Keeping My Brother's Keeper: An Introduction to Article III of the Oklahoma Guardianship Act

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OF THE OKLAHOMA GUARDIANSHIP ACT

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Guardianship is one of the traditional legal devices to provide a substitute
decision-maker when an individual is no longer capable of making personal
or financial decisions.1 With the graying of America, guardianships are being
imposed with greater frequency than ever before. Estimates on the number
of elderly under guardianships throughout the country vary from 300,0002
to over 500,000.3 In Oklahoma, one source estimated that 1600 elderly people
were subject to guardianships in 1987.4 This number seems low in light of
one public official’s estimate that 1977 new guardianships and conservator-
ships will be filed every year after 1988.5 Regardless of the actual number
of existing guardianships, statistics indicate that the number of elderly
Oklahomans will increase. Unfortunately many of them will suffer some reduc-
tion in their decision-making abilities and need a substitute decision-maker.6

The increasing number of elderly persons potentially subject to guardian-
ship proceedings has caused a nation-wide reevaluation of existing guardian-
ship laws.7 This re-evaluation resulted in a major restructuring and expansion

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(Sept. 1987) [hereinafter “AP Special Report”].
3. Abuses in Guardianship of the Elderly and Infirm: A National Disgrace: Questions and
Answers, U.S. House Select Committee on Aging, Subcommittee on Health and Long-Term
Care (Sept. 25, 1987).
4. Hundreds of Oklahomans ‘Disappear’ Each Year, Norman Transcript, Sept. 20, 1987,
at 3, col. 1.
5. Memorandum from Howard W. Conyers, Director of the Administrative Office of the
Courts, to Claudia Durrill, Legislative Assistant to the Joint Conference Committee on House
Bill 1078 (June 8, 1988) (projecting costs of implementing a court-appointed attorney system
for guardianship proceedings).
6. Protective Services for the Elderly: A Working Paper, Special Committee on Aging, United
States Senate (Comm. Print July 1977).
7. 1987 Hearings before the U.S. House Select Committee on Aging, Subcommittee on Health
and Long-Term Care; 1986 Investigative Study Conducted by the Associated Press resulting in
the AP Special Report; 1988 National Guardianship Symposium (known as the Wingspread Con-
ference) conducted by the ABA Commission on Legal Problems of the Elderly and the ABA
Commission on the Mentally Disabled.
of Oklahoma statutes governing guardianships. The purpose of this article is to examine and evaluate the new statutory scheme exclusively relating to adult guardianships.

Oklahoma Law Regarding Guardianship Prior to Passage of the Oklahoma Guardianship Act

Prior to the passage of the Oklahoma Guardianship Act (the “Act”)

8, the statutes governing the process for obtaining a guardianship over an adult were primarily contained in titles 30 and 58 of the Oklahoma Statutes. Title 30, captioned “Guardian and Ward”, contained only the most cursory descriptions of the responsibilities of a guardian. The Oklahoma Probate Code contained in title 58 set forth the procedural requirements for the appointment of a guardian or conservator.

Under prior law, a relative or a friend initiated the guardianship by petition. Prospective wards could also initiate conservatorships. If not self-initiated, the alleged incompetent was entitled to receive notice of the proceedings by personal service at least five days before the hearing of the petition. While the statutes specified that the prospective ward was to be present at the hearing, this requirement was often waived. Nothing in the statute required that the prospective ward be represented by counsel.

At the hearing on the petition, evidence concerning the ability of the ward to manage the ward’s personal and financial affairs was to be presented to

10. 58 OKLA. STAT. §§ 761-898.3 (1981) (amended by scattered sections of 30 OKLA. STAT.). Scattered provisions in other titles referred to the creation or powers of guardians, but most were merely supplemental to the provisions in titles 30 and 58. See, e.g., 72 OKLA. STAT. §§ 126.1-126.23 (1981).
14. Id.
15. The AP Special Report found that 49% of those in need of a guardianship were not present at the hearing of the petition for guardian. Scholarly literature in the area indicates a much higher percentage of absences. A 1973-74 study by the National Senior Citizens Law Center revealed that in the 1010 cases studied in the Los Angeles, California area, 84.2% of the hearings were attended by only the judge, the petitioner, and the petitioner’s attorney. (This study may have been the “recent study” which the House Subcommittee referred to in its preliminary findings. See supra note 7.)

In Oklahoma County, an informal survey of all adult guardianships filed from January 1, 1987 through July 31, 1987 revealed that of the 46 orders appointing guardians which indicated whether the alleged incompetent attended the competency hearing, only 8 of the 46 alleged incompetents were present. An additional 33 guardianships were initiated during the same time period, but the records of the hearings on the petitions are silent on the issue of whether the alleged incompetent was present.
the court. The evidence was often merely a doctor's letter stating that the ward was unable to provide self-care because of some medical condition. The court then made its determination and entered its order accordingly. If the court determined that the prospective ward was incompetent, the ward lost many important rights including the right to enter into contracts, the right to vote, and the right to engage in certain trades and professions.

Before the Act, courts often appointed guardians with little consideration of their qualifications or potential conflicts of interest. After the guardian gave the required oath and posted any required bond, the letters of guardianship were issued. The guardian then assumed the management of the ward's assets and/or person as the court order permitted. No requirement to report on the status of the person of the ward existed. The only requirement was to inventory and annually account for the ward's assets. The guardianship remained in place until the ward was restored to capacity or the court determined that the guardianship was no longer necessary.

Conceptual Changes in the Law's Approach to Adult Guardianships

To understand the changes that the Act made in prior guardianship law, it is helpful to focus on the statement of legislative purpose:

A. It is the purpose of the Oklahoma Guardianship Act to promote the general welfare of all citizens by establishing a system of general and limited guardianships for minors and for incapacitated or partially incapacitated persons which provides for the protection of their rights and the management of their financial resources.

B. It is the purpose of the system of general and limited guardianships for incapacitated and partially incapacitated persons established by this act to provide for the participation of such persons, as fully as possible, in the decisions which affect them. It is the intent of the Oklahoma State Legislature:

1. that the court shall exercise the authority conferred by the Oklahoma Guardianship Act so as to encourage the development of maximum self-reliance and independence of the incapacitated or partially incapacitated person and make appointive and other

17. See AP Special Report at 2, 6.
19. See State May Change Way Guardianships Administered, Norman Transcript, Sept. 23, 1987 at 20, col. 1 (recounting case where ex-husband was appointed guardian of former wife's estate and discontinued court-ordered support payments).
orders only to the extent necessitated by the mental and adaptive limitations or other condition of the incapacitated or partially incapacitated person warranting the procedure;

2. that in performing their duties and exercising their powers, guardians and limited guardians of incapacitated or partially incapacitated persons shall:
   a. assure, to the extent reasonably possible, that the rights of the wards for whom they are appointed are protected;
   b. encourage, to the extent reasonably possible, incapacitated or partially incapacitated persons to participate to the maximum extent of their abilities in all decisions which affect them and to act on their own behalf upon all matters in which they are able to do so within the limitations imposed by the court; and
   c. as appropriate, assist their wards to develop or regain to the maximum extent possible their capacity to meet the essential requirements for their health or safety, or to manage their financial resources or both.23

From this statement, the theme emerges of limiting court intervention to the minimum extent necessary to assist the individual subject to guardianship. An appreciation of this theme is critical to an understanding of the new system of general or limited guardianships. Limiting court intervention is the foundational concept of limited guardianships and underlies many of the new procedural safeguards contained in the provisions affecting general guardianships.

Definition of Incapacity

The Act’s definition of “incapacitated person” is a modification of the definition given in the Uniform Probate Code and similar to that contained in the ABA Model Guardianship & Conservatorship Act (the “ABA Model Act”).24 The new definition represents a substantial departure from the previous definition of incompetent person, which was:

[A] person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable or incapable, unassisted, of properly taking care of himself or managing his property, and [who] by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.25

The new definition attempts to define incapacity in terms of the process of decision-making rather than the decision which is made. Title 30, section

1-111(12)(a) requires that a person who is "incapacitated" be impaired by reason of mental illness, mental retardation, physical illness or disability, drug or alcohol dependency, or other similar causes. Section 1-111(12)(b) requires a further showing that the impairment adversely affects the potential ward's "ability to receive and evaluate information effectively or to make and to communicate responsible decisions" to such an extent that that person "lacks the ability to meet essential requirements of his physical health or safety or is unable to manage his financial resources."

