

A HANDBOOK FOR ADULT GUARDIANSHIPS

Prepared by

**Oklahoma Bar Association
Estate Planning, Probate & Trusts Section
Guardianship Handbook Subcommittee***

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I. GENERAL INFORMATION

This handbook is published by the Oklahoma Bar Association as an easy to read guide on Guardianship and conservatorship laws in Oklahoma and the duties and responsibilities required by them. The Guardianship and conservatorship laws of Oklahoma are under Title 30 of the Oklahoma Statutes.

This handbook includes a summary of the duties of Guardians and conservators, legal notices, timetables, required court approvals, accountability duties to the court, accountability duties to the Ward, and sanctions/penalties for non-compliance.

The Courts and the judges (as well as their clerks and bailiffs) assigned to the guardianship dockets cannot act as your attorney. They cannot advise pro-se guardianship litigants how to proceed, what forms to use, how to present the case or what is necessary legally to obtain a guardianship over a minor. Knowing the court's limitations up front will help to avoid frustration and confusion if you are trying to handle a minor guardianship on your own, or pro-se. This Handbook will provide information that should be helpful in the event you want to represent yourself in the minor guardianship process.

Do You Need an Attorney?

Guardianship and conservatorship laws are tricky. Title 30 of the Oklahoma Statutes contains over one hundred statutes and thousands of clauses. It was written by legislators and has been interpreted and reinterpreted by courts for generations. Perhaps most important, your case will have a judge assigned to it. His or her interpretation of the interplay of statutes and appellate opinions will have tremendous control over your case.

Lawyers went to law school and have spent a good portion of their adult lives to understand what the statutes and cases mean. They have taken the time to understand how each judge works and what they may expect.

If you break your arm, you might set the broken bone on your own. Your best chance for a good recovery though, is to go to the effort and expense of getting a doctor involved. Likewise, you might do your own Guardianship, but your best chance at a problem-free experience is to involve professionals from the beginning.

II. DEFINITIONS

Conservator - A person appointed by the court to oversee the property of an adult physically unable to manage their property. (30 O.S. §3-211).

Court - Refers to a Judge or proceedings in front of a Judge.

Court Order - A direction issued by a court or a judge requiring a person to do or not do something.

Entry of Appearance or Entering an Appearance – A document filed to show a person is a party of record and entitled to notice of all court filings. Entering an appearance is filing an Entry of Appearance or otherwise putting the court and all other parties on notice you are an interested party and/or a party of record.

Estate - The property of the person subject to the Guardianship proceeding. (30 O.S. §1-111).

Guardian - A person appointed by the court to take care of the person or property of another. (30 O.S. §1-105).

Guardian ad Litem - A person appointed by the court to investigate and assist in deciding what is in a Ward's best interests. (30 O.S. §1-111). [*NOTE: A Guardian ad Litem (also referred to as a "GAL") is different from a guardian. A GAL is a court appointed professional (attorney) whose duty is to investigate and advocate for the best interests of a minor or incapacitated adult. (30 O.S. § 1-117).]

Guardianship Plan - The plan for the care and treatment of a Ward or for the management of the Ward's financial resources, or both. (30 O.S. §1-111).

Guardianship Proceeding - A court proceeding to appoint a Guardian or for other orders regarding the condition, care or treatment or the management of the financial resources of a Ward. (30 O.S. § 1-111).

Guardianship Report - Any report required by a Guardian under the legal rules for incapacitated/partially incapacitated persons or Guardianship of the person and/or property of the Ward found in 30 O.S. § 4-305 and 4-306.

Incapacity/Incapacitated Person- An incapacitated person is defined by the statutes as "a person eighteen (18) years of age or older, who is:

An Incapacitated Person is someone who is impaired by reason of:

- 1) mental illness as defined by 43A O.S. §1-103;
- 2) intellectual or developmental disability as defined by 63 O.S. §1-818.2;
- 3) physical illness or disability;
- 4) drug or alcohol dependency as defined by 3A O.S. § 3-403; or
- 5) such other similar cases, and
- 6) whose ability to receive and evaluate information effectively or to make and communicate responsible decisions is impaired to such an extent that the person:
 - i. lacks the capacity to meet essential requirements for his physical health or safety; or
 - ii. unable to manage his financial resources.

Partially Incapacitated Person - Someone not fully incapacitated and only needs partial help with physical care and/or financial management.

A partially incapacitated person is someone who, without the court-approved assistance of a limited Guardian, would be unable to:

- 1) Meet the essential requirements for his physical health or safety, or
- 2) Manage all of his financial resources or to engage in all of the activities necessary for the effective management of his financial resources.

A finding that an individual is partially incapacitated shall not constitute a finding of legal incompetence. A partially incapacitated person retains all legal rights and abilities except those expressly limited or curtailed in a court order. (30 O.S. §1-111).

Letters (Letters of Guardianship) - A document signed by a judge after the appointment of a Guardian. Letters of Guardianship (Letters) will designate the name of the Guardian and specify the authority and powers of the Guardian.

Minor - A person under eighteen (18) years of age. (30 O.S. §1-111)

Notice - Informing people other than yourself that you are asking for a court order that may affect them or their rights. The process of "giving notice" means giving copies of court papers to the parties entitled to notice as required by law. The court papers can ONLY be delivered in a manner permitted by law, and proof of proper delivery must be filed.

Notary Public (Notary or Public Notary) - A person authorized to perform certain legal formalities, such as certify another person's signature after verifying that person's identity, particularly on legal documents and contracts. Having your signature notarized means having a Notary verify your identity and witness your signature on court documents, then the Notary will sign the documents to certify your signature and the date of your signature and the county you were physically present in when you signed the document.

Common places to find a notary:

- *City and town clerks' offices,*
- *Courts,*
- *Local banks,*
- *Real estate, insurance or law offices,*
- *Travel agencies,*
- *Local drug store or pharmacy, or*
- *Tag Agency.*

Party - A person filing a Guardianship petition, application, motion or other related legal documents, including but not necessarily limited to the person seeking Guardianship, a duly appointed Guardian, Guardian ad Litem, court-appointed conservator, the Ward or prospective Ward, any party who has filed an objection, and anyone else who has entered an appearance.

