

Meeting Minutes
December 12, 2022



Certified Professional Guardianship and Conservatorship Board

Monday, December 12, 2022
Zoom Meeting
7:30 a.m. – 9:00 a.m.

MEETING MINUTES	
Members Present	Staff Present
Judge Diana Kiesel, Chair	Ms. Stacey Johnson
Judge Grant Blinn	Ms. Thai Kien
Judge Robert Lewis	Mr. Samar Malik
Judge Ferguson-Brown	Ms. Sherri White
Mr. William Reeves	Ms. Kay King
Dr. K. Penney Sanders	Ms. Rhonda Scott
Ms. Susie Starrfield ¹	Ms. Linda Vass
Mr. Dan Smerken	Ms. Maureen Roberts ²
Ms. Kristina Hammond	
	Members Absent
	Ms. Melanie Maxwell
	Dr. Anita Souza
	Ms. Witthauer
	Ms. Lisa Malpass

Guests – See last page

1. Meeting Called to Order

Judge Diana Kiesel called the December 12, 2022 Certified Professional Guardianship and Conservatorship Board meeting to order at 7:30 a.m.

2. Welcome, Roll Call & Approval of Minutes

Judge Kiesel welcomed all present.

Motion: A motion was made and seconded to approve the November 14, 2022 Board meeting minutes. The motion passed.

¹ Ms. Starrfield joined at 7:58 a.m.

² Ms. Roberts joined at 7:37 a.m.

3. Executive Session (Closed to Public)

4. Reconvene (Open to Public)

5. Chair's Report

Judge Kiesel announced the 2023 Board meeting schedule. She thanked the Board members for dedication and service during an exceptional year.

6. Grievance Report

Staff reported two (2) grievances were received during the month of November. To date, the Board dismissed five (5) grievance received in 2022 as incomplete or for no jurisdiction, two (2) grievances have been forwarded to the court. A total forty-four (44) grievances are currently unresolved. A total of five hundred twenty-two (522) grievances from prior to 2022 have been resolved.

7. Regulations Committee

On behalf of the Regulations Committee, Mr. Smerken proposed a new regulation, 007, pertaining to how Board meetings are held.

Motion: A motion was made and seconded to put forward Regulation 007 for public comment. The motion passed.

8. Standards Vote on Executive Session Discussion

On behalf of the Standards of Practice Committee, Judge Grant Blinn presented the following grievances for Board action. Members of the Standards of Practice Committee abstained.

Motion: A motion was made and seconded to dismiss grievance 2022-029 following court review. The motion passed.

On behalf of the Applications Committee, Judge Robert Lewis presented the following applications for certification. The Application Committee abstained.

Motion: A motion was made and seconded to conditionally approve the application of Monica Scrugg with transferrable skills in healthcare. The motion passed.

Motion: It was moved and seconded to administratively decertify the following eleven (11) CPGCs for failure to recertify:

Ilie Burcheci
Julie Crawford
Nadifa Dahir
Justo Fraijo
Geniece Gregory
Madeleine Hudson

Donald Johnson
Crystal Joseph
Carmen Morbach
Sharon Sharrett
Susan Titus

9. Wrap Up/Adjourn

With no other business to discuss, the December 12, 2022 CPGC Board meeting was adjourned at 8:40 a.m. Next Meeting Date: Monday, January 9, 2022 at 9:00 a.m. via Zoom.

Recap of Motions:

MOTION SUMMARY		STATUS
Motion:	A motion was made and seconded to approve the minutes of the November 14, 2022 Board meeting.	Passed
Motion:	A motion was made and seconded to approve changes to Regulation 007.	Passed
Motion:	A motion was made and seconded to dismiss grievance 2022-029 following court review.	Passed
Motion:	A motion was made and seconded to conditionally approve the application of Monica Scrugg.	Passed
Motion:	A motion was made and seconded to administratively decertify eleven CPGCs.	Passed

Guests:

Samantha Hellwig (AAG)

Deborah Jameson

Karen Klem

Glenda Voller

Katlyn Balsam

Grievance Report
December, 2022

**Certified Professional Guardians and Conservators
Grievance Status
December 31, 2022**

New Grievances Received in December 2022:	3
2022 Grievances Dismissed by Board on December 12, 2022:	1
2022 Grievances Forwarded to Superior Court on December 12, 2022:	0

Total 2022 Grievances Received:	75
Total 2022 Grievances Forwarded to Superior Court:	40
Total 2022 Grievances Pending CRC Review	1
Total 2022 Grievances Pending Staff Investigation	1
Total 2022 Grievances Dismissed: (No Jurisdiction, Insufficient Grievance, or Following Court Review)	52

Please note that the numbers reported in this section will not necessarily be equal to the total number of grievances received; this is due to the timing of when new grievances are received and in process of review by the Board.

Active CPGCs: 258

Pre-2022 Grievance Status – December 2022	2021	2020	2019	2018	2017	2016	Total
Grievances Resolved this Month:	2						2
Grievances Remaining Requiring Investigation*:	17	0	0	0	0	0	17

Pre-2022 Grievances Pending*	2021	2020	2019	2018	2017	2016	Total
Voluntary Surrender/Litigation:		1	2				3
Conflicts Review Committee:							0
ARD:							0
Forward to Court:						1	1
Complaint/Hearing:							0
Administrative Decertification:							0
Total Pending:	0	1	2	0	0	1	4

[*Grievances in Pending status are not counted as Grievances Requiring Investigation.

