

Proposed revised Oregon probate code
GUARDIANSHIP OF MISSING PERSONS
2nd Draft
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Prepared by
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Section 1. ORS 126.006 is amended to read:

126.006. Definitions for ORS 126.006 to 126.565. As used in ORS 126.006 to 126.565, unless the context requires otherwise:

(1) "Court" means any court having probate jurisdiction or a judge thereof.

(2) "Guardian" means any person appointed under ORS 126.006 to 126.565 as guardian of the person, guardian of the estate, or both, for any other person.

(3) "Incompetent" includes any person who by reason of mental illness, mental deficiency, advanced age, disease, weakness of mind or any other cause, unable unassisted to properly manage and take care of himself or his property.

(4) "Institution" includes any public or private institution located within or outside this state.

(5) "Minor" means any person who has not arrived at the age of majority as provided in ORS 109.510 or 109.520.

(6) "Spendthrift" includes any person who, by excessive drinking, idleness, gaming or debauchery of any kind, spends, wastes or lessens his estate so as to expose or likely to expose himself or his family to want or suffering, or to cause any public authority or agency to be charged for any expense of the support of himself or his family.

(7) "Missing person" means any person whose whereabouts

is unknown and whose absence is unexplained or who is known to be unable to return to his usual place of abode and is unable to manage his affairs during his absence.

[(7)] (8) "Ward" means any person for whom a guardian has been appointed.

Section 2. ORS 126.106 is amended to read:

126.06. Jurisdiction to appoint guardians. Any court having probate jurisdiction may appoint:

(1) Guardians of the person, guardians of the estate, or both, for resident incompetents or resident minors.

(2) Guardians of the person or guardians of the person and estate for incompetents or minors who, although not residents of this state, are physically present in this state and whose welfare requires such appointment.

(3) Guardians of the estate for resident spendthrifts.

(4) Guardians of the estate for nonresident incompetents, nonresident minors or nonresident spendthrifts who have property within this state.

(5) Guardians of the estate for missing persons who have property within this state.

Section 3. ORS 126.126 is amended to read:

126.126. Petition for appointment of guardian. Any person may file with the clerk of the court a petition for the appointment of a guardian. The petition shall include the following information, so far as known by the petitioner:

(1) The name, age, residence and postoffice address of the proposed ward.

(2) Whether the proposed ward is an incompetent, minor, missing person or spendthrift, and whether he is a resident or nonresident of this state.

(3) Whether the appointment of a guardian of the person, guardian of the estate, or both, is sought.

(4) The name, residence and postoffice address of the proposed guardian, and that the proposed guardian is qualified to serve as guardian.

(5) A general description and the probable value of the property of the proposed ward and any income to which he is entitled. If any moneys are paid or payable to the proposed ward by the United States through the Veterans Administration, the petition shall so state.

(6) The name and address of any person or institution having the care, custody or control of a proposed ward who is an incompetent or minor.

(7) The reasons why the appointment of a guardian is sought, the relationship, if any, of the petitioner to the proposed ward and the interest, if any, of the petitioner in the appointment.

Section 4. ORS 126.131 is amended to read:

126.131. Issuance of citation. (1) Except as otherwise provided in ORS 126.136, 126.141 and 126.146, the court, upon the filing of a petition under ORS 126.126, shall order the issuance of a citation requiring the persons or institutions

referred to in subsection (2) of this section to appear and show cause why a guardian should not be appointed for the proposed ward.

(2) Citation issued under subsection (1) of this section shall be served:

(a) If the proposed ward is an incompetent, on any person or an officer of any institution having the care, custody or control of the incompetent, and on the incompetent.

(b) If the proposed ward is a minor, on any person or an officer of any institution having the care, custody or control of the minor, and if the minor is 14 years of age or older, on the minor.

(c) If the proposed ward is a missing person, on the missing person and on such other persons as the court may direct.

[(c)] (d) If the proposed ward is a spendthrift, on the spendthrift.

[(d)] (e) If the proposed ward is receiving moneys paid or payable by the United States through the Veterans Administration, on a representative of the Veterans Administration.

Section 5. ORS 126.146 is amended to read:

126.146. Service of citation; appearance. (1) The citation issued under ORS 126.131 shall require the person or institution served to appear and show cause:

(a) If served personally within the county in which the proceeding is pending, within 10 days after the date of service.

(b) If served personally within any other county in this

state, within 20 days after the date of service.

