



DISABILITY RIGHTS OREGON

THIRD EDITION

Guardianship Handbook:  
Protective Proceedings for Adults

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Protective Proceedings for Adults

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NOTICE: This Handbook is not intended as a substitute for legal advice.

Federal and state law can change at any time. You may wish to contact Disability Rights Oregon or consult with an attorney in your community if you require further information.

## Purpose of this Handbook

The purpose of this Handbook is to provide general information to individuals regarding their rights and protections under the law regarding guardianship.

A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations. ORS 125.300(1).

Under Oregon law, a judge can appoint an adult to make important decisions about the care and well-being of another person. This is called a protective proceeding.

In a protective proceeding, a judge can appoint a guardian, a conservator or both. In an emergency, a judge can appoint a temporary guardian, a temporary conservator or both.

A judge may order action be taken on behalf of an adult without appointment of a guardian or conservator. This is called a protective order. Any adult can file a petition in court to have a guardian appointed for another person.

Separate laws cover protective proceedings for adults and children. This Handbook is about adults only.

*See pp. 13-15, Worksheet for Protective Proceedings, which provides a method for reviewing a guardianship/conservatorship case.*

Special thanks to Shannon Rieke for reviewing this Handbook and providing suggestions to improve its clarity.

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## What is a protected person?

You are called a protected person if you are an adult and have a guardian, conservator or both.

## What is the purpose of a guardianship proceeding?

The focus of all participants in a guardianship proceeding should be to benefit and assist you in a manner that maximizes your self-reliance and independence. The primary goal is to allow you to live your own life with as much dignity and personal liberty as possible.

The relationship between a guardian and a protected person is called a guardianship. Only a court can set up a guardianship.

## What does incapacitated mean?

According to the law, you are considered incapacitated if you cannot make decisions well enough to get health care, food, shelter, and other care necessary to avoid serious physical injury or illness and, therefore, need continuing care and supervision. ORS 125.060 through ORS 125.080.

You may be legally incapacitated in some areas, but not in others. A guardianship should be limited so that your guardian is only given decision-making authority in the area that you are incapacitated. For example, a guardianship may apply only to medical treatment decisions.

## What is a guardian?

A guardian is an adult appointed by a court to make important decisions for you about your care and well-being. You must be considered incapacitated to have a guardian appointed for you.

If someone states that he or she is your guardian, there must be court papers that show this is true. If you are a protected person, you may contact the court and review the order of guardianship. Your guardianship should be tailored to meet your actual needs and therefore limit your guardian's authority to make decisions for you to the specific areas in which the court determines you do not have capacity to do so yourself. If no limitations are specified, you are under a general guardianship.

## What is a conservator?

A conservator is an adult appointed by a court to make important decisions for you about your finances. You must be considered financially incapable to receive a conservator.

You may have only a conservator or only a guardian or you may have both. When you have both a conservator and a guardian, they may or may not be the same person.

## What does financially incapable mean?

You are considered financially incapable when a condition makes you unable to manage your financial resources effectively.

To be financially capable, you must be able to carry out actions necessary to obtain, administer and dispose of:

- Real property (e.g., house)
- Personal property (e.g., furniture, clothes or car)
- Intangible property (e.g., bank accounts)
- Business property
- Benefits
- Income

## Are there alternatives to guardianship?

Yes. Alternatives to guardianship should be considered in terms of whether they are in place or could be in place.

*See Worksheet for Protective Proceedings, p. 15.*

## Can my guardianship order be limited?

Yes. Your guardianship order should be tailored to meet your actual mental and physical limitations so that the scope of your guardianship is the least restrictive possible.

You may make a request for a limited guardianship and specify the areas over which you should be able to keep your decision-making authority.

## How do I know I have a guardian?

If you have a guardian, then there must be a court order that states this is true. If someone is claiming to be your guardian, you can ask them to provide this documentation.

Otherwise, you may contact the probate department of the Circuit Court where you live (or lived when you believe an order may have been put in place) to ask whether or not there is a guardianship order.

## Is there an emergency guardianship proceeding?

Yes. A temporary guardian may be appointed by a court if you are found to be incapacitated, in immediate and serious danger to your life or health, and your welfare requires immediate action.

You must meet all three criteria listed above in order for a temporary guardian to be appointed for you.

The appointment can only be for a specific purpose and a specific time period (not more than 30 days).

The court can extend the temporary guardianship for an additional 30 days.

