

**Guardianship and Conservatorship Investigations:
Marion County Handbook for Court Visitors**

August 1, 2009

This Handbook was produced by
the Marion County Visitor Improvement Program

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Updates to Materials

This Handbook was based on the law in effect on August 1, 2009.

This date is reflected in the footer of each page.

Updates to this Handbook will be reflected in this copyright page and in the footers of
changed pages, so the reader may know if the pages are current.

Currently, the book has had no updates

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Introduction

The Marion County Visitor Improvement Program Committee convened in January, 2008. The general goal was to discuss ways to improve the Marion County program for court visitors. A specific goal was to ensure visitors' reports meet all statutory requirements and provide necessary and useful information to the court and the interested parties.

The Committee adopted a threefold approach to accomplish these goals: (1) create templates for visitors to use in creating their reports, (2) create a handbook that educates visitors, and (3) provide live or video training to all visitors. During this process, the Marion County Probate Court developed a process for prospective visitors to follow in applying to be on the Marion County Visitors List.

The report templates prompt each visitor to provide all information required by statute. The templates also prompt information the Probate Court deems necessary to understand the circumstances surrounding each respondent or protected person well enough for the Court to knowledgeably act on petitions for protective proceedings.

The *Handbook* educates visitors about the statutory requirements in protective proceedings and other issues visitors frequently face. These include legal and care issues that often arise, approaches for assessment and interviewing respondents and others, and issues that can arise during hearings.

In developing the *Handbook*, the Committee identified areas in which visitors could benefit from education and then Committee members drafted various chapters of the *Handbook*. All members reviewed and commented on the draft.

Committee members included the following people:

The Honorable Claudia M. Burton, Marion County Circuit Court Judge
The Honorable James L. Murch, Marion County Circuit Court Judge pro tem
Jennifer Todd, attorney and professor, Willamette College of Law, *Handbook* editor
Heather O. Gilmore, attorney and Chair of Committee
John Beckfield, attorney
David L. Carlson, attorney
Susan Cook, attorney
Pat Duke, LCSW, Marion County Court Visitor
Robert Dorszynski, attorney
Gregory Hansen, attorney

Most of the requirements for visitors' interviews and reports are governed by statute. However, some practices are governed by court practice and the local Presiding Judge's order. This *Handbook* reflects both the statutes and Marion County practice.

These are general recommendations. In specific cases, visitors might need to take different steps, such as using a different approach in interviewing, or providing information that is not described.

As with any publication, this *Handbook* is subject to change as statutes and case law change. The copyright page reflects the initial date of publication and the date of any

amendments. The footers of each page reflect the date of publication or amendment of that page.

To obtain the most recent version of this *Handbook*, visit the court visitor portion of website for the Marion County Courts:

<http://courts.oregon.gov/Marion/Services/Visitors.page?>

The most recent version of the Oregon Revised Statutes can be viewed at

<http://www.leg.state.or.us/ors/>

This *Handbook* is provided in conjunction with video training for Marion County court visitors. For instructions about how to obtain the training DVD, see the Court's webpage or contact the probate department.

The Committee thanks Willamette University College of Law for providing space, equipment, and technical expertise for recording and reproducing the training video.

Marion County Visitor Improvement Program Committee

Chapter 1

Statutory Definitions and Requirements

All aspects of guardianships and conservatorships are governed by Oregon statutes. These statutes contain requirements designed to protect the constitutional rights of people subject to these proceedings. The court visitor is an important part of this statutory scheme. For court visitors to effectively advise the Court (and support the constitutional protections of respondents), visitors must understand and follow the relevant statutes.

This section includes text quoted from Oregon Revised Statutes (“ORS”) that relate to guardianships, conservatorships, visitors, and so on. All text of statutes is quoted and the source is provided. Bold headings are included to identify main topics. The statutory text is bolded in places to identify defined terms or to point out requirements that are especially important for visitors.

1. Basic terminology for protective proceedings.

1.1 “**Visitor**’ means a person appointed by the court under ORS 125.150 for the purpose of interviewing and evaluating a respondent or protected person.” ORS 125.005(11).

1.2 “**Respondent**’ means a person for whom entry of a protective order is sought in a petition filed under ORS 125.055.” ORS 125.005(10).

1.3 “**Protected person**’ means a person for whom a protective order has been entered.” ORS 125.005(7).

1.4 “**Protective order**’ means an order of a court appointing a fiduciary or any other order of the court entered for the purpose of protecting the person or estate of a respondent or protected person.” ORS 125.005(8).

1.5 “**Protective proceeding**’ means a proceeding under ORS Chapter 125. ORS 125.005(9). This includes any proceeding seeking a protective order.

1.6 “**Fiduciary**’ means a guardian or conservator appointed under the provisions of this chapter or any other person appointed by a court to assume duties with respect to a protected person under the provisions of this chapter.” ORS 125.005(2).

2. Guardianship (relevant statutes and terms).

2.1 Requirements for appointment of a guardian. “After determining that conditions for the appointment of a guardian have been established, the court may appoint a guardian as requested if the court determines by clear and convincing evidence that:”

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

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

“(c) The nominated person is both qualified and suitable, and is willing to serve.” ORS 125.305(1).

2.2 “Incapacitated’ means a condition in which a person’s ability to receive and evaluate information or 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 and safety.” ORS 125.005(5).

2.3 “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.” ORS 125.005(5).

2.4 Guardianship must be necessary. “A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person 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).

2.5 Least restrictive alternative. “The court shall make a guardianship order that is no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the person. In making the order the court shall consider the information in the petition, the report of the visitor, the report of any physician or psychologist who has examined the respondent, if there was an examination and the evidence presented at any hearing.” ORS 125.305(2).

3. Rights of protected person in guardianship.

3.1 “An adult protected person for whom a guardian has been appointed is not presumed to be incompetent.” ORS 125.300(2).

3.2 “A protected person 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. Rights retained by the person include but are not limited to the right to contact and retain counsel and to have access to personal records.” ORS 125.300(3).

4. Conservatorship (relevant statutes and terms).

4.1 Requirements for appointment of a conservator. “Upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by clear and convincing evidence that the respondent is a minor or **financially incapable**, and that the respondent has money or property that requires management or protection.” ORS 125.400.

4.2 “Financially incapable’ means a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance.” ORS 125.005(3).

4.3 “Manage financial resources’ means those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.” ORS 125.005(3).

4.4 Power of conservator over property of protected person. “A conservator shall take possession of all the property of substantial value of the protected person, and of rents, income, issues and profits from those properties whether accruing before or after the appointment of the conservator. The conservator shall also take possession of all proceeds from the sale, mortgage, lease or other disposition of property of the protected person. **The conservator may permit the protected person to retain possession and control of property and funds for living requirements as appropriate to the needs and capacities of the protected person.** The title to all property of the protected person is in the protected person and not in the conservator.” ORS 125.420.

5. Considerations in appointing fiduciaries.

5.1 Most suitable person. “The court shall appoint the most suitable person who is willing to serve as fiduciary after giving consideration to the specific circumstances of the respondent, any stated desire of the respondent, the relationship by blood or marriage of the person nominated to be fiduciary to the respondent, any preference expressed by a parent of the respondent, the estate of the respondent and any impact on ease of administration that may result from the appointment.” ORS 125.200.

5.2 Persons not qualified to act as fiduciary. “A person is not qualified to serve as a fiduciary if the person is incapacitated, financially incapable, a minor or is acting as a health care provider, as defined in ORS 127.505, for the protected person.” ORS 125.205.

5.3 Comments about preferences in appointing fiduciaries

5.3.1 The statute describes factors the court should “give consideration to.” These factors do not create a priority. For example, relationship by blood or marriage does not create a priority.

5.3.2 “Any preference expressed by a parent of the respondent” may apply when the respondent is a minor child or is a developmentally disabled adult respondent.

5.3.3 The court can only appoint a fiduciary who has been formally nominated through a petition, amended petition, or a cross petition to appoint a guardian or conservator or both. *See Spady v. Hawkins*, 155 Or. App. 454, 463-64, 963 P.2d 125 (1998). If the most suitable guardian is a person other than the person the petition nominates, it is up to the parties or their counsel to file the appropriate pleadings.

6. Temporary fiduciaries.

6.1 Temporary guardian. “A temporary fiduciary who will exercise the powers of a guardian may be appointed by the court if the court makes a specific finding by

clear and convincing evidence that the respondent is **incapacitated** or a minor, that there is an **immediate and serious danger** to the life or health of the respondent, and that the welfare of the respondent **requires immediate action.**” ORS 125.600(1) (emphasis added).

6.2 Temporary conservator. “A temporary fiduciary who will exercise the powers of a conservator may be appointed by the court if the court makes a specific finding by clear and convincing evidence that the respondent is financially incapable or a minor, that there is an immediate and serious danger to the estate of the respondent, and that the welfare of the respondent requires immediate action.” ORS 125.600(2).

6.3 Limited time period. “A temporary fiduciary may be appointed only for a specific purpose and only for a specific period of time. The period of time may not exceed 30 days. The court may extend the period of the temporary fiduciary’s authority for an additional period not to exceed 30 days upon motion and good cause shown. The court may terminate the authority of a temporary fiduciary at any time.” ORS 125.600(3).

7. Appointment of visitors and timing issues in general.

7.1 Visitor for petition to appoint a “permanent”¹ fiduciary and timing of report. “The court shall appoint a visitor upon the filing of a petition in a protective proceeding that seeks the appointment of a guardian for an adult respondent or temporary fiduciary who will exercise the powers of a guardian for an adult respondent. The court may appoint a visitor in any other protective proceeding” ORS 125.150(1).

“A visitor shall file a report in writing with the court within 15 days after the visitor is appointed. The court may grant additional time for filing the visitor's report upon a showing of necessity and good cause.” ORS 125.155(1). **Note:** “15 days” here refers to 15 calendar days.

7.2 Visitor for petition to appoint a temporary fiduciary and timing of interview and report. “The court **shall** appoint a visitor if the petition seeks appointment of a temporary guardian. A visitor **may** be appointed by the court if a petition seeks appointment of a temporary conservator. **Within three days after the appointment of the temporary fiduciary, the visitor shall conduct an interview of the respondent. The visitor shall report to the court within five days after the appointment of a temporary fiduciary is made.** The report of the visitor shall be limited to the conditions alleged to support the appointment of a temporary fiduciary.” ORS 125.605(4) (emphasis added). **Note:** “Three days” and “five days” here refer to days the court is open as described in ORCP 10A (quoted in 7.4 below).

¹ Oregon statutes do not use the term “permanent” guardianship, because a guardianship is always subject to termination. Lawyers sometimes use this term to distinguish between a regular guardianship and a temporary guardianship.

7.3 Objection to appointment of temporary fiduciary and timing of hearing. “If objections are made to the appointment of a temporary fiduciary or to the extension of a temporary fiduciary's authority under ORS 125.600(3), the court shall hear the objections within **two judicial days** after the date on which the objections are filed.” ORS 125.605(5). **Note:** “Judicial days” here means days in which Marion County courts are open to the public.

7.4 Computing Time. Oregon Rule of Civil Procedure (“ORCP”) 10A (emphasis added)

In computing any period of time prescribed or allowed by these rules, by the local rules of any court or by order of court, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. If the period so computed relates to serving a public officer or filing a document at a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which service is to be made or the document is to be filed, in which event the period runs until the close of office hours on the next day the office is open for business. **When the period of time prescribed or allowed . . . is less than 7 days, intermediate Saturdays and legal holidays, including Sundays, shall be excluded in the computation.** As used in this rule, “legal holiday” means legal holiday as defined in ORS 187.010 and 187.020. . . .

8. Appointment of visitors.²

The following is the text of ORS 125.150.

- (1) The court shall appoint a visitor upon the filing of a petition in a protective proceeding that seeks the appointment of a guardian for an adult respondent or temporary fiduciary who will exercise the powers of a guardian for an adult respondent. The court may appoint a visitor in any other protective proceeding
- (2) A visitor may be an officer, employee or special appointee of the court. The person appointed may not have any personal interest in the proceedings. The person appointed must have training or expertise adequate to allow the person to appropriately evaluate the functional capacity and

² This statute includes references to “each petitioner and the person to be adopted under ORS 109.329” immediately after references to “the respondent or protected person.” These references to adoption have been omitted to save a little space and facilitate reading through the statute for the purposes of this handbook.

needs of a respondent or protected person The court³ shall provide a copy of the petition and other filings in the proceedings that may be of assistance to the visitor.

(3) A visitor appointed by the court under this section shall interview a person nominated or appointed as fiduciary and the respondent or protected person . . . personally at the place where the respondent or protected person . . . is located.

(4) Subject to any law relating to confidentiality, the visitor may interview any physician or psychologist who has examined the respondent or protected person . . . , the person or officer of the institution having the care, custody or control of the respondent or protected person . . . , and any other person who may have relevant information.

(5) If requested by a visitor under subsection (4) of this section, a physician or psychologist who has examined the respondent or protected person . . . may, with patient authorization or in response to a court order in accordance with ORCP 44 or a subpoena under ORCP 55, provide any relevant information the physician or psychologist has regarding the respondent or protected person

(6) A visitor shall determine whether it appears that the respondent or protected person . . . is able to attend the hearing and, if able to attend, whether the respondent or protected person . . . is willing to attend the hearing.

(7) If a petition is filed seeking the appointment of a guardian for an adult respondent, a visitor shall investigate the following matters:

- (a) The inability of the respondent to provide for the needs of the respondent with respect to physical health, food, clothing and shelter;
- (b) The location of the respondent's residence and the ability of the respondent to live in the residence while under guardianship;
- (c) Alternatives to guardianship considered by the petitioner and reasons why those alternatives are not available;
- (d) Health or social services provided to the respondent during the year preceding the filing of the petition, when the petitioner has information as to those services;
- (e) The inability of the respondent to resist fraud or undue influence; and
- (f) Whether the respondent's inability to provide for the needs of the respondent is an isolated incident of negligence or improvidence, or whether a pattern exists.

³ In Marion County, the Court expects the Petitioner's attorney to provide this information to the visitor.

