

# **Oregon Guardianship Statutes Overview**

# ORS Chapter 125

- Comprehensive statute on adult guardianship & conservatorship
- Lengthy and filled with legalese.

# General Provisions

## Definitions

- “Incapacitated” means 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. “Meeting the essential requirements for physical health and safety” means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.
- (3) “Financially incapable” means a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance. “Manage financial resources” means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.

# General Provisions

## Protective Proceedings

- Any person who is interested in the affairs or welfare of a respondent may file a petition for the appointment of a fiduciary or entry of other protective order.

## Venue

- Except as provided in this section, a protective proceeding must be commenced in the county where the respondent resides or is present.
- If the respondent resides in an institution by reason of an order of a court, the proceeding may be commenced in the county where that court sits.

# General Provisions

## Authority of the Court

- A court having jurisdiction over a protective proceeding shall exercise continuing authority over the proceeding. Subject to the provisions of ORS 125.800 to 125.852 and this chapter, the court may act upon the petition or motion of any person or upon its own authority at any time and in any manner it deems appropriate to determine the condition and welfare of the respondent or protected person and to inquire into the proper performance of the duties of a fiduciary appointed under the provisions of this chapter.

# Procedure in Protective Proceedings

## Petitions in Protective Proceedings

- A petition in a protective proceeding must contain the following information to the extent that the petitioner is aware of the information or to the extent that the petitioner is able to acquire the information with reasonable effort (a) The name, age, residence address and current location of the respondent.
  - The interest of the petitioner.
  - The name, age and address of the petitioner and any person nominated as fiduciary in the petition and the relationship of the person nominated to the respondent.
  - A statement as to whether the person nominated as fiduciary:
    - Has been convicted of a crime;
    - Has filed for or received protection under the bankruptcy laws;
    - Has been removed as a fiduciary under ORS 125.225; or
    - Has had a license revoked or canceled that was required by the laws of any state for the practice of a profession or occupation.
  - If the person nominated as fiduciary is not the petitioner, a statement indicating that the person nominated is willing and able to serve.
  - The name and address of any fiduciary that has been appointed for the respondent by a court of any state, any trustee for a trust established by or for the respondent, any person appointed as a health care representative under the

# Procedure in Protective Proceedings

## Petitions Continued

- The name and address of the respondent's treating physician and any other person who is providing care to the respondent.
- The factual information that supports the request for the appointment of a fiduciary or entry of other protective order, less restrictive alternatives to the appointment of a fiduciary that have been considered and why the alternatives are inadequate and the names and addresses of all persons who have information that would support a finding that an adult respondent is incapacitated or financially incapable.
- A statement that indicates whether the person nominated as fiduciary intends to place the respondent in a mental health treatment facility, a nursing home or other residential facility.
- A general description of the estate of the respondent and the respondent's sources of income and the amount of that income.
- A statement indicating whether the person nominated as fiduciary is a public or private agency or organization that provides services to the respondent or an employee of a public or private agency or organization that provides services to the respondent.
- A statement that indicates whether the petitioner is petitioning for plenary authority or specified limited authority for the person nominated as fiduciary.

# Procedure in Protective Proceedings

## Who must be given notice.

- The notices required by this section must be given to all persons whose identities and addresses can be ascertained in the exercise of reasonable diligence by the person required to give the notice.
- Notice of the filing of a petition for the appointment of a fiduciary or entry of other protective order must be given by the petitioner to the following persons:
  - The respondent, if the respondent has attained 14 years of age.
  - The spouse, parents and adult children of the respondent.
  - If the respondent does not have a spouse, parent or adult child, the person or persons most closely related to the respondent.
  - Any person who is cohabiting with the respondent and who is interested in the affairs or welfare of the respondent.
  - Any person who has been nominated as fiduciary or appointed to act as fiduciary for the respondent by a court of any state, any trustee for a trust established by or for the respondent, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660 and any person acting as attorney-in-fact for the respondent under a power of attorney.



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  - Any attorney who is representing the respondent in any capacity.
  - If the respondent is a resident of a nursing home or residential facility, or if the person nominated to act as fiduciary intends to place the respondent in a nursing home or residential facility, the office of the Long Term Care Ombudsman.
  - If the respondent is a resident of a mental health treatment facility or a residential facility for individuals with developmental disabilities, or if the person nominated to act as fiduciary intends to place the respondent in such a facility, the system described in ORS 192.517 (1).

