

This sample Adult Guardianship Code was drafted by CILS with funds through a grant from Department of Justice, Bureau of Justice Assistance (BJA.) The Code is available, free of charge, to any tribe who would like a copy. The sample draft Code will need to be tailored to each tribe’s individual needs. The comments throughout the Code which are highlighted are areas that a tribe may need to consider before adopting the Code although there is no requirement to do so. Note of caution, the Code was drafted in anticipation that a Guardianship Order issued under the Code may require state court recognition and as such CILS was mindful to include certain language from the California Probate Code to aid in the recognition process. If a tribe makes significant modifications to the Code, it may impact a state court’s recognition of an Order under the modified Code. If you have further questions please contact the CILS office in your area.

MODEL ADULT GUARDIANSHIP CODE

CONTENTS:

A.	Scope and Purpose.....	1
B.	Jurisdiction.....	1
C.	Definitions.....	1
D.	Petition.....	2
E.	Service of the Petition.....	3
F.	Opposition to the Petition.....	3
G.	Independent Evaluation and Interview.....	3
H.	Hearing Process and Procedures.....	4
I.	Findings and Court Order.....	5
J.	Letters of Guardianship --Duties and Responsibilities of the Guardian.....	6
K.	Special Requirements for a Guardian of the Estate.....	8
L.	Management of Ward's Estate.....	8
M.	Fraud, Waste, or Mismanagement.....	9
N.	Annual Accounting.....	10
O.	Failure to File Accounting.....	10
P.	Removal of Guardian.....	10
Q.	Appointment of Successor Guardian.....	11
R.	Duration and Termination of Guardianship.....	11
S.	Settlement of Accounts.....	11
T.	Guardian Compensation.....	12
U.	Right to Appeal.....	12

V. Amendments.....	12
W. Severability.....	12
X. Effective Date.....	12

A. Scope and Purpose

The [TRIBE] enacts this Code for the protection of its vulnerable adult members in need of assistance with their property, finances, and/or personal needs. This Code provides the legal process of establishing an adult guardianship. The careful selection process of a Guardian and the ongoing oversight of the Guardianship by the [TRIBE] Tribal Court will ensure adult Tribal members or others coming within jurisdiction of this Code will not be victims of financial or physical abuse.

B. Jurisdiction

The Tribal Court shall have jurisdiction over Guardianship proceedings when the proposed Ward is not under an existing Guardianship or Conservatorship in California, another state or tribe and any of the following criteria are met:

- (a) The potential Ward is a [Tribe] member, regardless of residency; or
- (b) The potential Ward is an Indian and:
 - (1) residing on the Reservation, or
 - (2) has property on the Reservation, or
 - (3) the Court determines that commencement of the guardianship in the Tribal Court is in the best interest of the proposed Ward.

C. Definitions

As used in this Code:

- (a) “Adult” means a person over the age of 18 years.
- (b) “California Tribe” means a federally recognized tribe located in California.
- (c) “Guardian of the Estate” means a person appointed by a court to manage another adult person’s financial resources to prevent and resist fraud or undue influence.
- (d) “Guardian of the Person” means a person appointed by a court to provide for another adult person’s personal needs such as health, the provision of food, clothing, and shelter.
- (e) “Immediate family” means spouse, domestic partner, children, step-children, parents, siblings, grandparents, grandchildren, aunts, uncles and other persons considered family by [TRIBE] custom and tradition.

- (f) “Incapacitated” means a person adjudged by a court to be substantially incapable of managing his or her property or caring for himself or herself by reason of infirmities of aging, developmental disabilities, serious mental illness, chronic alcohol or drug addiction or other like incapacities. Physical disability without mental incapacity is not sufficient to establish incapacitation.
- (g) “Interested person” means a person who has a close relationship and substantial interest in the health and well-being of the Ward such as a caregiver, close companion, social worker, or friend.
- (h) “Indian” means a person who is an enrolled member of a federally recognized tribe or has Indian blood, holds themselves out as being Indian and is recognized in the tribal community as Indian.
- (i) “Member” means an enrolled member of the [TRIBE].
- (j) “Reservation” means lands set aside for the [TRIBE’S] held in trust by the federal government for the benefit of the Tribe as well as fee lands within the boundaries of the [TRIBE’S] Reservation.
- (k) “Tribe” means the [TRIBE], a federally recognized tribe.
- (l) “Tribal Court” means the judicial body of the [TRIBE] with authority to interpret, and apply tribal laws and make legal judgments.
- (m) “Ward” means an adult person for whom a Guardian has been appointed.

