

## Chapter 126

### Guardianships and Conservatorships

#### 126.006

CASE CITATIONS: *Schindler v. Parzoo*, (1908) 52 Or 452, 97 P 755; *In re Sneddon*, (1915) 76 Or 470, 149 P 527; *In re Northcutt*, (1916) 81 Or 646, 148 P 1133, 160 P 801; *Dickenson v. Henderson*, (1918) 90 Or 408, 176 P 797; *In re Sturtevant's Estate*, (1919) 92 Or 269, 178 P 192, 180 P 595; *McIlroy v. McIlroy*, (1920) 96 Or 468, 190 P 309; *Holman v. Watt*, (1925) 115 Or 494, 237 P 984; *Oregon Mut. Life Ins. Co. v. James*, (1941) 166 Or 336, 111 P2d 1026; *Fahrenwald v. Wachter*, (1960) 221 Or 535, 352 P2d 152; *Logsdon v. State*, (1963) 234 Or 66, 380 P2d 111; *Olshen v. Kaufman*, (1963) 235 Or 423, 385 P2d 161; *Stangier v. Stangier*, (1966) 245 Or 236, 421 P2d 693.

LAW REVIEW CITATIONS: 47 OLR 304-319.

#### 126.020

##### NOTES OF DECISIONS

Under former similar statute where no one capable of representing an incompetent appeared upon his petition to revoke appointment of guardian, the court was required to appoint a guardian ad litem. *Wells v. Ellison*, (1930) 133 Or 155, 280 P 511.

Under former similar statute guardianship sections of the code did not apply to guardians ad litem. *Benson v. Birch*, (1932) 139 Or 459, 10 P2d 1050.

FURTHER CITATIONS: *Wade v. Northup*, (1914) 70 Or 569, 140 P 451.

ATTY. GEN. OPINIONS: Appointment of guardian ad litem to bring petition, 1942-44, p 280.

#### 126.106

##### NOTES OF DECISIONS

###### 1. In general

The measure of the court's authority to administer a statutory remedy is to be found in the statute creating the procedure. *Parmele v. Mathews*, (1963) 233 Or 616, 379 P2d 869.

If any element necessary to jurisdiction is not established, letters of guardianship may not be granted. *Id.*

###### 2. Under former similar statute

Notice to person previously adjudged insane was not essential to give the court jurisdiction to appoint a guardian. *California W. States Life Ins. Co. v. Marsters*, (1934) 145 Or 640, 28 P2d 233.

Jurisdiction to appoint guardians for minor children was within the sound discretion of the court and was only exercised when plainly demanded. *In re Henkle*, (1936) 153 Or 337, 56 P2d 343.

In absence of statutory provisions granting power to a probate court or court of general jurisdiction sitting in probate to hear or allow contested claims against the

guardian, the probate court had no such power. *In re Stroman's Estate*, (1946) 178 Or 100, 165 P2d 576.

A guardian was properly appointed for a man 71 years old who, although sane, had suffered strokes and who had only the vaguest appreciation of the current status of his whole estate. *Fahrenwald v. Wachter*, (1960) 221 Or 535, 352 P2d 152.

Former similar statute was constitutional. *Id.*

FURTHER CITATIONS: *Stangier v. Stangier*, (1966) 245 Or 236, 421 P2d 693.

ATTY. GEN. OPINIONS: Jurisdiction to appoint guardian for a minor whose parents are residents of another state, 1932-34, p 30; authority of county court to be guardian of the estate of a dependent child, 1948-50, p 318.

LAW REVIEW CITATIONS: 16 OLR 271.

#### 126.126

##### NOTES OF DECISIONS

###### 1. Under former similar statute

A petition alleging incompetency in substantially the words of the statute was sufficient. *Dickenson v. Henderson*, (1918) 90 Or 408, 176 P 797; *McIlroy v. McIlroy*, (1920) 196 Or 468, 190 P 309.

Proceedings for appointment of guardian were often necessarily informal and were presumed to be regular. *In re Lyon*, (1929) 128 Or 94, 265 P 1087.

Proceedings to determine lunacy and appoint a guardian under the Act of 1853 were not triable by a jury, and the Oregon Constitution therefore did not preserve that right as in "civil cases." *In re Idleman's Commitment*, (1934) 146 Or 13, 27 P2d 305.

The court was without jurisdiction to appoint a general guardian of the person of a child domiciled in California. *Fox v. Lasley*, (1957) 212 Or 80, 318 P2d 933.

"Residence" as used in the statute meant "domicile." *Id.*

FURTHER CITATIONS: *Brazee v. Schofield*, (1887) 124 Fed 495.

