

## GUARDIANSHIP AND OTHER TOOLS

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### I. INTRODUCTION

Under Oregon law, a **guardian** is a person appointed by the court to make health care decisions and decisions about other personal matters for a minor child (under the age of 18) or for an incapacitated adult. People sometimes use the word “guardian” to describe other relationships. A mother may refer to herself as her son’s guardian because he is living with mental illness and she is his primary support person. A woman who lives in a group home may tell people that her brother is her guardian because he is the representative payee for her Social Security benefits.

A **conservator** is a person appointed by the court to manage money and property for a minor child or for a financially incapable adult. The names for the roles can vary from state to state. A Washington court would appoint a guardian of the person to make health care and personal decisions and a guardian of the estate to manage money and property. The laws about guardianship and conservatorship are in Oregon Revised Statutes (ORS) chapter 125.

### II. GUARDIANSHIP FOR ADULTS

#### A. Required Elements

1. **Incapacity.** Oregon law defines incapacity as a condition in which a person is unable to make or communicate decisions necessary to provide for his or her basic physical health and safety. A diagnosis or a disability (such as bipolar disorder, substance addiction, traumatic brain injury, Down syndrome, or stroke) is not the same as a finding of legal incapacity. A person who makes bad decisions or who refuses to accept medical treatment or other help may not be incapacitated.

2. **Need for Continuing Care and Supervision.** In order to appoint a guardian for an adult, a judge must determine that the person is incapacitated and that the appointment of a guardian is necessary in order to provide continuing care and supervision

3. **Suitability of Proposed Guardian.** Finally, a judge must determine that the proposed guardian is qualified, suitable, and willing to serve as the guardian.

#### B. Process for Appointing a Guardian

1. **Petition.** A lawyer representing a family member or other concerned person prepares a petition asking the court to appoint a guardian. The person who starts the process is called the petitioner. The petitioner may also be the proposed guardian. The person who is the subject of the petition is called the respondent. The petition usually is filed with the court in the county where the respondent lives or is currently located.

2. **Required Information.** The petition includes information about the respondent, the incapacitating condition, and the reasons why the respondent needs a guardian. If the respondent has more than \$10,000 in assets, the petition may ask the court to appoint both a guardian to make personal decisions and a conservator to manage money and property. The same person can be both the guardian and the conservator.

3. **Notice.** The petitioner's lawyer arranges for a copy of the petition, a notice about the case and the right to object, plus a blue respondent's objection form, to be personally served on the respondent. The lawyer also mails copies of the petition and notices about the guardianship case to the respondent's closest relative(s) and to people and agencies listed in the law. Copies have to be mailed to Disability Rights Oregon if the respondent is in a mental health treatment facility or a residential facility for people with developmental disabilities or if the proposed guardian intends to place the respondent in one of those facilities, and to the office of the Long Term Care Ombudsman if the respondent is in a nursing facility, residential care facility, assisted living facility, or adult foster home or if the proposed guardian intends to place the respondent in one of those facilities. The notices have to be served or mailed at least 15 days before the deadline for filing objections.

4. **Court Visitor.** The court appoints an independent investigator (the court visitor) to interview the respondent in person and to interview the petitioner and other people involved in the case, including health care providers when possible. The court visitor files a written report with the court that includes factual information (such as the names of the people who were interviewed, a description of the respondent's current living situation, and whether the respondent objects to the appointment of a guardian) and opinions (such as whether the appointment of a guardian is necessary, whether the information in the petition is accurate, and whether the proposed guardian is an appropriate choice).

5. **Counsel for Respondent.** The respondent can retain a lawyer to represent him or her in the process and file objections. If the respondent objects and does not have a lawyer, the court can (but is not required to) appoint a lawyer. The court visitor can recommend that the court appoint a lawyer.

6. **Uncontested Cases.** No objections are filed in most cases. If no objections are filed, there will not be a hearing. The judge will make his or her decision based on the information in the petition and in the court visitor's report.

7. **Hearings in Contested Cases.** If the respondent or anyone else objects by the deadline in the notices, a hearing is held before a judge. The petitioner has the burden of proving by clear and convincing evidence that the respondent is incapacitated and that a guardian is needed. The court visitor is a witness. The parties, family members, friends, neighbors, adult protective services workers, and health care providers also may be witnesses. The judge makes a decision based on the evidence presented. In some counties, the parties are required to try to resolve the issues through mediation before having a hearing.