D. Petition

- (a) The proposed Ward, immediate family member, interested person, or tribal government agency or department representative authorized by tribal law to act as a Guardian, may petition for Guardianship. Such petition shall state:
 - (1) The name, date of birth, residence and address of the proposed Ward and if he or she is a tribal member or Indian;
 - (2) If a voluntary Guardianship, the grounds upon which the proposed Ward believes that he or she is unable properly to manage his or her property or income and is need of a Guardian of the Estate;
 - (3) If an involuntary Guardianship, the nature of the proposed Ward’s incapacity with specification, including but not limited to family or interested person’s declarations, written statements from a medical doctor, mental health care provider and/or other professional who is credentialed in the medical or mental health field and has personal knowledge of the proposed Ward’s mental and/or physical condition.

- (4) Documentation if available or other information to the best of the Petitioner's knowledge regarding the approximate value and inventory of the proposed Ward's property and assets ;
- (5) The proposed Ward's income and source of the income;
- (6) Any other income, compensation, pension, insurance or allowance to which the proposed Ward may be entitled;
- (7) The name and address of the person nominated as Guardian by the Petitioner or proposed Ward;
- (8) The names and addresses of the proposed Ward's immediate family members known to the Petitioner or that can with reasonable diligence be ascertained; and
- (9) The name and address of the person or institution currently having the care and custody of proposed Ward if applicable.

E. Service of the Petition

- (a) The Petitioner shall serve the Petition in the manner and method provided for under the Rules of the Tribal Court or Tribal Rules of Civil Procedure. If such Rules are not provided by Court, the Petition shall be personally served or served by certified mail return receipt requested. A Proof of Service must be filed with the Court at the time of filing of the Petition or within ___ days from the filing of the Petition.
- (b) The Petition shall be served on the proposed Ward, and all persons, institutions and facilities named in the Petition.

F. Opposition to the Petition

- (a) Any party served with the Petition may file an Opposition to the Guardianship within ___ days from service;
- (b) The Opposition shall be served on all persons who were named in the Petition and in the manner and method provided for under the Rules of Tribal Court or Tribal Rules of Civil Procedure or as proscribed under E.(a).

G. Independent Evaluation and Interview

(a) The Tribal Court shall appoint an independent evaluator which can be from Tribal Social Services, other appropriate tribal or local agency, or from outside of the Tribal government to conduct a personal interview with the proposed Ward to explain:

- (1) The Guardianship hearing procedure;

- (2) The right to counsel at his or her own expense;
 - (3) The right to secure an independent medical or psychological examination at his or her own expense, and to present a report from this independent evaluation or call the evaluator to testify at the hearing.
 - (4) The required presence of the proposed Ward at the hearing. If the proposed Ward is not able to attend the hearing due to his or her condition or stay in a facility that will not permit travel, the evaluator shall inform the Court immediately. In the event the proposed Ward cannot attend the hearing, the Petitioner shall obtain a medical statement from the proposed Ward's doctor explaining the inability of the proposed Ward to attend the hearing.
- (a) The independent evaluator shall also meet with the proposed Guardian(s) to:
- (1) Conduct a home study on any proposed or nominated Guardian; and
 - (2) Assist the proposed Guardian and other adults in his or her household with submitting to a criminal background check at the proposed Guardian's expense and provide the Court with the results. If the proposed Guardian or any adult residing in his or her home has prior felonies, serious misdemeanor convictions or an extensive criminal history, the Court in its discretion may determine the proposed Guardian is disqualified.

