

MARION COUNTY PROBATE COURT
POLICIES AND PRACTICE TIPS

Updated 2/7/11
Claudia M. Burton
Circuit Court Judge

INTRODUCTION

Materials included in this hand-out are intended to be of assistance to practitioners dealing with probate cases in Marion County. Obviously, the statutes and UTCRs cited will have statewide application, but many of the procedural suggestions will vary depending on the county.

PART ONE GENERAL PROBATE INFORMATION

I. WHO HAS MY FILE?

All probate cases are initially handled through the probate department, overseen by Probate Commissioner Elaine Martin. If Ms. Martin is unavailable your first point of contact with the probate department is with Probate Clerk Judy Stanfill. Probate cases are assigned out to individual calendar judges in the following circumstances: 1) an objection or other pleading will require a hearing; 2) probate staff requests the review or assistance of an assigned judge; 3) counsel requests that a judge be assigned. The judges accepting assignment of probate cases are Judges Burton, Graves, Hart and James. If your case has been assigned to a judge all communication and filings should be directed to that judge's chambers.

II. COMMUNICATION WITH THE COURT

A. General Questions or Updates

If you have a question about file status, or how to do something; or wish to update the court (EG, when bond will be obtained), we prefer written communication. Fax (503-589-3287) or e-mail is fine.

Elaine.Martin@ojd.state.or.us
Judy.Stanfill@ojd.state.or.us
Jessica.Schilling@ojd.state.or.us

We require that any e-mail communication from represented parties come through their counsel and not directly from the parties. Both attorneys and self-represented parties communicating with the court should remember to avoid ex parte communication (this means any correspondence must be copied to all parties to the case; if some of the parties do not have e-mail addresses on file they must be copied by mail or fax); and remember that no documents (EG pleadings, motions) can be filed via e-mail. E-mail may only be used for general correspondence.

B. Inquiries Regarding Status Of A Submitted Order

These are a major time problem for court staff. If at all possible, please wait for your confirmation card or conformed copy to come back. If you have OJIN access you can check yourself. Please do not inquire about the status of an order unless a) it has been at least two weeks since it was submitted; or b) it was submitted as an "ASAP" order. If you do need to make an inquiry, please do it by e-mail rather than phone call. That way staff can track down your file and respond without being interrupted. Please remember that we have over 2,000 open files. **You will not get your confirmation card or conformed copy back if you do not provide us with a stamped addressed card or envelope and a copy of the document if you want a conformed copy.**

C. When Order Needs to be Resubmitted

If you get an e-mail or a letter saying the court needs something before your order can be signed (EG, affidavit of compliance), when you send in the required filing please also send a cover letter asking staff to pull the file and re-submit the order for signature. Otherwise staff may just file in your documents without realizing that there is an order pending.

D. Communication From the Court to You

Judge Burton provides occasional updates via her website, <http://www.judgeburton.info>. You can subscribe to her RSS feed if you want to be sure you see any updates.

The probate commissioner also maintains an e-mail list to whom she sends occasional bulletins on topics of interest to probate practitioners. If you wish to be included, send her an e-mail at Elaine.Martin@ojd.state.or.us

UTCR 2.010(7) requires that your e-mail address be included on pleadings. Please make sure it is also included in correspondence.

II. "ASAP" ORDERS

If you have a critical deadline, please let us know and we will do our best to accommodate it. Please provide a cover letter and highlight in yellow highlighter the information as to what your deadline is and the reason it is urgent. You can increase your odds of getting your order signed on time by giving us sufficient lead time. If you give us a week and advise us that you have a critical deadline, we should almost always be able to get you taken care of. If you give us only a day or two, we will do our best but we will not always be able to get your order signed in that time frame.

Please keep timeframes for processing orders in mind. The fact that an estate beneficiary made an offer on a house before receiving her distribution is not an emergency. A beneficiary who has serious medical needs and no health insurance does have an emergency. Please do NOT ask to see a judge to have your order signed barring a TRUE emergency. In general we can get to your order faster if it is left with our office.

III. GENERAL EX PARTE ORDERS

A. Turnaround Time In General

Generally, uncontested orders appointing personal representatives, guardians, and conservators are handled within a few days of submission, if not immediately, by the probate commissioner (Elaine Martin). Other orders are usually processed in **two to three weeks**. "Processed" means the order is either signed, or the court sends information as to why it cannot be signed. If you have not heard after 3 weeks or so, please feel free to contact the court as described above.

B. Other Miscellaneous Tips

1. Get a conformed copy of critical documents that you file with the court. In the event of a lost or misfiled document, a confirmation card doesn't establish the contents of what was actually filed if there is a dispute.
2. If the court sends you an e-mail or a letter with questions, please answer them in the order they are numbered.
3. File documents at the information window, unless a fee is required. If a fee is required, you must file your document at the accounting window. If your case is assigned to a judge file all documents that don't require a filing fee directly with the judge's chambers.
4. Don't forget that filing fees are due when you are filing an objection.
5. Please remember that due to space limitations, we only keep the most immediate files in the probate department. Everything else is in records, which means there is often a delay before we get your file.

