

# Guardianship 101

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**“The typical ward has fewer rights than the typical convicted felon ... It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception ... of the death penalty”**

**Claude Pepper  
U.S. Representative from Florida  
“Abuses in Guardianship”, 1987**

# Purpose of this Class:

- Familiarize the CAAVA Volunteer with the basics of guardianship in Oklahoma, so he or she may:
  1. Help the court avoid unnecessary guardianships;
  2. In cases where guardianship appears to be needed, assist the court to identify an appropriate person to serve as guardian and the appropriate type of guardianship; and
  3. Determine whether or not a current guardian has fulfilled his/her duties.

# Things To Consider Before Pursuing Guardianship:

- Involves the loss of fundamental rights
- Deprives a person of control over his/her own life
- Runs contrary to the principles of self-determination
- Conveys a strong message of “inability”
- Brings court involvement into the lives of the guardian and person

# What is a Guardian?

- A guardian is a person appointed by a court to ensure the essential requirements for the health and safety of the ward are met, to manage the estate or financial resources of the ward, or both.

The guardian may be a family member, friend, or an organization.

# What is Guardianship?

- A legal relationship set up by a judge.
- Can be designed to fit each person's needs and still allow the person to make as many decisions in their life as possible.
- Specific responsibilities and limitations are outlined in the Oklahoma Guardianship and Conservatorship Act (Title 30), and may be further detailed in each individual court order.

# Types of Guardianship

## 1. General Guardianship

A. Established for individuals deemed by the court to be incapacitated. A general guardian may be:

- i. of the person – assures that the essential requirements for the health and safety of the person are met.
- ii. of the property – manages the person's financial resources or estate.
- iii. of the person and property

# Types of Guardianship (con't)

## 1. Limited Guardianship

A. Established for individuals deemed by the court to be partially incapacitated. A limited guardian may be:

- i. of the person – assures that the essential requirements for the health and safety of the person are met
- ii. of the property – manages the person's financial resources or estate
- iii. of the person and property

B. However, their authority is limited to only certain areas within those categories as specified by the court.

# Types of Guardianship (con't)

## 1. Special Guardianship

A. Appointed by the court to act in emergency situations when:

- i. It appears that there is imminent danger that the health or safety of said person will be seriously impaired or the financial resources will be seriously damaged or dissipated unless immediate action is taken, and
- ii. No other person appears to have authority to act in the circumstances, or the guardian previously appointed is unable to or refuses to take action.

B. Limited to 30 days, but can be extended by court order.

# Types of Guardianship (con't)

## 1. Temporary Guardianship

A. Title 43A Adult Protective Services guardianship (refer to APS module for details)

# Types of Guardianship (con't)

**Guardian ad Litem (GAL)** is not one of the types of guardianship according to Oklahoma law.

- ∅ A GAL is an officer of the court and an objective advocate within the context of a legal proceeding.
- ∅ A GAL has no duty to assure the health and safety of a ward or to manage his/her property in the manner that a guardian is responsible.

# Definition: Incapacitated

- A person eighteen years of age or older who is impaired by reason of
  - Ø mental illness, or
  - Ø mental retardation or developmental disability, or
  - Ø physical illness or disability, or
  - Ø drug or alcohol dependency,

AND

# Incapacitated (con't)

- Whose ability to receive and evaluate information effectively or to make and to communicate responsible decisions is impaired to such an extent that he or she lacks the capacity to meet essential requirements for physical health or safety, or is unable to manage his or her financial resources, or both.

# Definition: Ward

- A person for whom a guardian is appointed by the court.

# Guardianship Law

## Oklahoma Guardianship and Conservatorship Act

- Title 30 of Oklahoma Statutes
- 150 sections
- Sections to be familiar with:
  - Ø Intent §1-103
  - Ø Powers §1-119
  - Ø Confidential Information §1-122
  - Ø Duties §3-118
  - Ø Limitations §3-119
  - Ø Liabilities §4-901
  - Ø Removal §4-801

See attachments for copies of these sections

# How to Determine if Guardianship is Necessary

These 3 questions must be answered:

1. What specific decisions must be made in this person's life?
2. Does the person have the ability to make these decisions?
3. Is there any way the decisions can be handled without the appointment of a guardian?

