

GUARDIANSHIPS IN OREGON

Content of this document is taken from “Guardianships, Conservatorships, And Transfers To Minors” (Oregon CLE 2000).

Minor Protected Person

There is no prerequisite statutory condition that must be met before a court can decide to appoint a guardian for a minor. The respondent must be under 18 years of age, and the court may then determine whether the evidence shows the minor to be “in need of a guardian.” The court needs to determine whether it is in the “welfare and best interests” of a child to have a guardian before making the appointment.

Appointment of Guardian

After determining that conditions for the appointment of a guardian have been established, a guardian may be appointed if, by clear and convincing evidence, the court determines:

- The respondent is a minor in need of a guardian, or is incapacitated;
- The appointment is necessary as a means of providing continuing care and supervision of the respondent; and
- The person nominated as guardian is qualified, suitable, and willing to serve.

Preferences in Appointment

The most suitable person who is willing to serve as fiduciary is to be appointed after giving consideration to specific circumstances and desires of the respondent; relationship by blood or marriage of the person nominated as fiduciary; preferences expressed by a parent of the respondent; the nature of the respondent’s estate; and the impact on ease of administration that may result from the appointment.

Persons Not Qualified

An incapacitated or a financially incapable person, a minor, or a person acting as a health care provider for the protected person is not qualified to serve as a fiduciary. ORS 125.205.

In determining the suitability of a person for appointment as a fiduciary, the court is expected to take into consideration any criminal convictions, revocation of occupational license or bankruptcy of the prospective fiduciary. Notice must be given to the court of any such event, whether occurring before or after the appointment of an affected person as fiduciary. ORS 125.210(1)-(2). Failure to give these required notices can be a sufficient basis for refusing to appoint an applicant or disqualifying an existing fiduciary. ORS 125.210(4).

Termination of Fiduciary's Authority

A fiduciary's authority terminates when the protected person dies, or when the fiduciary dies, resigns, or is removed. ORS 125.230(1). The authority of a guardian of a minor terminates when the minor reaches 18 years of age, if minority was the only reason for the appointment. ORS 125.230(1).

Discharge of Fiduciary

The resignation or removal of a fiduciary does not act to discharge the fiduciary until the court has approved the final report or accounting, any surety has been exonerated, and the court has signed an order of discharge.

Termination of Protective Proceedings

The court may terminate protective proceedings on motion for any of the following reasons:

- The fiduciary was appointed, or a protective order was entered, because the protected person was a minor and has reached the age of majority.
- The protected person is no longer incapacitated, and incapacity was the basis for the fiduciary's appointment.
- A fiduciary was appointed or a protective order was entered because the protected person was financially incapable, and that person no longer is financially incapable or the value of the estate is \$10,000 or less and is appropriate for disposition.
- The protected person has died.
- The best interest of the protected person would be served by terminating the proceedings.

NOTE: Certain events, such as the protected person's death or reaching the age of majority, may automatically terminate a fiduciary's authority; but a motion is necessary to terminate the protective proceeding. Also, although resignation or removal of a fiduciary terminates authority, the fiduciary is not discharged without express court order.

Liability of the Fiduciary

A fiduciary is not personally liable to third persons for acts of the protected person solely by reason of being appointed fiduciary. ORS 125.235. But the fiduciary can incur liability for breaches of fiduciary duty. ORS 125.485.

The guardianship order must be no more restrictive on the liberty of the protected person than is reasonably necessary. The court's order must be based on information in the petition, the visitor's report, the report of any physician or psychologist who has examined the respondent, and evidence presented at any hearing.

General Powers, Duties, and Limitations of Guardian

- Unless limited by the order of appointment, the guardian has custody of the protected person and may establish that person's place of abode, in or out of Oregon.
- The guardian must provide for the care, comfort, maintenance, and, when appropriate, the training and education of the protected person. The guardian must take reasonable care of the protected person's clothing, furniture, and other personal effects, unless a conservator has been appointed.
- Subject to the provisions on advance directives, the guardian has the power to consent or refuse consent to health care for the protected person, with the qualification that the guardian is not liable for injury to the protected person solely by reason of consent.
- The guardian is authorized to make advance funeral and burial arrangements, and control disposition of the remains of the protected person, including making an anatomical gift under ORS 97.130.
- The guardian of a minor has powers and responsibilities of a parent with legal custody, except the guardian has no obligation to support the minor beyond the assets of the minor's estate, nor is the guardian liable for torts of the minor. A guardian may consent to the marriage or adoption of a minor protected person.
- A guardian has the power to receive money and personal property deliverable to the protected person, and to apply that money or property to the protected person's support, care, and education. The guardian must exercise care to conserve any excess for the protected person's needs. See ORS 126.700, which permits a guardian to receive from a third person up to \$10,000 owed to a minor protected person.

A guardian stands in a fiduciary and trust relationship with the protected person and will be held to high standards in the exercise of the guardian's powers and duties. A parent acting in the capacity of guardian for his or her child also stands in a fiduciary relationship to the minor child. Furthermore, a natural parent's appointment by the court to be guardian does not change the parent's legal obligation to support the child.

A guardian of a minor or an incapacitated person may delegate the guardian's authority to another person for up to six months, to a school administrator for up to 12 months, and during the parent's or guardian's term of active military service to another person for the term of the active military service. ORS 109.056.

Limitations on Guardian

- **Sterilization** – The guardian may not authorize sterilization of the protected person. ORS 125.320(1)
- **Room and Board** – Without prior court order, the guardian may not use the protected person's funds to pay for room and board for the protected person provided by the guardian or the guardian's spouse, parent, or child. ORS 125.320(2).
- **Placement in Residential Facility** – The legislature was concerned about inappropriate use of protective proceedings to commit an adult protected person

to a mental health facility, a nursing home, or a comparable facility. Any intent to accomplish such a commitment must be set forth in the initial petition for appointment. Failure to reveal such intent can be grounds for removing the fiduciary.

If you need any assistance regarding guardianship issues, please do not hesitate to contact our firm at 503.693.6641.