- (8) If a petition is filed seeking the appointment of a fiduciary, a visitor shall determine whether the respondent objects to:
- (a) The appointment of a fiduciary; and
 - (b) The nominated fiduciary or prefers another person to act as fiduciary.
- (9) If a petition is filed seeking the appointment of a conservator in addition to the appointment of a guardian, a visitor shall investigate whether the respondent is financially incapable. The visitor shall interview the person nominated to act as conservator and shall interview the respondent personally at the place where the respondent is located.
- (10) A visitor shall determine whether the respondent or protected person . . . wishes to be represented by counsel and, if so, whether the respondent or protected person . . . has retained counsel and, if not, the name of an attorney the respondent or protected person . . . wishes to retain.
- (11) If the respondent or protected person . . . has not retained counsel, a visitor shall determine whether the respondent or protected person . . . desires the court to appoint counsel.
- (12) If the respondent or protected person . . . does not plan to retain counsel and has not requested the appointment of counsel by the court, a visitor shall determine whether the appointment of counsel would help to resolve the matter and whether appointment of counsel is necessary to protect the interests of the respondent or protected person

9. Visitor's report.

The following is the text of ORS 125.155.

- (1) A visitor shall file a report in writing with the court within 15 days after the visitor is appointed. The court may grant additional time for filing the visitor's report upon a showing of necessity and good cause.
- (2) The report of the visitor appointed at the time a petition is filed requesting the appointment of a fiduciary must include the following:
- (a) A statement of information gathered by the visitor relating to the correctness of the allegations contained in the petition, whether the appointment of a fiduciary is necessary and whether the nominated fiduciary is qualified and willing to serve.
 - (b) The name, address and telephone number of each person interviewed for the report, the date of the interview and the relationship of the person interviewed to the respondent.
 - (c) The recommendations of the visitor with regard to the suitability of the nominated fiduciary, any limitations that should be imposed on the fiduciary and the need for further evaluation.

- (d) The recommendation of the visitor on any issue the court specifically asks the visitor to investigate regarding the propriety of appointing a fiduciary for the respondent.
- (e) The visitor's determinations required by ORS 125.150.
- (f) Any express communication made by the respondent relating to the desires of the respondent regarding representation by counsel.
- (g) Any express communication made by the respondent with respect to whether the respondent is willing to attend a hearing, wishes to contest the appointment of a fiduciary, objects to the nominated fiduciary or prefers another person act as fiduciary.

10. Qualifications of Visitors.

The following is the text of ORS 125.165.

- (1) A presiding judge shall by court order⁴ establish:
 - (a) Qualifications for persons serving as visitors for the court, in addition to those qualifications established by this section; and
 - (b) Standards and procedures to be used by visitors in the performance of their duties.
- (2) A visitor may be an employee of the court. The visitor may not have any personal interest in the respondent or protected person, or any pecuniary or financial interest in the proceedings, if those interests could compromise or otherwise affect the decisions of the visitor. A visitor may not receive compensation for services rendered as a fiduciary for two or more protected persons at the same time who are not related to the fiduciary.
- (3) A visitor must:
 - (a) Have the training and expertise adequate to allow the person to conduct the interviews and make the recommendations required under ORS 125.150 and 125.155, to communicate with, assess and interact with respondents and protected persons, and to perform the other duties required of a visitor; and
 - (b) Demonstrate sufficient knowledge of the law so as to be able to inform a respondent or protected person of the nature and effect of a protective proceeding, to inform a respondent or protected person of the rights of the respondent or protected person in the protective proceeding, to answer the questions of a respondent or protected person and to inform fiduciaries concerning their powers and duties.

⁴ The Marion County Order is reproduced in the Appendix.

Chapter 2

Qualifications and Training of Visitors

Because of the important role the court visitor plays in protective proceedings, statutes require court visitors to have qualifications and training that enable them to make effective reports and recommendations to the Court. Following is a summary of the necessary qualifications and training.

1. Training and expertise.

A visitor must have training or expertise adequate to allow the visitor to take the following actions:

- 1.1 Conduct the interviews and make the recommendations required by ORS 125.150 and 125.155;
- 1.2 Communicate with, assess, and interact with respondents and protected persons;
- 1.3 Evaluate the functional capacity and needs of respondents and protected persons as appropriate for the circumstances. For example, this may include:
 - 1.3.1 Training in the Folstein Mini-Mental Status Exam (“MMSE”) or other relevant assessment tool;
 - 1.3.2 Knowledge of activities of daily living (“ADLs”) and instrumental activities of daily living (“IADLs”) and how to assess these; and
 - 1.3.3 Familiarity with various levels of care.
- 1.4 If the visitor uses an assessment tool, the visitor needs to be prepared to explain the tool, how it is administered, the significance of any scoring, and the training the visitor received in learning to use the tool.
- 1.5 **A visitor should only use assessment tools for which the visitor is appropriately qualified.**

2. Knowledge of the law.

- 2.1 A visitor must know enough about the law related to protective proceedings to be able to take the following actions:
 - 2.1.1 Inform respondents and protected persons about the nature and effect of a protective order
 - 2.1.2 Inform respondents and protected persons of their rights in the protective proceeding,
 - 2.1.3 Answer questions by respondents and protected persons, and
 - 2.1.4 Inform prospective fiduciaries about their powers and duties.
- 2.2 A visitor should only provide information about the law and applicable statutes. A visitor must not give legal advice. For example, when a respondent asks if he or she should file a formal objection, a response that provides information about the law

would be “you have the right to do so if you want,” and a response that provides legal advice would be “yes, you should file an objection.”

3. Qualifications.

The visitor must have the following qualifications:

3.1 A license in good standing in any state as a licensed professional counselor, licensed marriage and family therapist, licensed clinical social worker, registered nurse, or attorney, or

3.2 A post-graduate degree (e.g., MSW, MSN, JD, etc.) and at least two years of relevant experience. The Probate Judge or Presiding Judge may determine whether the proposed visitor’s experience is sufficient.

4. Training.

Any person wishing to be approved as a court visitor must successfully complete any training required by order of the Marion County Presiding Judge.

Chapter 3 Visitor's Role and Mechanics of Appointment

1. Appointment of visitor and role of the attorney.

In Marion County, the attorney for the Petitioner arranges the appointment of the court visitor.

1.1 Whenever an attorney seeks appointment of a guardian or temporary guardian for an adult respondent, appointment of a visitor is required by ORS 125.150(1).

1.2 The visitor is the **Court's visitor** and does not work for the attorney.

1.3 The Court maintains a list of approved visitors. Attorneys are free to select from that list in arranging for a visitor.

1.4 Before asking the Court to appoint a particular visitor, the attorney should call the visitor, confirm that the visitor is available for the time frame for the requested appointment, provide contact data, and discuss fees. An attorney should not ask the Court for the appointment of a visitor unless the attorney has had such a conversation with the proposed visitor.

1.5 When arranging the appointment of a visitor in a temporary protective proceeding, the attorney and the visitor must be sensitive to the need for the visitor to appear at a hearing within a short time of any objection being filed.

1.6 Once the petition is filed, the attorney should **immediately** fax to the visitor or otherwise arrange for the visitor to obtain the following information:

- a copy of the signed order appointing the visitor,
- the petition,
- any affidavits or exhibits that accompanied the petition to the visitor,
- contact information for key people, including the telephone numbers for the Respondent or Protected Person and the nominated fiduciary.

1.7 The Court's practice is that the same visitor stays with a case when possible until the Court takes final action on the petition. In other words, an attorney or party cannot ask for a new visitor just because the attorney or party disagrees with the findings in the visitor's report.

1.8 The visitor must be present at the hearing on any objections to the appointment of a fiduciary. The Petitioner's attorney should notify the visitor of the proposed hearing date and seek to include the visitor in any scheduling.

2. Costs for the visitor's services.

2.1 By deciding to file a petition to appoint a fiduciary, the Petitioner becomes primarily liable for the cost for the visitor's services.

2.2 In addition to fees for interviews and preparing the report, the visitor is entitled to reasonable compensation for attending any hearing on objections to the appointment of a fiduciary.

2.3 If the Court does not create a guardianship or conservatorship, the Petitioner pays the cost of the visitor's services. Therefore, the attorney for the Petitioner may want the Petitioner to provide a retainer that covers this cost.

2.4 If a fiduciary is appointed, the cost of the visitor's services may be paid from the Protected Person's funds. However, payment from the Protected Person's funds must not occur until after the Court appoints a fiduciary.

2.5 "Prior court approval is required before the payment [from the funds of the Protected Person] of the fees of any visitor . . . if the fees are incurred for services relating to proceedings arising out of the filing of an objection to a petition or motion." ORS 125.095(2).

3. Role of the visitor.

3.1 A visitor must not have any personal interest in the proceedings. The visitor must not have any personal interest in the Respondent or Protected Person or any party involved in the proceeding, or any pecuniary or financial interest in the proceeding, if those interests could compromise or otherwise affect the decisions of the visitor. If the visitor has any personal interest in the proceeding, the visitor shall not accept the appointment as visitor. If the visitor has any knowledge of the parties or the circumstances surrounding the Petition, the visitor should (1) disclose this to the attorney for the Petitioner before accepting the assignment to serve as visitor and (2) disclose this in the visitor's report. If, after appointment as visitor, the visitor learns of any potential conflict of interest or discovers the visitor has prior knowledge of the parties or circumstances, the visitor should immediately report that information to the Court and disclose that information in the visitor's report.

3.2 The visitor **must** personally interview the Respondent or Protected Person at the place where the Respondent or Protected Person is located. ORS 125.150(3). It is good practice to interview the Respondent or Protected Person at least once without any other people present to minimize possible undue influence and get an accurate picture of the person's level of functioning. The visitor must personally interview the nominated or appointed fiduciary. ORS 125.150(3).

3.3 The visitor **may** interview the Respondent's physician or psychologist, the person (or facility representative) having the care, custody, or control of the Respondent, and any other person who may have relevant information.

3.4 The following statutes about **information from physicians and psychologists** are included in ORS 125.150, regarding the appointment of visitors:

(4) Subject to any law relating to confidentiality, the visitor may interview any physician or psychologist who has examined the respondent or protected person . . . , the person or officer of the institution having the care, custody or control of the respondent or protected person . . . , and any other person who may have relevant information.

(5) If requested by a visitor under subsection (4) of this section, a physician or psychologist who has examined the respondent or protected person . . . may, with patient authorization or in response to a

court order in accordance with ORCP 44 or a subpoena under ORCP 55, provide any relevant information the physician or psychologist has regarding the respondent or protected person

3.5 The following statute, ORS 125.300(3), describes the **rights of a protected person**:

A protected person 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. Rights retained by the person include but are not limited to the right to contact and retain counsel and to have access to personal records.

3.6 The visitor functions as the “eyes and ears” of the Court, and paints a picture of the Respondent’s situation in the visitor’s report. In the visitor’s report, the visitor needs to describe the following:

- 3.6.1 Background information.
- 3.6.2 What has led up to the need for the proposed guardianship/conservatorship.
- 3.6.3 Current functioning of the Respondent according to the visitor’s observation, assessment, and interview.
- 3.6.4 Assessment of cognitive functioning (by use of assessment tools such as the MMSE that the visitor is properly qualified to use) and ability to manage ADLs.
- 3.6.5 Relevant information and input from interested parties.

3.7 The visitor must be **present at the hearing** on any objection to the appointment of a fiduciary. The Petitioner’s attorney should notify the visitor of the proposed hearing date and seek to include the visitor in any scheduling. The Court will provide the visitor with a formal notice of the hearing. The visitor is entitled to reasonable compensation for attending the hearing.

3.8 When accepting the appointment as visitor in a temporary protective proceeding, the visitor must be sensitive to the need to appear at a hearing within a short time of any objection being filed.

3.9 The visitor is not expected to function as an attorney, physician, accountant, case manager, or mediator. The visitor’s role is to provide information to the Court. If the visitor thinks information might be useful to the court, but is unsure whether to include it in the report, the visitor most likely should include it in the report.

Chapter 4

Visitor’s Report—Statutory Requirements

Statutes include requirements for the timing of filing visitor’s reports and for the contents of the reports. The visitor should be sure to meet the statutory requirements. The templates for the visitor’s reports address all of the statutory requirements.

1. Timelines for filing visitor’s reports.

Statutes provide timelines in which the visitor must submit the visitor’s report to the Court, and, for temporary guardianships, interview the Respondent.

1.1 Temporary guardianship.

1.1.1 In a temporary guardianship proceeding, the visitor must

- (1) **interview** the Respondent or Protected Person within **3 days** of the appointment of the temporary guardian and
- (2) **submit the visitor’s report** to the Court within **5 days** of the appointment of the temporary guardian. ORS 125.605(4).

1.1.2 For a temporary guardianship, in calculating the days for the interview and submitting the report, “intermediate Saturdays and legal holidays, including Sundays, shall be excluded in the computation.” ORCP 10A. (This is because the time periods are less than seven days.)

1.2 “Permanent” guardianship.¹

1.2.1 The visitor’s report in a “permanent” guardianship proceeding must be submitted to the Court within **15 days** of the appointment of the visitor. ORS 125.155(1).

1.2.2 For a “permanent” guardianship, in calculating days for submitting the report, the day of the appointment of the visitor is not included. In calculating the days, the last day of the period is included, “unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday.” ORCP 10A.

1.3 Extension of time.

1.3.1 The Court may grant additional time for filing the visitor’s report upon a showing of necessity and good cause. ORS 125.155(1). The visitor may submit a “Motion for **Extension of Time** to File Visitor’s Report and Order” or the attorney for the Petitioner may do so.

1.3.2 Attached in the Appendix is a sample of a Motion for Extension of Time to File Visitor’s Report and Order Granting Extension.

¹ Oregon statutes do not use the term “permanent” guardianship, because a guardianship is always subject to termination. Lawyers sometimes use this term to distinguish between a regular guardianship and a temporary guardianship.

2. Contents of the visitor's report.

Statutes require the visitor's report to include several items of information and conclusions about the Respondent, the nominated fiduciary, and the Respondent's care. This information is described below and is also required in the visitor's report templates.

2.1 Reference to the person. The report should use the term "Respondent" to refer to the person who is the subject of the protective proceeding. (The term "protected person" should not be used until after the Court has entered a protective order.)

