STATE OF OKLAHOMA

1st Session of the 48th Legislature (2001)

COMMITTEE SUBSTITUTE
FOR ENGROSSED
HOUSE BILL 1106

By: Leist of the House

and

Shurden of the Senate

COMMITTEE SUBSTITUTE

[mental health - amending 43A O.S. 1991, Section 10-108 - Protective Services for Vulnerable Adults Act - codification -

emergency]

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 43A O.S. 1991, Section 10-108, as last amended by Section 4, Chapter 78, O.S.L. 1999 (43A O.S. Supp. 2000, Section 10-108), is amended to read as follows:

Section 10-108. A. 1. If the Department of Human Services determines that a vulnerable adult is suffering from abuse, neglect, or exploitation presenting a substantial risk of death~~,~~ or immediate and serious physical harm to the person or financial exploitation of the estate of the person to the extent that an emergency exists, and the vulnerable adult lacks mental capacity to consent to receive protective services and no consent can be obtained, the Department may petition the district court in the county ~~in which such person resides, or in the district court in the county where any of the protective services are to be provided,~~ specified by paragraph 3 of this subsection for an order:

~~1. Authorizing~~

a. authorizing involuntary protective services and appointing a temporary guardian~~;~~,

~~2. Freezing~~

b. freezing the assets of the vulnerable adult, if the vulnerable adult is being exploited, and directing a full accounting and investigation of the person alleged to be improperly managing the estate of the vulnerable adult~~;~~, or

~~3. Revoking~~

c. suspending or revoking the powers of an attorney-in-fact.

2. Under no circumstances shall the court authorize the Department, pursuant to this subsection, to consent or deny consent to a Do-Not-Resuscitate order or the withdrawal of hydration or nutrition or other life-sustaining treatment although the court retains jurisdiction to hear such matters under applicable law.

3. The district court which may be petitioned by the Department for an order pursuant to paragraph 1 of this subsection is:

a. the district court in the county in which the vulnerable adult resides,

b. the district court in the county in which the vulnerable adult is receiving inpatient services, or

c. the district court in the county where the vulnerable adult is located when any delay caused by taking the petition to the district court in the county of the residence of the vulnerable adult would result in greater substantial risk of death or greater serious physical harm to the vulnerable adult. The petition shall include an explanation of why the petition was filed in the district court in the county specified by this subparagraph rather than in the district court as specified in subparagraph a or b of this paragraph.

B. The petition shall be sworn to and include the name, age, and address of the vulnerable adult who the Department has

determined is in need of emergency protective services, the nature of the abuse, neglect, or exploitation, the services needed, and information relating to the capacity of the person to consent to services and the attempts of the Department to obtain consent and the name of the person or organization proposed to be appointed as temporary guardian.

C. 1. The vulnerable adult shall receive an opportunity for a hearing upon the petition, and shall be personally served with a copy of the petition and a notice scheduling hearing at least forty-eight (48) hours prior to any such hearing.

2. a. The hearing shall be set by the court on an expedited basis, but no later than five (5) calendar days from the date the notice scheduling hearing is signed by the judge. The vulnerable adult shall have a right to a closed hearing unless such vulnerable adult requests otherwise.

b. Unless the vulnerable adult objects or the person requiring notification pursuant to this subparagraph is alleged to have abused, neglected or exploited the vulnerable adult, the following persons shall be notified of any hearing held pursuant to this subsection:

(1) the legal guardian, guardian ad litem and caretaker of the vulnerable adult,

(2) any person so requested by the vulnerable adult to be present at the hearing, and

(3) persons required to be notified pursuant to Section 3-110 of Title 30 of the Oklahoma Statutes.

~~c. Under no circumstances shall the court authorize the Department to consent or deny consent to a Do-Not-Resuscitate order or the withdrawal of hydration or~~

~~nutrition or other life-sustaining treatment although the court retains jurisdiction to hear such matters under applicable law.~~

~~(1)~~

D. 1. Upon sworn testimony of a representative of the Department or law enforcement officer, or statement of a district attorney, that immediate and reasonably foreseeable death or serious physical harm to or financial exploitation of the vulnerable adult will result, the court may waive prior notice and ~~enter~~ issue a seventy-two-hour order whether or not during regular courthouse business hours. However, ~~on the date~~ within twenty-four (24) hours of issuance of the seventy-two-hour order, the vulnerable adult and the attorney of the vulnerable adult, if known, shall be personally served with written notice scheduling a hearing within seventy-two (72) hours.

