

## **CONSERVATORSHIP, Oregon Law Institute**

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\*The authors wish to acknowledge the contributions of Maggie Biondi, Carol Kyle and Mark Williams to these written materials.

**Caveat:** These materials do not discuss the issues unique to handling personal injury settlements or inheritance funds for minors. Fitzwater and Meyer is experienced in handling such cases. Please contact us for more information.

### **I. FINANCIALLY INCAPABLE**

When is a person no longer capable of making decisions for himself or herself? When is a person no longer capable of managing his or her own financial affairs and in need of a court appointed conservator?

#### **A. Disability Versus Incapacity**

First, it is important to distinguish between someone who is disabled and someone who is legally incapacitated or financially incapable. Disability has no legal definition C nor should it. We all require assistance with some aspect of our lives. Some people require more assistance than others.

When representing a client with disabilities, we focus upon what assistance the client requires and how we can facilitate the continuation or improvement of that assistance. The mere fact that the client is disabled does not mean that the client is incapable of managing financial affairs. Put another way, not all disabled persons are incapacitated. Incapacity, therefore, is but a *subset* of disability.

#### **B. Statutory Definitions**

ORS 125.400 provides that "upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by clear and convincing evidence that the respondent is **a minor or financially incapable**, and that the respondent has money and property that requires management or protection."

**"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

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substances, chronic intoxication, confinement, detention by a foreign power or disappearance." ORS 125.005(3).

**"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).

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) and ORS 126.157(2).

### **C. The Right to Make the Wrong Decision**

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 **C** if it were, many of us may 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 in the opinions of doctors, psychologists, public social workers, private case managers, family and friends (in my opinion - in that order). In a contested matter, the Court (or the Court visitor) will attempt to contact all relevant parties to get an overall picture of the individual's capacity.

### **D. Oregon Case Law**

There are few cases in Oregon which actually provide guidance to the court or practitioners. Often, the higher courts will defer to the finding and evaluations of the trial judge. That said, see *Smeed v. Brechtel*, 30 Or App 505, 567 P2d 588 (1977); *Van v. Van*, 14 Or App 575, 513 P2d 1205 (1973). For a review of cases in other states and some older Oregon decisions, see 9 *ALR3d* 774.

**PRACTICE TIP:** It is important to understand that 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.

## II. INVENTORY

### A. Generally

ORS 125.470 requires that within 90 days after the date of appointment, (or a longer time if granted by the court), a conservator must file an inventory of all the property (assets and income) that has come into the possession or knowledge of the conservator. This is, effectively, the conservator's "beginning balance." The inventory must show the estimates by the conservator of the respective true cash values as of the date of the protective order.

A copy of the Inventory must be served (personally or by mail) upon the protected person (if 14 years old or older). Most courts require or strongly recommend that copies also be given to other parties of interest.

**See Forms #3-9 Inventory and #3-10 Proof of Service of Notice of Inventory.**

### B. Real Property Abstract

If the estate of the protected person includes real property, the conservator must record in the county where the property is situated either:

1. A certified copy of the inventory; or
2. An abstract as required by ORS125.470(3).

**See Form #3-19 Real Property Abstract.**

## III. ESTABLISHING BOND AND RESTRICTING ASSETS

**RECENT UPDATE:** The authors recommend the recent article written by the Honorable Rita Batz Cobb and James D. Berrien entitled "*To Bond or Not to Bond*," PLF publication In Brief, August 2003.

### A. Value of Bond

It is common for the court to require a conservator to furnish a bond. Unless otherwise directed by the court, the bond must be in the amount of:

"the aggregate capital value of the property of the estate in the control of the conservator plus one year's estimated income minus the value of securities and money deposited under arrangements requiring an order of the court for their removal and the value of any real property that the conservator, by express limitation of power, lacks power to sell or convey without court authorization." ORS 125.410(1).

### B. Obtaining a Bond

Bonds are available from local agents who will provide a bond to file upon obtaining an order. The bond must be signed by the fiduciary and must be filed with the court before Letters of Conservatorship can be issued. The premium for the bond is payable from the assets of the protected person and is usually expected within 30 days of issuance by the bond agent.

