

A-Engrossed
Senate Bill 380

Ordered by the Senate April 13
Including Senate Amendments dated April 13

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[Requires Judicial Department to study protective proceedings. Directs department to submit findings to interim committees of Legislative Assembly related to judiciary not later than September 15, 2024.]

Directs Oregon Public Guardian and Conservator to develop and administer program for providing guardianship services to defendants who are unable to aid and assist in their defense. Appropriates moneys to Oregon Public Guardian and Conservator for program. Authorizes court in criminal proceeding to appoint temporary guardian. Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to protective proceedings; creating new provisions; amending ORS 125.683, 161.362 and
3 161.370; and prescribing an effective date.

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

5 **SECTION 1. Section 2 of this 2023 Act is added to and made a part of ORS 125.675 to**
6 **125.691.**

7 **SECTION 2. (1) The Oregon Public Guardian and Conservator shall develop and adminis-**
8 **ter a program to provide guardianship services to defendants whose criminal cases may be**
9 **or have been suspended or dismissed under ORS 161.370.**

10 **(2) Participants in the program must satisfy the requirements under ORS 125.680 (2) for**
11 **public guardian and conservator services.**

12 **(3) A defendant's eligibility to participate in the program may be determined at any time**
13 **after a defendant's fitness to proceed is drawn in question or, if the court found there was**
14 **no substantial probability that the defendant would, within the foreseeable future, gain or**
15 **regain the capacity to stand trial, no later than one year following the date on which the**
16 **defendant's case is dismissed.**

17 **(4)(a) In administering the program, the Oregon Public Guardian and Conservator shall**
18 **collaborate and coordinate with district attorneys, community mental health programs and**
19 **facilities in which defendants are housed, including the Oregon State Hospital.**

20 **(b) The Oregon Public Guardian and Conservator may provide services under this section**
21 **at any point after the defendant's fitness to proceed is drawn into question.**

22 **SECTION 3. ORS 125.683 is amended to read:**

23 **125.683. (1) In providing public guardian and conservator services, the Oregon Public Guardian**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 and Conservator shall conduct a needs assessment for a person who claims or is claimed not to have
2 relatives or friends willing or able to assume the duties of guardianship or conservatorship and who
3 claims or is claimed to lack the financial resources to obtain a private guardian or conservator. The
4 purpose of the needs assessment is to determine the person's eligibility to receive public guardian
5 and conservator services and to determine the appropriateness of filing a petition for the appoint-
6 ment of a fiduciary or other pleading on behalf of the person in a court having probate jurisdiction.
7 The needs assessment shall, at a minimum:

8 (a) Assess the person's capacity to:

9 (A) Care for the person's own safety;

10 (B) Manage the person's own financial affairs; and

11 (C) Attend to and provide for necessities such as food, shelter, clothing and medical care;

12 (b) Assess the person's financial resources;

13 (c) Determine whether information that is available about the person is sufficient to support a
14 finding that the person is incapacitated or financially incapable and the entry of a court order for
15 the appointment of a fiduciary under ORS 125.010;

16 (d) Determine whether any other person may be willing and able to serve as the person's
17 guardian or conservator and, if appropriate, locate and contact that other person;

18 (e) Determine the type of fiduciary, if any, to request in a petition filed under ORS 125.055,
19 giving preference to the least intrusive form of fiduciary relationship consistent with the best in-
20 terests of the person; and

21 (f) Determine how best to provide public guardian and conservator services to the person that
22 are least restrictive to the person's liberty, that are least intrusive to the person and that provide
23 for the greatest degree of independence that the person is capable of exercising.

24 (2)(a) If the person is a resident of a nursing home as defined in ORS 678.710 or a residential
25 facility as defined in ORS [441.402] **443.400**, the nursing home or residential facility shall provide the
26 Oregon Public Guardian and Conservator access to the person's records as is necessary to conduct
27 the needs assessment required under this section.

28 (b) Any other public agency that has provided or is providing care or services to the person
29 shall disclose to the Oregon Public Guardian and Conservator, upon request, a minimum amount of
30 information about the person for whom the needs assessment is being conducted, including protected
31 health information as defined in ORS 192.556 and financial information, as is reasonably necessary
32 to prevent or lessen a serious and imminent threat to the health or safety of the person who is the
33 subject of the needs assessment. For purposes of this paragraph, a request from the Oregon Public
34 Guardian and Conservator for the purpose of conducting a needs assessment is presumed to be a
35 situation that will prevent or lessen a serious and imminent threat to the health or safety of the
36 person.

