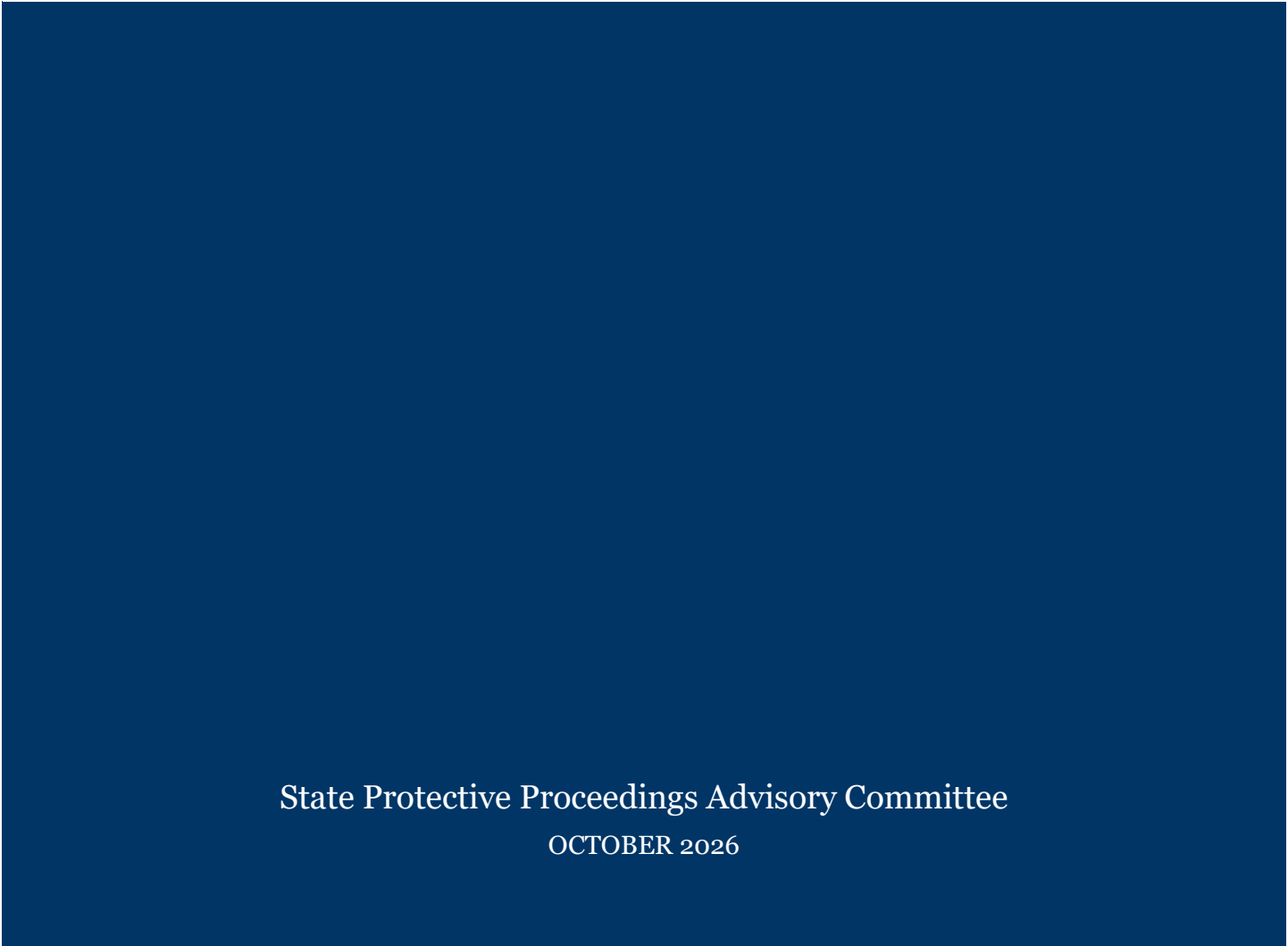




COURT VISITOR HANDBOOK



State Protective Proceedings Advisory Committee
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Table of Contents

Introduction	4
Chapter 1: Protective Proceedings Statutes and Overview	5
Statutory Definitions	6
Guardianship	7
Conservatorship.....	9
A Note on Minors and Vulnerable Youth	10
Petition Requirements	10
Statutory Role of Court Visitors.....	13
Visitors Generally.....	13
Visitor Appointment	13
Visitor’s Investigation	14
Visitor’s Report	16
Visitors at Objection Hearings.....	17
Visitor Qualifications, Standards, and Payment.....	17
Flowcharts for Case Steps	19
Chapter 2: Court Visitor Duties	19
Investigate	19
Communication Considerations	20
Cultural Competency and Bias	20
Health Information and Limitations	21
Specific Determinations	21
Evaluate	22
Report	23
Chapter 3: Incapacity	25
Capacity Considerations.....	25
A Note on Civil Commitments	26
Common Impairments.....	27
Assessing Capacity	27

Cognitive Functioning.....	28
Decision Making	29
Activities of Daily Living	29
Chapter 4: Financial Incapability.....	30
Assessing Financial Incapability	30
Investigating Financial Incapability	31
Instrumental ADLs	31
Chapter 5: Fiduciary Suitability	33
Types of Fiduciaries	34
Non-Professional (Lay) Fiduciary.....	34
Professional Fiduciary	34
Public Guardian and Conservator.....	34
Temporary Fiduciary.....	35
Suitability Considerations	35
Investigating Fiduciary Suitability.....	36
Chapter 6: Have Less Restrictive Alternatives Been Considered	38
Alternative Arrangements.....	38
Continuum of Care	41
Chapter 7: Should Limitations on the Guardianship/Conservatorship be Considered	43
Limitations.....	43
Example Limitations in Guardianships/Conservatorships	44
Chapter 8: Contested Hearings.....	45
Hearing Preparation.....	45
What to Expect as a Witness	45
Expert Witness.....	46
Hearing Logistics	46
Professionalism and Decorum	47
Testifying in Court.....	47
Guidelines for Testifying	48

Example Questions: Direct Examination	48
Example Questions: Cross Examination	48
After the Hearing	49
Chapter 9: Ethical Considerations.....	50
Court Visitor Ethical Principles	50
Appendix A: Glossary of Terms	52
Appendix B: Flowcharts	54
Appendix C: Judicial Guardianship Evaluation Worksheet	57
Appendix D: Example Interview Script.....	58
Adult Respondent/Protected Person.....	58
Regarding Procedural Rights	59
Regarding Incapacity	59
Regarding Financial Incapability.....	60
Minor Respondent/Protected Person	61
Proposed Fiduciary.....	62

Introduction

Court visitors play an invaluable role in Oregon protective proceedings. Often described as the “eyes and ears of the court,” visitors provide crucial information that helps inform the court and result in a just outcome. This handbook is designed to support new and experienced visitors alike by providing statutory requirements, detailing responsibilities and expectations, and sharing sample language and best practices.

Every court has unique rules, procedures, and expectations. This handbook provides general statewide guidance but does not replace local processes. It is also not legal advice, so please read this in conjunction with current statutes and rules, which always control. Visitors should follow the instructions from their local courts and reach out to their probate staff or judges when questions arise.

Serving as a court visitor can be challenging and requires passion and dedication. Know that the skill and care you bring to this role plays a meaningful part in the life of the respondent/protected person and those that care for, and about, them. Thank you for the compassion, professionalism, and commitment you show every day.

Chapter 1: Protective Proceedings Statutes and Overview

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. To effectively advise the court, visitors must understand and follow the relevant statutes and rules. Many of the relevant statutes are included in this chapter and discussed elsewhere in this Handbook, but visitors should be familiar with [Oregon Revised Statutes \(ORS\) Chapter 125](#), [Uniform Trial Court Rules \(UTCRC\)](#) Chapter 9, as well as any [Supplementary Local Rules \(SLR\)](#) of their court(s).

Guardianship or conservatorship is a tool for protecting and assisting an incapacitated or financially incapable person by granting another person (a fiduciary) authority to care for, make decisions on behalf of, and protect the respondent/protected person. This authority allows the fiduciary to seek out, navigate, and authorize services and resources to assist the protected person. The fiduciary's role includes helping a protected person maximize their independence and self-reliance, which includes considering the person's values and preferences in making decisions. The fiduciary may be temporary, lasting 30 days unless extended by a court, or indefinite, which lasts until circumstances change and the case is otherwise closed. Guardianship and conservatorship cases collectively may be referred to as "protective proceedings."

Court visitors play a very important role in protective proceedings. As the eyes and ears of the court, visitors independently and objectively investigate and evaluate the respondent/protected person and the proposed fiduciary. Visitors produce a report with their well-informed findings and recommendations, which the parties and court depend on to reach the most just outcome. The court must appoint a court visitor in all adult guardianship cases, whether temporary or indefinite, and in any contested dismissal of a protective proceeding. The court can also choose to appoint a visitor in any case and at any stage that the court believes a visitor would be beneficial.

If the court determines a protective proceeding is necessary, the court may grant the fiduciary either plenary or limited authority. Plenary authority gives the fiduciary the full authority permitted under the law. This imposes the greatest limitation on the individual rights of the protected person and is the most restrictive option available. Alternatively, the court may grant the fiduciary limited authority and restrict the fiduciary in any manner the court deems appropriate. Thoughtful restrictions on the fiduciary's authority can adequately protect the protected person with minimal limitations of the person's rights.

The types of protective proceedings available and the visitor's role are outlined alongside relevant statutes in this chapter and discussed at length with examples and advice in following chapters.

Statutory Definitions

Below are some important statutory definitions used in this Handbook. A glossary of terms can also be found in Appendix A.

Visitor: 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).

Respondent: a person for whom entry of a protective order is sought in a petition filed under ORS 125.055. ORS 125.005(10).

Protected person: a person for whom a protective order has been entered. ORS 125.005(7).

Protective order: 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).

Protective proceeding: a proceeding under ORS Chapter 125. ORS 125.005(9).

Fiduciary: 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). A fiduciary may be a layperson, a professional, or an agent of the state. Depending on the type of fiduciary appointed, they may be subject to different rules or have additional obligations.

Minor: any person who has not attained 18 years of age. ORS 125.005(6).

Incapacitated: a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety. ORS 125.005(5).

Meeting the essential requirements for physical health and safety: 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. *Id.*

Vulnerable youth: a person who: (a) Is at least 18 years of age but has not attained 21 years of age; (b) Is eligible for classification under 8 U.S.C. 1101(a)(27)(J); and (c) Cannot

be reunified with one or more of the person's parents due to abuse, neglect or abandonment, that occurred when the person was a minor. ORS 125.005(12).

Financially incapable: 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 retardation, 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).

Manage financial resources: those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income. *Id.*

Guardianship

A guardian is a fiduciary that makes decisions related to medical care, residence, social associations, and other aspects of the protected person's daily life. The guardian may be appointed to make all of these decisions (plenary) or only certain decisions (limited). 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, the respondent is incapacitated or the respondent is a vulnerable youth;
- (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 (emphasis added).

For a guardian to be appointed to a respondent, a court must find that the respondent is incapacitated. "Incapacitated" means a condition in which a person's ability to receive and evaluate information effectively, or to communicate decisions, is impaired to such an extent that the person presently lacks the capacity to "meet the essential requirements" for their health or safety. ORS 125.005(5). A person cannot "meet the essential requirements" if they cannot take those actions necessary to provide health care, food, shelter, clothing, personal hygiene, and other care without which serious physical injury or illness is likely to occur. *Id.* While the guardian may be able to manage small amounts of money or certain types of property within the guardianship, their primary responsibility is the protected person's health and welfare.

A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. ORS 125.300(1). 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. *Id.*

The guardian must promote the self-determination of the protected person and, to the extent practicable, encourage them to participate in decisions, act on their own behalf, and develop or regain the capacity to manage their personal affairs. ORS 125.315(1)(g). In doing so, the guardian is required to:

- (A) Become or remain personally acquainted with the protected person and maintain sufficient contact with them, including through regular visitation, to know their abilities, limitations, needs, opportunities, and physical and mental health.
- (B) To the extent practicable, identify the protected person's values and preferences and involve the protected person in decisions affecting their care, dwelling, activities, or social interactions.
- (C) Make reasonable efforts to identify and facilitate supportive relationships and services for the protected person.

ORS 125.315(1)(g)(A)-(C).

