

## Guardianship for Adults and Alternatives

Timothy M. McNeil, Attorney at Law<sup>1</sup>

### I. GENERAL BACKGROUND – GUARDIANSHIPS AND LESS RESTRICTIVE ALTERNATIVES.

#### A. Protective Proceedings

All guardianships, conservatorships and other protective proceedings fall under the jurisdiction of the probate court. *See generally* ORS 111.085. The probate court may appoint a guardian on behalf of a person in a circumstance in which a person is found to be incapacitated. The statutory definition of incapacitated as set forth in ORS 125.005(5) is:

“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.

Some potential clients have difficulty understanding the difference between a guardian and conservator, especially when some states broadly use the term “guardian” to define the role of the conservator. At the risk of oversimplifying, it may be helpful to advise clients that the guardian “guards” the person by taking care of health and placement issues, while the conservator “conserves” the funds by taking care of finances.

During the intake and case evaluation process, the attorney will determine if there is a need to seek appointment of a guardian, conservator, or both. In many cases, there is a need for appointment of both a guardian and a conservator. These roles may be filled by one person or it may be a situation where two different people should be appointed as guardian and conservator. In other cases, only a guardianship is necessary because the only issues present relate to health care and placement. While guardianships and conservatorships are intertwined, this chapter will focus on guardianship cases exclusively.

Case evaluation is critical. While attorneys are not expected to diagnose any particular medical condition, the question of proving incapacity by a standard of clear and convincing evidence is ever present, and the conditions which are the cause of incapacity should be considered and examined right from the start of the case.

#### B. Civil Rights and Less Restrictive Alternatives

---

<sup>1</sup> Updated and revised based on materials authored by Don B. Dickman and Julie Meyer Rowett. Thank you to Mr. Dickman and Ms. Meyer Rowett for generously allowing use of his materials and forms.

When considering a guardianship the attorney must first answer the question of “can an alternative be found which will eliminate the need for court involvement and not impose upon the civil liberties of the respondent?” In fact, ORS 125.055(2)(i) requires a petition for guardianship to include an explanation of “less restrictive alternatives to the appointment of a fiduciary that have been considered and why the alternatives are inadequate . . . “ A guardianship proceeding is a process that greatly curtails or even removes a person’s basic fundamental civil rights, and should be taken very seriously. Most courts will not grant a guardianship unless there is an undisputed need for protection and there are no other reasonable alternatives. What are the alternatives to a guardianship proceeding?

1. **Advance Directive for Health Care.** ORS Chapter 127 sets forth the requirements for an advance directive for health care. This document allows management of health care (including placement) and access to medical records. If the respondent has executed an advance directive, the health care representative may be able to effectively manage the respondent’s health care needs without the need for a guardianship.
2. **Declaration for Mental Health Treatment.** ORS 127.736 provides a form for designation of a representative for mental health treatment. It authorizes the representative to admit the principal to a health care facility for mental health treatment for up to 17 days. The declaration may avoid the need for temporary guardianships and should be considered in the appropriate circumstances.
3. **Family Involvement.** Are family members able to provide care and work together? In many cases, family members are able to work together to provide for the physical needs of the respondent without the need for court involvement.
4. **Other Professional Assistance.** Has the family worked with professionals such as social workers and placement specialists to address the concerns of the respondent? Often professionals who specialize in these issues can navigate family dynamics and assist in finding an appropriate placement for the respondent. This type of action is more appropriate when the respondent is not in immediate danger.
5. **Durable Powers of Attorneys/Estate Planning/Revocable Trusts.** These types of alternatives do not relate directly to avoiding a guardianship. They are used to avoid a conservatorship where appropriate.

## II. THE INTAKE PROCESS AND CASE EVALUATION

### A. The Attorney-Client Relationship.

The first step to take when considering a guardianship is to establish the attorney-client relationship. This can be surprisingly difficult, but it is critical to identify the client. It is not uncommon to have a group of family members or friends of the respondent attend the initial

appointment. If this happens, take a moment to clarify the scope of representation and inform the client that the presence of a non-client will breach the attorney client privilege. It is good practice to obtain a Release of Information (Forms 1-1 and 1-2) from your client, allowing you to discuss the case with others as you deem necessary, and allowing others to discuss the case with you. This may help to prevent any disputed issues or claims against you concerning your unauthorized release of confidential attorney client information.