Resolution of Pre-2022 Grievances – December 2022	2021	2020	2019	2018	2017	2016	Total
Dismissal – No Jurisdiction							0
Dismissal – No Actionable Conduct	2						2
Dismissal - Administrative							0
Dismissal – Insufficient Grievance							0
Advisory Letter 507.1							0
ARD - Admonishment							0
ARD - Reprimand							0
ARD - Suspension							0
Terminated – Voluntary Surrender							0
Terminated – Administrative Decertification							0
Terminated – Decertification							0
TOTAL PRE-2022 GRIEVANCES RESOLVED IN DECEMBER	2	0	0	0	0	0	2

Resolution of Pre-2022 Grievances – 2022	2021	2020	2019	2018	2017	2016	Total
Total Grievances Received by Year	95	80	77	85	104	104	545
Dismissal – No Jurisdiction	9	21	15	22	30	20	117
Dismissal – No Actionable Conduct	58	45	41	52	60	55	307
Dismissal – Miscellaneous		1					1
Dismissal – Insufficient Grievance	7	6	5	3	1	2	24
Dismissal – UGA Court Referral		3					3
Advisory Letter 507.1		2	5	3	2	4	16
ARD - Admonishment							0
ARD – Reprimand		1		1	1	4	7
ARD - Suspension							0
Termination – Administrative Decertification	4	1	3	1	1	3	13
Termination – Voluntary Surrender			1	2	8	15	26
Termination – Decertification			5	1	1		7
Total Pre-2022 Grievances Resolved:	78	79	75	85	104	103	524

Guardians/Agencies with Multiple Grievances

December 2022

ID	Year Cert.	Unresolved Grievances	Year(s) Grievances Received
A	2015	3	2021 (1), 2022 (2)
B	2009	2	2021 (2)
C	2016	10	2021 (4), 2022 (7)
D	2011	2	2021 (2)
E	2007	4	2019 (2), 2020 (1), 2022 (1)
F	2011	2	2021 (1), 2022 (1)
G	2001	3	2022 (3)
H	2006	2	2021 (2)
I	2011	5	2022 (5)
		33	

Of the 44 currently unresolved grievances, 33 involve 9 Certified Professional Guardians and Conservators or Agencies with 2 or more grievances.

Education Committee

CERTIFIED PROFESSIONAL GUARDIANSHIP BOARD APPLICATION FOR APPROVAL OF CONTINUING EDUCATION ACTIVITY

Please type or print legibly

1. Sponsor Name:
- Sponsor Address:
- Sponsor Phone:
- Sponsor Email:
- Contact Person of Sponsor:

<u>For Board Office Use Only</u>	
General Credits	_____
Ethics Credits	_____
Emerging Issues Credits	_____
Approved ____ Yes ____ No	
Initials _____	

2. Title of Educational Activity:

3. Date, time (start and end) and exact location (address including building or room) of presentation:

Start Date/Start Time	End Date/End Time	Location (Address, Building, Room)

Is this class a webinar? Yes No Is this webinar interactive? Yes No

Note: The sponsor is responsible for informing attendees that group viewing of the class is not acceptable. Each individual attendee must log in separately, as sponsor login records are used to verify attendance.

4. Number of continuing education credit hours requested:
 General: **5.50**
 Ethics:
 Emerging Issues: Cultural Diversity:
or
 Effective Listening and Communication Skills:
 (See CPG Continuing Education [Regulation 201](#))

5. Have you requested approval of this course before? Yes No
 If yes, when
6. Registration fee for activity:
7. Faculty: Attach a document containing all the information below for all faculty members.
- Name
 - Resume/Bio/Credentials (Include professional and educational background, teaching experience)
 - Topic they're teaching
8. Complete description of all materials to be distributed to participants.
9. Description of physical facilities (e.g., classroom or theater seating, availability of writing surface, etc.):
10. Method of evaluation of program (e.g., participant critique, independent evaluator, etc.):
11. Please complete "Outline of Course Presentation" on Page 8 with a description of each session.
12. Estimated number of attendees:

Sponsor agrees: (1) to allow the Certified Professional Guardian Board, a member thereof, or such other person as it shall designate, to audit the program in question; and (2) within **thirty (30) days** following the activity send to AOC a list of all CPGs who attended the activity, any Attestation Forms received, and all evaluations. **Attendance logs should reflect the actual arrival and departure time.**

NOTE: On the date of the continuing education activity, the sponsor must provide a copy of the CPG course approval form to each CPG in attendance.

**Return this form along with \$25 if filed more than thirty (30) days prior to the activity.
 If filed less than thirty (30) days before the activity, return the form with \$50.
 Return the form to:**

**Certified Professional Guardian Board
 Administrative Office of the Courts
 Attn: Samar Malik
 PO Box 41170
 Olympia, WA 98504-1170**

Certified Professional Guardian Board

Continuing Education Course Approval Request Invoice

Contact Information of Provider of Continuing Education:

Name:

Address:

Phone:

Course Title:

Date of Course:

Check the appropriate box below:

\$25 Enclosed (If received thirty (30) days before the date of the training).

\$50 Enclosed (If received less than thirty (30) days before the date of training).

Please return this form with check made out to the "Administrative Office of the Courts" to:

**Certified Professional Guardian Board
Administrative Office of the Courts
Attn: Samar Malik
PO Box 41170
Olympia, WA 98504-1170**

Please direct questions to:

Samar Malik
(360) 705-5308
Samar.Malik@courts.wa.gov

FOR INTERNAL USE ONLY

Provide Date Received, Check Number and Amount

October 28, 2022

BACK TO BASICS

- 8:00 – 8:15 **Check-in**, Housekeeping. Sign-in and pick-up handouts
Welcome – Brent Stanyer and Judge Anderson
- 8:15 – 9:15 **“Best Practices when Investigating”** Presenter: Sharon Saito
- 9:15 – 10:15 **“Alternatives to Guardianship – A Statutory Perspective v. Practical Application”**
Presenters: Judge Rachelle Anderson, Spokane County Superior Court and
Lynda Clark, Certified Professional Guardian, Safe Haven Guardianship Agency
- 10:15-10:30 Transition Break
- 10:30 – 12:00 **“Overview of new statutory procedures and drafting requirements”**
▪ ‘Orders Appointing CV’ – Best practices for scope of appointment (broad language v. specific scope)
▪ Who Gets the CV Report? – The statute indicates a significant departure from prior practice, so know your confidentiality requirements with 11.130
▪ Drafting the CV Report – How this is the same as prior reporting practices and how it is NOT
Presenter: Lisa Malpass
- 12:00 – 1:00 Lunch
- 1:00 – 1:15 **Check-in**, Housekeeping. Sign-in and pick-up handouts
Welcome and introduction of Keynote Speaker – Brent Stanyer
- 1:15 – 2:45 **KEYNOTE: “Taking Care of YOU – Resilience and Self-Care for Life”**
Jean Steel <https://happypeoplewin.com>
- 2:45 – 3:00 Transition Break
- 3:00 – 4:15 **Hypothetical / Interactive Discussion** including Ethics
Judge Rachelle Anderson, Spokane County Superior Court and
Commissioner Tony Rugel
- 4:15 - Complete Evaluations, Adjournment, Sign Out

