

**DEPARTMENT OF HUMAN SERVICES
SENIORS AND PEOPLE WITH DISABILITIES DIVISION
OREGON ADMINISTRATIVE RULES**

**CHAPTER 411
DIVISION 26**

GUARDIANSHIPS AND CONSERVATORSHIPS

411-026-0000 Purpose and Scope

(Amended 8/1/2010)

(1) The Department of Human Services (Department), Seniors and People with Disabilities Division (Division) has the authority and responsibility to provide protective services to older adults, age 65 or older, and adults with physical disabilities. For the purpose of providing protective services and administration of services under ORS chapter 410, the Division may request protections from a court under ORS chapter 125 for an individual who is functionally incapacitated or financially incapable.

(2) The Division's scope when requesting protections under ORS chapter 125 includes:

(a) Subject to contractual limitations and budgetary constraints, the Division may pay towards the costs of the petition and the protective proceeding under ORS chapter 125 when there are no other available resources, or when less restrictive interventions are not available, to protect an older adult or an adult with physical disabilities.

(b) For a protective proceeding, or in the case of an existing protective order issued under ORS chapter 125, the Division may inform and provide confidential information to the court to prevent or lessen a serious and imminent risk to health and safety of an older adult or adult with physical disabilities. The Division may also provide information about the fiduciary for the purpose of the petition or to report abuse when there is substantiated abuse or a failure to protect by the fiduciary.

(3) The rules in OAR chapter 411, division 026 also establish guidelines for the nomination and payment of legal costs for conservators when necessary to preserve, recover, and locate the individual's assets for the benefit of the individual to obtain and maintain Department benefits and services, and for estate recovery of public assistance.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 125.012 & 410.070

411-026-0010 Definitions

(Amended 8/1/2010)

For purposes of these rules, the following definitions apply:

(1) "Area Agency on Aging (AAA)" means the agency designated by the Department with responsibility to provide a comprehensive and coordinated system of service to older adults or adults with disabilities in a designated planning and service area.

(2) "Central Office" means the office of the Division that provides statewide support for the local offices.

(3) "Confidential Information" means any health, mental health, financial, substantiated abuse, and legal information that is designated as Department confidential or protected information by federal and state statutes or rule.

(4) "Conservator" means a person who has fiduciary duty and is appointed by a court to administer the financial and property resources of a protected individual under ORS chapter 125.

(5) "Court" means any court in Oregon having probate jurisdiction or a judge thereof.

(6) "Department" means the Department of Human Services (DHS).

(7) "Disability" means any chronic physical or cognitive condition, such as acquired brain damage or dementia that significantly interferes with an individual's ability to protect his or herself from harm, abuse, neglect, or exploitation.

(8) "Division" means the Department of Human Services, Seniors and People with Disabilities Division.

(9) "Fiduciary" means a guardian or conservator appointed under the provisions of ORS chapter 125. A fiduciary may be:

(a) Temporary in which the powers given in the protective order last generally 30 days and may be granted immediately in an emergency;

(b) Limited in which only specific powers (not all powers) are granted in the protective order; and

(c) Full in which all or a substantial amount of powers are granted in the protective order. Full guardianship and conservatorships are generally long term.

(10) "Financially Incapable" means a condition in which an individual is unable to manage his or her financial resources effectively for reasons including but not limited to physical disability or cognitive disability, such as acquired brain injury or dementia.

(11) "Functionally Incapacitated" means a condition in which an individual's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the individual presently lacks the capacity to meet the essential requirements for the individual's physical health or safety. "Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, financial attention, and other care without which serious physical injury or illness is likely to occur.

(12) "Guardian" means a person who has fiduciary duty and is appointed by a court to make personal, health, or other decisions for a functionally incapacitated individual under ORS chapter 125.

(13) "Interested Party" means persons or entities that under ORS 125.060 shall be notified about the filing of a protective order.

(14) "Local Office" means a Division district office or Area Agency on Aging office that delivers the Division's services to their service delivery area.

