

D R A F T

SUMMARY

Limits guardian's authority to limit protected person's preferred associations with third parties. Permits interested person to move court to review guardian's power to limit protected person's associations.

Requires guardian to utilize substituted judgment standard for making decisions on behalf of protected person. Permits guardian to utilize best interest standard if guardian is unable to determine protected person's preferences.

Permits removal of guardian for failure to perform certain duties.

A BILL FOR AN ACT

1
2 Relating to guardianships; creating new provisions; and amending ORS
3 125.080, 125.225, 125.315 and 125.325.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Section 2 of this 2019 Act is added to and made a part**
6 **of ORS chapter 125.**

7 **SECTION 2. (1) As used in this section:**

8 (a) "Association" means communication, visitation or other social
9 interaction with third parties; and

10 (b) "Interested person" means a protected person, a person with
11 whom association is being limited, any fiduciary for the protected
12 person or any person who has filed a request for notice in the pro-
13 ceedings.

14 (2) A guardian may not limit a protected person's preferred associ-
15 ations, except:

16 (a) As specifically allowed by the court; or

17 (b) To the extent the guardian determines necessary to avoid un-

1 reasonable harm to the protected person's health, safety or well-being.

2 (3) If a protected person is unable to communicate, the protected
3 person's preferred association shall be presumed based on the prior
4 relationship between the protected person and the person with whom
5 the association is contemplated.

6 (4)(a) If a guardian limits a protected person's association as pro-
7 vided in subsection (2)(b) of this section, an interested person may
8 move the court to modify the guardian's powers with respect to lim-
9 iting the association.

10 (b) Motions under this subsection must be in writing, except that
11 a protected person may move the court orally in person or by other
12 means that are intended to convey the protected person's motion to
13 the court. The court shall designate the manner in which an oral
14 motion may be made that ensures that a protected person will have
15 the protected person's motion presented to the court. The clerk of the
16 court shall provide a means of reducing the oral motion to a signed
17 writing for the purpose of filing the motion.

18 (c) Any limits on a protected person's associations in effect on the
19 date a motion is filed under this subsection remain in effect pending
20 the court's action under paragraph (e) of this subsection.

21 (d) The court shall schedule the hearing required under ORS 125.080
22 (3) on a motion under this subsection no later than 60 days following
23 the date the motion is filed with the court. The person making the
24 motion shall give notice to all persons entitled to notice under ORS
25 125.060 (3) of the date, time and place of the scheduled hearing at least
26 15 days before the date set for the hearing. Notice shall be given in the
27 manner prescribed by ORS 125.065. The court for good cause shown
28 may provide for a different method or time of giving notice under this
29 subsection.

30 (e) If the court determines that the guardian unreasonably limited
31 association under this section, the court may:

1 (A) Permit the association, with or without limitations;

2 (B) Modify the guardian's powers to limit the protected person's
3 associations;

4 (C) Remove the guardian; or

5 (D) Award reasonable attorney fees and court costs associated with
6 the motion.

7 **SECTION 3.** ORS 125.080 is amended to read:

8 125.080. (1) The court may require that a hearing be held on any petition
9 or motion in a protective proceeding.

10 (2) A hearing must be held on a petition or motion if an objection is filed
11 to the petition or motion and the objection is not withdrawn before the time
12 scheduled for the hearing.

13 (3) **A hearing must be held on a motion to modify a guardian's**
14 **powers under section 2 of this 2019 Act.**

15 [(3)] (4) The respondent or protected person may appear at a hearing in
16 person or by counsel.

17 [(4)] (5) If the court requires that a hearing be held on a petition, or a
18 hearing is otherwise required under this section, the court may appoint
19 counsel for the respondent unless the respondent is already represented by
20 counsel.

21 **SECTION 4.** ORS 125.225 is amended to read:

22 125.225. (1) A court shall remove a fiduciary whenever that removal is in
23 the best interests of the protected person.

24 (2) In addition to any other grounds, the court may remove a conservator
25 if the conservator fails to use good business judgment and diligence in the
26 management of the estate under the control of the conservator. The court
27 may apply a higher standard of care to a conservator who claims to have
28 greater than ordinary skill or expertise.

29 (3) **In addition to any other grounds,** the court may remove a guardian
30 **if the court determines the guardian:**

31 (a) **Unreasonably limits the protected person's associations under**

1 **section 2 of this 2019 Act;**

2 **(b) Fails to perform the guardian's duties required under ORS**
3 **125.315 (1)(g) to (i); or**

4 **(c)** [*The guardian*] Changes the abode of the adult protected person or
5 places the protected person in a mental health treatment facility, a nursing
6 home or other residential facility and:

7 [(a)] **(A)** Failed to disclose in the petition for appointment that the
8 guardian intended to make the placement; or

9 [(b)] **(B)** Failed to comply with ORS 125.320 (3) before making the place-
10 ment.