IV. LATE FILINGS

If you have requested no previous extensions and are asking for 30 days or less, a request for the extension by letter is acceptable. For second extensions of time or

longer extensions, a motion and order will be required. Please note, however, that if any other persons have filed an appearance or request for notice, you must serve notice and make a formal motion for any extension.

V. OPENING A DECEDENT'S ESTATE

A. Small Estates

Forms and instructions are available on the court's website at: <http://courts.oregon.gov/Marion/MaterialsAndResources/ProbateForms.page?##smallestates>. If you have any problem following this link, go to the main website <http://courts.oregon.gov/Marion> and follow the links to Materials and Resources – probate forms

B. Petition for Appointment of PR

See the Administering Oregon Estates CLE, chapter 5, for forms and basic information. Tips:

1. In a testate estate, please list heirs and devisees separately, even if they are the same people.
2. If a devisee, such as a spouse, has predeceased, please say so.
3. Remember, we need the original will or a statement pursuant to ORS 113.035(10).
4. We need an affidavit of attesting witness (ORS 113.055(1)) or other proof of the will (ORS 113.055(3)).
5. Bond will almost never be waived unless there is a will which waives it.

VI. ESTABLISHING GUARDIANSHIPS AND CONSERVATORSHIPS

A. Procedure

The probate commissioner reviews petitions for guardianships and conservatorships and can sign orders appointing if everything is in order and there are no objections.

B. Statutory Requirements for the Petition

1. Most of what needs to be in the petition is laid out in ORS 125.055.
2. We do need to know whether respondent is receiving money from veteran's affairs or AFS because of notice requirements. ORS 125.060(2)(h), (i).

3. If the petition concerns a minor, we need a statement of whether the Indian Child Welfare Act applies. ORS 125.025(2).
4. Don't forget information about other fiduciaries, trustee etc. as required by ORS 125.055(2)(e). If there are none, please say so.
5. For temporary fiduciaries, we need an explanation of the circumstances creating immediate and serious danger to the life or health of the respondent (guardianships) or the estate of a respondent (conservatorships) and requiring immediate action. Allege specific facts, not just the conclusion. ORS 125.600(1), (2).

C. Court Visitors

Appointment of a court visitor is required if there is a petition for a guardian for an adult, and may be required by the court in other protective proceedings. ORS 125.150(1).

Pursuant to ORS 125.165, the Presiding Judge has established qualification and training standards for court visitors. A copy of the presiding judge order is attached as Appendix A. A current list of approved visitors is posted on the court's website at:

<http://courts.oregon.gov/Marion/docs/Services/VisitorList.pdf>

The petitioner in a protective proceeding where a visitor is required is responsible for contacting a visitor, confirming that the visitor is available within the necessary timeframe and willing to serve, making payment arrangements with the visitor, and submitting the order appointing the visitor to the court. The court will e-mail the appointed visitor upon signature of the order to ensure that the visitor is aware of his or her appointment. The visitor is required to use Marion County's form for the visitor's report, which is available for download at:

<http://courts.oregon.gov/Marion/Services/Visitors.page?>

When a visitor's report contains protected information from DHS, the court is required to seal the report. ORS 125.012(3)(d). In such cases, the court has developed a brief summary that the visitor will submit for the public file. The full report will be sealed by the court. The summary is available at the court's website at:

<http://courts.oregon.gov/Marion/Services/Visitors.page?>

D. Petitions With Protected Information From DHS

HB 2137 (ORS 125.012)) now requires that any person filing any other document (EG, petition, objection) in a protective proceeding that contains confidential information from DHS must alert the court that the document contains protected information. The statute then requires the confidential

information, but not the entire document in which it is contained, to be sealed. In order to comply with this provision we will be asking persons filing documents containing confidential information from DHS to file an original, containing all of the information, which will be sealed; AND a redacted copy from which the confidential information has been deleted. The redacted copy will be subject to public inspection. The original document should contain a notation under the title of the pleading as follows: "CONTAINS CONFIDENTIAL INFORMATION FROM DHS. SEAL PURSUANT TO HB 2137". The redacted copy should contain the following notation wherever information is redacted: [CONFIDENTIAL INFORMATION FROM DHS REDACTED PURSUANT TO HB 2137]. For example, a redacted version of the petition might read as follows:

Respondent is incapacitated. Respondent suffers from the following medical conditions: [CONFIDENTIAL INFORMATION FROM DHS REDACTED PURSUANT TO HB 2137]. Respondent is not eating consistently, and forgets to take her medications.

E. Form of Notice

1. If the petition is for guardianship of a respondent who is alleged to be incapacitated, notice has to comply with ORS 125.070(3), and the respondent must be served with the objection form as specified in ORS 125.070(4).
2. If the petition is for appointment of a conservator for a respondent who is alleged to be financially incapable, or for appointment of a guardian or conservator of a minor, the notice must comply with ORS 125.070(2).
3. In all other cases, the notice must comply with ORS 125.070(1) and (5).

