

PROTECTIVE PROCEEDINGS, PART ONE
Initiation of Guardianships and Conservatorships

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BACKGROUND

A protective proceeding is a proceeding initiated under Chapter 125 of the Oregon Revised Statutes. There are two types of proceedings authorized under this chapter: a guardianship and a conservatorship. The former requires a finding that an individual is incapacitated and provides control and custody of the protected person to the guardian. The latter requires a finding that the protected person is financially incapable and grants control of the protected person's assets and property to the conservator.

INITIATION

A protective proceeding is initiated by filing a petition seeking the appointment of a fiduciary over the named individual. The proceeding may be on a permanent or temporary basis.

ORS 125.055(2) requires the following information to be included in the petition:

- Name, age, residence address, and current location of the respondent
- Petitioner's interest in the matter
- Name, age, and address of the petitioner and any person nominated as fiduciary in the petition and the relationship of the nominated person to the respondent
- Whether the nominee has any criminal convictions, bankruptcies, revocation of an occupational license, and if so, a description of surrounding circumstances.
- If the petitioner is not nominee, a statement that nominee is willing and able to serve.
- Name and address of:

- Any Court-appointed fiduciary
 - Trustee for the respondent
 - Health care representative appointed by the respondent in an advance directive
 - Attorney-in-fact appointed by the respondent in any power of attorney
 - Respondent's treating physician and any other person who is providing care to the respondent
- Factual information that supports the petition and names and addresses of all persons who would support a finding that respondent is incapacitated or financially incapable
 - Statement whether the petitioner or nominee intends to move the protected person to a nursing home or other residential facility
 - General description of respondent's estate and income
 - Statement whether the nominee is a public or private agency or organization or employee of same that provides services to the respondent

Temporary fiduciaries may be appointed subject to ORS 125.600-125.605. *See also* Lane County SLR 9.041.

NOTICE

Notice of the protective proceeding must be given to certain persons as required by ORS 125.060. Each person so notified is given time to object to the proceeding.

To the Respondent:

- If over the age of 14, to the respondent by personal service
- If a minor, to the person who has exercised principal responsibility for the care and custody of the respondent during the 60-day period before the filing of the petition

- The minor's parents must also be personally served. ORS 125.065(1).
- If no living parents, any person nominated as the minor's fiduciary in a parent's will or other instrument.
- Note the requirements of the form of the notice set forth in ORS 125.070(3)

To other interested parties

- Respondent's spouse, parents, and adult children, or if none, then to the relatives most closely related to respondent
- Any person who cohabits with respondent and who is interested in the respondent's welfare
- Any person nominated as the respondent's fiduciary by a court, any trustee of a trust for benefit of respondent, health care representative, or attorney in fact.
- The respondent's attorney
- Mental health facility or facility for individuals with developmental disabilities if the respondent is or may be moved to such a facility

Government Agencies

- Veterans Affairs if the respondent is receiving VA Benefits
- Oregon Department of Human Services or Oregon Health Authority if respondent receiving public or medical benefits from state
- If the respondent is living in a nursing care facility, or if the proposed fiduciary intends to place the respondent in such a facility, to the Long Term Care Ombudsman
- Other government agencies as listed in statute

APPOINTMENT OF COURT VISITOR

The appointment of a visitor is mandatory for the appointment of a guardian for adults. ORS 125.150. However, the court has the power to appoint a visitor for any other

protective proceeding, and in Lane County this is the usual practice. The petitioner must submit the Visitor's Fee (in Lane County, currently \$300) within 24 hours of notice of the appointment.

The Visitor will interview the respondent, the petitioner/nominee, other interested persons, physicians, and all others who have information on the respondent. The Visitor is required by the statute to investigate crucial considerations of the protective proceeding, including the respondent's ability to provide for his or her own physical health, food, clothing, shelter, and whether the respondent can avoid undue influence or fraud.

The Visitor will file a written report 15 days after he or she is appointed by the court. ORS 125.155. While the Visitor's recommendation and findings are not binding on the court, they can carry a great deal of weight in helping the judge evaluate the merits of the petition and any objections thereto.

HEARING

A hearing may be held on any petition for a protective proceeding. ORS 125.080. If the Respondent or any interested person files an objection to the proceeding, the court *will* hold a hearing on the matter. The statute also authorizes the court to appoint counsel for the respondent. In Lane County, all protected persons in contested proceedings are appointed independent counsel.