When circumstances require that the guardian make a decision *for* the protected person instead of *with* them, the guardian is directed to make the decision they reasonably believe the protected person would make if they were able. The exception to this rule is those instances where the decision would unreasonably harm or endanger the welfare or financial interests of the protected person. ORS 125.315(1)(h). As a result, a guardian must know or understand the protected person's previous or current instructions, preferences, values, or actions to the extent actually known or reasonably ascertainable. *Id.* If a guardian does not know or cannot determine what the protected person would do if they were able, the guardian is directed to use a best interest standard. ORS 125.315(1)(i). The best interest standard requires consideration of multiple factors such as information received from professionals and persons close to the protected person, information the guardian believes the protected person would consider if able, and other factors a reasonable person may consider. *Id.*

Additional powers of a guardian are listed in ORS 125.315, and limitations on guardians are found in ORS 125.320 and 125.323.

Conservatorship

A conservator is a fiduciary that assumes control over the property of the protected person and administers it for the protected person's benefit. 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 (emphasis added).

For a conservator to be appointed for a respondent, a court must find that the respondent is financially incapable. "Financially incapable" means a condition in which a person is unable to manage financial resources effectively for reasons including but not limited to mental illness, developmental delay, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention, or disappearance. ORS 125.005(3). A person cannot manage financial resources if they cannot take actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, or income. *Id.* A conservator is focused on the financial management of the protected person, who is often at greater risk of financial abuse or property loss due to their condition.

A conservator's powers and duties generally involve managing the protected person's property. Title to all property of the protected person remains with the protected person, but the conservator is directed to take possession of all property of substantial value, including income, proceeds from sales, and profits, while the protected person retains possession of personal property and funds for living requirements appropriate to their needs and capacities. ORS 125.420.

After taking possession of the protected person's assets and income, the conservator may spend the income or principal without prior court authorization for the support, education, care, or benefit of the protected person and their dependents. ORS 125.425. In making such payments, the conservator must consider the recommendations of a parent or guardian of the protected person unless those recommendations result in personal financial benefit to the parent or guardian or when the payments are not in the best interests of the protected person. *Id.* In deciding whether a payment is reasonably necessary, a conservator should consider:

- (a) The size of the estate, the probable duration of the conservatorship, and the likelihood that at some future time the protected person may be fully able to manage their own affairs.

(b) The accustomed standard of living of the protected person and members of the household of the protected person.

(c) Other available funds or sources used for the protected person's support.

ORS 125.425(2)(a)-(c).

A full list of actions the conservator is permitted to take, with and without court approval, can be found in ORS 125.440 and 125.445.

A Note on Minors and Vulnerable Youth

Minors are respondents/protected persons that are under 18 at the time a petition for a protective proceeding is filed. Oregon law, with a few exceptions for emancipated or married minors, presumes minors are incapacitated and financially incapable.¹ Therefore, the focus in minor proceedings is less on whether a protective proceeding is needed, and more on who should serve as their fiduciary. Once a person turns 18, they are presumed to have capacity to make their own decisions and be financially capable. Unless the protected person's condition persists and the fiduciary petitions the court under adult petition standards, minor protective proceedings terminate when the protected person reaches adulthood.

A "vulnerable youth" guardianship is a special type of guardianship. The vulnerable youth is not a minor and is often not alleged to be incapacitated. A vulnerable youth is an immigrant 18-21 years of age who is present in the United States but cannot viably be reunified with parents due to abuse, neglect, or abandonment that occurred while the youth was a minor (under age 18). The purpose of a petition for a vulnerable youth guardianship is to establish vulnerable youth status for U.S. immigration petition purposes.

Petition Requirements

The statutory requirements for an indefinite protective proceeding petition are listed below. The elements of a petition that the visitor should be particularly aware of and investigate are discussed further in the following chapters. A petition for a *temporary* protective proceeding requires additional allegations, which are discussed further in chapter 5.

¹ Minors may manage money without the need for a conservatorship, but a conservatorship may be requested in situations involving large amounts of money or complicated transactions.

125.055(2) A petition in a protective proceeding must contain the following information to the extent that the petitioner is aware of the information or to the extent that the petitioner is able to acquire the information with reasonable effort:

- (a) The name, age, residence address and current location of the respondent.
- (b) The interest of the petitioner.
- (c) The name, age and address of the petitioner and any person nominated as fiduciary in the petition and the relationship of the person nominated to the respondent.
- (d) A statement as to whether the person nominated as fiduciary:²
 - (A) Has been convicted of a crime;
 - (B) Has filed for or received protection under the bankruptcy laws;
 - (C) Has caused any loss resulting in a surcharge under ORS 125.025 (3)(e) or a similar statute of another jurisdiction;
 - (D) Has been removed as a fiduciary under ORS 125.225; or
 - (E) Has had a license revoked or canceled that was required by the laws of any state for the practice of a profession or occupation.
- (e) If an event listed in paragraph (d) of this subsection has occurred, a statement of the circumstances surrounding the event.
- (f) If the person nominated as fiduciary is not the petitioner, a statement indicating that the person nominated is willing and able to serve.
- (g) The name and address of any fiduciary that has been appointed for the respondent by a court of any state, any trustee for a trust established by or for the respondent, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660 and any person acting as attorney-in-fact for the respondent under a power of attorney.
- (h) The name and address of the respondent's treating physician and any other person who is providing care to the respondent.
- (i) The factual information that:

² Professional fiduciaries must include additional information. For a complete recitation see ORS 125.240.

(A) Except as provided in subparagraph (B) of this paragraph, supports the request for the appointment of a fiduciary or entry of other protective order, less restrictive alternatives to the appointment of a fiduciary that have been considered and why the alternatives are inadequate and the names and addresses of all persons who have information that would support a finding that an adult respondent is incapacitated or financially incapable.

(B) If the petition seeks appointment of a guardian for a vulnerable youth, supports a finding that the proposed protected person is a vulnerable youth.

(j) A statement that indicates whether the person nominated as fiduciary intends to place the respondent in a mental health treatment facility, a nursing home or other residential facility.

(k) A general description of the estate of the respondent and the respondent's sources of income and the amount of that income.

(L) A statement indicating whether the person nominated as fiduciary is a public or private agency or organization that provides services to the respondent or an employee of a public or private agency or organization that provides services to the respondent.

(m) A statement that indicates whether the petitioner is petitioning for plenary authority or specified limited authority for the person nominated as fiduciary.

125.055(3) In addition to the requirements of subsection (2) of this section:

(a) If a petition seeks appointment of a guardian, the petition must contain a statement on whether the guardian will exercise any control over the estate of the respondent. If the guardian will exercise any control over the estate of the respondent, the petition must contain a statement of the monthly income of the respondent, the sources of the respondent's income, and the amount of any moneys that the guardian will be holding for the respondent at the time of the appointment.

(b) Except as provided in paragraph (c) of this subsection, if the petition seeks the appointment of a guardian for an adult respondent, of a guardian for a minor respondent who is more than 16 years of age, in cases where the court determines there is the likelihood that a petition seeking appointment of a guardian for the respondent as an adult will be filed before the date that the respondent attains majority, in accordance with subsection (6)(a) of this section, or as an adult, or of a temporary fiduciary who will exercise the powers of a guardian for an adult

respondent, the petition must contain a statement notifying the court that a visitor must be appointed.

(c) If the petition seeks appointment of a guardian for a vulnerable youth, the petition must include:

(A) A statement that the court in its discretion may appoint a visitor; and

(B) Except as provided in subsection (6)(b) of this section, a declaration signed by the vulnerable youth consenting to the appointment of the proposed guardian.

125.055(4) In addition to the requirements of subsection (2) of this section, if a petition seeks appointment of a conservator or a temporary fiduciary who will exercise the powers of a conservator or if a petition seeks a protective order relating to the estate of the respondent, the petition must contain the petitioner's estimate of the value of the estate.

Statutory Role of Court Visitors

This section includes the statutes governing court visitors. Later chapters offer further explanation, discussion, and examples of a court visitor's role and responsibilities.

Visitors Generally

A visitor may be an officer, employee or special appointee of the court. ORS 125.150(2). The person appointed may not have any personal interest in the proceedings and must have training or expertise adequate to allow the person to appropriately evaluate the functional capacity and needs of a respondent or protected person, or each petitioner and the person to be adopted under ORS 109.329. *Id.* The court shall provide a copy of the petition and other filings in the proceedings that may be of assistance to the visitor. *Id.*

Visitor Appointment

ORS 125.120(1)(a) The court shall appoint a visitor upon the filing of a petition in a protective proceeding that seeks the appointment of:

(A) A guardian for an adult respondent;

(B) A guardian for a minor respondent who is more than 16 years of age, in cases where the court determines there is the likelihood that a petition seeking appointment of a guardian for the respondent as an adult will be filed before the date that the respondent attains majority, in accordance with ORS 125.055 (6)(a), or as an adult; or

(C) A temporary fiduciary who will exercise the powers of a guardian for an adult respondent.

ORS 125.120(1)(b) Notwithstanding paragraph (a) of this subsection, if a petition in a protective proceeding seeks the appointment of a guardian for a respondent because the respondent is, or, if the respondent is a minor, will be a vulnerable youth, the court in its discretion may appoint a visitor.

ORS 125.120(1)(c) The court may appoint a visitor in any other protective proceeding or in a proceeding under ORS 109.329.

A visitor *must* be appointed if a motion for termination of a guardianship is filed and objections are filed to the motion. ORS 125.090(1) (emphasis added). At any time after the appointment of a fiduciary, the court *may* appoint a visitor and require the visitor to perform any duty the visitor could have performed if appointed at the time the fiduciary was appointed, including interviewing relevant persons, examining relevant records, reporting in writing to the court and being present at any hearing. ORS 125.160 (emphasis added).

Visitor's Investigation

ORS 125.150(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, or each petitioner and the person to be adopted under ORS 109.329, personally at the place where the respondent or protected person, or each petitioner or the person to be adopted under ORS 109.329, is located.

ORS 125.150(4) Subject to any law relating to confidentiality, the visitor may interview any physician, naturopathic physician or psychologist who has examined the respondent or protected person, or each petitioner under ORS 109.329, the person or officer of the institution having the care, custody or control of the respondent or protected person, or each petitioner under ORS 109.329, and any other person who may have relevant information.

ORS 125.150(5) If requested by a visitor under subsection (4) of this section, a physician, naturopathic physician or psychologist who has examined the respondent or protected person, or each petitioner under ORS 109.329, may, with patient authorization or, in the case of a minor respondent, with the authorization of the minor's parent or the person having custody of the minor, or in response to a court order in accordance with ORCP 44 or a subpoena under ORCP 55, provide any relevant information the physician, naturopathic

physician or psychologist has regarding the respondent or protected person, or each petitioner under ORS 109.329.

ORS 125.150(6) A visitor shall determine whether it appears that the respondent or protected person, or each petitioner or the person to be adopted under ORS 109.329, is able to attend the hearing and, if able to attend, whether the respondent or protected person, or each petitioner or the person to be adopted under ORS 109.329, is willing to attend the hearing.

ORS 125.150(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.

ORS 125.150(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.

ORS 125.150(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.

ORS 125.150(10) A visitor shall determine whether the respondent or protected person, or each petitioner or the person to be adopted under ORS 109.329, wishes to be represented by counsel and, if so, whether the respondent or protected person, or each petitioner or

the person to be adopted under ORS 109.329, has retained counsel and, if not, the name of an attorney the respondent or protected person, or each petitioner or the person to be adopted under ORS 109.329, wishes to retain.

ORS 125.150(11) If the respondent or protected person, or each petitioner or the person to be adopted under ORS 109.329, has not retained counsel, a visitor shall determine whether the respondent or protected person, or each petitioner or the person to be adopted under ORS 109.329, desires the court to appoint counsel.

ORS 125.150(12) If the respondent or protected person, or each petitioner or the person to be adopted under ORS 109.329, 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, or each petitioner or the person to be adopted under ORS 109.329.

Visitor's Report

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.

ORS 125.155(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.

ORS 125.155(3) The State Court Administrator may prescribe one or more forms to be used by visitors for filing their reports.

ORS 125.155(4) As soon as possible after a report is filed with the court under the provisions of this section, the clerk of the court shall mail copies of the report to any person who has filed with the court a specific request for a copy of the report. A request made under ORS 125.060 (3)(b) does not meet the requirements of this subsection unless the request specifically requests a copy of the visitor's report.