2.2 Information about interviews. The report should include the following information about interviews:

- 2.2.1 The name, address, and telephone number of each person interviewed;
- 2.2.2 The date of the interview;
- 2.2.3 The relationship of the person interviewed to the Respondent or Protected Person.

ORS 125.155(2)(b).

2.3 Wishes of the Respondent. The report should contain a determination (including a description of express communications made by the Respondent) regarding whether the Respondent:

- 2.3.1 Wishes to contest the **appointment** of a fiduciary;
- 2.3.2 Objects to the **nominated** fiduciary;
- 2.3.3 Prefers **another person** act as fiduciary (if so, the visitor should identify the person and provide contact information);
- 2.3.4 Is willing to attend a hearing (and appears physically able to do so);
- 2.3.5 Wishes to be represented by counsel, and if so, has retained counsel, or if not, has the name of a lawyer the person wishes to retain or wants the court to appoint.

ORS 125.150(8), (10), (11); ORS 125.155(2)(f), (2)(g).

2.4 Need for counsel. The report should describe any belief by the visitor that the appointment of counsel by the Court for the Respondent is necessary to protect the interests of the Respondent or would help to resolve the matter. ORS 125.150(12).

2.5 Information about the Respondent's situation. The report should include the following information:

- 2.5.1 The location of the Respondent's residence and the ability of the Respondent to live in the residence while under guardianship. ORS 125.150(7)(b).
- 2.5.2 Alternatives to guardianship considered by the Petitioner, and reasons why those alternatives are not available. ORS 125.150(7)(c).
- 2.5.3 If visitor believes alternatives to guardianship are available, the visitor's report should say so and explain what those are and why they would meet the respondent's needs.

2.5.4 Health or social services provided to the Respondent during the year preceding the filing of the Petition (when the Petitioner has information as to those services). ORS 125.150(7)(d).

2.6 Abilities of the Respondent. The report should include the visitor's conclusions about certain abilities of the Respondent.

2.6.1 The ability or inability of the Respondent to provide for his or her needs for physical health, food, clothing, and shelter. ORS 125.150(7)(a).

2.6.2 Whether the Respondent's inability to provide for his or her needs is an isolated incident of negligence or improvidence, or whether a pattern exists. ORS 125.150(7)(f).

2.6.3 The ability or inability of the Respondent to resist fraud or undue influence. ORS 125.150(7)(e).

2.7 Fraud and undue influence. The factors of undue influence include a confidential relationship and one or more of the following suspect circumstances:

2.7.1 Haste or secrecy in the preparation of documents or plan

2.7.2 Seclusion of or restricted access to the person

2.7.3 An unexplained change in the person's attitude toward those he had previously expressed affection for

2.7.4 Lack of independent or objective advice

2.7.5 Participation by the alleged perpetrator in the preparation of the document

2.7.6 A discrepancy or lack of continuity from prior plan

2.7.7 Unnatural or unjust gift or grant of authority

2.7.8 The mental or physical condition of the person making him/her susceptible to influence.

In re Reddaway's Estate, 214 Or. 410, 421-426, 329 P.2d 886 (1958).

A "confidential relationship" is one of great trust. This could be a mother and son, husband and wife, or even a personal relationship with a neighbor, caregiver, or business associate.

Here is an example of **possible** undue influence by a care giver: A dependent elder person with three children signed over his property to his caregiver of two years rather than preserving his property for his children.

2.8 Overall conclusions. The report should include the visitor's conclusions about the need for a fiduciary and any limitations. The report should include statements about the following:

2.8.1 The correctness of the allegations contained in the Petition, including a statement as to whether the person is incapacitated and the basis for that conclusion. ORS 125.155(2)(a).

2.8.2 Whether the appointment of a fiduciary is necessary. ORS 125.155(2)(a).

2.8.3 Whether the nominated fiduciary is qualified, suitable, and willing to serve. ORS 125.155(2)(a).

2.8.4 Whether any limitations should be imposed on the nominated fiduciary and the need for further evaluation. ORS 125.155(2)(c).

2.8.5 Any other recommendations on any issue the Court has specifically asked the visitor to investigate regarding the propriety of appointing a fiduciary for the Respondent. ORS 125.155(2)(d).

2.9 Conservatorship. In addition to the other relevant requirements for a visitor's report, when the Petition requests creation of a conservatorship, the visitor's report must address (on the basis of clear and convincing evidence) whether the Respondent is financially incapable. ORS 125.150(9).

2.10 Temporary guardianship. When the Petition requests creation of a temporary guardianship, the visitor's report must address (on the basis of clear and convincing evidence) whether:

2.10.1 The Respondent is incapacitated.

2.10.2 There is an immediate and serious danger to the life or health of the Respondent.

2.10.3 The welfare of the Respondent requires immediate action.

ORS 125.600(1).

Even though a person may be in a setting where his or her needs are being cared for, immediate action may still be needed. For example, the person could be in a hospital, but need to be placed in a care facility and be unable to consent to placement. Also, the person could be in a secure environment, but exhibit exit-seeking behavior, and no one would have authority to require the person to remain in the facility. Further, the person might need an emergency medical procedure that requires consent, but the person is unable to consent.

2.11 Temporary conservatorship. In addition to the other relevant requirements for a visitor's report, when the Petition requests creation of a temporary conservatorship, the visitor's report must address (on the basis of clear and convincing evidence) whether:

2.11.1 The Respondent is financially incapable.

2.11.2 There is an immediate and serious danger to the Respondent's estate.

2.11.3 The welfare of the Respondent requires immediate action.

ORS 125.600(2).

Chapter 5

Proof of Need for a Guardian

For a guardian to be warranted, the Court must find that the following five things are proved by clear and convincing evidence:

- (1) The Respondent has a condition that impairs the Respondent. ORS 125.305(1)(a), 125.005(5).
- (2) The impairment interferes with the Respondent's ability to make or communicate decisions. ORS 125.305(1)(a), 125.005(5).
- (3) The inability to make or communicate decisions currently prevents the Respondent from meeting his or her basic health and safety needs. ORS 125.305(1)(a), 125.005(5).
- (4) This failure to meet health and safety needs means serious physical injury or illness is likely to occur. ORS 125.305(1)(a), 125.005(5).
- (5) The appointment of a guardian is necessary to provide continuing care and supervision of the Respondent. ORS 125.305(1)(b).

Each of these five requirements is described below.

1. Condition that creates impairment.

To be legally incapacitated, a person must suffer from a condition that impairs the person's ability to receive and evaluate information or to communicate decisions. This part of the definition is generally proved through medical evidence. Typical impairing conditions include dementia, developmental disability, mental health problems, and other impairments. However, a medically diagnosed impairment alone is not necessarily "incapacity" as that term is defined by statute.

1.1 Dementia. The most common medical diagnosis for people who are impaired enough to need guardianship involves some form of dementia (listed below.) (Dementia is characterized by multiple cognitive deficits that include impairment in memory and frequently also include impairment in orientation, insight, judgment, and the ability to reason and solve problems.) This is by far the largest group of impaired persons who are considered for guardianship. Common types of dementia include the following:

- 1.1.1 Dementia of the Alzheimer's Type.
- 1.1.2 Vascular dementia (also known as multi-infarct dementia.)
- 1.1.3 Dementia due to other medical conditions (e.g., HIV disease, head trauma, Parkinson's disease, Huntington's disease, etc.)
- 1.1.4 Substance-induced persisting dementia (i.e., due to abuse of alcohol/drugs, medication abuse, or toxin exposure).
- 1.1.5 Dementia due to multiple etiologies.

1.2 MR/DD. People diagnosed with or mental retardation or developmental disability ("MR/DD") are in the next most common group of people requiring guardianship, although it is substantially smaller than the dementia group. People

are legally considered to be adults and capable of their own decision-making when they reach age 18. Guardianship for a person with MR/DD problems is typically sought by the person's parents at the age of 18. Both IQ and adaptive functioning may be relevant here.

1.3 Mental health problems. People with mental health problems are the smallest group of persons for whom guardianship may be indicated. The most common mental health diagnoses include schizophrenia and bipolar disorder (manic-depressive illness.) People with these two diagnoses frequently can manage adequately when on medication, but frequently do not want to take medication. Because they are generally younger and mobile, this group presents the greatest challenge for fiduciaries and visitors.

1.4 Other impairments. ORS 125.005(3), which defines "financially incapable," also lists the following impairments as being relevant to the possible need for conservatorship: physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance.

2. Impairment in making and communicating decisions.

For a person to require a guardian, evidence must show that the person's impairment prevents the person from understanding or rationally processing information or communicating decisions. If a person makes unwise (or even stupid) decisions, this is not evidence of impairment as long as the decision-making process is reasonable and the person is able to understand the consequences of those decisions. For example, people have the right to refuse medical treatment, even against physician orders, if they understand the consequences of the refusal.

Consider patterns in the person's functioning over time. For example, a demented person may be having a "good day" when seen by the visitor but may have a verified history of "bad days" that have involved wandering behaviors, pots boiling dry on the stove, inability to take medications as prescribed, and so on.

A protective proceeding (guardianship or conservatorship or both) may be initiated due to a person's condition or disease that causes intermittent impairments. The person's inability to make and communicate decisions consistently may be the basis of the impairment. Examples of intermittent impairments may include alcoholism, drug addiction, certain types of dementia, and mental illness.

3. Lack of present ability to meet basic needs.

The impairment must be **presently** preventing the Respondent from being able to provide for the Respondent's own basic needs for health and safety. The threat must exist now—guardianship cannot be obtained to prevent future problems that may be foreseen or expected.

That a person requires assistance in meeting basic needs is not evidence of inability to meet those needs, so long as the assistance remains available to the person. For example, a stroke victim may need physical help to get out of a chair, but may still be cognitively able to arrange for caregivers to provide the needed help.

4. Serious physical injury or illness is likely to occur.

Medical information showing mental or cognitive impairment by itself is not sufficient to warrant guardianship—the impairment-caused inability to provide for basic needs must be severe enough that **serious harm is likely to result**. For example, if a person is unable to remember to take medications as prescribed, but the only medication being prescribed is Tums, no threat of serious harm exists, so no basis for guardianship exists.

In deciding whether serious harm is likely to result, focus on functional assessment. Functional assessments consider activities of daily living (“ADLs”), instrumental activities of daily living (“IADLs”), and mental status evaluation.

4.1 Assessment of activities of daily living. A functional assessment looks at how the person performs various activities of daily living based on observation of and interaction with the person in the person’s everyday living situation. ADLs include transfers, ambulation, bathing and grooming, dressing, eating, toileting, and medication management. IADLs include higher-level activities and abilities necessary to function in the community. The visitor is not required to personally conduct an extensive functional assessment of the Respondent, but does need to address the elements of a functional assessment in the visitor’s report. The visitor may also want to suggest or recommend that a formal evaluation such as a Kohlman Evaluation of Living Skills (“KELS”) be done if there is a particular issue that needs to be addressed in detail.

4.2 Mental status evaluation. A functional assessment also includes a mental status evaluation to examine how any cognitive deficits may impact the person’s daily functioning and ability to manage his or her ADLs and IADLs.

The **Folstein Mini-Mental Status Exam** (“MMSE”) is one example of an evaluation tool. The MMSE is a brief test of several cognitive functions, including orientation, instantaneous recall, short-term memory, ability to perform serial subtractions or reverse spelling, constructional capacities, and the use of language. Before using the Folstein Mini-Mental Status Exam, the visitor should be properly trained. The visitor should be prepared to explain that training on the witness stand if asked.

5. Practical necessity of a fiduciary.

Even if the impairment-caused inability to provide for basic needs is severe enough that serious harm is likely to result, there must be some **practical necessity** for a fiduciary. If a system is in place that adequately meets the care needs of the Respondent, then a guardian is likely not warranted, as the Court will conclude that the existing system is the least restrictive alternative to meeting the Respondent’s needs. However, circumstances can arise that create a need for a guardian or conservator.

5.1 For example, the great majority of residents in a secure (Alzheimer’s) unit in a nursing home or other secure facility do not have legally appointed guardians, despite their diagnoses and inability to direct their own care. A family member has generally been able to act as the responsible party for the resident, so no practical need for a

guardianship exists and the resident is able to be managed with the least restrictive alternative.

5.2 Guardianship may become necessary, however, if the person attempts to run away and the facility has no authority to hold the person, or if the person needs some kind of elective surgery and is not able to give informed consent.

5.3 Practical necessity often demands formal authority. Often third party providers like hospitals will demand that someone have formal authority to act on behalf of the person.

5.4 When considering whether a guardianship is necessary or whether to recommend any limitations to the guardianship, the visitor may need to evaluate whether the goals for the guardianship are realistic. For example, the Petitioner may be proposing guardianship to ensure the Respondent receives medication as prescribed. If the Respondent is an 88 year old woman with dementia who lives in an assisted living facility, this goal can likely be accomplished. If the Respondent is a 44 year old woman with schizophrenia who lives independently in an apartment, this goal may not be realistic.

5.5 Special note regarding conservatorships: Sometimes, even though other measures can be used for day-to-day money management, a conservatorship or special protective order is required to prevent the Respondent from being financially exploited or incurring debt, including credit card debt. Only a conservatorship or protective order legally prevents the person from incurring debt or contractual liability, since a protected person cannot enter into legally binding contracts. ORS 125.455(2). If the visitor believes the Respondent will be financially exploited or incur debt, the visitor should mention this in the report.

Chapter 6

Assessment and Interview Guidelines

1. Goal of the interview.

To determine the Respondent's level of capacity or incapacity through assessment of the Respondent's ability to receive and evaluate information or communicate decisions.

2. Useful information for the Court.

2.1 Verbatim responses of the Respondent (included in the report) are often helpful to the Court.

2.2 The use of open ended questions typically elicits higher quality information.

3. Possible areas to be addressed during the interview with the Respondent.

3.1 Awareness of proposed guardianship.

3.2 Receipt of notice.

3.3 Explanation of visitor's role.

3.4 Understanding of guardianship and the guardian's role.

3.5 Knowledge of and relationship with the proposed guardian.

3.6 Respondent's own assessment of his or her need for assistance.

3.7 Respondent's view of proposed appointment—

Has no objection,

Objects to having a guardian,

Objects to the person nominated to be guardian,

Wants someone different to be guardian.

