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Joint Interim Task Force on Public Guardian and Conservator (HB 2237) Report

Adopted: December 18, 2012

EXECUTIVE SUMMARY

Oregon has a significant and largely unaddressed health and human rights crisis. Due to the lack of public guardianship services throughout most of the state, adults who are incapable of making decisions about their personal and financial affairs have no one to make decisions on their behalf, to advocate for their interests, to provide services, and to protect their rights. These adults are at continuing and significant risk of harm and their numbers are likely to increase in coming years.

Guardianship is a relationship created by state law in which a court authorizes a person or entity to make decisions for another person who has been found to be unable to make those decisions for him or herself to the extent that serious injury or illness is likely to occur. Conservatorship is a similar legal relationship that gives a person or entity the power to make financial decisions for another who is incapacitated and unable to make financial decisions for him or herself. As used in this report, "guardianship" includes both personal and financial decision-making and refers only to adults. Guardianship of persons under 18 years of age is not the topic of this report.

For some high-risk, low-income persons, there is no one to serve as a guardian and no money to hire a professional fiduciary. Family members or friends are not available, either because they do not exist, or are not appropriate to be guardian or conservator. These vulnerable people are falling through Oregon's safety net. They fall victim to the self-interest of others and may be unnecessarily placed in institutions. For examples of public guardianship cases, please see Appendix B.

House Bill 2237 (2011) established the Joint Interim Task Force on Public Guardian and Conservator (Task Force) to complete the work of the 2009 Public Guardian and Conservator Task Force (House Bill 2883). The Task Force is charged with studying and making recommendations on the need for public guardian and conservator services in the state, specifically for those unable to afford such services. To achieve that end, the Task Force must develop options and models for programs, show the need and assess the cost of such programs, suggest pilot programs, if appropriate, and develop model standards of practice.

The Task Force strongly recommends the establishment of an independent statewide agency to provide guardianship services by passage of House Bill 2671.

The Task Force also supports future legislative action to provide a right to counsel for the proposed protected person and mandatory hearings in all public guardianship cases, with the necessary appropriations, as well as legislation relating to certification and training of fiduciaries.

RECOMMENDED LEGISLATION

The Task Force recommends the establishment of the State Office of the Public Guardian and Conservator (the Office) to provide direct guardian and conservator services to vulnerable adults who are without an appropriate option for guardian or conservator. To that end, the Task Force strongly recommends the Legislative Assembly pass House Bill 2671.

House Bill 2671 is the direct recommendation of the Task Force. The bill would establish a new state agency staffed by professional guardians and conservators. The State Office of the Public Guardian and Conservator is led by the Public Guardian, who is appointed by the Governor and confirmed by the Senate. The Office is responsible for assessing potential clients that are referred to the Office, petitioning for guardian and/or conservatorship over the proposed protected person, and developing an action plan for that person. The Office, once appointed, must provide guardianship and/or conservatorship services as directed by the Court in the least restrictive manner appropriate to the circumstances. The Office will have the ability to contract with attorneys, organizations, and professional fiduciaries to assist in providing guardianship services when it is infeasible or impractical for the Office to provide such services directly. Oversight of the Office will be from the Public Guardian and Conservator Advisory Committee. House Bill 2671 would not end current programs in operation, but would work in addition to current county-based and non-profit guardianship programs. Appendix A outlines the findings of the Task Force, as well as detailed recommendations for the philosophy and creation of the Office.

NEED FOR OFFICE

Appointment of a guardian or conservator for an adult most often involves individuals with serious and persistent mental health illness, intellectual and/or developmental disabilities, or seniors with dementia. Individuals may have multiple disabilities, including physical disabilities. When such individuals are incapable of making decisions and need a guardian, most have a responsible family member or friend who can serve in this capacity. But for some Oregonians, there are no available family members or friends to serve as a guardian. In many situations, the person cannot afford to pay for a private guardian. In the absence of statewide public guardianship, these individuals:

- Experience harm because of their inability to attend to their basic needs and obtain essential medical, mental health and habilitative treatment and services;
- Are particularly vulnerable to physical and sexual abuse and financial exploitation;
- Are often placed and remain in more intensive, restrictive and costly levels of care than is necessary; and
- Are subject to the decisions of care providers and others who, however well intentioned, have no legal authority to make decisions for another and do not always act in accord with the individual's rights, interests and welfare.

The demand for public guardian and conservator services is significant and the need for public guardian services is escalating. Factors contributing to the demand include the graying of the population, the aging of individuals with disabilities, the aging of caregivers, the advancement of medical technologies affording new choices for chronic conditions and end-of-life care, the rising incidence of abuse elders and other vulnerable adults, and the lack of means to acquire a legal surrogate.