The pertinent part of the commentary on the comparable section in the ABA Model Act points out the significance of defining incapacity based on the ability to make decisions instead of on the decisions which are made:

This act adopts a functional definition of disability. Rather than emphasizing the possible conditions which may cause a partial or total disability, it focuses on the extent to which an impairment of an individual's ability to understand and appreciate the facts necessary to reach an informed decision and to convey that decision impedes that individual from taking those actions necessary to protect his or her physical health or safety and/or manage his or her financial resources . . . This approach recognizes that the fact that an individual has reached an advanced age, has a developmental disability, is suffering from a mental or debilitating illness, or has injuries of the brain or other portions of the central nervous system is of little relevance to determining whether the legal capacity to act in his or her own behalf should be transferred to another person or a corporate entity. In addition, the definition limits the degree to which value judgments may enter into intervention proceedings. 'Since the purpose of the incapacity standard is to distinguish persons whose decisions . . . must be accepted as final from those whose choices may be validly overridden . . . the standard should focus on the ability to engage in a decision making process rather than on the resulting decision.'

Individuals with disabilities should have no less a right to be wrong than those without disabilities. Hence, there is no requirement that decisions regarding person or property be 'responsible' ones. 26

The Oklahoma legislature's definition of incapacity does not rely exclusively on the functional approach as does the definition contained in the ABA Model Act. Instead, the Oklahoma legislature's definition requires that the individual's decisions be "responsible," something which the drafters of the ABA Model Act refuse to do. Additionally, the Oklahoma legislature's definition includes a requirement that the cause of the impairment be specifically

26. Sales at 535-36 (footnotes omitted) (quoting Note, Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1216 (1974)).
determined to be one of five mental or physical conditions. Contrary to what the drafters of the ABA Model Act suggest by their comments, the Oklahoma statute implicitly affirms that the developmental disability, or debilitating illness is relevant to the determination of legal capacity.

The final paragraph in section 1-111(12) directs that:

Whenever . . . the term ‘incompetent person’ appears and refers to a person who has been found by a district court to be an incompetent person because of an impairment or condition described in this paragraph it shall have the same meaning as ‘incapacitated person’ but shall not include a person who is a partially incapacitated person.

The statutes give no guidance to the effect of a prior determination of incompetence based upon “advanced age” or some other ground which may not be recognized under section 1-111(12)(a). Thus, it is unclear whether the guardianship of that person would still be governed by the prior law relating to incompetency or whether the ward would be ipso facto restored to competency. This issue will probably be resolved by the trial courts when conducting the statutorily required review of all existing guardianships within two years from the effective date of the Act.27

Definition of Partial Incapacity

“Partial incapacity” is the state of someone who is impaired only to the extent that:

[W]ithout the assistance of a limited guardian said person is unable to:

a. meet the essential requirements for his physical health or safety, or
b. manage all of his financial resources or to engage in all of the activities necessary for the effective management of his financial resources.28

The idea of an individual’s needing court intervention only for certain activities or decisions is relatively new to Oklahoma. While the conservator statutes29 may have foreshadowed such a change, to a greater extent than ever the courts will have to evaluate the level of decision-making that should be taken from a prospective ward.

The most important conceptual change embodied by the idea of partial incapacity is contained in the final paragraph of section 1-111(21):

A finding that an individual is a partially incapacitated person shall not constitute a finding of legal incompetence. A partially incapacitated person shall be legally competent in all areas other than

the area or areas specified by the court in its dispositional or subsequent orders. Such person shall retain all legal rights and abilities other than those expressly limited or curtailed in said orders.\textsuperscript{30}

Anticipated difficulties in defining the nature and extent of the rights retained by the partially incapacitated person led to the Act's inclusion of a virtual laundry list of certain rights which the court is to determine whether the ward retains or loses.\textsuperscript{31}

\textit{Petition for Guardianship}

The sections specifically dealing with adult guardianship proceedings are contained in article III of the Act. Title 30, section 3-101 provides that any person interested in the welfare of an alleged incapacitated adult may initiate a guardianship by petition.\textsuperscript{32} The petition is required to be verified.\textsuperscript{33} It must include the names and addresses of persons entitled to notice pursuant to section 3-110 and of the attorney of the prospective ward, if any.\textsuperscript{34} Additionally, the petitioner must include the nature and the degree of the alleged incapacity,\textsuperscript{35} the relief requested, and the facts and reasons supporting the need for such relief, including where applicable a description of any acts or behavior of the prospective ward which has given rise to the allegations.\textsuperscript{36}

While not specified in the Act, the petition should also contain an allegation of facts sufficient to establish the jurisdiction of the court.\textsuperscript{37} Furthermore, the petition should classify the incapacity of the prospective ward as being due to mental illness, mental retardation, developmental disability, physical illness or disability, drug or alcohol dependency, or other similar cause. In addition, there should be an allegation that the impairment results in the prospective ward's inability to receive and evaluate information effectively or to make and communicate responsible decisions, thereby preventing the prospective ward from being able to meet essential physical health or safety requirements or to manage financial resources.\textsuperscript{38}

Petitions for a determination of partial incapacity differ slightly from petitions for complete incapacity. For partial incapacity, the petition must contain most of the elements listed above. However, it need not allege that the impairment results in incapacity to meet essential physical health and safety requirements and to manage financial resources.\textsuperscript{39}

\textsuperscript{31} 30 Okla. Stat. § 1-113(B) (Supp. 1988).
\textsuperscript{32} Under 30 Okla. Stat. §1-111(23) (Supp. 1988), a person is defined as "an individual," and thus an organization, as defined by 30 Okla. Stat. § 1-111(20), cannot be a petitioner.
\textsuperscript{33} 30 Okla. Stat. § 3-101(B) (Supp. 1988).
\textsuperscript{34} 30 Okla. Stat. § 3-109 (Supp. 1988).
\textsuperscript{37} 30 Okla. Stat. § 1-113 (Supp. 1988).
\textsuperscript{39} See 30 Okla. Stat. § 1-111(21) (Supp. 1988), for the definition of partially "incapacitated person."
Another new requirement for the petition is that it include a description of acts or behaviors of the prospective ward which have given rise to the petition.40 This language appears to require a description of acts or behaviors of the prospective ward at least in those instances where counsel is going to rely on an impairment by reason of "such other similar cause."41 A description of the acts or behaviors of the prospective ward would also appear to be important in those cases where the petitioner is seeking only a determination of partial incapacity.

The legislature included the requirement of describing acts of the prospective ward in order to ensure that those individuals who wish to contest the need for a guardian would understand the basis for the petition, and therefore have adequate notice in order to begin preparing objections.42 However, because such allegations would be immune from any slander suit, unscrupulous individuals could use this requirement in order to unnecessarily embarrass or harass the prospective ward.43 Section 4-901(B) of the Act provides some disincentive for this sort of conduct. It recognizes a cause of action against any person who willfully or maliciously files a false petition or application without a reasonable basis in fact. Moreover, section 4-901(B) allows the plaintiff in such an action to recover both actual and exemplary damages. This statutory recognition of a common law cause of action is long overdue.44

The final provision of 3-101(C) allows a petitioner to attach a copy of the results of any physical, psychological, or other professional evaluation on the condition of the prospective ward which was completed within sixty days prior to the time of filing the petition. This information may not be available to the petitioner, especially if the petitioner is not an immediate family member. However, if such information is available, its inclusion would appear to greatly enhance the prospects of obtaining a guardianship should an objection to the petition be filed.

Because the court must also determine who should serve as guardian if the prospective ward is incapacitated, the petition should contain a nomination of guardian and an allegation of the relationship of the nominated guardian to the ward. This identification will assist the court in the application of section 3-104 which sets forth the priority of persons entitled to be guardian.

