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Committee: Senate Committee on Judiciary

Measure: SB 528

Chair Prozanski, Members of the Committee

I am an Oregon elder law attorney with over 10 years of experience helping individuals and families with guardianship and conservatorship matters, establishing, administering, challenging, and terminating these protective proceedings. I am testifying today in opposition to SB 528 because of the legal, practical, financial, and health consequences on all parties involved in this process.

Before exploring the elder law related issues, I need to flag a problem that SB 528 creates for immigration proceedings. In 2021 the Legislature passed 2021 Oregon Laws Chapter 399, which created a process for establishing a guardianship of an individual between 18 and 21 years old who are eligible for a special immigrant status and unable to be reunified with parent due to abuse, neglect, or abandonment that occurred before age 18. This was necessary because of the requirements of the relevant federal immigration laws for a guardian. Chapter 399 specifically carved out a variety of exceptions to general guardianship procedures and made requirements that do not otherwise apply to reflect the unique nature of these cases. SB 528 would undo that work and lump these vulnerable youth cases into the same requirements that apply for other guardianships, creating unnecessary additional roadblocks in already complicated immigration matters. If nothing else, SB 528 needs to be amended to correct this overinclusion.

SB 528's proponents are not wrong in noting that there is significant room for improvement and increased self-determination in the implementation of the current guardianship system. However, the actions proposed in SB 528 would cause significant financial and administrative burdens on individuals without meaningfully addressing those problems.

The first major point to be addressed is that all of the harms alleged in the testimony of the bill's proponents are related to the needs of younger adults with intellectual and developmental disabilities(I/DD). These individuals are only a small fraction of the individuals served and protected by the guardianship and conservatorship system in Oregon. The substantial majority of those served by this system are older adults with dementias and other acquired cognitive impairments for whom the relevant concerns are very different. This focus on such a narrow subset of the affected individuals leads to the proposing of bad policy.

For example, younger adults with I/DD are generally in the continuing care and support of their parents or other immediate family having few immediate risks of harm or emergency needs requiring the appointment of a guardian. On the other hand, older adults in need of a guardian and/or conservator are often in the middle of a health crisis, financial or other abuse, or otherwise experiencing actual and immediate harm related

to a loss of capacity. In those cases, the appointment of a temporary guardian and/or conservator on an emergency basis can be the difference between life and death or retaining resources and bankruptcy. The new procedural requirements of SB 528 to "explore" supported decision making and other alternatives, rather than "consider" as required under current statute, include no exception for such emergencies. Given the change of language, a court would likely require some kind of tangible action to satisfy this requirement. Without an exception for emergencies, this requirement could easily be the reason why an abusive child has the time to clear out an individual's bank accounts, make off with their possessions, or cause lasting physical injury. Even in the absence of such a bad actor, the delay caused by this could be the difference between securing and losing placement in an appropriate setting after hospitalization or being able to make the necessary decisions in a medical emergency.

Looking further into the bill, many of the requirements of SB 528 are built around the concept of "supported decision making," which it defines as:

> decision-making by a person with the assistance or accommodation of another person, including assistance gathering relevant information, evaluating information to allow the supported person to make a decision or communicating the supported person's decision to others.

However, despite requiring the exploration and implementation of supported decision making, SB 528 provides no legal structure of any kind for this decision making. Critically, there is no basis for health care, financial, government benefit, or any other institutions interacting with an individual to provide information to "another person," to accept communication from them, or to otherwise treat them as anything but the legally irrelevant party they would be. Thus, it is functionally impossible to meet this requirement.

Additionally, SB 528 would require guardians to go through a process that typically costs multiple thousands of dollars every five years, regardless of whether anyone involved has the resources to pay those costs or whether there have been any meaningful changes in the situation that justify such cost. This greatly exacerbates the existing access to justice issues related to guardianships, essentially guaranteeing that only the rich will be able to access this tool and leaving the rest to whatever harm comes to them. Further, even in situations where the resources are available, the logistical burden of repeating the petition process every five years will deter many potential guardians from serving.

SB 528 also severely restricts the authority of a guardian and creates significantly more paperwork burden for a guardian to get and exercise the powers needed to facilitate the wellbeing of a protected person, without changing the core standard for the appointment of a guardian. The end result is an increase in the cost of the process, additional deterrence of potential guardians, and the expenditure of additional court resources, all for no meaningful benefit to the respondent/protected person.

All of the above, along with the other requirements imposed by this bill will make finding someone willing to serve as guardian, already the hardest part of many guardianships, even more difficult, deterring lay persons from serving and driving many

professional fiduciaries out of the field. This will increase the number of cases where a guardian is needed, but no willing guardian can be found.

Inability to get a guardian appointed in a timely manner can have dire health, legal, and financial consequences. The delays or lack of willing guardians cause by this bill will increase the number of patients in hospitals who are ready for discharge but are unsafe to return to their homes or other living situations and lack the capacity to make a placement decision, thus preventing discharged. In these circumstances, the appointment of a guardian is often necessary to arrange suitable placement and without a guardian patients can end up spending months longer in the hospital than is medically necessary. The costs associated with such an extended hospital stay can often bankrupt patients. Having these patients admitted so much longer than necessary also adds to the strain on both our hospital systems, which are already in crisis, and on the Oregon Health Plan and other state programs that end up having to pick up the tab. The lack of a guardian or conservator in these circumstances can also often trigger cascades of problems tied to all of the bills that are not paid while the person is in the hospital, sometimes leaving them with no home to return to, regardless of safety concerns.

