CIVIL COMMITMENT, GUARDIANSHIP, OR ...?
Oregon State Bar Elder Law Section UnCLE
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1. A familiar situation

Parent calls. Adult child in hospital on mental health commitment hold. Child with mental health history is off her medications, refusing to take her medications, and acting erratically. Hospital urging the parent to pursue emergency guardianship

2. Elements of a mental health commitment hold

Oregon statute regarding civil commitment commences with ORS 426.070

Oregon regulation regarding civil commitment commences with OAR 309-033-0200

OAR 309-033-250 indicates that civil commitment is appropriate only when an allegedly mentally ill person is a danger to self or others and is in need of treatment for mental illness

Civil Commitment affects persons with mental illness. According to ORS 426.0051)(f), a "Person with mental illness" means a person who, because of a mental disorder, is one or more of the following:
(A) Dangerous to self or others.
(B) Unable to provide for basic personal needs that are necessary to avoid serious physical harm in the near future, and is not receiving such care as is necessary to avoid such harm.
(C) A person:
(i) With a chronic mental illness, as defined in ORS 426.495 (Definitions for ORS 426.490 to 426.500);
(ii) Who, within the previous three years, has twice been placed in a hospital or approved inpatient facility by the authority or the Department of Human Services under ORS 426.060 (Commitment to Oregon Health Authority);
(iii) Who is exhibiting symptoms or behavior substantially similar to those that preceded and led to one or more of the hospitalizations or inpatient placements referred to in sub-subparagraph (ii) of this subparagraph; and
(iv) Who, unless treated, will continue, to a reasonable medical probability, to physically or mentally deteriorate so that the person will become a person described under either subparagraph (A) or (B) of this paragraph or both.

The initiation of a mental illness hold can occur in several ways

A. Two party petitions (ORS 426.070). Two persons, a local health officer, or any magistrate may file notice with the community mental health program director or a designee of the director in the county where the person alleged to have a mental illness resides. The notice must allege that a person has a mental illness and is in need of treatment, care or custody.

B. Peace officer hold (ORS 426.228). A peace officer can take into custody a person who the officer believes is dangerous to self or others and is in need of immediate care, custody or treatment for mental illness. The officer is authorized to transport the person to the nearest hospital, where he is subject to hospital hold process (see below).

C. Hospital Hold (ORS 426.232). A licensed independent practitioner who believes a person is danger to self or others and is in need of emergency care or treatment for mental illness may initiate a hold not longer than five days.

After the hold is initiated, a commitment coordinator must immediately investigate (See ORS 426.074) and make a recommendation. There are five potential recommendations, based upon whether the person is found to be a danger to self or others and in need of treatment for mental illness:

A. Drop the hold.

B. Keep the hold in place until it expires

C. 14 Day voluntary diversion

D. Postponement of hearing (See ORS 426.095(2)©)

E. Civil Commitment

Treatment post-hold is determined through a civil commitment hearing. The purpose of the hearing is for a judge, after listening to testimony from hospital staff, the commitment investigator, and other interested persons, to determine if a person is a danger to self or others and in need of treatment for mental illness. Held person is appointed counsel. Attorney from district attorney's office presents case for commitment.

If finding is that person is not danger to self or others and/or is not in need of treatment for mental illness, then person is released.

If finding is that person is a danger to self or others and is in need of treatment for mental illness, the court will civilly commit the person to continued hospitalization, to an outpatient mental health treatment program (ORS 426.127), or to a caregiver (ORS 426.125)

Civil commitment cannot exceed 180 days. If continued commitment beyond 180 days is needed, another hearing must occur.

3. Advantages of civil commitment

With limited mental health treatment resources available, civil commitment is often the only way to access the Oregon State Hospital program, as well as community mental health initiative programs (AMHI).

Oregon State Hospital is authorized to conduct an administrative process to override a patient's refusal to take medications.

4. Limitations to civil commitment

No authority to consent to placement, treatment (Civilly committed person who is hospitalized, may not be able to consent to post-hospitalization treatment and placement; Civilly committed person who is placed at State Hospital and needs surgery, may not be able to consent to surgery)

5. Intersection of Guardianship and civil commitment

Guardianship provides means of consent to placement, treatment, that civil commitment does not provide

Temporary guardianship to address termination of hold when civil commitment in doubt. What constitutes emergency warranting appointment of temporary guardian and waiver of notice (See **Appendix 1** for language requesting waiver of notice, appointment of temporary guardian)?