Another allegation helpful to the court in determining whether the nominated guardian is qualified to be appointed as guardian is a statement that the peti-

42. See Protective Services for the Elderly: A Working Paper, Special Committee on Aging, United States Senate at 39 (Comm. Print July 1977) ("The first step toward reform of guardianship proceedings must, therefore, enhance the ability of the alleged incompetent to defend himself adequately.").
tioner "is not a minor, incapacitated or partially incapacitated person, convicted felon, bankrupt, nor insolvent or under any financial obligation to the ward; or subject to a conflict of interest which would preclude or be substantially detrimental to the ward." This allegation establishes that the nominee is not disqualified on any statutory grounds.\textsuperscript{45}

\textit{Notice of the Proceeding}

Upon filing the petition, counsel for the petitioner should obtain a court order setting the hearing at least ten but no more than thirty days after the filing and directing that notice be given.\textsuperscript{46} The notice requirements are set forth in section 3-110 of the Act. The notice requirements are significantly expanded beyond those under prior law.

Notice must be given to the prospective ward, the spouse and \textit{either} the adult children, parents, or siblings of the prospective ward, in that order of preference.\textsuperscript{47} To the extent that there are no living children, parents, or siblings, then notice must be given to the prospective ward's nearest adult relatives whose existence and addresses can be ascertained by the petitioner. Additionally, notice must be given to any person or organization that has been nominated to serve as guardian or limited guardian if that person or organization is not the petitioner. Notice must also be given to the person or facility having care or custody of the prospective ward. Oklahoma's Department of Human Services or Department of Mental Health must be given notice if the prospective ward is receiving services or benefits from either department.\textsuperscript{48} The Oklahoma Veterans Administration must also be notified of the proceedings if required under title 72, section 126.8 of the Oklahoma Statutes.\textsuperscript{49}

The form of the notice is statutory and contained within section 3-110(D). Some lawyers have referred to this notice as the "Miranda warning" of guardianships because the notice is much more extensive than notice required under previous law. The new notice attempts to provide adequate information concerning the nature of the proceedings to anyone receiving such notice.\textsuperscript{50}

The petitioner must attach a copy of the petition to the notice. Interestingly, the requirement that a petition be attached to the notice differs from the


\textsuperscript{46} 30 Okla. Stat. § 3-109 (Supp. 1988).

\textsuperscript{47} 30 Okla. Stat. § 3-110 (Supp. 1988).

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} (1981 & Supp. 1988). Section 126.8 requires notice of the petition only if the action is brought pursuant to the Uniform Veterans Guardianship Act. However, 72 Okla. Stat. § 126.23 (1981), requires any guardian receiving Veterans benefits for a ward to post bond and to give the Veterans Administration notice of any accountings. For a critique of the Uniform Veterans Guardianship Act, see Fratcher, \textit{supra} note 1 at 987.

requirements set forth in section 2004(D) of the Oklahoma Pleading Code. The Pleading Code provides that failure to serve a copy of the petition with the summons in a civil matter does not result in deprivation of jurisdiction of the court to hear the matter. The Act does not include such language. In the absence of language similar to that in the Pleading Code, an argument can be made that failure to attach the petition would deprive the court of jurisdiction in a guardianship proceeding. Thus, careful attention should be given to the mailing of the notices.

Similar to prior law, notice must be personally served on the subject of the proceeding. Unlike petitions in civil matters, the attorney for the petitioner can make the personal service on the prospective ward. Alternatively, a sheriff or licensed process server may also serve the notice.

An ambiguity arises under section 3-110(C)(1) in that it states "[n]otice shall be served personally on the individual who is the subject of the proceeding within ten days before the time set for the hearing." The legislature intended that the notice be given at least ten days prior to the hearing as evidenced by the expansion of the time period for personal notice from five days as previously required to "within ten days." The current statutory language is subject to the interpretation that any period of notice of ten days or less prior to the hearing would be adequate. However, effective November 1, 1989, this provision will be amended to read "[n]otice shall be served personally on the individual who is the subject of the proceeding at least ten days before the time set for hearing."

Section 3-110(C)(2) requires that notice be mailed at least ten days before the time set for the hearing. No language exists which limits the persons who must receive notice by mail; therefore, notice by mail to the prospective ward may also be required. Failure to mail such notice to the prospective ward probably would not deprive the court of jurisdiction if personal service were made in compliance with section 3-110(C)(1). However, mailing notice to the prospective ward at least ten days prior to the hearing and serving the prospective ward personally ten days prior to the hearing avoids both the ambiguities concerning the duration of the notice period and the mailing requirement.

Rights of Prospective Ward in Relationship to Hearing

Section 3-106 sets forth the rights of the prospective ward at all hearings held within the guardianship proceeding. These rights include the right to

54. Id. (emphasis added).
55. 58 Okla. Stat. § 851 (1981). Even with ten days notice, this is less than the fourteen days suggested in the ABA Recommended Practices at 3.
notice, to be present at the hearing, to compel the attendance of witnesses, to present evidence, to cross-examine witnesses, to appeal adverse orders and judgments, to be represented by court-appointed counsel upon request, and to request that the proceedings be closed to the public. The extensive nature of these rights may seem to suggest that the legislature intended the rights to be applicable only to the hearing on the petition, but the statute specifically states that the rights apply to "all hearings conducted pursuant to the Oklahoma Guardianship Act."  

Section 3-106(B) provides that the right to notice and the right to be present at hearings are requirements. This language appears to be directed at the issue of whether the court can acquire jurisdiction absent proper notice being provided and the ward's being present. The requirement of notice cannot be waived. This subsection parallels prior law.  

The requirement that the prospective ward be present at hearings may be waived only upon a showing of good cause. This language does not differ greatly from prior law concerning the prospective ward's presence at the hearing of the petition for guardianship. The Act, however, adds the requirement of certain findings by the court prior to waiver to ensure that the waiver not be given without serious consideration. Section 3-106(B) requires the court to make inquiries to determine whether there is sufficient cause to waive the right to be present and whenever that requirement is waived, "the court shall make a finding on the record as to the reason the subject of the proceeding is not present at the proceeding and the alternatives which were considered to enable subject of the proceeding to be present."

In drafting the order disposing of the petition for guardianship, courts must now make findings concerning the presence of the prospective ward at the hearing. If the ward is present, then a simple allegation that the ward is present and represented by counsel, if so represented, will be adequate. However, if the ward is not present, it does not appear from the language of the statute a simple allegation that the presence of the ward was waived by the court will be sufficient. The statute seems to require that the order also contain statements regarding which alternatives were considered to enable the prospective ward to be present and that the waiver was given only after due consideration of those alternatives.

If the prospective ward is unable to be present because of a lack of transportation, the court may consider holding the hearings at the location where the ward is present (e.g., a hospital, nursing home, or other facility). The court

58. Id.
60. 30 Okla. Stat. § 3-106(B) (Supp. 1988).
61. Cf. In re Guardianship of Deere, 708 P.2d 1123 (Okla. 1985) (reversal of trial court due to court's refusal to continue hearing on petition in order for ward to overcome difficulties in arranging transportation from hospital to courthouse).
is empowered to hold guardianship hearings wherever it deems appropriate, and therefore, holding the hearing at a location other than at the courthouse may become an important alternative where the physical limitations of the prospective ward will not allow the prospective ward to be present at the courthouse. Alternatively, the court may order the petitioner to insure that adequate transportation is provided for the prospective ward.

Section 3-106(C) allows any person to apply for permission to participate in a proceeding or to be admitted to a proceeding which has been closed to the public. The first part of the subsection permits the court to remedy any standing questions which might arise when a nonrelated party seeks to intervene in a guardianship proceeding. Standing can be an issue when a trustee of a trust for which the prospective ward is a beneficiary seeks to intervene, and it may also arise when an unrelated individual who is concerned about the outcome seeks to intervene.

The court may allow participation upon a determination that it is in the best interest of the subject of the proceeding. Additionally, the court may grant such permission to be admitted to any closed proceeding if that person has a legitimate interest in the proceeding. However, before granting either the right to participate or the right to attend closed hearings, the court may impose such conditions that it deems necessary. This "participation determination" appears to preempt the use of intervention statutes contained in section 2024 of the Oklahoma Pleading Code, since the Pleading Code is applicable only to the extent that the particular procedural issue is not addressed within the Act or the Probate Code.

