

**LEGAL AND FINANCIAL ISSUES
OF AGING**

2009

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BETTY GARRETT WOOD, J.D.

Betty was born and raised in Oklahoma City, graduating from Putnam City High School (the original) in 1969. She attended the University of Oklahoma, obtaining a Bachelor's Degree in 1973 and a Juris Doctorate in 1980. While in law school at OU, she was a member of the Dean's Honor Roll and a member of the Board of Editors of the Oklahoma Law Review. Her article, "Estate Planning: Validity of Inter Vivos Transfers Which Reduce or Defeat the Surviving Spouse's Statutory Share" was published in the Oklahoma Law Review in 1979. Also while a law student, she clerked part-time for Justice Marian P. Opala of the Oklahoma Supreme Court.

Betty began her private practice of the law in 1981 with Fagin, Hewett, Mathews & Fagin, where she concentrated her practice in the areas of estate planning, elder law, business planning, probate, tax and employee benefit plans.

In 1987, she, along with other attorneys from the Fagin firm formed a new firm, which is now known as Clark, Stakem, Wood & Patten, P.C. Betty continues her areas of concentration - estate planning, elder law and business planning. She has over twenty-eight years of experience in these areas of the law.

Betty is a member of the National Academy of Elder Law Attorneys and a member of the Oklahoma City Estate Planning Council. She has been active in the Alzheimer's Association since 1989. She served as Chairperson of the Board of Directors of the Alzheimer's Association Oklahoma/Arkansas Chapter from 2003 to 2005. She is a guest columnist for The Oklahoman. She served as a member of the Oklahoma Attorney General's Task Force to Improve End-of-life Care in Oklahoma.

Betty is a frequent speaker to civic and professional groups on the topics of estate planning, probate, elder law (including Alzheimer's disease) and related matters.

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FINANCIAL AND LEGAL OPTIONS TO COPE WITH AGING

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FREQUENT QUESTIONS AND MISCONCEPTIONS

These are some of the most common questions asked or misconceptions which I hear in my practice.

I. VARIOUS METHODS FOR GAINING LEGAL AUTHORITY TO ACT FOR ANOTHER.

A. "Can't I act for my spouse who can no longer take care of our affairs? We have been married for years!"

ANSWER: YES, IN SOME SITUATIONS, BUT NO, IN MANY SITUATIONS.

B. "If all my siblings and I agree, can't I act for our dad without taking any legal action?"

ANSWER: NO, IN MANY SITUATIONS.

C. "I am named as Executor in my dad's Will. Doesn't that mean I can act for him during his lifetime?"

ANSWER: NO.

II ESTATE PLANNING/WILL VERSUS TRUST

A. "I have heard and seen a lot about revocable living trusts and how much better they are than wills. Doesn't everyone need a revocable living trust?"

ANSWER: FOR SOME CLIENTS A REVOCABLE LIVING TRUST IS APPROPRIATE, AND FOR OTHERS A WILL SUITS THEIR NEEDS. EACH CLIENT'S SITUATION NEEDS INDIVIDUAL ATTENTION AND ADVICE.

III. LONG TERM CARE BENEFITS UNDER MEDICAID/SPOUSAL IMPOVERISHMENT

B. "If my spouse needs nursing home care, I have heard the State of Oklahoma will take all our income and assets to pay for my spouse's care and leave me poor for the rest of my life."

ANSWER: NO. If your spouse needs nursing home care and is eligible for Medicaid long term care benefits, during your

lifetime so long as you do not need nursing home care, you will be allocated all your income and possibly a portion of your spouse's income (to bring your income up to \$2,739 in 2009 - adjusted annually), all exempt assets (home, auto, etc.) and one-half of all non-exempt assets (CDs, mutual funds, etc.) with a \$25,000 minimum up to a \$109,560 maximum in 2009 (adjusted annually).

C. "If my parent requires nursing home care, am I legally responsible to pay for her care from my personal funds?"

ANSWER: NO. While you may feel a moral responsibility to do so, you are not legally obligated to pay for a parent's nursing home care, unless you have agreed to do so with the nursing home or you are the recipient of a significant "gift" from a person who is applying for Medicaid long term care benefits or from a person who is married to an applicant.