~~(2)~~ 2. If a hearing on the seventy-two-hour order is declined, or upon conclusion of any such hearing, the court may terminate the temporary guardianship and involuntary services or enter a temporary ~~thirty-day order~~ guardianship for up to thirty (30) additional calendar days as provided for in ~~paragraph 2 of~~ subsection ~~D~~ G of this section.

~~3. a.~~

E. 1. The vulnerable adult has a right to be present and represented by counsel at any hearing authorized by this ~~subsection~~ section. If the vulnerable adult is indigent or, in the determination of the court, lacks capacity to waive the right to counsel, the court shall immediately appoint counsel who shall personally ~~contact~~ meet and attempt to discuss the petition or any pending motion with the vulnerable adult prior to any hearing.

~~b.~~ 2. If the vulnerable adult is not in attendance at a scheduled hearing, the court shall make a special finding as to why the vulnerable adult is unable to attend, and, upon the request of

the vulnerable adult or the attorney of the vulnerable adult, may continue the hearing to allow the vulnerable adult to attend.

~~c. (1)~~

3. If the vulnerable adult is indigent, the cost of representation by counsel shall be borne by court funds.

~~(2)~~ 4. If the vulnerable adult is not indigent, the court may order costs of representation paid from the estate in the same manner as currently paid under the Oklahoma Guardianship and Conservatorship Act.

~~D.~~ F. 1. After a hearing on the petition, the court may:

a. ~~issue an~~ appoint a temporary guardian and order ~~for~~ involuntary protective services ~~and appoint a temporary guardian~~ including, but not limited to, authorization for medical and/or psychological treatment and evaluations, and residential placement subject to the provisions of paragraph 2 of subsection G of this section,

b. issue an order freezing all assets of the vulnerable adult, establish any new accounts necessary to pay the daily living expenses of the vulnerable adult, and order a full accounting and investigation of the person alleged to be improperly managing the vulnerable adult's estate, or

c. suspend or revoke powers of attorney or terminate a guardianship or conservatorship upon a finding that the attorney-in-fact, guardian or conservator failed to act appropriately on behalf of the vulnerable adult.

2. The court appointing a temporary guardian and ordering involuntary protective services shall not have authority to order the sale of the real property of the vulnerable adult. Upon the appointment of a guardian or appointment of a new guardian pursuant

to the provisions of the Oklahoma Guardianship and Conservatorship Act, the guardian may sell the real property of the vulnerable adult as provided by the Oklahoma Guardianship and Conservatorship Act. Notwithstanding any of the provisions of this act limiting the Department of Human Services to a temporary guardianship of one hundred eighty (180) calendar days, if the Department of Human Services has been appointed temporary guardian and the court issues an order for the Department to continue as the temporary guardian of the vulnerable adult because there is no one willing and able to act as guardian for the vulnerable adult, the Department, as temporary guardian may, after one year from its initial appointment, sell the real property of a vulnerable adult pursuant to the provisions of the Oklahoma Guardianship and Conservatorship Act. The Department, as temporary guardian of a vulnerable adult, may also sell the real property of the vulnerable adult pursuant to court order if not selling the real property would jeopardize the vulnerable adult's eligibility for Medicaid.

G. Whenever the court issues an order for involuntary protective services, the court shall adhere to the following limitations:

~~a. only~~

1. Only such protective services as are necessary to remove the conditions creating the emergency, shall be ordered, and the court shall specifically designate the approved services in the order of the court~~,~~;

~~b. protective~~

2. Protective services authorized by an involuntary protective services order shall not include a change of residence unless the court specifically finds such action is necessary to remove the conditions creating the emergency and gives specific approval for such action in the order of the court. Emergency placement may be made to such facilities as nursing homes, ~~personal medical~~

~~institutions~~ hospital rehabilitation centers, assisted living centers, foster care ~~services~~ and ~~other home~~ in-home placements, or to other appropriate facilities; provided, however, emergency placement shall not be made to facilities for the acutely mentally ill~~,~~; and

~~c. involuntary~~

3. Involuntary protective services may be provided for a period not to exceed thirty (30) calendar days~~, and~~

~~d. in the court order, the~~.

