



# FITZWATER LAW

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## Elder Law Group

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## What is a Guardianship?

### What Is A Guardian?

A guardian is a person named by the court who has the authority and duty to make personal and health care decisions for a minor (under 18 years) or adult incapacitated person (the 'protected person'). A guardian may determine where the protected person will reside and what medical care he or she will receive. The court may appoint a guardian either with unlimited authority, or only for specific actions.

A guardian generally does not make financial decisions. The court may appoint a conservator to manage the finances of the protected person.

### Common Terms Used In A Guardianship Proceeding

Oregon law divides the functions of a court-appointed surrogate decision-maker into guardianship of a minor or protected person and conservatorship to manage a minor's or protected person's estate. However, it is common for a person to need both a guardian and a conservator.

**Guardian:** The person appointed by the court to make personal, medical, health care, and placement decisions for a minor (under 18 years) or an adult incapacitated person.

**Conservator:** The person appointed by the court to manage the finances of a person who is unable to do so for reasons such as minority, mental illness, physical disability, or chronic intoxication.

**Fiduciary:** A person appointed by the court to act as a guardian, conservator, temporary guardian, temporary conservator, or a combination or limitation of each.

**Professional Fiduciary:** A person paid to act as a fiduciary for three or more minors or protected persons at a time, who are not related to the fiduciary.

**Respondent:** A person for whom a guardianship and/or conservatorship is proposed.

**Protected Person.** A person (formerly respondent) for whom a guardian and/or conservator has been appointed.

**Court Visitor:** A neutral, trained individual, who is assigned by the court to interview the people involved in the guardianship proceeding and report back to the court.



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### When Is Guardianship Required?

*When is a person no longer capable of making decisions for himself or herself?*

A guardian is necessary when an individual lacks the capacity to make adequate decisions involving his or her care and safety. When is a person no longer capable of making decisions for himself or herself? This is perhaps the most difficult question for a family to make, or for an elder law attorney to answer.

Oregon law defines 'incapacity' in ORS 125.005 as:

'a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's 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 and other care without which serious physical injury or illness is likely to occur.'

The court evaluates information from doctors, psychologists, public social workers, private case managers, family, and friends. The court will appoint a neutral, trained individual, known as the court visitor, who will interview the people involved in the guardianship proceeding and report back to the court.

**IMPORTANT NOTE:** A medical diagnosis of dementia (i.e. Alzheimer's, organic brain syndrome, etc.) does not, in and of itself, constitute a legal finding of incapacity. Until a court **legally** determines that an individual is incapacitated, that person retains **all** of his or her rights and decision-making abilities. Without a legal determination of incapacity, the person has the right to make bad decisions, including decisions that might lead to injury, illness, harm or abuse, such as refusing assistance, case management, placement, medical treatment, and other forms of help. In a situation where a finding of incapacity has not yet been made by a court, the only hope is to convince the person to make the 'right' decisions for himself or herself and his or her future.

### How Is A Guardian Appointed?

The petitioner, usually with the assistance of an attorney, begins the guardianship appointment process by filing a petition with the court. The petition must contain specific facts supporting allegations of incapacity.

A copy of the petition must be personally served on the respondent, together with information about the right to object to the petition, the right to request a hearing, and the right to retain an attorney. The petitioner must also notify the respondent's spouse, parents, adult children, cohabitant, trustee, health care representative, and attorney for the respondent, if any.



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### How Is A Guardian Appointed? *(continued)*

If anyone files an objection to the petition, the judge will hold a hearing. At the hearing, the judge will decide whether a legal basis exists for appointing a guardian, and if so, who will serve as guardian. Few objections are actually filed.

If no one files an objection, 15 days after service, the petitioner's attorney can submit a limited judgment for the judge to sign. The limited judgment appoints a guardian for the respondent (protected person).

### What If It Is An Emergency?

Oregon law allows the appointment of a temporary guardian in an emergency situation, which is defined as **'an immediate and serious danger to life or health or danger to the estate.'** It requires **'clear and convincing'** evidence of that emergency, and two days' advance notice of application to the court, except where the emergency necessitates an immediate appointment. The duration of a temporary guardianship is 30 days, with a possible 30-day extension. During this 30-day temporary appointment period, the guardian can petition the court for permanent appointment.