6.25 proposed Last Edited: October 7, 2021

SPEAKER BIOS

JEAN STEEL received her master's degree in Wellness/Mind/Body health from California State University-Sacramento and a Bachelor of Arts degree from UC Santa Barbara. She has served on the faculty of Santa Barbara City College, Allan Hancock College, and Cal Poly San Luis Obispo. Her books include I'd Like to Run Wild!, a Wellness Action Guide, and Need Change? Customer Service Tips to Grow from Good to Great!. Jean has a vast and loyal client portfolio, such as the American Heart Association, California Hospital Association, G3 Enterprises, Arizona Association of Counties, Georgia Institute on Aging, U.S. Women in Nuclear, International Association of Exhibitions and Events (IAEE), Central California Women's Conference, the YMCA, and countless other organizations. And years later, Jean still pays visits to Africa as often as possible while also giving back much of her time and profits to several local and global charities.

JUDGE RACHELLE ANDERSON was appointed to Superior Court Dept. 12 in January 2019, prior to that, she served as a Spokane County Superior Court Commissioner since December 2010. Judge Anderson spent 13 years in private practice, focusing on family law and juvenile dependency matters. She spent a brief time as an Administrative Law Judge with the Washington State Office of Administrative hearings before her time on the bench.

Professional Affiliations: Judge Anderson currently serves as Immediate Past-President of the Superior Court Judges Association and is Co-Chair of the Superior Court Judges Association Legislative Committee. She serves on the SCJA Guardianship and Probate Committee, which she formerly chaired. She is former Chair of the Certified Professional Guardianship Board, former Chair of the WSBA Character and Fitness Board, and former Washington Young Lawyer Division Trustee.

Education: Eastern Washington University, Government, BA, 1994 • Gonzaga University School of Law, JD, 1997

Personal: Lifetime Spokane Resident • Married with five daughters between the two of us, dog lover and avid Gonzaga Basketball fan! Go ZAGS!

LYNDA CLARK is the owner of Safe Haven Guardianship Agency in Spokane Washington. Lynda is a certified professional guardian who has practiced in the Spokane area since graduating for University of Washington's Guardianship program in 2010. Safe Haven Guardianship currently has three professional guardians as well as five support staff to meet the needs of the clients we serve. Lynda enjoys working with clients to ensure they have a "voice" in their lives!

LISA A. MALPASS earned a Bachelor of Arts degree (BA) in Government and earned a Master's degree in Public Administration (MPA) from Eastern Washington University. In 2003, she earned her Law degree (honors) from Gonzaga University School of Law. Lisa has practiced law in Washington State since 2003 and was admitted to the State of Idaho in 2014.

Lisa has been an in-house legal benefits attorney for Adult Protective Services; an Attorney Advisor for the Social Security Administration; opened Malpass Law Office, P.S.; was a partner at Winston & Cashatt, Lawyers ; and now she can be found at the law firm of James P. Spurgetis, P.S.

Her areas of practice include guardianship/ conservatorship law, estate planning, probate administration and fiduciary services.

In 2019, Lisa was appointed to the Washington State Certified Professional Guardianship Board as a WSBA delegate. She is a past President of the Washington Chapter of the National Academy of Elder Law Attorneys (NAELA); a founding member of the SCBA Elder, Disability and Estate Planning (EDEP) section; a contributor of the Title 11.130 Guardian ad Litem State-Wide Advisory Committee; a member of the WSBA Elder Law and Administrative Law Sections, Real Property Probate and Trust Sections; and past chair of the Spokane County Superior Court Title 11.130 Training Committee. She is also a Leadership Spokane graduate and military veteran.

SHARON ANN SAITO was born and raised in Honolulu, Hawaii. She graduated from the University of Hawaii at Manoa in 1979 with a B.A. in Political Science and a certificate from the Marine Option Program. She is a proud graduate of the Gonzaga University School of Law, Class of 1982. Since obtaining her J.D., Ms. Saito's practice has included dependency cases where, at varying points of time, she represented children, parents, foster parents, adoptive parents, and the State of Washington in Pend Oreille County as a Special Assistant Attorney General for Children's Services. Ms. Saito was a founding member of the Pend Oreille County Family Dependency Drug Court and is a past president of the Spokane Chapter of the Japanese American Citizens League. Her current practice continues to include serving as a Title 4 Guardian ad Litem for vulnerable/impaired individuals, adoptions and RCW Title 11.130 adult guardianships.

Ms. Saito has been on the RCW 11.88 Guardian ad Litem registry in Spokane County since 2000 and also serves on the RCW 11.88 registries for Adams, Pend Oreille, and Stevens Counties.

