Alternatives to Guardianship for Adults[1]

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Issues to Consider before Pursuing Guardianship

Guardianship is one option when a person has significant problems managing financial affairs or personal care. Sometimes it is the only reasonable choice. It should be the last resort, for several reasons. Guardianship requires going to court and can be costly. It deprives an adult of very significant personal rights. Our state guardianship law protects individuals from losing these rights without clear and convincing evidence of the need for guardianship. That requires considering alternatives first.

Start by identifying the specific problems. Then consider whether alternatives to guardianship can address these problems. For example, some money management problems may be addressed with a representative payee to handle Social Security Administration benefits or with a bank system for automatic bill payment. The DSHS Home and Community Services office or local Senior Information and Assistance program can help identify options available in your community.

Even if alternatives cannot address the problems fully, guardianship still may be inappropriate. Some problems, such as excessive drinking or unsafe sexual practices, cannot be "fixed" through a guardianship or an alternative. Guardianship is not a way to force someone who is competent to do what someone else thinks he or she should do. An adult who has the legal capacity to manage his or her own affairs has a right to make decisions other people may view as unwise.

Courts grant guardianships only for a person determined to be legally "incapacitated." Incapacity means that the person has a significant risk of personal or financial harm. The risk must be evidenced by a demonstrated inability over time to manage property or financial affairs, or a demonstrated inability over time to provide or arrange adequately for nutrition, health, housing or physical safety. Advanced age, eccentricity, poverty, and medical diagnosis are not sufficient to justify guardianship.

A guardian ordinarily cannot place a person in a nursing home, institution, or other such facility against the person's will or commit a person involuntarily for mental health treatment. These involuntary placements require a court order under the Involuntary Treatment Act. An exception for certain treatments occurs when the person consented in advance, using a "mental health advance directive."

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[1]This material addresses laws in the State of Washington. Guardianship for children is a different topic, not addressed here. For updates to this pamphlet, check the website www.washingtonlawhelp.org and search for this pamphlet by title.

Guardianship for Adults in Washington

Guardianship is a formal legal process to give a person the power to make decisions for another person. In Washington, a guardianship petition for an adult is filed in Superior Court. Guardianship may be filed in tribal court if the person needing a guardian is a Native American (see below). A judge or court commissioner decides whether a person is incapacitated and needs a guardian to manage some or all of his or her affairs, and if so, who the guardian should be.

Usually the person seeking a guardianship (the *petitioner*) needs an attorney to bring the case into court. The court appoints an independent person (a *guardian ad litem*) to investigate whether a guardianship is needed and to make recommendations to the court. (A tribal court may also appoint a *guardian ad litem*.) The person for whom the guardianship is sought has the right to appear in court, to object to the guardianship or to the proposed guardian, to have an attorney to defend against the guardianship, and to argue for less restrictive alternatives.

Guardianship in Washington state courts requires giving a formal written notice to the subject of the guardianship about the rights the person may lose in a guardianship. These rights include: the right to marry or divorce; to enter into or end a state registered domestic partnership; to vote or hold an elected office; to enter into a contract; to make or revoke a will; to give a power of attorney; to sue or be sued other than through a guardian; to have a license to drive; to buy, sell, own, mortgage or lease property; to consent to or refuse certain medical treatment; to decide who will provide care and assistance; and to make certain decisions about social aspects of life.

Guardianships may be tailored to grant the guardian only limited rights and to avoid loss of decision-making powers by the subject of the guardianship. This is called a “limited” guardianship. To be sure what rights the person retains and what authority the guardian has, you must review the letters of guardianship issued to the guardian, or the court orders.

Some reasons a guardianship may be the only or best option for a particular incapacitated person’s situation include:

- No alternative gives someone else the authority to make a necessary decision;
- Family conflict make it legally hazardous or difficult for anyone with authority through an alternative to take action without court approval;
- Someone has authority to make decisions but is unqualified, is or may soon become unavailable to serve, is untrustworthy or unstable, or has engaged in abuse, neglect, or financial exploitation;

- Alternatives have been found inadequate to address or protect the adult from exploitation or other harm;
- The person's financial or medical needs are too complex for available alternatives and best managed through professional certified guardian services.