H. The court shall appoint the Department or an interested person or organization as temporary guardian of the person with responsibility for the welfare of such person and authority to give consent on behalf of the person for the approved protective services until the expiration of the order ~~for involuntary protective services~~.

~~3.~~ I. The issuance of an order for involuntary protective services and the appointment of a temporary guardian shall not deprive the vulnerable adult of any rights except to the extent validly provided for in the order or appointment.

~~4.~~ J. 1. To implement an order for involuntary protective services, the court may authorize:

a. forcible entry of the premises of the vulnerable adult to be protected for the purpose of rendering protective services ~~or~~, and

b. the transporting of the ~~person~~ vulnerable adult to another location for the provision of such services,

but only after a reasonable showing to the court that good faith attempts to gain voluntary access to the premises have failed and forcible entry is necessary.

2. ~~Persons making authorized~~ If forcible entry ~~shall~~ is authorized by the court, the order shall include a directive that the Department's representative be accompanied by a ~~peace~~ police

officer or deputy sheriff in the county where the vulnerable adult or property of the vulnerable adult is located.

~~E.~~ K. The vulnerable adult, the temporary guardian, or any interested person may petition the court to have the emergency order set aside or modified at any time.

~~F. 1.~~ L. If the vulnerable adult continues to need involuntary protective services after the thirty-day order provided in ~~paragraph 2 of~~ subsection ~~D~~ G of this section has expired, the temporary guardian shall immediately file a verified motion requesting the court to order either or both of the following:

~~a. appointment~~

1. Appointment of a permanent guardian as provided by Title 30 of the Oklahoma Statutes~~,~~; or

~~b. application for commitment of the vulnerable adult to a nursing home, personal medical institution, foster care service or other home placement, or to some other appropriate facility other than a facility for the acutely mentally ill, for a period not to exceed six (6) months.~~

2. Continuation of the temporary guardianship and involuntary protective services under this section for a period not to exceed one hundred eighty (180) calendar days.

M. 1. Service of the verified motion shall be made in conformity with subsection C of this section.

2. Upon filing such motion, the court shall order that a physical, mental, and social evaluation of the vulnerable adult be conducted by the Department and that a report and plan of care be submitted to the court within thirty (30) calendar days thereafter reflecting the evaluation findings and recommended services.

3. The prior temporary order shall remain in effect pending the scheduling of a review hearing at the end of the thirty-day evaluation period. The caretaker, guardian or next of kin of the

vulnerable adult may request that the evaluation period be shortened for good cause.

4. The evaluation shall include at least the following information:

a. the address of the place where the person is residing and the person or agency which is providing care, treatment, or services at present,

b. a summary of the professional treatment and services provided to the person by the Department or agency, if any, in connection with the problem creating the need for emergency protective services, and

c. a medical and social evaluation, including, but not limited to, the Department's assessment of the person's capacity to consent to services, a psychological or psychiatric evaluation and review if the mental state of the person is in question, and any recommendations for or against maintenance of partial legal rights. The evaluation and review shall include recommendations for placement based upon the best interests of the vulnerable adult taking into consideration the following:

(1) the least restrictive environment,

(2) the desires of the vulnerable adult and legal guardian,

(3) the desires of the caretaker of the vulnerable adult and of any of the persons specified in Section 3-110 of Title 30 of the Oklahoma Statutes,

(4) the physical and mental health needs of the vulnerable adult,

(5) the available programs and services, and

(6) the health, well-being and welfare of the vulnerable adult and the public.

~~3. At the conclusion of~~ During the hearing to consider the motion to continue the temporary guardianship of the vulnerable adult for up to one hundred eighty (180) calendar days, the court shall consider the Department's findings and proposed plan of care and any other evidence presented by the caretaker, guardian or other interested persons. The court shall either terminate the temporary guardianship and all involuntary services or continue the temporary guardianship and specify any necessary services to be provided by the Department for a period not to exceed ~~six (6) months~~ one hundred eighty (180) calendar days.