### **C. Sale of Principal Residence**

An example of "real property that the conservator, by express limitation of power, lacks the power to sell or convey without court authorization" is the principal residence of the protected person. ORS 125.430 provides that the protected person's principal residence may be sold by a conservator only with the prior approval of the court. A motion seeking prior approval must be filed with the court and notice given to the persons entitled to notice.

### **D. Restricting Other Assets**

The bond may be reduced by restricting the conservator's control of particular assets. Carol J. Kyle, in *Updating Conservatorship Issues*, OSB CLE ELDER LAW, June 30, 1994, suggested the following language may be approved by the Court and the Letters of Conservatorship endorsed as follows:

No securities may be transferred except on further order of this Court. This will not interfere with the conservator's ability to manage a stock folio; the broker can carry the account in street name, thereby allowing the conservator to manage investments. The effect of the restriction is to prevent the conservator from selling the investments and withdrawing the proceeds from the account.

No real property shall be sold, conveyed, hypothecated or leased for a term in excess of five years without further order of this court. Letters to be so endorsed.

**IMPORTANT NOTE - UTCR 9.050:** The procedure for restricting accounts is set forth in UTCR 9.050. A written acknowledgment is required from the depository of the restricted account confirming that they are aware of the restriction placed upon the asset by the court and that they will agree to abide by the restriction. UTCR 9.050 states that "**prompt procurement of the writing is the responsibility of the attorney for the fiduciary.**" (Emphasis added.)

**PRACTICE TIP:** Have the conservator prepare an annual budget and cash flow analysis. Bank accounts, mutual funds and other investments not needed to cover expenses of the protected person within that year can be restricted until the next annual account.

**PRACTICE TIP:** Try to avoid multiple court requests for restriction or

removal of restriction. The attorney fees for the requests often exceed the savings in bond premium. Presenting your request with the annual account also saves in time and fees.

### **E. Cancellation of Bonds**

When a surety cancels the bond, the conservator must file a new bond before the expiration date set out by the surety. If the conservator fails to file a new bond, the Letters of Conservatorship are void as of the date the bond is canceled. The surety remains liable for the time covered by the bond until an accounting is approved by the court and the surety is released. ORS 125.410(7) and ORS 125.415.

### **F. Exoneration of Bonds**

When the court approves a final account and the conservator is discharged, the bond is exonerated and the bond company needs to be notified so that any refund of premium may be calculated. Most bond refunds are not pro-rated during the first year, but are in successive years.

**See Form #3-25 Order Discharging Conservator, Exonerating Bond and Closing Conservatorship.**

## **IV. PROTECTING THE ESTATE PLAN**

The Conservator must consider and protect the estate plan of the protected person. ORS 125.460 states:

"In investing the estate, selecting assets of the estate for distribution and utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court, the conservator and the court shall take into account any known estate plan of the protected person, including the will of the protected person, any revocable trust of which the protected person is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the death of the protected person to another or others that the protected person may have originated."

When evaluating the estate plan of the protected person, the Conservator may request and review a copy of the Will (and, in the authors' opinions, all other estate planning documents of the protected person.)

It is important to note, as the statute implies, that estate planning documents can include more than just a Will. Estate planning can be done by revocable trust, joint ownership, POD and ITF designations on bank accounts, beneficiary designations of life insurance policies and annuities, and contracts.

Preserving the estate plan must occur not only when distributing assets, but when initially

placing assets in the conservatorship, when investing estate assets and when utilizing powers of revocation and withdrawal. This can become difficult when assets are held in joint ownership, ITF or payable upon death, and must be liquidated to provide for the care needs of the protected person. **Great care must be taken by the conservator to insure that no particular beneficiary suffers as a result.**

**PRACTICE TIP:** In the Inventory of the conservatorship, designate any jointly held assets and/or beneficiary designations of life insurance, IRA or annuity contracts. Not only does this emphasize the issue for your client, the Conservator, but clearly shows all third parties the status of the investments and the estate plan existing at the time the Conservatorship began.

Often, the conservator's best course of action is to develop a Spending Plan, which takes into consideration all the elements of the estate plan and the impact upon various beneficiaries. The Spending Plan can be submitted to the court in a Motion for Approval or Motion for Instructions. After notices to all affected parties, the court can approval a plan of spending that meet the ongoing cash needs of the protected person while preserving, as much as possible, the estate plan and inheritance of the ultimate beneficiaries.