Usually the expenses to establish and maintain a guardianship are paid from the incapacitated person's funds. People receiving Medicaid for institutional or alternative long term care programs may be able to pay for a guardian using income they would otherwise be required to pay for their care.[2] A limited program provides publicly-paid guardians for a small number of people.[3]

Under state law, a professional guardian who charges fees for serving as guardian of three or more (non-family) persons must meet certification requirements of the office of the Administrator of the Courts.[4] Many people have a family member or friend serve as guardian without charging a fee. A new state law sets out training requirements for such guardians. The training is designed to ensure that lay guardians understand the increasingly complex reporting and accounting requirements for guardianships.[5]

For Native American adults, a guardianship proceeding may sometimes be brought in tribal court instead of state court. Many Indian Tribes have their own guardianship codes and court requirements.[6] Usually the case is filed in the court on the reservation where the person lives. Before deciding whether to file a guardianship involving an Indian person in tribal court or state court, contact the tribe or a lawyer who regularly appears in the tribal court. Tribal courts hear the case even if a state court also would have jurisdiction. On some reservations, the tribal court may be the only court that can handle proceedings for incapacitated tribal members living on or near the Tribe's reservation. Tribal courts may provide a less formal and more culturally sensitive forum for decisions regarding incapacitated tribal members. Tribal court may be the only available forum with a working relationship with the Bureau of Indian Affairs or tribal programs delivering BIA services. Tribal court thus may be in a better position to assist an incapacitated tribal member with issues involving trust income or resources. Tribal court also may be available for proceedings involving Indian people living on a particular reservation who are enrolled with another tribe.

NOTE: More general information about guardianships is at www.washingtonlawhelp.org. Select the category "Seniors" and subcategory "Guardianships."[7]

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[2] See Washington Administrative Code Chapter 388-79**.**

[3] For more information, search for the Office of Public Guardianship under the "Programs" section of the Washington courts website: https://www.courts.wa.gov/

[4] For more information, see: http://www.courts.wa.gov/programs_orgs/guardian/

[5] See lay training information linked in the website shown in the above footnote.

[6] Even if a Tribe does not have a separate code or ordinance on Guardianship Proceedings for incapacitated adults, a Tribal court may allow use of its Code on Minor Guardianship Proceedings or the state law to address guardianships for incapacitated adults.

[7] **Other resources**: DSHS information about guardianship at http://www.adsa.dshs.wa.gov/pubinfo/legal/guardianship.htm; The King County Bar Association's

Alternatives to Guardianship

I. Options Available *before* a Person Becomes Incapacitated

A person capable of making decisions can arrange for someone else to manage finances or personal care decisions in the event incapacity occurs in the future. Several methods commonly used to do this are discussed below. Once a person has become incapacitated, the options are more limited (see Section II below).

A. Financial Decisions

All methods allowing someone else to handle a person's finances have potential to allow financial exploitation. Some methods have more safeguards than others. No method is safe unless the person managing the finances is trustworthy, stable, and available.

1. Durable Power of Attorney[8]

A power of attorney is a document through which a person (the *principal*) gives someone else (the *agent* or *attorney-in-fact*) legal authority to act for the person (the *principal*). A *durable* power of attorney includes language indicating that the power will continue even if the principal becomes disabled or incapacitated in the future. If the document lacks this kind of language, the power of attorney is not "durable," and it *terminates* if the principal becomes incapacitated.

The language used in the power of attorney document determines the extent of the agent's powers. The document may give powers over financial affairs, healthcare, or both. Financial powers may be narrow or broad.

A durable power of attorney may be written to take effect immediately or to take effect only when the person becomes incapacitated. The latter type of power of attorney is called a *springing* durable power of attorney. These powers of attorney should include language describing how incapacity will be determined.

Durable powers of attorney have many advantages. They are relatively simple and inexpensive to arrange compared to trusts or guardianships. The agent under the power of attorney is a *fiduciary*, meaning legally required to manage the

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"Family & Volunteer Guardian's Handbook" is at: **http://www.kcba.org/CLE/family_volunteer_guardian_handbook.pdf;** the Guardian ad Litem handbook is available at: **http://www.kcba.org/CLE/pdf/2012_GAL_Manual.pdf .**

[8] For more information go to the website www.washingtonlawhelp.org, select *Seniors* and then *Guardianships and Powers of Attorney*.

principal's assets in the interest of the principal. Powers of attorney can be revoked easily when the principal has the mental capacity to do so.

Powers of attorney can be abused. A potential disadvantage of powers of attorney compared with guardianships is the lack of a protective oversight system. (Guardians, by contrast, must report periodically to the court. Professional guardians are certified and regulated by a board through the state's court system.[9]) Problems with powers of attorney such as failure to provide an accounting can be addressed in legal proceedings under state law.[10] When a power of attorney is abused or mismanaged, however, losses may be difficult or impossible to recover.