Without a guardian, adults with disabilities or impairments are vulnerable to homelessness, untreated medical conditions, and are targets for elder abuse in all its forms. See Appendix B for examples. With a guardian, protected persons are guided to stable housing, medical care, and

protected from exploitation. Utilizing a 2011 study performed for the Washington state legislature and data from states with established public guardianship systems, the Task Force estimates that between 1,575 to 3,175 Oregonians need, but lack, public guardianship services. Further details can be found in Appendix A.

CURRENT PROGRAMS

Oregon's Public Guardianship law was enacted in 1971. Currently, the law allows counties to develop and fund public guardian programs. The first county to develop a legal guardian under that law was the Multnomah County Public Guardian and Conservator. Multnomah County's program has been the longest running program in Oregon and has served the most clients. Other counties have attempted to create Public Guardian programs, with limited success. Serious efforts occurred in Clackamas and Washington counties, but were not successful. In the past 15 years, Lane County has made three substantial efforts to get county approval for a Public Guardian, but to no avail. Jackson County started a pilot public guardian program, but transferred it to a non-profit organization that was already providing fiduciary services. House Bill 2671 will allow current programs to continue while creating a statewide program to provide services in areas where the counties have not been able to start or maintain a public guardian program.

OTHER RECOMMENDATIONS

While the Task Force has not introduced legislation to the effect, it strongly supports legislative action to require mandatory hearings and a right to counsel in all public guardianship cases, with the necessary appropriations to the Judicial Department and the Office of Public Defense Services, and supports mandatory certification and licensure of professional fiduciaries.

Oregon appears to be the only state in the nation that does not require a hearing on all guardianship petitions. Given that a guardianship is a permanent intrusion on an individual's liberty, hearings are an important safeguard against overreaching. The fact that a proceeding is not "contested" does not eliminate these basic concerns. Even in cases where no objection is filed, there is an important role for the court in safeguarding the interest of the protected person. Hearings require Petitioners to prove to the Court that the legal requisites for guardianship are present in the case, that no lesser alternative is appropriate, and that the proposed Guardian is a suitable person to have such power over the individual. In Oregon, if an individual or a family member objects to the Petition, a hearing is required. If the individual does not have the capacity to effectively register an objection, and there is no one looking out for his or her interests, there is no hearing.

Additionally, a majority of states in the US provide for appointment of counsel at public expense. Current Oregon law makes no provision for the appointment of counsel for persons unable to secure their own lawyer.

Finally, the Task Force endorses legislation that would require mandatory certification and training of professional fiduciaries in Oregon. Oregon does not require any training, certification, or oversight of persons overseeing the care or finances of another. The Task Force believes this lack of training and oversight leads to cases of abuse and fraud against vulnerable adults.

CONCLUSION

The Task Force urges the Legislative Assembly to take important and serious steps towards protecting the most vulnerable adults in Oregon. By passing House Bill 2671 and establishing a State Office of the Public Guardian and Conservator, we can begin to fill this need.

APPENDIX A: Findings and Detailed Recommendations of the Task Force

I: The Need for Public Guardian Services

Based on the best available current information, the Task Force estimates that between 1,800 to 3,400 Oregonians need public guardianship services. Presently, approximately 225 individuals are being provided some form of publicly funded guardianship services, leaving between 1,575 to 3,175 individual without needed guardianship services in Oregon.

In deriving the above estimate, the Task Force:

- Extrapolated from a 2011 study performed for the Washington State Institute for Public Policy for the Washington state legislature.¹ The study, which appears to be the most thorough study to date on a state's need for public guardianship services, included analysis of U.S. Census data and Washington court records on guardianship, and a comprehensive survey of health and human service care providers about individuals in their care in need of guardianship.
- Surveyed states with established public guardianship systems about the number of protected persons they serve. The data obtained was used to create an average, which in turn was used calculate Oregon's need. It should be noted that all programs reported they are not able to serve many of those in need of their services because of limited resources, and that this number has increased in recent years.

Given the nature of guardianship and the individuals who are need of these services, it is very difficult to accurately measure the extent of the need for public guardianship. While it is possible to estimate the need for individuals living in long-term care and residential care facilities, it is not possible to count individuals in need who reside in the community and those who are homeless. Consequently, the best estimates are likely low.