F. Service on the Respondent

Service is required on any respondent 14 years or older. ORS 125.060(2)(a). Personal service is required. ORS 125.065(1). Note that the respondent cannot waive notice. ORS 125.060(9). However, the respondent can acknowledge receipt of personal service of notice and waive objections.

G. Service on Absent Parents

If the petition concerns a minor, personal service on the parents is required. ORS 125.065(1).

Problem: a parent can't be found. ORS 125.060(1), which generally governs all notices in guardianships and conservatorships, says persons have to be served if their identity and location can be ascertained with reasonable diligence. This would appear to indicate that if you don't know where they are, you don't have to serve them. However, ORS 125.065(2) provides that if the address or identity of any person is not known and cannot be ascertained with reasonable diligence, notice of the filing of the petition may be given by publication. Since the statute is more specific with regard to its application to the initial petition, it probably controls over 125.060(1). This would seem to indicate that, at least with regard to the initial petition, you cannot get away with avoiding service to a parent.

Two options if you would like to avoid publication: if the missing parent is a putative father (paternity was never established), the court will enter an order waiving notice with a motion and affidavit meeting the criteria of ORS 109.096. Although it is not directly applicable, if notice to a father can be waived for an adoption the court feels it can be waived for guardianship or conservatorship. If paternity is established or you otherwise cannot meet the criteria of 109.096, consider a motion for service by alternate method under ORCP 7D(6)(a). The rule does include some alternatives to publication.

Note: the court is skeptical of affidavits from mothers stating that they do not know the identity of the father. The court will require some kind of explanation of such an assertion.

H. Interstate Compact (ORS 125.800 et seq.)

1. In order to ensure that a transfer or registration out of state does not occur without this court's knowledge, new limited judgments appointing guardians or conservators shall contain the following provisions:
 - In a conservatorship: "This court's judgment shall not be registered in any other state or transferred to any other state without an order of this court approving such registration or transfer."
 - In a guardianship or combined proceeding: "The guardian may not cause or permit the protected person to reside outside of the state of Oregon without further order of this court. This provision does not prohibit travel for vacation or visits to family and friends. This court's judgment shall not be registered in any other state or transferred to any other state without an order of this court approving such registration or transfer".
2. If the court receives notice of intent to register an existing Marion County Circuit Court judgment in another state, the file will be

routed to a judge for review. If a judge has been previously assigned on the case, it will go to that judge. If it has not been previously assigned it will go to Judge Burton, and she may assign it to another judge.

3. If a court in another jurisdiction requests to confer with the Marion County Circuit Court, the request will be directed to the assigned judge if it involves a case that has previously been assigned. Otherwise, it will be directed to Judge Burton and she may assign it to another judge.
4. This court will not accept any registrations of foreign protective proceeding judgments without proof that the registrant gave the foreign court notice of his/her intent to do so, as required by ORS 125.842 and ORS 125.845. This should be by affidavit or proof of service. The usual \$41 fee for registration of a foreign judgment will apply.
5. Once a foreign judgment is registered here, if the registrant seeks further orders of this court pursuant to ORS 125.847(2), further filing fees will apply. The usual filing fee for whatever petition or motion is filed seeking further relief will be charged.
6. Requests to transfer a Marion County protective proceeding to another state or to transfer an out-of-state protective proceeding here pursuant to ORS 125.837 and 125.840 shall be reviewed by Judge Burton or she may assign the case to another judge for review. The judge will make the determination what, if any additional information to request from petitioner; whether to request a conference with the court in the other state, and whether to schedule a hearing. If it is a transfer out pursuant to ORS 125.837, the petition for authorization would be filed in our existing case. If it is a transfer in pursuant to ORS 125.840, the petition for us to accept the transfer would start a new case. If the transfer is granted and we accept the case, that file would then become a Marion County guardianship or conservatorship, with the usual accountings, reports etc.

VII. SPECIAL NEEDS TRUSTS

The Marion County Circuit Court has adopted a policy regarding petitions to create special needs and income cap trusts as a general rule. Judges, of course, maintain discretion to make appropriate determinations based on the circumstances of individual cases. The court cannot provide any advice as to the requirements of any government benefit program.

