

Oct 30 9³⁰ 12³⁰

OREGON JUDICIAL DEPARTMENT

Task Force on Protective Proceedings

Report to the Chief Justice

Hon. Rita Cobb
Hon. Elizabeth Welch
Co-Chairs

Task Force on Protective Proceedings

Hon. Rita Cobb, Co-Chair	Washington County Circuit Court
Hon. Elizabeth Welch, Co-Chair	Multnomah County Circuit Court, Retired
Rodney Beck	Attorney, Gladstone
Jason Broesder	Attorney, Medford
James Cartwright	Attorney, Portland
Ryan Gibb	Attorney, Salem
	OSB Elder Law Section
Hon. Lauren Holland	Lane County Circuit Court
William Kuhn	Attorney, Hermiston
Nancy Lamvik	Trial Court Administrator, Lincoln
Michelle Leonard	Trial Court Administrator, Union/Wallowa
Hon. William Purdy	Jackson County Circuit Court
Michael Schmidt	Attorney, Aloha
	Guardian/Conservator Association of Oregon, Inc
BeaLisa Sydlik,	Family Law Staff Counsel
	Court Programs and Services Division
Erin Ruff	Staff, Court Programs and Services Division

The Task Force would like to acknowledge the generous assistance of Helga Barnes, Probate Supervisor, Multnomah County; Gary Beagle, Beagle, Burke & Associates; Morgan Brodie, Adult Protective Services Coordinator, Department of Human Services; Kirk Brusk, Trial Court Administrator, Josephine County; Jan E. Friedman, Oregon Advocacy Center ; Katie Garman, Court Visitor in Multnomah, Washington, Clackamas and other courts; Emily Kaufmann, Legal Aid Services of Oregon; and Dr Polly Fisher, Court Visitor In Multnomah, Clackamas, and other courts, and Patricia Webb, Probate Commissioner, Washington County; Erin Ruff and Darcy Davidson, Oregon Judicial Department Court Programs and Services Division.

Task Force on Protective Proceeding Report to the Chief Justice

Executive Summary

Protective proceedings involve the establishment of guardianships and conservatorships for those who are not able to care for their own physical or financial needs as defined by statute. The need for such proceedings is significantly increasing, and likely to continue to increase, due to the greater longevity of senior citizens.

These proceedings are particularly complex and require sensitivity due to the vulnerability of the persons involved who suffer from impaired capacity due to physical limitations, mental conditions, neglect, and/or financial exploitation.

In protective proceedings, the court is dependent upon family members, court visitors, professional fiduciaries, and attorneys to carry out the purposes of the law. The qualifications for performing such functions, reasonable rates of compensation, and the manner in which such persons carry out their duties, are critical to the rights of all concerned.

This Task Force has undertaken an up-to-date examination of the roles, responsibilities, and compensation of such individuals in protective proceedings and makes the following recommendations:

1. The Chief Justice should establish a standing probate protective proceedings committee;
2. The Oregon Judicial Department should publish an online benchbook;
3. The Oregon Judicial Department should establish uniform court visitor policies;
 - A. Create recommended court visitor qualifications, standards, & procedures;
 - B. Establish mandatory training for court visitors;
 - C. Establish standardized court visitor protocols;
 - D. Establish direct accounting system for court visitor fees;
 - E. Create court visitor website;
 - F. Use court visitors in conservatorships;
 - G. Use court visitors in minor guardianships;
4. The Oregon Judicial Department should establish uniform policies regarding fiduciaries in protective proceedings;
 - A. Establish a mandatory certification program for professional fiduciaries;
 - B. Create mandatory training for nonprofessional fiduciaries;
 - C. Standardize compensation of nonprofessional fiduciaries;
5. The Uniform Trial Court Rules should be amended to require a standardized procedure for application and approval of attorney's fees;
6. The Oregon Judicial Department should establish policies which support effective administration of probate protective proceedings;

- A. Establish lead probate judges;
 - B. Establish staff auditors;
 - C. Expand use of mediation;
 - D. Define and protect personal information;
 - E. Create standard electronic forms;
7. The Oregon Judicial Department and Probate Protective Proceedings Committee should support related legislative and policy efforts statewide;
- A. Appointment of public counsel for respondents and protected person;
 - B. Establishment of public guardian program(s);
 - C. Consideration of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA);
 - D. Expansion of statutory definition of "Professional Fiduciary."

Introduction

The population of the United States and Oregon is aging. In 2005 the number of persons over the age of 65 was 36.8 million; that number is projected to reach 40 million by 2010 and 55 million by 2020. Within the next 30 years, 40% of the population will be over 50 and seniors will outnumber children for the first time in history. This exponential increase has highlighted the serious issues surrounding the care and protection of incapacitated adults who are no longer able to care for themselves and their financial affairs.

Incidents of elder abuse are rising. Between 1986 and 1996, reports of abuse and neglect of seniors age 60 and older to state adult protective services agencies increased 150 percent.

The Oregon courts must plan for and be prepared to address the unique issues of this population as well as the projected increase in caseload. In light of the statutory oversight responsibility, the judicial branch will be expected to have the processes and programs to provide the necessary protection and safeguards for this growing population in place and functioning.

Protective proceedings are unlike other areas of the law where judges adjudicate disputes between opposing parties. The vast majority of protective proceedings involve only one attorney, who represents the proposed fiduciary. In Oregon, judges are charged with dual statutory responsibilities of determining the necessity of protection for the individual and providing oversight of the fiduciary appointed for the incapacitated and financially incapable.

