

LEGAL CONSIDERATIONS FOR GRANDPARENTS:
GUARDIANSHIPS, CUSTODY, ADOPTION and ESTATE PLANNING

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What rights to a grandparent have?

Under Oregon law, grandparents do not generally have a separate set of rights when it comes to their grandchildren. When a grandparent is caring for a grandchild, it is important to get legal advice to ensure that you have taken the steps necessary to ensure the safety and well-being of your grandchild or grandchildren. Significant issues include seeking and consenting to medical attention for the child, enrolling the child in school, determining where the child will live, and eligibility for health insurance. The main issues are Guardianship, Adoption, Custody, and Visitation. In some cases, a Power of Attorney may also be used to delegate certain authority for a child's care.

I. GUARDIANSHIP

A. Appointment of a Guardian

1. When a person needs health care decisions made for them, or if the person is a minor, the Court may appoint another person as a Guardian for them. The powers of a Guardian are derived from Oregon statutes. (ORS Chapter 125).
 - a. The Court takes control over the health care of the Principal, who is referred to as the Protected Person.
 - b. The Guardian is given specific authority by the Court to make decisions on behalf of the Protected Person.
2. Requirements
 - a. Oregon law sets forth specific findings of incapacity that the Court must make before the Court can appoint one person as Guardian for another. The Court must determine by clear and convincing evidence that:

- i. The Protected Person suffers from an impairment which affects his or her ability to receive and evaluate information and to communicate decisions.
 - ii. The Protected Person lacks the ability to provide for his or her own essential needs and activities of daily living because of the impairment.
 - iii. That serious physical injury or illness is likely to occur because the Protected Person is not receiving the necessary care.
 - iv. That no less restrictive alternative exists.
- b. The Court may also appoint a Guardian for a person who is under the age of 18.

3. Procedure

- a. A Guardianship is initiated by the filing of a Petition containing specific information required by the statutes.
- b. Notice of the right to object must be served upon the Protected Person and must be mailed to other specified individuals and entities, including: and spouse or cohabitant of the Protected Person, adult children of the Protected Person, any attorney for the Protected Person, any person acting under a Power of Attorney or a Health Care Representative for the Protected Person, any Trustee for the Protected Person, the Long Term Care Ombudsman Office (in certain circumstances), the Oregon Advocacy Center (in certain circumstances), the Department of Veterans Affairs (in certain circumstances), and anyone else the Court requires. If the Protected Person is under the age of 18, then the biological parent or parents must be personally served with notice as well.
- c. Those who are entitled to notice may object to the appointment of a Guardian for the Protected Person. These persons have 15 days to file an objection to the appointment of the Guardian.
- d. The Court will automatically appoint a Court Visitor to investigate the allegations in the petition, interview those with information as to the Protected Person's condition, and prepare a report for the Court. The Court may waive the Court Visitor Requirement in the case of the guardianship of a minor. The report may:

- i. Recommend appointment of the nominated person as Guardian.
 - ii. Recommend appointment of a different person as Guardian.
 - iii. Recommend no Guardian be appointed.
 - iv. Recommend limitations or conditions on the ability of the Guardian to act.
- e. If an Objection is filed to the petition, the Court will hold a hearing and, after reviewing all evidence and testimony, will make a decision.

4. Powers and duties of a Guardian

- a. The Guardian may make most any decision for the Protected Person, within the limitations set by the Court (if any).
- b. The statutes set forth specific decisions which the Guardian may not make without specific permission from the Court. Among these are: sterilization of the Protected Person and receiving compensation or paying compensation to any family member of the Guardian.
- c. The Guardian has authority to collect money payable to the Protected Person if no Conservator has been appointed, but must account for its use.
- d. The Guardian must provide notice to the Protected Person, to the Court, and to anyone else required by the Court before the Protected Person is moved to a residential facility, mental health facility, or other residential facility. Failure of the Guardian to provide notice is sufficient grounds to remove the Guardian.
- e. The Guardian must file a Guardian's Report annually within 30 days of the anniversary of the Guardian's appointment.
- f. If there is no Conservator for the Protected Person, the Guardian is generally required to file tax returns for the Protected Person.

