

# Temporary guardianship

By Nathan Rudolph, Attorney at Law



*Nathan A. Rudolph is a partner at Smith, McDonald, Vaught & Rudolph, LLP, located in Portland. He practices in a variety of areas, including estate planning, probate, trust administration, guardianships and conservatorships, and civil litigation. Nathan represents clients in contested matters, with an emphasis in fiduciary-related litigation that involves estates, trusts, and protective proceedings. He is licensed in Oregon and Washington.*

A temporary guardianship is, by definition, an emergency. A temporary guardian can only be appointed if there is an “immediate and serious danger to the life or health” of a human being. ORS 125.600(1). Most lawyers do not enjoy emergencies, as they tend to impede procrastination. Temporary guardianship cases are stressful, time- and energy consuming, and the facts are often heartbreaking. Temporary guardianship cases are also an incredible opportunity to genuinely help people experiencing a crisis.

## Intake: Is this urgent?

The first question I ask myself when I am speaking to a potential client about a guardianship is: How quickly must this situation be resolved? If, during your intake, you learn facts that lead you to conclude the situation needs to be resolved in fewer than 30 days, you may be looking at a temporary guardianship. The notice period for an indefinite guardianship is 15 days from personal service on the respondent (and 15 days from mailing for other parties). Always assume the court will take at least one to two weeks to sign and enter a judgment. Therefore, assuming you can get a petition drafted, filed, and served immediately, it generally takes three to four weeks to get an indefinite guardian appointed. Therefore, if the guardian needs to be appointed in less than 30 days, consider a temporary guardianship.

## The law

ORS 125.600–610 set forth the legal standards and notice periods required for temporary guardianships and conservatorships. In order to obtain a temporary guardianship you must also meet the same standards as an indefinite guardianship, which require a petition containing all the information under ORS 125.055, the appointment of a court visitor, as well as judicial findings that: (1) the respondent is “incapacitated” (as defined in ORS 125.005(5)); (2) the “appointment is necessary as a means

of providing continuing care and supervision of the respondent”; and (3) the person nominated to serve as temporary guardian is qualified, suitable, and willing to serve. ORS 125.305.

Furthermore, a guardian may only be appointed for an adult “as is necessary to promote and protect” his or her well-being, and the guardianship “must be designed to encourage the development of maximum self-reliance and independence of the [respondent] and may be ordered only to the extent necessitated by the person’s actual mental and physical limitations.” ORS 125.300.

In addition to the above, you have the burden of showing that there is an “immediate and serious danger” to the respondent’s life or health, and “the welfare of the respondent requires immediate action.” ORS 125.600(1).

A temporary guardian can only be appointed for 30 days. ORS 125.600(3). The court may grant one extension for an additional 30 days. Therefore, it is common for a petition to include a request for the appointment of a temporary and indefinite guardian, because in most situations the temporary appointment is the short-term solution, and most respondents will remain incapacitated after 60 days.

## Notice

Providing proper notice to the required parties is always imperative, but is even more significant when dealing with a temporary guardianship. You never want to be in a situation where you must explain to your client that the limited judgment was not signed due to defective notice. It is also important to realize that guardianships by their very nature are a process whereby a court places restrictions on a person’s liberty. Any defect in the notice itself, or the timing or service, could render the appointment of a guardian unconstitutional as a violation of a person’s due process rights. Therefore, attorneys should always provide as much advance notice as possible.

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The parties entitled to notice of a temporary guardianship are the same parties entitled to notice of an indefinite guardianship. See ORS 125.605(1) and ORS 125.060. The notice period for a temporary guardianship is two days. ORS 125.605(1). That is, two days from the date of personal service on the respondent, and two days from the date of mailing on other parties. Remember, weekends, holidays, and the date of service (or mailing) do not count when calculating the two days, and the notice period cannot end on a weekend or holiday. See ORCP 10(A).

The language you are required to include in your notices is set forth in ORS 125.070. Review this statute carefully, as the notices required upon respondents are different from the notices upon all other parties.

### Temporary “emergency” guardianships and waiver of pre-appointment notice

ORS 125.605(2) allows the court to waive the two-day notice requirement prior to appointment if the court finds that the immediate and serious danger requires an immediate appointment. Waiving notice prior to appointment allows a temporary guardian to be immediately appointed upon filing the petition. Some attorneys, clerks, and judges refer to these types of cases as “temporary emergency guardianships,” although that term does not appear in the statutes.

