

Alternatives to Guardianship for Adults



Northwest Justice Project

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Part 1. Introduction

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- ❖ You can find the most recent version of this guide on WashingtonLawHelp.org. That website also has a shorter, simpler version called **Quick Facts: Alternatives to Guardianship**.
 - ❖ The information here applies only to adults who live in the state of Washington. This is for people who know someone living in the state of Washington who might need a guardian or who think they may need a guardian or alternative someday.
 - ❖ You can find all the fact sheets we link to here at WashingtonLawHelp.org.
 - ❖ This is about **Guardianships and alternatives for adults only**.
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Have you been told you may need a guardian to help you manage your finances or health care decisions? Do you know someone who is having a hard time managing their finances or making decisions about their health care? Has someone at a nursing facility or other health care institution told you that your loved one needs a guardian? A judge will appoint a guardian only when a person is at significant risk of harm because they lack capacity to manage their financial affairs or personal care.¹ But guardianship should be the last resort, for several reasons.

- It takes away a person’s major personal rights.²
- Under state law, you must first consider the alternatives to guardianship.³
- You have to go to court to get guardianship.
- It can cost a lot to get guardianship.

It is important to consider if there are alternatives to guardianship before going to court. This guide explains guardianship and alternatives that may make guardianship unneeded.

¹ Washington’s guardianship laws changed in 2019 and 2020. Changes to adult guardianship take effect January 1, 2022. See [ESSB 6287, Chapter 312, Laws of 2020](#).

² Since 1990, Washington guardianship law has stressed that guardianships should restrict liberty and autonomy only to the minimum extent necessary. [RCW 11.88.005](#). The new law keeps this policy.

³ [RCW 11.88.030\(1\)\(i\)](#).

Part 2. What is guardianship?

This legal process gives someone (the “guardian”) the power to make decisions for another person. In Washington, a friend, family member or a representative of the State can file a petition for guardianship in Superior Court. A judge or court commissioner decides if a person is **incapacitated** and needs a guardian to manage some or all of their affairs. The judge also decides who the guardian should be.

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- ❖ You can file in **tribal court** if the person needing a guardian is a Native American. See “Are there different rules for Native Americans,” below.
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The person who starts the guardianship lawsuit is the **petitioner**. Often the petitioner asks to be appointed as guardian, but not always. The petitioner does not need an attorney to bring the case in court, but having a lawyer can help.

The court appoints an independent person (a **guardian ad litem**) to:

- investigate if the adult needs a guardianship, and
- make recommendations to the court, including whether the adult needs a guardianship, what kind of help the adult needs, and who should be guardian.

The adult who needs help and might need a guardian is the “**Alleged Incapacitated Person**” (**AIP**) in a guardianship case. The AIP has the right to:

- appear in court and object to the guardianship and/or proposed guardian,
- have a court-appointed lawyer to defend them against the guardianship, and
- argue for “less restrictive alternatives” to guardianship.

The petitioner must give formal written notice to the AIP about the rights they may lose in a guardianship. These include the right to:

- marry or divorce,
- vote or hold elected office,
- enter into a contract,
- make or revoke (cancel) a will,
- give someone power of attorney,

- sue or be sued other than through a guardian,
- hold a driver's license,
- buy, sell, own, mortgage, or lease property,
- consent to or refuse certain medical treatment,
- decide who will provide care and assistance, or
- make certain decisions about social aspects of life.

❖ Use the **footnotes** in this guide to look up the law. **RCW** stands for [Revised Code of Washington](#). These are the laws of the state of Washington. **WAC** stands for [Washington Administrative Code](#). These regulations put the laws into practice. These references are up to date as of July 2020. The law may change before we update the guide again.

A. When does it make sense to file for guardianship?

You may need to file a petition for guardianship in court when someone cannot manage their finances and/or health care and

- They do not have a power of attorney, payee, agent or other person with the legal authority to make all the decisions the person cannot make on their own.
- They have a power of attorney, payee, agent or other person with the legal authority to make the needed decisions, but the substitute is unqualified, unavailable, untrustworthy, unstable, or has engaged in abuse, neglect, or financial exploitation.
- A professional certified guardian service would be the best person to manage the person's complicated financial or medical needs.

