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Rights of adults who are protected persons

By Jan Friedman and Sarah Osborn, Disability Rights Oregon

A person for whom a guardianship order has been entered is called a “protected person.” ORS 125.005(7) (2019). When considering the rights of adults who are protected persons, each individual’s choices and personal values must be considered to encourage development of maximum self-reliance and independence. ORS 125.300(1) (2019). In this article, we focus on the legal and civil rights that are retained by an adult person who has a guardian appointed by a state circuit court judge.

Disability Rights Oregon (DRO) works with protected persons who have a variety of serious concerns about their professional guardian¹ or lay guardian. DRO is the Protection and Advocacy (P&A) law agency for people with disabilities in Oregon.² We provide client-directed advocacy and representation in guardianship proceedings of persons with disabilities, either when they are a respondent—the person over whom a guardianship order is sought in a petition filed under ORS 125.005(10) (2019)—or a protected person. DRO recognizes that many protected persons are tremendously grateful for their guardians and that we typically do not hear from these individuals.

Protected persons’ concerns are often due to a lack of choice. These restrictions govern every aspect of their day,

from morning to night. They may include choice of residence, medical care, and association with friends. Specific concerns about choice of residence include living too far from their familiar community and living in unsafe conditions. Lack of choice over medical care can result in many concerns, including that therapeutic counseling is futile because the guardian inserts himself or herself into the protected person’s counselor-patient relationship. It is also of critical concern when we see that a premature death of a protected person may result from unnecessary placement in hospice or denial of medical treatment. One choice by a protected person is continuing to live in the family home that provides comfort and stability. However, the guardian has put the home on the market³ without adequate consideration of alternatives such as seeking in-home support so the protected person can remain at home.

Guardianship is a huge infringement of civil liberties because it allows a separate party to make decisions about a person’s most important life affairs. This infringement is allowed because the protected person can no longer make these decisions, even with whatever support she or he can garner. The main concern that DRO hears from respondents in a guardianship proceeding is that they were not made aware of the proceeding nor of its gravity, combined with the problem that they cannot get an attorney to represent them.⁴

Oregon law affords a respondent some measure of due process, in that they must be personally served with the

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Rights of protected persons

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petition for guardianship, have a Court Visitor meet with them, and have the right to object orally or in writing. ORS 125.075(2) (2019). If respondents do not object—which occurs in the vast majority of guardianship cases—there is no court hearing and their guardianship may likely be approved by the circuit court judge.

Guardianship's high level of intrusion on civil liberties both in substance (decision-making over all matters for another) and scope (for life) is not accorded an equally high level of due process. In some instances, due process may be further curtailed. For example, some people who are respondents are served with their guardianship petition while in the hospital. The respondent may not notice the petition for a variety of reasons, and the Court Visitor may have been viewed as one of many visitors. While most Court Visitors do a good job, they can misconstrue conversations with respondents and impose their own bias or assumptions about people with disabilities. Court Visitors have told circuit court judges that a respondent had no objection, but that individual later came to DRO and told us that he or she had and continues to have an objection. Legislation has been introduced to ensure the best practices of Court Visitors, but has never made it to passage. The Court Visitor's role remains a key part of the guardianship process that does not provide the respondent a court-appointed attorney or a hearing.

If a respondent objects, she or he has the right to hire an attorney, the right to request an attorney (though court-appointed attorney is not required), and the right to a hearing.⁵ The rules of evidence and civil procedure apply to the hearing. ORS 125.050 (2019). Further, the petitioner has the burden of proving by clear and convincing evidence that the respondent is incapacitated and that respondent needs a guardian. ORS 125.600 (2019).

The respondent has the right to have his or her attorney maintain a normal attorney-client relationship as far as is reasonably possible.⁶

This includes effective communication with the respondent so that she or he can make critical decisions, rather than the

attorney's decision being substituted for that of the respondent. Over several decades of working with respondents, DRO staff members have noted that the vast majority of respondents who object to a guardianship petition can clearly communicate their desire to object and the basis of such objection. In the unusual circumstance of a respondent's capacity being diminished to such an extent that he or she is not able to engage in an attorney-client relationship, the attorney is authorized to assume a different role based on the scope of needed protection.⁷

Prior to a respondent becoming a protected person with a guardian, there must be clear and convincing evidence that he or she is incapacitated, there is no less-restrictive alternative, and guardianship is in the person's best interest. The definition for "incapacitated" is stringent and requires that the respondent would be in serious harm's way without a guardianship. Incapacity is defined in ORS 125.005(5) (2019) 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.* (Emphasis added)

Respondents are not considered incapacitated if they cannot function in the decision-making process on their own. Instead, respondents may access support from others in any and all decision-making in any area. This is what we all do.

