

Minutes and Grievance Reports

Certified Professional Guardianship Board
Monday, September 12, 2016 (8:00 a.m. – 9:00 a.m.)
Teleconference

Proposed Meeting Minutes

Members Present

Judge James Lawler, Chair
Commissioner Rachelle Anderson
Mr. Gary Beagle
Ms. Rosslyn Bethmann
Dr. Barbara Cochrane
Mr. Bill Jaback
Ms. Carol Sloan
Ms. Barbara West
Ms. Amanda Witthauer

Members Absent

Ms. Nancy Dapper
Judge Gayle Harthcock
Commissioner Diana Kiesel
Mr. Gerald Tarutis

Staff

Ms. Shirley Bondon
Ms. Carla Montejo
Ms. Kim Rood
Ms. Eileen Schock

Online Guests – see list on last page.

1. Call to Order

Judge Lawler called the meeting to order at 8:05 a.m.

2. Welcome, Roll Call & Approval of Minutes

Judge Lawler welcomed the Board members and the public to the meeting.

Approval of Minutes

Judge Lawler inquired if there were any changes or corrections to the proposed minutes from the August 8th, 2016 meeting. Hearing none, he requested a motion to approve the minutes of the meeting.

Motion: *A motion was made and seconded to approve the August 8th, 2016 meeting minutes. The motion passed. Bill Jaback abstained.*

3. Chair's Report

- 2017 Meeting Dates

The proposed Board members dates for the 2017 calendar year were reviewed and approved.

- Committee Assignments

The appointment of two new board members is effective October 1, 2016.

- Mr. Jerry Fireman, representing senior interests, will be appointed to the Application Committee and the Standards of Practice Committee.

- Ms. Penney Sanders, representing certified professional guardians, will be appointed to the Application Committee and the Education Committee.

Other committee changes, also effective October 1st are:

- Ms. Amanda Witthauer will chair the Applications Committee and will join the Regulations Committee
- Ms. Carol Sloan will chair the Education Committee.

4. Reports

- Grievance Status Report

Staff reported that they opened 10 grievances in August 2016. They closed seven grievances. The number of grievances received annually is expected to increase as superior courts begin to forward grievances they receive as required by the RCW 11.88.120 Complaint Procedure adopted in 2014.

5. Reconvene and Vote on Executive Session Discussion

Applications Committee

On behalf of the Applications Committee, Mr. Jaback presented the following applications for Board approval. Members of the Application Committee did not vote.

- Motion:** *A motion was made and seconded to deny Shannon Bryant's application for certification. The motion passed.*
- Motion:** *A motion was made and seconded to deny Lucy Leach's application for certification. The motion passed.*
- Motion:** *A motion was made and seconded to conditionally approve Joni Lee's application for certification. The motion passed.*
- Motion:** *A motion was made and seconded to conditionally approve Mary Scott's application for certification. The motion passed.*
- Motion:** *A motion was made and seconded to approve Carrie Wilson's application for certification. The motion passed.*
- Motion:** *A motion was made and seconded to approve Abigail Whittaker's application for certification. The motion passed.*
- Motion:** *A motion was made and seconded to conditionally approve Jacob Woiwod's application for certification. The motion passed.*

On behalf of the Applications Committee, Ms. Bethmann presented the following two applications for Board approval.

- Motion:** *A motion was made and seconded to deny Sean Allan's application for certification. Mr. Jaback abstained from voting. The motion passed.*

Motion: A motion was made and seconded to deny Jamilah Walter's application for certification. Mr. Jaback abstained from voting. The motion passed.

A member of the Standards of Practice Committee requested Board action in the matter of CPGB 2013-004, 2013-029, 2015-004 and 2015-04, involving CPG Lin O'Dell.

Motion: A motion was made and seconded to approve an agreement regarding discipline with letter of reprimand in the matter of CPGB 2013-004, 2013-029, 2015-004 and 2015-04. The motion passed.

6. Wrap Up /Adjourn

Meeting was adjourned at 8:53 a.m. The next meeting date will be October 17, 2016 at the SeaTac Office Center.

Recap of Motions from September 12, 2016 Meeting

Motion Summary	Status
Motion: A motion was made and seconded to approve the minutes of the August 8, 2016 meeting. The motion passed.	Passed
Motion: A motion was made and seconded to deny Shannon Bryant's application for certification. The motion passed.	Passed
Motion: A motion was made and seconded to deny Lucy Leach's application for certification. The motion passed.	Passed
Motion: A motion was made and seconded to conditionally approve Joni Lee's application for certification upon successfully completing the UW guardianship training. The motion passed.	Passed
Motion: A motion was made and seconded to conditionally approve Mary Scott's application for certification upon successfully completing the UW guardianship training. The motion passed.	Passed
Motion: A motion was made and seconded to approve Carrie Wilson's application for certification. The motion passed.	Passed
Motion: A motion was made and seconded to approve Abigail Whittaker's application for certification. The motion passed.	Passed
Motion: A motion was made and seconded to conditionally approve Jacob Woiwod's application for certification upon successfully completing the UW guardianship training. The motion passed.	Passed
Motion: A motion was made and seconded to deny Sean Allan's application for certification. The motion passed. Mr. Jaback abstained.	Passed
Motion: A motion was made and seconded to deny Jamilah Walter's application for certification. The motion passed. Mr. Jaback abstained.	Passed
Motion: A motion was made and seconded to approve an agreement regarding discipline with letter of reprimand in the matter of CPGB 2013-004, 2013-029, 2015-004 and 2015-04. The motion passed.	Passed

Online Guests

Tina Baldwin

Tom Goldsmith

Not Identified

Proposed

CERTIFIED PROFESSIONAL GUARDIAN GRIEVANCES

30-Sep-16

Grievances (Investigations)	2016	2015	2014	2013	Total
Open Needing Investigation August 31, 2016	36	31	27	2	96
Resolved w/o ARD or Hearing	3	1	0	0	4
Resolved w/ARD					
Resolved w Hearing					
Reopened Grievances					
New Grievances (opened since late report)	11				11
Open Needing investigation September 30, 2016	44	30	27	2	103
Closed	3	1	0	0	4

Year Received (Resolutions)	2016	2015	2014	2013	Total
Dismissal - Administrative					
Dismissal - No actionable conduct	1	1			2
Dismissal - No jurisdiction	2				2
Dismissal - Insufficient					
Admonishment					
Reprimand (Previously Investigated)					
Suspension					
Decertification					
Conflicts Review Committee Decision					
	3	1			4

Summary Current Activity	2016	2015	2014	2013	Total
Opened since last report	11				11
Closed w/o ARD/Hearing	3	1	0	0	4
Closed w ARD					
Closed w/Hearing					0

CPG ID	Grievances	Year(s) Grievances Received	Status
A	3	2014 (1), 2016 (2)	
B	3	2014 (1), 2016 (2)	
C	3	2014 (2), 2015 (1)	
D	2	2014 (1), 2016 (1)	
E	3	2015 (1), 2016 (2)	
F	18	2013 (2), 2014 (7), 2015 (8), 2016 (1)	
G	4	2012 (1), 2013 (1), 2015 (2)	
H	10	2014 (4), 2015 (5), 2016 (1)	
I	2	2016 (2)	
J	3	2016 (3)	
K	2	2016 (2)	
L	2	2015 (2)	
M	3	2014 (1), 2015 (1), 2016 (1)	
N	2	2015 (1), 2016 (1)	
O	2	2015 (2)	
P	2	2014 (2)	
Q	3	2015 (1), 2016 (2)	
R	2	2016 (2)	
S	3	2016 (3)	
T	2	2016 (2)	
U	6	2014 (1), 2015 (1), 2016 (4)	
V	3	2015 (2), 2016 (1)	
W	2	2014 (2)	
X	2	2015 (1), 2016 (1)	

Total 87

Year	Grievance by Year
2012	1
2013	3
2014	22
2015	28
2016	33

WINGS



ADMINISTRATIVE OFFICE OF THE COURTS

Callie T. Dietz
State Court Administrator

October 10, 2016

TO: Certified Professional Guardianship Board
FROM: Shirley Bondon, WINGS Coordinator
RE WINGS Report:

September 1, 2016, the WINGS Steering Committee met and approved the following recommendations submitted by WINGS subcommittees:

Legislative Proposals Approved:

1. Change the term Title 11 Guardian ad Litem (GAL) to court investigator. For more details, see Attachment A
2. Change the statutory reference “incapacitated person” to “individual in a guardianship” and “alleged incapacitated person” to “respondent”. For more details, see Attachment B.

Collaboration Approved

1. The Steering Committee approved sending letters to the Superior Court Judges’ Association Guardianship and Probate Committee (SCJA GPC), the Administrative Office of the Courts and the Pattern Forms Committee requesting their support and collaboration to implement the use of Guardianship Pattern Forms. For more details see Attachment C.
2. The Steering Committee approved submitting the proposed guardian standards of practice provided below to the Certified Professional Guardianship Board.

a. Is it appropriate for an attorney to represent the petitioner and the professional guardian?

Any certified professional guardian (CPG) nominated as guardian in a petition to establish a guardianship not filed by the nominated CPG shall only retain legal counsel in that guardianship who does not represent any other party in the guardianship past or present, unless a waiver is obtained by the attorney.

b. Is it appropriate for an attorney to represent the petitioner and the professional guardian?

A professional guardian who self-petitions to be guardian for someone must obtain a signed statement from the attorney general stating the reason the attorney general's office will not petition for guardianship; and, engage in an investigation that:

- (1) identifies alternative nominees and provides information as to why alternate nominees who are available are not suitable or able to serve;
- (2) provides a written request from the party requesting the guardianship, which identifies the basis for the request and the basis for the decision by that party not to petition;
- (3) provides documentation from third parties of the facts set out in the petition (such documentation can include statements from care providers, family members, friends, or others with knowledge of the circumstances of the incapacitated person);
- (4) provides documentation that the certified professional guardian has met with the alleged incapacitated person, the results of that meeting, and an opinion by the certified professional guardian of the capacity issues faced by the alleged incapacitated person; and
- (5) discloses to the court any relationship the certified professional guardian may have with a care facility and any practice the care facility may have involving the referral of residents to the certified professional guardian.

Approved submitting to the Certified Professional Guardianship Board with the additional alternative revision of paragraph 1 provided below.

*“A professional guardian who self-petitions to be guardian for someone must obtain a signed statement from the attorney general stating the reason the attorney general’s office will not petition for guardianship; **except in exigent circumstances**, and, engage in an investigation that.”*

c. *May a guardian who is an attorney provide legal services to an individual in a guardianship?*

406.5 A guardian who is an attorney may provide legal services to the incapacitated person only when doing so best meets the needs of the incapacitated person and is approved by the court following full disclosure of the conflict of interest. (Adopted 1-9-12)

406.5 (1) A guardian who is also an attorney shall only represent the guardian in their fiduciary capacity as guardian with respect to the administration of the guardianship for the person under guardianship. The guardian shall account to the court for the costs of its services as guardian and as attorney for the guardian separately.

406.5(2) A guardian for a person under guardianship or an attorney who is also the guardian shall not initiate legal action on behalf of the person under guardianship, or respond to legal action initiated against the person under guardianship, without the express approval of the court with local jurisdiction.

406.5(3) A guardian or an attorney who is a guardian shall not serve as attorney for the person under guardianship.

b. *Is it appropriate for a Guardian to serve as a Guardian ad Litem in a case where s/he is serving as guardian?*

A Certified Professional Guardian shall not serve as a guardian and as a guardian ad litem in the same guardianship matter.

3. The Steering Committee approved submitting the proposed standards of practice provided below to WINGS Legislative and Long Range Planning Committees.

a. *Is it appropriate for a GAL who is also an attorney to propose a professional guardian who the attorney represents as the guardian's attorney?*

If the GAL has an apparent conflict of interest, the GAL shall file a Motion for Order to Show Cause within five days of knowledge of the potential

conflict.

- b. Are there conflicts of interest that might exist if the attorney representing the self-petitioning guardian also represents the facility where the AIP lives?***

May a CPG self-petition based on a referral from a nursing home or other residential facility?

The Committee recommends that there should be mandatory appointment of an attorney for the respondent in a guardianship proceeding, with a provision for the respondent to waive appointment [like Minnesota Statutes sections 524.5-304(b), 524.5-406(b)].

<https://www.revisor.mn.gov/statutes/?id=524.5-304>

4. The Steering Committee agreed to review the items listed below during its December meeting.
 - a. Create a statewide guardianship monitoring program that helps the court fulfill its supervisory responsibilities. A committee member suggested this committee pursue grant funding, possibly from the State Justice Institute. For more details, see Attachment D.
 - b. The Long-Range Planning Committee's proposals regarding:
 1. Accessing conflict resolution.
 2. Appointing an attorney to every guardianship case.
 3. Establishing additional requirements for Guardians ad Litem to include an experience requirement.
 4. Providing education to lay guardians.
 5. Establishing an information line where a lay guardian could call in and get answers.
 - c. The WINGS Public Guardianship Committee's proposed strategic plan addressing the following:

1. Obtain and analyze data to determine the need for public guardianship services in Washington State.
 2. Increase the visibility of the Office of Public Guardianship (OPG).
 3. Rebrand OPG's image by creating a new mission, vision and values.
 4. Expand the role of the OPG to include providing other fiduciary services including serving as Representative Payee, Attorney-in-fact, and Trustee and performing Estate Administration.
 5. Increase the ability of OPG to advocate for itself.
 6. Seek to fully fund OPG statewide.
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5. The WING Steering Committee review a draft lay guardian handbook prepared by the Information and Technology Committee. Please contact Shirley Bondon if you'd like to review the draft manual.

