

When a Guardian is Appointed: What Happens Next?

The Role of a Fiduciary

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Professional Fiduciary

Learning Objectives

- ❖ Differentiate between fiduciary types.
- ❖ Understand the role of a professional fiduciary and the benefits of appointing a professional.
- ❖ Recognize the significance of fiduciary appointments.
- ❖ Understand fiduciary decision-making guidelines.
- ❖ Expand your resources and options.

Professional Fiduciaries – what/who are they?

Fiduciary – A person or organization that owes to another the duties of trust and good faith

Examples –

- Trustee
- Power of Attorney
- Conservator (Estate)
- Guardian (Person)
- Personal Representative/Executor
- Real Estate Agent
- Doctor
- Lawyer
- Teacher
- Priest

Professional Fiduciaries – what/who are they?

- *ORS 125.240*
- *Certified by Center for Guardianship Certification*
- *Appointed on 3 cases*
- *Guardian Conservator Association of Oregon*
- *National Guardianship Association*

Professional Fiduciaries – why are they needed?

Population Demographics

- Age
- Geographic
- Family Dispersion
- Family makeup
- Medical issues-crisis
- Wealth
- Abuse

Abuse Types in Community Settings

| | |
|---------------------------------------|------|
| Financial Exploitation | 32% |
| Verbal Abuse | 26 % |
| Self-neglect/Neglect by others | 24 % |
| Physical Abuse | 15 % |
| Abandonment, restraint, and seclusion | 2 % |
| Sexual Abuse | 1 % |

State of Oregon, Adult Protective Services, 2017 Information
Community Setting

How Can Professional Fiduciaries Help?

Let's look at some real cases

Jim – 77 YO farmer

- Elderly man with good cognition.
- Failing health wise.
- Never married.
- No children.
- No siblings.
- Owns 13 acre farm where he lived 72 years.
- Medical crisis move to facility.
- Squatter on property

How Can Professional Fiduciaries Help?

Jim – 77 YO farmer

OPTION - Power of Attorney

- Notice and Evict Squatter
- Clean up property
- Sell property
- Pay bills
- Advocate for Jim

An attorney would need to assess Jim for testamentary capacity and draft the POA for Jim – the attorney protects Jim's interests

What if Jim has limited or no capacity?

A conservatorship would be needed

- Court appointment
- Proof of incapacity – bills, medical report, foreclosure
- Complete control of all finances
 - Notice and Evict Squatter
 - Clean up property
 - Sell property
 - Pay bills
 - Advocate for Jim

Jim would still have an attorney. Biggest different to POA is court oversight – accountings.

A WORD ABOUT CAPACITY

There are DISTINCTIONS across DEFINITIONS:

- **COGNITION:** How well is the brain working?
- **COMPETENCE:** To what degree can Jim participate in his personal decisions? Does he *always* need someone else to do it for him?
- **CAPACITY:** Can Jim rationally manipulate information for decision-making purposes? A judge ultimately decides...

What's the process IE Guardian?

- Family member or responsible friend preferred
- Court appointment
- Proof of incapacity – court visitor, medical report, other
- Control of all decisions related to placement and medical treatment
 - Relocate to a facility
 - Decline or agree to particular medical treatments
 - Handle funeral and/or estate matters
 - Pay bills
 - Advocate

Being another person's guardian
(fiduciary) requires a balance between
legal and ethical responsibilities.

“The typical ward has fewer rights than the typical convicted felon...By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen.”

(House Select Committee on Aging, H.R. Rpt 100-641 (opening statement of Chairman Claude Pepper)).

Protection vs Self-Determination

- What decisions must you make?
- How must they be made?
- What should you be considering?
- Most importantly, what does the protected person think?
- How much will you involve them in the decision-making process?

Least Restrictive Alternative VS Safety.

Surrogate Decision Making

“It is the NGA’s position that the best interest principle should only be used when the guardian cannot determine the ward’s wishes and make the decision using the substituted judgement principle.”

Casasanto, M., Simon, M., & Roman, J. (2009). *A Model Code of Ethics for Guardians*. Bellefonte, PA: National Guardianship Association.

Substituted Judgement

What would the protected person choose for themselves?

If you're not sure, try to find out.

Best Interest

If you don't know what they would have done, then choose what you believe to be in their best interest.

With all decisions, be prepared to explain to a judge why you decided the way that you did.

More on Laws and Ethics

NCG Standards

- Substituted Judgement
- Best Interest
- Informed Consent
- Least Restrictive Alternative

Supported Decision Making

- Consistent with NCG Standards
- Less-restrictive alternative to guardianship

A Few Case Study Examples

Alta - 98 Years old – never married – dementia - lived alone in a house – APS notified she was found on her floor alone in medical distress. Emergency Conservatorship/Guardianship

Teruko – Married – Japanese with poor English - dementia – Husband goes into store while she stays in car. He has heart attack – taken to hospital. She wanders in six hours later – soiled. APS called. Emergency Conservatorship/Guardianship

Gary – Brother is POA in Boston. Gary has a well-managed mental illness. Gary needs surgery so POA needs to hire someone to arrange move to rehab, back to apartment, companions, etc. Case Management

Anna and Leo – Married – disabled son – want to create a special needs trust for him from their estate. No other relatives and no friends capable of managing the estate of \$10,000,000. They want the trustee to arrange caregivers if needed, and other personal attention to their son.

Mary – Deceased - left a large estate. Appointed daughter as personal representative. The daughter has been spending money and will not settle the estate with the other three children. The three seek a professional fiduciary to become personal representative.

QUESTIONS?

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