- A. Pursuant to ORS 125, the court may authorize either a conservator, or a special limited conservator, to create a trust, including a special needs trust (SNT). ORS 125.440(2), 125.650(4), (5). In addition, the court may create the trust without the appointment of a conservator pursuant to ORS 125.650 (1) and (5). If a protective proceeding already exists, the fiduciary (or other interested person) may petition for creation of the trust within the protective proceeding and a new file is not required. If there is no protective proceeding, a new file is required; IE, the court will not authorize creation of an SNT as a distribution vehicle in a decedent's estate or personal injury case.
- B. A new petition to create a SNT is a Chapter 125 proceeding and Chapter 125 filing fees apply. (If you believe there is authority other than Chapter 125 for the court to create a special needs trust, you will need to clearly cite the authority in your petition.)
- C. All notice provisions of Chapter 125 must be complied with. Pursuant to ORS 125.060(2)(m), the court will require notice to any relevant benefit-paying agency; typically DHS and/or Social Security.
- D. Unless it is a small amount of money, the court will require an ongoing conservatorship with normal conservatorship protections, ie fiduciary and fiduciary's attorney can't be paid without court approval, annual accountings in UTCR 9.160 form, and bond. Here is the court's reasoning: generally these are funds that normally would be in a conservatorship (EG, developmentally disabled person receives personal injury accident settlement). The only reason the funds are going to a trust rather than conservatorship is to achieve eligibility for some program. We know from experience that fiduciary misappropriation of funds is a common problem. The court is not prepared to strip a protected person from the protection they would otherwise have against misuse of their funds in order to qualify them for public benefits. In addition, the SNT takes funds that otherwise would replace public funds or be taken by a public benefit agency to fund services. If the court allows those funds to be diverted improperly by a fiduciary then the public is adversely affected.
- E. The court will require a complete copy of the trust approving attached to the order as Exhibit A. The order should specify that the trust is approved in the form set forth in Exhibit A.

VIII. ACCOUNTINGS

A. In General

1. UTCR 9.160

Marion County has now adopted an SLR (9.010) requiring accountings to comply with UTCR 9.160.

2. Required Disclosures of Specific Transactions

UTCR 9.170 requires disclosure of certain transactions. The disclosures required cover a broad range of transactions and reflect the UTCR committee's concern regarding many different kinds of actions by fiduciaries. The rule requires disclosure of all gifts. UTCR 9.170(1). It further requires disclosures of any transactions "with a person or entity with whom the fiduciary has a relationship which could compromise or otherwise affect decisions made by the fiduciary." This provision specifically includes, but is not limited to, payment for goods, services, rent, reimbursement of expenses, or any other like transactions. UTCR 9.170(2). Finally, the rule requires disclosure of any payment for goods or services provided either to a person who is not engaged in an established business providing such goods or services to the public, or where such payment is at a rate higher than that ordinarily charged to the general public. UTCR 9.170(3).

3. Vouchers

We prefer that you request waiver of the filing of the vouchers; we will ask for them if we want them. Remember to include language regarding your request in the accounting and language granting the waiver in the order. Note that the vouchers do have to be retained by the fiduciary for one year after approval of the **final** account. ORS 116.083(2)(d), ORS 125.475(3).

B. General Tips to Expedite Approval of Accountings

1. Use the UTCR 9.160 form for accountings. (This is required by supplemental local rule).
2. Provide a list of receipts and disbursements in UTCR 9.160 format for all accounts, including CDs and brokerage accounts.
3. Provide confirming bank statements documenting the opening and closing balance for each account. Ensure that the ending balance in your accounting is consistent with the bank's balance as shown on the statement, and explain any discrepancies.
4. Make sure any transfers between accounts clearly identify the account number from which or to which the transfer is being made.
5. If you represent a fiduciary who has done something that you even remotely suspect might look questionable to the court, provide a full explanation, and if appropriate, consider having the fiduciary reimburse funds before you file the accounting.

6. Notice everyone. If you are not sure whether someone is required to receive notice, send notice anyway.
7. Don't just attach whatever the fiduciary gives you for receipts and disbursements. Review it and make sure it makes sense. The court would rather approve fees to pay you for this than have to try to clean it up later. Besides, any fee "savings" is usually illusory.¹

C. Accountings In Decedent's Estates

1. Interim Accountings

Annual accountings are required. ORS 116.083(1)(a). Statute does not require court approval of interim (i.e., other than final) accountings. If you do want court approval, though, be sure you send notice of time to object to all heirs or devisees and any unpaid creditors. See ORS 111.215 (please set a date for objections rather than requesting a hearing date).

2. Final Accountings

a. What We Look For in General

We do not apply strict scrutiny to accountings in decedent's estates. Assuming that the proper people have received notice and an opportunity to object, the court will generally leave it to the interested parties to decide if they wish to object.

Therefore, the court's main concerns are to check that first that the prerequisites to close the estate have been met: notice to heirs and devisees (ORS 113.145); inventory (ORS 113.165); published notice and passage of 4 months (ORS 113.155, ORS 115.005(2)(a)); and affidavit of compliance (ORS 115.003(4)). Please also note the requirement to provide information to the Estate Administration Unit. ORS 113.145(6). Second, we check that any claims against the estate have been paid or resolved; or, if they have not been resolved, that notice of the final account has been sent to the creditor. ORS 116.093(1)(c). Third, we check that notice and an opportunity to object went to all the required people (ORS 116.093(1)), and that the accounting lists receipts and disbursements to a degree that interested persons have a meaningful opportunity to object. Finally, we check that the

¹ In 2003 an attorney was suspended for 60 days for failing to review accountings before filing them. *In RE Roberts*, 335 OR 476 (2003); the opinion does not recite the facts, which can be found in the Bar Bulletin archives here: <http://www.osbar.org/publications/bulletin/03augsep/discipline.html>

proposed distribution is consistent with the will or intestate succession.