Attachment A



ADMINISTRATIVE OFFICE OF THE COURTS

Callie T. Dietz
State Court Administrator

August 25, 2016

TO: WINGS Steering Committee

FROM: Shirley Bondon, WINGS Coordinator

RE: WINGS Priority - Improving Assessment of Persons Needing Decisional Support. Choose a more informative, less hostile, less formal name that is not off-putting to replace Title 11 Guardian ad litem.

The WINGS Legislative Committee, comprised of 22 members, voted to recommend changing the title "Title 11 Guardian ad litem" to "Court Investigator". This will require revising RCW Title 11 and perhaps other sections of the statute.

The Legislative Committee requests Steering Committee approval of the recommendation.

What is the Definition of a Guardian ad litem?

According to the Title 11.88 RCW Guardianship Guardian ad litem Handbook, 2012 Edition for Washington State Superior Courts, 11.88 Guardians ad litem and 11.88 GAL Training Providers:

"The GAL is a qualified individual whose name is obtained from a registry maintained by each county. The GAL is appointed by the court to 1) conduct a thorough investigation regarding the allegation of incapacity and 2) make a recommendation to the court regarding the need for a guardianship and the suitability of the proposed guardian.

The GAL should report to the court what the GAL believes is in "the best interests of the person [AIP or IP] for whom he or she is appointed." GALR 2(a); RCW 11.88.090(3). The GAL's conclusion regarding the "best interests may be inconsistent with the wishes" of the AIP. Id. (Emphasis added)".

Background:

Before the August 7, 2015 WINGS Conference, nine stakeholders, referred to as the Guardian ad litem (GAL) Issues Committee, volunteered to meet and develop recommendations to present during the August 7 conference that responded to

priorities identified via an online survey completed by 400 stakeholders. The GAL Issues Committee developed and presented seven priorities. Changing the title “Title 1 Guardian ad litem” to a term that was more informative, less hostile, less formal and that is not off-putting was one of the Committee’s seven recommendations. The Issues Committee suggested consideration of the titles listed below.

- Court Visitor
- Court Visitor ad litem
- Court Investigator
- Special Court Representative
- Special Court Appointee
- Special Needs Representative
- Fact Finder

During the August 7, 2015 WINGS Conference, 200 attendees voted on priorities. Changing the term “ Title 11 Guardian ad litem” received 56 votes, thus, this was the first, second or third priority of several participants and was overall Priority #3 within the category, Improving Assessment of Persons Needing Decisional Support. During breakout sessions, the two options below were added to the list of titles to be considered.

- Court Appointed Consultant
- Special Court Advocate

Legislative Committee Discussion:

The term “guardian ad litem” is well-established and in use in a variety of contexts. It has different meanings in those various contexts, defined by the statutes and caselaw that applies in each context. It will doubtless continue to be used. However, in the context of guardianship, the term is confusing and misleading to lay persons and lawyers alike. The WINGS recommendation is to replace “Title 11 Guardian Ad Litem” with “Court Investigator” to end the confusion. The recommendation to abandon the term “guardian ad litem” is specific to Title 11 and would not change the term in Titles 26, 13, 4, or elsewhere. It is in the context of guardianship that “guardian ad litem” can cause confusion as it is easy to conflate “guardian” and “guardian ad litem”.

In recent years, advocates have conducted trainings on guardianship and alternatives frequently for individuals with disabilities, family members, and social service professionals. After they receive an explanation, participants can grasp the difference between guardian ad litem (or “GAL”) and guardian. Still, as discussions continue during a training, the terms inevitably get misapplied, one for the other, and there are expressions of frustration. There is typically some confusion and consternation upon learning that a guardian ad litem is not really a guardian, but instead is (primarily) a court investigator. Lay people state, “Why not call it what it is?” The conclusion of many participants that it is just another example of unnecessary complication in the law, which is difficult enough to grasp as it is without adding misleading nomenclature.

Some suggest that instead of changing the law, more training should be provided. There is no doubt that more training is a great idea. People will need to understand the role whatever term we use. However, the question remains: why make the task harder

by using a term that obfuscates, rather than using plain language that reflects the actual meaning?

It isn't just the lay person who may be confused by the terms. Based on reports of colleagues, medical professionals are also confused by the term. Hospital staff have requested a change. Also some GALs are prone to exceed their decision-making authority, and it is likely that the title adds to their confusion about their role. GALs sometimes "take actions that are more "guardian-like" than simply investigating and reporting". However, the authority of the GAL is in fact very limited. The authority of the GAL is short-term, and not nearly as extensive as the authority of a guardian. The GAL can act where there is "need of emergency lifesaving medical services" and the individual "is unable to consent to such medical services due to incapacity pending the hearing on the petition to give consent for such emergency lifesaving medical services on behalf of the alleged incapacitated person". (RCW 11.88.090)

Washington law provides that the GAL has authority to move to protect the person from abuse, neglect, abandonment, or exploitation. This is true, but it is not unique to guardians or guardians ad litem; under RCW 11.88.110, any "interested person" has this authority, by petition for a "vulnerable adult protection order". Under very limited emergency circumstances, the GAL has very limited decision-making authority.

What is the actual role of the GAL? The term "guardian ad litem" means different things in different legal circumstances, and it has a particular meaning as it applies to guardianship. Under the guardianship statute, the GAL has the duty to investigate and gather reports, inform the alleged incapacitated person of his or her rights, and make recommendations (not decisions) to the court. RCW 11.88.090 (5) describes these duties in some detail. For example, the GAL is charged with gathering medical reports, interviewing those associated with the petition, and making recommendations related to whether alternatives would suffice or a guardianship is needed, whether the person should retain the right to vote, whether the person nominated would be a fit guardian. A review of the statute, and the tasks assigned to the GAL, makes it clear that a guardian ad litem is not much like a guardian and very much like a court investigator. (The relevant sections of RCW 11.88.090 are provided below, including the sections on emergency authority and the authority to respond to abuse noted in the previous paragraph).

Clearly, this is not the most important issue for WINGS and the Legislature to consider, as we work together to improve our state's policies on guardianship. It is a relatively small change. However, WINGS believes it is worth considering because this is a no-cost change that would make the whole guardianship process just a little less confusing by eliminating a bit of legal jargon. WINGS believes we should make a special effort to eliminate complication where we can, because so many lay people have made it clear that they find guardianship confusing and complicated.

RCW 11.88.090

Guardian ad litem—Mediation—Appointment—Qualifications—Notice of and statement by guardian ad litem—Hearing and notice—Attorneys' fees and costs—Registry—Duties—Report—Responses—Fee.

(5) The guardian ad litem appointed pursuant to this section shall have the following duties:

(a) To meet and consult with the alleged incapacitated person as soon as practicable following appointment and explain, in language which such person can reasonably be expected to understand, the substance of the petition, the nature of the resultant proceedings, the person's right to contest the petition, the identification of the proposed guardian or limited guardian, the right to a jury trial on the issue of his or her alleged incapacity, the right to independent legal counsel as provided by RCW [11.88.045](#), and the right to be present in court at the hearing on the petition;

(b) To obtain a written report according to RCW [11.88.045](#); and such other written or oral reports from other qualified professionals as are necessary to permit the guardian ad litem to complete the report required by this section;

(c) To meet with the person whose appointment is sought as guardian or limited guardian and ascertain:

(i) The proposed guardian's knowledge of the duties, requirements, and limitations of a guardian; and

(ii) The steps the proposed guardian intends to take or has taken to identify and meet the needs of the alleged incapacitated person;

(d) To consult as necessary to complete the investigation and report required by this section with those known relatives, friends, or other persons the guardian ad litem determines have had a significant, continuing interest in the welfare of the alleged incapacitated person;

(e) To investigate alternate arrangements made, or which might be created, by or on behalf of the alleged incapacitated person, such as revocable or irrevocable trusts, durable powers of attorney, or blocked accounts; whether good cause exists for any such arrangements to be discontinued; and why such arrangements should not be continued or created in lieu of a guardianship;

(f) To provide the court with a written report which shall include the following:

(i) A description of the nature, cause, and degree of incapacity, and the basis upon which this judgment was made;

(ii) A description of the needs of the incapacitated person for care and treatment, the probable residential requirements of the alleged incapacitated person and the basis upon which these findings were made;

(iii) An evaluation of the appropriateness of the guardian or limited guardian whose appointment is sought and a description of the steps the proposed guardian has taken or intends to take to identify and meet current and emerging needs of the incapacitated person;

(iv) A description of any alternative arrangements previously made by the alleged incapacitated person or which could be made, and whether and to what extent such

alternatives should be used in lieu of a guardianship, and if the guardian ad litem is recommending discontinuation of any such arrangements, specific findings as to why such arrangements are contrary to the best interest of the alleged incapacitated person;

(v) A description of the abilities of the alleged incapacitated person and a recommendation as to whether a guardian or limited guardian should be appointed. If appointment of a limited guardian is recommended, the guardian ad litem shall recommend the specific areas of authority the limited guardian should have and the limitations and disabilities to be placed on the incapacitated person;

(vi) An evaluation of the person's mental ability to rationally exercise the right to vote and the basis upon which the evaluation is made;

(vii) Any expression of approval or disapproval made by the alleged incapacitated person concerning the proposed guardian or limited guardian or guardianship or limited guardianship;

(viii) Identification of persons with significant interest in the welfare of the alleged incapacitated person who should be advised of their right to request special notice of proceedings pursuant to RCW [11.92.150](#); and

(ix) Unless independent counsel has appeared for the alleged incapacitated person, an explanation of how the alleged incapacitated person responded to the advice of the right to jury trial, to independent counsel and to be present at the hearing on the petition.

Within forty-five days after notice of commencement of the guardianship proceeding has been served upon the guardian ad litem, and at least fifteen days before the hearing on the petition, unless an extension or reduction of time has been granted by the court for good cause, the guardian ad litem shall file its report and send a copy to the alleged incapacitated person and his or her counsel, spouse or domestic partner, all children not residing with a notified person, those persons described in (f)(viii) of this subsection, and persons who have filed a request for special notice pursuant to RCW [11.92.150](#). If the guardian ad litem needs additional time to finalize his or her report, then the guardian ad litem shall petition the court for a postponement of the hearing or, with the consent of all other parties, an extension or reduction of time for filing the report. If the hearing does not occur within sixty days of filing the petition, then upon the two-month anniversary of filing the petition and on or before the same day of each following month until the hearing, the guardian ad litem shall file interim reports summarizing his or her activities on the proceeding during that time period as well as fees and costs incurred;

(g) To advise the court of the need for appointment of counsel for the alleged incapacitated person within five court days after the meeting described in (a) of this subsection unless (i) counsel has appeared, (ii) the alleged incapacitated person affirmatively communicated a wish not to be represented by counsel after being advised of the right to representation and of the conditions under which court-provided counsel may be available, or (iii) the alleged incapacitated person was unable to communicate at all on the subject, and the guardian ad litem is satisfied that the alleged incapacitated person does not affirmatively desire to be represented by counsel.

(6) If the petition is brought by an interested person or entity requesting the appointment of some other qualified person or entity and a prospective guardian or limited guardian cannot be found, the court shall order the guardian ad litem to

investigate the availability of a possible guardian or limited guardian and to include the findings in a report to the court pursuant to subsection (5)(f) of this section.

(7) The parties to the proceeding may file responses to the guardian ad litem report with the court and deliver such responses to the other parties and the guardian ad litem at any time up to the second day prior to the hearing. If a guardian ad litem fails to file his or her report in a timely manner, the hearing shall be continued to give the court and the parties at least fifteen days before the hearing to review the report. At any time during the proceeding upon motion of any party or on the court's own motion, the court may remove the guardian ad litem for failure to perform his or her duties as specified in this chapter, provided that the guardian ad litem shall have five days' notice of any motion to remove before the court enters such order. In addition, the court in its discretion may reduce a guardian ad litem's fee for failure to carry out his or her duties.

(8) The court appointed guardian ad litem shall have the authority, in the event that the alleged incapacitated person is in need of emergency lifesaving medical services, and is unable to consent to such medical services due to incapacity pending the hearing on the petition to give consent for such emergency lifesaving medical services on behalf of the alleged incapacitated person.

(9) The court-appointed guardian ad litem shall have the authority to move for temporary relief under chapter [7.40](#) RCW to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW [74.34.020](#), or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed before filing the petition for guardianship shall remain effective unless the court grants the relief requested under chapter [7.40](#) RCW, or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective.

Research:

The Committee reviewed the titles used in 39 states. The attached table indicates that 16 states use the title "Guardian ad litem" and 23 states use another title.

- Guardian ad litem - 16 states
- Visitor - 11 states
- Court Investigator - 2 states
- Investigator - 2 states
- Probate Court Investigator - 1 state
- Court Representative - 2 states
- Court Evaluator - 1 state
- Evaluator - 2 states
- Interdisciplinary Evaluation Team - 1 state
- Kukua Kahawai - 1 state

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
1.	Alabama	Court representative	The court representative shall interview the person alleged to be incapacitated, the petitioner, and any proposed guardian. Also, visit the present residence of the person alleged to be incapacitated and the place it is proposed that the person will be living if the appointment is made. The court representative will submit a report in writing to the court. Ala. Code § 26-2A-102.
2.	Alaska		
3.	Arizona	Investigator	"The investigator shall conduct an investigation before the court appoints a guardian or a conservator to allow the court to determine the appropriateness of that appointment." Ariz. Rev. Stat. § 14-5308
4.	Arkansas	Guardian ad Litem	A guardian ad litem "is ordinarily appointed by the court to represent a person or conduct an investigation in a specified legal proceeding." Ark. Code § 28-74-102.
5.	California	Court investigator	A court investigator shall make an investigation and file with the court a report and recommendation concerning the guardianship of the person. Cal. Prob. Code § 1513.
6.	Colorado	Visitor	"Upon receipt of a petition to establish a guardianship, the court shall appoint a visitor." Colo. Rev. Stat. § 15-14-305.