**See Form #3-31 Motion For Approval of Conservator's Spending Plan and Authority to Change Nature of Two Joint Bank Accounts.**

For more detailed information on this topic, see W. Fitzwater, *Preserving the Estate Plan*, Chapter 4, Guardianships and Conservatorship, OLI CLE, September 28, 2001.

## V. OBTAINING COURT APPROVAL

A conservator acts with authority granted from the court. Some actions require the prior approval of the court. Some 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 conservator 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.

Following is a discussion of the statutory requirements for prior court approval and disclosure. In addition, the authors describe certain cases in which the prudent conservator may find it helpful to request prior court approval or instructions.

### A. Acts Requiring Prior Court Approval

Is your conservator 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.

**IMPORTANT NOTE:** The request for fees must also comply with the provisions of UTCR 9.060.

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. The protected person's principal residence may be sold by a conservator only with the prior approval of the court. A motion seeking prior approval must be filed with the court and notice given to the persons entitled to notice.

**See Forms #3-14 Motion for Authority to Sell the Protected Person's Residence, #3-15 Affidavit in Support of Motion to Sell Protected Person's Residence and 3-18 Order Authorizing Conservator to Sell Protected Person's Residence.**

5. Gifts Over \$250 to One Person, and Over an Aggregate of \$1,000 for All Gifts. ORS 125.435. Prior to the 1995 legislative changes, courts had been liberal in allowing the conservator to make gifts if the protected person's estate was large enough to provide for all the projected needs of the protected person. "[A] conservator . . . may make gifts in a reasonable amount to charity and other objects as the protected person might have been expected to make." ORS 126.327, repealed 1995. This provision was frequently used to facilitate an existing "gifting plan" established by the protected person prior to incapacity. Often the gifting plan was established as a means to avoid death tax liability upon the death of the protected person. *Wilbanks v. Mars*, 37 Or App 795, 588 P2d 118 (1978) *evidence that the ward has indulged in a regular practice of Christmas and birthday gifting to immediate parties supported gifts by the conservator to those parties.*

Now, ORS 125.435 sets a limit upon the value and amount of gifts that can be made without court approval. If the estate has adequate funds, the conservator is allowed to make gifts of up to \$250 to a person in a calendar year. The aggregate value of the gifts made by the conservator may not exceed \$1,000 in a calendar year. **All other gifts by the conservator require court approval.**

**See Forms 3-16 Motion for Authority to Make Gifts, 3-17 Affidavit in Support of Motion for Authority to Make Gifts and 3-18 Order Authorizing Conservator to Make Gifts.**

6. Convey or Release Contingent or Expectant Interests in Property. ORS

125.440(1). Prior court approval is required to "convey or release contingent or expectant interests of the protected person in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety."

**PRACTICE TIP:** When an elderly couple are facing long-term care expenses, it is a common planning strategy to transfer the couple's home into the sole name of the well spouse. Unfortunately, in some cases, the incapacitated spouse is unable to execute such a transfer. In at least two counties, the courts have allowed and ratified the transfer of real property, previously held in joint names by husband and wife, into the name of one spouse. It is important to note that these were cases involving long term marriages and done with the consent of all heirs and family.

7. Create revocable or irrevocable trusts. ORS 125.440(2). Prior court approval is required to "create revocable or irrevocable trusts of property of the estate. A trust created by the conservator may extend beyond the period of disability of the protected person or beyond the life of the protected person. A trust created by the conservator must be consistent with the will of the protected person or any other written or oral expression of testamentary intent made by the protected person before the person became incapacitated. The court may not approve a trust that has the effect of terminating the conservatorship."

**NOTE:** Prior to 1995, some practitioners used irrevocable trusts as a method of shifting assets out of the conservatorship and terminating the conservatorship. This type of trust will no longer be allowed, if it has the effect of terminating the conservatorship.