The courts rely on attorneys, court visitors, professional fiduciaries as well as family members to provide the accurate and truthful information to make these vital decisions. Unfortunately, both incentive and opportunity for abuse of the fiduciary's authority exists. The current system must be improved to provide for adequate oversight and monitoring to discover and prevent such abuses.

Recognizing the demographic changes and increasing legal complexities which are impacting the ability of Oregon's courts to provide the protections needed, the Chief Justice established the Task Force to review the existing practices and procedures of the Oregon courts and to provide recommendations to improve the implementation and oversight of protective proceedings. The Task Force surveyed judges, court staff, attorneys, advocates, and fiduciaries. In addition, members gathered information from other states in determining what would be the most effective procedures and processes for Oregon. The recommendations have focused on ways to improve protective proceedings as well as providing a benchbook and reference materials for judges around the state in order to provide consistent and systemic protection of the most vulnerable segment of our society.

I. The Chief Justice Should Establish a Standing Probate Protective Proceedings Committee

This Task Force was convened to study Oregon Circuit Courts' existing practices regarding protective proceedings, and make recommendation for "best practices" which would respond to the increasing number of protective proceedings, and the courts' access to reliable information upon which to make sensitive and important decisions to protect vulnerable people. The initial objectives of the Task Force appeared straightforward:

1. Creation of a judicial benchbook re: best practices in probate protective proceedings;
2. Use of court visitors in protective proceedings;
3. Due process in protective proceedings;
4. Fiduciary qualifications in protective/probate proceedings;
5. Fiduciary and attorney compensation in protective/probate proceedings;
6. Best practices for court administration in protective proceedings.

After the Task Force was established, members were asked to explore other interrelated issues. For example, public guardianship is being addressed by a Department of Human Services committee. This is a matter that directly impacts the courts' ability to protect these at-risk individuals. Depending on how it is designed, a public guardian program could help or hinder the courts' ability to oversee protected persons. This is not a discussion under the control of the Judicial Department, but one in which court and judicial input is important for the ultimate success of the program. These and other issues require ongoing attention by a group strategically planning for the future of protective proceedings.

Many states have been forced to undertake reform with insufficient time and resources in response to social and political pressure resulting from publicity surrounding isolated but extreme abuses. Their experiences provide a few clear lessons. Reform should be:

1. Proactive, strategic, and comprehensive to minimize unintended negative consequences;
2. Multi-disciplinary involving a wide range of community stakeholders;
3. Adequately funded and staffed to accomplish the necessary research, coordination, and durability.

An example from Oregon's history can be found in the Oregon Task Force on Family Law, charged by the Chief Justice with creating a "non-adversarial system for families." That Task Force made a number of recommendations, including creation of the Statewide Family Law Advisory Committee (SFLAC). That committee, in turn, prioritized the necessary reforms and created the processes for implementing those reforms.

This Task Force believes that a standing committee, like the Statewide Family Law Advisory Committee, should be appointed to provide ongoing strategic leadership within the area of probate protective proceedings, beginning with the recommendations outlined

in this report. Should a permanent committee be impracticable, a temporary committee charged with implementing the recommendations of this report should be established. Members of the existing Task Force should be joined by other stakeholders in the protective proceedings system, including court visitors, professional fiduciaries, advocates, social services, and more.

II. The Oregon Judicial Department Should Publish an Online Benchbook

Members of the Task Force will complete a benchbook which will be available online to judges and others. The benchbook will cover law (ORS, Case Law), practice tips, hearings, motions, forms, and administration.

III. The Oregon Judicial Department Should Establish Uniform Court Visitor Policies

Court visitors provide the one of the greatest safeguards of the rights of proposed protected persons that exists under Oregon law. Visitors provide the primary, if not only, neutral assessment of both the need for, and the appropriate extent of, invasion that the court should make into the lives of persons for whom a guardianship or conservatorship has been filed. If the motives of the petitioner are not proper and the proposed protected person is unable to protect him or herself, the visitor stands as the primary barrier to abuse or other victimization of disabled or elderly persons.

In this critical role, court visitor is required by statute to interview the proposed protected person, family members, and others, and to advise the court:

1. Whether the allegations in the petition are true;
2. Whether appointment of a fiduciary is the least restrictive option necessary for the person's continuing care and supervision;
3. Whether the nominated fiduciary is both qualified and suitable, and is willing to serve.

In addition, if there is later cause for concern about the circumstances of the protected person, the court may order a visitor to investigate and report on the performance of the appointed fiduciary.

In many areas, court visitors are trained, qualified, and highly respected individuals. In other jurisdictions, courts report that limited resources make it difficult to identify persons to properly perform this function. Some existing practices call into question both the qualifications and neutrality of the visitor.

A: Create Recommended Court Visitor Qualifications, Standards & Procedures

The standing committee should develop recommendations consistent with the outline provided in Appendix A

The court and the public rely heavily on visitor's expertise and professionalism. The protection of vulnerable individuals depends on a neutral and thorough investigation. Because of the gravity of the decisions based on the visitor's report, the court should have confidence in the quality of the visitor's information.

B: Establish Mandatory Training for Court Visitors

A mandatory training program for court visitors should be developed. It should be delivered in a way that makes it accessible to those wishing to serve as visitors throughout the state.