# Procedure in Protective Proceedings

## Notice to Protected Person

- Must be printed in 14-point font
- Form is statutorily required, ORS 125.070
- Explains whole process
  - Rights
  - Use of funds
  - Court visitor
  - Request counsel
- Explains right to object
  - Objection form is included

# Procedure in Protective Proceedings

## Objections

- Any person who is interested in the affairs or welfare of a respondent or protected person may present objections to a petition or to a motion in a protective proceeding
- If objections are presented by any of the persons listed in subsection of this section, the court shall schedule a hearing on the objections.

# Procedure in Protective Proceedings

## Hearings

- The court may require that a hearing be held on any petition or motion in a protective proceeding.
- A hearing must be held on a petition or motion if an objection is filed to the petition or motion and the objection is not withdrawn before the time scheduled for the hearing.

# Procedure in Protective Proceedings

## Notice of appointment

- Upon appointment, a guardian shall deliver or mail to the respondent notice of the order of appointment.
- A notice under this section must include:
  - The title of the court in which the protective proceeding is pending and the clerk's file number;
  - The name and address of the protected person and the attorney for the protected person, if any;
  - The name and address of the guardian and the attorney for the guardian, if any;
  - The date of the appointment of the guardian;
  - A statement describing the authority awarded to the guardian and any limitations placed on the guardian's authority; and
  - A statement advising the protected person or other interested person of the right of the protected person to seek removal of the guardian or termination of the guardianship.

# Procedure in Protective Proceedings

## Termination

- The court may terminate protective proceedings upon motion after determining any of the following:
  - The appointment of a fiduciary or other protective order was made because the protected person was incapacitated, and the protected person is no longer incapacitated.
  - The protected person has died.
  - The best interests of the protected person would be served by termination of the proceedings.

# Procedure in Protective Proceedings

## Court Visitor

- The court shall appoint a visitor upon the filing of a petition in a protective proceeding that seeks the appointment of A guardian for an adult respondent
- A visitor may be an officer, employee or special appointee of the court. The person appointed may not have any personal interest in the proceedings. The person appointed must have training or expertise adequate to allow the person to appropriately evaluate the functional capacity and needs of a respondent or protected person.
- A visitor appointed by the court under this section shall interview a person nominated or appointed as fiduciary and the respondent or protected person where the respondent is located.
- Subject to any law relating to confidentiality, the visitor may interview any physician, naturopathic physician or psychologist who has examined the respondent or protected person, the person or officer of the institution having the care, custody or control of the respondent, and any other person who may have relevant information.

# Procedure in Protective Proceedings

## Court Visitor, continued

- If a petition is filed seeking the appointment of a guardian for an adult respondent, a visitor shall investigate the following matters:
  - The inability of the respondent to provide for the needs of the respondent with respect to physical health, food, clothing and shelter;
  - The location of the respondent's residence and the ability of the respondent to live in the residence while under guardianship;
  - Alternatives to guardianship considered by the petitioner and reasons why those alternatives are not available;
  - Health or social services provided to the respondent during the year preceding the filing of the petition, when the petitioner has information as to those services;
  - The inability of the respondent to resist fraud or undue influence; and
  - Whether the respondent's inability to provide for the needs of the respondent is an isolated incident of negligence or improvidence, or whether a pattern exists.
  - Whether the respondent objects to:
    - The appointment of a fiduciary; and
    - The nominated fiduciary or prefers another person to act as fiduciary.
- Court Visitor report
  - File a report to the court: available to testify



# Fiduciaries Generally

## **Preferences in appointing fiduciary.**

- The court shall appoint the most suitable person who is willing to serve as fiduciary after giving consideration to the specific circumstances of the respondent, any stated desire of the respondent, the relationship by blood or marriage of the person nominated to be fiduciary to the respondent, any preference expressed by a parent of the respondent, the estate of the respondent and any impact on ease of administration that may result from the appointment.

# Fiduciaries Generally

## Conflicts of interest

- Statute focuses on using protected persons funds to pay people the fiduciary is related to or has a pecuniary interest in.
- Extensive notice to the courts is required when doing so.

# Fiduciaries Generally

## Removal of a fiduciary

- A court shall remove a fiduciary whenever that removal is in the best interests of the protected person.
- In addition to any other grounds, the court may remove a guardian if the court determines the guardian:
  - Unreasonably limits the protected person's associations under ORS 125.323;
  - Fails to perform the guardian's duties required under ORS 125.315 (1)(g) to (i); or
  - Changes the abode of the adult protected person or places the protected person in a mental health treatment facility, a nursing home or other residential facility and:
    - Failed to disclose in the petition for appointment that the guardian intended to make the placement; or
    - Failed to comply with ORS 125.320 (3) before making the placement.
- On termination of the authority of a fiduciary, an interim fiduciary may be appointed by the court to serve for a period not to exceed 60 days. An interim fiduciary under this subsection may be appointed by the court without the appointment of a visitor, additional notices or any other additional procedure, except as may be determined necessary by the court.
- Upon termination of the authority of a fiduciary, the court may appoint a successor fiduciary. A petition for appointment as successor fiduciary must be filed in the same manner as provided for an original petition, and is subject to all provisions applicable to an original petition for the appointment of a fiduciary.