B. Hearing Process and Procedures

- (a) All Guardianship proceedings will be closed to the public.
- (b) The standard of proof shall be clear and convincing evidence.
- (c) The Petitioner, in a case of incapacitation, has the burden of establishing that the proposed Ward is incapacitated and that the proposed Guardian is qualified and fit to act on behalf of the proposed Ward.
- (d) The proposed Ward may be represented by legal counsel or a lay advocate at his or her own expense. The Tribal Court may appoint the proposed Ward a legal representative, at the expense of the [TRIBE], if it determines that such representation is necessary to protect the proposed Ward's rights.
- (e) At the hearing, the Petitioner, the proposed Ward and any person who filed a timely Opposition to the Petition may call and cross examine witnesses to testify and present documentary and physical evidence.
- (f) If the Tribal Court, in its discretion, determines that additional expert testimony is needed on the issue of incapacity, the Tribal Court may call medical, mental health or other appropriate professionals to testify as to their expert opinions of

the evidence produced to establish incapacity. To assist the Tribal Court in its determination the proposed Ward may voluntarily submit to an evaluation to demonstrate his or her capacity.

- (g) Expert testimony shall be presented at the hearing if the Petitioner is seeking authority to place the Ward involuntarily in a facility, hospital or institution.
- (h) If the Petitioner is seeking a voluntary Guardianship, he or she will be personally questioned by the Tribal Court and if the Court is satisfied that the Petitioner desires a Guardian and that the designated Guardian is suitable, the Tribal Court may appoint him or her. If there is no designated Guardian, the Tribal Court shall proceed to appoint one as provided for under the Code in cases of where the Ward is determined incapacitated. All Guardian of the Estate sections of this Code shall be applied to a voluntary appointment of a Guardian.

C. Findings and Court Order

- (a) At the conclusion of the hearing, the Tribal Court shall issue an order determining whether the proposed Ward is incapacitated or in the case of a voluntary Guardianship whether the person has knowingly and willingly consented to the Guardianship.
- (b) In cases of incapacity the Tribal Court's final written order, based on the evidence, shall consider the proposed Ward's:
 - (1) Alertness and attention, including without limitation, level of arousal or consciousness, ability to concentrate and orientation to time, place, person, and situation;
 - (2) Ability to process information, including without limitation, short- and long-term memory (including immediate recall), ability to understand or communicate with others (either verbally or otherwise), recognition of familiar objects and familiar persons, ability to understand and appreciate quantities, ability to reason using abstract concepts, ability to reason logically, and ability to plan, organize, and carry out actions in one's own rational self-interest;
 - (3) Deficiencies in his or her thought processes such as in organized thinking, hallucinations, delusions, or uncontrollable, repetitive, or intrusive thoughts; and
 - (4) Ability to modulate mood and affect, such as pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances;

- (c) In appointing a Guardian, the Tribal Court shall determine what is in the best interests of the Ward. The Tribal Court shall consider the proposed Guardian named in the Petition and also nominations by the proposed Ward, immediate family members, interested parties and Tribal government representatives. The Tribal Court may also consider any person named by the proposed Ward identified in a written instrument executed by the Ward during a time the Ward was deemed competent;
- (d) The Tribal Court in making its decisions on the appointment of a Guardian shall take into consideration tribal customs, practices, and traditions;
- (e) The Tribal Court may order the division of duties of the appointed Guardian, with one Guardian appointed to care for the Ward's personal and physical needs and another Guardian to manage the property or business affairs of the Ward;
- (f) Prior to the appointment of a Guardian of the Estate of the Ward, the Tribal Court may require the Guardian pay a bond to be deposited with Court and said bond will be given to ensure the faithful performance of the duties of the Guardian;
- (g) The Tribal Court may waive the requirement of a bond at any time in its discretion;
- (h) A Guardian of the Person shall make an annual report on the condition of the Ward to the Tribal Court that ordered the Guardianship. The report shall include, but not be limited to: the location of the Ward; his or her health condition; any recommendations regarding the Ward; and a statement of whether or not the Ward is living in the least restrictive environment consistent with his or her needs.

