CONTESTED PROTECTIVE PROCEEDINGS IN PROBATE COURT

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1. Introduction

Contested protective proceedings present different circumstances than litigation in most other areas of the law. The parties and issues can be highly emotional and the outcomes affect the fundamental rights of the proposed protected person. The courts will be very concerned and involved with the interests and the protection of the respondent. Procedures and local practice will vary widely from county to county. The attorneys, social service workers, court visitors and other professionals who work with the legal needs of the elderly often know each other, the probate judges and their staff. This is the backdrop when filing an appearance in a contested protective proceeding.

Against this backdrop are the attorneys advocating for their clients. The elder law attorneys appearing in protective proceedings may have limited experience in litigation. And litigation attorneys appearing in protective proceedings may have limited experience with the Probate Court and protective proceedings. Each of these backgrounds brings advantages and disadvantages to contested protective proceedings. An attorney representing a party in a protective proceeding becomes a more effective advocate for their client when experience and knowledge from both perspectives is brought to the contested protective proceeding.

These materials attempt to set forth a brief overview of both of these perspectives. Although, many litigation practices are discussed herein, the author is not advocating for their use in every case. One of the biggest factors that needs to be assessed in using extensive litigation practices in contested protective proceedings is cost. As in all litigation, a cost benefit analysis should be considered prior to the expenditure of large resources. The past practices of limited discovery and curtailed motion practice hopefully reflect this type of analysis on the part of the attorneys practicing in the field. Such considerations must be made and discussed with the client in the course of representation.

The most cost-effective protective proceeding is one that never becomes contested. Practitioners in this area should always attempt to discuss with their clients ways to avoid turning a case into a contested proceeding. However, due to the nature of protective proceedings, attempts to resolve these matters without conflict may fail. In these circumstances a thorough knowledge of the law pertaining to protective proceedings can help resolve a contested case as efficiently as possible.

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[1] The author primarily practices in the tri-county Portland metro area. References to local court practices relate primarily to these county courts. As in all court proceedings, Supplemental Local Court Rules and the Clerk's Office should be consulted regarding local practice.

2. An Overview Of The Law Covering Protective Proceedings

ORS Chapter 125 sets forth the statutory law pertaining to protective proceedings. The Probate Court and Commissioners have exclusive jurisdiction of protective proceedings. ORS 125.015. The Oregon Rules of Civil Procedure and the Oregon Evidence Code apply to protective proceedings. ORS 125.050. Venue for a protective proceeding must be commenced in the county where the respondent resides or is present. ORS 125.020(1). If conservatorship is sought only regarding assets that are within the state, and the respondent is not present in state, the proceeding can be filed in any county where such assets are located. ORS 125.020(3).

A protective proceeding is commenced by the filing of a petition in the Probate Court seeking the appointment of a fiduciary. ORS 125.010. A petition must be verified by at least one petitioner or by the attorney for the petitioner. ORS 111.205. The petition must contain the statutory information required under ORS 125.055. The petition must set forth facts that support the appointment of a fiduciary. ORS 125.055(2)(g). The original and a copy of the petition must be filed with the court. ORS 125.055(1).

Notice of the filing of a petition seeking the appointment of a fiduciary in a protective proceeding must be given to all interested parties. ORS 125.060-070. The Notice must contain a copy of the petition filed and a statement setting forth the procedure and deadline for filing objections. ORS 125.070(1). The Notice to be served upon the respondent must contain additional information as required under ORS 125.070(2), and be in substantially the same form as set forth in the statute. Id. The respondent must be personally served, ORS 125.065(1), and the respondent can not waive such service of notice. ORS 125.060(9).

The list of persons or agencies required to be noticed is set forth in ORS 125.060. It is reversible error for a trial court to appoint a permanent fiduciary if the petition served on the respondent does not contain the statutory information required under ORS 125.055. *Spady v. Hawkins*, 155 Or. App. 454, 963 P.2d 125 (1998).

Once a petition seeking the appointment of a guardian is filed, the court shall appoint a visitor to report to the court regarding the appointment of a fiduciary. ORS 125.150. The court may order a visitor to be appointed in any other protective proceeding. Id. The court visitor must interview the proposed fiduciary and the respondent. ORS 125.150(3). The court visitor may interview any physician or psychologist that has examined the respondent and any other person who might have relevant information. Id. The court visitor shall file a report with the court within 15 days of their appointment. ORS 125.155(1).