Pauper's Affidavit ("pauperis" affidavit) - Can be filed by very low-income persons to avoid paying filing fees to the court. Usually, the judge will review the affidavit and decide about whether you have to pay fees or not.

Petition - A written application from a person or persons asking for relief in court. A formal application made to a court in writing that requests action on a certain matter, such as a Petition for Guardianship.

Section – The Oklahoma Guardianship and Conservator Act is cited throughout this Handbook. The Act is found at Title 30 of the Oklahoma Statutes. In this Handbook, where you see the word Section or the symbol §, this is referring to the specific section of Title 30 or another title from the Oklahoma Statutes. For example, when you see 30 O.S. §1-111, this is a reference to Title 30, Section 1-111 of the Oklahoma Statutes.

The Subject of the Proceeding - A person (whether minor or an incapacitated/partially incapacitated adult) for whom a Guardianship is needed. Also referred to in this Handbook as: Ward, Minor, Adult, or Subject. (30 O.S. §1-111).

Surcharge - The imposing of personal liability ordered by the judge on a Guardian if that Guardian commits willful or negligent misconduct handling a Ward's property or financial resources.

Ward - A person over whom a Guardian is appointed and/or a person over whose property a Guardian or conservator is appointed. (30 O.S. §1-107).

In this Handbook, the term "Ward" is to refer to a "subject", "physically incapacitated person", "incapacitated person", "partially incapacitated person" or other person over whom a court has granted Guardianship.

Additional definitions may be found at Title 30 of the Oklahoma Statutes, Section 1-111.

III. TYPES OF GUARDIANSHIP

General Guardianship - A Guardian of the person or of all the property of the Ward within this state or of both person and property. (30 O.S. §1-109).

Limited Guardianship - A person authorized by the court to exercise limited powers over the person of the Ward, or over the property of the Ward within the state or of both person and property. (30 O.S. §1-109).

Special Guardianship - A Guardian appointed for an emergency purpose, unless extended by the court, not to exceed thirty (30) days. (30 O.S. §3-115). To obtain Special Guardianship, you must file a Petition for General Guardianship and an Application for Special Guardianship.

IV. WHO MAY BE APPOINTED AS GUARDIAN

1. Any person interested in the welfare of the person believed to be incapacitated or partially incapacitated may apply to the court for Guardianship. (30 O.S. § 3-101).
2. A person 18 years of age or older who is of sound mind and not acting under duress, menace, fraud, or undue influence may nominate their own Guardian over physical care and/or property. Such nomination must be in writing and signed by the person making the nomination. If two or more people are nominated, the person most recently nominated will be the Guardian. The court may also approve and appoint two people as co-Guardians, when appropriate. (30 O.S. § 3-102).
3. The court may consider the people listed below when appointing a Guardian and does not have to choose in the order listed. The court has final say and chooses the Guardian based on what is in the Ward's best interests.

The Court may consider the following people when choosing a Guardian:

- a) The nominated person(s) by a person 18 years of age or older;
- b) The current Guardian appointed or recognized by the court;
- c) A person nominated by the will or by other writing of a deceased parent, spouse, or an adult child who was serving as the Guardian of the subject of the proceeding;
- d) Spouse;
- e) Adult Child;
- f) Parent;
- g) Sibling;
- h) Any individual approved by the court with whom the subject of the proceeding has been living with for more than 6 months prior to the filing of the petition for Guardianship;
- i) If qualified to serve as a Guardian of a veteran pursuant to the Veteran's Volunteer Guardianship Act. (See Veteran's Volunteer

4. Guardian's Fitness Inquiry (30 O.S. § 4-105):

In conducting an inquiry to determine whether a person is suitable to serve as a Conservator, the court shall inquire whether the person apply for Guardianship is:

- a) Over the age of 18;
- b) Of sound mind (not incapacitated or partially incapacitated)
- c) Free of criminal convictions, protective orders, or pending criminal charges;
- d) Whether an Oklahoma State Bureau of Investigation (OSBI) criminal background check is needed (the person seeking Guardianship shall tell the court about any criminal history of himself/herself, or any other adult household member, so the court can consider whether the criminal history relates to the requested Guardianship);
- e) Whether the person seeking Guardianship is insolvent or has declared bankruptcy in the five (5) years preceding the Guardianship petition;
- f) Whether the person seeking Guardianship is under any financial obligation to the proposed Ward;
- g) Whether there is any conflict of interest that would keep the person seeking Guardianship from properly caring for the Ward or the Ward's finances;
- h) Whether the person seeking Guardianship is a citizen, legal resident, or is otherwise legally present in the United States of America.

5. If a Guardian is being appointed ONLY over the property of the incapacitated or partially incapacitated person, the court may appoint an organization nominated in writing by the proposed ward, or which would be in the best interest of the incapacitated or partially incapacitated person. (30 O.S. § 3-104).

6. A public agency may not be appointed as a Guardian of an adult except as required by 10 O.S. § 1415 for placement in an institution and/or 43A § 10-108 for the protection of a vulnerable adult. (30 O.S. § 3-104).

IV. STATUTORY NOTICES

A. NOTICE REQUIREMENTS – GENERAL GUARDIANSHIP (30 O.S. §3-110) (This differs from with a Special or Emergency Guardianship. See subparagraph B, below, for the notice requirements of a Special (Emergency) Guardianship.)

What Documents Must be Served in General Guardianship?

1. Notice of all hearings; and
2. A copy of Petition for Guardianship; and
3. Any other document filed with the court that is set for a hearing.

Who Receives Notice of a General Guardianship?

- 1) The Ward or incapacitated person; and
- 2) The Ward's spouse, if any;

- 3) The Ward's attorney, if and;
- 4) The Ward's adult children or, if none, the Ward's parents, if living; or (see next page)
- 5) If the Ward has no living parent, the Ward's adult siblings and all adult children of any deceased siblings of the Ward, and all adult grandchildren of the Ward;
- 6) If none of the above, then to at least one and not over 3 of the Ward's nearest relatives;
- 7) Any person or organization nominated or proposed to serve as Guardian or limited Guardian or limited Guardian by a will or other writing (if this is you, skip this step);
- 8) The person or facility having care or custody of the Ward;
- 9) The Department of Human Services or the Department of Mental Health and Substance Abuse Services, if providing services to the Ward;
- 10) If the Ward is a veteran and receiving or entitled to receive veteran benefits or services from the United States Department of Veterans Affairs (VA), then give notice to the VA;
- 11) Any other person as directed by the court.

