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Oregon Protective Proceedings Bench Book

A judicial resource on
guardianship, conservatorship,
and related legal issues

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Part 1: General Information

1-1: Foundational Information

1. Introduction

The adjudication of guardianship and conservatorship cases requires three disparate but firmly interrelated skills: a mastery of legal capacity, a commitment to the role of “notice” as the underpinning for every order or judgment signed by a judge, and an acceptance of the ongoing monitoring responsibility of a judicial officer for the duration of the case.

2. What Is a Protective Proceeding?

“Protective proceeding” is the general term used to describe a case that seeks to establish and maintain the appointment of a fiduciary who is legally authorized to make decisions for another person. These fiduciaries are traditionally known as guardians and conservators. Protective proceedings may also include proceedings seeking entry of a protective order that, even without appointment of a fiduciary, has the effect of protecting a person or estate. Because the terms “protective” and “protection” are used to describe an order in multiple areas of the law (for instance, discovery protective orders and family abuse protection orders), it is important to ground this work in the definitions found in ORS Chapter 125.

The critical procedural stages of a protective proceeding are:

- Petition
- Notice of Time to Object
- Objection and/or Cross-Petition
- Hearing
- Limited Judgment
- Annual Report or Accounting
- General Judgment Terminating

More specific information about each of these stages will be discussed throughout the bench book. For an overview of the stages of a protective proceeding, please find the case flow charts [here](#).

3. Incapacity and Financial Incapability

Unlike other court proceedings, which focus on what people did to one another and whether it was right or wrong, adult protective proceedings focus on whether

circumstances affecting a person's mind have diminished their ability to reason or function to an unsafe degree. The crux of understanding guardianship and conservatorship cases requires a judge to learn the contours of when this line is crossed and a protective proceeding becomes necessary.

The law generally presumes that a person has legal capacity to make their own decisions, for good or ill, at 18 years old. *Van v. Van*, 14 Or App 575, 578, 513 P2d 1205 (1973). But capacity is a spectrum, and circumstances presenting incapacity in one person may not be the same for another. While some states group all protective proceedings together as guardianship, Oregon law differentiates between incapacity and financial incapability, and the factual prerequisites and legal standards vary between adult and minor proceedings and between guardianship and conservatorship. Statutory definitions are included throughout this bench book where contextually necessary to better understand the relationships between the respondent or protected person, fiduciary, and court.

4. What Purposes Do Protective Proceedings Serve?

Guardianship or conservatorship is a tool for protecting and assisting a person with diminished capacity or financial incapability by granting to another person fiduciary authority to care for, make decisions on behalf of, and protect the person subject to the proceeding. This authority allows a designated and approved person to seek out, navigate, and authorize services and resources to assist the person subject to the proceeding. This approved person has the role of helping a protected person maximize their independence and self-reliance, which includes considering the person's values and preferences in making decisions.

The type of incapacity or financial incapability will affect both the need for and the level of intervention required. Someone in a coma, for instance, may require only the assistance of an emergency temporary guardian until independent decision-making is restored upon recovery. For someone experiencing a traumatic brain injury, the journey from injury to rehabilitation may take a year or more. For those with progressively worsening conditions, the need for guardianship may continue for many years or decades.

5. Case Types and Subtypes

The law presumes capacity for anyone age 18 years or older, and Oregon distinguishes between guardianship and conservatorship needs. ORS Chapter 125 applies to all protective proceedings, but because fact patterns and legal standards vary, cases are sorted into types and subtypes. Each case type and subtype requires a judge to consider particular standards as they apply to the respondent or protected person and obligates the appointed fiduciary to specific duties and reporting expectations. The needs of an incapacitated adult will be different from a child whose parents have unexpectedly died. Likewise, a developmentally delayed adult inheriting substantial wealth will need different support than a fixed-income retiree experiencing severe dementia. Judges experienced with protective proceedings will encounter similarities

across cases but also recognize the unique needs of each individual involved. As a result, a “cookie cutter” approach does not provide effective relief for litigants in these cases.

A. Case Types

I. Adult Cases

The adult case type applies to persons who are aged 18 years or older at the time of case initiation. The fundamental question in all adult protective proceedings is whether respondent’s condition causes them to lack the ability to care for themselves or their property to such a degree that they require the appointment of a fiduciary. If the court finds this true, the next question is who should be serving as the person’s fiduciary. Adult case subtypes include *guardianship*, *conservatorship*, *guardianship and conservatorship*, and *vulnerable youth*, a special type of guardianship.

II. Minor Cases

The minor case type is used for persons who are under 18 at the time of case initiation. Oregon law, with a few exceptions for emancipated or married minors under 18, presumes minors need protection and support. Thus, unlike an adult proceeding, the focus in minor case types is more often *who* should be serving as the fiduciary. Once a person turns 18, they are presumed to have capacity to make their own decisions and are presumed to be financially capable in handling their estate. Unless the protected person’s condition persists and the fiduciary petitions the court under adult petition standards, minor proceedings terminate when the protected person reaches adulthood. Minor case subtypes include *guardianship*, *conservatorship*, or *guardianship and conservatorship*.

B. Case Subtypes

Protective proceeding case subtypes are sorted not by age, but by the type of fiduciary involved, based on the needs of the person subject to the proceeding. See [Section 1-5](#) on fiduciary duty for the type of fiduciary appointed.

I. Guardianship Standard – Incapacity

For a guardian to be appointed for a person, a court must find that the person 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, the emphasis is on the protected person’s health and welfare.

In considering the issue of capacity, a court often receives evidence from more than just the petitioner. A court may hear evidence from multiple sources, including family members, medical providers, forensic evaluators, law enforcement, court visitors, and Adult Protective Service workers. The court visitor's report is a key component in the court's capacity analysis. It is incumbent on a judicial officer to receive and review all admissible evidence presented by the parties, but also understand the broad authority granted by ORS 125.025(3) to the court to solicit additional information that may bear on issues present in the case.

II. Conservatorship Standard – Financial Incapability

For a conservator to be appointed for a person, a court must find that the person 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 judge will likely receive evidence from some of the same sources cited above, but may also hear from bank representatives, financial advisors, and others. It is important to note, however, that appointment of a court visitor is not mandatory in conservatorship cases.

III. Joint Guardianship and Conservatorship

The joint case subtype is used for those individuals needing both a guardian and a conservator. A judge must make the required findings that the person meets both incapacity and incapability standards before appointing a guardian and conservator.

IV. Vulnerable Youth (Case Subtype)

A "vulnerable youth" guardianship is a special adult case subtype quite different from the rest in that there are often no allegations of incapacity whatsoever. Instead, the petitioner seeks to establish vulnerable youth status for U.S. immigration petition purposes. 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). Refer to the vulnerable youth section in [Section 2-1:4](#) for more detail about the petition, court findings, and scope of a vulnerable youth guardianship.

6. Limitations on Liberty and the Right to Be Heard

The appointment of a fiduciary over a respondent represents a substantial limitation of a person's individual liberty. As discussed in greater detail in [Section 3-2:3](#) and elsewhere

in this bench book, a fiduciary's plenary statutory authority is definitionally broad, granting the maximum statutory authority. The initial decision of *whether* to appoint a guardian or conservator is a critical consideration early in the case. A judge must carefully consider whether to impose any limitations to the fiduciary's authority that may be appropriate for the individual case, considering the preferences of the person subject to the proceeding and ensuring that the scope of the appointed fiduciary's authority is supported by clear and convincing evidence. A judge may limit who may have contact with the protected person and the frequency and location of such contact, as well as where and with whom the protected person will live.

A court's supervision of the ongoing protective proceeding occurs post hoc, when a court is reviewing the fiduciary's decisions and actions, up to a year after they occur. Because a judge cannot individually visit and observe the respondent at home or in the community and must therefore rely on parties' representations in court filings, a court has the authority to appoint various individuals at all stages of a proceeding to independently investigate concerns and verify facts.

It is fundamental that the opinions, beliefs, and preferences of the respondent or protected person should be an essential part of a judge's consideration. Because effective communication may be impaired by some aspect of the person's condition, a judge must be especially attuned to ensuring access to justice. ORS Chapter 125 provides extensive procedural protections seeking to involve the respondent or protected person in the proceeding, as well as those persons most likely to be affected by or interested in the proceeding's development. The practical application of these protections ranges from the appointment of counsel to the provision of assisted listening devices and everything in between. If a person is unable to travel to court, some judges have taken court to the person by special arrangement with the facility. The judicial obligation to provide meaningful access continues throughout the entire life of the case.

7. Abuse and Protective Proceedings

A common argument or factual allegation found in petitions for guardianship or conservatorship is that the respondent has had suspicious or objectively dangerous contact with people seeking to exploit them and is unable to protect themselves from the harm that will follow such contact. Vulnerable individuals are often targets of physical abuse, financial abuse, or both due to physical or mental limitations or age-related dependence on others. Protective proceedings granting authority to another person may be an effective means of reducing the susceptibility of higher-risk individuals to potentially abusive contact with perpetrators.

Unfortunately, a fiduciary's authority can also be a tool used to financially exploit, neglect, or inappropriately control those persons the fiduciary has been appointed to serve. As a result, the court is obligated to not only scrutinize the legitimate need for the appointment of a fiduciary, but also diligently supervise the fiduciary's performance and execution of their duties through ongoing case monitoring. The court's focus shifts after a fiduciary is appointed. Before entry of the judgment appointing the fiduciary, the court is focused on whether the petitioner has met their burden of proof and persuasion that

appointment is necessary. After such appointment, the court's attention shifts to the appropriateness and adequacy of the fiduciary's administration of the proceeding.

1-2: Jurisdiction and Authorities of the Court

1. Subject Matter Jurisdiction – ORS 125.015(1)

Probate courts and commissioners have exclusive jurisdiction of protective proceedings. The probate court has the general legal and equitable powers of a circuit court. ORS 111.095(1); ORS 111.175.

2. The Court's Authority – ORS 125.025

A. Scope of Authority

While ORS Chapter 125 contains more explicit probate court authority regarding protective proceedings, ORS 111.095 provides that the probate court has the general legal and equitable powers of a circuit court and establishes some of the basics of the court's powers.

The court shall exercise continuing authority over the protective proceeding. ORS 125.025(1). Supervising and monitoring the case after a fiduciary has been appointed is one of the court's most essential statutory duties.

The court can act upon a petition or motion of any person or upon its own authority at any time and in any manner it deems appropriate to determine the condition and welfare of the respondent or protected person and to inquire into the proper performance of the duties of an appointed fiduciary. ORS 125.025(1). The powers of the court may be exercised by the court directly or through a fiduciary. ORS 125.025(8). In conjunction, these two statutes allow the court to investigate and monitor the proceeding by directing particular actions within the fiduciary's discretion or making specific orders or judgments.

B. Powers of the Probate Court

ORS 125.025(3) lists 14 specific authorities applicable to protective proceedings. Where applicable, these authorities will be referenced elsewhere in this bench book. Summarized, these include:

- (a) Compelling attendance of any person, including parties or any other person who may have knowledge about the respondent or protected person or their estate, or requiring those persons to respond to inquiries and produce documents subject to discovery under ORCP 36.
- (b) Appointing counsel for a respondent or protected person.
- (c) Appointing investigators, visitors, and experts to aid the court in the court's investigation.

- (d) Exercising jurisdiction over any transaction entered into by a fiduciary to determine whether a conflict of interest existed and to enter an appropriate judgment with respect to the transaction.
- (e) Surcharging a surety for loss caused by the fiduciary's failure of duty, including for attorney fees incurred by the respondent or protected person by reason of the failure. The court can require the fiduciary to post bond as a condition of appointment. ORS 125.410.
- (f) Requiring immediate delivery of the protected person or their property, including records, accounts, and documents, to the court or a place the court designates.
- (g) Requiring the fiduciary to produce any and all records that might provide information about the treatment or condition of the protected person or their property.
- (h) Removing a fiduciary whenever that removal is in the best interests of the protected person.
- (i) Appointing a successor fiduciary when the fiduciary has died, resigned, or been removed.
- (j) Requiring a respondent or protected person to submit to a physical or mental examination, pursuant to ORCP 44.
- (k) Making provisions for parenting time or visitation or ordering support for any minor who is a respondent or protected person. See also [Section 4-4](#) regarding ORS 109.119 on parenting time issues.
- (l) Imposing any conditions or limitations on the fiduciary that the court considers appropriate, including limitations on duration of appointment.
- (m) Appointing protected person special advocates, pursuant to ORS 125.120.
- (n) Allowing a person whose attendance is compelled to attend by telephone, video, or remote appearance.

C. Probate Commissioners

The presiding judge of a circuit court may appoint a probate commissioner and one or more deputy probate commissioners, prescribing by rule or order their duties and responsibilities. ORS 111.175. Not all circuit courts need a probate commissioner, but those that have appointed one or more commissioners typically delegate substantial responsibility for reviewing and accepting probate filings.

Pursuant to ORS 111.185, and to the extent the circuit court prescribes, probate commissioners or deputies may:

- (a) Act upon uncontested petitions for appointment of fiduciaries;
- (b) Make and enter orders and judgments appointing fiduciaries and setting the amount of bond;
- (c) Appoint court visitors; and
- (d) Refer any matters to a judge of the court.

Probate commissioners' actions can be set aside or modified by a judge, but otherwise have the same effect as those of a judge. ORS 111.185(5).

3. Personal Jurisdiction

A. Parties to a Protective Proceeding

ORS 125.012(1)(a) identifies the parties to a protective proceeding:

- (a) The "petitioner" is the person who initiates the proceeding by filing a petition. The petitioner may nominate themselves or someone else for appointment. The Oregon Department of Human Services (ODHS) or the Oregon Health Authority (OHA) is allowed to initiate proceedings if they believe protective services are necessary. ORS 125.012(2).
- (b) The "respondent" is the person for whom entry of a protective order is sought. ORS 125.005(10). A person subject to the proceeding is called the "respondent" until a fiduciary is appointed for them. After appointment, the person subject to the protective proceeding is referred to as the "protected person."
- (c) A "court visitor" is a person appointed by the court pursuant to ORS 125.150 to investigate and report to the court as to the allegations forming the basis of the petition, whether the appointment of a fiduciary is necessary, and the suitability and willingness of the proposed fiduciary.
- (d) A "guardian" or "conservator" is a presently appointed fiduciary. Before being appointed, the person sought to serve is referred to as the "nominated guardian" or "nominated conservator."
- (e) An "interested person" is any other person who has filed a petition, objection, motion, or a request for notice into the proceeding. See [Section 1-3:3](#) for more information on interested persons.

B. Venue – ORS 125.020

Venue is proper in the county in which a respondent resides or is present. If the respondent resides in an institution by reason of an order of a court, the proceeding may be commenced in the county where that court sits. ORS 125.020(2). If the respondent does not reside in Oregon and is not present in Oregon, a conservatorship

may still be commenced in any county where property of the respondent is located. ORS 125.020(3). Strict limitations on proper venue of the case preserve personal jurisdiction over the respondent.

After the filing of the initial petition, the court may transfer a case to another county if it is in the best interests of the respondent or protected person. ORS 125.020(4). Be aware that although there is an established legal protocol for interstate transfer of cases, there is no fixed standard for intrastate, county-to-county transfers. If transfer to another Oregon county is in the best interests of the protected person, courtesy dictates certain things occur before such transfer finalizes. Refer to [Section 3-2:6\(D\)](#) for additional discussion.

C. Jurisdiction over Fiduciary – ORS 125.215(3)

The court has personal jurisdiction over any person who accepts appointment as a fiduciary for the purpose of any matter relating to the protective proceeding, whether the fiduciary is a resident or nonresident of Oregon. If the petitioner is also the nominated fiduciary in the petition, their signature on the petition serves as consent to appointment. ORS 125.215(1). Otherwise, the nominated fiduciary must give signed consent or file an acceptance of the appointment before appointment. ORS 125.215(1). Personal jurisdiction over the fiduciary attaches at the time they accept appointment.

D. Interstate Transfers – ORS 125.800 to ORS 125.852

Oregon passed the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) in 2009 to address three interstate jurisdictional issues involving guardianships and conservatorships. First, the act provides a system for resolving multi-state jurisdictional conflicts with a system of priorities for states with purported jurisdiction over the proceeding. Oregon's existing venue provisions, based on physical presence (ORS 125.020), make interstate conflicts exceedingly rare, so unless the court is dealing with a very complicated proceeding, it is unlikely many judges will ever deal with interstate conflicts.

The second jurisdictional issue the UAGPPJA addresses is the process for transferring protective proceedings between states by providing a standardized process for both states to prevent the appointment of multiple fiduciaries with conflicting authority. Courts will encounter interstate transfers when the protected person moves to or from Oregon. The process for transfers is covered in two different parts of this book. Transfers *to* Oregon from another state are discussed in [Section 2-8:1](#). Transfers *from* Oregon to another state are discussed in [Section 3-4:5](#).

Finally, the third issue the UAGPPJA clarifies is the ability to register a "foreign" protective proceeding in Oregon. Registering an out-of-state proceeding does not grant the fiduciary authority under Oregon law but provides recognition of another state's appointment and the fiduciary's granted authority under that state's laws. More information about registration can be found in [Section 2-8:4](#).

1-3: Protective Proceeding Process Generally

1. Oregon Rules of Civil Procedure, Oregon Evidence Code, Uniform Child Custody Jurisdiction Enforcement Act, and Indian Child Welfare Act

ORS 125.050 states that except as otherwise provided, the Oregon Rules of Civil Procedure and the Oregon Evidence Code apply to protective proceedings. There are several notable exceptions within ORS Chapter 125, such as the court's authority to compel responses and documents under ORCP 36 or submission to physical or mental examination under ORCP 44.

The Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) applies to minor guardianship proceedings. ORS 109.704(4).

All relevant provisions of the Indian Child Welfare Act (ICWA) codified at 25 USC Sections 1901 et seq. apply to minor protective proceedings. More information about the ICWA and guardianship can be found in [Section 4-10](#).

2. Initial Petition Starts a Protective Proceeding

Unless a petitioner is seeking registration of a foreign judgment, all ORS Chapter 125 cases begin with the petition for appointment of a fiduciary under ORS 125.055 or a petition for entry of a protective order under ORS 125.650. A petition with proper statutory notice is a fundamental procedural requirement required before the appointment of a fiduciary. *Spady v. Hawkins*, 155 Or App 454, 963 P2d 125 (1998).

3. Notice and Opportunity to Object

A. Rationale for Notice

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 US 319, 96 S Ct 893 (1976). Notice and opportunity to object is the statutory mechanism by which parties propose a plan and provide information about their plan, and they protect the due process rights of those who may be affected by or interested in the plan. Notice is the fundamental procedural safeguard for affected parties' rights.

B. When Is Notice Required?

Notice is required any time a petition, motion, or other request for court approval has been filed by any party involved in a protective proceeding, provided the court has not previously approved waiver of notice to a party that would otherwise be entitled to it (for instance, notice to an alleged abuser). Notably, a respondent or protected person may not waive notice. ORS 125.060(9).

Most notices in protective proceedings must be served after the filing of the petition or motion to which it applies. The notice must identify the time period in which notified parties must object to the proposed action. Proof of notice, including a copy of the

notice issued, must be filed in the case before the court may consider a proposed order or judgment. The notice provided and the proof of notice must be carefully reviewed to ensure that all those entitled to notice received it, and that the notice received was legally adequate.

There are some exceptions to this general rule, where notice may issue *after* the fiduciary has taken some action (like placement of the protected person). Those exceptions will be noted in their respective sections below, but in general, ORS 125.060 to 125.070 cover most of the notice process applicable to protective proceedings.

C. Who Receives Notice? – ORS 125.060

Who is entitled to notice under ORS 125.060 depends on whether the notice issues *before* the appointment of a fiduciary (ORS 125.060(2)) or *after* appointment (ORS 125.060(3)). After appointment, there are fewer persons entitled to notice of subsequent filings, as they could have appeared in the case if they wanted to continue receiving notice of the later filings. Nevertheless, any person can file a request for notice at any time during the case, and any person, whether they received notice or not, can proactively object so long as it is within the objection period.

Notably, there are additional parties that may be entitled to notice when guardianship is at issue, both before appointment and after. If a person other than the respondent files a request for notice or objects to a filing, they must pay a filing fee. See more on objections in [Section 1-3:4](#).

If the guardianship involves a minor, the court must apply all relevant provisions of the ICWA, including notice requirements.

I. Notice of the Petition for Appointment

ORS 125.060(2) directs who is entitled to notice of a petition for appointment of a fiduciary (guardian and/or conservator) or entry of a protective order under ORS 125.650. Not all of the following persons will be entitled to notice in all cases, but context in the petition or other documents may help clue in the court on who should be receiving notice of the petition. The petition checklists included in [Appendix D](#) include the following, taken from ORS 125.060(2):

- (a) The respondent, including minor respondents 14 years old or older.
- (b) The spouse, parents, and adult children of the respondent.
- (c) If the respondent does not have a spouse, parent, or adult child, the person or persons most closely related to the respondent.
- (d) Any person who is cohabiting with the respondent and who is interested in the affairs or welfare of the respondent.

- (e) Any person who has been nominated as fiduciary or appointed to act as fiduciary 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, and any person acting as attorney-in-fact for the respondent under a power of attorney.
- (f) If the respondent is a minor, the person who has exercised principal responsibility for the care and custody of the respondent during the 60-day period before the filing of the petition.
- (g) If the respondent is a minor and has no living parents, any person nominated to act as fiduciary for the minor in a will or other written instrument prepared by a parent of the minor.
- (h) If the respondent is receiving money paid or payable through the U.S. Department of Veterans Affairs, a representative of the regional office that has responsibility for the payments.
- (i) If the respondent is receiving money paid or payable for public assistance through ODHS, a representative of the department.
- (j) If the respondent is receiving money paid or payable for medical assistance through OHA, a representative of the authority.
- (k) If the respondent is committed to the legal and physical custody of the Oregon Department of Corrections, the Attorney General and superintendent or other officer in charge of the facility in which the respondent is confined.
- (l) If the respondent is a foreign national, the consulate for the respondent's country.
- (m) Any other person that the court requires.

ORS 125.060(7) adds additional notice requirements when the petition at issue seeks the appointment of a guardian for a person alleged to be incapacitated:

- (a) Any attorney representing the respondent in any capacity. Notably, an attorney receiving this notice has no obligation or responsibility to represent the respondent in the protective proceeding. ORS 125.060(10).
- (b) If the respondent is a resident of a nursing home or residential facility, or if the nominated guardian intends to place the respondent in a nursing home or residential facility, the [Office of the Long-Term Care Ombudsman](#).
- (c) If the respondent is a resident of a mental health treatment facility or residential facility for individuals with developmental disabilities, or if the nominated guardian intends to place the respondent in such a facility, the system described in ORS 192.517(1). Note: The "system" described in this statute is [Disability Rights Oregon \(DRO\)](#).

II. Notice of Filings After Appointment of Fiduciary

Once a fiduciary has been appointed, the scope of other persons entitled to notice of subsequent filings notably shrinks. ORS 125.060(3) lists those persons entitled to notice of motions to terminate the proceeding, remove a fiduciary, or modify the fiduciary's powers or authority, or for any request for approval of a fiduciary's actions:

- (a) The protected person, including minor protected persons if age 14 or older.
- (b) Any person who has filed a request for notice in the proceedings.
- (c) Except for a fiduciary making the motion or request, any fiduciary who has been appointed for the protected person.
- (d) If the protected person is receiving money paid or payable through the U.S. Department of Veterans Affairs, a representative of the regional office that has responsibility for the payments.
- (e) If the protected person is committed to legal and physical custody of the Oregon Department of Corrections, the Attorney General and superintendent or other officer in charge of the facility in which the protected person is confined.
- (f) If the protected person is a vulnerable youth, the consulate of the vulnerable youth's country of nationality.

Finally, the court may require that any other person receive notice under ORS 125.060(3)(g). The court may direct that additional notices be given to any person or organization that the court identifies.

D. Persons Requesting Notice

Any person who may be interested in the protective proceeding, but is not necessarily objecting to or contesting the proceeding, may appear in the case as a "person requesting notice." ORS 125.060(4). To become a "person requesting notice," they must file a written request for notice with the court that includes their name, address, and phone number along with the filing fee specified by ORS 21.135. They must also mail a copy of the request to the petitioner and/or appointed fiduciary.

Once added to the case, the person is entitled to notice of any filing requiring notice under ORS 125.060(3). This will also require the court to send court-generated notices or documents to the person, but does not require the court to provide notice of party-filed documents. Notice of party-filed documents must be provided by the filing party.

E. How Is Notice Provided? – ORS 125.065

Generally, personal service of the notice of an initiating petition (ORS 125.060(2)) is required for all respondents 14 years of age or older, as well as the parents of a minor respondent. ORS 125.065(1). All other persons entitled to notice of a petition may be

mailed notice to their last-known address. ORS 125.065(2). Any notices subsequent to appointment, except for the notice of appointment of a guardian required under ORS 125.082, may be mailed.

Notices must be served or mailed at least 15 days before the expiration of the notice period, unless the UCCJEA applies, in which case notice must be mailed 21 days before the end of the notice period. ORS 125.065(3). With good cause shown, typically by motion, the court may order a different method or time for giving notice. ORS 125.065(4). The court visitor is statutorily prohibited from delivering the notice to the respondent. ORS 125.065(1).

Proof of notice must be filed into the proceeding before the court enters any order or judgment. ORS 125.065(5). A common issue with respect to notice occurs when the proof of notice reflects delayed issuance of the notice and therefore shortens the period of time in which to object (for instance, when a 15-day notice is mailed only 10 days before the date on which the notice states objections must be filed). Requiring amended notice with a new, full notice period ensures compliance with due process.

F. What Information Does Notice Contain? – ORS 125.070

Each case subtype has different requirements for the content of the notice provided. ORS 125.070 contains specific statutory language and formatting requirements for particular types of notice. Many law firms have tailored their forms of notice to include additional information. It is incumbent upon the court to carefully review the content of the notice filed into the case prior to authorizing any action, even when no objection has been filed.

Pursuant to ORS 125.070(1), all notices issued under ORS 125.060 must contain the following:

- (a) The name, address, and telephone number of the petitioner or person filing the document requiring notice, and that person's relationship to the respondent.
- (b) A copy of the petition, motion, or filing.
- (c) A statement identifying where objections may be made or filed, and the deadline for making or filing the objections.
- (d) If a hearing has already been set, the date, time, and place of the hearing.

Additional requirements for notice contents for guardianship and conservatorship petitions are covered in [Section 2-2](#).

4. Objections

A. Who May Object?

Any person may file an objection so long as they have an interest in the affairs or welfare of the respondent or protected person. ORS 125.075(1) provides a sampling of possible objectors, such as any person entitled to notice under ORS 125.060, any stepparent or stepchild of the respondent or protected person, or “any other person the court may allow.” Statute does not define an “interested person,” but customarily the courts interpret an objector’s standing very openly. Despite very broad and open language allowing objections, there are few cases where multiple objectors appear.

The filing of an objection (and the subsequent hearing) is the most common triggering condition requiring the court to appoint counsel for the respondent or protected person. See [Section 1-6:3](#) on court-appointed counsel for more information.

B. Form of Objection

There is no statutory definition of an objection, meaning that various communications to the court about the proceeding might be interpreted as an objection. Courts should consider whether a particular communication indicates dissent or disagreement, especially when that communication comes from the respondent or protected person. The respondent or protected person may object to any filing orally, in writing, or if in response to the petition for appointment of a fiduciary, to the court visitor (who must communicate the objection to the court). All other parties must generally reduce their objection to writing. ORS 125.075(2). Additionally, under UTCR 9.080, all courts must have a process for memorializing oral objections in writing. Additional training and information about oral objections can be found on the [Probate SharePoint page](#).

The respondent or protected person, the Long-Term Care Ombudsman, DRO, and anyone objecting to a petition for temporary appointment are not required to pay a filing fee to object. All other objecting persons are required to pay the filing fee in ORS 21.170. ORS 125.075(4).

C. Timing of Objections

The notice must provide a date on which objections must be filed. In general, that date is 15 days from the date of personal service or mailing of the notice, unless the UCCJEA applies, in which case it is 21 days. ORS 125.075(2). Despite this provision, it may be prudent for a judge to consider whether an untimely objection still warrants some potential court review or action, taking into consideration the best interests of the respondent or protected person. A protected person may move to terminate the proceedings at any time. See ORS 125.090.

5. Hearings

The court *may* require a hearing on any petition or motion under ORS 125.080(1), but a hearing *is required* when:

- The respondent or protected person objects to a petition or motion and the objection is not withdrawn before the time scheduled for hearing. ORS 125.080(2).
- There is a request to modify a guardian's powers under ORS 125.323 when the guardian is seeking to limit the protected person's preferred associations with other persons. ORS 125.080(3).

Objection hearings are the most common, but the court may find hearings helpful in a variety of other circumstances. The following table offers some examples:

Status/Motion/Modification Hearings	Court-Initiated Show Cause Hearings	Party-Initiated Show Cause Hearings
<p>Used by the court to:</p> <ul style="list-style-type: none"> • Address preliminary issues before subsequent hearings • Consider modification of the authority of the fiduciary and/or termination of the proceeding 	<p>Used by the court to:</p> <ul style="list-style-type: none"> • Address deficiencies, delinquencies, or concerns • Otherwise compel a party to the case to address an issue in court 	<p>Used by parties to:</p> <ul style="list-style-type: none"> • Address alleged non-compliance by another party • Summon a non-party to address an issue affecting the proceeding, raised by the filing party

Unique hearing considerations are addressed in other parts of this book, but in scheduling the hearing, the court should consider appropriate timing of the hearing, whether the hearing should be in person or remote, and the parties entitled to notice. Under no circumstance should a hearing be set *before* the end of an applicable objection period, or less than 15 days from the date of a filed objection. See ORS 125.075(3). This allows the court to hear all objections at once and provides time for the parties (and appointed counsel) to prepare for the hearing.

The court, in its discretion, can determine whether it is more appropriate for the hearing to be held in person or remotely. Many judges consider the individual circumstances of the respondent or protected person in making this decision, including the respondent's or protected person's preference of live or remote appearance, their mobility and transportation, technological ability, and other accommodations to better engage with or address the case's issues.

Although ORS 125.075(3) directs the petitioner or movant to provide notice of the hearing, most courts issue notice of the hearing directly to all parties on the case.

The Juvenile and Family Court Programs Division (JFCPD) has also produced bench cards for the most common types of protective proceeding hearings. Copies of the bench cards are included at the end of [Appendix D](#).

6. Judgments and Orders

The appointment of a fiduciary is pursuant to a limited judgment, not an order or general judgment. ORS 125.030. Limited judgments are also reserved for decisions on an objection to an accounting, placement of a protected person, sale of the protected person's residence, or approval of fees and costs to be paid from the estate of the protected person. ORS 125.030(2). Unless otherwise specified by rule of the Chief Justice, all other decisions within a protective proceeding should be memorialized by an order until the proceeding closes.

A general judgment terminates and closes the protective proceeding.

1-4: Alternatives to Protective Proceedings

1. Protective Proceedings Are the Most Restrictive

Oregon law directs that guardianship proceedings must encourage maximum independence for the protected person. However, the breadth of plenary fiduciary appointment, where the fiduciary is granted the maximum statutory authority, represents the greatest possible limitation on the individual rights and basic freedoms of the person subject to the proceeding and is generally viewed as the most restrictive option for assisting persons who need help making decisions. [Section 3-2:3](#) discusses the statutory contours of each type of fiduciary's authority once appointed. Protective proceeding petitions require the petitioner to indicate whether they are seeking plenary or specified limited authority to the nominated fiduciary. ORS 125.055(2)(m). A limited judgment with carefully drafted limited powers of a fiduciary could adequately protect the protected person with minimal limitations of the person's rights. Nevertheless, most fiduciaries request plenary authority in the petition.

Before the appointment of a fiduciary, the petition must also include information about less restrictive alternatives the petitioner has considered and why those options are inadequate for the respondent's protection. ORS 125.055(2)(i)(A). Judges should be aware of less restrictive alternatives before automatically appointing fiduciaries with plenary authority.

2. Types of Alternative Arrangements

ORS Chapter 127 covers specific details of most of the alternatives to a protective proceeding summarized below. Most of these alternatives require no court intervention unless elements of their execution or application become contested.

A. Power of Attorney

A power of attorney, frequently abbreviated as a POA, is a legal document that allows a person to give another person (referred to as an "attorney-in-fact") the right to act on their behalf. A limited POA, such as one a person might sign as part of a real estate transaction to allow access to certain financial records, is specific in purpose. 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. They 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 signing it later becomes incapacitated.

B. Representative Payees and Veterans Affairs Fiduciaries

When a person receives monetary 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, referred to as a 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 usually, rules about the benefits management include some 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.

C. Health Care Representative

ODHS provides information about the process to appoint a health care representative (HCR) for people with intellectual or developmental disabilities. There is a form prescribed by ORS 127.527 to use the HCR process.

D. Advance Directive

An advance directive is a document that explains how a person wants medical decisions to be made if they are too ill or otherwise unable to make the decisions for themselves. An advance directive also allows the person to choose a health care representative to make decisions for them. Advance directives must be signed when the person is still able to make decisions on their own.

A specific form called “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. While different from an advance directive, most advance directives and POLSTs work in conjunction, and a POLST is completed with health care professionals after discussing current medical conditions, treatment options, and goals for care.

E. Declaration of Mental Health Treatment

Oregon has a process for completing a “Declaration of Mental Health Treatment” form, which tells doctors what kind of mental health treatment they would prefer if they experience a mental health crisis and cannot make their own decisions. The declaration covers medications, treatments, and admission to health care facilities and allows the declarant to appoint a representative to make treatment decisions on their behalf. The declaration must be completed when the person has capacity.

F. Relative Caregivers

A relative caregiver is an adult who is related to a minor child by blood, marriage, or adoption, who is not the legal parent or guardian of a child, and with whom the child lives with. 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.

G. Case Management/Services and Supports

Community programs and services connecting people to agency or private case management workers may be an option to support individuals who need assistance in a less formal or legally binding manner. Support may take the form of home health services, personal care assistants, ODHS or Medicaid case managers, family members providing care, or nutrition services. Health care advocacy may be available for some people with intellectual or developmental disabilities under OAR 411-390.

3. Limited Protective Orders

ORS 125.650 allows a court to enter a protective order, without or in addition to the appointment of a fiduciary, that authorizes a person to exercise some authority over the respondent or their estate. The granting of a protective order usually grants narrow authority to accomplish a specific task, rather than granting plenary authority to a fiduciary. In terms of scope, the protective order may exercise any power that could be exercised by a guardian or conservator in a protective proceeding or any power that could be exercised by the court in a protective proceeding in which a fiduciary is appointed. ORS 125.650(2). The process for seeking a protective order has the same requirements as a petition to appoint a fiduciary, and the court must find that grounds exist for the appointment of a fiduciary when granting a protective order. For a full discussion of protective orders, see *Cat Champion v. Primrose*, 210 Or App 206, 149 P3d 1276 (2006), in which the court entered a protective order for the limited purpose of placing neglected cats into adoptive homes.

There is often little practical distinction between a protective order and appointment of a limited fiduciary. Some common fact patterns for a protective order or appointment of a limited fiduciary for a particular purpose include:

- Granting an incapacitated person admission to a health care facility or a one-time authorization of a particular medical procedure.
- Creating and funding a special needs trust (SNT) using the respondent's funds.
- Approving re-titling specific assets in the joint name of spouses, where all other property is jointly held, but one spouse lacks the capacity to complete the transactions requested.

- Halting the private sale of the respondent's real property for substantially below market value or freezing a particular bank account to prevent fraudulent withdrawals.

Additional discussion of protective orders can be found in [Section 2-1:1](#).

1-5: Fiduciary Duty

1. Willingness to Serve

A nominated fiduciary must consent to their appointment, which is also consent to personal jurisdiction of the court, and acceptance of the fiduciary's duties as guardian or conservator. If the initial petitioner nominates themselves for appointment, their signature to the petition suffices to show willingness to serve. ORS 125.215(1). Otherwise, the nominated fiduciary must sign a consent to serve, filed into the case, before they are appointed. *Id.*

2. Fiduciary Duties Depend on Type of Appointment

A. Guardian

Upon appointment, a guardian with plenary or full authority assumes the care and control over the protected person, and subject to any limitations directed by the court, makes all decisions related to medical care, residence, social associations, and other aspects of the protected person's daily life. A guardian with limited authority assumes care within the contours of their appointment. In so doing, a guardian has an affirmative duty to promote the self-determination of the protected person and must, to the extent practicable, encourage the protected person to participate in decisions. This duty requires the guardian to become acquainted with, maintain contact with, and visit the protected person. The guardian is expected to understand the protected person's values and preferences as well as their needs and limitations.

While a guardian's authority is broad, it is not without limitation. First, the court may impose or limit any authority of the fiduciary as a condition of their appointment in the limited judgment. Second, by statute, some acts of the guardian require prior court approval, such as changing the protected person's home or limiting their social associations or activities. Specific actions of fiduciaries are discussed in [Section 3-2:3](#).

B. Conservator

Upon appointment, a conservator assumes control over all the property of the protected person and administers it for the protected person's benefit. The conservator's authority is statutorily divided into acts they may take without court approval and acts requiring court approval.

3. Conflicts of Interest

As the protected person's family or friend, a non-professional fiduciary usually has a personal interest in the well-being or protection of that person. Many may also have a personal financial interest in the estate of the protected person through inheritance, established gifting, or compensation for services. Even professional fiduciaries, who are not related to the protected person, are financially interested in payment for their time and services.

Therefore, courts have an obligation, both before appointment (when determining the appropriateness of the nominee) and post-appointment (when monitoring the fiduciary's performance), to consider conflicts of interest. ORS 125.221 discusses the disclosures professional fiduciaries must make about their business relationships, employees, and service providers, but the court's duty to consider a guardian's or conservator's conflicts of interest is much broader than that statute would suggest. ORS 125.221 requires particular disclosure of the rates and financial arrangements of a fiduciary hiring or paying others, but many of the most troubling and opaque conflicts of interest are less obvious, as when the guardian or conservator receives "in-kind" benefits instead of fees.

For instance, take a guardian who seeks to cohabitate in the residence of the protected person to provide in-home care. The guardian receives a personal benefit from the decisions they make for the protected person. These decisions may be completely legitimate and in the protected person's best interest, but they may not be. For additional discussion of conflict of interest, see [Sections 2-4:3](#) and [3-3](#) of this book, and also *Grimmett v. Brooks*, 193 Or App 427, 89 P3d 1238 (2004).

1-6: Attorneys in Protective Proceedings

1. Petitioner's/Fiduciary's Counsel

Many petitioners in protective proceedings avail themselves of counsel who assist the petitioner in navigating the appointment process. Within guidelines discussed below, parties may seek payment of their fees from the estate of the respondent or protected person. However, unlike conservatorship matters, guardianship cases (in particular those for minor respondents) often lack funds to pay an attorney to assist with initiating or managing the proceeding. Courts will inevitably have self-represented litigants seeking appointment using self-drafted or generic forms that may not address all the legally required information the court needs. Some courts require the petitioner or fiduciary to acquire counsel, whereas other courts may set hearings to address inadequate filings. It can be tricky to avoid providing legal advice to a party while also ensuring due process provisions are maintained.

Lawyers representing the petitioner are advised to consider potential ethical and malpractice issues by considering their client's motives and whether they should assist a client lacking an objectively reasonable rationale for seeking a protective proceeding. See Oregon State Bar, *Guardianships, Conservatorships, and Transfers to Minors* § 1.7 (2023 ed.). Attorneys are also obligated to clearly explain to the fiduciary the duties and

rights of the fiduciary and the rights of the protected person. A lawyer's persistent failure to carry out those responsibilities while representing a fiduciary can result in discipline for prejudicing the administration of justice. See *In re Hartfield*, 349 Or 108, 239 P3d 992 (2010).

2. Respondent's Counsel: Representing Clients with Diminished Capacity

Although protective proceedings inherently limit the individual liberties of the protected person, ORS 125.300 provides that the protected person retains all legal and civil rights not granted to the fiduciary, including the right to retain counsel. Navigating the complex landscape of a protective proceeding is usually much easier with representation. Attorneys representing a respondent or protected person in these cases should be well-versed in both the professional rule [ORPC 1.14](#) (Representing Clients with Diminished Capacity) as well as the ethics opinions and case law that provide guidance for how to accomplish this difficult task.