The court *shall* appoint a visitor if the petition seeks appointment of a temporary guardian and *may* be appointed by the court if a petition seeks appointment of a temporary conservator. ORS 125.605(4) (emphasis added). Within three days after the appointment of the temporary fiduciary, the visitor shall conduct an interview of the respondent. *Id.* The visitor shall report to the court within five days after the appointment of a temporary fiduciary is made. *Id.* The report of the visitor shall be limited to the conditions alleged to support the appointment of a temporary fiduciary. *Id.*

Visitors at Objection Hearings

The visitor must be present at the hearing on any objections to the appointment of a fiduciary. ORS 125.155(5). A visitor is entitled to reasonable compensation for attendance at the hearing. *Id.* The court shall notify the visitor of the time and place of any hearing on objections to the appointment. *Id.*

Visitor Qualifications, Standards, and Payment

Decisions regarding visitor qualifications, standards, and payment are delegated to the presiding judge of each circuit court, as noted in the statutes included below. This means that the hiring and review process, training requirements, and fees differ between most circuits. The visitor should ask their local probate staff for the local rules (SLRs) and/or presiding judge orders (PJOs) governing visitors to familiarize themselves with the specific procedures of their court and reach out to those staff with any questions.

ORS 125.165(1) A presiding judge shall by court order 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.

ORS 125.165(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.

ORS 125.165(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.

ORS 125.170(1) Not more than once each calendar year, the court may charge a respondent or protected person for any visitor services provided during the year. The court may order reimbursement to the state from the assets of the respondent or protected person for the cost of any interview or report unless the court finds that the assessment would impose a hardship on the respondent or protected person. If the respondent or protected person is receiving public assistance or medical assistance, as defined in ORS 414.025, there is a rebuttable presumption that charging a respondent or protected person for the services of a visitor would impose a hardship.

ORS 125.170(2) The presiding judge by court order shall establish fees for visitors conducting interviews and preparing reports.

Flowcharts for Case Steps

Flowcharts showing the case steps for a protective proceeding and the court visitor process can be found in Appendix B. These flowcharts are meant as a starting point to understand how a protective proceeding case tends to move through the court system. Every court has its own local process and rules, so visitors should arrange time to review the flowcharts with their court and note any differences on their copy of the provided flowchart.

Chapter 2: Court Visitor Duties

The appointment of a court visitor is required before the appointment of a guardian in all adult guardianship cases, whether temporary or indefinite. ORS 125.150(1)(a). The court may choose to appoint a visitor in any case type and at any stage of the proceeding. ORS 125.150(1)(b)-(c), ORS 125.160.

The visitor must not have any personal or financial interest in any party or the proceeding. ORS 125.165(2). If the visitor has a personal interest in or any knowledge of the parties or the circumstances surrounding the petition, the visitor should notify the court immediately. If the visitor learns of any potential conflict of interest or discovers the visitor has prior knowledge of the parties or circumstances after appointment, the visitor should immediately report that information to the court. The court will decide whether to proceed with the current visitor or appoint a different visitor.

Visitors are the eyes and ears of the court and have three essential responsibilities: **investigate, evaluate, and report**. Though the visitor report must investigate elements of the petition, the report should paint a full picture for the court so that it could stand on its own.

Investigate

Generally, the court visitor is tasked with investigating the circumstances of the allegations in the petition. ORS 125.150(7)-(12) specifically lists information to investigate. The purpose of the investigation is to understand the general condition of the respondent and the suitability of the proposed fiduciary.

The visitor must personally interview the nominated or appointed fiduciary and the respondent/protected person at the place where the respondent/protected person is located. ORS 125.150(3). It is good practice to interview the respondent/protected person at least once without other people present to minimize outside influence and get an accurate picture of the person's level of functioning. The respondent/protected person

often seems the most logical first interview, but that may not always be practical or productive if additional context from other sources may help prepare the visitor for the interview. If a visitor has safety concerns leading up to or during an interview, it may be prudent to contact Adult Protective Services to request assistance. It is also important to be aware of potentially sensitive or triggering topics going into interviews. More suggestions for how to approach interviews and example questions can be found in chapter 3-5 and Appendix D.

It is important to speak with more than just the parties to the case. The visitor should attempt to interview the respondent/protected person's service providers, family members, friends, and any other person who may have information regarding the respondent/protected person's desires, abilities, and limitations and the suitability of the proposed fiduciary. ORS 125.150(4). By speaking with a wide range of people and forming recommendations based on these conversations and observations, the report will be more thorough, and the judge will have better information on which to base their decision.

Communication Considerations

Not everyone will know or understand the many different legal, medical, or financial terms that may come up in conversation about protective proceedings. The visitor should use plain language whenever possible and be prepared to explain terms or concepts and provide examples. The visitor should also be aware of if an interviewee has hearing, speech, or vision impairments, and be willing and able to tailor the interview to accommodate those impairments. More suggestions for how to approach interviews and example questions can be found in chapter 3-5 and Appendix D.

The respondent/protected person, proposed fiduciary, or other interviewee may not speak English as their primary language or have a limited ability to speak, read, or write English. In these circumstances, visitors have complementary access to an on-demand virtual interpreter service called LanguageLine. To gain access to this service, visitors must view a LanguageLine training video and complete an acknowledgment form. Visitors should contact their local probate staff to obtain the training video and acknowledgment form.

Cultural Competency and Bias

When conducting their investigation, visitors will encounter people with vastly different life experiences and must remain open-minded and respectful in all interactions. More ethical expectations of a visitor are discussed in chapter 9.

While it is not possible to eliminate all bias, a visitor must remain objective and ensure their own lived experience and preconceptions do not impact their recommendations. To do this, the visitor should recognize their own biases and attempt to identify when those

biases could impact their communication, evaluation, or opinion of the case. A visitor should remember that people from different cultural groups do not necessarily share the same beliefs and practices, and they may perceive, encounter, or respond to similar experiences differently.

Health Information and Limitations

Visitors may seek information from the respondent/protected person's physician, naturopathic physician, or psychologist, but the Health Insurance Portability and Accountability Act (HIPAA) and physician-patient privilege may prevent access to this information. While ORS 125.150(5) permits the visitor to request information regarding the respondent/protected person's health, it does not require that the provider fulfill that request. Some providers may elect not to disclose information in the absence of patient authorization, authorization of the minor's parent or the person having custody of the minor, or without a court order in accordance with ORCP 44 or a subpoena under ORCP 55. ORS 125.150(5). If a court visitor has questions about physical or mental examinations (ORCP 44) or subpoena powers (ORCP 55), they should contact their local court. Sometimes a facility is unaware of the visitor's role and may struggle to understand what information they are permitted to share with the visitor. In those instances, the facility social worker or case worker may be of more assistance.

Remember that a person's diagnosis or treatment plan is not determinative of their capacity. The visitor should note their efforts to obtain medical information but also expand on their own observations regarding capacity. Capacity is discussed in much more detail in chapter 3.

Specific Determinations

During the investigation, statute directs that the visitor must determine the following:

Wishes of the Respondent/Protected Person

Whether the respondent/protected person:

- Wishes to contest the appointment of a fiduciary. ORS 125.150(8)(a).
- Objects to the nominated fiduciary. ORS 125.150(8)(a).
- Prefers another person act as fiduciary and if so, who. ORS 125.150(8)(a).
- Is willing to attend a hearing and appears physically able to do so. ORS 125.150(6).
- Wants to be represented by an attorney or if they are already represented, by whom. ORS 125.150(10)-(11).

Need for Counsel

Whether the visitor believes that the appointment of counsel by the court is necessary to protect the interests of the respondent or would help to resolve the matter. ORS 125.150(12).

Information About the Respondent/Protected Person's Situation

- 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).
- Alternatives to guardianship considered by the petitioner, and whether those alternatives are not available. ORS 125.150(7)(c).
- Health or social services provided to the respondent during the year preceding the filing of the petition, if known. ORS 125.150(7)(d).

Abilities of the Respondent/Protected Person

- The ability or inability of the respondent to provide for their needs, including physical health, food, clothing, and shelter. ORS 125.150(7)(a).
- 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).
- The ability or inability of the respondent to resist fraud or undue influence. ORS 125.150(7)(e). Considerations may include seclusion of or restricted access to the respondent, unexplained change in the respondent's attitude toward those they had previously expressed affection for, and discrepancy or lack of continuity from prior plans.
- If a conservatorship is sought, whether the respondent is financially incapable. ORS 125.150(9).

Appropriateness of Proposed Fiduciary

- The suitability of the nominated fiduciary, any limitations that should be imposed on the fiduciary, and the need for further evaluation. ORS 125.155(2)(c).

All the information gathered during the investigatory stage will be used to analyze and evaluate the necessity of the fiduciary's appointment and the suitability of the nominated fiduciary.

Evaluate

The evaluative function is not explicitly described in the statute but is a very important function that requires the visitor to analyze the facts and information gathered during their investigation. The visitor must evaluate, based on their experience and training, whether the respondent/protected person is incapacitated and in need of a protective proceeding and whether the nominated fiduciary is appropriate. The visitor's ability to apply their experience and training to the investigative record and evaluate the respondent/protected person and fiduciary, and the relationship between them, is the heart of a visitor's role. A more detailed discussion on how to evaluate capacity, financial capability, and fiduciary

suitability can be found in chapters 3-5. A sample interview script that includes example questions is included in Appendix D.

Remember that the visitor is not expected to function as an attorney, physician, accountant, case manager, or mediator. Rather, the visitor is tasked with synthesizing the information gathered during their investigation to provide the court with an independent and objective view of the circumstances so that the judge has enough information to determine if, and to what extent, a fiduciary is necessary.

Report

Following the visitor's investigation and evaluation, the visitor will prepare a written report presented to the court summarizing their interviews and opinions.

The court visitor's report is due to the court within 15 days of the visitor's appointment if the petition requests an **indefinite** guardianship and within five days of the visitor's appointment for a **temporary** guardian. ORS 125.155; ORS 125.605(4). There is a statewide form of report, but many counties have also developed forms for the report that reflect their preferences. These prescribed forms are necessary to ensure that the court is receiving all the information required by ORS 125.155:

- (a) A statement of the information gathered that relates to the correctness of the petition, including a conclusion about whether a fiduciary appointment is necessary and whether the nominated fiduciary is qualified and willing to serve.
- (b) A list of the people interviewed and their contact information.
- (c) Recommendations about the suitability of the nominated fiduciary and any limitations that should be imposed on the fiduciary's authority.
- (d) Recommendations on any specific questions posed by the court in the visitor's appointment order.
- (e) The visitor's determinations required by ORS 125.150.
- (f) A report as to whether any respondent or protected person desires a lawyer, either court-appointed or retained. If the person does not request an attorney, a visitor can nevertheless recommend that one be appointed.
- (g) Any express wishes of the respondent to be present for a hearing or willingness to attend a hearing, and whether the respondent wishes to contest the necessity of the appointment of a fiduciary in general or specifically the appointment of the nominated fiduciary, preferring another person to act in that role.

If a **temporary** guardianship or conservatorship is sought, the report must also address whether there is an immediate and serious danger to the life or health of the respondent (guardianship) or the respondent's estate (conservatorship) and the welfare of the respondent requires immediate action. ORS 125.600. Some courts require separate reports for a temporary and indefinite petition when both are requested, while others may allow for a combined report. The visitor should confirm their court's preference before beginning their report.

A clear, detailed, but concise report helps ensure the most important information reaches the reader, whether judge or party. If there is information the visitor felt was important but could not obtain, or if a recommendation cannot be made for some reason, include that information in the report. If additional time is needed to complete the report, the visitor should notify their local probate staff as soon as possible to determine next steps.

The report may include a significant amount of sensitive information regarding the respondent/protected person's health, lifestyle, and finances. This information is extremely useful to the court and parties, and the visitor should be as descriptive as possible when addressing any concerns. The visitor's choice of words should be carefully weighed to convey objective facts over subjective opinions, which also maintains a respectful and informative tone. An explanation of the details of the person's living conditions, for example that the visitor observed spoiled food or hazardous material, is more useful than ambiguous terms like "filthy" or "disgusting." To prevent public disclosure of this information, the visitor may wish to file their report confidentially. UTCR 9.420(2). Questions regarding confidentiality of filings should be directed to the visitor's local probate staff, as there is variation in interpreting confidentiality between the courts.

Once the report has been received, the court has an obligation to provide a copy to the respondent/protected person and all parties who have specifically requested one. UTCR 9.420(3). The visitor report should include all the information and analysis required by statute and that would otherwise assist the judge in reaching a decision. However, as the respondent/protected person will have access to the report, it is important to maintain a respectful and professional tone throughout. Recognizing the respondent/protected person's strengths and abilities, alongside any concerns, will help balance the report and give the judge important context regarding potential opportunities for limiting the guardianship/conservatorship in areas where fiduciary control may not be necessary. Limited guardianships and conservatorships are discussed in more detail in chapter 7.

