

**WHEN SOMEONE ELSE MAKES DECISIONS:
GUARDIANSHIP AND OTHER FORMS OF SURROGATE DECISION MAKING**
Office of the Long-Term Care Ombudsman Annual Conference
October 17, 2008
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I. INTRODUCTION

A. Guardianship and Conservatorship in Oregon

1. In Oregon, a guardian is appointed when someone is needed to make decisions about health care and other personal matters. A conservator is appointed when someone is needed to manage money and property. The laws about guardianships and conservatorships are in Oregon Revised Statutes (ORS) chapter 125. "Protective proceedings" refers to both types of cases. Other states follow different procedures and use different terms. For example, the Washington counterpart for a conservator is called a guardian of the estate.

2. When a guardian or conservator has been appointed, the court issues Letters of Guardianship or Letters of Conservatorship to provide proof of the person's authority.

3. The court files for guardianships and conservatorships are public records. The current files are kept with the circuit court or probate department records.

4. People sometimes use the word "guardian" as a generic term to refer to other roles (for example, the eldest child, the agent named in a financial power of attorney, the health care representative named in an advance directive for health care, etc.)

B. Other Examples of Surrogate Decision Making

1. Financial Power of Attorney. An person (called the principal) can sign a financial power of attorney to give another person (called the agent or the attorney-in-fact) the power to manage money and property. The power of attorney document lists the types of financial powers that the principal has given to the agent. In Oregon, a financial power of attorney is durable, which means that it continues to be effective if the principal becomes disabled or financially incapable unless it contains a time limit or has been revoked. A financial power of attorney is not supervised by a court or a government agency.

2. Advance Directive for Health Care. An person (called the principal) can sign an Advance Directive for Health Care to give another person (called the health care representative) the power to make health care decisions in the event that the principal is unable to make his or her own health care decisions. The form is set by statute and has spaces for limits and instructions, including a separate part for instructions about end-of-life care. An advance directive does not expire unless it contains a time limit. It can be revoked. An advance directive

is not supervised by a court or a government agency.

3. Successor Trustee. An person who creates a revocable living trust (called the settlor or the grantor or the trustor) often serves as the initial trustee of the trust. The trust agreement usually names a successor trustee and describes when and how the successor trustee can take over the administration of the trust. The successor trustee has authority to manage the trust assets for the benefit of the trust's beneficiaries, within the limits set by the trust agreement and by law. A revocable living trust can be revoked. It is not supervised by a court or a government agency.

4. Representative Payee. The Social Security Administration (SSA) can appoint a representative payee to manage Social Security benefits for a beneficiary who is unable to manage the benefits himself or herself. The beneficiary gets written notice of the process and can object. A care facility can be a representative payee. The representative payee has to fill out a SSA report form each year. The federal Department of Veterans Affairs (VA) has a similar process for appointing a fiduciary to manage VA benefits for a veteran who is unable to manage the benefits himself or herself.

5. Family Members. At the present time, Oregon law does not give the spouse, children, or siblings legal authority to make decisions for an adult under most circumstances. ORS 127.635 does contain a list of relatives who can make decisions regarding the withholding or withdrawing of life-sustaining procedures for a terminally ill incapable person who has not appointed a health care representative in an advance directive and who does not have a court-appointed guardian.

II. GUARDIANSHIP

A. Basis for Guardianship

1. In Oregon, a guardian is a person appointed by the court to make decisions about health care and personal matters for an incapacitated adult. The court can also appoint a guardian for a minor child (under the age of 18).

2. Oregon law defines "incapacitated" as a condition in which a person is unable to make or communicate decisions necessary to provide for his or her basic physical health and safety. A medical diagnosis or a disability (such as Alzheimer's Disease, traumatic brain injury, Down syndrome, or stroke) is not the same as a finding of legal incapacity. A person who makes bad decisions or who refuses to accept medical treatment or other help may not be incapacitated.

3. In order to appoint a guardian for an adult, a judge must determine that the person is incapacitated, that the appointment of a guardian is necessary, and that the proposed guardian is qualified and suitable.

B. Process for Appointing a Guardian for an Adult

1. An attorney representing a family member or other concerned person files a petition with the state circuit court, usually in the county in which the person alleged to need the guardian resides. The person who initiates the guardianship proceeding is the petitioner. The person who is the subject of the petition is called the respondent.

2. The petition includes factual allegations intended to show that the respondent is incapacitated and that a guardian is necessary. In many cases, the petition asks the court to appoint both a guardian and a conservator.