TONY M. RUGEL

Court Commissioner 6

Appointed: September 4, 2012

Career Highlights

- Assistant Attorney General, Spokane/Olympia 2004 - 2012
- Senate Committee Counsel, Washington State Senate 2002 - 2004
- Attorney at Law, Law Offices of Ron Hammett, Republic, WA
- Deputy Prosecuting Attorney, Okanogan County Prosecuting Attorney's Office
- Attorney at Law, Law Office of Hank Rawson, Okanogan, WA

Professional Affiliations, Committees

- Special Assistant United States Attorney 2007 - 2008

Education

- Seattle University School of Law, J.D., 1993
- Eastern Washington University, B.S., 1990

CERTIFIED PROFESSIONAL GUARDIANSHIP BOARD APPLICATION FOR APPROVAL OF CONTINUING EDUCATION ACTIVITY

Please type or print legibly

1. **CPGC Name**

Sponsor Name:

Sponsor Address:

Sponsor Phone:

Sponsor Email:

Contact Person of Sponsor:

<u>For Board Office Use Only</u>	
General Credits	_____
Ethics Credits	_____
Emerging Issues Credits	_____
Approved ____ Yes ____ No	
Initials _____	

2. Title of Educational Activity:

3. Date, time (start and end) and exact location (address including building or room) of presentation:

Start Date/Start Time	End Date/End Time	Location (Address, Building, Room)
September 20, 2022 8:00 a.m.	September 20, 2022 2:45 p.m.	Webinar

Is this class a webinar? Yes No Is this webinar interactive? Yes No

Note: The sponsor is responsible for informing attendees that group viewing of the class is not acceptable. Each individual attendee must log in separately, as sponsor login records are used to verify attendance.

4. Number of continuing education credit hours requested:

General: 4

Ethics:

Emerging Issues: Cultural Diversity: 1

or

Effective Listening and Communication Skills:

(See CPG Continuing Education [Regulation 201](#))

5. Have you requested approval of this course before? Yes No
If yes, when
6. Registration fee for activity:
7. Faculty: Attach a document containing all the information below for all faculty members.
- Name
 - Resume/Bio/Credentials (Include professional and educational background, teaching experience)
 - Topic they're teaching
8. Complete description of all materials to be distributed to participants.
9. Description of physical facilities (e.g., classroom or theater seating, availability of writing surface, etc.):
10. Method of evaluation of program (e.g., participant critique, independent evaluator, etc.):
11. Please complete "Outline of Course Presentation" on Page 8 with a description of each session.
12. Estimated number of attendees:

Sponsor agrees: (1) to allow the Certified Professional Guardian Board, a member thereof, or such other person as it shall designate, to audit the program in question; and (2) within **thirty (30) days** following the activity send to AOC a list of all CPGs who attended the activity, any Attestation Forms received, and all evaluations. **Attendance logs should reflect the actual arrival and departure time.**

NOTE: On the date of the continuing education activity, the sponsor must provide a copy of the CPG course approval form to each CPG in attendance.

**Return this form along with \$25 if filed more than thirty (30) days prior to the activity.
If filed less than thirty (30) days before the activity, return the form with \$50.
Return the form to:**

**Certified Professional Guardian Board
Administrative Office of the Courts
Attn: Heather Lucas
PO Box 41170
Olympia, WA 98504-1170**

Outline of Course Presentation

(Rows one and two are examples)

Start and End Times (Each Segment)	Subject Title and Description	Content (Must indicate type of credit per segment, General, Ethics or Emerging Issues; Ethics must include the SOPs that will be discussed)	Total Time Spent on Subject (Each Segment)	Faculty Name
7:30A – 8:30A	Developing a Care Plan	General	1 hour	Jane Doe
8:30A – 9:30A	Conflicts of Interest	Ethics	1 hour, SOP 406	John Doe
8:30 - 9:30 a.m.	Continuing Issues in Long-Term Care Facilities	General	1 hour	<i>Jeff B. Crollard</i>
9:30 – 10:30 a.m.	Guardianship	General	1 hour	Minta Andreve Mary Shobe, Clare Brown
10:45 -11:45 a.m.	Updates from the Washington Office of Public Guardianship	General	1 hour	Thai Kien
12:45 – 1:45	Unique Changes Under the UGA	Emerging	1 hour	Ermin Ciric
1:45 – 2:45	Access to Justice in Guardianship and Elder Law and Pro Bono Opportunities	General	1 hour	<i>Melinda Mann Michael J. Longyear Huy Nguyen Michael Terasaki Ashley Greenberg</i>

Elder Law Fall

Thursday, September 29, 2022, Seattle, WA

Presented by WSBA CLE

Tell us what you think: www.surveymonkey.com/r/22392WEB

Co-Chairs and Faculty

A Special Thank You to Our Program Co-Chairs and Faculty!

Those who have planned and will present at this WSBA CLE seminar are volunteers. Their generous contributions of time, talent, and energy have made this program possible. We appreciate their work and their service to the legal profession.

Program Co-Chairs

Suzanne Thompson Winger — *CTW Law Firm, Sumner, WA*
 Nicholas Pleasants — *Oseran Hahn P.S., Bellevue, WA*

Program Faculty

Jeff B. Crollard — *Crollard Law Office, PLLC, Seattle, WA*
 Minta Andreve — *Rehmke Law, P.S., Fircrest, WA*
 Mary Shobe — *Northwestern Fiduciary Solutions, Wauna, WA*
 Thai Kien — *Administrative Office of the Courts, Seattle, WA*
 Ermin Ciric — *Des Moines Elder Law PLLC, Des Moines, WA*
 Melinda Mann — *Justice Society Committee, Legal Foundation of Washington, Seattle, WA*
 Michael J. Longyear — *Reed Longyear Malnati Corwin & Burnett, PLLC, Seattle, WA*
 Huy Nguyen — *Benefits Law Center, Seattle, WA*
 Michael Terasaki — *Pro Bono Council, Bellevue, WA*
 Ashley Greenberg — *Northwest Justice Project, Seattle, WA*