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
7.	Connecticut	Guardian ad litem	"If the judge or magistrate appoints a guardian ad litem, the judge's or magistrate's order shall (i) limit the appointment in scope and duration, and (ii) direct the guardian ad litem to take only the specific action required or to answer specific questions posed by the judge or magistrate, including questions designed to ascertain whether the attorney's proposed course of action is the least restrictive means of intervention available to assist the person in managing his affairs." Conn. Gen. Stat. § 45a-132.
8.	Delaware	Not stated	
9.	Florida		
10.	Georgia		
11.	Hawaii	kokua kanawai	Upon receipt of a petition to establish a guardianship, the court may appoint a kokua kanawai. The duties of the kokua kanawai include interviewing the respondent, talking to physicians, and making a recommendation to the court about the appropriateness of a guardianship. Haw. Rev. Stat. § 560:5-305.
12.	Idaho	Visitor	The visitor shall interview the alleged incapacitated person, the person who appears to have caused the petition to be filed, and any person who is nominated to serve as guardian. Also, the visitor will visit the present place of abode of the person alleged to be incapacitated. The visitor's report is then submitted to the court. Idaho Code § 15-5-303.
13.	Illinois	Guardian ad litem	The court shall appoint a guardian ad litem to report to the court concerning the respondent's best interests. However, a guardian ad litem shall not be required when the court determines that such appointment is not necessary for the protection of the respondent or a reasonably informed decision on the petition. 755 Ill. Comp. Stat. Ann. 5/11a-10

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
14.	Indiana		
15.	Iowa	Guardian ad litem	"A guardian ad litem serves the court in a guardianship proceeding by advising the court after an impartial investigation." Iowa Code Ann. § 633.561
16.	Kansas	Not stated	
17.	Kentucky	Interdisciplinary evaluation team	Prior to the hearing on the petition for a limited guardian, or guardian, an interdisciplinary evaluation report shall be filed with the court. "The report may be filed as a single or a joint report of the interdisciplinary evaluation team or it may otherwise be constituted by the separate reports filed by each individual of the team." § 49:20.Procedure, 5 Ky. Prac. Methods of Prac. § 49:20
18.	Louisiana	Not stated	
19.	Maine	Visitor or Guardian ad litem	"The visitor or guardian ad litem shall interview the allegedly incapacitated person, the person who is seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will reside if the requested appointment is made." The visitor or guardian ad litem will submit a report in writing to the court. Me. Rev. Stat. tit. 18-A, § 5-303.
20.	Maryland	Guardian ad litem	It is the role of guardian ad litem to investigate facts of a case impartially, make independent assessment of need for guardian, and delivery a report to court. Code, Estates and Trusts, § 13-705(a, b).
21.	Massachusetts	Guardian ad litem	The court may appoint as guardian ad litem, an individual or any public or charitable agency to investigate the condition of the incapacitated person and make appropriate recommendations to the court. Mass. Gen. Laws. ch. 190B, § 5-106.
22.	Michigan	Guardian ad litem	The guardian ad litem is to make determinations and inform the court regarding alternatives to the

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
			appointment of a full guardian (e.g., appointment of a limited guardian). Mich. Prob. § 10:29.
23.	Minnesota	Visitor	"The visitor shall file a report in writing with the court. The report must include recommendations regarding the appropriateness of guardianship, including whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian." Minn. Stat. § 524.5-304 .
24.	Mississippi		
25.	Missouri		
26.	Montana	Visitor	The visitor shall interview the petitioner, the person who is nominated to serve as guardian, and visit the present place of abode of the person alleged to be incapacitated. The visitor will submit a report in writing to the court. Mont. Code § 72-5-315.
27.	Nebraska	Visitor	Conduct an evaluation of the allegations of incapacity
28.	Nevada	Investigator	Investigate allegations or claims. An investigator shall file with the court and parties a report concerning the scope of the appointment of the guardian and any special powers.
29.	New Hampshire	?	?
30.	New Jersey	Guardian ad litem	A guardian ad litem may be appointed to evaluate the best interests of the alleged incapacitated person and to present that evaluation to the court. N.J. Ct. R. R. 4:86-4
31.	New Mexico	Guardian ad litem	The guardian ad litem interviews the alleged incapacitated person prior to the hearing, presents the alleged incapacitated person's declared position to the court, interviews the qualified health care professional, and obtains independent medical or psychological assessments, or both, if necessary. N.M. Stat. § 45-5-303.1.

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
32.	New York	Court Evaluator	The Court Evaluator - investigating and making a written report and recommendations to the court; the report and recommendations shall include the court evaluator's personal observations as to the person alleged to be incapacitated and his or her condition, affairs and situation.
33.	North Carolina	Guardian ad litem	"The guardian ad litem shall personally visit the respondent as soon as possible and shall make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings. The guardian ad litem also may make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes." N.C. Gen. Stat. § 35A-1107.
34.	North Dakota	Visitor	The visitor will meet, interview, consult, obtain relevant information as directed by the court and submit a written report. A visitor in guardianship proceedings is a person who is in nursing or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings
35.	Ohio	Probate Court Investigator	The court shall require a regular probate court investigator appointed or designated under section 2101.11 of the Revised Code or appoint a temporary probate court investigator to investigate the circumstances of the alleged incompetent and to file a report with all of the following:
36.	Oklahoma	Guardian ad litem Whenever a court-appointed advocates for vulnerable adults (CAAVA) program is available to the court to serve as a	The guardian ad litem shall be appointed to advocate objectively on behalf of the vulnerable adult and to investigate all matters concerning the best interests of the vulnerable adult. Also the guardian ad litem presents written reports on the vulnerable adult's best interests that include conclusions and recommendations. Okla. Stat. tit. 30, § 3-106.1.

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
		GAL, priority shall be given to appointment of the CAAVA advocate.	
37.	Oregon	Visitor	"The court shall appoint a visitor upon the filing of a petition in a protective proceeding that seeks the appointment of a guardian for an adult respondent." The visitor shall interview the person nominated as guardian and the respondent. In addition, the visitor shall investigate alternatives to guardianship. Or. Rev. Stat. § 125.150.
38.	Pennsylvania	Evaluator	The court, upon its own motion or upon petition by the alleged incapacitated person for cause shown, shall order an independent evaluation relating to evidence of incapacity." 20 Pa. Stat. and Cons. Stat. §. 5511.
39.	Rhode Island	Guardian ad litem	The duties of a guardian ad litem shall include all of the following: (1) Personally visiting the respondent; (2) Explaining to the respondent the nature, purpose, and legal effect of the appointment of a guardian; (3) Explaining to the respondent the hearing procedure, including, but not limited to, the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, and to be represented by legal counsel; and (4) Informing the respondent of the name of the person known to be seeking appointment as guardian. 33 R.I. Gen. Laws § 33-15-7.
40.	South Carolina	Visitor	"Upon the filing and service of the summons and the petition the court shall send a visitor to the place where the allegedly incapacitated person resides to

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
			observe conditions and report in writing to the court." S.C. Code § 62-5-303 The court shall send a visitor to the place where the allegedly incapacitated person resides to observe conditions and report in writing to the court. A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings
41.	South Dakota	Court representative	"The court representative shall interview the petitioner and the proposed guardian, shall visit the person alleged to need protection at the place where the person is located, shall explain the contents of the notice and petition to the person alleged to need protection and record his response, and shall ascertain whether the person alleged to need protection desires and is able to attend the hearing on the petition." "The court representative shall make a recommendation to the court concerning the relief requested in the petition, and shall submit a written report unless the court otherwise orders." S.D. Codified Laws § 29A-5-310.
42.	Tennessee	Guardian ad litem	The guardian ad litem owes a duty to the court to impartially investigate the facts and make a report and recommendations to the court as to whether a fiduciary should be appointed to the respondent. The Guardian ad litem's investigation includes the respondent's physical or mental conditions, and an in-person interview with the respondent. Tenn. Code § 34-1-107.
43.	Texas	Court Investigator	The investigator meets with the proposed ward, attorney of record, social workers, family members and any other persons necessary to determine if guardianship is the least restrictive manner in which to handle the case.
44.	Utah	Visitor	"The person alleged to be incapacitated may be interviewed by a visitor sent by the court." "The visitor

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
			also may interview the person seeking appointment as guardian, visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will reside if the requested appointment is made, conduct other investigations or observations as directed by the court, and submit a report in writing to the court." Utah Code § 75-5-303.
45.	Vermont	Evaluator	When a petition is filed for a guardianship, the court shall order an evaluation of the respondent. "The evaluation shall be performed by someone who has specific training and demonstrated competence to evaluate a person in need of guardianship." Vt. Stat. tit. 14, § 3067.
46.	Virginia	Guardian ad litem	Duties of the guardian ad litem include the following: <ul style="list-style-type: none"> (i) personally visiting the respondent; (ii) advising the respondent of rights and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel be appointed for the respondent, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) investigating the petition and evidence, requesting additional evaluation if necessary, (v) and filing a report. Va. Code § 64.2-2003.
47.	West Virginia	Appointment of Counsel	Counsel may perform any or all: interview, pursue discovery of evidence formal and informal, prepare testimony, take all steps to limit the scope of guardianship and conservatorship to the individual's actual needs, and make all arguments to limit the amount of intervention
48.	Wisconsin	Guardian ad litem	The guardian ad litem shall function independently, in the same manner as an attorney for a party to the

	State	Title of the person charged with investigating the need for guardianship.	Statutory Language
			action, and shall consider, but is not bound by, the wishes of the proposed ward or ward or the positions of others as to the best interests of the proposed ward or ward.
49.	Wyoming	Guardian ad litem	Represent the best interests of any minor, incompetent person or mentally incompetent person interested in any matter. The condition of the proposed ward; Recommendations for the court
50.	District of Columbia	Visitor	A visitor serves as an independent investigator who is expected to reach his or her own conclusions regarding the circumstances surrounding the subject. Visitors are only appointed when deemed necessary by the court, to conduct a special investigation into specifically identified issue such as a possible conflict of interest or an issue involving the appropriate level of care needed by the incapacitated adult.

Attachment B

Callie T. Dietz
State Court Administrator

August 25, 2016

TO: WINGS Steering Committee

FROM: Shirley Bondon, WINGS Coordinator

RE: WINGS Priority - Improving Guardianship Standards and Practice, Use Respectful Language.

The WINGS Legislative Committee, comprised of 22 members voted to recommend changing the term “alleged incapacitated person” to “respondent” and “incapacitated person” to “individual in a guardianship”. This change will require revision of RCW 11.76.080, 11.88., 11.76.080; 8.25.270. 2.28.20, 2.72.030 and possibly other sections.

The Legislative Committee requests Steering Committee approval of the recommendation.

Background:

Before the August 7, 2015 WINGS Conference, 14 stakeholders, referred to as the Guardian Practice Committee, volunteered to meet and develop recommendations to present during the August 7 conference that responded to priorities identified via an online survey completed by 400 stakeholders. Using respectful language to refer to persons needing or receiving decisional support was one of the eight recommendations. To replace the term “incapacitated person”, the Guardian Practice Committee suggested consideration of the terms listed below.

- Person in a guardianship
- Person under a guardianship
- Person with diminished decision-making ability
- Person in need of decision support
- Individual with limitation

During the August 7, 2015 WINGS Conference, 200 attendees voted on priorities. Using respectful language to refer to persons needing or receiving decisional support received 36 votes, thus this was the first, second or third priority of several participants

and was overall Priority #3 within the category, Improving Guardianship Standards and Practice.

Legislative Committee Discussion:

The Legislative Committee easily coalesced around the term “respondent” to replace the term “alleged incapacitated person” because that is the term used to refer to an individual respond to a lawsuit, allegation etc., in almost all areas of the law. Committee saw no compelling reason to use a different term in guardianships.

Deciding on a term to replace “incapacitated person” required more discussion. The Committee considered the terms listed below to replace “incapacitated person”.

- Client
- Principal
- Individual in a guardianship
- Individual under guardianship
- Person under a guardianship (This might be shortened to PUG)
- Person under protection (This might be shortened to PUP)
- Person subject to a guardianship
- Person needing a guardian
- Protected Person
- Respondent

Some of the Committee’s rationale for selecting “individual in a guardianship” are listed below:

- Terms like "incapacitated person" and even "protected person" sound paternalistic and focus attention on the person as someone who is "deficient" in some way that they need protection. Instead, we should focus on empowering the person to be involved with their decision making process, in concert with the guardian, as much as possible.
- The term "respondent" works well prior to appointment of a guardian, but would be confusing if it continued to apply after the guardianship order is granted.
- The term "client" can apply to so many situations that it would not really be descriptive of a guardianship or what it does.
- The term “Protected Person” is too confusing with its use in other areas of the law and is somewhat inappropriate for those people for whom only a Guardianship of the Estate is established.

- In law we abbreviate so many things, stakeholders were convinced that “Person in a Guardianship”, though appropriate, would lead to “PIG” which of course is unacceptable.
- The preferred term, therefore, is “**Individual in a Guardianship**”

Research:

The Legislative Committee reviewed the terms used in 49 states and one territory. The attached table indicates the following usage:

Term used to refer to a person believed to need guardianship service after a petition for guardianship is filed.