8. **Letters of Guardianship.** If the judge decides to appoint a guardian, the judge signs a judgment. Once a guardian is appointed, the respondent is called the protected person. A copy of the judgment appointing the guardian, including information about any limitations, is attached to the Letters of Guardianship issued by the court. A court-certified copy of the Letters of Guardianship is official proof of the guardian's authority to act.

## C. Guardian

1. **Basic Requirements for Guardian.** The petition has to identify the proposed guardian. A person who is incapacitated, financially incapable, a minor child, or acting as a health care provider for the respondent is not qualified to serve as the guardian. The guardian is not required to live in Oregon. However, a guardian who lives far from the protected person may need to work with a case manager or other local contact in order to carry out his or her duties.

2. **Suitability.** If objections are filed, the judge considers the respondent's circumstances, the respondent's preferences, the relationship to the respondent by blood or

marriage, and financial issues and then appoints the most suitable person who is willing to serve as the guardian.

3. **Professional Fiduciaries.** The court may appoint a professional fiduciary when a close relative is not available or is not suitable to serve as guardian, when there is a disagreement about who should be the guardian, or when special expertise is needed. The professional fiduciary must be certified by the national Center for Guardianship Certification, [www.guardianshipcert.org](http://www.guardianshipcert.org). The website allows people to search for certified professional fiduciaries by location. The Guardian/Conservator Association of Oregon also has an online directory, [www.gcaoregon.org](http://www.gcaoregon.org).

4. **Training Class for Guardians.** The courts in Clackamas, Multnomah, and Lane Counties require a guardian who is not a professional fiduciary to complete a short training class within 60 days (90 days for Lane County) after the judgment appointing the guardian was signed. The class is presented by Guardian Partners, [www.guardian-partners.org](http://www.guardian-partners.org).

#### **D. Guardian's Powers and Duties**

1. **General Powers.** The guardian has the powers that are included in the judgment. The general powers and duties listed in ORS 125.315 are:

- The power to decide where the protected person lives, subject to the notice requirement described below;
- The power to consent, to refuse consent, or to withhold or withdraw consent, to health care. "Health care" includes diagnosis, treatment, and care of disease, injury, and conditions, and excludes sterilization. Health care decisions include decisions relating to admission to and discharge from a health care facility;
- The duty to make arrangements for the protected person's care, comfort, and maintenance, and (when appropriate) training and education; and
- The power to make advance funeral and burial arrangements.

The guardian's authority ends when the protected person dies, when the guardianship is terminated, or when the guardian dies, resigns, or is removed.

2. **Limits on Guardian's Powers.** The judgment may grant specific powers to the guardian or set limits on the guardian's powers. ORS 125.300 directs the court to order a guardianship "\*\*\*\*only to the extent necessitated by the person's actual mental and physical limitations.\*\*\*\*" ORS 125.330 limits the powers of guardian for a protected person who is incarcerated or in the custody of the Department of Corrections.

3. **Advance Notice of Placement or Move.** ORS 125.320 requires the guardian to give a notice to the protected person at least 15 days before placing the protected person in a treatment facility or care facility and before moving the protected person. The guardian can give less advance notice if the change is required "\*\*\*\*to protect the immediate health, welfare or safety of the protected person or others.\*\*\*\*"

4. **Rights Retained by Protected Person.** The protected person retains legal and civil rights not limited by ORS 125.315 or the court, including the right to retain a lawyer and the right to have access to personal records.

5. **Finances.** In a case in which there is no conservator, the guardian is responsible for taking reasonable care of the protected person's personal belongings. The guardian may receive money belonging to the protected person and use it to pay for the protected person's support and care. Court approval is required before paying room and board charges to the guardian or a close relative of the guardian. The guardian is required to get permission from the court before making payments from the protected person's funds to himself or herself or to an attorney who has provided services related to the protective proceeding.

6. **Annual Report.** The guardian is required to file an annual report with the court. The report form is in ORS 125.325. Some courts have adopted local versions of the report form. The guardian's report includes information about the protected person's physical and mental condition and the services that the protected person receives. It also includes information about money received and paid if the guardian is handling the protected person's money. A copy of the guardian's report has to be mailed or given to the protected person.