**PRACTICE TIP:** One example of a trust that can be created by the conservator and approved by the court is a "**disability trust.**" This is an irrevocable trust for a "disabled person" (as defined under SSI rules) under age 65 containing that person's assets and established for that person's benefit by the person's parent, grandparent, legal guardian/conservator, or a court. Assets held in this type of trust will not be considered "available" for SSI or Medicaid purposes, provided the state will receive all amounts remaining in the trust upon the death of the disabled person up to the amount of Medicaid assistance provided to this person by the state. See OAR 461-145-540(8)(a). **This is an excellent vehicle for a disabled person who is about to receive an inheritance or a personal injury award.**

There is no statutory limit on the size of such a trust, but it will need to be justified by the age and special needs of the protected person and the likelihood that the funds are insufficient to supplant the need for government assistance. The State of Oregon must be given notice, but routinely does not object to the creation of trusts for reasonable amounts.

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.

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).

**CAUTION:** With regard to items 8, 9, and 10 above, conservators must exercise due caution when taking possession of these types of assets under the initial fiduciary duties of ORS 125.420 and when making the above changes as authorized under ORS 125.440. An over-zealous or ignorant fiduciary may unwittingly alter the title or the beneficiary designations, which could interfere with the protected person's estate plan (see ORS 125.460), and/or trigger unfavorable tax consequences.

11. Payment of Compensation to Persons Related to the Conservator. ORS 125.221 Senate Bill 35 (ch 392). Beginning January 2004, prior court approval is required for payment of compensation to a person who is the 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 or to provide services to the fiduciary that directly affect the protected person. The fiduciary must provide the court with the following information:

- a. The specific services to be provided;
- b. The qualifications of the person providing the services;
- c. The rate of compensation charged by the person; and
- d. Any other information relevant to either the person providing the services or the services being provided to the protected person, including, but not limited to, loss of a professional license or a criminal conviction.

**PRACTICE TIP: Expenditures over \$5,000.** In addition to the items listed above, 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. 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.

## **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.

**IMPORTANT NOTE:** Also, see UTCR 9.170 "*Fiduciary Disclosure in Accounting.*"

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. (Discussed in more detail in Chapter 1 – Guardianships.)

### C. When To Seek Court Approval

ORS Chapter 125 grants conservators the authority to take many, if not most, actions without prior approval of the court. However, at certain times, the prudent conservator 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. The account with beneficiary B had \$30,000, and the account with beneficiary C had \$20,000. 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 **Y** 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 Conservatorship, OLI CLE, September 28, 2001.

3. Motivating Others to Cooperate. Fiduciaries often depend on the cooperation of others in order to fulfill their duties, such as obtaining financial information on behalf of the protected person. What happens when ordinary efforts to obtain information fail? Often, the only course of action is to request the assistance of the court.

**ORS 114.275.** A personal representative (and arguably a conservator) 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 125.025.** A court having jurisdiction over a protective proceeding may:

Compel the attendance of any person, including respondents, protected persons, fiduciaries and **any other person** who may have knowledge about the person or estate of a respondent or protected person. The court may require those persons to respond to inquiries and produce documents that are subject to discovery under ORCP Rule 36. (Emphasis added.)

**ORS 125.465.** The court may order any person to appear and give testimony by deposition if it appears probable that the person:

- a. has concealed or disposed of property belonging to the protected person;
- b. fails to account for property entrusted to him or her;
- c. has concealed or disposed of documents or other written instruments;

- d. has knowledge or information that is necessary to the administration of the affairs of the protected person; and
- e. failed to allow access to corporate books and records regarding the protected person.

**CASE EXAMPLE:** A conservator needed to furnish the court with information about the assets and debts of a partnership in which the protected person had served as a general partner. The conservator also needed to verify the filing of all required tax returns. The business partner refused to provide the conservator with any financial information. The partner also refused to file required income and payroll tax returns for the partnership. The conservator tried unsuccessfully for several months to obtain the information.

The conservator filed a Motion and Order To Show Cause and the court set a date for hearing under the authority of ORS 125.465. At the hearing, the court ordered the business partner to produce the requested financial data and tax returns. The business partner finally produced the required information and filed the tax returns.

## VI. TEMPORARY CONSERVATORSHIP

ORS 125.600 specifically allows the appointment of a fiduciary who will "exercise the powers of a conservator" if the court makes a specific finding that:

1. the respondent is financially incapable or a minor;
2. that there is an **immediate and serious danger to the estate** of the respondent and that the welfare of the respondent requires immediate action.

