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## Inside this Brief

- **Overview of Guardianship**
- **Establishing a Guardianship**
- **Public Guardianship in Oregon**
- **Staff and Agency Contacts**

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Background Brief on ...

# Guardianships & Oregon Public Guardian and Conservator

## Overview of Guardianship

Guardianship is a legal relationship in which a court authorizes a person or entity to make personal decisions for another person who has been found to be unable to make those decisions for him or herself to the extent that serious injury or illness is likely to occur. Appointment of a guardian or conservator for an adult most often involves individuals with serious and persistent mental health illness, intellectual and/or developmental disabilities, or seniors with dementia.

Guardianship of a child is established when no parent is available to care for and raise a child. *Guardianship of a child is not the focus of this brief.*

Guardians and conservators are both a type of fiduciary. A guardian has control over the protected person and makes medical and placement decisions, while a conservator has control over the person's property and makes financial decisions. The job of a conservator is to conserve the assets of the protected person and spend the assets to provide for the needs of the protected person. If the protected person does not have substantial assets, the guardian may manage the finances of the protected person. In Oregon, a protected person must have a conservator if the protected person has assets worth more than \$10,000. An individual may be appointed as both a guardian and a conservator.

Guardians are often family members or close friends. Professional guardians are also available. These nationally certified individuals provide guardian and conservator services for several clients and may be a good option in situations where family dynamics prevent the selection of a family member as a guardian.

A non-professional guardian is responsible for seeing that the protected person's needs are met, whether in the protected person's own home or in some form of therapeutic placement. The guardian is able to decide who has contact with the protected person and how and where the protected person will be cared for. A guardian is not necessarily a care provider. A guardian sees to it that necessary and proper care is provided to the protected person. Frequently, however, where the guardian is a family member, he or she will provide actual care in whole or in part.

Guardianship proceedings should not be initiated if there is a less restrictive manner with which to address issues surrounding the proposed protected person. Less restrictive alternatives include use of powers of attorney, advance health directives, money management programs, and case management.

### **Establishing a Guardianship**

Guardianships are created by courts. A petition for guardianship must be filed. Typically, the petitioning party is a family member who has concerns for the safety and welfare of an elderly person or developmentally disabled adult. The petition must state the statutory basis for the proposed guardianship and/or conservatorship, the authority sought by the guardian, and the identity of the proposed guardian. If a professional fiduciary has been approached by the family or other interested person, that fiduciary may file the petition.

After a petition is filed, the proposed protected person is served with the petition and is provided by law with a document that allows the person to register objections to the petition. Family members are also notified of the filing.

The threshold determination in a guardianship matter is whether the proposed protected person meets the stringent legal definition of incapacitated as stated in ORS 125.005(5). "Incapacitated" means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the

essential requirements for the person's physical health or safety. "Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, and other care without which serious physical injury or illness is likely to occur.

If no objections to the petition are received, the court finds the proposed protected person lacks capacity, and no other less restrictive alternatives are available, the court may impose the guardianship and will detail the authority of the guardian in the Guardianship Order.

If objections are received, the Court will order a hearing. A hearing before a judge is only required when objections to the petition have been filed; otherwise, a guardianship can be established without an appearance by any party before the court.

If a guardianship is found necessary, ORS 125.300 requires that "(A) guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence for the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations." Further, the person's actual mental and physical limitations should be assessed so the guardianship order can be properly tailored, including a limited guardianship.

If a guardianship is ordered by the court, the guardian has a continuing obligation to provide the protected person with the most normalized environment possible and maximize opportunities for independence and autonomy. The guardian is expected to learn as much as possible about the values of the protected person currently, and in the past, so that any decisions made by the guardian comport with those values. This responsibility is known as "substituted judgment".

After a guardianship is ordered, if the guardian determines the protected person needs to be placed in a care facility, the protected person and other "interested parties" are notified. If there is

an objection, the Court must decide after a hearing whether the placement is appropriate.

Guardians must file an annual report with the court detailing any changes in the protected person's living arrangements, employment, activities, etc., and must account for the protected person's money. House Bill 4114 (2014) allows local courts to establish a program for monitoring guardians and guardianships through specially trained volunteers. Such a program is in operation in Multnomah County.

Guardianships remain in effect until lifted or transferred by the court upon a motion, or the death of the protected person.

### **Public Guardianship in Oregon**

As our population ages, more and more adults will face incapacity issues. But many Oregonians lack appropriate family or friends to serve as guardians and do not have the financial resources to hire a professional guardian. Without a guardian, adults with disabilities or impairments may be vulnerable to homelessness, untreated medical conditions, and are targets for elder abuse in all its forms.

In 2014, Oregon established a statewide Office of the Public Guardian through Senate Bill 1553. Prior to passage of Senate Bill 1553, Oregon authorized counties to develop and fund public guardian programs. Multnomah County was the first to develop a legal guardian under that law. The Multnomah County Public Guardian and Conservator program has been the longest-running program in Oregon and has served the most clients. Other counties have attempted to create Public Guardian programs, with limited success. Serious efforts occurred in Clackamas and Washington counties, but were not sustainable. In the past 15 years, Lane County has made three substantial efforts to get county approval for a Public Guardian, but with no lasting success. Jackson County started a pilot public guardian program, but transferred it to a non-profit organization that was already providing fiduciary services.

Senate Bill 1553 established the Office of the Public Guardian and Conservator (**OPGC**) within the Office of the Long Term Care Ombudsman. The Long Term Care Ombudsman is responsible for appointing the Public Guardian, who will be responsible for building and managing the deputy public guardians. The OPGC will provide guardianship and conservatorship services to individuals who do not have appropriate family or friends to serve as guardians and who lack the resources to hire a professional guardian. The OPGC will educate the public on guardianship issues and develop models and standards for guardians. The program is tasked with utilizing trained volunteers and is authorized to contract with other professional guardians as needed. The new law requires that the Public Guardian do a need assessment on each potential client to determine eligibility for services and the appropriateness of a guardianship. If a person is eligible to receive public guardian services, the OPGC must file with any petition or pleading documents a written description of the services to be provided and the timeline for the guardianship. Courts may not appoint the OPGC as guardian for a protected person unless the OPGC has petitioned for the appointment or consents to the appointment. If the OPGC determines less restrictive alternatives are available for the proposed protected person, the OPGC can coordinate access to assistive resources for the person.

The Long Term Care Ombudsman began recruitment efforts for the position of Public Guardian in June of 2014. For the 2013-2015 biennium, the projected cost of creating and staffing the Office of the Public Guardian was \$949,000. The projected cost for the 2015-2017 biennium, when the office actually begins serving clients, is projected to increase to \$2,179,000.

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