If the visitor learns new information or circumstances change before a hearing is held or a determination is made, the visitor should alert the court or file an amended or supplemental report.

Chapter 3: Incapacity

To appoint a guardian, the court must find that the following elements were proven by clear and convincing evidence:

ORS 125.305(a) The respondent is a minor in need of a guardian, the respondent is incapacitated or the respondent is a vulnerable youth;

(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.

To appoint a *temporary* guardian, the court must find, by clear and convincing evidence, that 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(a). The judge will decide what constitutes “immediate and serious danger,” so it is important for the visitor to be as descriptive as possible about any facts that support or contradict the urgency of the situation.

“Incapacitated” means a condition in which a person’s ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person’s physical health or safety. ORS 125.005(5). “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. *Id.*

A petition may request a guardianship with a conservatorship, or a guardianship only.

Capacity Considerations

The existence of a person’s medical or mental health diagnosis does not automatically meet the criteria for incapacity and result in the need for a guardianship. To be incapacitated, an impairment must prevent a person from meeting their essential physical health and safety needs. This is different from a situation where a person with an impairment makes lifestyle choices that their loved ones or medical team disagree with. Making unhealthy or unwise decisions is not in itself evidence of impairment, as people have the right to folly or to make bad decisions. For example, people have the right to refuse medical treatment against physician orders if they understand the consequences of

the refusal. Incapacity is the inability of a person to make an informed decision as to their preferences in light of the facts and consequences of that decision. The decisions may rightfully frustrate or worry the people who care about the respondent/protected person. However, it is important to keep in mind that guardianship is a serious infringement on a person's fundamental rights, so there may be options available to protect the respondent/protected person that allow for more independence and self-determination. Limited guardianships and conservatorships are discussed further in chapter 7.

Even if the respondent/protected person is incapacitated, guardianship is only needed if appointment of a fiduciary is necessary as a means of providing continuing care and supervision of the respondent/protected person. If a system is in place that adequately meets the care needs of the respondent/protected person, whether it be with professional assistance or by informal arrangements, the visitor should describe the system and its efficacy in their report.

Capacity is not static, but for a guardianship to be established the impairment resulting in incapacity must be presently occurring. What “presently occurring” means is something parties may argue and that the judge ultimately decides – the visitor does need to try and make this determination. Instead, the visitor should report any recent, continuing, and/or intermittent effects the respondent/protected person's impairment may have on their life and decision-making. The visitor should also note if any changes in the respondent/protected person's environment, treatment, or other circumstances appear to impact their capacity. Objective presentation of this information provides the court with important context and will assist the judge in deciding whether any incapacity is presently occurring.

The Elder Justice Initiative developed a worksheet to guide judges through making capacity determinations. Visitors may find review of the worksheet informative, as it highlights what the court is looking at when making a decision about guardianship. The worksheet can be found in Appendix C.

A Note on Civil Commitments

A civil commitment is an action by the *state* seeking to intervene on the rights of an individual. These proceedings are governed by different statutes and therefore have different standards and procedures than a guardianship case. It is not appropriate for a visitor to recommend that the respondent/protected person be civilly committed. However, it is helpful for a visitor to include in their report if they are aware of any current or past civil commitment of the respondent/protected person, and the context in which it may have arisen, if that information is available to the visitor.

Common Impairments

There are many impairments that a visitor may encounter, but the most common are briefly discussed here. Many cases will involve a respondent/protected person who may be experiencing multiple medical, physical, psychological or mental health conditions. The severity and impact of these conditions can vary greatly, and every respondent/protected person has unique life experiences and circumstances that may affect the way the impairment impacts their ability to meet their physical health and safety needs. It is not the responsibility of the visitor to diagnose a respondent/protected person – the visitor should instead endeavor to understand and report on the unique condition(s), prognosis, available supports, and functioning of each respondent/protected person.

Mental health disorders such as post-traumatic stress disorder, bipolar disorder, schizophrenia, schizoaffective disorder, and depression can result in hospitalization and require long term treatment and support, but many people with mental health disorders successfully manage their health and wellbeing. For more information, visitors should watch [Mental Illness and Functional Capacity for a discussion of common mental health disorders, their impact, and interview tips presented by a clinical psychiatry professor and tailored to Court Visitors.](#)

Developmental and cognitive disabilities include autism spectrum disorder, cerebral palsy, and intellectual disabilities. It is essential to remember that having a disability does not mean that the person is not aware of, or able to communicate, their own preferences and needs. When someone does not communicate verbally, the visitor should determine the respondent/protected person's wishes by finding ways to communicate non-verbally with the respondent/protected person, observing the respondent/protected person, and speaking to those who know the respondent/protected person well.

Other conditions that may result in incapacity include substance use disorder, multiple sclerosis, Alzheimer's disease, Parkinson's disease, dementia, stroke, and traumatic brain injuries. The extent of the impact these conditions have on a respondent/protected person require consideration of many factors and will vary greatly person to person. For more information, visitors should watch [What Court Visitors Need to Know About Dementia and Delirium for a discussion about dementia and how to evaluate a person's level of functioning, presented by a geriatric psychiatrist.](#)

Assessing Capacity

As part of the visitor's interview of the respondent/protected person, the visitor should attempt to determine the respondent/protected person's level of capacity through assessment of their ability to receive and evaluate information and communicate

decisions. The below are some abilities to consider when communicating with and/or observing the respondent/protected person. For a verbal respondent, the use of open-ended questions will likely elicit more helpful information. Specific examples of questions to ask can be found in Appendix D.

Cognitive Functioning

- Abstract thinking
- Affect
- Attention
- Awareness/insight
- Comprehension/understanding
- Concentration
- Confusion
- Delusions
- Hallucinations
- Impulsivity
- Initiation
- Judgment
- Language
- Level of consciousness
- 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)
- Orientation:
 - Person
 - Place
 - Time
 - Situation
- Paranoia/suspiciousness
- Perseveration
- Repetition
- Sensory impairment
- Speech or language impairment:
 - Clarity/intelligibility
 - Word-finding problems
- Suggestibility
- Thought process:
 - Quantity and rate
 - Circumstantiality
 - Tangentiality
 - Incoherence

Decision Making

- Recognize existence of problem/decision to be made
- Understand relevant facts and/or options
- Process information rationally
- Appreciate the significance and consequences of various elements or options
- Retain information/options for a time sufficient to make a decision
- Communicate the decision
- Maintain the decision consistently

Activities of Daily Living

Activities of Daily Living (ADLs) mean those personal functional activities required by an individual for continued well-being, which are essential for health and safety. OAR 411-015-0005(2). ADLs include eating, dressing and grooming, bathing and personal hygiene, mobility, elimination, and cognition. *Id.* Instrumental ADLs consist of housekeeping tasks such as laundry, shopping, transportation, medication management and meal preparation. OAR 411-015-0007.

A guardianship may not be needed even if the respondent/protected person struggles with cognitive functioning, decision-making, or ADLs. However, including first-hand observations of these abilities and skills in the visitor's report gives significant context to the court. Some examples of ADLs that a visitor may want to observe or inquire about are below.

ADLs

- Walking and getting in and out of furniture and baths
- Eating meals independently
- Choosing clothes and getting dressed
- Bathing/showering
- Maintaining dental, hair and nail hygiene
- Using the bathroom

Instrumental ADLs

- Planning and preparing meals
- Cleaning surfaces and dishes
- Shopping for groceries, clothing or other necessities
- Using the phone and computer to communicate with others
- Calling for assistance in case of fire or medical emergency
- Managing transportation (driving, hiring cabs/ride shares or taking public transportation)
- Caring for dependent family members or pets
- Maintaining hobbies or interests
- Socializing with friends, family, and peers
- Making and remembering to go to medical appointments
- Taking medications as prescribed

- Managing a budget

Chapter 4: Financial Incapability

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 is an adult and is financially incapable, and that the respondent has money or property that requires management or protection. ORS 125.400.

To appoint a *temporary* conservator, the court must find, 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).

“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 retardation, 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). “Manage financial resources” means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income. *Id.*

A petition may request a conservatorship alongside a guardianship, or a conservatorship only.

Assessing Financial Incapability

Incapacity, other impairments, and financial decisions that loved ones or financial professionals disagree with do not necessarily render a person financially incapable. Whether the respondent/protected person or any other person manages their financial resources “effectively” is oftentimes subject to debate. The judge will decide whether there is clear and convincing evidence that the person before them meets the definition for financially incapable, but the visitor’s objective facts and observations regarding the respondent/protected person’s financial circumstances and management skills will greatly assist the court in making this determination.

It can be daunting to assess the finances of another person, particularly if the value of the respondent/protected person’s estate is large. However, the visitor does not need to have a full understanding of, or experience with, the type of assets the respondent/protected person has in order to investigate financial incapability and report back to the court. The

visitor can look to the history of how the respondent/protected person's finances were handled in the past and how, if at all, the management has changed over time to determine if there are irregularities or other concerns. If something seems different or unusual, the visitor should explain that in their report to the best of their ability, even if they do not fully understand all the financial elements at play.

Investigating Financial Incapability

The visitor should attempt to determine the respondent/protected person's financial circumstances and whether and to what extent the respondent/protected person understands those circumstances. The visitor should especially look for any signs the respondent/protected person is susceptible to fraud or solicitation.

It can feel uncomfortable to ask questions or make observations about something as sensitive as the respondent/protected person's financial situation, and it is possible the respondent/protected person may be embarrassed or offended by the inquiries. Building rapport and trust with the respondent/protected person before asking some of the more difficult questions can help put everyone at ease and elicit more truthful answers. The visitor can also acknowledge at the outset of their interview that while their questions may feel very personal, the visitor is not looking to accuse or judge the respondent/protected person's actions. For example, the visitor can begin their questioning by saying: "I do not work for the petitioner and am not here on their behalf, but here are the concerns the petitioner has shared with the court. Can you help me understand these? It is important that I understand your perspective so that I can report back to the court."

If the visitor approaches their investigation with respect, the visitor can both obtain the information the court requires and make the respondent/protected person feel comfortable.

Instrumental ADLs

Some of the financial information and related skills the visitor could observe or inquire about are below. These apply to both small and large estates. An example script with sample questions can be found in Appendix D.

- The amount the respondent/protected person typically spends per month for essentials (i.e. housing, food) and non-essentials (i.e. hobbies, travel)
- If the respondent/protected person's housing, utility and/or other bills paid on time.
 - Observe if there are unopened bills/mail
 - Can they show you their recent bills and explain what they are for?
- Whether the respondent/protected person's tax return been filed.
- If the respondent/protected person has food available to them.

- Whether the respondent/protected person knows what their income is and what assets they have.
 - Does anyone send them gifts or money?
 - Do they enter into sweepstakes or other contests?
 - Do they mine or otherwise use crypto currency?
 - Do they collect anything? Coins, memorabilia, etc.
 - Observe if there are any unexplained purchases visible
- Whether the respondent/protected person knows where their money is kept and how to access it.
 - Do they use digital banking applications, and are they able to do so comfortably?
 - If they encounter issues, is there someone they usually ask to help them navigate technology?
- If there is a representative payee, Power of Attorney, or any other person(s) designated (formally or informally) to receive or hold money for the respondent/protected person, and whether they can identify that person(s).
 - How/why did they select that person for that role?
 - Do they trust that person?
 - Does that person communicate with them? Involve them in decisions? Follow their instructions?
- If the respondent/protected person send money or gifts to friends or charities.
 - If so, to whom? How much? How was it sent? Cash, check, gift card, electronic transfer, etc.
 - How do they decide who to give to? What do they do if they do not have enough money to give to everyone they want to give to?
 - If the visitor were to ask them for money, would they agree?
- Can the respondent/protected person show you their checkbook and any digital payment applications such as Venmo, Zelle, PayPal, Cash App, and Apple Pay?
 - Can they show you their recent transactions and explain them?
- If the respondent/protected person receives emails, phone calls, letters, or texts requesting money, gift cards, or asking for their personal information, and how they handled it.
 - Are the requests from someone they know? Someone they do not know?
 - Whether there is someone they ask to help them review suspicious communication.
- How the respondent/protected person feel about the idea of someone else handling their finances, and whether they prefer that it be the nominated fiduciary, someone else they know, or someone they do not know.

Chapter 5: Fiduciary Suitability

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.

Court visitors are encouraged to share information about these preferences or relationships in their report to assist the court in considering this statutory direction. Relatedly, some individuals are disqualified from serving as a fiduciary, so if a visitor learns about any of the listed disqualification below, they should share that with the court in their report.