II: The Least Restrictive Alternative

It is critically important that guardianship proceedings should not be initiated if there is a less restrictive manner with which to address an individual's incapacity issues. The threshold determination in a guardianship matter is whether the proposed protected person meets the

¹ Mason Burley. (2011) *Assessing the potential need for public guardianship services in Washington state*. (Document No. 11-12-3901). Olympia: Washington State Institute for Social Policy

stringent legal definition of incapacitated as stated in ORS 125.005(5)² or of financially incapacitated per ORS 125.005(3)³.

In cases where a guardianship petition is filed and the court does find that a protective proceeding is necessary, the court will consider whether interventions short of a guardianship can address the proposed protected person's circumstances. The guiding principle in determining the proper intervention is to assure the greatest degree of personal self-determination that the circumstances allow. If a guardianship is found necessary, ORS 125.300 requires that "(A) guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence for the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations." Further, the person's actual mental and physical limitations should be assessed so the guardianship order can be properly tailored, including a limited guardianship.

If a guardianship is ordered by the court, the Guardian has a continuing obligation to provide the protected person with the most normalized environment possible and maximize opportunities for independence and autonomy. The Guardian is expected to learn as much as possible about the values of the protected person currently and in the past, so that any decisions made by the Guardian comport with those values. This responsibility is known as "substituted judgment".

III: Eligibility for Public Guardian and Conservator Services

It is proposed that the following standards be established for eligibility for service by a public guardian program:

- Documentation for incapacity meets all statutory requirements as found in ORS 125.005(5) or ORS 125.005(3)
- The incapacity is expected to persist beyond acute needed mental health or drug and substance abuse treatment.
- The proposed protected person is an Oregon resident, or the court has found venue.
- The proposed protected person is 18 years of age or older.
- There is no less restrictive alternative to guardianship and/or conservatorship and there is a workable plan with needed services available.
- The person has no one else to serve as guardian and/or conservator.

² ORS 125.005(5) "Incapacitated" means 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.

³ ORS 125.005(3): "Financially incapable" means 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 person is in a life threatening situation or is at high risk for abuse, exploitation, self-neglect, deterioration of health, loss of rights, or loss of independence without a fiduciary.
- If program capacity prevents services to all eligible persons, priority will be given to the highest risk individuals for whom intervention will produce immediate reduction of risk.

IV: Petition Filing and Referral

Public Guardian programs in Oregon should be permitted to file petitions for guardianships when no other alternative is available. Even if this is controversial nationally, the Task Force believes this is critical to serve the vulnerable adults who qualify for Public Guardian services.

V: Duties of the Public Guardian

The Task Force recommends the following duties be considered by the Public Guardian and Conservator Advisory Committee when the Committee establishes rules.

Public Guardians shall perform, at a minimum, the following functions:

- Evaluation of client's needs: living situations, medical/care plan, caregivers, levels of ADLs, family/friend involvement, healthcare directives,
- Securing bond as required by law,
- Inventory of client resources, review of finances, and development of a budget and completion of representative payee application as appropriate,
- Authorization of community services including private or public case management and in-home services,
- Application for public benefits as appropriate,
- Liquidation of client resources as necessary,
- Plan for conservation of client's resources as necessary and establishment of recordkeeping system in accordance with standard accounting practices,
- Contract with professional services as needed to address client's circumstances,
- Each PG client shall have a written service plan that is filed with the court within a prescribed number of days of appointment, and
- Periodic review of the continued need for protective proceeding as directed by the court and as stated in the Annual Guardianship Report.

VI: Standards and Qualifications of the Public Guardian

The Task Force recommends the following standards and qualifications be considered by the Public Guardian and Conservator Advisory Committee when the Committee establishes rules.

- The Public Guardian program shall maintain multi-disciplinary staff to meet the range of needs that clients will present,
- Public guardians must be professional guardians with no less than the current forms of certification provided nationally and in Oregon,
- Public guardians should meet annual training requirements,
- The courts should appoint the Public Guardian program, not individual guardians.
- Public guardians should carry a maximum caseload of 30 cases each.

VII: Right to a Hearing

Under current Oregon law and practice, hearings are required in guardianship cases only when an objection to the petition is filed. **Oregon appears to be the only one of the fifty states that does not have mandatory hearings in guardianship matters.** Due to current financial climate, the Task Force at this time recommends that hearings in public guardianship cases be held when there is an objection made or filed in response to the petition or in any matter in which the Court deems a hearing appropriate. The Task Force also recommends the Legislative Assembly make the necessary appropriations to the Judicial Department to adequately accomplish this action.