B. How does a judge decide if someone needs a guardian?

A judge will appoint a guardian when the judge determines that someone is “incapacitated”.⁴ This generally means the person has a mental incapacity causing a significant risk of harm.

- A judge will appoint a guardian 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."⁵
- A judge will appoint a guardian 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."⁶

You **cannot** use these alone as proof of the need for guardianship⁷:

- Advanced age,
- medical diagnosis,
- eccentricity, or
- poverty.

C. Does a guardian get paid?

Yes, in some cases. The court may let a guardian be paid from the incapacitated person’s funds. People who get Medicaid for institutional or alternative care may sometimes pay a guardian using income otherwise used to pay for their care.⁸

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- ❖ A limited state program provides paid **public guardians** for a small number of people without funds. See the [Office of Public Guardianship’s brochure](#). Visit www.courts.wa.gov/content/publicUpload/Office%20of%20Public%20Guardianship%20-%20About%20Us/OPG_BRO_OfficePublicGuardianship2011.pdf.
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⁴ [RCW 11.88.010](#)

⁵ [RCW 11.88.010\(1\)\(b\)](#)

⁶ [RCW 11.88.010\(1\)\(a\)](#)

⁷ [RCW 11.88.010\(1\)\(c\)](#)

⁸ See Washington Administrative Code Chapter [388-79A](#). **Medicaid limits the amount of payment.**

D. Are there different rules for Native Americans?

Yes, sometimes. Many Indian tribes have their own guardianship laws and court requirements.

When the incapacitated person is Native American and lives on the reservation, usually you will file the case on the reservation where the person lives. Find out if this is true in your case. Talk to the tribe or to a lawyer who regularly appears in that tribal court. Read the tribe's guardianship law. Many tribal codes are available online. Otherwise, contact the tribal court to ask for a copy of its guardianship code. Visit <https://goia.wa.gov/tribal-directory> for contact information for Washington tribes.

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- ❖ A tribal court can hear the case even if a state court also would have jurisdiction.
 - ❖ A tribal court can also hear the case when the Alleged Incapacitated Person (AIP) lives on the reservation but belongs to a different tribe.
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When the person lives near the reservation, many tribal courts decide cases involving their members no matter where they live. The tribe's laws and Constitution will say when the tribe has jurisdiction over the parties and subject.

E. Why would I file for guardianship in tribal court instead of state court?

- The Tribal Court may have exclusive (sole) jurisdiction over the enrolled Tribal member or a member of another Tribe who is believed to be incapacitated.
- It may be a more culturally appropriate forum.
- The process may be more user-friendly for unrepresented parties.
- The tribal court may have a helpful working relationship with the Bureau of Indian Affairs (BIA) or tribal programs that provide social services.

- Tribal court may be better able to help an incapacitated tribal member with issues involving trust income or resources.

F. When does guardianship not help?

You cannot use guardianship to fix problems such as someone’s unsafe substance use or sexual practices. You cannot use guardianship to force someone who is otherwise competent to do what you think they should do. An adult with the legal capacity to handle their own affairs has the legal right to make decisions others may think are unwise.

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- ❖ A guardian ordinarily cannot place someone in a nursing home, institution, or other such facility against their will, or commit someone involuntarily for mental health treatment. The guardian needs a court order under the [Involuntary Treatment Act](#)⁹ to do that. The guardian does **not** need a court order if the person consented in advance in a “Mental Health Advance Directive.” See the section on Mental Health Advance Directives, below.
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G. Are there alternatives to get help with decisions without losing rights in a guardianship?

Yes. We discuss several options below.

⁹ [RCW 71.05](#).

Part 3. Alternatives to Guardianship for Me

A. What is “Supported Decision Making” (SDM)?

A Supported Decision Making agreement lets you choose someone you trust to help make decisions for you. The SDM model for decision-making began as a way to protect independence for people with intellectual and developmental disabilities. It also can be used by people with other kinds of disabilities, including cognitive decline.