11 (4) On termination of the authority of a fiduciary, an interim fiduciary
12 may be appointed by the court to serve for a period not to exceed 60 days.
13 An interim fiduciary under this subsection may be appointed by the court
14 without the appointment of a visitor, additional notices or any other addi-
15 tional procedure, except as may be determined necessary by the court.

16 (5) Upon termination of the authority of a fiduciary, the court may ap-
17 point a successor fiduciary. A petition for appointment as successor fiduciary
18 must be filed in the same manner as provided for an original petition, and
19 is subject to all provisions applicable to an original petition for the ap-
20 pointment of a fiduciary. No filing fee shall be charged or collected for the
21 filing of a petition for the appointment of a successor fiduciary.

22 **SECTION 5.** ORS 125.315 is amended to read:

23 125.315. (1) A guardian has the following powers and duties:

24 (a) Except to the extent of any limitation under the order of appointment,
25 the guardian has custody of the protected person and may establish the
26 protected person's place of abode within or without this state.

27 (b) The guardian shall provide for the care, comfort and maintenance of
28 the protected person and, whenever appropriate, shall arrange for training
29 and education of the protected person. Without regard to custodial rights
30 of the protected person, the guardian shall take reasonable care of the
31 person's clothing, furniture and other personal effects unless a conservator

1 has been appointed for the protected person.

2 (c) Subject to the provisions of ORS 127.505 to 127.660 and subsection (3)
3 of this section, the guardian may consent, refuse consent or withhold or
4 withdraw consent to health care, as defined in ORS 127.505, for the protected
5 person. A guardian is not liable solely by reason of consent under this par-
6 agraph for any injury to the protected person resulting from the negligence
7 or acts of third persons.

8 (d) The guardian may:

9 (A) Make advance funeral and burial arrangements;

10 (B) Subject to the provisions of ORS 97.130, control the disposition of the
11 remains of the protected person; and

12 (C) Subject to the provisions of ORS 97.965, make an anatomical gift of
13 all or any part of the body of the protected person.

14 (e) The guardian of a minor has the powers and responsibilities of a par-
15 ent who has legal custody of a child, except that the guardian has no obli-
16 gation to support the minor beyond the support that can be provided from
17 the estate of the minor, and the guardian is not liable for the torts of the
18 minor. The guardian may consent to the marriage or adoption of a protected
19 person who is a minor.

20 (f) Subject to the provisions of ORS 125.320 (2), the guardian may receive
21 money and personal property deliverable to the protected person and apply
22 the money and property for support, care and education of the protected
23 person. The guardian shall exercise care to conserve any excess for the pro-
24 tected person's needs.

25 **(g) The guardian shall promote the self-determination of the pro-**
26 **ected person and, to the extent practicable, encourage the protected**
27 **person to participate in decisions, act on the protected person's own**
28 **behalf and develop or regain the capacity to manage the protected**
29 **person's personal affairs. To accomplish the duties under this para-**
30 **graph, the guardian shall:**

31 **(A) Become or remain personally acquainted with the protected**

1 person and maintain sufficient contact with the protected person, in-
2 cluding through regular visitation, to know the protected person's
3 abilities, limitations, needs, opportunities and physical and mental
4 health;

5 (B) To the extent practicable, identify the values and preferences
6 of the protected person and involve the protected person in decisions
7 affecting the protected person, including decisions about the protected
8 person's care, dwelling, activities or social interactions; and

9 (C) Make reasonable efforts to identify and facilitate supportive
10 relationships and services for the protected person.

11 (h) In making decisions for the protected person, the guardian shall
12 make the decisions the guardian reasonably believes the protected
13 person would make if the protected person were able, unless doing so
14 would unreasonably harm or endanger the welfare or personal or fi-
15 nancial interests of the protected person. To determine the decision
16 the protected person would make if able, the guardian shall consider
17 the protected person's previous or current instructions, preferences,
18 opinions, values and actions, to the extent actually known or reason-
19 ably ascertainable by the guardian.

20 (i) If the guardian cannot make a decision under paragraph (h) of
21 this subsection because the guardian does not know and cannot rea-
22 sonably determine the decision the protected person would make if
23 able, or the guardian reasonably believes the decision the protected
24 person would make would unreasonably harm or endanger the welfare
25 or personal or financial interests of the protected person, the guardian
26 shall act in accordance with the best interest of the protected person.
27 In determining the best interest of the protected person, the guardian
28 shall consider:

29 (A) Information received from professionals and persons that dem-
30 onstrate sufficient interest in the welfare of the protected person;

31 (B) Other information the guardian believes the protected person

1 **would consider if the protected person were able; and**

2 **(C) Other factors a reasonable person in the circumstances of the**
3 **protected person would consider, including consequences for others.**

4 (2) If a conservator has been appointed for the protected person, the
5 guardian may file a motion with the court seeking an order of the court on
6 the duties of the conservator relating to payment of support for the protected
7 person.

