. This has caused much distress and anxiety.

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).

Protected persons reasonably expect that there are open pathways of communication with their guardians. The Annual Guardian Report is part of this on-going conversation as to how a guardian may support a person's independence and self-reliance. Protected persons may be able to contribute and it may be useful knowledge for their paths to greater independence. We meet with many protected persons who did not get to see their guardian's annual report—sometimes they've not seen this report after decades of being under guardianship.

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.*

We've had clients who owned their home, raised their kids there, and now it's a lot more than simply walls a floor & a ceiling but is comfort, stability, etc.

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

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examples of ways they tried to explore and engage in supported decision-making during the conservatorship.

DRO strongly supports SB 528 because people under guardianship proceedings need further legal requirements to be supported in their independence, self-reliance and positive growth. There are many Oregonians who are trapped in guardianships that are unnecessary entirely or in scope. And it's for their entire life. This has caused people under protective proceedings to, at times, languish in their day to day lives that are devoid of agency and meaning.

2. Disability Rights Oregon (DRO):

- Protection & Advocacy agency for people with disabilities in Oregon since 1976; DRO promotes and defends the rights of individuals with disabilities.
- DRO's clients in protective proceedings (guardianship or conservatorship) are always the Respondent (person who may get a Guardian) or Protected Person (person who has a guardian).
- DRO is part of a national network of Protection & Advocacy agencies (P & As)—the written report that DRO submitted, "Overcoming Civil Death" is DRO's equivalent P & A for Texans with disabilities.
- Advocating for the rights of people under guardianship is a constant goal of DRO due to its huge infringement on individual liberties.

DRO recognizes the tremendous and laudable benefit to protected persons who have guardians that consistently use the least restrictive alternatives to support a person's independence and self-reliance. DRO does not generally hear from this group of protected persons.

DRO advocates for people under guardianship who experience excessive restrictions in their day-to-day lives coupled with unnecessary losses. Protected people express that their choice over the following has not been considered and is not happening:

- Choice of community and home
- Choice of food for meals
- Choice to work, take a vacation or pursue a hobby
- Choice to hear their selected music, get fresh air or wear their own clothes
- Choice over how to use of their own money, including barriers to setting up ABLE accounts
- Choice of medical care including having one on one mental health counseling

DRO has the privilege of advocating for and representing 100's of 1000's of people under guardianship; we receive approximately 100 pleadings each month since notice was required to DRO around 1999. We advocate in a variety of ways including:

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Individual representation to class action law suits; training and education; collaboration in, for example, work groups and task forces; and legislative advocacy.

3. My Background & Experience:

I've been an attorney since 1989 and a Senior Staff attorney with DRO since 1999. Prior to working with DRO, I worked as a public defender as well as a sole practitioner.

My education includes earning Bachelor Degrees from Oberlin College in Biology and Sociology/ Anthropology; a law degree from Northeastern University School of Law.

My collaboration with other stakeholders includes: Member, Working Interdisciplinary Network of Guardians (WINGS) (2014 to current); Member, Elder Justice Advisory Committee (2022-current); Member, Youth Voice Youth Choice state group (2022-Current); Member, State of Oregon's Durable Medical Equipment Prosthetics Orthotics & Supplies Stakeholders Group (2015-Present).

Additionally, additional collaborative groups have included: Board Member, Oregon Long-Term Care Ombudsman (2015-2022); Public Guardian Task Force (2012-2016); DRO's Amicus Representative for Mental Health Alliance in U.S. DOJ v. Portland Police Bureau (PPB) (2018-2021); PPB's Behavioral Health Unit Advisory Committee (BHUAC) (2014-2018); Multnomah County Probate Mediation and Curriculum Committee (2009-2010); Attorney Generals' Sexual Abuse Task Force' Legislation and Public Policy Committee (2008-2010).

I co-authored written materials including DRO's Know Your Rights: Guardianship for Adults FAQ and Guardianship Handbook (both submitted as written testimony); 4 articles in OSB Elder Law Section's electronic newsletter (submitted as written testimony); and the Declaration for Mental Health Treatment (Revisions in 2002)

I've presented trainings on empowering people under guardianship and ensuring least restrictive alternatives to county, state, non-profit groups as well as on less restrictive alternatives, such as the Declaration for Mental Health Treatment to residential and service providers and the Psychiatric Security Review Board. As a member of the WINGs' sub-group on Train the Trainer, we developed a curriculum and presented on less restrictive alternatives to guardianship.

I've been a member of many professional groups, including the Oregon State Bar's Elder Law Section since 2010 (Chair in 2018).

We support SB 528 for Oregonians experiencing a civil death.

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About Disability Rights 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).