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Program Schedule

Elder Law Fall

Thursday, September 29, 2022

-
- 8:00 a.m. Webcast Sign-In Opens**
- 8:25 a.m. Welcome and Introductions by Program Co-Chair**
Suzanne Thompson Winingler - CTW Law Firm, Sumner, WA
Nicholas Pleasants – Oseran Hahn P.S., Bellevue, WA
- 8:30 a.m. Continuing Issues in Long-Term Care Facilities**
 This session will discuss the laws concerning private pay and Medicaid contracts in LTC facilities, hospital “dumping” by facilities, the changing guidelines on COVID related restrictions on visitation, and the interplay between the Raven decision and the uniform guardianship act at RCW 11.130.330. Audience participation and discussion encouraged!
Jeff B. Crollard – Crollard Law Office, PLLC, Seattle, WA
- 9:30 a.m. Guardianship**
 Hear about topics important to both Certified Professional Guardians and Guardians.
Minta Andreve – Rehmke Law, P.S., Fircrest, WA
Mary Shobe – Northwestern Fiduciary Solutions, Wauna, WA
Clare Brown – Tahoma Guardianship Services, LLC, Maple Valley, WA
- 10:30 a.m. BREAK**
- 10:45 a.m. Updates from the Washington Office of Public Guardianship**
 This presentation will provide information on public guardianship services, which includes OPG’s evolution from a pilot to permanent statewide program, eligibility for services, how to request a public guardian, duties of a public guardian, and OPG’s authority to provide less restrictive alternatives services. It will also highlight the success of the program as well as current and future challenges of public guardianship.
Thai Kien – Administrative Office of the Courts, Seattle, WA
- 11:45 a.m. LUNCH**

Schedule continued on next page

*Program Schedule (cont.)***12:45 p.m. Unique Changes Under the UGA**

A review of the changes under RCW 11.130 to various procedural and transactional issues in guardianships and conservatorships. The presentation will go over standing (who can petition, who can seek to be nominated, how does this change after appointment), scope of guardianship/conservatorship (need for conservator in county pay cases), fee requests and fee advances (who can now request fees and how are fees allocated for the upcoming reporting period), reporting requirements (what should a guardian/conservator disclose), protective orders as supplemental authority, and the stretch of TEDRA.

Ermin Ciric – Des Moines Elder Law PLLC, Des Moines, WA

1:45 p.m. Access to Justice in Guardianship and Elder Law and Pro Bono Opportunities

This CLE will provide information on the provision of civil legal aid in Washington state with a specific focus on elder law and guardianship issues for low income seniors and veterans. Information about how to provide pro bono services and which organizations are in need will also be shared in addition to highlighting the rules of professional conduct for attorneys as it relates to the provision of pro bono. The event is hosted by the Endowment for Equal Justice, Washington state's only sustainable fund for civil legal aid.

Melinda Mann – Justice Society Committee, Legal Foundation of Washington, Seattle, WA

Michael J. Longyear – Reed Longyear Malnati Corwin & Burnett, PLLC, Seattle, WA

Huy Nguyen – Benefits Law Center, Seattle, WA

Michael Terasaki – Pro Bono Council, Bellevue, WA

Ashley Greenberg – Northwest Justice Project, Seattle, WA

2:45 p.m. Adjourn • Complete Evaluation Forms

Co-Chair Biographies

Suzanne Thompson-Wininger

Suzanne Thompson Wininger has been a Registered Nurse over 24 years and an attorney since 2002, graduating from Gonzaga School of Law. She has a Bachelor of Science in Human Development from the University of California, Davis and Bachelor of Science in Nursing (BSN) from the University of Mary Hardin Baylor.

Suzanne's practice involves elder law, nurse consulting and care management. Her unique combination of nursing and law allows her to provide a boutique service to her clients. She loves serving as guardian ad litem (RCW 11.88, settlement and probate), protecting vulnerable individuals and working with families to care for their loved ones. She believes the focus of an individual should always be on their abilities.

Prior to entering into private practice in September 2008, Suzanne worked for the State of Washington as both an attorney and a RN for 5 ½ years.

Nicholas Pleasants

Nicholas Pleasants has always been an entrepreneur. I had a lemonade stand at age 5, and by age 10 he started his own yard care business, Nicky's Lawnmowing Service. By middle school, he was distributing a patented fastener product that his uncle had invented. In high school, he helped manage the Student Store, joined the Marketing Club, and was President of Garfield High's chapter of DECA, an international business organization for students. I went on to major in Economics and Political Science at Columbia University. Being in New York City for college opened Nick's eyes to the enormous opportunities and challenges facing our world, and with a new resolve to help people innovate and improve society. He returned to Seattle for law school and to be with family. He graduated from UW Law with a JD as well as a Masters of Laws in Taxation. In law school, he quickly discovered that it was unusual for a law student to enjoy working in Excel and manipulating numbers. He got hooked on business and tax classes, and decided to add an extra year's worth of classes to get the Master's degree.

Nick enjoys running a small business – his law firm. getting to talk with clients every day and understand their legal needs. He also loves technology and the way it is helping lawyers deliver legal services faster and better.

Under MCLE Rules, we report hours of course attendance. Our report is based on you confirming your attendance with our CLE representative as you arrive, and the receipt of this CLE Attendance Adjustment Form from anyone who chooses to attend only part of the seminar.

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https://www.wsba.org/docs/default-source/licensing/mcle/mcle-faq---with-late-fee-chart.pdf?sfvrsn=bafd07f1_4 OR questions@wsba.org

Seminar Sponsor:	<u>WSBA CLE</u>									
Seminar Name:	Elder Law Fall (22392WEB)									
Seminar Date:	September 29, 2022									
Approved Credits:	<u>5.00</u> CLE Credits for Washington Attorneys (<u>3.0</u> Law & Legal Procedure, <u>1.0</u> Ethics and <u>1.0</u> Other)									
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CHAPTER ONE

Continuing Issues in Long-Term Care Facilities

September 2022

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JEFF B. CROLLARD of Crollard Law Office, PLLC, was the attorney for the Washington State Long-Term Care Ombudsman Program from 1990 to 2014. In that role, he represented a number of residents in facilities, wrote exposé reports regarding poor state oversight of assisted living facilities and adult family homes, chaired state taskforces concerning vulnerable adults and facilities, and participated extensively in policy, regulatory, and legislative issues, helping to draft portions of the state's vulnerable adults law and regulations and laws governing long-term care facilities. He has also served as a past chair of the WSBA's Elder Law Section, past co-chair of the state trial attorney association's Elder Abuse Section, and was on the leadership council of National Consumer Voice. Jeff is now in private practice, and represents residents of LTC facilities who have been abused, neglected, or suffered wrongful death. He sometimes represents individuals accused of abuse, neglect, or financial exploitation. Jeff's practice is state-wide. He accepts referrals, and often co-counsels with other attorneys.