The report shall include a statement of the visitor's belief about with the allegations in the petition are substantially correct, whether the appointment of a fiduciary is necessary and whether the nominated fiduciary is qualified and willing to serve. ORS 125.155(2). The report also must include the names, addresses and phone numbers of

the persons interviewed and recommendations of the suitability of the nominated fiduciary and any limitations that should be imposed on the fiduciary. Id.

The court visitor report can be one of the most important documents that will be filed with the court. Typically the court has a long working relationship with the court visitor and the visitor report will be one of the first items the court will review in regard to the appointment of a fiduciary. If the visitor is not aware of counsel for one of the parties, it is advisable to notify the court visitor of such representation and provide them with contact information for additional persons who have relevant information regarding the proceeding. Although there is a statutory procedure for requesting the court to forward a copy of the report to a requesting party, ORS 125.155(4), typically the court visitor with furnish the parties with a copy upon request.

The respondent enjoys a presumption of competency under Oregon law. *In The Matter Of Schaefer*, 20534, A115334, (Or. App. 8-28-2002). *Van v. Van*, 14 Or App 575, 578, 513 P.2d 1205 (1973). This presumption must be overcome by clear and convincing evidence. ORS 125.305(1); ORS 125.400; *In The Matter Of Schaefer*, 20534, A115334, (Or. App. 8-28-2002). Clear and convincing evidence is evidence of "extraordinary persuasiveness." *In The Matter Of Schaefer*, 20534, A115334, (Or. App. 8-28-2002). *State v. Gjerde*, 147 Or App 187, 191, 935 P.2d 1224 (1997).

The petitioner must allege that the respondent is incapacitated and is in need of the appointment of a conservator or guardian in order to protect the respondent. In a guardianship action the court must find by clear and convincing evidence that the respondent is a minor or is incapacitated, that the appointment is necessary to provide care and supervision and that the nominated fiduciary is qualified, suitable and willing to serve. ORS 125.305.

> "'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).

The recent decision by the Oregon Court of Appeals in *In The Matter Of Schaefer*, A115334, (Or. App. 8-28-2002), sets out the substantive requirements necessary to support imposing a guardianship. The definition of incapacity requires the petitioner to prove three things: "(1) the person to be protected has severely impaired perception or communication skills; (2) the person cannot take care of his or her basic needs to such an extent as to be life or health-threatening; and (3) the impaired perception or communication skills *cause* the life-threatening disability." *Id.* (emphasis in original). The court emphasizes in that case that "[t]he key is the nexus between the inability to

process and communicate information, on the one hand, and the inability to perform essential functions, on the other."

Without clear and convincing proof of a causal link between a severe cognitive or communitive impairment and the "life-threatening" disability, a guardianship petition should be dismissed. *Id*. It is not clear what the Court drew upon to state that the standard to impose a guardianship includes proving a life-threatening disability, but that is the standard articulated in *Schaefer*.[2]

In a conservatorship action the court must find by clear and convincing evidence that the respondent is financially incapable and that the respondent has money or property that requires management or protection. ORS 125.400.

> "'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 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."

ORS 125.005(3).

Applying this statutory language and the reasoning set forth in *Schaefer*, a petitioner must prove that a respondent is unable to effectively manage their financial resources because of some form of disability. The non-exclusive list of conditions set forth in ORS 125.005(3) is broader than the conditions set forth in the definition of incapacity for the imposition of a guardianship. These broader non-exclusive factors suggest a lessor standard of incapacity necessary for the imposition of a conservatorship compared to a guardianship proceeding. Also, absent from the requirements of the imposition of a conservatorship is the element of necessity. ORS 125.400. Whereas in a guardianship matter the court must find the appointment necessary as a means to provide care and supervision, ORS 125.305(1)(b), no such necessity requirement is set forth for the appointment of a conservator. ORS 125.400. Therefore, the court may appoint a conservator in a protective proceeding even where other forms of alternative financial protection are available to the respondent.

The court is required to appoint the most suitable person who is willing to serve as a fiduciary. ORS 125.200. The court must give consideration to the specific circumstances of the respondent, the respondent's stated desires including testamentary statements, the relationship between the nominated fiduciary and the respondent and any impact on ease of administration resulting from the appointment. ORS 125.200; *See also Driscoll v. Jewell*, 37 Or. App. 529, 588 P.2d 49 (1978) (court

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[2] The Court did point out that the petitioner alleged a immediate and serious danger to the respondent's life or health. However, the petitioner was also seeking a temporary guardianship in that case.

is not required to abide by the stated preferences of the respondent, decided under statute repealed by Oregon Laws 1995 c. 664 § 105.)