JUDGMENT

After any hearing on the matter, or if none, after the objection period has ended, the court will enter a Limited Judgment appointing the fiduciary. In guardianships, the judgment must be carefully drafted in describing the powers the fiduciary will have

over the protected person. Likewise, a judgment appointing a conservator must state the amount of the bond as well as any restrictions on assets.

LETTERS

Letters of Guardianship and/or Letters of Conservatorship will issue after entry of the judgment and any required bond is filed with the court.

OTHER CONSIDERATIONS

Jurisdictional.

Jurisdictional concerns may be an issue in protective proceedings. A starting point is to verify where the respondent has been located for the six months preceding the nominee's petition. If the respondent has been physically present outside Oregon (other than for temporary absences) in the six months preceding the petition, the attorney should refer to the appropriate jurisdiction act.

- Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. ORS 125.800 *et seq.* applies to adult respondents. Oregon has jurisdiction over an adult respondent only if:
 - Oregon is the respondent's home state
 - Oregon is a significant-connection state and:
 - The respondent does not have a home state or the home state has declined jurisdiction because Oregon is the more appropriate forum or
 - No proceeding is pending in the home state or another significant connection state and, before the Oregon court enters an order,
 - No petition is filed in the home state
 - No one objects to the Oregon court's jurisdiction

- The Oregon court concludes that it is the appropriate forum
 - Oregon does not have jurisdiction but the home state and all other significant-connection states have declined to exercise jurisdiction on the grounds that Oregon is the most appropriate forum and jurisdiction is consistent with both the Oregon and US Constitutions.
 - The special jurisdiction requirements of ORS 125.822 are met
- Uniform Child Custody Jurisdiction Enforcement Act ORS 109.701 et seq. Applies to *any* proceeding involving a determination of child custody, including guardianships under ORS 125.

Ethical.

A lawyer practicing in this area must be mindful of ethical and malpractice concerns. A lawyer's involvement in a protective proceeding may arise from his or her previous representation of the protected person. The lawyer should take care not to later agree to represent the prospective fiduciaries of such a person, which would give rise to a conflict of interest. *See Oregon Rules of Professional Conduct (Oregon RPC), Rule 1.7.*

Additionally, lawyers should be mindful of undue influence when approached by family members seeking appointment of a fiduciary for an elderly or incapacitated person. Is the respondent truly incapacitated or unable to manage his or her affairs? Or do the family members simply disagree with the manner in which these affairs are being managed? It can be disheartening to see a loved one squander money or give it away to a new romantic interest, and sometimes these actions *are* the sign of diminished capacity. But competent adults are free to make bad decisions, so one should not start from the assumption that a bad decision by itself signals incompetence or incapacity.

Constitutional.

A protective proceeding deprives adult respondents of some liberty rights. Therefore, the burden in such a proceeding is on the petitioner to prove by clear and convincing evidence that the respondent is in need of the requested protection.

It is the stated position of Judge Holland that these concerns are paramount in the court's mind when considering a petition for a protective proceeding. Lane County's practice is to appoint an attorney to represent the interests of a respondent in such a proceeding, and a number of local practitioners have agreed to serve as court-appointed counsel for a respondent. Family members of protected persons often do not understand this concern. But when the court's position is explained to them, they often have a better understanding of the measures taken to ensure that the protective proceeding is necessary *and* truly in the best interests of the protected person.

ALTERNATIVES

It is not always possible to avoid a protective proceeding; conversely, a protective proceeding may not be the best option for a particular individual or family. Such proceedings are not only expensive, but a matter of public record, and many families desire more privacy. Others bristle at what they see as unduly restrictive oversight in the absence of fiduciary misconduct.

To some extent, a good estate plan can avoid the need for a conservatorship. A durable power of attorney and/or a trust provide for management of an incapacitated person's assets. An estate plan that establishes a trust for property inherited during a child's minority can not only avoid a conservatorship, but can also delay ultimate distribution of the assets to the child beyond the age of 18, as would happen in a conservatorship.

Unfortunately, when a person has lost capacity and is no longer able to manage his or her health or safety, a guardianship may be the only option. Advance directives may permit a health care representative to make certain medical decisions, but they do not permit the health care representative to admit the person to a nursing facility against his will (for example). However, prior to that point, many families are likely to manage a loved one's incapacity more informally - assisting with medication, transporting to doctor's visits, providing in-home care, and so forth.

SUGGESTED RESOURCES

Oregon Revised Statutes, Chapter 125

Guardianships, Conservatorships, and Transfers to Minors, (OSB Legal Pubs 2009)

Oregon Uniform Trial Court Rules

Local Supplementary Rules

PLF Practice Guides and Forms