IV. LONG TERM CARE INSURANCE

A. "Should we purchase long term care insurance?"

ANSWER: EVERYONE SHOULD LOOK INTO LONG TERM CARE INSURANCE, EXCEPT THE VERY WEALTHY AND THOSE WITH MODERATE MEANS. If, however, you have been diagnosed with a serious or chronic disease such as Alzheimer's (or a related disorder), you will not qualify for such coverage, unless you purchased the policy in advance. If you are neither wealthy nor poor, there are many factors to consider to determine which (if any) company and which policy of that company is right for you.

This material is for general informational purposes only and is not intended as legal advice as to any particular situation. A person should consult with their personal attorney regarding these matters.

**VARIOUS METHODS FOR GAINING
LEGAL AUTHORITY TO ACT FOR ANOTHER**

FURTHER DISCUSSION REGARDING QUESTIONS I.A., B., AND C.

Once a person becomes an adult, he/she has the legal right to make his/her own decisions and act for him/herself. This right cannot be taken away without the agreement of the adult, or meeting certain legal requirements which includes notice and opportunity to be heard to the adult in question. Every adult is presumed under law to be capable of making his or her own decisions, unless proven in a court to be otherwise, regardless of advanced age.

Practically, a spouse may be able to withdraw funds from a joint bank account on behalf of the other spouse. Many physicians will follow the directions of a spouse regarding health care of the other spouse, except usually in end-of-life issues. It is not advisable to leave this up to chance.

DURABLE POWER - REQUIRES PREPLANNING
- ASSET AND HEALTH CARE DECISIONS

It is advisable for every adult to have a durable power of attorney (except in those rare situations where there is no one the adult believes he can trust to carry out these duties for him). A durable power is a written document in which an adult may appoint an "attorney-in-fact" to act for him in the event of he is unable to act for himself. An attorney-in-fact is a person who has the legal authority to act on another's behalf and may be any adult, such as your spouse, a child, trusted friend or business associate.

A general power of attorney is no longer valid when the person appointing becomes incapacitated, but a durable power remains valid. Under Oklahoma law, a power of attorney is durable if it contains certain language regarding the person's intention that the power remain valid even through incapacity.

Oklahoma law recognizes a "springing" durable power which means that you may sign a durable power document today which does not take effect unless and until you need it. You may also sign a durable power which takes effect immediately. A durable power ceases to be effective upon death of the person appointing.

You may give your attorney-in-fact broad or limited powers to act on your behalf. For example, you may give the power to pay your bills, buy and sell property, borrow or lend money, make gifts, create a trust, make decisions regarding your person and/or other powers. All powers given by you must be exercised on your behalf and in your best interests, but there is no court to

supervise your attorney-in-fact. Therefore, it is important to appoint a person or persons you trust.

It is advisable for everyone (young or old) to consider a durable power of attorney to help avoid a potential expensive and burdensome guardianship. If you already have signed a durable power of attorney or are appointed as an agent under someone else's durable power, you should have the document reviewed by your attorney. A durable power which is signed before two witnesses is entitled to a presumption of validity by third parties who are asked to cooperate with the attorney-in-fact under the durable power. If you signed a durable power without witnesses, it may be advisable for you to have your attorney review your durable power.

If a durable power of attorney is to govern real estate or mineral interests, it is important to have all signatures on the durable power acknowledged and to include the legal descriptions of the real estate and mineral interests in the durable power document.

Effective November 1, 1998, a new Oklahoma statutory form of power of attorney is available. This statutory form of power of attorney is durable and with it a person may designate another to make decisions for him or her regarding property or assets. A person who wishes to use this new statutory form has several options to choose within the form, such as the types of specific powers which he or she may desire to give to another. It is important that a person understand the broad scope of the power before choosing it. The form does not spell out the broad powers given to the attorney-in-fact or agent; those are set out only in the statutes. Also, this statutory form does not govern decisions regarding the person such as health and medical decisions. Presumably, this form was enacted so that persons could take advantage of the durable power without consulting an attorney and avoid the expense.

For persons age 60 and over, the Senior Law Project at (405) 557-0014 provides free durable powers of attorney. The Department of Human Services (DHS) has available free of charge to the public a Durable Power of Attorney form which deals only with powers regarding the person, such as health care. DHS also has available Do Not Resuscitate forms and instructions and Advance Directive for Health Care and instructions without charge by calling the DHS Records Center toll free 1-877-283-4113, in the OKC area 962-1721, faxing your written request to (405) 962-1740 or emailing your request to bill.gulick@okdhs.org.