CONTINUING ISSUES IN LONG-TERM CARE FACILITIES

By Jeff B. Crollard

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CONTINUING ISSUES IN LONG-TERM CARE FACILITIES

By Jeff B. Crollard

I. INTRODUCTION

These materials cover a few select issues concerning long-term care facilities in Washington state, specifically in nursing homes, assisted living facilities, and adult family homes. These facilities are licensed and regulated by the Washington State Department of Social & Health Services (DSHS). There are other DSHS licensed LTC facilities, fewer in number, which are not covered in the materials.¹ Residents in all three long-term care facility license categories need physical or cognitive support or both, are elderly or disabled or both, and all are deemed to be vulnerable adults, RCW 74.34.020(21)(d). What follows is a summary of the facility types and then a discussion of the select issues.

Nursing homes provide 24-hour skilled care, with nurses and therapists on site, full assistance with personal care (at least in theory), medications, and other services. Nursing homes fill the niche just below a hospital. About 20% of the residents are short-term and receive relatively intense rehab care (covered by Medicare); the other residents are longer term, often frail, and continue to need assistance with personal care, nursing, medications, and other services. About 40% of the roughly 16,000 nursing home residents are on Medicaid. All nursing homes must have a *state license* to operate and *federal certification* to serve Medicaid or Medicare residents, which nearly all do. The helpful DSHS website for nursing home laws and information is here: <https://www.dshs.wa.gov/altsa/residential-care-services/information-nursing-home-professionals>

Adult family homes are residential homes in a neighborhood, licensed to care for two to six elderly or disabled residents. They provide housing, food, activities, supervision, assistance with personal care such as toileting, bathing and dressing, and depending on the staff's training and possible nurse oversight, assistance with medications and other needs. A few adult family homes are intensely staffed with nurses or other skilled staff 24 hours a day, but that is not the norm. About 45% of the approximately 17,000 AFH residents are on Medicaid. There are NO federal licensing or certification laws for adult family homes. Their regulation is based on state law. The DSHS website for AFH laws and information is found here: <https://www.dshs.wa.gov/altsa/residential-care-services/information-adult-family-home-providers>

Assisted living facilities (ALFs) are the most diverse of the three licensed facility categories. They range from small to large in size. This includes the 12 person group home

¹ Enhanced Services Facilities, a category created in 2017 to serve individuals with complex personal care and behavioral challenges who've been discharged from psychiatric hospitals and have no other placement options. RCW § 70.97; WAC 388-107; Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IDs), long established facilities that serve individuals with developmental disabilities, and must follow WAC 388-835 and federal certification rules; and privately operated ICF/IDs: ones with 16+ beds must be licensed as a nursing home, and smaller private ICF/IDs are licensed as ALFs.

serving people with developmental disabilities, the 40 person locked memory care facility, and the 100 person facility serving a range of needs (and often called “communities” and have great looking landscaping and lobby/dining areas, but may be short on night and weekend staff). One of the distinguishing features of ALFs is the flexibility given in the state licensing law for the ALF to decide what services it will or won’t provide. The minimum floor is quite low, with few services required. However, the anti-discrimination reasonable accommodations laws also apply, so sometimes ALFs are supposed to provide more services than they advertised. Some ALFs are housing residents whose care needs are comparable to those previously found in nursing homes, yet the staffing standards are lower than in nursing homes. For example, ALFs in Washington can serve residents who are: incontinent of bowel and bladder; bed-ridden; require transfers to a bed or chair via mechanical (Hoyer) lift; need two person physical assistance with bathing, toileting, and other personal care; have a stoma for body waste removal; and are tube-fed. About 20% of the roughly 28,000 ALF residents are on Medicaid. Again, there are NO federal licensing or certification laws for assisted living facilities. Their regulation is based on state law. The DSHS website for ALF laws and information is found here: <https://www.dshs.wa.gov/altsa/residential-care-services/information-assisted-living-facility-professionals>

II. SELECTED ISSUES IN LTC FACILITIES

A. Private Pay and Medicaid Discrimination

1. Nursing homes

Nursing homes that accept Medicaid (which is all but 4 or 5 NHs in Washington) cannot discriminate against Medicaid residents. This applies to the admission, transfer, or discharge of a Medicaid resident. RCW 74.42.055(3); WAC 388-97-0040(5) and (6). Medicaid discrimination by NHs is a *per se* Consumer Protection Act violation, subject to an award of actual damages, attorney’s fees and costs, and treble damages up to \$25,000. RCW 74.42.055(6); RCW 19.86.090.

In a Medicaid certified nursing home, *every bed is Medicaid certified*. Some or all of the beds may also be *Medicare* certified. Those beds are called dually certified. The Medicare bed is NOT just Medicare certified. WAC 388-97-0001 (*see* definition of Nursing Facility).

Medicaid discrimination frequently still occurs in nursing homes. The easiest way to confirm this is to call a nursing home and ask if it has an available bed. If the facility says it has a “rehab” or “sub-acute” bed, but no “long-term care” beds, that’s disguised Medicaid discrimination. The facility has used code words. Medicare pays for a maximum of 100 days in a nursing home, and often Medicare residents are rehabbing from a serious injury or illness, whereas Medicaid pays for long-term nursing home care. Medicare pays more per day, so those patients are more desirable. However, the Medicaid resident has the right to be admitted into any open semi-private bed. **Practice Tip:** It would be helpful for elder law attorneys to educate their clients about this right, as it could significantly increase their choice of nursing homes.