## Will I be notified that someone has petitioned the court to become my guardian?

Yes. No one can become your guardian unless you are given prior written notice and are given an opportunity to tell a judge why you do not need a guardian.

*See pp. 4-5, How do I object to a guardianship petition?*

A guardianship proceeding is started by filing papers in court.

Those papers are called a petition, and the person who files the petition is called the petitioner.

A petition for guardianship must state:

- Who you are, and that you need a guardian
- Why you need a guardian
- Who should be your guardian and why he or she is qualified
- Whether your guardian plans to put you in a care facility

You, the person named as needing a guardian, must be personally served with a copy of the petition.

Your close relatives must be mailed a copy of the petition. The Office of the Long Term Care Ombudsman (LTCO) must be mailed a copy of the petition if you live in, or your guardian intends to place you in, a nursing home or residential facility.

Disability Rights Oregon (DRO) must be mailed a copy of the petition if you live in, or your guardian intends to place you in, a mental health treatment facility or a residential facility for individuals with developmental disabilities.

All of the parties listed above must be given the opportunity to object to all or part of the petition.

## How do I object to a guardianship petition?

You should be given a blue-colored form that explains your rights and includes three sentences that you can check to tell the court why you object to the petition. You are the 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 [name of proposed guardian or conservator] making any decisions for me.

\_\_\_ I do not want [name of proposed guardian or conservator] to make the following decisions for me:

\_\_\_\_\_  
\_\_\_\_\_

You must sign and date your form. Also, you need to make sure that your objection form is received by the probate department of the court.

You also have the right to appear in court to be heard by a judge on these objections and to have an attorney's assistance in the process.

Once someone files a petition for guardianship, the court will send an independent investigator, called a court visitor, to meet with you to verify whether or not you may need a guardian.

The court visitor checks your home and talks with you. He or she will also talk with doctors, caregivers, and others who might have relevant information about whether you need a guardian. The court visitor also talks with the proposed guardian (or conservator) and others who might have relevant information about the qualifications and suitability of the proposed guardian (or conservator).

You should provide the court visitor with the names and contact information of people you believe have relevant information about your current decision-making capacity and/or about the suitability of the proposed guardian (or conservator).

The court visitor writes a report to the court to tell the judge whether you need a guardian, and whether the person who wants to become your guardian is qualified, and the best person, to do so. ORS 125.150.

A judge decides whether to appoint a guardian after reviewing all information provided, including the report by the court visitor. If anyone objects to the guardianship, a hearing is held and the judge considers all of the evidence from this hearing. Judges can appoint a guardian for you only if you meet the legal definition of incapacitated. *See p. 1, What does incapacitated mean?* If you do not meet the definition, the case should be dismissed. ORS 125.305(a).

## What are my rights if I have a guardian?

Even if you have a guardian, you keep all legal and civil rights provided by law except those that have been specifically granted to your guardian by the court. You keep the right to contact and hire an attorney and to have access to your own records.

Also, you maintain your right to vote. At any time, you may petition the court to have the guardianship ended or to have your guardian changed.

You retain all of your civil rights, aside from authority specifically granted to your guardian by the judge. You can be admitted to a facility only if your guardian has been given authority to make placement decisions. This can only happen if the doctor or other professional from the facility agrees the admission is appropriate. You or anyone else may contact the court to object to the placement as not being in your best interest.

Your guardian can be removed or replaced by the court if the court finds that doing so is best for you. A judge may end a guardianship if he or she decides that you have regained capacity to make your own decisions.

### Can my medical provider give the court visitor my confidential medical information?

Your medical provider can release your confidential medical information to the court visitor only if you consent or if the provider is required to give the information by court order or subpoena.

### Is a hearing required for a guardian to be appointed?

No. A hearing is not required unless objections are filed or a judge decides that a hearing is necessary.

### Why does the determination of whether I am legally incapacitated matter?

If the judge determines that you are not legally incapacitated according to the strict legal definition, then the judge may not order that you have a guardian, and the case is dismissed.

### How does a judge appoint a guardian?

A judge decides whether to appoint a guardian after reviewing the court visitor's report and, if necessary, conducting a hearing. If the judge decides to appoint a guardian, then he or she will sign an order for guardianship.

This order becomes part of the court's file that is kept by the probate department. The judge appoints a guardian only if he or she finds that you are incapacitated and need continuing care and supervision.