3.8 Respondent's legal representation—

Has an attorney already. (If Respondent has any attorney, note who it is or who the Respondent considers to be his or her attorney)

Wants representation by an attorney.

Ability to contact an attorney.

3.9 Physical health issues.

3.10 Medications.

3.11 Involvement with physician and hospitals.

3.12 Impact on ability to perform ADLs (described below).

3.13 Cognitive issues.

3.14 Significant recent events.

3.15 Description of any assessment tool used (e.g. MMSE) and response of Respondent.

4. Assessment of cognitive functioning—elements for consideration.

4.1 Abstract thinking (capacity to formulate concepts and to generalize) in contrast to concrete thinking

4.2 Affect (observable behaviors that reflect a feeling state)

- 4.3 Attention
- 4.4 Awareness/insight
- 4.5 Comprehension/understanding
- 4.6 Concentration
- 4.7 Confusion
- 4.8 Delusions (a false belief based on incorrect inference about external reality)
- 4.9 Hallucinations (a sensory perception that seems real to the person but occurs without external stimulation of the relevant sensory organ)
- 4.10 Impulsivity (a sudden inclination to action without considered thought)
- 4.11 Initiation (the action of taking the first step or move)
- 4.12 Judgment
- 4.13 Language
- 4.14 Level of consciousness
- 4.15 Memory:
 - Immediate (within 10-30 seconds)
 - Short-term (within a few minutes or hours)
 - Recent (a few hours to several days)
 - Recent past (last few weeks and months)
 - Long-term or remote (6 months to lifetime)
- 4.16 Orientation:
 - Person
 - Place
 - Time
 - Situation
- 4.17 Paranoia/suspiciousness
- 4.18 Perseveration (continuation of a mental activity or behavior without the ability to shift easily or to stop the activity or behavior)
- 4.19 Repetition (speaking or doing something again and again)
- 4.20 Sensory issues (hearing or vision impairment)
- 4.21 Speech content (topics or themes that make up what a person talks about)
- 4.22 Speech or language impairment:
 - Clarity/intelligibility of speech
 - Receptive/expressive aphasia (interference with the comprehension and/or use of language that results from an injury to the brain)
 - Word-finding problems
- 4.23 Suggestibility (the ability to lead the Respondent by the power of suggestion).
- 4.24 Thought process:
 - Quantity and rate
 - Goal-directedness and continuity vs. disturbances (circumstantiality, tangentiality, loose associations, perseverance, etc.)

- 5. Assessment of decision-making capacity and/or problem-solving ability.**
 - 5.1 Able to recognize existence of problem/decision to be made.
 - 5.2 Able to understand relevant facts and/or options.
 - 5.3 Able to process information rationally.
 - 5.4 Able to appreciate the significance and consequences of various elements or options.
 - 5.5 Able to retain information/options for a time sufficient to make a decision.
 - 5.6 Able to communicate the decision.
 - 5.7 Able to maintain the decision consistently for a reasonable length of time (unless information or circumstances change significantly.)
- 6. Activities of Daily Living (“ADLs”).**
 - 6.1 ADLs are basic activities that support survival.
 - 6.2 Transfers
 - 6.3 Ambulation
 - 6.4 Bathing and personal hygiene
 - 6.5 Dressing
 - 6.6 Toileting
 - 6.7 Eating
 - 6.8 Medication administration
- 7. Instrumental Activities of Daily Living (“IADLs”).**
 - 7.1 IADLs are higher-level activities and abilities necessary to function in the community.
 - 7.2 Laundry/cleaning
 - 7.3 Meal planning/preparation
 - 7.4 Shopping
 - 7.5 Money management/check writing bill paying
 - 7.6 Transportation
 - 7.7 Knowledge/use of community resources
 - 7.8 Compliance with health treatment

Chapter 7

Continuum of Care

Several levels of care are available in Oregon to provide for people with impairments. These levels of care vary depending on the level of functioning of the person needing care. The following is a summary of the levels of care, starting with the lowest levels of care and progressing to the highest levels of care.

The asterisk (*) after the first five levels of care denotes that these care levels are not appropriate for people who wander or are frequently combative. People with these problems generally cannot be managed in any of these settings and require some kind of special or secure unit.

1. Own Home/Private Residence.*

- 1.1 Independent living with minimal supports.
- 1.2 If lives alone, is independent in transfers and ambulation.
- 1.3 If lives with significant other, that person must be able to handle any needed assistance with transfers and ambulation.
- 1.4 Services such as Meals on Wheels or housekeeping and bathing assistance may be helpful.

2. Retirement Center.*

- 2.1 Independent living in group settings. Meals, housekeeping, and some activities provided.
- 2.2 Must be able to get to dining room on own (with or without assistive device.)
- 2.3 No assistance provided with bathing and medication management.
- 2.4 Usually have call buttons in room for safety.

3. Residential Care Facility (“RCF”).*

- 3.1 Requires moderate assist with self-care, medication management, and activities of daily living. Meals, housekeeping, and some activities provided.
- 3.2 Must be able to get to dining room on own (with or without assistive device.)
- 3.3 Ability to provide assistance with transfers and ambulation varies from facility to facility.
- 3.4 Does not have RNs routinely available. Care performed by aides (CMAs and CNAs.)

4. Assisted Living Facility (“ALF”).*

- 4.1 Requires moderate to heavy assist with self-care, medication management, and activities of daily living.
- 4.2 Meals, housekeeping, and some activities provided.
- 4.3 Ability to provide assistance with transfers and ambulation varies from facility to facility.
- 4.4 Does not have RNs routinely available. Care performed by aides (CMAs and CNAs.)

5. Adult Foster Home (“AFH”).*

5.1 Requires moderate to heavy assist with self-care, medication management, and activities of daily living. Amount of assistance with activities of daily living depends on certified level of AFH.

5.2 Can provide ongoing assistance with transfers and ambulation, but generally can only manage 1-person assists.

5.3 Generally cannot manage residents who need assistance at night.

5.4 Does not have RNs routinely available. Care performed by AFH provider.

6. Intermediate Care Facility (“ICF”).

6.1 Requires heavy assist with custodial care, with generally chronic health problems needing ongoing RN services.

6.2 Can receive intermittent PT, OT, and ST (under Part B Medicare.)

7. Skilled Nursing Facility (“SNF”).

7.1 Requires Skilled RN or Skilled Rehab services (Physical Therapy, Occupational

7.2 Therapy, or Speech Therapy) on a **daily** basis.

7.3 Only type of nursing home stay covered by Medicare if conditions met.

(Requires 3-day in-patient hospital stay for Medicare coverage, and ability to benefit from skilled service provided.)

8. Acute In-Patient Rehab Center.

8.1 Requires intensive rehab services.

8.2 Patient must be able to tolerate therapy for **3 hours per day** total.

8.3 Covered at 80% by Medicare if conditions met. (Supplemental insurance generally covers other 20%.)

9. Hospice.

9.1 Person has a prognosis of 6 months or less to live.

9.2 Provides intermittent medical care and emotional support to patients and families in any of the above settings.

9.3 Does **not** provide an in-home care-giver to provide continuing care to a patient.

(Does provide Hospice volunteers who can stay with a patient for 1-3 hours for family respite.)

9.4 At this time, does **not** include a hospice facility where patients can reside.

Chapter 8

HIPAA and Physician-Patient Privilege

In many situations requiring a guardian (and thus the appointment of a visitor) the Respondent suffers from a deteriorating physical or mental condition. Frequently the best way to obtain a complete understanding of the situation is to examine Respondent's medical records and discuss the situation with the Respondent's doctor or other health care providers. Two possible obstacles can prevent the visitor's access to this information: the Health Insurance Portability and Accountability Act ("HIPAA") and the physician-patient privilege. The Appendix contains more information about HIPAA.

1. HIPAA and the Visitor.

HIPAA is a regulation designed to protect patient information from disclosure to unauthorized persons. Although it is tempting to conclude that the court-appointed visitor is automatically an authorized person, that may not necessarily be the case in the eyes of the persons holding the information.

The statute that describes the authority of the visitor allows the visitor to **interview** the Respondent's health care providers for information. It does not, however, require that the health care provider **answer** the questions presented. Some health care providers will decide to err on the side of non-disclosure and refuse to disclose information that the visitor believes is necessary.

If the health care provider refuses to disclose necessary information, the visitor has three options. The first is to proceed without the information. The second is to inform the Court that a health care provider has information that is necessary and request assistance from the Court in obtaining this information, possibly through a subpoena pursuant to Oregon Rule of Civil Procedure ("ORCP") 55, or an order pursuant to ORCP 44¹. *See* ORS 125.150(5). Both of these can be somewhat awkward to use and will certainly require additional cost. A court order is, however, a certain method for obtaining information from the health care provider in that it is specifically allowed by HIPAA. *See* 45 C.F.R. § 164.512(e).

If the provider's refusal to provide information is based on HIPAA, the visitor has a third option that can satisfy the health care provider's concerns. This option occurs in the federal Code of Federal Regulations ("C.F.R."). Specifically, 45 C.F.R. § 164.510(b)(3) provides the following:

Limited uses and disclosures when the individual is not present. If the individual is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with

¹ An order pursuant to ORCP 44 is a court order for a person to submit to a physical or mental examination.

the individual's health care. A covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, X-rays, or other similar forms of protected health information.

In other words, if the patient/Respondent is incapacitated, HIPAA itself allows a health care provider to release information about the Respondent that is directly relevant to the receiving person's involvement with the Respondent's health care. The visitor's "involvement" is to assist a third party (the Court) to determine whether assistance and medical treatment is necessary or warranted because the Respondent cannot act independently. In that circumstance disclosure would be permitted.

HIPAA is **not** a limitation on the visitor's right to ask for information. It is instead a limitation on the health care provider's ability to provide the information. And even though a visitor may be a "covered entity" under HIPAA in a different context, for example the visitor may be a doctor or nurse in addition to a visitor, the limitations presented by HIPAA do not restrict the visitor unless the visitor is also already the health care provider for the Respondent, an unlikely occurrence.

Summary:

1. A health care provider may conclude that HIPAA prevents a health care provider from disclosing protected health care information.
2. HIPAA contains a provision (45 C.F.R. § 164.510(b)(3)) that may allow the provider to disclose information under certain conditions and at the provider's professional discretion.
3. If the health care provider refuses to provide information at the request of the visitor, the visitor may proceed without the information or may request that the Court issue an order under ORCP 44 or a subpoena under ORCP 55.

A visitor must not provide advice or direction to a health care provider on the release of information. The visitor may provide the health care provider with a copy of 45 C.F.R. § 164.510(b)(3). This C.F.R. is reproduced in the Appendix.

2. The Physician-Patient Privilege and the Visitor.

Although HIPAA may not present an obstacle for the visitor's quest for information, the physician-patient privilege certainly can. Generally speaking the privilege (set out in ORS 40.235) prohibits the disclosure of the physician's information regarding the patient/Respondent so long as the patient does not wish that information disclosed. The order appointing the visitor does not allow the visitor to avoid the privilege issue and even the visitor's right to ask questions is subject to limitations due to confidentiality. ORS 125.150(4).

This presents a potential problem for the visitor in that not only might the doctor elect not to disclose, but if the doctor does disclose, the visitor's report might be vulnerable because the Respondent could object to the inclusion of the privileged information and seek to block the visitor's report, either in whole or in part. The solution to the problem is much the same as the solution to the HIPAA problem. If the doctor

refuses to provide the information and the visitor cannot proceed without the information, inform the Court that additional steps are necessary and the Court may choose to act.

If a doctor or other health care professional subject to the privilege does disclose information to the visitor, the Respondent could exercise the privilege and thus prohibit the information from coming into the Court's record regarding the guardianship. Therefore, a good practice is to place the information from the doctor in a separate portion of the visitor's report so, if necessary, the Court can exclude that portion of the report either permanently or until it becomes appropriate to admit that information. The Court may rule that the Respondent has waived the privilege if he or she offers testimony, from any source, on the subject of the privileged information.

Summary:

1. A doctor may not disclose information that is protected by the physician-patient privilege.
2. If a doctor refuses to disclose information that is necessary, inform the Court of this immediately so that an ORCP 44 motion or subpoena pursuant to ORCP 55 can be used to obtain the information.
3. Include medical information in a separate portion of the report that can be segregated from the remainder of the report if the Respondent objects to the inclusion of the medical information.
4. Medical information may be initially excluded but become admissible later in the process depending on what occurs during a hearing.

3. Medical information in the Visitor's report.

A visitor's report should be primarily based on the visitor's own observations and interviews. If a visitor is able to obtain useful medical information, it can be included in the report. The best practice is to segregate the medical information and the opinion based on medical information that the visitor receives from health care providers. Medical information from others (non-providers) does not need to be segregated. The purpose of the segregation is to ensure that if the Respondent invokes the physician-patient privilege, then the visitor and Court can still rely on the observations and opinion of the visitor not based on evidence that is inadmissible.

Chapter 9 Asset Management Options

Note: This document is intended to provide a simple and general explanation of certain legal and financial arrangements that can be very complex in nature. It is not an exhaustive description of all the issues, considerations, and requirements that relate to the creation and use of these various arrangements. The visitor is not expected to be a financial expert.

A visitor may have questions about how to achieve a desired financial outcome in a specific case. The visitor may identify the issues or concerns in the visitor's report, along with the desired goal recommended by the visitor, and defer to the Court the decision about the appropriate financial mechanism to achieve that goal. If a visitor has questions about the specific circumstances of a case the visitor has, the visitor should direct those to the Court. (Any inquiry to the Court should be in writing and copies of it should be sent to all parties. See Chapter 10, Communicating with the Court.)

A basic understanding of asset management options may help the visitor assess a Respondent's ability to function and recommend the least restrictive alternative to the Court. The main options include informal help, joint ownership of assets, a durable power of attorney, a trust, and a conservatorship.

1. Informal assistance and supervision.

This simply involves having the helper(s) keep a close eye on what the impaired person is doing financially, instructing the impaired person about what to do, and helping with things like writing out checks and filling out forms for the impaired person to sign.