b. Tips To Speed Up Approval Of Your Final Accounting

- If an asset that was specifically devised doesn't exist at decedent's death, please say so in the final accounting. If the will says the boat goes to Harold and the court can't find anything about Harold or the boat in the final accounting, the court will need to ask you.
- If any devisees pre-deceased, please say so, either in the petition or final account (or both). Don't just expect the court to draw the inference from the fact that you didn't list the person as a devisee in the petition.
- If a creditor actually filed a formal claim and has been paid, please try to obtain and file a satisfaction from the creditor. If you can't, specifically state that payment has been made, and a copy of the front and back of the check would be nice. Don't expect the court to search through the receipts and disbursements to find the payment to Visa.
- Where you have a small number of heirs or devisees, consider using the final accounting by verified statement whenever possible. This saves the estate the accounting filing fee as well. ORS 116.083(4).

c. Top Five Reasons Final Accountings Don't Get Approved

- Affidavit of compliance not filed
- Somebody didn't get notice
- No notice to DHS per ORS 113.145(6)
- A claim appears to be outstanding
- A minor is going to get money, the transfer isn't permitted under the UTMA, and there is not a conservatorship set up. Under ORS 126.822, the PR can transfer up to \$30,000.00 to a custodian for a minor without court approval. Over \$30,000.00 the court will require a conservatorship rather than a custodian under the UTMA.

- d. If all creditors have been paid and all heirs/devisees consent, a verified statement will be faster and save the estate the accounting filing fee. ORS 116.083(4).

D. Conservatorship Accountings

1. Background Information

In conservatorships that have been open for awhile, some brief background information such as the relationship of the conservator to the protected person and the reason for the conservatorship, as well as the age of the child if the conservatorship involves a minor, is helpful to the court. Many of these files span several volumes and only the most recent come up with the accounting; or, assuming the complete file is here, it takes quite a bit of digging to find this basic information if there are several years of accountings on top of the petition.

2. Generally, What the Court Is Looking For

We scrutinize conservatorship accountings much more thoroughly than accountings in decedent's estates. Basically, we are checking to see:

- a. Were required notices served?
- b. Are the assets that existed at the end of the last accounting or in the inventory still there with an appropriate value; and if not, is there an explanation of where they went or why the value declined?
- c. Were the disbursements appropriate?
- d. Are the assets remaining approximately right given the receipts and disbursements?

3. Disbursements That Give the Court Pause

The following are examples of types of disbursements that may cause the court to question your accounting if they are not adequately explained:

- a. Gifts over \$250.00 to one person or more than \$1,000.00 in one year. ORS 125.435. **(See UTCR 9.170 regarding all gifts)**
- b. Unexplained disbursements (e.g., \$250.00 to Fred Smith with no explanation of who Fred Smith is or what the payment was for).

- c. Cash to anyone, including the protected person. If the cash is going to the protected person, information about the protected person's activities and capabilities is helpful -- does the person go out for lunch with friends, or is the person unable to leave the house without supervision?
- d. Any money going to an attorney or fiduciary without court approval. ORS 125.095(3). A reference to the date of an order approving fees will greatly assist the court in reviewing the accounting.
- e. A transfer out of an account if we can't find it as a transfer in to another account (so make it easy to find).

IX. MISCELLANEOUS

A. Partial Distributions

These usually will not be approved until 4 months from publication have passed and the affidavit of compliance has been filed. The statute leaves notice requirements up to the court. ORS 116.013. The court prefers to see notice of time to object or waivers by all heirs/devisees, although the court may not require this if, for example, specific devises are being distributed and there are no creditors to worry about. The court will generally not allow distribution of the bulk of the estate prior to closure of the estate absent a compelling reason.

B. Minor or Incapacitated Beneficiaries in Decedent's Estates

If a beneficiary is a minor or incapacitated, please consider having a guardian ad litem appointed per ORCP 27. If there isn't one and there is a question as to the capacity of a beneficiary, I will probably look for one to appoint. If a beneficiary is a minor, the court will ordinarily require the appointment of a conservator to receive the minor's inheritance.

C. Don't Forget that Order of Discharge!

Remember your PR isn't discharged until you file receipts and get the order of discharge. Don't count on the court to remind you.

PART TWO PROBATE AND PERSONAL INJURY

I. PERSONAL INJURY SETTLEMENTS FOR MINORS

A. Guardian Ad Litem

1. Litigation

If litigation is pending, ORCP 27A provides for appointment of a guardian ad litem in the pending litigation. There is no particular form of petition required, it can simply be accomplished by motion. If the personal injury case is assigned, the assigned Judge can sign the order appointing the guardian ad litem. If a judge is not yet assigned, the motion and order to appoint a guardian ad litem can be directed to the probate department.

2. No Litigation

ORS 126.725 now allows settlement of claims for minors without court intervention if the settlement is under \$25,000. However, there is no provision for the court to enter any orders or judgments under ORS 126.725.