Our state law adds supported decision making as a guardianship alternative, starting in 2022.¹⁰ This will require SDM agreements to be in writing and include the types of decisions, name of the supporter and relationship to the person, and the supporter’s role.

In the future, a person who needs this help but does not have a trusted person available may get help from the state’s Office of Public Guardianship (OPG).¹¹ Visit WashingtonLawHelp.org to learn more about supported decision-making.

B. How can I make sure I will not need a guardian if I become incapacitated?

You can arrange now for someone you trust to manage your finances or personal care decisions if you become incapacitated later. Read on for some ways to do this.

C. Can I arrange just for help with my financial decisions?

Yes.

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- ❖ All options for help with financial decisions open you to the risk of financial abuse. Some have more safeguards than others do. **You must choose someone trustworthy, stable, and available to help with your finances.**
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Durable Power of Attorney: All types of Powers of Attorney let you (the principal) give someone else (the agent or attorney-in-fact) legal authority to do things for you. But if you want the power to continue if you become disabled or incapacitated in the future, the Power of Attorney document must say that it is “durable” (DPoA).

¹⁰ [ESHB 6287, Ch. 312, Laws of 2020](#).

¹¹ Law changes will appear in [RCW 2.72](#). **OPG resources are limited.**

If the Power of Attorney document (PoA) is **not “durable”**, it **ends** if you become incapacitated. Do not use a PoA that is not durable if you want to prevent guardianship in the future.

The DPoA should state what powers you are giving to your agent. You can give powers over financial affairs, healthcare, or both. If you want, you can limit your agent’s financial powers.

A DPoA can take effect either right away or only when you become incapacitated. It should say which of these applies. If the DPoA takes effect only when you become incapacitated, we call it a **springing** Durable Power of Attorney. A springing DPoA should state how the agent will determine that you have become incapacitated.

Good things about using a DPoA:

- It is easier and cheaper to do than a trust or guardianship.
- It is easy to revoke (cancel) if you do not want it to continue.
- Under the DPoA, the agent is a “fiduciary”. Under state law, a fiduciary must manage your assets in your interest.
- You can go to court to try to resolve problems with a DPoA (or PoA), such as the agent’s failure to give you an accounting.¹²

Some concerns about PoA’s:

- PoA’s can be abused. Don’t use a PoA if you do not have a willing, capable, and trustworthy person to be your agent.
- There is no protective oversight system for PoA’s. Your agent does not have to make regular reports to the court. Your agent is not certified and regulated, as a professional guardian would be.¹³
- Although you can go to court to try to resolve problems with a PoA, it is expensive. And if your agent uses the PoA to steal money or other assets from you, often you cannot recover the losses.

¹² RCW [11.125.160](#).

¹³ See “Certified Professional Guardian” at <http://www.courts.wa.gov/guardianportal/>.

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- ❖ You can find Durable Power of Attorney forms and instructions here:
[Durable Power of Attorney Documents.](#)
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Trusts: This legal arrangement lets you (the “**grantor**”) transfer money or property into a trust. A “trustee” manages the property for you (“the “beneficiary”) and for any other named beneficiaries.

A trust can do many different things. It can let you keep control of assets until you become incapacitated.

But trusts are complicated. You will need a lawyer to set it up for you. A trust may not make sense if you have few assets. Talk with a lawyer specializing in this area.

Joint Property Arrangements: Holding an asset in joint ownership is an “unofficial” way to manage your finances. For example, married people may hold funds belonging to both spouses in joint accounts. Either spouse may manage the funds without a guardianship if the other becomes incapacitated. Sometimes this works well.

But joint property arrangements can be a bad idea in some cases. For example, you may add someone to your bank account so they can help manage your finances and would get the balance in the account upon your death. However, this arrangement can lead to financial abuse or other negative outcomes.

The funds in a joint bank account with right of survivorship generally continue to belong to the depositors in proportion to the funds each has deposited, but exceptions to this can make ownership unclear.¹⁴ Nevertheless, a joint account holder who has access to the account has the power, if not necessarily the right, to treat the account as if half or even all the money belongs to themselves.

It can be hard to recover your losses if your joint account is abused. Poor record keeping makes it harder. Often people are unclear about authorized spending. Making someone a joint account owner does not automatically create a “fiduciary” legal obligation the way a power of attorney does.