Persons disqualified to act as a fiduciary are persons who are incapacitated, a minor or a person acting as a health care provider, as defined in ORS 127.505, for the protected person. ORS 125.205. The nominated fiduciary must consent to the appointment in writing and disclose to the court any criminal convictions, bankruptcies, revocations of professional licenses and any potential financial conflicts of interests. ORS 125.210-221.

3. Objections To The Petition

Any person interested in the affairs or welfare of the respondent may file an objection to a petition seeking the appointment of a fiduciary. ORS 125.075(1). Objections must be filed with court within 15 days after notice of petition is served or mailed. ORS 125.075(2). Objections may be written or oral and the court must designate a place where oral objections may be made and reduced to writing. ORS 125.075(2). A respondent is not required to pay any fees in filing an objection. ORS 125.075(4). Once an objection is filed the court shall schedule a hearing to be held. ORS 125.075(3). As a practical matter most courts will look to the attorneys involved to contact the court to set a hearing date. The petitioner shall give notice to all parties entitled to notice under ORS 125.060(3) of the date, time and place of the hearing. ORS 125.075(3).

There is no statutory guidance or requirements regarding the form of objections. The respondent can raise objections by simply signing the blue form objection sheet and returning it to the court. Any interested party can show up at the courthouse and object orally. If the respondent tells the court visitor that they object to the protective proceeding this fact will be submitted to the court in the visitor's report. Counsel can draft objections in the form of an answer as in any other civil matter and admit or deny the allegations in the petition. Such an objection in the form of an answer can also allege the factual basis for why a protective proceeding is inappropriate.

The basis of an objection can be to any aspect of the petition. An objection can challenge the issue of incapacity, the nominated fiduciary, or both. It is common for a represented respondent to object to the need for the appointment of any fiduciary, but if the court finds otherwise, they object to the appointment of the nominated fiduciary. An objection may be based upon the scope of the fiduciary powers sought and request only limited powers. *See* ORS 125.305(2).

Due to the relatively short period of time between the service of a notice of the filing of a petition and time to object, counsel for a potential objector must act quickly. It is advisable to contact the attorney for the petitioner to see if an agreement can be reached to extend the deadline to file objections in order to investigate the matter. Alternatively, a simple short objection may be filed to protect the rights of an objector, which can be supplemented later. This is especially true due to the fact that many times

a court visitor report may not be filed prior to the deadline to object. ORS 125.155(1). This visitor's report will generally contain substantial information necessary to assess the facts underlying the petition.

Many times counsel may not be involved on behalf of objector until an objection has already been filed. In this case the objection filed should be reviewed for possible submission of additional grounds or clarification. As a practical matter, any form of an objection will preserve the objector's rights and require a hearing on the objection. The decision to file more extensive objections should be based on the need to answer damaging allegations in the petition, as the petition and any objections filed will be the first pleadings filed with court.

4. Special Considerations In Repesenting Respondents

Counsel can end up representing respondents in protective proceedings by several different ways and particular issues arise in such representation. Counsel may have represented the respondent in the past, or the respondent may be referred to an elder law attorney by a personal attorney or a family member. Many times the court may appoint counsel to represent a respondent who has objected to a petition, or if third parties have objected and the court wants the respondent represented. In this representation, you will be dealing with someone who is alleged to be incapacitated and will need to take steps to assure proper representation of this person.

The most important task is to meet with your client and go over all the issues at hand. It is imperative to make sure your client fully understands the nature of protective proceeding and what that will mean to them if the petition is granted. Discuss and seek out alternative care and support arrangements that could alleviate the need for the appointment of a fiduciary. If the respondent has already filed an objection you should fully discuss the basis of the objection. It may be that a protected proceeding is appropriate and the respondent is only objecting to the appointment of the nominated fiduciary. In this case you should consider negotiating with the petitioner's attorney, or other interested party, to file an amended petition nominating a fiduciary your client does not object to.

Medical Privilege Issues: It is common practice for a petitioner to request information from the respondent's health care providers to support of the appointment of a fiduciary. Routinely this is done through a statement from a treating physician that is attached to the petition. Such information is privileged under OEC 504-1; *See State v. McGrew,* 46 Or. App. 123, 126, 127, 610 P.2d 1245, *rev den,* 289 Or. 587 (1980). There is debate among practitioners in this field regarding the propriety of seeking and releasing such information. The better practice may be to have the petitioner allege the medical factual basis in the petition and not attach such physician statements.