A. Client with Diminished Capacity – ORPC 1.14

[ORPC 1.14](#) provides the following guidance for lawyers representing clients with diminished capacity:

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity or is at risk of substantial physical, financial, or other harm unless action is taken and the client cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

B. Relevant Ethics Opinions

The relationship between an attorney and their client when their client is either serving as a fiduciary or being served by a fiduciary can be complicated. The two ethics opinions below offer discussion of some of these complications in both types of attorney-client relationships.

- [Formal Opinion No 2005-41 Competence and Diligence: Client with Diminished Capacity.](#)

This opinion includes discussion of a lawyer's ethical options when their client exhibits diminished capacity.

- [Formal Opinion No 2005-119 Conflicts of Interest, Current Clients: Fiduciaries](#)

This opinion includes discussion of a lawyer's duties to their client when the client is serving in a fiduciary capacity.

3. Court-Appointed Counsel

A. The Right to Counsel

ORS Chapter 125 has long provided a respondent or protected person a right to counsel, but until the passage of [Senate Bill 578](#) (2021), court-appointed counsel was a permissive authority of the court. ORS 125.025(3)(b). With the passage of [Senate Bill 578](#) (2021), ORS 125.080(6)(a) now requires the court to appoint counsel for the respondent or protected person upon certain case triggers:

- (A) The respondent or protected person requests appointment of counsel;
- (B) An objection is filed into the case by *any* person, not just the respondent or protected person;
- (C) The court visitor recommends appointment of counsel in their visitor's report; or
- (D) The court determines that the respondent or protected person is in need of legal counsel.

There is no requirement to appoint counsel for a respondent or protected person if they are already represented by counsel, nor to appoint an attorney if they have explicitly refused court-appointed representation. ORS 125.080(6)(b).

B. Choosing the Lawyer

The statutory framework for court-appointed counsel in ORS 125.080(7)(b) also provides that the Oregon Public Defense Commission (OPDC) shall pay approved attorney fees for financially eligible respondents and protected persons. Shortly before the changes in ORS 125.080 were applied statewide, OPDC contracted with DRO to provide counsel for financially eligible persons and transferred funding allocated for attorney fees to DRO.

Historically, courts would appoint counsel when necessary, and then *if* the estate could pay attorney fees, appointed counsel might petition for approval of their fees. Finding willing counsel to take frequently pro bono appointments for respondents and protected persons was a significant challenge for courts. The DRO contract with OPDC functionally pre-paid DRO attorneys to accept financially eligible cases. However, because the value of a respondent's estate is often challenging to discern early in a

case, the new challenge facing courts is predicting which cases should be directed for DRO appointment and which should remain with private counsel.

If the case is “guardianship-only” and there are no obvious estate funds discernible from the petition or other filings, an attorney from DRO should be appointed. The [Odyssey Help system](#) has updated contact information for DRO’s lead guardianship attorney, who is assigned to all DRO attorney appointments. After entry of the order appointing counsel, a copy of the order and any important case documents are emailed to that attorney. The DRO office will file a notice of substitution if their office assigns an attorney other than the lead guardianship attorney.

If the proceeding involves a conservatorship or the petition or filings indicate the respondent has funds, the court must solicit private counsel to accept appointment. Probate staff should have a local list of private attorneys who have consented to court appointment in protective proceedings in the past. However, if your court does not have a list of willing attorneys, JFCPD staff may be able to help identify possible appointees who have taken cases in other counties. See the [Probate SharePoint page](#) for JFCPD contact information.

The general business process and additional detailed information about appointing counsel is available on the [Odyssey Help system](#) or on the [Probate SharePoint site](#).

4. Attorney Fees in Protective Proceedings

A. ORCP 68 Does Not Apply

Although most judges are familiar with ORCP 68 and applications for attorney fees, that rule does not apply to protective proceedings. Instead, ORS 125.095 and ORS 125.098 provide specific rules about the application for and approval of attorney fees related to guardianship and conservatorship cases.

B. Using Respondent or Protected Person’s Funds for Attorney Fees

The funds of a person subject to a protective proceeding may be used to pay reasonable fees, costs, and disbursements to any attorney related to the protective proceeding, or for services provided on behalf of a fiduciary, respondent, petitioner, cross-petitioner, objector, or protected person. ORS 125.095(1). Most commonly, this means attorney fees attributable to the petitioner or fiduciary’s attorney, or fees from the respondent or protected person’s counsel. Objectors seeking payment of attorney fees from the estate of the protected person face a challenge in showing the reasonableness of the fee award, which the court determines by considering several factors discussed below. The court does not typically see, or review, attorney fees paid to counsel from any other source.

ORS 125.095(3) provides that court approval is *not* required before:

- (a) Payment of attorney fees incurred prior to the filing of a petition in a protective proceeding for services unrelated to the protective proceeding; or

- (b) Payment for services provided by an attorney who is hired as a mediator for mediation services related to a protective proceeding.

Note the key words in ORS 125.095(3)(a) are “prior to the filing of a petition” and “unrelated.” Arguably, any attorney fees requested to be paid from the estate of the protected person after the petition has been filed require court approval before payment. Funds used to pay attorney fees for services performed before the petition must be “unrelated” to the protective proceeding.

C. Reasonable Fees Must Be Approved by the Court Before Payment

Attorney fees requested in guardianship and conservatorship proceedings must be supported by an affidavit or declaration under penalty of perjury setting forth the justification for the amount requested. UTCR 9.060(1). Typically, attorney fee requests are filed by motion or separate petition, or filed with an annual accounting in a conservatorship, but requests for attorney fees must be served in the manner and on the persons described in ORS 125.475. UTCR 9.060(4).

ORS 125.098(2) provides factors for the court to consider in determining *whether* to award attorney fees in a protective proceeding:

- (a) The benefit to the person subject to the proceeding by the party’s actions in the proceeding. This factor shall be given the greatest weight in the court’s consideration.
- (b) The objective reasonableness of the position asserted by the party.
- (c) The party’s self-interest in the outcome of the proceeding.
- (d) Whether the relief sought by the party was granted in whole or in part, subject to the respondent’s right to contest the proceeding.
- (e) The conduct of the party in the transactions or occurrences that gave rise to the need for a protective proceeding, including any conduct of the party that was reckless, willful, malicious, in bad faith, or illegal.
- (f) The extent to which an award of attorney fees in the proceeding would deter others from asserting good faith positions in similar proceedings.
- (g) The extent to which an award of attorney fees in the proceeding would deter others from asserting meritless positions in similar proceedings.
- (h) The objective reasonableness of the party and the diligence of the party and the attorney during the proceeding.
- (i) The objective reasonableness of the party and the diligence of the party in pursuing settlement of the dispute.

- (j) Any other factor the court may consider appropriate under the circumstances.

ORS 125.098(3) provides factors for the court to consider in determining the *amount* of fees to award:

- (a) The time and labor required in the proceeding, the novelty and difficulty of the issues involved, and the skill needed to provide the legal services.
- (b) The likelihood that the acceptance of the employment on behalf of the party by the attorney would preclude the attorney from other employment, when the likelihood should be apparent or was made apparent to the party.
- (c) The fee customarily charged by an attorney in the locality for similar legal services.
- (d) The time limitations imposed by the party or the circumstances of the proceeding.
- (e) The experience, reputation, and ability of the attorney providing the legal services.
- (f) The amount of the attorney fees requested relative to the estate of the person subject to the protective proceeding, whether or not the estate of the person subject to the protective proceeding is subject to the direct or indirect control of a conservator.

Part 2: Pre-Appointment and Appointment

2-1: The Petition

There are three protective proceeding cases all judges should read:

- *Spady v. Hawkins*, 155 Or App 454, 963 P2d 125 (1998) (the authoritative case on the necessity of petition, notice, and due process before appointment of a fiduciary).
- *Grimmett v. Brooks*, 193 Or App 427, 89 P3d 1238 (2004) (discussing capacity, financial incapability, due process of petitions and notice, and the nuances of conflict of interest of the fiduciary).
- *Helmig v. Farley, Piazza & Associates*, 218 Or App 622, 180 P3d 749 (2008) (discussing the requirements for appointment of a conservator, the interaction between alternatives to a protective proceeding, and interested parties' involvement and interests).

While there are more recent decisions, these cases set the stage for understanding both the current standard of practice for litigants and the court's responsibility in ensuring that the standards are met. This duty begins with the petition. All protective proceedings are commenced by the filing of a petition in a court with jurisdiction over the proceeding. ORS 125.010(2).

1. Petitions for Appointment Generally

ORS 125.055 provides an itemized list of all information to be included in a petition for appointment of a fiduciary. The petition must designate the type of fiduciary sought to be appointed. ORS 125.055(1).

The required elements of the petition are of crucial importance in protective proceedings because the petition provides a statutory basis for the necessity of the court's intervention. The court cannot intervene without legally sufficient findings that the respondent's level of capacity presents risk to them physically, financially, or both. The petition must contain allegations which, if proven at hearing, confirm that a person is unable to meaningfully protect themselves as defined by statute and case law. ORS 125.055(2) mandates that the petitioner must clearly and accurately provide information as to each element. The petitioner has the responsibility to make reasonable effort to acquire information the petitioner may not otherwise have. ORS 125.055(2).

A petition must present *facts* rather than legal conclusions. Except for petitions seeking appointment for a vulnerable youth, discussed below, the petition in a protective proceeding must present facts to establish a prima facie case that the respondent is incapacitated or financially incapable. ORS 125.055(2)(i)(A). For example, a person is not legally incapacitated because they have been diagnosed with dementia or a traumatic brain injury. The petition must state facts to illustrate how the respondent's

dementia or traumatic brain injury causes the person to “lack the capacity to meet the essential requirements for the person’s physical health and safety” (guardianship) and/or “manage financial resources effectively” (conservatorship). A petition must further describe facts that support any finding the petitioner requests, and the appointment of a fiduciary is not the automatic solution for all capacity or financial incapability issues.

The court is directed by ORS 125.055(7) to review the petition upon filing. If the petition fails to meet the pleading requirements of ORS 125.055, a court must, on its own motion, either dismiss the proceeding without prejudice or require the petition to be amended. This issue is addressed more thoroughly in [Section 2-9](#).

2. Elements of All Petitions

The next sections discuss the required elements of initiating petitions, but for efficient checklists covering the elements, refer to the [Appendix D](#).

All petitions must include a designation of the type of fiduciary sought and/or the nature of the protective order requested. ORS 125.055(1)(a). The caption must clearly indicate that information as well. *Id.* The statute states that an original and duplicate copy must be filed, but electronic case records have eliminated the need for the duplicate copy, and no court still requires one. The petition must include the name, age, residence address, and current location of the respondent; the interest of the petitioner; and whether the petitioner is the nominated fiduciary. ORS 125.055(1)(a)-(c). If the petitioner is not nominating themselves for appointment, a statement must be included that the nominated fiduciary is able and willing to serve. ORS 125.055(2)(f). Additional required disclosures about the nominated fiduciary include whether or not the nominated fiduciary is a public or private agency or an organization that provides services to the respondent or an employee of such an agency or organization. ORS 125.055(2)(k)(L).

The petition is also required to state several pieces of background information about the suitability of the nominated fiduciary. The required information, listed in ORS 125.055(2)(d), includes:

- Whether that person has been convicted of a crime
- Whether that person has ever filed for bankruptcy
- Whether that person has been surcharged or removed as a fiduciary by any other court (in or outside of Oregon)
- Whether that person has had a license revoked which is otherwise required by any state to practice a profession or occupation

If the answer is “yes” to any of those questions, the petition must also include an explanation of the surrounding circumstances. ORS 125.055(2)(e). A common example concerns the circumstances of a nominated fiduciary convicted of a crime years prior to the petition. If so, the petition should explain the details of the conviction, including the

type of crime, compliance with the sentence imposed, and an explanation as to why that conviction should not lead the court to conclude that the nominated fiduciary is unsuitable for appointment. Failure to provide a candid explanation is a red flag. Professional fiduciaries failing to disclose prior removal from a case or inadequately explaining other actions taken against them by a court is a glaring red flag. For more information about the qualifications of fiduciaries, see [Section 2-4](#).

If there are other fiduciaries appointed for the respondent in any other court (Oregon or elsewhere), any trustees for a trust established by or for the respondent, or any person appointed as a health care representative or acting as attorney-in-fact (under a power of attorney (POA)) for the respondent, the petition must include the names and contact information for those individuals. ORS 125.055(2)(g). This information is necessary to prevent any potential conflict in authority between the nominated fiduciary and others acting in a fiduciary capacity.

The petition must include the name and address of the respondent's treating physician and any other person who is providing care to the respondent. ORS 125.055(2)(h).

ORS 125.055(2)(i) requires factual information that supports the request for the appointment of a fiduciary or entry of another protective order. The factual allegations in the petition are vitally important for the court to understand the circumstances of the respondent. In adult proceedings, these facts should explain why the respondent lacks legal capacity or financial capability. Minors are legally incapacitated and financially incapable based on their age. The petition should instead focus on the factual allegations describing the adverse conditions that place the child in need of a guardian, or the circumstances that resulted in the child having financial resources requiring a conservatorship.

Narrative information within the petition must include a description of "less restrictive alternatives" to the appointment of a fiduciary (see [Section 1-4](#) above) that have been considered prior to filing. ORS 125.055(2)(i)(A). The petition should also explain why the alternatives are inadequate to meet the needs of the respondent. *Id.*

Furthermore, the petition must state whether the nominated fiduciary intends to place the respondent in a mental health treatment facility, nursing home, or other residential facility. ORS 125.055(2)(j). In addition, the petitioner must provide a general description of the estate of the respondent and the amount and sources of the respondent's income. ORS 125.055(2)(k). The former triggers additional notice requirements in ORS 125.060 and the latter can be helpful in determining whether the respondent's financial considerations are being adequately addressed by the relief requested. The amount of money in the respondent's estate also affects how court-appointed counsel might be paid, should appointed counsel become necessary. Refer to [Section 1-6:4](#) for more detail about attorney fees.

Finally, the petitioner must state whether they are seeking the appointment of a fiduciary with plenary authority, which means to the full extent allowable by law, or specified limited authority. ORS 125.055(2)(m).

3. Specialized Elements of Some Petitions

In addition to the requirements explained above, additional provisions must be included for certain types of fiduciary appointments.

A. All Guardianships

When the petition seeks the appointment of a guardian, the petition must state whether the guardian will exercise any control over the respondent's estate. ORS 125.055(3). If so, the petition must include a statement of the respondent's monthly income, the sources of that income, and the amount of any money that the guardian will be holding for the respondent at the time of appointment. ORS 125.055(3)(a). A guardian's financial control is limited to smaller amounts of money, as illustrated below.

A common petition fact pattern could include a guardian seeking to serve as the representative payee for the respondent's Social Security benefits. Apart from the monthly benefits, if the respondent has little to no other income, it is common to allow the guardian to manage these funds without bond or asset security because there are modest funds and agency rules in place to track benefit payments. See [Section 1-4:2\(B\)](#) for more information regarding Social Security representative payees. Substantial liquid assets, however, may require a court to inquire as to whether a conservatorship is also appropriate. Accounting expectations of conservators provide better oversight and security of the protected person's estate than what otherwise might be expected of a guardian. If the guardian intends to use the protected person's funds to pay room and board provided by the guardian or the guardian's family members, the guardian must get prior court approval, typically in the form of a budget. See [Section 3-2:6\(E\)](#) for additional room, board, and budget discussion.

B. Adult Guardianship and Guardianships for Soon-to-Be Adults

All adult guardianships require the appointment of a court visitor, and the petition must notify the court of the requirement. ORS 125.055(3)(b). It is also possible for a petitioner to seek the appointment of a guardian for a minor whose condition could sustain a finding of incapacity even after the minor turns 18. ORS 125.055(6)(a). If a guardianship petition for a 16-year-old minor is filed, and the court expects that a petition will be filed for an adult guardianship for the minor before the minor becomes an adult, the petition must include the same statement requiring the appointment of a court visitor. *Id.* These types of petitions are relatively infrequent. They should allege more than minority as the basis for incapacity, however, as the condition requiring court intervention is not expected to change with age. Given that the condition will continue into legal adulthood, a court visitor's involvement is required.

C. Conservatorships

Conservatorship petitions require an estimate of the value of the respondent's estate. ORS 125.055(4). While a petitioner may not know the exact assets of the estate, they should include a gross value estimate and an estimate for annual income, which the

court may use in later bond determination. The actual bond amount can always be adjusted once more concrete information becomes known.

4. Petitions for Guardianship of Vulnerable Youth

A petition for guardianship of a vulnerable youth is slightly different from other protective proceedings because the basis of eligibility has nothing to do with capacity or financial incapability, but rather whether the respondent would qualify for Special Immigrant Juvenile Status (SIJS). The factual information required in the petition, under ORS 125.055(2)(i)(B), must support a finding that the respondent is a vulnerable youth.

Under ORS 125.005(12), a “vulnerable youth” is a person who:

- (a) Is at least 18 years of age but has not yet turned 21;
- (b) Is eligible for classification under 8 USC 1101(a)(27)(J); and
- (c) Cannot be reunified with one or more parents due to abuse, neglect or abandonment, that occurred when the person was a minor.

The petition must provide factual information on all three components listed above. A state court is only the first stop for these youth. Classification under 8 USC 1101(a)(27)(J) requires several components that the Secretary of Homeland Security will use, but in order to apply for SIJS, a state court must first find that the person meets the above criteria. The factual information in the petition will likely talk about the respondent’s immigration history, abuse, neglect, or abandonment by one or both of the respondent’s parents during the respondent’s minority and explain why a return to their previous country is not in the respondent’s best interests. The Oregon court does not make findings about immigration status, but rather eligibility to seek SIJS status.

In addition to this factual difference, two other special requirements apply to vulnerable youth petitions:

- (A) A statement that the court, in its discretion, may appoint a court visitor; and
- (B) A declaration signed by the respondent consenting to the appointment of the proposed guardian.

ORS 125.055(3)(c)(A)-(B).

5. Petitions for Temporary Fiduciaries

Some situations cause petitioners to seek immediate and/or temporary appointment of a fiduciary. These situations may exist for myriad reasons, but generally apply in cases where a person has a catastrophic but recoverable health event or is at significant and imminent physical or financial risk. The appointment of a temporary fiduciary is reserved for unexpected circumstances that require immediate control over a person or their estate. ORS 125.600 protects against the misuse of a temporary appointment by

imposing rigid time limitations and requirements for immediate notice and hearing, if requested. These requirements ensure that the temporary fiduciary process is used with the utmost care and that incredibly restrictive measures are used only where justified.

All requirements for petitions under ORS 125.055 also apply to temporary petitions, but the factual pleading level is heightened to include information about the conditions set forth in ORS 125.600(1):

- The respondent is incapacitated, financially incapable, or a minor;
- There is an immediate and serious danger to the respondent's life, health, or estate; and
- The respondent's welfare requires immediate action.

Procedural differences between indefinite and temporary petitions, also discussed in their respective sections of this bench book, are found in ORS 125.605:

- Notice of the temporary petition must be given at least two days before the appointment unless the court finds by clear and convincing evidence that the immediate and serious danger requires an immediate appointment. In these "emergency" appointment cases, notice must be given within two days after appointment of the fiduciary.
- A visitor must be appointed for temporary guardianship, with no distinction between adult and minor respondents. The visitor appointment must be made within three days of the appointment of the fiduciary, with the visitor's report, limited to the conditions alleged to support the temporary appointment, due within five days of the fiduciary's appointment. The court should appoint the visitor as soon as possible to maximize the visitor's time to interview persons and prepare the report.
- Any objection to temporary appointment requires a hearing set within two judicial days of the filing of an objection. There is no filing fee to file any objection by any person.

6. Petition for Protective Order (of Disclosure) – ORS 125.012

Unlike a petition for a protective order under ORS 125.650 (see [Section 1-4:3](#)), a petition for a protective order under ORS 125.012 is not an initiating petition. Instead, it is typically a petition filed within an existing case by the Oregon Department of Human Services (ODHS). These occur when ODHS is contracting with a petitioner to pursue fiduciary appointment (ORS 125.055) or a limited protective order (ORS 125.650) filed simultaneously with an initiating petition "for the purpose of providing protective services." ORS 125.012(2).

ODHS and the Oregon Health Authority (OHA) are subject to strict confidentiality rules with respect to the information these agencies hold. When ODHS seeks court

intervention for an individual through the appointment of a fiduciary or “other protective order” under ORS 125.650, they must seek a court order allowing them to disclose protected information about the respondent to support the request for fiduciary appointment or approval.

An order approving disclosure under ORS 125.012 directs ODHS to provide protected information that supports their position to the court. The information disclosed should contain only the minimum amount of protected information reasonably necessary and must be filed confidentially. ORS 125.012(3)-(4)(a). The information is only subject to inspection by the parties to the proceeding. ORS 125.012(4)(b). To the extent the visitor report contains any protected information, the court must make the whole report confidential. ORS 125.012(4)(d). Courts should establish training or guidelines for staff related to the receipt and entry of protected information in the Odyssey system to make sure it complies with the protective order.

2-2: Notice of Petitions

1. Who Is Entitled to Notice of the Petition?

ORS 125.060(2) lists the individuals and agencies that are entitled to notice of a petition for appointment of a fiduciary. The full list can also be found in [Section 1-3:3\(C\)](#) or the notice checklist in [Appendix D](#). Besides the obvious requirement to provide notice to any respondent age 14 or older, who may not waive notice but can accept service, some of the most commonly notified persons include:

- The spouse, parents, or adult children of the respondent. If the respondent has none of these relations, then notice must go to the person or persons most closely related. ORS 125.060(2)(b)-(c). Anyone cohabiting with the respondent who is interested in the affairs or welfare of the respondent also gets notice, even if the petition alleges they are a negative influence on the respondent.
- Any person with nominated or existing fiduciary responsibilities to the respondent, whether appointed by any state court, serving as a trustee or health care representative, or holding a POA.
- For minors, anyone who has exercised principal responsibility for the minor in the 60 days prior to the filing of the petition. If the minor has no living parents, any person nominated in a will or other document to act as a fiduciary for the minor also gets notice.
- Representatives of various agencies may be entitled to notice depending on the circumstances of the petition, including the U.S. Department of Veterans Affairs, ODHS, OHA, the Oregon Department of Corrections, or the consulate of the respondent’s country of citizenship if they are not a citizen of the United States.
- The Office of the Long-Term Care Ombudsman and Disability Rights Oregon if the respondent is to be placed in residential or long-term care.

The court can also direct notice to any other person at the court's discretion. The petitioner must exercise reasonable diligence in finding and providing notice per ORS 125.065(2), and careful reading of the statutory provisions and the petition at issue will alert the court to additional parties that should be provided notice of the petition.

2. What Must the Notice of Petition Contain?

Fundamentally, the notice must be adequate to apprise the person receiving it of the nature of the proceeding, the relief requested, the time for filing objections, and the consequences of failing to do so. The elements of every notice, whether for the petition or of subsequent filing, are listed in ORS 125.070(1) and bullet pointed in Part 1-3:3 above.

The expiration of the notice period included in the notice must be at least 15 days from the date of service or mailing, unless the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) applies (for minor guardianship), in which case the notice period must be 21 days. Notice of petitions to non-Respondent persons must include an additional provision alerting them to their option to receive future, subsequent notices. The statement, required by ORS 125.070(5) reads:

NOTICE: If you wish to receive copies of future filings in this case, you must inform the judge and the person named as petitioner in this notice. You must inform the judge by filing a request for notice and paying any applicable fee. The request for notice must be in writing, must clearly indicate that you wish to receive future filings in the proceedings and must contain your name, address and phone number. You must notify the person named as petitioner by mailing a copy of the request to the petitioner. Unless you take these steps, you will receive no further copies of the filings in the case.

A notice for a respondent is more thorough than a notice to other persons. Judges and court staff should carefully review the copy of the notice filed by the petitioner to ensure that statutory requirements are met. Keep in mind that if the court has already appointed a temporary fiduciary and waived prior notice, the content of the notice should address that appointment specifically, including the shortened time for setting a hearing.

A. Notice to Respondent of Petition for Conservatorship

In addition to the general requirements of ORS 125.070(1), ORS 125.070(2) requires a notice to the respondent of a petition for conservatorship to contain the following:

- (a) An explanation of the purpose and possible consequences of the petition.
- (b) A statement that financial resources of the respondent may be used to pay court-approved expenditures of the proceeding.
- (c) Information regarding any free or low-cost legal services and other relevant services available in the area.

- (d) Information on any appointment of a visitor and the role of the visitor.
- (e) A statement of the rights of the respondent as follows:
 - (A) The right to be represented by an attorney.
 - (B) The right to file a written or oral objection.
 - (C) The right to request a hearing.
 - (D) The right to present evidence and cross-examine witnesses at any hearing.
 - (E) The right to request at any time that the power of the fiduciary be limited by the court.
 - (F) The right to request at any time the removal of the fiduciary or a modification of the protective order.

Most attorneys have developed their own template for this notice, which will differ in form from the notice provided to the other non-respondent parties listed in ORS 125.060(2).

B. Notice to Respondent of Petition for Guardianship

A notice of a petition for guardianship to a respondent alleged to be incapacitated (as an adult) is the most particular in content. Under ORS 125.070(3), in addition to the general requirements of ORS 125.070(1), the notice must be printed in 14-point type, include a blank objection form, and be in substantially the following form:

NOTICE TO RESPONDENT
<p>To: Respondent _____:</p> <p>_____, Petitioner, who is your _____ (relationship to respondent), or that is an agency or business that provides guardianship services, has asked a judge for the power to make decisions for you. The judge has been asked to give this person, agency or business the authority to make the following decisions for you (mark the appropriate spaces):</p> <p><input type="checkbox"/> Medical and health care decisions, including decisions on which doctors you will see and what medications and treatments you will receive.</p> <p><input type="checkbox"/> Residential decisions, including decisions on whether you can stay where you are currently living or be moved to another place.</p> <p><input type="checkbox"/> Financial decisions, including decisions on paying your bills and decisions about how your money is spent.</p> <p><input type="checkbox"/> Other decisions: _____</p> <p><u>YOUR MONEY MAY BE USED IF THE JUDGE APPOINTS A GUARDIAN FOR YOU. YOU MAY BE ASKED TO PAY FOR THE TIME AND EXPENSES OF THE GUARDIAN, THE TIME AND EXPENSES OF THE PETITIONER'S ATTORNEY, THE TIME AND EXPENSES OF YOUR ATTORNEY, FILING FEES AND OTHER COSTS.</u></p> <p><u>YOU MUST TELL SOMEONE AT THE COURTHOUSE BEFORE _____ (DATE) IF YOU OPPOSE HAVING SOMEONE ELSE MAKE THESE DECISIONS FOR YOU.</u></p> <p>OBJECTIONS:</p> <p>You can write to the judge if you do not want someone else making decisions for you. The judge's address is: _____.</p> <p>You have the right to object to the appointment of a guardian by saying you want to continue to make your own decisions. If you do not want another person, agency or business making decisions for you, you can object. If you do not want _____ (Proposed Guardian) to make these decisions for you, you can object. If you do not want your money to be used to pay for these expenses, you can object.</p> <p>You can object any time after the judge has appointed a guardian. You can ask the judge at any time to limit the kinds of decisions that the guardian makes for you so that you can make more decisions for yourself. You can also ask the judge at any time to end the guardianship.</p> <p>THE HEARING:</p> <p>The judge will hold a hearing if you do not want a guardian, do not want this particular person to act as your guardian or do not want your money used this way. At the hearing, the judge will listen to what you and others have to say about whether you need someone else to make decisions for you, who that person should be and whether your money should be spent on these things. You can have your witnesses tell the judge why you do not need a guardian and you can bring in records and other information about why you think that you do not need a guardian. You can ask your witnesses questions and other witnesses questions.</p> <p>THE COURT VISITOR:</p> <p>The judge will appoint someone to investigate whether you need a guardian to make decisions for you. This person is called a "visitor." The visitor works for the judge and does not work for the person who filed the petition asking the judge to appoint a guardian for you, for you or for any other party. The visitor will come and talk to you about the guardianship process, about whether you think that you need a guardian and about who you would want to be your guardian if the judge decides that you need a guardian. The visitor will talk to other people who have information about whether you need a guardian. The visitor will make a report to the judge about whether what the petition says is true, whether the visitor thinks that you need a guardian, whether the person proposed as your guardian is able and willing to be your guardian, who would be the best guardian for you and what decisions the guardian should make for you. If there is a hearing about whether to appoint a guardian for you, the visitor will be in court to testify.</p> <p>You can tell the visitor if you don't want someone else making decisions for you when the visitor comes to talk with you about this matter.</p> <p>LEGAL SERVICES:</p> <p>You can call a lawyer if you don't want someone else making decisions for you. If you don't have a lawyer, you can ask the judge whether a lawyer can be appointed for you.</p> <p>There may be free or low-cost legal services or other relevant services in your local area that may be helpful to you in the guardianship proceeding. For information about these services, you can call the following telephone numbers _____ and ask to talk to people who can help you find legal services or other types of services.</p> <p>OBJECTION FORM:</p> <p>You can mark the blue sheet (Respondent's Objection) that is attached to this form if you do not want someone else to make your decisions for you. You can give the blue sheet to the visitor when the visitor comes to talk with you about this, you can show it to your attorney or you can mail it to the judge.</p>

The more legible form of this notice can be found in [Appendix C](#).

C. Objection Form

Unique to the petitions for the appointment of a guardian for incapacitated persons, ORS 125.070(4) requires the notice to include a special form for the respondent to use if they wish to file an objection. It must be printed in 14-point type on *blue* paper. The form provides check spaces for the respondent to select options for contesting the proceeding or, more narrowly, the nominated guardian. The objection form can be filed with the court in person or by mail. It can also be given to the court visitor, who must file it with the court.

The objection form should look exactly like this:

IN THE _____ COURT OF THE STATE OF OREGON FOR THE COUNTY OF _____			
(Case Title))	Case No. _____	
)		
)	RESPONDENT'S	
)	OBJECTION	
)		
)		
)		
I object to the petition for the following reasons:			
___ I do not want anyone else making any of my decisions for me.			
___ I do not want _____ making any decisions for me.			
___ I do not want _____ to make the following decisions for me:			

			_____ (Signature of Respondent)
			_____ (Date)
GIVE TO THE VISITOR OR MAIL TO:			

A sample of the respondent's objection form is provided in [Appendix C](#).

3. Manner of Notice

Personal service of notice of the petition is required upon all respondents aged 14 or older. In minor protective proceedings, personal service of the notice is also required on the legal parents of the minor respondent. ORS 125.065(1). The court visitor is prohibited from serving notice. For all others, notice must be sent to the last known address of any person entitled to notice. ORS 125.065(2).

If the address or identity of a person is not known and cannot be ascertained with reasonable diligence, notice of the filing may be given by publishing notice once a week for three consecutive weeks in a newspaper of general circulation in the county where the proceeding is located. ORS 125.065(2). The last week of publication must occur more than 15 days before the last date to object. *Id.* With good cause shown, a court may provide for a different method or time of giving notice. ORS 125.065(4).

Proof that the petitioner has given notice must be filed into the proceeding before the court enters a judgment of appointment. ORS 125.065(5).

2-3: Court Visitors (Guardianship)

1. What Is a Court Visitor?

A court visitor is 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).

A. Qualification of Visitors

ORS 125.165 defers the specifics of a visitor's qualifications to the presiding judge of the circuit court but does require, broadly, that a prospective visitor:

- (a) Have sufficient training. A visitor must have the training and expertise to:
 - (i) Allow the visitor to conduct interviews and make the required recommendations regarding the respondent;
 - (ii) Communicate with, assess, and interact with respondents and protected persons;
 - (iii) Perform the other duties required of a visitor.
- (b) Demonstrate sufficient knowledge. The visitor must demonstrate sufficient knowledge of the law so as to be able to:
 - (i) Inform the respondent or protected person of the nature and effect of a protective proceeding;
 - (ii) Inform a respondent or protected person of their rights in the proceeding;
 - (iii) Answer questions of the respondent or protected person and inform fiduciaries of their powers and duties.

2. When Is a Court Visitor Required?

ORS 125.150(1)(a) provides that the court shall appoint a visitor upon the filing of a petition in a protective proceeding seeking the appointment of:

- (A) A guardian for an adult respondent.
- (B) A guardian for a minor who is more than 16 years old, in cases where the court determines there is a likelihood that a petition seeking appointment of a guardian for the respondent as adult will be filed before the date that the respondent attains majority.
- (C) A temporary fiduciary who will exercise the powers of a guardian for an adult respondent.

In other words, the appointment of a court visitor is required before the appointment of a guardian in all adult guardianship cases, whether temporary or indefinite. It is optional in all other case types and subtypes. The court may choose to appoint a visitor in these cases, but more often, the appointment of a visitor will be requested by a party. Given that the appointment of a visitor can potentially be costly (see [Section 2-3:6](#) regarding visitor fees), the court may want to consider the financial resources of the petitioner and respondent against the informational benefit of a visitor report before appointing on the court's own motion in an optional appointment case type.

3. The Visitor Order

Because the visitor fills an objective and neutral role, often described as the “eyes and ears of the court,” it is best for the court to choose an individual visitor for appointment who has no ties to any party. ORS 125.165(2) requires the visitor not to have any personal interest in the respondent or protected person or any pecuniary or financial interest in the proceedings. While some circuits allow the petitioner to choose or nominate the visitor to be appointed, this practice can create an appearance of impropriety, especially if certain visitors are always used by certain law firms. An impartial, court-selected rotation of visitors is a better practice.

The visitor order should be entered as promptly as possible after the petition is filed. While ORS 125.150 contains no deadline by which the court shall appoint a visitor, ORS 125.605, covering temporary petitions, directs that the court shall appoint the visitor no later than three days after the temporary appointment is made.

Upon the appointment of the visitor, the court shall provide a copy of the petition and any other filings in the proceeding that may be of assistance to the visitor. ORS 125.150(2).

Many courts have a standard order of appointment of a visitor, which is generated by court staff, signed by a judge, and then sent to the appointed visitor with a copy of the initiating petition. Examples of a standardized order are available in [Appendix C](#).

It can be difficult for courts to maintain a stable list of qualified visitors. The effort to ensure qualified and available visitors should be monitored by a judge within the circuit. Information about training and visitor qualification can be found on the [Probate SharePoint page](#). Some publicly accessible training materials and videos are hosted on the statewide [guardianship and conservatorship website](#).

4. The Visitor's Duties

As the “eyes and ears of the court,” visitors have three essential responsibilities: investigate, evaluate, and report.

A. Investigate

Generally, the court visitor is tasked with investigating the circumstances of the allegations in the petition. ORS 125.150(7)-(12) specifically list information to investigate, summarized in the table below.

The Respondent's Condition – ORS 125.150(7)
The inability of the respondent to provide for their needs with respect to physical health, food, clothing, and shelter.
The location of the respondent's residence and the ability of the respondent to live in the residence while under guardianship.
Alternatives to guardianship considered by the petitioner and reasons why those alternatives are not available.
Health or social services provided to the respondent during the year preceding the filing of the petition.
The inability of the respondent to resist fraud or undue influence.
Whether the respondent's inability to provide for their needs is an isolated incident of negligence or improvidence, or whether a pattern exists.
Existence of Objections – ORS 125.150(8)
Whether the respondent objects to the appointment of a fiduciary and whether they object to the nominated fiduciary or prefer another person to act as fiduciary.
Respondent's Counsel or Interest in Counsel – ORS 125.150(10)-(12)
Whether the respondent is represented by counsel, desires to be represented by counsel, requests that the court appoint counsel, or, if none of the former, whether appointment of counsel would help resolve the matter.

The visitor will interview the respondent, petitioner, and other interested parties listed in the petition, including family members, friends, and professionals such as doctors or care providers. The visitor will meet personally with the respondent, perhaps on more than one occasion and in various settings depending on the circumstances. Subject to confidentiality laws, they may review medical or psychiatric records. ORS 125.150(5). The purpose of this investigation is to understand the general condition of the respondent, including their ability to provide for their essential needs, in order to form opinions about the person's capacity.

B. 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 the investigatory process. The visitor must evaluate, based on their experience and training,

whether the respondent is incapacitated and in need of a protective proceeding and whether the nominated fiduciary is appropriate. The court visitor is tasked with synthesizing the information gathered during their investigation to provide the court with an independent view of the circumstances.

C. Report

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

5. The Visitor's Report

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). The State Court Administrator may prescribe a form, but many counties have also developed forms for the visitor report that reflect their bench's informational 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.

Any objections by the respondent related in the court visitor's report should be handled in the same way as a filed objection.

Once the report has been received, the court has an obligation to provide a copy to all parties who have specifically requested one. Notably, the court is not obligated to

provide a copy to an “interested person” who has requested future notice unless the request for notice specifically requests a copy of the visitor report. ORS 125.155(4).

6. The Visitor’s Fee

The amount and process for payment of the visitor’s fee should be established in each circuit by a Presiding Judge Order. ORS 125.170. There are many pros and cons to each circuit’s fee scheme, beyond the scope of this bench book. For more information about visitor fees, refer to the [Probate SharePoint page](#).

7. Visitors at Hearings

If an objection to the petition is filed, the visitor is required to be present at the hearing. ORS 125.155(5). Statute requires that the court notify the visitor of the time and place of the objection hearing and that they are expected to attend.

Much like a parenting time evaluator, a visitor may testify as to the information the visitor used in making their recommendations. The visitor is statutorily required to appear at contested appointment hearings and be present at any hearing as required by the court. ORS 125.155(5); ORS 125.160. It is up to any party disputing the visitor’s recommendations to bring evidence to the court that would undermine the assumptions made by the visitor in forming their recommendations. Lawyers may seek to shorten the length of a hearing by stipulating to the admission of the visitor report as evidence and waiving the opportunity to call the visitor as a witness. Courts should review the report and case file prior to the hearing to confirm that the court agrees that the visitor is not a necessary witness.

If the visitor is required to testify at a hearing, they are statutorily entitled to compensation for their time. ORS 125.155(5). With some objection hearings being potentially long, many judges ask that the visitor be called as the first witness and be excused afterward so that the visitor is not stuck in court all day, uncertain as to whether they will be needed at all.

2-4: The Proposed Fiduciary

A court is charged with appointing the most suitable person who is willing to serve as fiduciary. In making the decision, a court must give weight to various aspects of the nominee’s qualifications, including the relationship between nominee and respondent, and the circumstances and preferences of the respondent. It is important to remember that a fiduciary’s eligibility and qualification may change during the life of the proceeding. A willing, capable, and qualified appointee may become overwhelmed by ongoing challenges or conflict, lose capacity themselves, or need to be removed for conflicts or breach of duty. These changes are integral to a court’s obligation to monitor the actions of the fiduciary and the conditions of the protected person. Fiduciaries’ power, duties, and performance post-appointment are discussed in further detail throughout [Part 3](#).

Spady v. Hawkins, 155 Or App 454, 963 P2d 125 (1998) is a must-read case on eligibility for appointment and requiring an adequate petition and proper notice before consideration for appointment. In most protective proceedings filed with the court, there is only one petitioner and therefore only one potentially appointable fiduciary. The question for a judge, therefore, may be “Do I appoint *this* nominee or no one?” If a contested case contains cross-petitions, however, then the court may have a choice between nominated fiduciaries.

1. Preference in Appointment of Fiduciary – ORS 125.200

In making the decision on a proposed fiduciary, or dueling proposed fiduciaries, the court is directed by ORS 125.200 to appoint the most suitable person who is willing to serve after considering the specific circumstances and stated desires of the respondent, the relationship by blood or marriage of the nominee, the stated wishes of the respondent’s parents, and the estate of the respondent. See [Appendix A](#) for additional cases involving preference and eligibility of fiduciaries.

In addition to the factors listed above, the court is authorized to consider the “impact on ease of administration” in the choice of fiduciary for the proceeding. ORS 125.200. This consideration can cut in many ways. Sometimes, family alignments will mean that any family member appointed is in for repeated objections from other family members. This only raises the financial costs of the proceeding and does nothing to quell the conflict. A common contested fact pattern for young adult guardianships is the re-litigation of the respondent’s parents’ divorce where a neutral or professional fiduciary would save time, money, and emotional energy for everyone involved. Parties in those circumstances tend to lose sight of the express wishes of the respondent. In that instance, it is vital to appoint a lawyer for the respondent who understands their role. In other cases, though, nomination of a neutral fiduciary may spark turmoil because of perceived unfamiliarity or more clinical decision making. Each case is unique, requiring a judicial officer to be careful to apply a healthy dose of caution and common sense to the dynamics involved.