#### **E. Ending or Changing a Guardianship**

1. **Termination.** The guardian, the protected person, or another interested person may file a motion asking the court to terminate the guardianship on the grounds that the protected person is no longer incapacitated.

2. **Modification.** The court may modify the powers or authority of a guardian. An interested person (including the protected person) may file a motion asking the court for the modification.

3. **Removal of Guardian.** The court may remove a guardian whenever the removal is in the best interests of the protected person. An interested person (including the protected person) may file a motion asking the court to remove a guardian.

4. **Appointment of Successor Guardian.** If a guardian dies, resigns, or is removed, the process for having a successor guardian appointed is similar to the process for appointing the initial guardian. The court can appoint an interim guardian for up to 60 days if the guardian dies, resigns, or is removed.

### **III. TEMPORARY GUARDIANSHIP**

#### **A. Requirements for Temporary Guardianship**

1. **Standard.** The court can appoint a temporary guardian for 30 days if there is a serious and immediate danger to the life or health of an incapacitated respondent and the respondent's welfare requires immediate action. The appointment can be extended for another 30 days.

2. **Notice.** The court can appoint a temporary guardian with two days notice or, in extreme cases, with no advance notice. If advance notice was not given, then notice as to be given within two days after the appointment of the temporary guardian.

3. **Process.** The process varies by county. Most courts require a signed statement from the respondent's physician or another health care provider about the danger to the respondent and the need for a temporary guardian and hold a short hearing before appointing a temporary guardian. If advance notice was given and a court visitor was appointed, the court visitor often provides a preliminary report for the court.

### **IV. CONSERVATORSHIP FOR ADULTS**

#### **A. Required Elements**

1. **Financially Incapable.** "Financially incapable" is defined as being unable to manage his or her money and property effectively due to mental or physical illness or disability, chronic intoxication or use of controlled substances, confinement, or disappearance. A person who makes bad financial decisions or who gives money and property away may not be financially incapable.

2. **Finances in Need of Protection.** In order to appoint a conservator for an adult, a judge must determine that the person is financially incapable and that the person has money or property which needs to be managed or protected.

## **B. Process for Appointing a Conservator**

1. **Petition.** The process for appointing a conservator is very similar to the process for appointing a guardian. A lawyer representing a family member or other concerned person (the petitioner) prepares a petition asking the court to appoint a conservator for the respondent. The petition may ask the court to appoint both a guardian and a conservator. The petition usually is filed with the court in the county where the respondent lives or is currently located. The petitioner may also be the proposed conservator.

2. **Required Information.** The petition includes information about the respondent, the reasons why the respondent needs a conservator, and general descriptions of the respondent's assets and income.

3. **Notice.** The notice requirements for a petition seeking the appointment of a conservator are virtually the same as for a petition seeking the appointment of a guardian.

4. **Court Visitor.** The court can appoint a court visitor but is not required to do so.

5. **Counsel for Respondent.** The respondent can retain a lawyer to represent him or her in the process and file objections. If the respondent objects and does not have a lawyer, the court can (but is not required to) appoint a lawyer.

6. **Uncontested Cases.** No objections are filed in most cases. If no objections are filed, there will not be a hearing. The judge will make his or her decision based on the information in the petition.

7. **Hearings in Contested Cases.** If the respondent or anyone else objects by the deadline in the notices, a hearing is held before a judge. The petitioner has the burden of proving by clear and convincing evidence that the respondent is financially incapable and has money or property that needs to be managed or protected by a conservator. The parties, family members, friends, neighbors, adult protective services workers, bankers, and health care providers may be witnesses. The judge makes a decision based on the evidence presented. In some counties, the parties are required to try to resolve the issues through mediation before having a hearing.

8. **Bond.** If the judge decides to appoint a conservator, the judge signs a judgment. The judgment requires the conservator to obtain a surety bond in an amount that covers the value of the assets and income the conservator will manage. The bond company charges an annual premium for the bond and usually runs a credit check when deciding whether to provide a bond.

9. **Letters of Conservatorship.** Once a conservator is appointed, the respondent is called the protected person. The court will issue Letters of Conservatorship after the conservator submits the bond and the bond is approved by the court. A court-certified copy of the Letters of Conservatorship is official proof of the conservator's authority to act.