Do my personal values and beliefs matter in determining who will be appointed as my guardian?

Yes. Your personal preference should factor into the judge's decision as to whom to appoint as your guardian. Your proposed guardian must be qualified, suitable and willing to serve.

The court has a duty to appoint the most suitable person who is willing to serve as your guardian after giving consideration to your specific circumstances, your specific stated desires, as well as your relationship by blood or marriage to the proposed guardian.

If the judge determines I need a guardian, can the guardian's ability to make decisions for me be limited?

Yes. Oregon law states that a guardian may be appointed for you only as is necessary to promote and protect your well-being. The guardianship should be ordered only to the extent that is necessitated by your actual mental and physical limitations.

Therefore, the guardianship should be the least restrictive possible.

A limited guardian may have one or more of the powers described for a general guardian. *See pp. 8-9, What powers and duties does my guardian have?*

Can I appeal the judge's decision to have a guardian appointed for me?

Yes. You can appeal the judge's decision to have a guardian appointed for you.

## What powers and duties does my guardian have?

Your guardian has only those powers given by the court. Generally, guardians make decisions in three primary areas: residential placement, health care, and general care and comfort. Your guardian should get as much input as possible from you prior to making decisions on your behalf. This includes finding out your opinions, desires and personal values. *See Worksheet for Protective Proceedings, pp. 13-15.*

When a guardian has all the powers allowed by law, this is called a general guardianship. A general guardian:

- Decides where you live
- Provides for your care, comfort and maintenance, including training and education
- Takes care of your personal property, unless a conservator has been appointed
- Makes health care decisions
- Makes advance funeral and burial arrangements
- Controls the disposition of your remains
- Receives and spends your money for your support, care and education

Guardians also have a number of less important powers.

A guardian may not:

- Authorize sterilization
- Use your money to pay for room and board provided by the guardian or the guardian's close relatives unless approved by the court
- Put you in a mental health treatment facility, nursing home or residential facility unless the guardian gives prior written notice to the court, as well as to you and other interested parties, and gives you the opportunity to object and have a hearing



Your guardian must file a report with the court once each year describing how you are doing, how the guardianship powers have been used during the year, whether or not the guardianship should be continued, and other information.

## Do I retain any rights if I have a guardian?

Yes. Although a guardian may have been appointed for you, that does not mean you are presumed to be incompetent.

You retain all legal and civil rights provided by law except those that have been expressly limited by court order or specifically granted to your guardian by the court.

For example, you retain the right to contact and seek representation by an attorney, and the right to have access to your personal records.

## How long does a guardianship last?

A guardianship ends upon the death, resignation or removal of your guardian or when you pass away. A guardian may be removed by a judge when he or she finds this to be in your best interest.

## Can a business provide guardianship services to families?

A person who acts as a guardian for three or more protected persons with whom he or she is not related is considered a professional fiduciary.

A professional fiduciary must provide the judge with detailed information about his or her business and clients in order to be appointed.

## What authority does the court have over me as a protected person?

The court may act upon the petition or motion of any person or on its own authority in any manner that the court deems appropriate to determine:

- Your condition and welfare
- The proper performance of your guardian or conservator

## Can I get a different guardian or conservator?

Yes. However, you must get approval of the court, which will require that you follow the court procedures, including showing that the change is in your best interest. Oregon law gives preference to a family member to act as guardian.

Your choice of a replacement guardian or conservator must meet the court criteria and a new petition for the replacement guardian or conservator must be filed with the court.

## Can I terminate my guardianship or conservatorship?

Yes, under specific circumstances. Your guardianship has been ordered by the court and lasts until your death, or until the guardianship is terminated by a court.

To terminate your guardianship by court proceeding, send a letter to the probate court in the county that your guardianship proceeding took place. In the letter, state the following:

- You want your guardianship terminated because you are able to make decisions for yourself and therefore are not incapacitated.
- You have a medical professional who supports that you no longer need a guardian and who has written a letter to that effect. It is preferable if this letter is from a psychiatrist who can state that you have the capacity to make decisions about all matters given to your guardian by the court. (Enclose the letter.)
- You would like the court visitor to investigate and make a report to the court.
- You would like to have a hearing on the matter. (If your guardian agrees with you, enclose a statement of agreement from your guardian.)
- You would like to request that the court appoint an attorney on the matter to represent you.

Then, the court visitor should interview you, your guardian and any other relevant people.