Because the circumstances a visitor must review are growing in complexity, appropriate training is required for visitors to be able to provide reliable information. Economies of scale make it cost-efficient to develop a single statewide training to be available for potential court visitors across the state.

C: Establish Standardized Court Visitor Protocols

A standing committee should consider and recommend amendments to the Uniform Trial Court Rules to include standardized protocols for court visitors designed to streamline and protect the process, including the issues outlined in Appendix B

For visitors to serve most effectively, the procedures for their selection and compensation must support their neutrality. In some courts there is a fee that is paid into the court by the Petitioner and the court selects and then compensates the visitor. In other districts, the court visitor is both selected and paid directly by the attorney for the Petitioner, creating a potential concern about the neutrality of the visitor.

D: Establish Direct Accounting System for Court Visitor Fees

The Oregon Judicial Department should include specific systems and codes for courts to account for the receipt and disbursement of court visitor funds.

Where the court visitor's fee is paid into court, the current accounting system does not allow the courts a uniform way to directly track those funds. To support responsible financial accounting practices, and the neutrality of the court visitor, the Office of the State Court Administrator must create a way that courts can make and track payments to court visitors directly.

E: Create Court Visitor Website

The Oregon Judicial Department should create a website which makes current information regarding local court visitor qualifications, standards and procedures in each Judicial District easily available to other courts and the public. To accomplish this, each judicial district should be required to provide a current copy of the order enacted by its Presiding Judge pursuant to ORS 125.165 (1), to the State Court Administrator's Office at least annually on a cycle to be determined.

For visitors to serve most effectively, courts must have reliable access to qualified visitors on short notice, and the public should have access to information about visitor qualifications and selection.

F: Use Court Visitors in Conservatorships

Court visitors should be appointed in conservatorship cases.

The statute mandates the use of court visitors in all adult guardianship proceedings. The practice of using visitors is discretionary, and rare, in cases in which only a conservatorship is sought. As the bar and the courts become increasingly aware of the pervasive financial abuse of the elderly, visitor scrutiny should be extended to conservatorship matters to ensure that financial abuse is controlled. This gap in the investigation of protective proceedings has become unacceptable.

The Probate Protective Proceedings Committee should create a plan for implementation of this recommendation, including any specialized qualifications necessary for investigation of financial issues.

G: Use Court Visitors in Minor Guardianships

Visitors should be appointed in minor guardianship cases.

The issues in guardianships for minors are very different from guardianships for adults. Guardians of minors are often family members caring for the child of a relative due to the disabilities, absence, or inadequacy of the child's parents. These relatives often seek the protection of the court to preserve the placement. Many of these proposed guardians are unrepresented, further complicating the proceeding. The court must assess the adequacy of the proposed caretaker. Without a court visitor, there is often no reliable information upon which the court can base that important decision.

The Probate Protective Proceedings Committee should create a plan for implementation of this recommendation including any specialized qualifications necessary for investigation of minor guardianship issues.

IV. The Oregon Judicial Department Should Establish Uniform Policies Regarding Fiduciaries in Protective Proceedings

When a court determines that a person is incapacitated or financially incapable, it has a statutory duty to appoint a guardian/conservator to protect that person. The duties of a fiduciary are complex and varied; competent performance of those duties is essential. The court has a responsibility to the public and protected persons to appoint qualified and trustworthy fiduciaries, and to monitor their performance.

Despite the significance of the position and duties of a fiduciary, no specific qualifications or training is currently required to obtain court appointment as a fiduciary. Professional fiduciaries, those serving 3 or more unrelated individuals, are statutorily required to provide some background information to the court and interested persons. Judicial experience shows that the required disclosures do not give an adequate measure of professional competence. Furthermore, the information that does exist about qualifications and performance is contained in individual case files. There is no mechanism for judges to share information state-wide regarding the performance of professional fiduciaries.

Beyond those professional fiduciaries, there are two other kinds of fiduciaries whose preparation for the job is even more difficult to measure. First, there are private individuals holding themselves out as fiduciaries to the public, but who limit their practice to fewer than three unrelated individuals. Second, there are family members and friends providing services to their loved ones. The vast majority of protected persons are served by these nonprofessional fiduciaries, who may not possess the required integrity, skill, or commitment needed to adequately manage the life and financial resources of an incapacitated person.

A: Establish a Mandatory Certification Program for Professional Fiduciaries

The Oregon Judicial Department should establish a mandatory certification program for professional fiduciaries, including qualifications, appointment, and mandatory training, consistent with the details provided in Appendix C and in the models provided by the Washington Certified Professional Guardian Board, and Arizona Fiduciary Certification Program.

Uniform qualifications and mandatory training would serve to provide a better measure for the competence of professional fiduciaries. Other service providers charged with duties or tasks designed to protect the rights of litigants in the Oregon courts are governed by uniform qualifications or certification, such as court-connected mediators and Certified Court Interpreters. There is also a nationwide movement towards certification of professional fiduciaries, often prompted by media attention to particularly egregious cases of malpractice.

Models for certification of professional fiduciaries are available in Arizona, California, Washington, and through the national Center for Guardianship Certification (CGC), as well as through the Oregon Guardianship/Conservatorship Association (Oregon CGA), a nonprofit, voluntary organization of Oregon professional fiduciaries. The CGC and Oregon CGA have already cooperated to offer a voluntary certification program available to all Oregon professional fiduciaries.