2. Appropriateness of the Fiduciary

A. Persons Not Qualified to Serve – ORS 125.205

A court cannot appoint a person who is themselves incapacitated, financially incapable, or a minor. ORS 125.205(a). A current health care provider for the respondent or protected person cannot be appointed as their fiduciary. ORS 125.205(b). Lastly, a parent or former guardian cannot be appointed if at any time while the respondent was under their care, the protected person was removed from their care and not returned, or parental rights were terminated. ORS 125.205(c).

B. Obligation to Disclose Eligibility Information – ORS 125.210

The proposed fiduciary has a duty to be candid with the court about matters related to the suitability of the fiduciary both before and after appointment. The purpose of these disclosures is to provide the court with important information so the court can weigh

their impact on the fiduciary's obligations and future performance. The court is tasked with ensuring that a competent, honest person holds the position.

If the petitioner and the nominated fiduciary are the same person, the information must appear in the petition. ORS 125.210(1)(b). If the nominated fiduciary is different from the petitioner, then the nominee must separately file the required disclosures. See ORS 125.210(1)(a). Discussed in more depth in [Section 2-4:4\(B\)](#), professional fiduciaries have heightened disclosure requirements before they can be appointed.

ORS 125.210(1)(a) requires the nominated fiduciary to disclose whether they have:

- (A) Been convicted of a crime. Note that there is no distinction here between conviction of a misdemeanor and conviction of a felony. All convictions, regardless of the nominee's age at the time or the crime's severity, are required to be disclosed.
- (B) Filed for or received protection under bankruptcy laws.
- (C) Caused any loss resulting in a fiduciary surcharge, whether in Oregon or in another jurisdiction.
- (D) Been removed as a fiduciary.
- (E) Had a license revoked or canceled that was required for the practice of a profession or occupation.

Disclosure of these types of events do not de facto disqualify a nominee, but they do bear on the court's analysis of the fiduciary's suitability. All of these situations are indicative of a person's ability to follow the law and/or manage their own affairs or the affairs of someone else. The duty of disclosure here is to "inform the court of the circumstances" so that the court can analyze the import of the event. There is a difference between a fiduciary who withdrew because a suitable and willing family member was identified and one who was removed for misappropriation of the protected person's funds, just as there is a difference between a nominee's historical reckless driving conviction and a recent conviction for fraud or theft.

In addition to the fiduciary's disclosures before appointment, the same disclosures are required immediately should any of the same events occur during the fiduciary's appointment. ORS 125.210(2). Based on these disclosures, or the failure to faithfully comply with the disclosure requirements, the court may decline to appoint the person or remove them as a fiduciary. Dishonesty about an event can often be worse than the event itself when considering the suitability of a proposed fiduciary.

C. Background Checking

As part of the routine case processing when petitions are filed, it is highly recommended that court staff run at least a name check on the petitioner, nominated fiduciary, and respondent through Odyssey. Not only does it assist the court in ensuring that there is

not more than one case involving the respondent within Oregon, but it serves as an efficient (and free) method of double-checking that the required disclosures are made in the petition. For additional discussion of background checking parties, see the training materials on the [Probate SharePoint page](#).

Of course, some individuals have more common names than others, so the existence of potentially alarming name check results does not necessarily mean the person was dishonest, but they are usually an opportunity for the court to specifically inquire with the party (or their attorney, whose client may not have informed them) for clarification or context.

3. Obligation to Disclose Conflicts

In addition to the eligibility disclosures discussed above, ORS 125.221 requires the fiduciary to provide full and accurate disclosures of their conflicts of interest. In reviewing the statute, it is tempting to only focus on the fiduciary's employment or hiring of contractors and employees with whom they have a pecuniary interest, and conflict disclosures required based on those relationships and interests. See ORS 125.221(1), (3)-(6). However, the court "may require additional disclosures for the purpose of assessing whether the pecuniary or financial interest could compromise or otherwise affect decisions made by the fiduciary in carrying out their duties." ORS 125.221(2).

Sometimes, these conflicts are readily apparent, like in a case in which an adult protected person's live-in guardian mother was wholly dependent on the protected person's monthly benefits but provided him near round-the-clock attention and care. In that instance, was the decision to keep the son at home in his best interests? Other times, the impact of conflicts of interest are not always readily apparent, such as in a case in which a conservator did not disclose that the buyer in a land sale contract at below market rate, entered into shortly before the conservator's appointment, was in fact her husband. In the former, with disclosure and transparent reporting, the guardian served for years in the respondent's home and provided great care. In the latter, the conservator was removed and surcharged, and the case was referred to law enforcement as possible elder financial abuse.

4. Types of Fiduciaries

In the context of protective proceedings, fiduciaries are either "lay fiduciaries" or "professional fiduciaries." Under ORS 125.240(5), a "professional fiduciary" means a person nominated or serving as a fiduciary for three or more protected persons to whom they are not related at the same time. This distinction matters because ORS 125.240 requires additional disclosures prior to and periodically during a professional fiduciary's appointment, as well as licensure and a criminal background check.

A. Non-Professional (Lay) Fiduciaries

The most common nominated guardian or conservator will be a spouse, child, parent, or other family member of the protected person. A familial relationship with the fiduciary can be beneficial, as someone personally close to the respondent or protected person is

more likely to know the person's individual needs, wishes, and preferences. Though any appointed fiduciary can seek compensation for their services, many family fiduciaries do not seek payment, so the financial cost of the proceeding is usually much lower than those with a professional whose livelihood depends on billing for their time.

Conversely, an emotional attachment between the protected person and the fiduciary can make it harder for the fiduciary to make difficult decisions. For example, it is one thing to intellectually understand a protected person's instruction not to tube feed or hydrate and an entirely different thing to realize you are withholding food and water from your own parent. In addition, family relationships can also come with conflict. Family disputes over care choices, prospective inheritances, or even personal grievances between family members can lead to multiple costly hearings that could be avoided with a professional, neutral fiduciary. Statistically, most incidences of elder abuse are perpetrated by a family member or caregiver, so though there are tangible benefits to appointing a person close to the protected person, the judicial officer should be perceptive of indications to the contrary.

Many courts in Oregon require that appointed non-professional fiduciaries of all types take a class specifically tailored to the type of fiduciary appointment they are assuming. Courts with an educational requirement will have either a Presiding Judge Order or [Supplementary Local Rule](#) establishing the timeline and expectation. For more information about course availability, see [Section 3-2:1\(D\)](#) or the [Guardian Partners website](#).

B. Professional Fiduciaries

A professional fiduciary in the context of ORS Chapter 125 is a person who is nominated to serve as, or is serving as, a fiduciary in three or more protective proceedings for persons to whom they are not related. ORS 125.240(5). A professional fiduciary may be an individual person or a business entity with multiple employees that offer a range of services and hourly rates for those services. Professional fiduciaries are subject to additional requirements to make sure that the persons they serve are receiving appropriate care and attention.

I. Licensure

A professional fiduciary must prove that they, or the individual within the organization that is responsible for making care decisions or managing assets, are certified by the Center for Guardianship Certification or its successor organization as a National Certified Guardian or National Master Guardian. A copy of their professional certificate is typically filed with their preliminary disclosures (discussed below), and the [Center for Guardianship Certification website](#) maintains a public list of their certified fiduciaries and provides disciplinary records for their members.



II. Professional Fiduciary Disclosures

ORS 125.240(1)(a)-(m) adds additional disclosure requirements for professional fiduciaries to the general petition requirements of ORS 125.055. Typically filed as an exhibit or attachment to the petition, these disclosures must be included as part of the notice required by ORS 125.070. It is worth reviewing the specifics of the disclosure requirements to understand the breadth of information expected, but the disclosures must lay out the events that led to the professional fiduciary's involvement in the case at issue, their experience and educational background, their fee and billing practices, the employment and contracting arrangements they customarily engage in, and contact information for each person who may be making decisions or providing services to the person subject to the protective proceeding.

The professional and all staff with responsibility for making decisions for clients or managing client assets must also undergo a criminal records check before the nominated professional can be appointed. ORS 125.240(2). The criminal records check results are confidential, are *not* a public record, and are typically provided to the court outside of an individual case, held securely by the court while the professional is serving in any protective proceeding in that circuit.

Updated disclosures and criminal records checks are required to be filed when the professional's circumstances change. Several courts specifically require professional fiduciaries to designate a primary decision maker for the case to make sure there is a certified and capable fiduciary who is personally responsible for the administration of the protective proceeding, rather than allowing decisions to be made by unlicensed staff.

C. State or Public Fiduciaries

In addition to lay and private professional fiduciaries, Oregon has public guardianship programs at the county and state level. ORS Chapter 125 provisions applicable to the Oregon Public Guardian and Conservator Program (OPG) begin at ORS 125.675. County public guardian provisions begin at ORS 125.700. Courts do not charge any filing or appearance fees to any public guardian programs. Court visitor fees are typically paid by these fiduciaries because the visitor fee is not exempted by the statute that exempts filing and appearance fees. Neither type of public guardian is required to file disclosures under ORS 125.221 or ORS 125.240 if nominated as the fiduciary to be appointed.

County public guardians typically only accept cases for persons residing within the county they serve.

OPG is considered the 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. OPG has stringent case acceptance requirements, and OPG must petition, or consent to a third-party petition, for their appointment. Additional information about OPG is available [here](#).

D. Trust Companies and Financial Institutions

A trust company or a financial institution, as those terms are defined by ORS 706.008, are insured institutions, licensed by the state to conduct financial business. While these fiduciary options are unlikely to accept appointment in all but the largest value proceedings, they are also exempt from the conflict of interest disclosure requirements in ORS 125.221 and professional fiduciary disclosure requirements in ORS 125.240.

2-5: Objections

1. Who Can Object

Any person interested in the affairs or welfare of a respondent may present objections to the petition in a protective proceeding. ORS 125.075(1). Statute explicitly states that any person entitled to notice under ORS 125.060 may object, along with any stepparent or stepchild of the respondent, or any other person the court may allow. ORS 125.075(1). Keep in mind that any filed objection triggers consideration of appointment of counsel for the respondent. Refer to [Section 1-6:3](#) for a full discussion.

2. Form of Objection

A respondent's objection never requires a filing fee and can be made in literally any form that conveys their objection to the petition. This means that the respondent could object:

- In writing, using the blue objection form provided as part of ORS 125.070 notice, by letter, or potentially by email.

- To the court visitor during the visitor's interview.
- Orally in person or via telephone.

The result sought in a protective proceeding is a significant interference in the life of a respondent, so the utmost leniency is allowed for the expression of an objection. A court should liberally construe any type of communication from a respondent or protected person suggesting they object to a petition or motion.

Any other person's objection is normally in writing. If, however, the objection is made to a petition for appointment, whether temporary or indefinite, the interested person's objection may be made orally, but the oral objection should ultimately be reduced to writing if the objector will not do it themselves. Each circuit court was required by UTCR 9.080 to implement a [Supplementary Local Rule](#) describing their local process for reducing oral objections to writing. Court staff should be trained to understand the importance of the local rule and the method in which to ensure the objection makes its way into the case file, as the judge will not be the one initially receiving the oral objection. A sample oral objection form is provided in [Appendix C](#).

Any non-respondent objector is required to pay an objection fee to object in a case, unless that objection is to a petition for temporary appointment.

3. The Objection Period

The statutory notice period, meaning the period of time between service of notice and the expiration of time to file objections, is 15 days. The only exception is for cases where the UCCJEA applies (for minor guardianship petitions), in which the notice period is 21 days (ORS 125.065(3)), and for temporary petitions, where the notice period is two days (ORS 125.605(5)). If no objections are filed before the expiration of the notice period, the petitioner typically submits the limited judgment of appointment for the court to consider.

Despite the statutory notice period, there will be cases in which the court becomes aware of untimely objections, and often a judicial officer must determine whether the court will consider the objection notwithstanding its lateness. Two common situations are (1) when an objector submits their objection without a required filing fee and (2) an objection is filed after the expiration of the notice period but before the judicial officer reviews the proposed limited judgment.

In the former situation, electronically filed objections usually have a "relation back" period during which the eFiler is permitted to correct an error (such as paying a required filing fee) with the submission, and the filing date relates back to the initial submission date. Most courts will consider the objection timely if within the "relation back" period of submission. With respect to the latter situation, court staff are generally prohibited from offering customers "legal advice," and the timeliness of an objection frequently falls within the category of information that clerks are reticent to attempt to explain to a customer. There are two schools of thought. Some judicial officers consider the notice

period as rigidly fixed. Others rely upon equitable principles in deciding whether to take action, especially when the objection is from a respondent who is alleged to be incapacitated and/or financially incapable. The form of notice to the respondent is required to have language allowing objection any time after the judge appoints a guardian (ORS 125.070(3)), which provides a solid statutory basis for considering the protected person's objections at any time.

2-6: Hearings

1. When a Hearing on a Petition May Be Required

Unless the objection is withdrawn, a court must hold a hearing when any objection is filed. ORS 125.080(2). A court can also schedule a hearing on its own motion, as some circuits do for certain types of filings. For example, given the urgency of temporary petitions, which are always paired with a reduction in procedural safeguards, some courts require parties to appear on all petitions seeking the appointment of a temporary fiduciary. See [Section 1-3:5](#) for additional discussion.

2. Who Gets Notice of the Hearing

All parties entitled to notice under ORS 125.060(3) are entitled to notice of the hearing. Whether the court issues notice of the hearing directly or requires notice to be provided by the petitioner, the notice must issue at least 15 days before the scheduled hearing, unless the hearing is on an objection to a temporary petition, in which case notice must issue at least two days before the hearing. ORS 125.075; ORS 125.605.

3. Hearings Trigger 125.080 Appointment of Counsel

If the court requires a hearing, whether on its own motion or because an objection has been filed, the appointment of counsel provisions of ORS 125.080 trigger, and an attorney is likely required. If the appointment of counsel is required, it may affect the scheduling of a hearing, so best practice is to appoint counsel before scheduling the hearing at which they will represent the respondent. That way, all relevant schedules are available to the court, and only one notice needs to be given.

4. Scheduling Considerations

The statute applicable to the appointment of temporary fiduciaries requires that a hearing occur within two judicial days after the date on which the objection to the petition was filed. ORS 125.605(5). The hearing is required whether the filed objection precedes the appointment of the temporary fiduciary or is filed in response to an appointment granted under "emergency" findings. The same accelerated hearing schedule applies to objections to the 30-day extension of a temporary fiduciary's appointment. *Id.* Refer to [Section 2-1:5](#) for more detail on petitions for temporary fiduciaries.

A degree of flexibility in a court's docket is required for these cases. This is especially true because one hearing may be necessary to address objections in cases seeking a

temporary appointment and another hearing may be necessary to address objections to an indefinite appointment. Since the scope of the objection hearing is limited to the appointment of the temporary fiduciary, it is generally inappropriate to hold one hearing to address both temporary and indefinite appointment. The nature of the inquiry is fundamentally different, as are the time requirements for scheduling. In no event should a hearing addressing the indefinite petition be set prior to the expiration of the 15-day (or 21-day) notice period because it creates the possibility that a subsequent, timely objection may still be received after a premature hearing. In that case, the court is tasked with holding another hearing for the new party to present evidence. In setting a hearing on the request for an indefinite fiduciary, a court should balance the need for litigant preparation with adequate judicial availability while ensuring timely, fair, and efficient justice. Additional discussion of hearings can be found in [Section 1-3:5](#), but in no case should a hearing addressing the indefinite petition be set prior to the expiration of the indefinite notice period.

5. Hearing Process

Objection hearings must be on the record, and the petitioning party has the obligation to provide evidence and testimony sufficient to establish by clear and convincing evidence that the allegations in the petition are true and the relief requested is appropriate. An objector must present the basis of the objection and any evidence to support the objection.

6. In-Person vs. Remote Hearings

Given the quality of technology now available to courts and parties, remote hearings can be effective in engaging respondents and protected persons. However, a court should be careful to utilize the modality that best allows for the respondent and other parties to be able to hear, understand, and participate in the hearing. There are instances where a person may not otherwise be able to appear except through a remote connection. Courts should be flexible. For example, many care homes do have rooms where a respondent and their lawyer can be “present” through a video connection. These arrangements should be tested in advance to ensure Wi-Fi capability and working technology.

2-7: Bonds and Asset Restrictions (Conservatorship)

1. Purpose of Bond

A fiduciary bond is a surety agreement whereby the surety agrees to joint and several liability for the conservator’s performance of their duties, in an amount designated by the court and agreed to by the surety. The purpose of a bond is to safeguard the assets of the protected person, ensuring that the estate will be made whole against any losses in the event of malfeasance by the fiduciary for the life of the conservator’s appointment. ORS 125.410(1) provides that “the court shall require a conservator to furnish a bond conditioned upon faithful discharge of all duties” unless the court waives the bond for “good cause shown.” Per UTCR 9.020, any bond requested in an amount less than the

aggregate value of the property must be supported by facts in the petition or in a supporting motion. “Good cause shown,” likewise, should be thoroughly explained in the petition, rather than in a generic request that bond be waived without explanation.

Notwithstanding the requirement of bond above, certain fiduciaries are exempt from a bonding requirement. ORS 125.410(2)(b) exempts county public guardians, OPG, trust companies acting as the appointed fiduciary, and the U.S. Department of Veterans Affairs. Any other nominated fiduciary should be “bondable” in the amount of the bond required by the court. An “un-bondable” nominee should be disclosed in the petition, as it reflects on the suitability of a prospective fiduciary.

2. Asset Restriction in Lieu of Bond

A common strategy to reduce the total bond amount, and thereby reduce the bond premiums charged by surety companies, is to seek court restriction of specific, often high-value, assets. Restriction of assets is an express limitation on a conservator’s statutory authority that prevents the removal or sale of the subject assets without prior court approval. Any designated restriction on property must be reflected in the limited judgment of appointment, which is attached to the letters appointing the fiduciary, which is the documentary proof of a fiduciary’s appointment.

A. Real Property Restriction

The most commonly restricted asset is real property, especially if the conservatorship holds the protected person’s principal residence. The term “principal residence” is defined as a residence that is owned by the protected person and in which the protected person resides or last resided. ORS 125.430(2). Since real property is often the most valuable asset an individual owns and would have to be bonded in its gross value, and as ORS 125.430(1) requires court approval prior to the sale of the principal residence anyway, it is usually the first asset the conservator seeks to restrict. There may be reasons not to restrict the principal residence, for instance, if the sale of property is necessary to generate funds to pay for long-term care, but like any other restriction on sale or withdrawal, the provisions restricting the property should be included in the limited judgment.

When the conservatorship takes control of real property, the conservator records a copy of the inventory or an abstract with the county property recorder showing the conservator’s control over the property. Recording is required by ORS 125.470(3).

B. Restricted Accounts

A depository account from which no funds may be withdrawn without a court order is considered a restricted account. An acknowledgment of the restriction, signed by a representative of the depository institution holding the funds, must be filed with the court within a designated period set by the court, typically 30 days. UTCR 9.050.

Most acknowledgments of restriction allow additional funds to be deposited into a restricted account and may allow reinvestment of funds or depository management of

restricted investment accounts, so long as no withdrawals are made from the account without court approval. Frustrated with some depository institutions allowing withdrawals despite the acknowledgment, some judges have insisted on the acknowledgment including language requiring the depository institution to replace funds released without a court order. These judges argue that without “teeth” to the acknowledgment, the purported restriction does not adequately secure the assets that would otherwise be bonded. An example of the acknowledgment of restriction with more specific language can be found on the [Probate SharePoint page](#).

3. Bond Amount

ORS 125.410(1) directs a formulaic calculation of the total amount of the bond. It is the amount of the aggregate capital value of the property of the estate in control of the conservator, plus one year’s estimated income, minus the value of the restricted funds and restricted real property. Put simply:

$$\begin{array}{r} \text{Gross value of all assets} \\ (+) \text{ one year estimated income} \\ (-) \text{ value of restricted accounts} \\ \underline{(-) \text{ value of restricted real property}} \\ = \text{Bond amount} \end{array}$$

2-8: Non-Standard Petitions

While most initiating petitions will follow the trends discussed in [Section 2-1](#) above, there are circumstances in which the petition seeks non-standard relief in lieu of, or in addition to, the appointment of a fiduciary. The examples below are not an exhaustive list of non-standard petitions but do highlight common situations in which the court might be asked to address unique or specific requests.

1. Transfer of Petitions into Oregon – ORS 125.840

Adult protected persons relocate for a variety of reasons, such as affordability, care options, or family or social connections, and sometimes these moves cross state lines. If there is an existing protective proceeding in another state and the protected person is relocating to Oregon, the fiduciary is faced with a choice. Either they terminate the existing proceeding and start over with a petition to appoint an Oregon fiduciary, or they transfer the out-of-state proceeding here. The primary concern with either option is that there is consistency of protection without conflicting fiduciary authority. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) addresses these concerns by providing a standardized process for UAGPPJA states to follow. All but four states (Florida, Kansas, Michigan, and Texas) have adopted the UAGPPJA. The UAGPPJA applies only to adult protective proceedings. There is no statutory prescription for the transfer of protective proceedings of minors.

The first filing the Oregon court will encounter is a petition to accept the transfer from the transferring state to Oregon. ORS 125.840(1). The contents of the petition are not clearly set by statute, so courts must carefully read the contents of the initial petition, but

it should factually explain the need for the transfer, the suitability of the fiduciary, and the circumstances of the proceeding and appointment in the transferring state. The petition should include court-certified copies of the following documents from the transferring court:

- Judgment of appointment confirming the transferring court's findings regarding incapacity or inability.
- Letters of appointment showing the good standing of the out-of-state fiduciary.
- The transferring court's provisional order of transfer. ORS 125.840(1). Note that the provisional order of transfer may not initially accompany the initiating petition, but must be filed before the Oregon court provisionally accepts the transfer, as described below.

The petitioner is required to provide notice and proof of notice of the petition to accept transfer to anyone who would be entitled to notice of a petition for appointment under ORS 125.060(2). ORS 125.840(2). If the petition is contested or the court deems it necessary, a hearing is set on the petition. ORS 125.840(3).

In general, the findings from the transferring state regarding the need for fiduciary appointment must be recognized by the receiving Oregon court, but the nominated Oregon fiduciary must still be qualified. ORS 125.840(7). If the transfer is a guardianship proceeding and the Oregon-qualified out-of-state fiduciary is nominated to serve, no visitor appointment is necessary. However, if there is an Oregon successor nominee, then a visitor appointment may be necessary to report on that nominee's suitability.

After the expiration of notice and resolution of any objections, the receiving court enters an order provisionally accepting the transfer, unless the court determines transfer is contrary to the interests of the protected person or the nominated fiduciary is ineligible for Oregon appointment. ORS 125.840(4). The petitioner uses a certified copy of the provisional order to obtain a final order of transfer from the transferring court.

A certified copy of the final order of transfer from the transferring court is filed into the Oregon case showing that the transferring court is done with the out-of-state case. ORS 125.840(5). At that point, the petitioner submits a limited judgment of appointment and final order of acceptance of transfer, which appoints the Oregon fiduciary and directs issuance of letters.

A cheat sheet for transfer cases can be found in [Appendix D](#).

2. Petition to Approve Settlement

Minors or incapacitated adults may require court approval of their personal injury claims and, depending on the amount of money involved in the prospective settlement, the appointment of a conservator or creation of a trust. Lawyers in personal injury cases are not protective proceeding practitioners and will often be unacquainted with the

requirement for probate court involvement in the approval and management of estates for incapacitated or financially incapable plaintiffs. Judges need to be especially wary of settlements that do not address how proposed settlement funds will be preserved for the benefit of these individuals. Common issues that arise include proposed settlements that:

- Distribute a minor's funds to the minor's parent(s) instead of to the minor directly. Despite the assumption that a parent has their child's best interests at heart, distributing substantial sums of money to a parent for the child's benefit does not inherently protect the child's money from misappropriation or misuse by the parent(s). See additional discussion of these types of issues in [Section 4-8](#).
- Apportion settlement funds to multiple plaintiffs disproportionately or inequitably. If the petitioner, proposed fiduciary, or family member of the respondent was a co-plaintiff, the court needs to carefully scrutinize how settlement funds are allocated among the parties. The concern here is that a minor or incapacitated person receives disproportionately less than other parties because their interests were not adequately protected or a representative who was supposed to protect their interests had or has a conflicting interest.
- Seek to approve structured settlements that may not address the respondent or protected person's immediate needs or may not be in their best interests.

Settlement issues can be exceedingly complex and difficult to parse. Courts can provide guidance using [Supplementary Local Rules](#) to further clarify filing and evidentiary issues with respect to prospective settlements. See, for example, [Multnomah County's Supplementary Local Rule 9.055](#).

3. Petition to Create Trust

One of the statutorily authorized powers of an appointed conservator is the creation of a revocable or irrevocable trust of conservatorship property, but per ORS 125.440, the creation of a trust requires prior court approval. The reason the court must approve the creation of a trust is because the effect of the trust may extend beyond the period of disability, or even lifespan, of the protected person. If a person lacks the financial capability to create a trust for themselves, the court may see a petitioner request appointment for the sole purpose of creating a trust. As discussed in [Part 1-4\(3\)](#), creation of a trust may be a less restrictive alternative to the appointment of an indefinite conservator. ORS 125.440 highlights two of the most common circumstances in which these petitions arise:

- A trust created for the purpose of qualifying the person for needs-based government benefits or maintaining eligibility of the person for those benefits. If, for example, a Medicaid eligible individual was about to inherit a disqualifying amount of money, a petitioner could seek court approval of the creation of a special needs trust that would continue their eligibility without the need for an indefinite conservator managing all their assets and finances.

- If the value of the funds that would be managed by an indefinite conservator does not exceed \$50,000, the petitioner can seek the creation of a trust to manage those assets instead. That threshold amount is generally seen as minimal enough to mitigate the cost of ongoing conservatorship despite possible reduction in court oversight of the funds.

The contents of a petition for the creation of a trust are not fundamentally different from other ORS 125.055 petitions, except that the petitioner must explain the factual circumstances more thoroughly regarding the creation of the trust and include a draft of the proposed trust to be created. Trust law, and especially Medicaid eligibility and special needs trusts, can be more complicated than this section can address, so it is vital that the judicial officer carefully read the petition and proposed plan regarding the trust before authorizing its creation. Additional information about trusts, and their interaction with protective proceedings generally, can be found in [Section 4-9](#).

4. Registration of a Foreign Judgment – ORS 125.842 to ORS 125.847

A request to register a foreign judgment of a protective proceeding is not actually a protective proceeding involving the appointment of a fiduciary in this state, but the court's recognition of an out-of-state appointment and the appointee's authority. To register a foreign judgment (ORS 125.842; ORS 125.845), the following documents are filed with the court:

- A request to register the foreign judgment, usually a motion or petition to register.
- Proof of notice to the out-of-state court of the filer's intention to register the judgment in Oregon.
- Certified copies of the order of appointment of the fiduciary and their letters of appointment.
- The filing fee due for the registration of the judgment.

Upon the registration of a guardianship or conservatorship order from another state, the fiduciary can exercise all the powers authorized by the order of appointment within Oregon, except for those which Oregon prohibits. ORS 125.847. Registration does not result in Oregon letters of appointment or anything following the filings, so the "case," such that it is, gets closed after the above filings have been entered. Additional information about registration of a foreign judgment is available in the [Appendix D](#).

2-9: Review Before Appointment

1. The Court Must Review Before Appointment – ORS 125.055(7)

ORS 125.055(7) obligates the court to review a petition seeking the appointment of a fiduciary or approval of a protective order before appointment or approval. Under that statute, the court shall dismiss the proceeding without prejudice or require that the petition be amended if the court determines it does not meet the statutory requirements.

Each court should develop a process by which court staff and judges work together to ensure that this statutory expectation is met in a timely way.

Except in rare circumstances, a protective proceeding's initiation is neither expected nor anticipated by a judge. A judge may not be aware of a protective proceeding until it becomes contested or the uncontested limited judgment is routed for a judge's consideration for signature. Given that the filing of the proposed limited judgment is the first prompt for a judge to review the case file, it is incumbent upon a court to have clear processing guidelines and staff that are cross-trained to implement them. It is much more helpful to the parties and efficient for the court to spot deficiencies early.

2. Who Reviews the File?

Almost all circuits with larger protective proceeding and probate caseloads have a probate commissioner or probate clerk who will preliminarily review the contents of the file before sending a proposed judgment to a judge. Because not all commissioners or clerks are necessarily lawyers, most who screen case contents earlier in the case use a standardized checklist to ensure the file appears ready for consideration: checking the petition contents, confirming completion of notice requirements, and flagging potential issues. Smaller circuits often have fewer staff who cover more case types, so the judge may be the designated reviewer. Petition review checklists are included in [Appendix D](#) and on the [Probate SharePoint page](#).

3. An Efficient Approach Strategy

There are some basic questions that any reviewer should be able to answer before appointment. Allegations of fact (in the petition, the visitor report, or objections) are what the court relies on in making findings supporting or denying the limited judgment.

- Who?
 - Who is the nominated fiduciary, and is the nominee appropriate?
 - Who is entitled to notice, and has proof of notice been filed showing proper information in the proper manner?
- What?
 - What conditions or problems is the respondent facing?
 - What is the petitioner requesting?
- Why?
 - Why is the appointment of the fiduciary necessary for the respondent?
- How?

- How is the proposed appointment or requested action going to affect the respondent?

4. The Absence of Objection Does Not Require Approval of Appointment

With very few exceptions (a missing person conservatorship, perhaps), there is no presumption that a petitioner is entitled to a “default” judgment appointing a fiduciary. Statewide, less than one tenth of cases are contested at the petition stage (before appointment). The legal standard for appointing a fiduciary is not whether there is disagreement with the appointment, but rather whether appointment is warranted based on the court’s findings by clear and convincing evidence. See *Schaefer v. Schaefer*, 183 Or App 513, 517, 52 P3d 1125 (2002). If the factual information presented in the case does not meet legal requirements, the court is not expected to appoint a fiduciary or grant a request, even if neither the respondent nor any other person contests the petition. Additionally, the court should consider the preferences in appointment of a fiduciary, as itemized in ORS 125.200.

5. Inadequate Petitions May Be “Returned” for Amendment or Correction

As noted earlier, the court may dismiss inadequate petitions without prejudice or direct the amendment of insufficient filings. Most courts will direct amendment at least once before dismissing a case. Dismissals without an opportunity to cure are generally reserved for those matters in which the petitioner fails to timely complete notice or fails to timely respond to court-requested correction or amendment. Many circuits have developed an audit letter that includes commonly omitted items that can be checked and issued to notify parties of inadequate filings. The correspondence also includes a deadline for response and an explanation of subsequent actions the court may take if the deadline is not met. An example of an audit letter is available on the [Probate SharePoint page](#).

6. Reviewing Notice

In addition to the petition’s substantive review, the court should review notice documents to:

- Confirm that notice was served in the proper manner on the correct persons, and that the correct notice deadline was included with appropriate information about how to file an objection.
- Check that no objections have been timely filed, including in the court file, the visitor report, and any notes about oral objections.
- Consider whether any untimely notices have been filed, and whether the court should consider them notwithstanding their untimeliness. See [Section 2-5:3](#) on objection periods for more detail.

2-10: Limited Judgment of Appointment

The appointment of a fiduciary in a protective proceeding shall be made by limited judgment. ORS 125.030(1). All judgments need to include court findings and the court's order of appointment.

1. Standard of Evidence

The standard for every finding with respect to the appointment of a fiduciary is clear and convincing evidence. Individual findings for each type of fiduciary are listed below.

2. Findings

A. Guardianship

There are three findings required before the appointment of a guardian:

- The respondent is a minor in need of a guardian, is incapacitated, or is a vulnerable youth. ORS 125.305(1)(a).
 - “Incapacitated” is defined as 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 health or safety. ORS 125.025(5).
 - A “vulnerable youth” is a person at least 18 years of age but not yet 21 years of age who is eligible for classification under 8 USC 1101(a)(27)(J) and cannot be reunified with one or more parents due to abuse, neglect, or abandonment that occurred when the person was a minor. ORS 125.025(12). Refer to [Section 2-1:4](#) on vulnerable youth for more information.
- The appointment of a guardian is necessary as a means of providing continuing care and supervision. ORS 125.305(1)(b).
- The nominated guardian is qualified, suitable, and willing to serve. ORS 125.305(1)(c).

If the petition seeks temporary appointment, with or without notice before appointment, there is a fourth finding required:

- There is an immediate danger to the life or health of the respondent, and the welfare of the respondent requires immediate action. ORS 125.600(1).

B. Conservatorship

There are three findings required before the appointment of a conservator:

- The respondent is financially incapable or a minor. ORS 125.400.
 - Financial incapability is defined as a condition in which a person is unable to manage financial resources of the person effectively for reasons including but not limited to several statutorily listed conditions. ORS 125.005(3).
- The respondent has money or property that requires management or protection. ORS 125.400.
- The nominated conservator is qualified, suitable, and willing to serve. ORS 125.200; ORS 125.405.

If the petition seeks temporary appointment, with or without notice before appointment, there is a fourth finding required:

- There is an immediate danger to the estate of the respondent, and the welfare of the respondent requires immediate action. ORS 125.600(2).

3. Order of Appointment

The order of appointment part of the limited judgment serves as directions to parties and the court regarding the details of the appointment. At minimum, it should:

- Explicitly appoint the nominated fiduciary, by name, for the respondent, by name, and include the title of the appointment (guardian, conservator, or both guardian and conservator).
- Set any limitations or restrictions on the scope of the fiduciary's appointment or the powers granted to them. Common limitations or restrictions often include but are not limited to:
 - The expiration date of any temporary appointment, most commonly "30 days from the date of this judgment."
 - The bond amount required to secure conservatorship property.
 - Any restriction on sale or transfer of specific conservatorship property.
 - Any restriction or limitation of plenary statutory authority otherwise allowed by statute.
- State that Letters of Guardianship and/or Conservatorship shall issue.
 - Common language used in the appointment of a conservator is "Letters of Conservatorship shall issue upon filing and approval of satisfactory bond."

Part 3: Post-Appointment and Monitoring

3-1: Shift in Court Focus

1. Philosophy of Monitoring

The court's responsibilities in a protective proceeding do not end after a fiduciary is appointed. A court must supervise the fiduciary's actions on behalf of the protected person on an ongoing basis. ORS 125.025(1). After finding by clear and convincing evidence that the protected person does need a fiduciary appointed for their health and welfare, the court is then obligated to ensure, to the degree possible, that the protected person receives the services and care required, that the estate is being managed appropriately, and that the scope of the proceeding continues to reflect the needs of the protected person and their condition.

2. Continued Need for Proceeding

The basis for the proceeding often determines the length of time for court involvement. If the fiduciary appointment stems from specific, limited circumstances or is meant to accomplish a specific task, a case may last only a few months. Most, however, last much longer. A few even last decades. Regardless of duration, the court's attention must remain steadfastly on the well-being of the protected person. This attention includes a yearly determination that the proceeding remains necessary through a review of mandatory annual reporting. By consenting to the appointment, the fiduciary also undertakes the responsibility of championing the protected person's well-being for as long as necessary. It is always hoped that an appointed fiduciary serves a limited term resulting in a restoration of rights for the protected person.

Appointed fiduciaries are required to annually update the court and all interested persons, including the protected person, about events of the preceding year. Although a court can require more frequent reporting, the statutory default time period is yearly. The report must follow a prescribed form depending on whether the fiduciary is a guardian or conservator. It covers their actions taken on behalf of the protected person, the general condition of the protected person, and, if applicable, an accounting of the protected person's finances.

Annual guardian's reports and annual conservatorship accountings (see [Section 3-2:7](#)) are designed to provide context and information about how the protected person's circumstances have developed under the proceeding, as well as show the fiduciary's performance, care, and support of the protected person. It is incumbent upon a court to have methods for flagging a case without timely filed reports. Failure to timely file these reports is a red flag requiring immediate and effective court action.

Once a report is received, it must be reviewed. So, a court must also have a procedure identifying who conducts these reviews and how. Many courts designate staff to take the first look but ensure that all reports are read by a judge as well. These reports should allow a court to determine, first and foremost, whether the fiduciary is providing

all required information. Failing to adequately answer all reporting requirements is also a red flag requiring court action.

There are multiple ways to address a late filing, inadequate information, or a concern or question about the information provided. These methods are discussed in [Section 3-3](#). Doing nothing, however, is not an option.

Beyond the four corners of the current report or accounting, the court should compare the information in the initiating petition and any previous reporting to identify changes indicating the proceeding may no longer be necessary. Sometimes the fiduciary and the protected person both believe that a fiduciary is no longer necessary, but they do not know how to seek termination of the appointment and dismissal of the case.

By the same token, comparing information between filings also ensures that original safety threats are ameliorated by the fiduciary. Certain safety issues cannot, and should not, be ignored. One example that illustrates this point is a case in which there was verified spousal abuse leading to the appointment of a son as the guardian, rather than the husband. When the guardian report came in, it contained information that the guardian son placed the protected person back in the home with the abusive spouse. Had alert court staff not compared the annual report with the original visitor report, the guardian's neglect in exposing the protected person to further abuse (confirmed through investigation by the reappointment of the visitor) might not have been caught.

Judges must also remember that they have broad, continuing authority to inquire further, dig deeper, and take broad action in many forms. ORS 125.025(1) allows the court to "act upon the petition or motion of any person or *upon its own authority* at any time and in any manner it deems appropriate to determine the condition and welfare of the respondent or protected person and to inquire into the proper performance of the duties of a fiduciary" (emphasis added). That action can take many forms. Given that the person subject to the protective proceeding is called the "protected person," it is important that such protection comes not only from the appointed fiduciary, but also the circuit court's supervision and jurisdiction of the case.

Different levels of concern require different methods of inquiry. In view of the limitations on court resources, a degree of creativity is needed on the part of judges. Over the years, Oregon judges have developed multiple strategies to fulfill this duty. Sometimes a court letter requesting additional information may be the best option and the only action need. Some cases need a hearing for testimony on an issue. At any time before or after the appointment of a fiduciary, the court can appoint or reappoint a court visitor or appoint or reappoint counsel for the respondent or protected person. In those counties with an active special advocate program (ORS 125.120), the court can appoint a monitor to report on the case. For more discussion of the options available to courts, see [Section 3-3](#) below.

3. The Fiduciary's Ongoing Performance

Meeting the burden for the appointment of a fiduciary is often the least controversial part of these cases. Traditionally, courts relied upon a combination of guidance from an attorney, duties enunciated in the judgment confirming appointment, and court-issued instructional letters to ensure non-professional fiduciaries had a clear understanding of their duties. National organizations, including the National College of Probate Judges, started to recommend a fiduciary class requirement, which many states adopted. While not yet statewide, educational requirements are also part of the [Supplementary Local Rules](#) for many circuits in Oregon. Non-professional fiduciaries are required to complete the relevant class within a specified time of their appointment (typically 60-90 days from the date of appointment). These classes cover specific fiduciary duties in plain language and are useful because they provide emphasis on the continuous obligations of the fiduciary to the protected person and the court and provides another avenue for holding the fiduciary accountable to their duties.

As mentioned above, and more thoroughly discussed in [Sections 3-2:6](#) and [3-2:7](#), fiduciaries are expected to show their work through proactive disclosures of changes in circumstance and periodic reporting requirements. Fiduciaries exercise expansive authority over the protected person. Annual reporting provides the court with a regular opportunity to review the fiduciary's actions. Unless a pleading is filed, these annual reports are the only window into the events of the preceding year. It is therefore crucial that the appointed fiduciary fully comply with statutory, UTCR, and [Supplementary Local Rule](#) expectations for guardian reports and conservator accountings. It is also essential that courts fully review the content submitted.

3-2: Post-Appointment Events and Reporting

1. Issuance of Letters


A. Letters Generally – ORS 125.310 (Guardianship) and ORS 125.405 (Conservatorship)

Letters of appointment, issued by the court, are the official documentation memorializing the appointment of the fiduciary. The appointed guardian or conservator presents a copy of court-certified letters as proof of their authority when acting on behalf of the protected person with third parties such as medical providers, banks, schools, and benefits providers. While some fiduciaries may present a form of letters for the court to sign, it is strongly encouraged that courts use either the statewide Odyssey form of letters or a local court form in compliance with ORS 125.310 and ORS 125.405. A court accepting and issuing a party-generated, non-standard form of letters risks inclusion of unexpected provisions, awkward language, and potential difficulty when the fiduciary deals with third parties accustomed to relying upon the standard form.

B. Issuance of Letters

After entry of the limited judgment of appointment and filing and approval of the required bond, the court shall issue the letters. ORS 125.310; ORS 125.405. The existence of

any condition or limitation imposed on the fiduciary's authority must be clearly identified within the letters of appointment by a reference as follows: "RESTRICTIONS: SEE LIMITED JUDGMENT." A copy of the limited judgment is attached to the issued letters so that anyone presented with the letters can confirm the condition or limitation.