#### **B. Conflict Check.**

Potential conflicts of interest are prevalent in protective proceedings due to the potential for adverse interests between spouses, siblings, parents and children. Pay attention for potential developing conflicts as the case unfolds. If there is a potential future conflict between clients, write a letter explaining the potential conflict and asking both parties to sign indicating that you have fully informed them of the potential conflict. Review the Oregon Rules of Professional Conduct, Rule 1.7 carefully when considering this type of representation. Sample letters are available through the Professional Liability Fund.

Another common scenario is when an existing client has diminished capacity and a spouse, sibling, parent, or friend wishes to pursue a guardianship. In guardianship proceedings, a petitioner is an adverse position in relation to a respondent. An attorney cannot represent both petitioner and respondent due to these conflicting positions, While Rule 1.14 of the Oregon Rules of Professional Conduct allows a lawyer to take reasonably necessary protective action when the client is at risk of substantial physical, financial or other harm, this rule does not resolve the conflict of interest between a petitioner and a respondent. The most straightforward way to address this problem is to refer the family member to another attorney specializing in guardianships and conservatorships.

#### **C. Evaluate the Client.**

Is the potential client someone that you would like to work with for many years? Is the potential client credible? Does the potential client understand the complexity of the situation and demonstrate a willingness to follow directions? Does the client have an existing fiduciary relationship, such as power of attorney, with the protected person? It is good practice to run a cursory background check through the Oregon Judicial Information Network (OJIN) to check for convictions or pending court cases. A check for bankruptcy proceedings or federal court cases through the PACER system is accessible online.

#### **D. Assess the Need for a Guardianship.**

After you have ruled out all less restrictive alternatives, assess the strength of your case. Discuss the facts in detail with your client to help you determine that you can meet your burden of proof as set forth in statute and in the *Schaefer* case. *Schaefer v. Schaefer*, 183 Or App 515 (2002). Can you establish a nexus between the condition that has impaired the respondent and the respondent's inability to manage the respondent's care and safety? Evaluate the case from the worst case scenario, and make sure that the client understands the pitfalls.

1. **Assess the Potential for Objections.** Once you are confident you can meet your burden of proof, discuss the possibility of objections with the client. Is the protected person hostile to the proposed action? Are other family members in opposition? Is there another family member that wishes to serve as guardian? Will filing trigger family issues or a potential disinheritance? If objections are anticipated, discuss ways to minimize the risk with your client. Will open communication with other siblings prior to filing be helpful? Can you consider using a professional fiduciary to diffuse family tensions? If you can identify the need for a professional fiduciary from the beginning, this can save your time and expense of filing an amended petition in response to an objection.
2. **Mediation.** Multnomah County now has mandatory mediation for all objections in probate matters. See Multnomah County SLR 12.045 for a complete description of the procedures and rules related to mediation.

**E. Obtain all Necessary Information.**

Complete information about the protected person and all persons who may have an interest in the case is necessary. A completed Guardianship/Conservatorship Information Sheet (Form 1-3) is essential, and many attorneys have a potential client complete this form prior to the first interview. Another useful form is the “Guardianship Checklist” published by the Professional Liability Fund and available on the PLF website.

**F. Attorney Fees.**

ORS 125.095 requires court approval of attorney fees before payment from assets of the protected person. There is no guarantee that fees will be awarded, and it is nearly certain that fees will not be awarded if the court denies the petition for guardianship. For these reasons, it is important to have a fee agreement with the client. The client needs to assume the ultimate responsibility for payment of your fees.

Do not accept fees from the funds of the protected person without court approval. Take care to examine the source of your funds. For example, a spouse may write you a retainer check from an account with the protected person as joint owner. Accepting this payment without court approval may violate ORS 125.095 because the funds are at least partially owned by the protected person.

III. COURT FILINGS, SERVICE AND NOTICES.

### **A. Petition for Appointment of Guardian.**

ORS 125.055 sets forth all the requirements for the Petition for Appointment of Guardian of an Adult for an Indefinite Period (Form 1-4). Failure to include all required statutory information could result in rejection of the petition or requirement for correction. Note that 2018 legislation amended ORS 125.055 to require (1) an explanation of less restrictive alternatives to the appointment of a fiduciary that have been considered and why the alternatives are inadequate (ORS 125.055(2)(i)) and “A statement that indicates whether the petitioner is petitioning for plenary authority or specified limited authority for the person nominated as fiduciary.” (ORS 125.055(2)(m)). The petition sets the stage for your case and it is important to have full, complete and accurate information. Make sure that your petition tells the story of your case in detail. If necessary, consider filing supplemental affidavits if they will help provide a clear picture of the situation.