ORS 125.205(1) A person is not qualified to serve as a fiduciary if the person:

- (a) Is incapacitated, financially incapable or a minor;
- (b) Is acting as a health care provider, as defined in ORS 127.505, for the protected person; or
- (c) Is the protected person's parent or former guardian and:
 - (A) At any time while the protected person was under the care, custody or control of the person, a court entered an order:
 - (i) Taking the protected person into protective custody under ORS 419B.150; or
 - (ii) Committing the protected person to the legal custody of the Department of Human Services for care, placement and supervision under ORS 419B.337; and
 - (B) The court entered a subsequent order that:
 - (i) The protected person should be permanently removed from the person's home, or continued in substitute care, because it was not safe for the protected person to be returned to the person's home, and no subsequent order of the court was entered that permitted the protected person to return to the person's home before the protected person's wardship was terminated under ORS 419B.328; or

(ii) Terminated the person's parental rights under ORS 419B.500 and 419B.502 to 419B.524.

ORS 125.205(2) A protected person, while not incapacitated, may petition the court to remove a prohibition contained in subsection (1)(c) of this section.

Types of Fiduciaries

In protective proceedings, a fiduciary will either be lay fiduciary, professional fiduciary, or public fiduciary. The fiduciary can petition for an indefinite appointment, which lasts until the case is closed or dismissed, or a temporary appointment, which lasts for 30 days at a time. The different types of fiduciaries are discussed below.

Non-Professional (Lay) Fiduciary

A spouse, child, parent, other family member, or friend of the respondent/protected person is often the proposed fiduciary. These fiduciaries are called lay fiduciaries, as opposed to professional fiduciaries, which are discussed below. While lay fiduciaries often have more familiarity with the respondent/protected person, in some circumstance they may also bring conflict or bias into the fiduciary relationship.

Professional Fiduciary

Professional fiduciary means a person nominated to serve or serving as a fiduciary while they are already appointed as a fiduciary for three or more protected persons they are not related to. See ORS 125.240(5). This can include for-profit or non-profit organizations that provide fiduciary services. Professional fiduciaries may not have as much familiarity with the respondent/protected person as a lay fiduciary would, but their neutral position may reduce conflict or tensions.

Professional fiduciaries are subject to additional requirements found in ORS 125.240 and must be certified by the Center for Guardianship Certification. ORS 125.250(1)(a). To obtain and keep their certification, professional fiduciaries must maintain minimal eligibility requirements. The requirements can be found on the Center for Guardianship Certification website: <https://guardianshipcert.org/certification-requirements/>.

Public Guardian and Conservator

In addition to lay and private professional fiduciaries, Oregon has public guardianship programs in some counties and at the state level. ORS 125.675-.694, 125.700-.730.

Oregon Public Guardian (OPG) is considered the guardian of last resort and only serves when there is no less restrictive option available for addressing serious safety risks and no appropriate alternative guardian is available. OPG has stringent case acceptance

requirements, and OPG must petition, or consent to a third-party petition, for their appointment. More information about OPG case requirements and resources can be found on the OPG website: <https://www.oltco.org/programs/opg-about-us.html>.

County public guardians typically only accept cases for persons residing within the county they serve. County public guardians' case acceptance requirements vary depending on their capacity and internal policy. Note that not every county has a public guardian and conservator.

Temporary Fiduciary

A temporary fiduciary may be appointed by the court if the court makes a specific finding by clear and convincing evidence that the respondent is incapacitated (guardianship), financially incapable (conservatorship), or a minor, that there is an immediate and serious danger to the life or health of the respondent (guardianship) or to the estate of the respondent (conservatorship), and that the welfare of the respondent requires immediate action. ORS 125.600(1)-(2).

A temporary fiduciary may be appointed only for a specific purpose and only for a specific period of time. ORS 125.600(3). The period of time may not exceed 30 days. *Id.* 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. *Id.* The court may terminate the authority of a temporary fiduciary at any time. *Id.*

Suitability Considerations

The court visitor must include a statement in the visitor's report about whether the nominated fiduciary is qualified and willing to serve. ORS 125.155(2)(a). To determine this, the visitor must interview the proposed fiduciary and inquire about the proposed fiduciary when interviewing others. The visitor's report should include information shared with them about the fiduciary, as well as the visitor's own impressions of the fiduciary's suitability to perform their statutory responsibilities. Specific responsibilities are discussed in more detail in Chapter 1.

The visitor may utilize the Oregon eCourt Case Information (OECI) system to search the proposed fiduciary's criminal or related case involvement, which may provide helpful context to the visitor and the court. For more information about access to OECI, a visitor should speak with the probate staff at their court.

If appointed, a fiduciary will have significant authority over the protected person's life. Subject to limitations, a guardian is responsible for providing for the care, comfort and maintenance of the protected person and a conservator is responsible for managing the

protected person's property and other financial assets. To best protect the protected person and promote self-determination, a fiduciary must understand the protected person's historic and current known needs, preferences, and values. A fiduciary must also be diligent in identifying and solving problems and be able to appropriately engage and communicate with the protected person's friends, family, and service providers.

A guardian must file an annual report that provides the court with information about the protected person's condition, care, and lifestyle. ORS 125.325. The report also requires the guardian to account for any money paid to themselves or held or spent on behalf of the protected person. *Id.* A conservator must file an initial inventory of the protected person's assets with the court, and then file annual accountings that detail all transactions made by or for the protected person. ORS 125.470-.475.

A guardian report and/or annual accounting may be the only information the court receives about the protected person's wellbeing and finances each year, so the court must be able to trust the fiduciary. It is essential that the fiduciary is reliable in their filings, is candid with the court, and follows all laws and court orders.

The visitor should inform the court about any concerns regarding the fiduciary's ability to fulfill these responsibilities.

If difficult family dynamics or other information leads the visitor to believe a neutral third-party fiduciary (lay person or professional) may be more appropriate than the proposed fiduciary, the visitor should say so in their report. The visitor does not have to take a definitive stance on whether the proposed fiduciary is or is not suitable – the report can explain multiple perspectives and possibilities.

Investigating Fiduciary Suitability

The inquiries below can draw out information from the proposed fiduciary that will help the court determine the proposed fiduciary's suitability and flag any potential conflicts of interest. An example script with sample questions can be found in Appendix D.

- The status and quality of the relationship between the proposed fiduciary and the respondent/protected person.
- The proposed fiduciary's plan of care for the respondent/protected person.
- Any existing financial arrangement between the proposed fiduciary and respondent/protected person.
- Whether the proposed fiduciary and respondent/protected person reside together
- The extent of the proposed fiduciary's current involvement in the respondent/protected person's care.

- The proposed fiduciary's familiarity with the respondent/protected person's service providers, if any.
- Whether the proposed fiduciary knows of, and has an amicable relationship with, the respondent/protected person's family and friends.
- If the proposed fiduciary intends to place any restrictions on the respondent/protected person's finances, relationships, or movements.
 - If so, the restrictions and reasoning for those restrictions.
- How the proposed fiduciary will handle disagreements with the respondent/protected person, particularly when the respondent/protected person makes decisions the fiduciary does not like.
- Whether the proposed fiduciary considered a neutral, third-party fiduciary (lay person or professional).
 - If not considered, why not.
- The proposed fiduciary's educational background and employment.
- If the proposed fiduciary has cognitive, mental health, substance use, or physical concerns of their own.
- Whether the proposed fiduciary has criminal history, has filed for bankruptcy, has ever been removed as a fiduciary or lost a license, or any other history that may impact their ability to be a fiduciary.

Chapter 6: Have Less Restrictive Alternatives Been Considered

To appoint a guardian, the court must determine that, in addition to the existence of incapacity, there is clear and convincing evidence that the appointment is necessary as a means of providing continuing care and supervision of the respondent. ORS 125.305(1). The petitioner must include in the petition what less restrictive alternatives to guardianship or conservatorship were considered and why they were deemed insufficient. ORS 125.055(2)(i)(A).

It is not the role of the visitor to recommend less restrictive alternatives to the fiduciary or the court. The visitor's role is to investigate and report on what alternatives the petitioner did consider, if any, and the reasons why those alternatives were not available or not considered. ORS 125.150(7)(c). It is helpful for the court to understand what efforts were made to address the concerns for the respondent before a petition was filed, as it can provide context for the respondent's situation and inform the court's evaluation of the fiduciary's suitability.

Alternative Arrangements

Less restrictive alternatives are arrangements that, on their own or in combination, may sufficiently protect the respondent/protected person while allowing them to maintain more independence in other areas of their life than appointment of a guardian or conservator would. A few of the most common alternative arrangements are described below so that visitors can understand and recognize those that may be seen in, or missing from, a petition. Some arrangements provide broad support, while others address a specific concern.

Supported Decision-Making

Supported decision-making is an approach that allows a person to make their own choices with the support of trusted friends, family members, and/or professionals. It keeps decision-making control in the hands of the person by providing customized and specific assistance when needed and can be a formal or informal arrangement. This is a form of decision-making that almost all people use at times.

Relative Caregivers

A relative caregiver is an adult who is related to a minor child (not the legal parent or guardian) and with whom the child lives. ORS 109.572. This relative can complete an

affidavit that allows them to consent to medical treatment or educational services for the child in the absence of the child's or the child's parents' ability to consent. ORS 109.575.

Case Management/Services and Supports

Community programs and services can connect people to agencies or private case management workers who support individuals who need assistance. Support may take the form of home health services, personal care assistants, Oregon Department of Human Services or Medicaid case managers, family members, or nutrition services.

Trusts

A trust holds money or property for the benefit of the person or organization. The trust can benefit the person who made the trust, or it can benefit someone else. 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, it must be executed when the person giving consent still has capacity.

Representative Payees and Veterans Affairs Fiduciaries

When a person receives financial benefits from agencies such as the Social Security Administration or U.S. Department of Veterans Affairs, these agencies have their own processes and rules for choosing a representative (representative payee) to help the person manage their benefits. A representative payee can only manage the person's government benefits for that specific agency and the agency rules typically include reporting requirements and segregated accounting. Even if a person has been appointed as a guardian or conservator, they still need to go through the agency process to be chosen as the representative payee. Representative payees can influence the care and support of a respondent/protected person directly or indirectly, so visitors should report on whether any payees are already in place.

Power of Attorney

A power of attorney (POA) is a legal document that allows a person to give another person the right to act on their behalf. A limited POA is specific in purpose and limited in scope. General POAs are much broader and can grant authority immediately or upon future conditions but must be executed when the person giving consent still has capacity. POA's can be revoked in writing any time after execution, provided the person still has capacity. A durable POA, a variation on a general POA, is one that remains in effect even if the person who signed it later becomes incapacitated. As with any representative payees, it is important for the court to know about any POAs involving the respondent/protected person.

Health Care Representative

A Health Care Representative (HRC) is someone elected by a capable adult to make health care decisions for that adult should they become incapable. ORS 127.510. The form for appointment of an HRC is found in ORS 127.527. A HRC may also be elected in an advance directive.

Advance Directive

An advance directive is a document that allows a capable adult to explain how they want medical decisions to be made if they become too ill or are otherwise unable to make decisions for themselves. ORS 127.510. An advance directive also allows the person to choose a health care representative (HRC) to make medical decisions for them. *Id.* The form for appointment of an HRC is found in ORS 127.529.

Portable Orders for Life-Sustaining Treatment

Portable Orders for Life-Sustaining Treatment (POLST) is a medical order that gives seriously ill or frail people control over the treatments they do or do not want during a medical crisis. ORS 127.663. While different from an advance directive, most advance directives and POLSTs work in conjunction. A POLST is completed with health care professionals after discussing current medical conditions, treatment options, and goals for care.

Health Care Advocates

A Health Care Advocate is a person who is authorized to make certain health care decisions on behalf of an adult with intellectual or developmental disabilities if the individual does not have a guardian or a health care representative. OAR 411-390. To qualify, the person must be determined by a court or their attending physician to be unable to make and communicate health care decisions and be receiving support through the Office of Developmental Disabilities Services. *Id.*

Declaration of Mental Health Treatment

A Declaration of Mental Health Treatment form tells doctors what kind of mental health treatment a person would prefer if they were to experience a mental health crisis and be unable to make their own decisions. ORS 127.700–127.737. The declaration covers medications, treatments, and admission to health care facilities and allows the person to appoint a representative to make treatment decisions on their behalf during a crisis. *Id.* The declaration must be completed when the person has capacity. *Id.*

Continuum of Care

Part of a guardian's authority includes determining the living placement for the protected person. Changes made to the protected person's residence are one of the most common sources of conflict in protective proceedings. Several levels of residential care are available to respondents/protected persons, and the levels vary depending on the abilities of the person needing care. Like less restrictive alternatives, less restrictive living arrangements are relevant to the need for, or scope of, a guardianship or conservatorship. The following is an overview of some of the most common levels of care, from least to most supportive.