Section 3-106(D) requires that the court be advised if the prospective ward is under the influence of any type of psychotropic medication. The court must be advised of the purpose of the medication and the effect it will have on the individual's actions, demeanor, or participation. The attorney should not attempt to determine whether a medication is psychotropic. Instead, the attorney should advise the prospective ward's physician of the requirement to advise the court concerning this matter and request the doctor to confirm the use or nonuse of such medication.

Section 3-106(E) creates a privilege for any statements made by an individual alleged or found to be partially or fully incapacitated during the course of the evaluations, examinations, and treatments pursuant to the Act. Note that the privilege is not a general privilege for any statements made within the guardianship proceedings. It extends only to those statements made dur-

62. 30 OKLA. STAT. § 1-116(A) (Supp. 1988).
63. 12 OKLA. STAT. (Supp. 1988).
64. 30 OKLA. STAT. § 1-116(C) (Supp. 1988).
65. "Psychotropic" medication is defined as medication "having an effect on the psyche or mind." J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER 367 (1988).
66. Cf. the physician and psychotherapist-patient privilege (12 OKLA. STAT. § 2503 (Supp. 1988)), and privilege pertaining to statements made by person allegedly requiring treatment in involuntary commitment proceedings (43A OKLA. STAT. § 5-401(K) (Supp. 1988).
ing the course of evaluations, examinations, or treatment. Once statements made during the course of evaluation, examination, or treatment have been used in a guardianship proceeding, it is unclear whether those statements will be privileged in other settings. Privilege may not be an issue in light of the confidentiality requirements of section 1-122 of the Act.

Representation of a Prospective Ward

Perhaps the most controversial section of the entire Act provides that any prospective ward will be provided counsel for the hearing of the petition if the prospective ward so desires.\(^{67}\) To the extent that the prospective ward does not employ counsel, the court is required to explain to the prospective ward the purpose and possible consequences of the hearing on the petition for guardianship, and that the prospective ward has a right to be represented.\(^{68}\) The court must then inquire of the prospective ward whether the prospective ward desires an attorney. If the ward requests an attorney, the court must appoint one.\(^{69}\) If the ward’s estate is sufficient to pay for the representation, it will be paid by such estate.\(^{70}\) However, if the prospective ward cannot afford counsel, the public defender’s office or court-appointed counsel compensated from the court fund will represent the prospective ward.\(^{71}\) Nevertheless, if the court determines that the prospective ward is capable of making a decision and the prospective ward does not request an attorney after an affirmative inquiry on the part of the court, the court need not appoint an attorney.\(^{72}\)

If the prospective ward does not request the appointment of an attorney and the court is uncertain as to whether the prospective ward is capable of making an informed decision requiring the appointment of an attorney, the court must then decide whether it is in the best interest of the prospective ward to be represented.\(^{73}\) To the extent that a guardianship results in a substantial deprivation of an individual’s rights, it has been argued that representation by counsel is always in the best interest of the prospective ward.\(^{74}\) Addi-

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68. 30 Okla. Stat. § 3-107(B)(1) (Supp. 1988). The requirements of section 3-107 are limited to the hearing on the petition only, unlike 30 Okla. Stat. § 3-106 (Supp. 1988), which applies to all hearings.
69. 30 Okla. Stat. § 3-107(B)(2) (Supp. 1988). This requirement is absolute, and thus applies even when the court is persuaded by the conduct of the prospective ward that the guardianship is necessary.
74. See Ned v. Robinson, 181 Okla. 507, 74 P.2d 1156, 1160 (1938). ("We do think, however, that in the matter of appointing a guardian ad litem of a person accused of incompetency, as above stated, it would have been far wiser for the Legislature to provide for some form of protection, which has been done in several states, but in the absence of such provision we are without power to create it, under color of the doctrine of implication, for there is no statutory provision for wording upon which to base such implication.").
tionally, the ABA has recommended that counsel be provided to prospective wards in all guardianship proceedings.\footnote{75} Certain advocates, relying on the rationale of the cases holding that counsel for juvenile proceedings is constitutionally required in certain instances, believe that counsel for the prospective ward is constitutionally mandated in all cases.\footnote{76} Opponents of such a requirement argue that guardianship petitions are primarily filed by close family members and only after it is clear that the prospective ward is no longer capable of making informed decisions. Opponents argue further that proper adjudication of the vast majority of cases would not be facilitated by the ward’s having separate counsel. They argue that representation might result in an unnecessary depletion of the ward’s estate because of counsel’s attempt to vigorously defend the ward.\footnote{77}

If the prospective ward is not present at the hearing on the petition, the court must make sufficient inquiry to determine affirmatively whether it would be in the best interest of the prospective ward to appoint counsel.\footnote{78} Some critics of the Act believe that this requirement of affirmative inquiry will simply mean that counsel for the petitioner must incorporate specific findings that the court inquired and determined that it was not in the best interest of the ward that counsel be appointed.\footnote{79} While there may be some danger of this inquiry being strictly pro forma, with the only evidentiary input being provided by the petitioner, section 3-107(D) requires the court to explain on the record the reasons for the decision not to appoint counsel. Hopefully, this requirement of an explanation will minimize the danger.

\textit{Duration of Representation}

In the event that an attorney is appointed for the prospective ward at the hearing of the petition, the court is required to delay the hearing of that petition for a minimum of five days in order to allow counsel adequate time to prepare.\footnote{80} This short delay was intended to benefit the prospective ward by insuring that the matter of capacity is resolved as quickly as possible. However, such a short delay requires the court to expedite all discovery in order to allow the prospective ward time to prepare a defense. Unless discovery time is reduced, what was intended as a civil equivalent to the guarantee of a “speedy trial” results in a return to “trial by ambush” in guardianship matters. Alternatively, where a temporary guardian has been appointed pending a hearing on the petition and the court grants an extended delay for trial preparation, the “temporary” guardianship can be extended well beyond the short time contemplated by the statutes.\footnote{81}

78. 30 \textit{Okla. Stat.} § 3-107(C) (Supp. 1988).
Appointed counsel must promptly contact the prospective ward and "shall represent the client only until the determination of incapacity or partial incapacity has been made, and the appointment of a guardian has been entered by the court, and any appeals therefrom."\(^{82}\) To the extent that counsel is needed in subsequent hearings related to the guardianship, the court is permitted to appoint counsel for those proceedings.\(^{83}\)

**Independence of Prospective Ward's Counsel**

Section 3-107(G) relates to the concern that counsel retained by or on behalf of the prospective ward is often not independent of the petitioner. The court must inquire as to whether counsel is independent and whether any conflict of interest exists which would preclude proper representation. A finding that counsel is not sufficiently independent empowers the court to appoint other counsel for purposes of representing the prospective ward.\(^{84}\)

This power to replace attorneys creates grave concern. Attorneys who have represented two and three generations of the family of the prospective ward may find themselves disqualified from representing the prospective ward in guardianship proceedings simply because they have represented the petitioner in other matters. To the extent that the prospective ward is a former or present client, it is also possible that the "family lawyer" is disqualified from representing the petitioner since a guardianship proceeding may be considered "adverse" to the client's interest.\(^{85}\) Furthermore, any waiver would be suspect in light of the client's alleged incapacity. Thus, potentially, the lawyer who has the best understanding of the family relationships involved may be precluded from representing anyone. In highly contested cases, it will be interesting to see how the courts interpret section 3-107(G) in conjunction with the Oklahoma Model Rules of Professional Conduct.\(^{86}\)

**Role of Prospective Ward's Counsel**

Attorneys representing prospective wards have often been called upon to determine what their role in that representation will be. The attorney has had to choose between two models: (1) being the zealous advocate who consistently strives to either defeat the petition for determination of incapacity, or partial incapacity, or at least minimize the restrictions placed upon the prospective ward's ability to make decisions concerning the ward's affairs; or (2) substituting the attorney's judgment for that of the prospective ward concer-
ning the best interest of the prospective ward and either cooperating in the
petition for determination of capacity or incapacity, or taking those actions
which the attorney perceives as being in the best interest of the client. The
dissonance of these two positions has led to extensive scholarly writing in
the area.87

The legislature has implicitly resolved this conflict by the adoption of sec-
tion 1-117(B).