ATTY. GEN. OPINIONS: Statutory provisions to be strictly followed, 1920-22, p 489; authority of Oregon State Board of Control to conduct proceedings, 1936-38, p 646; place of appointment of guardian for state hospital patient, 1944-46, p 236.

#### 126.131

##### NOTES OF DECISIONS

Under former statute, a court of probate jurisdiction had discretion to permit appearance as a party in appointment proceeding of one who was not a necessary party. *Moore v. Sater*, (1959) 215 Or 417, 335 P2d 843.

## 126.136

CASE CITATIONS: *Parmele v. Mathews*, (1963) 233 Or 616, 379 P2d 869; *Olshen v. Kaufman*, (1963) 235 Or 423, 385 P2d 161.

## 126.146

## NOTES OF DECISIONS

## 1. Under former similar statute

Unless notice was given 10 days before the time appointed for the hearing of the case, a valid order, adjudging the supposed insane person incompetent or appointing a guardian over such person or his estate, could not be rendered. *Wells v. Ellison*, (1930) 133 Or 155, 289 P 511.

An incompetent could not waive the necessary formality of notice or personal service. *Id.*

A guardian was appointed of a previously adjudged insane person without notice to him. *California W. States Life Ins. Co. v. Marsters*, (1934) 145 Or 640, 28 P2d 233, 878.

A court of probate jurisdiction had discretion to permit appearance as a party in appointment proceeding of one who was not a necessary party. *Moore v. Sater*, (1959) 215 Or 417, 335 P2d 843.

LAW REVIEW CITATIONS: 13 OLR 372.

## 126.161

## NOTES OF DECISIONS

Under a former similar statute, preference was given to the incompetent's next of kin when the court was exercising its discretion in the appointment of a guardian. *Re Hampton's Estate*, (1950) 190 Or 279, 223 P2d 1039, 21 ALR2d 873.

It was an abuse of discretion for the court to appoint a sheriff or his deputy as guardian when such official was an officer of the court making the appointment. *Id.*

## 126.166

## NOTES OF DECISIONS

## 1. Under former similar statute

The court took a child under 14 years from his parent and placed him in custody of a grandparent where it best protected the interests of the child. *Larson v. Wellner*, (1920) 97 Or 514, 191 P 671.

The court could not refuse a habeas corpus application for custody by a lawful guardian if he were a fit and proper person. *In re Henkle*, (1936) 153 Or 337, 56 P2d 343.

The rights of a surviving father to custody of a minor child were held superior to those of a testamentary guardian named by mother who had been granted custody by divorce decree. *Bryant v. Dukehart*, (1923) 106 Or 361, 210 P 454.

LAW REVIEW CITATIONS: 49 OLR 314.

## 126.171

## NOTES OF DECISIONS

## 1. Under a former similar statute

A county court could not require a guardian to give an accounting after his discharge, even though the discharge was obtained from the ward by fraud. *Richardson's Guardianship*, (1901) 39 Or 246, 64 P 390.

Bank was liable to surety on its bond where the surety repaid amounts drawn by guardian on his individual checks from guardianship funds. *United States Fid. Co. v. United States Nat. Bank*, (1916) 80 Or 362, 158 P 155.

A guardian ad litem did not need to give a bond. *Benson v. Birch*, (1932) 139 Or 459, 10 P2d 1050.

ATTY. GEN. OPINIONS: Effect of breach of second condition, 1928-30, p 170.

## 126.205

## NOTES OF DECISIONS

## 1. Under former similar statute

A guardian of an insane person had no discretion to ratify a mortgage given by his ward, but was bound at his peril to disaffirm and void it. *Bowman v. Wade*, (1909) 54 Or 347, 103 P 72.

A guardian was held to have the right to possession of the land, and could bring an action in his own name on behalf of the ward to recover it. *Simmons v. Zarthas*, (1921) 99 Or 476, 195 P 157.

The guardian of an insane person was under a duty to return certain effects such as old clothing and jewelry to the ward. *In re Lyon*, (1928) 128 Or 94, 265 P 1087.

FURTHER CITATIONS: *Schindler v. Parzoo*, (1908) 52 Or 452, 97 P 755; *In re Sneddon*, (1915) 76 Or 470, 149 P 527; *In re Northcutt*, (1916) 81 Or 646, 148 P 1133, 160 P 801; *Dickenson v. Henderson*, (1918) 90 Or 408, 176 P 797; *In re Sturtevant's Estate*, (1919) 92 Or 269, 178 P 192, 180 P 595; *McIlroy v. McIlroy*, (1920) 96 Or 468, 190 P 309; *Holman v. Watt*, (1925) 115 Or 494, 237 P 984; *Oregon Mut. Life Ins. Co. v. James*, (1941) 166 Or 336, 111 P2d 1026; *Sprigg v. Stump*, (1881) 8 Fed 211; *Portland Trust & Sav. Bank v. United States*, (1938) 24 F Supp 953.