If, during your intake with your client, you learn facts that lead you to conclude the situation needs to be resolved in less than two days, you should consider requesting a waiver of pre-appointment notice. For instance, imagine that an elderly woman suffering from advanced dementia has been admitted to the ER due to failure to thrive in her home, where she has no support or care, and medical providers are recommending immediate placement in a memory-care unit because returning home would cause an immediate and serious danger to her life and health. The woman, against all medical advice, insists on returning home, and the hospital plans to release her tomorrow.

This might be a situation that warrants waiver of notice prior to appointment, so that a temporary guardian can find appropriate placement.

Note that if the court does waive notice prior to appointment, notice must be given within two days after appointment. ORS 125.605(2).

### The court visitor

As with indefinite guardianships, the court will appoint a court visitor to investigate, interview parties, and file a report in regard to a petition for temporary guardianships. ORS 125.605(4). The court visitor is often your best witness, and his or her report is often your best evidence to support the appointment of a temporary guardian.

### Objections

If an objection is made to the appointment of a temporary guardian (or an extension of the temporary guardianship), “the court shall hear the objections within two judicial days after the date on which the objections are filed.” ORS 125.605(5). Therefore, you must be ready to go to a hearing within two days after filing and serving the petition, and you should clear your calendar accordingly. If an objection is filed, you must also be prepared to ensure the hearing gets scheduled, which may entail politely reminding a clerk that the hearing must be set within two days of the objection, since not all counties automatically set hearings upon receiving an objection.

### Hearings

A hearing on a temporary guardianship can take many forms. Often, because these hearings are set so quickly, the judge may have a limited amount of time available. Being able to present your evidence efficiently is crucial (not to mention courteous to the overloaded judges and their staff). Take your cues from the judge. For instance, if the judge tells you that she only has 15 minutes, do not go over the allotted time. If the judge makes a point of telling you that she has read your petition and the court visitor report, you can probably dispense with an opening statement. Be concise with your questions and arguments, and prepare your witnesses so they stick with relevant facts.

You should also prepare a form of limited judgment and e-file it the day before the hearing, so it is in the judge’s queue and she can (perhaps) review and sign it on the spot. You may also check with the judge or her clerk to learn whether you should email it to the judicial assistant prior to the hearing.

Some counties have historically appointed attorneys for respondents in the event the respondent objects or if the court visitor recommends the appointment of an attorney. SB578 amends ORS 125.080 to require that an attorney must be appointed for a protected person if a hearing is scheduled and the

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protected person requests an attorney, an objection is filed by any person, the court visitor recommends appointment of an attorney, or the court determines appointment of an attorney is appropriate. The amendments under SB578 are effective in Multnomah County and Lane County on January 2, 2022, and in Columbia County on January 2, 2023, and statewide on January 2, 2024. Attorneys who represent petitioners should be prepared to present their case against experienced guardianship attorneys.

### Less restrictive alternatives

Guardianships in general—and temporary guardianships especially—are drastic, expensive, and a sledgehammer in the lawyer’s tool box. They should always be viewed as a measure of last resort. Investigating and considering less restrictive alternatives is not only statutorily required under ORS 125.055(2)(i); it is also prudent. If there is another way to solve the problem (e.g., using authority granted to a healthcare representative under an advance directive), you must at least consider it and explain in your petition why it is an inadequate solution.

### Post-appointment

Once your client is appointed, your job is not over. You may be called on to resolve practical problems, such as referring the guardian to necessary community resources in order to better fulfill the obligations of a guardian. The estate planning and elder law discussion lists can be great resources you can use to assist your clients.

Additionally, ORS 125.082 requires that a guardian provide notice after appointment to specified parties, and the notice must include specific information about the case and the respondent’s right to seek the removal of the guardian. SB 190 (which went into effect on January 1, 2022) amended ORS 125.082 and now requires that the guardian personally deliver the notice of appointment to the protected person “in a manner reasonably calculated to be understood by the protected person,” and to also provide oral notice, if requested by the protected person.

Pursuant to ORS 125.610, temporary fiduciaries are required to file a report detailing their activities. The report is due upon completion of their duties, upon expiration of the appointment, or when the court orders termination of their authority. If the temporary guardianship converts into an indefinite appointment, the report can be included in the annual guardian’s report.