Benefits: This type of arrangement can work well for a person who has minimal impairments and who is receptive to direction. It has no cost to put in place and is a natural first step in helping a person with diminishing capacity. This arrangement empowers the impaired person to remain in control of his or her own finances longer than acting independently.

Drawbacks: The success of this arrangement completely depends on the cooperation of the impaired person and the helper's powers of persuasion. This arrangement leaves the impaired person exposed to exploitation or improper powers of persuasion by the helper or others. If the impaired person tends to be suspicious or uncooperative, this arrangement will fail. This arrangement does not prevent the impaired person from spending money or entering into contracts, if that type of protection is needed. The helper has no legal authority to transact business or obtain information on behalf of the impaired person. The helper must always work with and through the impaired person to accomplish anything.

2. Joint ownership.

With joint ownership, the person who needs help managing finances adds the name of a trusted person as an **owner** (not a signer or just someone with authority to write checks) on bank or other financial accounts.

Benefits: This arrangement enables another person to help the impaired person with paying bills and handling deposits. It is easy to put into place with little or no cost. It is an arrangement most “lay people” understand.

Drawbacks: This arrangement makes the helper a co-owner of the bank account and gives the helper complete access to the funds. The change in ownership can have an unintended impact on the impaired person’s estate plan. Typically the helper automatically becomes the sole owner of the funds in the account upon the death of the impaired person, regardless of the distribution scheme reflected in the impaired person’s will. The helper can only help with the accounts the helper is made a signer on. This requires the impaired person to take the affirmative step of putting another signer on the account. There is little to no outside supervision of the actions of the helper, if the impaired person is unable to effectively supervise. This arrangement does not prevent the impaired person from spending money or entering into contracts, if that type of protection is needed. Creating joint ownership is not an effective way to help with the management of real property and, in fact, can create some very significant obstacles to the effective management of the property for the benefit of the impaired person.

Note: Creating joint ownership in a bank account should be distinguished from simply adding an accommodation signer on an account. **Frequently, people who use the joint ownership option believe they are only adding a “signer” to the account, when in fact, the helper has become a co-owner and will automatically own all the funds in the account when the impaired person dies.** If an “accommodation signer” arrangement is desired, the impaired person must clearly state those wishes and makes sure the bank or other financial institution uses the proper forms to reflect this arrangement when the signer is added to the account.

3. Power of attorney.

A power of attorney (“POA”) involves the formal signing of a legal document by the impaired person typically giving the designated attorney-in-fact broad authority to act on behalf of the impaired person. POAs can also be very narrow in their scope, limited to a specific asset, a specific duration, a specific transaction or other restrictions. For the POA to be valid, the impaired person, when signing it, must have enough capacity to comprehend the nature, risks and benefits of executing such a document.

Benefits: Primary benefits of this arrangement are simplicity and low costs to put the POA in place. It can often be done without the assistance of a lawyer. POAs are common documents that are usually recognized and accepted by other people and institutions. A POA is a very effective tool to enable a “helper” to take care of the financial business of an impaired person.

Drawbacks: Who is designated as the attorney-in-fact in a POA is entirely up to the impaired person. This means the selection of the helper who is given the POA can easily be the product of manipulation or undue influence over a person with diminished faculties. A POA is generally revocable. The person who granted the POA can revoke it (for real and rational or imagined and irrational reasons), leaving no one with the authority to act on behalf of the impaired person. Alternately, the impaired person can give multiple people POAs, or can create a succession of granted and revoked POAs, resulting in competing POA authority or uncertainty regarding who properly has authority to act on behalf the impaired person. This arrangement requires the impaired person to take the affirmative step of executing a POA. There is little to no outside supervision of the actions of the attorney-in-fact, if the impaired person is unable to effectively supervise. This means that an unscrupulous agent can use a POA to take the person's money for his or her own purposes instead of to benefit the principal (the person granting the POA). This arrangement does not prevent the impaired person from spending money or entering into contracts, if that type of protection is needed. At times, people or institutions will refuse to recognize the authority of the POA.

Note: The agent acting under the POA may be entitled to reasonable compensation for the services performed. To protect against allegations of possible financial exploitation, the agent should create and maintain records establishing the basis for any compensation taken.

4. Trust.

A trust involves a legal document signed by the impaired person creating the trust. Basically, the trust document (1) names who is to manage the trust (the trustee), (2) describes for whose benefit the assets are to be used (the beneficiary), and (3) tells the trustee how to manage and distribute the assets of the trust. The person creating the trust then transfers ownership of assets to the trustee and the trustee then manages the assets as instructed in the trust document. The person creating the trust can also be the trustee and the beneficiary. Typically, a trust document will designate who is to serve as trustee if the initial trustee decides not to serve, becomes incapacitated, or dies. For the trust to be valid, when signing the trust document, the impaired person must have sufficient capacity to execute such a document.

Benefits: Trusts are a well recognized arrangement and are readily accepted by people and institutions. They are a very effective mechanism for managing the assets that have been put into the trust. Enhanced reporting requirements oblige the trustee to account to other people, besides the impaired person, regarding the management of the trust assets. Procedures exist for involving the courts if people have concerns about how the trustee is administering the trust.

Drawbacks: A trust is a relatively complex arrangement. To make sure it is done correctly, an attorney (and sometimes an accountant) should be involved, which is a significant cost. A trust is only effective for managing the assets titled in the name of the trust. If the impaired person has income or assets not in the name of the trust, the trustee will not be able to manage them, or even get information about them. The trustee often

does not have legal authority to manage other financial matters (income, insurance, Medicaid application, income tax returns, etc.) of the impaired person. A trust does not prevent the impaired person from spending money, entering into contracts, or demanding distributions from the trust, if that type of protection is needed.

5. Conservatorship.

A conservatorship requires the court appointment of a person or institution to manage the financial affairs of an impaired person. Statutes require a person be “financially incapable” before a conservator can be appointed. If the person is not financially incapable, a conservatorship is not an option. A conservatorship is the most restrictive arrangement for the impaired person, legally eliminating the ability to handle most, if not all, of their own finances. Final financial decision making authority is held entirely by the conservator. The conservator accounts to the Court for the handling of the impaired person’s finances and the Court has primary supervision of the conservator.

Benefits: Conservatorships provide well established and defined procedures and requirements with significant court supervision of the conservator. The conservator must post a surety bond and provide financial accountings and other disclosures at specific times and under specific circumstances. There is no uncertainty regarding whether the conservator’s decision-making authority is in effect. Conservatorships are well recognized and accepted by other people and institutions. Conservatorships are typically the most effective way to protect an impaired person from wanton spending, financial theft or fraud, unscrupulous or unnecessary contractual obligations.

Drawbacks: Conservatorships are significantly more expensive than the other options. The impaired person has the least amount of input into decisions made regarding the person’s finances and may feel demeaned by the conservatorship. The process for creating a conservatorship can exacerbate acrimony, damage relationships, and generate litigation between family members. The public nature of court records greatly diminishes the impaired person’s privacy as to finances. The authority of a conservator typically does not cover assets held in a trust, unless the Court specifically orders that the conservator is the trustee or that the assets of the trust are subject to the Court’s review.

Chapter 10

Litigation Issues for Court Visitors

1. The adversary system.

The legal system in the United States is known as an adversary system. In this system, lawyers representing each party essentially control the litigation process. The lawyers are responsible for developing and presenting their arguments, gathering and submitting evidence, and calling and questioning witnesses. This work is carried out according to rules of criminal and civil procedure and of evidence. The fact finder, who may be a judge or a jury, is expected to remain neutral throughout the proceeding, dispassionately hearing and weighing the evidence presented by each party. For protective proceedings, including the appointment of a guardian, a judge decides the matter. Juries are not used in protective proceedings.

The system is based on the belief that each person is entitled to a “day in court,” representation by a zealous advocate, and a hearing before an impartial decision maker. Both sides are given equal opportunity to present their case. Client advocacy requires lawyers to challenge the evidence against their clients, even if that means chipping away at the testimony of purportedly neutral witnesses like court visitors. It is the lawyers’ job to win the suit using every legal and ethical means within their power.

2. Visitor’s role in court.

An Oregon case, *Spady v. Hawkins*, has explained the visitor’s role, noting that “the provisions pertaining to the appointment of visitors are designed to give the Court meaningful information not only about the respondent’s incapacity, but also, and as importantly, about the nominated person’s suitability to act as a permanent guardian.” 155 Or. App. 454, 463, 963 P.2d 125 (1998).

The visitor is both an expert and fact witness, but is not testifying as an advocate for any party to the proceeding. The visitor’s role is to provide information to the Court.

3. Communication with the Court.

The court visitor’s report is prepared for, and submitted to, the Court. The visitor should provide copies to all parties to the proceeding. This means anyone who has filed a petition, objection, or appearance.¹ Copies may be provided as a professional courtesy to the Adult Protective Service worker or the professional fiduciary nominated in the proceeding. Costs for copies should be billed in the visitor’s invoice.

The Court is not permitted to receive “ex parte communication”—that is, information about the facts of the case that is not shared with all parties. The Court cannot receive this information from any source, including the court visitor. Therefore,

¹ An “appearance” generally means the coming into a court proceeding as a party to a case, either in person or by attorney. As a practical matter, the Oregon Judicial Information Network (“OJIN”) lists the parties who have made an “appearance” at the top of each case detail report.. The visitor can ask court staff for the names and addresses of persons who are parties and should receive copies of the report.

the court visitor may communicate directly with the Court only for routine scheduling, such as checking when a hearing is scheduled. Any other communication with the Court (including communication with the judge's staff) should be made in writing, with copies to all parties who have appeared or to their lawyers.

4. Communication with lawyers.

Marion County courts allow a court visitor to communicate with any or all attorneys during preparation of the visitor's report and testimony. However, the court visitor is presumed to be a neutral investigator. Therefore, if the visitor communicates with one attorney, the visitor should not refuse to communicate with the other attorney(s), if asked to do so.

5. Evidentiary issues.

Oregon's rules of evidence determine what evidence the judge can consider in deciding the case. These rules are provided by the Oregon Evidence Code ("OEC") and the Oregon Revised Statutes ("ORS").

5.1 Fact witness. A fact witness testifies about events directly observed. In this context, the court visitor testifies not as an expert, but as a witness to interactions he or she actually observes while investigating. Often, a court visitor offers testimony both as a fact witness and as an expert witness.

5.2 Expert witness (OEC 702-705)

5.2.1 Rule 702: Testimony by experts. An expert witness is qualified to testify based on knowledge, skill, experience, training or education. This testimony, which may be in the form of an opinion, is intended to help the judge to understand the evidence or to determine a fact in issue (e.g., the capacity of the Respondent). Unless the parties stipulate, a lawyer must lay a foundation for the admission of expert testimony by establishing the expert's education, credentials and experience.

5.2.2 Rule 703: Bases of opinion testimony by experts. The expert may base his or her opinion or inference on facts or data perceived or made known to the expert before or at the hearing. The facts or data do not have to be admissible as evidence if it is the type of information reasonably relied upon by experts in that field.

5.2.3 Rule 705: Disclosure of fact or data underlying expert opinion. An expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the Court requires otherwise. The expert may be required to disclose the underlying facts or data on cross-examination.

5.3 Hearsay (OEC 801-802)

5.3.1 Definition. The statute defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Basically, the term hearsay describes evidence based on the reports of others rather than the personal knowledge of the witness.

5.3.2 Hearsay rule. Hearsay is not admissible unless the type of statement meets a statutory exception.

5.3.3 Relevant exceptions. Certain types of statements are admissible as exceptions to the hearsay rule based on the theory that they possess “indicia of reliability.” For example, exception is made for records made immediately after observing an event or information collected routinely in the regular course of business because these types of statements are considered more reliable. Statements made by a party are usually an exception to hearsay.

A court visitor’s notes and report will normally fall into one of the hearsay exceptions. Further, if the visitor is qualified as an expert, the visitor may testify as to the hearsay, or rely on hearsay, in forming the visitor’s opinion.

5.4 Confidentiality and privilege. The concepts of confidentiality and privilege are often confused. Confidentiality is much broader than privilege and refers to information shared with the intent that it not be disclosed. For example, Oregon Rule of Professional Conduct 1.6 prohibits lawyers from revealing information related to a representation without the client’s informed consent. Doctors and other professionals may be similarly bound by rules of confidentiality or by such statutes as HIPPA.

The visitor should be aware that using a medical release signed by the Respondent may provide information that may later be inadmissible as evidence in a court proceeding.

ORS 125.150 grants visitors permission, subject to confidentiality laws, to interview “any physician or psychologist who has examined the respondent or protected person . . . the person or officer of the institution having the care, custody or control of the respondent or protected person . . . [and] any other person who may have relevant information.”

“Privilege” is a rule of evidence that protects certain types of confidential communications from admission as evidence in a court proceeding. The right to invoke privilege is held by the person who made the original communication and prevents disclosure by the person receiving the communication. Not all interactions are privileged; privilege protects only those communications that traditionally were considered to involve a special trust relationship, for example husband/wife, physician/patient, social worker/patient, or clergy/penitent.

Some relevant statutes include:

5.4.1 OEC 505. Husband-wife privilege. A spouse may refuse to disclose, and prevent the other spouse from disclosing, any confidential communication made by one spouse to the other during the marriage. The privilege created by this subsection may be claimed by either spouse. This privilege does not apply to communications made before marriage or in a civil proceeding where the spouses are adverse parties.

5.4.2 OEC 504, 504-1 to 505-4. Medical personnel-patient privilege. This series of rules governs the privilege held by a patient to refuse to disclose, and to prevent medical personnel from disclosing, confidential communications made

for the purposes of diagnosis, treatment, or nursing care. The medical personnel covered include psychotherapists, licensed professional nurses, doctors, licensed clinical social workers and their representatives. These privileges may be claimed by the patient or claimed **on the patient's behalf** by a representative of the patient including a guardian, conservator, the personal representative of a deceased patient, or the medical personnel. The rules are subject to some exceptions, including communications made during a court-ordered physical or mental examination, unless the judge orders otherwise.

