

Guardianship 101: Everything You May Need to or Want to Know (or Hope not to Know) but were Afraid to Ask

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What is a Guardian in Oklahoma?

- Title 30 governs private adult guardianships.
- 30 O.S. §1-105 states that:

A guardian is a person appointed by the court to take care of the person or property of another.

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Types of Guardians of and Adult:

- Special
Emergency; generally good for 30 days with a show cause hearing needed.
- General
No such thing as permanent, but close to it.
Once put in place, to get out of the guardianship have to show restoration to capacity
- Limited
(retain right to vote, serve as a juror, drive, etc.)

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Who may serve as a guardian in Oklahoma?

- 30 O.S. §4-101 states that: No person shall be appointed guardian of any minor or incapacitated or partially incapacitated person, who is, at the time of the hearing of the application for appointment, the guardian of as many as **five persons, other than his own family or relatives.**
- Exceptions:
 - This does not apply to boards of control and superintendents of charitable institutions, under the control or charge of the state, under which the boards of control and superintendents may be appointed as guardian of the estate or person of those committed to their charge or safekeeping.
 - The provisions of this section shall not prohibit the appointment of officers or managers of fraternal or benevolent orders or homes and church orphanages as to inmates of such institutions. This section shall in no way alter or repeal the provisions of Section 1001 of Title 6 of the Oklahoma Statutes, or Section 126.4 of Title 72 of the Oklahoma Statutes.

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Being a Guardian or Co-Guardian is a thankless job:

Annual Report every year. Court must approve every year. All money in and all money out (like a check ledger).

7.5% of income (but if co-guardians, then split the funds). Must apply with the court.

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Qualification of a guardian:

- No natural person shall be eligible to act as guardian of an estate under the jurisdiction of any judge of the district court, if said judge of the district court is under any financial obligation whatsoever to such person. 30 O.S. §4-103
- A guardian cannot be a minor or an incapacitated or partially incapacitated person. 30 O.S. §4-105
- The person proposed to serve as guardian and each adult member of the proposed guardian's household has a record of a criminal conviction, protective order, or pending criminal charge. The petitioner shall disclose the case name and status of any civil or criminal matter in state or federal court involving the proposed guardian or any adult household member of the proposed guardian. 30 O.S. §4-105
- The person proposed to serve as guardian is insolvent or has declared bankruptcy during five (5) years prior to the filing of the pleading proposing such person to serve as guardian. 30 O.S. §4-105
- The person proposed to serve as guardian is under any financial obligation to the ward. 30 O.S. §4-105
- There exists a conflict of interest 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. 30 O.S. §4-105

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Priority of Who Should be Appointed as Guardian:

- A. The following priorities shall guide the selection by the court of a guardian or limited guardian of an incapacitated or partially incapacitated person from among those eligible:
1. The individual or individuals nominated by the subject of the proceeding pursuant to Section 3-102 of this title;
 2. The current guardian or limited guardian appointed or recognized by the appropriate court of any other jurisdiction in which the incapacitated or partially incapacitated person resides;
 3. An individual nominated by the will or by other writing of a deceased parent, spouse, or an adult child who was serving as the guardian or limited guardian of the subject of the proceeding;
 4. The spouse of the subject of the proceeding;
 5. An adult child of the subject of the proceeding;
 6. A parent of the subject of the proceeding;
 7. A sibling of the subject of the proceeding;
 8. Any individual approved by the court with whom the subject of the proceeding has been living for more than six (6) months prior to the filing of the petition. Provided that any owner, operator, administrator or employee of a facility subject to the provisions of the Nursing Home Care Act, the Residential Home Care Act or the Group Homes for the Developmentally Disabled or Physically Handicapped Persons Act shall not be appointed guardian or limited guardian of a resident of such facility unless the owner, operator, administrator or employee is the spouse of the resident, or a relative of the resident within the second degree of consanguinity and is otherwise eligible for appointment.

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What a Guardian Cannot Do: (Limitations of Guardian 30 O.S. § 3-119