If you just want to give someone the power to write checks on your behalf, your bank may let you **add the person** as an authorized signer. You do not need to make them a joint owner. This would still make the person able to steal your money. But it

¹⁴[RCW 30A.22.090](#). Exceptions apply “when the contract of deposit provides otherwise” or “there is clear and convincing evidence of a contrary intent at the time the account was created.”

would be more clear that the money is yours and not owned in part by the other person.

If you want an account to transfer to someone when you die, ask the bank about **payable on death** or adding a beneficiary for the account.

Usually it is safer to use a Durable Power of Attorney to authorize someone to handle your money. A will is another way to have property transfer on death.

Transferring an ownership interest in an asset, especially real estate, could have unintended negative consequences. If the new joint owner has debts, dies, or divorces, the legal interests of your joint owner’s creditors, heirs, or divorced spouse could affect the interest in the property you transferred.

Example: You transfer part ownership in your home to your child. That child divorces. The child’s ex-spouse may end up owning the part ownership (or part of it) of what you may think is “your” home.

Joint property arrangements also may have negative tax and estate planning effects. Getting property as a gift instead of an inheritance may cause negative tax treatment of the property for the person getting the property.¹⁵ Also, your joint owner may manage assets without knowing and respecting your estate plan.

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- ❖ Assistance programs such as SSI and Medicaid long-term care programs can disqualify you for “transferring” assets. Adding someone as an owner is likely to count as a “transfer.”
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For all these reasons, **get legal advice** before using joint property arrangements to give someone authority to manage your assets.

D. Are there options to help just with my health care decisions?

Durable Power of Attorney for Health Care Decisions: This kind of DPoA can give your agent authority to make health care decisions for you if you become unable to do so. Many durable power of attorney forms **do not** include authority for health care decisions. If this is what you want, make sure your form includes this.

¹⁵ When you inherit property, the tax “basis” in the property (used to determine taxes on a sale) usually becomes the fair market value of the property. This does not apply to property received as a gift. See [26 U.S.C. 1014](#); [IRS Publication 17](#)’s section regarding “Inherited Property.”

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- ❖ It is okay to have one durable power of attorney for health decisions and a separate one for financial decisions.
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These people cannot serve as your agent for health care decisions, unless the person is also your spouse, state registered domestic partner, adult child, or sibling¹⁶:

- Your doctors,
- Your doctors' employees, or
- The owners, administrators, or employees of the health care facility where you live or get your care.

Like a guardian, an agent under a power of attorney does not have authority to consent to certain electro-convulsive therapy or certain other psychiatric or mental health procedures.¹⁷ **Exception:** when you gave advance consent for electro-convulsive therapy or mental health hospitalization in a special Mental Health Advance Directive.¹⁸ See the section on Mental Health Advance Directives, below.

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- ❖ You can find Durable Power of Attorney forms and instructions on the WashingtonLawHelp.org: [Durable Power of Attorney Documents](#).
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Health Care Directive (or Living Will): The [Washington Natural Death Act](#) lets you make a “living will.” This lets you instruct your doctor to withhold or withdraw life-sustaining procedures if you have a terminal condition or are permanently unconscious. You can include a special durable power of attorney for health care decisions in the living will, directing the agent to enforce the living will provisions. You may want to review and update your Health Care Directive from time to time, or when you have a new diagnosis or a life-changing event.

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- ❖ You can find Health Care Directive forms and instructions on the WashingtonLawHelp.org: [Health Care Directive \(or Living Will\)](#).
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¹⁶ [RCW 11.125.400\(3\)](#)

¹⁷ [RCW 11.125.400\(3\)](#)

¹⁸ [RCW 71.32](#)

Mental Health Advance Directives: This lets you express your preferences and instructions about mental health treatment. As long as you have the mental capacity to do so, you can use the directive to consent now to mental health treatment you may need later, when you may not have capacity to consent. You can give advance consent for mental health treatment that otherwise would require a court order. **(Example:** inpatient hospitalization.) The law has specific requirements, options, and protections.¹⁹ Learn more at www.hca.wa.gov/health-care-services-supports/behavioral-health-recovery/mental-health-advance-directives.

