GUARDIANSHIPS, CONSERVATORSHIPS, AND TRANSFERS TO MINORS

2009 REVISION
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PREFACE

This Guardianships, Conservatorships, and Transfers to Minors handbook is designed to be a practical guide for evaluation of the need for, and implementation of, proceedings to protect the person and property of minors, the elderly, and the disabled.

This is the fifth edition of the book, which was initially published in 1993. The format of the handbook has essentially remained the same since the first edition, with periodic revisions to incorporate legislative changes and current judicial decisions in this area of the law. The revisions have also added numerous practice tips, comments, and forms deriving from the experience of the editors and author. I have been the author of the guardianship and conservatorship chapters of the book since the first edition. The strength of the publication is the group of experienced Oregon practitioners and judges who have edited each of the five revisions over the past 17 years. These editors, exemplified this year by Gary Vigna and Rod Beck, have had broad experience in handling protective proceedings, elder law, trusts, litigation, and the other disciplines related to this increasingly important area of law.

This new edition includes analysis of several significant new cases interpreting Oregon’s guardianship and conservatorship statutes, and discussions of a number of amendments and additions to those statutes. One of the 2009 Legislature’s additions to the law, which this edition covers, is the Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act (UAGPPJA) (effective January 1, 2010, a product of the National Conference of Commissioners on Uniform State Laws dealing with jurisdiction and other issues in situations in which an elderly or impaired adult has connections with more than one state). This year the Legal Publications staff also undertook a thorough revision of the text of this book to improve its structure and readability. We hope this 2009 edition will prove as helpful and instructive as past editions appear to have been. Thanks to all involved.

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I. (§3.1) SCOPE

This chapter summarizes the statutory requirements that must be met before the court will appoint a guardian for a person who needs protection. The chapter also discusses the powers and duties of the guardian, limitations on those powers, and the guardian’s reporting requirements. The accelerated process of appointing a temporary fiduciary is also included.

This chapter offers examples of various forms, including a form of petition to appoint a guardian (see Form 3-1) and a guardianship checklist (see Form 3-13), which will assist the lawyer in monitoring a guardianship. See chapter 2 for other forms relevant to protective proceedings, including forms regarding notice, termination of a protective proceeding, and the visitor’s report.

II. GUARDIANS

A. Generally

1. (§3.2) Adult Protected Person

Oregon law presumes a person to be competent. Van v. Van, 14 Or App 575, 578, 513 P2d 1205 (1973). That presumption can be overcome only by clear and convincing evidence. Schaefer v. Schaefer (In re Schaefer), 183 Or App 513, 517, 52 P3d 1125 (2002). “Imposing a guardianship deprives a person of ‘‘precious individual rights.’’” Schaefer, 183 Or App at 516 (quoting Van, 14 Or App at 581). Oregon’s statutory process is designed to protect those rights with “extensive procedural requirements and substantive requirements.” Schaefer, 183 Or App at 516; Van, 14 Or App at 580–581. A guardian may be appointed for an adult only when “necessary to promote and protect the well-being of the protected person.” ORS 125.300(1). The guardianship must be designed “to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person’s actual mental and physical limitations.” ORS 125.300(1).

A protected person (adult or minor) “retains all legal and civil rights provided by law except those that have been expressly limited by court order or specifically granted to the guardian by the court.” ORS 125.300(3). Those retained rights include the right to counsel and the right to have access to personal records. ORS 125.300(3).

Even an adult protected person for whom a guardian has been appointed is not presumed to be incompetent. ORS 125.300(2). In Wood
v. Bettis (In re Estate of Cooper), 130 Or App 140, 880 P2d 961 (1994) (decided before the 1995 revision of guardianship statutes, see §1.2), however, the court held that “[w]hen a guardian has been appointed because of the testator’s mental capacity, a rebuttable presumption of a lack of testamentary capacity arises.”

The notice requirements for the appointment of a guardian for an allegedly incapacitated adult are discussed in §§2.36–2.37. See Forms 2-3 and 2-4.