When and How is Notice Served in a General Guardianship? (This is different for Special Guardianship, see subparagraph B, below.)

1. Notice by Personal Service to the Ward.
 - a) At least ten (10) days before the hearing.
 - b) Copies of the notice of hearing and the petition for Guardianship must be delivered in person to the Ward by the Sheriff or a licensed process server, or your attorney if you hire one.
 - c) A return of service must be filed. This must contain the date and time of service, and who completed service, and must have the notarized signature of the person making service.
2. Notice by Mail to all Others.
 - a) At least ten (10) days before the hearing.
 - b) Copies of the notice of hearing and the petition for Guardianship must be mailed, by regular first-class mail, to all other persons entitled to notice of hearing on the petition for Guardianship, listed in the Who Receives Notice section above.

B. NOTICE REQUIREMENTS – SPECIAL (EMERGENCY) GUARDIANSHIP (30 O.S. §3-115). (This differs from with a General Guardianship. See subparagraph A, above, for the notice requirements of a General Guardianship.)

To obtain Special Guardianship, you must file a Petition for General Guardianship and an Application for Special Guardianship. Special Guardianship may be ordered with or without notice. If notice is required, the notice shall specify a time for hearing on the Petition within seventy-two (72) hours.

What must be given to Notice recipients in Special Guardianship, if notice is required:

1. Notice of Hearing; and
2. Copy of Petition or other document giving rise to the notice.

Who receives Notice in Special Guardianship, if notice is required?

- 1) The Ward or incapacitated person;
- 2) The Ward’s attorney, if any
- 3) The Ward’s spouse, if any; and
- 4) At least one other adult relative of the Ward who is not the petitioner or person seeking Guardianship.

When and How is Notice served in a Special Guardianship, if notice is required? (Different for general Guardianship)

- 1) Notice to the Ward in Special Guardianship by personal service in the manner directed by the court
- 2) Notice to all other persons receiving notice as directed by the court.

V. REQUIRED COURT APPROVALS

Once you have a Guardianship in place, the Guardian and the court work together to manage the care and finances of the incapacitated adult (the Ward). The Guardian must provide the court with certain information and the court must review the Guardian’s actions and plans. At a minimum, the Guardian must obtain the court’s approval of:

- A. **ORDER APPOINTING GUARDIAN.** This court-approved order creates the Guardianship and lists the Guardian’s powers to act. If a power is not listed in the order, the Guardian does not have that authority.

- B. PLANS FOR THE GUARDIANSHIP. There are two plans of care or management required to be filed by the Guardian at or near the beginning of the Guardianship.

The plans are:

1. A plan for the management of the financial resources of the Ward; and
2. A plan for the care and treatment of the Ward.

These plans outline the needs and services the Guardian believes the Ward needs and how the Guardian plans to ensure these needs and services are provided. The plans must be approved by the court. (See forms: Plan for Care and Treatment of the Ward). (30 O.S §§ 3-120 and 122).

INVENTORY. Within two (2) months of appointment, the Guardian must file an inventory listing the Ward's assets and debts. This provides a way for the court to know what property of the Ward over which the Guardian has control and/or access to. The Inventory must be filed with the court clerk. (See form: Inventory of Ward's Estate). (30 O.S §§ 4-301).

MOVING THE WARD'S RESIDENCE. A Guardian must get the court's approval to move the Ward out of the County.

SALE OF THE WARD'S PROPERTY. The Guardian must obtain court approval before selling the Ward's property.

REMOVAL OF WARD'S PROPERTY FROM THE STATE. When the Ward has property in Oklahoma, but the Ward and Guardian reside in another state, territory or foreign country, an application can be submitted requesting permission to remove the Ward's property to the state, territory or foreign country where the Ward resides. (30 O.S §§ 4-605).

SALE OF THE WARD'S PROPERTY. The Guardian may file a petition to the court requesting permission to sell property of the Ward if such sale would be a benefit to the Ward. In this circumstance the Guardian must present to the court a verified petition stating the condition of the estate of the Ward and the facts and circumstances on which the request is made. (30 O.S §§ 4-752 and 754).

TRANSFER OF GUARDIANSHIP TO ANOTHER STATE. A Guardian or conservator appointed in this state may petition the court to transfer the Guardianship or conservatorship to another state.

UPDATES. The Guardian must update the court and others with the Ward's status as ordered generally every year. Each judge will have rules on how to file the reports.

VII. ACCOUNTABILITY TO THE COURT

A. GUARDIAN'S DUTIES

In carrying out the duties to the court, any Guardian MUST:

- 1) Assure the court that the rights of their appointed Ward are protected. (30 O.S. §1-106).
- 2) Perform in good faith and diligently any specific duties and powers assigned by the court.
- 3) Assure the court the Ward's property is safe, subject to the order and the Guardianship plan for the management of the financial resources of the Ward. (30 O.S. §3-121).
- 4) Assure the court the Guardian is properly managing his/her own finances and affairs.
- 5) File with the Court Clerk a proposed plan for the care and treatment of the Ward (care plan) and a proposed plan for the management of the Ward's financial resources (financial plan).
 - a) The proposed plan for care and treatment of the Ward may be filed at the time of filing of the petition, time of hearing, or within 10 days of appointment as Guardian. Any modification to the care plan must also be submitted. (30 O.S. §3-120).

A proposed plan for care and treatment of the Ward should include:

- i. *Services necessary to meet the essential requirements for the Ward's physical health and safety, considering recommendations from the court;*
- ii. *The plan for providing or obtaining those services;*
- iii. *How the Guardian of the person will share decision making authority with the Ward; and*
- iv. *Any other services that are necessary to assist in fulfilling the Ward's needs. (30 O.S. §3-120). (See forms: Plan for Care and Treatment of the Ward).*

- b) The proposed plan for the management of the Ward's finances must be filed within 2 months after appointment. Any modification to the financial plan shall also be submitted to the Court. (30 O.S. §3-122).

