



# FITZWATER L A W

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## What is a Conservatorship?

### What Is A Conservator?

A conservator is a person appointed by the court with the authority and duty to manage the financial affairs of a person needing protection, such as a minor (under 18 years) or an adult incapacitated person (the 'protected person').

A conservator may be appointed for an adult if a judge determines that the individual lacks the capacity to manage his/her financial resources. The conservator can be an individual (family member or trusted friend), bank, trust company, or professional fiduciary. The conservator is empowered to take possession of the protected person's assets and income, and provides for payment of the protected person's expenses.

The conservator becomes the sole financial decision-maker for the protected person. The protected person loses all control of his or her property and assets, except for a few limited powers in certain situations. Sometimes a protected person may be competent to make a Will, or change beneficiaries of life insurance and annuity policies. The conservator may also give the protected person access to a limited amount of funds for personal use.

### Common Terms Used In A Conservatorship Proceeding

**Conservator:** The person appointed by the court to manage the finances of someone who is unable to do so for reasons such as minority (under age 18), mental incapacity, illness, physical disability, or chronic intoxication. (Please note that 'advanced age' is not, in and of itself, a valid reason for conservatorship.)

**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.

**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 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 the 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. (Note: only necessary in guardianship proceedings.)



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### When Is A Conservatorship Required?

A conservator is necessary when an individual lacks the capacity to manage his or her financial resources. Oregon law defines 'financially incapable' in ORS 125.005 as:

'a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance.

Manage financial resources' means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.'

The court evaluates information from doctors, psychologists, public social workers, private case managers, family, and friends to assist in determining whether the person is 'financially incapable.'

**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 financial incapacity. Until a court legally determines that an individual is incapacitated, that person retains **all** of his or her rights and decision-making abilities. This includes the right to make bad financial decisions and be subjected to possible financial abuse. In a situation where a finding of incapacity has not yet been made by a court, the only solution is to convince the person to make the 'right' decisions for himself or herself and his or her future and hope that the person is not a subject of abuse.

### How Is A Conservator Appointed?

The procedure for the establishment of a conservatorship is similar to that of guardianship. (In fact, the two powers are often requested at the same time.) Unlike guardianship, the appointment of a conservator does not require an investigation by a court visitor. The appointment of a conservator does, however, require that the conservator be bonded.

**Important Note:** The authority of a guardian (where a conservator has not been appointed) is primarily for health and personal decisions. Some limited financial powers exist. However, generally speaking, a guardian cannot handle financial matters in excess of \$10,000. Therefore, a guardian (who has not been appointed as a conservator) does not have the authority to handle real property transactions for the protected person.

The petitioner (typically the proposed conservator), usually with the assistance of an attorney, begins the conservatorship 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, along with information about the right to object, 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 presentative, or attorney of the respondent, if any.



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### How Is A Conservator 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 conservator, and if so, who the most appropriate person is to serve as conservator. 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 conservator for the respondent (minor or protected person).

### What If It Is An Emergency?

Normally, the procedure for the appointment of a permanent conservator takes approximately 20-30 days to complete.

Oregon law also allows the immediate appointment of a temporary conservator in an emergency situation. A court can appoint a temporary conservator within two to three days, if the court determines that an emergency exists and that the assets and property of the protected person are at risk. Examples of situations requiring a temporary conservator include irreparable financial abuse, or where emergency access to funds is necessary to pay for medical treatment. Appointment of a temporary conservator can also be used to freeze or limit access to bank accounts and investments while an investigation into elder abuse is being conducted. Temporary conservatorships are less common than temporary guardianships, but the process is similar.

### Who Can Or Should Serve As Conservator?

The proposed conservator must be 'suitable' (not defined in the statute) and 'willing to serve,' and inform the court if he/she has filed for bankruptcy or been convicted of a crime. The proposed conservator 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 conservator. If none of the aforementioned are available or are not suitable to serve, the court may look to other options. Banks and trust companies are often good choices to act as conservators in larger estates. The Veteran's Administration (VA) serves as conservator for some disabled veterans.

A professional fiduciary is also a good choice to serve as conservator. Professional fiduciaries receive referrals from a variety of sources to act as conservators for people who have the funds to pay for their services.



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### Who Can Or Should Serve As Conservator? (*continued*)

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 Guardian/Conservator Association of Oregon. The Association's website at [www.gcaoregon.org](http://www.gcaoregon.org) can provide more information about professional fiduciaries.

### What Are The Duties Of A Conservator?

1. **Take Possession of All Property and Income of the Protected Person.** This includes such tasks as reviewing all of the person's available records, giving the court a complete list of assets, and continuously reviewing all mail.
2. **Place All Funds Into Conservatorship Accounts.** The conservator must change all accounts to reflect that they are held in a conservatorship, but continue to use the protected person's Social Security number on the accounts. The conservator must provide copies of the front and back of all cancelled checks to the attorney for later filing with the court.
3. **Make Prudent Investments With the Conservatorship Assets.** The conservator must evaluate the protected person's assets and projected needs, and then structure the investment portfolio appropriately. The conservator's duty is to the protected person first and foremost - ahead of protecting someone's inheritance.
4. **Receive Money and Personal Property for the Protected Person, and Apply That to His or Her Support, Care, and Education.** The conservator must verify the status of Social Security and/or pension income, past and present income taxes, real property income and expenses (including rent, property taxes, and homeowner's insurance), medical care expenses, divorce obligations, spousal support, and ongoing care needs.
5. **Responsibilities to the Court.** Within 90 days of becoming appointed, the conservator must file a formal inventory of the protected person's assets. Each year the conservator must give the court an accounting of all income and expenses. The conservator must furnish copies of bank statements and all cancelled checks documenting the year's transactions. The conservator must close the conservatorship if the protected person dies, or if the assets drop below \$10,000.
6. **Power of Attorney.** The conservator needs to find out if the protected person has signed a Power of Attorney. Oregon law gives the conservator authority over any prior 'attorney-in-fact,' including the power to revoke all or part of a Power of Attorney.



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### What Are The Duties Of A Conservator? (*continued*)

7. **Protected Person's Estate Plan.** Oregon law requires conservators and the court to 'take into account' the protected person's estate plan when making decisions to invest, distribute, and/or utilize the protected person's funds for his or her support. This means the conservator needs to pay attention to any Will or Revocable Trust, AND any 'contract, transfer or joint ownership arrangement' established by the protected person. However, any duty to preserve an existing estate plan remains secondary to the conservator's duty to provide for the care and support of the protected person.

The conservator should consult with an attorney regarding how to interpret and follow these requirements.

### What Are The Costs Involved?

Expenses associated with a conservatorship include the court's filing fee, fees for serving documents upon the proposed protected person, the fiduciary bond, and attorney fees. Other costs sometimes necessary to establish the conservatorship include the court visitor's fee, medical evaluations, psychological testing, and/or functional assessments. Often these expenses will be reimbursed from the protected person's funds after the court appoints a conservator.

Once the conservatorship has been established, the court may approve payment for the conservator's time and out-of-pocket expenses. Currently, the court is approving fees for a family member's services as conservator in the range of \$20-\$35 per hour. Fees for professional conservators can range from \$85 -\$150 per hour. Banks and trust companies customarily charge fees based upon a percentage of the total estate under management.

Attorney fees must be approved by the court before they can be paid. The range of attorney fees can vary greatly depending on the case. The attorney for the conservator submits a detailed description of all attorney and staff time to the court. The court reviews the attorney's documents and gives the conservator permission to pay the 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.