At any point in a guardianship proceeding, the subject of the
proceeding, his attorney, the guardian of the subject of the pro-
ceeding or anyone interested in the welfare of the subject of the
proceeding may file an application to have a guardian ad litem
appointed by the court, or the court on its own motion may ap-
point a guardian ad litem. If not precluded by a conflict of in-
terest, a guardian ad litem may be appointed to represent several
persons or interests.88

A guardian ad litem is defined in the Act as "a person appointed by the
court to assist the subject of the proceeding in making decisions with regard to the
guardianship proceeding, or to make said decisions when the subject of the
proceeding is wholly incapable of making said decisions even with assistance."89
This right to seek the appointment of a guardian ad litem would appear to
relieve the attorney of the obligation to consider the substituted judgment
model of representation. It also appears to be consistent with rule 1.14 of
the Oklahoma Model Rules of Professional Conduct relating to an attorney's
representation of a disabled client.

While the Act does not set forth any required allegations in an application
to appoint a guardian ad litem, rule 1.14(B) of the Oklahoma Model Rules
of Professional Conduct would limit the use of such an application to only
those instances where "the lawyer reasonably believes that the client cannot
adequately act in the client's own interest." The commentary to this rule makes
clear the troubling nature of this remedy because the disclosure of the at-
torney's perception of the client's disability may adversely affect the client's
defense to a petition for determination of incapacity or partial incapacity.
For this reason, attorneys for the prospective ward should make extensive
efforts to adequately communicate with the client prior to seeking the ap-
pointment of a guardian ad litem.90

87. See L. Frolich, Plenary Guardianships: An Analysis, A Critique and A Proposal For
Reform, 23(2) ARIZ. L. REV., 599-660 (1981); J. Krauskopf, The Elderly Person: When Protec-
tion Becomes Abuse, 19 TRIAL 61-67 (Dec. 1983); P. Horstman, Protective Services for the Elderly:
The Limits of Parens Patriae, 40 Mo. L. REV. 215-236 (Spring 1975).
88. 30 OKLA. STAT. § 1-117(B) (Supp. 1988).
89. 30 OKLA. STAT. § 1-111(8) (Supp. 1988).
90. For alternative resolutions of the conflicting roles of an attorney, compare ABA Model
Act §§ (19), 3(20), 33, 34, and the related commentary, with the Uniform Probate Code § 5-303(b).
Replacement of Prospective Ward's Counsel

Section 3-107(E)(2) requires the court to replace appointed counsel with another attorney, if: (1) the prospective ward prefers the services of another attorney, (2) the other attorney is willing to represent the prospective ward, and (3) the court is notified of the prospective ward's preference and the attorney's acceptance of representation. This right of replacement mirrors that granted to individuals allegedly requiring treatment pursuant to the involuntary commitment procedures contained in the Mental Health Code.\(^{91}\)

Discretionary Evaluation of Prospective Ward

Section 3-108 of the Act provides that the court may on its own motion or at the request of any party to the proceeding, order an evaluation of the prospective ward. The evaluation is to be performed by a physician, psychologist, social worker with appropriate credentials in the area, or other expert with sufficient knowledge to provide a meaningful evaluation. The requirement that the expert have "sufficient knowledge to provide a meaningful evaluation" is particularly important in guardianship proceedings concerning the elderly.\(^{92}\)

The required contents of the evaluation report are:

1. a description of the nature and extent of the incapacity of the person, if any;
2. a description of the mental, emotional and physical condition of the person, his ability to function in the ordinary activities of daily life and, if appropriate, the educational condition, adaptive behavior and social skills of the person;
3. an opinion regarding the kind and extent of assistance, if any, required by the person;
4. an assessment and review of any services necessary to provide for the well-being of the person in the following areas:
   a. physical health,
   b. mental health,
   c. social skills, and
   d. adequate and appropriate living conditions;
5. an opinion regarding:
   a. the probability that the extent of the incapacity, if any, of the person may significantly lessen or increase, and
   b. the type of services or treatment appropriate for the subject of the proceeding or which could facilitate improvement in the condition of the subject of the proceeding; and
6. a description of any tests or other evaluative techniques used.\(^{93}\)

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The nature of the evaluation report reflects the continuing theme of the Act: that courts should intervene only to the minimum extent necessary to adequately assist the ward.

If counsel for the prospective ward is seeking to limit court intervention, and an evaluation has been made a part of the record reflecting the need for greater intervention than the prospective ward desires, it will be extremely important for attorneys to become familiar with community resources for assisting the elderly and disabled. Examples of community organizations designed to assist the elderly include Eldercare Access Center, Inc.; Area-Wide Aging Agency, Inc.; Neighborhood Services Organization, Inc.; and the State Department of Health, Chronic Disease and Eldercare Division.

The ABA Model Act contains a similar concept of an "evaluation report," yet it requires that the report be prepared by a multidisciplinary evaluation team. At least one physician, one social worker, and one psychiatrist must be included on each evaluation team. This concept of multidisciplinary evaluation is advocated in the 1977 working paper of the United States Senate's Special Committee on Aging and also contained in legislation introduced by the late Representative Claude Pepper.

By enactment of section 3-108, the legislature appears to have modified the Oklahoma Supreme Court's decision in Goodner v. Lindley wherein the court held that the mere allegation of incompetence in a guardianship petition was not sufficient to overcome the presumption of competence and allow a court to order a mental and physical examination of the prospective ward.

**Determination of Incapacity or Partial Incapacity**

Section 3-111 of the Act provides substantial clarification of the issues to be determined by the trial court at the hearing on the petition for guardianship, as well as the evidentiary standards to be employed in making those determinations. Section 3-111(A)(1)-(2) requires that a court enter preliminary findings determining the financial and/or personal needs of the prospective ward, which must be met as a condition precedent to the court's determination of capacity.

Section 3-111(A)(4) clarifies that the evidence supporting a determination of incapacity or partial incapacity must be clear and convincing. This standard is higher than the "preponderance of the evidence" standard articulated in some cases under prior Oklahoma law. This higher standard, however, is consistent with the standard in pending national legislation.

The "clear and convincing evidence" standard differs from that utilized

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94. ABA Model Act §§ 3(23), 8.
96. 721 P.2d 801 (Okla. 1986).
in the Uniform Guardianship and Protective Proceedings Act,99 and that utilized in section 44 of the ABA Model Act.100 The rationale for adoption of the "beyond a reasonable doubt" standard offered by the drafters of the ABA Model Act is that the deprivation of rights associated with a determination of incapacity is comparable to that suffered after conviction of a crime; and therefore, the "beyond a reasonable doubt" standard is appropriate.101 The Uniform Act does not provide any commentary concerning the burden of proof.

Section 3-111(B) requires the court to appoint a guardian or limited guardian upon a determination of incapacity or partial incapacity. This section specifically requires the court to "explain on the record the facts and reasons supporting the decision not to impose any less restrictive alternatives." While the Act does not elaborate on the potentially "less restrictive alternatives," the ABA Model Act incorporates requirements that the court consider directing the establishment of a trust for administration of the prospective ward's assets, requiring the provision of residential services to the prospective ward in order to assist in those aspects of daily living the ward appears unable to manage; or mandating that certain medical, psychological, or therapeutic services be provided to the prospective ward on a noncustodial basis.102

Just as the court is required to consider less restrictive alternatives, it appears that a petition for guardianship can be defeated if counsel for the prospective ward can show that alternative mechanisms for substituted decision-making are either already in place or could be put in place.103 Examples of alternatives include the existence of a revocable trust or durable power of attorney for management of property, a durable health care power of attorney for purposes of making health care decisions, and the residence of the prospective ward in a protective community-type residence where there is some supervision of the daily activities of the prospective ward.

