Questions and Answers on Guardianship

What is a guardian?

A *guardian* is a person appointed by a court to manage the affairs of a person who is incapacitated.

A guardian may be appointed to manage the financial affairs of a person at significant risk of harm because of a "demonstrated inability to adequately manage property or financial affairs." A guardian may be appointed to make health care and other non-financial decisions for a person at significant risk of harm because of a "demonstrated inability to adequately provide for nutrition, health, housing or physical safety." (The quoted language is from the Washington State law, Revised Code of Washington 11.88.010.)

How are guardians appointed?

Guardians are appointed by Superior Court judges or court commissioners. Appointments are made in response to petitions filed in the Superior Court. Any interested person may file a petition; the person who files it need not want to be appointed guardian.

The petition asks the court (1) to determine that the person identified in the petition is incapacitated, and (2) to appoint a guardian. A court cannot appoint a guardian for a person unless it determines that the person is incapacitated and needs a guardian.

Before a decision is made about whether a guardian is needed, four steps must be taken:

1. notice of the guardianship petition must be given to the person identified in the petition;
2. the court must appoint a person (called a "guardian ad litem") to make an investigation and report to the court;
3. the guardian ad litem must obtain a statement from a physician or psychologist; and
4. a hearing must be held.

In order to act as a guardian for another person, a lay proposed guardian (someone who is not a professional guardian) must complete standardized training made available by the court. The training is done online (on a computer). In limited circumstances, the court may waive the training requirement. There is no cost for the training, and free computer access is available at public libraries. Training is required to ensure that guardians understand the responsibilities they are assuming, and to inform guardians about the laws they must follow throughout their appointment as guardian. Both existing lay guardians and prospective lay guardians are required to complete the training.

If the court determines that a guardianship is appropriate, and determines that the proposed guardian is a suitable person to act; the court will enter an order appointing the guardian and directing that Letters of Guardianship be issued. Letters of Guardianship is a document issued by the court clerk verifying that the guardian has fulfilled the legal requirements to serve, has been appointed by the court to serve, and is authorized to serve, as guardian. The document also identifies the type of guardianship (guardianship of the person and/or the estate) and whether the guardianship is a limited or a full guardianship. Letters of Guardianship may be issued by the court for a time period of up to five years, after which the Letters must be renewed by court order. Depending on circumstance, Letters may be issued by the court for less than five years.

What if guardianship is sought for someone who doesn't want a guardian?

People who object to having guardians are entitled to have their objections considered at a hearing. They may be represented by their own lawyer at the hearing. If they want a lawyer and can't afford to hire one, the court will appoint a lawyer for them. A guardian may only be appointed if the court is convinced, after the hearing, that a guardian is needed.

What if someone is not totally incapacitated but still needs help?

Courts can appoint *limited guardians* for people who are capable of caring for themselves, or arranging for their care, in some ways but not in others.

Guardianships are supposed to be limited in this way, and are not supposed to be broader than necessary to meet the needs resulting from a person's incapacity.

What are a guardian's responsibilities?

A guardian's responsibilities depend on whether and how the guardian's role has been limited by the court. It is common to talk about two broad categories of responsibility – "estate" and "person" – but a limited guardianship could contain elements from one or both categories.

A *guardian of the estate* of an incapacitated person is responsible for management of the person's property and finances. He or she must file an inventory with the court within three months of appointment, as well as an annual accounting. Some management decisions will require court approval.

A guardian of the person is responsible for assessing the person's physical, mental and emotional needs, and any need for assistance in activities of daily living. He or she will be responsible for implementing a plan to meet these needs, and must file a care plan (identifying needs and explaining how they will be met) with the court within three months of appointment, as well as an annual status report. A guardian of the person may also be responsible for giving or withholding consent to medical treatment.

In case of his or her incapacity or death, a guardian must file a written notice with the court designating a standby guardian to serve. The notice of designation of standby guardian must be filed within 90 days of the original guardian's appointment by the court. Within 30 days of death or the adjudication of incapacity of the originally appointed guardian, the standby guardian must petition the court to appoint a substitute guardian.

Are there decisions that guardians may not make?

Yes. For example, a guardian may not decide to place an incapacitated person in a nursing home against his or her will, and may not consent to the commitment of an incapacitated person for mental health treatment. A guardian may, however, ask a court (in a proceeding under the Involuntary Treatment Act) to order an involuntary commitment.

Also, a court order is required for any therapy or other procedure that induces convulsion, or any psychiatric or mental health procedure that restricts physical freedom of movement.