B: Create Mandatory Training for Nonprofessional Fiduciaries

A mandatory training program for nonprofessional fiduciaries should be developed. It should be delivered in a way that makes it accessible to those wishing to serve as non-professional fiduciaries throughout the state.

Most court appointed fiduciaries are family or friends of the protected person doing their best to help. These persons typically do not have skill or experience relevant to their court responsibilities. Nor do they always have a clear understanding of the higher standards of behavior required of them when they serve as a fiduciary. Common errors include:

- Failure to segregate the protected person's funds from the fiduciary's own funds,
- Failure to keep adequate records, and
- Failure to file annual reports and accountings.

This puts the protected person at risk. When errors are made, significant resources of the court and the protected person may be required to rectify the situation, if it can be rectified at all. These unnecessary costs are partially preventable by a commitment to better training and education for those willing to serve this important role.

It is essential that such training be easily accessible to nonprofessional fiduciaries statewide and at little to no cost. The Oregon Judicial Department should explore the most effective and efficient training method. Some training resources are already being developed in Oregon and could be available quickly if funding were made available. In addition, models exist in other states that might be replicated, including in the Superior Court of San Francisco County, California.

C: Standardize Compensation of Nonprofessional Fiduciaries

The Uniform Trial Court Rules should be amended to require local courts to establish rebuttable standard compensation rate for nonprofessional fiduciaries, consistent with Appendix B.

Compensation is a very troublesome issue to many courts. Many factors come into consideration in determining how much and whether the fiduciary should be paid. Does the fiduciary live with the protected person? Does the fiduciary have any special expertise? What is reasonable for the community? Overall guidelines would assist the courts and fiduciaries in determining the issue of compensation.

V. The Uniform Trial Court Rules Should be Amended to require a Standardized Procedure for Application and Approval of Attorney's Fees

The complexity and issues of due process protections in guardianship and conservatorship cases makes the participation of counsel for the Respondent very important. The statutes give the court broad latitude, bounded by the concept that the protective proceeding and its enabling statutes are ultimately designed to safeguard the protected person and his or her estate.

This creates a tension between fair payment for counsel's services and the protection of the protected person, including his or her assets, which will be required for his or her ongoing care. Some of the issues noted by courts are:

- Attorney fee accountings sometimes include insufficient detail;
- Attorneys often seek compensation at their standard fee for services which were, or should have been, performed by a non-lawyer;
- The compensation of counsel for parties other than the protected person from the protected person's funds involves complex analysis ;
- Because judges outside the probate context do not analyze fee awards unless there is specific objection from a party, many attorney fee applications that are presented in protective proceedings are not scrutinized;
- To object to attorney fees is costly to opposing clients;
- Court has resource, process, and legal limitations on ability to oversee the requests for attorney fees;

Variations in the procedure for approval of attorney fees have two negative impacts on the efficient and effective processing of these cases. First, attorneys who work in more than one jurisdiction must spend extra time ensuring that their bills comply with varying local requirements. Second, the processes in some jurisdictions do not give the court sufficient information to assess whether the amount of attorney fees sought were reasonable in light of any benefit to the protected person. Standardization of application and procedure would improve the information and consistency, increasing the protection for vulnerable individuals.

The Probate Protective Proceedings Committee should create and propose amendments to the Uniform Trial Court Rules, consistent with the issues outlined in Appendix B.

VI. The Oregon Judicial Department Should Establish Policies Which Support Effective Administration of Probate Protective Proceedings

In order to enable the court to effectively carry out the statutory responsibilities in protective proceedings, a uniform structure for court monitoring and review must be in place throughout the state.

The implementation of policies which provide consistent oversight are necessary to manage the a broad spectrum of concerns, which include assuring quality and timeliness of visitor's reports, holding attorneys to mandated timelines, and implementing consistent practices in the compensation of professional and non-professional fiduciaries.

A: Establish Lead Probate Judges

The Presiding Judge of each judicial district should designate a Lead Probate Judge to make policy and administrative decisions within that court.

Effective administration requires consistency in the application of the policies, rules and statutes. The Presiding Judge should designate one judge to ensure uniformity of probate practice within the district. This lead probate judge need not preside over all probate matters or all hearings regarding protective proceedings, but should serve as the nexus between the bar, court staff and other interested persons to implement and coordinate probate policies and procedures. In addition, the designated judge would act as the leader to whom other communities, agencies, and individuals involved in this important work can look to for changes and for guidance.

B: Establish Staff Auditors

The Oregon Judicial Department should seek funding and authority for court staff positions to audit accountings, attorney fee, and monitoring cases.

A judge cannot effectively oversee complex probate matters without adequate staff. Trained, detail-oriented staff can examine accountings, filings, and billings, assist the judge in identifying problems and concerns, and act as an aid to the bar and court appointed fiduciaries in understanding the court's demands and expectations.

C: Expand Use of Mediation

The Oregon Judicial Department should explore funding and models to make mediation available in contested protective proceedings statewide.

In the 1980's and 1990's, courts in Oregon and across the nation incorporated mediation into the traditional adversarial court process in an effort to obtain better outcomes for children and families. Two lessons have emerged. First, mediation is a very successful way to address the individualized needs of families. Second, litigants are more likely to use mediation if it is cost-neutral to them.

The individual nature of the issues and needs in guardianship and conservatorship cases are comparable to those of family law cases. As with children, an incapacitated person's personal needs, family dynamic, and available resources are unique, and meeting that person's best interest often requires the cooperation of family.