Section 3-112(A) requires the court to appoint both a general guardian of the person and a general or limited guardian of the property upon a determination that the prospective ward is incapacitated. Section 3-112(B) requires the court to appoint either a limited guardian of the person, and a general or limited guardian of the property, for any person whom the court determines to be partially incapacitated. Section 3-112(C) permits the court to appoint the same or separate persons to serve in the various capacities. While the Act permits an organization to act as guardian of the property of an incapacitated or partially incapacitated person, an organization may not be appointed as guardian of the person.104 This distinction was intended to

99. [Hereinafter "Uniform Act"] (section 2-206(b) permits appointment of a guardian "if [the court] is satisfied that the person for whom a guardian is sought is incapacitated").
100. "No guardianship or conservatorship shall be established unless the petitioner proves beyond a reasonable doubt that the guardianship and/or conservatorship is needed."
102. See ABA Model Act § 11.
discourage "professional guardianship" companies from developing in Oklahoma.\textsuperscript{105}

\textbf{Dispositional Order}

Section 3-113 of the Act was an attempt to provide statutory guidance to the courts concerning the contents of a dispositional order establishing a guardianship. Section 3-113(A) is self-explanatory and provides as follows:

The dispositional order in a guardianship proceeding, based upon evidence adduced shall set forth:

1. the determinations made by the court at the hearing;
2. the name and address of the individual, if any, appointed to serve as the limited guardian or guardian;
3. the specific limitations imposed upon the ward, if the ward is a partially incapacitated person;
4. the date of the initial review of the case. Said initial review shall be set for no more than two (2) months from the time of the dispositional order.\textsuperscript{106}

Section 3-113(B)-(C) provides some statutory guidance to the courts in considering which rights of the ward are impacted by a determination of partial incapacity. Section 3-113(B) was specifically drafted to integrate with existing laws concerning individual rights that are impacted by a determination of incompetence.

The court must determine whether the ward retains the right to vote. Such determination clarifies the impact of a decision of partial incapacity on title 26, section 4-101(2) of the Oklahoma Statutes,\textsuperscript{107} which provides that those individuals adjudged mentally incompetent shall be ineligible to register to vote, and title 26, section 4-120.5,\textsuperscript{108} which requires the court clerk in each county to provide a monthly list of all persons adjudged mentally incompetent to the county election board, for purposes of having those persons stricken from the registered voter rolls. Additionally, a determination by the court as to the capacity of the partially incapacitated person to serve as a juror is intended to integrate with title 38, section 28 of the Oklahoma Statutes,\textsuperscript{109} which eliminates as qualified jurors those persons who "are not of sound mind and discretion."

The court's determination concerning operation of a motor vehicle relates to title 47, section 6-103(5)-(8) of the Oklahoma Statutes\textsuperscript{110} prohibiting the

\begin{itemize}
\item \textsuperscript{106} 30 OKLA. STAT. § 3-113(A) (Supp. 1988).
\item \textsuperscript{107} (1981).
\item \textsuperscript{108} (1981).
\item \textsuperscript{109} (1981 & Supp. 1988).
\item \textsuperscript{110} (1981 & Supp. 1988).
\end{itemize}
Department of Public Safety from issuing a license to individuals who suffer from a mental disability or disease and title 47, section 6-207 permitting the Department of Public Safety to cancel a driver's license if the driver suffers from mental disease.

The requirement that the court determine whether the partially incapacitated ward shall continue to be licensed or practice any profession is an attempt to define the impact of a determination of partial incapacity on multiple provisions in the Oklahoma Statutes concerning various professions. Examples include statutes suspending or revoking the license of an attorney if the attorney is not mentally competent; a physician if the physician's medical condition renders practice unsafe; and a dentist if the dentist is adjudicated mentally ill or incompetent.112

The court must determine if the ward retains the power to make personal medical decisions including such extraordinary decisions as the withholding or withdrawing of life-sustaining procedures and routine or necessary medical decisions. This section must be read in conjunction with sections 3-118 and 3-119 of the Act which expressly limit a guardian's powers to make certain medical decisions absent court authorization.

Section 3-113(C) contains a laundry list of powers relating to property which the court must determine if the ward retains. The determination concerning the ability of a partially incapacitated person to appoint an agent is particularly relevant in light of the case law which characterizes a power of attorney as an agency relationship. If the partially incapacitated person retains sufficient power to appoint an agent, then that person could attempt to limit or defeat the powers of the court-appointed guardian by execution of a durable power of attorney. Because the power of attorney is a less restrictive method of obtaining a surrogate decision-maker, the court granting the guardianship might feel compelled to limit the guardian's powers. However, the relationship of an attorney in fact and a guardian is defined to some extent by title 58, section 1074 of the Oklahoma Statutes.113

The court must also determine whether the ward retains sufficient capacity to enter into contracts in order to clarify the ward's capacity for purposes of meeting all statutory requirements for the creation of a valid contract.114 Additionally, the court's determination concerning the ward's ability to grant conveyances relates to existing case law interpreting title 16, section 1 of the Oklahoma Statutes115 limiting persons who may convey property.116

113. See 30 OKLA. STAT. § 3-111(B) (Supp. 1988) (requiring the court to explain its reason for not imposing any less restrictive alternatives).
Furthermore, the court must decide whether the ward retains the right to "make a will or execute any other document directing the disposition of the ward's property upon the death of the ward." By inclusion of the language "execute any other document directing the disposition of the ward's property upon the death of the ward," it appears that the ability of the ward to execute a revocable trust agreement would be dependent upon the terms of the dispositional order. The execution of a disclaimer of property or the assertion of a forced heir's share probably would not be encompassed by a general determination by the court pursuant to section 3-113(C)(4) of the Act. However, if either situation is anticipated, specific court guidance should be sought.

The requirement that the dispositional order contain a determination of the ward's ability to make gifts of property must be construed in conjunction with section 3-121(A)(3) concerning the ability of a guardian of the property to make gifts on behalf of the ward from the guardianship estate. The restriction in section 3-121(A)(3) is also intended to control the conservator's powers to make a gift.

Powers of Limited Guardians

Section 3-114 of the Act delineates the powers which the court may grant to a limited guardian of a partially incapacitated person. Section 3-114(A) permits the court to empower a limited guardian of the person with all powers and duties of a general guardian of the person, except the power to take custody of the ward. Section 3-114(B) specifies that a limited guardian of the property could either be a guardian who has all of the rights, powers, and duties of a general guardian of the property over some, but not all, of the assets of the ward, or alternatively could be a guardian who holds only certain rights, powers, and duties of a general guardian over all of the assets of the ward.

An example of the latter type of limited guardian would be one who is required to make all decisions relating to the ward's estate concerning individual transactions anticipated to have an economic impact on the ward's estate in excess of $1,000.

Section 3-114(C) requires that any limitations on the powers of a guardian of the property be specified on the face of letters of guardianship. This

121. This possibility of a guardian having powers over only specific assets of a ward resulted in the requirement that letters of guardianship specify the assets subject to guardianship. See 30 Okla. Stat. § 1-123 (Supp. 1988).
annotation of the letters of guardianship is to provide notice to any persons dealing with the guardian of the property of those limitations that might be relevant to any transactions in which they are engaged.

Temporary Guardianship Proceedings

Section 3-115 of the Act specifies a procedure for establishing a temporary guardianship. By passage of this statute, the legislature has remedied one of the most troublesome questions in this area, which was created by the decision of the Court of Appeals for the Tenth Circuit in Taylor v. Gilmartin. In Taylor, the court determined that, absent statutory authority, a probate court has no authority to issue an order appointing a temporary guardian. The court did not address the argument that a temporary guardianship was permissible as a "special guardianship" under section 3-115. Based on section 3-115 and the obvious necessity for such a procedure, many courts have disregarded Taylor and continued issuing orders appointing a temporary guardian.

The procedure for appointment of a temporary guardian under section 3-115 can be used when there is no existing guardian or when the existing guardian refuses to act and imminent danger is posed to either the person or assets of the prospective ward. Procedurally, this section requires a petition be presented alleging the danger to the person or property of the prospective ward and that no person has the ability to act or that the guardian refuses to act. The court must then set the petition for hearing within forty-eight hours from the filing of the petition and order that notice be immediately served on the prospective ward, spouse, one other adult relative, or other person. The prospective ward is to receive personal service of the notice.

