

# OAN Legal Issues

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# Estate Plan Options

- Wills
- Trusts
- Ancillary Options
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# Common Question

- Why do I need an Estate Plan





# Answer

- Without an Estate Plan, you are said to die Intestate. Your Estate is then distributed under State Law. This means you have no control over how your Estate is distributed.

# Intestate Succession

**State Law Specifies which relatives can inherit your estate and the share for each relative.**

# Estate Property

- There is no distinction between the descent of real property and personal property.
- 84 O.S. Sec. 212



# Vested Interests

- Upon the death of an intestate individual, the heirs( spouse and lineal descendants) have a vested right to the estate, subject to Court control.
- Note - Step-children are not deemed lineal descendants unless they were adopted by decedent.

# Husband and Wife

- Property acquired by joint industry during the marriage will take 50% of the estate.
- Status of Husband and Wife is determined as of the date of death.
- Oklahoma recognizes Common Law Marriages.

# Husband & Wife cont'd

- Right of Husband & Wife can be waived or limited by a valid Pre-Nuptial Agreement.
- Relationship of Husband & Wife does not apply to restricted Indian Lands.

# Distribution Examples

- Assume H & W and two children: Wife gets 50%, and each child receives 25%
- Distribution to children is in equal shares. If a child predeceases a parent, but has children, the Grand-children split the parents share.

# Last Will and Testament

- This device allows the Testator to direct how the estate will be split, both as to Real Property and Personal property.
- Person receiving Real Property is a "Devisee".
- Person(s) receiving Personal Property, or money are "Legatees"

# Last Will and Testament cont'd

- “Executor” is the person named in the Will to administer the Estate, with Court Supervision.
- The Testator can not exclude a spouse, or the spouse can challenge the Will to receive a spousal share.
- Testator can exclude children or Grand-children.

# Probate Administration

- Probate Judge of District Court will administer the decedents estate.
- Notice is given to all known Creditors, and must also publish notice.
- Notice must also be sent to all known heirs.
- Court Holds Hearing to determine heirs, devisees & Legatees.

# Role of Executor

- Marshall all assets of the estate.
- Pay valid creditor claims by statutory priority:
- Funeral Expenses have first priority
- Last Medical bills have second priority
- Attorney Fees have third priority
- Secure Creditors , fourth priority, then other creditors and heirs



## Executor cont'd

- If there are not substantial sums to pay all creditors, the Executor may have to Petition the Court to sell assets to pay creditor claims. This requires Court approval for Real property. Court approval is not required for personal property to be sold at an Estate Sale, or Garage Sale.

# TRUSTS

- Trusts allow you to protect your property, control distribution of your estate and in most instance avoid probate.
- Persons creating the Trust are called "Settlors".
- Trust can be a Revocable Inter-vivos Trust, or an Irrevocable Trust.
- Settlors serve as "Trustees" of their Trust normally.

# Trusts cont'd

- Upon death of first Settlor, remaining Settlor becomes sole Trustee.
- Trust can last multi-years to provide for family members, including step-children.
- Trust is highly advantageous for providing for Special Needs family members.

# TRUSTS CONT'D

- Trust will provide for Successor Trustees that will see that the Trust is administered according to terms of the Trust and that Distributions are managed according to Trust terms.
- Trusts are generally not supervised by the Court, unless beneficiaries challenge whether the Trustee is administering the Trust in accordance with its terms.

# Special Needs Trust Provisions

- Trust document can include a Special Needs Trust to provide for the care, maintenance and financial needs of a family member with Special Needs for their lifetime.
- Trust can nominate an individual they want to be the Guardian of a Special Needs family member, although this still requires filing a Guardianship, and Court approval of the Guardian.

# Special Needs Trust cont'd

- Special Needs Trust provisions specify that the funds in the Trust for the benefit of the Special Needs individual **DO NOT REPLACE** Government benefits, but are intended to supplement government benefits, to provide a more secure existence for the Special Needs family member.

## Special Needs Trusts cont'd

- Absent a Special Needs Trust, Federal and State benefits may be suspended until the Trust or family assets have been exhausted in caring for the Special Needs Family member.

# ASSETS INCLUDED IN A TRUST

- The Makers of the Trust should convey all real property , mineral interests and personal property such as vehicles, boats, airplanes, etc
- Monetary assets such as investment accounts, stocks, bonds should also be placed in the Trust. This protects these assets from creditor claims.



# TRUST ASSETS CONTINUED

- Life Insurance can be held by the Trust with benefits being paid into the Trust; or they can remain outside the Trust with benefits going to designated beneficiaries.
- Often families with Special Needs family members will use a Life Insurance Policy to fund the Special Needs Trust portion of the Trust

# Pour Over Wills

- This is a document ancillary to a Trust. It simply designates that assets not titled in the name of the Trust are intended to be placed in the Trust
- It can also serve to designate specific bequests of personal property to family members.
- If Real property is the subject of a Pour Over Will, Probate will still be required.