- Respondent – 36 states
- Proposed ward – 7 states
- Alleged incapacitated person – 5 states
- Person of alleged unsound mind – 1 state
- Alleged person with a disability – 1 state

Term used to refer to a person with a court-appointed guardian.

- Incapacitated Person – 27 states
- Ward – 15 states
- Person with a disability – 3 states
- Person under a guardianship – 1 state
- Adult with an impairment in need of a guardian or a conservator or both – 1 state
- Interdict – 1 state
- Protected Person – 2 states

STATE	SOMEONE IN A GUARDIANSHIP	SOMEONE BELIEVED TO NEED A GUARDIAN
Alabama	“ward” or “minor ward” Ala. Code § 26-2A-20 (22) “incapacitated person” Ala. Code § 26-2B-102	“respondent” Ala. Code § 26-2B-102 (14)
Alaska	“incapacitated person” Alaska Stat. § 13.27.490	“respondent” Alaska Stat. § 13.27.490
Arizona	“ward” or “minor ward” Ariz. Rev. Stat. § 14-5101 “incapacitated person” Ariz. Rev. Stat. § 14-12102	“respondent” Ariz. Rev. Stat. § 14-12102
Arkansas	“incapacitated person” Ark. Code § 28-74-102(6)	“respondent” Ark. Code § 28-74-102 (13)
California	“ward” Rule 7.1016	“proposed ward” Rule 7.1016
Colorado	“ward” 15-14-102 (15)	“respondent” Colo. Rev. Stat. § 15-14-102 (12)
Connecticut	“ward” Conn. Gen. Stat. § 45a-669	“respondent” Conn. Gen. Stat. § 45a-669
Delaware	“person with a disability” 12 3901(a)	“respondent” Del. Code tit. 12, § 39A-101
District of Columbia	“incapacitated individual” DC ST § 21-2011 (11)	“alleged incapacitated” D.C. Code § 21-2042 (c)
Florida	“incapacitated” 744.331(6) Florida Statutes	“alleged incapacitated person” 744.331 (2) Florida Statutes
Georgia	“ward” Ga. Guardianship and Conservatorship § 1:10	“proposed ward” Ga. Guardianship and Conservatorship § 1:10
Hawaii	“ward” Haw. Rev. Stat. § 560:5-102	“a person of allegedly unsound mind” Haw. Rev. Stat. § 560:5-309

Idaho	“incapacitated” 15-5-101(a) “ward ” 66-4025 (d)	“respondent” Idaho Code § 15-13-102
Illinois	“person with a disability” 755 Ill. Comp. Stat. 5/11a-2	“alleged person with a disability” 755 Ill. Comp. Stat. 5/11a-3
Indiana	“incapacitated” Ind. Code § 29-3-2-3	“alleged incapacitated person” Ind. Code § 29-3-2-3
Iowa	“incapacitated person” Iowa Code § 633.723 (8)	“proposed ward” Iowa Code § 633.552
Kanas	“adult with an impairment in need of a guardian or a conservator, or both” Kan. Stat. § 59-3051(a) “ward” Kan. Stat. § 59-3051 (q)	“proposed ward” Kan. Stat. § 59-3051 (p)
Kentucky	“incapacitated person” Ky. Rev. Stat. § 387.010 (6) “ward” Ky. Rev. Stat. § 387.510(15)	“respondent” Ky. Rev. Stat. § 387.510(14)
Louisiana	“interdict” Code of Civ. Pro. 392	Not stated
Maine	“ward” Me. Rev. Stat. tit. 18-A, § 5-101	“allegedly incapacitated person” Me. Rev. Stat. tit. 18-A, § 5-304
Maryland	“incapacitated person” Md. Code, Est. & Trusts § 13.5-101	“respondent” Md. Code, Est. & Trusts § 13.5-101
Massachusetts	“ward” or “protected person” Mass. Gen. Laws. ch. 190B, § 5-101	“respondent” Mass. Gen. Laws. ch. 190B, § 5-101

Michigan	“legally incapacitated person” Mich. Comp. Laws § 700.1105(i)	“respondent” Mich. Comp. Laws § 330.1600
Minnesota	“ward” Minn. Stat. § 524.5-102	“respondent” Minn. Stat. § 524.5-102
Mississippi	“incapacitated person” Miss. Code. § 93-14-102	“respondent” Miss. Code. § 93-14-102
Missouri	“incapacitated person” Mo. Stat. § 475.502	“respondent” Mo. Stat. § 475.502
Montana	“ward” Mont. Code § 72-5-101 “incapacitated person” Mont. Code § 72-5-602	“respondent” Mont. Code § 72-5-602
Nebraska	“ward” and “minor ward” Neb. Rev. Stat. § 30-2601 “incapacitated” Neb. Rev. Stat. § 30-3902	“respondent” Neb. Rev. Stat. § 30-3902
Nevada	“ward” Nev. Rev. Stat. § 159.027	“proposed ward” Nev. Rev. Stat. § 159.025
New Hampshire	“ward” N.H. Rev. Stat. § 464-A:2 “incapacitated person” N.H. Rev. Stat. § 464-C:2	“respondent” N.H. Rev. Stat. § 464-C:2
New Jersey	“incapacitated person” N.J. Stat. § 3B:12B-3	“respondent” N.J. Stat. § 3B:12B-3

New Mexico	“incapacitated person” N.M. Stat. § 45-5A-102	“respondent” N.M. Stat. § 45-5A-102
New York	“incapacitated person” N.Y. Mental Hyg. Law § 81.03 (McKinney)	“alleged incapacitated” N.Y. Surr. Ct. Proc. Act Law § 1750 (McKinney)
North Carolina	“ward” N.C. Gen. Stat. § 35A-1202	“respondent” N.C. Gen. Stat. § 35A-1101
North Dakota	“incapacitated person” N.D. Cent. Code § 28-35-01	“respondent” N.D. Cent. Code § 28-35-01
Ohio	“ward” Ohio Rev. Code § 2111.01	“respondent” Ohio Rev. Code § 2112.01
Oklahoma	“incapacitated person” Okla. Stat. tit. 30, § 1-111	“respondent” Okla. Stat. tit. 30, § 3-302
Oregon	“incapacitated person” Or. Rev. Stat. § 125.802	“respondent” Or. Rev. Stat. § 125.802
Pennsylvania	“incapacitated person” 20 Pa. Cons. Stat. § 5902	“respondent” 20 Pa. Cons. Stat. § 5902
Rhoda Island	“incapacitated person” R.I. Gen. Laws § 33-15.2- 102	“respondent” R.I. Gen. Laws § 33-15.2- 102
South Carolina	“incapacitated person” S.C. Code § 62-5-702	“respondent” S.C. Code § 62-5-702
South Dakota	“protected person” S.D. Codified Laws § 29A- 5A-102	“respondent” S.D. Codified Laws § 29A- 5A-102
Tennessee	“person with a disability” Tenn. Code § 34-1-101	“respondent” Tenn. Code § 34-1-101
Texas	“incapacitated person” Tex. Estates Code § 1002.017 “ward” Tex. Estates Code § 1002.030	“proposed ward” Tex. Estates Code § 1002.026

Utah	“incapacitated person” Utah Code § 75-5b-102	“respondent” Utah Code § 75-5b-102
Vermont	“person under guardianship” Vt. Stat. tit. 14, § 3061	“respondent” Vt. Stat. tit. 14, § 3061
Virginia	“incapacitated person” Va. Code § 64.2-2100	“respondent” Va. Code § 64.2-2100
Washington	“incapacitated person” Wash. Rev. Code § 11.90.020	“alleged incapacitated person” 11.88.010 (3)
West Virginia	“incapacitated person” W. Va. Code § 44C-1-2	“respondent” W. Va. Code § 44C-1-2
Wisconsin	“ward” Wis. Stat. § 54.01	“proposed ward” Wis. Stat. § 54.01
Wyoming	“ward” Wyo. Stat. § 3-1-101	“respondent” Wyo. Stat. § 3-1-101

Attachment C



ADMINISTRATIVE OFFICE OF THE COURTS

Callie T. Dietz
State Court Administrator

August 25, 2016

TO: WINGS Steering Committee
FROM: Shirley Bondon, WINGS Coordinator
RE: WINGS Priority – Standard Guardianship Forms

The WINGS Legislative Committee, comprised of 22 members voted to recommend that a complete set of standardized forms be available and accepted by all superior courts.

The Legislative Committee asks the Steering Committee to approve the recommendation and write letters to the Superior Courts Judges' Association, Guardianship & Probate Committee and the Pattern Forms Committee requesting support for the recommendation and action to ensure implementation.

BACKGROUND (provided by Angela Carlson-Whitley)

CURRENT SYSTEM

Currently, there are "model" or "pattern" (sample) guardianship forms on the AOC website. The available forms on the website are not yet a complete set of forms, although there is a committee (the Pattern Forms Probate/Guardianship Subcommittee) working to develop a complete set. As forms are developed, they are reviewed by the statewide Pattern Forms Committee. The forms may be sent back to the Subcommittee for changes, or approved and put on the website. These forms are optional, not mandatory.

Several counties have their own forms they have developed. In some of those counties, the forms are mandatory for use in that county by local rule (e.g., Spokane). Other counties have their own forms available on their websites, and some are mandatory and some are optional (e.g., Pierce). Some counties have their own optional forms available on their websites (e.g., King). Some counties do not have forms at all.

EXPLANATION/PROCESS FOR OBTAINING COMMENTS

Ms. Whitley emailed members of the Thurston County Guardianship Roundtable and also put out a request for comment on the WSBA's Elder Law List-Serve. A few others passed on her request to other organizations, such as the Tacoma-Pierce County Bar Association. All of the comments she received are summarized. Although she tried to

organize the responses as being in favor of mandatory forms, against them, neutral, or somewhere in between, some of them could probably fit just as easily in another category.

IN FAVOR:

Six people submitted responses in favor of mandatory guardianship forms. Here's a list of common reasons given for their support:

- Helps keep pro se litigants and attorneys all on the same page.
- Streamlines and simplifies the process for pro-se litigants in much the same way mandatory family forms do.
- Simplification and uniformity for attorneys; rather than spending time drafting forms, attorneys can focus on the issues that are in controversy.
- Creates consistency statewide so that attorneys would not have to figure out which form is accepted in each individual county, saving time.
- Consistency in forms would assist the Superior Courts in fulfilling their duty to "monitor" guardianships and locate the vital information they need.
- Assists the self-represented guardian and any county which implements a guardianship facilitator.

AGAINST:

Eighteen people and the Spokane Superior Court submitted responses opposing mandatory guardianship forms. Here's a list of common reasons given for their opposition:

- They are not practical because each person's situation is unique.
- Independent-minded counties such as King, Pierce, and Spokane would likely not agree on a single form and use different case management systems.
- Well-written petitions are preferred rather than ones with checks and boxes to fill in.
- State statute already sets forth necessary items needed in Petition.
- Creates problems with thinking outside the box as a one size does not fill all.
- Forms that combine provisions for minor child guardianships with language for other guardianship proceedings would be confusing.
- Creates an illusion for pro se litigants that they can "fill in the blanks" and are covered legally.
- Would be a limitation for practitioners in that they cannot delete sections even if they are irrelevant.
- Makes it too easy for lay people to use self-help and that should not be the case as, unlike family law mandatory forms, these forms affect constitutional rights.
- It takes away required critical thinking in a fairly complex area of law.
- Guardianship law is not as regulated as family law and judicial expectations and knowledge vary widely by county.

- No pattern form can possibly cover all scenarios.
- Would rather see some flexibility for attorneys to create their own pleadings.
- Counties already have a number of free models that are generally available to the public.
- More mandatory forms would clog up the system and be a step backward in this area of law.
- They don't keep up with changes in the law substantively, procedurally, or with changes in dispute resolution models.
- To mandate their use could undermine the programs in areas where they are already well established.

The Spokane Superior Court firmly opposes forms being mandatory statewide, because they (and other courts) have created monitoring programs in their counties using specific forms they have developed. There are calendaring aspects built into their forms, and they were developed for ease in review of cases by their volunteers and judicial officers. The Court expressed concern that mandating the use of the statewide pattern forms would undermine programs in areas where they are already well-established (e.g., Spokane). The Court did not object to having model or pattern forms because such forms could be of assistance to pro se litigants in other counties. Spokane has its own mandatory training for lay guardians that includes discussion and review of their forms, and they keep their forms updated whenever the law changes.

NEUTRAL:

Three people were neutral regarding mandatory guardianship forms. Here's a list of common reasons given for their neutrality:

- Does not have specific comments about guardianship forms, but wanted to express that some mandatory forms are drafted in an awful format with strange TAB settings, highlighted things that won't go away, and other bad things that affect those without word processing skills.
- One way or the other, pro se litigants benefit from both model and mandatory forms, but would defer to the opinions of more experienced practitioners.

IN FAVOR OF STANDARDIZED FORMS, BUT WITH CONDITIONS:

Eight people expressed their support, but with conditions. Here's a list of common reasons given:

Why it's a good idea:

- Consistency creates efficiency and we could find the same "consistency" no matter the county we are working in.
- Forms provide a "checklist" and all of the information which is required for a particular matter.
- Initially restrict mandatory forms to items required in all guardianship cases.

- Can enhance access to the courts by those who cannot afford an attorney or choose not to use the services of an attorney.
- Use of the forms can assist the judiciary in its review of matters submitted for consideration and decision.
- Could lead to the collection and analysis of useful data about guardianships.