RESTRICTIONS: SEE LIMITED JUDGMENT	
IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of said court at my office on <u>DATE</u> .	
	[Circuit Name] County Court Administrator (TCA SIGNATURE)
STATE OF OREGON	

C. Instructional Letters to Fiduciaries

In an effort to help non-professional fiduciaries understand their new role, many courts issue an instructional letter to the newly appointed guardian or conservator with their letters. These letters are one way a court can place all non-professionals on notice of their obligations. The instructional letter contains important due dates for court filings, county-specific rules or expectations, and contact information for the probate department of the court. Although many attorneys representing guardians and conservators provide similar instruction to their clients, not all fiduciaries are represented by counsel.

D. Educational Requirements – Fiduciary Class

The majority of Oregon circuit courts also require non-professional fiduciaries to complete a web-based training course focused on the responsibilities and expectations specific to the type of case for which the appointment was granted. These courses are Oregon-specific and are already developed and provided by the nonprofit Guardian Partners. Separate classes exist for adult or minor guardianships, conservatorships, and trust proceedings. Each course is taught by experienced protective proceeding attorneys, tenured fiduciaries, and social work professionals, who provide information and explanations before each section's brief comprehension quiz. The due date for completion of the course varies by circuit, but in general, fiduciaries are expected to complete it within 60-90 days of the date of appointment.

Enrollment costs for these classes are considered a cost of administration in the proceeding, refundable to the guardian or conservator by the protected person's estate. Upon the fiduciary's completion of the class, Guardian Partners electronically submits a certificate to the court file confirming the non-professional fiduciary has satisfied the requirement. See [Guardian Partners' education page](#) for more information.

2. Notice of Appointment (Guardianship) – ORS 125.082

Upon a guardian's appointment, a special notice provision in ORS 125.082 requires that the guardian deliver written notice of the order of appointment to the persons listed in ORS 125.060(3). This notice is intended to plainly state a summary of the appointment and the contours of the guardian's authority to all interested persons. The notice must include the following information:

- (a) The title of the court in which the protective proceeding is pending and the case number.
- (b) The name and address of the protected person and the attorney for the protected person, if any.
- (c) The name and address of the guardian and the attorney for the guardian, if any.
- (d) The date of appointment of the guardian.
- (e) A statement describing the authority awarded to the guardian and any limitations placed on that authority.
- (f) A statement advising the protected person or other interested person of the right of the protected person to seek removal of the guardian or termination of the guardianship.

ORS 125.082(2)(a)-(f).

The type of delivery of this notice to the protected person differs notably from the standard requirements of ORS 125.065. The statute takes great care to ensure that the protected person receives this information “in a manner reasonably calculated to be understood by the protected person.” ORS 125.082(1)(b)(A). When delivering written notice to the protected person, the guardian must also provide oral notice (ORS 125.082(1)(b)(B)) with “reasonable accommodations for effective communication as necessary.” ORS 125.082(1)(b)(C). Unlike the provisions of ORS 125.065, the guardian is the person who provides notice to the protected person, rather than a process server or other neutral person. Notwithstanding the unique requirements above, the guardian may mail notice of appointment to the protected person if personal delivery is determined to be unduly burdensome. ORS 125.082(1)(c).

No later than 30 days following the date of appointment, proof of delivery of this post-appointment notice must be filed, with details showing:

- (a) The date, time, and place where written notice was provided.
- (b) A description of the manner in which the notice was provided to the protected person, whether oral notice was provided, and whether any reasonable accommodations were necessary.

- (c) If the notice was mailed to the protected person instead of delivered personally, why personal delivery was unduly burdensome, with proof of mailing.

ORS 125.082(3)(a)-(c).

3. Fiduciary Powers and Duties

A. Guardian Powers and Duties – ORS 125.315

A guardian may make many decisions on behalf of the protected person, but the guardian must do more than make decisions for the protected person. In general, a guardian has an “immediate and direct duty to promote and protect the welfare of the protected person.” *State, Long Term Care Ombudsman v. Symons*, 264 Or App 769, 775, 333 P3d 1170 (2014). The contours of that duty can be hard to define, and the discrete powers of the guardian can be similarly nebulous and broad. Court hearings can be expensive, slow, and impersonal, so the guardian may exercise broad power without prior court approval of most of the guardian’s acts and decisions. A comparison of ORS 125.315 (general powers and duties of guardian) and ORS 125.320 (limitations on guardian) provides context and guidance to both the court and parties about the relationship between the guardian and the protected person.

There is, for lack of a better description, a “right way” to be a guardian. The guardian shall 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 a guardian must make a decision *for* the protected person instead of *with* them, the guardian is directed to make decisions 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 interests standard. This standard includes consideration of multiple factors such as information received from professionals and persons close to the protected person, other information the guardian believes the protected person would consider if able, and other factors a reasonable person may consider. ORS 125.315(1)(i).

In this context, some of the other powers and duties of the guardian become less ambiguous when applicable to a specific case with a unique protected person. A court should take care to review ORS 125.315 for the nuance provided therein. Some of these powers, particularly those regarding health care, are granted only with specific reference to other statutes.

Other powers listed in ORS 125.315 include:

- (a) Custody of the protected person and power to establish the protected person's place of abode.
- (b) Providing for the care, comfort, and maintenance of the protected person, and whenever appropriate, arranging for their training and education, as well as taking reasonable care of the protected person's clothing, furniture, and other personal effects (unless a conservator has been appointed).
- (c) Consenting, refusing consent, or withholding or withdrawing consent to health care.
- (d) Making advance funeral and burial arrangements, and subject to ORS Chapter 97, controlling the disposition of the remains of the protected person or making anatomical gifts.
- (e) For minors, the powers and responsibilities of a parent who has legal custody of a child, except that the guardian has no obligation to support the minor beyond what can be provided from the minor's estate.
- (f) Receiving money and personal property deliverable to the protected person and applying it for support, care, and education. The guardian is required to exercise care to conserve any excess for the protected person's needs.

ORS 125.315(1)(a)-(f).

See [Section 3-2:6](#) below for more discussion on limitations to the guardian's powers to act without notice as well as actions that require a guardian to request and obtain court approval first.

B. Conservator Powers and Duties

In contrast with a guardian's powers and duties, a conservator's powers and duties may seem more approachable because they generally involve marshalling and managing the protected person's property using a more traditional fiduciary standard. 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 assets and income, the conservator may then 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 disbursement is reasonably necessary, a conservator should consider the following:

- (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).

ORS 125.445 provides a long and diverse list of actions the conservator can take in the fulfillment of their duty to manage the estate of the protected person. This bench book will not provide a detailed discussion of each approved action. Instead, the examples provided are meant to illustrate the scope of a conservator's discretion. Critical to the topic, however, is this caveat: Despite the breadth of the conservator's authority, any transaction entered into by a conservator is voidable if there is a substantial conflict of interest for the conservator. ORS 125.450.

Prior court approval of a transaction provides "safe harbor" for a conservator worried about whether the transaction might be called into question. *Id.* As with guardians, conservators must get court approval before they complete some specific transactions. Those acts, discussed in more detail in other sections, include:

- (1) Conveying or releasing contingent or expectant interests in property, including marital property rights and any right of survivorship. For example, when a protected person gets divorced, property settlements must be approved by the court.
- (2) Creating any revocable or irrevocable trusts. For additional discussion of protective proceeding and trust intertwinement, see [Section 4-9](#).

- (3) Exercising a right to elect options and change beneficiaries under insurance and annuity policies, or surrender the policies for cash value.
- (4) Disclaiming any interest the protected person may have by testate or intestate succession, by intervivos transfer, or by transfer on death deed.
- (5) Authorizing, directing, or ratifying an annuity contract or contract for life care.
- (6) Revoking a transfer on death deed.

ORS 125.440(1)-(6).

I. Gifting

If the conservatorship has adequate funds, the conservator is allowed to “make gifts on behalf of the protected person for such purposes as the protected person might have been expected to make.” ORS 125.435. Gifting may be done without court approval if the gifts do not exceed \$250 to any one person in a calendar year or an aggregate amount of \$1,000 in the same period. Court approval is required for gifting plans exceeding those limits. See *Willbanks v. Mars*, 37 Or App 795, 588 P2d 118 (1978), *rev. den.*, 285 Or 319 (1978).

C. Fiduciary Fees

Fiduciary fees and costs require court approval if they are to be paid from the estate of the protected person. ORS 125.095(2)(b). These cannot be paid until approved by the court. These fees must be reasonable. ORS 125.095(1). Unlike attorney fee awards (discussed in [Section 1-6:4](#)), there is little statutory guidance on what factors make fiduciary fees reasonable. Professional fiduciaries are required to show the rates at which they and their employees bill in their professional disclosures filed at the outset of the case. When seeking approval for fees, a fiduciary should provide an itemized statement in support of requested fees. ORS 125.240(1)(d). Non-professional fiduciaries may request fiduciary fees, but analyzing the reasonableness can be more difficult for courts. There is a vast difference between a professional billing for a face-to-face visit with the protected person and a son or daughter requesting compensation for visiting their parent. Likewise, the hourly rate for lay fiduciaries is likely to be less than that of a professional. All fee requests should be carefully considered by the court, especially with respect to potential for conflicts of interest. ORS 125.221. Some attorneys also serve as fiduciaries. If the attorney and fiduciary are the same individual, the court should carefully consider fee requests and how the attorney-fiduciary is allocating tasks vis-à-vis hourly rates. See *In re McGraw*, 362 Or 667, 414 P3d 841 (2018), in which a lawyer serving as a conservator was suspended from practice after charging attorney rates for fiduciary work.

Most fiduciary fee requests are submitted annually alongside the guardian’s report and/or conservator’s accounting. UTCR 9.060(4) requires that applications for fiduciary fees be served in the manner of an accounting as described in ORS 125.475, which directs notice to the parties listed in ORS 125.060. If the court has approved a monthly

budget that includes estimated fiduciary fees, the fiduciary is still required to request approval of the actual fees requested for the budgetary period. Those requests also must follow all notice requirements.

4. Notice Requirements for Subsequent Filings – ORS 125.060(3)

When contemplating an action for which prior court approval is required, a fiduciary should follow procedure and file a petition to receive approval prior to taking such action. It is not sufficient to ask for forgiveness rather than permission. There are times, however, when a fiduciary may request that a court ratify such decisions retroactively. Either way, once a fiduciary files a petition or motion seeking court approval for such actions, the fiduciary must give statutory notice to parties entitled to it. A court must have confirmation of compliance with notice requirements before signing an order or judgment approving a request.

ORS 125.060(3) lists those persons entitled to notice of motions for court approval of a fiduciary's actions, the removal of a fiduciary, or the termination the proceeding:

- (a) The protected person, if age 14 or older.
- (b) Any person who has filed a request for notice in the proceedings.
- (c) Except for a fiduciary making the motion or request, any fiduciary who has been appointed for the protected person.
- (d) If the protected person is receiving money paid or payable through the U.S. Department of Veterans Affairs, a representative of the regional office that has responsibility for the payments.
- (e) If the protected person is committed to legal and physical custody of the Oregon Department of Corrections, the Attorney General and superintendent or other officer in charge of the facility in which the protected person is confined.
- (f) If the protected person is a vulnerable youth, the consulate of the vulnerable youth's country of nationality.

Additionally, the court may require any other person receive notice under ORS 125.060(3)(g). Depending on the type of request presented, there may be good cause for the court to direct notice to an additional person or organization that could be interested in the request.

If a guardian has been appointed in the proceeding, additional persons may also be entitled to notice of subsequent filings. ORS 125.060(8) requires notice to any attorney who has represented the protected person during the protective proceeding (ORS 125.060(8)(a)), however, that notice does not impose any responsibility on the attorney receiving the notice to represent the protected person. ORS 125.060(10). If the protected person is a resident of a nursing home or residential facility, or if they are to be placed there, notice is required to the Office of the Long-Term Care Ombudsman.

ORS 125.060(8)(b). If the protected person is a resident of a mental health treatment facility or residential facility for individuals with developmental disabilities, or if they are to be placed there, then notice is also required to Disability Rights Oregon. ORS 125.060(8)(c).

5. Inventory (Conservatorship)

Within 90 days of appointment, a conservator must file an inventory of all property of the protected person “that has come into possession or knowledge of the conservator.” ORS 125.470(1). The inventory sets the baseline for the assets the fiduciary is tasked with managing. The value of those assets, which may fluctuate and change over time, control the amount set for the initial bond. Each accounting is a prompt to review the asset list to note any unexplained changes as well as the bond amount to ensure it matches the actual value of the assets.

A copy of the inventory must be served on the protected person, either personally or by mail, if the protected person is 14 years of age or older. ORS 125.470(1).

A. Form of Inventory and Valuation

The inventory should separately list every property interest held by the protected person at the time of the conservator’s appointment. Per ORS 125.420, the conservator is expected to take possession of all “property of substantial value,” which should be itemized separately in the inventory. “Substantial value” is not defined in statute, so some interpretation is required. Customarily, absent a particular value, property like household furnishings or the protected person’s clothing are grouped generally instead of being individually listed. Prospective income generated from property is not required to be disclosed or reported in the inventory, though some attorneys include a summary of expected annual income anyway.

The inventory should use each asset’s “true cash value” as of the date of the conservator’s appointment (ORS 125.470(1)) and include the total value for the property listed. Individual items of substantial note or value should be listed separately, for instance, high-value jewelry or art. Other types of property have some specific “best practice” expectations in terms of description and valuation:

- Real property: The property’s the legal description and address should be included. A thorough inventory will also include the property tax lot number.
- Prospective legal claims: Potential claims like personal injury, elder abuse, or other unresolved claims are often listed as “unknown” until there is a verdict or settlement.
- Annuities or contracted future benefit assets: Most annuity-type assets have two values: the “cash value” and the “surrender value.” Depending on the terms of the contract, the surrender value is usually listed, and benefits under the policy are income.

- Fractional interests or co-owned property: The value of the interest held by the conservator should be listed along with a clear explanation of the portion of the total value of the asset used.

Because the amount of the bond order at the time of appointment is generally based on an estimate of the estate value at the time of filing, receipt of the inventory is the first opportunity for a court to review the sufficiency of the bond. Once appointed, a conservator can conduct a more complete investigation into the protected person's assets, so the inventory should be a more accurate representation of their value. It is expected that the amount of the required bond will change when necessary.

Best practice dictates that the conservator signs the inventory, as it is a factual representation of the assets the conservator is managing. While an attorney may prepare and file the inventory on the conservator's behalf, if later evidentiary disputes about valuation or reporting arise, the conservator is the person who will need to justify the valuation reported. A signature indicates personal knowledge and approval of the document.

B. Updates to Inventory

ORS 125.470(2) requires that any later-discovered property not listed in a previous inventory or accounting must be submitted in a supplemental inventory within 30 days of the conservator's possession or knowledge. These subsequent filings may have different names to indicate the nature of the inventory modification. If the asset existed at the time of the conservator's appointment and was omitted in error from the original inventory, it should be included in an amended inventory, rather than appearing in a later-filed accounting. A supplemental inventory is used to add assets discovered later. Some attorneys will use an amended inventory for either situation.

6. Post-Appointment Changes to the Proceeding Requiring Notice

A. Change in Contact Information for the Fiduciary – ORS 125.215(2)

The court and all interested parties must know how to reach the fiduciary at all times. All fiduciaries are expected to promptly file with the court any change in their name, residence, or post-office address. ORS 125.215(2). Notwithstanding this requirement, a change in the fiduciary's contact information without notice to the court is one of the most common problems facing judges and court staff. Collecting additional contact information such as telephone numbers or email addresses, if the fiduciary is willing, can greatly assist the court in maintaining connection with the fiduciary.

B. Sterilization (Guardianship) – ORS 125.320(1)

A guardian is not allowed to authorize the sterilization of the protected person. ORS 125.320(1). See [Section 4-11](#) for a discussion of court authority to order sterilization.

C. Change of Abode or Placement of the Protected Person (Guardianship) – ORS 125.320(3)

With few exceptions, the protected person cares very much where they live. While a guardian has authority under ORS 125.320 to change the protected person's abode, a guardian is expected to consider and accommodate, if possible, the protected person's preferences with respect to proposed changes to their living arrangements. Related, and equally important, is that the court and all interested parties must know the actual location of the protected person. As a result, before changing the protected person's abode or residence, the guardian must file and serve a statement declaring the intent to make the change.

The statement must be filed and served on the persons required by ORS 125.060(3) and (8) in the manner required by ORS 125.065 at least 15 days before the change or placement takes effect. ORS 125.320(3)(a). If an objection is filed, the court must set a hearing, and, under ORS 125.080, may be required to appoint counsel for the protected person as well.

The same procedures apply when a guardian intends to place the protected person in a mental health facility, nursing home, or other residential facility. However, additional notice of the intent to place must also go to specifically interested organizations:

- The Office of the Long-Term Care Ombudsman is entitled to notice if the protected person is already a resident of or is to be placed in a nursing home or residential facility. ORS 125.060(8)(b).
- Disability Rights Oregon is entitled to notice if the person is already a resident of or is to be placed in a mental health treatment facility or residential facility for individuals with developmental disabilities. ORS 125.060(8)(c).

It is worth noting that the guardian may establish the protected person's abode inside or outside of Oregon. ORS 125.315(a). An Oregon protective proceeding for a protected person residing out of state can complicate the effectiveness and efficiency of the guardian or conservator, so while Oregon doesn't necessarily lose personal jurisdiction of the protective proceeding, it may not be in the protected person's best interests for Oregon to keep the proceeding. See [Section 3-4:5](#) for discussion of transferring a proceeding to another state.

D. Motion to Change Venue

If the protected person has changed abodes and no longer resides within the county in which the protective proceeding was filed (but still resides in Oregon), the court may need to consider the transfer of the proceeding to another court within Oregon. ORS 125.020(4) allows the court to transfer a protective proceeding at any time to another court if the transfer is in the best interests of the respondent or protected person.

A request for transfer is typically filed as a motion with a supporting declaration that establishes why the transfer is in the best interests of the respondent or protected

person. A notice period of 15 days applies under ORS 125.065 with notice provided to the persons listed in ORS 125.060(3). If the court determines that transfer is in the protected person's best interests on its own motion, permissible under ORS 125.025(1), the court should issue notice to all parties in the case to ensure they understand the transferring court will no longer be the monitoring court for the proceeding. Similarly, alerting the probate court to which the proceeding is being transferred of any potential issues in the proceeding supports consistent monitoring of the case.

E. Immediate Placement of the Protected Person (Guardianship) – ORS 125.320(3)(b)(B)

If there is a situation that requires placement “to protect the immediate health, welfare, or safety of a protected person or others” that cannot wait for the 15-day notice period to expire, the guardian can file a statement explaining the reasons for an immediate move. ORS 125.320(3)(b)(B). This statement can be filed at any time “with as much advance notice as possible,” but in no event more than two days after the change of abode or placement has occurred. Any person entitled to notice, including the protected person, can still file an objection, after which the court must hold a hearing.

By imposing specific procedures on a fiduciary prior to a move of any type, the legislature has highlighted the protected person's right to due process before such a disruptive decision is implemented. The importance of notice is further emphasized by the consequence of implementing a move without proper notice. A guardian's failure to disclose the intent to place the protected person in a mental health facility, nursing home, or other residential facility can be grounds for removal of the guardian under ORS 125.225(3)(c).

F. Use of Funds and Fiduciary Budgets – ORS 125.320(2)

A guardian shall not use funds from the protected person's estate to pay the guardian or guardian's spouse, parent, or child for the protected person's room and board unless the charge for this service is approved by court order before the payment is made. ORS 125.320(2). Note that this statutory limit specifically restricts guardians but not conservators; however, best practice dictates that conservators also ask for permission to receive payments from the protected person for services provided outside the scope of the conservator's normal duties. A court should view any payment to a family member of the fiduciary with a healthy dose of skepticism, but there may be times when it makes practical sense.

Guardians typically have limited authority over the assets and income of protected persons, but as discussed in [Section 2-1:3\(A\)](#), guardians often serve as a representative payee for Social Security benefits. A substantial portion of monthly benefits are supposed to be allocated for the beneficiary's room and board, which is often provided by the person with whom the beneficiary lives. Unexpected disputes over or changes to representative payee designations are an indication that the court may need to inquire about the underlying drivers of the dispute.

Conservators are personally liable for the use of the protected person's funds to pay for support, education, or services upon the recommendation of a parent or guardian if the conservator knows that the parent or guardian is deriving personal financial benefit from those payments or that the recommendations of care providers are clearly not in the protected person's best interests. ORS 125.425(1)(a)-(b). Conservators must also annually account to the court and protected persons for all their receipts and disbursements on behalf of the protected person. This obligation provides more detail and financial transparency than a guardian's report.

Comparatively speaking, guardians can manage an estate of only minimal value that has disbursements that essentially match income. The protected person's funds are used to pay a relatively predictable and static set of expenses. One common strategy for a guardian is to propose a monthly budget for court approval that outlines anticipated monthly expenses, including room, board, and care services. These court-approved budgets have the benefit of protecting the fiduciary from suspicion, while at the same time alerting both the court and all interested persons to the cost of living for the protected person. For protected persons with a fixed income dependent upon resource-capped benefits that may be lost if they become "over-resourced," this budget is a useful monitoring tool. Some judges will approve plans that include estimated monthly fiduciary fees, but with the caveat that the fiduciary must still seek approval annually for the actual fees earned with the appropriate fee petition. ORS 125.095. Procedurally, to utilize this practice, a fiduciary will file a motion with a supporting declaration detailing the budget. Notice is provided as required for any request to the court. Absent objections, the court then reviews and approves the plan by court order, subject to annual revision or amendment. If objections are received, a hearing must occur before the court takes action.

G. Limits on Association (Guardianship) – ORS 125.323

Most adults (and all teens) would chafe at the thought of someone imposing limits on how they can associate with others and with whom, yet a guardian may be required to make those decisions. Consider a son who visits his mother in assisted living to get her to sign the deed to the house, or the well-meaning daughter who regularly visits her father's care home but becomes confrontational with caregivers over the quality of care, threatening to disrupt his placement. In such circumstances, a guardian is faced with difficult decisions about limiting contact between the protected person and a relative or friend. In some cases, a guardian will make a decision about the protected person's associations that serves the guardian's interests but not those of the protected person.

ORS 125.323 provides procedural guidance on limitations of association. The statute is designed to give the protected person a voice in their preferred associations, to the extent possible, while providing a framework for guardians to limit dangerous or risky associations and preventing unreasonable exclusions of the people important to the protected person's life. A guardian's authority to assert control over a protected person's preferred associations (without prior court approval) can only be "to the extent necessary to avoid unreasonable harm to the protected person's health, safety, or well-being." ORS 125.323(2)(b). If the protected person or an interested person (often the

person whose association with the protected person is under dispute) disagrees with the guardian's limitation, they can seek court review by filing to modify the guardian's powers to limit the association. ORS 125.323(4)(a). The motion must be in writing unless presented by the protected person, in which case it may be orally presented. As with other subject matter areas where the protected person has a right to make their request orally, the court must have a means in which to reduce the motion to writing. ORS 125.323(4)(b).

Alternatively, a more cautious or concerned guardian may seek court approval of a prospective limitation by filing a motion to approve a limitation on association. ORS 125.323(2)(a). For either type of motion (under ORS 125.323(4)(a) or ORS 125.323(2)(a)), notice is required under ORS 125.060(3). ORS 125.323(4)(d). The court must schedule a hearing for a motion filed under ORS 125.323(4)(a) no later than 60 days from the date of the motion, with any limits imposed by the guardian remaining in effect pending the court's decision. ORS 125.323(4)(c)-(d). A hearing on a guardian's prospective motion limiting association is required if it is contested. ORS 125.080. All hearings require the court to consider the appointment of counsel for the protected person. *Id.*

If the protected person is unable to communicate, preferred associations "shall be presumed based on the prior relationship between the protected person and the person with whom the association is contemplated." ORS 125.323(3). Who brings the issue of limited association to the court is an important distinction. If the court determines that the guardian unreasonably limited the protected person's association (without prior court approval), ORS 125.323(4)(e) provides four options to the court:

- (A) Permit the association, with or without limitations (e.g., "only during weekday daylight hours");
- (B) Modify the guardian's powers to limit the protected person's associations (which would require modifying the judgment of appointment to restrict the guardian from limiting association);
- (C) Remove the guardian; or
- (D) Award reasonable attorney fees and court costs associated with the motion.

However, if the guardian files the motion to limit association prospectively but the court does not approve the motion, there is no specific consequence to the guardian.

A limitation on association sought using ORS 125.323 is not procedurally the same as an Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA) petition. Although a guardian can seek an EPPDAPA protection order on the protected person's behalf, the standards for such an order and for violating such an order are entirely different and controlled by statute. EPPDAPA and protective proceedings are discussed in [Section 4-6](#).

H. Motions to Modify or Terminate the Proceeding

Unless the proceeding is a guardianship of a vulnerable youth, a motion to modify or terminate the protective proceeding can be filed at any time by any interested person, as well as on the court's own motion. ORS 125.085(3). If the Oregon Long-Term Care Ombudsman files the motion, the information in support of the motion may be limited by disclosure restrictions and may require preliminary consideration of a protective order under ORS 125.012. Notice of the motion must be provided to the parties as required by ORS 125.060(3).

In contrast, motions to modify vulnerable youth guardianships may only be made by the protected person or on the court's own motion. The motion must be supported by a declaration setting forth the facts for the modification, with both the motion and declaration served on the guardian and any proposed guardian. ORS 125.085(5)(a). The guardian of a vulnerable youth can seek to modify the guardianship by filing a motion and declaration establishing a substantial change in circumstances and why modification would serve the best interests of the protected youth. ORS 125.085(5)(b).

I. Successor Fiduciaries

Successor fiduciaries may become necessary if the originally appointed fiduciary cannot or will not continue in that role. Examples range from a planned and consensual substitution to an unexpected court removal of a fiduciary for failing to meet standards of care. Whatever the reason, it is important to remember that the appointment of a successor requires all the same attendant pleading and due process requirements as the original petition. ORS 125.225(5); *Spady v. Hawkins*, 155 Or App 454, 963 P2d 125 (1998). There is no filing fee for a successor's petition for appointment (ORS 125.225(5)), though a successor may be required to file an appearance fee, depending on interpretation of ORS 21.175(1) and ORS 21.180(4).

A successor fiduciary is different from an interim fiduciary. Pursuant to ORS 125.225(4) on the termination of the authority of a fiduciary, an interim fiduciary may be appointed by the court to serve for a period not to exceed 60 days. Unlike a successor fiduciary, an interim fiduciary may be appointed by the court without the appointment of a court visitor, additional notices, or any other additional procedure, except as may be determined necessary. ORS 125.225(4). An interim fiduciary is intended to be a stopgap when the former fiduciary is unexpectedly lost due to the fiduciary's death, removal, or unresponsiveness, but the protected person still appears to be in need of a protective proceeding. The interim fiduciary serves to triage the needs of the protected person until a successor can properly petition for appointment. Judges in need of an interim fiduciary often rely on a willing elder law attorney or experienced professional to bridge the gap until a successor can step in. It is not a long-term solution but can maintain protection for the protected person quickly.

7. Periodic Reporting Requirements

Fiduciaries are generally expected to file an annual report with copies provided to all interested persons. The content of the annual report is tailored to the type of fiduciary appointed in the protective proceeding, and under the court's continuing authority over the proceeding, it is one of the few regular opportunities for the court to review and reevaluate the proceeding.

Annual guardianship reports and annual conservatorship accountings have different statutory due dates, so it is not unusual for an attorney to request, by motion and order, consolidation of the due dates for a report and accounting if the same fiduciary is serving in both capacities.

A. Guardianship

I. Adult Guardian's Report

A guardian for an adult protected person must file an annual report within 30 days of the anniversary of appointment. ORS 125.325(1). The report must include a declaration under penalty of perjury in the form required by ORCP 1 E. A copy of the annual report must be given to the persons specified in ORS 125.060(3). Judges should familiarize themselves with the content required in the report and what it conveys about the guardian and protected person. Unless the guardianship is for a vulnerable youth, the report must be in substantially the same form as statutorily provided:

GUARDIAN'S REPORT

I am the guardian for the person named above, and I make the following report to the court as required by law:

1. My name is _____.

2. My address and telephone number are:

Phone _____

3. The name, if applicable, and address of the place where the person now resides are:

4. The person is currently residing at the following type of facility or residence:

5. The person is currently engaged in the following programs and activities and receiving the following services (brief description):

6. I was paid for providing the following items of lodging, food or other services to the person:

7. The name of the person primarily responsible for the care of the person at the person's place of residence is:

8. The name and address of any hospital or other institution where the person is now admitted on a temporary or permanent basis are:

9. The person's physical condition is as follows (brief description):

10. The person's mental condition is as follows (brief description):

11. Facts that support the conclusion that the person is incapacitated include the following:

12. I made the following contacts with the person during the past year (brief description):

13. I limited the person's association with _____ (Please specifically name any limitations and briefly describe the limitation):

14. I made the following major decisions on behalf of the person during the past year (brief description):

15. I believe the guardianship should or should not continue because:

16. At the time of my last report, I held the following amount of money on behalf of the person: \$ _____. Since my last report, I received the following amount of money on behalf of the person: \$ _____. I spent the following amount of money on behalf of the person: \$ _____. I now hold the following amount of money on behalf of the person: \$ _____.

17. A true copy of this report will be given to the person, any conservator for the person and any other person who has requested notice.

18. Since my last report:

(a) I have been convicted of the following crimes (not including traffic violations):

(b) I have filed for or received protection from creditors under the Federal Bankruptcy Code (yes or no): _____.

(c) I have had a professional or occupational license revoked or suspended (yes or no): _____.

(d) I have had my driver license revoked or suspended (yes or no): _____.

19. Since my last report, I have delegated the following powers over the protected person for the following periods of time (provide name of person powers delegated to):

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.
 Dated this ____ day of _____, 2____.

 Guardian

NOTICE: ANY PERSON INTERESTED IN THE AFFAIRS OR WELFARE OF THE PROTECTED PERSON WHO IS THE SUBJECT OF THIS REPORT WHO HAS CONCERNS ABOUT THIS REPORT OR THE GUARDIAN'S PERFORMANCE MAY CONTACT THE COURT AS FOLLOWS:

The Oregon Judicial Department has statewide forms (available in [Appendix C](#)) for the guardian's report that comply with ORS 125.325, but some circuits have adopted local versions of the report that incorporate additional information the judges of that circuit may find necessary. At minimum, the report must include the statutory requirements. The Probate SharePoint site has a [guardian's report review guide](#) that goes into more detail about each of the elements of the report.

The guardian should complete the report thoroughly and honestly. If the guardian indicates in the report that the guardianship should not continue or fails to provide adequate information in the report supporting the continuing need for guardianship (Question 15), the court shall order the guardian to supplement the report or to file a motion to terminate the proceeding under ORS 125.090. ORS 125.325(2). If the guardian fails to comply with that order within 30 days of the date of the order, ORS 125.325(3) provides that such failure is grounds for removal under ORS 125.225(1), and ORS 125.325(4) directs the court to set a show cause hearing as to why the guardian should not be removed. Any order to supplement or show cause must be sent by the court to the persons listed in ORS 125.060(3).

Guardianships for vulnerable youth do not have the same reporting requirements as those for incapacitated adults. The court may require a report more frequently than those for adults, or in a different form approved in advance. ORS 125.325(6). Some

circuits direct guardians of vulnerable youth to file semi-annual status reports that narratively describe the developments and status of the vulnerable youth.

There is no statutory provision regarding the approval of annual guardian reports, but it is incumbent on each circuit to develop a reliable process for tracking the guardian's compliance with both timely filing and completion requirements. Some courts have developed business processes within Odyssey to route guardian reports to judges who add a document note after reviewing before returning to staff. Others use related case notes in the Events tab to confirm the same. For more information on due dates, time standards, and tracking, refer to the [Probate SharePoint page](#).

II. Minor Reporting

There is no statutory requirement for guardians of minors to file annual reports, as ORS 125.325 only applies to guardianships for adults. The majority of circuits have adopted a [Supplementary Local Rule](#) requiring an annual report in minor guardianships, either in the form directed by ORS 125.325 or with a local version of the report. As discussed in [Section 1-1:5\(A\)](#), adult and minor guardianships often address very different issues facing the protected person, so the content of an adult form of report may not match information relevant to a minor guardianship. At the time of drafting this bench book, there is a pending UTCR proposal to require annual reporting in all minor guardianship cases statewide.

B. Conservatorship

I. Annual Accounting

1. Basics of Accountings

A conservator must file an annual accounting within 60 days of the anniversary of their appointment. ORS 125.475(1). The purpose of the accounting is to disclose the condition of the protected person's estate and show any change in the value of the assets, income or receipts received, disbursements made, and other information relevant to reviewing the present financial circumstances of the conservatorship. Accountings are required to be served on persons listed in ORS 125.060(3).

2. Content of Accountings

ORS 125.475(2) outlines the minimum required information for each accounting but provides little direction as to accounting structure, organizational guidelines to conservators or courts, or specific transaction documentation expectations. The Chief Justice may (and has) specified the form and contents of accountings by rule. ORS 125.475(7). The UTCRs provide three important rules for accountings, and there is a [statewide accounting form](#) that covers all requirements that, if completed thoroughly, will provide a complete picture of the accounting period.

First, UTCR 9.160 explains the format of an accounting. The rule requires all accountings to contain the following:

- (1) Preliminary information that includes the first and last date of the accounting period, the last day being within 30 days of the anniversary of appointment. UTCR 9.160(1)(a). It must include the total value of the conservatorship assets on the last date of the accounting and the current value of the bond, and it must show whether a change to the bond is necessary based on a change in the value of the assets. UTCR 9.160(1)(b).
- (2) An asset schedule that lists all assets from the inventory or previous accounting and any assets acquired during the accounting period with beginning and ending date values. UTCR 9.160(2). The asset schedule should serve as a snapshot of the current assets and values of the conservatorship, as well as the total beginning and ending values for all assets.
- (3) Separate lists of receipts and disbursements from each account held by the conservatorship during the accounting period. UTCR 9.160(3). These are typically included as exhibits to the accounting and referenced in the asset schedule.
- (4) A narrative describing any changes in the assets of the conservatorship or the financial life of the protected person not clearly shown in the asset schedule, including corrections to previously declared values, omitted assets, the closing of accounts, the sale or purchase of any assets, significant changes in living expenses, or stock splits. UTCR 9.160(4).

Second, UTCR 9.170 requires the narrative of the accounting to disclose all potentially conflicted transactions. These transactions include:

- Gifts. See [Section 3-2:3\(B\)\(I\)](#) on gifting for more detail.
- Transactions with a person or entity with whom the fiduciary has a relationship that could compromise or otherwise affect the fiduciary's decision making. See [Section 3-2:3\(B\)](#) for more detail.
- Payments that were either (a) to a person not normally engaged in an established business of providing similar goods and services to the general public or (b) at rates higher than those ordinarily charged to the general public.

Third, UTCR 9.180 requires the submission of depository statements and vouchers with the accounting. Both types of documents independently support the conservator's description of transactions during the accounting period. Under UTCR 9.180(2), the accounting shall include a depository statement showing the beginning and ending balance for each account. A voucher is defined by UTCR 9.180(1) as a document showing the name of the payee, date, and amount for any expense. Vouchers and depository statements are not required to be served on persons entitled to copies of the accounting and can be filed under a separate exhibit into the case.

Requests for the approval of attorney or fiduciary fees are often included in annual accountings. Attorney fee requests must be supported by an affidavit addressing the factors laid out in ORS 125.098. The protected person's funds may not be used to pay these fees until they are approved by a court.

For a more thorough discussion of accounting elements and requirements, see the [Probate SharePoint page](#).

3. Accounting Review

Reviewing accountings can be a daunting and tedious task, especially given the complexity and detail some accountings present. Each court must take into account their available resources and case load size to develop a business process for reviewing accountings that fits the needs of their county. All courts must prioritize addressing problematic accountings. While the [Probate SharePoint page](#) has much more information about accounting review, there are four main questions that highlight common potential issues:

- (1) Filing Sufficiency: Is there enough information to determine whether the accounting is a complete picture of the accounting period?
 - Example: An account listed in the inventory was reported closed, but no explanation was offered as to where the funds went at closure.
- (2) Reporting Accuracy: Do the summarized financial activities and reported transactions match corroborating documentation?
 - Example: The asset schedule shows the checking account ending balance as \$4,000 higher than the credit union bank statement reflects.
- (3) Fiduciary Conflicts: Has the conservator adequately disclosed and explained transactions that may involve conflicts of interest or raise suspicion?
 - Example: The protected person is wheelchair-bound, but the conservator is insuring multiple vehicles not listed in the inventory.
- (4) Appropriateness of Administration: Is the conservator reasonably managing funds and assets within the circumstances of the protected person's situation?
 - Example: The accounting shows expenses for routine trips to a casino because "she likes watching the lights."

Courts will routinely encounter inadequate or troubling accountings. There are different strategies, discussed in [Section 3-3](#), to direct conservators to supplement, clarify, or correct problems, but one resource worth specifically highlighting here is the Conservatorship Auditing Program (CAP). CAP provides Oregon courts with professional review, audit, and advisory services in protective proceeding case types.

CAP's goals are that:

- Judges receive helpful evaluative information on their cases;
- Court staff receive complex case review assistance;
- Fiduciaries receive guidance on improving their practice;
- Attorneys are informed about the work of the CAP; and
- Program transparency provides additional assurance to the public that persons under guardianship and conservatorship receive court oversight.

Much more information about CAP, audit requests and process, guides, and form templates can be found on the [CAP SharePoint page](#).

4. Approval of Accountings

If any objections are made to an accounting, a hearing must be set unless the objections are withdrawn before the time scheduled for hearing. ORS 125.080(2). As always, objections may trigger the need for court-appointed counsel. Necessary changes to the bond should be reflected in the order approving the annual accounting. If attorney fees are part of the approval or the court's decision resolves any objections raised, the conservator may use a limited judgment instead of an order. ORS 125.030(2)(a), (3). This distinction can be important because an order itself is ordinarily not appealable, but a party may want to appeal an adverse ruling.

Additionally, judges should be aware of some complexity with respect to finality issues with approving interim accountings. ORS 125.480 provides that an order approving "an intermediate accounting" is final as to the liabilities of the conservator concerning matters considered in the accounting. Case law tempers that somewhat. *See Harrington v. Thomas*, 76 Or App 648, 700 P2d 304, rev. den., 300 Or 162 (1985), in which the approval of interim accountings did not serve as court approval of a lawyer's excessive and insufficiently explained fee, or *Fuentes v. Tillett*, 263 Or App 9, 326 P3d 1263 (2014), which considered a successor conservator's petition for surcharge against the former conservator.

II. Annual Report of Restricted Funds

ORS 125.475 allows a court to order a deviation from the statutory requirement of annual accounting when a conservatorship contains restricted funds. In those instances, some courts permit an "Annual Report of Restricted Funds" in lieu of a full annual accounting. This form of annual report is not a waiver of the accounting requirement; it simply allows for a less costly way of demonstrating that the funds in a restricted depository account are there in the amount expected. This confirmation is accompanied by an acknowledgment of restriction from the depository institution. The report indicates the current balance of the restricted account, describes any court orders allowing

withdrawals of funds during the reporting period, and includes a current bank statement that confirms the current balance of the restricted account.

By contrast, a full accounting includes receipts and disbursements and a narrative explanation of the annual actions of the conservator. Accountings also require a filing fee based on the ending value of the conservatorship assets. The rationale for allowing an annual report of restricted funds is that if all assets are restricted, and cannot be removed without court order (including funds to pay annual accounting filing fees), confirmation that the expected funds are there completes the accounting expectations of the conservator. For an example of an annual report of restricted funds, see [Appendix C](#).

8. Requests for Extension to File

Sometimes a fiduciary may need to delay filing an annual report, accounting, or other court-directed submission. If so, they should file a request for an extension prior to the expected due date that clearly states the reasons for the delay and the anticipated date the court should expect compliance. The court has the discretion to grant or deny these requests. Some common reasons for a delay might include:

- (1) Real property was listed for sale, but the sale will not close until after the filing deadline. A delay would allow the conservator to provide a more complete explanation of the assets and proceeds from the sale than they would if the accounting was filed before the sale finalized. Without the extension, the court would not review the sale until the following accounting.
- (2) The conservatorship is expected to terminate after the due date for an accounting. By briefly delaying the submission of an annual accounting so the conservator may submit a final accounting instead, the conservatorship saves the time and expense of multiple consecutive accountings.
- (3) A successor fiduciary is preparing a petition for appointment, and the current fiduciary will file a final report or accounting covering substantially the same period as they would if they filed an annual report.