Furthermore, counsel for the respondent should notify health care providers not to release such information without the respondent's consent. This request should be in writing and revoke any previously executed releases of information to any potentially

adverse parties. Counsel should also consider filing a motion with the court to recover any privileged documents that was released to parties without the consent of the respondent.[3] *See Goldsborough v. Eagle Crest Partners, Ltd*., 314 Or. 336, 342, 838 P.2d 1069 (1992)[4].

Voluntary disclosure by the respondent, or consent to such disclosure, acts as a waiver of any such privilege. OEC 511. Once the respondent offers any medical testimony in their defense against the proceeding, the privileges are waived. OEC 511; Such a disclosure occurs if the respondent seeks to depose a physician for use at hearing. Waiver does not occur with the presence of a third party at the time of examination or treatment if the third party is participating in the diagnosis and treatment. OEC 504-1(1)(a)(C). Issues of waiver may occur if the respondent makes disclosures in an objection or to others in regard to medical condition as a defense to the allegations in the petition.

The court can also order upon the request of any party that respondents undergo a medical or mental examination pursuant to ORCP 44. ORS 125.025. The court is likely to grant such a request when the respondent maintains the privilege to hold their medical records undiscoverable.

5. Discovery In Protective Proceedings

All forms of discovery under Oregon Rules of Civil Procedure are available in a protective proceeding. ORS 125.050. However, the taking of multiple depositions and lengthy requests for production are typically not used as extensively in contested protective proceedings compared to other forms of civil litigation. This again hopefully reflects that counsel involved in these matters are weighing the costs involved against the benefit of extensive discovery. However, it is also not uncommon for practitioners in this area to agree to informal disclosure of discovery materials. It is also not uncommon for the parties to agree to meet with counsel to discuss their respective positions in an attempt to resolve the matter. Typically the court visitor will speak to the parties regarding the basis of their recommendations to the court. Such informal discovery methods should be considered prior to more formal and costly approaches.

In highly contested cases that are likely to go to hearing more thorough discovery may be appropriate. Counsel for parties adverse to the petition should consider deposing the witnesses who are central to the petitioner's case, including the petitioner. In may

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[3] Do be aware that some interested parties in these cases may not recognize these actions as effective advocacy and believe that the respondent's attorney is acting against the interest of the respondent. It may be important to educate these parties as to the nature of privileged information.

[4] "A court need not necessarily conclude that the lawyer-client privilege has been waived when a document has been produced during discovery. Factors to be considered by the court may be whether the disclosure was inadvertent, whether any attempt was made to remedy any error promptly, and whether preservation of the privilege will occasion unfairness to the opponent." *Goldsborough* at 343 *citing* McCormick, Evidence 342-43, § 93 (4th ed 1992).

be necessary to depose the court visitor in a case to explore their qualifications and the basis of their recommendations. Subpoenas may need to be issued to various institutions and persons to discover medical and financial records. These decisions will need to be made on a case by case basis.

Extensive discovery methods should also be considered in cases that concern alleged financial abuse. Often times it is such allegations that give rise to a protective proceeding. The alleged abuser might object to the proceeding. Typically this objection is based upon the 'I'm taking care of him and we're just doing fine' defense. In this situation the petitioner should seek any and all information from the objector in regard to the financial dealings with the respondent. Of course this can only occur if the alleged abuser makes themselves a party by objecting. However, once a protective proceeding is in place, either temporary or permanent, a court can compel any person to appear for deposition or to produce documents. ORS 125.025(3)(a).

6. Motion Practice In Contested Protective Proceedings

As a general rule motions typically filed in other forms of civil litigation are rarely used as in contested protective proceedings. The costs of litigating such motions may not be appropriate in most protective proceedings. ORCP motions by their nature and restrictions do not seem appropriate to protective proceedings. (E.g. When is an objection "served" on a party?) In addition, the Probate Court may be frustrated by attempts to dismiss an action based upon defects in pleadings or procedure where an allegedly incapacitated person may need protection. The court would almost certainly allow the petitioner leave to refile if a matter was dismissed and such a dismissal would have little preclusionary effect in a subsequent petition. This being said, appropriately drafted motions against the petition may help clarify the allegations of incapacity and assist the parties in defining what is truly at issue.