A proposed plan for the management of the Ward's financial resources should include:

- i. *Services necessary to manage the Ward's property under the Guardian or limited Guardian's control;*
- ii. *The plan for providing or obtaining those services;*
- iii. *How the Guardian of the property will share decision making authority with the Ward;*
- iv. *Any other services that are necessary to assist in the management of the Ward's property to fulfill the Ward's needs and the Guardian's duties. (See forms: Plan for the Management of the Property of the Ward).*

- 6) File with the Court Clerk an inventory of the estate of the Ward within 2 months after their appointment (can be extended by the court by showing good reason to). The inventory shall state the Guardian's opinion of the value of the Ward's estate. Any property discovered or transferred regarding the state of the Ward must have a new inventory filed. Inventories may be required by the court at any time. The judge, the Ward, or any interested person may request that the property be appraised. (30 O.S. §4-301). (See form: Inventory of Ward's Estate).
- 7) A Guardian may have to post a bond with the court before serving as a Guardian. If the value of the Ward's estate and the yearly income of the Ward is not over forty thousand dollars (\$40,000), and the Guardian is a parent, spouse, brother, sister, grandparent, child, or grandchild of the Ward, the bond may be waived. The court alone may waive a bond. (30 O.S. §4-201).
- 8) A Guardian must, at the conclusion of his first year of Guardianship, and at least once a year thereafter, file a report on the Ward and Guardianship of the property. (30 O.S. §4-303).
 - a. This report must include an accounting of any money received by the Guardian for the Ward, any payment(s) made for the Ward by the Guardian, any changes of property on the inventory, and any significant change in the physical or mental condition of the Ward, or Ward's financial resources. The report shall state the Guardian's request for compensation and the Guardian's request for compensation for the attorney. Additional reports may be required of Guardians and limited Guardians by the court appointing them.

The requirements for an Annual Report on the Guardianship of a Ward and the property are as follows:

- i. The name and place of abode of the Ward;*
- ii. The name and address of the Guardian;*
- iii. Any significant changes in the capacity of the Ward to meet the essential requirements for physical health or safety, manage financial resources and the service being provided for the management of those resources;*
- iv. The services being provided to the Ward and their relationship to the Guardianship plan;*
- v. Problems during the reporting period;*
- vi. And any significant actions by the Guardian during the reporting period, and the reasons why the appointment should be continued and not terminated, the reasons, if any, why no less restrictive alternative environment for the Ward is to be considered. (30 O.S. §§4-305, 4-306).*

(See forms: Annual report and Proposed plan for the care and treatment of a Ward and Management of the Ward's property).

- 9) Unless the court directs, or it is required by the Uniform Veteran's Guardianship Act (72 U.S.C. § 126. J, et seq.), the Guardian of the property of a Ward may not have to file an annual accounting or an annual plan if Ward's financial resources or assets, other than the homestead, are worth less than Forty Thousand Dollars (\$40,000), if a bond has been posted, or are worth less than Ten Thousand Dollars (\$10,000) whether a bond has been posted and if the Guardian or limited Guardian of the property is the spouse or a relative of the Ward to the fourth degree.
- 10) Any Guardian, if allowed by court order, may start proceedings or other action to compel the performance by any person with a duty to support the Ward or pay money for the welfare of the Ward only when a Guardian or conservator has not been appointed for the estate of the Ward. (30 O.S. § 3-118).
- 11) Any Guardian, if allowed by court order, and if satisfied that the incapacity or partial incapacity of the Ward has stopped, the Guardian shall file a petition requesting a determination on the restoration of capacity of the Ward and the termination of the Guardianship. (30 O.S. § 3-118).
- 12) When it is no longer proper that the Ward should be under Guardianship, for example, upon termination of the disability of the Ward or upon his death, or upon the resignation or removal of the Guardian or conservator, there shall be a final account and request for final compensation filed within thirty (30) days after it is determined that the Guardianship should be terminated. The court shall set the final account for hearing. Notice of the hearing shall be given at least ten (10) days before the hearing date by mailing a copy to those persons in the section of this handbook titled "Step by Step Guide to Adult Guardianship". (30 O.S. § 4-803)

VIII. ACCOUNTABILITY TO THE WARD

A. DUTIES OWED BY THE GUARDIAN TO THE WARD:

- 1) To ensure the Ward's proper care, safety, and protection;
- 2) To ensure the support, health, and education of the Ward (30 O.S. §1-120);
- 3) Must keep safe and in good condition the property of the Ward. A Guardian must permit no unnecessary waste or destruction of the real property of their Ward unless by order (30 O.S. §1-121);
- 4) To safely encourage, to the extent possible, the Ward's participation in decisions affecting the Ward in all matters they are able, within any court-imposed limitations. Including but not limited to allowing the Ward to make their own decision;
- 5) To perform all duties and powers assigned by the court;

- 6) Become and remain knowledgeable of the Ward's capabilities, limitations, and needs (physical, mental, medical, etc.);
- 7) Ensure the Ward has proper housing in the least restrictive, safest, and most normal manner;
- 8) Determine the Ward's place of residence (cannot move out of the county without court approval);
- 9) Timely pay the Ward's debts (30 O.S. §4-701);
- 10) Collect all debts owed to the Ward (30 O.S. § 4-702);
- 11) Settle claims or lawsuits as authorized by the court;
- 12) Sell real property, with court order only (30 O.S. § 4-705);
- 13) Make investments, with court order only (30 O.S. § 4-708);
- 14) Provide consents and approvals as authorized by the court (30 O.S. § 3-118).