In the interview, present information that supports your belief that you do not need a guardian. Give the court visitor contact information for people you feel he or she should talk with regarding your capacity to make decisions. Be sure to include your doctor's contact information. The court visitor then files a report with the judge presiding over your guardianship proceedings.

In that report, the court visitor will state either that:

- The evidence supports that your guardianship should be terminated because you are no longer incapacitated; or
- The evidence supports that your guardianship should continue because you remain incapacitated.

The court visitor's opinion is not definitive of whether or not the judge will find in your favor. However, his or her opinion will be considered by the judge and at a hearing. If your guardian agrees that the guardianship should be terminated, then a hearing may not be necessary.

If, however, your guardian disagrees, then a hearing should be held where you have a right to be present and to have an attorney. You have the right to contact an attorney and seek legal advice.

You may contact a private attorney who practices guardianship law. The Oregon State Bar's Lawyer Referral Service (1-800-452-7636) can provide you with the names and contact information for three attorneys who practice guardianship law and may be able to represent you.

You may also contact Disability Rights Oregon for information regarding guardianship termination, as well as other guardianship issues.



# WORKSHEET FOR PROTECTIVE PROCEEDINGS

## 1. Values & Expressed Wishes

Specify preferred guardian/conservator: (Is this person a family member? Do they have either a criminal record or a bankruptcy filing? Carefully consider qualifications and willingness.)

Specify preferred health care services: (What sorts of services are desired/needed? Who are the preferred treatment providers?)

Specify preferred living arrangements: (Carefully consider the benefits and drawbacks of making a change in residence.)

Specify preferred manner of managing finances:

Specify preferred care, comfort and maintenance services:

Indicate expressed wishes regarding disposition of remains:

## 2. Appropriate Scope of Guardianship

| <b>SPECIFIC AREA</b>          | <b>ABILITY/CAPACITY</b>                                  | <b>COMMENTS</b> |
|-------------------------------|--|-----------------|
| Medical                       | <input type="checkbox"/> No <input type="checkbox"/> Yes |                 |
| Residential                   | <input type="checkbox"/> No <input type="checkbox"/> Yes |                 |
| Financial                     | <input type="checkbox"/> No <input type="checkbox"/> Yes |                 |
| Testamentary                  | <input type="checkbox"/> No <input type="checkbox"/> Yes |                 |
| Care, comfort and maintenance | <input type="checkbox"/> No <input type="checkbox"/> Yes |                 |
| Death/Burial                  | <input type="checkbox"/> No <input type="checkbox"/> Yes |                 |

### 3. Alternatives to Guardianship &/or Conservatorship

| <b>ALTERNATIVES</b>                     | <b>DESCRIPTION OF ALTERNATIVES</b>  | <b>RULED OUT?</b>   |
|---|---|---|
| Other Assistance                        | Family members, personal care assistants, case managers, home health services, Meals on Wheels as well as education regarding people/agencies who may be able to work together to provide care for your physical and financial needs. This requires your cooperation and the financial authority to act on your behalf. | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Advance Directive for Health Care       | This allows the management of your health care and access to your medical records. ORS 127.531.   | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Declaration for Mental Health Treatment | This allows you to designate a representative to make decisions pertaining to your mental health care in the event that you become incapacitated.   | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Durable Power of Attorney (DPA)         | This allows you to grant another person authority to act for you if you become incapacitated. DPA's usually affect property decision-making, but may also relate to health care.  | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Education Power of Attorney             | This is like the Durable Power of Attorney above and allows you to designate a person to make decisions for you pertaining to your education.   | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Daily Money Management (DMM)            | Daily money management services help you with the gamut of services regarding your financial affairs. DMM is voluntary; you must be capable of asking for or accepting services.  | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Special Needs Trust                     | This allows you to remain eligible for government benefits, while your designated trustee manages the funds for particular uses for your benefit.   | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Revocable Trust                         | A properly drafted trust can be a good alternative to a guardianship if you agree with it and are able to follow through.   | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Joint Ownership                         | Joint ownership of land or bank accounts may allow your co-owner to manage your property if you become incapacitated.   | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |
| Representative Payee                    | A representative payee is appointed by a government agency to receive, manage and spend your government benefits on your behalf.  | <input type="checkbox"/> No<br><input type="checkbox"/> Yes |





Your Notes:

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Printed in-house on 30% post consumer recycled paper

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