TRUST - REQUIRES PREPLANNING
- ASSET DECISIONS ONLY

If a person has created a revocable trust during his lifetime for his own benefit, the trustee of the trust may make decisions on behalf of the beneficiary as to the assets held by the trustee. A trust is generally created by the preparation and signing of a written document setting out the terms of the trust, such as who the trust should benefit (referred to as beneficiaries), how the assets of the trust (referred to as trust estate) should be managed and distributed and who should carry out these terms (referred to as trustee). The trustee of a trust has no power to make decisions regarding a beneficiary's person (such as health or medical decisions). The trustee's authority to make decisions with regard to assets held in the trust estate does not cease upon death of the beneficiary, as it does with a durable power, conservatorship and guardianship. There is more discussion about trusts below.

CONSERVATORSHIP - NO PREPLANNING
- ASSET DECISIONS ONLY

An individual with capacity to consent but who is unable to manage his property due to physical disability only may consent to the appointment by the court of a conservator to manage his property. A conservator has no authority over the person of the ward, meaning that a conservator has no power to make decisions regarding health care or medical treatment. A ward is the person for whom a conservator or guardian is appointed. Therefore, it appears a conservatorship may not be available for an Alzheimer's patient, for example, if there is no physical disability.

GUARDIANSHIP - NO PREPLANNING
- ASSET AND HEALTH CARE DECISIONS

Once a person becomes incapacitated, if there has been no advance planning, a guardianship is the only valid method for obtaining the legal authority to act on the incapacitated person's behalf.

If there is no valid durable power of attorney or trust created by the incapacitated person while he or she still had capacity, a guardianship may be necessary. An interested person such as a spouse or adult child may petition the court to be appointed as guardian of the person, property or both of the incapacitated person. Current guardianship laws provide for greater accountability by the guardians and protection of the rights of prospective wards. However, compliance with these laws makes guardianship an expensive, emotionally traumatic and time-

consuming experience, which should be avoided if possible by the use of a durable power.

ADVANCE DIRECTIVE FOR HEALTH CARE - REQUIRES PREPLANNING
- HEALTH CARE DECISIONS ONLY

In May, 2006, the Oklahoma Advance Directive for Health Care form (commonly known as a living will) was amended to include an additional situation in which a person may, in advance, express their wishes regarding end-of-life care. With an Advance Directive for Health Care ("ADHC"), a person may appoint another to make health care decisions when the appointing person is no longer able to make such decisions. The attending physician and one other physician determine when the ability to make such decisions is not present.

With an ADHC, a person may set out his or her wishes with regard to end-of-life care, including but not limited to, the withholding or withdrawal of life-sustaining procedures and/or artificial administration of food and water in the event of a diagnosis of a terminal condition, persistently unconscious or end-stage condition (such as Alzheimer's disease).

Each individual should decide for themselves whether he or she wishes to take advantage of this opportunity under Oklahoma law to make their wishes known in a legal way by signing an Advance Directive for Health Care ("ADHC"). This is purely a personal decision on the part of each individual. If an individual wishes to have either or both life-sustaining procedures and artificial administration of food and water, withheld or withdrawn in these circumstances, it is advisable to sign an ADHC. Whatever your wishes are in this regard, make them known to your family and physicians.

The Act also clarifies that you may designate another to be your health care proxy in the event that you can no longer make health care decisions. A health care proxy must make decisions based on your known intentions, personal views and best interests. If evidence of your wishes is sufficient, your wishes control. If not, the decisions shall be based on the reasonable judgment of your health care proxy as to your values and wishes.

The ADHC must be substantially in the form set out in the Act to be legally valid. The ADHC must be signed by the individual before two disinterested witnesses. The ADHC must be followed by your attending physician or you must be referred to a physician who will follow the ADHC.

Life-sustaining procedures are defined in the Act as any medical procedure or intervention, including but not limited to the

artificial administration of nutrition and hydration if the individual has specifically authorized the withholding and withdrawal of artificially administered nutrition and hydration, that, when administered to a qualified patient, will serve only to prolong the process of dying or to maintain the patient in a condition of persistent unconsciousness. Life-sustaining treatment shall not include the administration of medication or the performance of any medical treatment deemed necessary to alleviate pain nor the normal consumption of food and water.