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- ❖ You can find Mental Health Advance Directive forms on WashingtonLawHelp.org: [Mental Health Advance Directive](#).
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¹⁹ [RCW 71.32](#).

Part 4. When Someone You Love Becomes Incapacitated

A. My parent, spouse, or relative has become incapacitated. What can I do?

If the person has no guardian and no advance planning directives like a durable power of attorney, think about these options.

For problems making health decisions:

Consent to Health Care Statute: You have the right to make decisions about what care or treatment is done to your body. **Informed consent** means you make a decision to accept or refuse medical care after being informed about the possible risks and benefits of the proposed care and of other options. To give informed consent, you must have the mental capacity to understand the choices and to make the decision. Whether you have mental capacity to make your own health care decisions can be unclear. You may need a medical professional to evaluate your capacity.

When you don't have the capacity to make health care decisions for yourself, Washington's informed consent law for adults lists specific people who can make health care decisions for you. This can help when you don't have a guardian, power of attorney or other substitute decision-maker.²⁰

❖ Health care consent for minor children is different.²¹ Do **not** use this guide.

Under Washington's informed consent law, when an adult in Washington does not have capacity to consent to health care, the following people, in order of priority, can be your substitute decision-maker for health care:²²

1. Any appointed guardian
2. Someone to whom the patient has given a durable power of attorney that grants authority to make health care decisions

²⁰ [RCW 7.70.065\(1\)](#).

²¹ [RCW 7.70.065\(2\)](#).

²² [RCW 7.70.065\(1\)](#) (see Reviser's note: ... RCW 7.70.065 was amended twice during the 2019 legislative session, each without reference to the other. For rule of construction concerning sections amended more than once during the same legislative session, see RCW 1.12.025).

3. The patient's spouse or state-registered domestic partner
4. Children of the patient who are at least age eighteen
5. The patient's parents
6. The patient's adult brothers and sisters
7. The patient's adult grandchildren who are familiar with the patient
8. The patient's adult nieces and nephews who are familiar with the patient
9. The patient's adult aunts and uncles who are familiar with the patient
10. An adult who:
 - Has exhibited special care and concern for the patient;
 - Is familiar with the patient's personal values;
 - Is reasonably available to make health care decisions;
 - Is not the patient's doctor or an employee of the doctor; the owner, administrator, or employee of a health care facility, nursing home, or long-term care facility where the patient lives or gets care; or paid to provide care to the patient; and
 - Provides a signed declaration meeting the requirements of [RCW 7.70.065\(1\)](#)

All substitute decision-makers must use this standard when making health decisions:

- Choose what the person, with their values and preferences, would want if competent to decide.
- **Only** if you cannot make this determination, decide based on what you believe is in the person's "best interests."

How it works: A doctor looking for informed consent for proposed health care of an incapacitated person must make reasonable efforts to find and get consent from a person in the highest priority class that applies to the patient. (See list above.)

Example: The patient has a guardian with health care authority. The doctor must first try to reach the guardian for consent.

If no one is available in the highest priority class, the doctor can try to get authorization from the available people in the next lower priority class. You cannot get consent if a person in a higher priority class has already refused to give consent to health care. When the priority class has multiple members (**example:** two parents), all available members of the priority class must agree to consent.

Example: Your mother has become ill and is incapacitated. She has no guardian. She has no power of attorney giving an agent authority to make health care decisions. She is widowed. She has three children. Your mother’s doctor must get consent from you and both your siblings (if all of you are available).

If the person has no available person in the classes listed in the law, someone needs to become guardian to have a substitute decision-maker.

❖ In an emergency, consent to needed care may be implied.²³

Some decisions require a court order, not a guardian or agent’s consent:

- Electroconvulsive therapy, psychosurgery, and certain other intensive psychiatric or mental health treatment²⁴
- Placement in a residential treatment facility, such as a nursing home, against the person’s will²⁵

You may not need a court order for certain mental health treatment when the patient has given advance consent through a mental health advance directive.²⁶ (See section on Mental Health Advance Directives, above.)