D. Letters of Guardianship --Duties and Responsibilities of the Guardian

- (a) The Tribal Court shall issue Letters of Guardianship setting forth the Guardian's powers and duties. Additional the Letters shall define, when appropriate, the retained authority and powers of the Ward to care for himself or herself or to manage his or her financial resources commensurate with his or her ability to do so. The following is not an all-inclusive list and it will be in the discretion of Court whether a duty will need Court approval before it is exercised:
 - (1) Establish a new place of residence within or outside the jurisdiction of the [TRIBE];
 - (2) Whether in the custody of the Guardian or in a hospital, institution or facility, the Guardian will be responsible for ensuring for the Ward's care, comfort, and maintenance needs, including ensuring food, clothing, shelter, health care, social and recreational requirements are being met, also, when appropriate, provide the Ward with training, education, and rehabilitation. The Guardian has no duty to pay for these requirements

out of his or her own funds. Whenever appropriate, the Guardian has the duty to meet these requirements through governmental benefits or services to which the Ward is entitled before accessing funding from the Ward's estate.

- (3) Take reasonable care of the Ward's clothing, furniture, vehicles, and other personal effects and begin protective proceedings if other property of the Ward is in need of protection;
- (4) Consent to or approve any necessary medical or other professional care, counseling, treatment or service for the Ward;
- (5) A Guardian of a Person, upon order of the Court, may have custody of the person, may receive all notices on behalf of the person and may act in all proceedings as an advocate of the person, but may not have the power to bind the Ward or the Ward's property, or to represent the Ward in any legal proceedings pertaining to the property, unless the Guardian of the Person is also appointed as the Ward's Guardian of the Estate.
- (6) A Guardian of the Person may admit the Ward to a residential facility by order of the Court or make an emergency protective placement. The Guardian of the Person has the power to apply for placement of the Ward within the state protective services law, or for commitment in state court under the state mental health law;
- (7) In all cases the Court shall make a specific finding as to which legal rights the person is competent to exercise. Such rights include but are not limited to the right: to vote; marry; obtain a motor vehicle operator's license or other state license; and to testify in any judicial or administrative proceeding. Such rights may be conditioned on prior Court approval before being exercised by the Guardian.
- (8) Retain, sell or transfer the Ward's real and personal property;
- (9) Provide reasonable approval or withhold approval of any contract the Ward wishes to sign;
- (10) Pay out of the Ward's account all just and lawful debts;
- (11) Initiate or defend a civil suit on behalf of the Ward;
- (12) Invest all funds not necessary for the satisfaction of debts and charges of the Ward's estate in secure and guaranteed accounts with low risk to the Ward's assets;
- (13) Do all other things necessary for the protection of the Ward; and

- (14) The Guardian will not be liable to third persons for the acts of the Ward solely by reason of the Guardianship relationship.

E. Special Requirements for a Guardian of the Estate.

- (a) Inventory: When a Guardian of the Estate has been appointed an inventory and appraisal shall be made in the same manner and subject to the same requirements as are provided for the inventory of a decedent's estate found in the Tribe's Probate Code or if the Tribe does not have a Probate Code the inventory shall include but is not limited to the following:
- (1) Real property owned by the Ward with appraised or estimated value of each piece of property;
 - (2) Personal property owned by the Ward;
 - (3) The Ward's income, including the monthly amount, the source, where the income is deposited or maintained, the amount in savings, investments, stocks, bonds, dividends, CDs, IRAs, and other financial vessels;
 - (4) The nature and amounts of the Ward's debts, whether they are secured or unsecured, the source(s) of the debt, and whether payments are being made on the debt;
 - (5) The Ward's expenses; and
 - (6) Any other financial item of the Ward's that requires management.
- (b) The Guardian's inventory shall be certified under penalty of perjury that it reflects all property belonging to the Ward and was prepared to the best of the Guardian's knowledge after a diligent inquiry. The Court may examine the Guardian in relation to any property listed or in relation to any supposed omissions.
- (c) If the Guardian neglects to file the inventory or account when required by Court, the Court shall notify the Guardian and provide the Guardian a reasonable amount of time to comply. If the Guardian continues to neglect filing the necessary inventory he or she may be held in contempt and fined and/or removed as Guardian.