If, however, the case file contains existing reasons for concern or other contested issues, then the court should consider denying the request or shortening the requested extension. Some attorneys will request multiple consecutive extensions on the same overdue filing. It is up to the court's discretion how to handle this situation. Often, establishing clear expectations regarding the court's extension policy can preclude attorneys who use the court as their office tickler system. If there are multiple late filings, the court should set a hearing to hear directly from the fiduciary the reasons for not fulfilling their responsibilities.

3-3: Monitoring

Protective proceeding monitoring encompasses the post-appointment tracking, review, and proactive investigation that courts perform during the lifespan of each case.

Protective proceedings are premised on the need for protection, which extends the court's duties past the "calling balls and strikes" philosophy of judging. Attentive monitoring of these cases helps manage risk, prevent abuse, and increase public confidence in the courts.

Guardianship and conservatorship case monitoring starts with tracking due dates. Fiduciaries have assumed responsibility for an individual or an estate, and that includes a duty to timely report their administration of the estate. Courts then review those filings to confirm that the fiduciary is meeting the court's expectations or investigate beyond the case file if necessary. Everyone involved with a protective proceeding should want the same outcome: safety, support, and stability for the protected person. If a fiduciary is not fulfilling their responsibilities, it is up to the court to steer them back.

Regardless of the size or caseload of a court, each should have more than one staff person with specific training in processing filings for protective proceedings. Staff and judges should be cross-trained so that there are no gaps in processing if anyone is absent. The [Probate SharePoint page](#) has many training materials available for staff and judges that discuss specific case approaches and processing strategies. The site also contains forms, guides, videos, and a discussion board as resources.

1. Tracking Fiduciary Reporting Compliance

All types of protective proceeding cases have subsequent deadlines for filing required documents. The Odyssey case processing system has multiple ways to identify overdue filings, provided the deadlines are entered correctly at the time the fiduciary is appointed. Many due dates or time standards must be manually set in protective proceedings, but overdue filings can be automatically identified once the target date has been missed. There are trainings specific to protective proceedings for clerks on due dates, time standards, and generating reports if anyone working these cases needs them. A "cheat sheet" on due dates in protective proceedings is also included in [Appendix D](#).

2. Reviewing Specific Filings and Power to Request Additional or Amended Filings

Multiple sections of this bench book cover the specific requirements of the filings fiduciaries must submit, but little has been said about what the court does if the content submitted doesn't meet expectations. One of the court's most exercised authorities is found in ORS 125.025(3)(a), which allows the court to compel a person's attendance and/or require the person to respond to inquiries and produce documents related to the protected person or their estate.

Filings with omitted or ambiguous information are common, especially with inexperienced fiduciaries. Many courts have developed checkbox templates for requests for additional information. Judges or staff can select the item and add a brief note about the problem before issuing the form letter and adding it to the case record. These template letters include language about a deadline for correcting the filing, after

which the court will take further action. If the filing has not been amended or supplemented after that deadline (usually 30 days for non-urgent issues), the court escalates to setting a show cause hearing on the issue.

If the issue encountered is more alarming or is a safety issue, a letter request is not an appropriate first step.

3. Fiduciary Failure to File

There are many strategies to address a party's failure to file. Working from an Odyssey-generated overdue filings list, most courts will first issue a notice that alerts the party that they are late in filing. These courtesy notices provide a specified time period in which to file the missing document(s) or cure the deficiency. The courtesy notice itself is entered with a due date in Odyssey that will appear on the next report if unsatisfied.

After the expiration of the due date on the courtesy notice, if the filing has still not been submitted, most courts will enter an order to show cause as to why the fiduciary should not be removed for failing to submit the required document. Having a regular docket on which to set show cause hearings is essential to maintaining supervision over the fiduciary's missing filings. These hearings are usually only a few minutes in length if they end up occurring at all. Many fiduciaries cure their filings before the time set for hearing.

4. External Resources for Court Monitoring

While there are multiple strategies for the court to review filings, solicit records, or summon parties to court, there are situations in which the absence of objective information may hinder progress to resolve issues in the proceeding. Courts may need investigative information from someone who can "leave the courthouse." Appointing an external party tasked with investigating issues in the case can help the court discover more about the case that hasn't been presented in the case record. The most common strategies include the appointment of counsel, reappointment of a court visitor, involvement of a special advocate, or referral of the case to Oregon Department of Human Services (ODHS) or Adult Protective Services investigators.

A. Appointment of Counsel

Appointing counsel for the respondent or protected person is a solid first step for many concerns arising in protective proceedings. The process and triggers for the appointment of counsel are covered many places in this bench book, but most of those triggers involve an objection filed into the proceeding. However, even before ORS 125.080 was amended, the court was permitted to appoint counsel for the respondent or protected person. Appointing counsel when the fiduciary is unresponsive or there are accounting concerns or any other problems apparent in the case ensures that there is a legally sophisticated attorney who can represent the interests of the protected person while the investigation or resolution develops. The counsel will meet with the protected person and be capable of protecting the person's rights with appropriate case filings.

B. Reappointment of a Court Visitor

At any time after the appointment of a fiduciary, the court may appoint a court visitor. ORS 125.160. The visitor can then perform any duty a visitor can normally perform if appointed at the time a fiduciary is appointed. *Id.* Judges may appoint a visitor later when there is a dearth of information about the current circumstances of the protected person, and the visitor may offer the court their qualified conclusions and recommendations. The downside to reappointing a visitor is often the cost of the visitor fee.

C. Special Advocates and Guardian Partners

Like the reappointment of a visitor, but free, is the appointment of a protected person special advocate (also known as a guardian monitor) under ORS 125.120. At any time after the appointment of a fiduciary, the court may appoint one of these volunteers to:

- (a) Investigate and evaluate the protected person's circumstances to establish whether the fiduciary is fulfilling their duties and obligations.
- (b) Inform the fiduciary of support services and resources available in the community to assist in the care and welfare of the protected person.
- (c) Provide a written report to the court of their findings, in a form approved by the court, and provide copies of the report to all persons entitled to notice under ORS 125.060(3).
- (d) Perform any other duties, responsibilities, or functions as ordered by the court.

ORS 125.120(2)(a)-(d).

The caveat to appointing of a special advocate is that before one may be appointed, the court must establish by rule or Presiding Judge Order the qualifications, standards, and procedures for the volunteer monitors. ORS 125.120(5). Since the special advocate must be a volunteer, no courts have created county-specific monitor programs. Instead, they have coordinated with [Guardian Partners](#) to provide qualified special advocates to investigate and report.

D. Oregon Department of Human Services or Adult Protective Services Case Referral

Depending on the type of issue facing the court, the court may involve ODHS, which provides a variety of services for adults or minors, or Adult Protective Services, which can investigate the veracity of allegations of abuse or neglect. Judges and attorneys are mandatory reporters, and reporting concerns with cases may be the appropriate action in a case. More information on reporting can be found on the [ODHS website](#).

ODHS may also proactively engage with a protective proceeding. Depending on the protected person's circumstances and the individuals in their orbit, ODHS may alert the

court to concerns by filing a letter or appearing as an interested party in the protective proceeding. After reviewing information from ODHS, setting a hearing is usually the appropriate next step.

5. Removal of Fiduciary

The court must remove a fiduciary whenever removal is in the best interests of the protected person. ORS 125.225(1). A conservator, more specifically, may be removed for failing to use good business judgment and diligence. ORS 125.225(2). These two standards are separate and distinct, as illustrated by *Smith v. Lovejoy*, 26 Or App 1, 552 P2d 606 (1976), where the fiduciary, who was serving in both roles, remained as the appointed guardian despite being removed as the conservator.

The best interests standard will be specific to the protected person and their circumstances. Incompatibility or hostility between the fiduciary and protected person or other interested parties may be sufficient to warrant removal. See *Windishar v. Windishar*, 83 Or App 162, 731 P2d 445 (1986), *adh'd to on recons.*, 84 Or App 580, 735 P2d 10 (1986). Alternatively, if a fiduciary fails to file their annual guardian report, but their removal might jeopardize the protected person's facility residency, removal might *not* be in the protected person's best interests.

In addition to the best interests standard established in ORS 125.225(1), the court may also remove a guardian if the court determines under ORS 125.225(3) that the guardian:

- (a) Unreasonably limited the protected person's associations;
- (b) Failed to perform duties required under ORS 125.323; or
- (c) Failed to adhere to notice and disclosure requirements before changing the protected person's abode or placing them in a facility.

3-4: Termination of Proceedings

There are varied reasons why a protective proceeding may end. If the reason does not involve the protected person's death, it is important to remember that the protected person is entitled to the same due process rights and procedures provided for in the original proceedings. ORS 125.090(1). If a petition or motion to terminate the protective proceeding has been filed and the fiduciary contests termination, the fiduciary has the burden of proving by clear and convincing evidence that the protected person continues to be incapacitated or financially incapable. *Id.* A visitor must be appointed for guardianship termination and may be appointed for conservatorship termination. *Id.*

Protective proceedings are terminated by a general judgment. ORS 125.090(3). Conservatorships, however, usually require the interim step of an order approving the final accounting when the protected person is still living. ORS 125.525. Upon court approval of the final accounting, the conservatorship is then terminated and closed by general judgment. ORS 125.090(2) outlines various circumstances in which a court may

terminate a proceeding. Each of these circumstances will be covered below, with specific court considerations and processes for each.

1. Final Reporting Requirements Generally

Guardianship proceedings do not have a “final report” equivalent of the annual guardian’s report. When the guardianship is terminated by a general judgment, the guardian’s authority ceases and the case is closed. The guardian may retain some authority over the disposition of the protected person’s remains in cases where the protected person died while under guardianship, but the guardian’s priority in this area is beyond the scope of this book.

Conservators do have the obligation to file a final accounting before they are discharged unless the conservatorship is ending because the protected person is no longer financially incapable, but specific steps must be taken to avoid final accounting in that circumstance. ORS 125.475(4). Otherwise, a final accounting is due within 60 days if the protected person dies or the minor reaches age 18. ORS 125.475(1)(a). The timeline is shortened for the filing of a final accounting to 30 days if the conservator is removed, they resign, or their authority terminates because of surety or bonding problems. ORS 125.475(1)(b). Procedural steps for terminating a conservatorship vary depending on the reason for termination and are clarified under the subsections below.

Court approval of the final accounting, made upon notice and hearing, is final as to all previously unsettled liabilities of the conservator to the protected person or successors relating to the conservatorship. ORS 125.480.

The court should issue notice of the general judgment closing the protective proceeding to any parties under ORS 125.060(3).

2. Best Outcomes are Restoration of Rights Through Improvement or Less Restrictive Alternatives

There are instances where the appointment and support of a guardian leads to a more stable medical, therapeutic, or living situation, and the protected person no longer needs the guardian’s ongoing oversight. In other instances, changes in medical care result in the protected person’s rehabilitation or improvement. At this juncture, it may be appropriate for the guardian to terminate the proceeding in favor of implementing a plan that restores the protected person’s rights. Less restrictive alternatives to guardianship may be effective in maintaining stability. See [Section 1-4](#) for examples of alternatives to protective proceedings.

When a conservatorship becomes unnecessary because the protected person is no longer financially incapable, the court orders the conservator to deliver the assets in the conservator’s possession to the protect person immediately to the extent that they are not required for the payment of expenses of administration or outstanding debts. ORS 125.525(1). The conservator then files a final accounting subject to the same requirements as annual accountings, but with the balance of the property distributed back to the formerly protected person. The same notice provisions apply to the final

accounting as interim accountings; however, if the protected person is no longer financially incapable, it is possible for them to consent to the final accounting.

After the order approving the final accounting, the conservator distributes the balance. The protected person then signs a receipt, which is filed with the court. The general judgment terminating the conservatorship and discharging the conservator is entered.

ORS 125.475(4) provides a method by which the conservator's final accounting may be waived by the court. If the protected person is no longer financially incapable, the conservator may deliver all conservatorship property to the protected person, who signs a receipt. ORS 125.475(4)(b). The conservator files the receipt with the court, which confirms delivery of the property. ORS 125.475(4)(c). The conservator can then be discharged, any bond exonerated, and the proceeding closed by general judgment.

3. Age of Majority and Aging Out

Upon the 18th birthday of a protected minor, the court may enter a general judgment terminating the guardianship or an order terminating the conservatorship. Most minor proceedings have a due date set in the case for the protected person's 18th birthday, based on the age of the protected person at the time of appointment. For conservatorship cases, a final accounting would follow the same procedure as outlined above. However, if all assets were restricted and annual accountings were waived, the court may accept a final report of restricted funds in lieu of an accounting and order their release to the now-adult. The formerly protected person signs and files a receipt confirming they have received their funds, and the court may close the proceeding by general judgment.

If the protective proceeding is a vulnerable youth guardianship, once the vulnerable youth attains 21 years of age, the guardianship must terminate. ORS 125.090(2)(f).

4. Death of Protected Person

When a protected person dies, the proceeding should be terminated. If the proceeding is a guardianship, there is no final reporting requirement set by statute, and the general judgment may be entered promptly.

If the proceeding is a conservatorship, a final accounting is due within 60 days of the death of the protected person. ORS 125.475(1)(a). The final accounting must be approved before the conservator may be discharged. "Death terminates the conservator's authority to act as a fiduciary, [but] the conservator is still responsible for paying conservatorship debts and administrative expenses, accounting to the court, and transferring the conservatorship assets to the persons entitled to the decedent's estate." *Herburger v. Herburger*, 144 Or App 89, 925 P2d 103 (1996). The final accounting is subject to the same requirements as an annual accounting, but will include distributive provisions to either the decedent's personal representative or others appropriate under the decedent's estate plan.

Upon court approval of the final accounting by order, the conservator transfers property as approved by the court. Distributees of the conservatorship estate sign receipts acknowledging the completion of the transfer, which are filed with the court.

If the conservator possesses the protected person's will at the time of their death, they are expected to deliver the will to the personal representative named in the will or to the court for safekeeping. If delivered to the court, the conservator is required to notify the protected person's personal representative, or if unable to reach them, to notify the beneficiaries named in the will. ORS 125.530.

Conservatorship assets that do not transfer by operation of law upon the protected person's death will require probate administration. As a result, when objections are filed to a final accounting, it is not uncommon for there to also be a parallel estate proceeding waiting to receive distribution. A personal representative or simple estate affiant needs authority to sign the custodial receipt and receive estate property to administer. To gain that authority, a personal representative needs to be appointed by a court, or a simple estate affiant must have their affidavit accepted for filing. Following the filing of the receipts, the court may terminate the conservatorship by general judgment, discharging the conservator and exonerating any bond.

5. Transfer Out-of-State (Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act)

As discussed in [Section 2-8](#), adult protected persons may relocate to another state. If, after proper notice of the change in abode or placement (see [Section 3-2:6\(C\)](#)), the fiduciary believes it is in the best interests of the protected person to transfer the proceeding to the new state, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act directs the procedural steps to accomplish the transfer.

The procedural steps before transfer and closure under ORS 125.837 include:

- (1) The fiduciary (or another interested person, possibly) files a petition to transfer the proceeding to another state. ORS 125.837(1).
- (2) Notice of the petition to transfer issues to anyone entitled to notice of a petition for appointment under ORS 125.060(2), with proof of notice filed into the Oregon case. ORS 125.837(2).
- (3) If objections are filed or the court deems it necessary, a hearing is set on the request to transfer. ORS 125.837(3).
- (4) If the Oregon court finds the transfer is in the best interests of the protected person, an order of provisional transfer is entered. Specific findings are required to be made in the order of provisional transfer:
 - (a) For guardianship cases, the protected person is physically present in the receiving state or is expected to move there permanently. ORS 125.837(4)(a). For conservatorship cases, the protected person is

physically present in the receiving state, is expected to move there permanently, or has significant connection to the other state considering the factors in ORS 125.812(2). ORS 125.837(5)(a).

(b) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person. ORS 125.837(4)(b), (5)(b); and

(c) For guardianship cases, plans for care and services for the incapacitated person in the other state are reasonable and sufficient. ORS 125.837(4)(c). For conservatorship cases, adequate arrangements will be made for management of the protected person's property. ORS 125.837(5)(c).

(5) Upon receipt of a certified copy of the order provisionally accepting transfer from the receiving state, the Oregon court may enter a final order confirming the transfer and a general judgment closing the Oregon proceeding. ORS 125.837(6).

6. Depletion of Assets

If at any time the conservatorship consists only of personal property below \$10,000 after reduction for unpaid expenses, claims, or costs, the conservator can file a final accounting. ORS 125.535. This threshold amount is considered too small to warrant the cost of maintaining the conservatorship. Upon court approval of the final accounting and plan for distribution, the conservator distributes the personal property according to the accounting. *Id.* The recipient of the property shall give a receipt to the conservator, who files it into the case, and the court enters a general judgment. *Id.*

7. Fiduciary Failures or Death of Fiduciary

Unfortunately, some protective proceedings come to an end because the fiduciary failed, was removed, or died. If a conservator was removed, ORS 125.475(1)(b) requires the conservator to file an accounting. In practice, this is unlikely to occur, especially if the conservator's removal arose from failing their duties. If the conservator has died, they will also not file a final accounting.

If the protected person loses their appointed fiduciary and there is no interested person petitioning to be appointed as successor, the court should first exhaust the external resources described in [Section 3-3:4](#). Gathering any information available about the protected person's situation can assist in ensuring the best resolution to the case. Ultimately, if there is no alternative, the court may be forced to terminate the case notwithstanding the potential need for a guardian or conservator. A general judgment citing ORS 129.090(2)(e), that the interests of the protected person would be better served by termination, becomes the frustrating conclusion.

Part 4: Related Legal Considerations

4-1: Preface to Part 4

Parts 1, 2, and 3 of this bench book detail the various issues arising from protective proceedings authorized by ORS Chapter 125. Part 4 will highlight some of the related areas of the law with which guardianships and conservatorships may intersect. Judges may see some of these intersections once in a career, while others occur frequently.

4-2: Guardian vs. Guardian ad Litem (ORCP 27)

There is a temptation for unrepresented parties, and even some lawyers, to confuse the appointment of a *guardian* (ORS Chapter 125) with the appointment of a *guardian ad litem* (ORCP 27). A guardian ad litem (GAL) is a person appointed by the court to stand in the place of a minor or incapacitated person in a particular legal proceeding. This need occurs in a civil lawsuit where a minor or incapacitated adult is a plaintiff or defendant. Unlike the broader authority of an appointed guardian, the appointment of a GAL is specific to that case only. ORCP 27 provides that if the incapacitated party already has a guardian or conservator appointed pursuant to ORS Chapter 125, a separate appointment of a GAL is not required for a civil suit. Instead, ORCP 27 designates the guardian or conservator to automatically assume party status on behalf of the incapacitated person. If an unemancipated minor or a person who is incapacitated or financially incapable, as those terms are defined in ORS 125.005, is a party to an action and doesn't have an appointed fiduciary, however, the court must appoint a GAL. ORCP 27 B. That obligation is mandatory.

The procedure for appointment is prescribed by ORCP 27, unless there is another applicable statute that uses a different procedure. Appointment can result from the court's own motion or by an individual qualified to file a motion for appointment in accordance with ORCP 27. ORCP 27 A. The motion to appoint a GAL must be supported by sufficient facts to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor, incapacitated, or financially incapable. ORCP 27 D. If a person with a disability, who may not necessarily be incapacitated or financially incapable, is a party to an action, appointment of a GAL is discretionary. ORCP 27 C. The same declaration or affidavit in support is required. There are specific notice provisions prescribed by ORCP 27.

The appointed GAL should be a competent adult who is able to act in the party's interests in and for the purposes of the action. ORCP 27 A. A GAL and an attorney for the party represented by a GAL do not perform the same role. The attorney provides legal advice; the GAL provides instructions to the attorney, in essence "standing in the shoes" of the incapacitated party. A court should not allow an attorney to fulfill both roles as the opportunity for a conflict of interest is inherent.

It is important to note that a parent does not automatically assume the role of GAL for their minor or incapacitated adult child without following the procedures of ORCP 27. A parent of a minor does not have the legal authority of a GAL without a court

appointment. While a parent may be the most qualified person to serve as GAL for their own child, there may also be reasons that a parent is not the most appropriate person to assume the role. For example, parents and children are often in motor vehicle accidents together. In that instance, the parent and child are coplaintiffs in the case, and allocating damages in a settlement would present an inherent conflict of interest for a parent seeking damages from the same limited pool.

Finally, while the GAL may seek court approval of a settlement on behalf of the party they represent, such approval does not carry authority for the GAL to receive or maintain settlement funds on behalf of the party after payment. ORCP 27 I and ORS 126.725 set conditions on the GAL's settlement authority, depending on the settlement amount and structure, when there is no court-appointed conservator. See ORCP 27 I and ORS 126.725. Even with a GAL's potential authority to settle claims, a conservator may nonetheless be necessary to manage and maintain the funds. For these reasons, some courts require probate court approval of minor settlements. This step allows for an examination of the allocation and the conflicts presented and ensures that settlement funds are appropriately protected for the incapacitated party's benefit. See, e.g., [Multnomah County's Supplementary Local Rule 9.055](#). For a more detailed discussion of settlement on behalf of minors, see [Section 4-8:2](#).

4-3: Juvenile Dependency

The purpose of the juvenile dependency system is to protect children from harm and provide them with a safe and nurturing environment. The system is designed to protect children and preserve families and relies on varied agencies and offices investigating and evaluating a child's safety before seeking court intervention to formalize a plan. When necessary, the dependency system seeks to provide an alternative permanent home and family for children who cannot be reunited with their parents.

Dependency court jurisdiction is outlined primarily in ORS Chapter 419B. These cases involve issues of abuse, neglect, or abandonment of children, and are generally initiated by the state (specifically the Child Welfare Division of the Oregon Department of Human Services (ODHS)), who intervenes to exercise their protective powers over the welfare of a child. If the child is in the legal or physical custody of the state, the goal of the dependency court is to establish a permanent plan for the child. Ideally, this means reunification with a parent (or legal guardian); however, if that cannot be accomplished within a reasonable time, then an alternative type of placement may provide a permanent, safe, and stable home. Other permanency options such as adoption, different forms of guardianship, or placement with a fit and willing relative are available if reunification is not possible.

A legal guardian of a child is a party to a juvenile dependency proceeding, even if the child does not live with the guardian.

1. Probate Guardianship vs. Juvenile Dependency Guardianship

Once jurisdiction is established in a dependency case, the juvenile court has exclusive jurisdiction. *Kelley v. Gibson (In re Wilde)*, 184 Or App 343, 56 P3d 925 (2002). There are two types of juvenile court guardianships that are considered permanent plans. The most permanent and stable is a “permanent guardianship” established under ORS 419B.365. The other, less permanent and stable, is a guardianship established under ORS 419B.366, commonly known as a “durable guardianship.” A permanent guardianship is considered more stable because it cannot be challenged by a parent once it is granted (ORS 419B.368(7)), but is more difficult to establish because it requires a higher standard of proof of parental unfitness sufficient to justify the termination of a parent’s rights. ORS 419B.365(2)-(4). A durable guardianship functions more like a minor guardianship under ORS Chapter 125, where letters of guardianship are issued by the juvenile court and the appointed guardian must file annual reports with the juvenile court. A juvenile dependency guardianship may be modified or vacated by the court or by a motion of a party to the case, including parents. ORS 419B.368.

Generally, a juvenile court cannot grant a minor guardianship under ORS Chapter 125. See *Kelley v. Gibson (In re Wilde)*, 184 Or App 343, 56 P3d 925 (2002). Judges are more likely to see a guardianship petition for a minor in a case where ODHS’s Child Welfare Division (Child Welfare) identifies a relative who is competent to care for the child before filing a petition in juvenile court. A typical fact pattern includes the following: A grandparent has cared for a child for a significant period of time and needs authority to make decisions directly for the child. The parents are unavailable to provide safe and secure care for the child, which places the child at risk of harm. In such circumstances, if the grandparent petitions in probate court to obtain minor guardianship, ODHS may delay initiating a dependency proceeding to allow that grandparent to seek legal authority as the child’s guardian. This happens often when the grandparent is capable of meeting the needs of the child, both economically and from a medical or therapeutic standpoint, without the involvement of the state. An ORS Chapter 125 guardianship can provide the grandparent with the authority to access services and make placement and visitation decisions on behalf of the child without state intervention in the family.

The appointment of a minor guardian for the child through a protective proceeding does not preclude Child Welfare from nevertheless initiating a dependency proceeding. An already appointed guardian would be summoned to the juvenile matter pursuant to ORS 419B.839(1)(b) because they are a party as defined by ORS 419B.875(1)(a)(B). A guardianship petition filed *after* the initiation of a juvenile dependency matter, however, provides no required notice or participation rights to the petitioner of the probate guardianship. Regardless of the order, the cases must be consolidated pursuant to ORS 419B.806(2). Consolidation requires that the actions are heard before one judge (ORS 419B.806(1)), but it does not merge the procedural or substantive law of the individual cases. ORS 419B.806(3). The parties to the individual consolidated actions do not have standing solely by virtue of the consolidation. *Id.* The juvenile matters must be heard first unless the court finds that it is in the best interests of the child to proceed otherwise. ORS 419B.806(4). Thus, a grandparent petitioning the probate court after the

initiation of the dependency proceeding does not become a party or have any standing unless the court finds it in the child's best interests not to hear the juvenile matter first.

2. Emancipation

In addition to jurisdiction over cases to determine permanency plans for children, an Oregon juvenile court has exclusive jurisdiction over petitions for emancipation. If a minor is emancipated, they are granted most of the rights and responsibilities of an adult, including the ability to contract, loan, and work for adult wages. An emancipated minor's minority cannot be used as the basis to grant a guardianship under ORS Chapter 125. In other words, a petitioner must have other grounds besides the emancipated minor's age for an emancipated 17 year old to be subject to a guardianship.

4-4: Parenting Time for Third Parties – ORS 109.119

It is axiomatic that a probate minor guardianship will always involve a guardian who is not the legal parent of a child. Legal parents do not need guardianship for their own child, so disputes between legal parents reside only in ORS Chapters 107, 108, and 109, as applicable. An ORS Chapter 125 guardianship is one way a non-legal parent can seek custody of a child. It is *not* a method for seeking visitation rights. If visitation is what is desired, ORS 109.119 is the sole route.

Unlike ORS 109.119, which requires a relationship with the child to have existed over a period of time prior to filing, a petition in an ORS Chapter 125 proceeding can be initiated by any interested person. ORS 125.010(1).

To obtain custody of a child under ORS 109.119, any person "who has established emotional ties creating a child-parent relationship" may file a motion for intervention in a pending proceeding or may file a petition for custody or guardianship if no proceeding is pending in the court of record where the child resides. ORS 109.119(1). ORS 109.119 is complicated and includes multipart definitions, rebuttable presumptions, and interrelated burdens of proof, but provides an alternative to guardianship.

The fundamental right of a legal parent to determine the care, custody, and control of the parent's children is protected by the Due Process Clause in the Fourteenth Amendment and is therefore entitled to significant weight in child custody decisions. *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). As a result of *Troxel*, ORS 109.119, which addresses the legal right to a relationship with a child, was substantially amended in 2001, with two very important changes. Specifically, it (1) established a rebuttable presumption that the legal parent acts in the best interests of the child (ORS 109.119(2)(a)) and (2) created a nonexclusive list of factors to consider in determining whether the presumption is rebutted (ORS 109.119(4)). There have been multiple Oregon cases since *Troxel* applying these principles to Oregon law. A summary of those cases can be found in the Oregon State Bar Book *Family Law in Oregon* (OSB Legal Pubs 2023), Chapter 9: Third-Party Rights and Issues.

If there is no preexisting case regarding custody, parenting time, or visitation of a child under ORS Chapters 107, 108, or 109, an interested third party is likely to petition for minor guardianship under ORS Chapter 125 instead of petitioning under ORS 109.119. The former option does not require the same petitioner-child relational standing as the latter. If the child's legal parents consent (or do not object) to the minor guardianship, the petition proceeds as described in [Part 2-1:1](#). But if the legal parents object to or contest the guardianship, the court is required to consider the provisions of ORS 109.119. *Burk v. Hall (In re Guardianship of Goodwin)*, 186 Or App 113, 62 P3d 394, rev. den., 336 Or 16 (2003). *Burk*, which analyzes the impact of *Troxel* on minor guardianship cases, is essential reading for judges considering parent-contested minor guardianship cases.

If a petition for minor guardianship is filed while there is an ongoing proceeding regarding custody, parenting time, or visitation, then the court must carefully consider the procedural steps of the case, given the application of the Uniform Child Custody Jurisdiction Enforcement Act and the potential for conflicting findings and judgments. The two cases should be consolidated for the purpose of resolution. This is another good reason for courts to run an Odyssey name search for parties when protective proceeding petitions are initially filed.

4-5: Interaction with Civil Commitment Cases

The important distinction between an action for civil commitment and an ORS Chapter 125 protective proceeding is that a civil commitment is an action by the state seeking to intervene on the rights of an individual. An ORS Chapter 426 proceeding may result in the involuntary commitment of an individual to the custody of the Oregon Health Authority (OHA) for up to 180 days for treatment. ORS 426.130(1)(a)(C), (2). Under ORS 426.005(1)(f), a person is mentally ill if, because of a mental disorder, the person is dangerous to themselves or others or unable to provide for basic personal needs that are necessary to avoid serious physical harm in the near future and they are not receiving such care as is necessary to avoid such harm. A person suffering from a chronic mental illness defined in ORS 426.495 may also be subject to civil commitment. ORS 426.005(1)(f)(C). A commitment hearing for an involuntarily held person alleged to have a mental illness must occur within five judicial days of the person's detention. ORS 426.095(2).

In contrast, the standard for a finding of incapacity, which is required for the appointment of a guardian of an adult under ORS Chapter 125, is that the 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 and safety. ORS 125.025(5). The standards established under both processes are similar, and the same facts may support findings for both purposes. Thus, a person subject to civil mental commitment may also meet the standards for the appointment of a guardian, in which case they may already have been appointed a guardian or might become the respondent to a petition for the appointment of a guardian.

The probate court may be asked to consider a petition for the appointment of a guardian for persons facing civil commitment because a legal guardian of the person has important rights in the commitment process. These rights include:

- Requesting counsel for the person facing commitment. ORS 426.100(3)(c).
- Requesting a postponement of up to five judicial days of the commitment hearing. ORS 426.095(2)(c)(B).
- Requesting conditional release of the person to the guardian's care. ORS 426.130; ORS 426.125.
- Requesting transport options for the person. ORS 426.150(2).
- Requesting a competency hearing for the committed person. ORS 426.295.
- Notice of different filings required under ORS Chapter 426.

For persons facing civil commitment, the appointment of a qualified legal guardian may be an appropriate diversionary alternative. With commitment hearings set on short notices, given the deprivation of liberty involved, most petitions for the appointment of a guardian in these cases include a request for temporary appointment. Indefinite appointment may also be necessary so that the legal guardian can comply with diversion requirements within ORS Chapter 426, but the probate court should review the ongoing necessity of the indefinite guardian through post-appointment case monitoring discussed in [Section 3-3](#).

4-6: Elderly Persons and Persons with Disabilities Abuse Prevention Act

The Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA) is found at ORS 124.005 to ORS 124.040. For a complete detailed examination of the provisions and case law related to these statutes, refer to the [Family Abuse Prevention Act \(FAPA\) Protection Order Benchbook](#).

EPPDAPA orders are intended to address the immediate and ongoing danger of abuse to the petitioner or person on whose behalf the petition was filed. Unlike the definitions in the Family Abuse Prevention Act, the EPPDAPA's definition of abuse is broader and intended to encompass the types of coercion used to exploit people with diminished capacity. The risk need not be physical; it can also be financial. A guardian or conservator can seek an order under the EPPDAPA on behalf of a protected person, but a protected person cannot seek this type of order against their guardian or conservator. ORS 124.010(8).

Given the array of immediate relief available through an EPPDAPA order, ORS Chapter 124 provides a faster method of addressing danger to a protected person. These orders, among other things, can include provisions that remove a respondent from the protected person's home and require the return of property wrongfully taken. As under the Family Abuse Prevention Act, a respondent can request a hearing, which must

occur within 21 days of the date of the request. These types of orders also have more enforcement options, including arrest and prosecution for punitive contempt, which carries the possibility of a maximum of six months in jail.

A guardian may seek an EPPDAPA order to address a limitation on association otherwise covered by ORS 125.323. See ORS 125.323(2)(a). If a protected person or guardian is a party to an EPPDAPA proceeding, it is important for the court to relate the matters in Odyssey so that the probate court can, if necessary, address overlapping issues between the cases. A judge may need to carefully consider the interactions between parties and the different purposes and durations of the two provisions.

4-7: Conservatorship for Missing Persons

ORS Chapter 117 covers the administration of the estates of absentees, colloquially known as a “missing person.” The administration of an absentee’s estate proceeds in the same manner as the administration of a deceased person’s estate (ORS 117.055) but requires a hearing and additional facts that include the absentee’s whereabouts having been unknown for a period of at least one year. ORS 117.015; ORS 117.005(3)(a). If a person has been missing for less than a year, an estate representative can’t be appointed by the court.

If the missing person has property that may be subject to waste, misappropriation, or other loss, an interested person may petition to be appointed as a conservator to protect those assets. ORS 125.005 defines “financially incapable” to include persons unable to manage financial resources effectively for reasons including disappearance. The appointment of a conservator to protect that person’s assets may be sought earlier than the administration of their estate.

In considering the appointment of a conservator for a missing person, alternative methods of notice will be necessary because the respondent cannot be personally served. Courts should consider appropriate protections or restrictions on the conservator, which might include bond, asset restriction, or periodic status reports regarding efforts to locate the protected person as part of ongoing monitoring.

4-8: Uniform Transfers to Minors Act (Chapter 126)

The Uniform Transfers to Minors Act (UTMA) provides legal alternatives to a conservatorship for a minor. This act applies to any asset of a minor, regardless of origin. It could be an inheritance, a gift, or a personal injury award. Most people, especially parents, would be justifiably wary of a minor receiving a substantial sum of money without limitation or oversight. Although parents have many rights to make decisions by and for their children, if assets are owned directly by children, those assets are not automatically a parent’s to own or manage. Indeed, the child is the owner but by operation of law lacks capacity to manage or direct the use of those assets.

The UTMA’s purpose “is to provide a simple, low-cost mechanism for handling gifts or transfers of property or funds to minors, without the complexity and expense of establishing a trust or conservatorship.” *Ivers v. Salladay*, 253 Or App 195, 289 P3d 334

(2012). The methods available for transferring property to a minor depend on the value and the source of the asset to be transferred. If there is a conservator appointed for a minor, the UTMA does not apply, and the property must be delivered to the conservator.

1. Payment or Delivery for Benefit of Minor – ORS 126.700

If a person is under a duty to pay or deliver money or property to a minor, and the amount does not exceed \$10,000 per year, ORS 126.700(1) allows for payment or delivery to:

- (a) A person having the care and custody of the minor with whom the minor resides (usually a parent);
- (b) A guardian of the minor; or
- (c) A financial institution savings account in the sole name of the minor with notice of the deposit to the minor.

The parent or guardian must use the money for the support and education of the minor. The money must be used to support the child. Except for reimbursement for out-of-pocket expenses, parents cannot use the child's money to pay themselves. ORS 126.700(3). Any money remaining at the time the child reaches majority is the property of the child.

2. Settlement Agreements for Minors – ORS 126.725

Some claims may be settled by a person having legal custody of a minor if specific conditions of ORS 126.725 are met. The required conditions include:

- (a) A conservator has not been appointed for the minor;
- (b) The total amount of the claim not including reimbursement of medical expenses, liens, reasonable attorney fees, and costs is \$25,000 or less, payable in cash or purchase of a premium for an annuity;
- (c) The money paid under the settlement will be protected as set forth in ORS 126.725(3) and (4); and
- (d) The attorney or person entering into the settlement agreement on behalf of the minor completes an affidavit attesting that:
 - (A) To the best of the person's knowledge, the minor will be fully compensated by the settlement; or
 - (B) There is no practical way to obtain additional amounts from the party entering into the settlement agreement with the minor.

ORS 126.725(1)(a)-(d).

A guardian appointed under ORS Chapter 125 fits this definition as legal custody is granted to the guardian under ORS 125.315(a). It is important to note that the amount of the settlement cannot exceed \$25,000 (ORS 126.725), and the provisions above do not apply if a conservator has been appointed for the minor. If the settlement exceeds this amount, generally, a conservator must be appointed. ORS 126.725(3) directs the funds to be paid directly to the trust account of the attorney, a depository account in the sole name of the minor, to the issuer of the annuity, or to a sub-trust account held by OHA. Whatever type of account holds the funds must be restricted. The funds cannot be withdrawn until the minor reaches age 18 or dies, or a court orders otherwise. ORS 126.725(4).

3. Payment of Judgment on Behalf of Minor

If a minor's claim has been reduced to a money judgment, payment of the judgment on behalf of the minor functions in the same manner as the approval of a settlement. An amount not exceeding \$25,000 may be paid to a person having legal custody of the minor or to the minor's guardian. ORS 126.730(1). Under ORS 126.730(2)(a), if the minor is represented by an attorney, the attorney receives the money and deposits it into the attorney's trust account, then deposits the funds into a federally insured interest bearing account in the sole name of the minor. If the minor or person to whom payment is made is not represented by an attorney, the payment is made directly to a federally insured, interest bearing account in the sole name of the minor or to the provider of the annuity. ORS 126.730(2)(b)-(c). If the minor is a ward of ODHS, the judgment is paid to a sub-trust established by OHA. ORS 126.730(2)(d). The funded account must be restricted from withdrawal until the minor reaches age 18 or dies, or a court orders otherwise. ORS 126.730(3).

4. Gifting to Minors

ORS 126.805 to ORS 126.886 provide processes and procedures for gifting money or property to minors. Gifts, unlike other transfers or obligations of property, can be conditioned by the grantor, and the UTMA establishes a system of custodianship whereby the gift is held on behalf of the minor until a certain age. Once a custodial transfer is made, the minor is the beneficiary of the custodianship. ORS 126.805(2). An essential distinction for UTMA gifting is the definition of "minor." Elsewhere in statute and this book, a minor is a person who has not yet reached age 18. ORS 125.005(6). Under the UTMA, a "minor" is a person who has not attained the age of 21. ORS 126.805(11). This means that property transferred to a custodian is held longer than conservatorship property or restricted accounts funded by settlement or judgment proceeds.

Any person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a beneficiary. ORS 126.816. Most often, the creation and transfer of custodial property happens without court involvement and requires no court supervision or approval. The transfer is made for one beneficiary and only one person may be the custodian, but all property transferred for the same beneficiary to the same custodian constitutes a single

custodianship. ORS 126.836. The custodian has duties to the beneficiary and property very similar to other fiduciaries, as provided in ORS 126.842, and manages the property until the beneficiary may receive it directly. Since the transferor of the gift conditions the gift to the minor using UTMA custodianship, and ostensibly believes it sufficient to protect the gift to the minor, there is no value limit to the money or property transferred through this process.

5. When the Court Encounters UTMA Issues

UTMA issues rarely arise on their own. The court is most likely to encounter UTMA transfers in probate estate or trust matters when a distributee of the estate is a minor. If the governing will or trust authorizes a transfer to a custodian on behalf of a minor distributee of the trust or estate, the personal representative or trustee is authorized to complete the transfer, without value limit, to the custodian nominated in the document. ORS 126.819. If the will or trust directs transfer to a custodian but does not nominate the custodian or the nominated custodian cannot serve, the personal representative or the trustee shall designate a custodian from those eligible to serve for the type of property transferred. ORS 126.819(3).

There are limits, however, if the will or trust does not direct the transfer of a minor distributee's interest to a custodian. Most commonly, this occurs in intestate estates or testate estates without custodial transfer provisions where a minor heir stands to receive a substantial distribution. It could also arise if an appointed conservator was seeking approval to gift conservatorship property in excess of statutory limits as part of established estate planning strategies. Under ORS 126.822(3), a personal representative, trustee, or conservator may only make a custodial transfer under the UTMA if:

- (a) The personal representative, trustee, or conservator considers the transfer to be in the best interests of the minor;
- (b) The transfer is not prohibited by or inconsistent with any applicable will, trust, or governing instrument; and
- (c) The transfer is authorized by the court if it exceeds \$30,000 in value.

The court should carefully review proposed transfers to custodians when not authorized, since the management and custody does not require ongoing supervision by the court. The outright transfer of \$30,000 is a substantial sum for any minor to manage on their own, and there may be a more appropriate and secure way of protecting money on behalf of the minor, either through a restricted account or conservatorship.