Publicly funded mediation of these cases has succeeded in other states, and in Douglas County, Oregon, for many of the same reasons that family mediation has succeeded. It has proven to be a helpful resource to both meet the needs of incapacitated persons and their support network, and assist the courts with efficient docket management. Based on these and other successes, both Multnomah and Deschutes Counties are currently creating pilot projects in probate mediation. These efforts should be supported and expanded.

D: Define and Protect Personal Information

The Oregon Judicial Department should determine the necessary steps to protect the personal information of those subject to guardianship and/or conservatorship to prevent abuse or misuse.

Identity theft is a major issue in today's society, and protected persons are vulnerable when their personal and financial information is included in public court documents. Statutory and rule changes should be enacted to prevent abuse of this vulnerable population.

E: Create Standard Electronic Forms

The Oregon Judicial Department should create standard, user-friendly, interactive forms for filing, objections, and fiduciary reporting. These forms should be available online.

Oregon courts, like those across the country, have experienced a dramatic increase in self-representation by those who are unable to afford legal counsel, or choose to proceed without an attorney for other reasons. Protective orders are often sought without the assistance of an attorney because neither the family members or friends seeking the order, nor the person to be protected, have the resources to hire counsel. While access to full legal representation is the goal, self-representation is a reality in Oregon's probate courts that must be directly confronted and purposefully planned. Easy to use, statewide forms are an essential component of assuring that self-represented individuals have effective access to the courts.

Family members or friends serving as guardians or conservators often perform the role of fiduciary without access to legal counsel. The responsibilities of the fiduciary, including accounting and reporting, are complex. They can be misunderstood by those with good intentions, and exploited by those with malicious intentions. Mandatory training of these nonprofessional fiduciaries is a first step towards improving their understanding and performance. Availability of clear and complete forms is another piece of the overall puzzle.

The availability of consistent, user-friendly forms has also been shown to improve the efficiency of courts as well. Judges and their staff are better able to monitor fiduciary performance and have a clear sense of the accountings when they are well acquainted with the forms used. Other states have made pro se forms available in their courts for the protective proceedings and this recommendation would bring Oregon in line with national trends.

VII. The Oregon Judicial Department and Probate Protective Proceedings Committee Should Support Related Legislative and Policy Efforts Statewide

The courts' ability to assess and protect individuals in need of protection depends on many factors, including the successful implementation and operation of state, local, and non-profit social and legal services, which in turn depend upon the court to accomplish their mission. Because these programs are relied upon, but not directed by the court, and because they must be mutually acceptable, the Oregon Judicial Department should participate collaboratively in efforts that support mutual customers, including but not limited to the issues discussed below.

A: Appointment of Public Counsel for Respondents and Protected Persons

The potential loss of liberty in protective proceedings is significant, and of substantial, usually permanent, duration. A guardian can have extensive authority over the life of a protected person. A conservator, after appointment, has control of the individual's money and assets. Yet, the only right to counsel afforded a potential protected person under Oregon law is the right to hire their own counsel. In contrast, in an order of civil commitment, the potential loss of liberty is limited to a temporary stay in a locked hospital facility, with eventual return to the community. Despite far less severe consequences, persons subject to a civil commitment are provided an attorney automatically at state expense.

Many other states provide court appointed counsel for protective proceedings. In some states, the filing of a petition for such a proceeding triggers an appointment. The Public Defense Services Commission is currently exploring this issue, and the Oregon Judicial Department should continue to participate in that effort, including cooperation in development of a pilot program.

B: Establishment of Public Guardian Program(s)

Principles of access to justice dictate that the legal protections of guardianships and conservatorships be readily available to those who need them. Because of the nature of protective proceedings, orders are often sought by and for people with limited resources. This simultaneously impacts the ability of individuals in need and the efficiency of the courts attempting to serve them. Establishment of a Public Guardian program, currently being explored by the Department of Human Services, could provide a much-needed resource for courts and individuals who would not otherwise have access to a competent guardian.

C: Consideration of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)

Our increasingly mobile society creates complex jurisdictional issues in guardianship cases. When a protected person's property or potential caretakers are spread across state lines, or the protected person crosses state lines, voluntarily or involuntarily, questions arise concerning choice of laws, jurisdiction, and transfer of case. When conflict occurs in such cases, it is often cumbersome and expensive for family members, courts, and lawyers. Additionally, lack of clear rules of jurisdiction can foster "granny snatching" and other abusive actions.

To address these challenging problems, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) seeks to clarify jurisdiction and provide a

procedural roadmap for addressing dilemmas where more than one state is involved. The effectiveness of uniform laws depend on adoption by most or all states. Oregon should complete an in-depth examination of the proposed act in light of local laws, issues, and needs.

D: Expansion of Statutory Definition of "Professional Fiduciary"

The statutory definition of professional fiduciary should be expanded to include those persons who offer their services to the public, regardless of the actual number of protected persons served.

The current statute defines a professional fiduciary as one who is acting at the same time as a fiduciary for three or more protected persons who are not related to the fiduciary. The Task Force believes that anyone offering their services as a professional fiduciary should be expected to meet minimum requirements as a matter of public protection, regardless of the number of clients being served. The Oregon Judicial Department should work collaboratively with others to seek and support legislative change.

