

EMERGENCY PROCEEDINGS
Oregon Law Institute CLE Seminar: Guardianships and Conservatorships:
Updated Forms and Procedures
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I. Circumstances Constituting Emergency

A. Statutory standard for appointment of temporary guardian: ORS 125.600(1).

(1) “. . . clear and convincing evidence that the respondent is *incapacitated* or a minor, . . .”

"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 (ORS 125.005(5)).”

Common Warning Signs of Incapacity: Stove burners left on; mismanagement of essential medications; multiple responses of fire or police personnel to residence; unsafe condition of home (no food or spoiled food; hoarding has led to precarious piles, risk of falling; pest infestation); lost, disoriented, wandering in neighborhood

(2) “. . . that there is an immediate and serious danger to the life or health of the respondent . . .”

Common Dangers Which Warrant Appointment of Temporary Guardian: Psychiatric hold at hospital¹; Medical emergency and refusal to accept care; Close call in home (fire; injury caused by condition of house (rotten floor, trip and fall); Caregiver holding respondent “hostage”; Threat that respondent will be moved out of state

(3) “. . . and that the welfare of the respondent requires immediate action.”

Explain why a fifteen day notice period – the notice period required in a standard guardianship proceeding – would jeopardize the health and/or safety of the respondent. If the standard notice period would not create extra jeopardy, temporary guardianship is inappropriate.

B. Statutory standard for appointment of temporary conservator: ORS 125.600(2).

¹Senate Bill 16 (2009 Oregon Laws Chapter 381) provides an alternative to temporary guardianship in some circumstances by authorizing a health care representative named in an advance directive to consent to the involuntary psychiatric hospitalization of a patient for up to 18 days for the treatment of behavior caused by dementia. Effective date: June 18, 2009.

(1) “. . . clear and convincing evidence that the respondent is *financially incapable* or a minor,…”

"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 (ORS 125.005(3))."

Common Warning Signs of Financial Incapability: Financial exploitation as evinced by APS report, bank records reflecting rapid depletion of account, non-working, non-rent paying housemates conducting criminal activities at residence of respondent; overdue bill payments cause pending foreclosure, electricity or water shut-off.

(2) “. . . that there is an immediate and serious danger to the estate of the respondent . . .,”

Common Dangers Which Warrant Appointment of Temporary Conservator: Financial exploitation jeopardizes respondent’s capacity to pay for care; significant financial occurrence (transfer of home; change in account ownership); placement emergency will warrant fiduciary’s control of finances in order to pay for care.

(3) “and that the welfare of the respondent requires immediate action.”

Explain why a fifteen day notice period – the notice period required in a standard conservatorship proceeding – would jeopardize the health and/or safety of the respondent. If the standard notice period would not create extra jeopardy, temporary conservatorship is inappropriate.

II. Essential Elements of the Petition

A. ORS 125.605(1): Allege all elements required in standard guardianship petition.

These elements are listed in ORS 125.055, and are summarized as follows:

- (1) Designate type of fiduciary sought (guardian and/or conservator)
- (2) Name, age, address-residence, address-current location of respondent
- (3) Interest of petitioner
- (4) Name, age, address of petitioner and nominated fiduciary, and relationship of nominated fiduciary to respondent
- (5) Nominated fiduciary: Convicted? Bankrupt? License revoked? If yes, explain. Is nominated fiduciary willing to serve?
- (6) Other fiduciaries, appointed by court or by respondent
- (7) Treating physician, care provider contact information
- (8) Facts, names and addresses supporting incapacity or financial incapability
- (9) Placement plans
- (10) General description of estate and income
- (11) Statement regarding whether proposed fiduciary is public or private agency providing services to respondent
- (12) For guardianship: will guardian manage money?

- (13) For conservatorship: what is estimated value of estate?

B. ORS 125.605(1): Allege all elements required to justify temporary appointment.

These elements are listed in ORS 125.600, and are summarized as follows:

- (1) For guardianships: Incapacity
- (2) For conservatorships: Financial incapability
- (3) Immediate and serious danger to life or health (guardianships) and/or estate (conservatorships)
- (4) Welfare of respondent requires immediate attention
- (5) Specific purpose of fiduciary
- (6) Specific time frame of fiduciary's authority (not to exceed 30 days)

C. Independent, non-petitioner provided verification of need for appointment

- (1) Examples: court visitor report and/or testimony; letter from APS investigator, physician, police officer, bank representative, case worker.
- (2) Not a statutory requirement. Only Multnomah County has specific local rule: *SL 9.075(3)- Petitioner for Appointment of a Temporary Guardian should be accompanied by appropriate affidavits and medical reports.* However, expected by most courts. Allegations of petitioner alone are rarely sufficient to establish need to appoint temporary fiduciary.

III. Notice

A. To Respondent

- (1) How is notice served? (See ORS.065)
 - Personally, if respondent is 14 or older
- (2) What should notice contain, in addition to language in standard notice? (See ORS 125.070)
 - Time, date, exact location of hearing set for appointment of temporary fiduciary
 - Prior to filing petition, providing notice, contact court to schedule hearing
- (3) How much notice is required? (See ORS 125.605(2))
 - Notice of a petition for the appointment of a temporary fiduciary must be given at least two judicial days before the appointment of a temporary fiduciary. Note that hearing availability may dictate notice.
 - However, ORS 125.605(2) allows that “the court may waive the requirement that notice be given before appointment if the court finds that the immediate and serious danger requires an immediate appointment. In no event may the notice required by ORS 125.060 be given more than two days after the appointment is made.”
 - Circumstances warranting waiver of notice: Financial abusers will accelerate abuse with notice; notice would provoke abduction of respondent; respondent would be discharged from hospital, released to self-care; respondent facing grave medical crisis.
 - If circumstances warrant it, file motion, proposed order to waive two day

notice along with petition to appoint temporary fiduciary.