The temporary conservator is appointed only for a specific purpose and only for a specific period of time. The procedure for the appointment of a temporary conservator is the same as the appointment of a temporary guardian, with the exception that appointment of a court visitor is not required. ORS 125.605.

A temporary conservator must file a final report with the court setting out all activities of the temporary conservator while the appointment is pending. If the temporary conservator is later appointed as permanent fiduciary, the report can be postponed until the first annual accounting of the conservator. ORS 125.610.

**PRACTICE TIP:** Temporary conservatorship for the limited purpose of freezing accounts and assets pending investigation can be an excellent tool to help stop or minimize suspected financial abuse. The court is often more willing to sign an Order freezing assets for a limited time (as opposed to an Order granting full

conservatorship powers.) This may allow the time and protection needed to save assets and investigate possible abuse.

**See Forms** #3-36 Petition for Appointment of Temporary Conservator, #3-29 Notice of Time for Filing Objections to Appointment of Temporary Conservator, #3-37 Proof of Service of Notice of Petition for Appointment of Temporary Conservator, #3-29 Order Appointing Temporary Conservator and #3-30 Temporary Conservator's Report.

## VII. ACCOUNTINGS

The conservator must account to the court for the administration of the protected person's estate within 30 days after each anniversary of appointment and upon termination of the conservatorship or of the conservator's appointment as conservator. ORS 125.475.

Effective August 1, 2000, rules amending UTCR Chapter 9 have standardized the accounting format. UTCR 9.160. While courts may accept other accounting forms, most courts have made the UTCR form mandatory or, at least, strongly recommended.

**See Form** UTCR Chapter 9 in your materials.

**See Forms** #3-22 Conservator's Accounting, #3-21 Final Accounting and #3-23 Notice of Time for Filing Objections to Conservator's Accounting.

For an excellent discussion of the UTCR rules and form, see S. Friedenber, *UTCR Probate Court Accountings*, Chapter 5, Guardianships and Conservatorship, OLI CLE, September 28, 2001.

## VIII. TERMINATION

### A. Grounds for Termination

The Conservator, the protected person or any other person may petition the Court to terminate the Conservatorship for the following reasons:

1. Death of the Protected Person;
2. Recovery from financial incapacity (and can prove it); and
3. The value of the estate drops below \$10,000 and there is no real property.

With prior accounting and approval of the court, the conservator may pay the remaining expenses and claims of the estate and deliver the remaining estate to the person designated by the court (such as the personal representative, guardian, attorney-in-fact or care facility) in the order, to be held, invested or used as ordered by the court.

**PRACTICE TIP:** Unfortunately, many conservators wait too long to begin terminating a conservatorship below \$10,000. Some believe that they should wait until the assets get below Medicaid levels (below \$2,000) (discussed below.) Others, simply, are not thinking ahead. The problem is that once the money runs out, there are no additional funds to pay conservatorship expenses, including conservator and attorney fees. Therefore, encourage your conservators to begin termination proceedings as soon as the conservatorship estate drops below \$10,000.

**See Forms** #3024 Distribution Receipt and #3-25 Order Discharging Conservator, Exonerating Bond and Closing Conservatorship.

### **B. Upon the Protected Person's Death. ORS 125.530**

Upon the protected person's death, the conservator should follow the requirements of ORS 125.530 for the delivery of the Will and the administration of the estate until delivery to the personal representative.

Generally, the conservator must deliver the Will of the protected person to:

1. The personal representative named in the will; or
2. The court for safekeeping and inform the personal representative of the delivery. If it is not possible to notify the personal representative, inform the beneficiaries of the Will.

Also, the conservator is required to "retain and administer the estate for delivery to the personal representative of the decedent or other persons entitled to the estate."

## **IX. MEDICAID ELIGIBILITY FOR LONG-TERM CARE**

Often the protected person is elderly and receiving some form of long-term care in a nursing home, adult foster home or assisted living facility. This type of care is very expensive (\$1,000-\$4,000 a month) and can quickly deplete the conservatorship estate. Fortunately, in many cases, the protected person will eventually be eligible for Medicaid to assist him or her with the long-term care expenses. It is important therefore that the conservator be aware of Medicaid and the basic rules of eligibility. (For a more complete discussion of Medicaid issues, see the OSB CLE Handbook on *Elder Law* (the Purple Book). For the most current information about Medicaid, see *Elder Law Essentials: Planning Tools and Practice Tip*, OSB CLE, October 3, 2003.)