ATTY. GEN. OPINIONS: Superintendent of state hospital as mere custodian of person of insane person, 1920-22, p 489; authority to receive cash bonus for ward, 1920-22, p 521; representation of minor in purchase of property, 1922-24, p 45; validity of contract of marriage after appointment of guardian, 1926-28, p 132; power to execute mortgage, 1926-28, p 376; validity of purchase of property for ward without order of court, 1938-40, p 217.

LAW REVIEW CITATIONS: 8 OLR 57; 8 OLR 58; 13 OLR 371.

## 126.210

LAW REVIEW CITATIONS: 49 OLR 314.

## 126.225

## NOTES OF DECISIONS

## 1. Under former similar statute

A general guardian was under a duty to appear for his ward and defend a suit against him. *Ankeny v. Blackiston*, (1879) 7 Or 407; *Wade v. Northup*, (1914) 70 Or 569, 140 P 451.

A ward was bound by a compromise made by his guardian representing him in a suit, where the ward was a party to the compromise. *Savage v. McCorkle*, (1888) 17 Or 42, 48, 28 P 444.

An action could not be maintained against the guardian upon the liability of a ward, but the guardian was under a duty to appear and defend for interest of the ward. *Sturgis v. Sturgis*, (1908) 51 Or 10, 93 P 696.

A guardian and not the estate was personally liable on contracts made by guardian for the benefit of the ward. *Id.*

The guardian was required to pay out of the ward's estate for necessities used by the ward. *In re Barker*, (1917) 83 Or 702, 164 P 382.

It was not good management for a guardian to give money to his spendthrift ward to buy necessities. *Id.*

The guardian's duty in managing the ward's estate was measured by the standard of care, prudence and diligence

that a reasonable person would use in his own affairs. In re Marchand, (1931) 137 Or 445, 3 P2d 128.

Until the ward exercised his election to surrender, the cash surrender value of an insurance policy was not a debt due the ward which guardian was under a duty to receive. Oregon Mut. Life Ins. Co. v. James, (1941) 166 Or 336, 211 P2d 1026.

The county court could not compel a guardian to account where he had secured a full release from the ward, after the ward has reached his majority. Richardson's Guardianship, (1901) 39 Or 246, 248, 64 P 390.

The county court could not correct or surcharge settled accounts of the guardian. Id.

To set aside for fraud a discharge by a ward after majority, and to call the guardian to account, required recourse to a suit in equity. Id.

When the jurisdiction of the county court was properly invoked by a petition of the guardian then in office, the court had power to settle the accounts of the prior guardian. Wilson's Guardianship, (1902) 40 Or 353, 68 P 393, 69 P 439.

In settling the accounts of a guardian, the guardian should be allowed credit for expenses necessarily incurred in support of ward even though such expenses were not incurred by direction of court. Id.

A judgment against a ward could be enforced by an accounting under direction of the county court even though it could not be enforced against the ward's estate or the guardian. Sturgis v. Sturgis, (1908) 51 Or 10, 93 P 696.

In a proceeding for an accounting, the court had no jurisdiction to enter a judgment against the bondsmen. In re Marchand, (1931) 137 Or 444, 3 P2d 128.

The guardian in accounting to the court was allowed to credit himself as guardian for payment of the ward's uncontested just debts. In re Stroman's Estate, (1946) 178 Or 100, 165 P2d 576.

FURTHER CITATIONS: English v. Savage, (1875) 5 Or 518; Fuller v. Hager, (1905) 47 Or 242, 83 P 782; Security Inv. Co. v. Miller, (1950) 189 Or 246, 218 P2d 966; State Bd. of Control v. Loprinzi, (1967) 246 Or 206, 424 P2d 889.

ATTY. GEN. OPINIONS: Authority to receive cash bonus, 1920-22, p 521.

LAW REVIEW CITATIONS: 19 OLR 142, 37 OLR 70.

#### 126.270

CASE CITATIONS: Esson v. Flickinger, (1964) 237 Or 462, 391 P2d 769.