Some possible areas the court will authorize are:

- i. Consents necessary for financial management;*
- ii. Initiate lawsuits or proceedings necessary to compel a duty to support the Ward or pay sums for the Ward's benefit; and*
- iii. Consent to routine or necessary medical or other professional care, treatment, advice.*

B. WHAT THE GUARDIAN CANNOT DO:

- 1) The Guardian **CANNOT** use the Ward's money for anything other than the Ward's needs and maintenance;
- 2) The Guardian **CANNOT** sell the Ward's property without prior order;
- 3) The Guardian **CANNOT** move the Ward's residence out of the county without prior order;
- 4) The Guardian **CANNOT** consent on behalf of the Ward to withhold or withdraw life-support or life-sustaining procedures without court authorization or as authorized by an Advance Directive;
- 5) The Guardian **CANNOT** consent on behalf of the Ward to termination of the Ward's parental rights;
- 6) The Guardian **CANNOT** consent on behalf of the Ward to an abortion, psychosurgery, removal of a bodily organ, performance of any biomedical or behavioral procedure except in an emergency and as necessary to save the Ward's life and with permission;

- 7) The Guardian **CANNOT** prohibit marriage or divorce of the Ward except with court approval;
- 8) The Guardian **CANNOT** consent on behalf of the Ward to placing the Ward in a facility or institution absent formal commitment proceedings (30 O.S. § 3-119);
- 9) The Guardian **CANNOT** restrict or limit the Ward more than necessary; and
- 10) The Guardian **CANNOT** have more than five Wards at one time. (30 O.S. §4-101).

IX. RIGHTS OF THE WARD

A. RIGHT OF THE POTENTIAL WARD

Guardianship results in losing fundamental rights, including the right to decide where to live, how to spend money, and whether or not to consent to medical care. Persons who are the subjects of Guardianship proceedings are therefore given rights and protections to minimize the risk they will be placed under a Guardianship that is unnecessary or too restrictive.

1) Burden of Proof

Every adult is presumed to have capacity. The petitioner must prove that the potential Ward lacks capacity. This must be proven by clear and convincing evidence.

2) Notice

The potential Ward may receive actual notice of all hearings. Notice of the initial hearing and a copy of the Petition for Guardianship must be personally served on the potential Ward at least ten (10) days before the hearing. The right to be given notice cannot be waived. (See forms: Notice of Hearing Petition For Guardianship and Petition for Guardianship).

3) Attendance and Participation at Hearings

The potential Ward may be at any hearing held on the Guardianship petition. If the potential Ward is not present, the judge will ask why he or she is absent, and the petitioner must explain the absence. At the hearing, the potential Ward may present evidence. The potential Ward may call witnesses to testify on his or her behalf. If witnesses are called by the petitioner or other parties, the potential Ward has the right to cross-examine these witnesses.

4) Representation by an Attorney

The potential Ward may be represented by an attorney. This cannot be the same attorney who represents the petitioner. If the potential Ward attends the hearing without an attorney, the judge will explain the potential consequences of the proceedings and the rights of the potential Ward to have an attorney. The Court must appoint an attorney for the potential Ward if the potential Ward requests one. If the judge feels it is in the best interest of the potential Ward to be represented by an attorney, the judge may appoint an attorney even if the potential Ward does not

request one or does not appear at the hearing. If the judge appoints an attorney to represent the potential Ward, the hearing will be postponed at least five (5) days to give this attorney adequate time to prepare. The court-appointed attorney's fees may be paid by the court if the potential Ward cannot afford an attorney.

5) Appeal

A potential Ward who disagrees with the judge's decision may appeal. The appeal process is the same as any civil case.

B. RIGHTS OF THE WARD UNDER A GUARDIANSHIP

A Ward under a Guardianship retains the right to be respected and treated like an adult. This includes the right to privacy, to live independently, and to participate in decisions. Once a person is appointed a Guardian, he or she must act to protect the Ward's interest. A Guardian must seek the least restrictive alternative when meeting the needs of the Ward.

C. THE RIGHT TO BE FOOLISH

Adults have the freedom to control their lives and with this freedom of choice comes the responsibility of dealing with the consequences of foolish choices. Adults enjoy this right to freedom of choice if able to understand the situations and the likely consequences of our choices. If trauma, disability, and/or illness are severe enough to impair the mental abilities so much that a person cannot understand their situations and knowingly accept the likely consequences of his or her actions, it may be necessary to limit that individual's rights to prevent harm.

X. CONFIDENTIALITY

Confidential information filed with or submitted with any proceeding under the Oklahoma Guardianship and Conservatorship Act, shall not constitute a public record and shall be sealed by the court. Access to confidential information shall be strictly controlled.

A. Except upon court order, no confidential information shall be disclosed to persons other than:

- 1) The subject of the proceeding and the attorney;
- 2) The Guardian ad litem;
- 3) If the subject of the confidential information is a Ward, the Guardian or conservator of the Ward;
- 4) If the subject of the confidential information is the Guardian or conservator, the Ward and the attorney, and the attorney of such Guardian or conservator;
- 5) Abstractors licensed under the Oklahoma Abstractors Law, to have access to records regarding minors and determinations of persons as incapacitated or partially incapacitated

persons under the Oklahoma Guardianship Act. Abstractors shall maintain the confidentiality of this data, except for such parts as relate to the land title being researched;

- 6) An authorized representative of the United States Department of Veterans Affairs upon presentation of proper identification; and
- 7) An authorized representative of the Department of Human Services upon presentation of proper identification

B. The fact of a Guardianship or conservatorship of a person or that person's estate shall not be considered confidential information. (30 O.S. §1-122).

XI. SANCTIONS/PENALTIES FOR NON-COMPLIANCE

A Guardian must protect the incapacitated person (the Ward) and their property. The Guardian's duty extends to not benefit themselves. *This is called a fiduciary duty.*

Guardians that fail to follow the court's orders, fail to timely file reports, or who waste, embezzle, or steal the Ward's property may be subject to removal, fines, or even civil or criminal penalties. In addition, the Guardian may also be required to correct the problem that resulted or could cause removal, fines, or penalties.

Guardians can also encounter problems when they fail to understand the requirements and limitations associated with their duties and responsibilities. There are age and residency requirements, and limitations based on criminal convictions, bankruptcies, dealings with the judge, and other conflicts of interest. As part of the application process, Guardians may go through several background checks and can have to have a home study completed (*yes, even for an adult Ward*), if ordered by the court.