(c) If served by publication or if served personally outside this state but within the United States, within four weeks after the date of first publication or after the date of personal service.

(d) If served personally outside the United States, within six weeks after the date of service.

(2) The citation shall be served and returned as summons is served on a defendant and returned in a civil action. If the proposed ward is a missing person, citation shall be served on the missing person by publication, by registered mail to his last-known address and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last-known address available to that agency.

(3) Service of citation is not necessary on a person or an officer of an institution who has signed the petition, has signed a written waiver of service of citation or makes a general appearance.

Section 6. ORS 126.151 is amended to read:

126.151. Order of appointment. If it appears to the court that the allegations of the petition are sufficient and that a guardian should be appointed for the proposed ward, the court shall make an order appointing a guardian. The order shall specify whether the guardian appointed is guardian of the person, guardian of the estate, or both; whether the ward is an incompetent, minor, missing person or spendthrift; and

whether the ward is a resident or nonresident of this state. The court by order shall specify the amount of the bond to be executed and filed by the guardian.

Section 7. ORS 126.166 is amended to read:

126.166. Preferences in appointing guardians. The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian of the person for the minor. Subject to this preference, the court shall appoint as guardian for an incompetent, minor, missing person or spendthrift the qualified person most suitable who is willing to serve, having due regard, among other factors, to:

(1) Any request for the appointment as guardian for an incompetent contained in a written instrument executed by the incompetent while competent.

(2) Any request for the appointment as guardian for a minor child contained in a will or other written instrument executed by a parent of the minor child.

(3) Any request for the appointment as guardian for a minor 14 years of age or older made by the minor.

(4) The relationship by blood or marriage of the proposed guardian to the proposed ward.

Section 8. ORS 126.186 is amended to read:

126.186. Letters of guardianship. When a guardian has filed a bond as provided in ORS 126.171, and his name, residence and postoffice address as provided in ORS 126.181, the court shall cause to be issued letters of guardianship to the guardian.

Letters of guardianship may be in the following form:

_____)
State of Oregon)
))
) ss.)
))
County of _____)

TO ALL WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That on _____, 19___, the _____
(month) (day)
Court, _____ County, State of Oregon, appointed _____
_____ guardian of the _____
(name of guardian) (person)

_____ for _____
(name of ward)
or estate or person and estate)

a(n) _____
(incompetent [or], minor, missing person or spendthrift)

that the named guardian has qualified and has the authority and
shall perform the duties of guardian of the _____
(person or estate)

_____ for the named ward as provided by law.
or person and estate)

IN TESTIMONY WHEREOF, I have hereunto subscribed my name
and affixed the seal of the court at my office on _____
(month)
_____, 19____.
(day)

_____, Clerk of the Court

(Seal) By _____, Deputy

Section 9. ORS 126.338 is amended to read:

126.338. Distribution of copies of accounts; court settle-
ment of accounts. (1) Before filing any account other than

his final account, a guardian of the estate shall cause a copy of the account to be mailed or delivered:

(a) If the ward has been committed or admitted to, and not discharged from, a state institution listed in ORS 426.010, 427.010 or 428.420, to the Secretary of the Oregon State Board of Control and to the superintendent of the institution who has presented a written request for a copy to the guardian and filed a copy of the request in the guardianship proceeding before the filing of the account.

(b) If there is a guardian of the person for the ward other than the guardian of the estate, to the guardian of the person.

(c) If the ward is a minor 14 years of age or older or a spendthrift, to the ward.

(d) If the ward is a minor, a missing person or an incompetent, to the ward's spouse who is not under legal disability and to those of the ward's children, parents, brothers or sisters who are not under legal disability and have presented a written request for a copy to the guardian and filed a copy of the request in the guardianship proceeding before the filing of the account.

(2) A guardian of the estate shall file with each account other than his final account his affidavit or other proof satisfactory to the court that copies of the account have been mailed or delivered as provided in subsection (1) of this

section, showing the names of the persons to whom, and the addresses to or at which, the copies were mailed or delivered.

(3) A guardian of the estate shall cause a copy of his final account to be mailed or delivered to a ward not under legal disability, each person to whom copies of other accounts are required to be mailed or delivered as provided in subsection (1) of this section, the executor or administrator of a deceased ward's estate and a successor guardian. Within 10 days after the date of the mailing or delivery, any such person may make and file in the guardianship proceeding written objections to the final account.