Motions to consider filing in a protective proceeding include motions to dismiss and motions to strike. ORCP R21. Motions under ORCP R21 could include: Motions to Dismiss for insufficient service or notice; Motions to Dismiss for failure to state ultimate facts sufficient to constitute a claim; or Motions to Strike.

It is not uncommon to see petitions that fail to sufficiently set out ultimate facts to support the appointment of a guardian or conservator. In this situation a Rule 21A(8) motion may be effective in pointing out to the petitioner the burden they face in overcoming the presumption of competency the respondent enjoys and the causal link that must be proved for the court to making a finding of incapacity.

A Rule 21A(8) motion to dismiss for failure to state ultimate facts sufficient to constitute a claim may be made at any time, including at hearing. R21G(3). Motions to dismiss based upon insufficient service or notice may be deemed waived if not filed prior to filing a responsive pleading. R21G(1). This rule should not apply to objections due to the mandatory time limit in which to file such objections. However, the safer practice would to file such a motion prior to or at the same time as an objection.

Motions to strike under Rule 21E should be considered where a pleading contains sham, frivolous, irrelevant or redundant matters. These matters are frequently seen in objections filed against the petition. Because no responsive pleading is allowed against objections, a motion to strike under Rule 21E must be filed within 10 days after filing of an objection.

There may also be cases where a summary judgement motion under ORCP 47 might be appropriate. This would be rare in a protective proceeding due to the ultimate issue being a legal conclusion of incapacity that is inferred from a multitude of contested specific facts. However, there should be no reason why summary judgment would be precluded in a protective proceeding. *See e.g. Matter Of The Marriage Of Annala,* 47 Or. App. 423, 426, 614 P.2d 618, (1980). In the case of a petition filed without any underlying factual basis of incapacity or alternatively evidence of incapacity is overwhelming, counsel may consider filing a summary judgement motion. Such a motion would also force the non-moving party to produce supporting evidence prior to hearing on the matter.

7. Negotiation And Settlement

As in other areas of the law most contested protective proceedings settle prior to hearing. The typical reason that these cases settle is the same as any other legal matter: a compromise is reached that the parties can live with and the risks of going forward outweigh the down side of a compromise. To get to this point it is essential for the parties to have a clear understanding of their real goals and priorities in the proceedings. This is especially true in regard to cases where the only real issue is who will be appointed as the fiduciary. The tougher case to settle is where capacity is a real issue or where the respondent absolutely will not withdraw his/her objection.

The typical case where the only real issue is who will be appointed the fiduciary tends to be where family members are in conflict. In these cases a compromise resolution will generally involve finding a third party that the parties can agree on. This can be a neutral family member or friend. If there are resources available, the appointment of a professional fiduciary can be the best solution. Most professional fiduciaries have some experience dealing with families in conflict and work towards resolving those conflicts. Setting up a time for the contestants to meet with and interview professional fiduciaries can go a long way to resolving these disputes.

This type of compromise solution should be addressed even prior to the filing of a petition. The proposed petitioner can usually alert their counsel of potential conflicts within the family. If it is apparent that seeking the appointment of a certain person will invite objections, alternatives should be discussed up front. A petitioner seeking to have a neutral third party appointed in a family where there is conflict has gone a long way towards success in their petition. The court will not be as concerned about whom is right or wrong in a long running family conflict, as it will be in ending the conflict in regard to the protection of the respondent.

The appointment of a neutral third party will help alleviate the court's concern regarding the family conflict. It also makes the petitioner's role, real or imagined, in the family conflict irrelevant as to the issue of who shall be appointed. Many times an objector will continue to attempt to attack the family member petitioner who is seeking the appointment of a third party. This position is ill advised as it strengthens the petitioner's request to appoint a neutral third party.

Cases with conflicts between family members over the appointment of a fiduciary are also appropriate for mediation. Many experienced elder law attorneys are available for mediation services that might not be on a counsel's list of preferred mediators or listed with the local court list of available mediators. Although any qualified mediator can assist in resolving these disputes, the parties may be well served to contact the probate court for a referral to an experienced elder law attorney who would be willing to provide mediation services.

Some of the more difficult cases to resolve are where the evidence of the respondent's incapacity is slight or if the evidence of incapacity is clear but the respondent refuses to withdraw their filed objection. In both of these types of cases, respondent's counsel should seek to address the petitioner's concerns through alternative care and protection methods in order to alleviate the need for a protective proceeding. In the latter case, a resolution may be achieved by educating the respondent on the benefits of a protective proceeding. Failing this, the respondent is entitled to their day in court and counsel for the respondent must hold the petitioner to their burden of proving incapacity.