Concerns/Suggestions:

- Standardized forms often limit the ability to explain the complexity of a client's situation.
- If a client's situation does not fit into any of the check boxes, choosing "other" minimizes the explanation.
- Must follow the intent of the statute, which is a problem with current model forms.
- Must be drafted in a more usable format than exists with current forms.
- Some jurisdictions may add their own forms to the mandatory ones, which could create additional work, confusion, and missed forms by County.
- Supports statewide mandatory forms, but only for basic data and for estates less than \$3,000.
- Suggestion to initially restrict the mandatory forms to those items which are required in all guardianship cases.
- Forms must be flexible enough to take into account the different notice provisions which each court may have developed by local rule.
- So far the forms seem to have a strong King County influence, which makes them less useful to people in other jurisdictions.
- Would it be possible for counties to produce their own forms that could be used as alternates?
- Recommends that guardianship of the estate and guardianship of the person be split into two different forms.
- If adopted, courts should be instructed not to modify the mandatory forms.
- The more a form tries to encompass all possible scenarios, the more confusing it is to pro se litigants.
- Any forms that are developed should use plain language from the start.

Attachment D



ADMINISTRATIVE OFFICE OF THE COURTS

Callie T. Dietz
State Court Administrator

August 25, 2016

TO: WINGS Steering Committee
FROM: Shirley Bondon, WINGS Coordinator
RE: WINGS Priority - Guardianship Monitoring Program

The WINGS Legislative Committee, comprised of 22 members voted to recommend developing a statewide guardianship monitoring program that helps the "Super Guardians" - the Superior Courts, and the lay and professional guardians that the courts appoint to execute the court's authority.

The Legislative Committee requests Steering Committee approval of the recommendation.

Issue:

Washington residents age 65 and over have increased 53% since 2010 and are estimated to increase another 45% by 2040. The effect of Dementia, Traumatic Brain Injury (TBI), serious mental illness and developmental disabilities on decision-making creates particular challenges for individuals and systems, especially the courts in their duty to oversee legislative mandates while also protecting the liberty, autonomy, and constitutional rights of people needing decision-making support using the least restrictive means possible.

The number of persons with dementia, including Alzheimer's disease, will increase significantly in the next 25 years. The Alzheimer's Association expects between 215,000 and 270,000 citizens age 65 or older will have a form of dementia in 2040. National estimates indicate that about two percent of the US population live with long-term or lifelong traumatic brain injury (TBI) related disability. The National Alliance on Mental Illness of Washington reports that seven percent of the US population is seriously affected by mental health challenges. These trends are likely to result in a substantial increase in the number of court proceedings required to protect vulnerable and elderly persons including abuse and neglect cases, and guardianships covering all levels and types of disabilities. Thus, the need for protections such as qualified guardians and effective court monitoring of the guardians' activities increases. Unfortunately, lay

guardians find it difficult to perform their duties with limited resources and assistance. Likewise, courts are finding it increasingly difficult to provide the necessary guardian oversight. Finally, it is difficult to plan for the growing demand for guardians and other protections without a thorough profile of incapacitated persons, their numbers, characteristics, and needs for which there are no systems in place in Washington.

Background:

Guardianships are a necessary alternative for people who are unable to manage their personal and/or financial affairs due to age-related diseases, mental illness, or developmental disability. The legislature has set out a procedure for court determination of whether a person should be found to be incapacitated and have a guardian appointed appropriate to the level of incapacitation. Incapacitation is a legal determination, not a medical one. Guardians have the authority to make personal and/or property/monetary decisions for the incapacitated person.

The guardians appointed by the courts are either professional guardians or lay guardians who meet minimal qualifications. A professional guardian, defined as a guardian who serves for pay in more than two cases, must be certified by the Supreme Court pursuant to GR 23 (Certified Professional Guardian or "CPG"). A CPG's pay must be approved by the courts but is often limited to a portion of the governmental benefits the incapacitated person lives on and a trend is emerging where CPGs are refusing to take certain clients due to inadequate pay. Lay guardians are often family members, friends, or sometimes even neighbors or community volunteers of the incapacitated person. Lay guardians are required to complete a two-hour on-line training course but receive no other training or assistance after appointment, and generally serve with little or no pay.

The legislature gave courts the authority and responsibility to direct and control guardians, rendering the court the "Super Guardian." This includes the directive to monitor existing guardianships to ensure that the incapacitated person is receiving the care and protection he or she needs while protecting the liberty and autonomy of the incapacitated person to the maximum extent possible. Monitoring helps courts to manage risk, prevent abuse, and increase public confidence in the judicial system.

National and state experts including the Conference of Chief Justices, the Conference of State Court Administrators, the National Center for State Courts, the American Bar Association, the U.S. Governmental Accountability Office (GAO) and the Elder Law Section of the Washington State Bar Association have acknowledged that there is insufficient data to determine the incidence of abuse of incapacitated persons by guardians or if guardians are protecting incapacitated persons.

The findings, discussion and conclusions of these entities solidify the belief that there is little state-level guardianship data collected beyond filings and dispositions. As currently collected, county-level data in Washington State cannot be aggregated in a manner that makes it usable for effective guardianship monitoring, or guide policy makers and

practitioners to strengthen the guardianship system and prevent abuse of incapacitated persons. Effective monitoring should facilitate (1) effective case processing; (2) gauge the extent of abuse by guardians and the extent to which guardians protect incapacitated persons from abuse;(3) gauge the effect of court orders; (3) shape guardianship policy, practice, training and education; (4) provide useful feedback and support in a demanding role; and (5) have a preventive effect.

Washington's Superior Courts have addressed their responsibility to monitor guardianship cases in a variety of ways, some more effectively than others. Concerning is that many courts have no monitoring program at all. In other counties, the monitoring program consists primarily of ensuring that the annual reports on the status of the person and/or an accounting a guardian is required to file are filed promptly, but sometimes with little or no evaluation by the court of their contents or accuracy. Because the needs of an incapacitated person in a guardianship may change over time and the guardian may need to make complex decisions about health care, residential placement, finances and property, proper funding and consistent procedural statewide guidelines are essential to the court's oversight role to ensure proper care and to possibly spot abuse or monetary fraud is critical.

Proposed Solution:

AARP Volunteer Monitoring

In the late 80s, AARP created the model for a Volunteer Guardianship Monitoring Program that was used by several courts in Washington State. Today, Spokane Superior Court continues to successfully use this model to monitor guardianships under its jurisdiction. Volunteer monitoring programs have identified failures to report to the court, inadequate communication with protected persons and improper use of funds.

Conservator Account Auditing (or "Guardian of the Estate")

In 2011, Minnesota began auditing conservator accountings. It established a centralized accounting center and hired auditors. In 2015, four full-time and three part-time auditors completed 1085 audits. Eighty-seven accountings involved possible loss of funds, where the auditor may have recommended court removal of the conservator and/or repayment of funds to the incapacitated person. Concerns identified by auditing included loans from the incapacitated person to the conservator, expenditures without court approval or expenditures not in the best interest of the incapacitated person, and co-mingling of funds between the conservator and the incapacitated person where there was no close family relationship.

Detailed Recommendation:

This recommendation combines aspects of volunteer guardianship monitoring, formal auditing and data collection, and the Gatekeeper program and recommends a regional model that considers the differences in county needs, resources, and the number of guardianship appointments.

The following regions are recommended (see attached maps):

Region 1: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman, Yakima

Region 2: Island, King, San Juan, Skagit, Snohomish, Whatcom

Region 3: Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Kitsap, Lewis, Mason, Pacific, Pierce, Skamania, Thurston, Wahkiakum

The recommended model includes the following components:

- (1) Regional volunteer coordinators and volunteer researchers, visitors, and auditors;
- (2) Centralized auditors.

Regional volunteer coordinator(s) – At least one person in each region should be designated as the manager or coordinator of volunteers. This person will be responsible for:

- Recruiting and screening new volunteers
- Working with local/regional educational institutions to arrange for student volunteers
- Training new volunteers
- Matching volunteers to cases and providing forms to get started on a case
- Supervising and supporting volunteers – including answering questions about cases, acting as liaison with court staff, and engaging in regular communication with volunteers
- Reviewing volunteer reports for completeness and need for action; routing complex cases to a judge or other court staff for review when necessary
- Routing questionable accountings to the audit program for a complete audit
- Tracking court response to volunteers' recommendations and keeping volunteers informed
- Maintaining volunteer records; tracking volunteer participation including number of cases completed and amount of time devoted to program

- Handling volunteer reimbursement
- Convening regular meetings of volunteers
- Meeting with student volunteers to provide required oversight for educational credit
- Conducting periodic evaluations of program
- Serving as liaison with community agencies
- Developing and implementing a procedure to regularly update contact information for each person in a guardianship and their court-appointed guardian
- Collecting and reporting data, such as (1) number of audits performed; (2) number of visits performed; and (3) status of guardianship cases - is the person under guardianship deceased? Was the guardianship terminated or is the guardianship active? To the central office for statewide reporting and distribution.
- Volunteer researchers, visitors, and auditors – after training, volunteer researchers will collaborate with county clerks and court administrators to research guardianship court records, obtain the current address of the person in a guardianship and his or her court-appointed guardian, verify the status of the court file, and prepare cases for assignment to volunteer visitors.
- During visits, volunteer visitors will observe the person in a guardianship. Utilizing an approved checklist, volunteer visitors will assess the person's well-being and provide a report to the court on:
 - The cleanliness and safety of the home environment
 - The existing supports for the person under guardianship, and whether existing elements of guardianship are appropriate or if the person can make those decisions independently or with support at a level not appropriate for a guardianship
 - Whether the person is allowed to and able to work toward independence at a level appropriate to their goals and needs
 - The person's feelings about the guardianship, as well as their unspoken emotional state and opinion of whether each category of guardianship is still appropriate (right to vote, right to work, right to determine own medical care, etc.).
- Volunteer auditors will perform a cursory review of accountings and refer concerns to the professional audit team.
- Professional auditors will review accountings to (1) determine the accurate beginning and ending year balances; (2) ensure expenditures are appropriately substantiated; (3) confirm that expenditures are reasonable based on the needs of the protected person, and (4) confirm that all funds are accounted for.
- Throughout monitoring and auditing, the coordinators will seek to identify essential adult guardianship data being collected and not being collected by the court system and determine the quality of data collected. They will develop an appropriate design for data collection and report about to the number, type, and status of guardianships and regularly report to the courts.

Legislation Proposed by Rep. Jenkins

1 AN ACT Relating to communication regarding incapacitated persons;
2 amending RCW 11.92.043; adding a new section to chapter 11.88 RCW;
3 and adding a new section to chapter 2.72 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 11.88
6 RCW to read as follows:

7 (1) Except as otherwise provided in this section, an
8 incapacitated person retains the right to communicate, visit, and
9 interact with other persons upon his or her consent, which includes
10 the right to receive visitors, telephone calls, and personal mail. If
11 the incapacitated person is unable to express consent for
12 communication, visitation, or interaction with another person,
13 consent may be presumed based on the incapacitated person's prior
14 relationship or history with the person.

15 (2) A guardian or limited guardian may not restrict an
16 incapacitated person's right to communicate, visit, or interact with
17 other persons unless specifically authorized by court order.

18 (3) A guardian or limited guardian's motion seeking authority to
19 restrict an incapacitated person's communication, visitation, or
20 interaction with another person must be served upon the person
21 against whom the restriction is sought. The person against whom the

1 restriction is sought must have not less than fourteen days to
2 respond to any allegations set forth in the motion.

3 (4) A hearing on the matter must proceed with all testimony taken
4 under oath. Medical testimony may be entered by declaration.

5 (5) The court may enter an order allowing restrictions to be
6 placed on an incapacitated person's ability to communicate, visit, or
7 interact with another person upon the guardian or limited guardian's
8 showing of good cause by a preponderance of the evidence. In
9 determining good cause, the court must consider:

10 (a) Whether any protection, restraining, or no-contact orders
11 have been issued to protect the incapacitated person from the person
12 against whom the restriction is sought;

13 (b) Whether abuse, neglect, or financial exploitation of the
14 incapacitated person by the person against whom the restriction is
15 sought has occurred or is likely to occur;

16 (c) Any documented wishes of the incapacitated person regarding
17 communication, visitation, or interaction with the person against
18 whom the restriction is sought; and

19 (d) Any other factors deemed relevant by the court.

20 (6) An order entered under this section must be based on written
21 findings of fact and conclusions of law. If the order is granted in
22 whole or in part, the findings of fact and conclusions of law must
23 specify the manner in which the order furthers the best interests of
24 the incapacitated person and must set forth the basis for the finding
25 of good cause.

26 (7) The scope of an order entered under this section must not be
27 more restrictive than is necessary to protect the best interests of
28 the incapacitated person. The court must consider authorizing
29 restrictions in the following priority:

30 (a) Placing reasonable time, manner, or place restrictions on
31 communication, visitation, or interaction between the incapacitated
32 person and the other person;

33 (b) Requiring that communication, visitation, or interaction
34 between the incapacitated person and the other person be supervised;
35 or

36 (c) Denying communication, visitation, or interaction between the
37 incapacitated person and the other person, provided that unless the
38 court finds that the person poses a threat to the incapacitated
39 person, supervised communication, visitation, or interaction must be

1 ordered prior to the denial of any communication, visitation, or
2 interaction.

3 (8) The court, at its discretion, may enter a time-limited order.

4 (9) An order entered under this section must contain language
5 setting forth the right of the person whose communication,
6 visitation, or interaction with an incapacitated person may be
7 restricted under the order to appeal the court's decision and the
8 manner and timeline under which an appeal may be brought.

