

## EVIDENCE IN CONTESTED GUARDIANSHIP AND CONSERVATORSHIP CASES

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Contested guardianship and conservatorship cases are tried before judges rather than juries. While judges tend to take a more relaxed view about some of the evidentiary rules when they are the triers of fact, the Oregon Evidence Code and the Oregon Rules of Civil Procedure do apply to guardianship and conservatorship proceedings<sup>1</sup>. The appointment of a guardian or a conservator for an adult requires proof of the person's inability to function. Showing that the respondent has a particular diagnosis or a mental or physical disability is not sufficient. *In the Matter of Grimmatt*, 193 Or App 427 (2004). As the court stated in *Schaefer v. Schaefer*, 183 Or App 513, 517 (2002), the petitioner in a guardianship case must prove that the respondent has "\*\*\*severely impaired perception or communications skills\*\*\*," and that the impairments result in the respondent being unable to provide for basic health and safety. See ORS 125.005(5). The petitioner in a conservatorship case has to demonstrate that the respondent cannot manage his or her income and property effectively. ORS 125.005(3); *In the Matter of Baxter*, 128 Or App 91 (1994).

The court must hold a hearing if an objection is filed, and may hold a hearing in other circumstances. ORS 125.080. In some counties, the lawyer must schedule a hearing when filing a petition seeking the appointment of a temporary fiduciary. Although most cases involving adult respondents are not contested, it is hard to predict when a respondent or another interested person will object. Considering what evidence could be used if an objection is filed helps in drafting the petition as well as preparing for a hearing.

The first reason for objecting listed on the statutory respondent's objection form is "I do not want anyone else making any of my decisions for me." ORS 125.070(4). That objection is treated as a general denial of the allegations that the respondent needs a guardian or a conservator. The petitioner is usually the main source of information about the respondent's situation as well as the principal witness at a hearing. The factual allegations required by ORS 125.055(2)(g) come from the petitioner's own observations and from other people "\*\*\*who have information that would support a finding that an adult respondent is incapacitated or financially incapable\*\*\*." Contacting those people before listing their names, addresses, and telephone numbers in the petition gives the lawyer the opportunity to assess them as potential witnesses and to prepare them for being contacted by the court visitor and others involved in the case.

Another common reason for objecting is that the proposed fiduciary is not the most suitable person to serve in that role. The proposed fiduciary should be prepared to testify about

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<sup>1</sup>ORS 125.050 was adopted as part of the 1995 guardianship and conservatorship legislation because some lawyers and judges expressed a different view.

his or her background and qualifications, relationship with the respondent, and plans for carrying out the duties of a guardian or conservator. Other evidence will depend on the specific grounds for the objection, and may be more appropriately reserved for rebuttal. If an alternate fiduciary will be proposed as a possible solution, due process requires that the parties be given notice and the opportunity to object. *Spady v. Hawkins*, 155 Or App 454 (1998).

The court visitor must be present at the hearing on a contested petition<sup>2</sup> and is often a key witness. While the court visitor's written report contains inadmissible hearsay, the court visitor can testify about his or her observations, about statements that are not hearsay (such as admissions against interest), and about anything that would qualify as a hearsay exception.<sup>3</sup> The court visitor is likely to be accepted as an expert witness and allowed to testify about his or her opinions and recommendations. The parties can expect a judge to give great weight to that testimony due to the court visitor's neutral position, experience, and ongoing relationship with the court. Attacking the court visitor's qualifications and credibility is rarely a good strategy. A party who disagrees with the findings and recommendations in the court visitor's report should plan to present expert testimony or other evidence that supports the party's position.