F. Management of Ward's Estate

- (a) The Guardian shall take possession of all of the Ward's real and personal property, rents, income, and benefits whether accruing before or after his or her appointment, and of the proceeds arising from the sale, mortgage, lease or exchange of any of the Ward's property as of the date that the Letters of Guardianship are issued. It is the duty of the Guardian to protect and preserve

the Ward's property, but the Guardian may retain, sell or invest the property for the benefit of the Ward under this Code.

- (b) In all cases where the Tribal Court deems it advantageous to continue the business of a Ward, such business may be continued by the Guardian of the Estate on such terms and conditions as may be specified in the order of the Court.
- (c) The Guardian of the Estate may, with the approval of the Tribal Court, after such notice as the Court directs, invest the proceeds of sale of any Guardianship assets and any other moneys in his possession in such real or personal property as the court determines to be in the best interests of the Guardianship Estate.
- (d) No Guardian shall lend Guardianship funds to himself or herself.
- (e) The Tribal Court, on the application of the Guardian, after such notice, if any, as the Court directs, may authorize or require the Guardian to sell, mortgage, pledge, lease or exchange any property of the Guardianship estate upon such terms as the Tribal Court may order, for the purpose of paying the Ward's debts, providing for his or her care, maintenance and education and the care, maintenance and education of his or her dependents, investing the proceeds or for any other purpose which is in the best interest of the Ward.
- (f) No Guardian shall purchase property of the Ward, unless sold at public sale with the approval of the Tribal Court, and then only if the Guardian is immediate family of the Ward or is a cotenant with the Ward in the property.
- (g) The limitations of this section relating to retention, sale, investment or reinvestment of any asset shall not be applicable to any bank or trust company authorized to exercise trust powers.
- (h) The Guardian of the Estate, with the Tribal Court's approval, may create or modify an Indian Will disposing of the Ward's federally-held trust assets upon his or her passing.

G. Fraud, Waste, or Mismanagement.

If the Tribal Court has reason to believe that a Guardian within its jurisdiction has filed a false inventory, claims property or permits others to claim and retain property belonging to the estate which he or she represents, and is guilty of waste or mismanagement of the estate or is unfit for the proper performance of duties, the Tribal Court shall order the Guardian to file the accounting with the Court. The Tribal Court will appointment a temporary Guardian for the Ward. If upon the examination of the accounting the Tribal Court deems it necessary to proceed further, a time and place for the adjustment and settlement of the accounting shall be fixed by the Tribal Court, and at least 10 days' notice shall be given to the temporary Guardian and to all persons named in the Petition for Guardianship. If upon the adjustment of the accounting, the Tribal Court is of the opinion that the interests of the estate and of the Ward requires it, the Guardian may be removed and another appointed pursuant to this Code.

H. Annual Accounting.

- (a) The Guardian shall annually file an account under oath and specify therein the amount of property received by him or her and remaining in his or her hands or invested by him or her, and the nature and manner of such investment, and his or her receipts and expenditures during the preceding calendar year and whenever ordered by the Tribal Court, he or she shall, within 30 days, render and file a like account for any shorter term.
- (b) The account shall be promptly examined under the Tribal Court's direction and if it is not satisfactory, notice shall be given to the Guardian to appear before the Court to address the Tribal Court's issues and concerns. Notice to the Guardian may be served personally or by certified mail as the Tribal Court directs.
- (c) If the Guardian cannot reconcile the accounting to the satisfaction of the Tribal Court, the Court may remove the Guardian as provided for under this Code and require the Guardian to reimburse the Ward's estate for any loss due to mismanagement or self-dealing and/or fine the Guardian.

I. Failure to File Accounting.

If a Guardian fails to file his or her account as required by this Code or ordered by the Tribal Court, the Court may, upon its own motion or upon the Petition of any immediate family member, interested party or representative of the Tribe, issue an order to show cause before the Tribal Court why he or she should not immediately make and file his or her report or account. If a Guardian fails, neglects or refuses to make and file any report or account after having been cited by the Tribal Court so to do, or he or she fails to appear in Tribal Court as directed, the Court shall find the Guardian in contempt and issue a fine not to exceed \$_____.