# Guardianships

- Three types:
- Special or Emergency Guardianship is used where the prospective Ward poses a Threat to themselves, or others.
- Guardianship for Adults
- Guardianship for Minors

# Guardianship of Minors

- At law, natural parents are deemed to be the Guardian of their children.
- When a minor child is living with a family member other than their natural parents, a Guardianship is recommended.
- This does not mean a relative having temporary custody needs to apply for a Guardianship.

# Temporary Custody of Minors

- In situations where the natural parents have to give temporary custody to another family member, it may be possible to use a Limited Power of Attorney and a Medical Power of Attorney, to allow these family members having custody to make decisions for the minor with regards to school, and to consent for medical treatment.

# Do you need an Attorney for a Guardianship

- Guardianship laws are tricky. Title 30 of the Oklahoma Statutes govern Guardianships. There are over 100 separate sections governing Guardianships, and thousands of sub-sections.
- Representing yourself PRO SE does not relieve you from the responsibility of knowing, and complying with the law and statutory procedures.

# Attorney Representation cont'd

- The Judge assigned to your Guardianship case, and his/her staff are not able to assist you in preparing your documents, and presenting your case to the Court.
- Not every family can afford an attorney to handle their Guardianship case. The Oklahoma Bar Association has prepared a Handbook to assist you, if you must represent yourself.

# Self Representation

- The Guardianship Handbook can be found on the Oklahoma Supreme Court website: [www.oscn.net](http://www.oscn.net), Click on the "Forms" Tab to find the Handbook.
- The handbook contains all required forms, Explanation of the procedure, and check lists of documents you will need.
- Covers both Guardianship of Adults and Minors.



# Incapacitated Persons

- Under Oklahoma Law, Guardianships for incapacitated persons shall be:
- Used only to promote and protect well being of the person and their property;
- Designed to encourage the development of maximum self-reliance and independence of the person
- Ordered by the Court to the extent required

# Definition of Incapacitated persons

- One who is impaired by reason of mental illness, 43A O.S. Sec 1-103;
- Incapacity due to Intellectual development, 63 O.S. Sec.1-818.2
- Incapacitated by physical illness or disability;
- Incapacitated by Drug or Alcohol dependency, 3A O. S. Sec. 3-403.

# Minors

- Defined by law as being an individual under the age of 18.
- Once a Minor attains the age of 17 years, and six months, it is appropriate to file for an Adult Guardianship.
- A minor's Guardianship does not automatically roll over to an Adult Guardianship at age 18.

# Who can be appointed Guardian

- Must be over the age of 18
- A current Guardian for a Minor, or a Guardian appointed in another state.
- Person nominated in a Will or Trust, subject to Court Approval
- Spouse of a prospective Ward
- An adult child of prospective Ward

# Guardian Eligibility cont'd

- A parent of the proposed Ward
- A sibling of a proposed Ward
- Any individual approved by the Court, who has been living with the proposed Ward for more than 6 months prior to filing the Petition
- A person qualified to serve as Guardian of a Veteran, pursuant to the Veteran's Guardianship Act.

# Guardian Fitness

- Over the age of 18
- Is of sound mind(not incapacitated or partially incapacitated)
- Is free of Criminal Convictions, Protective Orders, or pending Criminal Charges. (OSBI Background check required). This also applies to others living in the Guardian's house

# Guardian Fitness Cont'd

- Must be solvent and able to pay bills with current income. Must not have filed Bankruptcy in last five years.
- May not be under any financial obligation to the proposed Ward
- May not have any self-interest that may cause them to misuse their position to care for the Ward and its finances.

# Guardian Fitness cont'd

- Must be a Citizen or, Legal Resident alien, or is otherwise legally present in the U.S.



# Guardianship Notice Requirements

- Notice of all Hearings
- Copy of Petition for Guardianship
- Any other document filed with the Court requesting a Hearing

# Who must receive Notice

- The proposed Ward;
- The Ward's Spouse , if any;
- The Ward's Attorney, if any;
- The Ward's Adult children, or if none, the Ward's parents if living;
- Adult siblings, if Ward's parents are not living.
- If none of the above, at least one, but not more than 3 nearest relatives.

## Notice Cont'd

- Any person or organization nominated or proposed to serve as Guardian;
- The person or facility having care or custody of the proposed Ward;
- The OKDHS, or Mental Health and Substance Abuse Services, if providing services to the proposed Ward;
- Veterans Admin. If the proposed Ward is a Veteran

# How Notice is served

- Ward must be personally served at least 10 days prior to the Hearing. Must include copy of the Petition, or notice of any other matter to be heard;
- Sheriff, Private Process Server, or Attorney for Petitioner may serve Notice
- Affidavit of Service must be filed showing date and time of service, who completed service, and Notarized signature of person making the service.