What happens to someone's legal rights when a guardian is appointed?

When a court determines that a person is incapacitated and appoints a guardian, the court authorizes the guardian to make certain decisions for the incapacitated person. The incapacitated person may no longer make those decisions.

If the guardianship is a full guardianship, the incapacitated person loses the right to make most decisions adults normally make for themselves. For example, the incapacitated person will no longer be able to manage his or her own financial affairs or to make independent decisions about medical treatment.

If the guardianship is a limited one, the court order will say what decisions are to be made by the guardian and what decisions are to be made by the incapacitated person.

For example, a limited guardianship order might say that financial decisions are to be made by the guardian, but health care decisions are to be made by the incapacitated person.

Even if a court order says that a guardian is to make health care decisions, the guardian is not simply free to do whatever he or she thinks best. The guardian's responsibility is to make decisions that are consistent with the views and values held by the incapacitated person before the incapacity developed, if those views or values are known. In addition, if the incapacitated person can express a preference about a medical treatment issue, the guardian must consider the expression of preference before making a decision.

In deciding whether to follow current expressions of preference, the guardian should consider how well the incapacitated person understands his or her medical condition and any treatment options. The guardian's role in this context is a delicate one and should be undertaken with common sense and with respect for the incapacitated person.

Isn't a power of attorney an easier alternative?

Yes and no. A power of attorney can be used by a person who is not incapacitated to appoint another person (an agent) to act for the first person. And it can be written to provide that it will remain in effect after the first person becomes incapacitated in the future.

But a person who is already incapacitated cannot give power of attorney to an agent. So, if a person already needs a guardian, a power of attorney is no longer an alternative. For more information on powers of attorney, see Power of Attorney Documents at WashingtonLawHelp.org.

If I already have power of attorney for a person, and the person becomes incapacitated, is a guardianship needed?

It depends on what the paper giving you the power of attorney says. Some powers of attorney, called "durable powers of attorney" (DPOA) continue in effect after the person who granted the powers (the principal) becomes incapacitated. But a power of attorney doesn't continue in effect after the principal becomes incapacitated, unless the paper the principal signed says it does. If you are not sure whether you have been given a DPOA, you should seek legal advice.

- ❖ Even with a durable power of attorney, there is sometimes a need to petition for guardianship. If you have a DPOA and think the principal is now incapacitated, but the principal disagrees and a conflict develops, the incapacity question should ordinarily be answered by a court. The issue may be presented in a guardianship proceeding or in a proceeding brought under the power-of-attorney statute (RCW 11.94.090).10.

Can a guardianship be modified or terminated?

Yes. Individuals who believe that their guardian should be replaced, that their guardian's responsibilities should be changed, that their guardian has acted inappropriately, or that they are no longer in need of a guardian, should discuss their concerns with their guardian, if that seems to make sense. Otherwise, they may write to the clerk of the court and ask for modification or termination of the guardianship. The clerk will refer the letter to a judge for action.

What costs are involved in a guardianship proceeding?

The major costs of the ordinary guardianship proceeding are the court filing fee, the lawyer's fee, the fee for the guardian ad litem, and the fee for the physician's or psychologist's report. If the person for whom a guardianship is sought has very limited means, the county will pay the fee for the guardian ad litem, and if the person's assets are less than $3,000, no filing fee will be required. A lawyer's fee will vary depending on the complexity of the case and how much time it will take. Fees should be discussed before agreeing to hire a lawyer.

Can a guardian be paid?

Yes. A court will usually allow reasonable fees to be paid from the incapacitated person's funds, if there are sufficient funds.

If the incapacitated person is on Medicaid in a nursing home or receiving services under the COPES program, it may be possible to have the Department of Social and Health Services (DSHS) set aside part of the individual's income to pay a guardian fee that has been set by a court. DSHS will only do this if certain rules have been followed, and this should be discussed with the lawyer assisting with the guardianship proceeding. (The rules are found in Washington Administrative Code, Chapter 388-79.)

What if someone needs a guardian, but there is no one to start a guardianship proceeding or serve as guardian?

If a person in need of a guardian is being abused or neglected, the State may file a guardianship proceeding. If you know of such a person in King County, you should call the office of Adult Protective Services at (206) 341-7750. To find the right number to call outside King County, you should call 1(866)363-4276.

Assistance in finding people to serve as guardians or to file guardianship proceedings may be available in King County from Senior Information & Assistance at (206) 448-3110. For information outside of King County, check your telephone directory for a local Senior Information & Assistance office.