**PRACTICE TIP:** A lawyer for a protected person or for the guardian must be cautious to avoid conflicts of interest in advising either person, or both, in connection with other legal matters, such as estate planning, family, and corporate issues.

### 2. **(§3.3) Minor Protected Person**

Unlike in a guardianship proceeding involving an adult respondent, incapacitation is not a statutory condition that must be met before a court can decide to appoint a guardian for a minor. See ORS 125.300(1); see also §3.2. The respondent must be under 18 years of age, and the court then determines whether the evidence shows that the minor is “in need of a guardian.” ORS 125.305(1)(a), 125.005(6). See §3.5. Case law interpreting the previous Oregon statute in this regard held that the court was to determine whether it was in the “welfare and best interests” of a child to have a guardian appointed. Ornduff v. Bjork, 100 Or App 448, 454, 786 P2d 1284 (1990); Iremonger v. Michelson, 97 Or App 60, 63–64, 775 P2d 860 (1989).

**NOTE:** As mentioned in §2.10, the “in need of a guardian” criteria does not apply in a child-custody dispute when a nonparent seeks a guardianship over the objections of a birth parent, or in juvenile court guardianship proceedings. The juvenile court has its own separate process for appointing a guardian and administering a guardianship over a minor who is subject to the juvenile court’s jurisdiction. See ORS 419B.365–419B.379.

The authority of a fiduciary appointed solely on the basis of a person’s minority terminates when the protected person reaches the age of 18. ORS 125.230(1); see §2.18. However, the protective proceeding is terminated only by the court’s entry of a general judgment. ORS 125.090(3). See §2.52.

Oregon law does not clearly set forth the requirements for appointing a fiduciary and administering or terminating a protective proceeding.
when the proceeding is based not only on the respondent’s minority but also on his or her incapacity or financial incapability. For example, the court is required to appoint a visitor only when a petition seeks the appointment of a guardian for an adult respondent; otherwise, the decision whether to appoint a visitor is discretionary with the court. ORS 125.150(1). See §§2.28–2.29. Because the authority of a fiduciary who is appointed solely on the basis of a person’s minority terminates when the person reaches the age of 18 (see §2.18), it may be necessary to initiate a new petition for the appointment of a fiduciary for an incapacitated adult when the minor becomes an adult and reasons for a protective proceeding allegedly still exist. If it appears likely, however, that the need for a guardianship will extend beyond the minority, it may be appropriate to have a visitor appointed, give the notices required in an incapacitated adult guardianship, and ask for the order of appointment to be based on both age and disability. The notice requirements for the appointment of a guardian for a minor are discussed in §§2.36–2.37, 2.41, and 2.43. See Form 2-3.

Notice must be served on a minor protected person only if the minor is 14 years of age or older. ORS 125.060(2)(a), 125.065(1). See §2.40.

B. Appointment of Guardian

1. (§3.4) Visitor’s Report

The involvement of a visitor is a required and integral part of the appointment of guardian for an incapacitated adult. ORS 125.150(1). A guardian for an allegedly incapacitated adult cannot be appointed unless the court received and considered the visitor’s report. ORS 125.150(1), 125.305(2). The court has discretion to require a visitor in other protective proceedings. ORS 125.150(1). For further discussion on visitors, including the qualifications and duties of a visitor, see §§2.28–2.32.

NOTE: An Oregon court that accepts the transfer of a guardianship from another state under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) would apparently not be required to use the services of a visitor. See 2009 Or Laws ch 179 (SB 238) (effective January 1, 2010), discussed in §§2.7 and 2.58. The UAGPPJA directs the Oregon court to recognize the determination of incapacity by the transferring court. 2009 Or Laws ch 179, §17(7).
Legislation enacted in 2003 significantly raised the standards for the investigation that the visitor must undertake regarding the need for a guardianship, the willingness of the respondent to have a guardian appointed, and the ability of the respondent to attend and participate in a hearing. ORS 125.150(4)–(10). The visitor’s report must include a description of the results of the investigation, the identity of the persons interviewed, and the visitor’s recommendations as to the suitability of the nominated fiduciary. ORS 125.155. See Form 2-11 (visitor’s report).