1. Trusts

A trust is a legal arrangement through which a person (the *grantor*) transfers money or property to a *trustee* who manages the property for the benefit of the grantor or other named beneficiaries. Trusts are flexible legal tools that can accommodate a variety of goals. A trust may be drafted to allow a person to retain control of assets until incapacity occurs. Trusts are complex, however, requiring careful consideration, drafting, and management. They may be completely impractical for a person with small assets. Advice of an attorney specializing in this area is essential. Even more specialized expertise is required when the beneficiary depends on needs-based assistance programs such as Medicaid long term services and supports or SSI.

2. Joint Property Arrangements

Holding an asset in joint ownership is an informal method some people use to allow a person to manage their finances. Sometimes this works well. For example, happily married husbands and wives may hold funds belonging to both of them in joint accounts. This allows either spouse to manage the funds without a guardianship if the other spouse becomes incapacitated.

Joint property arrangements also may be inappropriate or hazardous. Sometimes a person changes a solely-owned account to a joint account held with a family member or friend who made no deposits to the account, intending only to get help with writing checks and to leave the balance upon death to the joint holder. This may work well for some situations, but is an arrangement particularly subject to abuse.

Under Washington law, funds held in a joint bank account with right of survivorship continue to belong to the depositors in proportion to the funds each has deposited.[11] A joint account holder has access to the account, however, and may think funds belong to him or her.

Recovering losses when joint accounts are abused can be very difficult. Difficulties increase with poor record-keeping and lack of clarity about authorized

[9] See www.courts.wa.gov
[10] RCW 11.94.090
[11] See RCW 30.22.090.

spending. Making someone a joint account owner does not necessarily create a "fiduciary" legal obligation in the way that a power of attorney automatically does.

If the reason for adding a person to a bank account is simply to enable the person to write checks on your behalf, joint ownership of the account is not required. Instead, you can simply add the person to the signature card. Although this method will not transfer the account automatically on death, a simple will can do that, with less risk.

Transferring an ownership interest in an asset, especially real estate, may have unintended effects. If the new joint owner of the property has creditors, dies, or dissolves a marriage, the transferred interest in the property may be affected in ways the original owner did not anticipate.

Joint property arrangements also may have unintended or undesired tax and estate planning consequences. Gift or inheritance taxes are a consideration for some people. Receiving property as a gift instead of as an inheritance may cause different (less favorable) capital gains tax treatment for the recipient. A joint owner can manage assets without knowing and respecting the original owner's estate plan, disrupting the distributions to heirs that were intended.

Eligibility for public benefits based on financial need (such as Medicaid, SSI, and cash assistance for low-income families) also can be affected by making joint property arrangements. Assistance programs such as SSI cash assistance and Medicaid long-term care programs can disqualify people for "transferring" assets. Adding a person as an owner may be treated as such a transfer. Eligibility for many assistance programs is affected by the assets a person "owns." Being added to an account or property as an "owner" may cause ineligibility for some benefits.

For all these reasons, get individualized legal advice before using joint property arrangements to give someone authority to manage assets.

B. Health Care Decisions

1. Durable Power of Attorney for Health Care Decisions

A durable power of attorney can give the agent authority to make health care decisions for the principal when the principal becomes unable to make such decisions. Many durable power of attorney forms DO NOT include authority for health care decisions. To determine whether a particular power of attorney document includes these powers, read it carefully. Some people choose to have one durable power of attorney for health decisions and a separate durable power of attorney for financial decisions.

Unless the person is the spouse, state registered domestic partner, adult child, or sibling of the principal, none of the following people may serve as an agent for health care decisions: the principal's physicians; the physicians' employees; the owners, administrators, or employers of the health care facility

where the principal resides or receives care. An agent under a power of attorney, like a guardian, does not have authority to consent to certain electro-convulsive therapy or certain other psychiatric/mental health procedures.[12] An exception occurs when the incapacitated person provided advance consent for electro-convulsive therapy or mental health hospitalization in a special mental health advance directive.[13]

2. Living Will (*Health Care Directive*)

The Washington Natural Death Act allows an adult to make a written directive (commonly called a *living will*) instructing the person's doctor to withhold or withdraw life-sustaining procedures in the event of a terminal condition or permanent unconscious condition. Many people include a special durable power of attorney for health care decisions in the document, directing the agent to enforce the living will provisions.