## **C. Conservator**

1. **Basic Requirements for Conservator.** The petition has to identify the proposed conservator. A person who is incapacitated, financially incapable, a minor child, or acting as a health care provider for the respondent is not qualified to serve as the conservator. The conservator is not required to live in Oregon.

2. **Preferences.** If objections are filed, the judge considers the respondent's circumstances, the respondent's preferences, the relationship to the respondent by blood or marriage, and the respondent's assets, and the ease of administration that may result from the appointment.

3. **Professional Fiduciaries.** The court may appoint a professional fiduciary when a close relative is not available or is not suitable to serve as conservator, when there is a disagreement about who should be the conservator, or when special expertise is needed. The professional fiduciary must be certified by the national Center for Guardianship Certification,

[www.guardianshipcert.org](http://www.guardianshipcert.org). The website allows people to search for certified professional fiduciaries by location. The Guardian/Conservator Association of Oregon also has an online directory, [www.gcaoregon.org](http://www.gcaoregon.org).

4. **Training Class for Conservators.** The courts in Clackamas, Multnomah, and Lane Counties require a conservator who is not a professional fiduciary to complete a short training class within 60 days (90 days for Lane County) after the judgment appointing the conservator was signed. The class is presented by Guardian Partners, [www.guardian-partners.org](http://www.guardian-partners.org).

#### **D. Conservator's Powers and Duties**

1. **General Powers.** The conservator has the power to take possession of the protected person's income and property and the power to make payments for his or her support, education, care, and benefit.

2. **Limits on Conservator's Powers.** The conservator has to take the protected person's estate plan into account when making decisions about finances. Some actions require specific authority from the court, including selling the protected person's residence, making gifts over a certain amount, creating a trust, changing the beneficiaries of a life insurance policy or annuity, making a transaction in which the conservator has a conflict of interest, and paying the conservator and the conservator's attorney for their services. The amount of the bond will be decreased if the court restricts the sale, encumbrance, or transfer of certain assets.

3. **Rights Retained by Protected Person.** A competent protected person retains the rights to make a will and to change the beneficiaries of a life insurance policy or annuity.

4. **Inventory.** ORS 125.470 requires the conservator to file an initial inventory with the court showing the assets owned by the protected person and their values.

5. **Annual Account.** The conservator is required to file a detailed annual account which includes lists of money received, payments made, and changes in assets. A copy of the conservator's accounting has to be mailed or given to the protected person.

#### **E. Ending or Changing a Conservatorship**

1. **Termination.** The conservator, the protected person, or another interested person may file a motion asking the court to terminate the conservatorship on the grounds that the protected person is no longer financially incapable. The conservator may ask the court to end the conservatorship if the assets consist of bank accounts and other personal property with a net value of \$10,000 or less.

2. **Modification.** The court may modify the powers or authority of a conservator, approve proposed actions, and restrict assets. An interested person (including the protected person) may file a motion asking the court for the modification.

3. **Removal of Conservator.** The court may remove a conservator whenever the removal is in the best interests of the protected person. An interested person (including the protected person) may file a motion asking the court to remove a conservator.

4. **Appointment of Successor Conservator.** If a guardian dies, resigns, or is removed, the process for having a successor conservator appointed is similar to the process for appointing the initial guardian. The court can appoint an interim conservator for up to 60 days if the conservator dies, resigns, or is removed.

#### **V. TEMPORARY CONSERVATORSHIP**

##### **A. Requirements for Temporary Conservatorship**

1. **Standard.** The court can appoint a temporary conservator for 30 days if there is a serious and immediate danger to the estate of a financially incapable respondent and the

respondent's welfare requires immediate action. The appointment can be extended for another 30 days.

2. **Notice.** The court can appoint a temporary conservator with two days notice or, in extreme cases, with no advance notice. If advance notice was not given, then notice as to be given within two days after the appointment of the temporary conservator.

3. **Process.** The process varies by county. Most courts require signed statements from the respondent's physician, or an adult protective services investigator, or other person with knowledge of the respondent's financial incapability and the danger to the respondent's money or property and hold a short hearing before appointing a temporary conservator.