Home/Private Residence

A person may be able to remain living in their own home or other private residence with live-in or periodic assistance. This assistance may come from a friend, family member, or service provider.

Independent Living Communities

Residents in independent living communities still take care of themselves without support. Communities may offer amenities such as meals and activities. There may be medical staff on site at designated times, but 24-hour care is not available.

Assisted Living and Residential Care Facilities

Assisted Living Facilities (ALFs) consist of self-contained, individual living units where six or more seniors and adult individuals with disabilities may reside in homelike surroundings. OAR 411-054-005(12). Living units in Residential Care Facilities (RCFs) may be individual or shared. OAR 411-054-005(90).

ALFs and RCFs offer a range of services available on a 24-hour basis to meet the daily living, health, and social needs of residents. OAR 411-054-005(12), (90). However, ALFs and RCFs do not offer continuous nursing care or complex therapy services provided by nursing and post-acute care rehabilitation facilities, though they are required to have a registered nurse on staff or on contract. OAR 411-054.

Adult Foster Homes

There are three categories of Adult Foster Homes (AFHs) in Oregon: AFHs for older adults and adults with physical disabilities, AFHs for adults with intellectual and developmental disabilities, and AFHs for adults with a qualifying mental illness. Though each serve a different population, they are generally defined as a family home or facility where residential care is provided to five or fewer residents not related to the

manager/operator/provider. OAR 309-040-0305(6), OAR 411-049-0102(6), OAR 411-360-0020(1).

24-hour care is provided by the AFH provider (who is not required to be a registered nurse) and generally includes meals, assistance with personal care, monitoring health and behavior issues, medications, transportation, and care coordination.

Memory Care Communities

Memory care communities provide specialized services in a secured environment for individuals with dementia. The facility must provide residents with dementia trained staff who have been instructed in the person-centered care approach. OAR 411-057. Memory care communities have 24-hour medical care available and provide housekeeping and meal services.

Skilled Nursing Facility (SNF)

Skilled Nursing Facilities (SNFs) are licensed long-term care facilities providing care for persons with severe and/or unstable health problems which cannot be managed at the intermediate care level, requiring the availability of a registered nurse 24 hours daily, seven days a week, but not requiring the levels of nursing, physician and specialized services available in a hospital. OAR 333-610-0010(19).

Hospice

Hospice is public agency or private organization that is primarily engaged in providing care to terminally ill people – meaning those with a life expectance of six months or less if the illness were to run its normal course. OAR 410-142-0020 (16), (37). Hospice Programs provide a coordinated program of home and inpatient care, available 24 hours a day, that utilize a team of personnel trained to provide palliative and supportive services to a person experiencing a life-threatening disease with a limited medical prognosis. OAR 410-142-0020(20).

Chapter 7: Should Limitations on the Guardianship/Conservatorship be Considered

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. ORS 125.305(2). In making the order the court shall consider the information in the petition, the report of the visitor, the report of any physician, naturopathic physician or psychologist who has examined the respondent, if there was an examination, and the evidence presented at any hearing. *Id.* The court may impose any conditions and limitations upon the fiduciary that the court considers appropriate, including limitations on the duration of the appointment. ORS 125.025(3)(L).

Limited guardianships or conservatorships encourage the respondent/protected person's participation in decisions about their health, finances, and safety with the fiduciary acting as an advocate and safety net. While it is not appropriate for the visitor to recommend less restrictive *alternatives* to a guardianship or conservatorship, it is the visitor's duty to recommend what, if any, *limitations* should be placed on the fiduciary's power. ORS 125.155(2)(c). The visitor may review the facts and determine that a person needs decision-making support from a fiduciary in limited spheres of their life. For example, a respondent may only require a guardian's assistance in managing their mental health care treatment. If there are less restrictive alternatives in place, the visitor should also identify those alternatives and report on their efficacy.

Limitations

The court may limit the powers of the fiduciary such that they adequately protect the respondent/protected person with minimal limitations on the person's rights. This stands in contrast to a plenary guardianship or conservatorship, where the fiduciary is granted every authority permitted under the law. The limitations can be as specific and tailored as needed, and the visitor is uniquely positioned to provide recommendations based upon what they have learned about the respondent/protected person, their individualized needs, and the proposed fiduciary.

The visitor's recommendations can help facilitate discussion amongst the parties and will aid the court in determining what the scope of the fiduciary's powers should be. The visitor should include all possible recommendations, including reasonable or prudent limitations preferred by the respondent/protected person. Inclusion of all reasonable suggestions in the visitor report can help ensure the respondent/protected person feels heard, as the

judge is given the opportunity to consider and acknowledge the suggestions even if they are not ultimately implemented.

Example Limitations in Guardianships/Conservatorships

The below examples address some of the most common issues in guardianships/conservatorships, such as changes to the respondent's residence and alienation of particular family members or support people.

- The guardian must investigate options to maintain the respondent in the respondent's home.
- The guardian must make efforts to ensure the respondent may keep their pet with them at their current or future residence.
- The guardian should [consult/keep informed] [person requested by respondent] when making major medical decisions or changing the respondent's residence.
- If the respondent is moved from their residence, the respondent should have access to outdoor spaces or a garden at their new residence.
- The conservator is restricted from selling or transferring [specific property].

The examples below provide a general framework in cases involving a respondent with mental health related concerns or diagnosis.

- If the respondent is engaged with recommended medications and treatments, with stable symptoms, the role of the guardian is limited to communication with providers and participating in care meetings.
- If the respondent is not engaged with recommended medications and/or treatment with an increase in mental health symptoms, the guardian will have the authority to consent to treatment or hospitalization and/or least restrictive residential placement as recommended by the respondent's treatment team.
- Even if symptomatic, the respondent should be included, as much as reasonably possible, in any discussions, meetings and decisions about their health, safety, and residential options.
- The guardian is granted decision-making authority as to health care decision-making only.

Chapter 8: Contested Hearings

The court may require that a hearing be held on any petition or motion in a protective proceeding, and a hearing must be held on a petition or motion if the respondent or protected person makes or files an objection to the petition or motion and the objection is not withdrawn before the time scheduled for the hearing. ORS 125.080(1)-(2). Any person who is interested in the affairs or welfare of a respondent or protected person may present objections to a petition or to a motion in a protective proceeding, including a motion to terminate the proceeding. ORS 125.075, 125.090(1).

The visitor must be present at the hearing on any objections to the appointment of a fiduciary. ORS 125.155(5). At any hearing, the visitor may be called as a witness by the judge or one of the parties to speak about the visitor's report and the reasons for the visitor's recommendations. The visitor should confirm any special payment for appearance at hearings with their court.

Hearing Preparation

If a visitor has not previously been to court or testified in a hearing, the visitor should contact the probate staff at their court and arrange to observe a hearing. This also provides the visitor with an opportunity to become more familiar with the courthouse and the probate staff they will be working with.

Before a hearing on an assigned case, the visitor should review their report and any associated notes to refresh their memory of the case. It is not uncommon for months to pass between the time the visitor files their report and the hearing date, so the respondent/protected person's preferences or circumstances may have changed during that time. It is helpful to the court and parties if the visitor supplements their original report with any known updates in these situations. The visitor should contact their court about if and how payment is provided for additional investigation that may be required.

What to Expect as a Witness

The visitor may be called by the judge or a party as a witness. Once called, the visitor will be directed to the witness stand and administered an oath. Once the visitor is sworn in, the judge or parties will ask questions about the visitor's report and recommendations. A contested hearing is inherently adversarial, so the visitor should expect that any side that agrees with the report will try to show why the visitor's recommendations should be followed, while any side that disagrees will try to show flaws in the methodology or

reasoning. Though it can be difficult, the visitor should remain composed and remember that challenges to their report and recommendations are not meant as a personal attack.

The visitor should be aware that attorneys or parties may request to review any extra notes or materials the visitor brings to the hearing and uses during their testimony. All communication with the parties (no matter how informal) is discoverable, meaning available to the court and parties to read. If the visitor is qualified as an expert witness, the parties can request to view the visitor's entire case file, whether referenced or not.

Expert Witness

There are two categories of witnesses under the Oregon Evidence Code: (1) lay witnesses, also known as "fact witnesses," and (2) expert witnesses, who may give opinions on areas of special knowledge, as well as testify to facts. OEC 702. Lay witnesses are prohibited from stating their opinions on the ultimate fact at issue, whereas expert opinions are expected to give such opinions and permitted to receive compensation for their time due to their special knowledge.

The judge or a party may seek to qualify the visitor as an expert witness. In doing so, the visitor may be asked about their educational and professional background, their time as a court visitor, their experience working with a certain population, or knowledge about particular impairments. Judges may vary in their opinions about the differences between lay witnesses and expert witnesses. The visitor may contact their local court before a hearing to confirm whether the judge generally recognizes a visitor as an expert witness and if not, whether that affects the court's expectations of the visitor.

Hearing Logistics

There can be variability in the order of hearings. For instance, some judges will ask the parties if they have an opening statement at the outset, while others may not. Some courts may exclude visitors from the hearing, meaning the visitor may not be permitted to sit in the courtroom until they are called to testify. Visitors will be told by the court if they will be excluded.

At any point, the judge may call the visitor as a witness and ask the visitor questions. If a party calls the visitor as a witness, the typical order of the hearing is as follows: Generally, because the petitioning party is required to meet the burden of proof, the judge will request that the petitioner proceed with their case first. The petitioner will then call any and all of their witnesses and ask their questions first (direct examination). The objecting party then gets the opportunity to ask questions (cross examine) of each of the petitioner's witnesses, addressing those subjects covered in direct examination, before having the opportunity to call witnesses of their own. The petitioner may cross-examine the objector's witnesses,

after which the petitioner may call any witness for rebuttal to the objector's witnesses' information. However, every hearing can differ, so the visitor is encouraged to ask court staff if they have any questions about how hearings are conducted.

The visitor is often called as the first witness in an effort to limit their time in court. However, it is possible the visitor may be called at a later time or more than once (e.g., for direct examination and for rebuttal, or if new questioning is necessary after other testimony). If the visitor has time constraints that impact their availability, they should let the court know as soon as possible.

If the visitor is expected to appear in person for the hearing, but needs the option to appear remotely, the visitor should contact their court before the hearing. The visitor should reach out to court staff with any questions or concerns about the timing and manner of their court appearance as soon as those questions arise. It greatly assists the court to have advance notice that accommodations may be needed.

Professionalism and Decorum

Court visitors are independently appointed by the court, and therefore every aspect of their work is a reflection on the court in addition to the visitor's individual reputation. Once assigned a case, it is necessary for the visitor to maintain a friendly but professional demeanor in every interaction with those connected to the case. The visitor should also consider how their interactions appear to others. For instance, if a visitor laughs with an attorney that they are familiar with in the hallway outside a hearing, the respondent/protected person could see the exchange and suspect favoritism or bias. Maintaining professionalism in all situations will inspire confidence in the visitor's objectivity and the judicial system.

Testifying in Court

The court visitor is the eyes and ears of the court, and their expertise is significant in the judge's final determination. The visitor brings forward facts upon which the judge relies in applying the law and making their determination, so objectivity and honesty is imperative.

The visitor should answer all questions respectfully and based on their knowledge and experience. Any party or the judge may ask questions, and a party may object to a question. If a party objects to a question, stop speaking immediately (even if you have not finished your answer) and wait for directions from the judge.

A visitor may feel challenged if an attorney conducts an examination that emphasizes mistakes or weaknesses in the visitor's report or recommendation. It is important to take

difficult questions in stride and be willing to acknowledge errors made or shortcomings in the case to ensure credibility as a witness.

Guidelines for Testifying

- Tell the truth.
- Relax and take the time necessary to think about your answer.
- Speak clearly, slowly, and directly into the microphone so that everyone can hear and understand your testimony.
- Listen carefully and answer the question that was asked. If it a “Yes or No” question, that is all that is needed.
- Make sure you understand the question. If not, ask for it to be repeated or clarified.
- If you do not know the answer, say so. You are only expected to tell what you know.
- If you do not recall something, say so. If you can refresh your memory by reviewing something in the courtroom, say so.
- Turn off your cell phone and any other potential distractions.