XII. INTRODUCTION TO CONSERVATORSHIPS

***THIS ACT APPLIES ONLY TO INDIVIDUALS WITH A "PHYSICAL DISABILITY" NOT TO PEOPLE WITH MENTAL OR EMOTIONAL LIMITATIONS.**

A. GENERAL STATEMENT

If a person is unable, by reason of physical disability to manage his or her property and voluntarily consents to the establishment of a conservatorship and the appointment of a conservator, a verified petition—the contents of the petition are attested by the individual suing, verifying the accuracy of the information in the body of the petition—may be filed in district court. The court shall direct that notice be personally served on the person alleged who cannot manage his or her property. Notice shall be served on others of significance as directed by the court (including individuals in close family relationships), and the notice must be served on other parties at least (5) five days before the hearing. Proof of service must be presented to the court on the date. (*See forms: Verified Petition for Conservatorship, Consent by Ward to Appointment of Conservator, Notice of Hearing Petition for Conservatorship, Affidavit of Mailing and Personal Service.*)

The subject of the conservatorship, if able, must be produced before the court at the hearing. (30 O.S. §3-211 (3)).

After a Conservator is appointed, the court may find that the physically incapacitated person shall not thereafter have the power to enter into any contract creating an obligation against his estate except for necessities.

The objective of the conservatorship of the incapacitated person is to assure that the personal needs of the incapacitated person are met.

B. THE HEARING

If, after a full hearing and examination on the petition, it appears to the court this person is, from physical disability, unable to manage his real and personal property. (30 O.S. §3-212).

WHO MAY SERVE AS A CONSERVATOR

No person shall be appointed Conservator of an estate who would be ineligible to act as Conservator of the Ward in such a case. (30 O.S. §3-213).

Conservator Fitness Inquiry:

In conducting an inquiry to determine whether a person is suitable to serve as a Conservator, the court shall determine if:

- 1) The person proposed to serve as Conservator is a minor or an incapacitated or partially incapacitated person;
- 2) The person proposed to serve as Conservator and each adult member of the proposed Conservator's household has a record of a criminal conviction, protective order, or pending criminal charge. When requested by the court, the petitioner shall present to the court an Oklahoma State Bureau of Investigation (OSBI) criminal background check for the proposed Conservator and any adult household member evidencing no record of a criminal conviction in the OSBI criminal history repository based on the search criteria provided. The petitioner shall disclose the case name and status of any civil or criminal matter in state or federal court involving the proposed Conservator or any adult household member of the proposed conservator;
 - a. The court shall inquire into such conviction, order, charge or matter and the surrounding circumstances. The court shall appoint such person proposed to serve only upon determining that the facts underlying the circumstances do not cause a reasonable belief that the person proposed to serve will be unfaithful to or neglectful of the fiduciary and care
 - b. responsibilities of the Conservator, and that the appointment is in the best interest of the Ward.

- 3) The person proposed to serve as Conservator is insolvent or has declared bankruptcy during five (5) years before filing the pleading proposing to serve as Conservator;
 - a. Insolvency or bankruptcy shall not affect the qualification of a person proposed to serve as Conservator of the person of an incapacitated or partially incapacitated person.
- 4) The person proposed to serve as conservator is under any financial obligation to the Ward;

or

 - a. The court shall appoint the person proposed to serve only after a determination that such obligation will not impair the ability of the person proposed to discharge the person's fiduciary responsibilities, and that the appointment is in the best interest of the Ward. Being under financial obligation to the Ward shall not affect the qualification of a person
 - b. proposed to serve as Conservator of the person of an incapacitated or partially incapacitated person.
- 5) There exists a conflict of interest—a situation in which the concerns or aims of the parties are incompatible—which would preclude or be substantially detrimental to the ability of the person to act in the best interest of the subject of the proceeding if such person is appointed.
- 6) Only a person who is a citizen or legal resident of or legally present in the United States of America shall be eligible to be appointed Conservator of the property or person of a physically incapacitated person by the courts of this state, unless the court determines there are no such qualified individuals available to serve as conservator and that it is in the best interest of the physically incapacitated person to appoint a person without such qualifications. (30 O.S. §4-105).

Every Conservator appointed to preserve and protect the estate of his Ward shall have the “care, custody, and management” of such estate until the Conservator is legally discharged. The Conservator shall give bond to the State of Oklahoma, similarly, as provided for Guardians of incapacitated and partially incapacitated persons. (30 O.S. §3-214).

Care, Custody, and Management includes (“report”):

- 1) *Identify all assets, including legal descriptions, bank accounts, investments, retirement plans, IRAs, vehicles, personal property of value or significance.*
- 2) *Compile all documents for filing with the court.*
- 3) *Accounting of all debts and liabilities, insurances, taxes, etc.*
- 4) *Accounting of monies owed to the Ward.*
- 5) *Continued management of the estate.*

C. MULTIPLE CONSERVATORS

If two Conservators are both residents of this state, the act of one alone shall be the same as an act of both:

- 1) If there is a co-conservator is laboring under any legal disability from serving, the co-conservator in such case shall be relieved from serving as Conservator; provided, however, proper finding and valid order of the district court having jurisdiction; or
- 2) If a co-conservator has given the other co-conservator authority in writing to act for both.

If there are over two conservators, the act of the majority is valid.

D. LIMITATIONS ON INVESTMENTS

Except as provided in subsection B (30 O.S. §4-709(B)), the money belonging to estates of physically incapacitated persons, subject to the jurisdiction of the court, can only be invested in one or more of:

- 1) Real estate and first mortgages upon real property which do not exceed fifty percent (50%) of the actual value of the property;
- 2) United States bonds, or any other security certificate, or evidence of indebtedness guaranteed by the United States government, or any authorized agency thereof;
- 3) State bonds;
- 4) Bonds of municipal corporations;
- 5) Annuities covered by the Oklahoma Life and Health Insurance Guaranty Association, which do not exceed Three Hundred Thousand Dollars (\$300,000.00), individually; or
- 6) Accounts in savings and loan associations and credit unions in this state, and all types of interest-bearing time deposits and certificates of banks, savings and loan associations, and credit unions in this state, not to exceed the amount insured by the United States government. (30 O.S. §4-709).

E. ORDER APPOINTING AND LETTER

The Conservator will get a court order approving and appointing them as the Conservator for the Ward, complete an oath of Conservator, and must receive Letters of Conservatorship. (*See forms: Order Appointing Conservator, Oath of Conservator, Letters of Conservatorship*).