6. Vacancy in Custodianship

Besides the three aforementioned methods of transfers to minors that may come before the court, one less common but more unique reason is for the appointment of a successor custodian, either because there is no willing, nominated successor or because there is nobody qualified to nominate a successor. ORS 126.862 provides for

substitute and successor custodians. It directs that a custodian may designate the successor if the transferring instrument does not so designate. ORS 126.862(2). However, if the custodian declines to serve, resigns, or dies, a successor custodian may be appointed by the transferor, their legal representative, or even the beneficiary themselves, if over 14 years of age. ORS 126.862(1)-(3). Otherwise, a member of the beneficiary's family or another interested person must petition the court to designate a successor. ORS 126.862(4).

4-9: Trusts, Briefly

A trust is a method of transferring one's property, either during their life or at their death, for the benefit of another person, with instructions on how the property is to be managed and administered under the terms of the transferring instrument. Every trust has at least three parties: the settlor, the trustee, and one or more beneficiaries. The settlor is the person who creates the trust or contributes property to the trust. ORS 130.010(18). The trustee is the person following the settlor's instructions about the property held in trust. A beneficiary is a person for whose benefit the trust was created. See ORS 130.010(2). Trusts may be revocable, meaning the settlor can "undo" the creation of the trust, or irrevocable, which keeps the settlor from unwinding or amending the terms of the trust without additional approval or processes. Oregon's Uniform Trust Code, covering many types of trusts and trust circumstances, is found in ORS Chapter 130.

A respondent or protected person may be a trust's settlor, beneficiary, or trustee at the time they become a party in a protective proceeding. While it is beyond the scope of this bench book to describe the myriad ways trusts affect protective proceedings, there are some common fact patterns that courts should be aware of when the respondent or protected person is also a party to a trust. For substantially more information about trusts, the Oregon State Bar Book *Administering Trusts in Oregon* (OSB Legal Pubs 2024) is an excellent resource.

The two most common types of trusts the court will encounter in protective proceedings are revocable living trusts and special needs trusts.

1. Revocable Living Trusts

A revocable living trust (RLT) is an estate planning tool where the same person can be the settlor, the trustee, and the beneficiary of the trust, so long as they are not the sole trustee and sole beneficiary. ORS 130.155(1)(e). Many people create RLTs to avoid probate, maintain privacy, or anticipate incapacity issues and avoid protective proceedings by creating triggers for successor trustees to control assets if the settlor can no longer manage them.

2. Special Needs Trusts

A special needs trust (SNT) is a type of irrevocable trust created to establish a supplemental source of funds for a person. SNT funds are intended to support the needs of the beneficiary without disqualifying them from various public assistance programs like Supplemental Security Income, Medicare, Medicaid, low-income housing,

and other community programs. Most of these programs allow certain types of property to be exempt from qualification barriers. An SNT contains limitations on the amounts and use of trust property to balance two objectives: (1) supplementing public benefits to improve the beneficiary's quality of life and (2) avoiding exceeding income or resource limits that would result in terminating benefits.

There are two main types of SNTs: "third-party SNTs," which are funded with the assets of someone other than the disabled beneficiary, and "first-party SNTs," which are funded with the beneficiary's own assets. Also known as "payback trusts," there are significantly more restrictions on and oversight of first-party SNTs, which usually require trust provisions repaying public benefits providers with trust assets once the beneficiary has died.

3. Pre-Appointment Trust Considerations

A petition for the appointment of a fiduciary must include the name and address for any trustee appointed for a trust established by or for the respondent. ORS 125.055(2)(g). The petition must also contain a general description of the assets and the sources and amounts of income. ORS 125.055(2)(k). In this way, the court should be aware of any trust the respondent created and any trust in which they are a beneficiary. The court should also gain a sense of the amount of income or property of a trust benefiting the respondent.

If the respondent is the current trustee of an RLT for which they are also the beneficiary, the petition may seek the appointment of a successor trustee for the trust in conjunction with the appointment of a conservator. Since the circuit court has subject matter jurisdiction and venue in the trust's principal place of administration (ORS 130.060; ORS 130.065), the probate court may take jurisdiction of trust issues related to protective proceedings. If the nominated conservator will also be the successor trustee of a trust for which the protected person is a beneficiary, judges must carefully weigh future reporting expectations within the conservatorship. If the protected person is the beneficiary of a trust that will provide income or distributions to the protected person, that income or distribution may affect the non-trust accounting and administration in complex ways.

Some protective proceeding petitions do not seek the appointment of an indefinite fiduciary, but instead seek to transfer non-trust assets of the respondent's estate into a preexisting trust for which there is already a non-respondent trustee. These petitions are sometimes styled as Petitions for Appointment of a Conservator for a Limited Purpose or filed as a petition for a protective order under ORS 125.650.

Finally, some initiating petitions seek the creation of a trust, often a first-party SNT, to be funded with a respondent's inheritance or personal injury settlement. ORS Chapter 125 contains specific provisions with respect to the creation of trusts.

4. Creation of Trusts Within Protective Proceedings

ORS 125.440(2) permits a conservator to create revocable or irrevocable trusts with the protected person's property only with court approval. Any trust created by a conservator may extend beyond the period of incapacity or incapability, or even beyond the life, of the respondent-beneficiary, but must be consistent with the will or other written or oral expressions of estate planning intent by the respondent or protected person. *Id.* The court may not approve a trust that has the effect of terminating the conservatorship unless one of the following is true:

- (a) The trust is created for the purpose of qualifying the protected person for needs-based government benefits or maintaining their eligibility for such benefits. Typically, a copy of the proposed first-party SNT is included for court review before approval of the trust's creation. Third-party trusts are not funded with the respondent or protected person's estate, so they do not require court approval.
- (b) The value of the conservatorship estate, including the amount to be transferred to the trust, does not exceed \$50,000. This provision prevents a conservator from terminating court oversight of the protected person's estate by transferring the balance to an unsupervised trust.
- (c) The purpose of establishing the conservatorship was to create the trust. The court must still balance the purpose of the trust's creation with the cost of the administration of the conservatorship and the protective interests served by court supervision of the respondent's estate.
- (d) The conservator shows other good cause to the court.

ORS 125.440(2)(a)-(d).

4-10: Indian Child Welfare Act

1. Applicability

The federal Indian Child Welfare Act (ICWA) was enacted to protect the best interests of Indian children and promote the stability of Indian tribes and families. 25 USCA § 1902. The ICWA applies to protective proceedings for minors if the minor is an Indian child. ORS 125.025(2). An Indian child is an unmarried minor who (a) is a member of a federally recognized tribe or Alaska Native village or (b) is eligible for such membership and is the biological child of a member. 25 USCA § 1903(4). The petitioning party may not know the child is an Indian child or may be unsure whether that fact is important to raise with the court. Therefore, it is imperative that the court inquire as to the child's status in the earliest possible stages of the protective proceeding.

The courts must first determine whether the child is, or could be, an Indian child. The ICWA frames this as whether the court "knows" or "has reason to know" that the child is an Indian child. Examples of how a court may determine that there is reason to know a child is an Indian child are codified and include:

- (1) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.
- (2) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.
- (3) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.
- (4) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
- (5) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10152-53 (Feb. 25, 2015). This rule was later codified as 25 CFR § 23.107(c).

If the court determines that there is reason to know a child may be an Indian child but lacks evidence that the child is in fact a member or eligible to be a member of a tribe, the court should verify the child's status through either the BIA or the tribe itself. The tribe's determination is conclusive. 25 CFR § 23.108 (2025).

Please note that the Oregon Indian Child Welfare Act (ORICWA) does not apply to protective proceedings.

2. Notice and Intervention

Once the court knows the child is an Indian child, if the protective proceeding is involuntary (meaning a parent does not consent to the guardianship, conservatorship, or proposed fiduciary), the party seeking the guardianship or conservatorship over the minor must give notice to the child's parent or Indian custodian and the tribe(s) by registered mail with return receipt requested. 25 USCA § 1912(a). If multiple tribes are implicated, all should be notified, then the court determines which tribe has the most significant contacts with the child. 25 USCA § 1903(5). The BIA Guidelines provide factors the court should consider in making this determination. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10153 (Feb. 25, 2015).

If the parent or Indian custodian or tribe cannot be located or identified, notice must be served on the Bureau of Indian Affairs Regional Director. *Id.* The court cannot proceed until at least 10 days after the parent or Indian custodian and tribe or Secretary have received the notice. *Id.* The parent or Indian custodian or tribe have the right to be granted up to 20 additional days upon request. 25 CFR § 23.112(a) (2025).

The child's tribe has the right to intervene at any point in the protective proceeding. 25 USCA § 1911. Once notified, the tribe may or may not elect to intervene. Even if the tribe does not intervene, the ICWA requires several additional procedures and findings. This bench book outlines the most common ICWA provisions the court may encounter, but careful reading of the statute is necessary to ensure full compliance.

Protective proceedings are considered "child custody proceedings," which include foster care placement. 25 USCA § 1903(1)(i); 25 CFR § 23.2 (2025).

3. Out-of-Home Placement Determination

Before appointing a guardian to an Indian child in an involuntary protective proceeding, the court must determine that the parent or Indian custodian continuing to have custody of the child is likely to result in serious emotional or physical damage to the child. 25 USCA § 1912(e). The court's determination must be supported by clear and convincing evidence, including testimony from a qualified expert witness (QEW). *Id.* The BIA Guidelines offer guidance as to who may be considered a QEW:

- A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- A lay expert witness having substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- A professional person having substantial education and experience in the area of his or her specialty.

Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10157 (Feb. 25, 2015).

The BIA can aid in locating a QEW if needed. *Id.* For an example of a case involving a QEW that was a professional person (therapist), see *In re Guardianship of L.N.P.*, 2013 Wy 20, 294 P3d 904 (2013).

4. Active Efforts

It is well established in juvenile dependency cases that the ICWA requires ODHS to make "active efforts" to maintain or reunify the Indian child and their family, rather than the reasonable efforts otherwise required by the juvenile code. In protective proceedings, where the party seeking the guardianship is typically an individual rather than an agency, there is less clarity. The ICWA appears to contemplate that *any* petitioning party seeking an out-of-home placement for the child should still demonstrate that active efforts were made to alleviate the need for the removal of the Indian child from their parent or Indian custodian, but case law on the issue is limited. See 25 USCA § 1912(d). It may be prudent for a court to err on the side of caution and inquire as to how the proposed fiduciary has, and would continue to, support social and cultural ties

with the Indian child's living parent or Indian custodian and tribe. Examples of actions that constitute active efforts can be found in 25 CRF § 23.2 (2025).

5. Placement Preferences

When evaluating a proposed fiduciary for an out-of-home placement, the court must select the placement that is the least restrictive setting where any special needs may be met. 25 USCA § 1915(b). Absent a showing of good cause or different preferences established by the child's tribe, the court must give preference to:

- (i) A member of the Indian child's extended family;
- (ii) A foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) An institution approved by or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 USCA § 1915(b).

For examples of courts applying these preferences, see *Matter of Guardianship of L.C.*, 28 Wash App 2d 766, 538 P3d 309 (2023) and *Matter of Guardianship I.L.J.E.*, 2018 SD 81, 921 NW2d 463 (2018).

6. Voluntary Consent

If a parent or Indian custodian consents to a guardianship, the ICWA requires the court to provide a clear explanation of rights and the consequences of this consent to the parent or Indian custodian. 25 USCA § 1913(a). The parent or Indian custodian must then provide voluntary written consent accompanied by a presiding judge certificate that states that the terms and consequences of the consent were fully explained and understood by the parent or Indian custodian in their primary language. *Id.* Consent must be on the record. There is also a mandatory 10-day waiting period after birth. *Id.*

4-11: Sterilization

Sterilization is an example of an issue that will arise once in a judicial career, if that. While a guardian may not authorize sterilization independently of the court, they may seek court approval of such an action. A court may authorize sterilization only under the exact circumstances prescribed by law. A careful reading of ORS Chapter 436 is required before ruling.

4-12: Medical Decision Making – ORS Chapter 127

Occasionally, family members will challenge a protected person's or guardian's decision related to the protected person's medical or end-of-life care (tube feeding, for example).

When disputes regarding a guardian's medical decision making arise, judges should carefully consider the type and scope of the care at issue and understand how ORS Chapter 127 provisions affect court-appointed guardians, who are included in the definition of health care representative. ORS 127.505(13).

As discussed in [Section 3-2:3\(A\)](#), a guardian is granted explicit authority to consent, refuse consent, or withhold or withdraw consent to health care for the protected person, subject to ORS 127.505 to ORS 127.660. ORS 125.315(1)(c). "Health care," as used in ORS 125.315(1)(c), is defined in ORS 127.505 to mean "diagnosis, treatment or care of disease, injury and congenital or degenerative conditions, including the use, maintenance, withdrawal or withholding of life-sustaining procedures and the use, maintenance, withdrawal or withholding of artificially administered nutrition and hydration."

In a notable case from Southern Oregon (*In the Matter of the Guardianship of Nora Raupers Harris*, Jackson County Circuit Court Case No. 13-017-G6), a guardian requested that the court order a health care facility to stop spoon-feeding a protected person with Alzheimer's disease whose advance directive declined artificially administered nutrition and hydration. The circuit court determined it could not make the order because ORS 127.505(4)'s definition of "artificially administered nutrition and hydration" does not include "provision of nutrition and hydration by cup, hand, bottle, drinking straw or eating utensil."

ORS 127.540 also limits a health care representative's or guardian's (pursuant to ORS 127.505(13)) health care decisions with respect to:

- (1) Convulsive treatment.
- (2) Psychosurgery.
- (3) Sterilization.
- (4) Abortion.
- (5) Withholding or withdrawing of a life-sustaining procedure unless statutory preconditions are met.
- (6) Withholding or withdrawing artificially administered nutrition and hydration, other than hyperalimentation, necessary to sustain life except as provided in ORS 127.580.

A guardian may seek court approval of health care decisions related to these specific situations, or other interested persons may file a motion for court intervention with respect to these decisions within a guardianship.

Appendix A: Case Law

Section A-1 of this appendix lists all cases cited in this bench book and in the OSB Bar Book. Section A-2 provides summaries of a few key cases.

A-1: Case Citations

Section A-1(1) below contains an alphabetical list of all cases cited in this bench book. For each case, you can see where the case was cited in this bench book, as well as in the Oregon State Bar Book *Guardianships, Conservatorships, and Transfers to Minors in Oregon* (OSB Legal Pubs 2023).

Section A-1(2) also lists the cases cited in this bench book, but the list is organized by section of the bench book. Section A-1(3) lists all cases cited in the OSB Bar Book, some of which are not cited in this bench book, but may be relevant to a topic covered in this bench book.

To learn more about a topic covered in a particular case, you can find its location in this bench book and the bar book using Section A-1(1). Then, you can find other cases cited in the same section of this bench book (using Section A-1(2)) or the bar book (using Section A-1(3)).

1. All Cases Cited in Bench Book, Alphabetical

The table below is an alphabetical list of all cases cited in this bench book, along with their locations in this bench book and the Oregon State Bar Book *Guardianships, Conservatorships, and Transfers to Minors in Oregon* (OSB Legal Pubs 2023).

Case Citation	Location(s) in Bench Book	Location(s) in OSB Bar Book
<i>Burk v. Hall (In re Goodwin)</i> , 186 Or App 113, 62 P3d 394, <i>rev. den.</i> , 336 Or 16 (2003)	4-4	2.4, 3.2
<i>Cat Champion Corp. v. Primrose</i> , 210 Or App 206, 149 P3d 1276 (2006)	1-4:3	2.2, 2.4, 4.3
<i>Fuentes v. Tillet</i> , 263 Or App 9, 326 P3d 1263 (2014)	3-2:7	1.7, 2.3, 4.2
<i>Grimmett v. Brooks</i> , 193 Or App 427, 89 P3d 1238 (2004)	1-5:3, 2-1	1.4, 1.6, 2.5, 2.9, 4.2
<i>Harrington v. Thomas</i> , 73 Or App 648, 700 P2d 304, <i>rev. den.</i> , 300 Or 162 (1985)	3-2:7	2.5, 4.2
<i>Helmig v. Farley, Piazza & Associates</i> , 218 Or App 622, 180 P3d 749 (2008)	2-1	2.2, 2.4, 2.5, 2.9, 4.2

Case Citation	Location(s) in Bench Book	Location(s) in OSB Bar Book
<i>Herburger v. Herburger</i> , 144 Or App 89, 925 P2d 103 (1996)	3-4:4	2.9, 4.2
<i>In re Guardianship of L.N.P.</i> , 2013 Wy 20, 294 P3d 904 (2013)	4-10:3	N/A
<i>In re Hartfield</i> , 349 Or 108, 239 P3d 992 (2010)	1-6:1	1.7, 4.2
<i>In the Matter of the Guardianship of Nora Raupers Harris</i> , Jackson County Circuit Court Case No. 13-017-G6	4-12	N/A
<i>In re McGraw</i> , 362 Or 667, 414 P3d 841 (2018)	3-2:3	2.9
<i>Ivers v. Salladay</i> , 253 Or App 195, 289 P3d 334 (2012)	4-8	5.3
<i>Kelley v. Gibson (In re Wilde)</i> , 184 Or App 343, 56 P3d 925 (2002)	4-3:1	2.4, 3.2
<i>Matter of Guardianship I.L.J.E.</i> , 2018 SD 81, 921 NW2d 463 (2018)	4-10:5	N/A
<i>Matter of Guardianship of L.C.</i> , 28 Wash App 2d 766, 538 P3d 309 (2023)	4-10:5	N/A
<i>Matthews v. Eldridge</i> , 424 US 319, 96 S Ct 893 (1976)	1-3:3	N/A
<i>Schaefer v. Schaefer</i> , 183 Or App 513, 517, 52 P3d 1125 (2002)	2-9:4	1.4, 2.2, 2.8, 3.2
<i>Smith v. Lovejoy</i> , 26 Or App 1, 552 P2d 606 (1976)	3-3:5	2.5, 2.9
<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)	1-3:2, 2-1, 2-4, 3-2:6	1.4, 2.5, 2.8, 2.9
<i>State, Long Term Care Ombudsman v. Symons</i> , 264 Or App 769, 333 P3d 1170 (2014)	3-2:3	2.4, 3.2
<i>Troxel v. Granville</i> , 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000)	4-4	3.2
<i>Van v. Van</i> , 14 Or App 575, 513 P2d 1205 (1973)	1-1:3	2.7, 3.2
<i>Willbanks v. Mars</i> , 37 Or App 795, 588 P2d 118 (1978), rev. den., 285 Or 319 (1979)	3-2:3	4.1, 4.2

Case Citation	Location(s) in Bench Book	Location(s) in OSB Bar Book
<i>Windishar v. Windishar</i> , 83 Or App 162, 731 P2d 445 (1986), <i>adh'd to on recons.</i> , 84 Or App 580, 735 P2d 10 (1987)	3-3:5	2.5

2. All Cases Cited in Bench Book, By Section

The table below is a list of all cases cited in this bench book, organized by where they appear in this bench book. Some cases are cited in multiple sections of this book and therefore appear multiple times in this list.

Part	Section	Subsection	Case Citation
1	1-1	1-1:3	<i>Van v. Van</i> , 14 Or App 575, 513 P2d 1205 (1973)
	1-3	1-3:2	<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)
		1-3:3	<i>Matthews v. Eldridge</i> , 424 US 319, 96 S Ct 893 (1976)
	1-4	1-4:3	<i>Cat Champion Corp. v. Primrose</i> , 210 Or App 206, 149 P3d 1276 (2006)
	1-5	1-5:3	<i>Grimmett v. Brooks</i> , 193 Or App 427, 89 P3d 1238 (2004)
	1-6	1-6:1	<i>In re Hartfield</i> , 349 Or 108, 239 P3d 992 (2010)
2	2-1	N/A	<i>Grimmett v. Brooks</i> , 193 Or App 427, 89 P3d 1238 (2004)
			<i>Helmig v. Farley, Piazza & Associates</i> , 218 Or App 622, 180 P3d 749 (2008)
			<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)
	2-4	N/A	<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)
	2-9	2-9:4	<i>Schaefer v. Schaefer</i> , 183 Or App 513, 517, 52 P3d 1125 (2002)

Part	Section	Subsection	Case Citation
3	3-2	3-2:3	<i>In re McGraw</i> , 362 Or 667, 414 P3d 841 (2018)
			<i>State, Long Term Care Ombudsman v. Symons</i> , 264 Or App 769, 333 P3d 1170 (2014)
			<i>Willbanks v. Mars</i> , 37 Or App 795, 588 P2d 118 (1978), <i>rev. den.</i> , 285 Or 319 (1979)
		3-2:6	<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)
		3-2:7	<i>Fuentes v. Tillet</i> , 263 Or App 9, 326 P3d 1263 (2014)
			<i>Harrington v. Thomas</i> , 73 Or App 648, 700 P2d 304, <i>rev. den.</i> , 300 Or 162 (1985)
	3-3	3-3:5	<i>Smith v. Lovejoy</i> , 26 Or App 1, 552 P2d 606 (1976)
			<i>Windishar v. Windishar</i> , 83 Or App 162, 731 P2d 445 (1986), <i>adh'd to on recons.</i> , 84 Or App 580, 735 P2d 10 (1987)
	3-4	3-4:4	<i>Herburger v. Herburger</i> , 144 Or App 89, 925 P2d 103 (1996)
4	4-3	4-3:1	<i>Kelley v. Gibson (In re Wilde)</i> , 184 Or App 343, 56 P3d 925 (2002)
	4-4	N/A	<i>Burk v. Hall (In re Goodwin)</i> , 186 Or App 113, 62 P3d 394, <i>rev. den.</i> , 336 Or 16 (2003)
			<i>Troxel v. Granville</i> , 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000)
	4-8	N/A	<i>Ivers v. Salladay</i> , 253 Or App 195, 289 P3d 334 (2012)
	4-10	4-10:3	<i>In re Guardianship of L.N.P.</i> , 2013 Wy 20, 294 P3d 904 (2013)
		4-10:5	<i>Matter of Guardianship I.L.J.E.</i> , 2018 SD 81, 921 NW2d 463 (2018)
			<i>Matter of Guardianship of L.C.</i> , 28 Wash App 2d 766, 538 P3d 309 (2023)
	4-12	N/A	<i>In the Matter of the Guardianship of Nora Raupers Harris</i> , Jackson County Circuit Court Case No. 13-017-G6

3. All Cases Cited in Bar Book, By Section

The table below is a list of all cases cited in the Oregon State Bar Book, *Guardianships, Conservatorships, and Transfers to Minors in Oregon* (OSB Legal Pubs 2023), organized by where they appear in the bar book. Some cases are cited in multiple sections of the bar book and therefore appear multiple times in this list. Some, but not all, of these cases are cited in this bench book. The purpose of this section of the appendix is to list cases that may be related to the topics covered in this book for ease of further research.

Chapter	Section	Case Citation
1	1.4	<i>Grant v. Johnson</i> , 757 F Supp 1127 (D Or 1991)
		<i>Grimmett v. Brooks</i> , 193 Or App 427, 89 P3d 1238 (2004)
		<i>Haley v. Haley</i> , 215 Or App 36, 168 P3d 305 (2007)
		<i>Lehman v. Bielenberg (In re Stafford)</i> , 257 Or App 501, 307 P3d 478 (2013)
		<i>Schaefer v. Schaefer</i> , 183 Or App 513, 52 P3d 1125 (2002)
		<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)
	1.6	<i>Grimmett v. Brooks</i> , 193 Or App 427, 89 P3d 1238 (2004)
	1.7	<i>Fuentes v. Tillet</i> , 263 Or App 9, 326 P3d 1263 (2014)
		<i>In re English</i> , 14 DB Rptr 159 (2000)
		<i>In re Hartfield</i> , 349 Or 108, 239 P3d 992 (2010)
		<i>Reynolds v. Schrock</i> , 341 Or 338, 142 P3d 1062 (2006)
2	2.2	<i>Brown v. MacDonald & Associates, LLC</i> , 260 Or App 275, 317 P3d 301 (2013)
		<i>Cat Champion Corp. v. Primrose</i> , 210 Or App 206, 149 P3d 1276 (2006)
		<i>Helmig v. Farley, Piazza & Associates</i> , 218 Or App 622, 180 P3d 749, rev. den., 345 Or 301 (2008)
		<i>Schaefer v. Schaefer</i> , 183 Or App 513, 52 P3d 1125 (2002)
	2.3	<i>Department of Human Services v. RMS (In re NN)</i> , 280 Or App 807, 383 P3d 417 (2016)
		<i>Fuentes v. Tillet</i> , 263 Or App 9, 326 P3d 1263 (2014)

Chapter	Section	Case Citation
	2.4	<i>Burk v. Hall (In re Goodwin)</i> , 186 Or App 113, 62 P3d 394, rev. den., 336 Or 16 (2003)
		<i>Cat Champion Corp. v. Primrose</i> , 210 Or App 206, 149 P3d 1276 (2006)
		<i>Helmig v. Farley, Piazza & Associates</i> , 218 Or App 622, 180 P3d 749, rev. den., 345 Or 301 (2008)
		<i>Justice ex rel. Mosiman v. Vercher</i> , 321 Or App 439, 518 P3d 131 (2022), rev. den., 370 Or 789 (2023)
		<i>Kelley v. Gibson (In re Wilde)</i> , 184 Or App 343, 56 P3d 925 (2002)
		<i>State, Long Term Care Ombudsman v. Symons</i> , 264 Or App 769, 333 P3d 1170 (2014)
		<i>Strain v. Rossman</i> , 47 Or App 57, 614 P2d 102, rev. den., 290 Or 149 (1980)
	2.5	<i>Compton v. Compton</i> , 187 Or App 142, 66 P3d 572 (2003)
		<i>Driscoll v. Jewell</i> , 37 Or App 529, 588 P2d 49 (1978)
		<i>Gardner v. Cox (In re Blackman)</i> , 117 Or App 57, 843 P2d 469 (1992)
		<i>Grimmett v. Brooks</i> , 193 Or App 427, 89 P3d 1238 (2004)
		<i>Harrington v. Thomas</i> , 73 Or App 648, 700 P2d 304, rev. den., 300 Or 162 (1985)
		<i>Helmig v. Farley, Piazza & Associates</i> , 218 Or App 622, 180 P3d 749, rev. den., 345 Or 301 (2008)
		<i>Iremonger v. Michelson</i> , 97 Or App 60, 775 P2d 860 (1989)
		<i>Ornduff v. Bjork</i> , 100 Or App 448, 786 P2d 1284 (1990)
		<i>Sheard v. Franks</i> , 60 Or App 65, 652 P2d 849 (1982)
		<i>Smith v. Lovejoy</i> , 26 Or App 1, 552 P2d 606 (1976)
		<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)
		<i>Storms v. Schilling</i> , 25 Or App 209, 548 P2d 529 (1976)
		<i>Windishar v. Windishar</i> , 83 Or App 162, 731 P2d 445 (1986), <i>adh'd to on recons.</i> , 84 Or App 580, 735 P2d 10 (1987)
	2.5	<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)

Chapter	Section	Case Citation
	2.6	<i>Bishop v. Waters</i> , 280 Or App 537, 380 P3d 1114 (2016)
		<i>Church v. Woods</i> , 190 Or App 112, 77 P3d 1150 (2003)
		<i>Herring v. American Medical Response Northwest, Inc.</i> , 255 Or App 317, 297 P3d 9, <i>rev. den.</i> , 353 Or 867 (2013)
	2.7	<i>Van v. Van</i> , 14 Or App 575, 513 P2d 1205 (1973)
	2.8	<i>Schaefer v. Schaefer</i> , 183 Or App 513, 52 P3d 1125 (2002)
		<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)
	2.9	<i>Babbitt v. Babbitt (In re Babbitt-Reynolds)</i> , 226 Or App 452, 204 P3d 799 (2009)
		<i>Brown v. MacDonald & Associates, LLC</i> , 260 Or App 275, 317 P3d 301 (2013)
		<i>Caswell v. Day Law & Associates, P.C. (In re Guardianship & Conservatorship of Lang)</i> , 309 Or App 367, 481 P3d 972 (2021)
		<i>Grimmett v. Brooks</i> , 193 OR App 427, 89 P3d 1238 (2004)
		<i>Haley v. Haley</i> , 215 Or App 36, 168 P3d 305 (2007)
		<i>Helmig v. Farley, Piazza & Associates</i> , 218 Or App 622, 180 P3d 749, <i>rev. den.</i> , 345 Or 301 (2008)
		<i>Herburger v. Herburger</i> , 144 Or App 89, 925 P2d 103 (1996)
		<i>In re Altstatt</i> , 321 Or 324, 897 P2d 1164 (1995), <i>cert. dismissed</i> , 517 US 1129 (1996)
		<i>In re McGraw</i> , 362 Or 667, 414 P3d 841 (2018)
		<i>Middleton v. Chaney</i> , 335 Or 58, 57 P3d 893 (2002)
		<i>Naito v. Naito</i> , 125 Or App 231, 864 P2d 1346 (1993), <i>rev. den.</i> , 318 Or 582 (1994)
		<i>Smith v. Lovejoy</i> , 26 Or App 1, 552 P2d 606 (1976)
		<i>Spady v. Hawkins</i> , 155 Or App 454, 963 P2d 125 (1998)
3	3.2	<i>Alvarez v. Salvation Army</i> , 89 Or App 63, 747 P2d 379 (1987), <i>rev. den.</i> , 305 Or 594 (1988)
		<i>Babbitt v. Babbitt (In re Babbitt-Reynolds)</i> , 226 Or App 452, 204 P3d 799 (2009)

Chapter	Section	Case Citation
		<i>Burk v. Hall (In re Goodwin)</i> , 186 Or App 113, 62 P3d 394, rev. den., 336 Or 16 (2003)
		<i>Cooksey ex rel. Cooksey v. Portland Public School District No. 1</i> , 143 Or App 527, 923 P2d 1328 (1996)
		<i>Everart v. Fischer</i> , 75 Or 316, 147 P 189 (1915)
		<i>Frederiksen v. Ostermeier</i> , 162 Or App 430, 986 P2d 1194 (1999)
		<i>Iremonger v. Michelson</i> , 97 Or App 60, 775 P2d 860 (1989)
		<i>Kelley v. Gibson (In re Wilde)</i> , 184 Or App 343, 56 P3d 925 (2002)
		<i>Lehman v. Bielenberg (In re Stafford)</i> , 257 Or App 501, 307 P3d 478 (2013)
		<i>Luchini v. Harsany</i> , 98 Or App 217, 779 P2d 1053, rev. den., 308 Or 608 (1989)
		<i>Ohio Casualty Insurance Co. v. Mallison</i> , 223 Or 406, 354 P2d 800 (1960)
		<i>Ornduff v. Bjork</i> , 100 Or App 448, 786 P2d 1284 (1990)
		<i>Perez ex rel. Yon v. Bay Area Hospital</i> , 315 Or 474, 846 P2d 405 (1993)
		<i>Schaefer v. Schaefer</i> , 183 Or App 513, 52 P3d 1125 (2002)
		<i>State ex rel. Juvenile Department of Multnomah County v. Smith</i> , 205 Or App 152, 133 P3d 924 (2006)
		<i>State ex rel. Wells v. Stump (In re Guardianship of Messner)</i> , 29 Or App 661, 564 P2d 1088 (1977)
		<i>State, Long Term Care Ombudsman v. Symons</i> , 264 Or App 769, 333 P3d 1170 (2014)
4	3.3	<i>Troxel v. Granville</i> , 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000)
		<i>Wood v. Bettis (In re Estate of Cooper)</i> , 130 Or App 140, 880 P2d 961 (1994)
		<i>Grant v. Johnson</i> , 757 F Supp 1127 (D Or 1991)
4	4.2	<i>Alvarez v. Salvation Army</i> , 89 Or App 63, 747 P2d 379 (1987), rev. den., 305 Or 594 (1988)

Chapter	Section	Case Citation
		<i>Brown v. MacDonald & Associates, LLC</i> , 260 Or App 275, 317 P3d 301
		<i>Crofoot v. Oregon State Bar (In re Estate of Birch)</i> , 54 Or App 151, 634 P2d 284 (1981)
		<i>Dorszynski v. Department of Human Services</i> , 238 Or App 285, 242 P3d 657 (2010)
		<i>Fuentes v. Tillet</i> , 263 Or App 9, 326 P3d 1263 (2014)
		<i>Gardner v. Cox (In re Blackman)</i> , 117 Or App 57, 843 P2d 469 (1992)
		<i>Georgetown Realty, Inc. v. Home Insurance Co.</i> , 313 Or 97, 831 P2d 7, vac'd, 313 Or 297, 832 P2d 1233 (1992)
		<i>Grimmett v. Brooks</i> , 193 Or App 427, 89 P3d 1238 (2004)
		<i>Haley v. Haley</i> , 215 Or App 36, 168 P3d 305 (2007)
		<i>Hansen v. Bussman</i> , 287 Or 527, 601 P2d 794 (1979)
		<i>Harrington v. Thomas</i> , 73 Or App 648, 700 P2d 304, rev. den., 300 Or 162 (1985)
		<i>Helmig v. Farley, Piazza & Associates</i> , 218 Or App 622, 180 P3d 749, rev. den., 345 Or 301 (2008)
		<i>Herburger v. Herburger</i> , 144 Or App 89, 925 P2d 103 (1996)
		<i>In re Hartfield</i> , 349 Or 108, 239 P3d 992 (2010)
		<i>Jones v. Kuhn</i> , 59 Or App 135, 650 P2d 999, rev. den., 294 Or 149 (1982)
		<i>Luchini v. Harsany</i> , 98 Or App 217, 779 P2d 1053, rev. den., 308 Or 608 (1989)
		<i>Sheard v. Franks</i> , 60 Or App 65, 652 P2d 849 (1982)
		<i>State ex rel. Children's Service Division v. Horner (In re Kessell)</i> , 44 Or App 455, 606 P2d 650 (1980)
		<i>Willbanks v. Mars</i> , 37 Or App 795, 588 P2d 118 (1978), rev. den., 285 Or 319 (1979)
		<i>Wood v. Bettis (In re Estate of Cooper)</i> , 130 Or App 140, 880 P2d 961 (1994)

Chapter	Section	Case Citation
	4.3	<i>Cat Champion Corp. v. Primrose</i> , 210 Or App 206, 149 P3d 1276 (2006)
		<i>Connell v. Franklin</i> , 120 Or App 414, 852 P2d 924, <i>adh'd to as modified on recons.</i> , 123 Or App 68, 858 P2d 911 (1993), <i>rev. den.</i> , 318 Or 381 (1994)
	5.3	<i>Ivers v. Salladay</i> , 253 Or App 195, 289 P3d 334 (2012)

A-2: Selected Case Summaries

Van v. Van, 14 Or App 575, 513 P2d 1205 (1973)

An allegedly incapacitated person's children filed for a permanent guardianship citing chronic alcoholism as the basis for incompetency, and the trial court granted the request. The decision was reversed. A person is presumed competent, and evidence of chronic alcoholism alone does not overcome that presumption. No hospital records or medical testimony were provided to support a finding of chronic alcoholism, and even if there were, evidence is needed to show that the respondent is unable to manage their property or take care of themselves to the extent that a guardian should be appointed.

Spady v. Hawkins, 155 Or App 454, 963 P2d 125 (1998)

A protected person's mother filed a petition and gave notice to be appointed their temporary and permanent guardian. The mother was appointed temporary guardian, but at the hearing on her appointment as permanent guardian, having reviewed the visitor's report and objection from the protected person, mother withdrew her request to be permanent guardian and asked that the protected person's brother be appointed instead. The trial court granted the request. The petition and notice given to the protected person did not state the brother as the proposed guardian or give information about his ability or willingness to serve as a guardian as statutorily required by ORS 125.055 and 125.070. The protected person was deprived of their right to notice and an opportunity to be heard, so the appointment of the brother as permanent guardian was reversed.

Matthews v. Eldridge, 424 US 319, 96 S Ct 893 (1976)

The Social Security Administration made a final determination to terminate the respondent's benefits after the respondent disputed the initial determination. Instead of requesting reconsideration of the initial determination as per the agency's administrative procedure, the respondent challenged the validity of the procedure in court, asserting that an evidentiary hearing is required to comport with the Due Process Clause of the U.S. Constitution. The U.S. Supreme Court disagreed and held that to satisfy procedural due process in the face of final deprivation of a property interest, the procedures must be tailored to ensure those effected are given a meaningful opportunity to present their case. An evidentiary hearing is not always required.

Cat Champion Corp. v. Primrose, 210 Or App 206, 149 P3d 1276 (2006)

A cat rescue organization petitioned for a limited protective order and appointment as fiduciary for the purpose of placing the owner's cats in adoptive homes. The cats were given to the organization by local law enforcement after the cat's owner was charged with animal neglect. The charges were dismissed after the owner was found unable to aid and assist in her defense, so she remained their owner. The organization believed the owner could not care for the cats, but they could not place the owner's cats in adoptive homes without a court order. The trial court did not believe it had authority to grant such an order. If grounds exist under ORS 125.650 to appoint a fiduciary, one may be appointed for the purpose of implementing a protective order, and such an order can be for any power that would normally be exercised by a fiduciary.

The organization sought to manage personal property (cats), a conservator power, and as the statutory requirements of a conservatorship under ORS 125.400 were met, the court may grant the organization any power typical of a conservator under ORS 125.445, which includes disposing of estate assets. Therefore, the court has authority to enter a limited protective order allowing the disposal of assets (the adoption or placement of the cats) and appoint the organization as a conservator for the purpose of implementing the order.

Grimmett v. Brooks, 193 Or App 427, 89 P3d 1238 (2004)

The goddaughter of a protected person initially filed a petition for guardianship, but later amended the petition to request appointment as conservator. The court granted the request over the protected person's objection. The original petition for guardianship and the amended petition for conservatorship together met the statutory requirements of ORS 125.055, even if the amended petition did not satisfy all the requirements on its own. The protected person was properly found to be financially incapable based on the testimony from the protected person, her friend, her residential facility staff, her financial manager, the conservator, and letters from physicians.

The protected person objected to the goddaughter as fiduciary and had recently removed her as a beneficiary in her will, replaced her as trustee in her living trust, and revoked her power of attorney. ORS 15.200 requires only that a court consider a protected person's wishes as to who is appointed as fiduciary. The protected person's objection alone does not prevent an appointment, and the goddaughter was otherwise a suitable fiduciary. Further, a court cannot appoint a person as conservator unless that person petitions or cross-petitions for appointment, and the goddaughter was the only person requesting appointment. Finally, the goddaughter did not breach her duty as fiduciary when she accepted a transfer of stock from the protected person prior to the protective proceeding because it was found to be intended as a gift and the protected person did not claim to be incompetent to make the gift at the time.

In re Hartfield, 349 Or 108, 239 P3d 992 (2010)

A lawyer cannot engage in conduct that is prejudicial to the administration of justice. Prejudicial conduct occurs when a lawyer's act(s) causes substantial harm to the administration of justice. It was prejudicial to the administration of justice for a lawyer to repeatedly fail to appear for scheduled court hearings and fail to file an inventory or accounting in a conservatorship case because it unreasonably prolonged the proceeding and resulted in additional attorney fees when the lawyer was replaced.

Helmig v. Farley, Piazza & Associates, 218 Or App 622, 180 P3d 749 (2008)

A professional fiduciary was appointed as conservator for a protected person whose assets were in a revocable living trust. The protected person, prior to her death, appealed on the basis that her trust controls how her assets should be handled in the event of incapacity and should therefore be controlling. The appeal was not made moot by her death, as the conservator is only discharged by an order of the court after a final report or accounting has been approved. A professional fiduciary has standing under ORS 125.010 to file a petition for the appointment of a fiduciary as a person interested in the affairs or welfare of the protected person. The protected person owned her trust and was a beneficiary, and the trust defined incapacity and named a successor trustee, but that does not preclude a protective proceeding from being filed or heard. The protected person's beneficiary interest was not properly managed, as evidenced by a failure to pay her rent and phone bill. Additionally, the protected person's desire for privacy does not preclude the appointment of a professional fiduciary whom she did not know prior.

Schaefer v. Schaefer, 183 Or App 513, 517, 52 P3d 1125 (2002)

The alleged incapacitated person's son was appointed her guardian over her objection, and that decision was reversed because there was not sufficient evidence that she was incapacitated. Someone who is physically deteriorating or struggling to process information is not incapacitated under ORS 125.005 if the person can still take care of themselves. Persistent cat urine smell in the home, suicidal ideation that was not likely to result in suicide, and refusal to take prescribed medications are not sufficient to overcome the presumption of competency. There must be a nexus between the alleged actions and an impaired ability to receive and evaluate information effectively or communicate decisions to establish incompetency.

