

# **AN INTRODUCTION TO GUARDIANSHIP AND CONSERVATORSHIP**

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## **I. INTRODUCTION**

### **A. Guardianship and Conservatorship in Oregon**

1. The statutes governing guardianship and conservatorship are in Oregon Revised Statutes (ORS) chapter 125.

2. The court issues Letters of Guardianship and Letters of Conservatorship as proof that the court has appointed a guardian or conservator. The court file for a guardianship and/or conservatorship case is a public record. It is kept with the records for the probate department (if there is one) or with the other circuit court records.

3. “Fiduciary” can mean a guardian and/or a conservator. “Protective proceedings” include guardianship and conservatorship cases.

4. Other states follow different procedures and use different terms. For example, the Washington counterpart for a conservator is called a guardian of the estate.

## **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 adult who is incapacitated. 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 the 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 starts the process by filing a petition with the state circuit court. The petition is usually filed 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 has to include facts demonstrating that the respondent is incapacitated and that a guardian is needed. In many cases, the petition asks the court to appoint both a guardian and a conservator. The petitioner or the attorney for the petitioner may ask physicians, nurses, social workers, family members, and others who are familiar with the respondent's situation for information that supports the need for a guardian. A health care provider has to determine whether he or she is able to respond to a request for information based on the particular circumstances of the case.

3. A copy of the petition, together with a notice that explains the process and the right to object, is personally served on the respondent. Copies of the petition and notices about the guardianship case are mailed to the respondent's closest relative(s) and to other people and agencies listed in the statute. The notices have to be mailed at least 15 days before the deadline for filing objections.

4. The respondent can object to the proposed guardianship or to the proposed guardian. Other interested people can also object.

5. The court appoints a court visitor who goes to the place where the respondent is located and interviews him or her in person. The court visitor also interviews the petitioner, health care providers, and other people involved in the case, often by telephone. The court visitor then writes a report 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 order an independent physical or mental examination of the respondent.

7. If the respondent or anyone else objects within the time set in the notices, the court will schedule a hearing on the petition and the objections. The court can appoint an attorney for the respondent. The hearing is held 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.

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

9. 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. Choosing the Guardian**

1. The proposed guardian is identified in the petition, and is usually a close relative of the respondent. The petitioner and the proposed guardian are often the same person.

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 can appoint one person to serve as both the guardian and the

conservator.

4. There are a number of professional fiduciaries who serve as guardians and conservators. 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. The Guardian/Conservator Association of Oregon has a web site that includes a list of professional fiduciaries, [www.gcaoregon.org](http://www.gcaoregon.org).

5. Multnomah County has a Public Guardian and Conservator's office which acts as guardian and/or conservator for incapacitated adults who live in Multnomah County, who are high risk due to abuse, exploitation, or severe self-neglect, and for whom no other option is available. The Public Guardian and Conservator is part of the county's Aging and Disability Services, (503) 988-3620.

#### **D. Powers and Duties of the Guardian**

1. The guardian has the powers that are included in the judgment signed by the judge. The judgment may contain language that limits the guardian's powers.

2. The guardian generally has the power to decide where the protected person lives (including the power to place the protected person in a care facility), to make arrangements for the protected person's care and safety, and to make health care decisions. However, 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. If there is no conservator, the guardian is responsible for taking care of the protected person's money and belongings.

4. The guardian has to get permission from the court before paying himself or herself and before paying the guardian's attorney from the protected person's funds.

5. The guardian has to give a special type of notice before placing the protected person in a care facility and before moving the protected person from one care facility to another.

6. The guardian is required to file a report with the court every year with information about where the protected person lives, the services that the protected person receives, and the protected person's physical and mental condition. If the guardian is taking care of the protected person's money, the report has to include information about the amounts of money received and paid out during the year, and the amount being held by the guardian. 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.

#### **E. Temporary Guardianship**

1. The court can appoint a temporary guardian with less advance notice in an emergency situation. 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 limited judgment appointing a temporary guardian is signed by a judge unless the judge makes an

exception based on the nature of the emergency.

2. The most common reasons for asking the court to appoint a temporary guardian are to get medical care for the respondent and to place the respondent in a care facility in a crisis situation.

3. Most courts hold a short hearing before appointing a temporary guardian. In addition to showing that the respondent is incapacitated, the petitioner has to provide clear and convincing evidence that there is a serious and immediate danger to the respondent's life or health. The supporting evidence often includes a letter from the treating physician describing the threat to the respondent.

4. A temporary guardian can be appointed for up to 30 days.

### **III. CONSERVATORSHIP**

#### **A. Basis for Conservatorship**

1. In Oregon, a conservator is appointed by the court to manage the money and property belonging to an adult who is financially incapable. 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. Choosing the Conservator**

1. The proposed conservator is identified in the petition, and is usually a close relative of the respondent. The petitioner and the proposed conservator are often the same person.

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 (described in II C 4 *supra*) serve as conservators. Some banks and trust companies also serve as conservators if there are sufficient assets.

5. The Oregon Department of Veterans' Affairs serves as the conservator for some veterans.

6. 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 judgment may contain language that limits the conservator's powers. The most common limits are restrictions that require the conservator to get specific court authority before selling the home or other piece of real property or before using money from a particular account.

2. The conservator generally has 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 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.

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 has to get specific permission from the court in order to take certain actions. For example, the conservator has to have the court's approval in order to sell the protected person's residence, to withdraw money from a restricted account, to create a trust, to pay himself or herself, or to pay the conservator's attorney.

5. The conservator is required to file an account with the court every year listing the protected person's assets plus all of the income received and all of the expenses paid during the past year. Copies of the annual account and notices 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.

#### **E. Temporary Conservatorship**

1. The court can appoint a temporary conservator with less advance notice in an emergency situation. 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 limited judgment appointing a temporary conservator is signed by a judge unless the judge makes an exception based on the nature of the emergency.

2. The most common reason for asking the court to appoint a temporary

conservator is to stop or prevent financial abuse.

3. Most courts hold a short hearing before appointing a temporary conservator. In addition to showing that the respondent is financially incapable, the petitioner has to provide clear and convincing evidence that there is immediate and serious danger to the respondent's money or property.

4. A temporary conservator can be appointed for up to 30 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.

2. The fee for the court visitor in a guardianship case varies from county to county and, in some counties, from case to case. It is generally between \$250 and \$500.

3. The expenses for having the respondent personally served and getting certified copies from the court are usually around \$100.

4. There are additional expenses in contested cases. Examples of those expenses include the court hearing fee, witness fees, subpoenas, an independent medical or psychological examination, and depositions.

##### **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. The attorney fees will be higher in temporary guardianships, temporary conservatorships, contested cases, and other complex cases because more time and work is required.

2. Professional fiduciary fees are based on the amount of time spent and the hourly rates for the fiduciary and the fiduciary's staff. The court can also approve payments from the protected person's funds to family fiduciaries for the time they spend on guardian and conservator duties.

3. If the court appoints the guardian and/or conservator, the attorney can submit detailed requests asking 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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