~~C. The~~ N. Neither the Department nor any of its employees or any other petitioner shall ~~not~~ be liable for filing ~~the~~ a petition pursuant to the Vulnerable Adults Act if the petition was filed in good faith.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 10-109a of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. The Commission for Human Services shall establish uniform policies detailing the responsibilities and duties of employees of the Department of Human Services when providing or arranging services for vulnerable adults whether the services are to be paid for by the vulnerable adult or from other private or public funds.

B. The policies shall include, but not be limited to:

1. The handling of the personal resources, such as bank accounts, cash, checks, notes, mortgages, trust deeds, sales contracts, stocks, bonds, certificates or other liquid assets of a vulnerable adult without prior approval of the supervisor;

2. Specific procedures for obtaining and handling repairs, personal services and other necessary actions to provide health care, food, shelter to or on behalf of a vulnerable adult;

3. Prohibiting an employee from any type of solicitation or charging, requesting or accepting any fee, gift, reward, or payment of any kind from individuals or staff for any services rendered as a volunteer, intern, or employee relating to vulnerable adults;

4. Prohibiting an employee from using contact with clients or any member or the client's support system for personal gain or personal relationships;

5. Prohibiting an employee, upon termination of any assignment, from making personal contact with former clients or any member of the client's support system and from using former contact with clients for personal gain;

6. Prohibiting an employee from buying items from clients;

7. Ensuring that no employee whose responsibilities relate in any manner to services provided to or on behalf of a vulnerable adult is subject to a conflict of interest which would impair the ability of the employee to carry out his or her employment duties in an impartial manner;

8. Sufficient oversight by administrative heads of local offices of the Department as to the provision for and arrangement of services to vulnerable adults; and

9. Such other requirements as deemed necessary by the Commission.

SECTION 3. AMENDATORY 30 O.S. 1991, Section 1-103, is amended to read as follows:

Section 1-103. A. 1. It is the purpose of the Oklahoma Guardianship and Conservatorship Act to promote the general welfare of all citizens by establishing a system of general and limited guardianships for minors and for incapacitated and partially incapacitated persons which provides for the protection of their rights and the management of their financial resources.

~~B.~~ 2. It is the purpose of the system of general and limited guardianships for incapacitated and partially incapacitated persons

established by ~~this act~~ the Oklahoma Guardianship and Conservatorship Act to provide for the participation of such persons, as fully as possible, in the decisions which affect them.

3. It is the intent of the Oklahoma State Legislature:

~~1.~~ a. that the court shall exercise the authority conferred by the Oklahoma Guardianship and Conservatorship 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 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~~;~~, and

~~2.~~ b. that in performing their duties and exercising their powers, guardians and limited guardians of incapacitated or partially incapacitated persons shall:

~~a.~~ (1) assure, to the extent reasonably possible, that the rights of the wards for whom they are appointed are protected~~;~~,

~~b.~~ (2) 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 on all matters in which they are able to do so within the limitations imposed by the court~~;~~, and

~~c.~~ (3) 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.

B. The Legislature hereby establishes the Office of Public Guardianship within the Department of Human Services for the purpose of:

1. Furnishing guardianship services, and information regarding less restrictive alternatives, to all Oklahomans who need them;

2. Providing assistance to guardians throughout the state in securing necessary services for their wards including, but not limited to, removing a guardian or limited guardian; and

3. Providing assistance to courts, attorneys and proposed guardians or limited guardians in the handling of guardianship proceedings.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 10-201 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. The Department of Human Services shall establish a public guardianship pilot program and begin operations no later than January 1, 2002. The pilot program shall end no later than November 1, 2004.

B. The Department of Human Services shall establish and operate the pilot program in consultation with an evaluating board established pursuant to this section and in accordance with the provisions of the Oklahoma Public Guardianship Act.

C. The evaluating board shall determine the effectiveness of the pilot program, and make a report to the Legislature, no later than May 1, 2005. Such report shall cover:

1. The feasibility of statewide expansion of the program;

2. Staffing, particularly use of volunteers, training and liability issues;

3. Funding sources;

4. Eligibility standards;

5. Fee schedule;

6. Special-needs wards; and

7. Professional guardians.

D. The evaluating board shall consist of not more than two appointees from the following officials and agencies:

1. Governor;

2. Speaker of the House of Representatives;

3. President Pro Tempore of the Senate;

4. Office of the Attorney General;

5. Oklahoma Health Care Authority;

6. Developmental Disabilities Services Division of the Department of Human Services;

7. Department of Mental Health and Substance Abuse Services;

8. Adult Protective Services;

9. A Legal Services Developer;

10. State Long-Term Care Ombudsman;

11. Legal Aid of Western Oklahoma;

12. Legal Services of Eastern Oklahoma;

13. Oklahoma Bar Association; and

14. Advocacy Partnership for Aging Oklahomans.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 10-202 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. 1. This section shall be known and may be cited as the "Oklahoma Public Guardianship Act".