#### 126.280

#### NOTES OF DECISIONS

The spendthrift is incompetent to estop himself from asserting the invalidity of a contract. Olshen v. Kaufman, (1963) 235 Or 423, 385 P2d 161; Lilienthal v. Kaufman, (1964) 239 Or 1, 395 P2d 543.

The law of Oregon was applied under the "choice-of-law" conflicts rule to advance the public policy of Oregon. Lilienthal v. Kaufman, (1964) 239 Or 1, 395 P2d 543.

FURTHER CITATIONS: Sturgis v. Sturgis, (1908) 51 Or 10, 93 P 696; In re Barker, (1917) 83 Or 702, 164 P 382.

ATTY. GEN. OPINIONS: 44 OLR 325-330; 48 OLR 46.

#### 126.295

CASE CITATIONS: State Bd. of Control v. Loprinzi, (1967) 246 Or 206, 424 P2d 889.

#### 126.311

CASE CITATIONS: Olshen v. Kaufman, (1963) 235 Or 423, 385 P2d 161; State Bd. of Control v. Loprinzi, (1967) 246 Or 206, 424 P2d 889.

#### 126.341

#### NOTES OF DECISIONS

##### 1. Under former similar statute

A guardian was not allowed the cost of permanent improvements placed by him on minor's property without authority. Gerber v. Bauerline, (1888) 17 Or 115, 19 P 849.

Where a guardian had received interest on estate funds deposited, she was required to account for this less a credit for expenses incident to management of the funds. Independent Foresters v. Keliher, (1899) 36 Or 501, 514, 59 P 324.

Where a guardian was compelled to pay a debt on a contract made on behalf of his ward, he was allowed credit against the estate. Sturgis v. Sturgis, (1908) 51 Or 10, 93 P 696.

The amount of compensation to be allowed was within the sound discretion of the court, and not to be reversed unless a manifest abuse of discretion. In re Prince, (1922) 104 Or 670, 209 P 90.

An agreement as to the amount of compensation before appointment was not controlling on the court, nor was consent of some legatees of deceased ward to a specific compensation binding on other legatees or controlling on the court. Id.

Although a note given by a guardian to procure advance funds for care of the ward did not bind the ward's estate, the guardian was allowed reimbursement for all reasonable expenses he incurred. In re Lyon, (1928) 128 Or 94, 265 P 1087.

Guardian was allowed credit for reasonable expenses for commissions and filing fees. In re Marchand, (1931) 137 Or 444, 3 P2d 128.

FURTHER CITATIONS: Godfrey v. Gempler, (1937) 157 Or 251, 70 P2d 551.

#### 126.411

#### NOTES OF DECISIONS

##### 1. Under former similar statute

Property of a ward was not subject to attachment or execution. Sturgis v. Sturgis, (1908) 51 Or 10, 93 P 696; Kirk v. Mullen, (1921) 100 Or 563, 197 P 300.

The court acquired jurisdiction of a proceeding by a guardian to sell the lands of his ward, upon the filing of a petition by the guardian. Gager v. Henry, (1878) 5 Sawy 237, 9 Fed Cas 1031.

Statute did not require the guardian to petition for sale of any specific portion of the real property. Id.

The validity of a guardian's sale could be attacked only by the ward or someone claiming under him. Goldsmith v. Gilliland, (1885) 23 Fed 645.

Except for provisions which permitted the guardian to mortgage the land of his ward for certain purposes, there was no authorization for the guardian to enter into a contract which would bind the ward's estate in the first instance. Kirk v. Mullen, (1921) 100 Or 563, 197 P 300.

The guardian was allowed to sell property to pay money advanced by and expenses of the guardian. In re Lyon, (1928) 128 Or 94, 265 P 1087.

Statute permitting a sale by guardian was construed strictly as in derogation of the common law. Olson v. Rasmussen, (1934) 146 Or 648, 30 P2d 329.

The guardian was not personally liable upon mortgage and note signed in her representative capacity, and the

mortgagee was allowed to foreclose against the ward's estate. *Godfrey v. Gempfer*, (1937) 157 Or 251, 70 P2d 551.

**FURTHER CITATIONS:** *Buster v. Marion County*, (1917) 84 Or 624, 165 P 1168; *Sprigg v. Stump*, (1881) 8 Fed 207; *Walker v. Goldsmith*, (1886) 14 Or 125, 12 P 537.

**ATTY. GEN. OPINIONS:** Necessity of superintendent of state hospital as party to mortgage, 1920-22, p 489; execution of mortgage by guardian, 1922-24, p 45, 1924-26, p 584, 1926-28, pp 7, 376, 1928-30, pp 122, 171; loan to a veteran who is a minor, 1948-50, p 57.

