

## **GUARDIANSHIPS AND CONSERVATORSHIPS IN OREGON**

**Prepared By: Wesley D. Fitzwater, Attorney at Law, FITZWATER & MEYER, LLP**

### **A. History**

The guardianship and conservatorship code in Oregon, ORS Chapter 125, underwent a major revision in 1995. The primary purpose of this revision was to add procedural safeguards for persons subject to protective proceedings and to better organize and standardize the process for the appointment of a fiduciary.

In 1999, the legislature passed two bills that will substantially change protective proceedings over the next several years. House Bill 2759 created the first statutory standard for professional fiduciaries. House Bill 2760 added notice requirements for adult guardianship petitions and an actual form for "objections" by a respondent to the petition. Finally, beginning in July 2000, a pilot program in Multnomah County will substantially expand the role of the court visitor and will provide for the appointment of counsel for unrepresented respondents.

The purpose of this material is to generally explain the 1995 guardianship and conservatorship code as it applies to incapacitated adults. References to the 1999 changes are made throughout this material (see "**UPDATE**") and copies of the new statutes are included at the end of the chapter.

### **B. "Protected Person"**

*"When is a person no longer capable of making decisions for himself or herself? After years of experience as an elder law attorney, I have yet to find a more difficult question to answer or a more difficult decision for a family to make."*

Legally, the issue is one of capacity. ORS 125.005 defines "**incapacitated**" as:

"a condition in which a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person's physical health or safety.

**'Meeting the essential requirement 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 defines "**financially incapable**" as:

"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 deficiency, 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."

**NOTE:** Except for the elimination of the description "*age*," the reasons for the appointment of a conservator for an adult and the definition of the term "*manage financial resources*" is the same as the previous code. ORS 126.003 (5).

"Incapacitated" persons who are unable to make decisions about their health and safety may require a court-appointed guardian. An inability to manage financial resources may require the appointment of a conservator. In both instances, the rights and the decision-making abilities of the person are substantially reduced.

Supreme Court Justice Douglass once said that we all have the "right to folly." Put another way, we all have the right to make the wrong decisions. The issue, therefore, is not whether we have made the wrong decision, but with what capacity the decision was made.

For example, is bouncing a few checks evidence of incapacity? Probably not - if it was, we may all be in trouble. On the other hand, overdrafts for the past few months, together with an increased history of unpaid bills, misplaced funds, unexplained gifts, susceptibility to influence and related problems may be evidence of an "inability to manage financial resources."

Except for the language of the statute, there are no clear rules for determining capacity. Each case must be evaluated independently. The court places weight on the opinions of doctors, psychologists, public social workers, private case managers, family and friends (in my experience - in that order). The court, through its court visitor will attempt to contact all relevant parties to get an overall picture of the individual's capacity.

**IMPORTANT NOTE:** A medical diagnosis of dementia (i.e. Alzheimer's, organic brain syndrome, etc.) does not, in and of itself, constitute a **legal** finding of incapacity. Until a court legally determines that the individual is incapacitated, that person retains **all** of their rights and their decision-making abilities. They continue to have the "right to make the wrong decision." This includes the right to refuse assistance, case management, placement, medical treatment and other forms of help. Until a finding of incapacity, the only hope is to convince the person to make the "right" decision for themselves and their future.

### **C. Least Restrictive Alternative**

Oregon's policy for appointing a guardian is stated in ORS 125.300:

“A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and shall be ordered only to the extent necessitated by the person's actual mental and physical limitations.”

Guardianship and conservatorship proceedings replace the ward's decision-making abilities and substitute the decisions of another. Sometimes this is necessary, but it should always be viewed as a last resort. Every less restrictive alternative should be explored first.

Before guardianship is considered, you should review options such as a medical advance directive, hospital ethics committees, case management, support and placement services, access to assistive devices and/or medical care. Before conservatorship is considered, you should review options such as financial powers of attorney, trusts, joint or two-signature bank accounts, representative payee, money management or check-writing service, training, public benefits, and private lawsuit to recover property.

**UPDATE:** In the Multnomah County pilot program, the court visitor will have to investigate the alternatives available to the respondent and the reasons why the alternatives did not or would not work.

## D. Definitions

Oregon divides the functions of a court-appointed surrogate decision-maker into **guardianship** of the person and **conservatorship** to manage a person's estate. However, it is common for a person to need both a guardian and a conservator.

**Guardian.** The person appointed by the court to make personal and health-care decisions for a minor or incapacitated person.

**Conservator.** The person appointed by the court to manage the finances of a person who is unable to do so for reasons such as minority, mental illness, physical disability, or chronic intoxication. (Please note that “age” is not a valid reason for conservatorship.)