Matter of Guardianship I.L.J.E., 2018 S.D. 81, 921 N.W.2d 463 (2018)

A maternal uncle and his wife petitioned to be appointed guardians for a minor child who was enrolled in an Indian tribe. The child's father, who was incarcerated for manslaughter after killing the child's mother, objected and asked for his Indian sister to be appointed guardian. The Indian Child Welfare Act (ICWA) applied, and though the child's tribe intervened, they did not object to the maternal uncle as guardian. The trial court granted the maternal uncle guardianship, and father appealed.

The appointment was upheld because extended family members are the first placement preference under the ICWA, and the maternal uncle and his wife were extended family

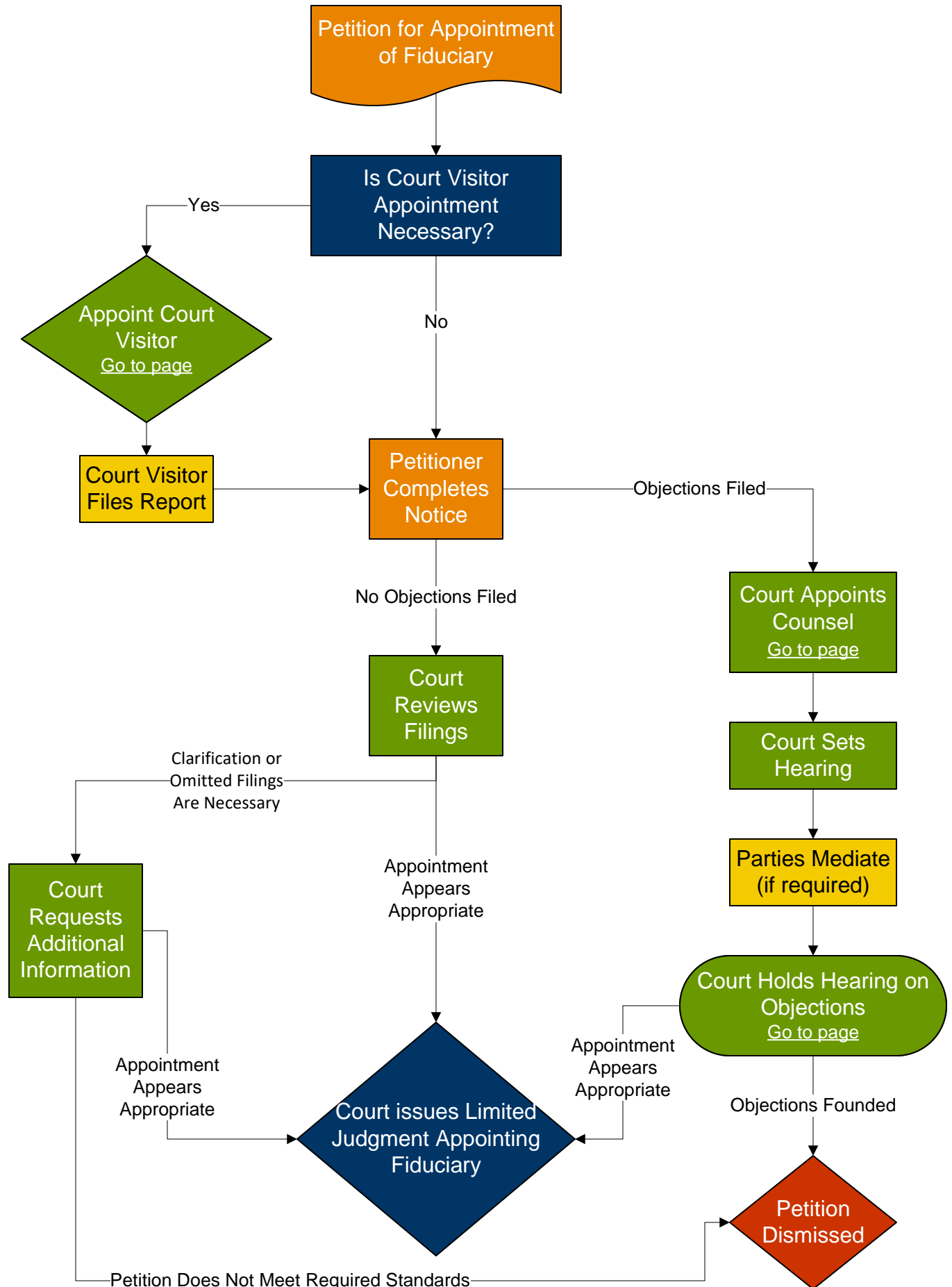
of the child. Additionally, the qualified expert witness testified that ICWA preferences do not depend on Indian blood. Finally, though the maternal uncle had not yet taken action to understand the tribal culture of the child, they were willing and able to do so and would promote the child's tribal connections, including with his maternal aunt.

Appendix B: Flowcharts for Case Steps and Important Options

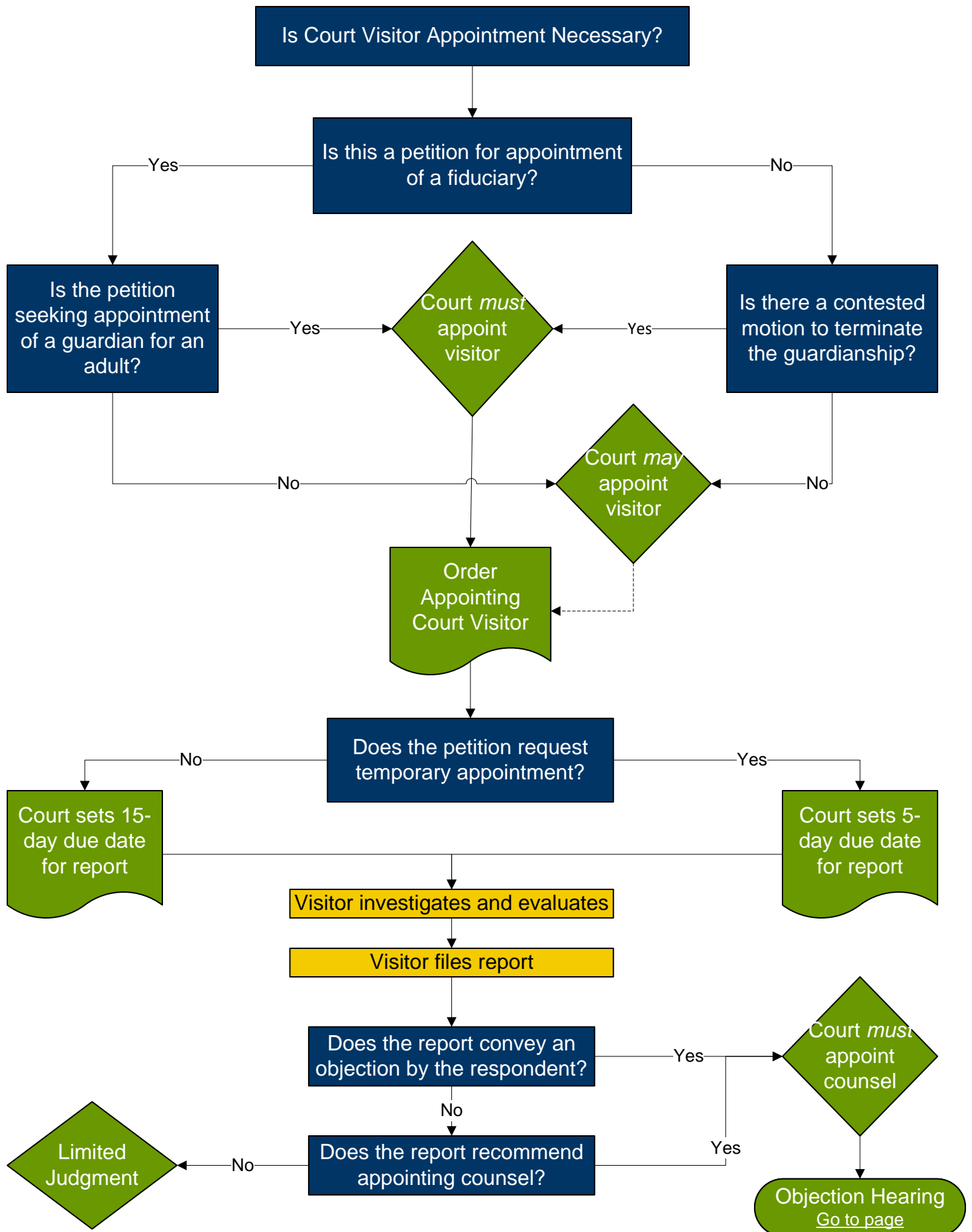
The flowcharts provided in this appendix appear in the following order:

- (1) Overview
- (2) Court Visitors
- (3) Notice Requirements for Appointment of Fiduciary
- (4) Appointment of Counsel
- (5) Objections and Hearings
- (6) Post-Appointment Process

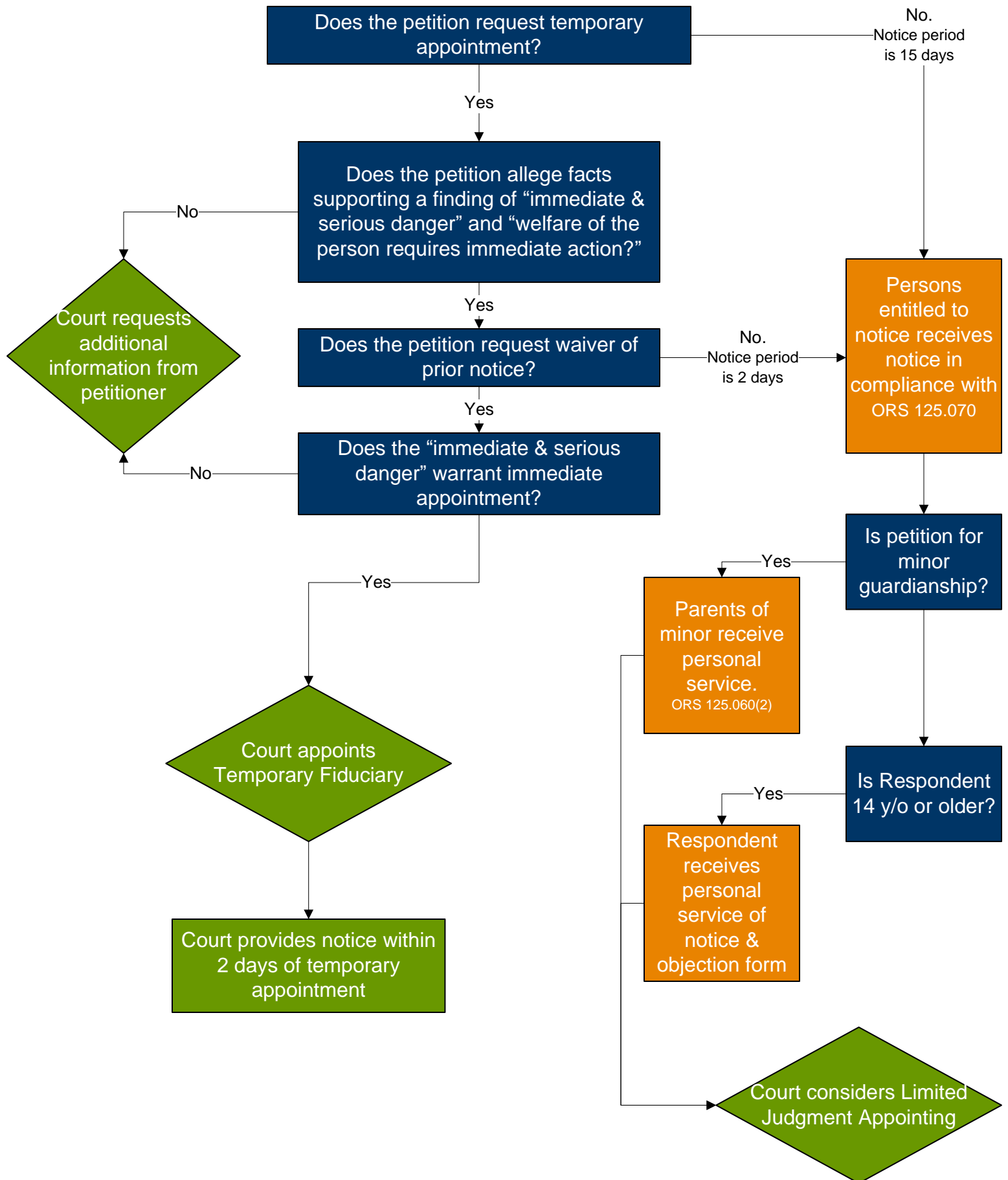
Protective Proceedings: Overview



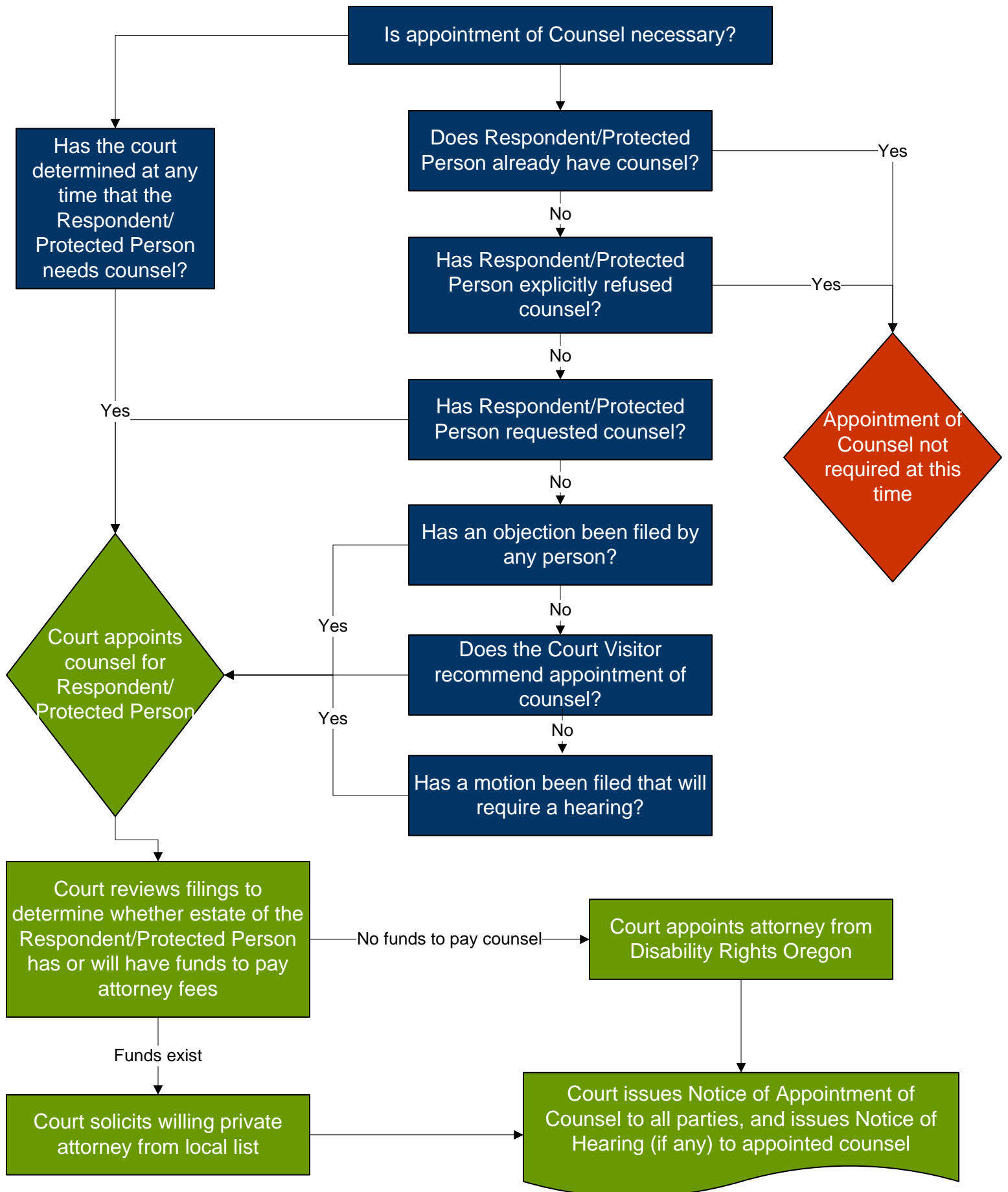
Protective Proceedings: Court Visitors



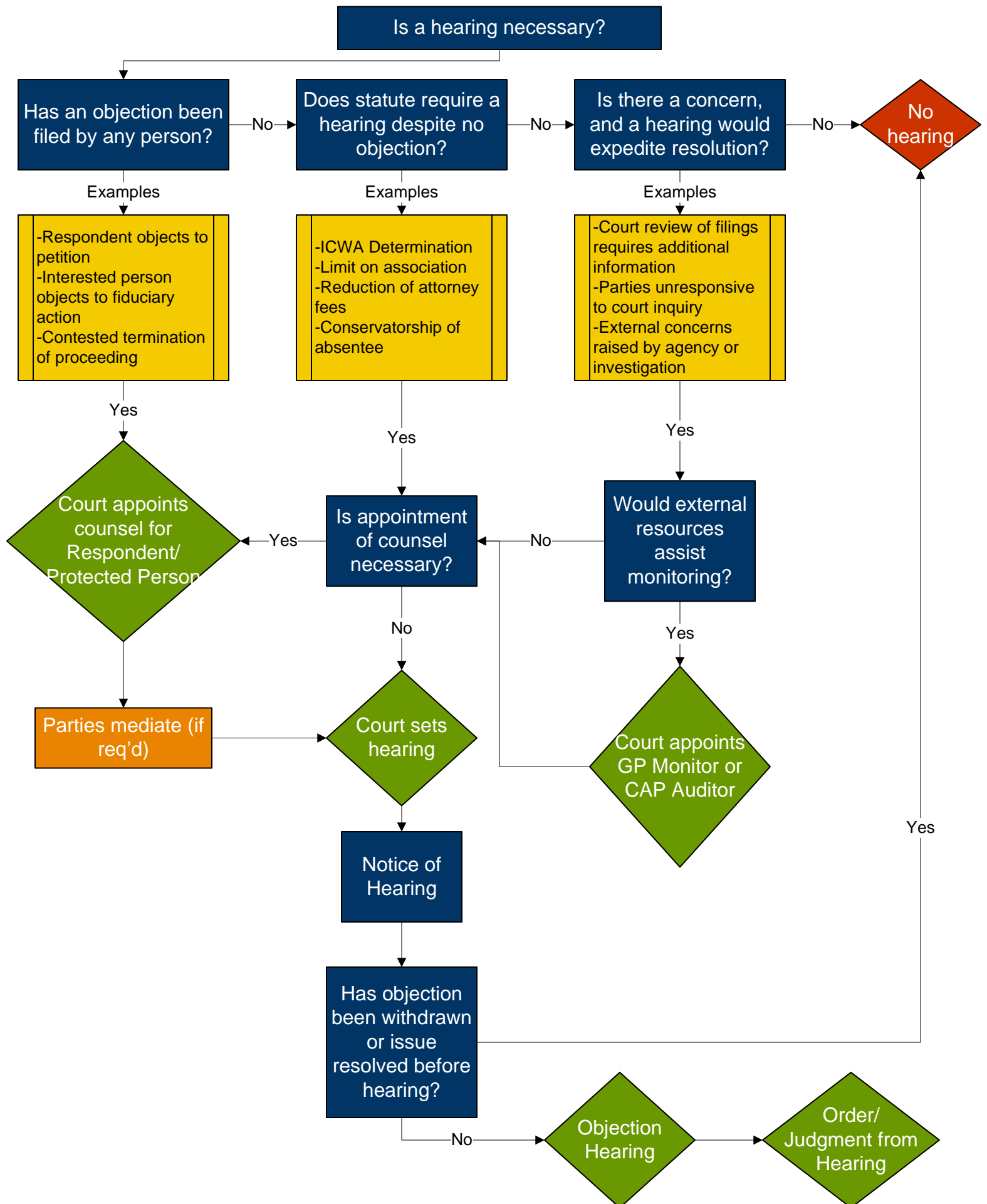
Protective Proceedings: Notice Requirements for Appointment of Fiduciary



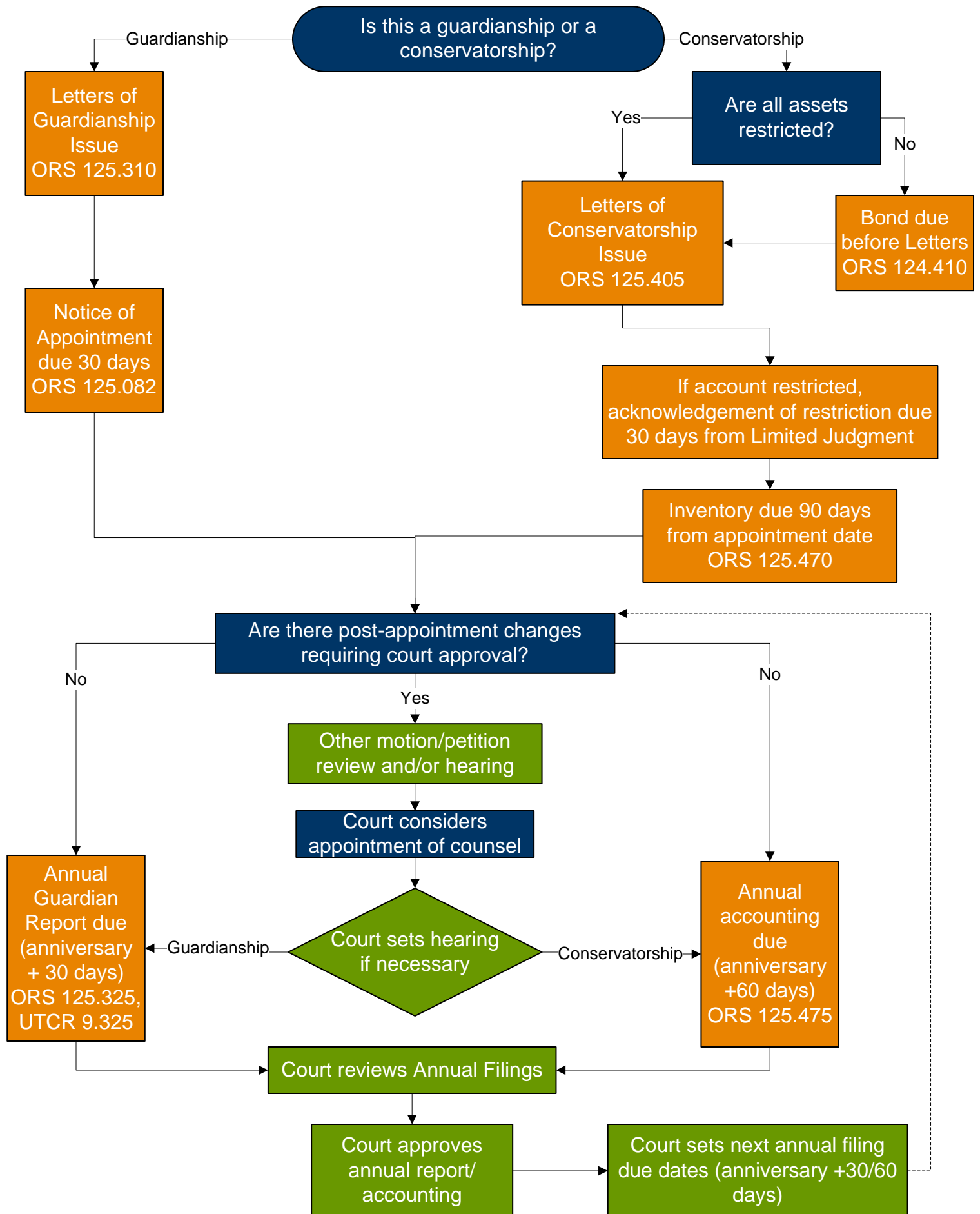
Protective Proceedings: Appointment of Counsel



Protective Proceedings: Objections and Hearings



Protective Proceedings: Post-Appointment Process



Appendix C: Forms

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

- (1) [Notice to Respondent Template](#)
- (2) [Order Appointing Court Visitor Template](#)
- (3) [Respondent's Objection Form](#)
- (4) [Oral Objection Reduced to Writing Template](#)
- (5) [Guardian's Annual Report – Adult Form](#)
- (6) [Annual Report of Restricted Funds Form \(for Conservatorships\)](#)

NOTICE TO RESPONDENT

To: Respondent _____:

_____, Petitioner, who is your _____ (relationship to respondent), or that is an agency or business that provides guardianship services, has asked a judge for the power to make decisions for you. The judge has been asked to give this person, agency or business the authority to make the following decisions for you (mark the appropriate spaces):

___ Medical and health care decisions, including decisions on which doctors you will see and what medications and treatments you will receive.

___ Residential decisions, including decisions on whether you can stay where you are currently living or be moved to another place.

___ Financial decisions, including decisions on paying your bills and decisions about how your money is spent.

___ Other decisions: _____

YOUR MONEY MAY BE USED IF THE JUDGE APPOINTS A GUARDIAN FOR YOU. YOU MAY BE ASKED TO PAY FOR THE TIME AND EXPENSES OF THE GUARDIAN, THE TIME AND EXPENSES OF THE PETITIONER'S ATTORNEY, THE TIME AND EXPENSES OF YOUR ATTORNEY, FILING FEES AND OTHER COSTS.

YOU MUST TELL SOMEONE AT THE COURTHOUSE BEFORE _____ (DATE) IF YOU OPPOSE HAVING SOMEONE ELSE MAKE THESE DECISIONS FOR YOU.

OBJECTIONS:

You can write to the judge if you do not want someone else making decisions for you. The judge's address is: _____.

You have the right to object to the appointment of a guardian by saying you want to continue to make your own decisions. If you do not want another person, agency or business making decisions for you, you can object. If you do not want _____ (Proposed Guardian) to make these decisions for you, you can object. If you do not want your money to be used to pay for these expenses, you can object.

You can object any time after the judge has appointed a guardian. You can ask the judge at any time to limit the kinds of decisions that the guardian makes for you so that you can make more decisions for yourself. You can also ask the judge at any time to end the guardianship.

THE HEARING:

The judge will hold a hearing if you do not want a guardian, do not want this particular person to act as your guardian or do not want your money used this way. At the hearing, the judge will listen to what you and others have to say about whether you need someone else to make decisions for you, who that person should be and whether your money should be spent on these things. You can have your witnesses tell the judge why you do not need a guardian and you can bring in records and other information about why you think that you do not need a guardian. You can ask your witnesses questions and other witnesses questions.

THE COURT VISITOR:

The judge will appoint someone to investigate whether you need a guardian to make decisions for you. This person is called a “visitor.” The visitor works for the judge and does not work for the person who filed the petition asking the judge to appoint a guardian for you, for you or for any other party. The visitor will come and talk to you about the guardianship process, about whether you think that you need a guardian and about who you would want to be your guardian if the judge decides that you need a guardian. The visitor will talk to other people who have information about whether you need a guardian. The visitor will make a report to the judge about whether what the petition says is true, whether the visitor thinks that you need a guardian, whether the person proposed as your guardian is able and willing to be your guardian, who would be the best guardian for you and what decisions the guardian should make for you. If there is a hearing about whether to appoint a guardian for you, the visitor will be in court to testify.

You can tell the visitor if you don’t want someone else making decisions for you when the visitor comes to talk with you about this matter.

LEGAL SERVICES:

You can call a lawyer if you don’t want someone else making decisions for you. If you don’t have a lawyer, you can ask the judge whether a lawyer can be appointed for you.

There may be free or low-cost legal services or other relevant services in your local area that may be helpful to you in the guardianship proceeding. For information about these services, you can call the following telephone numbers _____ and ask to talk to people who can help you find legal services or other types of services.

OBJECTION FORM:

You can mark the blue sheet (Respondent’s Objection) that is attached to this form if you do not want someone else to make your decisions for you. You can give the blue sheet to the visitor when the visitor comes to talk with you about this, you can show it to your attorney or you can mail it to the judge.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____
[Court Address]

In the Matter of the _____ **Case No:** _____
of:

**ORDER APPOINTING
COURT VISITOR**

The court finds that _____ is qualified and willing to serve as Court Visitor in this matter under ORS 125.150.

_____ is appointed Court Visitor in this proceeding.

The court orders that _____:

- 1) Must personally interview _____ and all persons nominated or appointed to act as fiduciaries in this matter according to ORS 125.150.
- 2) Must investigate all matters necessary under ORS 125.150.
- 3) Must file a Visitor's Report with this court within _____ **days** of this Order as required by ORS _____.
- 4) May interview any physician or psychologist who has examined the respondent or protected person, the person or officer of the institution having the care, custody or control of the respondent or protected person, and any other person who may have relevant information, subject to any law relating to confidentiality.
- 5) May interview any person who may have information relevant to this proceeding.

The Court Visitor is to be paid _____ by _____ by _____. If necessary, additional fees will be considered when the Court Visitor's report is approved by the court.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____
Probate Department

In the Matter of _____) Case No. _____
the [Guardianship /)
Conservatorship] of) RESPONDENT'S
) OBJECTION
)
_____,)
)
Respondent.)

I object to the petition for the following reasons:

_____ I do not want anyone else making any of my decisions for me.
_____ I do not want _____ making any decisions for me.
_____ I do not want _____ to make the following decisions for me:

_____.

DATED: _____, 20 ____.

/s/ _____
[respondent's name]

GIVE TO THE VISITOR OR MAIL TO:

In the Matter of _____)
 _____) Case No. _____
 _____)
 _____) **ORAL OBJECTION REDUCED TO**
 _____) **WRITING**
 _____)

[illegible]

Objector's Signature

Printed Name

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____

In the Matter of:

Case No: _____

GUARDIAN'S ANNUAL REPORT

Protected Person

☐ FINAL REPORT

Guardian's Information:

Name: _____

Address: _____

Phone: _____

Information regarding Protected Person since the last report:

1. Protected Person's current residence:

a. Name (if applicable): _____

b. Address: _____

c. Type of facility or residence: _____

d. Name of the person at the residence who is primarily responsible for care of
Protected Person: _____

e. Name and address of any hospital or other institution where Protected Person is
now admitted on a temporary or permanent basis:

2. Protected Person is currently engaged in the following programs and activities and
receiving the following services:

3. I made the following contacts with Protected Person during the past year (*date and
description*):

4. Protected Person's physical condition is (brief description):

5. Protected Person's mental condition is (brief description):

6. Specific facts that support the conclusion that Protected Person is incapacitated include: _

7. I was paid for providing the following items of lodging, food, or other services to Protected Person:

8. I made the following major decisions on behalf of Protected Person during the past year:

9. I limited Protected Person's association with the following persons:
(List the names of any restricted contacts and describe the limitations)

10. Finances - Money received or spent **on behalf of** Protected Person
(please attach an itemized account for any amounts received or spent)

a. At the time of my last report I held \$ _____ on behalf of Protected Person

b. I received the following amount of money: _____

c. I spent the following amount of money: _____

d. I now hold the following amount of money: _____

11. ☐ I, or other members of my household, have been convicted of the following crimes (**not** including traffic violations): (*include the name of the applicable person*): _____

12. ☐ I have filed for or received bankruptcy protection from creditors (*explain*): _____

13. ☐ I have had a professional or occupational license revoked or suspended (*explain*): _____

14. ☐ I have had my driver's license revoked or suspended (*explain*): _____

15. ☐ I was removed as a guardian, conservator, or trustee in another case (*case number and description of removal*): _____

16. ☐ I have delegated powers over Protected Person as follows:
a. To (*name*): _____
b. Powers delegated: _____
c. For how long: _____

I believe the guardianship ☐ should ☐ should not continue because: _____

- ☐ I have given or will give a copy of this report to all required parties listed in ORS 125.060(3):
- Protected Person (if 14 years of age or older)
 - Any person who has filed a request for notice in this case
 - Any fiduciary who has been appointed for Protected Person
 - If Protected Person is receiving money paid or payable by the United States through the Department of Veterans Affairs (DVA), a representative of the DVA regional office that has responsibility for the payments to Protected Person
 - If Protected Person is committed to the legal and physical custody of the Department of Corrections, the Attorney General and the superintendent or other officer in charge of the facility where Protected Person is confined

- Any other person the court requires

**I hereby declare that the above statements are true to the best of my knowledge and belief.
I understand they are made for use in court and I am subject to penalty for perjury.**

Date

Signature

Name (printed)

Co-guardian:

Date

Signature

Name (printed)

Address

City, State, ZIP

Phone

NOTICE: Any person interested in the affairs or welfare of the protected person who is the subject of this report who has concerns about this report or the guardian's performance may contact the court as follows:

COURT INFORMATION: (*GUARDIAN: You must complete the information below*)

County Name:	
Court Address:	
Court Phone:	

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____
Probate Department

In the Matter of the Conservatorship)	
)	Case No. _____
)	
Of:)	
)	ANNUAL REPORT OF
)	RESTRICTED FUNDS
_____)	
(Enter Name of Protected Person or Minor))	
)	
Birth Date of Protected Person _____)	

Pursuant to ORS 125.475, the undersigned reports to the Court as follows:

1. My name is _____

2. My residence address and telephone number are: _____

Phone: _____

3. The name (if applicable), and address of the place where the protected person now resides

is: _____

4. A brief description of major decisions made on the protected person's behalf during the past year: _____

5. FUNDS HELD IN RESTRICTED ACCOUNTS TOTAL VALUE \$ _____

NAME OF INSTITUTION WHERE RESTRICTED FUNDS ARE HELD _____

**ENCLOSED ARE COPIES OF THE BANK STATEMENTS WITHIN 30 DAYS OF THE
ENDING DATE OF THIS ACCOUNTING AND CONFIRMING THE BALANCE ON
HAND**

6. I HEREBY CERTIFY THAT SINCE MY LAST REPORT: (All questions MUST be completed)

I have been convicted of the following crimes (not including traffic infractions): (If none, so state)

A. I have filed for or received protection from creditors under the Federal Bankruptcy code:

No _____ If Yes, Bankruptcy Case No. _____

I have had a professional or occupational license revoked or suspended:

No ____ Yes ____ Explain: _____

I have had my driver's license revoked or suspended: No _____ Yes _____

7. REQUEST FOR RELEASE OF RESTRICTED ASSETS (If applicable)

_____ The conservator herewith petitions the court for the release of the amount of \$ _____ from restricted conservatorship assets for the following purpose:

8. **I HEREBY CERTIFY THAT A TRUE COPY OF THIS REPORT HAS BEEN GIVEN OR MAILED TO THE PROTECTED PERSON OR MINOR (IF 14 YEARS OF AGE OR OLDER) AND ANY OTHER PERSON WHO IS ENTITLED TO OR HAS REQUESTED NOTICE AS FOLLOWS:**

<u>PERSON</u>	<u>By Personal Service or by Mail at:</u>	<u>Date served/mailed</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED: _____

SIGNATURE OF CONSERVATOR

FOR COURT USE ONLY:

APPROVED: _____

Appendix D: Checklists and Guides

The checklists and guides provided in this appendix appear in the following order:

- (1) [Guardianship Petition Checklist – Adult](#)
- (2) [Guardianship Petition Checklist – Minor](#)
- (3) [Conservatorship Petition Checklist](#)
- (4) [Guardianship and Conservatorship Petition Checklist](#)
- (5) [Notice Checklist](#)
- (6) [Due Date Cheat Sheet](#)
- (7) [Interstate Transfer Steps](#)
- (8) Juvenile and Family Court Programs Division's Protective Proceeding Bench Cards on Objections:
 - (a) Objection to Appointment of a Fiduciary for an Adult/Vulnerable Youth
 - (b) Objection to Appointment of a Fiduciary for a Minor
 - (c) Objection to Attorney or Fiduciary Fees
 - (d) Miscellaneous Objections in Protective Proceedings

GUARDIANSHIP – ADULT

Name of Protected Person: _____ Age: _____ Case Number: _____ PR _____

_____ Venue [ORS 125.020] _____ Odyssey/OECI name search (recommended) _____ Add event if over 65

_____ Petition (Needs to state the type of appointment in the caption): [ORS 125.055]

___ Respondent's information (name, age, residence address & current location) [(2)(a)]

___ Proposed guardian information (relationship to respondent, name, age, address) [(2)(c)]

___ If fiduciary is not the petitioner, statement of fiduciary regarding willingness to serve [(2)(f)]

___ If a professional, must submit disclosure statement and information under ORS 125.240

___ If fiduciary is not the petitioner, name, age, address and interest of petitioner [(2)(b), (c)]

___ A statement whether proposed GRD has been convicted of a crime, has filed for/received bankruptcy protection, lost an occupational license, was removed as a fiduciary, or was surcharged for loss- **if yes**, explanation [(2)(d),(e)]

___ Name and address of any fiduciary that has been appointed by any Court, any Trustee for an established or testamentary Trust, any appointed health care representative and any person acting as attorney-in-fact under a POA [(2)(g)]

___ Name and address of the respondent's treating physician and care providers [(2)(h)]

___ **Factual information supporting the request, less restrictive means considered**, and names/addresses of all persons with information regarding incapacity [(2)(i)]

Assets: _____ [125.055(2)(k)]

___ Statement of intent regarding placement [(2)(j)]

Income: _____ [125.055(2)(k)]

___ Statement that indicates whether Petitioner is requesting **plenary authority or specified limited authority** [(2)(m)]

___ Statement regarding fiduciary as public or private agency providing services to respondent or employee of such [(2)(L)]

___ Statement whether guardian will exercise any control over the estate of the respondent. [125.055(3)(a)] If **YES**:

___ Monthly income listed

___ Sources of respondent's income

___ Amount of money guardian will be holding at time of appointment

___ If GRD intends to provide room/board to PPR and charge them for the service, **require** budget and order [125.320(2)]

BEFORE APPOINTMENT:

___ Notices sent/served: [ORS 125.065 (who), ORS 125.060 (how)]. Contents of Notice (ORS 125.070)

___ **Respondent (personal service required, cannot waive notice)** [(2)(a), (9)]

___ Spouse of respondent [(2)(b)] Name: _____

___ Parents of respondent [(2)(b)] Names: _____

___ Adult children of respondent [(2)(b)] Names: _____

___ If none of above family, to person(s) most closely related [(2)(c)] Names: _____

___ Anyone co-habiting with Respondent who is interested [(2)(d)] Names: _____

___ Any person who has requested notice [(3)(b)] Names: _____

___ Any nominated/appointed fiduciary, trustee, POA [(2)(e)] Names: _____

___ Veterans Affairs if benefits [(2)(h)] _____ DHS if benefits [(2)(i)] _____ OHA if OHP [(2)(j)]

___ Any attorney who is representing the respondent in any capacity [(7)(a)] _____ DOC/AG if in custody [(2)(k)]

___ OLTCO if RSP is placed or will be placed in nursing home or residential care facility [(7)(b)]

___ If RSP is placed or will be placed, the system described in ORS 192.517 (Disability Rights Oregon) [(7)(c)]

___ ICWA [125.025(2)] _____ If a foreign national, to the consulate [(2)(L)]

___ Court Visitor Order Visitor Name: _____ Visitor Report: _____

___ 15 day notice period exp. [ORS 125.065(3)] OR _____ 2-day notice period exp. [ORS 125.605(2)]

___ If fiduciary is not the petitioner, signed acceptance of appointment by fiduciary [125.215(1)]

___ Limited Judgment appointing contains findings and complies with UTCR 2.010(12) and UTCR 9.030

NOTES: _____

Date of Initial Review: _____ By: _____ (Initials)

Revised 5/25/22

GUARDIANSHIP – MINOR

Name of Protected Person: _____ Age: _____ Case Number: _____ PR _____

_____ Venue [ORS 125.020] _____ Odyssey/OECI name search (recommended) Set date for majority

_____ Petition (Needs to state the type of appointment in the caption): [ORS 125.055]

_____ Respondent's information (name, age, residence address & current location) [(2)(a)]

_____ Proposed guardian information (relationship to respondent, name, age, address) [(2)(c)]

_____ If fiduciary is not the petitioner, statement of fiduciary regarding willingness to serve [(2)(f)]

_____ If a professional, must submit disclosure statement and information under ORS 125.240

_____ If fiduciary is not the petitioner, name, age, address and interest of petitioner [(2)(b), (c)]

_____ A statement whether proposed GRD has been convicted of a crime, has filed for/received bankruptcy protection, lost an occupational license, was removed as a fiduciary, or was surcharged for loss- **if yes**, explanation [(2)(d),(e)]

