Submitter: Matthew Whitman

On Behalf Of:

Committee: Senate Committee On Judiciary

Measure: SB528

I am a trial lawyer. My practice is entirely in the Oregon probate courts. I have participated in many, many protective proceedings, representing court-appointed fiduciaries, people for whom fiduciaries have been appointed, and people opposing any assertion of of judicial authority over them and their affairs.

There are a number of problems with this bill as gutted-and-stuffed. (I submitted written opposition testimony to the bill as originally proposed.)

First, the gut-and-stuff procedure is bad. The Legislature shouldn't do it in this case, or at all. It prevents careful and thoughtful commentary by the stakeholders that will be most affected, which is of course the point.

Second, the primary advocate of this bill, Disability Rights Oregon, is an important player in the community of stakeholders who deal with protective proceedings under ORS Chapter 125. But they are not the most important player, and despite request have refused to engage the broader community (lawyers, judges, etc.) in any attempt to further the reforms DRO sees as necessary. As a result, this bill addresses ONLY DRO's premise -- that some people subject to protective proceedings don't have counsel when they should -- without either considering counterarguments or the externalities that the bill would foist on others. This is not the way to legislate, and, as an aside, is terrible community relations on the part of DRO.

So, counterarguments: before the Legislature takes the extreme step of requiring court-appointed counsel for every single person subject to a protective proceeding who resides in a facility (proposed ORS 125.080(6)(a)(F)) or is under 65 with a disability (proposed ORS 125.080(6)(a)(H)), then it ought to engage in detailed factfinding about the on-the-ground reality of DRO's premise. Between those categories alone, this would require court-appointed counsel for most people subject to guardianships. Why is that the best answer to the perceived problem, as opposed to the use of a taxpayer-purchased hammer to smash a fly?

Related to that, remember the necessary factual predicate to the appointment of a guardian in the first place: a person must be incapacitated within the meaning of ORS 125.005(5): having "a condition in which a person’s ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person’s physical health or safety." These people, by definition, cannot have an ordinary attorney-client relationship; most of them cannot understand the proceeding

(with or without accessibility accommodation) and certainly cannot direct a lawyer or participate meaningfully in the proceeding. The natural consequence of that is that lawyers appointed to represent such people will be taking advocacy positions based entirely on substituted decisionmaking -- what the lawyer wants, believes, and thinks are appropriate, rather than what the "client" does. So: cui bono? Who will be appointed to do this work if this bill becomes law, and what agendas will they bring to their representation of "clients" who cannot understand or communicate their desires?

So, externalities: first, how much will it cost, and who will pay for it? The public defender services are already underfunded. How will the cost of hiring MANY more lawyers be borne? Will we have to cut funding for other public defender services to pay for this new mandate? If not, where will the money come from?

Second, by its nature this bill seeks out more contested hearings before judges. Again, last I saw the Oregon trial-level judiciary was not swimming in available docket time. How many more hearings will this bill cause to take place? What level of statutory and Constitutional priority will those hearings take? In other words, what cases would get pushed to the bottom of the pile and receive no timely justice because of this bill?