5. Duration

- a. The Guardianship will continue indefinitely as long as the Protected Person remains incapacitated or under the age of 18.
- b. If the Protected Person is no longer incapacitated or turns 18, the Court will close the Guardianship case upon the request of the Protected Person or another interested party. If the Protected Person is no longer incapacitated, the Court may order another Court Visitor report.
- c. If the Protected Person passes away, the Guardianship is automatically terminated.

B. Temporary Guardianship

- a. The Court may appoint a Temporary Guardian, for a period of 30 days, upon showing by clear and convincing evidence that there is a risk of serious injury or death to the Protected Person. The same procedure must be followed for a Temporary Guardianship as for a regular, permanent Guardianship. The Temporary Guardian has the same powers as a regular Guardian.
- b. The time to file objections to a Temporary Guardianship is reduced to 2 days, rather than 15. The 2 day period may be waived by the Court on a showing of imminent harm to the Protected Person.
- c. The Temporary Guardianship may be continued by the Court for a period of 30 more days.
- d. Once the short time period is expired, the Temporary Guardianship will expire automatically.

II. ADOPTION

A. Private Adoption

1. By a relative (first degree blood relationship).
 - a. A relative adoption may be initiated by a person in the first degree of blood relationship (adult sibling, grandparent, aunt, uncle).
 - b. Petitioner(s), birth parent(s), or child must have been an

Oregon resident for at least 6 months.

- c. Both birth parents must consent to the adoption, per ORS 109.312. The birth parent consent requirement may be waived by the Court after a hearing to show good cause that the parent has deserted or neglected the child.
 - i. Requires a showing that the parent has willfully deserted the child or neglected them without just and sufficient cause for one year preceding the filing for petition for adoption.
 - ii. Other factors may be considered by the Court, including whether the person providing care has interfered with the parent's attempt to provide for or contact the child.
- d. If the birth parents are deceased, or if they are no longer have birth parent rights, then the person in custody (typically a guardian) is entitled to notice, and must consent.
- e. If the child is 14 or older, they must consent as well.
- f. If the child has lived in the relative's home for the specified period of time, the Court and DHS may waive the requirement that the relative obtain a Home study.
 - i. If the child was placed in the relative's home as a newborn, they must reside there for 6 months or more.
 - ii. If the child was placed in the relative's home as an older child, they must reside there for 1 year or more.
- g. Adoptions are very technical in nature, and you should see an attorney to be sure that all requirements are met.

B. Step-parent adoptions

- 1. If a child is to be adopted by their step-parent, the grandparents on the "other" side have a right to notice and to ask the Court to allow them to have visitation with the child. ORS 109.332
 - a. The grandparent must show:

- i. The visitation is in the best interest of the grandchild;
- ii. A substantial relationship existed prior to the adoption; and
- iii. Establishing the visitation does not substantially interfere with the relationship between the child and the adoptive family.

C. State Adoption (DHS)

1. When the State of Oregon becomes involved in child's custody, the State will attempt to place the child with a biological relative. However, the State can be very difficult to work with. Ultimately, an adoption of a child that has been placed by the State is a slow process. Grandparents are encouraged to be in communication with the DHS caseworker to continue to have as much involvement in the child's life as possible. Grandparents are also encouraged to consult with an attorney.

III. CUSTODY AND VISITATION RIGHTS (ORS 109.119)

A. Legal Presumptions

1. Grandparents have no specific rights relating to custody of their grandchildren. ORS 109.119 gives everyone the same "rights" to establish a child-parent relationship (for custody, guardianship, or visitation rights), or an ongoing personal relationship (for visitation, only).
2. In all actions under ORS 109.119, there is a legal presumption that the legal parent is acting in the best interest of the child. This presumption must be overcome before the Court will grant any custody or visitation under ORS 109.119. These presumptions must be overcome in a Court proceeding by either a preponderance of the evidence (for a child-parent relationship) or by clear and convincing evidence (for an ongoing personal relationship).

B. Child-parent relationship

1. Defined as "a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship, a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing,

shelter and incidental necessities, and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs.”