The filing fee for a guardianship is now \$124. If you are filing a conservatorship together with your guardianship, the fees will increase based on the size of the protected person’s estate. The fees for the court visitor vary from county to county. In addition, the procedure for appointing the court visitor varies from county to county. In many counties, the attorney is responsible for selecting a Court Visitor, confirming that person’s availability to serve, and submitting the Order Appointing Visitor. If this is the case, provide an Order Appointing Visitor to the court. Failing to do so can result in unnecessary delay of your case.

### **B. Notice to Respondent.**

ORS 125.060 requires personal service for a respondent 14 years of age or older. Use of a private process server is recommended as the presence of a uniformed sheriff’s deputy may cause unnecessary distress for the respondent.

ORS 125.070(3) sets forth the statutory Respondent’s Notice that is personally served on the respondent. (Form 1-5). The notice must be printed in at least 14 point type. Check your local rules as well. Some counties require that the notice contain specific information as to the availability of low cost or free legal services for seniors. ORS 125.070(4) sets forth the Respondent’s Objection Form (Form 1-6). The Respondent’s Objection Form is printed on blue paper and attached to the Respondent’s Notice.

### **C. Notice to Interested Persons.**

A sample Notice to Interested Person is found at Form 1-7. Read ORS 125.060 carefully and often. The notice requirements are very broad. The primary notice is given to the spouse, parents, and adult children. However, the statute has many additional requirements including:

1. Any person who is cohabiting with the respondent and who is interested in the affairs or welfare of the respondent;
2. Any trustee, health care representative or agent under a financial power of attorney;
3. Any known attorney for the respondent;

4. If the person is in a nursing home or residential facility, the Long Term Care Ombudsman;
5. If the person receives Veteran's Benefits or money paid through the Department of Veteran's Affairs, the Regional Office of the US Department of Veteran's Affairs;
6. If the respondent is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, a representative of the department;
7. If the respondent is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, a representative of the authority. OAR 407-043-1101 states that mailing or service of notices or documents on the Department shall be considered notice on the Oregon Health Authority. Therefore, the one notice sent to the Department of Human Services also satisfies this notice requirement;
8. If the person is a resident of a mental health treatment facility or a residential facility for individuals with developmental disabilities, or if the guardian intends to place the respondent in such a facility, to Disability Rights Oregon.
9. Any other person that the court requires.
10. If there is any doubt err on the side of caution and provide notice. Failure to provide a required notice can result in additional delay. Addresses for the notice requirements set forth above are found in Form 1-8.

#### **D. Appointment of Court Visitor.**

The court visitor's report carries substantial credibility with the court. The court visitor is appointed after the filing of the petition. The procedures for the appointment of the court visitor vary from county to county. Some counties require the petitioner to solicit a Court Visitor approved by the county and to submit a proposed order appointing that Court Visitor. Other counties appoint a Court Visitor in response to the filed guardianship petition, with no other input from petitioner. Petitioner's counsel should contact the county probate office to determine the practice of that court. After appointment, the court visitor investigates the circumstances of the case. Generally, the court visitor interviews the respondent in person. The court visitor also interviews the petitioner, listed relatives, and all persons listed as having information to support the finding of incapacity. (Paragraph 15, in Form 1-5). The court visitor submits a report to the court which informs the court of the visitor's conclusions and recommendations as to the appropriateness of appointing a guardian. The court visitor's report is filed prior to the appointment of a guardian. In most cases, the court visitor completes the report during the objection period.

#### **E. Proof of Service.**

File the appropriate Proof of Service upon the respondent. If you use a process server to personally serve the respondent, the process server will provide the Proof of Service to file with

the court. You also need to file the appropriate Proof of Service of Notice of Time for Filing Objection to Petition for Appointment of Guardian. (Form 1-9).