9 (10) If a guardian or limited guardian has grounds to believe
10 that there is an immediate need to prevent or limit the incapacitated
11 person's communication, visitation, or interaction with another
12 person in order to protect the incapacitated person from abuse,
13 neglect, abandonment, or financial exploitation, as those terms are
14 defined in RCW 74.34.020, the guardian may prevent or limit
15 communication, visitation, or interaction without a court order for
16 the period necessary to prepare and file a petition for a vulnerable
17 adult protection order.

18 **Sec. 2.** RCW 11.92.043 and 2011 c 329 s 3 are each amended to
19 read as follows:

20 It shall be the duty of the guardian or limited guardian of the
21 person:

22 (1) To file within three months after appointment a personal care
23 plan for the incapacitated person which shall include (a) an
24 assessment of the incapacitated person's physical, mental, and
25 emotional needs and of such person's ability to perform or assist in
26 activities of daily living, and (b) the guardian's specific plan for
27 meeting the identified and emerging personal care needs of the
28 incapacitated person.

29 (2) To file annually or, where a guardian of the estate has been
30 appointed, at the time an account is required to be filed under RCW
31 11.92.040, a report on the status of the incapacitated person, which
32 shall include:

33 (a) The address and name of the incapacitated person and all
34 residential changes during the period;

35 (b) The services or programs which the incapacitated person
36 receives;

37 (c) The medical status of the incapacitated person;

38 (d) The mental status of the incapacitated person;

1 (e) Changes in the functional abilities of the incapacitated
2 person;

3 (f) Activities of the guardian for the period;

4 (g) Any recommended changes in the scope of the authority of the
5 guardian;

6 (h) The identity of any professionals who have assisted the
7 incapacitated person during the period;

8 (i)(i) Evidence of the guardian or limited guardian's successful
9 completion of any standardized training video or web cast for
10 guardians or limited guardians made available by the administrative
11 office of the courts and the superior court when the guardian or
12 limited guardian: (A) Was appointed prior to July 22, 2011; (B) is
13 not a certified professional guardian or financial institution
14 authorized under RCW 11.88.020; and (C) has not previously completed
15 the requirements of RCW 11.88.020(3). The training video or web cast
16 must be provided at no cost to the guardian or limited guardian.

17 (ii) The superior court may, upon (A) petition by the guardian or
18 limited guardian; or (B) any other method as provided by local court
19 rule:

20 (I) For good cause, waive this requirement for guardians
21 appointed prior to July 22, 2011. Good cause shall require evidence
22 that the guardian already possesses the requisite knowledge to serve
23 as a guardian without completing the training. When determining
24 whether there is good cause to waive the training requirement, the
25 court shall consider, among other facts, the length of time the
26 guardian has been serving the incapacitated person; whether the
27 guardian has timely filed all required reports with the court;
28 whether the guardian is monitored by other state or local agencies;
29 and whether there have been any allegations of abuse, neglect, or a
30 breach of fiduciary duty against the guardian; or

31 (II) Extend the time period for completion of the training
32 requirement for ninety days; and

33 (j) Evidence of the guardian or limited guardian's successful
34 completion of any additional or updated training video or web cast
35 offered by the administrative office of the courts and the superior
36 court as is required at the discretion of the superior court unless
37 the guardian or limited guardian is a certified professional guardian
38 or financial institution authorized under RCW 11.88.020. The training
39 video or web cast must be provided at no cost to the guardian or
40 limited guardian.

1 (3) To report to the court within thirty days any substantial
2 change in the incapacitated person's condition, or any changes in
3 residence of the incapacitated person.

4 (4) To inform any relatives entitled to notice of proceedings
5 under RCW 11.92.150 and any other person designated by the
6 incapacitated person as soon as possible, but in no case longer than
7 five days, after the incapacitated person:

8 (a) Changes residence or is staying at a location other than his
9 or her residence;

10 (b) Has been admitted to a medical facility for emergency care in
11 response to a life-threatening injury or medical condition, or for
12 acute care; or

13 (c) Dies, in which case the notification must be made in person
14 or by telephone.

15 (5) Consistent with the powers granted by the court, to care for
16 and maintain the incapacitated person in the setting least
17 restrictive to the incapacitated person's freedom and appropriate to
18 the incapacitated person's personal care needs, assert the
19 incapacitated person's rights and best interests, and if the
20 incapacitated person is a minor or where otherwise appropriate, to
21 see that the incapacitated person receives appropriate training and
22 education and that the incapacitated person has the opportunity to
23 learn a trade, occupation, or profession.

24 ((+5)) (6) Consistent with RCW 7.70.065, to provide timely,
25 informed consent for health care of the incapacitated person, except
26 in the case of a limited guardian where such power is not expressly
27 provided for in the order of appointment or subsequent modifying
28 order as provided in RCW 11.88.125 as now or hereafter amended, the
29 standby guardian or standby limited guardian may provide timely,
30 informed consent to necessary medical procedures if the guardian or
31 limited guardian cannot be located within four hours after the need
32 for such consent arises. No guardian, limited guardian, or standby
33 guardian may involuntarily commit for mental health treatment,
34 observation, or evaluation an alleged incapacitated person who is
35 unable or unwilling to give informed consent to such commitment
36 unless the procedures for involuntary commitment set forth in chapter
37 71.05 or 72.23 RCW are followed. Nothing in this section shall be
38 construed to allow a guardian, limited guardian, or standby guardian
39 to consent to:

40 (a) Therapy or other procedure which induces convulsion;

1 (b) Surgery solely for the purpose of psychosurgery;

2 (c) Other psychiatric or mental health procedures that restrict
3 physical freedom of movement, or the rights set forth in RCW
4 71.05.217.

5 A guardian, limited guardian, or standby guardian who believes
6 these procedures are necessary for the proper care and maintenance of
7 the incapacitated person shall petition the court for an order unless
8 the court has previously approved the procedure within the past
9 thirty days. The court may order the procedure only after an attorney
10 is appointed in accordance with RCW 11.88.045 if no attorney has
11 previously appeared, notice is given, and a hearing is held in
12 accordance with RCW 11.88.040.

13 NEW SECTION. **Sec. 3.** A new section is added to chapter 2.72 RCW
14 to read as follows:

15 The office of public guardianship, in partnership with the office
16 of the state long-term care ombuds, shall develop and offer training
17 targeted to the legal community and persons working in long-term care
18 facilities regarding the different kinds of decision-making
19 authority, including guardianship, authority granted under power of
20 attorney, and surrogate health care decision-making authority. The
21 training must include, at a minimum, information regarding the roles,
22 duties, and responsibilities of different kinds of decision makers;
23 the scope of authority and limitations on authority with respect to
24 different kinds of decision makers; and any relevant remedial
25 measures provided in law for activity that exceeds the scope of
26 decision-making authority.

--- END ---

To: Rep. Jinkins
From: Jasmine Vasavada
Re: Stakeholder input on Guardianship bill (H-0023.1/17)
Date: Sept. 27, 2016

Please find below a summary of comments received from stakeholders on "An Act Relating to communications regarding incapacitated persons" (H-0023.1/17). As of noon today, I have received comments from:

- Amy Freeman, on behalf of Patrica Hunter, WA State LTC Ombudsman Program
- Alison Grazzini, WSBA Elder Law Section
- Claudia Donnelly
- Christina Baldwin
- David Lord, Disability Rights Washington; Shaun Bickley, Alliance of People with Disabilities; and Noah Seidel, Self-Advocates in Leadership (together, "Self-Advocates")

Section 1:

Subsection 1, Statement of rights:

LTC Ombuds: The language in this section offers clarity that guardianship does not dissolve these rights, and also offers tangible examples of what is involved, such as phone calls and personal mail.

Self-Advocates: Add language to clarify right to communicate includes all media: "Except as otherwise provided in this section, an incapacitated person retains the right to communicate, visit, and interact with other persons upon his or her consent, which includes and is not limited to the right to receive visitors, telephone calls, emails and social media, and person mail."

Subsection 2, Prohibition on guardian:

Christina Baldwin: suggests different language for Section 1(2), based on National Guardianship Standard: "No guardian or limited guardian may prevent or limit contact between an Incapacitated Person and any other person except when necessary to protect the Incapacitated Person from substantial harm."

Subsection 2, Requirement of court order:

LTC Ombuds: Provides much needed clarity, especially in the context of facilities. In cases of improper restriction on communication and visitation, facility staff often follow informal directions from surrogate decision-makers in violation of resident rights laws.

Subsections 3 – 10, Process to obtain court order:

LTC Ombuds: Existing process in RCW 74.34, Vulnerable Adult Protection Act, is preferable. If there is concern that the existing process is insufficient, these should be discussed.

WSBA Elder Law: Better to amend RCW 74.34 if necessary instead of creating a parallel court proceeding.

Subsection 3, Notice of Motion

Self Advocates: Notice of motion should be served on the "incapacitated person"; actual notice should be required; notice must be in plain language and, where incapacitated person is known to have limited ability to read, should be conveyed in person in a manner calculated to provide the incapacitated person with actual notice of what is occurring, and what his or her options are in response to the notice.

Subsection 5, Evidence considered:

Self Advocates: "Any documented wishes of the incapacitated person regarding communication, visitation, or interaction with the person against who the restriction is sought. This evidence will be given great weight. Where the individual has limited ability to express him or herself verbally, evidence of wishes communicated non-verbally shall be considered."

Subsection 5, Standard of Proof:

Claudia O Donnell: Nursing home/guardian may often justify exclusion of visitor based on previous visits that "agitated" the incapacitated person. What should be standard of proof for a guardian to demonstrate that this agitation is actually occurring (proposes beyond a reasonable doubt)?

Subsection 7, Scope of Order:

Self Advocates: "The scope of an order entered under this section must not be more restrictive than is necessary to protect the best interests of the incapacitated person. Great weight shall be given to the incapacitated person's expressions of his or her wishes, and where the incapacitated person has expressed a desire to have contact with an individual who will be subject to court restrictions, effort will be made to allowing such contact as may be possible without compromising the safety of the individual."

Subsections 8 through 10:

Self Advocates: Support the subsections that follow Section 1(7), which specify the *restrictions on contact will be tailored to the circumstances, rather than absolute prohibition.*

Section 2: Amendment of RCW 11.92.043

Subsection 2, Duty of guardians:

Christina Baldwin: Guardians should be required to file reports from medical and mental health experts when seeking restriction on association; judge should be making decisions that maintain or improve the wellbeing of the individual in guardianship in the least restrictive manner and must have medical and mental health reports to do so.

Subsection 4, Notice provisions

LTC Ombuds:

- The provisions requiring notice of hospitalizations and changes in location are helpful in that they are limited to persons already entitled to receive notice of guardianship proceedings and persons designated by the person under guardianship.

- Privacy Nevertheless, these provisions may implicate privacy concerns in cases where a resident does not want certain family members to know of hospitalizations. The parameters of these provisions should be studied further by the stakeholder group.

WSBA Elder Law:

- Necessity? Is there evidence of a problem with guardians timely informing interested parties of the death of an individual in a guardianship?
- Privacy Raises concerns about personal and health care privacy rights of the individual in a guardianship
- Timeline and manner of notice may be problematic. Consider amending previous subsection, RCW 11.92.043(3), to clarify what “substantial changes” are, triggering the requirement of a guardian to report to the court, and possibly a timeframe less than the current 30 days. Provide specificity of how notice should be given (i.e. U.S. mail verified by an affidavit of service).

Section 3: Training

Funding

LTC Ombuds: LTC Ombuds provides training in its discretion and as resources allow; would like to explore how to provide and fund training to LTC facilities and the organizations that represent them.

WSBA Elder Law:

Elder Law Section has played a lead role for more than 10 years, but maintaining funding for OPG has been a consistent challenge and OPG currently is unable to fulfill its primary function, which is to “contract for public guardianship services” for low-income individuals.

Competence and audience

LTC Ombuds: The group should explore what entities would be appropriate to train the “legal community” and define the targeted audience for such training.

WSBA Elder Law: OPG and LTC Ombudsman not necessarily the appropriate bodies to provide the education.

WSBA Elder Law: Seniors, disabled people, lay-guardians, and certified professional guardians might also benefit from such education.

Christina Baldwin: Lacks language about specific training of attorneys to represent people with disabilities.

Mandatory?

LTC Ombuds: Should anyone be *required* to receive training?

Other

Powers of Attorney:

LTC Ombuds: The Program would be interested in working on potential solutions to the problems addressed in the bill, as they arise in the context of powers of attorney; there have been few problems with guardians improperly restricting visitation and communication.

Claudia Donnelly:

- Bill addresses isolation by a guardian, what if there is no guardian involved and isolation is by a family member? (i.e. Kathy Wright Brawn and Tom Wright were isolated by a step-mom)
- Might be helpful to hear from a judge or commissioner at a stakeholder meeting, about their ability to void a POA

Christina Baldwin:

- Terminology recommended by Wings is now "individual in guardianship" (IIG), not "incapacitated person"
- IIG would have representation in these proceedings.

Proposed Policies and Standards of Practice

Certified Professional Guardianship Board

BYLAWS

ARTICLE I: Certified Professional Guardianship Board (Board)

ARTICLE II: Purpose

January 25, 2000, the Supreme Court created the Certified Professional Guardianship Board (Board) with the adoption of General Rule (GR) 23. The Board was created to regulate professional guardians. According to GR 23, the Board's regulation shall include (1) processing applications for certification; (2) adopting and implementing policies or regulations setting forth minimum standards of practice for professional guardians; (3) adopting and implementing regulations establishing a professional guardian training program; and (4) adopting and implementing procedures to review any allegation that a professional guardian violated an applicable statute, fiduciary duty, standard of practice, rule, regulation or other requirement governing the conduct of professional guardians.