# Notice to Other interested parties

- This includes family members and others required to receive Notice, may be served by U.S. Mail, First Class, postage pre-paid;
- Must Send Notice of Hearing Date, and Copy of Petition, or other document requesting a Hearing.

# Order Appointing Guardian

- Only a Court Order may create a Guardianship.
- Order must list the Guardian's Powers
- If a Power is not listed in the Order, the Guardian does not have power to act.
- Order must include a specific finding that the need for Guardianship was established by Clear and convincing evidence, and no less restrictive alternatives exist. 30 O.S. Sec. 3-111(B)(2).

# Plans Required for Guardianship

- Plan for management of the financial resources of the Ward;
- Plan for Care and Treatment of the Ward: place of residence; providing for daily care needs; and providing for medical care and treatment.
- Must be filed at Hearing on Appointment, or shortly thereafter at a time set by the Court.

# Inventory of Ward's Assets

- Within 2 months of appointment, the Guardian must file an Inventory of the Ward's assets and debts.
- Must be filed with the Court Clerk, and must be updated annually.
- Annual update can be included in the Annual Guardian Report.



# Moving the Ward

- If the Ward is to be moved out of County, permission from the Court must be obtained prior to the Move!
- If the Ward is to be moved to a new residence within the County, Notice of Change of Address should be filed, with Notice mailed to all interested parties.

# Sale of Ward's Property

- May Petition the Court for a sale of the Ward's real property. Sale must be for the benefit of the Ward. Guardian must file a verified Petition describing the Estate of the Ward, the property to be sold, and facts and circumstances on which the request is made. 30 O.S. Sec. 4-752 and 4-754.

# Annual Report

- Each year the Guardian must file an Annual Report with the Court.
- Must include: Address of Ward; Address of Guardian; Summary of any changes in Ward's health, and ability to make decisions; summary of how Ward's best interests are being met; any changes in Ward's Finances; whether the Guardianship should continue; and statement of any other material changes.

# Annual Report Cont'd

- Must mail Notice to the Ward, and any other family members and other interested parties.
- Interested persons have 15 days to object from the date of filing with the Court.
- If an Objection is filed, matter will be set for Hearing.

# Bond

- If Wards' estate and annual income is less than \$40,000 and the Guardian is a relative, the Bond may be waived. 30 O.S. Sec. 4-201
- In other instances the Court has discretion to require a Bond, and to set the Amount of the Bond.

# Guardian Duties

- Ensure Ward's proper care.
- Ensure support, health and education of Ward.
- Preserve the Property of the Ward
- Encourage and support Ward's participation in decision making to the extent possible.

# Guardian Duties Cont'd

- Perform all duties imposed by the Court.
- Become and remain knowledgeable of the Ward's capabilities, limitations, and needs(Physical, mental and medical)
- Ensure Ward has housing in the least restrictive, safe and most normal manner.

# Guardian Duties Cont'd

- Determine Ward's place of residence. Can not be moved out of County without Court approval.
- Timely pay Ward's debts(30 O.S. Sec. 4-701
- Collect all debts owed to the Ward.
- Settle Claims and lawsuits authorized by the Court



# Guardian Duties Cont'd

- Sell real property with Court Approval(30 O.S. Sec. 4-705)
- Make investments with Court Approval(30 O.S. Sec. 4-708).

# Resources

- Adult Protective Services - 800-522-3511
- CAVA - Court Appointed Advocates for Vulnerable Adults 405-208-4021
- Legal Aid Services 405-557-0014
- Mental Health Hotline 800-522-9054

# Resources Cont'd

- Oklahoma Dept of Human Services, Aging Services, 800-211-2116
- OKDHS, Developmental Disabilities Svcs. 405-521-3571
- Okla. Developmental Disabilities Council, 405-521-0805

# Resources Cont'd

- Oklahoma Access to Justice Foundation, Melissa Brooks, Dir. Of Legal Information & Engagement 405-594-0805, [www.okacesstojustice.org](http://www.okacesstojustice.org).
- Social Security Administration, [www.ssa.gov](http://www.ssa.gov)
- Sunbeam Family Services 405-528-7721

# Resources Cont'd

- U.S. Dept. of Veterans Affairs, Muskogee Regional Office, 800-827-1000 [www.va.gov](http://www.va.gov).
- Oklahoma Supreme Court Network [www.oscn.net](http://www.oscn.net).
- Oklahoma Disability Law Center 405-525-7755
- The Johnston Law Firm, D. Craig Johnston, 405-517-1787, E-mail: [dcraigjohnstonlaw@outlook.com](mailto:dcraigjohnstonlaw@outlook.com).