6. Limitations of Guardianship

- Mentally ill person, medicated, does not fulfill statutory standard for guardianship. Is there a present need for a guardian for a medicated respondent? Does history of decompensation warrant appointment of guardian? (See **Appendix 2** for language creating "springing" guardianship authority; also note research documenting progressive injury from repeated periods of decompensation)

- If issue is medication, how, practically, will guardian medicate protected person?

- How, practically, will guardian keep young, physically healthy protected person in safe environment?

- What resources are available for guardian when protected person is in crisis? (Secure transport; hospitalization, admission to psych unit; placement; police)

- If issue is medication, how, legally, will guardian administer medications over objection of protected person? Perception that this is evasion of administrative process available in civil commitment; court unwillingness to give "blanket" authority to guardian to medicate protected person (See **Appendix 3** for language establishing authority to medicate)

- Potential for guardianship to destroy relationship between protected person and guardian. Are limits to guardian's authority sufficient to satisfy protected person. Does protected person's resistance to guardianship doom the effectiveness of the guardian? When is protected person better served by terminating guardianship? (See **Appendix 4** for statement in support of terminating guardianship)

- Is guardian truly able to choose placement following discharge of protected person from Oregon State Hospital?

APPENDIX 1

SAMPLE LANGUAGE IN PETITION TO WAIVE NOTICE, APPOINT TEMPORARY GUARDIAN

Appointment of Temporary Guardian. The appointment of a temporary guardian is necessary because respondent is incapacitated, an immediate and serious danger to respondent's health exists, and respondent's welfare requires immediate action. Respondent suffers from depression, bulimia, and anxiety disorder. She suffered a traumatic brain injury in 2008 which caused severe damage to respondent's frontal lobe and limbic system. Respondent's condition causes her to behave erratically and to endanger herself. Respondent's current hospitalization began on April 28, 2014, when police picked her up while she was running in traffic in her underwear. She reported to hospital staff that she had been raped. Hospital care has not stabilized her condition. Respondent's impulsive, self-harming behavior while hospitalized has included pulling large chunks of skin off of her face, pulling out her hair, and swallowing papers in an effort to kill herself.

The hold under which respondent was hospitalized has expired. Respondent has demanded to leave the hospital. Respondent called a friend in Oklahoma to ask if she could stay with her friend. Respondent's current care providers believe that if respondent leaves the hospital under her own care, she will be in grave danger. Her care providers are pleading with her not to leave. Cedar Hills Hospital urges the immediate appointment of a guardian to avoid this danger. See letter attached as **Exhibit 1**, and incorporated herein.

Oregon State Hospital is not being considered as an option for respondent's placement.

3.

Waiver of Notice Period. ORS 125.605(2) requires at least two days notice to the respondent prior to the appointment of a temporary fiduciary. ORS 125.605(2) also allows the court to waive this notice requirement if the court finds that the immediate and serious danger requires an immediate appointment. As the letter attached as Exhibit 1 attests, respondent's current care provider believes that the immediate appointment of a guardian is necessary to protect respondent. If the notice period is not waived, respondent may leave the hospital without a guardian to direct care and placement, and respondent will be in danger. Respondent has no home in Portland or anywhere else. An immediate appointment is necessary to direct respondent's care at Cedar Hills and to plan and implement respondent's care when she leaves Cedar Hills hospital.

Oregon State Hospital is not being considered as an option for respondent's placement.

APPENDIX 2

SAMPLE LANGUAGE ESTABLISHING "SPRINGING" GUARDIANSHIP AUTHORITY

2. **<u>Releases of Information.</u>** The limited guardian shall have access to the protected person's health care (including mental health care), housing, and placement information, including information collected by the Empowerment Initiative program.