5.4.3 ORS 179.505. Disclosure of written accounts by health care services provider. This statute regulates the disclosure of written individually identifiable health information without permission from the individual or a personal representative of the individual. Protected information includes: medication prescription and monitoring; method and frequency of treatments; clinical test results; or summaries of diagnosis, functional status, treatment plans, symptoms, prognosis and patient progress. If the Respondent voluntarily produces evidence regarding a subject referred to in a written account, the person opens the door to the contents of that written account being disclosed for use in the court proceeding.

6. Burden of proof.

Appointment of a guardian or conservator limits the rights of the protected person. Therefore, Oregon statutes establish a high burden of proof for appointment of a guardian or conservator. Under Oregon law, a person is presumed to be competent.

The petitioner asking for the appointment of a guardian or conservator must overcome this presumption by presenting clear and convincing evidence that: (1) the standards of mental or financial incapacity are met, (2) a guardianship or conservatorship is most suitable, and (3) there is no less restrictive alternative. If a party moves to terminate the protected status, the fiduciary must meet the same burden for the protective relationship to continue. ORS 125.090(1).

7. Visitor's report, physical file, and notes.

ORS 125.155 sets out the statutory requirements for the contents of a visitor's report. The visitor should also retain in the physical file all notes taken during interviews and other supporting documents. Inability to produce such documentation may pave the way for the opposing party to question the validity of the visitor's conclusions. If the visitor brings the physical file to court when called to offer testimony, the file can be examined by all parties and submitted into evidence. The visitor is not required to bring the file unless it is subpoenaed.

8. Preparation for hearing.

The Appendix contains some suggestions for how a visitor can prepare for testifying at a hearing and what to bring to the hearing.

9. Appearance at hearing.

9.1 Exclusion of witnesses. (OEC 615) A party may request the Court to exclude a witness from the courtroom until the proceeding reaches the final argument stage.

The Court may also, of its own volition, order exclusion of a witness. However, the rule does not allow exclusion of certain parties to the suit and also does not authorize exclusion of “a person whose presence is shown by a party to be essential to the presentation of the party’s cause.”

9.2 Visitor’s presence mandatory. (ORS 125.155(5)) The presence of the visitor is mandatory at any hearing where an objection to the appointment of a guardian or conservator is presented; therefore, a subpoena is not required. The statute provides for the visitor to receive “reasonable compensation” for attending the hearing. Attendance can only be excused by the Court.

10. Demeanor.

The visitor’s demeanor as a witness should be calm and professional. Dress should be appropriately professional, such as for attending a formal business meeting. Although cross-examination may feel like a personal attack, the visitor should avoid becoming defensive. The questions are not aimed at the visitor as a person, but are designed to elicit facts that support the lawyer’s case.

11. Oath and perjury.

Before testifying, a witness must take an oath in which she swears before the Court to tell the truth. Some witnesses object to the religious implications of taking an oath and are allowed to substitute an affirmation, which is a solemn declaration that has the same effect as an oath.

A witness who offers a “false statement in regard to a material issue, knowing it to be false” may be charged with perjury. ORS 162.065. Perjury is a Class “C” felony punishable by up to five years in prison and a fine of \$125,000. ORS 161.605(3); ORS 625(1)(d).

12. Testimony.

As a witness, the visitor’s testimony will be solicited through questioning. Rarely are witnesses allowed to simply make a free-form statement. Depending on which party is asking the questions, different rules apply. First, a witness is subject to direct examination by the party who requested the presence of the witness. In direct examination, the lawyer is generally prohibited from asking leading questions. Leading questions are those that suggest the answer or contain the information the examiner is looking for. This rule is intended to prevent a lawyer from feeding answers to a favorable witness.

After direct examination, the opposing party is given an opportunity to cross-examine the witness. Cross-examination is limited to questions related to the facts revealed in direct examination. Unlike in direct examination, leading questions are permitted in a cross-examination, because the witness is presumed to be unsympathetic to the opposing party. During cross-examination, the opposing attorney will attempt to elicit facts favorable to the party he or she represents or to impeach the credibility of the testifying witness in an attempt to limit the weight a judge may give to unfavorable testimony.

Redirect examination allows the lawyer who conducted the direct examination to ask follow-up questions on issues raised during the cross-examination.

A judge may choose to ask questions during examination.

Chapter 11

Visitor's Fees

The Marion County Presiding Judge issued an Order Establishing Qualifications and Standards For Court Visitors (“Order”). The most common practice in Marion County has been for the court visitors to charge an hourly rate for the time they expend to investigate and prepare the report. The current range of the hourly rate for court visitors in Marion County is \$60 to \$100. The Order caps the hourly rate at \$125. The Order also requires that court visitors to reduce their hourly rate by 50% for travel time and charge the IRS rate for mileage reimbursement. Court visitors should notify the Court, in advance, of any increase in their hourly rate.

By deciding to file a petition to appoint a fiduciary, the Petitioner becomes primarily liable for the cost for the visitor’s services. If the Court does not create a guardianship or conservatorship, the Petitioner pays the cost of the visitor’s services. Therefore, the attorney for the Petitioner should prepare the Petitioner for the cost of the visitor’s report. The attorney for the Petitioner may want the Petitioner to provide a retainer that covers this cost. Most attorneys prefer to advise their clients that the cost of the report will range from \$400 to \$700. It would be helpful if the court visitor would give the attorney for the Petitioner a courtesy call if the facts of the case warrant a report that will cost in excess of \$750. Also, it is advisable for the visitor to discuss his or her billing practices with the attorney for the Petitioner prior to accepting the case.

If a fiduciary is appointed, the cost of the visitor’s services may be paid from the Protected Person’s funds. However, payment from the Protected Person’s funds must not occur until after the Court appoints a fiduciary. The bill for visitor’s services should be submitted to the attorney for the Petitioner and any billing inquiries can be directed to either the attorney for the Petitioner or directly to the Petitioner.

If an objection to the petition is filed and a hearing is held, the visitor must attend the hearing and is entitled to reasonable compensation. In a contested case, the attorney for the Petitioner must obtain Court approval of the court visitor’s fees before the bill can be paid from the Protected Person’s income or resources. ORS 125.095(2). The attorney for the Petitioner may advance the payment of visitor’s bill pending court approval or wait for the Court to approve the fee (this generally takes two to three months).

Appendix

Presiding Judge's order establishing qualifications and standards for court visitors	App - 2
Report template – main form (“permanent” and temporary fiduciary)	App - 5
Report template – temporary fiduciary only	App - 14
Outline of report template – main form (“permanent” and temporary fiduciary)	App - 20
Outline of report template – temporary fiduciary only	App - 21
Motion for extension of time to file visitor's report and order granting extension	App - 22
Basics about HIPAA and physician-patient privilege	App - 23
45 C.F.R. § 164.510(b)(3) (2008)	App - 27
Suggestions for hearing preparation and materials	App - 28
Notes for attorneys filing in Marion County	App - 29

[A conformed copy of this order is available on the Court's website.]

IN THE CIRCUIT COURT OF STATE OF OREGON
FOR MARION COUNTY

ORDER ESTABLISHING)
QUALIFICATIONS AND STANDARDS)
FOR COURT VISITORS)
_____)

Pursuant to ORS 125.165 and 125.170(2),

IT IS HEREBY ORDERED THAT:

- 1) Visitors shall have the following qualifications:
 - A) A license in good standing in any state as any of the following: licensed professional counselor, licensed marriage and family therapist, licensed clinical social worker, registered nurse, or attorney; or
 - B) Post-graduate degree (e.g. MSW, MSN, other master's degree, J.D.) and at least two years of relevant experience.
 - C) The presiding judge or his or her designee may determine whether the proposed visitor's experience is sufficient.
- 2) Visitors shall have the following training:
 - A) Visitors shall view the Marion County Visitor Improvement Project DVD and read the Marion County Handbook for Visitors. After viewing the DVD and reading the Handbook, the visitor shall certify to the court, in a form provided by the court, that he or she has done so.

- B) Visitors who are already on the Marion County Circuit Court list of approved visitors as of September 1, 2009, shall view the Marion County Visitor Improvement Project DVD and read the Marion County Handbook for Visitors; and certify to the court, in a form provided by the court, that they have done so, no later than March 1, 2010.
- 3) The presiding judge or his or her designee shall have the sole and absolute discretion to place a person on the approved visitor's list or remove a person from the approved visitor's list.
- 4) Visitors shall utilize the following standards and procedures in the performance of their duties:
- A) Visitors shall interview persons deemed by the visitor to possess relevant information;
 - B) Visitors shall review relevant records regarding the respondent, to the extent such records are available;
 - C) Visitors shall comply with ORS 125.150(3)-(10);
 - D) The visitor's report shall comply with ORS 125.155(2);
 - E) The visitor's report shall be in the form prescribed by the Marion County Circuit Court; and
 - F) The visitor shall be present at any hearing on objections to the appointment of a fiduciary as required by ORS 125.155(5). The visitor's fee for testifying shall not exceed the visitor's normal hourly rate.
- 5) Visitors may charge an hourly rate for conducting interviews and preparing visitor's reports. The hourly rate shall not exceed \$125.00. In addition, visitors may charge mileage at the IRS rate and may charge for travel time in an amount not to exceed one-half of their normal hourly charge.

6) This order supersedes all prior Presiding Judge Orders regarding Court Visitor Qualifications and Standards.

Dated this 26th day of August, 2009.

/s/ James L. Rhoades
Hon. James L. Rhoades
Presiding Judge
Marion County Circuit Court

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
MARION COUNTY
Probate Department**

[Insert caption from Petition]

Case No. [Insert case number from
Petition]

COURT VISITOR'S REPORT

The undersigned, [insert Visitor's name], was appointed as Court Visitor on [insert date of order appointing visitor] in the above-named proceeding. *Select one of the following options:*

Option A: The Visitor does not recommend that a fiduciary be appointed for the Respondent.

Option B: The Visitor recommends that [insert names of all persons nominated in Petition] be appointed as [insert titles of all fiduciaries requested in Petition] for the Respondent, as proposed in the Petition.

Option C: The Visitor recommends that a [insert titles of all fiduciaries the Visitor recommends to be appointed] be appointed for the Respondent, but does not recommend the appointment of [insert names of persons nominated in the Petition] as proposed in the Petition.

Option D: [Describe other recommendations besides those listed, as appropriate.]

1. EXPRESS WISHES OF RESPONDENT AND PROCEDURAL RIGHTS

For each question in this section, fully describe any express communication made by the Respondent. Also include observations about the communication.

1(a) Does the Respondent object to the appointment of a fiduciary? Unk* No Yes

1(b) Does the Respondent object to any nominated fiduciary? Unk* No Yes

1(c) Does the Respondent prefer that another person act as fiduciary?

Unk* No Yes

Provide below the name, address, telephone number, and proposed role of any person preferred by the Respondent.

1(d) Does the Respondent wish to be represented by counsel? Unk* No Yes

If the Respondent wishes to be represented by counsel, give the name of any attorney the Respondent has retained, or the Respondent wishes to retain.

If the Respondent has not retained counsel, describe whether the Respondent desires the Court to appoint counsel.

1(e) If the Respondent does not plan to retain counsel and has not requested the appointment of counsel by the Court, does the Visitor believe that appointment of counsel (1) would help to resolve the matter or (2) is necessary to protect the interests of the Respondent?

N/A No Yes

If the answer is yes, explain.

1(f) If the Respondent objects to the appointment of a fiduciary, does the Respondent understand that a hearing will be held? Unk * N/A Yes No

1(g) Is the Respondent able to attend a hearing ? Unk * Yes No

If the answer is no, explain.

If the Respondent is able, is the Respondent willing to attend a hearing?

Unk * Yes No

If the Respondent is unable or unwilling to attend a hearing, is the Respondent able and willing to talk to the Judge by telephone during the hearing? Unk * Yes No

1(h) State below the Visitor's comments, observations, concerns, and suggestions regarding the above questions. Note any needed accommodations or security concerns that may be an issue if a hearing occurs.

2. BACKGROUND AND INTERVIEWS WITH INTERESTED PERSONS

2(a) **Brief social history.** Provide Respondent's age and date of birth, and a brief history of Respondent's education, work experience, locations, marriages, children, family, and so on.

2(b) **Brief legal history.** Provide name of Petitioner, name and date of appointment of any court-appointed fiduciary, and name of each fiduciary nominated in the Petition.

2(c) **Background of nominated fiduciary.**

- (1) Has any person nominated to be a fiduciary been convicted of a crime?
No Yes
- (2) Has any person nominated to be a fiduciary filed for or received protection under the bankruptcy laws?
No Yes
- (3) Has any person nominated to be a fiduciary had a license revoked or canceled that was required by the laws of any state for the practice of a profession or occupation?
No Yes

If the answer to any question is yes, explain.

Describe below the age, employment, and recent interaction with Respondent for each nominated fiduciary.

2(d) **Chronological summary.** Provide a chronological summary of the circumstances leading up to the alleged need for the appointment of a fiduciary. The summary should include a description of interviews with interested persons, including the Petitioner and each nominated fiduciary.

3. CAPACITY

3(a) Describe the interview with the Respondent. Include the setting, who was present, and the Respondent's physical appearance and demeanor. Identify and describe any tools used in the assessment.

3(b) Provide a summary of the Visitor's impressions from the interview that are not described elsewhere.

3(c) Describe any inability of the Respondent to provide for his or her needs with respect to physical health, food, clothing, and shelter.

3(d) Describe any inability of the Respondent to resist fraud or undue influence.

3(e) Is the Respondent's inability to provide for his or her needs an isolated incident of negligence or improvidence? No Yes

Does a pattern exist regarding Respondent's inability to provide for his or her needs?

Yes No

Explain the answers.

4. EVALUATION OF RESIDENCE, HEALTH CARE, AND SOCIAL SERVICES RECEIVED IN PAST YEAR

4(a) Describe the residence where the Respondent has lived most recently and how long the Respondent has lived there. Also provide available information about any other residence where the Respondent lived during the year preceding the filing of the Petition and how long the Respondent had lived there.

4(b) Is the Respondent able to live at the current residence while under guardianship?

Yes No

Comments:

4(c) Describe the Respondent's current location, if different from the answer given in 4(a) about Respondent's current residence. N/A

4(d) Describe the health or social services provided to the Respondent during the year preceding the filing of the Petition (if the Petitioner or others have information as to those services).