Example Questions: Direct Examination

- Please state your qualifications/education/training and how long you have been a court visitor.
- How did you prepare your report in this matter?
- What information did you rely on in preparing the report?
- How did the respondent present during your interactions?
- What are respondent’s diagnoses/medical status/care prognosis? How do those affect their ability to make decisions and stay out of serious harm’s way?
- Does the respondent have good insight into their deficits and care needs?
- Can the respondent still perform [skill/activity]?
- What are your opinions about the respondent’s needs with respect to physical health and safety, and why?
- What are your opinions about the respondent’s risk of self-neglect and/or exploitation, and why?
- What is your opinion of the proposed guardian’s appropriateness?
- When was your most recent contact with the respondent or protected person?

Example Questions: Cross Examination

- Why didn’t you talk to [person] or consider [specific fact] in your report?
- Hasn’t the respondent generally been fine without a guardian?
- Do you disagree with the respondent’s life choices?
- Are you licensed to be diagnosing [specific condition]?
- Aren’t you being paid to submit this report?

After the Hearing

Every hearing will be different depending on the judge, the parties, and the unique facts of the case. Circumstances may arise at the hearing which the visitor would have no reason to know about or investigate beforehand, and the outcome may not always be what the visitor recommends or expects. Do not fret – the visitor is responsible for providing the court with information, not the outcome. The judge alone makes the final determination.

The visitor may feel that certain questions were not asked or remember information they wanted to share. Once the hearing is complete, the visitor should not provide further information to the court unless the court requests it. Remember that the judge had access to the entire visitor report in addition to any other evidence or testimony provided.

Many judges are happy to provide feedback to court visitors after a case is resolved. The visitor may contact their local probate staff to request general feedback from the judge on their report and/or testimony, if desired.

Chapter 9: Ethical Considerations

It is of the utmost importance that the court visitor acts honestly, fairly, and professionally. To maintain the integrity of the visitor's role, the visitor should immediately alert court staff to any potential conflict of interest on an assigned case. A potential conflict is anything that may affect the visitor's full independence in carrying out their duties for the court – interpret this broadly and notify the court of any concern, so that the court can determine whether or not the conflict requires the visitor's removal from that particular case. Candor and transparency are critical.

During an investigation, a visitor becomes privy to extremely sensitive medical, financial, and personal information about the respondent/protected person, the fiduciary, and other involved persons. Though this information should be included in the visitor report where appropriate, the visitor should be careful not to disclose the information to others unless it is necessary to complete the visitor's investigation. Any questions about what a visitor may share and with whom should be directed to the visitor's local probate court staff.

The visitor's report should only be shared with authorized legal parties to the case or when otherwise ordered by the court. To prevent public disclosure of sensitive information, the visitor may file their report and/or attachments to their report confidentially. UTCR 9.420.

The visitors' notes and communication with any party are discoverable. This means that the respondent/protected person, petitioner, and other parties may have access to written material beyond the submitted report, including emails and text messages. Though the visitor may develop a comfortable rapport with a party, it is important to remain professional in all interactions and protect the visitor's objectivity.

Before contacting a party's attorney directly, the visitor should check with their local probate court staff to see if direct communication is permitted and if so, whether it is limited to procedural matters, such as scheduling, or may include substantive information about the case.

Court Visitor Ethical Principles

Court visitors should strive to uphold the following throughout their appointment.

A court visitor **will**:

- Comply with all laws, court rules, and court orders.
- Treat all individuals with dignity and respect.
- Be thorough and professional in every aspect of their investigation and reporting.
- Avoid conflicts of interest and notify the court immediately if potential conflicts arise.

- Fulfill all duties in a timely manner and immediately notify the court of any delays that will impact completion of these duties.
- Keep information relating to the case confidential and not disclose case information except in reports to the court and when permitted by law or court order.
- Safely and securely maintain any confidential electronic and hard copy correspondence, files and records.

A court visitor **will not**:

- Use their role inappropriately or for improper personal, professional or financial gain.
- Practice, condone, facilitate or participate in any form of discrimination on the basis of race, color, sex, sexual orientation, age, religion, national origin, marital status, political belief, or mental or physical disability.

Appendix A: Glossary of Terms

Visitor: 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).

Respondent: a person for whom entry of a protective order is sought in a petition filed under ORS 125.055. ORS 125.005(10).

Protected person: a person for whom a protective order has been entered. ORS 125.005(7).

Protective order: 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).

Protective proceeding: a proceeding under ORS Chapter 125. ORS 125.005(9).

Fiduciary: 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). A fiduciary may be a layperson, a professional, or an agent of the state. Depending on the type of fiduciary appointed, they may be subject to different rules or have additional obligations.

Minor: any person who has not attained 18 years of age. ORS 125.005(6).

Incapacitated: a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety. ORS 125.005(5).

Meeting the essential requirements for physical health and safety: 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. *Id.*

Vulnerable youth: a person who: (a) Is at least 18 years of age but has not attained 21 years of age; (b) Is eligible for classification under 8 U.S.C. 1101(a)(27)(J); and (c) Cannot be reunified with one or more of the person's parents due to abuse, neglect or abandonment, that occurred when the person was a minor. ORS 125.005(12).

Financially incapable: 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 retardation, 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).

Manage financial resources: those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income. *Id.*

Temporary guardian: 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).

Temporary conservator: 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).

Professional fiduciary: a person nominated as a fiduciary or serving as a fiduciary who is acting at the same time as a fiduciary for three or more protected persons who are not related to the fiduciary. ORS 125.240(5). This can include non-profit organizations that provide fiduciary services.

Oregon Public Guardian (OPG): guardian of last resort and only serves when there is no less restrictive option available for addressing a serious safety risk and no appropriate alternative guardian is available. ORS 125.700-.730. OPG has stringent case acceptance requirements, and OPG must petition, or consent to a third-party petition, for their appointment. More information about OPG case requirements and resources can be found on the OPG website: <https://www.oltco.org/programs/opg-about-us.html>.

County Public Guardian: typically only accept cases for persons residing within the county they serve. Note that not every county has a Public Guardian and Conservator. ORS 125.675-.694.

Expert witness: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. ORS 40.410.

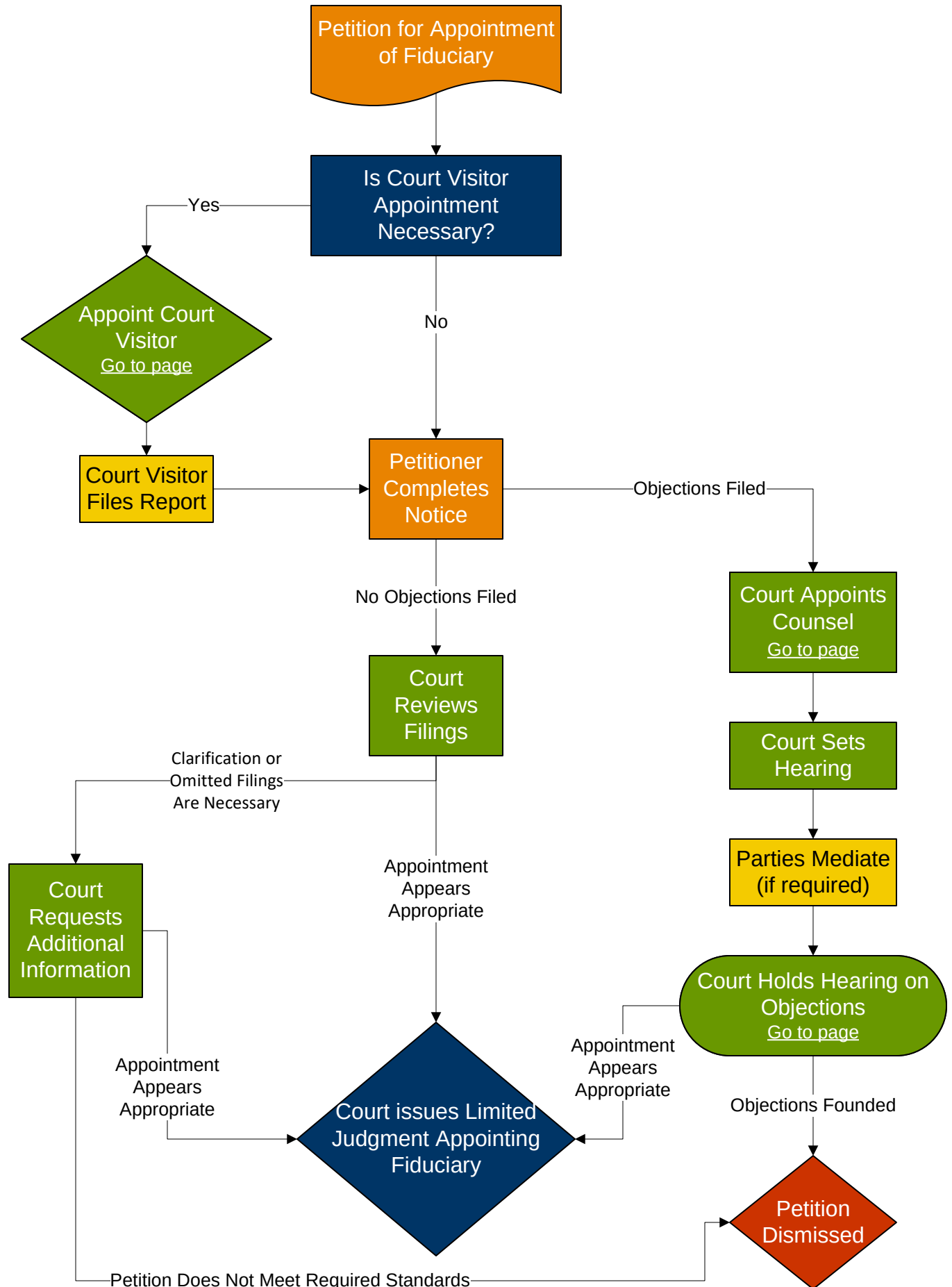
Appendix B: Flowcharts

These flowcharts are meant as a starting point to understand how a protective proceeding case tends to move through the court system. Every court has its own local process and rules, so visitors should arrange time to review the flowcharts with their court and note any differences on their copy of the provided flowchart.

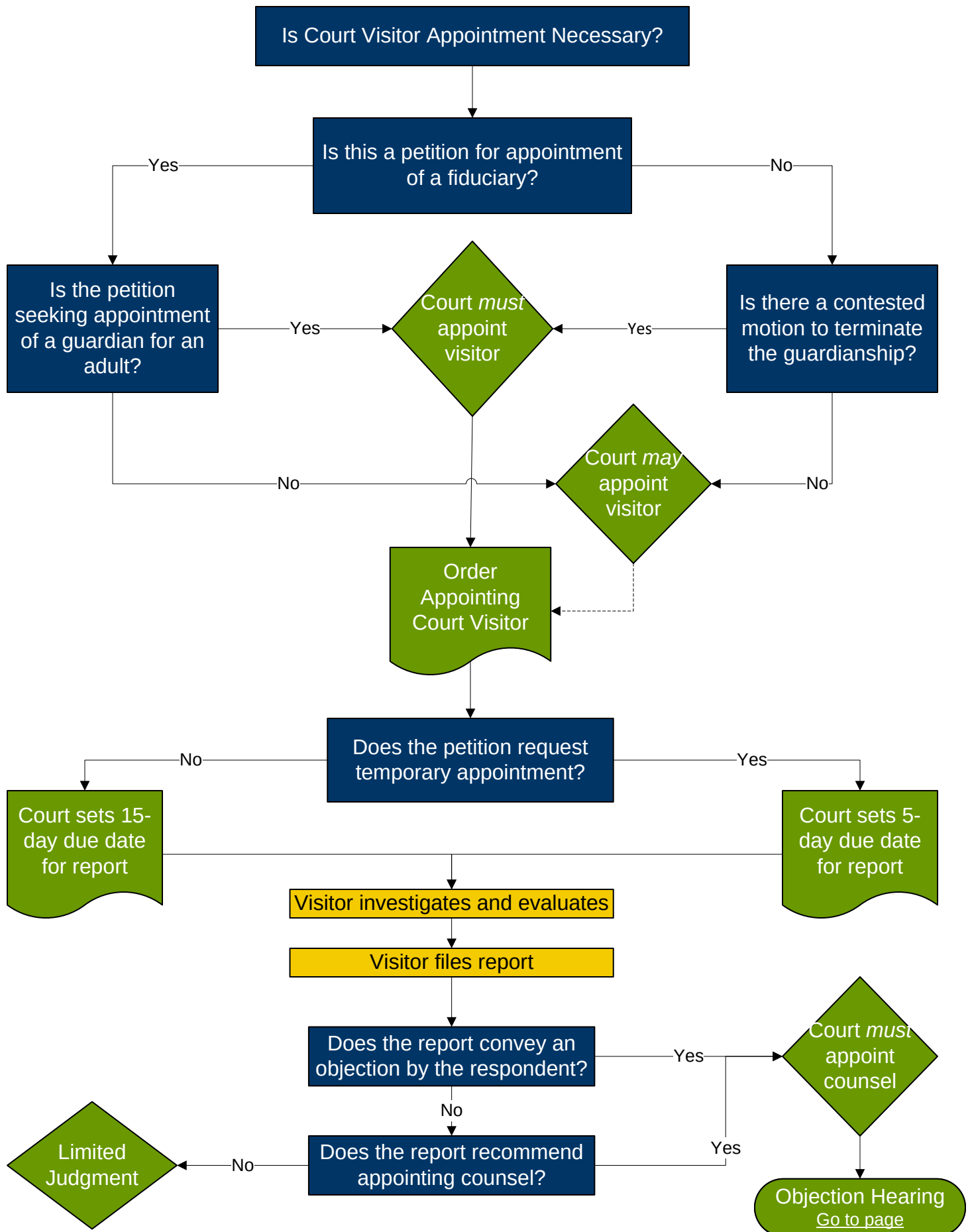
The flowcharts provided in this appendix appear in the following order:

- (1) Overview
- (2) Court Visitors

Protective Proceedings: Overview



Protective Proceedings: Court Visitors



Appendix C: Judicial Guardianship Evaluation Worksheet

The Judicial Guardianship Evaluation Worksheet is a tool designed by the Department of Justice and university of Southern California to help judges organize and assess evidence about a person's capacity and identify factors that may indicate a risk of abuse before appointing a guardian. Reviewing this worksheet can help the visitor better understand what a judge is looking for when making a guardianship determination.

[Access the worksheet from the Department of Justice website.](#)

Appendix D: Example Interview Script

The following interview scripts are templates that a visitor may choose to utilize when preparing to speak with an adult or minor respondent/protected person and a proposed fiduciary. The unique circumstances of each interview, communication needs and preferences of the interviewee, and personal style of the visitor will determine what tone, language, and questions to use.

To ensure a productive and safe interview, the visitor could determine in advance of an interview what the best conditions for effective communication are, such as location and time of day, as well as whether firearms, animals, or other individuals will be present. The visitor may also find it helpful to ask the petitioner about the respondent/protected person's likes and dislikes before their interview, to avoid potential triggers and help develop rapport.

Adult Respondent/Protected Person

Hello, my name is [court visitor name]. I am here because [proposed fiduciary name] is asking to be your [guardian/conservator], but the judge needs more information before making their decision. The judge cannot visit you themselves, so I will write a report about if I think a [guardian/conservator] is needed, if [proposed fiduciary name] is the right person, and what decisions they should be able to make for you.

I am not on anyone's side. I am here to listen and get information so that I can give my own opinion to the judge. I want my report to be fair and true, so I will talk to you, [proposed fiduciary name], and any other person who may have helpful information. You, the judge, [petitioner name], and any other party to the case will get a copy of my report.

I have some questions to ask you about yourself and [proposed fiduciary name]. I know some of these questions will feel very personal and may be difficult to answer, but it will help me a lot to know you better and hear what you have to say. I will be open-minded and will not criticize or judge your answers.

- Do you have any questions about why I am here?
- How long have you lived here?
- How are you feeling today? What did you do today?
- Tell me more about why you think a [guardianship/conservatorship] is being requested.

Regarding Procedural Rights

The judge will hold a hearing (a hearing is a meeting in a courtroom, with a judge) if you do not want a [guardian/conservator] or do not want [proposed fiduciary name] to make decisions for you. If there is a hearing, I will also be there and talk about my report.

- If there is a hearing, would you be willing to go to a hearing?
 - Would you want to be there in person? Would you prefer to be there over the phone or by video?
- Are you represented by an attorney?
 - If so, what is their name?
 - If not, would you like to be represented by an attorney?
 - If not, why not?

Regarding Incapacity

- Do you prefer to cook for yourself or eat out?
 - Do you like to go to the grocery store? How often do you usually go?
 - What do you like to eat? What did you eat yesterday?
- Do you typically order clothes or other necessities online, or do you prefer to shop in person?
 - How often do you make these kinds of purchases?
- How do you usually travel? Car, bus?
- Are there people in your life that help you with certain tasks, like cleaning, getting groceries, or transportation?
 - Tell me more about them and how they help.
 - Are there things that you feel you need help with more than others?
- Can you tell me about your neighbors, friends, or family members that you are close to?
 - Do you see them in person or talk to them on the phone? How often?
 - What do you like to talk about or do together?
- Do you like where you currently live?
 - How long have you lived here?
 - Does anyone else live with you? Tell me more about them.
 - Do you have any pets? Can I see them? What is their routine?
- Tell me about what you like to do for fun.
 - How often do you do that?
 - Are there people you like to do that with?
 - Do you feel like you can do that fairly easily?
- How is your health?
 - Do you see a doctor or other person about your physical or mental health?
 - Do you like them?
 - Where are they located? How often do you see them?
 - Are there medications they want you to take?
 - If so, what are they for? Do you take them?

- If you run into questions about your computer or your phone, is there someone you usually ask to help you?
- How do you know [proposed fiduciary]? I would like to know more about your relationship.
 - How long have you known them?
 - How often do you speak or see them?
 - Do they currently help you with things? If so, what?
 - Do you trust them to make decisions for you?
 - Are there types of decisions you would not want them to make for you?
 - Is there someone else you would trust to make decisions for you?

Regarding Financial Incapability

- Can you share about how much you typically spend per month on housing? Food? Hobbies?
 - Do you collect anything?
 - Do you like to enter into contests or sweepstakes?
 - Can you tell me about some of your most recent purchases?
- Do you usually get your bills delivered in the mail or electronically?
 - Would you show me some of those bills and tell me more about what they are for?
- Do you do your own taxes or does someone else do them for you?
 - When was your last tax return filed?
- Do you own any land or property?
- Do you have investments? Stocks/bonds, precious metals, cryptocurrency?
 - Do you like to manage those or does someone else manage them for you?
- What are your sources of income?
- Do you prefer to use a local bank or credit union, or another type of financial institution?
 - Do you like to go there in person, or do you use their website or app?
 - Do you feel comfortable using their website or app?
- Do you have a representative payee, Power of Attorney, or any other person(s) designated (formally or informally) to receive or hold money for you?
 - Who is it?
 - Can you tell me about why you selected that person for that role?
 - Do you trust that person?
 - Does that person communicate with you and involve you in decisions? Do you feel like that person follows your instructions?
- Do you like to send money or gifts to friends or charities?
 - Tell me more about when and why you started doing that.
 - Who do you usually like to send money/gifts to?
 - How much do you usually send?
 - Do you usually send cash, a check, a gift card, or do use electronic transfers?
 - How do you decide who to give money or gifts to? If one month you do not have enough money to give what you usually like to give, what do you do?
 - If I asked you for some money, what would you do?

- Would you mind showing me your checkbook? Any digital payment applications (Venmo, Zelle, PayPal, Apple Pay, Cash App, etc.)?
 - Tell me a little about some of your recent transactions.
- Have people sent you emails, letters, texts, or calls requesting money, gift cards, or personal information?
 - Was it from someone you know or someone you have never met?
 - What do you do when you receive requests like this? If you are suspicious of a request, is there someone you trust that helps you review it?
- How do you feel about the idea of someone else handling your finances?
 - Would you be okay if it was [proposed fiduciary]?
 - Would you prefer someone else you know, or someone you don't know?

Minor Respondent/Protected Person

Hello, my name is [court visitor name]. [Proposed fiduciary name] is asking to be your [guardian/conservator]. A [guardian/conservator] is someone who is asking for the right to care for you and help you make decisions. A judge decides if you need a [guardian/conservator] and if [proposed fiduciary name] is the best person for that job. The judge asked me to come meet you to learn more about you. I will talk with you and other people who know you and then write a report for the judge to help them make a decision.

Part of my job is to talk with you so I can learn about your life and hear what you think. I have some questions to ask you about yourself and about [proposed fiduciary name]. Some of these questions might be a little hard to answer, but I am really interested in what you have to say. I want to make sure my report is fair and correct.

- What do you like to do for fun?
 - Who do you like spending time with? Friends, other family?
 - Tell me about them.
 - What do you like to do together?
 - Where do you usually hang out?
 - How often do you see them?
- Tell me what a normal day looks like for you.
 - What did you eat for breakfast today?
 - Where do you go to school?
 - How do you get there and home?
 - How do you feel about going to school most days?
 - What do you usually do after school or on the weekends?
 - How do you get there and home?
 - What do you usually eat for dinner?
 - What is your favorite food?
 - Are there things you wish were different about your day?
- Can you tell me the name of your doctor/dentist/therapist?
 - How often do you see them?

- Do you take any medicine?
- When you need help with something, who do you ask? Homework, meals, disagreements, etc.
 - What do you like to do on your own?
 - Are there things you need more help with?
- Tell me more about [proposed fiduciary].
 - What do you usually do together?
 - What happens when you disagree?
 - What helps you calm down when you feel angry or frustrated?
 - How does [proposed fiduciary] help you when you are upset?
 - Do you feel like they listen to you?
- Is there anything else you want the judge to know?

Proposed Fiduciary

Hello, my name is [court visitor name] and I have been appointed as the court visitor in this case. My job is to investigate and write a report about whether what the petition says is true, if I think a [guardian/conservator] is needed, if you are able and willing to be the [guardian/conservator], and what decisions you should be able to make. You, the judge, the [respondent/protected person], and any other party to the case will get a copy of my report.

I do not work for the [respondent/protected person], for you, or for any other party. The court has asked me to provide a neutral evaluation of whether a [guardianship/conservatorship] is needed. I want to understand everyone's perspective, so I will talk to you, the [respondent/protected person], and any other people who may have information that can help me make informed recommendations to the judge.

If the judge sets a hearing, I will be in court to testify about my report.

Part of my job is to talk to you and understand more about you and the situation that led to your request. To do that, I have some questions about the petition, yourself, and the [respondent/protected] person. I know some of these questions will feel very personal and may be difficult to answer, but please answer as thoroughly and honestly as you can. I need this information to make sure my report is as accurate and fair as possible.

- Tell me a little about yourself. What is your background?
 - Why do you want to be the fiduciary?
 - Did you consider nominating a neutral, third-party fiduciary (lay person or professional)?
 - If not, can you tell me more about why?
 - If so, what made you decide against it?
- Can you share why you think [respondent/protected person] needs a fiduciary?

- If alternatives to [guardianship/conservatorship] were provided in the petition: Can you tell me more about why those alternatives did not work?
 - If alternatives to [guardianship/conservatorship] were not provided in the petition: Can you tell me whether any alternatives to guardianship/conservatorship were considered?
 - If so, why did they not work?
 - If not, why not?
- How would you describe the relationship between yourself and [respondent/protected person]?
- Do you live together?
- Tell me more about the healthcare and any other services provided to [respondent/protected person] in the last year.
 - Do believe these providers or services are benefiting [respondent/protected person]?
 - Did/do you attend any appointments with [respondent/protected person]?
 - Did/do you speak with any of the providers?
- What does [respondent/protected person]’s daily schedule entail?
- If you were appointed fiduciary, what is your plan of care for [respondent/protected person]?
- Can you tell me about [respondent/protected person]’s friends? Other family members?
 - Do you know these people?
 - How would you describe your relationship with these people?
 - Are there people in [respondent/protected person]’s life you do not believe they should associate with? Why?
 - Would you restrict [respondent/protected person]’s contact with those people if appointed? In what way?
- Are there places [respondent/protected person] currently go that you do not agree with?
 - Would you restrict their ability to go there if appointed? In what way?
- How does [respondent/protected person] manage their finances?
 - Can you tell me about their income and any assets they have?
 - Do they ask you or anyone else for help managing their money? If so, in what ways?
 - Do you receive or hold any money for them? If so, about how much and how is it managed?
- Are there ways [respondent/protected person] spends their money that you do not agree with?
 - If appointed, do you plan to restrict how [respondent/protected person] uses their money? In what way?
- How do you and [respondent/protected person] currently handle disagreements?
 - How do you plan to handle disagreements if appointed?
- How would you go about making sure that the respondent/protected person's preferences and values are honored?