8 (3) A guardian may consent to the withholding or withdrawing of arti-
9 ficially administered nutrition and hydration for a protected person only
10 under the circumstances described in ORS 127.580 (1)(a), (b), (d), (e) or (f)
11 and, if the protected person has a medical condition specified in ORS 127.580
12 (1)(b), (d), (e) or (f), the condition has been medically confirmed.

13 **SECTION 6.** ORS 125.325 is amended to read:

14 125.325. Within 30 days after each anniversary of appointment, a guardian
15 for an adult protected person shall file with the court a written report. The
16 report must include a declaration under penalty of perjury in the form re-
17 quired by ORCP 1 E, or an unsworn declaration under ORS 194.800 to
18 194.835, if the declarant is physically outside the boundaries of the United
19 States. Copies of the guardian’s report must be given to those persons spec-
20 ified in ORS 125.060 (3). The report shall be in substantially the following
21 form:

22 _____

23 IN THE _____ COURT _____ COUNTY,

24 STATE OF OREGON

25 DEPARTMENT OF PROBATE

26 In the Matter of the) No. _____

27 Guardianship of)

28 _____,)

29 (Name of protected)

30 person))

31 A Protected)

1 Person.)

2 GUARDIAN'S REPORT

3 I am the guardian for the person named above, and I make the following
4 report to the court as required by law:

5 1. My name is _____.

6 2. My address and telephone number are:

7 _____

8 _____

9 Phone _____

10 3. The name, if applicable, and address of the place where the person now
11 resides are:

12 _____

13 _____

14 4. The person is currently residing at the following type of facility or
15 residence:

16 _____

17 5. The person is currently engaged in the following programs and activ-
18 ities and receiving the following services (brief description):

19 _____

20 6. I was paid for providing the following items of lodging, food or other
21 services to the person:

22 _____

23 _____

24 7. The name of the person primarily responsible for the care of the person
25 at the person's place of residence is:

26 _____

27 8. The name and address of any hospital or other institution where the
28 person is now admitted on a temporary or permanent basis are:

29 _____

30 _____

31 9. The person's physical condition is as follows (brief description):

1 _____
2 _____

3 10. The person’s mental condition is as follows (brief description):

4 _____
5 _____

6 11. Facts that support the conclusion that the person is incapacitated in-
7 clude the following:

8 _____

9 12. I made the following contacts with the person during the past year
10 (brief description):

11 _____

12 **13. I limited the person’s association with _____ (Please specifically**
13 **name any limitations and briefly describe the limitation):**

14 _____

15 [13.] 14. I made the following major decisions on behalf of the person
16 during the past year (brief description):

17 _____

18 [14.] 15. I believe the guardianship should or should not continue because:

19 _____

20 [15.] 16. At the time of my last report, I held the following amount of
21 money on behalf of the person: \$_____. Since my last report, I received the
22 following amount of money on behalf of the person: \$_____. I spent the
23 following amount of money on behalf of the person: \$_____. I now hold
24 the following amount of money on behalf of the person: \$_____.

25 [16.] 17. A true copy of this report will be given to the person, any
26 conservator for the person and any other person who has requested notice.

27 [17.] 18. Since my last report:

28 (a) I have been convicted of the following crimes (not including traffic
29 violations):

30 _____

31 (b) I have filed for or received protection from creditors under the Federal

1 Bankruptcy Code (yes or no): _____.

2 (c) I have had a professional or occupational license revoked or suspended
3 (yes or no): _____.

4 (d) I have had my driver license revoked or suspended (yes or no):
5 _____.

6 [18.] **19.** Since my last report, I have delegated the following powers over
7 the protected person for the following periods of time (provide name of per-
8 son powers delegated to):

9 _____

10 I hereby declare that the above statement is true to the best of my
11 knowledge and belief, and that I understand it is made for use as evidence
12 in court and is subject to penalty for perjury.

13 Dated this ____ day of _____, 2____.

14 _____

15 Guardian

16 NOTICE: ANY PERSON INTERESTED IN THE AFFAIRS OR WEL-
17 FARE OF THE PROTECTED PERSON WHO IS THE SUBJECT OF THIS
18 REPORT WHO HAS CONCERNS ABOUT THIS REPORT OR THE
19 GUARDIAN'S PERFORMANCE MAY CONTACT THE COURT AS FOL-
20 LOWS:

21 _____

22 _____

23 _____

24 _____

25 _____

26 _____

27 _____