#### **F. Limited Judgment Appointing Guardian.**

Submit an appropriate limited judgment based on Form 1-10. In addition, submit a Certificate of Compliance in accordance with UTCR 5.100, which informs the court regarding the position of any adverse party with regard to the proposed judgment. (Note: This certificate is required to be submitted with all proposed orders and judgments, including Court Visitor Orders). If there is no adverse or objecting party, the proposed judgment need not be reviewed by any other party prior to submission to the court. Order your Letters of Guardianship. Procedures vary from county to county. In some counties, the first Letters of Guardianship are free. If you need additional copies of the Letters of Guardianship, pay the appropriate fees to the court when requesting the extra Letters.

#### **G. Notice of Appointment**

ORS 125.082 requires that not later than 30 days following the date of the guardian's appointment, the guardian must provide notice of the guardian's appointment to the protected person, to anyone who has requested notice in the proceeding, to any other fiduciary for the protected person, to the VA, if the protected person receives Veteran's benefits and to the Attorney General and facility superintendent if the protected person is incarcerated.

The notice must contain information outlined in ORS 125.082 (See Form 1-11).

#### **Follow up with Guardian.**

Upon appointment, send the guardian a detailed letter outlining the specific powers and duties of guardian. (Form 1-12). Some counties send a general duties letter to the guardian upon appointment. This is generally not sufficient. The guardian needs a more detailed and specific letter addressing the unique facts of your case. See below for more information. The Professional Liability Fund publishes a sample "Duties of Guardian" letter (Form 1-13).

1. **The Guardian's Report.** In your letter, advise the client of the due date of the annual Guardian's Report. Calendar the date in your file to send the report well in advance of the due date. It is a good idea to send the guardian two blank copies of the Guardian's Report (Form 1-14). The first copy can serve as a draft copy and the second copy can be the final version.
2. **Guardianship Class.** The Circuit Courts in Lane, Clackamas, Marion, Douglas, Tillamook and Multnomah Counties require guardians to sign up for a guardianship class within fifteen days of appointment and to take the class within sixty days of appointment. The class currently costs \$100, and can be taken on line or in person. Guardian Partners is the organization that provides the class and receives the fee.

## H. Petition for Attorney Fees.

After appointment of the guardian, you may be ready to petition for your attorney fees and costs. ORS 125.095(2)(c) establishes that “Prior court approval is required before the payment of fees from the funds of a person subject to a protective proceeding when the payment is to any attorney who has provided services relating to a protective proceeding, including services provided in preparation or anticipation of the filing of a petition in a protective proceeding.” ORS 125.098(2) establishes factors for the court to consider in the determination of *whether* to award attorney fees, while ORS 125.098(3) directs the court to consider the same factors as well as additional ones in the determination of *the amount* of an award of attorney fees. A fee petition should specifically address each factor, even if only to state that a specific factor does not apply. Of all of the factors, “the benefit to the person subject to the protective proceeding by the party’s actions in the proceeding, . . . shall be given the greatest weight in the court’s consideration.”<sup>2</sup>

1. **Service of Fee Petition.** UTCR 9.060(4) directs that the fee petition must be served on all persons described in ORS 125.475(5), which re-directs the reader to ORS 125.060(3). The statute requires notice on the respondent, and any other person who has filed an appearance or Request for Notice. Read the statute carefully to be sure all required notices are properly sent. A Notice of Time for Filing Objections to Petition for Payment of Attorney Fees and Costs (modify Form 1-7) must be served along with the Petition.
2. **Proof of Service.** Submit a Proof of Service of Notice of Time for Filing Objections to Petition for Payment of Attorney Fees and Costs. Provide 15 days for filing objections along with 3 days for mailing the Notice. After the notice period has run, and if no objections have been filed, submit an Order Approving Payment of Attorney Fees and Costs and a Certificate of Compliance in accordance with UTCR 5.100.
3. **Guardian Fees and Costs.** Much like the attorney’s requirement for court approval, the guardian must also have prior court approval for guardianship fees See ORS 125.095(2)(b). If the guardian is going to request a fee, it is efficient to request such fees at the same time of filing the attorney’s Petition for Payment of Attorney Fees and Costs. The guardian should also file a Statement in Support of Request for Guardianship Fees. The issue of reimbursement of costs advanced by the guardian varies from county to county. Many counties require court approval for reimbursement of costs.

## I. Special Issues with Temporary or Emergency Guardianships.

---

<sup>2</sup> ORS 125.098(2)(a)



If there is a life threatening emergency, the court may appoint a temporary guardian for a period not to exceed 30 days pursuant to ORS 125.600. This can be extended for a period of 30 day for good cause shown (ORS 125.600(3)).