37 (c) Any health care provider not identified in either paragraph (a) or (b) of this subsection may
38 disclose protected health information to the Oregon Public Guardian and Conservator in accordance
39 with 45 C.F.R. 164.512 (j) to prevent or lessen a serious or imminent threat to the health or safety
40 of a person if the health care provider, in good faith, believes the disclosure is necessary to prevent
41 or lessen the threat. For purposes of this paragraph, a request from the Oregon Public Guardian and
42 Conservator for disclosure under this paragraph for the purposes of conducting a needs assessment,
43 or the good faith belief and disclosure of the health care provider under this paragraph, are pre-
44 sumed to be situations that will prevent or lessen a serious and imminent threat to the health or
45 safety of the person.

1 **(d) If the person is currently or was previously a defendant subject to ORS 161.370, the**
2 **Oregon Public Guardian and Conservator may have access to any reports resulting from**
3 **examinations of the defendant, documents containing recommendations of or resulting from**
4 **consultations with community mental health programs, documents submitted to the court**
5 **by a state mental hospital related to the proceedings under ORS 161.370 and any other court**
6 **records relating to the defendant.**

7 (3) For each person determined to be eligible for public guardian and conservator services under
8 this section, the Oregon Public Guardian and Conservator shall develop a written plan setting forth
9 the type and duration of services to be provided by the Oregon Public Guardian and Conservator.
10 The plan shall be included in any nonemergency petition or pleading filed with the court.

11 **SECTION 4.** ORS 161.362 is amended to read:

12 161.362. (1) A recommendation provided by a certified evaluator, pursuant to ORS 161.355 to
13 161.371, that a defendant requires a hospital level of care due to the acuity of the defendant's
14 symptoms must be based upon the defendant's current diagnosis and symptomology, the defendant's
15 current ability to engage in treatment, present safety concerns relating to the defendant and any
16 other pertinent information known to the evaluator. If the defendant is in a placement in a facility,
17 the evaluator may defer to the treatment provider's recommendation regarding whether a hospital
18 level of care is needed.

19 (2) A determination by a community mental health program director, or the director's designee,
20 pursuant to ORS 161.355 to 161.371, that appropriate community restoration services are not present
21 and available in the community must include information concerning the specific services necessary
22 to safely allow the defendant to gain or regain fitness to proceed in the community and must specify
23 the necessary services that are not present and available in the community.

24 (3)(a) Reports resulting from examinations performed by a certified evaluator, and documents
25 containing the recommendations of or resulting from consultations with a community mental health
26 program director or the director's designee, prepared under ORS 161.355 to 161.371, and any docu-
27 ment submitted to the court by a state mental hospital related to the proceedings under ORS 161.355
28 to 161.371, are confidential and may be made available only:

29 (A) To the court, prosecuting attorney, defense attorney, agent of the prosecuting or defense
30 attorney, defendant, **Oregon Public Guardian and Conservator**, community mental health program
31 director or designee, state mental hospital and any facility in which the defendant is housed; or

32 (B) As ordered by a court.

33 (b) Any facility in which a defendant is housed may not use a report or document described in
34 paragraph (a) of this subsection to support a disciplinary action against the defendant.

35 (c) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or agent of
36 the prosecuting or defense attorney from discussing the contents of a report or document described
37 in paragraph (a) of this subsection with witnesses or victims as otherwise permitted by law.

38 (4) The court shall ensure that an order entered under ORS 161.355 to 161.371 is provided, by
39 the end of the next judicial day, to any entity ordered to provide restoration services.

40 (5) Unless the court orders otherwise or either party objects, a defendant committed to a state
41 mental hospital or other facility, or a certified evaluator or other expert witness, may attend
42 hearings held under ORS 161.355 to 161.371 via simultaneous electronic transmission.

43 **SECTION 5.** ORS 161.370 is amended to read:

44 161.370. (1)(a) When the defendant's fitness to proceed is drawn in question, the issue shall be
45 determined by the court.

1 (b) If neither the prosecuting attorney nor counsel for the defendant contests the finding of the
2 report filed under ORS 161.365, the court may make the determination on the basis of the report.
3 If the finding is contested, the court shall hold a hearing on the issue. If the report is received in
4 evidence in the hearing, the party who contests the finding has the right to summon and to cross-
5 examine any certified evaluator who submitted the report and to offer evidence upon the issue.
6 Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

7 (2)(a) If the court determines that the defendant lacks fitness to proceed, the criminal proceeding
8 against the defendant shall be suspended and the court shall proceed in accordance with this sub-
9 section.

10 (b) After making the determination under paragraph (a) of this subsection, the court shall re-
11 ceive a recommendation from a community mental health program director or the director's
12 designee, and from any local entity that would be responsible for treating the defendant if the de-
13 fendant were to be released in the community, concerning whether appropriate community restora-
14 tion services are present and available in the community.