Note: The requirement for a visitor increases the cost, time, and uncertainty of a guardianship proceeding, and is another factor that a lawyer must consider in advising a person whether to initiate guardianship proceedings.

2. (§3.5) Limited Judgment of Appointment

After determining that conditions for the appointment of a guardian have been established (see §§3.2–3.3), the court may appoint a guardian if it “determines by clear and convincing evidence” that:

(1) The respondent is either a minor “in need of a guardian” or incapacitated;

(2) The appointment is necessary “as a means of providing continuing care and supervision of the respondent”; and

(3) The person nominated as guardian is qualified, suitable, and willing to serve. ORS 125.305(1).

An evidentiary hearing must be held on a petition for the appointment of a guardian if objections to the petition are filed and not withdrawn. Babbitt v. Babbitt (In re Babbitt-Reynolds), 226 Or App 452, 457–458, 204 P3d 799 (2009). See §§2.45–2.46.

See ORS 125.200 and §2.12 concerning preferences in the appointment of a fiduciary. Cases discussing preferences include the following pre-1995 cases, which involve the appointment of a guardian for a child over a parent’s objection: Ornduff v. Bjork, 100 Or App 448, 454, 786 P2d 1284 (1990) (after the death of the children’s mother, the court concluded that the best interests of the children would be served by the appointment of a guardian; that the sexually abusive birth father would be unsuitable as a guardian; and that the children’s grandparents were qualified, suitable, and willing to serve as guardians); Iremonger v. Michelson, 97 Or App 60, 64, 775 P2d 860 (1989) (after the mother died, the father had the right to custody and control of the children; even though the aunt had been caring for the children, there was “no
basis for a guardianship” and it was unnecessary for the court to
determine whether the children’s aunt was a qualified guardian).

In Frederiksen v. Ostermeier, 162 Or App 430, 435, 986 P2d 1194
(1999), the court applied a “best interests of the child” standard in
granting a grandmother custody of her grandchild and appointing her as
the guardian of the child over the objections of the birth father.

More recent Oregon cases emphasize the need to recognize the
rights of parents in any guardianship proceeding, particularly in the light
of Troxel v. Granville, 530 US 57, 66, 120 S Ct 2054, 147 L Ed2d 49
(2000) (recognizing “the fundamental right of parents to make decisions
concerning the care, custody, and control of their children”). See, e.g.,
Kelley v. Gibson (In re Wilde), 184 Or App 343, 349–350, 56 P3d 925
(2002); Burk v. Hall (In re Goodwin), 186 Or App 113, 121, 62 P3d
394 (2003) (discussed in §2.10). But see State ex. rel Juvenile Dep’t v.
Smith (In re Smith), 205 Or App 152, 166, 133 P3d 924 (2006), in
which the court stated that the “right that Troxel protects does not
automatically attach to every parent by virtue of parenthood alone”;
rather, “the right attaches only to a fit parent.” Thus, the preference for
the appointment of a parent as the guardian of a child assumes a “fit”
parent; and when the parent is found to be unfit, the preference does not
bar the appointment of a third person over the objections of the parent.

The guardianship order must be “no more restrictive upon the
liberty of the protected person than is reasonably necessary to protect
the person.” ORS 125.305(2). The court’s order must be based on
information in the petition, the visitor’s report, the report of any
physician or psychologist who examined the respondent, and evidence
presented at any hearing. ORS 125.305(2).

The Department of Human Services (DHS) may be appointed the
guardian of a minor who has no living parents if no willing, qualified,
and suitable relative or other person has petitioned the court for
appointment. ORS 125.305(4). For additional notice requirements when
DHS is the prospective guardian, see ORS 125.060(6) and §2.37. DHS
also has the authority to petition for the appointment of a guardian
under certain circumstances. State ex. rel Juvenile Dep’t, 205 Or App at
158 (having been granted custody of a minor under the juvenile code,
DHS was held to have the authority to apply for the appointment of a
guardian under ORS chapter 125).

See Form 3-4 for a form of limited judgment appointing a
guardian. See also Forms 3-2 and 3-3 (limited judgment appointing a
temporary guardian).