1. The court must make a specific finding by clear and convincing evidence that the respondent is “incapacitated or a minor, that there is an immediate and serious danger to the life or health of the respondent, and that the welfare of the respondent requires immediate action.” Add factual information to your Petition for Appointment of Guardian for an Indefinite Period (Form 1-5) that specifically addresses the requirements of ORS 125.600.
2. The appointment of a temporary fiduciary may be requested in a separate petition or may be incorporated into the regular petition for appointment of a guardian for an indefinite period. It is often most efficient to incorporate everything into one petition. Clarity in writing and presentation to the court are essential in this situation. Headings can help to differentiate the different sections of your petition.
3. Notice must be given to the respondent and other persons specified in ORS 125.060(2) at least two days prior to the appointment of a guardian. The court may waive the two day notice requirement upon a finding of immediate and serious danger.
4. An ex parte appearance is necessary for the appointment of a temporary guardian. Call the court to schedule your appearance. Procedures vary from county to county. If the two day notice requirement is not waived, the court visitor may complete a report prior to the appearance date and will also attend the ex parte appearance. Efile your Limited Judgment Appointing Temporary Guardian prior to the ex parte appearance.
5. ORS 125.605(5) requires the court to hear any objections to the appointment of a temporary guardian within two judicial days after the date the objection is filed. Therefore, be prepared to attend an emergency hearing on a moment’s notice.
6. Some counties require a letter from a medical professional that confirms the need for the temporary guardianship. There is active debate among practitioners regarding this requirement that is beyond the scope of these materials.
7. Washington County requires a hearing if the temporary guardian plans to place the protected person at the Oregon State Hospital.

8. One of the most important safeguards to the civil rights of a respondent in a protective proceeding is notice. The procedure for the appointment of a temporary guardian severely limits or eliminates notice. For this reason, the temporary guardianship procedure is only appropriate in the most severe and dangerous of circumstances, when immediate and serious danger is clear. Clients are often advised by hospital or care facility personnel to retain counsel and secure the appointment of a temporary guardian immediately. Legal counsel must make certain that appropriate circumstances exist to take this drastic action.

#### IV. CONTESTED CASE HEARINGS

##### A. Objections for the Petition and Cross Petitions.

The case strategy will vary depending on who has filed an objection. The respondent has an absolute right to object to the guardianship proceeding. When a respondent objects, the court will often appoint an attorney to represent the respondent. Any interested person has the right to object to the guardianship proceeding. In many cases, at the time an objection is filed, a cross-petition will be filed nominating a different guardian. When representing a person who is objecting, you must file a cross petition nominating an alternative guardian and serve it in the same manner as the original guardianship. The court has no authority to appoint any person as a fiduciary unless the respondent has received proper notice of the petition. *Spady v. Hawkins*, 155 Or App 454, 1998. See Form 1-15 for a sample objection.

##### B. Objections in General.

1. **Respondent is not incapacitated.** The standard of proof for a finding of incapacity is set forth in statute and interpreted in the *Schaefer* case. The petitioner must prove by clear and convincing evidence that the person has 1) such severely impaired perception or communication skills, that 2) the person cannot take care of his or her basic needs to an extent to be life or health threatening, and 3) the impaired perception or communication skills cause the life threatening disability. The petitioner must prove the inability to process and communicate information and the inability to perform essential functions. The petitioner must overcome the presumption of competency.
2. **No Guardian is Needed but a Protective Order May be Appropriate.** There are instances where the respondent may be incapacitated but a guardian is not needed because of the prior execution of an Advance Directive for Health Care, yet for some reason court assistance is required. For example, feuding family members may dispute visitation of the respondent. It may be a case where a relative or acquaintance has been harassing the respondent,

borrowing money, or living in the respondent's home. ORS 125.600 allows the entry of a protective order without the appointment of a fiduciary, if the court determines that grounds exist for appointment of a fiduciary.

3. **The Proposed Guardian is not Suitable.** In many cases, it is clear that the respondent needs a guardian but the parties cannot agree who should be appointed as guardian. ORS 125.200 establishes that "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." Note that while the court considers the stated desire of respondent, the law assigns no higher priority to these factors than any others (see *Grimmett v. Brooks*, 193 Or App 427 (2004)). The hearing may turn into an assault upon the character of the nominated guardian, so make sure that the nominated guardian can withstand the stress of the hearing. Conversely, if opposing the nomination of the guardian, then the objector needs to show unsuitability.
  