The Medicaid program currently pays for over 50% of all long term care in Oregon. Medicaid is a joint Federal and State program. Medicaid covers the full range of long term care services, including skilled, intermediate and custodial care, adult foster home and in-home services.

Medicaid eligibility is based upon financial need. The following numbers are subject to annual adjustment, but these are the current numbers for 2003. Institutionalized individuals whose income is at or below \$1,656 (300% of the SSI standard) and whose assets are below \$2,000 for an individual and \$18,132 for a couple will be eligible. Couples with assets above \$18,132 may be required to split their assets and spend down before eligibility.

An individual can have up to \$2,000 in cash or other non-exempt resources. An additional \$11,500 can be set aside in an interest-accumulating savings account dedicated as a "burial fund." Jointly-held liquid assets, such as joint bank accounts, are considered available to the Medicaid applicant. However, the state cannot force a co-owner to sell a jointly-held parcel of real property. The value of a resource is its "equity value" (fair market value minus encumbrances). **Do not confuse current ownership status with impermissible transfers of assets by the applicant.**

Certain resources are exempt and not counted in determining eligibility for Medicaid benefits. These include the person's home, one motor vehicle, household items, personal effects, medical equipment, "hard goods" for burial, including burial space, casket, liner, headstone; and a funeral or burial fund up to \$1,500.

**PRACTICE TIP:** Prior to terminating the conservatorship for an elderly person, the conservator should consider purchasing a burial plan for the protected person. For the purposes of Medicaid eligibility, the plan can be either **(a)** the sum of \$1,500 in a designated bank account, revocable burial trust or cash value of burial insurance product, or **(b)** an irrevocable burial trust **in any amount**. The best choice is to fully pay the burial expenses with an irrevocable burial trust.

**IMPORTANT NOTE:** Once Medicaid eligibility has been established, the monthly income of the protected person will be used to offset his or her medical expenses. Medicaid **does not** allow the use of the protected person's monthly income to pay the administrative expenses and fees of a guardian or conservator, or the attorney for them.

## **X. OTHER PROTECTIVE ORDERS**

### **A. Generally**

The court may enter protective orders without the appointment of a guardian or conservator, or in addition to appointment. The court may appoint a fiduciary whose authority is limited to a specified time and whose power is limited to certain acts needed to implement the protective order.

### **B. Procedure**

A petition for a protective order that does not seek the appointment of a fiduciary is subject to all requirements prescribed for appointment (ORS 125.650). This includes a petition,

notices, time for filing objections, and hearing on objections. A protective order may be entered only if the court finds that sufficient grounds would have existed for the appointment of a fiduciary.

### **C. Authorized Actions**

The court may exercise any power that could be exercised by a guardian or conservator. This includes authorization of, direction to or ratification of:

"Any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the protected person, including but not limited to payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust." ORS 125.650(4)(a).

"Any contract, trust or other transaction relating to the protected person's financial affairs or involving the estate of the person if the court determines that the transaction is in the best interest of the protected person." ORS 125.650(4)(b).

Before entering a protective order, the court shall consider the interests of creditors and dependents of the protected person and whether the protected person needs the continuing protection of a fiduciary. ORS 125.650(3).

**PRACTICE TIP:** One-time protective orders can be an excellent way to establish a special needs trust for a minor or adult in need of assistance.

## **XI. CONCLUSION**

The wise practitioner always checks with the county of venue regarding local court practices. Beyond the statutes, UTCR and supplementary local court rules lurk the most important rules: the unwritten rules and practices of local venues.

**RESOURCES:** For a sample letter summarizing the duties of a conservator, go to [www.osbplf.org](http://www.osbplf.org), click on loss prevention, then click on practice aids and forms, then select Guardianships and Conservatorship. You can choose: Conservatorship Duties. Other related practice aids include: Conservatorship Acknowledgment of Restriction of Assets Form for Circuit Court, Conservatorship Checklists, Guardianship Checklists and Guardianship Duties. If you do not have Internet access, call the PLF at 503-639-6911.

**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



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