The forms used for this may be called *Directive to Physicians* or *Health Care Directives* or *Living Wills*.[14] The state law describes the effects of making a Living Will and the procedures to do so.[15] Because the law changed significantly in 1992, forms produced before early 1992 may not include all options available under the current state law.

3. Mental Health Advance Directives[16]

Mental health advance directives were created by the legislature in 2003 to allow a person to express preferences and instructions about mental health treatment. A person with mental capacity to do so can use the directive to consent in advance to mental health treatment that may be needed later, when the person may not have capacity to consent.[17] Advance consent can be given for mental health treatment such as inpatient hospitalization or electro-convulsive therapy, that otherwise would require a court order. The law contains many specific requirements, options, and protections.[18] The form used is in the law.[19]

II. Options Available *after* an Adult Loses Capacity

When an adult has difficulty managing finances or personal care, and advance planning directives (such as a durable power of attorney or other device

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[12] See RCW 11.94.010(3).
[13] See RCW 71.32.
[14] An information pamphlet with forms is available on the legal services website at www.washingtonlawhelp.org (select category *Seniors*, subcategory *Medical and Mental health*). Hospitals, home health providers, stationery stores, senior information and assistance programs, and private attorneys are other sources for these forms.
[15] *See* RCW 70.122.010 *et seq.*
[16] A DSHS website with information about MHADs is: http://www.dshs.wa.gov/dbhr/advdirectives.shtml
[17] A caution to consider is that the person may not be able to revoke the power during a later period of incapacity.
[18] See RCW Chapter 71.32.
[19] See RCW 71.32.260.

discussed above) are absent or inadequate, consider the following options. A guardianship may not be the only option.

A. Consent to Health Care Statute

Washington law has a method for someone else to make health care decisions for an adult who cannot make health care decisions *by reason of mental incapacity*. (Note: Health care consent for minor children is different.[20]) Having a physical ailment does not necessarily mean the adult is not capable of consenting to health care.

An adult generally has the right to make decisions about what care or treatment is to be done to his or her body. *Informed Consent* means a person makes a decision about medical care (including the refusal of care) after being informed about the possible risks and benefits of the proposed care and of other options. To give informed consent, a person must have the mental capacity to understand the choices and make the decision.

Whether a person still has the mental capacity to make his/her own health care decisions sometimes is unclear. If the person believes he/she is able to make such decisions and the medical provider disagrees, a court may need to resolve the dispute in a guardianship proceeding.

The consent to health care statute provides authority for a substitute decision-maker when an adult in Washington does not have capacity to consent to health care.[21] The order of priority for substitute decision-making *for an adult i*s:

a. The appointed guardian, if any;
b. A person to whom the patient has given a durable power of attorney that specifically grants authority to make health care decisions;
c. The patient's spouse or state registered domestic partner;
d. Children of the patient who are at least age eighteen;
e. Parents of the patient;
f. Adult brothers and sisters of the patient.

All substitute decision-makers (guardian, agent under durable power of attorney, or close relative) must use this standard for making health care decisions:

- Choose what the person, with his or her values and preferences, would want if he or she were competent to decide.
- If, and only if, this determination cannot be made, decide based on what you believe is in the person's "best interests." [22]

[20] See RCW 7.70.065(2).)
[21] See RCW 7.70.065(1).
[22] See RCW 7.70.065(1)(c).

This is the process. A physician seeking informed consent for proposed health care of an incapacitated person must make reasonable efforts to locate and get consent from the person(s) in the highest priority class that applies to the patient (see list above). Example: If the patient has a guardian with health care authority, the physician must first attempt to reach the guardian for consent. If no person is available in the highest priority class, the physician can seek authorization from the available people in the next lower priority class in which people are available. Consent cannot be given if a person in a higher priority class has refused authorization. *When the priority class has multiple members (e.g. parents), the decision to consent must be unanimous among all available members of the priority class*.

If the person has no available person in the classes listed in the law, a guardianship can create a person with this authority. In an emergency, however, consent to needed care may be implied.

Some decisions require a court order rather than a guardian or agent's consent.