4. **Request for Restrictions on the Authority of the Guardian.** There are situations where an objection may simply contain a request to place limitation on the authority of the guardian, perhaps restrictions on placement of the respondent or allowing the continuation of a previously appointed Health Care Representative.

### **C. Settlement and Compromise.**

Look at the case realistically and make every attempt to compromise and settle the case if at all possible. Consider the following:

1. In Multnomah County, mediation is now mandatory. Even if not required by local rules, mediation may be helpful.
2. A judicial settlement conference may be appropriate.
3. Disputed cases often have more to do with unfinished personal matters between family members than with the legal issues.
4. Consider whether the appointment of an independent person such as a professional guardian would be appropriate?
5. Consider creative approaches. Stephen R. Owen has published an excellent article, "Creative Solutions to Contested Conservator and Guardian Matters,"

that offers excellent ideas and sample language. Most settled cases include some inclusion of the language from this article.

#### **D. Prepare the Case as Early as Possible.**

Prepare your case well in advance of your hearing date. Consider the following when preparing for your hearing:

1. Issue subpoenas promptly, and be sure to include witness and mileage fees. Proper service is necessary. See ORCP 55.
2. Under the revised ORCP 55H, a “qualified protective order” is needed for obtaining medical records.
3. Interview all witnesses and prepare your direct examination of each witness. Surprises at trial are less likely to occur.
4. Prepare your direct examination of the court visitor with care. Prepare the direct examination to avoid hearsay objections.

#### **E. Presenting the Evidence at the Hearing.**

1. **Burden of Proof- What Needs to Be Proven at Hearing?** The most recent case on point regarding the fundamental issues of guardianship is *Schaefer and Schaefer*, 183 Or App 513, (2002). The facts in that case involved an 86 year old woman with medical problems, memory lapses, resistance to medical treatment, and a large collection of dogs and cats resulting in a smelly house. The trial court appointed a guardian, but the Court of Appeals reversed. The Court held that in order for the appointment of a guardian to be proper, the Petitioner must prove by clear and convincing evidence that the respondent has 1) such severely impaired perception or communication skills that 2) the respondent cannot take care of his or her basic needs to an extent to be life or health threatening, and 3) the impaired perception or communication skills cause the life threatening disability.

Practitioners have noted that *Schaefer* appears to confuse the statutory standard for a finding of incapacity as set forth in ORS 125.005(5), and instead appears to blend three differing statutory standards of: (a) a guardianship under ORS 125.005(5); (b) an emergency guardianship under ORS 125.600(1); and (c) a civil commitment proceeding under ORS 426.005(1)(d)(A).

As a practical matter, very few guardianship cases are taken to the court of appeals and there has been no further clarification of the holding in *Schaefer*. Don B. Dickman, in previous years, has set forth the belief that the holding in *Schaefer* narrowly addresses causation, as the appeals court determined that

while the respondent showed signs of diminished mental health, there was no causal connection between her diminished capacity and a substantial life threatening condition.

When preparing for a contested proceeding before a court, consider characterizing the evidence incorporating both the statutory and the *Schaefer* standards.

2. **The Court Visitor.** Generally speaking, the testimony of the court visitor is the most important testimony because such testimony often carries the greatest weight with the judge. Some judges consider the court visitor to be a representative of the court. The court visitor is generally considered an expert pursuant to OEC 702, as ORS 125.150(2) states that the person appointed as visitor must have the training and experience required to make the recommendations required under ORS 125.150 and 125.155. If the court visitor does not agree with the petitioner, it does not mean there is no hope for your case. Evidence may be presented to rebut findings of the court visitor. However, also carefully consider the recommendations of the court visitor. Can the petitioner change the strategy to incorporate recommendations of the court visitor, such as considering a more appropriate care setting?
3. **Other Witnesses.** Present credible witnesses who will support your position and will be able to relate specific facts about the case. For example, a caregiver can testify as to the level of assistance that the respondent may need, and the behaviors that he or she has observed. Neighbors and friends can testify as to the changes in the respondent's behaviors and health, and provide a "before and after" contrast. Family members who are regularly involved with the respondent can provide testimony as to their observations about the respondent.
4. **Trial Memorandum.** A brief trial memorandum outlining the case history and the evidence that is expected to be presented is usually helpful to the court. You may want to also consider submitting proposed findings of fact on a separate pleading form, such as a finding that "based on the testimony presented, the petitioner has proven by clear and convincing evidence, that the respondent..."