2. To establish a child-parent relationship, the Court must find that the legal presumption has been overcome. In determining this, the Court will consider whether:
 - a. The legal parent is unwilling or unable to care adequately for the child;
 - b. The petitioner or intervenor is or recently has been the child's primary caretaker;
 - c. Circumstances detrimental to the child exist if relief is denied;
 - d. The legal parent has fostered, encouraged, or consented to the relationship between the child and the petitioner or intervenor;
 - e. The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.
3. Upon finding a child-parent relationship, the Court may grant custody, guardianship, right of visitation, or other rights to the person having the child-parent relationship, if to do so is in the best interest of the child.
4. The Court's finding is always subject to a Motion to modify at a later date.

C. Ongoing Personal Relationship

1. Defined as “a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.”
2. To establish an ongoing personal relationship, the Court must find that the legal presumption has been overcome. In determining this, the Court will consider whether:
 - a. The petitioner or intervenor is or recently has been the child's primary caretaker;

- b. Circumstances detrimental to the child exist if relief is denied;
 - c. The legal parent has fostered, encouraged, or consented to the relationship between the child and the petitioner or intervenor;
 - d. Granting relief would not substantially interfere with the custodial relationship;
 - e. The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.
3. Upon finding an ongoing personal relationship, the Court may grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child.
 4. The Court's finding is always subject to a Motion to modify at a later date.

IV. DELEGATION OF POWERS BY PARENT OR GUARDIAN (ORS 109.056)

- A. A parent or guardian of a minor or incapacitated person may delegate any of the powers of the parent or guardian regarding care, custody, or property of the Protected Person, to another person for a period of not more than six months. This must be done through a validly executed Power of Attorney. This does not include the power to consent to marriage or adoption of the minor child.
- B. The powers may be delegated to a school administrator for a period of up to 12 months.
- C. A servicemember-parent may delegate the powers to a person for the duration of their active duty service plus 30 days. If the child is living with the child's other parent, then the delegation must be to the other parent, unless the parents are divorced and have joint custody, in which case the servicemember-parent may delegate the powers to their spouse, who is not the parent of the child.

V. HEALTH CARE DECISIONS

- A. Because of all of the advanced medical technologies available to keep a person alive, it is important that when completing your planning, you make your wishes known to doctors and other persons who will be making medical decisions for you when you are no longer able. Make your wishes known by signing an Advance Directive.
 1. An Advance Directive has three parts, "Information About Advance Directive", "Health Care Instructions" and "Appointment of Health Care

Representative."

a. Part A: Information About Advance Directives

- (1) Provides general instructions.
- (2) Allows selection for time period directive is in effect.

b. Part B: Appointment of Health Care Representative

- (1) Appointment by you of another person and an alternate to make medical decisions for you when you are not able to do so.
- (2) You may authorize your representative to make decisions about:
 - (a) The withholding or withdrawal of life support procedures
 - (b) The withholding of tube feeding for nutrition and hydration purposes.
- (3) There is a place on the form to insert special conditions or instructions to your representative.
- (4) The Health Care Representative and alternate must sign the document accepting the appointment.

c. Part C: Health Care Instructions

- (1) A directive to health care providers from you.
- (2) Instructions on when to pursue or withdraw life support and/or tube feeding when you are close to death, permanently unconscious, have an advanced progressive illness, or are suffering extraordinary pain.
- (3) Instructions can only be followed when two attending physicians certify that you are:
 - (a) Close to death and life support would only postpone the moment of death,
 - (b) Permanently unconscious and it is very unlikely consciousness will be regained,

- (c) At an advanced stage of a progressive terminal illness that will be fatal and it is unlikely your condition will improve substantially, or
 - (d) Life support will not improve your medical condition and would cause permanent and severe pain.
 - (4) There is a space on the form to insert additional conditions or instructions.
- d. The Health Care Directive in general is:
 - (1) Controlled by statute.
 - (2) Will not expire unless you limit its duration.
 - (3) Can be revoked at any time.
 - (4) You may cross out words on the form or add words to better express your wishes.
 - (5) Must be witnessed by two persons. Witnesses cannot be:
 - (a) The person appointed as Health Care Representative or alternative, or
 - (b) The attending physician.
 - (6) One witness must not be:
 - (a) A relative by blood, marriage or adoption,
 - (b) Entitled to any portion of the estate,
 - (c) Own, operate or be employed at a health care facility where you are a patient or resident.
 - (7) A copy should be given to your primary physician to be kept in your medical records.
 - (8) The Advance Directive is easy to prepare because the statutory format is required.
 - (9) You can prepare the documents yourself or have an attorney do it for you. Check with AARP, the Oregon Medical

Association or an office supply store to obtain pre-printed forms.