(4) The court, before settlement of any account, may provide for inspection of the balance of the property of the ward on hand. The court shall settle each account filed by a guardian of the estate by allowing or disallowing, either in whole or in part, or surcharging such account; but without prejudice to objections thereto at the time and in the manner that objections may be made to a final account.

Section 10. ORS 126.411 is amended to read:

126.411. Petition for sale, mortgage or lease. A guardian of the estate may file in the guardianship proceeding a petition for the sale, mortgage or lease of any property of the ward. The petition shall include the following information, so far as known by the petitioner:

(1) The name, age, residence and postoffice address of the ward.

(2) Whether the ward is an incompetent, minor, missing person or spendthrift.

(3) The name and address of any person or institution having the care, custody or control of a ward who is an incompetent or minor.

(4) A general description and the probable value of all the property of the ward that has come to the possession or knowledge of the guardian and not theretofore disposed of, and of all the property to which the ward may be entitled upon any distribution of any estate or of any trust.

(5) The income being received from the property to be sold, mortgaged, or leased, from all other property of the ward and from all other sources, and the application of such income.

(6) Such other information concerning the guardianship estate and the condition of the ward as is necessary to enable the court to be fully informed.

(7) The purpose of the proposed sale, mortgage or lease, a general description of the requirements for such purpose and the aggregate amount needed therefor.

(8) A specific description of the property to be sold, mortgaged or leased.

Section 11. ORS 126.426 is amended to read:

126.426. Sale, mortgage or lease for more than five years of real property; issuance of citation. (1) Except as otherwise provided in ORS 126.431 and 126.471, the court, upon the filing

of a petition under ORS 126.411 for the sale or mortgage of real property, or the lease of real property for a term exceeding five years, shall order the issuance of a citation requiring the persons or institutions referred to in subsection (2) of this section to appear and show cause why an order for the sale, mortgage or lease should not be made.

(2) Citation issued under subsection (1) of this section shall be served:

(a) If the ward is an incompetent, on any person or an officer of any institution having the care, custody or control of the incompetent, and on the incompetent.

(b) If the ward is a minor, on any person or an officer of any institution having the care, custody or control of the minor, and if the minor is 14 years of age or older, on the minor.

(c) If the ward is an incompetent or minor in the care, custody or control of any institution, on any person paying or liable for the care and maintenance of the incompetent or minor at the institution.

(d) If the ward is a missing person, on the missing person and on such other persons as the court may direct.

~~[(d)]~~ (e) If the ward is a spendthrift, on the spendthrift.

Section 12. ORS 126.431 is amended to read:

126.431. Service of citation; appearance. (1) The citation

issued under ORS 126.426 shall require the person or institution served to appear and show cause:

(a) If served personally within the county in which the proceeding is pending, within 10 days after the date of service.

(b) If served personally within any other county in this state, within 20 days after the date of service.

(c) If served by publication or if served personally outside this state but within the United States, within four weeks after the date of first publication or after the date of personal service.

(d) If served personally outside the United States, within six weeks after the date of service.

(2) The citation shall be served and returned as summons is served on a defendant and returned in a civil action. If the ward is a missing person, citation shall be served on the missing person by publication, by registered mail to his last-known address and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last-known address available to that agency.

(3) Service of citation is not necessary on a person or an officer of an institution who has signed the petition, has signed a written waiver of service of citation or makes a general appearance.

Section 13. ORS 126.476 is amended to read:

126.476. Exchange, partition, sale or surrender of ward's

property. (1) A guardian of the estate, with prior approval of the court by order, may accept an offer to exchange real or personal property, or both, of the ward for real or personal property, or both, of another, or to effect a voluntary partition of real or personal property, or both, in which the ward owns an undivided interest, where it appears from the petition therefor and the court determines that such exchange or partition is in the best interests of the ward.

(2) A guardian of the estate, with prior approval of the court by order, may accept an offer for the purchase or surrender of the interest or estate of the ward in real or personal property, or both, where it appears from the petition therefor and the court determines that:

(a) The interest or estate of the ward in such property is contingent or dubious;

(b) The interest or estate of the ward in such property is a servitude upon the property of the offeror;

(c) The interest or estate of the ward in such property is an undivided interest in property in which the offeror owns or is offering to purchase another or the other undivided interest or interests; or

(d) For any other reason, there is no market for the interest or estate of the ward in such property except by such sale or surrender to the offeror.

(3) A guardian of the estate may file in the guardianship proceeding a petition for authority to accept an offer under subsection (1) or (2) of this section. The petition shall

include the following information, so far as known by the petitioner:

(a) The name, age, residence and postoffice address of the ward.