VII: Right to Counsel for Proposed Protected Persons

The appointment of a Guardian represents a significant and most often permanent loss of liberty for the proposed protected person. A guardian has extensive power over every aspect of the proposed protected person's life.

Most states have some provision for the appointment of counsel for persons who are the subject of a guardianship petition. Thirty states require counsel in all such cases. Another 12 states provide for counsel if the proposed protected person so requests. Finally, 6 states give judges discretion to appoint counsel. **Oregon is one of four states that make no provision for counsel in guardianship matters.** In contrast, in an Oregon civil commitment proceeding where the potential loss of liberty is most often a temporary stay in a locked hospital facility with an eventual returns to the community, attorneys are automatically appointed for all persons who are the subject of a petition for commitment.

As a matter of fundamental due process, persons are provided counsel in commitment proceedings because it state action. The Task Force sees guardianship petitions and the potential loss of rights as a comparable due-process concern. The Task Force strongly recommends that in public guardianship cases, the court appoint counsel for the proposed protected person and that the Legislature makes the necessary appropriations to the Office of Public Defense Services.

If the proposed protected person has sufficient funds, counsel for the proposed protected person should be paid (subject to court approval) from the proposed protected person's funds. If the proposed protected person is unable to afford to pay for counsel, the court should appoint

qualified counsel to be paid by the Office of Public Defense Services (OPDS). OPDS should be entitled to seek reimbursement or partial contribution from the proposed protected person for the costs of counsel to the extent of proposed protected person's ability to pay.

APPENDIX B: Case Studies

- Ed is an agreeable but confused and disoriented 86 year old man who was living with his son when his house burned down. Ed lost everything he owned. In addition, meth production toxins damaged his lungs and he had to be admitted to a hospital and put on oxygen. Upon discharge, Ed moved into an adult foster home. Ed's son subsequently visited him, ostensibly to take Ed to lunch, but instead took Ed to a local bank where the son cashed Ed's Social Security and pension checks and absconded with all but \$40 of his father's funds. Adult Protective Services (APS) has been unable to find someone to serve as guardian for Ed.
- Gloria is a young woman with mental retardation and post-traumatic stress disorder from sexual and physical abuse. Gloria was referred to the Multnomah County Public Guardian and Conservator (MCPGC) after repeatedly being assaulted by her boyfriend, a registered sex offender with a history of criminal behavior. While the police arrested the boyfriend a number of times, Gloria would recant her initial report and refuse to press charges. A psychological evaluation found that Gloria's decision making capacity was limited. MCPGC was appointed Gloria's guardian and has acted to ensure her safety. However, Gloria would have been without a guardian and at risk of further assault by her boyfriend had she not moved from another county, where public guardianship services are unavailable, to Multnomah County.
- Joe is a cognitively impaired but verbally fluent man who lives alone, often wanders far from his home and cannot recall where he lives. Joe has lost and is continuing to lose weight from not eating, he falls, and he longer sees a physician. Joe has no insight about his condition and is hostile when confronted about his inability to cope. Family, friends, and neighbors are burnt out on Joe and have removed themselves from his life. Joe has been given an eviction notice. There is no one available to serve as Joe's guardian.
- Alice is a 74 year old woman who is unaware of time, place and the identities of others, and who must be reminded to eat. At the time Alice came to the attention of Adult Protective Services (APS), she was living in a small, decrepit and hazardous trailer with her adult sons. One son, with a developmental disability, was attempting to care for her but two others were often drunk, belligerent and abusive. As a result, Alice and her disabled son were often confined to their bedrooms. Alice had been forced into the trailer after one son took a credit line out on her house and incurred \$60,000 in gambling debts, precipitating foreclosure on

the home. Alice had no one to serve as her guardian. Eventually, the local aging services office found a volunteer and Alice was moved into a licensed adult foster home.

- Sarah is an older woman who was living in her own home with her son and grandson when APS began to investigate reports of Sarah being abused, neglected, and financially exploited. But there was not sufficient information to indicate that Sarah was incapable of making decisions for herself, even if poor ones. Sarah was subsequently admitted to a hospital for a broken hip, which was determined to be the result of physical abuse. While in the hospital, allegations of sexual abuse surfaced. In addition, Sarah was diagnosed with Alzheimer's disease and untreated diabetes. It was evident her decisional capacity was limited. Sarah had no responsible family member willing and able to serve as her guardian but did have financial resources with which pay a private professional fiduciary. APS referred Sarah to MGPGC when no private fiduciary was willing to take her case. MGPGC was appointed Sarah's guardian, authorized the surgery on her hip and obtained a restraining order on her grandson, the alleged perpetrator of the abuse.