J. Removal of Guardian.

- (a) The Tribal Court may remove a Guardian upon written complaint by the Ward, the Ward's immediate family member, an interested party, or third party with personal knowledge or information about the Guardian relating to allegations of:
 - (1) Failing or neglecting the discharge his/her duties and responsibilities;
 - (2) Concealment of the Ward's assets or property, theft or conveyance of any of the money, goods, effects or instruments in writing belonging to the Ward and/or allegations of mismanagement; and/or
 - (3) Mistreatment of the Ward and/or not caring for the Ward's personal or health needs.
- (b) If the Tribal Court determines the complaint has merit, it shall issue notice to the Guardian, all persons named in the original Guardianship Petition and the

complainant to appear before the Court for a hearing on the specific grounds being alleged against the Guardian. If good cause is established, the Guardian shall be removed.

- (c) If the Tribal Court finds that the Ward's estate has been harmed due to (gross) negligence of the Guardian, the Guardian's bond shall be forfeited. In the event no bond was issued, the Court may hold the released Guardian liable for the loss to the Ward's estate.

K. Appointment of Successor Guardian

When a Guardian dies, is removed by order of the Court, or resigns and such resignation is accepted by the Court, the Court may appoint another Guardian in his or her place in the same manner and subject to the same requirements as are herein provided for an original appointment of a Guardian.

L. Duration and Termination of Guardianship

- (a) Any Guardianship shall continue during the life of the incapacitation, upon the request of a Ward under a voluntary Guardianship, or until terminated by the Tribal Court upon a determination that the Guardianship is no longer needed. The Tribal Court shall make a specific finding of any rights that the Ward retains and may exercise during his or her incapacitation.
- (b) The Tribal Court shall review and may terminate a Guardianship upon marriage to any person who is not subject to a Guardianship.
- (c) Any person on behalf of the Ward or the Guardian may petition the Tribal Court to have the Guardian discharged and a new Guardian appointed, or to have the Guardian of his or her property designated as a limited Guardian.
- (d) The Guardian, Ward or any person acting on the behalf of the Ward may petition for a review of incompetency. Upon such a petition for review, the Tribal Court shall conduct a hearing at which the Ward shall be present. After the hearing or on its own motion, the Tribal Court may terminate if the Ward is determined to no longer be incapacitated or modify a Guardianship if the Tribal Court determines that the Ward remains limited and/or incapacitated to manage his or her personal needs and estate.
- (e) A Guardianship shall terminate at the death of the Ward.

M. Settlement of Accounts

Upon termination of a Guardianship, or upon resignation, removal or death of a Guardian, such Guardian or his personal representative shall forthwith render his or her final account to the Tribal Court and to the former Ward, the successor Guardian or the deceased Ward's personal representative as the case may be. Upon approval of the account and filing proper receipts the Guardian shall be discharged and his or her bond released.

N. Guardian Compensation

Every Guardian shall be allowed the amount of his or reasonable expenses incurred in the execution of his or her trust responsibilities including necessary compensation paid to attorneys, accountants, brokers and other agents and servants. He or she shall also have such compensation for his or her services as the Court, in which his or her accounts are settled, deems to be just and reasonable.

O. Registration/Enforcement

A Guardianship order issued pursuant to this Code appointing a Guardian of the Person, Guardian of the Estate, or a Guardian of the Person and Estate, may be registered and enforced in a California court.

P. Right to Appeal

Any appeal by a party to an action under this Code will be made in accordance with Tribal Appellate Court Rules and Procedures.

Q. Amendments

This Code and the procedures promulgated hereunder may be amended or rescinded by the [add the tribal body that is authorized to amend and rescind Codes for your tribe] at a duly called meeting.

R. Severability

If any section, provision or portion of this Code is found unconstitutional or invalid by a court of competent jurisdiction, the remainder of this Code shall not be affected thereby.

S. Effective Date

This Code shall take effect upon [add final approval of Codes for your Tribe].