15 (c) If the parties agree as to the appropriate action under this section, the court may, after
16 making all findings required by law, enter any order authorized by this section. If the parties do not
17 agree as to the appropriate action, the court and the parties shall, at a hearing, consider an ap-
18 propriate action in the case, and the court shall make a determination and enter an order necessary
19 to implement the action. In determining the appropriate action, the court shall consider the primary
20 and secondary release criteria as defined in ORS 135.230, the least restrictive option appropriate for
21 the defendant, the needs of the defendant and the interests of justice. Actions may include but are
22 not limited to:

23 (A) Commitment for the defendant to gain or regain fitness to proceed under subsection (3) or
24 (4) of this section;

25 (B) An order to engage in community restoration services, as recommended by the community
26 mental health program director or designee, under subsection (6) of this section;

27 (C) Commencement of a civil commitment proceeding under ORS 426.070 to 426.170, 426.701 or
28 427.235 to 427.290;

29 (D) Commencement of protective proceedings under ORS chapter 125; or

30 (E) Dismissal of the charges pursuant to ORS 135.755.

31 (d) If the court, while considering or ordering an appropriate action under this subsection, does
32 not order the defendant committed to a state mental hospital or other facility, but finds that ap-
33 propriate community restoration services are not present and available in the community, for any
34 defendant remaining in custody after such determination, the court shall set a review hearing seven
35 days from the date of the determination under paragraph (a) of this subsection. At the review
36 hearing, the court shall consider all relevant information and determine if commitment to the state
37 mental hospital or other facility is appropriate under subsection (3) or (4) of this section, or if an-
38 other action described in paragraph (c) of this subsection is appropriate. At the conclusion of the
39 hearing the court shall enter an order in accordance with the defendant's constitutional rights to
40 due process.

41 (e) If the court determines that the appropriate action in the case is an order for the defendant
42 to engage in community restoration services, but the defendant has a pending criminal case, warrant
43 or hold in one or more other jurisdictions, the other jurisdictions shall, within two judicial days of
44 becoming aware of the proceeding under this section, communicate with the court and the other
45 jurisdictions, if applicable, to develop a plan to address the interests of all jurisdictions in the de-

1 defendant in a timely manner.

2 **(f) If the court determines that the appropriate action in the case is the commencement**
3 **of a protective proceeding under ORS chapter 125, the court may, subject to ORS 125.600 and**
4 **125.605, appoint a temporary guardian for the defendant until a permanent guardian can be**
5 **appointed.**

6 (3)(a) If the most serious offense in the charging instrument is a felony, the court shall commit
7 the defendant to the custody of the superintendent of a state mental hospital or director of a facility
8 designated by the Oregon Health Authority if the defendant is at least 18 years of age, or to the
9 custody of the director of a secure intensive community inpatient facility designated by the author-
10 ity if the defendant is under 18 years of age, if the court makes the following findings:

11 (A) The defendant requires a hospital level of care due to public safety concerns if the defendant
12 is not hospitalized or in custody or the acuity of symptoms of the defendant's qualifying mental
13 disorder; and

14 (B) Based on the findings resulting from a consultation described in ORS 161.365 (1), if applica-
15 ble, from any information provided by community-based mental health providers or any other
16 sources, and primary and secondary release criteria as defined in ORS 135.230, the appropriate
17 community restoration services are not present and available in the community.

18 (b) If the defendant is committed under this subsection, the community mental health program
19 director, or director's designee, shall at regular intervals, during any period of commitment, review
20 available community restoration services and maintain communication with the defendant and the
21 superintendent of the state mental hospital or director of the facility in order to facilitate an effi-
22 cient transition to treatment in the community when ordered.

23 (c) If the court does not order the commitment of the defendant under this subsection, the court
24 shall proceed in accordance with subsection (2)(c) of this section to determine and order an appro-
25 priate action other than commitment.

26 (4)(a) If the most serious offense in the charging instrument is a misdemeanor, the court may
27 not commit the defendant to the custody of the superintendent of a state mental hospital or director
28 of a facility designated by the Oregon Health Authority if the defendant is at least 18 years of age,
29 or to the custody of the director of a secure intensive community inpatient facility designated by
30 the authority if the defendant is under 18 years of age, unless the court:

31 (A)(i) Receives a recommendation from a certified evaluator that the defendant requires a hos-
32 pital level of care due to the acuity of symptoms of the defendant's qualifying mental disorder; and

33 (ii) Receives a recommendation from a community mental health program director, or director's
34 designee, that the appropriate community restoration services are not present and available in the
35 community; or

36 (B) Determines that the defendant requires a hospital level of care after making all of the fol-
37 lowing written findings:

38 (i) The defendant needs a hospital level of care due to the acuity of the symptoms of the
39 defendant's qualifying mental disorder;

40 (ii) There are public safety concerns; and

41 (iii) The appropriate community restoration services are not present and available in the com-
42 munity.