**Fiduciary.** A person appointed by the court to act as a guardian, conservator, temporary guardian, temporary conservator or a combination or limitation of each.

**Professional Fiduciary.** A person acting as a fiduciary for three or more protected persons who are not related to the fiduciary.

**Respondent.** A person for whom a guardianship and/or conservatorship is proposed.

**Protected Person.** The person for whom a guardian and/or conservator has been

appointed.

**Court Visitor.** A neutral, trained individual who is assigned by the court to interview the people involved in the guardianship proceeding and report back to the court.

After a guardianship petition is filed, the court appoints a court visitor to interview the parties. The visitor has 30 days to complete his or her investigation and submit a written report on (a) whether a guardianship is necessary; (b) whether the proposed guardian is suitable; and (c) any recommendations concerning limitations and/or further evaluations.

Each county (or judicial district) has its own process for choosing visitors. Some use volunteers, others require the petitioner to propose someone. In Multnomah County, the court has chosen four people to serve as court visitors and requires that petitioners pay a fee (\$300) for the visitor's services.

**UPDATE:** In the Multnomah County pilot program, the court visitor will read and explain the notice to the respondent; determine whether the respondent objects to the appointment of a fiduciary; determine whether the respondent wishes to be represented by counsel; and perform a more in-depth investigation of the need for guardianship.

## **E. Appointing A Guardian Or Conservator**

The appointment process consists of (1) petition, (2) notice, (3) hearing and (4) order.

1. The Petition. The petitioner (usually the proposed guardian and/or conservator) files a petition in the appropriate state circuit court, with the probate department if there is one.

(a) Guardianship. A guardianship petition is required to allege the area(s) in which the respondent lacks capacity and factual information to support those allegations.

The court must find that:

- (i) the respondent is incapacitated;
- (ii) that a guardian is needed to provide care and supervision;
- (iii) that no less restrictive alternative is appropriate;
- (iv) and that the proposed guardian is qualified, suitable and willing to serve.

Individual facts should be stated, rather than a restatement of the statutory language.

(b) Conservatorship. A conservatorship petition is required to:

- (i) describe the property to be protected;
- (ii) the value of the property;
- (iii) and the reason(s) why a conservator should be appointed.

The petitioner should give facts so that the court can find a basis for the appointment of a conservator.

2. **Notice.** A copy of the petition must be personally served on the respondent, together with a notice listing the date objections are due, the right to request a hearing and the right to retain an attorney. The petitioner must also notify the following:

- (a) the spouse, parents and adult children of the respondent;
- (b) any person cohabiting with the respondent;
- (c) the trustee of any trust established by the respondent;
- (d) and any person appointed as health-care representative in an advance directive.

**UPDATE:** HB 2760 now requires that all notices shall state whether the petition seeks authority for the guardian to make medical and health care decisions, decisions on where the respondent will live, financial decisions, and what other authority is being requested.

A new form called the “Respondent’s Objection” must accompany the Notice to Respondent. The form must be printed in **14-point type on blue paper**.

A copy of the Notice and Respondent’s Objections is attached at the end of this chapter.

**UPDATE:** HB 2760 now requires notice to the following:

- (a) Any attorney who is representing the respondent in any capacity. However, the notice requirement does not impose any responsibility on the attorney who gets the notice to represent the respondent. (This author believes that an attorney’s ethical duty would at least require the attorney to make inquiry with the client about the need for representation.)
- (b) If the respondent is a resident of a nursing home or residential facility, or if placement is intended, notice must be sent to The Office of the Long Term Care Ombudsman in Salem, Oregon.
- (c) If the respondent is a resident of a mental health treatment facility or a

residential facility for individuals with developmental disabilities, or if placement is intended, notice must be sent to the Oregon Advocacy Center in Portland, Oregon.

3. Hearing. Oregon does not *require* that a hearing be held on guardianship and conservatorship petitions. A hearing is held if the respondent or protected person, or another interested party, files written objections with the court within 15 days of receiving notice of the proceeding. Oregon courts rarely appoint counsel for respondents and protected persons.

If objections are filed, a hearing is held before a judge, who takes evidence from the petitioner and the person(s) who filed objections, and then decides whether a legal basis exists for appointing a guardian or conservator. Few objections are actually filed. In most cases, the petitioner waits the 15 days after service and submits an order for the judge to sign.

**UPDATE:** As part of the Multnomah County pilot program, the court will hold a hearing if the respondent tells the court that the respondent objects to the guardianship or to the proposed guardian; or if the court visitor recommends the appointment of counsel to protect the interests of the protected person. At the time of this writing, the court's current position is that any expression of objection will be sufficient.