B. Protective Proceedings

1. What Type of Protective Proceeding?

Approval of a settlement of personal injury case for minor through a protective proceeding under ORS Chapter 125 generally means a conservatorship. However, the court does have authority to enter other protective orders, including approval of settlements, without the appointment of a conservator under ORS 125.650. The same requirements (petition, notice, etc.) apply as for appointment of a fiduciary. This statute can be used for the court to approve a settlement for which a conservator is not otherwise required. For example, this statute could be used for a personal injury settlement for a minor if: (1) the insurance company will not require a conservator and (2) funds will be held in a restricted account or will be received after the minor reaches 18. (See below for a further discussion of restricted accounts.)

2. Requirements for a Protective Proceeding

Again, these requirements apply whether you are seeking the appointment of a conservator or simply an order approving the settlement without appointment of a conservator under ORS 125.650.

Please see section VI. of Part One of this hand-out.

Please be sure that the motion for approval of the settlement complies with UTCR 9.040.

C. Options for Holding Funds

Regardless of what vehicle is used for approval (guardian ad litem, conservatorship or ORS 125.650), the probate court will apply the following guidelines for the way funds are held:

1. Total Funds of \$4,000 or Less

If the net proceeds after payment of all expenses are \$4,000 or less, the funds can be placed in a Uniform Transfers to Minors Act (UTMA) account. Upon delivering to the court a receipt from the financial institution holding the account, and submission of an order, the file can be closed.

2. Total Funds of \$4,001 to \$10,000

If the net proceeds after payment of all expenses are from \$4,001 to \$10,000, the funds can be placed in a UTMA account that is restricted to provide that no funds shall be withdrawn without prior court approval. That restriction would end when the child reaches age 18.

Upon delivering to the court an acknowledgment of the funds received and the order restricting from the financial institution holding the account, the file can be closed.

3. Total Funds over \$10,000

If the net proceeds after payment of all expenses are over \$10,000, the funds can be placed in an account that is restricted to provide that no funds shall be withdrawn without prior court approval. That restriction would end when the child reaches age 18. The account would be a conservatorship account.

Because the funds are held in a restricted account, the court will waive the requirements for a bond, inventory, and annual accounting normally required in a conservatorship.

However, the conservator must file an annual report on a one-page form provided by the court and attach a copy of the most recent account statement. The form for the report is available at the court's web site at: <http://courts.oregon.gov/Marion/docs/MaterialsAndResources/ConservatorReport.pdf>. If you have any problems following this link, go to the Marion County Circuit Court's homepage at

<http://courts.oregon.gov/Marion/> and follow the links to Materials & Resources -- probate forms – Conservator’s Report. If the conservator fails to provide a report, the court may remove the conservator and appoint a successor conservator.

4. Requirements to Waive Bond and Approve a Restricted Account

Due to problems with restricted accounts, and limited court staff time available to track such settlements and ensure that the funds are properly restricted, the court has implemented the following policy:

a. Requirements for the Order Approving Settlement

The order approving the settlement must contain the following provisions:

- It will be the responsibility of the attorney for the conservator to ensure that the net settlement after payment of any attorney's fees, costs, and liens, is distributed directly from the attorney's trust account to a restricted account. The restriction on the account must specify that no withdrawals may be made without court order, except that the proceeds may be distributed to the protected person once he or she has reached the age of 18.
- It will be the responsibility of the attorney for the conservator to obtain and file with the court an affidavit of restriction from the bank or financial institution holding the funds. The affidavit is to be filed within 30 days of the court's approval of the settlement.
- The court approves the amount of \$**. ** as fees for the attorney for the conservator and \$**. ** for costs. The attorney is not authorized by this order to pay him/herself those funds from the trust account. After the attorney has filed the affidavit of restriction with the court, the attorney may submit another order authorizing the attorney to actually receive the payment.
- **[Only required if net settlement exceeds \$10,000.00]**
The Conservator may file an abbreviated annual report in lieu of the annual accounting. The first report is due _____. The attorney for the conservator shall ensure that the conservator is advised of this requirement.

b. Additional Notes

- If the net settlement is under \$10,000.00, you may submit a judgment closing along with the affidavit of restriction. Annual reports will not be required.
- The court's preferred form for the affidavit of restriction is available in PDF format at:
<http://courts.oregon.gov/Marion/docs/MaterialsAndResources/AffidavitandAcknowledgmentofRestriction.pdf>

If you have any problems following this link, go to the Marion County Circuit Court's homepage at <http://courts.oregon.gov/Marion/> and follow the links to Materials & Resources -- probate forms -- Affidavit and Acknowledgment of Restriction. The court may accept Affidavits of Restriction in different formats, but it would be wise to check with the court first. The court will **not** waive bond based on a letter from a depository institution or an affidavit which states that the depository institution cannot be responsible for funds disbursed in violation of the court's order.

- For item #4 (the annual report), the court will fill in the date that the first report is due. It will be one year plus 60 days from the date the order approving is signed.
- At the time you file the Affidavit of Restriction, you may submit an order allowing yourself to go ahead and pay the approved fees and costs from your trust account. Language such as:

The Affidavit of Restriction having been filed, the attorney for the conservator is now authorized to pay him/herself the previously approved fees in the amount of \$.* from his/her trust account.*

would be sufficient.