## **VI. COSTS FOR GUARDIANSHIP AND CONSERVATORSHIP**

### **A. Filing Fees and Other Out-of-Pocket Costs**

1. The current filing fee for a guardianship is \$117. The filing fee for a conservatorship ranges from \$265 to \$1,109, depending on the value of the assets. The respondent does not pay a fee to object. Others objectors pay a \$117 first appearance fee in a guardianship case or a \$265 first appearance fee in a conservatorship case. The fee arrangements for court visitors vary by county, but the cost is generally between \$250 and \$650.

2. There are other out-of-pocket costs, such as charges to have the respondent personally served and charges by the court for certified copies. In contested cases, there may be witness fees, subpoenas, deposition costs, and charges for an independent medical or psychological examination.

3. The guardian does not pay a fee to file the annual guardian's report.

4. The conservator is required to obtain a bond in the amount set by the court. There is an annual premium for the bond. There also is a fee to file the annual account. The bond premium and filing fees are paid from the protected person's funds.

### **B. Attorney, Guardian, and Conservator Fees**

1. Attorney fees are based on the amount of time spent and the hourly rates charged for the attorney and the attorney's staff.

2. Professional fiduciaries charge fees based on the amount of time spent and the hourly rates for the fiduciary and the fiduciary's staff. Family members who serve as guardians/conservators can charge fees for the time they spend on guardian/conservator duties.

3. If the court appoints a guardian/conservator, an attorney who represents the petitioner and/or the guardian/conservator can submit motions with records of expenses and time spent to the court and ask the court to approve paying the out-of-pocket costs, the attorney fees, and the guardian/conservator fees out of the protected person's funds.

## **VII. OTHER TOOLS AND ALTERNATIVES**

### **A. Advance Directive for Health Care**

1. An adult who is capable of making his or her own health care decisions can sign an advance directive for health care naming a health care representative to make those decisions in the event that the person signing the form becomes incapable (incapacitated) in the future. The person can include instructions about end-of-life care and other types of care. There will be a new form for the advance directive for health care in ORS Chapter 127 and a separate form for appointing a health care representative only beginning January 1, 2019, due to the passage of House Bill 4135. Advance directives signed before January 1, 2019, using the current form will remain effective. Copies of the form(s) and instructions are available from most hospitals and many other health care providers.

2. A health care representative named in an advance directive for health care does not have the power to consent to convulsive treatment; psychosurgery; sterilization; or abortion. In 2011, the Oregon legislature removed the restriction that kept a health care representative from consenting to admission or retention in a facility for care or treatment of mental illness.

3. The person who signed the advance directive for health care may revoke it at any time as long as he or she is capable. "Capable" is defined as not incapable.

4. In Oregon, a health care representative whom a capable person named in a valid advance directive for health care has priority to make health care decisions for the person while the person is incapable, even if the court appoints a guardian for the person.

#### **B. Declaration for Mental Health Treatment**

1. An adult who is capable of making his or her own health care decisions can sign a declaration for mental health treatment. The declaration may include the appointment of an attorney-in-fact to make mental health treatment decisions in the event that the person signing the form becomes incapable of making those decisions in the future as well as preferences and instructions regarding mental health treatment. The form is in ORS 127.736. Health care providers can disregard the instructions if the person has been civilly committed or committed in connection in a criminal proceeding or if there is an emergency situation.

2. An attorney-in-fact named in a declaration has the authority to make mental health treatment decisions regarding convulsive treatment, treatment of mental illness with psychoactive medication, admission to and retention in a health care facility for up to 17 days for care and treatment of mental illness, and outpatient services.

3. The person who signed the declaration for mental health treatment may revoke it at any time if he or she is not incapable. If the declaration is not revoked, it continues in effect for three years.

#### **C. Consent to Health Care Services by Person Appointed by Hospital**

1. ORS 127.760, adopted in 2011, allows a hospital to appoint a health care provider to give informed consent on behalf of a hospital patient who is incapable/incapacitated and who does not appear to have a health care representative or a guardian.

2. The health care provider appointed by the hospital cannot consent to mental health treatment, sterilization, or abortion, and can only consent to withholding or withdrawing life-sustaining treatment in certain situations.