Oregon Judicial Department

Court Visitor Qualifications Rules

Overview

Oregon Revised Statutes 125.165 requires each presiding judge to establish by order qualifications for persons serving as visitors for the court, in addition to those qualifications established by statute, including:

- a) The training and expertise adequate to allow the person to conduct the interviews and make the recommendations required under ORS 125.150 and 125.155, to communicate with, assess and interact with respondents and protected persons, and to perform the other duties required of a visitor; and
- b) Demonstrate sufficient knowledge of the law so as to be able to inform a respondent or protected person of the nature and effect of a protective proceeding, to inform a respondent or protected person of the rights of the respondent or protected person in the protective proceeding, to answer the questions of a respondent or protected person and to inform fiduciaries concerning their powers and duties.

Qualifications: Areas to Be Addressed

1. Training and Expertise

- a. Licensure or other qualifying background
 - i. Registered Nurse; Licensed Clinical Social Worker; Licensed Psychologist in good standing, or
 - ii. Other qualifying experience in mental health, geriatrics, or developmental disabilities, and
- b. Knowledge of services and resources available for the target demographic.

2. Subject Matter Knowledge

- a. Demonstrated knowledge of the law (see ORS 125.165), and
- b. Demonstrated understanding of the fundamentals of elder abuse, including financial abuse.

3. Training. Successful completion of a mandatory training module, to be developed by the State Court Administrator's Office, including the elements of the visitor's function for both minor and adult guardianships.

4. Ethics

- a. Criminal background requirements
 - i. No felonies or bankruptcies
- b. Standards of Conduct
 - i. Anyone who serves as a court visitor in a case may not serve as a professional fiduciary in the matter.

APPENDIX A

Process to Register Approved Court Visitors

1. Establishment of registries;
2. Application Process;
3. Acceptance and Denial Process;
4. Complaint process;
5. Removal process;
6. Grievance process;
7. Recommendations regarding how to appropriately identify court visitors in the case management system.

Topics to Be Included in a Proposed Uniform Trial Court Rule Amendment

Court Visitors

Appointment

1. Court visitors should be designated by court appointment.
 - a. Attorneys should not be permitted to express preferences in, or otherwise control the selection.
 - b. A standard Form of Order consistent with Appendix B.1 should be used.
2. No visitor shall be appointed who is not approved and registered under the Supreme Court Rules.

Fees

3. Court visitors should be paid an hourly rate through the court.
4. Each Judicial District should establish the hourly rate for visitors through their Supplementary Local Rules.

Registry

5. State and local registries of approved court visitors should be created and maintained, including:
 - a. Mechanisms for courts to report information regarding the performance of visitors, including any removals or limitations a court places on the visitor, for use by other courts when making appointments from the registry;
 - b. Mechanisms to maintain consistency between the state and local registries.

Report

6. A standard court visitors report substantially in the form specified in Appendix B.2 should be used in all adult guardianship and conservatorship cases.
7. Visitors reports should be sealed if the case is dismissed, and after entry of guardianship.

Fiduciaries

Appointment

8. No fiduciary shall be appointed who is not certified under the Supreme Court Rules.
 - a. Professional Fiduciaries must be certified as required by the Supreme Court Rules.
 - b. Non-professional Fiduciaries must have completed the required training.

Compensation for Nonprofessional Fiduciaries

9. Each Judicial District should establish a rebuttable standard compensation rate for nonprofessional fiduciaries, including:

APPENDIX B

- a. A flat fee for nonprofessional fiduciaries who live with their ward;
 - b. An hourly rate for nonprofessional fiduciaries who live separately from their ward.
10. Judges should have discretion to accept a rate other than the standard rate based on an assessment of the following:
- i. If the fiduciary is the sole heir of the protected person;
 - ii. Proof of loss of income resulting from the performance of fiduciary duties;
 - iii. Increased compensation of unusual or onerous duties;
 - iv. Decreased or no compensation for activities that the fiduciary would have been expected to participate in regardless of his/her role as fiduciary;
- b. Require straightforward and specific time records using a standard Fiduciary Report and Application for Fees consistent with Appendix B.4.

Attorney Fees

11. A standard attorney fee application consistent with Appendix B.5 should be used in all guardianship and conservatorship cases.
12. A procedure for rejecting attorneys' fees should be established.

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

In the matter of the)
Permanent/Temporary Guardianship (circle) *Case # _____*
one)
Of _____) **ORDER APPOINTING**
Respondent) **COURT VISITOR**
)

The above entitled matter having come before the Court on the petition for the appointment of a temporary permanent guardian for the above named Respondent.

Pursuant to the provisions of ORS 125.150(1) and the Court having found said visitor is a qualified person who is willing to act as visitor and being fully advised,

IT IS HEREBY ORDERED that [Visitor] is appointed to act as visitor who shall investigate this matter and file a report to the Court. The visitor shall interview persons, including, but not limited to physicians and psychologists who have examined or treated the Respondent about the capacity and functional ability of the Respondent.

DATED this ____ day of _____, 20__.

Circuit Court Judge

Appendix B.2

H. Visitor's comments or any expressed communication of Respondent that related to any of the above questions:

II. CAPACITY

A. Discuss any inability of the Respondent or impairments of the Respondent which might impact their ability to provide for their needs with respect to physical health:

B. Discuss any inability of the Respondent or impairments of the Respondent which might impact their ability to provide for their needs with respect to food/clothing concerns:

C. Discuss any inability of the Respondent or impairments of the Respondent which might impact their ability to provide for their needs with respect to shelter:

D. Please comment if the investigation has determined that the Respondent is unable to resist fraud or undue influence:

E. Are these findings as indicated in "A" and "B" above part of an overall pattern of inability? If YES, please comment:

Yes

No

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

A. In what type of residence does Respondent live and how long has he / she lived there?
Comments:

Appendix B.2

B. Is the Respondent able to live at this residence while under guardianship? Yes No

C. As per the petitioner, what health and social services or alternatives to guardianship have been provided to the Respondent during the year preceding the filing of the petition (if known)?