**LAW REVIEW CITATIONS:** 19 OLR 142; 37 OLR 70.

## 126.431

## NOTES OF DECISIONS

Under a former similar statute, although publication was made for only three weeks, the proceedings were valid as jurisdiction attached upon filing of the petition by the guardian and not upon completion of publication. *Gager v. Henry*, (1878) 5 Sawy 237, 9 Fed Cas 1031.

Under a former similar statute, publication did not have to be for four successive weeks next preceding the sale; it was sufficient if made for four weeks successively at some time prior to the sale. *Walker v. Goldsmith*, (1886) 14 Or 125, 12 P 537.

**FURTHER CITATIONS:** *Sprigg v. Stump*, (1881) 8 Fed 207.

**ATTY. GEN. OPINIONS:** Statutory provisions to be strictly followed, 1920-22, p 489.

## 126.441

## NOTES OF DECISIONS

Under a former similar statute, where the proof of posting notices of a guardian's sale of lands was sufficient in form, but the jurat stated a date prior to that on which the notices were posted, as shown by the affidavit, the misdate in the jurat was deemed a clerical error. *Walker v. Goldsmith*, (1886) 14 Or 125, 145, 12 P 537.

**FURTHER CITATIONS:** *Gager v. Henry*, (1878) 5 Sawy 237, 9 Fed Cas 1031.

## 126.451

## NOTES OF DECISIONS

Under a former similar statute, the validity of a guardian's sale could be attached for want of sufficient security only by the ward or someone claiming under him. *Goldsmith v. Gilliland*, (1885) 23 Fed 645.

The bond required by a former similar section was a special bond. *Smith v. United States Fid. & Guar. Co.*, (1932) 138 Or 554, 6 P2d 212.

## 126.481

## NOTES OF DECISIONS

A person suing a guardian, under a former similar statute, for purchasing land fraudulently at inadequate price must either affirm the transaction and sue for damages, or repudiate the bargain and call on equity; both remedies could not be maintained in one action. *Marshall v. Gustin*, (1918) 89 Or 53, 170 P 312, 173 P 461.

## 126.490

## NOTES OF DECISIONS

Under a former similar statute, a sale was presumed to have been regular. *Walker v. Goldsmith*, (1886) 14 Or 125, 12 P 537.

Under a former similar statute, long acquiescence in the sale of his property by the ward after reaching his majority was equivalent to an express affirmance. *Brazee v. Schofield*, (1887) 124 Fed 495.

**FURTHER CITATIONS:** *Hobart v. Upton*, (1872) 2 Sawy 302, 12 Fed Cas 259; *Gager v. Henry*, (1878) 5 Sawy 237, 9 Fed Cas 1031; *McCulloch v. Estes*, (1891) 20 Or 349, 25 P 724; *Seidel v. Chick*, (1913) 64 Or 321, 323, 130 P 53.

**ATTY. GEN. OPINIONS:** Loan to a veteran who is a minor, 1948-50, p 57.

## 126.506

## NOTES OF DECISIONS

Plaintiff, as friend and attorney of the ward, had authority to initiate a petition for removal of defendant as guardian alleging unfaithfulness to and neglect of his trust. *Spaulding v. Miller*, (1960) 221 Or 503, 350 P2d 1073.

## 126.520

## NOTES OF DECISIONS

A settlement and discharge by a married woman five days before she was 18 was effective under former similar and other statutes fixing her majority at 18 or marriage. *Richardson's Guardianship*, (1901) 39 Or 246, 64 P 390.

**FURTHER CITATIONS:** *Spaulding v. Miller*, (1960) 221 Or 503, 350 P2d 1073.

## 126.530

**ATTY. GEN. OPINIONS:** Paying accrued monthly benefit of deceased retired public employe to guardian, 1966-68, p 599.

## 126.565

## NOTES OF DECISIONS

Under a former similar statute, the procedure of a foreign guardian in applying for a license to sell realty was held governed by the laws of this state. *Smith v. United States Fid. & Guar. Co.*, (1932) 138 Or 554, 6 P2d 212.

**ATTY. GEN. OPINIONS:** Compliance with the trust law provisions of this state, 1936-38, p 471.

## 126.616

## NOTES OF DECISIONS

Under former similar statute a conservator was in the nature of a temporary guardian having the duty of conserving the ward's property until a guardian was appointed. *In re Hampton's Estate*, (1950) 190 Or 279, 223 P2d 1039, 21 ALR 2d 873.

## 126.805 to 126.880

**LAW REVIEW CITATIONS:** 39 OLR 125, 126; 44 OLR 58.