VI. ESTATE PLANNING: PLANNING FOR WHAT HAPPENS TO YOUR ASSETS UPON YOUR INCAPACITY AND UPON DEATH

There are three main options for estate planning. First, the use of a combination of a will and durable power of attorney, second a revocable living trust, and third, joint ownership with survivorship rights of all property.

A. Durable Power Of Attorney

1. Allows you to appoint another person to act on your behalf. That person is called your “attorney-in-fact” or “agent”. The attorney-in-fact has the authority to manage your finances and business affairs by executing documents on your behalf by signing his/her own name followed by Attorney-in-fact for "John Doe".
2. The authority that you give your attorney-in fact can be very broad or it can be very limited, depending on how the document is drafted. There is no statute that controls the language that must be in a power of attorney, so it can be drafted to fit your specific needs.
3. A power of attorney will not allow the attorney-in-fact to make gifts on your behalf unless it specifically states that you give him/her that authority.
4. Specific language is also required to give the attorney-in-fact authority to sign your tax returns.
5. A "durable power of attorney" remains in effect after you become incapacitated. The use of a durable power of attorney is very important for planning for your disability. The power of attorney can also be drafted to be effective only upon a certain date or event (i.e. the powers “spring” into effect).
6. Advantages: Easy to obtain, relatively inexpensive. Steven Ness forms are available from any office supply store.
7. Disadvantages: Because they are easy to obtain and many people prepare them themselves, they are subject to abuse and some third parties may be reluctant to give weight to the power of attorney and may not allow your attorney-in-fact to sign on your behalf without further proof of authority.

B. Will

1. A will is usually used in conjunction with a durable power of attorney as

part of a coordinated estate plan.

2. A will specifies to whom and how you want your assets distributed upon your death. Be aware that a will only applies to probate assets. Probate assets include assets in your name, and which do not pass to someone else by operation of law. If there are probate assets a probate is generally required.
3. A will is only effective upon your death. It does not protect any of your assets while you are alive.

C. Revocable Living Trust

1. A trust is an arrangement where you appoint a trustee to manage some or all of your assets. When a trust is created, the assets are transferred into the name of the trust.
2. While you are able, most likely you will be the trustee. When you become incapacitated, a successor trustee automatically steps into your shoes and takes over the management of the trust. No court involvement is required.
3. In the trust document, you can give detailed instructions to the trustee as to how the trustee is required to manage and spend the assets, including how they are to be spent for your care.
4. The trustee has a duty to follow those instructions.
5. The trust document also specifies how the assets are to be distributed upon your death and the trustee must follow those instructions.
6. If all of your assets are in the name of the trust, there is no probate.
7. A trust, unlike a will, is effective immediately, and, thus, allows for planning for your disability as well as your death.
8. Advantages: It is a more formalized document than a durable power of attorney, and if prepared properly, you will not have problems with any entity or third party accepting the trustee as acting on behalf of the trust. It is a more comprehensive Estate plan and coordinates planning for disability as well as planning for death. It avoids probate.
9. Disadvantages: It is more complicated to create because the assets have to be transferred into the name of the trust. Thus, trusts are more expensive to create.

D. Joint Ownership Of Property

1. Property may be held in joint ownership with rights of survivorship. Upon the death of one of the owners, the survivor obtains ownership of all the property by operation of law. Therefore, no probate is required.
2. Joint ownership of some property will allow the property to be managed by one of the co-owners without the signature of the other co-owner. For example, bank accounts and money market accounts can be established in this manner. However, although real property may be owned jointly, the signatures of both co-owners are required in order to transfer the property.
3. Joint ownership provides no method to control or direct how the asset is used by the co-owner.
4. Joint ownership may result in persons receiving the asset who you would not have chosen.
5. Joint ownership may be used in conjunction with a durable power of attorney.