IV. FINDINGS AND RECOMMENDATIONS

A. Are the facts stated in the petition substantially correct? Yes No

B. Have alternatives to guardianship/conservatorship been considered? E.g. Advance Directive for Health Care, Revocable Trust, Family Assistance, and/or a Durable Power of Attorney? If YES, please comment: Yes No

C. Is the Respondent so impaired that he/she is unable to make reasoned decisions about his/her safety? Yes No

D. Is the appointment of a fiduciary necessary? Yes No

E. Is it appropriate to limit the scope of the fiduciary's appointment? If YES, for what limited purpose(s) is a fiduciary necessary? Not Applicable

F. Is the nominated fiduciary(ies)

1. Qualified to serve? Yes No

2. Suitable to serve? Yes No

3. Willing to serve? Yes No

If NO, please comment:

G. If there is an objection to the petition from parties other than the Respondent, what are the issues? Yes No

H. If you have identified anyone else you believe is more appropriate for appointment as guardian and/or conservator, please provide the name and reasons for the conclusion:

Appendix B.2

I. If the Respondent does not wish to be represented, is counsel recommended to protect Respondent's interests or to help resolve issues in the case?

If YES, please comment:

J. Should there be any limitations to the scope or duration imposed on the proposed fiduciary(ies)? If YES, please comment:

K. Additional comments that might assist the Court and all persons interested in this matter:

IV. All of the people interviewed by the visitor while compiling this report are listed below:

Name	Address & Phone	Relationship	Date Interviewed

STATE OF OREGON)
County of Multnomah) ss.

I hereby declare 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.

Court Visitor Name

Signature of Court Visitor

Date

Appendix B.3

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

In the matter of the Guardianship of)
) Case # _____
)
)
) Respondent, a minor) **COURT VISITOR'S REPORT**
) **MINOR GUARDIANSHIP**

I, _____, have been appointed as court visitor in the above-mentioned proceeding.

I. CAPACITY

- A. The minority of the Respondent has been established and s/he will reach the age of majority:
(month and year) _____
- B. The express wishes/concerns of the minor are as follows:

- C. Any special requirements or needs of the minor:

II. EXPRESS WISHES, CONCERNS OR REQUEST OF THE PARENT(S) OF THE MINOR

III. I HAVE CONDUCTED AN INQUIRY/INVESTIGATION OF THE PARTIES TO THIS PROCEEDING REGARDING ANY:

- A. Criminal Background:

- B. DHS or Juvenile Court Involvement History:

- C. Domestic Violence History:

Appendix B.3

D. Terms of Agreement with Parent(s):

--

E. Circumstances of Placement:

--

F. Any Other Legal Proceedings in any Other State:

--

IV. PROPOSED GUARDIAN

A. Proposed guardian is:

- 1. Qualified to serve
- 2. Suitable to serve
- 3. Willing to serve

Yes No

<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

--

B. I have conducted an evaluation of the residence where the minor will reside, including the other adults and children living in the home:

<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------

--

C. The education/schooling plans for the minor:

--

D. Plan for health care:

--

E. Resources available for care of the minor:

--

Appendix B.3

V. RECOMMENDATIONS

A. Limitations on the Guardianship:

--

B. Duration of the Guardianship:

--

C. Other matters the Court should be made aware of:

--

IV. All of the people interviewed by the visitor while compiling this report are listed below:

Name	Address & Phone	Relationship	Date Interviewed

STATE OF OREGON)
County of Multnomah) ss.

I hereby declare 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.

Court Visitor Name

Signature of Court Visitor

Date

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

In the matter of the Conservatorship of) *Case # _____*
 _____)
)
Respondent) **COURT VISITOR'S REPORT**
) **CONSERVATORSHIP**

I, _____, have been appointed as court visitor in the above-mentioned proceeding.

- I. EXPRESSED WISHES OF RESPONDENT / PROCEDURAL RIGHTS**
- | | | |
|---|--------------------------|--------------------------|
| | Yes | No |
| A. Does the Respondent object to the appointment of a fiduciary? | <input type="checkbox"/> | <input type="checkbox"/> |
| B. Is the Respondent willing to attend any hearing that may be scheduled? | <input type="checkbox"/> | <input type="checkbox"/> |
| C. Does Respondent prefer that another person act as fiduciary? | <input type="checkbox"/> | <input type="checkbox"/> |
| The name, address, telephone number and proposed role of the person of preference is: | <input type="checkbox"/> | <input type="checkbox"/> |

- D. Does the Respondent wish to be represented by counsel? Yes No
 If so, comment on whether Respondent has named an attorney or wishes the Court to appoint an attorney.