4. Orders of Guardianship or Conservatorship. "Letters" of guardianship or conservatorship are documents issued by the court as evidence of authority after the order appointing a guardian or conservator has been signed.

(a) Guardianship. A guardianship order can grant specific powers or limit powers in particular areas. The court will make a guardianship order that is no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the protected person.

(b) Conservatorship. A conservatorship order should be "appropriate." Some orders freeze specific accounts or prevent the conservator from taking certain actions. The purpose of these types of restrictions is usually to decrease the amount of the fidelity bond the conservator must post.

5. Temporary Orders. ORS 125.600 allows the appointment of a temporary guardian or conservator in an emergency situation, which is defined as "**an immediate and serious danger to life or health or danger to the estate.**" It requires "**clear and convincing**" evidence of that emergency, two days' advance notice of application to the court, except where the emergency necessitates an immediate appointment (then notice must be given within two days following the appointment). An expedited hearing and court visitor's report is provided. The length of a temporary guardianship is 30 days, with a potential 30-day extension.

A temporary conservatorship is now expressly allowed by statute. The petitioner

must show that there is a threat of "**immediate and serious danger to the estate of the respondent**" and that the "**welfare of the respondent requires immediate action.**"

## **F. Legal Status Of A Protected Person**

The protected person retains some rights, even though a guardianship and/or conservatorship have been imposed.

1. Guardianship. The protected person in a guardianship proceeding "is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court. Rights retained by the person include, but are not limited to, the right to contact and retain counsel and the right to have access to personal records.

The protected person has the right to object to placement outside the home or in a more restrictive setting. The guardian is required to file a statement informing the court when the guardian intends to place the protected person in a mental health facility, nursing home or other residential facility. Notice must be given to the protected person and others as required by the guardianship statutes. If objections are filed, the court may schedule a hearing. Failure to file the above-required notice is grounds for removal of the guardian.

2. Conservatorship. A protected person in a conservatorship proceeding "if mentally competent, may make Wills, change beneficiaries of life insurance and annuity policies and exercise any power of appointment or any elective right to share in the estate of a deceased person. Otherwise, the protected person "cannot convey or encumber the estate of the person or make any contract or election..." One exception is that the conservator may permit the protected person to have limited possession and control of property and funds for living requirements.

## **G. Choice Of Guardian And/Or Conservator**

1. Suitable Persons. The proposed guardian/conservator must be "suitable" (not defined in the statute), "willing to serve," and not have filed for bankruptcy or been convicted of a felony or a Class A misdemeanor. The proposed guardian must state whether he/she is providing services to the respondent. People who cannot serve are: an incompetent; a minor; a suspended or disbarred lawyer; a state court judge, or an owner, administrator or employee of a nursing home, adult foster home, residential care facility or assisted living facility.

2. Non-family Choices. In most cases, relatives are appointed to serve. Counties are authorized to establish Public Guardian offices. Multnomah County is one of the few to have done so. Some counties recruit volunteers to serve people with little money and no other available options.

Banks and other financial institutions act as conservators in large estates. The Veteran's Administration (VA) serves as conservator for some disabled veterans.

The number of professional guardians and conservators is increasing. They receive referrals from a variety of sources to set up guardianships and conservatorships for people who have the funds to pay for their services. Banks and professional guardians can provide the "neutral party" often needed in cases involving difficult family dynamics.

## **H. Powers And Duties Of A Guardian And/Or Conservator**

1. Guardian. A guardian has the powers stated in the order appointing him/her. A guardian with full statutory powers has the authority and responsibility to decide where the protected person will live; to arrange for care, maintenance, education and training; to consent to medical treatment; and to manage certain money and property if no conservator has been appointed.

A guardian is required to file an annual report with the court, summarizing the guardian's actions over the past year.

A guardianship continues until the protected person dies or the court terminates the guardianship.

A guardian is not permitted to make substitute decisions on certain issues, including marriage, sterilization and areas covered by an existing Power of Attorney for Health Care (or Medical Advance Directive). In other words, a health care representative has priority over a court-appointed guardian.

2. Conservator. A conservator has extensive powers to manage money and property and the duty to pay bills and expenses. The order appointing the conservator may set some limits on his/her authority. Title to all real property remains in the name of the protected person, while other assets, such as bank accounts, are placed in the name of the "conservatorship."

Upon appointment, a conservator must file an Inventory listing of the income, money and property of the protected person's estate. In addition, a conservator must file an Annual Accounting with the court, which includes all of the past year's financial transactions.

A conservator must obtain specific court approval before selling the protected person's home.

A conservator must take into account and must protect any known estate plan of the protected person when dealing with his/her estate. The conservator should attempt to locate a Will and other estate planning documents.

