

FIDUCIARY ACTS AND PRIOR COURT APPROVAL
Oregon State Bar
Elder Law Section Newsletter

Prepared By: Deborah Keller and Wes Fitzwater, Attorneys at Law, FITZWATER & MEYER, LLP

A fiduciary acts with authority granted from the court. Some fiduciary actions require the prior approval of the court. Some actions require prior disclosure to the court. Most fiduciary actions, however, are performed without the need for prior approval or disclosure. That said, there are times when the prudent fiduciary finds it necessary to seek the approval and/or instructions of the court to resolve disputes or to obtain clear instructions for the management of a protected person's affairs or the administration of an estate.

This article highlights the statutory requirements for prior court approval and disclosure. In addition, the authors describe certain cases in which the fiduciary may find it helpful to request prior court approval or instructions.

A. Acts Requiring Prior Court Approval

When does the fiduciary client cross the line between ordinary duties and those requiring prior court approval? Elder law practitioners and their clients should maintain a keen awareness of this distinction. Is your fiduciary aware that the following actions require prior court approval?

1. Payment of Fees of Visitor or Physician When Related to an Objection. ORS 125.095(2). A fiduciary must obtain court approval before using a protected person's funds to pay a visitor or physician for services related to an objection to a petition or motion.

2. Any Compensation to a Fiduciary or the Attorneys for a Fiduciary. ORS 125.095(3). All payments from a protected person's funds for services performed by fiduciaries and their attorneys must have prior court approval. An exception allows payment to a conservator who is a trust company under ORS 709.030. A fiduciary may reimburse expenses without court approval if paid for the support, education, care, or benefit of the protected person and the protected person's dependents. ORS 125.425.

3. Payment for Room and Board Furnished by the Guardian or Guardian's Spouse, Parent, or Child. ORS 125.320(2). A guardian (and arguably a conservator) must have prior court approval to use a protected person's funds to pay room and board furnished by the guardian or the guardian's immediate family.

4. Sale of Protected Person's Residence. ORS 125.430. A conservator may only sell a principal residence after obtaining prior court approval, with required notices.

5. Gifts Over \$250 to One Person, and Over an Aggregate of \$1,000 for All Gifts. ORS 125.435. The conservator must have prior court approval for gifts to one person over \$250 in a calendar year, or exceeding an aggregate of \$1,000 for all gifts in calendar year.

6. Convey or Release Contingent or Expectant Interests in Property. ORS 125.440(1). These include marital property rights, and any right of survivorship incident to joint tenancy or tenancy by the entirety.

7. Create revocable or irrevocable trusts. ORS 125.440(2).

8. Elect Options or Change Beneficiaries to Insurance and Annuity Policies, or Surrender the Policies for Cash Value. ORS 125.440(3). The conservator who takes any of these actions must obtain prior court approval.

CAUTION: All conservators must exercise due caution when simply “taking possession” of these types of assets under the initial fiduciary duties of ORS 125.420. A zealous or ignorant fiduciary may unwittingly alter titling or beneficiary designations, which could interfere with the protected person's estate plan (see ORS 125.460), and/or trigger unfavorable tax consequences.

9. Disclaim Any Interest the Protected Person May Have by Testate or Intestate Succession or by Inter Vivos Transfer. ORS 125.440(4).

10. Authorize, direct or ratify any annuity contract or contract for life care. ORS 125.440(5).

PRACTICE TIP: Expenditures over \$5,000.00. The authors are aware of at least one court in Oregon that now requires a conservator to obtain prior approval for any expenditure over \$5,000.00. If your fiduciary is planning a major expenditure, it may be wise to contact the court and inquire about the need, if any, for prior court approval.

LEGISLATIVE UPDATE: Senate Bill 35 (passed both House and Senate with amendments) will require prior court approval for the payment of compensation to a person who is a spouse, parent or child of the fiduciary, or to a business entity in which the spouse, parent or child of the fiduciary has an ownership interest, and that is employed by the fiduciary to provide direct services to a protected person. For a copy of the bill see <http://landru.leg.state.or.us/03reg/measure/main.html>

B. Acts Requiring Prior Disclosure

1. Employment of Another Person in Which the Fiduciary Has a Pecuniary or Financial Interest. ORS 125.221. This includes any ownership interest, business association, or financial involvement between the fiduciary and the person, or any relationship that could compromise the fiduciary's decisions. Before the fiduciary employs such a person, the fiduciary must give a full and accurate disclosure of (a) the pecuniary or financial interest, (b) the services to be performed, and (c) the anticipated costs to the estate. The court may require additional disclosures as it deems appropriate.

2. Placement of an Adult Protected Person in a Facility. ORS 125.320(3). Before moving a protected person to a new facility, a guardian must file a statement of intent with the court and give required notices. Most of the time this statement is filed after the fact. Practitioners should strive to give notice in advance, whenever possible.

C. When To Seek Court Approval

ORS Chapters 114 and 125 grant fiduciaries the authority to take many, if not most, actions without prior approval of the court. However, at certain times, the fiduciary may find that he or she is still unable to act without the court's further involvement. The authors have achieved favorable results from seeking court approval or instructions in cases described in the following examples.