The petition for guardianship requires that the respondent be put on notice as to which less-restrictive alternatives have been considered or tried, as well as the reason they will not suffice. ORS 125.683(1)(f) (2019). There are many less

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restrictive alternatives, including supported decision-making, advance health care directive, declaration for mental health treatment⁸, durable power of attorney, special needs trust, representative payee, protective orders, and any other alternatives that help support independence in decision-making.⁹ These can be used individually or in combination. ORS 125.683(1)(f) (2019); ORS 125.693(5) (2019).

Even if a guardianship is imposed, the guardianship order should be appropriately limited. ORS 125.300(1) (2019). Because Oregon law delineates stringent guidelines for determining the scope of a guardianship, limited guardianships are often the most appropriate option. A guardian may be appointed only “as is necessary to promote and protect the well-being of the protected person ... [and] may be ordered *only to the extent necessitated by the person’s actual mental and physical limitations.*” [emphasis added]. Limited guardianships should be tailored to the circumstances—e.g., a respondent may need decision-making assistance with health care only, and the guardian’s authority should be restricted accordingly. Despite this, in the experience of Disability Rights Oregon, broad-scoped guardianship (called “full” or “plenary”) is generally used regardless of whether the protected person actually meets the definition of “incapacitated” in each of the decision-making areas taken away.

Whether a guardianship is limited or not, protected persons keep all legal and civil rights. However, the judge can give specific rights to the guardian. Protected persons’ rights include having access to their records, retaining an attorney, looking for work, and voting. The heart of the guardianship law says the following:

ORS 125.300 in general

(1) 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.

(2) An adult protected person for whom a guardian has been appointed is not presumed to be incompetent.

(3) A protected person retains all legal and civil rights provided by law except those that have been expressly limited by court order or specifically granted to the guardian by the court. Rights retained by the person include but are not limited to the right to contact and retain counsel and to have access to personal records. [1995 c.664 §27]

An overview of the rights of a protected person can be found in *Know Your Rights: Guardianship for Adults FAQ*, available on the DRO website: <https://droregon.org/kyr-guardianship-adults-faq>

Once someone becomes a protected person, he or she is entitled to a notice from the guardian that includes: name of the circuit court, name of the protected person and attorney (if any), name and address of the guardian (and attorney if any), date of the appointment of the guardian, a statement describing the authority awarded to the guardian and limitations placed on that authority, and a statement advising the protected person of the right of the protected person to seek to remove the guardian or terminate the guardianship. ORS 125.082

Throughout the guardian’s contact with a protected person, substituted judgment should be used—meaning that the protected person’s specific preferences and values should be considered to determine the decision the protected person would make if able. ORS 125.315 (1)(h). Making a decision in accordance with the “best interests” of a protected person, should only be used after the protected person’s present as well as past specific preferences and values have been considered. ORS 125.315(1)(i) The National Guardianship Association supports this mode of interacting with protected persons.¹⁰

At numerous junctures, procedural due process is accorded to protected persons—specifically for moves, sale of home, guardian reports, and attorney/fiduciary fees.¹¹ For example, fifteen days’ notice for objection and hearing is required to be given to a protected person if the guardian intends to move the person to another residence. Best practices would allow protected persons maximum choice over where their home may be and what options they have.

Protected persons have the ability to have their rights restored through termination of their guardianship. This is an important right and one that the court shall act upon, should there not be sufficient facts in any Annual Guardian Report to support continuation of the guardianship. ORS 125.832 (2019).

Conclusion

Sometimes the requirement of protected person-centered practices¹² can cause confusion and tension between the protected person, family members, service providers, and the guardian. It is important to understand that the protected person must be treated with dignity, as a person with person-

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al values, preferences, and choices. The guardian has no more authority in decision-making than would be accorded to the protected person if she or he had capacity.

While many guardians are allowing their protected persons to be their most realized selves, some impose unnecessary restrictions in the guise of protection. Guardians should not direct lives of protected persons as if they have the same values and preferences as the guardian. It is important to emphasize the rights of the protected person to counter the power dynamics associated with both professional and lay guardians.