The petitioner has the legal burden of persuading the court that the standards for appointing a fiduciary have been met by clear and convincing evidence. Oregon Evidence Code, Rule 305; ORS 125.305(1) and 125.400. The attorney for the petitioner should be prepared to put on his or her case even if the objecting party is not expected to appear at the hearing. This may include subpoenaing the respondent and arranging for transportation to the courthouse. The attorney for a respondent who is objecting will have to decide whether to offer the respondent's testimony and how to prepare a respondent who may have significant physical or mental impairments for the stress of the hearing. An elderly or disabled respondent who is able to testify about his or her objections and the reasons for those objections can make an excellent impression on a judge. An attorney who conducts an insensitive or overbearing cross-examination of such a respondent may regret doing so. On the other hand, testimony by an impaired respondent who denies needing any help or who is delusional will tend to support the petitioner's case.

The issues in the case will determine what testimony and physical evidence are likely to be persuasive. If the issue is whether the respondent's living conditions pose a serious danger to health and safety, photographs of the respondent's home may be helpful. If the allegation is that the respondent's perceptions are so impaired that he or she is refusing necessary services, letters written by the respondent accusing multiple people and organizations of conspiracy and theft may demonstrate the degree of the impairment. An advance directive for health care naming someone other than the proposed guardian as the health care representative may convince a judge that a guardian is not needed because there is a less restrictive alternative or that the proposed guardian is not suitable. If the respondent wants to remain in his or her home, testimony from an

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<sup>2</sup>ORS 125.155(5).

<sup>3</sup>Oregon Evidence Code, Rule 801 and Rule 803.

expert witness who has evaluated the respondent and the home may lead a judge to limit the guardian's authority. Documents such as police reports and financial records are often relevant in conservatorship cases.

The most discussed evidentiary issue in protective proceedings involves medical information. While evidence of the respondent's medical condition and treatment is often relevant and may be crucial in some cases, the information that the respondent's physicians and psychotherapists have about his or her diagnosis, treatment, and test results are protected from disclosure by evidentiary privilege.<sup>4</sup> The respondent may waive the privilege by his or her actions. However, the fact that the petitioner has obtained a copy of a privileged document does not waive the respondent's privilege. Sharing medical information with family members who are assisting with the respondent's care or treatment also does not waive the privilege.

Respondents' lawyers asserting the privilege, together with health care providers' increased awareness of the importance of protecting personal health information as a result of HIPAA<sup>5</sup>, have led to fewer doctor's letters being used in protective proceedings. A petitioner who believes that medical evidence is critical to the proving the need for a guardian or a conservator can ask the court to order a physical or mental examination of the respondent under ORS 125.025(3)(j) and ORCP 44. The results of a court-ordered examination are not privileged, and the examining physician or psychologist may be called as a witness.

A court-ordered examination is not a realistic option in all cases. Judges expect a petition seeking the appointment of a temporary guardian to be accompanied by supporting information such as a medical report or affidavits describing the emergency situation.<sup>6</sup> If the respondent is being held in a psychiatric unit pursuant to a Notice of Mental Illness, a doctor who has examined the respondent as part of the commitment process may provide a statement regarding the need for a temporary guardian as an alternative to commitment<sup>7</sup>. Neighbors, landlords, adult protective services workers, and others may be willing to sign affidavits recounting their observations and experiences with the respondent.

Lawyers should consider the potential evidentiary and procedural issues as they prepare for hearing. A lawyer representing a respondent may be able to keep confidential medical records from being admitted by asserting the physician-patient privilege (Oregon Evidence Code, Rule 504-1) or by objecting to the method by which the information was obtained (*see* ORCP

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<sup>4</sup>Oregon Evidence Code, Rule 504 *et seq.*

<sup>5</sup>The Health Insurance Portability and Accountability Act of 1996, P.L. 104-191.

<sup>6</sup>*See* Multnomah County SLR 9.075(3).

<sup>7</sup>This limited disclosure appears to be allowed under HIPAA. *See* 42 CFR §164.512(j)(1)(i).

55H). Documents and other physical evidence can be excluded under Oregon Evidence Code, Rule 901, if they are not properly authenticated. Carefully drafted pleadings and an articulate closing argument cannot take the place of evidence.

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