8. The Hearing

The hearing of contested protective proceeding is in the probate court and will be heard by a judge, not a jury. ORS 111.205. It is the petition's responsibility to give 14 days prior notice to all persons entitled to notice under ORS 125.060(3) of the date, time and place of the hearing. ORS 125.075(3). The court visitor must be present at the hearing. ORS 125.155(5). It typically falls to the petitioner to notify the court visitor of the hearing date, time and place.

The respondent can appear through counsel. ORS 125.080(3). However, by local court practice many courts require the appearance of the respondent if capacity is an issue. It is also determined by local court practice which party is responsible for arranging the appearance of the respondent. Counsel should inquire with their local court how these issues are handled. Typically, the respondent need not appear if the contesting parties are able to stipulate to a finding of incapacity and the only real issue is who shall be appointed.

Attorneys in contested case hearings tend to raise less evidentiary objections and highly technical legal arguments. However, the rules of civil procedure and evidence do apply and counsel should be fully prepared to raise and answer any appropriate evidentiary objections. One frequent objection raised in protective proceedings is the court visitor

testifying to hearsay statements. Arguments can be made for both the exclusion and admittance of such statements. Frequently the proponent of the visitor's testimony will attempt to qualify the visitor as an expert in order to admit the basis of the visitor's opinions and recommendations. OEC 702-5. Opponents to this testimony might attempt to challenge this qualification of the visitor as an expert.

Counsel should also be aware of making an adequate record for imposition of a protective order. It may seem obvious to petitioner, their counsel, the court visitor and the judge that the respondent is incapacitated, but if an inadequate record is presented on appeal, the case can be reversed. *See In The Matter Of Schaefer*, A115334, (Or. App. 8-28-2002). Also the issue of admissible medical evidence may be an issue at hearing. Although incapacity is a legal conclusion, the petitioner should seek to introduce some form of medical evidence that supports a finding of incapacity. This can be difficult due to privilege issues and the costs of a physician testifying at a deposition or hearing.

When representing an objecting respondent at hearing it is important to have the respondent understand the real issues at hand. The respondent may have come to believe the allegations of specific, perhaps risky, acts in the petition are the problem. A respondent testifying at such a hearing will tend to minimize the behavior that they feel is at issue. However, the respondent needs to realize that they would be better served by standing by their decisions and articulating the reasons for them, then to appear to be not aware of the consequences of their acts. The best way for a respondent to do this is by counsel helping them overcome their fears of the courtroom and the stress of testifying. In addition, even if not called to testify by any party, the respondent should be aware that the court might address them during the course of the hearing.

9. Final Orders

If the court imposes a conservatorship and/or guardianship the proponent will submit a proposed final Order. If prepared in advance, the Order can be presented in open court with the parties present. UTCR 5.100. If not presented in open court, the proponent should seek consent from the objector as to the form of the Order and if forthcoming file the order as a stipulated order. Id. If no consent is forthcoming a copy of the order must be served on adverse parties. Orders must be served on opposing counsel not less than three days prior to submission to the court and seven days prior to unrepresented parties. Id.

In a guardianship matter the court has a statutory directive to fashion an Order that is no more restrictive upon the liberty of the protective person than is reasonably necessary to protect the person. ORS 125.305(2). An Order appointing a conservator typically will address the issue of the conservator's bond. See ORS 125.410. The amount of bond should be stated in the Order or whether the bond has been waived for good cause shown. ORS 125.410(2)(a).

10. Attorney Fees And Costs

All parties to a contested protective proceeding typically anticipate their attorneys' fees and costs to be paid from the assets of the protected person. See ORS 125.095(1). It is common practice for parties seeking authorization for payment of attorney's fees and costs from the protected person's assets to err on the side of caution and request court approval and serve notice on all interested parties with an opportunity to object. Although the statutory mandate for such a court request is only clear as to the appointed fiduciary's attorney. ORS 125.095(3).

Unsuccessful, non-respondent, parties should anticipate objections being filed if they seek authorization for fees and costs to be paid from the protected person's assets. The court is likely to deny such requests and the client should be aware of this risk in an attorney fee agreement. If an Objection is filed regarding the request for payment of fees and costs a hearing must be held as with any other objection. ORS 125.075.