Oregon has made strides to strengthen the rights of respondents and protected persons—for example, through the Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) group¹³—but has a great need for improvement. We may look to other states that have implemented best-practice aspects for guardianship such as Minnesota, which passed a Bill of Rights for Protected Persons in recent legislation. Explicitly documenting concrete rights that a layperson could easily read and digest may assist protected persons' self-advocacy as well as other advocacy. Even if Oregon law clearly states that the protected person retains all rights not restricted by the court and that these rights must be enforced, this often gets lost in practice. As in Minnesota, it is important to document rights of the protected person extending from recreational needs, education, and habilitation, to executing a healthcare directive, to petitioning the court against a change in abode. MINN. STAT. § 525.5–120 (2019).

Although the various people who interact with respondents and protected persons may view the issues of right to self-determination and need for protection very differently, it is essential that respondents and protected persons in Oregon benefit from person-centered laws that allow respondents and protected persons to self-advocate. Ultimately, we should all recognize a common goal of those who support protected persons is to maximize the protected person's values, preferences, and dignity. ■

Endnotes

1. Professional guardians are defined in ORS 125.240(a) (2019).
2. ORS 125.060(7)(c) and (8)(c) require that DRO, as the Protection & Advocacy agency for Oregon, gets notice of certain pleadings related to people with disabilities. ORS 125.060(7)(c)–(8)(c) (2019).
3. Given that a guardian may only manage minimum assets (generally less than \$10,000), a Conservator is the likely fiduciary involved in selling a protected person's home with court approval.
4. *Guardianship Handbook*, Disability Rights Oregon (2009), https://static1.squarespace.com/static/5d645da3cf8e4c000158e55a/t/5daea2c146f15f2ffeae1ae/1571726017955/DRO-Guardianship_Handbook-3ed-updated-title-no-xtra-pgs.pdf
5. Right to object: Respondent may object in writing or orally in ORS 125.075(2); The contents for the notice of right to object is in ORS 125.070(5). Right to a hearing: Respondent's right to a hearing is found in ORS 125.080 and the contents for the notice of hearing are in ORS 125.070(5). Right to an attorney: The court may appoint an attorney and the respondent has a right to an attorney as found in ORS 125.025(3)(b) and 125.080(5). The contents for the notice of right to an attorney is in ORS 125.070(5). Although there have been many legislative efforts to require a court-appointed attorney for people under guardianship petitions or orders, these have not been successful.
6. Under Oregon Rule of Professional Conduct 1.14, when a client's capacity to make "adequately considered" decisions is diminished because the client is underage, mentally impaired, or for some other reason, the lawyer is required to maintain a normal client-lawyer relationship "as far as reasonably possible."
7. See Or. R. Pro. Conduct r. 1.14 (b–c) (Or. Bar Ass'n 2010); ORS 125.315 (1)(i) (2019).
8. ORS 125.700– 127.737 (2019); *Oregon's Declaration for Mental Health Treatment*, DHS (Jan. 2002), <https://www.clatsopbh.org/documents/declaration-of-mental-health-treatment-2017-156.pdf>
9. *Options in Oregon to Help Another Person Make Decisions*, DHS (Aug. 2017), <https://www.oregon.gov/DHS/SENIORS-DISABILITIES/SUA/Documents/options-oregon-help-person-make-decisions.pdf>
10. Standards for Agencies and Programs Providing Guardianship Services, Nat'l Guardianship Assn (2007), https://www.guardianship.org/wp-content/uploads/2017/07/Agency_Standards_2017.pdf.
11. Moves: ORS. 125.070 (2019); Sale of home: ORS 125.430 (2019); Attorney fees: ORS 125.085 (2019); Fiduciary fees: ORS 125.240 (2019)
12. *Your First Year as Guardian*, DHS (2010), <https://sharedsystems.dh-soha.state.or.us/DHSForms/Served/se0559.pdf>
13. Oregon WINGS, <http://wingsoregon.org>

***Treat with dignity: allow choice,
maximize self-reliance and independence***

Recent updates ...



From Oregon Department of Human Services (DHS)

While infection prevention and outbreak mitigation efforts remain critically important in long-term care settings, where residents are more vulnerable to virus exposure, DHS acknowledges that it is equally important to consider the quality of life and dignity of individuals living in long-term care settings, as well as the important role of family relationships to overall health. ... This guidance allows for the possibility of limited, structured outdoor visitation utilizing best practices for physical distancing. [DHS Safety Oversight and Quality Unit \(July 13, 2020\)](#)

The Oregon Home and Community-Based Services rules allow for the proposal of individually-based limitations of the following rights to protect the health or safety of the individual or others when less restrictive alternatives are not adequate in keeping the person or others safe.