### The gap problem

If you are also seeking the appointment of an indefinite guardian, you must ensure the temporary guardianship does not expire before the indefinite guardianship begins. If there is an objection to the indefinite guardianship, you should try to get a hearing set before the temporary appointment expires. If you cannot get a hearing within 30 days, you may file for a 30-day extension of the temporary under ORS 125.600(3), which will require a motion and two-day notice. Calendar your deadlines appropriately.

Given the lack of judicial resources caused by a multitude of issues, not the least of which is clearing out the backlog from the COVID pandemic, attorneys are increasingly running into a situation in which the court appoints a temporary guardian but does not have judicial availability to schedule the hearing on the indefinite guardianship appointment within the 60-day window.

Because ORS 125.600(3) allows only one extension of a temporary guardianship, and a gap in the guardianship is likely to be dangerous for the respondent, attorneys must get creative. The most efficient solution is to try to get the hearing on the indefinite guardianship set within the 60-day window. For the most part, judges and clerks are sympathetic to this dilemma and recognize the need to resolve these cases. Start by asking if you can get the hearing moved up. This may require a motion/order for an expedited hearing under the court’s supplemental local rules.



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If that does not work, a creative attorney might take a look at ORS 125.650, which allows a court to “enter protective orders...in addition to appointment of a fiduciary,” which can include “appoint[ing] a fiduciary whose authority is limited to a specified time and whose power is limited to certain acts needed to implement the protective order.” Before entering such a protective order, the court shall consider “whether the protected person needs the continuing protection of a fiduciary.”

If you have filed a petition for the appointment of a temporary and indefinite guardian, and you have secured the appointment of the temporary guardian, but—for whatever reason—a hearing on the indefinite guardianship is not possible before the expiration of the temporary appointment, consider whether a motion under ORS 125.650 could possibly extend the appointment until the date of the hearing on the objection.

### A few final tips

If this is your first (or second, third, tenth, fiftieth) time filing a temporary guardianship, you should consider doing the following:

1. Consider contacting another attorney if you need some advice or just want to bounce some ideas around. In general, attorneys are flattered when another attorney asks for guidance.
2. Consider venue. A “protective proceeding must be commenced in the county where the respondent resides or is present.” ORS 125.025. The county where the respondent is “present” may be different from the county where the respondent “resides,” which gives the filing attorney an opportunity to choose the venue. Venue can affect the case in myriad ways. Certain counties process petitions/judgments more quickly. Some counties require hearings on temporary appointments even if there is no objection.

3. Read the Supplemental Local Rules (SLRs). Counties have specific SLRs on temporary guardianships.

For instance, in Multnomah County a court appearance is required before the court will sign a judgment to appoint a temporary guardian. SLR 9.075(3).

Pursuant to ORS 125.070(1)(d), the notice to respondent and other parties must provide the date, time, and place of a hearing, if a hearing has been set. Therefore, in Multnomah County, you cannot finalize your notice for service until you have scheduled a hearing. If the hearing is going to be via phone, you must make sure the notices provide call-in information.

4. **CALL THE PROBATE CLERK BEFORE YOU FILE.** I cannot overstate the importance of this. Unless you are regularly filing temporary guardianship petitions in that county, it is crucial to check in with the clerk. Some counties appoint a court visitor on their own order, while other counties require petitioners to choose a court visitor from an approved list, which means you need to have that request in your petition. It is also courteous to the court clerks if you let them know you are filing a temporary guardianship petition so they can pull it out of their normal queue. A clerk may have dozens (or hundreds) of filings in the queue waiting to be accepted. If you give the clerk a heads up, he or she may accept the petition faster, which will give you a case number sooner, which will allow you to finalize the notices and serve the required parties earlier. The clerks are often the best resources and can help you help your clients.

### Conclusion

Temporary guardianships are an extraordinary opportunity to help a person in crisis. These cases often require an attorney to drop everything else and devote complete attention to a single matter, which can be a nice change of pace from staring at the stack of files on your desk that you “might get to tomorrow.” Given the aging population in our community (and the seemingly inadequate mental health resources across the state), the need for temporary guardians will only grow. Good attorneys who care about helping people and solving problems are needed to handle these cases. ■