4(e) Describe the alternatives to guardianship considered by the Petitioner for the Respondent, and the reasons why those alternatives are not available.

4(f) State below the Visitor's comments, observations, concerns, and suggestions regarding the place of residence and health or social services.

5. FINDINGS AND RECOMMENDATIONS

5(a) Are the allegations stated in the Petition substantially correct? Yes No

If the answer is no, explain.

5(b) **Incapacity.** Is the Respondent's ability to receive and evaluate information effectively or to communicate decisions impaired to such an extent that the Respondent presently lacks the capacity to meet the essential requirements for the Respondent'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.) Yes No

If the answer is yes, describe (1) the impairment and its likely cause, and (2) the actions the Respondent is unable to take to provide for his or her health care, food, shelter, clothing, personal hygiene, and other care.

5(c) **For temporary guardianship (immediate and serious danger).** In addition to answering "yes" to the previous question, is there an immediate and serious danger to the life or health of the Respondent, and does the welfare of the Respondent require immediate action?

N/A Yes No

If the answer is yes, describe (1) the immediate and serious danger, and (2) why the Respondent's welfare requires immediate action.

If the answer is no, explain why.

5(d) **For temporary guardianship (purpose and duration).** Describe below the specific purpose for the appointment of the temporary guardian and the recommended duration of the appointment (not to exceed 30 days). N/A

5(e) **For conservatorship (financial incapability).** Is the Respondent unable to manage his or her financial resources effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance? (“Manage financial resources” means those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.)

N/A Yes No

If the answer is yes, describe (1) the reason why the Respondent is unable to manage financial resources, and (2) the financial management actions the Respondent is unable to take.

If the answer is no, explain why.

5(f) **For temporary conservatorship (immediate and serious danger).** In addition to answering “yes” to the previous question, is there an immediate and serious danger to the estate of the Respondent, and does the welfare of the Respondent require immediate action?

N/A Yes No

If the answer is yes, describe (1) the immediate and serious danger to the Respondent’s estate, and (2) why the Respondent’s welfare requires immediate action.

If the answer is no, explain why.

5(g) **For temporary conservatorship (purpose and duration).** Describe below the specific purpose for the appointment of the temporary conservator and the recommended duration of the appointment (not to exceed 30 days). N/A

5(h) **Necessary.** Is the appointment of a fiduciary necessary as a means of providing continuing care and supervision of the Respondent? Yes No

If the answer is no, explain why.

5(i) **Suitability of fiduciary.** Is each nominated fiduciary suitable, qualified, and willing to serve? Yes No

If the answer is no, explain why.

5(j) If the Visitor is aware of an Objection to the Petition filed by parties other than the Respondent, describe the issues, if known to the Visitor.

5(k) If the Visitor has identified anyone else the Visitor believes is more appropriate for appointment as a fiduciary than any person nominated in the Petition, provide the name and reasons for the conclusion.

5(l) Regarding the requirement that the guardianship order be no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the person, does the Visitor recommend any limitations to the scope or duration of the authority of any proposed fiduciary?

N/A No Yes

If the answer is yes, explain why and describe the recommended limitations.

5(m) Is there any need for further evaluation? No Yes

If the answer is yes, explain why and recommend the scope and timing of future evaluation.

5(n) State below additional comments that might assist the Court and persons interested in this matter.

6. SOURCES OF INFORMATION

6(a) All of the people the Visitor interviewed while compiling this report are listed below.

Name of Respondent	
Address	
Phone Number	
Relationship to Respondent	Self
Date Interviewed	

Name of Petitioner	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name of Nominated Guardian	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name of Nominated Conservator (if any)	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

6(b) The Visitor also reviewed the documents or records described below.

--

STATE OF OREGON)
) ss.
 County of Marion)

Affirmation pursuant to UTCR 2.120

I am the Court Visitor in the above entitled matter. I declare that the foregoing Court Visitor's Report is true and accurate to the best of my knowledge and belief and I understand that it is made for use as evidence in court and is subject to penalty for perjury.

DATED this _____ day of _____, 20__.

Court Visitor

cc:

*Unk—Respondent is unable to respond, or response is inconsistent, so the answer is unknown.

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
MARION COUNTY
Probate Department**

[Insert caption from Petition]

Case No. [Insert case number from
Petition]

COURT VISITOR'S REPORT

TEMPORARY FIDUCIARY

The undersigned, [insert Visitor's name], was appointed as Court Visitor on [insert date of order appointing visitor] in the above-named proceeding to evaluate the need for a temporary guardian. *Select one of the following options:*

Option A: The Visitor does not recommend that a temporary fiduciary be appointed for the Respondent.

Option B: The Visitor recommends that [insert names of all persons nominated in Petition] be appointed as [insert titles of all temporary fiduciaries requested in Petition] for the Respondent, as proposed in the Petition.

Option C: The Visitor recommends that a [insert titles of all temporary fiduciaries the Visitor recommends to be appointed] for the Respondent, but does not recommend the appointment of [insert names of persons nominated in the Petition] as proposed in the Petition.

Option D: [Describe other recommendations besides those listed, as appropriate.]

1. EXPRESS WISHES OF RESPONDENT AND PROCEDURAL RIGHTS

For each question in this section, fully describe any express communication made by the Respondent. Also include observations about the communication.

1(a) Does the Respondent object to the appointment of a fiduciary? Unk* No Yes

1(b) Does the Respondent object to any nominated fiduciary? Unk* No Yes

1(c) Does the Respondent prefer that another person act as fiduciary?

Unk* No Yes

Provide below the name, address, telephone number, and proposed role of any person preferred by the Respondent.

1(d) Does the Respondent wish to be represented by counsel Unk* No Yes

If the Respondent wishes to be represented by counsel, give the name of any attorney the Respondent has retained, or the Respondent wishes to retain.

If the Respondent has not retained counsel, describe whether the Respondent desires the Court to appoint counsel.

1(e) If the Respondent does not plan to retain counsel and has not requested the appointment of counsel by the Court, does the Visitor believe that appointment of counsel (1) would help to resolve the matter or (2) is necessary to protect the interests of the Respondent?

N/A No Yes

If the answer is yes, explain.

1(f) If the Respondent objects to the appointment of a fiduciary, does the Respondent understand that a hearing will be held? Unk* N/A Yes No

1(g) Is the Respondent able to attend a hearing ? Unk* No Yes

If the answer is no, explain.

If the Respondent is able, is the Respondent willing to attend a hearing?

Unk* Yes No

If the Respondent is unable or unwilling to attend a hearing, is the Respondent able and willing to talk to the Judge by telephone during the hearing? Unk* Yes No

1(h) State below the Visitor's comments, observations, concerns, and suggestions regarding the above questions. Note any needed accommodations or security concerns that may be an issue if a hearing occurs.

2. BACKGROUND AND INTERVIEWS WITH RESPONDENT AND INTERESTED PERSONS

2(a) **Brief legal history.** Provide name of Petitioner, name and date of appointment of any court-appointed fiduciary.

2(b) **Chronological summary.** Provide a brief chronological summary of the circumstances leading up to the alleged need for appointment of a fiduciary. Identify the individuals contacted to date, including any interested persons, the Petitioner, and each nominated fiduciary.

2(c) **Summary of impressions.** Provide a summary of the Visitor's impressions from the interview with the Respondent. Include the setting and who was present, and identify any tools used in the assessment. Give the date of the interview of the Respondent and how many judicial days that was following the appointment as Visitor.

3. FINDINGS AND RECOMMENDATIONS

3(a) Are the allegations stated in the Petition substantially correct? Yes No

If the answer is no, explain.

3(b) **Incapacity.** Is the Respondent's ability to receive and evaluate information effectively or to communicate decisions impaired to such an extent that the Respondent presently lacks the capacity to meet the essential requirements for the Respondent'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.) Yes No

If the answer is yes, describe (1) the impairment and its likely cause, and (2) the actions the Respondent is unable to take to provide for his or her health care, food, shelter, clothing, personal hygiene, and other care.

3(c) **Immediate and serious danger.** Is there an immediate and serious danger to the life or health of the Respondent, and does the welfare of the Respondent require immediate action?

Yes No

If the answer is yes, describe (1) the immediate and serious danger, and (2) why the Respondent's welfare requires immediate action.

If the answer is no, explain why.

3(d) Purpose and duration of temporary guardianship. Describe below the specific purpose for the appointment of the temporary guardian and the recommended duration of the appointment (not to exceed 30 days).

3(e) Financial incapability (for temporary conservatorship). Is the Respondent unable to manage his or her financial resources effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance? ("Manage financial resources" means those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.)

N/A Yes No

If the answer is yes, describe (1) the reason why the Respondent is unable to manage financial resources, and (2) the financial management actions the Respondent is unable to take.

If the answer is no, explain why.

3(f) Immediate and serious danger to estate (for temporary conservatorship). In addition to answering "yes" to the previous question, is there an immediate and serious danger to the estate of the Respondent, and does the welfare of the Respondent require immediate action?

N/A Yes No

If the answer is yes, describe (1) the immediate and serious danger to the Respondent's estate, and (2) why the Respondent's welfare requires immediate action.

If the answer is no, explain why.

3(g) Purpose and duration of temporary conservatorship. Describe below the specific purpose for the appointment of the temporary conservator and the recommended duration of the appointment (not to exceed 30 days).

N/A

3(h) Is each nominated fiduciary suitable, qualified, and willing to serve?

Yes No

If the answer is no, explain why.

--

3(i) If the Visitor has identified anyone else the Visitor believes is more appropriate for appointment as a fiduciary than any person nominated in the Petition, provide the name and reasons for the conclusion.

--

3(j) State below additional comments that might assist the Court and persons interested in this matter.

--

3(k) **Future action by Visitor.** (Select the appropriate option.)

- This concludes the Visitor's responsibilities in this proceeding.
- The Visitor was also appointed as the Visitor in the permanent guardianship *[add if appropriate: and conservatorship]* proceeding for the Respondent and will submit a more detailed report to the Court at a later date.

4. SOURCES OF INFORMATION

4(a) All of the people the Visitor interviewed while compiling this report are listed below.

Name of Respondent	
Address	
Phone Number	
Relationship to Respondent	Self
Date Interviewed	

Name of Petitioner	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name of Nominated Temporary Guardian	
Address	
Phone Number	
Relationship to Respondent	

Date Interviewed	
------------------	--

Name of Nominated Temporary Conservator (if any)	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

Name	
Address	
Phone Number	
Relationship to Respondent	
Date Interviewed	

4(b) The Visitor also reviewed the documents or records described below.

--

STATE OF OREGON)
) ss.
 County of Marion)

Affirmation pursuant to UTCR 2.120

I am the Court Visitor in the above entitled matter. I declare that the foregoing Court Visitor's Report is true and accurate to the best of my knowledge and belief and I understand that it is made for use as evidence in court and is subject to penalty for perjury.

DATED this _____ day of _____, 2009.

 Court Visitor

cc:

*Unk—Respondent is unable to respond, or response is inconsistent, so the answer is unknown.

Visitor's Report Template – Outline (Main Form)

- 1. EXPRESS WISHES OF RESPONDENT AND PROCEDURAL RIGHTS**
 - (a) Object to appointment of fiduciary?
 - (b) Object to any nominated fiduciary?
 - (c) Prefer that another person act as fiduciary?
 - (d) Wish to be represented by counsel?
 - (e) Would appt. of counsel help resolve matter or protect interests of Respondent?
 - (f) Understand a hearing will be held?
 - (g) Able to attend a hearing?
 - (h) Comments, observations, concerns and suggestions.

- 2. BACKGROUND AND INTERVIEWS WITH INTERESTED PERSONS**
 - (a) Brief social history.
 - (b) Brief legal history.
 - (c) Background of nominated fiduciary.
 - (d) Chronological summary.

- 3. CAPACITY**
 - (a) Interview with Respondent.
 - (b) Summary of impressions.
 - (c) Inability to provide for needs re physical health, food, clothing, and shelter.
 - (d) Inability to resist fraud or undue influence.
 - (e) Isolated incident or pattern?

- 4. EVAL. OF RESIDENCE, HEALTH CARE, & SOC SERVICES REC'D IN PAST YEAR**
 - (a) Residence where lived most recently & how long. Other residences in past year.
 - (b) Able to live at current residence while under guardianship?
 - (c) Current location, if different from current residence.
 - (d) Health or social services provided during the past year.
 - (e) Alternatives to G. considered and why not available.
 - (f) Comments, obs, concerns, & suggs re place of residence & health or soc services.

- 5. FINDINGS AND RECOMMENDATIONS**
 - (a) Allegations substantially correct?
 - (b) Incapacity—impairment & cause, actions unable to take to provide for needs.
 - (c) TG—immediate and serious danger.
 - (d) TG—purpose and duration.
 - (e) Conservatorship—financial incapability.
 - (f) Temporary Conservatorship—immediate and serious danger.
 - (g) Temporary Conservatorship—purpose and duration.
 - (h) Appointment of fiduciary necessary?
 - (i) Suitability of fiduciary.
 - (j) Objection by other parties & issues.
 - (k) Anyone else more appropriate for appointment as fiduciary?
 - (l) Any limitations to scope or duration of authority of fiduciary?
 - (m) Any need for further evaluation?
 - (n) Any additional comments?

- 6. SOURCES OF INFORMATION**
 - (a) Individuals interviewed.
 - (b) Documents or records reviewed.

Visitor's Report Template – Outline (Temporary Guardianship/Conservatorship)

- 1. EXPRESS WISHES OF RESPONDENT AND PROCEDURAL RIGHTS**
 - (a) Object to appointment of fiduciary?
 - (b) Object to any nominated fiduciary?
 - (c) Prefer that another person act as fiduciary?
 - (d) Wish to be represented by counsel?
 - (e) Would appt. of counsel help resolve matter or protect interests of Respondent?
 - (f) Understand a hearing will be held?
 - (g) Able to attend a hearing?
 - (h) Comments, observations, concerns and suggestions.

- 2. BACKGROUND AND INTERVIEWS WITH INTERESTED PERSONS**
 - (a) Brief legal history.
 - (b) Chronological summary.
 - (c) Summary of impressions.