- Access to food at any time
- Locked door for privacy
- Choice of roommates
- Ability to decorate and furnish room
- Ability to control one's schedule
- Access to visitors at any time
- Freedom from restraints

The rule also requires the consent of the individual or representative to the proposed limitations.

[Policy Transmittal; DHS Aging and People with Disabilities \(7/29/2020\)](#)

From Internal Revenue Service (IRS)

Anyone who already took a required minimum distribution (RMD) in 2020 from certain retirement accounts now has the opportunity to roll those funds back into a retirement account following the CARES Act RMD waiver for 2020.

The 60-day rollover period for any RMDs already taken this year has been extended to August 31, 2020, to give taxpayers time to take advantage of this opportunity.

[IR-2020-127 \(June 23, 2020\)](#)

Under the CARES Act, individuals eligible for coronavirus-related relief may be able to withdraw up to \$100,000 from IRAs or workplace retirement plans before December 31, 2020, if their plans allow. In addition to IRAs, this relief applies to 401(k) plans, 403(b) plans, profit-sharing plans and others. These withdrawals are not subject to the 10% additional tax on early distributions that would otherwise apply to most withdrawals before age 59½.

[IR-2020-172 \(July 29, 2020\)](#)



From Centers for Medicare & Medicaid Services (CMS)

The Centers for Medicare & Medicaid Services is aware of allegations that some nursing homes are seizing residents' economic impact payments (Stimulus Checks) authorized under the CARES Act. This practice is prohibited, and nursing homes that do so could be subject to federal enforcement actions, including potential termination from participation in the Medicare and Medicaid programs.

[CMS \(June 11, 2020\)](#)



From Oregon State Bar (OSB)

The OSB Board of Governors is seeking member feedback on proposed amendments to the MCLE rules that would shift the compliance deadlines by four months. The new deadline for completing credits would be April 30, and the deadline for filing compliance reports would be May 31. The change would assist OSB members whose practices have been impacted by COVID-19 this year, and also provide efficiencies in future years. [Summary of changes.](#)

Please send your comments to feedback@osbar.org by September 1, 2020.



A message from Theressa Hollis, Elder Law Section Chair

I am making another appeal to request that you please send any disposable or washable face coverings to be used at our courthouses to Oregon Association of Defense Counsel.

As Oregon moves toward reopening our courthouses, we are faced with the challenge of making them a safe environment for the legal community and visiting members of the public. Our court system simply cannot operate effectively if those accessing the courthouse are anxious for their own safety.

One of the simplest approaches to enhance safety will be to encourage people to wear face coverings.

To encourage the wearing of face masks, Chief Justice Walters wants our courthouses to have enough masks on hand for anyone who might have forgotten to bring one from home or otherwise needs one. To make sure there are enough masks, the Chief Justice needs our help.

Chief Justice Walters has reached out to the Oregon legal community and is asking us to pull together in this time of need to help our court system by either donating masks or making masks that can be used in courthouses around the state. We quite literally need **thousands** and the Judicial Department has limited ability to obtain extra masks. There are simply not enough masks available for procurement.

If every legal professional in Oregon could donate just one mask (or more!) it would be a tremendous help. The masks need not be the N95 variety. Simple disposable or washable masks are great. You can even make masks for donation with these [CDC Instructions!](#)

Chief Justice Walters has assured us homemade masks would be very much welcome and we recommend any homemade masks be placed in individual bags for distribution.

Our Section's response

In response to this call for action from the Chief Justice, the Elder Law Section is working to gather masks for distribution, along with the Oregon Association of Defense Counsel (OADC) which has agreed to be the point of collection for the Oregon legal community. They will then pass along all donated masks to the Oregon Judicial Department Marshal's Office who will be working to distribute masks to the counties in need.

If you have any questions, have masks to donate, or can make masks to contribute, please contact [Geoff Horning](#) at the OADC office.