1. Preserving the Nature of Joint Accounts. A conservator must take into account the **estate plan** of the protected person, including "joint ownership arrangement with provisions for payment or transfer of benefits or interests at the death of the protected person to another." ORS 125.460.

A conservator does not have discretionary rights to a joint account and may not change the nature of the account. The conservator may, however, use joint account funds for the essential care, support and maintenance of the ward. Strain v. Rossman, 47 Or. App. 57, 614 P.2d 102 (Or. App. 1980).

CASE EXAMPLE: A conservator had an inventory of three different accounts, in three different amounts, with three different beneficiaries. The account with beneficiary A had \$50,000.00. The account with beneficiary B had \$30,000.00, and the account with beneficiary C had \$20,000.00. There were no other assets and the monthly care expenses were high. The obvious question was how to access each account equally, while still preserving the joint nature of the accounts and the transfer of benefits at death.

After filing the appropriate Motion, with notices to all interested (and affected) parties, the court allowed the conservator to liquidate the investments and combine them into one account. The money was then used to pay for the ongoing expenses of the protected person. Upon death, and after payment of the final conservatorship expenses, the court allowed the remaining account balance to be distributed, without probate, to the beneficiaries as follows: Beneficiary A =

50%, Beneficiary B = 30%, and Beneficiary C = 20%. This distribution was consistent with the beneficiaries' respective interests in the estate at the time the conservatorship was created.

2. Approving a Spending Plan. Again, ORS 125.460 requires a conservator to take into account the known estate plan of the protected person, "including the Will of the protected person," when "selecting assets of the estate for distribution ... for the support of the protected person."

CASE EXAMPLE: A conservator had an inventory that included (a) cash (comprising the residue of the protected person's estate plan), (b) real property (a named specific bequest in the protected person's Will), and (c) a joint account (non-probate assets). Again, the conservatorship had no other assets and high monthly care expenses. Which assets should be spent first?

After filing a "Motion to Approve a Spending Plan," with notices to all interested (and affected) parties, the court approved a specific plan for spending the assets consistent with abatement in a probate cases (ORS 116.133), spending first from the residue, second, if necessary, from the specific bequests and third, if necessary, from non-probate assets. For more information, see W. Fitzwater, *Preserving the Estate Plan*, Chapter 4, Guardianships and Conservatorships, OLI CLE, September 28, 2001.

3. Motivating Others to Cooperate. Fiduciaries often depend on the cooperation of others in order to fulfill their duties. What happens when ordinary efforts to obtain information fail?

A personal representative may apply to the court for authority, approval or instructions on any matter concerning the administration, settlement or distribution of an estate, and the court, without hearing or upon such hearing as it may prescribe, shall instruct the personal representative or rule on the matter as may be appropriate. ORS 114.275.

In a conservatorship proceeding, "[t]he court may order any person to appear and give testimony by deposition if it appears probable that the person ... (d) Has knowledge or information that is necessary to the administration of the affairs of the protected person." ORS 125.465.

CASE EXAMPLE: A personal representative needed to furnish the court with information about the assets and debts of a partnership in which the decedent had served as a general partner. The personal representative also needed to verify the filing of all required tax returns on the decedent's behalf. The surviving business partner refused to provide the personal representative with any financial information. The surviving partner also refused to file required income and payroll tax returns for the partnership for the year ending at the partner's death.

The personal representative tried unsuccessfully for over a year to obtain the information.

The personal representative filed a Motion and Order To Show Cause and the court set a date for hearing under the authority of ORS 114.275. At the hearing, the court ordered the business partner to produce the requested financial data and tax returns. The individual produced the required information and filed the tax returns.

4. Dueling Trusts. An increasingly common problem is presented when two (or more) trusts exist for the benefit of the same life beneficiary, but with different remainder beneficiaries. Multiple issues arise, including insuring that each trust bears the same financial burden for the life beneficiary's needs.

ORS 128.135(2) provides that any beneficiary of a trust or the trustee thereof may petition the court to, among other things, "[obtain] authority, approval or instructions on any matter concerning the interpretation of the trust or the administration, settlement or distribution of the trust estate," and, "make any modification of the trust that the parties could make by agreement under the provisions of ORS 128.177."

CASE EXAMPLE: John was the life beneficiary of two trusts, one established by his mother and one established by his aunt. Both trusts provided for John's "support and maintenance," however, each had different remainder beneficiaries upon John's death. To make matters worse, Mom's trust owned the house John was living in, and held no cash. Aunt's trust had cash. For John to continue to live in the home would exhaust all cash from Aunt's trust (to the detriment of its remainder beneficiary), in favor of Mom's trust (and the benefit of its remainder beneficiary).

A petition was filed for modification and instructions for both trusts. After notices to all interested and affected parties (including the remainder beneficiaries), the court approved a specific plan for spending the assets during lifetime and distributing the funds equally to the remainder beneficiaries upon death.

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