(15) "Manage Financial Resources" means those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.

(16) "Party to the Proceeding" means the respondent, petitioner, guardian, conservator, and their legal counsel, or any other person allowed by the court to participate in a guardianship or conservatorship proceeding.

(17) "Visitor" means a person who is an officer, employee, or special appointee of the court, is not an interested party in the proceedings, and has been trained or has the expertise to appropriately evaluate the needs of the allegedly incapacitated individual.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 125.012 & 410.070

411-026-0020 Eligibility for State Payment

(Amended 8/1/2010)

When a protective order is the appropriate action to protect an individual, the Division may pay towards the costs of the proceeding for a protective order for an individual who:

- (1) Is age 65 years or older or is age 18 or older with a physical disability;
- (2) Is functionally incapacitated or financially incapable;
- (3) Is unable to make informed choices because he or she lacks the ability to understand the current situation, understand the options available and their likely consequences, and reasonably choose from among those options and communicate the choice;
- (4) Is in imminent and serious danger of harm to health, safety, or loss of property or resources;
- (5) Has no means, family, or other person or entity able to pay for the protective proceeding, or family or other person or entity that has the ability or willingness to petition for the responsibility for the safety and welfare of the individual;

(6) Shall benefit directly from having a guardian or conservator; and

(7) All available lesser restrictive options to protect his or her health and safety are exhausted or are not feasible.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 410.070

411-026-0030 Screening

(Amended 8/1/2010)

(1) The local office shall complete a screening of the individual for whom a guardian or conservator is sought. The screening shall:

(a) Provide specific objective evidence of functional incapacitation or financial incapability;

(b) Address whether the individual's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that he or she presently lacks the essential requirements for:

(A) His or her health or safety; or

(B) Managing his or her financial resources.

(c) If a conservatorship is not required with a guardianship, determine if the guardian or other person or entity needs to exercise powers over the individual's resources;

(d) Demonstrate that a protective order is necessary to prevent or lessen a serious and imminent threat of harm to the individual; and

(e) Recommend the most appropriate type of protective order, as follows:

(A) Temporary order (emergency order) when there is an imminent and serious danger that needs immediate action.

(B) Limited order when the incapacitated individual needs some but not all decisions to be made by someone else.

(C) Full order when it is demonstrated that long-term and substantial decision-making is needed for the continuing care, comfort, and maintenance of the incapacitated individual.

(D) Other protective orders that may be a less restrictive option.

(2) Unless unattainable, a professional clinical evaluation to determine the individual's capacity to make decisions shall accompany the assessment.

(3) The local office staff may recommend a person to act as a fiduciary. This may be a family member, friend, public or community guardianship program, or a private case manager. Within the capacity of the Division's existing services, procedures, and resources, the local office shall make reasonable efforts to inquire if the person is suitable to act as a fiduciary.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 410.070

411-026-0040 Recommendation for Guardianship

(Repealed 8/1/2010)

411-026-0050 Assignment of Attorney

(Amended 8/1/2010)

Central office shall establish a list of contracted attorneys to be used by the Department to pursue guardianships, conservatorships, and probate matters. Central office shall nominate an attorney from the list to be the petitioning attorney. The attorney names shall be placed on a geographical list and, unless circumstances require otherwise, be assigned on a rotating basis. Central office may assign a specific attorney in limited circumstances that require a specialized legal need.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 410.070

411-026-0060 Request and Authorization for Payment

(Amended 8/1/2010)

