

Oklahoma Guardianship and Conservatorship Act

Title 30.
Guardian and Ward

Competency - Definition

- Minimal mental, cognitive, or behavioral trait, ability, or capability
- Required to perform a particular legally recognized act
- Or assume some legally recognized role.
- **Minimal Cognitive Capacity.**

Competency

- Adults 18 years and older are presumed competent.
- Law recognizes decisions or choices made by a competent individual.
- Issue of competency arises in minors and mentally impaired.

Incompetent

- Individual whose actions fail a legal test of “minimal cognitive capacity,” due to
- Incapacity by a medical condition or emergency; and
- Judicially determined.

Legal Incompetency

1. Subject or task specific.
2. Does not translate into and should not be interpreted as a finding of mental illness.
3. Not synonymous with the need for psychiatric treatment.
4. *Incompetency* and *insanity* are two entirely distinct concepts.

Consent To Medical Rx

- Only **competent** persons are legally recognized as **capable** to give informed consent.

Capacity

- Capacity refers to an individual's actual ability to understand, appreciate, and form a relatively rational intention with regard to some act.

Capacity To Contract

- **Competents:** Cognitive capacity to give free & knowing consent to enter into an agreement or contract.
- Minors & the mentally incompetent lack **cognitive capacity.**
- Lack of capacity to contract:
 - Total
 - Partial

Competency & Capacity

- Wills and testamentary capacity
- **Guardianship**
- Competency to testify
- Criminal law:
 - Standards and assessment of competency to stand trial
- **Incompetency:** Judicial evaluation

Competency Issue

- May be raised at any stage of the proceeding.
- Prima facie evidence must be presented.
- Must be resolved before proceeding with trial.

Guardianship

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

(30 O.S. §1-105)

Ward

- Incompetent or incapacitated
- A person over whom a guardian is appointed, and
- A person over whose property a **guardian** or **conservator** is appointed.

Types of Guardians

1. **General Guardian**
2. **Limited Guardian**
3. **Special Guardian**

General Guardian

- 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 Guardian

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 Guardian

- A guardian appointed for an emergency purpose, generally not to exceed thirty (30) days.

(30 O.S. §3-115)

Special Guardian

- A special guardian may be appointed if imminent danger to the health or safety of the ward exists, or if the ward's property will be seriously damaged or dissipated.
- Hearing set within 72 hours.

Guardian Ad Litem

- NOT A Guardian.
- A person appointed by the court to assist in making decisions.

(30 O.S. §1-111)

Guardianship Plan

- The plan for the care and treatment of a ward, or
- For the management of the ward's financial resources,
- Or both the ward & resources.

(30 O.S. §1-111)

Guardianship Proceeding

- A proceeding for the appointment of a guardian, or
- For other orders regarding the condition, care or treatment of or the management of the financial resources of a ward.

(30 O.S. §1-111)

Conservatorship

- If a person is unable, by reason of **physical disability only**, to manage his or her property, and
- **Voluntarily consents** to establish a conservatorship and appointment of a conservator,
- A verified petition may be filed.

Conservator

- A conservator will **NOT** be appointed unless the subject of the proceeding **consents** to the appointment.

(30 O.S. §3-212)

Guardianship Act Covers

- **Minors**
- **Incapacitated Persons**
- **Partially Incapacitated**
- **Property**

Guardian: Court Appointed

- No person, whether a parent or nonparent, has any power as a guardian unless so **appointed by the court.**

Parental Rights

- The Oklahoma Guardianship and Conservatorship Act shall not be construed to limit the parental rights of parents as the **natural guardians of their children.**

Incapacity

An 18-yr-old or older, impaired by:

- Mental illness;
- Mental retardation or developmental disability;
- Physical illness or disability;
- Drug or alcohol dependency;
- Other similar cases; AND

Incapacity (Cont'd)

- whose ability to receive and evaluate information effectively or to make and to communicate responsible decisions is impaired to such an extent that the person:

Incapacity (Cont'd)

1. Lacks the capacity to meet essential requirements for his/her **physical health or safety**, or
2. Unable to manage his/her **financial resources.**

Partial Incapacity

A person whose impairment is only to the extent that without the **assistance** of a **limited guardianship person**, he/she is unable to:

1. Meet the essential requirements for his/her **physical health or safety**, or
2. Manage **all financial resources**.

Partial Incapacity versus Incompetency

- A finding of partial incapacity shall not constitute a finding of legal incompetence.
- A partially incapacitated person shall be legally competent in all areas other than those specified by the court in its orders.

Partially Incapacitated

- A partially incapacitated person shall retain all legal rights and abilities other than those expressly limited or curtailed in the court order or orders.