According to GR 23, regulation of professional guardians may include (1) adopting and implementing regulations governing the preparation and administration of certification examinations; (2) adopting and implementing regulations for continuing education; (3) investigating to determine whether an applicant for certification meets the certification requirements or to determine whether a professional guardian violated any statute, duty, standard of practice, rule, regulation or other requirement governing the conduct of professional guardians; and (4) adopting regulations pertaining to the orderly conduct of a hearing.

ARTICLE III: Governing Body

The Washington State Supreme Court will govern the activities of the Certified Professional Guardianship Board. The Supreme Court shall appoint 12 or more members to the Board.

ARTICLE IV: Membership

Section 1: Members

Members of the Certified Professional Guardianship Board shall include representatives from the following areas of expertise: professional guardians; attorneys; advocates for incapacitated persons; courts; state agencies; and those employed in medical, social,

health, financial, or other fields pertinent to guardianships. No more than one-third of the Board membership shall be practicing professional guardians.

Section 2: Terms of Appointment

The term for a member of the Board shall be three years. No member may serve more than three consecutive full three-year terms, not to exceed nine consecutive years, including any unfilled term. Terms shall be established such that one-third shall end each year. All terms of office begin October 1 or when a successor has been appointed, whichever occurs later, and end September 30.

Section 3: Vacancies

Any vacancy occurring in the terms of office of Board members shall be filled for the remaining time of an unexpired term.

Section 4: General Duties

Duty of Care:

A board member has the obligation to exercise reasonable care when he or she makes a decision for the Board. Reasonable care is what an "ordinarily prudent" person in a similar situation would do.

Duty of Loyalty:

A board member must never use information gained through his/her position for personal gain and must always act in the best interests of the Board and the public. Determining public interest in a particular situation can be complex, but on a practical level, a Board member's public duty can best be fulfilled by focusing on the Board's duty to protect the public by ensuring that guardianship services are provided by certified professional guardians in a competent and ethical manner.

Duty of Obedience:

A board member must be faithful to the Board's purpose. He or she cannot act in a way that is inconsistent with the Board's goals. The public trusts the board to make sure the Board abides by the rules, regulations, and laws governing its actions.

Article V: Officers

Section 1: Chair and Vice Chair

Appointment: The Supreme Court shall appoint the Board Chair. By a majority vote, the Board shall elect a Vice Chair from its members.

Removal: The Board may petition the Supreme Court to remove a chair for failure to comply with any statute, duty, standard of practice, rule, regulation bylaw or other requirement governing his or her conduct.

Leave of Absence: Any Board member who is the subject of a disciplinary investigation by the Board may be asked to take a leave of absence from the Board. The Board Chair shall have the sole discretion to decide whether the Board member should take a leave of absence from the Board and when the Board member may return to the Board. A Board member may not continue to serve as a member of the Board if the Supreme Court has imposed a final disciplinary sanction on the Board member.

Section 2: Specific Duties of Chair and Vice Chair

The Chair shall set the agenda for and preside at all meetings of the Board, performing the duties usually incident to such office, and shall be the official spokesperson for the Board. The chair shall appoint the chairs of all committees. The vice chair shall perform the duties of the chair in the absence or incapacity of the Chair or at the Chair's request.

The Chair of the Board shall have the power to issue subpoenas and may make pre-hearing or other orders as are necessary for the orderly conduct of any hearing.

Article VI: Members

Section 1:

Appointment: The Board will solicit members and shall nominate all members with two exceptions, one member of the Board will be a representative of the Department of Social and Health Service (DSHS) nominated by DSHS; two members of the Board will be members of the Washington Bar Association (WSBA) nominated by WSBA. The Board shall review the qualifications of potential representatives from DSHS and WSBA and make a recommendation to DSHS and WSBA before a nomination is submitted to the Supreme Court. The Supreme Court shall appoint all board members.

Removal: The Board Chair may petition the Supreme Court to remove a board member, including the vice chair, for failure to comply with any statute, duty, standard of practice, rule, regulation bylaw or other requirement governing his or her conduct.

Section 2: Specific Duties of Members

Each member shall serve on one or more committees.

Article VII: Committees

Standing committees, as well as ad hoc committees and task forces of the Board, shall be established by majority vote. Each committee shall have such authority as the Board deems appropriate. The Chair will appoint the chair of all committees created by the Board. The terms of ad hoc and task force committee members will have terms as determined by their charge.

Article VIII: Meeting

The Board shall hold meetings as determined to be necessary by the chair.

Section 1: Regular Meeting

Regular meetings will be open to the public.

Section 2: Special Meeting

Executive session, review panel, or disciplinary meetings before the filing of a disciplinary complaint will be closed to the public.

Section 3: Quorum

A majority of the board is required for a quorum. A quorum must be present on the phone, online or in person for voting to occur. When a quorum is established, a motion will be approved by a majority of those present.

Section 4: Attendance

Board members are required to participate in a minimum of 80% [to be rounded down] of full Board meetings held during the calendar year. A board member may not have more than two unexcused absences during a calendar year and continue to serve on the Board. An absence resulting due to an emergency will be excused. Absences will also be considered excused if a board member informs the chair or AOC staff via phone or e-mail of his or her expected absence at least 24 hours before the meeting start time.

Section 5: Votes

Committee action will be taken by voting. Whenever a vote is not unanimous, the Chair may call for a show of hands. Members participating, in-person, online or on the phone may vote. No member will be allowed to cast a vote by proxy.

Article IX: Public Input

Section 1: Public Comment

Each regularly scheduled in-person meeting shall include a public comment period. The public comment period shall be the first item on the agenda after the chair's report. The comment period shall not exceed thirty minutes total and will be subject to the following general guidelines:

1. Speakers must sign in to speak and must list name and topic.
2. Only one speaker at a time.
3. Only the Chair may interrupt a speaker.
4. No personal attacks or accusations.
5. Comments will be limited to three minutes per speaker.

6. No repetition of comments from previous meetings.

7. Written comments may be submitted in lieu of, or in addition to public comments.

A written copy of public comments provided to AOC staff during or immediately following the meeting staff will be attached to meeting minutes.

Regulation 600, the procedure for adoption, amendment and repeal of regulation also provides an opportunity to provide written comments.

Section 2: Public Meeting

Annually, the Board holds a planning meeting to discuss emerging issues in guardianship practice and long-term projects. Before the planning meeting, the public is invited to a moderated discussion with the Board.

Section 3: Communication

To effectively and efficiently perform its regulatory mission, the Board uses a Communications Plan¹, adopted to facilitate the consideration of diverse perspectives in an environment that supports and respects differences and commitment to group initiatives.

Article X: Conflict of Interest²

To address conflicts of interest board members should:

- a) Fully disclose their relationships with any and all individuals and organizations when matters involving those entities come before the board;
- b) Avoid participating in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by other Board members;
- c) Not participate in rulemaking when the organization in which they have a personal interest is the petitioner for the rule in question; and
- d) Not participate in grievances and complaints or other quasi-judicial proceedings involving individuals and organizations with which they are personally interested

¹ For additional guidance regarding the Communications Plan see <http://www.courts.wa.gov/guardianportal/index.cfm?fa=guardianportal.cpg&content=rules>

² For additional guidance review the memo dated August 1, 2014, RE: Conflicts Review/Recusal Process <http://www.courts.wa.gov/guardianportal/index.cfm?fa=guardianportal.cpg&content=rules>

or where their impartiality might reasonably be questioned as a result of their association with those entities.

Article XI: Amendments and Repeal of Bylaws

Bylaws may be amended or modified by majority vote at any regular meeting of the Board.

Article XII: Board Member Expenses

Board members shall not be compensated for their services. Consistent with the Office of Financial Management rules, Board members may be reimbursed for actual and necessary expenses incurred in the performance of their duties.

Article XIII: Address of the Board

Administrative Office of the Courts
ATTN: Certified Professional Guardianship Board
PO Box 41170
Olympia, WA 98504

Callie T. Dietz
State Court Administrator

October 10, 2016

TO: Certified Professional Guardianship Board

FROM: Administrative Office of the Courts Staff

RE: WINGS Standard of Practice Recommendation

Recommendation: Any Certified Professional Guardian (CPG) nominated as guardian in a petition to establish a guardianship not filed by the nominated CPG shall only retain legal counsel in that guardianship who does not represent any other party in the guardianship past or present, unless a waiver is obtained by the attorney.

Issue/Question: *Is it appropriate for an attorney to represent both the petitioner and the professional guardian?*

Committee Process:

The WINGS Standards of Practice Committee began to discuss the question above at its October 29, 2015 meeting. It is generally agreed in the guardianship arena that an attorney should not represent both the petitioner and the professional guardian.

One member of the Committee who is a guardian commented that she had observed it was common for the attorney for the petitioner to resign, and then represent the guardian. Another Committee member recommended considering a Standard of Practice that precluded a guardian from hiring an attorney who had represented the petitioner in the guardianship.

An Ad Hoc Committee was formed to consider a Standard of Practice regarding this matter. This Committee was to exchange proposals by email during the interim before the November 12, 2015 meeting. One member expressed concern that an absolute prohibition on dual representation was a departure from current law. Ethics Advisory Opinion 2005-001 does allow an attorney to represent the guardian who is also the petitioner when certain requirements are met. He pointed out that there can be efficiencies in retaining an attorney who is familiar with the case as a result of having represented the petitioner, to represent the guardian after a guardianship is established.

Low income individuals could find it easier to retain counsel when it is more efficient for the attorney. Further, attorneys are not prohibited by their professional code from representing both the petitioner and later the guardian. However, another member of the committee commented that there is an inherent conflict when the same attorney represents both the petitioner in a guardianship and then the guardian. The petitioner and the guardian for the person subject to the guardianship have very different roles, which is part of the checks and balances in the law protecting the person under guardianship. The Chair of the Committee pointed out that the purpose of Standards is to put the person under guardianship in the best possible situation. Efficiency is not a major concern. The focus should be the best interest of the person under guardianship. The Chair suggested that it would be a “better practice” for a guardian not to retain counsel who had earlier represented the petitioner in the same guardianship.

The Standards and Practices Committee was unable to reach unanimity at this meeting, so the matter was referred back to the Ad Hoc Committee. The Ad Hoc Committee was asked to try to come up with language that everyone could agree with, and set out the best standards that could be identified. The Chair suggested including any desirable language from the Ethics Advisory Opinion rather than making reference to it. The Standards of Practice Committee met again on December 10, 2015, when several members of the Committee made proposals. The following were the three main proposals:

- A) A guardian shall only retain legal counsel who has not represented any other party in the guardianship proceeding in the past or present, unless the guardian is (1) the petitioner, (2) the nominated guardian, and (3) meets all requirements of the Ethics Advisory Opinion 2005-001.
- B) In any specific guardianship case, a Certified Professional Guardian (CPG) shall not be represented by an attorney with whom the CPG has [a] business relationship when that attorney is also the petitioning attorney.
- C) A guardian shall only retain legal counsel who has not represented any other party in the guardianship proceeding in the past or present, unless the guardian is:
 - (1) the petitioner,
 - (2) the nominated guardian,
 - (3) obtains a signed statement from the AG [attorney general] stating the reason the AG’s office will not petition for guardianship,
 - (4) engages in an investigation [and document that investigation] in an Affidavit or Declaration to the court the following pre-filing efforts:
 - a. identifying any alternative nominees and providing information as to why alternate nominees who are available are not suitable or able to serve;
 - b. provides a written request from the party requesting the guardianship which identifies the basis for the request and the basis for the decision by that party not to petition;

- c. provides documentation from third parties of the facts set out in the petition. Such documentation can include statements from care providers, family members, friends, or others with knowledge of the circumstances of the incapacitated person;
- d. provides documentation that the certified professional guardian has met with the alleged incapacitated person, the results of that meeting, and an opinion by the certified professional guardian of the capacity issues faced by the alleged incapacitated person; [and]
- (5) discloses in the Affidavit or Declaration to the court any relationship the certified professional guardian may have with a care facility and any practice the care facility may have involving the referral of residents to the certified professional guardian.

One Committee member commented that the first and second proposals had similar content. He felt that the one with the clearest language should be adopted. He said that Proposal C was different, and addressed both legal representation and self-petitioning. He asked if the group wanted to address both of these issues. The proponent of "C" explained that she had attempted to take the Chair's directive to the Ad Hoc Committee and incorporate the provisions of the Ethics Opinion. The nine Committee members present voted on the proposals. There was no clear unanimity, so the Chair recommended that the proposals return to the Ad Hoc Committee.

The Standards of Practice Committee met on Thursday, January 7, 2016 to review the Ad Hoc Committees recommendations regarding these proposals. Eight committee members were present. The Committee decided to adopt Proposals A and C, with some refining, as each addressed separate issues. The SOP recommended above, based on Proposal A, is intended to prohibit a guardian from retaining an attorney that has represented the petitioner or any other party.

Issue Background:

The August 7, 2015 WINGS Conference recommended consideration as to whether an attorney should represent the petitioner and the professional guardian. This was a question that had been addressed by the National Guardian Association (Standard 16E and Ethics Advisory Opinion 2005-001 (2006)), the Council on Accreditation (Standard 6.03), and the Second National Guardianship Conference among others. All had concluded that an attorney should not engage in dual representation.

National Guardianship Association- Standards of Practice Standard 16E

E. A guardian who is not a family guardian may act as petitioner only when no other entity is available to act, provided all alternatives have been exhausted.

