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Testimony of Leo J. Delicata, Esq., Legal Services for the Elderly, against L.D. 82 proposed committee amendment dated 2/23/20 revised 2.24.20 before the Joint Standing Committee on the Judiciary.

Senator Carpenter, Representative Bailey and members of the Joint Standing Committee on Judiciary,

We agree that the bond serves no purpose and should be repealed. You have an opinion from the Attorney General and we largely agree with its reasoning. However, we are concerned that repeal without a protective replacement will leave people subject to a public guardianship or conservatorship at a distinct legal disadvantage. Because the State is immune under the Maine Tort Claims Act and there is no other statutory exception or common law theory that waives that immunity, we believe that people who are harmed by a breach of duty by their public guardian or conservator have no remedy against the State. As a matter of public policy we believe that such a remedy should exist.

Equal treatment under the law is a basic principle of our rule of law and this seems like an appropriate rationale to apply in this circumstance. Private guardians and conservators are required to provide a bond to guarantee that assets will be available to satisfy legal claims for their negligent or intentional conduct causing harm. The State acting as public guardian or conservator has the same fiduciary duty to the people it serves and should be subject to the same remedy for the harm caused by a breach of that duty. Of course, a bond will not work because the State has immunity and that immunity extends to the entity providing the bond.

It appears to us that one way to effectively provide a remedy for those who have a public fiduciary is to provide a specific waiver of immunity under the Tort Claim Act. We encourage the Committee to consider this suggestion. This is the language that we think would accomplish this purpose:

Amend Title 14, Part 7, Chapter 741, Section 8104-A as follows:

§8104-A. Exceptions to immunity

Except as specified in section 8104-B, a governmental entity is liable for property damage, bodily injury or death in the following instances.

5. Duties and powers of a public guardian or conservator. A governmental entity acting as a public guardian or conservator is liable for its negligent acts or omissions arising out of and occurring during the performance of its powers, rights and duties respecting the individual subject to guardianship or the individual subject to conservatorship.

It may be helpful to know that a claim against the State under this act is capped at \$400,000.

Thank you for giving us the opportunity to comment on the amendment. We hope that you decide to provide a remedy for this population of very compromised adults whether or not you accept our suggestion as a model.