(30 O.S. §1-111)

Who May Be Appointed As a Guardian?

1. Person(s) nominated by the subject
2. Current guardian or limited guardian
3. Person nominated by will or writing
4. Spouse;
5. Adult child;
6. A parent;
7. A sibling;
8. A “significant other” person
9. Bonded guardians.

Legal Representation

- The person who is the subject of the proceeding may hire an attorney, or
- The court may appoint a lawyer for the person who is the subject of the petition.

(30 O.S. §3-107)

Judge: Specific Limitations

Determine whether the ward retains sufficient capacity to: **vote**, serve as a **juror**, **drive**, be licensed or continue to **practice any profession**, make **personal medical decisions**, appoint an **agent**, enter into **contracts**, grant **conveyances**, or make **gifts** of property. (30 O.S. §3-113)

Responsibilities of A Guardian

- Proposed Plan for the Care and Treatment of a Ward;
- Proposed Plan for the Management of the Financial Resources of the Ward;
- Annual Reports.

Limitations of Powers of Guardian

- Withhold/withdraw life-sustaining procedures without authorization by court or Advance Directive.
- Consent to abortion, psychosurgery, removal of a bodily organ, performance of any experimental biomedical or behavioral procedure, except in emergency to preserve life of ward and with permission of the court.

Limitations of Powers of Guardian (Cont'd)

- Terminate ward's parental rights;
- Place the ward in a facility or institution absent formal commitment proceedings.
- Prohibit the marriage or divorce.

Civil Liability

- Any guardian who willfully violates the duties or powers assigned by the court shall be liable for actual damages.

(30 O.S. §4-901)

Restoration of Capacity

- Any person judicially determined to be incapacitated, totally or partially, the guardian, any relative or friend of the ward may petition the court for restoration to capacity.
- Proceeding must be brought in the court having jurisdiction over the guardianship proceeding by filing a verified petition.

**Supreme Court of Oklahoma.
(April 7) 2009 OK 22**

**Suzanne Russell, not individually, but
as Guardian of Donald R. Russell, an
incapacitated person, Plaintiff,
v.**

**Chase Investment Services Corp., a
Delaware corporation, Defendant.**

FACTS: Russell v. Chase

- April 7, 1999, Donald R. Russell (the ward), who was married, executed a durable power of attorney (DPA) naming Brenda Kennemer (Kennemer), his daughter, as his attorney-in-fact to "become effective upon [his] disability or incapacity."

FACTS: Russell v. Chase

The DPA of April 7, 1999, by Donald R. Russell gave the daughter,

- Broad power over the ward's person and his property; and stated that it
- **“Shall be valid and binding upon me until revoked or terminated.”**

FACTS: Russell v. Chase

- June of 1999, Mr. Russell arranged for the defendant, Chase Investment Services Corporation (Chase), to act as custodian of his IRA and to make \$1,000 monthly distributions to him.
- April of 2000, he suffered a stroke.
- April 23, 2000, both the wife & daughter agreed that he became incapacitated.

FACTS: Russell v. Chase

- February 26, 2001, the District Court issued an order finding the ward to be incapacitated, and named BOTH wife & daughter as co-guardians.
- March 15, 2001, wife & daughter jointly filed an inventory of the ward's property.

FACTS: Russell v. Chase

- Between 2002 and 2005, Chase, at the daughter's request and based on the ward's DPA, made approximately \$99,000.00 in distributions from the ward's IRA.
- Wife confronted the daughter who then committed suicide.

FACTS: Russell v. Chase

- Wife sued Chase.
- The petition alleged that Chase, as a fiduciary, allowed the daughter to withdraw the ward's IRA assets with no proof of her authority to do so.

FACTS: Russell v. Chase

Certified Question:

- Does the appointment of a general guardian withdraw all of the assets from the estate of a ward subject to a durable power of attorney, such that the person holding power of attorney is without authority to control the ward's assets?

FACTS: Russell v. Chase

- 25 Title 58, subsection 1074(A) unambiguously provides for coexistence of guardianship & DPA.
- Wife failed to point to anything, and we find nothing, in the Guardianship Act which would operate to effectively terminate a durable power of attorney upon the appointment of a general guardian.

FACTS: Russell v. Chase

Certified Question Answered:

- We answer that the appointment of a **general guardian of the property** does not automatically withdraw all of a ward's assets such that an attorney-in-fact is without power to act on a ward's behalf pursuant to a durable power of attorney.

Opinion By TAYLOR, V.C.J.

- EDMONDSON, C.J., TAYLOR, V.C.J., and HARGRAVE, KAUGER, WATT, WINCHESTER, COLBERT, and REIF, JJ., concur.
- OPALA, J., concurs in result.

That's All Folks

Thank You