_____ Name and address of any fiduciary that has been appointed by any Court, any Trustee for an established or testamentary Trust, any appointed health care representative and any person acting as attorney-in-fact under a POA [(2)(g)]

_____ Name and address of the respondent's treating physician and care providers [(2)(h)] _____ **UCCJEA info**

_____ **Factual information supporting the request, less restrictive means considered**, and names/addresses of all persons with information regarding incapacity [(2)(i)]

Assets: _____ [125.055(2)(k)]

_____ Statement of intent regarding placement [(2)(j)]

Income: _____ [125.055(2)(k)]

_____ Statement that indicates whether Petitioner is requesting **plenary authority or specified limited authority** [(2)(m)]

_____ Statement regarding fiduciary as public or private agency providing services to respondent or employee of such [(2)(L)]

_____ Statement whether guardian will exercise any control over the estate of the respondent. [125.055(3)(a)] If **YES**:

_____ Monthly income listed

_____ Sources of respondent's income

_____ Amount of money guardian will be holding at time of appointment

_____ If GRD intends to provide room/board to PPR and charge them for the service, **require** budget and order [125.320(2)]

BEFORE APPOINTMENT:

_____ Notices sent/served: [ORS 125.065 (who), ORS 125.060 (how)] Contents of Notice (ORS 125.070)

_____ **Respondent, if 14 or older (personal service required, cannot waive notice)** [(2)(a), (9)]

_____ Parents of respondent (incl. alleged parents if minor) [(2)(b)] Names: _____

_____ If none of above family, to person(s) most closely related [(2)(c)] Names: _____

_____ Anyone co-habiting with Respondent who is interested [(2)(d)] Names: _____

_____ Anyone with care/custody in last 60 days (if minor) [(2)(f)] Name: _____

_____ Any person who has requested notice [(3)(b)] Names: _____

_____ Any nominated/appointed fiduciary, trustee, POA [(2)(e)] Names: _____

_____ If no living parents *for minor*, any nominated fiduciary in Will or writing [(2)(g)] Names: _____

_____ Veterans Affairs if benefits [(2)(h)] _____ DHS if benefits [(2)(i)] _____ OHA if OHP [(2)(j)]

_____ Any attorney who is representing the respondent in any capacity [(7)(a)] _____ DOC/AG if in custody [(2)(k)]

_____ If RSP is placed or will be placed, the system described in ORS 192.517 (Disability Rights Oregon) [(7)(c)]

_____ ICWA [125.025(2)] _____ If a foreign national, to the consulate [(2)(L)]

_____ Court Visitor Order (if necessary) Visitor Name: _____ Visitor Report: _____

_____ 21 day notice period exp. [ORS 125.065(3)] OR _____ 2-day notice period exp. [ORS 125.605(2)]

_____ If fiduciary is not the petitioner, signed acceptance of appointment by fiduciary [125.215(1)]

_____ Limited Judgment appointing contains findings and complies with UTCR 2.010(12) and UTCR 9.030

NOTES: _____

Date of Initial Review: _____ By: _____ (Initials)

Revised 5/25/22

CONSERVATORSHIP

Name of Protected Person: _____ Age: _____ Case Number: __PR_____

_____ Venue [ORS 125.020] _____ Odyssey/OECI name search (recommended) _____ Add event if over 65

_____ Petition (Needs to state the type of appointment in the caption): [ORS 125.055]

___ Respondent's information (name, age, residence address & current location) [(2)(a)]

___ Proposed conservator information (relationship to respondent, name, age, address) [(2)(c)]

___ If fiduciary is not the petitioner, statement of fiduciary regarding willingness to serve [(2)(f)]

___ If a professional, must submit disclosure statement and information under ORS 125.240

___ If fiduciary is not the petitioner, name, age, address and *interest* of petitioner [(2)(b), (c)]

___ A statement whether proposed CSVR has been convicted of a crime, has filed for/received bankruptcy protection, lost an occupational license, was removed as a fiduciary, or was surcharged for loss- **if yes**, explanation [(2)(d),(e)]

___ Name and address of any fiduciary that has been appointed by any Court, any Trustee for an established or testamentary Trust, any appointed health care representative and any person acting as attorney-in-fact under a POA [(2)(g)]

___ Name and address of the respondent's treating physician and care providers [(2)(h)]

___ **Factual information supporting the request, less restrictive means considered**, and names/addresses of all persons with information regarding incapacity [(2)(i)]

Assets: _____ [125.055(2)(k)]

___ Statement of intent regarding placement [(2)(j)]

Income: _____ [125.055(2)(k)]

___ Petitioner's estimate of the value of the estate [ORS 125.055(4)]

___ Statement that indicates whether Petitioner is requesting **plenary authority or specified limited authority** [(2)(m)]

___ Statement regarding fiduciary as public or private agency providing services to respondent or employee of such [(2)(L)]

___ **Bond amount:** \$ _____ (unrestricted assets + annual income) Restriction of assets? _____

___ If funds restricted, JGLM must state that AKRA to be filed w/in 30 days. [UTCR 9.050]

___ If purpose of pet. is claim/settlement & no bond requested, JGLM must require court to review/approve settlement

___ Settlement of personal injury claim must comply with UTCR 9.040

___ Notices sent/served: [ORS125.065 (how), ORS 125.060 (who)]. Contents of Notice (ORS 125.070)

___ **Respondent, if 14 or older (personal service required, cannot waive notice)** [(2)(a), (9)]

___ Spouse of respondent [(2)(b)] Name: _____

___ Parents of respondent (incl. alleged parents if minor) [(2)(b)] Names: _____

___ Adult children of respondent [(2)(b)] Names: _____

___ If none of above family, to person(s) most closely related [(2)(c)] Names: _____

___ Anyone co-habiting with Respondent who is interested [(2)(d)] Names: _____

___ Anyone with care/custody in last 60 days (if minor) [(2)(f)] Name: _____

___ Any person who has requested notice [(3)(b)] Names: _____

___ Any nominated/appointed fiduciary, trustee, POA [(2)(e)] Names: _____

___ If no living parents *for minor*, any nominated fiduciary in Will or writing [(2)(g)] Names: _____

___ Veterans Affairs if benefits [(2)(h)] _____ DHS if benefits [(2)(i)] _____ OHA if OHP [(2)(j)]

___ DOC/AG if in custody [(2)(k)] _____ ICWA [125.025(2)] _____ If a foreign national, to the consulate [(2)(L)]

_____ 15 or 21 day notice period exp. [ORS 125.065(3)] OR _____ 2-day notice period exp. [ORS 125.605(2)]

_____ If fiduciary is not the petitioner, signed acceptance of appointment by fiduciary [125.215(1)]

_____ Limited Judgment appointing ***contains findings*** and complies with UTCR 2.010(12) and UTCR 9.030

NOTES: _____

Date of Initial Review: _____ By: _____ (Initials)

Revised 2/22/23

GUARDIANSHIP AND CONSERVATORSHIP

Name of Protected Person: _____ Age: _____ Case Number: _____ PR _____

_____ Venue [ORS 125.020] _____ Odyssey/OECI name search (recommended) _____ Add event if over 65

_____ Petition (Needs to state the type of appointment in the caption): [ORS 125.055]

_____ Respondent's information (name, age, residence address & current location) [(2)(a)]

_____ Proposed guardian & conservator information (relationship to respondent, name, age, address) [(2)(c)]

_____ If either fiduciary is not the petitioner, statement of fiduciary regarding willingness to serve [(2)(f)]

_____ If a professional, must submit disclosure statement and information under ORS 125.240

_____ If fiduciary is not the petitioner, name, age, address and interest of petitioner [(2)(b), (c)]

_____ A statement whether proposed GRD or CSVR has been convicted of a crime, has filed for/received bankruptcy protection, lost an occupational license, was removed as a fiduciary, or was surcharged for loss- **if yes**, explanation [(2)(d),(e)]

_____ Name and address of any fiduciary that has been appointed by any Court, any Trustee for an established or testamentary Trust, any appointed health care representative and any person acting as attorney-in-fact under a POA [(2)(g)]

_____ Name and address of the respondent's treating physician and care providers [(2)(h)]

_____ **Factual information supporting the request, less restrictive means considered**, and names/addresses of all persons with information regarding incapacity [(2)(i)]

Assets: _____ [125.055(2)(k)]

_____ Statement of intent regarding placement [(2)(j)]

Income: _____ [125.055(2)(k)]

_____ Petitioner's estimate of the value of the estate [ORS 125.055(4)] _____ UCCJEA if Minor

_____ Statement that indicates whether Petitioner is requesting **plenary authority or specified limited authority** [(2)(m)]

_____ Statement regarding fiduciary as public or private agency providing services to respondent or employee of such [(2)(L)]

_____ **Bond amount:** \$ _____ (unrestricted assets + annual income) Restriction of assets? _____

_____ If funds restricted, JGLM must state that AKRA to be filed w/in 30 days. [UTCR 9.050]

_____ If purpose of pet. is claim/settlement & no bond requested, JGLM must require court to review/approve settlement

_____ Settlement of personal injury claim must comply with UTCR 9.040

_____ Notices sent/served: [ORS 125.065 (who), ORS 125.060 (how)] Contents of Notice (ORS 125.070)

_____ **Respondent, if 14 or older (personal service required, cannot waive notice)** [(2)(a), (9)]

_____ Spouse of respondent [(2)(b)] Name: _____

_____ Parents of respondent (incl. alleged parents if minor) [(2)(b)] Names: _____

_____ Adult children of respondent [(2)(b)] Names: _____

_____ If none of above family, to person(s) most closely related [(2)(c)] Names: _____

_____ Anyone co-habiting with Respondent who is interested [(2)(d)] Names: _____

_____ Anyone with care/custody in last 60 days (if minor) [(2)(f)] Name: _____

_____ Any person who has requested notice [(3)(b)] Names: _____

_____ Any nominated/appointed fiduciary, trustee, POA [(2)(e)] Names: _____

_____ If no living parents *for minor*, any nominated fiduciary in Will or writing [(2)(g)] Names: _____

_____ Veterans Affairs if benefits [(2)(h)] _____ DHS if benefits [(2)(i)] _____ OHA if OHP [(2)(j)]

_____ Any attorney who is representing the respondent in any capacity [(7)(a)] _____ DOC/AG if in custody [(2)(k)]

_____ OLTCO if RSP is placed or will be placed in nursing home or residential care facility [(7)(b)]

_____ If RSP is placed or will be placed, the system described in ORS 192.517 (Disability Rights Oregon) [(7)(c)]

_____ ICWA [125.025(2)] _____ If a foreign national, to the consulate [(2)(L)]

_____ Court Visitor Order Visitor Name: _____ Visitor Report: _____

_____ 15 or 21 day notice period exp. [ORS 125.065(3)] OR _____ 2-day notice period exp. [ORS 125.605(2)]

_____ If fiduciary is not the petitioner, signed acceptance of appointment by fiduciary [125.215(1)]

_____ Limited Judgment appointing **contains findings** and complies with UTCR 2.010(12) and UTCR 9.030

NOTES: _____

Date of Initial Review: _____ By: _____ (Initials)

Revised 5/25/22

NOTICE CHECKLIST

Appointment Notice – Prior to Appointment of Fiduciary

- ☐ **Respondent's Notice** (adults and minors 14 years old or older)
 - ☐ Form of notice checked (125.070)
 - ☐ **Guardianship** notice (125.070(1), (3))
 - ☐ Name, address, relationship, phone for petitioner (125.060(1)(a))
 - ☐ Copy of petition (per proof of service)(125.070(1)(b))
 - ☐ Statement where objections may be made & deadline (125.070(1)(c))
 - ☐ If a hearing is set, details of the hearing (125.070(1)(d))
 - ☐ Proper "Notice to Respondent" (125.070(3))
 - ☐ Blue objection form (125.070(4))
 - ☐ **Conservatorship** notice
 - ☐ Name, address, relationship, phone for petitioner (125.060(1)(a))
 - ☐ Copy of petition (per proof of service)(125.070(1)(b))
 - ☐ Statement where objections may be made & deadline (125.070(1)(c))
 - ☐ If a hearing is set, details of the hearing (125.070(1)(d))
 - ☐ Additional notice provisions (125.070(2))
 - ☐ Explanation of purpose/consequences (125.0070(2)(a))
 - ☐ Statement that funds of RSP may be used (125.0070(2)(b))
 - ☐ Information re: legal services (125.0070(2)(c))
 - ☐ Information on any appt. of visitor (125.0070(2)(d))
 - ☐ Statement of 6 rights (125.0070(2)(d))
 - ☐ **Guardianship/Conservatorship** notice
 - ☐ Name, address, relationship, phone for petitioner (125.060(1)(a))
 - ☐ Copy of petition (per proof of service)(125.070(1)(b))
 - ☐ Statement where objections may be made & deadline (125.070(1)(c))
 - ☐ If a hearing is set, details of the hearing (125.070(1)(d))
 - ☐ Proper "Notice to Respondent" (125.070(3))
 - ☐ Blue objection form (125.070(4))
 - ☐ Personal service by non-party complete and proof of service filed (125.065(5))
 - ☐ Notice period has expired
 - ☐ 15 days indefinite appointment (125.065(3))
 - ☐ 21 days for minor proceedings (125.065(3))
 - ☐ 2 days temporary appointment (125.605(2))
- ☐ **Non-Respondent's Notice**
 - ☐ **Parties** entitled to notice checked – *crosscheck with petition/petition checklist* (125.060(2))
 - ☐ Form of notice checked (125.070)
 - ☐ Name, address, relationship, phone for petitioner (125.070(1)(a))
 - ☐ Copy of the petition/motion (per proof of notice)(125.070(1)(b))
 - ☐ Statement where objections to be made/ filed & deadline (125.070(1)(c))
 - ☐ If a hearing is set, details of hearing included (125.070(1)(d))
 - ☐ Instructions on requesting future notice (125.070(5))
 - ☐ Method of notice checked (125.065)
 - ☐ Proof of notice filed (125.065(5))
 - ☐ If alternative to mailing, order as to time/method approved. (125.065(4))
 - ☐ Notice period has expired or consents/waivers have been filed
 - ☐ 15 days indefinite appointment (125.065(3))

☐ 21 days for minor proceedings (125.065(3))

☐ 2 days temporary appointment (125.605(2))

Non-Appointment Notice – Prior to approval of order/judgment

☐ **Parties** entitled to notice checked (125.060(3))

☐ **Protected person** (125.060(3)(a))

☐ Parties requesting notice (125.060(3)(b))

☐ Any appointed fiduciary (other than filer of notice) (125.060(3)(c))

☐ Any attorney of PPR (125.060(8)(a))

☐ VA if benefits (125.060(3)(d))

☐ DOC if in custody (125.060(3)(e))

☐ OLTCO if placed or to be placed (125.060(8)(b))

☐ DRO if placed or to be placed (125.060(8)(c))

☐ Consulate if vulnerable youth (125.060(3)(f))

☐ Any other party directed by court (125.060(3)(g))

☐ Form of notice checked (check copy of notice)(125.070)

☐ Name, address, relationship, phone for petitioner/movant (125.070(1)(a))

☐ Copy of the petition/motion stated to be included (per proof of notice)(125.070(1)(b))

☐ Statement where objections to be made/filed & deadline for objecting (125.070(1)(c))

☐ If a hearing is set, details of hearing included (125.070(1)(d))

☐ Method of notice checked (check proof of notice)

☐ Notice period has expired or consents/waivers have been filed

☐ Proof of notice filed (125.065(5))

☐ 15 days objection period unless shorter period approved (125.065(3))

☐ 21 days for minor proceedings (125.065(3))

Protective Proceeding Due Date Cheat Sheet

(Updated 9/8/22)

NOTE:

Protective proceeding cases are monitored, in part, through tracking that certain statutorily-required filings are submitted in a timely manner. To that end, courts are encouraged to consistently set due dates and run regular reports to administratively manage cases. The charts below detail the various types of filings for which due dates should be set. Depending on whether your court tracks filings through case event due dates or Time Standard Tab due dates, the process for setting up an automated report will differ.

Unless otherwise noted, the “date of appointment” is the date on which the limited judgment of appointment was signed, not the date it was entered.

Other custom due dates can and should be set where necessary, based on specific provisions or requirements in an order or limited judgment.

Guardianship of an Adult

Document/Event	Due Date	Citation	Notes
Annual Report of Guardian	1 year + 30 days from the date of appointment.	ORS 125.325	For second or subsequent annual guardians reports, the due date is the anniversary of appointment + 30 days. The due date does not measure from the filing of the previous year’s report.
Certificate of Completion for Guardian Partners Class	Depends on local court’s direction; typically 60 or 90 days from the date of appointment.	Per SLR or other local rule.	Not all courts require fiduciary education. This due date may not apply to your court.
Notice of Appointment of Guardian	30 days from the date of appointment.	ORS 125.082	Parties to be notified are those entitled under ORS 125.060(3)

Guardianship of a Minor

Document/Event	Due Date	Citation	Notes
Annual Report of Guardian	1 year + 30 days from the date of appointment, if your court requires guardian reports in minor guardianships	ORS 125.325	For second or subsequent annual guardians reports, the due date is the anniversary of appointment + 30 days. The due date does not measure from the filing of the previous year's report.
Certificate of Completion for Guardian Partners Class	Depends on local court's direction; typically 60 or 90 days from the date of appointment.	Per SLR or other local rule.	Not all courts require fiduciary education. This due date may not apply to your court.
Minor's 18th Birthday	Date that minor ages out of protective proceeding based on minority.	ORS 125.090(2)(a)	If the exact date is unknown, the last day of the year the minor would turn 18 can be set as a backstop date.
Notice of Appointment of Guardian	30 days from the date of appointment.	ORS 125.082	Statute does not specifically exempt this notice in minor proceedings.

Conservatorship

Document/Event	Due Date	Citation	Notes
Acknowledgment of Restricted Asset (AKRA)	Typically 30 days from the date of appointment.	UTCR 9.050	AKRAs are used in lieu of bond to restrict funds held in a depository account.
Accounting - Conservatorship	1 year + 60 days from the date of appointment.	ORS 125.475(1)	For second or subsequent annual accountings, the due date is the anniversary of appointment + 60 days. The due date does not measure from the filing of the previous year's accounting.

Annual Report of Restricted Funds	1 year + 60 days from the date of appointment	Permissible under UTCR 9.160(5)	If all assets are held in a restricted depository account, courts may allow for an annual report of restricted funds or the filing of a depository statement showing the restricted balance in lieu of an annual accounting. Due date would remain the same.
Bond	Typically 30 days from the date of appointment, or 30 days from the approval of an order/judgment that modifies the bond amount.	ORS 125.410(4)	Letters of Conservatorship shall not issue before bond is approved where required.
Receipt(s) for conservatorship assets	Typically 30 days from the date of approval of the final accounting; Alternatively 30 days from date of termination of a minor conservatorship due to protected person reaching the age of majority.	ORS 125.535	Terms of the order/judgment approving a final accounting may dictate who the receipt(s) should be signed by.
Certificate of Completion for Guardian Partners Class	Depends on local court's direction; typically 60 or 90 days from the date of appointment.	Per SLR or other local rule.	Not all courts require fiduciary education. This due date may not apply to your court.
Inventory	90 days from the date of appointment.	ORS 125.470(1)	

Guardianship & Conservatorship – Set all applicable due dates from both charts above.

INTERSTATE TRANSFER OF PROTECTIVE PROCEEDINGS

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
(ORS 125.800 et. seq.)

TRANSFERS IN

1. Petition to accept transfer from another state to Oregon.
2. Notice and proof of notice to everyone who would be entitled to a petition for appointment. ORS 125.060(2).
3. If the petition is contested or if your court deems it necessary, set a hearing.
4. Before getting to Step 5, your court needs a copy of the transferring court's provisional order of transfer. Often this is attached as an exhibit to the petition to accept transfer.
5. Your court issues an order provisionally accepting the transfer unless your court determines transfer is contrary to the interests of the protected person OR the nominated fiduciary is ineligible for appointment in Oregon. See ORS 125.205 and 125.210.
6. Petitioner files a final order of transfer from the out-of-state court.
7. Your court issues a limited judgment (final order) accepting transfer.
8. You issue letters to the fiduciary.

TRANSFERS OUT

1. The fiduciary (or another person possibly) files a petition to transfer the proceeding to another state.
2. Notice of the petition to transfer has to go to anyone entitled to notice of a petition for appointment (125.060(2)). Notice and proof has to be filed (and expire).
3. If anyone objects, or your court deems it necessary, set a hearing on the request to transfer.
4. Your court, if transfer is found in the interest of the protected person, enters an order of provisional transfer.
 - a. Findings are required to be in the order of provisional transfer:
 - i. The protected person is physically present in the receiving state or they are expected to move to that state permanently.
 - ii. No objections were filed to the transfer, OR it is not contrary to the interests of the protected person; AND
 - iii. Plans or adequate arrangements have been made for their care and/or the financial management of their property.
5. Your court must receive a copy of the order provisionally accepting the transfer. The copy is usually submitted by the petitioner.
6. Your court then enters a final order confirming the transfer and closes the Oregon case with a general judgment terminating.

REGISTERING A PROTECTIVE PROCEEDING FOREIGN JUDGMENT

Filing party needs to file:

1. Request to register the foreign judgment (usually a motion or petition)
2. Proof of notice to the out-of-state court of the filer's intention to register the judgment in Oregon
3. Certified copies of the order of appointment of the fiduciary AND their letters of appointment.
4. Filing fee* for registration of a foreign judgment

Registering foreign guardianship order	ORS 21.145; ORS 125.842	\$124
Appearance in matter of foreign guardianship	ORS 21.145; ORS 125.842	\$124
Registering foreign conservatorship order	ORS 21.145; ORS 125.845	\$124
Appearance in matter of foreign conservatorship	ORS 21.145; ORS 125.845	\$124

*As of 3/1/23

The case can be closed once all the above have been entered.



Purpose of the Hearing

A hearing must be held when an objection to a petition to appoint a fiduciary or for another protective order is filed, and the objection is not withdrawn before the scheduled hearing. The court's priority is to protect the respondent's person, preserve their rights and independence, and protect their property.

Prior to the Hearing

- Review the case file, Petition, Court Visitor's Report, *if any*, and any Objections. This will help you understand the respondent's current situation, any physical or mental health concerns and/or limitations, and the family dynamics of Respondent.
- Is the Petition seeking a temporary appointment, permanent appointment, or both? ***An objection to a temporary appointment must be heard within two judicial days. (ORS 125.605(5))***
- Check to see whether Respondent is represented by counsel. If not, **appointment of counsel for the respondent** is required in advance of the hearing, even if they are not the objector, unless they already have counsel or have explicitly objected to counsel being appointed. (ORS 125.080)
- Do any parties need ADA accommodations or a Court Interpreter to participate in the hearing?

The Hearing

On the Record

- **On the record, briefly visit jurisdiction and venue.** Probate courts and commissioners have exclusive jurisdiction of protective proceedings. (ORS 125.015) A protective proceeding must be commenced in the county where the respondent resides or is present but may be commenced in the county where the respondent resides in an institution by reason of an order of a court, or if the respondent does not reside or is not present in this state, a conservatorship proceeding may be commenced in any county where property of the respondent is located. (ORS 125.020)
- **Acknowledge who is present.** Are Respondent, their attorney, court visitor, and the nominated fiduciary present? Does Respondent have any witnesses present to speak on Respondent's behalf?
- **Have parties discussed alternatives to protective proceedings?**

Required Findings

- Is the Respondent incapacitated (guardianship) or financially incapable (conservatorship)?
- Is the scope of the protective proceeding appropriate?
- Is the nominated fiduciary qualified, suitable, and willing to serve?
- *Spady v. Hawkins*, 155 Or 454, 1998: Statutory notice and hearing protections are not met when the face of a petition and notice for guardianship fail to mention anything about the person ultimately appointed.

Notice Requirements

The petitioner or person making the motion shall give notice to all persons entitled to notice under [ORS 125.060\(3\)](#) of the date, time and place of the scheduled hearing at least 15 days before the date set for hearing. Notice shall be given in the manner prescribed by [ORS 125.065](#). However, in most counties, the court has a business process for notifying parties of a hearing scheduled upon an objection being filed.

Rules of Evidence and Burden of Proof

Subject to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, ORS 125.800 - 125.852, the court may act upon the petition of any person or its own authority, at any time and in any manner it deems appropriate to determine the condition and welfare of the respondent. (ORS 125.025)

ORCP/Evidence Code

Except as otherwise provided by ORS 125, the ORCP and Oregon Evidence Code apply in protective proceedings. (ORS 125.050)



Statutory and Rule Guidance

The Court's authority: [ORS 125.010](#) and [ORS 125.025](#).

The Hearing: [ORS 125.080](#).

Required Findings (*in depth*): Is Respondent incapacitated, financially incapable, or a vulnerable youth?

- **Appointment of a Permanent Guardian:** A guardian may be appointed for an adult or vulnerable youth only as is necessary to promote and protect their well-being and must be designed to encourage maximum self-reliance and independence. (ORS 125.300)
 - Appointment is necessary to provide continuing care and supervision of the Respondent. (ORS 125.305(1)(b))
 - The nominated person is qualified, suitable, and willing to serve. (ORS 125.305(1)(c))
 - The court shall grant the guardianship only to the extent necessary and consider the information in the petition, the reports of the visitor and any physicians, naturopathic physicians, or psychologists who have examined the respondent, and the evidence presented at hearing. (ORS 125.305(2))
 - Consider Respondent's capacity at the time of hearing and whether any incapacity is fleeting (e.g., dementia where one's capacity comes and goes.)
- **Appointment of a Permanent Conservator:** The court may appoint a conservator and make other protective orders if the court finds by clear and convincing evidence that the respondent is financially incapable and has money or property that requires management or protection. (ORS 125.400)
- **Appointment of a Temporary Guardian:** Upon finding clear and convincing evidence that Respondent is incapacitated, the court must additionally find 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)
- **Appointment of a Temporary Conservator:** Upon finding clear and convincing evidence that Respondent is financially incapable, the court must additionally find 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)

Bonds: Statute encourages the court's consideration of a bond or asset security for conservators. (ORS 125.410)

After the Hearing

ORS 125.030(1): "The appointment of a fiduciary in a protective proceeding shall be made by Limited Judgment." If the appointment is for a temporary fiduciary or a limited purpose, ensure that is reflected in the judgment and included on the letters issued to the fiduciary. A written judgment of findings made during the hearing should be prepared by the court or by assignment to a party or attorney at the hearing.

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.

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.

A guardianship for a vulnerable youth shall be ordered only to the extent the youth consents and to the extent necessary. (ORS 125.300)
For vulnerable youth matters, the court may not inquire into the immigration status of parties or any other witness, or place in which the respondent entered the US. (ORS 125.080(5)(c)(d))

Some courts require non-professional fiduciaries to take in-person guardian and conservator training within 60 days of appointment. Some service providers also offer case monitoring to the courts. Check your local court rules for your county's practices.



Purpose of the Hearing

Any person who is interested in the affairs or welfare of the respondent may object to the petition for appointment of a fiduciary for a minor. (ORS 125.075) Upon an objection being filed, the court must schedule an objection hearing. The court's priority, is to protect the respondent's person, preserve their rights and independence, and protect their property.

Prior to the Hearing

- Review the case file, Petition, Court Visitor's Report *if any*, and all objections to help you understand the respondent's current situation, any physical or mental health concerns or limitations, and the family dynamics of Respondent.
- Is the Petition seeking a temporary or permanent appointment of a guardian, conservator, or both? ***An objection to a temporary appointment must be heard within two judicial days. (ORS 125.605(5))***
- **Is the Indian Child Welfare Act (ICWA) applicable?** (25 USC 1901)
- Check to see whether Respondent is represented by counsel. If not, **appointment of counsel for the respondent** is required in advance of the hearing, even if they are not the objector, unless they already have counsel or have explicitly objected to counsel being appointed. (ORS 125.080)
- Is a guardianship being sought in order to avoid a potential juvenile dependency matter?
- Is there a pending juvenile matter for which consolidation is required as per ORS 419B.806? (See [Kelly v. Gibson, 184 Or. App. 343 \(2002\)](#))
- If no dependency matter exists and parent objects, ORS 109.119 still applies. (See [Burk v. Hall, 186 Or. App. 113 \(2003\)](#))
- Is a conservatorship sought to address a personal injury or wrongful death claim, or for purposes of creating a trust? Is a limited scope appropriate?
- Do any parties need ADA accommodations or an interpreter?

Rules of Evidence and Burden of Proof

The court may act upon the petition of any person or its own authority, at any time and in any manner it deems appropriate to determine the condition and welfare of the respondent. (ORS 125.025)

ORCP/Evidence Code

Except as otherwise provided by ORS 125, the ORCP and Oregon Evidence Code apply in protective proceedings. (ORS 125.050)

The Hearing

On the Record

- **On the record, briefly visit jurisdiction ([ORS 125.015](#)) and venue ([ORS 125.020](#)).**
- **Acknowledge who is present.** Are Respondent, parent(s), a current caregiver, Respondent's attorney, court visitor, the nominated fiduciary, or any witnesses present?
- **Have parties discussed alternatives to protective proceedings?**

Required Findings

- Is the Respondent incapacitated (guardianship) or financially incapable (conservatorship)?
- Is the scope of the protective proceeding appropriate?
- Is the nominated fiduciary qualified, suitable, and willing to serve?
- *Spady v. Hawkins*, 155 Or 454, 1998: Statutory notice and hearing protections are not met when the face of a petition and notice for guardianship fail to mention anything about the person ultimately appointed.

Notice Requirements

The petitioner or person making the motion shall give notice to all persons entitled to notice under [ORS 125.060\(3\)](#) of the date, time and place of the scheduled hearing at least 15 days before the date set for hearing. Notice shall be given in the manner prescribed by [ORS 125.065](#). However, in most counties, the court has a business process for notifying parties of a hearing scheduled upon an objection being filed.



Statutory and Rule Guidance

The Court's authority: [ORS 125.010](#) and [ORS 125.025](#).

The Hearing: [ORS 125.080](#).

Required Findings (in depth): Is Respondent a minor in need of a guardian?

- **Appointment of a Permanent Guardian:** The court may appoint a guardian if the court determines by clear and convincing evidence that (a) the respondent is a minor in need of a guardian; (b) the appointment is necessary as a means of providing continuing care and supervision of the respondent; and (c) the nominated person is qualified, suitable, and is willing to serve. (ORS 125.305)

The court shall appoint the most suitable person willing to serve after giving consideration to Respondent's circumstances, any stated desire of Respondent, the relationship to Respondent, any preference expressed by a parent, the estate of Respondent, and any impact of ease of administration. (ORS 125.200)

The Department of Human Services may be appointed guardian of a minor if the minor has no living parents and if no willing, qualified, and suitable relative or other person has petitioned the court for appointment as a guardian. (ORS 125.305(4))

- **Appointment of a Permanent 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 financially incapable and has money or property that requires management or protection. (ORS 124.400)
- **Appointment of a Temporary Guardian:** Upon finding clear and convincing evidence that Respondent is incapacitated, the court must additionally find 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)
- **Appointment of a Temporary Conservator:** Upon finding clear and convincing evidence that Respondent is financially incapable, the court must additionally find 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)

Bonds: Statute encourages the court's consideration of a bond or asset security for conservators. (ORS 125.410)

After the Hearing

ORS 125.030(1) The appointment of a fiduciary in a protective proceeding **shall** be made by Limited Judgment.

- If the appointment is for a temporary fiduciary or a limited purpose, ensure that it is reflected in the judgment and included on the letters issued to the fiduciary.
- A written judgment of findings made during the hearing should be prepared by the court or by assignment to a party or attorney at the hearing.

Court Visitors

The court, in its discretion, may appoint a Court Visitor in a protective proceeding for a minor. (ORS 125.150)

Appointing a visitor in a protective proceeding for a minor, helps ensure the appropriateness of the placement and the nominated fiduciary.

If the objection is to a temporary appointment, the court will not likely yet have the Visitor's Report.

Some courts require non-professional fiduciaries to take in-person guardian and conservator training within 60 days of appointment. Some service providers also offer case monitoring to the courts. Check your local court rules for your county's practices.



Purpose of the Hearing

An objection to attorney or fiduciary fees usually occurs after a Petition, annual or final accounting, motion, or other pleading in which the prayer for relief includes a request by the fiduciary, attorney, or other party seeking to have their fees paid from the respondent's or protected person's estate.

Rules of Evidence and Burden of Proof

- ORCP 68 does not apply in protective proceedings. (ORS 125.095(5))
- Attorney fees must be supported by affidavit setting out the justification for fees. (UTCRC 9.060(1))

Prior to the Hearing

- Review the case file to understand the complexity or unusualness of the proceeding, before reviewing the petition, motion, or other pleading requesting attorney or fiduciary fees, the objection(s), and any responsive filings.
- Check to see whether Respondent is represented by counsel. If not, appointment of counsel for the respondent is required in advance of the hearing, even if they are not the objector, unless they already have counsel or object to counsel being appointed. (ORS 125.080)
- Do any parties need ADA accommodations or a Court Interpreter to participate in the hearing?

The Hearing

Required Findings: [ORS 125.095 Fees, costs, and disbursements payable in protective proceedings.](#)

- Is it reasonable for the party seeking fees to have requested them be paid by funds of the respondent/protected person?
- Are all of the fees requested "related to" the protective proceeding?
- If yes to both, is the amount of fees requested reasonable? Were itemizations provided for services rendered?

Notice Requirements: ORS 125.075(3) provides once a hearing is scheduled on an objection, Petitioner or person making the motion, must provide notice to those entitled under ORS 125.060(3). Those requiring notice include the respondent/protected person, any person who has filed a request for notice, any other fiduciaries of the respondent/protected person, the VA if respondent/protected person is receiving VA payments, the Attorney General if the respondent/protected person is in custody through the DOC, any other person the court requires, and if the protected person is a vulnerable youth, then their consulate for country of origin.

PLEASE NOTE: *Most courts follow the OJD business process for the courts to provide notice of hearing to the parties upon an objection being filed.*



Statutory and Rule Guidance on Attorney Fees

ORS 125.098(2) provides factors the court shall consider when determining whether to award any attorney fees to a party.

- The factor to be given the greatest weight is the benefit to the person subject to the protective proceeding by the party's actions in the proceedings.
- **Note:** Petitions, cross-petitions, 3rd party objections, etc., may have some benefit to the respondent/protected person, even if the party does not prevail, but see the remaining factors in 125.098(2) for circumstantially appropriate considerations, especially if conduct was reckless, malicious, or in bad faith.
- **Note:** ORCP 68 does not apply in protective proceedings, and a pleading alleging the basis for payment is not required, but fee requests must be supported by affidavit. ORS 125.095(4), (5), UTCR 9.060.

ORS 125.098(3) provides additional factors to consider in determining the amount of attorney fees to award.

- **Note:** Factors listed in ORS 125.098(2) above, can also be used in determining the amount of fees.
- Time/labor required in the proceeding, the novelty and difficulty of the issues involved, and the skill needed to provide the legal services.
- The likelihood that the attorney would be precluded from other employment.
- The fee customarily charged by an attorney in the locality for similar legal services.
- Time limitations imposed by the party or the circumstances of the proceeding.
- The experience, reputation, and ability of the attorney.
- The amount of the attorney fees requested relative to the estate of the respondent/protected person.

Statutory and Rule Guidance on Fiduciary Fees

There is no statutory guidance or factors directing fiduciary fee review, but under ORS 125.095, they still must be reasonable and related to the proceeding.

- Some of the 125.098(3) factors may help guide your analysis:
 - Considering experience, reputation, etc., is the hourly rate reasonable?
 - Is the amount billed reasonable, both for individual services and total amount billed?
- Is the amount billed reasonable relative to the value of the estate?
- Is a fiduciary seeking fees for time spent doing activities or providing care (e.g., parent-child relationship) which ought to be done in the normal course of their relationship?

Courts may request additional information or supplemental filings from parties before ruling on a fee award. ORS 125.025 grants the court extensive authority, "at any time and in any manner it deems appropriate" to inquire into proper performance of parties' duties.

After the Hearing

- ORS 125.030(d) provides a Limited Judgment may be used for a decision on a payment that is authorized or subject to approval under ORS 125.095. Otherwise, rule by order.
- Determine who, if not the court, will prepare the Limited Judgment.



Purpose of the Hearing

Throughout the duration of the protective proceeding, fiduciaries take certain actions on behalf of the protected person. The actions dictate whether prior court approval is necessary. If a motion for approval of an action is filed, any person interested in the affairs or welfare of the protected person may object. The objection will necessitate a hearing on the matter. (ORS 125.075)

Also, Respondent may ask for a hearing at any time, often by an objection being filed, to limit the fiduciary's actions without any preceding motion for approval having been filed. This too, will compel a hearing on the matter.

Prior to the Hearing

- Review the case file to understand the complexity or unusualness of the proceeding, before reviewing the motion or other pleading requesting court approval of a fiduciary's actions, the objection(s), and any responsive filings.
- Check to see whether Respondent is represented by counsel. If not, appointment of counsel for the respondent is required in advance of the hearing, even if they are not the objector, unless they already have counsel or object to counsel being appointed. (ORS 125.080)
- Do any parties need ADA accommodations or a Court Interpreter to participate in the hearing?
- Understand the court's authority in protective proceedings ([ORS 125.025](#)).
- Depending on the subject matter of the motion, pleading, or objection before the court, familiarize yourself with the general powers and limitations of guardians ([ORS 125.315-320](#)), and/or conservators ([ORS 125.420-480](#)).

The Hearing

On the record:

- Briefly address the motion or issue before the court and any objections.
- Acknowledge who is present: Are the respondent, the fiduciary, their attorneys, or any witnesses present?
- Have parties met and conferred regarding the current motion and objection thereto?

Required Findings

- What actions by the fiduciary are being questioned?
- Was prior court approval required?
- Were the actions taken in the best interest of the protected person?
- Should the court limit or terminate the fiduciary's powers?

ORCP/Evidence Code

Except as otherwise provided by ORS 125, the ORCP and Oregon Evidence Code apply in protective proceedings. (ORS 125.050)

Notice Requirements

ORS 125.075(3) provides once a hearing is scheduled on an objection, Petitioner or person making the motion, must provide notice to those entitled under ORS 125.060(3). **However, most courts follow the OJD business process for the court to prove notice of hearing to the parties upon an objection being filed.**



Statutory and Rule Guidance on Miscellaneous Objections

Some possible motions and objections thereto include, but are not limited to, the following:

- **Change of Placement of the Protected Person:** ORS 125.320 outlines that before a guardian may change the abode of an adult protected person or place an adult protected person in a mental health treatment facility, a nursing home or other residential facility, the guardian must file with the court and serve a statement declaring that the guardian intends to make the change of abode or placement. Proper notice and notice of time to object must be given to all legal parties. If placement is being changed from their personal residence to a nursing home or other residential facility, service must also be provided to the Office of the Long-Term Care Ombudsman or Disability Rights Oregon, respectively.
 - If immediate placement is necessary to protect the immediate health, welfare, or safety of the protected person or others, the notice must include said statement and must be filed and served with as much advance notice as possible, in no event later than two judicial days after the change of abode or placement occurs. The guardian may make the change of abode or placement prior to a hearing on any objection.
- **Limits on Associations:** ORS 125.323 provides a guardian may not limit a protected person's preferred associations, except as specifically allowed by the court, or to the extent the guardian determines necessary to avoid unreasonable harm to the protected person's health, safety, or well-being. If a protected person is unable to communicate, the protected person's preferred association shall be presumed based on the prior relationship between the protected person and the person with whom the association is contemplated.
- **Sale of Protected Person's Residence:** ORS 125.430(1) states, "A protected person's principal residence may be sold by a conservator only with the prior approval of the court. A motion seeking prior approval must be filed with the court and notice given to the persons specified in ORS 125.060 (3)."
- **Conservator's Accountings:** Occasionally, a protected person or another interested party may object to the conservator's annual or final accountings. Often, this is due to a protected person or other party believing the fiduciary has misappropriated funds of the protected person. The court should thoroughly review the annual or final accountings prior to the hearing. ORS 125.475 outlines what contents must be included in an accounting, while UTCR 9.160 outlines what form the accounting must be in.

After the Hearing

- After reviewing the filings and hearing argument on the matter, determine whether the actions of the fiduciary were appropriate, or whether their authority should be limited or terminated.
- A Limited Judgment may be used for a decision on an objection to an accounting, a decision on placement of a protected person, a decision on the sale of the residence of a protected person, or on a payment that is authorized or subject to approval under ORS 125.095. Otherwise, rule by order.