3. A copy of the petition, a copy of the notice that describes the process, and a blue respondent's objection form, have to be personally served on the respondent. Copies of the petition and notices about the guardianship case have to be mailed to the respondent's closest relative(s) and to people and agencies listed in the law. ORS 125.060(7)(b) states that copies have to be mailed to the office of the Long-Term Care Ombudsman if the respondent is in a nursing facility, residential care facility, assisted living facility, or adult foster home or if the proposed guardian intends to place the respondent in one of those care facilities. The notices have to be served or mailed at least 15 days before the deadline for filing objections.

4. The respondent can object to the proposed guardianship and/or to the proposed guardian. Appendix 1 is a sample Respondent's Objection form [not included]. Other interested people can also object.

5. The court appoints a court visitor who interviews the respondent in person. The court visitor also interviews the petitioner and other people involved in the case, often by telephone. The court visitor files a written report with the court that includes factual information (such as the names of the people who were interviewed, a description of the respondent's current living situation, and whether the respondent objects to the appointment of a guardian) and opinions (such as whether the appointment of a guardian is necessary, whether the information in the petition is accurate, and whether the proposed guardian is appropriate).

6. The court can (but is not required to) appoint a lawyer for the respondent.

7. The court can order an independent physical or mental examination of the respondent.

8. If the respondent or anyone else objects within the time set in the notices, a hearing is scheduled in front of a judge. The witnesses may include the court visitor, the parties, family members, friends, neighbors, adult protective services workers, and health care providers. The judge makes a decision based on the evidence presented.

9. No objections are filed in most cases. If no objections are filed, the judge bases his or her decision on the information in the petition and in the court visitor's report.

10. If the judge decides to appoint a guardian, the judge signs a limited judgment. A copy of the limited judgment is attached to the Letters of Guardianship issued by the court. Once a guardian is appointed, the respondent is called the protected person.

C. Guardian

1. The proposed guardian is identified in the petition, and is often the petitioner.
2. The guardian is not required to live in Oregon, but a guardian who lives far from the protected person may need to get help in order to carry out his or her duties.
3. The court may appoint a professional fiduciary when a close relative is not available or is not suitable, when family members disagree about who should be the guardian, or when special expertise is needed.

D. Powers and Duties of the Guardian

1. The guardian has the powers that are included in the judgment signed by the judge. The general powers and duties listed in ORS 125.315 are the power to decide where the protected person lives (including the power to place the protected person in a long-term care facility after appropriate notice), the duty to make arrangements for the protected person's "care, comfort and maintenance," and to the power to make health care decisions. The judgment may grant specific powers to the guardian or set limits on the guardian's powers. The protected person retains legal and civil rights not limited by the court, including the right to retain a lawyer and the right to have access to personal records.
2. If the protected person has a valid Advance Directive for Health Care, the health care representative named in the Advance Directive for Health Care has priority over the guardian for making health care decisions.
3. In a case where there is no conservator, the guardian is responsible for taking care of the protected person's money and belongings. The guardian may receive money belonging to the protected person and use it to pay for the protected person's support and care.
4. The guardian has to get permission from the court before paying himself or herself or the guardian's attorney from the protected person's funds.
5. The guardian has to give written notice before placing the protected person in a long-term care facility and before moving the protected person from one long-term care facility to another.
6. The guardian is required to file an annual report with the court using a statutory form. The guardian's report includes information about where the protected person lives, the services that the protected person receives, and the protected person's physical and mental condition. It also includes information about money received and paid out during the year if the

guardian is handling the protected person's money. A copy of the guardian's report has to be mailed or given to the protected person.

7. The guardian's authority ends when the protected person dies, when the guardianship is terminated, or when the guardian is removed.

III. CONSERVATORSHIP

A. Basis for Conservatorship

1. In Oregon, a conservator is appointed by the court to manage the money and property belonging to a financially incapable adult. The court can also appoint a conservator for a minor child (under the age of 18).

2. Oregon law defines "financially incapable" as a condition in which a person is unable to take the actions necessary to manage the person's income, real property, and other assets effectively. A particular medical diagnosis or disability (such as alcoholism, bi-polar disorder, or blindness) is not the same as a legal finding that the person is financially incapable. A person who makes bad investment decisions, who has been the victim of a financial scam, or who is not paying bills may not be financially incapable.

3. In order to appoint a conservator for an adult, a judge must determine that the person is financially incapable, that the person has money or property that requires management or protection (usually having a combined value of more than \$10,000), and that the proposed conservator is qualified and suitable.

B. Process for Appointing a Conservator for an Adult

1. The process followed to appoint a conservator for an adult is very similar to the process to appoint a guardian for an adult, except that the court is not required to appoint a court visitor.

2. If the judge decides to appoint a conservator, the judge signs a limited judgment. The Letters of Conservatorship issued by the court do not include a copy of the judgment. Once a conservator is appointed, the respondent is called the protected person.