# What specific decisions must be made in this person's life?

Ø Programs/services essential to health and safety

Right now or in the foreseeable future  
(generally within 30 days):

- ü Routine medical
- ü Specialized medical
- ü Financial
- ü Legal contracts
- ü Residential services
- ü Employment/School
- ü Professional  
therapies
- ü Other

Does the person have the ability to make these decisions?

Ø Capacity to give informed consent ...

... is the ability to make and express voluntary decisions, given correct and sufficient information about the nature, purpose, risks, benefits, and alternatives of a proposed service or action.

# Capacity To Give Informed Consent

Capacity to give informed consent is the ability to make and express voluntary decisions, given **correct and sufficient information** about the nature, purpose, risks, benefits, and alternatives of a proposed service or action.

**Correct and Sufficient Information** – The nature, purpose, risks, benefits and alternatives are provided in sufficient quantity and at a level and manner appropriate to the person's understanding

To be sure you are providing “correct and sufficient information” when explaining the content of a consent:

- ✓ Tailor the explanation to the receptive language abilities of the person
- ✓ Use simple, straightforward language
  - ✓ Leave out the very technical aspects
- ✓ If attention span is an issue, give explanations in small doses
  - ✓ Have someone who knows the person’s communication style give the explanation
- ✓ If possible, someone who the person trusts should give it

# Capacity To Give Informed Consent

Capacity to give **informed** consent is the ability to make and express voluntary decisions, given correct and sufficient information about the nature, purpose, risks, benefits, and alternatives of a proposed service or action.

**Informed** – The person understands the nature, purpose, risks, benefits, and alternatives of a given action

# Capacity To Give Informed Consent

Capacity to give informed consent is the ability to make and express **voluntary** decisions, given correct and sufficient information about the nature, purpose, risks, benefits, and alternatives of a proposed service or action.

**Voluntary** – Consent is given of the person's own volition and free will, without perceived or real coercion

# Capacity To Give Informed Consent

Capacity to give informed consent is the ability to make and **express** voluntary decisions, given correct and sufficient information about the nature, purpose, risks, benefits, and alternatives of a proposed service or action.

**Express** – Person is able to communicate three things: An understanding of the information provided, what the decision is, and the reasons for the decision.

# Capacity To Give Informed Consent

- All 4 criteria of capacity must be met in order to give informed consent.
- ∅ Standard for capacity differs for each decision. Generally, the riskier or more intrusive the decision, the higher the standard for capacity to consent to it.
- ∅ Has capacity = No guardian
- ∅ Does not have capacity = May or may not need guardian, but only as last resort – must consider other alternatives first.
- ∅ Ability to give consent vs. Making good/bad decisions

Is there any way the decisions can be handled without the appointment of a guardian?

Ø Less Restrictive Alternatives, such as:

- ü Assistance from family/friends
- ü Representative payee
- ü Limited bank accounts
- ü Durable Power of Attorney
- ü Advance Directive
- ü Trust fund
- ü As many others as you can think of

# Determining the Need for Guardianship

1. What specific decisions must be made in this person's life? ~ Programs/services essential to health & safety
2. Does the person have the ability to make these decisions? ~ Capacity to give informed consent
3. Is there any way the decisions can be handled without the appointment of a guardian? ~ Less restrictive alternatives

If a person has programs and services essential to health and safety, does not have the ability to give informed consent to them, and there are no less restrictive alternatives to handle these consents, **guardianship is warranted.**

# Legal Process

Once it has been determined that a person needs a guardian, and an appropriate person has been identified to serve:

1. Person wanting guardianship chooses an attorney.
2. Attorney prepares a **Petition** for appointment of a guardian and files it with the district court in the county in which the potential ward resides (or the potential guardian resides).
3. A hearing is scheduled.
4. Attorney notifies all those who are entitled by law to be notified of the hearing – **Notice of Hearing**.
5. At the hearing, testimony is presented about the reasons why guardianship is needed, level of guardianship needed, and qualification of proposed guardian.