- E. If Respondent objects to the appointment of a fiduciary, does the Respondent understand that a hearing will be held? Not Applicable Yes No
- F. If a hearing is scheduled, is the Respondent willing to attend a hearing or to talk to the Judge by telephone during the hearing? Yes No
- G. Does the Respondent wish for the visitor to interview particular individuals? Yes No

If so, please list the individuals' names, whether they were interviewed, and the visitor's reason for not interviewing, if applicable:

Name & Relationship	Interviewed ?		If no, visitor's reason:
	Yes	No	
	<input type="checkbox"/>	<input type="checkbox"/>	
	<input type="checkbox"/>	<input type="checkbox"/>	
	<input type="checkbox"/>	<input type="checkbox"/>	

Appendix B.4

H. Visitor's comments or any expressed communication of Respondent that related to any of the above questions:

II. FINANCIAL INCAPABILITY

A. Discuss any condition of the Respondent which might impact their ability to effectively manage their financial resources :

B. Discuss any indication that the Respondent is unable to resist fraud or undue influence:

C. Are these findings as indicated in "A" and "B" above part of an overall pattern of inability? If YES, please comment:

Yes No

III. FINDINGS AND RECOMMENDATIONS

A. Are the facts stated in the petition substantially correct?

Yes No

B. Has the Respondent signed a Durable Power of Attorney, Advanced Directive, Will or Trust within the last 12 months? If YES, please comment:

C. Is the Respondent so impaired that he/she is unable to manage financial resources as described in ORS 125.005(3)?

Not Applicable

D. Is the appointment of a fiduciary necessary?

E. Is it appropriate to limit the scope of the fiduciary's appointment? If YES, for what limited purpose(s) is a fiduciary necessary?

Not Applicable

F. Is the nominated fiduciary(ies) suitable and qualified to serve?

G. Has the nominated fiduciary had any financial dealings with the Respondent?

Appendix B.4

H. Has the nominated fiduciary received any money, loans or property from the Respondent? If so, what.

Yes

No

I. Has the nominated fiduciary acted in any fiduciary capacity for the Respondent: Examples: Power of Attorney, Trustee, Representative Payee, Guarantor or obligor? If so, what.

J. If there is an objection to the petition from parties other than the Respondent, what are the issues?

K. If you have identified anyone else you believe is more appropriate for appointment as Guardian and/or Conservator, please provide the name and reasons for the conclusion:

L. If the Respondent does not wish to be represented, is counsel recommended to protect Respondent's interests or to help resolve issues in the case?

If YES, please comment:

M. Should there be any limitations to the scope or duration imposed on the proposed fiduciary? If YES, please comment:

N. Additional comments that might assist the Court and all persons interested in this matter:

Appendix B.4

IV. All of the people interviewed by the visitor while compiling this report are listed below:

Name	Address & Phone	Relationship	Date Interviewed

STATE OF OREGON)
County of Multnomah) ss.

I hereby declare 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.

Court Visitor Name

Signature of Court Visitor

Date

Oregon Judicial Department
Probate Fiduciary Qualifications Rules

Qualifications for Approved Individual Professional Fiduciaries

5. ***General***
 - a. Be at least 18 years of age;
 - b. Be of sound mind;
 - c. Satisfactory personal credit;
6. ***Education***
 - a. Bachelors degree or higher with at least two years qualifying experience, or
 - b. Associates Degree with at least four years of qualifying experience;
7. ***Experience.*** Working in a discipline pertinent to the target demographic, including decision-making, or the use of independent judgment on behalf of client(s) in the area of legal, financial, social services, healthcare, or other disciplines pertinent to the provision of the target demographic;
8. ***Training and Examination.*** Successful completion of a mandatory training module, to be developed by the State Court Administrator's Office;
9. ***Ethics***
 - a. No felonies or bankruptcies;
 - b. No misdemeanor convictions that reflect adversely on the ability to perform the responsibilities of a fiduciary;
 - c. Standards of Conduct;
10. ***Continuing Education***
11. ***Insurance Coverage.*** In addition to the bonding requirements of ORS Chapter 125, applicants must be insured or bonded at all times in such amount as may be determined by the certifying body and shall notify the certifying body immediately of cancellation of required coverage. Proof of financial responsibility shall be in such form and in such amount as the certifying body may prescribe by regulation.
12. ***Grandparenting.*** A local court may waive the educational requirements under this rule for professional fiduciaries who have been found to be qualified and suitable at the time this rule is adopted.

Qualifications for Approved Professional Fiduciary Agencies

1. ***General***
 - a. Officers and Directors must meet the qualifications of ORS Chapter 125 for fiduciaries;
 - b. Agency must have at least (2) individuals who are qualified professional fiduciaries under the Oregon Supreme Court Rule;
 - c. Method to identify the individual professional fiduciary with final decision-making authority in each case filed with a court.

APPENDIX C

Process To Qualify Or Certify Fiduciaries

1. Establishment of qualifying or certifying body
2. Application Process
3. Acceptance and Denial Process
4. Complaint process
5. Removal process
6. Grievance process
7. Recommendations regarding how to appropriately identify Fiduciaries in the Case Management System

Additional Resources

1. Arizona Fiduciary Certification Program
<http://www.supreme.state.az.us/fiduc/>
2. California Professional Fiduciaries Bureau
<http://www.fiduciary.ca.gov/>
3. The Washington Certified Professional Guardian Board Qualifications
http://www.courts.wa.gov/programs_orgs/Guardian/
4. Center for Guardianship Certification
<http://www.guardianshipcert.org/>
5. Oregon Guardianship/Conservatorship Association, a nonprofit, voluntary organization of Oregon professional fiduciaries
<http://www.gcaoregon.org/>