Please send masks to the OADC office for distribution at:

**Oregon Association of Defense Counsel
47 SE 102nd Ave
Portland OR 97216**

Anything and everything that you can do would be a help. Every mask that is made or donated will help ensure a safer courthouse for all of us, and will help us remain open and effective for the citizens of our state. ■



Resources for elder law attorneys

CLE Seminars

Estate and Gift Tax Planning in an Environment Without a One-size-fits-all Approach

August 19, 2020/3:00–4:00 PM
MBA Seminar via zoom.com
[Information and registration](#)

The Impact of HB 2001 on Housing Affordability

August 20, 2020/12:00–1:00 PM
OSB Webinar
[Register](#)

How to Feel In Control When Things Are Out of Control

August 21, 2020/12:00– 1:00 PM
OSB Webcast
Facilitated by a psychologist specializing in attorney wellness, this webcast will provide you with reliable strategies for steadying yourself amid the coronavirus—and other storms of life.
[Register](#)

Tax Basics of Special Needs Trusts

August 27, 2020/11:00 AM to 12:00 PM PT
NAELA Webinar
[Information and registration](#)

Charitable Giving

September 10, 2020/4:15–6:00 PM
Stoel Rives LLP
760 SW Ninth Ave., Suite 3000, Portland
[Register](#)

Helping With Your Clients' Non-Legal Needs

September 10, 2020/11:00 AM–12:00 PM PT
NAELA Webinar
[Information and registration](#)

COVID-19 and Other Legislative Updates

September 10, 2020/12:00–1:00 PM
OSB Webinar
[Register](#)

Publication

Advance Directive: Your Life. Your Decisions—with the KEYConversations™ Planning Guide

<https://www.oregonhealthdecisions.org/product/advance-directive-your-life-your-decisions-with-the-keyconversations-planning-guide-english-version/>

Websites

Elder Law Section website

<https://elderlaw.osbar.org>

Links to information about federal government programs and past issues of the Section's quarterly newsletters

National Academy of Elder Law Attorneys (NAELA)

<https://www.naela.org>

Professional association of attorneys dedicated to improving the quality of legal services provided to elders and people with special needs

National Center on Law and Elder Rights

<https://ncler.acl.gov>

Trainings and technical assistance on a broad range of legal issues that affect older adults

OregonLawHelp.org

<https://oregonlawhelp.org>

Helpful information for low-income Oregonians and their lawyers

Aging and Disability Resource Connection of Oregon

<https://www.adrcforegon.org/consite/index.php>

Includes downloadable Family Caregiver Handbook, available in English and Spanish versions

Administration for Community Living

<https://acl.gov>

Information about resources that connect older persons, caregivers, and professionals to federal, national, and local programs

Big Charts

<https://bigcharts.marketwatch.com>

Provides the price of a stock on a specific date

American Bar Association Senior Lawyers Division

For elder law attorneys age 62+

https://www.americanbar.org/groups/senior_lawyers/

National Elder Law Foundation

<http://www.nelf.org>

Certifying program for elder law and special-needs attorneys

National Center on Elder Abuse

<https://ncea.acl.gov>

Guidance for programs that serve older adults; practical tools and technical assistance to detect, intervene, and prevent abuse

Common Scams That Target the Elderly

Special report on scams related to covid-19

<https://www.seniorliving.org/research/common-elderly-scams/>

Important elder law numbers

as of July 1, 2020

Supplemental Security Income (SSI) Benefit Standards	Eligible individual\$783/month Eligible couple.....\$1,175/month
Medicaid (Oregon)	Asset limit for Medicaid recipient\$2,000 Long term care income cap.....\$2,349/month Community spouse minimum resource standard \$25,728 Community spouse maximum resource standard \$128,640 Community spouse minimum and maximum monthly allowance standards.....\$2,155/month; \$3,216/month Excess shelter allowanceAmount above \$646.50/month SNAP utility allowance used to figure excess shelter allowance\$444/month Personal needs allowance in nursing home \$64.11/month Personal needs allowance in community-based care.....\$175/month Room & board rate for community-based care facilities..... \$608/month OSIP maintenance standard for person receiving in-home services\$1,283 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2018.....\$8,784/month
Medicare	Part B premium \$144.60/month* Part D premiumVaries according to plan chosen Part B deductible \$198/year Part A hospital deductible per spell of illness\$1,408 Skilled nursing facility co-insurance for days 21-100 \$176/day * Premiums are higher if annual income is more than \$85,000 (single filer) or \$170,000 (married couple filing jointly).



Elder Law Section

Newsletter Committee

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section: Theresa Hollis, Chair. Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.

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