Representative Payees to handle government benefits or assistance: Some government agencies can appoint a payee to get and manage the benefits owed a recipient. Agencies that sometimes use payees are:

- Social Security Administration (SSA)
- Veterans Administration (VA)
- Department of Defense (DoD)

²³ [RCW 7.70.050\(4\)](#)

²⁴ [RCW 11.92.043\(5\)](#)

²⁵ [RCW 11.92.190](#)

²⁶ [RCW 71.32](#)

- Railroad Retirement Board
- Office of Personnel Management (OPM)

A payee must use the government benefits on behalf of the beneficiary for the beneficiary's personal care or well-being. You do not need a guardianship to manage these funds.

An agency may require a guardian be made representative payee before the guardian can access the person's funds. This may also be true for some Washington state assistance programs and protective payees.²⁷

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- ❖ If you want a payee, you must make your request to the government agency that sends your benefits.
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The person getting benefits might not want a payee, or might want someone different to be payee. The agency can explain any rights the person has to object to and appeal the decision.

Vulnerable Adult Protection Order (VAPO): You can get a VAPO under [RCW 74.34](#). This court order can protect an adult who is vulnerable due to mental or physical disability who is victimized by abandonment, abuse, neglect, or financial exploitation. An interested person can file for a VAPO in court even when the vulnerable adult cannot or will not seek help. The forms you need are at www.courts.wa.gov/forms. Read [Protecting Elders and Vulnerable Adults from Abuse and Neglect](#) to learn more.

Supervised Individual Indian Money (IIM) Accounts: Some Native Americans get income from Indian trust land managed by the federal government. 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 must make sure that an agent or guardian only uses IIM funds for the IIM account holder's benefit.

If no one is available to be guardian or agent, the BIA should supervise the account as trustee of Indian funds. The BIA may first need a court, BIA or tribal social worker, or other federal agency to determine that the person needs help managing

²⁷ [RCW 74.12.250](#); [74.08.280](#); [WAC Chapter 388-460](#)

affairs. The SSA or VA can appoint the BIA to be the person's payee. This will also trigger BIA supervision of individual Indian trust income.

To have BIA manage an IIM account or other funds of an incapacitated Native American, contact the BIA's Social Services department, at the BIA agency that manages the Indian trust land for that person and tribe.

B. Can Community-Based Supportive Services help?

Maybe. Finding the right services may solve problems that otherwise could lead to an unnecessary guardianship. Some of these services may be available in your community:

Money Management Services. These include:

- Automatic banking, which lets the bank pay regular bills;
- Direct deposit, which allows electronic deposit of income into your bank account; or
- Personal money management services or bill paying services. These services may cost a lot. If you choose one of these, look closely at staff qualifications, management practices, and protections such as bonding and insurance to reduce chance of loss by negligence or theft.

Case Management. This can help adults with functional disabilities get needed support services. Case managers can:

- Assess someone's ability and needs;
- Develop a detailed plan of care; and
- Follow up to make sure the person gets services and that services change as needed.

❖ You may be able to get free case management through the Division of Developmental Disabilities (DDD), Division of Mental Health, Division of Vocational Rehabilitation (DVR), or DSHS Home and Community Services (HCS). Local Senior Information and Assistance programs may be able to help seniors find services or case management.²⁸

²⁸ The DSHS website can help you find these services: www.dshs.wa.gov/AL TSA/resources

Respite Care and Other Services. Case managers can help you find other available social and health services. These may include:

- respite care
- information and referral
- adult day care
- home health care
- homemaker and 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)
- transportation

Eligibility for some services may depend on:

- income
- assets
- age
- type of disability

You may be able to get respite care 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.

Part 5. Get Legal Help

Outside King County, call the CLEAR Hotline at 1-888-201-1014 weekdays between 9:15 am - 12:15 pm.

In King County, call 2-1-1 weekdays between 8:00 am - 6:00 pm. They will refer you to a legal aid provider.

Seniors (age 60 and over) can also call CLEAR*Sr at 1-888-387-7111, statewide.

You can also apply online with CLEAR*Online: nwjustice.org/get-legal-help.

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