Moreover, SB 528 changes how court visitors are selected in some counties, including Marion, from the current model where a petitioner selects a court visitor off a list of court-approved visitors and takes care of securing the visitor's agreement to serve and handling payment, to a model where all of that is put on the already overburdened courts. The requirement for visitors to do a report every 5 years also puts many times the current demand on a very limited pool of interested, qualified visitors.

Happily, there are already tools in place to address the harms noted by the proponents of SB 528, they are simply underfunded and underutilized. Regarding the decision making of a guardian, ORS 125.315(1)(g)-(i) already provide as follows:

> (g) The guardian shall promote the self-determination of the protected person and, to the extent practicable, encourage the protected person to participate in decisions, act on the protected person's own behalf and develop or regain the capacity to manage the protected person's personal affairs. To accomplish the duties under this paragraph, the guardian shall:
>
> (A) Become or remain personally acquainted with the protected person and maintain sufficient contact with the protected person, including through regular visitation, to know the protected person's abilities, limitations, needs, opportunities and physical and mental health;
>
> (B) To the extent practicable, identify the values and preferences of the protected person and involve the protected person in decisions affecting the protected person, including decisions about the protected person's care, dwelling, activities or social interactions; and
>
> (C) Make reasonable efforts to identify and facilitate supportive relationships and services for the protected person.
>
> (h) In making decisions for the protected person, the guardian shall make

the decisions the guardian reasonably believes the protected person would make if the protected person were able, unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the protected person. To determine the decision the protected person would make if able, the guardian shall consider the protected person's previous or current instructions, preferences, opinions, values and actions, to the extent actually known or reasonably ascertainable by the guardian.

(i) If the guardian cannot make a decision under paragraph (h) of this subsection because the guardian does not know and cannot reasonably determine the decision the protected person would make if able, or the guardian reasonably believes the decision the protected person would make would unreasonably harm or endanger the welfare or personal or financial interests of the protected person, the guardian shall act in accordance with the best interest of the protected person. In determining the best interest of the protected person, the guardian shall consider:

(A) Information received from professionals and persons that demonstrate sufficient interest in the welfare of the protected person;

(B) Other information the guardian believes the protected person would consider if the protected person were able; and

(C) Other factors a reasonable person in the circumstances of the protected person would consider, including consequences for others.

In addition to these requirements, Oregon has several programs and entities that are already at work in addressing or tasked with addressing these issues, that need additional funding to be viable or successful. Among these programs is the Oregon Public Guardian and Conservator (OPGC), which is intended to be providing services to individuals across Oregon who need the supports of a guardian but either cannot afford one and/or have no one in their lives willing to serve in that role. The OPGC is so woefully underfunded that its capacity is only 160-185 clients for the entire state.

Two other impactful programs in this area are the Guardian Partners fiduciary education and monitoring programs. The fiduciary education program is required in many counties and provides training to new guardians and conservators on their duties and authority in those roles, including training on ORS 125.315(1)(g)-(i). The Guardian Partners monitoring program is a currently very limited program that has trained volunteers visit with the fiduciary and the protected person to give the court neutral information about the situation. This provides all of the benefits intended by SB 528, without the $2,500 to $5,000+ in costs that would come from the proposed motion to continue the protective proceeding. Providing funding to this program to allow statewide implementation on all cases would allow for these benefits to be realized without financially punishing families and individuals.

Further, ORS 125.080(6) provides for court appointed counsel for a respondent or protected person when they request that counsel be appointed, an objection is made

or filed to the petition or motion by any person, the court visitor recommends appointment of counsel, or the court determines they are in need of legal counsel. ORS 125.080(7) provides for appointed counsel to be paid by the respondent or protected person if possible, or by the public defense services executive director if they are financially eligible for appointed counsel at state expense. This program is currently in effect in Multnomah, Lane, and Columbia counties and will go into effect statewide on January 2, 2024. Providing sufficient funding to this program would achieve SB 528's goal of providing representation to respondent's and protected persons without creating new costly and burdensome requirements on all parties.

Another program that should be helping in this space is the major proponent of SB 528, Disability Rights Oregon (DRO). DRO is the system in Oregon designated to protect and advocate for the rights of individuals. Every guardianship/conservatorship petition related to an individual in a mental health treatment facility or a residential facility for individuals with developmental disabilities or that proposes placement in such a facility is served on DRO, along with virtually all other filings for the remainder of the case. According to a search of Oregon's electronic court records on 1/26/2023, DRO has appeared or taken action in only 3 total cases, out of over 1,500 filed annually. Funding and/or action by DRO to provide the representation that is needed would again be a far more reasonable solution to this problem.

The solution to the problems noted by the proponents of SB 528 is better funding and implementation of these existing solutions, not creating a new suite of statutory requirements that lack both meaningful legal structures to operate from and any funding to mitigate their crippling impact on individuals with disabilities, their families, guardians, court visitors, and the courts.

I strongly urge this committee not to allow this bill to move forward.

Very truly yours,

Christopher D. Hamilton