### Who Can Or Should Serve As Guardian?

The proposed guardian must be 'suitable' (not defined in the statute) and 'willing to serve', and must inform the court if he or she has filed for bankruptcy or been convicted of a felony or a Class A misdemeanor. The proposed guardian must state whether he/she is currently providing services to the respondent. People who cannot serve are: an incompetent; a minor; a suspended or disbarred lawyer; a state court judge; or an owner, administrator, or employee of a nursing home, adult foster home, residential care facility, or assisted living facility in which the protected person is living.

In most cases, a spouse, adult child, other relative, or partner is appointed to serve as guardian. If none of the aforementioned are available or are not suitable to serve, the court may look to other options.

A professional fiduciary is also a good choice to serve as guardian. Professional fiduciaries receive referrals from a variety of sources to act as guardians for people who have the funds to pay for their services. Professional fiduciaries can provide the 'neutral party' often needed in cases involving difficult family dynamics.

Fitzwater Law, is proud to be a member of the Guardianship/Conservatorship Association of Oregon. The Association's website at [www.gcaoregon.org](http://www.gcaoregon.org) can provide more information about professional fiduciaries.



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### What Are The Duties Of A Guardian?

1. Take Custody of the Protected Person. The guardian must control the minor's or protected person's activities, determine where he or she will live, and provide for his or her safety.
2. Make Health Care Decisions for the Protected Person. The guardian must always seek to carry out the minor's or protected person's known wishes.
3. Take Reasonable Care of the Minor's/Protected Person's Personal Effects. This duty does not apply to the guardian if a conservator has been appointed.
4. Receive Money and Personal Property for the Minor/Protected Person, and Apply That to His or Her Support, Care, and Education. This duty lies primarily with the conservator. However, the guardian must inform the conservator about the minor's or protected person's ongoing needs for support, daily care, past debts, current expenses, and current and future medical needs, and keep track of what funds are necessary for these expenses.
5. Make Advance Funeral and Burial Arrangements and Control Disposition of the Remains of the Minor/Protected Person in the Event of Death.
6. Responsibilities to the Court. Each year, the guardian must file a report detailing the mental and physical condition of the minor or protected person, where he or she resides, what kind of services the minor or protected person receives, etc. The guardian must also give the court advance written notice any time the minor or protected person moves to a new residential care facility or mental health treatment facility.

### The Advance Directive Or A POLST Form?

The guardian needs to find out if the protected person has an Advance Directive for health care, and/or a POLST form completed by a physician. The guardian should then consult with an attorney regarding how to interpret and follow these documents. In some cases, the health care representative appointed by the Advance Directive may have priority over the guardian for certain health care decisions.

### What Are The Costs Involved?

Expenses associated with a guardianship include the court's filing fee, fees for serving documents on the proposed minor or protected person, the court visitor's fee, and attorney fees. Other costs sometimes necessary to establish the guardianship include medical evaluations, psychological testing, and/or functional assessments. Often these expenses can be reimbursed from the minor's or protected person's funds after the court appoints a guardian. Once the guardianship has been established, the court may approve payment for the guardian's time and out-of-pocket expenses.



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### What Are The Costs Involved? (*continued*)

Attorney fees must be approved by the court before those fees are paid from the protected person's assets. The range of attorney fees can vary greatly depending on the case. The attorney for the guardian submits a detailed description of all attorney and staff time to the court. The court reviews the attorney's documents and gives the guardian (or conservator) permission to pay his or her attorney.

**DISCLAIMER:** The information contained in this document is based on Oregon law and is subject to change. It should be used for general purposes only and should not be construed as specific legal advice by Fitzwater Meyer Hollis & Marmion, LLP or its attorneys. Neither this website nor use of its information creates an attorney-client relationship. If you have specific legal questions, consult with your own attorney or call us for an appointment.