43 (b) If at the time of determining the appropriate action for the case, the court is considering
44 commitment under paragraph (a)(A) of this subsection and:

45 (A) Has not received a recommendation from a certified evaluator as to whether the defendant

1 requires a hospital level of care due to the acuity of symptoms of the defendant's qualifying mental
2 disorder, the court shall order a certified evaluator to make such a recommendation.

3 (B) Has not received a recommendation from the community mental health program director or
4 designee concerning whether appropriate community restoration services are present and available
5 in the community, the court shall order the director or designee to make such a recommendation.

6 (c) If the court does not order the commitment of the defendant under this subsection, the court
7 shall proceed in accordance with subsection (2)(c) of this section to determine and order an appro-
8 priate action other than commitment.

9 (d) If the defendant is committed under this subsection, the community mental health program
10 director, or director's designee, shall at regular intervals, during any period of commitment, review
11 available community restoration services and maintain communication with the defendant and the
12 superintendent of the state mental hospital or director of the facility in order to facilitate an effi-
13 cient transition to treatment in the community when ordered.

14 (5) If the most serious offense in the charging instrument is a violation, the court may not
15 commit the defendant to the custody of the superintendent of a state mental hospital or director of
16 a facility designated by the Oregon Health Authority if the defendant is at least 18 years of age,
17 or to the custody of the director of a secure intensive community inpatient facility designated by
18 the authority if the defendant is under 18 years of age.

19 (6)(a) If the court does not order the commitment of the defendant under subsection (3) or (4)
20 of this section, if commitment is precluded under subsection (5) of this section or if the court de-
21 termines that care other than commitment would better serve the defendant and the community, the
22 court shall release the defendant, pursuant to an order that the defendant engage in community
23 restoration services, until the defendant has gained or regained fitness to proceed, or until the court
24 finds there is no substantial probability that the defendant will, within the foreseeable future, gain
25 or regain fitness to proceed. The court may not order the defendant to engage in community resto-
26 ration services in another county without permission from the other county.

27 (b) The court may order a community mental health program director coordinating the
28 defendant's treatment in the community to provide the court with status reports on the defendant's
29 progress in gaining or regaining fitness to proceed. The director shall provide a status report if the
30 defendant is not complying with court-ordered restoration services.

31 (c) A community mental health program director coordinating the defendant's treatment in the
32 community shall notify the court if the defendant gains or regains fitness to proceed. The notice
33 shall be filed with the court and may be filed electronically. The clerk of the court shall cause
34 copies of the notice to be delivered to both the district attorney and the counsel for the defendant.

35 (d) When a defendant is ordered to engage in community restoration services under this sub-
36 section, the court may place conditions that the court deems appropriate on the release, including
37 the requirement that the defendant regularly report to a state mental hospital or a certified evalu-
38 ator for examination to determine if the defendant has gained or regained fitness to proceed.

39 (7) The Oregon Health Authority shall establish by rule standards for the recommendation pro-
40 vided to the court described in subsection (2) of this section.

41 **SECTION 6. In addition to and not in lieu of any other appropriation, there is appropri-**
42 **ated to the Oregon Public Guardian and Conservator, for the biennium beginning July 1, 2023,**
43 **out of the General Fund, the amount of \$1,696,450 for deposit in the Oregon Public Guardian**
44 **and Conservator Fund established under ORS 125.689, to carry out the purposes of section 2**
45 **of this 2023 Act.**

1 **SECTION 7.** (1) Section 2 of this 2023 Act and the amendments to ORS 125.683, 161.362
2 and 161.370 by sections 3 to 5 of this 2023 Act become operative on January 1, 2024.

3 (2) The Oregon Public Guardian and Conservator may take any action before the opera-
4 tive date specified in subsection (1) of this section that is necessary for the Oregon Public
5 Guardian and Conservator to exercise, on and after the operative date specified in subsection
6 (1) of this section, all of the duties, functions and powers conferred on the Oregon Public
7 Guardian and Conservator by section 2 of this 2023 Act and the amendments to ORS 125.683,
8 161.362 and 161.370 by sections 3 to 5 of this 2023 Act.

9 **SECTION 8.** This 2023 Act takes effect on the 91st day after the date on which the 2023
10 regular session of the Eighty-second Legislative Assembly adjourns sine die.

11