- The court still may require a bond on a case-by-case basis.

5. Access to Restricted Funds

The child's parents have a duty to provide for the child's care and support. ORS 109.010. In emergencies, if the parents are unable to provide for the child's basic support, the parents may request funds from the

restricted account. This would be done by motion to release restricted funds. A simple form for the motion and order, which the parents can submit themselves, is available in PDF format at: <http://courts.oregon.gov/Marion/docs/MaterialsAndResources/ReleaseRestrictedFunds.pdf>. If you have any problems following this link, go to the Marion County Circuit Court's homepage at <http://courts.oregon.gov/Marion/> and follow the links to Materials & Resources -- probate forms -- Motion and Order for Release of Restricted Funds. Interested parties must receive notice and time to object as required in ORS 125.060 to 125.070, or consent (the form is designed for consent). The court expects that requests for release of funds will only be made in emergencies.

6. Non-restricted Accounts

If the conservator wishes to have funds exceeding \$4,000 held in an unrestricted account, usually with the expectation that payments will be made from the account, the conservatorship must be kept open, and the conservator must comply with all regular conservatorship requirements: bond (ORS 125.410), inventory (ORS 125.470), and annual accountings (ORS 125.475). Expenditures from the conservatorship must be appropriate under the statutes (i.e., parents are responsible to support their children from the parents' funds, not the child's funds.)

7. Annuities

If the settlement is substantial, an annuity may be an attractive alternative to placing the funds in a restricted account. No annual accountings would be required assuming the funds were not going to distribute before the minor turns 18. In order to waive bond, the following requirements apply:

The order approving the settlement must contain the following provisions:

- It will be the responsibility of the attorney for the conservator to ensure that the annuity is purchased. The annuity must specify that no withdrawals, advancements, discounts, or encumbrances against or from the annuity may be made and that the annuity cannot be transferred or conveyed without court approval.
- It will be the responsibility of the attorney for the conservator to obtain and file with the court proof of the purchase of the annuity and that the annuity contains the terms referred to in item 1 above. Such proof is to be filed within 30 days of the court's approval of the settlement.

- The court approves the amount of \$**.** as fees for the attorney for the conservator and \$**.** for costs. The attorney is not authorized by this order to pay him/herself those funds from the trust account. After the attorney has filed the proof of the annuity with the court, the attorney may submit another order authorizing the attorney to actually receive the payment.
- If no payments from the annuity will be made before the protected person reaches the age of 18, no annual accountings will be required.

Additional Notes:

- If no payments from the annuity will be made before the protected person reaches the age of 18, you may submit a judgment closing along with the proof of the annuity.
- There is no form for the proof of the annuity as there is for an Affidavit of Restriction. Generally we would want to see a copy of the annuity.
- At the time you file the proof of the annuity, you may submit an order allowing yourself to go ahead and pay the approved fees and costs from your trust account. Language such as:

The proof of the annuity having been filed, the attorney for the conservator is now authorized to pay him/herself the previously approved fees in the amount of \$. * from his/her trust account.*
would be sufficient.

II. WRONGFUL DEATH ESTATES

A. Settlements of Wrongful Death Claims

1. Approval of the Settlement

Court approval is required for settlement of a wrongful death claim. ORS 30.070. The motion for approval of the settlement should be filed in the probate case. Notice to the heirs or devisees of the motion for approval of the settlement is not expressly required by statute, but the court generally prefers that it provided or waived; and may specifically require that in some cases.

2. Distribution of the Settlement Funds

Apportionment of the wrongful death settlement is governed by ORS 30.030 through ORS 30.050. If there is no agreement amongst the beneficiaries, apportionment between the beneficiaries is supposed to be made by the probate court in case of settlement, and by the trial court in case of trial of the wrongful death action. ORS 30.040, 30.050.

B. Handling Wrongful Death Estates

A wrongful death claim is not subject to payment of taxes or claims against the decedent's estate. ORS 30.030(5). Therefore, if the **only** asset in the estate is the wrongful death claim, the court will generally not require you to follow normal probate procedures such as published notice, notice to heirs and devisees, and accountings. However, notice to DHS per ORS 113.145(6) is still required. You should indicate in the petition for appointment of a personal representative that the only asset of the estate is the wrongful death claim; and you should file an inventory per 113.165 confirming that the only asset of the estate is the wrongful death claim. While formal interim accountings are not required, please file a yearly report providing information on the status of the claim and whether the file needs to remain open. Otherwise, the estate may be closed pursuant to ORCP 54 for lack of prosecution.

Once the claim is settled and apportionment has been approved, simply file receipts from the beneficiaries and submit an order closing and discharging the personal representative. If you are unsuccessful in obtaining recovery or determine that it is not worth continuing to pursue recovery, please submit a motion to close the estate. It should be supported by an affidavit from the personal representative or attorney explaining why the claim will not be pursued. You should provide notice and an opportunity to object to any heirs or devisees, and submit an order closing the estate and discharging the personal representative after expiration of the time to object.