The court may only appoint the temporary guardian if it appears that there is: (1) imminent danger to the health or safety of the prospective ward or (2) the financial resources of the prospective ward will be seriously damaged or dissipated absent immediate action, and (3) there is no one who is willing or able to take the necessary actions. The temporary guardianship established after notice cannot be continued for more than ten days unless extended at a hearing at the end of the initial ten days. Upon a showing of the continuation of the circumstances which warranted the initial appointment, the court may extend the temporary guardianship for an additional ten days. If, however, a petition for permanent guardianship or limited guardianship has been filed, the court may continue the temporary guardianship until a determination on the petition for guardianship is made.

122. 686 F.2d 1346 (10th Cir. 1982).
123. id. at 1351.
125. 30 Okla. Stat. § 3-115(B) (Supp. 1988).
limits the duration of the temporary guardianship to a maximum of twenty
days absent the filing of a petition for a guardianship.

The court has the power to waive the notice and immediately issue an order
appointing a temporary guardian if it is persuaded that a forty-eight hour
delay will result in serious physical harm or irreversible serious impairment
to the person or property of the prospective ward.128 The duration of a tem-
porary guardianship created instanter is open to question. The appointment
of a temporary guardian without notice does not relieve the court of its obliga-
tion to "hold a hearing as provided by this section."129 The section provides
for hearings to be held either within forty-eight hours if treated as an exten-
sion of the temporary guardianship, or within ten days if treated as an exten-
sion of the temporary guardianship.130 Thus, an ambiguity exists.

In those instances where the permanent guardian or limited guardian
previously appointed by the court has refused to act and the court appoints
a temporary guardian, the powers of the permanent or limited guardian are
suspended for the period in which the temporary guardian has been empowered
to act.131 At the termination of the temporary guardianship, the temporary
guardian must file a report showing all actions taken during that time period.132

Restoration

Any person may seek a determination that a ward’s capacity be restored.133
However, a guardian who is satisfied that restoration is appropriate has a
duty to petition the court.134 In section 3-116 the Act recodifies and expands
the provision of title 58, section 854 of the Oklahoma Statutes135 regarding
the procedures for judicially restoring an individual to capacity.136 The new
provision simply amends the prior statute to incorporate the new language
of "incapacity," instead of incompetence.

The amendment to section 854(B) requires that a hearing on the petition
for restoration be set within ten days after the date of the filing of a peti-
tion,137 and that notice of the hearing be provided in accordance with section
47 of the Act.138 The reference to section 47 of the Act creates an ambiguity
because the notice provision in section 47(C) requires ten days notice, yet the

128. 30 OKLA. STAT. § 3-115(C) (Supp. 1988).
129. Id.
130. 30 OKLA. STAT. §§ 3-115(B), (E) (Supp. 1988).
131. 30 OKLA. STAT. § 3-115(F) (Supp. 1988).
132. 30 OKLA. STAT. § 3-115(G) (Supp. 1988).
133. 30 OKLA. STAT. § 3-116(A) (Supp. 1988).
134. 30 OKLA. STAT. §§ 3-118(C), 3-121(C) (Supp. 1988).
SERV. 806, 808 (West), amends this section to require the hearing be set within 30 days. This
amendment was effective Nov. 1, 1989.
138. Section 47 is codified as 30 OKLA. STAT. § 3-110 (Supp. 1988).
hearing must be "set" within ten days.\textsuperscript{139} Perhaps a hearing could be set and then continued in order to allow adequate time for notice.

Unfortunately, the amended language of title 58, section 854 does not include a statement concerning the burden of proof at such a hearing, nor the evidentiary standard for the court to employ. Thus, there is no clear statutory change from existing case law requiring the ward to establish capacity.\textsuperscript{140} In light of the dramatic changes made by the Act and the Act’s direction that courts minimize their intervention in the ward’s decision making, it can be argued that there is an implicit change. Based on this argument, the proper procedure would be to impose upon the ward merely a burden to produce some evidence of capacity. If such evidence of capacity was produced, the guardian would then be required to come forward and establish by clear and convincing evidence the continuing incapacity or partial incapacity of the ward.\textsuperscript{141} Section 44 of the ABA Model Act requires the guardian to come forward and establish beyond a reasonable doubt a continuing need for the restrictions on the ward’s capacity. The approach of the ABA Model Act was rejected by the drafters of the Act as too easily abused by persistent wards filing multiple petitions seeking restoration.

\textit{Powers and Duties of Guardians of the Person}

Sections 3-118, 3-119, and 3-120 of the Act outline the powers, duties, and responsibilities of a guardian or limited guardian of the person. Section 3-118 is a combination of some of the concepts contained in sections 2-109 and 2-209 of the Uniform Act and section 17(4) of the ABA Model Act.

The requirement that a guardian or limited guardian of the person become or remain sufficiently acquainted with the ward is taken verbatim from section 2-109(b)(1) of the Uniform Act. Additionally, the requirement that the guardian assure that the ward has a place of abode in the least restrictive setting possible is taken verbatim from section 17(4)(a)(ii) of the ABA Model Act. The commentary to the ABA Model Act explains the rationale for this requirement:

\textit{[S]ubparagraph (4)(a)(ii) stresses that in selecting a place of residence for a disabled person, preference must be given to community-based residential settings when that person cannot remain in his or her own home. Except pursuant to an order of the court following a formal civil commitment proceeding, disabled persons should not be removed from a setting in which the ‘patterns}

\textsuperscript{139} 30 Okla. Stat. § 3-116(B) (Supp. 1988).
\textsuperscript{140} In re Carney's Guardianship, 110 Okla. 165, 237 P. 111 (1925).
\textsuperscript{141} Recommendation III-F of the National Guardianship Symposium adopts this approach. “Upon a showing of favorable change in circumstances, the burden of proof should be imposed upon those seeking to continue the guardianship.”
of life and conditions of everyday living . . . are as close as possible to the regular circumstances and ways of life of society.142

Section 3-118(C) directs that the guardian or limited guardian of the person shall provide any required consents or approvals on behalf of the ward as authorized by the court.143 Moreover, the provisions within section 3-118(B)(2) permitting the court to authorize a guardian or limited guardian of the person to initiate civil or administrative proceedings on behalf of the ward in the absence of the appointment of a guardian of the property or conservator, and to authorize the guardian or limited guardian of the person to consent to routine or necessary medical or professional care for the ward are substantially similar to section 2-109(c) of the Uniform Act.

Section 3-119 of the Act contains a general statement that: “A guardian shall have no powers except as expressly provided by the Oklahoma Statutes or given to him in the dispositional order in the proceedings.” Clearly, this statement is consistent with prior Oklahoma case law that a guardian, by virtue of the guardian’s appointment, is not entitled to “make purely personal decisions.”144 However, this language creates a most troubling ambiguity. Does the requirement that the powers be “expressly given by the Oklahoma Statutes or granted in the dispositional order” eliminate any implied powers which might be necessary for the guardian to adequately fulfill the guardian's obligations or duties?

Section 3-120 proceeds to specifically prohibit a guardian from consenting on behalf of the ward to the withholding or withdrawal of life-sustaining procedures as defined in the Oklahoma Natural Death Act,145 absent a specific authorization by the guardianship court. It is open to question whether this provision applies when a ward is in need of life-sustaining treatments but is not suffering from a terminal condition.146 While the specific definition of life-sustaining treatments does not restrict the term “life-sustaining procedure” to treatments administered to terminal patients, the Oklahoma Natural Death Act requires that a patient be diagnosed as terminal prior to being a “qualified patient” and capable of executing a binding directive.147 This restriction on the efficacy of the directive contained in the Oklahoma Natural Death Act could be construed to impose a condition that the ward be terminal before a guardian is able to consent to withholding or withdrawal of life-sustaining treatments.

142. Sales at 564 (quoting Nirje, The Normalization Principle, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 213 (R. Kugel & A. Shearer eds. 1976)).
143. Compare § 17(4)(a) of the ABA Model Act.
144. See In re Delaney, 617 P.2d 886, 891 (Okla. 1980). See also Hendricks v. Grant County Bank, 379 P.2d 693 (Okla. 1963) (guardian not empowered to act for ward in matters involving exercise of personal discretion so as to alter acts performed by ward while competent).
Court authorization of a guardian to consent to withholding or withdrawal must be granted only at the time when the ward is in need of life-sustaining treatment. This provision represents a compromise between two philosophically opposed approaches to the question of a surrogate making extraordinary health care decisions.