- A guardian shall have no powers except as provided by the Oklahoma Statutes or given to such guardian in the orders in the guardianship proceeding. This limitation of powers includes but is not limited to the following:
 1. No guardian shall have the power to consent on behalf of the ward to the withholding or withdrawal of life-sustaining procedures as provided in the Oklahoma Advance Directive Act from the ward, except, in accordance with Section 3-102.4 of Title 30 of the Oklahoma Statutes
 - a. with specific authorization of the court having jurisdiction over the guardianship proceedings which authorization must be granted in a separate order and only at such time as the ward is in need of life-sustaining treatment, and must include specific findings of fact and conclusions of law based on the standard established in Section 3-101.16.c of the Oklahoma Statutes,
 - b. as authorized by an advance directive executed pursuant to the Oklahoma Advance Directive Act,
 - c. as authorized by a consent not to resuscitate made pursuant to the Oklahoma Do-Not-Resuscitate Act, or
 - d. to receive hospice services as authorized by a licensed physician who determines the ward is terminally ill, as defined in Section 1-100.2 of Title 63 of the Oklahoma Statutes, provided that withholding or withdrawal of life-sustaining procedures can be authorized only in accordance with the provisions of this paragraph;
 2. No guardian or court having jurisdiction of the guardianship proceeding shall have the power to consent on behalf of the ward or order the consent on behalf of the ward to the termination or relinquishment of parental rights of the ward;
 3. Except in an emergency and only as necessary to preserve the life of the ward, no guardian shall have the power to consent on behalf of the ward to an abortion, psychosurgery, removal of a bodily organ, performance of any experimental biomedical or behavioral procedures, or participation in any biomedical or behavioral experiments, except with specific authorization of the court having jurisdiction of the guardianship proceeding;
 4. No guardian shall have the power to prohibit the marriage or divorce of a ward except with specific authorization of the court having jurisdiction of the guardianship proceeding; and
 5. No guardian shall have the power to consent on behalf of the ward to placement of the ward in a facility or institution to which a person without a guardian would have to be committed pursuant to the laws of this state absent formal commitment proceedings in which the ward has independent counsel.

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Goal is to keep the Ward in the least restrictive environment:

- Private home health care is now over \$20,000 a month for licensed, home-health care providers.
- Assisted Living in Oklahoma has a few facilities now taking Medicaid.
- Nursing Home care is costly, and getting into a facility that takes Medicaid is important while the Ward still has funds.
- Memory Care is mostly private pay and upwards of \$8,000 a month.

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Duties of Guardian of the Property 30 O.S. §1-121

- A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the court, but must so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward or the successors of the ward at the close of his guardianship, in as good condition as he received it.
- A guardian of the property, in relation to powers conferred pursuant to the provisions of the Oklahoma Guardianship and Conservatorship Act, shall act as a fiduciary and shall perform, diligently and in good faith, as a prudent person would in managing his own property, not with regard to speculation but with regard to conservation and growth, and the specific duties and powers assigned by the court.

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Guardian's Bond 30 O.S. § 4-201

- Upon a finding by the court that the anticipated annual income to a ward for one (1) year plus the value of the personal property of the ward is less than Forty Thousand Dollars (\$40,000.00), the court may order that a bond is not necessary. For purposes of this paragraph, personal property shall not include property owned with a joint tenant.

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Authorization to Invest Sale Proceeds 30 O.S. § 4-708

- The district court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the district court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require.

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Investments 30 O.S. § 4-709

A. Except as provided in subsection B of this section, the money belonging to estates of minors and incapacitated or partially incapacitated persons, subject to the jurisdiction of the court, can only be invested in one or more of the following:

- 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 type of security certificate, or evidence of indebtedness which is 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 located in this state, and all types of interest-bearing time deposits and certificates of banks, savings and loan associations, and credit unions located in this state, not to exceed the amount insured by the United States government.

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Investments 30 O.S. § 4-709 (continued):

- B. When an individual guardian is investing the money belonging to estates of minors or incapacitated or partially incapacitated persons, subsection A of this section shall not apply, provided that the guardian has contracted with a person who is a registered investment advisor representative pursuant to the Oklahoma Uniform Securities Act of 2004 and a certified Financial Planner credentialed by the Certified Financial Planner Board of Standards, and provided further that the court authorizes such investments.

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Property Sale:

- Must ask for court permission and do a long probate sale.
- Cannot do the shorter 58 O.S. § 239 sale because the heirs are not known, as the Ward is very much living.
- Wasting or diminishing value assets can be sold under 30 O.S. §4-769
Notwithstanding any other provision contained in the Oklahoma Guardianship and Conservatorship Act, a guardian or limited guardian of the property of a ward may sell, at public auction or private sale, **without obtaining prior court authorization for sale, without filing a return of sale, and without obtaining court confirmation of sale, any personal property of the ward which is perishable, is otherwise likely to depreciate in value, or would cause the estate of the ward to incur loss or expense if kept.** Title to such property shall pass to the purchaser thereof without approval of or confirmation by the court of such sale.

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Important Cases:

Case law is limited in Oklahoma for adult guardianships. Not a lot of cases go up on appeal.

- *In re Guardianship of Holly*, 164 P.3d 137, 2007 OK 53
- *In re Guardianship of Berry*, 335 P.3d 779, 2014 OK 56

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Durable Power of Attorney versus Guardianship:

- Good practice to terminate powers of attorney in a guardianship order so not competing with the power of attorney's decision.
- At one point, guardianship terminated durable power of attorney; right now both coexist

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Trusts

- Not part of a guardianship. Under *Berry* case, have to report in the annual report what money is available from the trust but not account for anything spent from the trust.
- Judge Glassco in Tulsa County wants fee applications even if trust is paying the attorney's bill (this is new).

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Get a Court Order!

- Fees
- Expense reimbursement
- Anything not routine