The U.S. Congress passed the Patient Self-Determination Amendments in 1990 requiring hospitals and other institutional providers of health care services to offer to Medicare and Medicaid patients written information about their rights under state law to sign advance directives or living wills.

Advance Directives are available free of charge from the Department of Human Services at (405) 962-1721 or 1-877-283-4113, and many other sources.

DNR - NO PREPLANNING IF OTHER STEPS TAKEN
- CPR ONLY

Every person is presumed to consent to the administration of CPR in the event of cardiac or respiratory arrest, unless a Do Not Resuscitate Form ("DNR") has been signed or another statutory exception exists. An attorney-in-fact with health care powers under a durable power, a health care proxy under an ADHC or a guardian of the person may sign a DNR for another, if a physician so certifies.

DNR forms are available free of charge from the Department of Human Services at (405) 962-1721 or 1-877-283-4113.

ESTATE PLANNING/WILL VERSUS TRUST

FURTHER DISCUSSION REGARDING QUESTION II.A.

If estate planning has not been done or reviewed recently, it is important to do so now. This is especially true if there has been a tentative diagnosis of Alzheimer's or a related disorder. There will be several important decisions to be made about who should be in charge of carrying out the terms of the estate plan upon incapacity and death, who should be the people (or charities) to benefit from the estate after death, etc.

One of those decisions may be whether to use a Will or a Trust as the main estate planning document. A discussion of the advantages and disadvantages of each follow.

Inter Vivos Trusts (Living Trusts)

Inter vivos or living trusts are created by a person (called a trustor or settlor) during lifetime and may be revocable or irrevocable. These materials discuss only the revocable inter vivos trust.

Decisions to be made with a revocable inter vivos (living) trust

(a) Selection of trustees - A settlor may be the sole trustee of the trust, may serve as trustee with another person or entity (such as a bank or trust company) or may appoint another person or entity to be trustee.

(b) Selection of beneficiaries - A settlor may be the sole beneficiary of the trust during lifetime or may direct the trustee to distribute income and/or principal of the trust to others, as well as settlor. A settlor may designate who the beneficiaries of the trust will be upon the settlor's death or may give another the power to appoint the trust property.

(c) Directions as to distribution or accumulation of trust income and principal - A settlor may direct the trustee to distribute all or any part of the income or principal of the trust or to accumulate income. These directions may include specific directions, such as making distributions when beneficiaries reach a certain age or finish college. The settlor may give the trustee discretion to distribute when the trustee believes it to be in the best interest of the beneficiary.

(d) Funding - A settlor may transfer all or any part of settlor's assets to the trustee to be held under the terms of the trust agreement. However, those assets not transferred to the

trustee will not be governed by the trust agreement and the benefits of having a trust may be lost as to those assets not transferred.

Advantages of a revocable inter vivos trust:

Avoidance of guardianship in the event of settlor's incapacity and avoidance of probate at settlor's death, as to those assets transferred to the trust.

Relief of the burden of management of the settlor's assets if a third party is appointed as trustee.

Retention of control and enjoyment of trust assets by settlor.

Privacy, assuming no lawsuit is filed with a court regarding the trust, such as a claim by a beneficiary of breach of duty by the trustee.

Somewhat speedier disposition and distribution of assets upon death with a trust as compared to a probate, except when receipt of estate tax releases may prudently postpone complete distributions.

No court approval is required for sale or mortgage of trust assets as is required in a guardianship or probate.

Generally less expense than a conservatorship or guardianship.

More likely to get settlor's estate in order during lifetime.

Easier to amend than a will in some cases.

Disadvantages of a revocable inter vivos trust:

Present costs of creating the trust and transferring assets to it.

Generally no estate or income tax savings and no creditor protection or protection from long term care expenses.

Continuing expenses and/or burdens of administering the trust, including the potential requirement of an additional income tax return preparation and filing for the trust.

Lack of procedure to cut off presentment of claims by interested parties to a trust upon the death of settlor, as is provided in a probate.

More expensive than a durable power of attorney (but remains effective after death).