F. PLANS AND REPORTS

A Conservator shall have the same powers and duties, including the submission of a “plan” (how the Conservator intends to protect the assets of the Ward). and “report” (as outlined above in “Care, Custody, and Management”).

All laws relative to the jurisdiction of the court over the estate of the Ward, including:

- 1) *The investment, management, sale or mortgage of his property, and*
- 2) *The payment of his debts shall be applicable to the estate of a person under conservatorship.*

Usually these actions will involve an application to the court for approval of transactions involving the property of the Ward. This plan and report must be updated and presented to the court annually. (See forms: *Initial Report of Conservator, Plan for The Management of the Ward’s Estate, Verified Application and Petition for Conveyance of Real Property, Notice and Order of Hearing Verified Application and Petition for Conveyance of Real Property, Affidavit of Mailing Verified Application and Petition for Conveyance of Real Property*). (30 O.S. §3-215).

G. JURISDICTION OF THE COURT

The Conservator shall have the same powers and duties as a Guardian of an incapacitated person under Oklahoma Law.

The appointment of a Conservator does not prohibit a person from disposing of his estate, real and personal, by will; provided, that when any person subject to a conservatorship shall dispose of such estate by will, such will must be subscribed and acknowledged in the presence of a judge of the district court.

The judge before whom the will is subscribed and acknowledged shall attest to the execution of the will but shall have neither the duty nor the authority to approve or disapprove the contents of the will. Subscribing and acknowledging such will before a judge shall not render such will valid if it would otherwise be invalid. (84 O.S. §41(B)).

H. CONFIDENTIALITY

The Guardianship rules of Confidentiality applies directly to Conservatorships. (See *Confidentiality Section IX of this Handbook, page 13.*) (30 O.S. §1-122).

I. REMOVAL OF A CONSERVATOR

The authority and responsibility of a Conservator terminate upon the death of the Conservator, or the Ward, determining incapacity of the Conservator, or on removal or resignation of the Conservator. Termination does not affect the liability of a Conservator for prior acts or the obligation to account for any funds and assets of the Ward under the control of the Conservator.

The court, after notice and hearing, may remove a Conservator for cause if the Conservator has failed for thirty (30) days, after he must do so, to render an account or make a report, and compel him to surrender the estate of the Ward to the person found to be lawfully entitled thereto. (30 O.S. §4-803).

J. DISCHARGE AND ACCOUNTING

A Conservator may be discharged by the court upon application by the Ward or otherwise on personal service of such notice as determined by the court to the individuals originally notified, and the Conservator, when the conservatorship is no longer necessary.

In the event of the death, resignation or removal of a Conservator, the court, on the application and notice the court may determine that the Ward is discharged by law if the conservatorship of the Ward is no longer necessary.

(See forms: Motion to Discharge Conservator, Notice and Order of Hearing Application for Discharge of Conservator, Affidavit of Mailing and Personal Service, Order Dissolving Conservatorship and Discharging Conservator).

Upon the termination of a Conservator, a Conservator shall give a final accounting to the court. (30 O.S. §3-216).

K. COMPENSATION

The Conservator shall receive as compensation for his services the compensation provided by law for Guardians. (30 O.S. §3-217).

- 1) Every Conservator must be allowed his reasonable expenses in the execution of his trust, and he compensation for his services as the court in which his accounts are settled deems just and reasonable.
- 2) If the services of a Conservator of the property are for the collection of income of the Ward, compensation for such services shall not exceed seven and one-half percent (7.5%) of the income so collected. For this section,
- 3) "income" means funds received by and accounted for by the Conservator on behalf of the Ward, other than from the sale of property of the Ward, plus the net proceeds
- 4) from the sale of property of the Ward over the value of such property as last determined in the conservatorship proceeding.
- 5) All compensation and reimbursements under this section shall otherwise be approved by the court before payment.
- 6) Joint Conservators shall not receive more compensation than a single Conservator.

L. LIABILITY FOR NON-COMPLIANCE

The Conservator must protect the assets of the Ward. The Conservator's duties extend to not harming the Ward or benefiting themselves at the Ward's expense. Failure to perform these acts as a Conservator can cause civil and criminal liability for the Conservator.

XIII. VETERANS VOLUNTEER GUARDIANSHIP ACT

A. DEFINITIONS

The words "ex-service person", "veteran", or "war veteran" used in this act shall be construed to mean any person who:

- 1) Has served the full obligation for active duty, Reserve or National Guard service in the military, or received an early discharge for a medical condition, hardship or reduction in force; and
- 2) Has been separated or discharged from such service honorably or under honorable conditions. (72 O.S. § 2).

B. APPOINTMENT

- 1) The court may appoint a Guardian or limited Guardian may be appointed for an incapacitated or partially incapacitated adult veteran under the procedures and requirements of the Guardianship statutes found at 30 O.S. § 1-101. (See Section IV of this Handbook, page 5).
- 2) The court may appoint a general or limited Guardian as defined at 30 O.S. § 1-109. (See Definitions Section II of this Handbook, page 2).
- 3) If a Guardian or limited Guardian is appointed under the Veterans Volunteer Guardianship Act, the petition and orders for Guardianship must specifically state that the Guardianship or limited Guardianship is granted under the Veterans Volunteer Guardianship Act. (72 O.S. § 191, et. seq.).
- 4) Except as otherwise provided in the Veterans Volunteer Guardianship Act, a Guardian appointed under this Act shall be subject to all the duties, requirements and protections provided at Title 30 of the Oklahoma Statutes, relating to a Guardian of an incapacitated person or partially incapacitated person.
- 5) A Guardian appointed under this Act **MUST** maintain:
 - a. Regular contact with Ward to assess the Ward's capabilities, limitations, needs and opportunities; and
 - b. If applicable, regular contact with the Ward's social workers, health care providers, and/or institutions that provide services to the Ward. (72 O.S. § 193).

C. REQUIREMENTS, AND GUARDIAN OR FIDUCIARY COMPENSATION

- 1) The subject of the proceeding in a Guardianship established under the Veterans Volunteer Guardianship Act (also called a “Ward”) **MUST**:
 - a. Meet the requirements of "veteran" under 72 O.S. § 2;
 - b. Be a resident of this state; and
 - c. Be in receipt of a veteran's disability compensation or pension from the United States Department of Veterans Affairs under Title 38 of the Code of Federal Regulations or in receipt of benefits under the Supplemental Nutrition Assistance Program.