Private Pay. The main private pay issue in nursing homes is some facilities will ask (usually buried in the admission contract) family members to be personal guarantors for payment. This is expressly prohibited under state and federal law. WAC 388-97-0040(2)(c) says “A nursing facility must not require or request: . . . A third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility.”² See also 42 CFR § 483.15(a)(3). CMS and the Consumer Financial Protection Bureau issued a Notification Letter on September 8, 2022, reminding nursing homes of this provision, and saying that a violation of this law could also violate the Fair Debt Collections Practices Act and the Fair Credit Reporting Act. **Practice Tip:** elder law attorney should advise the family members of residents entering nursing homes to watch out for this provision, which is expressly illegal.

2. Adult family homes and assisted living facilities

Medicaid discrimination is permitted by adult family homes and assisted living facilities because they can refuse to accept Medicaid, or limit the number of Medicaid residents. Residents in AFHs and ALFs only have “notice” rights. RCW 70.129.190 requires facilities to: “fully disclose to residents the facility's policy on accepting medicaid as a payment source. The policy shall clearly state the circumstances under which the facility provides care for medicaid eligible residents and for residents who may later become eligible for medicaid.” Initially this law appears protective, saying the policy must be “fully disclosed,” but it imposes no substantive requirements, such as requiring the facility to allow a certain percentage of its residents to be on Medicaid. It also does not prohibit the facility from changing its Medicaid policy *after* the resident has been admitted and paid a substantial amount in private fees for years.

Many AFHs and ALFs do change their Medicaid policies after a resident’s admission. Facilities say they can do so after 30 days written notice, but in fact 90 days prior notice is required. When a facility is voluntarily changing its Medicaid policy to lessen the number of Medicaid beds, this is a reduction in services and requires 90 days advance notice. RCW 18.20.300(3)(b); RCW 70.128.280(3)(b).

The other problem is that a facility policy may say the private pay resident can convert to Medicaid if they have an available Medicaid bed, but it doesn’t define what is meant by “available.” The policy doesn’t list the number of Medicaid beds or rooms, nor does it inform the resident that DSHS allows AFHs and ALFs to lower the number of available Medicaid rooms at a moment’s notice—the facility just faxes a short form to DSHS. The facility has complete control of the number of “available” Medicaid rooms. These are problems that need to be addressed. They are symptomatic of the larger problem we all have of an aging society, insufficient state budgets, and low Medicaid rates.

² WAC 388-97-0040(2)(c) continues with: “However, the facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, without incurring personal financial liability, to provide facility payment from the resident's income or resources.” Thus, the family member who’s not paying with the resident’s funds, or stealing them, could be gone after.

Practice Tip: For the elder law attorney working with clients who may need Medicaid in the future, it's important to let clients know that things may not be what they're stacked up to be. Oral promises by a facility are usually far more expansive than the written policy, and the written policy itself may get changed mid-stream. Clients should try to get a contract addendum that spells out better terms, e.g., "After paying privately for a minimum of 12 months, the facility will allow Mabel Smith to convert to Medicaid and remain at the facility, if the facility continues to be able to meet her needs. This addendum can only be changed by written mutual agreement of both parties." Some facilities will sign such agreements because of their interest in attracting private pay residents, though they often want 3 or 4 years private pay, which few people can afford. Facilities have little incentive to agree to a shorter term, but it's worth a try.

Practice Tip: Sometimes contract based defenses are the best way to fight a term that says the resident can convert to an "available" Medicaid bed. Ambiguous contract terms are interpreted against the drafter; there may be lack of notice if the facility didn't inform the resident of the new policy; and there could be a Consumer Protection Act claim for "bait and switch" deceptive practices. The CPA applies to the business practices of a long-term care facility. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn.App. 290 (2002).

Case Example. A 99 year old resident of a Seattle ALF, after spending \$300,000 as a private pay resident, was faced with eviction when the facility said it didn't have an "available" Medicaid bed. Since this resident's admission years ago, the facility had lowered its Medicaid beds through attrition from about 20 beds to 8. Shortly after celebrating her 99th birthday, and now needing to go onto Medicaid, the facility served her with a discharge notice. With the ombudsman's help, she fought the discharge. The ALF could only remove her through an unlawful detainer eviction action. In her defense, she raised a CPA counterclaim for deceptive practices. The facility did not prevail at the show cause hearing and now was faced with a future jury trial. The story hit the press. Just the prior month the facility had featured her as Resident of the Month in its newsletter. Faced with delay, egg on its face and bad press, they relented.

ALF residents have additional rights under RCW 18.20.440. This law requires ALFs to give residents 60 days' notice of a Medicaid contract termination, to not discharge existing Medicaid residents, and not discharge residents who've paid privately for two years and will convert to Medicaid within 6 months of contract termination. These are helpful protections. But please note: this law only applies to the *termination* of a Medicaid contract. If the facility lowers its "available" Medicaid beds to 1 or 2, it still has a Medicaid contract, but has effectively terminated it for the other residents. The facility's action, however, may be deceptive and violate the CPA, as in the above case.

Medicaid contracts. ALFs and AFHs serving Medicaid residents must have a contract with DSHS. The *contract* is separate from the *license*. There are three main contract categories for ALFs: assisted living services, enhanced adult residential care, and adult residential care. WAC 388-110. The Medicaid contracts and corresponding regulations create additional obligations. For example, ALFs with an "assisted living services" or "enhanced adult residential care" contract must provide, at no additional cost

to the Medicaid resident, intermittent nursing services, medication administration, and personal care services. WAC 388-110-150(2), -220(10). By contrast, ALFs operating just under the licensing laws and without a Medicaid contract can choose whether to provide such services.

