

## Investing Guardianship Assets

May 3, 2017

By: [James C. Milton](#)

*The Journal Record*

If approved by the Governor, House Bill 1243 will amend Section 4-709 of the Oklahoma Guardianship and Conservatorship Act, which governs the investment of guardianship assets.

When originally enacted in 1923, Section 4-709's precursor placed draconian limitations on types of investments. The ward's assets could be invested in well-secured real estate mortgages, bonds, or the stock issued by building and loan associations.

In 1968, the statute was amended to allow banks and trust companies to invest guardianship assets under the "prudent-man rule." Based on common law, this rule had its limitations. A fiduciary governed by the prudent-man rule could be held liable for losses in a single investment, even if the overall portfolio did well.

In 1995, the legislature adopted the Uniform Prudent Investor Act (UPIA) to replace the prudent-man rule. The UPIA uses a portfolio approach and favors diversification of investments. Section 4-709 was amended in 1995 to refer to the UPIA as the new standard for banks and trust companies investing guardianship assets.

Unless they retain a bank or trust company as agent, individual guardians are still governed by the 1923 investment rules -- with only a few modest updates. That could change with House Bill 1243.

But rather than extending the UPIA to individual guardians, House Bill 1243 allows individual guardians to avoid the old 1923 investment rules by employing both a registered investment advisor representative and a certified financial planner. Under the rules governing their professions, both registered investment advisor representatives and certified financial planners owe their clients fiduciary duties. When investing guardianship assets, they will be required to ensure that the investments are in their clients' best interests.

The new law will create some uncertainty for guardians. The ultimate investment decision appears to remain with the guardian. The new provision does not expressly require the guardian to follow the advice of investment professionals. In making investment decisions, it is unclear whether the

guardian will be held to a standard of “prudent man” or “prudent investor.”

The new law is also silent on whether guardians may enter into investment agreements containing arbitration provisions. In *Freeman v. Prudential Securities*, decided in 1993, the Oklahoma Supreme Court affirmed an order denying a motion to compel arbitration in a dispute between a conservator and an investment company, but left open the issue of whether a guardian or conservator can enter contracts containing arbitration provisions that might limit the District Court’s jurisdiction.

The referenced bill was approved by Governor Mary Fallin on May 2, 2017.

## Attorneys

---

- James C. Milton