- Electro-convulsive therapy, psychosurgery, and certain other intensive psychiatric/mental health treatment require court order.[23]

- Placement in a residential treatment facility, such as a nursing home, against the person's will requires a court order in an Involuntary Treatment Act proceeding.[24]

A court order may not be needed for some such mental health treatment, including hospitalization, when the patient has provided advance consent through a *mental health advance directive*.[25]

B. Representative Payeeships

A representative payee is someone appointed by a government agency to act as a substitute to receive and manage the benefits owed to a recipient. Agencies using representative payeeships for benefits include:

- Social Security Administration,
- Veterans Administration,
- Department of Defense,
- Railroad Retirement Board, and
- Office of Personnel Management (federal employee retirement)

The representative payee must use the government benefits on behalf of the beneficiary for the beneficiary's personal care or well-being. A guardianship is not needed to manage these funds. Agencies may refuse to allow a guardian to

[23]See RCW 11.92.043(5).
[24] See RCW 11.92.190
[25]See RCW 71.32.

access the funds without first being appointed as representative payee. Some Washington state programs have similar provisions for *protective payees*.[26]

Requests for a representative/protective payee are made to the government agency issuing the benefits. Sometimes the person receiving benefits does not want a payee or wants a different person to serve as payee. The agency can explain any rights the person has to object and to appeal the decision.

C. Vulnerable Adult Protection Orders

State law changes in 2007 expanded options for Vulnerable Adult Protection Orders under RCW 74.34. These orders can protect an adult vulnerable due to mental or physical disability who is victimized by abandonment, abuse or financial exploitation. Now an *interested person* can seek relief in court even when the vulnerable adult is unable or unwilling to seek help. This option may provide quick access to orders protecting a person from further abuse or exploitation. Mandatory forms to use for these cases are on the court website: http://www.courts.wa.gov/forms/ Many counties have courthouse facilitators who can assist people in limited ways. Adult Protective Services also may assist.

D. Supervised Individual Indian Money Accounts

Some Native Americans receive one-time or recurring income from Indian trust land managed by the federal government or as compensation for the loss of Indian lands. If the person already has a guardian or has given someone a power of attorney, the Bureau of Indian Affairs (BIA) or the tribal provider of BIA services will work with the appointed person to manage the person's "Individual Indian Money" (IIM) funds. The BIA has a trust responsibility to ensure that withdrawals of IIM funds by an agent or guardian are used only for the benefit of the IIM account holder. If there is no appropriate, available person to serve as guardian or agent, the BIA should supervise the account in its capacity as trustee of Indian funds.

Before the BIA will supervise the account, the BIA may require a court, a BIA or tribal social worker, or another federal agency to determine that the individual needs help managing financial affairs. The BIA can be appointed as representative payee for the Social Security Administration (for SSI or Social Security benefits) or for the Veterans Administration. This appointment will trigger BIA supervision of individual Indian trust income as well.

Requests to have an Individual Indian Money account or other funds of an incapacitated Native American managed by the BIA are made to the U.S. Department of Interior, Bureau of Indian Affairs Superintendent at the particular BIA agency that manages the Indian trust land for that individual and tribe.

[26] See RCW 74.12.250; 74.08.280; WAC Chapter 388-460.

III. Community-Based Supportive Services

Finding appropriate supportive services can solve problems that otherwise could lead to an unnecessary guardianship. Some supportive services available in many communities are described below.

A. Money Management Services

Money management alternatives include automatic banking, direct deposit and personal money management services. Automatic banking allows the bank to pay regular bills. Direct deposit allows electronic deposit of regular sources of income into the recipient's bank account. Personal money management or bill paying services can be helpful but may be expensive. Choosing such a service requires careful consideration of the staff qualifications, management practices, and protections such as bonding and insurance to reduce chance of loss by negligence or theft.

B. Case Management

Case management can help functionally disabled adults get necessary support services. Case managers can assess a person's ability and needs, develop a detailed plan of care, and follow-up to ensure services are provided and changed as needed. Free case management may be available under state programs administered by the Division of Developmental Disabilities, Division of Mental Health, Division of Vocational Rehabilitation, or DSHS Home and Community Services. Local Senior Information and Assistance program can suggest options.

C. Respite Care and Other Services

Case managers can help identify other available social and health services. These may include respite care, information and referral, adult day care, home health care, homemaker, personal care, home delivered meals, mental health services, adult day program/day care, vocational services, tenant support, legal services (for help with eligibility for funding of services), and transportation. Eligibility for publicly funded services may depend on income, assets, age and type of disability. Respite care may be available to help non-paid caregivers avoid burnout. Respite services range from brief day care or home care to temporary stays in hospitals or nursing homes.

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