3. **Medical and Health Care Decisions.** The limited guardian's authority to make medical and health care (including mental health care) decisions shall be limited to those circumstances when the limited guardian concludes, after consultation with the protected person's physician and/or other health care provider, that (a) the protected person is not taking medications as prescribed, (b) the protected person is not adhering to the medical treatment plan prescribed for the protected person by her physicians or other health care providers, or (c) the protected person's condition has become unresponsive to medication and/or other treatment and the limited guardian needs to make decisions about the care services that the protected person receives in order to protect the protected person's health and safety;

Subject to the condition outlined in the previous paragraph, the limited guardian may consent, refuse consent, withhold or withdraw consent to health care and to services for the protected person. Such authority shall include the authority to consent to hospitalization and/or medication on behalf of the protected person. The limited guardian will make health care decisions that are consistent with the protected person's desires and values to the extent reasonable and possible.

4. **Residence and Placement.** The limited guardian's authority to establish residence and placement for the protected person shall be limited to those circumstances when the limited guardian concludes, after consultation with the protected person's physician and/or other health care provider, that (a) the protected person is not taking medications as prescribed, (b) the protected person is not adhering to the medical treatment plan prescribed for the protected person by his physicians or other health care providers, or (c) the protected person's condition has become unresponsive to medication and/or other treatment and the limited guardian needs to make decisions about the protected person's placement in order to protect the protected person's health and safety.

However, this limitation on the guardian's placement authority shall not apply when placement decisions need to be rendered immediately following psychiatric hospitalization for the protected person. In such situations, the limited guardian, after consulting with the protected person and her care team, has the authority to establish the protected person's place of abode.

Subject to the conditions outlined in the previous paragraphs, the limited guardian may establish the protected person's place of abode. The limited guardian will work with the Empowerment Initiatives program to establish residence and placement for the protected person that is independent and safe. Placement in the limited guardian's home shall be a last resort.

The protected person shall provide notice of her address to the limited guardian.

Under no circumstances shall the protected person reside outside of the State of Oregon, unless the limited guardian and protected person stipulate to such residence;

5. **Visitation.** The limited guardian shall provide the protected person with 24-hour notice prior to visiting the protected person, unless the limited guardian has reason to believe that the protected person's health and safety require her immediate attention. In such cases, no notice is required prior to visitation.

APPENDIX 3

SAMPLE LANGUAGE ESTABLISHING GUARDIAN'S AUTHORITY TO CONSENT TO ADMINISTRATION OF MEDICATION OVER OBJECTION OF PROTECTED PERSON

1. **Medical and Health Care.** The guardian may consent, refuse consent, withhold or withdraw consent to health care and to services for the protected person."Health Care" includes, but is not limited to administration of medication and treatment even over the objection of the protected person, as recommended by the protected person's health care providers. The guardian will make health care decisions that are consistent with the protected person's desires and values to the extent reasonable and possible.

APPENDIX 4

SAMPLE STATEMENT IN SUPPORT OF TERMINATION OF GUARDIANSHIP

I, <*>, am the guardian in the above entitled proceeding, and I offer the following statement in support of my motion to terminate guardianship:

My authority as guardian has proved to be ineffective in my effort to assist my daughter, <*>. When I have attempted to act as guardian by initiating hospitalizations here in Oregon, hospital care persons have not always been willing to provide care in the face of <*>'s objection to the guardianship. <*> has been coherent and convincing, and when she presents herself to others, including professionals, she has proved persuasive. She has steadfastly and consistently maintained that she does not need a guardianship and that she needs the opportunity to establish her autonomy and live a productive life.

In the past year, <*> has continually asserted her independence, and at times been in danger when she felt that she could not reach out to me or trust me when she needed to. <*>'s opposition to the guardianship has been relentless. As long as I am guardian, she does not trust me and is guarded towards me. I now believe that I may be able to help/support <*> (as I do my other children) by just being her mother and by restoring our mother/daughter relationship rather than continuing the guardianship. This relationship cannot co-exist with the guardianship.

Finally, <*> has continually resisted the medications prescribed, and because of the guardianship, she has felt forced to take them against her better judgment. She has maintained stability for long periods of time without medication. After this past year, and with this in mind, I give credence to <*>'s position on her diagnosis and I do not think that <*> has been fully understood, or diagnosed with complete accuracy.

In summary, the guardianship has not fulfilled its goal of protecting <*>, and it has severely damaged my relationship with my daughter. <*> is not taking any medications and has not done so for almost a year. She is organized and focused and managing her life well. For these reasons, I believe that it is in <*>'s best interest that the guardianship be terminated.

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