Council on Accreditation, Public Agencies - Adult Guardianship
PA-AG 6 Conflict of Interest

Purpose

Individuals who receive guardianship services maintain a level of independence and self-determination appropriate to their functional capacity, and are at minimized risk of abuse, neglect or exploitation.

Standard

The agency establishes the well-being of individuals as its primary responsibility and eliminates the risk, or appearance, of a conflict of interest.

Interpretation:

A conflict of interest exists when an action made on behalf of the individuals may be seen as self-serving to the guardianship worker or the agency as a whole.

PA-AG 6.01

Whenever possible, the guardianship program:

- a. operates as an independent entity: and
- b. refers individuals to services offered by outside providers.

Interpretation:

When the guardianship program is part of a larger agency or entity, it should have the authority to make independent decisions in order to avoid conflicts due to the potentially competing interests of the larger agency or entity. Exceptions to element (b) should be made only:

1. when an appropriate outside service provider is unavailable, and
2. when the exception is in the best interest of the individual served.

Research Note:

When the office of the public guardian falls under the auspices of a larger social service agency that provides direct services to the identified service population, a conflict of interest can arise. In such situations, guardianship workers may not have the autonomy required to advocate on the individual's behalf or assess the quality and appropriateness of the service being provided. The guardianship agency must develop a clear process for assessing the needs of the individual and identifying the service provider who will most effectively meet those needs.

PA-AG 6.02

When the agency refers the individual to services offered by a governmental agency with direct oversight of the guardianship program, reasons for the arrangement should be documented in the case record.

PA-AG 6.03

The agency discloses any potential conflict of interest to all involved parties including the court, the individual, and his or her family as appropriate.

Interpretation: *For example, if the agency acts as both guardian and direct service provider, the court should be notified.*

PA-AG 6.04

The agency only petitions the court for its own appointment as guardian when no other entity is available.

Research Note:

The literature strongly suggests that there is an inherent conflict of interest when the agency acts as both petitioner and guardian. The guardian's first responsibility is to protect the rights and assets of the individual, and acting as petitioner could be seen as self-serving. When acting as petitioner, an agency has the power to pick only those cases that would be profitable, or require minimal staff time and avoid cases involving destitute individuals or individuals with significant behavioral issues.

However, it is also important to point out that barriers to finding a petitioner such as a lack of community relationships or an inability to cover court and filing fees could result in individuals going without needed services. Agencies should collaborate with other stakeholders such as nursing homes, police departments, community mental health agencies, family members, adult protective services, hospitals, attorneys, and assisted living facilities to identify potential petitioners with the community. The agency should also be aware of fee waivers in their state that may make petitioning the court more financially viable for community members and service providers.

When the agency must act as petitioner, it should do so based upon a referral from a neutral third party and provide evidence that steps were taken to protect the individual's right to due process including access to quality legal representation.

PA-AG 6.05

All guardianship fees are reported to and approved by the court.

The Second National Guardianship Conference – Recommendations **VI. Lawyers as Fiduciaries or Counsel to Fiduciaries** **Changes in Practice Precepts or Guidelines**

The Conference recommends that:

62.

A lawyer petitioning for guardianship of his or her client *not* (a) be appointed as the respondent's counsel, (b) be appointed as the respondent's counsel, (c) be appointed as the respondent's guardian ad litem for the guardianship proceeding, and (d) seek to be appointed guardian except in exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity.

Callie T. Dietz
State Court Administrator

October 10, 2016

TO: Certified Professional Guardian Board

FROM: Administrative Office of the Courts Staff

RE: WINGS Standard of Practice Recommendation

Recommendation:

A professional guardian who self-petitions to be guardian for someone must obtain a signed statement from the attorney general stating the reason the attorney general's office will not petition for guardianship; and engage in an investigation that:

- (1) identifies alternative nominees and provides information as to why alternate nominees who are available are not suitable or able to serve;
- (2) provides a written request from the party requesting the guardianship, which identifies the basis for the request and the basis for the decision by that party not to petition;
- (3) provides documentation from third parties of the facts set out in the petition (such documentation can include statements from care providers, family members, friends, or others with knowledge of the circumstances of the incapacitated person);
- (4) provides documentation that the certified professional guardian has met with the alleged incapacitated person, the results of that meeting, and an opinion by the certified professional guardian of the capacity issues faced by the alleged incapacitated person; and
- (5) discloses to the court any relationship the certified professional guardian may have with a care facility and any practice the care facility may have involving the referral of residents to the certified professional guardian.

Issue/Question: *Is it appropriate for an attorney to represent both the petitioner and the professional guardian?*

Committee Process:

The Standards of Practice Committee met on Thursday, January 7, 2016 to review two proposals related to the above question. Eight committee members were present. An Ad Hoc Committee had worked on the proposals in the interim. The Committee decided to adopt two separate standards, as each proposal addressed a separate issue. The SOP above was intended to address the problem of self-petitioning.

Issue Background:

There is considerable concern expressed in national statutes and standards regarding the potential for conflict of interest presented by self-petitioning. An ethics advisory opinion of the Washington Certified Professional Guardianship Board provides ““The practice of nominating oneself as guardian automatically raises the appearance of self-dealing.” WASH. CERTIFIED PROF’L GUARDIAN BD., Ethics Advisory Op. 2005-001 (2010).

It is frequently indicated that self-petitioning should be a last resort. A Wingspan Conference recommendation is that:

A lawyer petitioning for guardianship of his or her client not (a) be appointed as the respondent’s counsel, (b) be appointed as the respondent’s guardian ad litem for the guardianship proceeding, and (c) seek to be appointed guardian except in exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity. [Wingspan-The Second Nat’l Guardianship Conference, Recommendations, 31 STETSON L. REV. 595, 608 (2002)].

Similarly, the National Guardianship Association has promulgated a Standard that provides:

“A guardian [CPG] who is not a family guardian may act as petitioner [for appointment of oneself as guardian] only when no other entity is available to act, provided all alternatives have been exhausted.” [National Guardianship Association (NGA) Standard 16(III)(E) (2013)].

The organization [a CPG] only petitions the court for its [the CPG’s] own appointment as guardian when no other entity is available. When the organization must act as petitioner, it should do so based upon a referral from a neutral third party and provide evidence that steps were taken to protect the individual’s right to due process including access to quality legal representation. [Council on Accreditation Adult Guardianship. 6.04 (2016)].

There is also recognition of the possibility of conflict should an office of public guardianship petition for appointment of a guardian. The office [of public guardianship] shall not petition for appointment of a public guardian for any individual. It may develop a proposal for the legislature to make affordable legal assistance available to petition for guardianships. [Wash. Rev. Code section 2.72.030(5)].

“The office of public guardian may: Not initiate a petition of appointment of the office as guardian or conservator.” 2 [2010 Model Public Guardianship Act].

One treatise provides: “Such petitioning could present several conflicts of interest. First, if the program relies on fees for its operation, or if its budget is dependent on the number of individuals served, the program might petition more frequently, regardless of individual needs. On the other hand, the program might . . . ‘only petition for as many guardianships as it desires, perhaps omitting some persons in need of such services.’ Or it could “cherry pick,” petitioning only for those individuals easiest or least costly and time-consuming to serve.” [Teaster, et al., Public Guardianship: In the Best Interests of Incapacitated People? (2010), p. 19.]

One alternative widely identified to avoid self-petitioning is to designate the attorney general to petition for guardianship where there is no other alternative. Washington statute so provides: “The attorney general may petition for the appointment of a guardian or limited guardian in any case in which there is cause to believe that a guardianship is necessary and no private party is able and willing to petition.” [Wash. Rev. Code section 11.88.030(3)(a).]

The above recommendation was intended to ensure that self-petitioning took place as a last resort, when it was documented that the attorney general would not file the guardianship, all other alternatives had been explored, and the petitioner has made full disclosure to the court regarding the circumstances behind the petition and any possible conflict of interest.

Callie T. Dietz
State Court Administrator

October 10, 2016

TO: Certified Professional Guardian Board

FROM: Administrative Office of the Courts Staff

RE: WINGS Standard of Practice Recommendation

Existing SOP Language

406.5 A guardian who is an attorney may provide legal services to the incapacitated person only when doing so best meets the needs of the incapacitated person and is approved by the court following full disclosure of the conflict of interest. (Adopted 1-9-12)

Recommendation: *To add the following language:*

406.5.1 A guardian who is also an attorney shall only represent the guardian in their fiduciary capacity as guardian with respect to the administration of the guardianship for the person under guardianship. The guardian shall account to the court for the costs of its services as guardian and as attorney for the guardian separately.

406.5.2 A guardian for a person under guardianship or an attorney who is also the guardian shall not initiate legal action on behalf of the person under guardianship, or respond to legal action initiated against the person under guardianship, without the express approval of the court with local jurisdiction.

406.5.3 A guardian or an attorney who is a guardian shall not serve as attorney for the person under guardianship.

Issue/Question:

May a guardian who is an attorney provide legal services to an individual in a guardianship?

Committee Process:

The WINGS Standards and Practices Committee held its first meeting on Thursday, October 1, 2015. The Chair reviewed a Request for Ethics Advisory Opinion sent to the Committee. The request for an Ethics Advisory Opinion is set out below. The issue presented was whether a Certified Professional Guardian who is also an attorney can perform and charge for legal services provided to the person under guardianship who has not sought permission from the court to perform legal services for the client. The group discussed the issue in depth. SOP 406.5 addresses legal work for a client by a guardian who is also an attorney. The current version of the regulation is set out above. The Chair designated an ad hoc committee to draft a revised version of SOP 406.5 for discussion at the next meeting.

At the October 15, 2015 meeting the ad hoc committee proposed three new subsections to SOP 406.5.

Proposed Revised Standard of Practice

406.5.1 A guardian who is also an attorney may represent the guardian in their fiduciary capacity as guardian with respect to the administration of the guardianship for the person under guardianship. The guardian shall account to the court for the costs of its services as guardian and as attorney for the guardian separately. A guardian who is also an attorney may not serve as the attorney for the person under guardianship, even if the attorney is not representing the guardian for that person under guardianship.

406.5.2 A guardian for a person under guardianship or an attorney who is also the guardian shall not initiate legal action on behalf of the person under guardianship, or respond to legal action initiated against the person under guardianship, without the express approval of the Court with local jurisdiction.

406.5.3 A guardian or an attorney who is a guardian shall not provide legal services on behalf of the person under guardianship unless doing so best meets the needs of the person under guardianship without first receiving Court approval following full disclosure of the conflict/potential conflict of interest.

The Committee discussed the proposal. There was a difference of opinion among the ad hoc group regarding subsection .3, and whether it was needed. Some felt that a person under guardianship would rarely need an attorney. However, the consensus was that there were times when the client could need legal services, and having the guardian perform the work could be more efficient. Imposing a requirement to seek permission of the Court to perform the services would retain the option, while ensuring protection for the person under guardianship.

The Chair then proposed that the last section of subsection .1 be omitted, as a guardian would have the right to represent him or herself in the guardianship. The group was in agreement. The Chair also proposed some wording changes to the language of

subsection .1. He suggested changing “may” in the first sentence of 406.5.1 to “shall only”, and “may not” in the last sentence of the section to “shall not”. The committee agreed to amend the wording as proposed, which was incorporated into the final version presented above. The Committee approved sending the new SOP 406.5 on to the Board and WINGS Steering Committee.

Issue Background:

The WINGS Committee Stakeholders raised the question as to the propriety of an attorney who is also a guardian for the incapacitated person providing direct legal services to the client. The AOC staff performed research regarding this question.

May a court- appointed guardian who is also an attorney provide legal services to the incapacitated person he is the court-appoint guardian for?

An attorney as serving as guardian for a client should include clear guidelines at the commencement of the guardianship regarding the duties and responsibilities of the guardian, and whether the attorney will also serve as attorney for the client. Edward D. Spurgeon & Mary Jane Ciccarello, Lawyers Acting As Guardians: Policy and Ethical Considerations, 31 Stetson L. Rev. 791, 845 (2002). The “lawyer/guardian should be compensated for services rendered as guardian, and as lawyer if the lawyer also continues to serve as lawyer.” *Id.*

Also, in regards to offering legal services, or making legal decisions a guardian who is also an attorney should get the court's approval “before making any decisions that could be met with opposition from the family or others later.” Dynamics, Dysfunction, and Disability: Power Play Between Guardians, Conservators, Proxies, and Attorneys in Fact, at 9. For example, if an attorney is serving as a guardian and incapacitated person (IP) that is going through a divorce proceeding, that attorney should ask the court for the appointment of a guardian ad litem (GAL). The neutral GAL can investigate the terms of the IP’s divorce settlement and evaluate for the judge whether or not the terms of the divorce settlement are as good as they could possibly get within reason. *Id.* at 7.

Florida has a provision in their statutes that prohibits an attorney from representing an IP and serving as guardian for the IP. The 2015 Florida Statutes 744.331(c).

Idaho prohibits any attorney representing an AIP from serving as a guardian of the AIP or as counsel for the petitioner for guardianship. <http://www.legislature.idaho.gov/idstat/Title15>.

Subsequently, a request for an Ethics Advisory Opinion was submitted to the WINGS Standards of Practices Committee. A Certified Professional Guardian (CPG) who is also an attorney charges fees to incapacitated persons he serves as a guardian for legal services he or she provides. He or she has never sought permission from the Court to perform legal services for the incapacitated persons served. The question

asked was whether the purpose of SOP 406.5 was to ensure that a CPG who is an attorney cannot engage in self-dealing by hiring himself or herself to do legal work that is billed to an IP.

The WINGS Standards of Practice Committee first took this matter up at its initial meeting on October 1, 2015, as discussed above.