- 3. FINDINGS AND RECOMMENDATIONS**
 - (a) Allegations substantially correct?
 - (b) Incapacity—impairment & cause, actions unable to take to provide for needs.
 - (c) TG—immediate and serious danger.
 - (d) TG—purpose and duration.
 - (e) Temporary Conservatorship—financial incapability.
 - (f) Temporary Conservatorship—immediate and serious danger.
 - (g) Temporary Conservatorship—purpose and duration.
 - (h) Each nominated fiduciary suitable, qualified, and willing to serve?
 - (i) Anyone else more appropriate for appointment as fiduciary?
 - (j) Any additional comments?
 - (k) Future action by Visitor.

- 4. SOURCES OF INFORMATION**
 - (a) Individuals interviewed.
 - (b) Documents or records reviewed.

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
MARION COUNTY
Probate Department**

[Insert caption from Petition]

Case No. *[Insert case number from
Petition]*

MOTION FOR EXTENSION OF TIME TO FILE
VISITOR'S REPORT AND ORDER

[Insert Visitor's name], the visitor appointed by Court order dated *[insert date of order appointing visitor]* requests permission to file the visitor's report by *[insert proposed new date for filing the report.]*. The visitor's report was originally due *[insert original due date of visitor's report (usually 15 calendar days from date of appointment)]*. The visitor needs the extension because:

[Briefly describe reasons for need for extension. Example: Delay in receiving order appointing visitor. It is also good to state the number of days in the extension. Example: The visitor needs additional time to conduct interview and prepare the report, and is requesting an extension of time of 15 days to do so.]

Dated _____, 20__.

Court Visitor

ORDER

- The Motion is allowed.
 The Motion is denied.

Dated _____, 20__.

Circuit Court Judge
Probate Clerk

MOTION FOR EXTENSION OF TIME TO FILE VISITOR'S REPORT AND ORDER

More on HIPAA and Physician-Patient Privilege

I. The Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is the source of significant confusion among both health care providers and lawyers alike. Passed in 1996, with regulations subsequently adopted by the U.S. Department of Health and Human Services (HHS) (known as the Privacy Rule), HIPAA implements privacy standards designed to protect patient information from disclosure.

A. Who is covered by HIPAA: The “covered entities”

The scope of this particular privacy protection, however, may be widely misunderstood. First, HIPAA is applicable only to “covered entities,” which are defined as health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA. 45 C.F.R. § 160.103. Contrary to popular belief, not all health care providers are covered by this provision. HIPAA-covered transactions include benefit eligibility inquiries, referral authorization requests, or other transactions for which HHS has established standards under the HIPAA Transactions Rule. For example, many health care providers are covered entities because they transmit billing information to insurance companies in an electronic format.

B. What is covered: “Protected Health Information”

Generally speaking, protected health information (PHI) is individually identifiable health information that consists of information that identifies the person’s past, present or future physical or mental health or condition, the provision of health care to the person, or the past, present, or future payment for the provision of health care to the person, and that identifies the person or for which there is a reasonable basis to believe can be used to identify the person. Individually identifiable health information includes such things as name, address, birth date, Social Security numbers. 45 C.F.R. § 160.103. Individually identifiable health information can include information that is not created or generated by the entity that holds the information.

C. What is protected:

The purpose of the privacy regulation of HIPAA is to prevent the unauthorized disclosure of protected health information by covered entities except under certain limited circumstances. Disclosures can be divided into two separate types of disclosures: required disclosures and permitted disclosures.

1. Required Disclosures:

The covered entity is required to disclose protected health information under two circumstances: (1) to people or their personal representatives who specifically request the disclosure of the person’s protected health information and (2) to HHS when HHS is engaged in an investigative review or enforcement action. 45 C.F.R. § 164.502(a)(2).

2. Permitted Disclosures:

The covered entity is allowed to disclose protected health information (to people or entities *other* than the patient) as follows:

- (1) For the treatment, payment, and health care operations (as permitted by other regulations);
 - (2) Pursuant to and in compliance with a valid authorization;
 - (3) Incident to an otherwise permitted or required use and disclosure pursuant to regulations;
- 45 C.F.R. § 164.502(a)(1).

The covered entity is also allowed to disclose PHI to the person and for the person's treatment and care when that care is being provided by the entity holding the information. The covered entity may also disclose information relating to victims of abuse or neglect (45 C.F.R. § 164.512(a), (c)) and for certain law enforcement purposes (*see* 45 C.F.R. § 164.512(f)).

Covered entities are allowed to disclose PHI pursuant to an "order of the court," but only to the extent specifically required in the order. 45 C.F.R. § 164.512(e)(1)(i). Disclosure may also be made pursuant to a subpoena, but only if certain assurances are provided that the person whose information is sought has been notified of the request and that the seeking party has an appropriate protective order. An appropriate protective order is one that prohibits the disclosure of information outside the litigation and requires the information be destroyed at the end of the litigation. 45 C.F.R. § 164.512(e).

A covered entity may disclose a limited amount of information when the person is clearly incapacitated. This is authorized in 45 C.F.R. § 164.510(b)(3), which provides:

Limited uses and disclosures when the individual is not present. If the individual is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care. A covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, X-rays, or other similar forms of protected health information.

This provision may help visitors obtain information from covered entities if the person is clearly incapacitated. However, if the Respondent is not obviously incapacitated or incapable of providing consent, this may not be useful.

Lastly, it is worth noting that HIPAA is neither a sword nor a shield for purposes of obtaining PHI. In other words, HIPAA does not place limits on third parties seeking information. Rather, it restricts covered entities and prohibits certain disclosures by those covered entities. If a covered entity discloses information in violation of the regulation, the Department of Health and Human Services has an administrative procedure for taking enforcement action against the covered entity. HIPAA does not contain a private remedy for an aggrieved person whose medical information has been wrongfully disclosed, nor does it contain a provision allowing the person to block the distribution of that information once the "genie is out of the bottle."

For further information see:

<http://www.hhs.gov/ocr/hipaa/>
<http://www.hhs.gov/ocr/privacysummary.pdf>

II. Patient-Physician Privilege (OEC 504-1; ORS 40.235)

Oregon's patient-physician privilege is codified at ORS 40.235. This statute is also referred to as Oregon Evidence Code (OEC) section 504-1. Generally speaking, a patient

has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

OEC 504-1(2). The privilege may be claimed by the patient, the patient's guardian or conservator, the personal representative of a deceased patient, or the physician, but only on behalf of the patient. OEC 504-1(3). Examinations pursuant to ORCP 44 are **not** privileged under OEC 504-1.

Although the rule specifies that the privilege applies only to communications between the patient and physician, the rule is generally interpreted to include the physician's observations and test results. *See* Laird C. Kirkpatrick, *Oregon Evidence* 246 (5th ed., 2002). Nor does the presence of a third party in the examination waive the privilege so long as the third party is there to assist the patient or physician in the diagnosis or treatment. *Id.*

The privilege, however, may be waived by the holder of the privilege. The holder waives the privilege if the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the matter or communication." OEC 511 (ORS 40.280). The rule specifies that, with regard to psychotherapists and physicians, voluntary disclosure occurs "upon the holder's offering of *any* person as a witness who testifies as to the condition."

For purposes of the visitor's report, although the statute authorizing visitors to ask physicians for information clearly anticipates that the visitor may wish to receive medical information, such a disclosure would still be subject to the provisions of the privilege. If a physician were to voluntarily disclose privileged information to the visitor, such information's use may be blocked by the patient (presumably the Respondent). However, if the Respondent offered **any** person's testimony, including the Respondent, as to the medical or psychological condition of the Respondent then the privilege is waived and the Respondent's medical records are subject to discovery and disclosure. This is true regardless of which person is called to testify. In *State ex rel. Calley v. Olsen*, the Court held that once the patient has intentionally offered any privileged information, other doctors who have examined the patient may be called to testify and the medical records relating to the patient's condition may be offered. 271 Or. 369, 532 P.2d 230 (1975). In other words, if the Respondent either testifies in his or her defense, or offers testimony of an expert witness who examined the Respondent for purposes of the hearing, the Respondent will be waiving the privilege as to other doctors who may have examined the Respondent in the past. Whether this helps a visitor in the initial stages of the investigation, however, is highly dependent upon the individual circumstances of the case.

Visitor's options for obtaining privileged patient-physician information:

Although the visitor may ask for information from the physician (ORS 125.150(4)), such a request is explicitly subject to any law regarding confidentiality, presumably including the patient-physician privilege. If the request is refused and the visitor desires that information then there are a limited number of ways to obtain that information.

First, the visitor may obtain a release from any person who controls the privilege, except, presumably, from the physician. Whether the Respondent will acquiesce to such a request, or whether such a request is appropriate depends on the circumstances of the situation. Second, the visitor may recommend the Court to order an examination of the Respondent.

45 C.F.R. § 164.510(b)(3)

Title 45 of the Code of Federal Regulations, section § 164.510(b)(3) (regarding HIPPA) provides the following:

Limited uses and disclosures when the individual is not present. If the individual is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care. A covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, X-rays, or other similar forms of protected health information.

45 C.F.R. § 164.510(b)(3) (2008).

Hearing Preparation and Materials

Below are some suggestions for how visitors can prepare for testifying at a hearing and what to take to the hearing.

1. Hearing Preparation (1-2 days prior to the hearing):

- 1.1 Review the Petition (especially the allegations and supporting information).
- 1.2 Read through the visitor's report and highlight relevant parts.
- 1.2 Make an outline of the report (this helps in the review of the report, summarizes the most important info.)
- 1.4 On the Visitor's Report Template Outline, list the corresponding page numbers in the report next to the appropriate Outline section (this makes for easier reference).
- 1.5 Prepare notebook for hearing.

2. Notebook Contents

- 2.1 Copy of highlighted visitor's report.
- 2.2 Outline of visitor's report.
- 2.3 Template Outline with page numbers.
- 2.4 Various statutory definitions (incapacity standard for guardianships, financially incapable standard for conservatorships, statute regarding least restrictive alternative, and statute regarding preference in appointing fiduciaries).
- 2.5 List of dates of training for Folstein Mini-Mental Status Exam (if visitor gave that exam during the investigation).
- 2.6 Copy of visitor's resume.
- 2.7 Copy of professional fiduciary's resume (if visitor recommends appointment of professional fiduciary).

Notes for Attorneys Filing in Marion County

The following information is drawn from the *Handbook* and compiled here for easy reference for attorneys filing guardianships and conservatorships in Marion County. While most of the requirements for visitor's interviews and reports are governed by statute, some practices are governed by Court practice and the local Presiding Judge's Order. Marion County practices are summarized below.

1. **Appointment of visitor and role of the attorney.** In Marion County, the attorney for the Petitioner arranges the appointment of the court visitor.

1.1 The Court maintains a list of approved visitors. Attorneys are free to select from that list in arranging a visitor. (However, the visitor is the **Court's visitor** and does not work for the attorney.)

1.2 Before asking the Court to appoint a particular visitor, the attorney should call the visitor, confirm that the visitor is available for the time frame for the requested appointment, provide contact data, and discuss fees. An attorney should not ask the Court for the appointment of a visitor unless the attorney has had such a conversation with the proposed visitor.

1.3 When arranging the appointment of a visitor in a temporary protective proceeding, the attorney and the visitor must be sensitive to the need for the visitor to appear at a hearing within a short time of any objection being filed.

1.4 Once the petition is filed, the attorney should **immediately** fax to the visitor or otherwise arrange for the visitor to obtain the following information:

- a copy of the signed order appointing the visitor,
- the petition,
- any affidavits or exhibits that accompanied the petition to the visitor,
- contact information for key people, including the telephone numbers for the Respondent or Protected Person and the nominated fiduciary.

1.5 The Court's practice is that the same visitor stays with a case when possible until the Court takes final action on the petition. In other words, an attorney or party cannot ask for a new visitor just because the attorney or party disagrees with the findings in the visitor's report.

1.6 The visitor must be present at the hearing on any objections to the appointment of a fiduciary. The Petitioner's attorney should notify the visitor of the proposed hearing date and seek to include the visitor in any scheduling.

2. **Timing of visitor interviews and reports.**

2.1 Visitor for petition to appoint a "permanent" fiduciary and timing of report. A visitor shall file a report in writing with the Court within 15 days of the visitor's appointment. "15 days" here refers to 15 calendar days.

2.2 Visitor for petition to appoint a temporary fiduciary and timing of interview and report. Within three days after the appointment of the temporary fiduciary, the visitor shall conduct an interview of the Respondent. The visitor shall report to the Court within five

days after the appointment of a temporary fiduciary is made. “Three days” and “five days” here refer to days the Court is open as described in ORCP 10A.

3. Provision of copy of Petition and other filings to the visitor. In Marion County, the Petitioner’s attorney is expected to provide this information to the visitor. (The Court does not do so.)

4. Costs for the visitor’s services.

4.1 The current range of the hourly rate for Marion County visitors is \$60 to \$100. The visitors typically charge half their hourly rate for travel time and charge the IRS rate for mileage. The average visitor’s report will range in cost from \$400 to \$700. (If the facts of the case warrant a report that will cost in excess of the \$750, the visitor is expected to notify the Petitioner’s attorney of this with a courtesy call.)

4.2 By deciding to file a petition to appoint a fiduciary, the Petitioner becomes primarily liable for the cost for the visitor’s services. If the Court does not create a guardianship or conservatorship, the Petitioner pays the cost of the visitor’s services. Therefore, the attorney for the Petitioner may want the Petitioner to provide a retainer that covers this cost.

5. Visitor communication with attorneys. Marion County allows a court visitor to communicate with any or all attorneys during preparation of the visitor’s report and testimony. However, the court visitor is presumed to be a neutral investigator. Therefore, if the visitor communicates with one attorney, the visitor should not refuse to communicate with the other attorney(s), if asked to do so.

6. Visitor communication with the Court. The Court is not permitted to receive “ex parte communication”—that is, information about the facts of the case that is not shared with all parties. The Court cannot receive this information from any source, including the court visitor. Therefore, the visitor may communicate directly with the Court only for routine scheduling, such as checking when a hearing is scheduled. Any other communication to the Court should be made in writing, with copies to all parties who appeared or to their attorneys.