#### **D. HIPAA and Access to Protected Health Information**

1. The federal Health Insurance Portability and Accountability Act (HIPAA) regulates the use and disclosure of protected health information. An adult can follow the HIPAA privacy rule process to get access to or purchase copies of his or her own health record, excluding psychotherapy notes. He or she can also sign a release authorizing another person to get access to or copies of protected health information or revoke a previously signed release. Many health plans and providers have their own HIPAA release forms.

2. In Oregon, a health care representative under an Advance Directive for Health Care executed by a person who is presently incapable, an attorney-in-fact under a Declaration for Mental Health Treatment executed by a person who is presently incapable, or a court-appointed guardian is a personal representative who can get access to or copies of protected health information under the HIPAA privacy rules. In addition, a health care provider may disclose directly relevant information to a family member or friend identified by the person as being directly involved with his or her care.

## **E. POLST and End-of-Life Treatment Decisions**

1. Oregon has been a leader in developing the POLST (Physician Orders for Life-Sustaining Treatment) form. A doctor who is treating a person with a terminal illness or other serious medical condition can complete a POLST form detailing the end-of-life treatments that the person will and will not receive after discussing the choices with the person (or, if the person is incapable, with the health care representative or guardian or involved family members). A POLST form can be revised or revoked at any time. Completed POLST forms are automatically added to the Oregon POLST Registry, where they are available to emergency medical services and other authorized health care providers.

2. The Oregon statutes provide a default priority list to be followed if a decision regarding life-sustaining treatment has to be made for an incapable person who does not have a health care representative care or a guardian. The person's spouse or registered domestic partner has first priority, followed by a majority of the adult children who can be located, either parent, a majority of the adult siblings, any adult relative or friend, and the attending physician.

3. Some people have signed a Living Will, Directive to Physicians, or similar document giving instructions about end-of-life care or included those instructions in an Advance Directive for Health Care.

## **F. Financial Power of Attorney**

1. A capable adult (called the principal) can sign a financial power of attorney naming a trusted relative or friend as the agent or attorney-in-fact and authorizing the agent to make certain decisions about money and property. The authority given to the agent is described in the power of attorney. The agent shares that authority with the principal.

2. In Oregon, most financial powers of attorney are effective when they are signed. They are durable, which means that they remain in effect if the principal becomes financially incapable. The principal or a court-appointed conservator can revoke a power of attorney.

3. There are risks involved in signing a financial power of attorney. No court or government agency monitors what the agent named in the power of attorney is doing.

## **G. Authorized Signer on Account**

1. Adding another person to a bank or credit union account as an authorized signer is a type of limited power of attorney. The person's authority is limited to managing the account(s) listed in the paperwork. Financial institutions have forms that the owner of an account can sign to authorize another person to have access to that account.

2. Creating a joint account is different from adding an authorized signer. It makes all of the people named on the account joint owners of the account, with the right of survivorship. Any owner can manage the funds and can withdraw funds from the account. A creditor with a judgment against one of the owners of a joint account can garnish all of the money in the account.

## **H. Revocable Living Trust with Successor Trustee**

1. A revocable living trust is a written agreement in which the person creating the trust (called the settlor or grantor or trustor) appoints a person or a bank or a trust company as the trustee. The trustee agrees to follow the instructions in the trust agreement and to be responsible for managing and distributing the money and property that is transferred into the trust. The most common reason for creating a revocable living trust is to avoid the court-administered probate process after the settlor's death.

2. The person creating the trust is often the initial trustee. If the initial trustee resigns, dies, or becomes financially incapable, a successor trustee named in the trust can follow the procedure in the trust agreement to take over managing the money and property in the trust.

#### **I. Representative Payee and VA Fiduciary**

1. The Social Security Administration (SSA) can appoint a relative, friend, or organization to receive and manage Social Security disability (SSDI) or retirement benefits or Supplemental Security Income (SSI) benefits for a person who is not able to handle the benefits himself or herself. The SSA does not recognize court-appointed guardians/conservators.

2. The VA has a separate process for appointing a fiduciary to receive and manage VA benefits for a person who is not able to handle the benefits himself or herself. The VA does not recognize court-appointed guardians/conservators.

3. A representative payee or VA fiduciary is required to provide an annual report to the agency describing how the representative payee or VA fiduciary used the benefits.

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