Last Will and Testament

You may choose to use a Will, instead of a revocable living trust, as the main governing document of your estate plan. If you do this, your Will will govern only those assets which are held in your name only or as a tenant in common with another at your death. Assets held in joint tenancy with right of survivorship or which pass by designation of beneficiary (such as a life insurance policy or retirement benefits) are not generally governed by a Will (unless the estate or the executor of the estate is designated as the beneficiary). In order to be effective, a Will must be filed with the court and a "probate proceeding" commenced. A person may use a Will to name the recipients of his or her estate and to designate their personal representative (or executor), which is the person to be in charge of the deceased person's affairs.

LONG TERM CARE BENEFITS UNDER MEDICAID/SPOUSAL IMPOVERISHMENT

FURTHER DISCUSSION REGARDING QUESTIONS III.A. & B

In an attempt to prevent the impoverishment of a spouse caring for an institutionalized spouse, Congress enacted rules for allocating income and resources between spouses. This applies to married couples, one of whom is in a nursing home ("institutionalized spouse"), and the other of whom is not ("community spouse"). The institutionalized spouse is an individual who is likely to be in a medical institution or a nursing facility for at least thirty consecutive days.

An individual is not eligible for Medicaid if his fixed gross monthly income is over a certain amount per month. In 2009, that amount is \$2,022.00 per month. This amount is adjusted for inflation annually. If an individual's income is over \$2,022.00 but not over \$3,000.00 per month, a Medicaid Income Trust may be created in order to assist the individual in becoming eligible for Medicaid.

Now, long term care benefits under Medicaid may be provided at home as well. Generally, a Department of Human Services nurse must evaluate the Medicaid applicant to determine if the provision of home care is required in order to keep the applicant out of the nursing home. The wait for an evaluation in Oklahoma and Tulsa Counties may be as long as 90 days. The eligibility rules are the same.

Income Allocation to Community Spouse

The community spouse must be allowed to retain or acquire from the institutionalized spouse a minimum monthly maintenance allowance. This minimum monthly allowance cannot exceed \$2,739 in 2009, unless certain circumstances exist. This amount is adjusted annually for inflation.

For example, Sam enters a nursing home on January 13, 2009, and applies for Medicaid. His gross income (in his name only) is \$1,800 per month. Sally, his wife at home, receives gross income of \$1,050 per month (in her name only). Sally will be allocated and entitled to receive \$1,050 (her own income) and \$1,689 of Sam's income (for a total of \$2,739). The rest of Sam's income will have to be used for personal needs (\$50), nursing home expense and other permissible expenditures. If the resources (assets) allocated to Sally (see below) are income producing, her allocation of Sam's income will be reduced by that income.

The institutionalized spouse's income may be further allocated for personal needs (\$50 per month), a family allowance for each

dependent family member and amounts for the expenses incurred for medical or remedial care for the institutionalized spouse.

Resource Allocation To Community Spouse

The community spouse is allocated all exempt resources. Exempt resources are the homestead, household goods, personal effects, car, a life insurance policy with face value of \$1,500 or less and an irrevocable burial contract of \$7,500 per person. In addition, DHS allows a community spouse to keep \$25,000 in non-exempt resources or one-half of these resources, whichever is greater, but not more than \$109,560 in 2009 (indexed annually for inflation). Non-exempt resources are all resources which are not exempt. If the community spouse's allocated share is higher than his or her actual resources, the institutionalized spouse must transfer to the community spouse an amount sufficient to increase the community spouse's resources up to the allowed spousal share.

If the community spouse's share is over \$109,560 in 2009, the community spouse must contribute the overage to the spend down as explained below, unless a hearing or a court order determines otherwise.

Spend Down

The amount of non-exempt assets allocated to the institutionalized spouse must be spent down to just under \$2,000 on any expense for the benefit of either or both spouses. For example, the spend down amount may be used for paying off the mortgage on the residence, making repairs or improvements to the residence, purchasing burial contracts or policies, taking a vacation by either or both spouses, as well as paying for home health care or long term care. Making gifts or payments for the benefit of persons other than one or both of the spouses is not a permissible expenditure.

Recovery

Oklahoma Health Care Finance Authority is required by federal law to attempt to recover benefits paid on behalf of an individual after the death of the individual from his or her estate, if there are any assets remaining. If there is a community spouse surviving, the recovery is delayed until the survivor's death. Liens may be filed on the real estate of the couple, after the community spouse's death.