C. Conservator

1. The proposed conservator is identified in the petition, and is often the petitioner.

2. The conservator is not required to live in Oregon.

3. The court can appoint one person to serve as both the conservator and the guardian.

4. Professional fiduciaries serve as conservators. Some banks and trust companies also serve as conservators if there are sufficient assets. The Oregon Department of Veterans'

Affairs serves as the conservator for some veterans.

5. A conservator who is not a bank, a trust company, or a government agency has to post a surety bond before he or she can take control of the protected person's income and assets. The amount of the bond is set by the court based on the value of the protected person's unrestricted assets and annual income.

D. Powers and Duties of the Conservator

1. The conservator has the powers that are included in the judgment signed by the judge. The general powers and duties listed in ORS 125.420 and 125.425 include the power and the duty to take possession and control of the income and assets that belong to the protected person, and to use the income and assets to pay for the reasonable expenses of the protected person. The judgment may grant specific powers to the conservator or set limits on the conservator's powers. The most common limits are restrictions that require the conservator to get court approval before taking a particular action, such as selling a specific asset.

2. The conservator has to get prior court approval in order to take certain actions, such as selling the protected person's residence, changing beneficiary designations, creating a trust, or using the protected person's funds to pay the conservator or the conservator's attorney.

3. The conservator does not have the power to deal with the protected person's Social Security or VA benefits unless the conservator has been appointed as the representative payee (by the Social Security Administration) or as the VA fiduciary (by the federal Department of Veterans Affairs).

4. The conservator does not have authority over assets that are in a trust unless the conservator is also the trustee. If the protected person has a financial power of attorney, the conservator can revoke it.

5. The conservator is required to file an annual account with the court following a statutory format. The account lists the protected person's assets, the income received and the expenses paid. Copies of the annual account and notices about the right to object have to be mailed to the protected person and to other people and agencies required by law.

6. The conservator's authority ends when the protected person dies, when the conservatorship is terminated, or when the conservator is removed, although the conservator is responsible filing a final account and taking the steps needed to wind up the conservatorship.

IV. TEMPORARY GUARDIANSHIP AND CONSERVATORSHIP

A. Basis for Appointing a Temporary Guardian or Conservator

1. The court can appoint a temporary guardian if there is an immediate and serious danger to the life or health of the respondent and quick action is required. The most common reason for asking for a temporary guardian is to get medical care or treatment for the respondent. The treatment may include hospitalization or placement in a crisis situation.

2. The court can appoint a temporary conservator if there is an immediate and serious danger to the respondent's estate and quick action is required. The most common reason for asking for a temporary conservator is to stop or prevent financial abuse.

B. Process for Appointing a Temporary Guardian or Conservator

1. The court can appoint a temporary guardian or conservator with less advance notice. Copies of the petition and the notice have to be personally served on the respondent and mailed to the others entitled to receive notice at least two days before a temporary guardian or conservator is appointed unless the judge makes an exception based on the nature of the emergency.

2. Local court practices about holding hearings in temporary guardianship and conservatorship cases vary. In addition to showing that the respondent is incapacitated or financially incapable, the petitioner has to provide clear and convincing evidence of the serious and immediate danger. The supporting evidence often includes a letter from the treating physician describing the incapacitating condition and the danger to the respondent.

3. A temporary guardian or conservator can be appointed for a specific purpose for a period of up to 30 days. The period can be extended for up to 30 additional days.

IV. COSTS

A. Filing Fees and Other Out-of-Pocket Costs

1. The current filing fee for a guardianship of an adult is \$78. The filing fee for a conservatorship varies from \$78 to \$662 depending on the amount of the assets involved. The respondent does not pay a fee to object. Others objectors pay a \$73 first appearance fee. The fees for court visitors vary, but are generally between \$250 and \$500.

2. There are charges to have the respondent personally served and to get certified copies from the court. In contested cases, there are additional costs such as the court hearing fee, witness fees, subpoenas, charges for an independent medical or psychological examination, and depositions costs.

B. Attorney and Fiduciary Fees

1. Attorney fees are based on the amount of time spent and the hourly rates for the attorney and the attorney's staff.

2. Professional fiduciaries charge fees based on the amount of time spent and the hourly rates for the fiduciary and the fiduciary's staff. Family members who serve as guardians and conservators can charge fees for the time they spend on guardian and conservator duties.

3. If the court appoints a guardian and/or conservator, the attorney who represents the petitioner and/or the fiduciary can submit motions with records of expenses and time spent to the court and ask the court to approve paying the out-of-pocket costs and the attorney and fiduciary fees out of the protected person's funds.

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