(b) Whether the ward is an incompetent, minor, missing person or spendthrift.

(c) The name and address of any person or institution having the care, custody or control of a ward who is an incompetent or minor.

(d) The name and address of the offeror.

(e) A specific description of the property, interest or estate to be exchanged, partitioned, sold or surrendered, and the price or property to be received therefor.

(f) Such other information as the petitioner may consider necessary to enable the court to be fully informed in respect of the subject matter.

(4) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists solely of personal property or an interest or estate therein, the provisions of ORS 126.416 shall apply, except that no return of his proceedings need be made and filed by the guardian.

(5) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists in whole or in part of real property or an interest or estate therein, the provisions of ORS 126.426 and 126.431 and subsection (1) of ORS 126.471 shall apply, except that no return of his proceedings need

be made and filed by the guardian.

(6) Upon the entry of an order of the court authorizing acceptance of an offer under subsection (1) or (2) of this section, the guardian may execute such instruments as are appropriate to effect such exchange, partition, sale or surrender. If the guardian executes a conveyance of real property or an interest or estate therein, the provisions of ORS 126.461 and 126.466 and subsections (3) and (4) of ORS 126.471 shall apply.

(7) Except as otherwise provided in this section, the provisions of ORS 126.406 to 126.471 do not apply to exchanges, partitions, sales or surrenders under this section.

Section 14. ORS 126.495 is amended to read:

126.495. Transfer of ward's property not an ademption.

In case of the sale or other transfer by a guardian of the estate of any real or personal property specifically devised [or bequeathed] by the ward [,] who was competent to make a will at the time he executed the will but was not competent to make a will at the time of the sale or transfer and never regained such competency, or specifically devised by the ward who was a missing person subsequently found to be dead who did not make a valid will subsequent to the sale or transfer, so that the devised [or bequeathed] property is not contained in the estate of the ward at the time of his death, the devisee [or legatee] may at his option take the value of

the property at the time of the death of the ward with the incidents of a general devise [or bequest], or the proceeds of such sale or other transfer with the incidents of a specific devise [or bequest].

Section 15. Repeal of existing statutes. ORS 127.010, 127.020, 127.030, 127.040, 127.050, 127.060, 127.070, 127.080, 127.090, 127.100, 127.110, 127.120, 127.130, 127.140, 127.150, 127.160, 127.170, 127.180, 127.190, 127.310, 127.320, 127.330, 127.340 and 127.350 are repealed.

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COMMENTS

The proposed amendments to the guardianship code, chapter 126, would supersede, replace and repeal the present chapter 127 Oregon Revised Statutes covering the matter of conserving property of missing persons. The effect of the amendments would be to provide very simply that the present guardianship code would cover guardianships of the estates of missing persons, in addition to the present coverage of minors, incompetents and spendthrifts.

The bulk of chapter 127 covering conserving property of missing persons was enacted in 1937. The latter portion of the chapter covering persons missing during war was enacted in 1945. It is apparent from the annotations to the Oregon Revised Statutes that this chapter has been very little used since its enactment. The chapter was considered in the recent case of Esson v. Flickinger, 237 Cr 462, 391 P2d 769 (1964). This decision would indicate that it may well be that the power given guardians to represent wards in the guardianship code is much broader than the powers provided by chapter 127. (See ORS 126.725.)

It would seem that the broad and familiar procedural and notice provisions of the 1961 guardianship code would provide a superior vehicle for administration and conservation of the

property of missing persons than does the somewhat limited present chapter 127.

It is apparent that the proposed amendments to the guardianship code do not in any way change the content of the present guardianship code but merely include in its provisions the additional category of ward, namely, "missing persons". It should be noted, however, that because of the unusual nature of the problem more adequate notice requirements are provided for notice to the missing person. Thus not only is publication required, but it is required that notice be given by registered mail and also by mail to be forwarded by the United States Social Security Administration which, as is well known, has a very complete system of nationwide information on the beneficiaries of the Social Security Act. Furthermore, it is provided that notice be given to such additional persons as the court might find interested and entitled.

In view of the fact that the proposed amendments would repeal that portion of chapter 127 covering persons missing during war, it should be noted that definition of missing persons specifically includes one "who is known to be unable to return to his usual place of abode and is unable to manage his affairs during his absence." It is obvious that this portion of the definition would cover those persons referred to in ORS 127.310 to 127.350 inclusive.