- (1) The local office shall submit to the central office a request for payment for a protective proceeding. Payment may be for attorney fees for the preparation of a petition to the court and the protective proceeding including paid court fees and court visitor fees. The request shall use forms and procedures established by central office.
- (2) The local office shall vigorously pursue any means for private, pro-bono, or another agency payment of the protective proceeding before requesting payment from the Division.
- (3) The Division shall not authorize payment for guardianship proceedings solely for the provision of medical care or hospitalization.
- (4) The local office shall make reasonable efforts to identify and provide the petitioning attorney with any information about existing fiduciaries including but not limited to an agent for power of attorney, health care representative (advanced directives), guardian, conservator, trustee, or representative payee.
- (5) The local office shall make reasonable efforts to identify and provide the petitioning attorney with the names and addresses of interested parties that are required to receive notice under Oregon law.
- (6) When payment for a requested guardianship or conservatorship is recommended, the central office shall authorize payment by nominating an attorney who has a contract with the Department for protective proceedings and probate matters. The local office shall then contact the attorney and provide the information necessary to petition the court. To be paid through his or her contract with the Department, the attorney must submit a detailed invoice to central office for attorney fees, court fees, and court visitor fees. Payment shall be limited to the amount set forth in the contract.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 410.070

411-026-0070 Disclosure of Information

(Amended 8/1/2010)

(1) In the absence of an individual's authorization for disclosure, a local office may disclose the individual's confidential information or information about the fiduciary or proposed fiduciary when the disclosure is ordered by a court or is:

(a) Reasonably necessary to prevent or lessen a serious and imminent threat to the individual's health or safety; and

(b) The minimum amount of information to sufficiently achieve the legal requirements of the petition and the protective proceeding and to adequately report abuse to the court.

(2) The local office staff shall identify and mark any information or documents for the petitioning attorney, court visitor, or the court that are to be treated as confidential or protected. If the local office staff verbally presents confidential or protected information to the petitioning attorney, court visitor, or the court, then the staff shall request that the information be treated as confidential and protected as required under ORS 125.012 to prevent further disclosure to the general public.

(3) For the purposes of petitioning the court for a protective order, the local office shall request that the:

(a) Petitioning attorney or person or entity presenting confidential information to the court not disclose Department confidential information that is not identified and marked as confidential and protected;

(b) Disclosure of the confidential information be limited to the parties to the proceeding and their counsel or as otherwise ordered by the court;

(c) Petition is written so as to disclose only the minimal amount of confidential information that is specifically necessary to interested parties who are required to receive notice of the petition, but who are not active parties to the proceedings;

(d) Petition contains language, or there is a motion to seal confidential Department information disclosed to the court, including the petition, visitor's report, and any Department provided documents,

to prevent further disclosure of the confidential information to the public; and

(e) Petitioning attorney follows the Uniform Trial Court Rules 2.100 and 2.110 or similar county court rules for guidance on the treatment of confidential and protected Department information.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 125.012 & 410.070

411-026-0080 Estate Administration

(Amended 8/1/2010)

(1) An individual who receives public assistance through the Department, who is financially incapable, and whose assets need protection, recovery, or for whom disposition of excess property is needed to maintain eligibility for services or benefits, may be referred to the Department's Estate Administration Unit for nomination of a conservator under this rule. The local office shall use forms and procedures established by the Department's Estate Administration Unit.

(2) In determining whether or not a conservatorship should be pursued, the Department's Estate Administration Unit shall consider, including but not limited to, the following factors:

(a) Whether the individual is receiving public assistance from the Department.

(b) Whether the individual is financially incapable.

(c) The cost effectiveness of pursuing a conservatorship including but not limited to:

(A) The likelihood that the assets of the conservatorship estate shall be sufficient to cover expenses and be a benefit to the client; or

(B) The ability to successfully retrieve assets that may have already been conveyed to another person or entity can be successfully retrieved.

(d) The availability of an appropriate conservator or entity to manage the financial affairs of the individual.

(3) When the individual is receiving public assistance, the Department's Estate Administration Unit shall coordinate the nomination of a conservator with the local office providing that assistance.

(4) The conservator shall be paid through the assets of the individual's estate as ordered by the court and in accordance with the Department's contract provisions where a contract has been entered into with the attorney nominated in the matter. When there are no assets from which to pay the costs of establishing or pursuing the conservatorship, the Department may pay the costs as provided through an established contract with the Department.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 410.070