# Fiduciaries Generally

## Professional Fiduciaries

- ORS 125.240 requirements
  - Certified by Center for Guardianship Certification (CGC)
  - Criminal background check
  - Bond
  - Disclosures of fees
- ORS 125.242
  - OPGC is exempt

# Guardians

## In general

- 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.
- An adult protected person for whom a guardian has been appointed is not presumed to be incompetent.
- A protected person retains all legal and civil rights provided by law except those that have been expressly limited by court order or specifically granted to the guardian by the court. Rights retained by the person include but are not limited to the right to contact and retain counsel and to have access to personal records.

# Guardians

## Order of appointment

- After determining that conditions for the appointment of a guardian have been established, the court may appoint a guardian as requested if the court determines by **clear and convincing** evidence that:
  - The respondent is incapacitated;
  - The appointment is necessary as a means of providing continuing care and supervision of the respondent; and
  - The nominated person is both qualified and suitable, and is willing to serve.
- 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.

# Guardians

## General Powers and Duties of a Guardian

- Except to the extent of any limitation under the order of appointment, the guardian has custody of the protected person and may establish the protected person's place of abode within or without this state.
- The guardian shall provide for the care, comfort and maintenance of the protected person and, whenever appropriate, shall arrange for training and education of the protected person. Without regard to custodial rights of the protected person, the guardian shall take reasonable care of the person's clothing, furniture and other personal effects unless a conservator has been appointed for the protected person.
- The guardian may consent, refuse consent or withhold or withdraw consent to health care, for the protected person. A guardian is not liable solely by reason of consent under this paragraph for any injury to the protected person resulting from the negligence or acts of third persons.
- The guardian may:
  - Make advance funeral and burial arrangements;
  - Control the disposition of the remains of the protected person; and
  - make an anatomical gift of all or any part of the body of the protected person.
- The guardian may receive money and personal property deliverable to the protected person and apply the money and property for support, care and education of the protected person. The guardian shall exercise care to conserve any excess for the protected person's needs.
- 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

# Guardians

## General Powers and Duties of a Guardian

- 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:
  - 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;
  - 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
  - Make reasonable efforts to identify and facilitate supportive relationships and services for the protected person.



# Guardians

## General Powers and Duties of a Guardian

- 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.
- If the guardian cannot make a 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:
  - Information received from professionals and persons that demonstrate sufficient interest in the welfare of the protected person;
  - Other information the guardian believes the protected person would consider if the protected person were able; and
  - Other factors a reasonable person in the circumstances of the protected person would consider, including consequences for others.

# Guardians

## Limitations on guardians

- A guardian may not authorize the sterilization of the protected person.
- A guardian may not use funds from the protected person's estate for room and board that the guardian or guardian's spouse, parent or child have furnished the protected person unless the charge for the service is approved by order of the court before the payment is made.
- Before a guardian may change the abode of an adult protected person or place an adult protected person in a mental health treatment facility, a nursing home or other residential facility, the guardian must file with the court and serve a statement declaring that the guardian intends to make the change of abode or placement
  - The statement must be filed and served in the manner provided for serving a motion at least 15 days prior to each change of abode or placement of the protected person.
  - When the guardian determines that the change of abode or placement must occur in less than 15 days to protect the immediate health, welfare or safety of the protected person or others, the statement shall declare that the change of abode or placement must occur in less than 15 days to protect the immediate health, welfare or safety of the protected person or others. The statement must be filed and served with as much advance notice as possible, in no event later than two judicial days after the change of abode or placement occurs.

# Guardians

## Limits on association.

- A guardian may not limit a protected person's preferred associations, except:
  - As specifically allowed by the court; or
  - To the extent the guardian determines necessary to avoid unreasonable harm to the protected person's health, safety or well-being.
- If a protected person is unable to communicate, the protected person's preferred association shall be presumed based on the prior relationship between the protected person and the person with whom the association is contemplated.

# Guardians

## **Guardian's report.**

- Not later than 30 days following each anniversary of appointment, a guardian for an adult protected person shall file with the court a written report.
- Form of court reports is statutory. See ORS 125.325