If the estate is financially able, a conservator may make gifts to charities and other beneficiaries. The court looks for a history of gifting and a determination that adequate assets remain to care for the needs of the protected person.

If the incapacitated person had previously executed a **financial power of attorney**, then the authority of the attorney-in-fact or agent under that power continues even though a

conservator is later appointed. However, the agent must account to the conservator rather than to the incapacitated person. The conservator has the same power that the principal would have to revoke, suspend, or terminate all or any part of the power of attorney.

## I. Removal And Termination

1. Removal of a Guardian or Conservator. The protected person or any other person may petition the court to remove a guardian and appoint a successor. Reasons include:

- (a) Failure to perform duties, including filing a notice of placement.
- (b) Conflict with the protected person.
- (c) Misconduct.
- (d) Death or incapacity of the guardian/conservator.
- (e) Filing for bankruptcy.
- (f) Conviction of a felony or Class A misdemeanor.

2. Termination of a Guardianship or Conservatorship. Again, the protected person or any other person may petition the court to terminate a guardianship or conservatorship for the following reasons:

- (a) Death of the protected person.
- (b) Recovery from incapacity (and can prove it).
- (c) For a conservatorship, when the value of the estate drops below \$10,000 and there is no real property included in the estate.

## PLANNING FOR INCAPACITY

Planning for incapacity is often overlooked, and yet there is a 65% chance that each of our clients will experience some period of incapacity and a 25% chance of suffering a long period of incapacity. The best method of planning is to use the following legal tools to appoint a **surrogate** or **substitute decision-maker** to assist the client when, and if, the time comes.

### 1. Planning Tools for Health Care Decisions.

a. Advance Directive. The Advance Directive is your client's statement that if death is imminent, because of a terminal disease or injury, your client does not want

artificial life support procedures used to postpone the natural moment of death.

In addition, your client can designate another person, a family member or friend, (called "health care representative") to act legally on behalf of your client to make health care decisions. The health care representative will be authorized to make any health care decision your client could have made (with some limited exceptions, i.e.: sterilization). This includes the authority to withdraw life support procedures, such as respirators or artificial nutrition and hydration.

The Advance Directive replaces the "Directive to Physicians" and the "Health Care Power of Attorney." These two forms, if already signed, remain effective. However, after November 4, 1993, the new "Advance Directive" should be used.

b. Guardianship. (See detailed discussion above.)

## 2. Planning Tools for Financial Decisions.

a. General Power of Attorney. Your client can designate another person, a family member or friend (called "attorney-in-fact"), to act legally on your client's behalf. Simply put, the attorney-in-fact has the power to sign your client's name to any legal document.

Oregon law provides that a power of attorney will continue beyond disability or incapacity ORS 127.005. However, it is best to specifically address the issue of incapacity. This is known as a **durable** power of attorney.

b. Bank - Power of Attorney. Most local banks allow your client to appoint an attorney-in-fact for a bank account or group of accounts at that bank or branch. Contact the bank to obtain their forms for this purpose.

c. Bank - Joint Accounts. A bank officer may recommend that your client put an account in joint names or ownership with a family member or friend. This will allow the joint owner to have access to the account should your client become incapacitated.

Joint ownership also makes the account available to the joint owner and his/her creditors. Upon your client's death, the account becomes the sole property of the surviving joint owner (despite the terms of a Will or Trust).

d. Representative Payee. When a person becomes unable to manage his/her resources, several public programs (such as Social Security) provide for a **representative payee** or **fiduciary** to receive benefits on behalf of the beneficiary.

e. Revocable Living Trust. The Revocable Living Trust is an excellent way to plan for decision-making if your client becomes incapacitated. The trust appoints a decision-maker (successor trustee) if your client become incapacitated. The trust document can incorporate specific instructions about how funds will be used if your client becomes incapacitated.

**PRACTICE NOTE:** Recently, we are seeing an evolution in the drafting of Revocable Living Trusts. The primary purpose of the trust is no longer simply probate avoidance. Now, more focus is being placed upon the client's "quality of life." Many people are no longer able to rely upon a close and supportive family to be there in times of need. One alternative is to draft, as part of a good living trust, language that provides direction and assurance that the trustee will use trust funds to promote the highest quality of life.

f. Conservatorship. (See detailed discussion above.)

**DISCLAIMER:** The information contained in this website is based on Oregon law and is subject to change. It should be used for general purposes only and should not be construed as specific legal advice by Fitzwater & Meyer, LLP, or its attorneys. Neither this website nor use of its information creates an attorney-client relationship. If you have specific legal questions, consult with your own attorney or call us for an appointment.

© Fitzwater & Meyer, LLP, 2003