B. To interested persons

- (1) Who is entitled to it (See ORS 125.060(2))
 - Spouse, Parents, Adult Children of Respondent, or other closest relation.
 - Interested Co-habitant
 - Fiduciary appointed by court or by respondent
 - For minor - Primary caregiver/custodian in 60 days prior to petition
 - For minor with no living parents - PR named in will of parent
 - For respondent receiving VA benefits:
 - U.S. Department of Veteran's Affairs
 - Western Area Fiduciary Hub
 - 550 Foothill Drive
 - P.O. Box 58086
 - Salt Lake City, Utah 84158-8086
 - For respondent receiving funds payable for public assistance provided under ORS Chapter 411 (OMIP programs):
 - Department of Human Services
 - Estate Administration Unit
 - P.O. Box 14021
 - Salem, Oregon 97309-5024
 - For respondent receiving funds payable for medical assistance provided under ORS Chapter 414 (Oregon Health Plan): Oregon Health Authority
 - For incarcerated respondent - Attorney General and superintendent of facility
 - For foreign national respondent - Consulate
 - Respondent's Attorney
 - When respondent lives in long-term care facility or may be placed in one:
 - Office of the Long-term Care Ombudsman
 - 3855 Wolverine NE, Suite 6
 - Salem, Oregon 97310
 - When respondent lives in mental health treatment facility or may be placed in one:
 - Disability Rights Oregon
 - 620 SW Fifth Avenue, 5th Floor
 - Portland, Oregon 97204
- (2) How is notice served? (See ORS 125.065)
 - If basis of petition is that respondent is a minor, respondent's parents are personally served with notice of petition
- (3) What should the notice contain, in addition to language in standard notice? (See ORS 125.070)
 - Time, date, exact location of hearing set for appointment of temporary fiduciary
- (4) How much notice is required? (See ORS 125.605(2))
 - Notice of a petition for the appointment of a temporary fiduciary must be

- given at least two days before the appointment of a temporary fiduciary.
- However ORS 125.605(2) allows that “the court may waive the requirement that notice be given before appointment if the court finds that the immediate and serious danger requires an immediate appointment. In no event may the notice required by ORS 125.060 be given more than two days after the appointment is made.”
- If circumstances warrant it, file motion, proposed order to waive two day notice along with petition to appoint temporary fiduciary

IV. Appointment of Temporary Fiduciary

A. Arranging for hearing

- Appointment occurs through hearing with judge or with probate coordinator. Arrangements for hearing made prior to filing of petition. Petitioner’s attorney should call court probate coordinator to make these arrangements. Notice of petition to respondent and to interested persons should include details of hearing.

B. Parties present at hearing

- (1) The attorney for the petitioner
- (2) The petitioner (some courts do not require presence of petitioner. Check with court clerk prior to hearing.)
- (3) Court visitor (for petitions to appoint temporary guardian)
- (4) Proposed fiduciary (some courts do not require presence of proposed fiduciary. Check with court clerk prior to hearing.)
- (5) Judge or probate coordinator. Supplemental rules in some counties allow probate coordinator to appoint fiduciary in uncontested cases.

C. Substance of the Hearing

- (1) Unless waiver of two day notice requirement has been proposed, bring proof of service to respondent. Does not have to be actual affidavit from courier, as long as that will be forthcoming.
- (2) If waiver of two day notice requirement has been proposed, be prepared to recount allegations substantiating need for waiver, and to submit proposed order waiving two day notice requirement.
- (3) Be prepared to recount allegations substantiating need for appointment of temporary fiduciary.
- (4) Bring proposed limited judgment appointing temporary fiduciary. Limited judgment should specify time period for fiduciary’s temporary authority. If temporary fiduciary is being appointed for a specific purpose, specific purpose should be specifically described in the limited judgment as being within the fiduciary’s authority to accomplish, along with general authorities which fiduciaries hold.

V. Extending Authority of Temporary Fiduciary

A. Statutory Authority to Extend

(1) ORS 125.600(3) allows that the “court may extend the period of the temporary fiduciary’s authority for an additional period not to exceed 30 days upon motion and good cause shown.”

(2) ORS 126.605(3) directs that notice of a motion to extend the authority of a temporary fiduciary must be given in the same manner that the original petition was given (including personal service to respondent, if appropriate), and that notice must occur at least two days prior to the entry of an extension order.

B. Circumstances Establishing “good cause” to Extend

- Objection to appointment pending and objection hearing will not occur prior to expiration of 30-day authority, or settlement discussions are ongoing. Gap of time during which no fiduciary exists poses risk to respondent.
- Specific purpose of temporary proceeding may be accomplished with additional 30 days of fiduciary authority.

VI. Closing the temporary proceeding

A. Most common scenario - no final report needed for temporary proceeding if the same fiduciary is appointed for an indefinite period. *ORS 125.610(2): If the person appointed as temporary fiduciary is appointed to act as a permanent fiduciary for the protected person, the report of the activities of the temporary fiduciary may be included in the first annual report of the guardian or in the first accounting of the conservator.* Note that if the temporary fiduciary is not the same as the fiduciary appointed for an indefinite period, the temporary fiduciary should file a report pursuant to ORS 125.610(1)

B. Less common - temporary appointment is not followed by appointment of fiduciary for an indefinite period. *ORS 125.610(1): A temporary fiduciary shall file a report with the court setting out all activities of the temporary fiduciary under the authority of the appointment. Except as provided in subsection (2) of this section, the report must be filed:*

- (a) When the temporary fiduciary completes the duties of the fiduciary;*
- (b) When the temporary appointment expires; or*
- (c) When the court orders the termination of the temporary fiduciary’s authority.*

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