# Legal Process (con't)

1. If there is an objection to the guardianship or the person who seeks to serve, the judge will likely appoint an attorney to represent the person and will reset the hearing.
2. If there is no objection, the judge will issue a dispositional order, aka the **Guardianship Order**, and **Letters of Guardianship** appointing a guardian.
3. A guardian has ten days from that date to file a **Plan for the Care and Treatment of the Ward** (often presented and approved at the hearing).
4. The order will include a date for filing of the annual reports, which is usually the anniversary date one year from appointment of the guardian.

# Legal Process (con't)

1. On the anniversary date, guardian submits **Report on the Guardianship of the Person** (and **Property**, if relevant). Copies must be given to the ward and any other individuals were required to receive notice of the original hearing.
2. Judge will review the reports and approve them, unless an objection is filed (objection must be filed within 15 days of filing of the report).
3. If an objection is filed the judge will set a hearing.
4. Once the report is approved, the judge will set a new annual report due date for the following year.

# Role & Responsibilities of the Guardian

Title 30 §1-119 & §3-118

## Primary role is decision-making

Responsibilities are:

- Ø Follow the orders of the court and the law
- Ø Protect the remaining rights of the ward
- Ø Develop a close relationship with the ward
- Ø Know the capabilities, physical and mental health, and finances of the ward
- Ø Promote, encourage, and respect the ward's right to be involved in all decisions affecting her life
- Ø Honor the ward's choices when making decisions on her behalf
- Ø Make informed decisions when giving consent
- Ø File a petition to restore the ward's capacity when guardian believes incapacity has ended

# Limitations of the Guardian

## Title 30 §3-119

Aside from those in the law:

Ø Only have authority over the areas of their ward's life that are specified in the guardianship order.

Ø Law does not give guardians carte blanche to make all decisions that affect a person, such as:

- ü What they eat or wear

- ü How they spend their leisure time

- ü With whom they have relationships

# Liabilities of the Guardian

## Title 30 §4-901

- Ø A guardian is not held liable for decisions made in good faith and within the limits set by the court, as long as the guardian has acted responsibly and without negligence.
- Ø A guardian cannot be held liable for the actions of his/her ward, as long as those actions were not a product of the guardian's neglect or misuse of authority.

# Rights of the Ward

A ward retains all legal rights, civil rights, and basic human rights, except those limited by the guardianship order.

Depending on her capacity in specific areas, the ward still has a right to:

- ü Make or change a will or trust
- ü Get married and divorced
- ü Vote (only under a limited guardianship)
- ü Practice the religion of her choice

# Rights of the Ward (con't)

- üReceive personal mail, unopened
- üPrivacy
- üBe free from abuse, neglect and exploitation
- üBe represented by an attorney
- üExpress concerns, ask questions and make suggestions
- üControl personal spending money (if guardian has authority over property and ward is given an allowance)
- üAsk court to end the guardianship or change the guardian

In general, ward is entitled to respect, understanding and the right to have her voice heard.

# Wrap-up

- How will the CAAVA Volunteer:
  1. Help the court avoid unnecessary guardianships?
  2. In cases where guardianship appears to be needed, assist the court to identify an appropriate person to serve as guardian and the appropriate type of guardianship?
  3. Determine whether or not a current guardian has fulfilled his/her duties?

# Attachments

## üA Model Code of Ethics for Guardians

Authored by Michael D. Casasanto, Mitchell Simon, and Judith Roman

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## üARC/AAIDD Guardianship Position Statement

## üAlternatives to Guardianship

## üTitle 30 sections

## üGood Samaritan Act

## üVolunteer Act

## üAccessing guardianship statutes

## üExamples of types of guardianships

## üLegal forms (Petition, Order, Letters, Plan for Care and Treatment of the Ward, Annual Reports)

## üActivity – Types of Guardianship