Advocates for permitting the surrogate to make such health care decisions argue that the right to withhold or withdraw life-sustaining procedures is derived from the constitutional right of privacy and thus must continue to accrue to an individual, even during periods of incapacity. In order to protect the ward's constitutional right it is necessary that the guardian be empowered to make the decision during any period of incapacity.148

Alternatively, others argue that there are some rights which are so personal and fundamental that they cannot be exercised by a surrogate. Thus, permitting the guardian to authorize such withholding or withdrawing of life-sustaining procedures is inappropriate.149 Advocates of denying the guardian the power to consent to withholding or withdrawing life-sustaining treatment have also argued that, at a minimum, the guardian should be required to initiate a separate action in district court. A separate proceeding would require the guardian to give notice to members of the ward's immediate family of the guardian's intent to consent to the withholding or the withdrawal of life-sustaining treatments in order to allow those individuals an opportunity to appear and object. Such notice would avoid the potential ex parte nature of a hearing on such a matter in a guardianship proceeding.150

The Act does not address the guardian's ability to consent to the withholding of nourishment or hydration. The express prohibition contained in the Hydration and Nutrition For Incompetent Patient Act would control such a situation.151

Section 3-119(2) of the Act prohibits a guardian consenting on behalf of the ward to the termination of parental rights of the ward. The guardianship court is also prohibited from ordering such consent. This prohibition is consistent with the holding of In re Delaney wherein it was determined that the proper role of a guardian in a proceeding to terminate parental rights is to require the party seeking termination to establish a case that termination is proper.152

Section 3-119(3) prohibits a guardian from consenting to an abortion, psychosurgery, removal of a bodily organ, performance of any experimental

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149. Cf. In re Delaney, 617 P.2d at 891.
151. 63 OKLA. STAT. §§ 3080.1 and 3080.5(C) (Supp. 1988).
152. In re Delaney, 617 P.2d at 891.
biomedical or behavioral procedure, or participation in any such experiment except: (1) if an emergency exists and such consent is necessary to preserve the life of the ward or (2) with specific authorization of the court having jurisdiction over the guardianship proceeding. This provision is very similar to section 17(5)(b) of the ABA Model Act. As the commentary to the model provision points out, section 17(5)(b) is not a flat prohibition to consenting to these medical procedures listed, but rather is a limitation on such consent in light of the extraordinary nature of the procedures.193

Section 3-119(4) establishes that a guardian has no right to prohibit the marriage or divorce of a ward absent specific authorization of the guardianship court. It remains to be seen how this provision will be reconciled with title 12, section 1283 of the Oklahoma Statutes which provides:

When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void by the district court, in an action brought by the incapable party or by the parent or guardian of such party; but the children of such marriage begotten before the same is annulled, shall be legitimate. Cohabitation after such incapacity ceases, shall be sufficient defense to any such action.154

Also, note that this limitation is expressed in terms of prohibiting the marriage or divorce of a ward. The commentary to a similar provision of the ABA Model Act suggests that this "prohibition" language is intended to implicitly grant a guardian of the person the power to consent to a divorce.155 However, the ABA Model Act does not include comparable language to the first sentence of section 3-119 of the Act limiting a guardian's powers only to "those expressly given by the Oklahoma Statutes or by the dispositional order." Thus, the power to consent to a divorce may be an "implied power" not given to a guardian.

Section 3-119(5) prohibits a guardian from consenting to the commitment of a ward to a mental health treatment facility.156 This provision is also very similar to section 17(5)(a) of the ABA Model Act. Section 3-120 of the Act requires a guardian or limited guardian of the person to present a proposed plan for the care and treatment of the ward to the court. This plan must be submitted within ten days after the guardian's appointment unless extended by the court, but such extensions may not exceed thirty days. The form and contents of the plan are outlined in section 3-120(B).

153. Commentary to § 17(5)(b) of the ABA Model Act, reprinted in Sales at 565.
155. Commentary to § 17(5)(c) of ABA Model Act, reprinted in Sales at 566.
156. The Oklahoma Involuntary Commitment Procedures are contained in 43A OKLA. STAT. § 5-401-07 (Supp. 1988).
Powers and Duties of Guardians of the Property

Sections 3-121 and 3-122 of the Act outline the powers and duties of a guardian of the property. Section 3-121(A)(1) directs a guardian of the property to expend the ward’s funds in such a manner that the ward is properly provided for and that the financial resources of the ward are prudently managed. This section of the statute is derived from section 18(3)(a) of the ABA Model Act. The commentary to the model provision observes that:

[P]rudent management [of the ward’s financial resources] should not be considered synonymous with conserving financial resources for the benefit of the heirs of a partially disabled or disabled person. The primary use of a partially disabled or disabled person’s financial resources should be to protect his or her health, safety, rights and assets, and to maximize his or her abilities.\textsuperscript{157}

This commentary may be helpful in those common conflicts where heirs apparent of the ward object to the guardian's management of the ward’s assets.

Section 3-121(A)(2) clarifies that the guardian of the property may utilize the ward’s funds for the support of the ward’s legal dependents as well as other members of the ward’s household who are unable to support themselves. This concept is consistent with that contained in section 2-324 of the Uniform Act. The inclusion of the power to authorize disbursements or expenditures on behalf of members of the ward’s household who are unable to support themselves raises the spectre of abuse by adult children of the ward or aging members of the ward’s household. Additionally it is unclear how this provision integrates with title 10, section 12 of the Oklahoma Statutes which provides:

It is the duty of the father and the mother of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. Provided, that the liability of a parent to an institution, nursing home, intermediate care facility, or other resident facility for the care or maintenance of any such poor person shall not be excessive and shall not cause undue financial hardship upon said parent. Provided further, that the provisions of this section shall not apply to charges for care provided by institutions of the Department of Mental Health or to charges for care provided by the Department of Mental Health outpatient facilities, including the alcohol and drug programs. The promise of an adult child to pay for necessaries previously furnished to a parent is binding.\textsuperscript{158}

Section 3-121(A)(3) permits the court to approve gifts from the ward’s estate and appears to contemplate the dispositional order permitting gifts in small amounts for various special occasions. However, the statute specifically re-

\textsuperscript{157} Sales at 569.

quires that court approval of other gifts be "based upon an established pattern of giving made by the ward prior to the appointment of a guardian or limited guardian." The requirement of an "established pattern" of giving seems to preclude court approval of gifts for purposes of tax planning if the ward has not engaged in such gifting previously. This oversight has been corrected with the passage of Oklahoma House Bill 1288 which permits the court to approve a gift if it finds the gift is in the best interest of the ward "on the basis of tax or estate planning." 159

Section 3-121(B) requires that "limited guardians of property shall consider the size of the financial resources of the ward which have not been placed under their supervision or control." By its language, this provision does not apply to general guardians of the property. The rationale for this distinction is not apparent in light of the fact that general guardians of the property may not have control over the assets of a trust for which the ward is a beneficiary. Nevertheless, those assets probably should be considered when making decisions regarding the proper administration of the ward's estate.

Guardians of the property are required to submit a proposed plan of management of the property of the ward within two months after their appointment. 160 This period is longer than the period granted to guardians of the person to prepare a plan for management of the person under section 3-120. This distinction may be attributable to the fact that guardians of the property must marshal the assets prior to being able to devise a meaningful plan for their management. However, because the Act requires the court to determine the type and amount of financial resources of the prospective ward at its hearing on the petition for guardianship, the marshalling may merely require the transfer of control or management of assets, rather than the identification of them. 161

Section 3-122(B)-(C) dictate the contents and form of the plan.

Conclusion

The Oklahoma Guardianship Act has been characterized as misguided and costly by opponents, 162 and "representing a major advance for Oklahoma guardianship proceedings" by proponents. 163 The Act has attempted to address many of the evils reported in the media, but it remains to be seen at what cost. Due process protections are substantially strengthened, and meaningful accountability is required. The courts are given the flexibility to craft innovative solutions which afford the ward the necessary assistance while preserving the greatest amount of self-determination and dignity possible. Procedural problems exist in the Act which must be remedied, but all in all it is a significant improvement over prior law.

160. 30 OKLA. STAT. § 3-122(A) (Supp. 1988).