## V. THE POWERS AND DUTIES OF A GUARDIAN

### A. Rights of the Protected Person.

The statutes require that the court enter the least restrictive order possible. "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." ORS 125.305(2). Under the terms of ORS 125.300(3), the protected person retains all of his or her legal and civil rights, "except those

that have been expressly limited by court order or specifically granted to the guardian by the court.” Basic rights include, but are not limited to:

1. Right to vote.
2. Right to marry.
3. Right to contact and obtain counsel.
4. Right to seek termination of the guardianship or review or modify any aspect of the guardianship.
5. If mentally competent, the right to enact estate planning including making or changing a will, changing beneficiaries of a life insurance policy or annuity.
6. Right to receive notices concerning any aspect of the guardianship proceeding, including attorney fee petitions, accountings, intent to change placement, and any other relevant proceeding. Be sure to send direct notice to the respondent of all future actions which require notice.

#### **B. Specific Powers of the Guardian.**

It is important that the guardianship limited judgment have a general recitation of the powers of the guardian, although it is not required that all powers of the guardian are listed within the limited judgment. ORS 125.315 lists the general powers and duties of a guardian, including, but not limited to:

1. Health care.
2. Placement/residence.
3. Care, comfort and maintenance.
4. Disposition of remains.
5. Finances. Pursuant to ORS 125.315(f) and 125.320(2), the guardian may receive money and personal property deliverable to the protected person and apply the money and property for the support, care and education of the protected person. The statute directs that the guardian shall exercise care to conserve any excess for the protected person. The court may require the guardian to post a bond if the guardianship will clearly involve financial management.

#### **C. Limitations of the Guardian’s Powers**

1. **Use of the Protected Persons Funds.** The guardian may not use the protected person's funds to pay the guardian, or the guardian's spouse, parent or child, for the room and board of the protected person without court approval. Carefully review ORS 125.320(2) and 125.221(4).
2. **Conflicts of Interest.** Review ORS 125.221 for any issues which can arise concerning conflict of interest by the guardian in the expenditure of the protected person's funds.
3. **Placement.** Before placement of an adult protected person in a mental health facility, nursing home, assisted living, residential care, or adult foster home, the guardian must file a Notice of Intent to Place the protected person (Form 1-16) and give proper notice pursuant to ORS 125.065. Note that all placement changes, not just moves to care facilities, require prior notice (ORS 125.320(3)(a)). The notice must be filed and served at least 15 days prior to the change in placement, unless the guardian determines that the placement change must occur in less than 15 days in order to protect the immediate health, welfare or safety of the protected person or others. If these circumstances exist, they must be articulated in the move notice, and the notice must be filed or served no later than two judicial days after the move. A court order authorizing the move is not required.
4. **Limitation on Association.** According to ORS 125.323, a guardian may not limit a protected person's interaction with a protected person's "preferred associations" except as allowed by the court or to avoid harm to the protected person. If a guardian limits an association, the limit is challenged, and the court rules that the limit is unreasonable, the court could remove the guardian and/or award attorney fees to the challenging party.

#### **D. Guardian's Report.**

ORS 125.325 requires the filing of a Guardian's Report within 30 days after the anniversary of the guardian's appointment. A statutory form is reproduced as Form 1-14. The court is not required to approve the report or take any other action on the report. The report must also be served upon:

1. The protected person.
2. Any other fiduciary other than the guardian who has been "appointed" for the protected person (beyond a court appointed conservator, it is prudent to include any trustee, health care representative or any other fiduciary).
3. Any person who is a party or has required notice.

4. Department of Veterans Affairs if the protected person is receiving Veteran's Administration benefits.
5. Any other person the court requires.

**E. Termination of the Guardian's Authority.**

The authority of the guardian ends upon the death, resignation or removal of the fiduciary. Upon termination of the guardian's authority, if the need for a guardian still exists, a petition to appoint a successor guardian must be filed and served in the same manner as the original petition. Under ORS 125.090(2), the court has authority to terminate the guardianship if the protected person has died, if the need for a guardianship no longer exists due to restoration of capacity, or the best interest of the protected person would be served by the termination of the guardianship.