2. There is hereby created the Office of Public Guardianship within the Department of Human Services. Until the expansion of the pilot program established by Section 4 of this act becomes statewide and rules are promulgated by the Commission for Human Services, the Office of Public Guardian shall be a source of information and assistance on guardianship and alternatives for the public needing public guardianship services.

B. 1. Upon receipt of recommendations of the evaluating board established pursuant to Section 4 of this act evaluating the pilot

project established pursuant to Section 4 of this act which indicates that the expansion of the pilot project on a statewide basis would be economically feasible and practical, the Commission shall promulgate rules for developing a statewide program for public guardianship pursuant to the Oklahoma Public Guardianship Act.

2. Upon promulgation of rules by the Commission, the provisions of this section shall become effective statewide.

C. For the pilot program, and after the program has been expanded on a statewide basis, the Office of Public Guardian shall serve as a public guardian for eligible wards. The Office of Public Guardian shall be a source of guardians, limited guardians, attorneys for guardians and wards. In addition, the Office of Public Guardian shall:

1. Establish and maintain relationships with governmental, public, and private agencies, institutions, and organizations to assure the most effective guardianship program for each ward;

2. Have, at a minimum, phone contact with each ward every two (2) weeks;

3. Visit each ward at least three times every quarter, with one visit being unannounced;

4. Keep and maintain the following records on all cases in which the public guardian provides guardianship services:

a. itemized financial records,

b. health care,

c. rehabilitation,

d. education, and

e. vocation;

5. Provide information and referrals to the public regarding guardianship proceedings, but not information that would identify a particular case;

6. Foster the increased independence of the ward, to include termination of the guardianship when appropriate; and

7. Develop and maintain a current listing of public and private medical, mental health, social advocacy, educational, rehabilitative, counseling, therapeutic, homemaking, recreational, financial, and legal services and programs available to assist wards and their families.

D. The Office of Public Guardian may:

1. Contract for services necessary to carry out the duties of the Office; and

2. Accept the services of volunteer workers or consultants and reimburse them for their necessary expenses.

E. For the pilot program and after the program has been expanded on a statewide basis, the Office of Public Guardian may, on its own motion or at the request of a district court, intervene in a guardianship proceeding if the public guardian or a court considers the intervention to be justified because:

1. An appointed guardian is not fulfilling his or her duties;

2. The estate is subject to waste as a result of the costs of the guardianship;

3. A willing and qualified guardian is not available; or

4. The best interests of the ward or the person who is the subject of a guardianship proceeding require the intervention.

F. The Office of Public Guardian may employ staff and delegate to members of the staff or to volunteers the powers and duties as guardian and other powers and duties pursuant to the Oklahoma Public Guardianship Act. However, the Office of Public Guardian retains responsibility for the proper performance of the delegated powers and duties. All delegations shall be to persons who meet the eligibility requirements of a guardian pursuant to Section 3-104 of Title 30 of the Oklahoma Statutes.

G. For the pilot program, and after the program has been expanded on a statewide basis, a public guardian has the same powers

and duties with respect to the ward as a private or volunteer guardian.

H. For the pilot program and after the program has been expanded on a statewide basis, a public guardian shall endeavor, for as long as practicable, to find a suitable private or volunteer guardian of the ward. For each ward, the public guardian shall report to the court having jurisdiction of the ward, at least every six (6) months, efforts to find a private or volunteer guardian.

I. For the pilot program and after the program has been expanded on a statewide basis, any district court of this state may order a public guardian to act as full guardian, limited guardian, special guardian, or conservator for a person who is determined under the Oklahoma Public Guardianship Act to be in need of guardian service if no other person or private guardianship association is willing and qualified to perform this function.

SECTION 6. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

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