- 2) The current or prospective Guardian in a Veteran’s Guardianship **MUST**:
 - a. Be an individual;
 - b. Be a resident of this state;
 - c. Not be related to the Ward by blood, adoption or marriage;
 - d. Not be considered ineligible or barred from serving as a fiduciary for a veterans affairs beneficiary under 38 CFR § 13.130; provided, that any Guardian appointed under the Veterans Volunteer Guardianship Act subsequently denied appointment as a fiduciary shall notify the court within thirty (30) days of receipt of notice of the denial;
 - e. Serve as Guardian on a volunteer basis;
 - f. Waive compensation for services as a Guardian, except the Guardian may receive reimbursement of expenses incurred on behalf of the Ward as authorized by court order and subject to the limitations imposed by the court; and
 - g. Be availed of any benefits and subject to any additional requirements promulgated by rules or policy of the Oklahoma Department of Veteran Affairs, as the Department deems beneficial to the recruitment of community volunteer Guardians and protection of the interest of the Wards, including but not limited to background checks.

- 3) Nothing in this section shall be construed to prevent a Guardian or prospective Guardian from receiving compensation for services as a fiduciary appointed by the United States Department of Veterans Affairs or as a court-ordered Guardian otherwise authorized under Title 30 of the Oklahoma Statutes and does not cite authority or request benefits from the Veterans Volunteer Guardianship Act.

- 4) Nothing in this section shall entitle a Guardian of the property of a veteran to payments on behalf of the subject of the proceeding for veteran's benefits unless the Guardian has applied to the United States Department of Veterans Affairs for appointment as a fiduciary as required by federal law. (72 O.S. § 194).

D. BOND REQUIRED

Before the entry of an order appointing a person as the Guardian or limited Guardian of the property of an incapacitated or partially incapacitated veteran is submitted and before the letters of Guardianship issue, the court shall require the person to be appointed to provide a bond, in an amount of the value of intangible personal property as alleged in the petition or otherwise determined by the court at the hearing on the petition, plus projected annual income of the subject of the proceeding from all sources, rounded to the nearest One Hundred Dollars (\$100.00). (72 O.S. § 195).

E. APPOINTED AS A FIDUCIARY

If the Guardian is appointed as a fiduciary by the United States Department of Veterans Affairs, the fiduciary accounting provided to the Department under 38 CFR § 13.130 shall be included in the annual accounting filed with the district court as part of the annual accounting of a Guardian of the property as required by 30 O.S. § 4-303. (72 O.S. § 196).

F. PROCEEDINGS TO COMMIT/CONFINEMENT IN A HOSPITAL OR INSTITUTION

Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and such person is eligible for care or treatment by the Veterans Administration or other agency of the United States Government, the court, upon receipt of a certificate from the Veterans Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment, may commit such person to said Veterans Administration or other agency.

- 1) The person whose commitment is sought shall be personally served with notice of the pending commitment; nothing in this act shall affect his right to appear and be heard in the proceedings.
- 2) Upon commitment, such person, when admitted to any facility operated by any such agency within or without this state shall be subject to the rules and regulations of the Veterans Administration or other agency. The chief officer of any facility of the Veterans Administration or institution operated by any other agency of the United States to which the person is so committed shall regarding such person be vested with the same powers as superintendents of state hospitals for mental diseases within this state regarding retention of custody, transfer, parole or discharge.
- 3) Jurisdiction is retained in the committing or other courts of this state to inquire into the mental condition of the person so committed and to determine the necessity for continuance of his restraint, and all commitments under this act are so conditioned.

The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans Administration, or other agency of the United States Government for care or treatment shall have the same force and effect as to the committed person while in this state, as in the jurisdiction in which the court entering the judgment or making the order is situated; and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed to inquire into the mental condition of such person, and of determining the necessity for continuance of his restraint; as provided in subsection (1) of this section regarding persons committed by the courts of this state. Consent is given to applying the law of the committing state or district regarding the authority of the chief officer of any facility of the Veterans Administration, or of any institution operated in this state by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.

Upon receipt of a certificate of the Veterans Administration or such other agency of the United States that facilities are available for the care or treatment of any person committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans Administration or other agency of the United States for care or treatment.

Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans Administration or other agency of the United States if he be confined under conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless before transfer the court or other authority originally committing such person shall enter an order for such transfer after motion and hearing.

Any person transferred as provided in this section shall be deemed committed to the Veterans Administration or other agency of the United States under the original commitment. (72 O.S. § 197).

XIV. OTHER RESOURCES

Adult Protective Services

(800)522-3511

Alzheimer's Association

(800) 272-3900

American Bar Association Commission on Law and Aging

(202)662-8690

www.abanet.org/aging

Bazelon Center for Mental Health Law

(202)467-5730

www.bazelon.org

CAAVA: Court-Appointed Advocated for Vulnerable Adults

(405)208-4021

<http://caava.org>

Legal Aid Senior Law

(405)557-0014

www.legalaidok.org

Long-Term Care Ombudsman

(405)521-6734

Mental Health Hotline

(800)522-9054

Oklahoma Bar Association

(405)416-7000 or (800)522-8065

www.okbar.org

Oklahoma Department of Human Services, Aging Services Division

(800)211-2116

www.okdhs.org

Oklahoma Department of Human Services, Developmental Disabilities Services

(405)521-3571

Oklahoma Developmental Disabilities Council

(405)521-4984 or (800)836-4470

www.okddc.ok.gov

Oklahoma Disability Law Center

(405)525-7755 or (800)880-7755

www.oklahomadisabilitylaw.org

Oklahoma Mental Health and Aging Coalition

www.omhac.org

Oklahoma Supreme Court Network

www.oscn.net

Senior Info Line

Dial 211 or (800) 211-2116

Social Security Administration

(800)772-1213

www.ssa.gov

Sunbeam Family Services

(405)528-7721

www.sunbeamfamilyservices.org

U.S. Department of Veterans Affairs Muskogee Regional Office

1-800-827-1000

www.va.gov