Remedies

Two remedies exist for a community spouse who believes the monthly allowance or resource allocation is too low. The community

spouse may seek a court order of support against the institutionalized spouse through a divorce or separate maintenance action or request a hearing from DHS.

Transfers for Less than Adequate Consideration (Gifts)

Effective for transfers made after August 10, 1993, but before February 8, 2006, if a transfer from an individual to an individual for less than fair market value is made within thirty-six (36) months prior to applying for Medicaid, a penalty may result related to the value of the transfer which is uncompensated, unless undue hardship would result. If the transfer is to or from a trust (as opposed to individuals), the "waiting period" is 60 months.

For gifts made within the above period, if Medicaid benefits are applied for in Oklahoma, the penalty period is determined by one month of ineligibility for each \$2,000 of value of the uncompensated transfer. For example, a transfer of \$20,000 would result in ineligibility for benefit for ten (10) months. The penalty period begins to run on the date of the transfer. If a gift of \$20,000 is made on December 10, 2005, the penalty period runs out September 1, 2006.

For all transfers made on or after February 8, 2006, there is a five-year "waiting period" for all transfers (whether from or to individuals or trusts), and the penalty period begins to run, in most cases, on the date an applicant meets all other financial eligibility criteria for Medicaid and is admitted to a nursing home. Further, for gifts made on or after February 8, 2006, the penalty period is determined by dividing the value of the gift(s) by \$132.85 to determine the number of days of Medicaid ineligibility.

If one or more gifts have been made by a person applying for Medicaid long term care benefits (or their spouse) with five years of the date of application, it is advisable to consult with an elder law attorney BEFORE making application for such benefits.

LONG TERM CARE INSURANCE

FURTHER DISCUSSION REGARDING QUESTION IV

For those who do not want to rely on Medicaid long term care benefits to provide whatever long term care, if any, is needed and whose income and/or assets are sufficient to make the payment of premiums, there are long term care insurance policies available from various companies. There are usually offered several different types and levels of benefits, so that the premium cost can be controlled somewhat by your choices.

It is important, of course, to choose a company which is stable and will be around to pay the benefits you are counting on and paying for. It is also important to choose an insurance agent you have trust and confidence in to guide you through the maze of choices you have with long term care insurance, including whether it is right for you.

A few of the factors to keep in mind when you are considering the purchase of a long term care insurance policy include:

- A. Does the policy pay benefits only for long term care in a nursing facility or does it pay benefits for home health care also? If it does pay benefits for home health costs, does it pay at the same rate as for nursing facility costs or does it pay, for example, only 50% benefit at a setting other than a nursing facility?
- B. How does the policy define disability? Some policies contain very narrow definitions of disability, so that benefits are difficult to obtain.
- C. Always beware of any agent or professional who pushes you to close a sale. Take time to think over any major decision and discuss it with a trusted family member, friend or your attorney. Any agent or professional who has your best interest at heart will not pressure you or hurry you. Stable insurance companies do not usually have "limited offers."
- D. How long do you want the benefits to be payable? Obviously, unlimited benefits will result in higher premiums. You may usually choose 2, 3, 4 and 5 year benefit periods.

- E. Do you want a daily or monthly benefit? Are the premiums level? Is there a spousal discount? Will your agent be available to service the account and does the agent have experience with long term care concerns?
- F. There are riders available on most policies which can tailor the policy benefits to you. For example, you can have a provision which allows you to stop the payment of premiums if you become disabled and are receiving benefits.
- G. Benefits received under policies issued after 1996 by chronically or terminally ill insured persons will generally be excludable from income as payments from a health insurance contract for sickness (IRC Section 7702B).
- H. Free consulting regarding long term care insurance policies is available by calling Senior Counseling, a division of the State Insurance Department, at 1-800-763-2828 or (405) 521-6628. They have a free brochure available. You may wish to call (816) 842-3600 to obtain a copy of *A Shopper's Guide to Long-Term Care Insurance* published by the National Association of Insurance Commissioners, telephone (816) 842-3600. The Insurance Department, P.O. Box 534008, Oklahoma City, Oklahoma, 73152-3408, 1-800-522-0071 or (405) 521-2828, is responsible for providing information to the public about insurance and enforcing the insurance laws. They publish a free directory that includes financial information for all insurance providers licensed in Oklahoma.