III. ESTATES WITH ASSETS OTHER THAN WRONGFUL DEATH CLAIMS

If the estate has assets other than the wrongful death claim, ordinary probate procedures need to be followed. This could include a wrongful death case where the decedent also possessed property that would typically pass through probate, such as real property, bank accounts, etc. **This also includes an estate where the only asset is a personal injury claim arising before the death of the decedent, but not causing the death of the decedent.** ORS 30.075(1) provides that personal injury actions do not abate upon the death of the injured person, but may be pursued by the personal representative. However, this statute does not contain the same provision as ORS 30.030(5), therefore, recovery from a personal injury claim is subject to claims against the decedent's estate.

If you have a case with assets other than a wrongful death claim that needs to follow ordinary probate procedure, the most important requirements are listed here briefly. Within 30 days after appointment, the personal representative must send a notice to heirs and devisees and file an affidavit that the notice was sent. ORS 113.145. In addition, the PR must give notice within 30 days to DHS. ORS 113.145(6). Within 60 days after appointment, the personal representative must file an inventory listing all of the property of the estate, including estimates of the true cash values of the assets as of the date of decedent's death. ORS 113.165. If you have a wrongful death or personal injury claim of uncertain value, list the claim and state that the value is uncertain. If you have a guesstimate as to what the claim is worth, go ahead and list that, specifying that it is only an estimate. Within three months after appointment, the personal representative is required to diligently search for any person who may have a claim against the estate, and within 30 days after the expiration of that three months, the personal representative is supposed to send a notice to any person who may have a claim against the estate. ORS 115.003(1),(2). Not more than five months after appointment, the personal representative is required to file an affidavit of compliance with these requirements. ORS 115.003(4). Notice of the estate must be published for three weeks, and the estate cannot be closed until four months have passed from the date first publication. ORS 113.155, ORS 115.005(2)(a). Accountings are required one year and 60 days after the appointment of the personal representative, annually thereafter, and when the estate is ready to close. ORS 116.083.

This is, of course, only a very brief description of the general requirements of probate. If you have a case that needs to go through the ordinary requirements of probate, please consider consulting or associating an attorney who specializes in probate.

IN THE CIRCUIT COURT OF STATE OF OREGON
FOR MARION COUNTY

ORDER ESTABLISHING)
QUALIFICATIONS AND STANDARDS)
FOR COURT VISITORS)
_____)

Pursuant to ORS 125.165 and 125.170(2),

IT IS HEREBY ORDERED THAT:

1) Visitors shall have the following qualifications:

- A) A license in good standing in any state as any of the following: licensed professional counselor, licensed marriage and family therapist, licensed clinical social worker, registered nurse, or attorney; or
- B) Post-graduate degree (e.g. MSW, MSN, other master's degree, J.D.) and at least two years of relevant experience.
- C) The presiding judge or his or her designee may determine whether the proposed visitor's experience is sufficient.

2) Visitors shall have the following training:

- A) Visitors shall view the Marion County Visitor Improvement Project DVD and read the Marion County Handbook for Visitors. After viewing the DVD and reading the Handbook, the visitor shall certify to the court, in a form provided by the court, that he or she has done so.

- 1 B) Visitors who are already on the Marion County Circuit Court list of
2 approved visitors as of September 1, 2009, shall view the Marion County
3 Visitor Improvement Project DVD and read the Marion County Handbook
4 for Visitors; and certify to the court, in a form provided by the court, that
5 they have done so, no later than March 1, 2010.
- 6 3) The presiding judge or his or her designee shall have the sole and absolute discretion
7 to place a person on the approved visitor's list or remove a person from the approved
8 visitor's list.
- 9 4) Visitors shall utilize the following standards and procedures in the performance of
10 their duties:
- 11 A) Visitors shall interview persons deemed by the visitor to possess relevant
12 information;
- 13 B) Visitors shall review relevant records regarding the respondent, to the
14 extent such records are available;
- 15 C) Visitors shall comply with ORS 125.150(3)-(10);
- 16 D) The visitor's report shall comply with ORS 125.155(2);
- 17 E) The visitor's report shall be in the form prescribed by the Marion County
18 Circuit Court; and
- 19 F) The visitor shall be present at any hearing on objections to the
20 appointment of a fiduciary as required by ORS 125.155(5). The visitor's
21 fee for testifying shall not exceed the visitor's normal hourly rate.
- 22 5) Visitors may charge an hourly rate for conducting interviews and preparing visitor's
23 reports. The hourly rate shall not exceed \$125.00. In addition, visitors may charge
24 mileage at the IRS rate and may charge for travel time in an amount not to exceed
25 one-half of their normal hourly charge.
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1 6) This order supersedes all prior Presiding Judge Orders regarding Court Visitor
2 Qualifications and Standards.
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4 Dated this 26th day of August, 2009.
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6 /s/ James L. Rhoades
7 Hon. James L. Rhoades
8 Presiding Judge
9 Marion County Circuit Court
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