Medicaid supplementation. If the ALF or AFH has a Medicaid contract, the facility must accept the Medicaid rate for the Medicaid resident as full payment for services. The rates are set according to the resident's assessed care needs and which county the resident lives in. WAC 388-110-0005. The facility cannot charge a Medicaid resident or family additional amounts for items, services, or room and board covered by Medicaid, which generally means the items and services included in the negotiated service agreement, and room and board similar to what's provided to other residents. WAC 388-105-0050(3)(a), and -0055. That would include the intermittent nursing and medication administration services listed above for contracted ALFs. Intentionally charging or accepting additional payment for covered items or services is a felony. RCW § 74.09.260.

ALFs and AFHs with a Medicaid contract *can* charge a Medicaid resident supplemental fees for services or items not covered by Medicaid, such as a private phone, or for a room with a unique feature, like a private bathroom. The additional charges must be stated in ALF or AFH policy, and disclosed in advance to the resident. WAC 388-105-0050(3)(b), and -0055. The resident's record must show what the supplemental charges cover, who's paying and how much, and the case manager is to be notified. WAC 388-105-0050(6) and (7). **Discussion Point:** The law appears clear, but the practicalities can be messier. Some families pay extra amounts on the side because they like the facility and the owner complains about the low Medicaid rate. What is an extra, non-covered feature may be ambiguous. Finding another AFH (where this mainly occurs) that accepts Medicaid can be hard. But the family may not have extra funds. How do you handle this?

Private Pay. One significant private pay issue in ALFs (and some AFHs) is when facilities ask family members to be personal guarantors for payment. Unfortunately, this is not prohibited by the ALF or AFH licensing laws. This admission contract provision is usually termed "Resident Representative" and talks mostly about agreeing to receive notices and perhaps sign the care plan. Buried in the small print it may say if the resident doesn't pay, then the Resident Representative will assume personal responsibility for paying. **Practice Tip:** elder law attorney should advise family members of residents entering ALFs or AFHs to watch out for this provision. They could refuse to agree to it, and instead offer the language from the nursing home law which says they'll use the resident's funds to pay. The facility can refuse to accept that. Alternatively, if they're not concerned about the adequacy of the resident's funds or their own, they could sign without problem. But they should be alerted so they can make an informed decision.

Private Pay and Leaving a Facility On Short Notice. Most private pay admission contracts say the resident must give 30 days' advance notice of a resident initiated discharge. But sometimes the resident wants to leave more quickly, and the 30 day provision would be costly. Can this be done without incurring the penalty? Yes. RCW 70.129.150(1) limits the amount a facility can keep if the resident transfers "to another

facility for more appropriate care and does not return to the original facility.” In that situation, then “notwithstanding any minimum stay policy or discharge notice requirements” the facility cannot retain more than 5 days’ charges for reasonable expenses incurred because of the resident’s move. *Id.* (This provision also applies if the resident dies or is hospitalized.) Note: Many facilities think the law says the resident must move to a “higher level of care” facility, such as a nursing home. It does not. It says for “more appropriate care.” Some facilities say in their admission contract that if *they* determine the resident needs to move to a different facility this provision applies. The law is not limited to that. The resident or resident’s family can decide a different facility is more appropriate. These resident rights cannot be waived, and any contract provision to the contrary is superseded by the statute. RCW 70.129.105 and 70.129.150(2). **Practice Tip:** This provision can help your clients move to a better facility and not get stuck with a \$5,000 to \$10,000 bill from the prior facility. In my experience, it usually requires a letter to the prior facility pointing out how its care fell short and how the new facility is more appropriate, e.g., it may have awake staff at night.

B. Hospital “Dumping” and Resident Re-Admission Issues

An all too common problem is nursing homes and assisted living facilities (rarely adult family homes) sending a resident to the hospital and then refusing to readmit the resident. Colloquially, this is called hospital “dumping.” Sometimes, the non-readmission is entirely appropriate, e.g., an ALF resident breaks a hip and now needs a nursing home level of rehab, or a wound worsens and requires daily skilled nursing. Other times though, the trip to the hospital is pretext for getting rid of a troublesome resident without the bother of giving a 30 day discharge notice. In many cases, the resident’s needs could be met, or the alleged safety threat adequately lessened, by the provision of a more sensitive assessment, additional services, and reasonable accommodations³ by the original facility. Doing so would avoid the problem of transfer trauma, and better comply with the law.

Medicaid residents in *nursing homes* who are hospitalized or on therapeutic leave have the express right to “be readmitted to the first available, semi-private bed if the resident needs nursing facility care.” WAC 388-97-0120(4)(b). This provision prohibits nursing homes from refusing to readmit a Medicaid resident if that resident still needs nursing home care. Under federal law, this right extends to private pay, Medicare, and VA residents as well, based on 42 CFR § 483.10(a)(2), which says: “A facility must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services . . . for all residents regardless of payment source.”

³ “*Reasonable accommodations*” is defined to mean a service provider or facility must make reasonable changes in its policies, practices, or procedures, or provide additional aids and services, so long as those changes don’t fundamentally alter the nature of the services or facility, or would result in an undue burden. 42 U.S.C. § 12182(b)(2)(A); WAC 388-97-0001; WAC 388-78A-2020. This could include modifications in policies, such as allowing a lift in an ALF, and/or providing extra services or staff to lessen the risk of a preventable decline or injury, or the risk of harm from an aggressive or confused resident, or to prevent an unnecessary discharge. I have more extensive writings on this issue, available on request.

Nursing homes and ALFs that refuse to readmit a resident from a hospital typically do so on the grounds that they can't meet the resident's needs, or that the resident endangers the health or safety of others. However, prior to initiating a transfer or discharge of a resident, the nursing home is required to "attempt to avoid the transfer or discharge of a resident from the nursing home through the use of reasonable accommodations." WAC 388-97-0120(3)(b). The same requirement to provide reasonable accommodations to avoid a possible discharge applies to ALFs and AFHs. RCW 70.129.110(3)(a). Written notice of the transfer/discharge must be given *before* the transfer/discharge, RCW 70.129.110(3); WAC 388-97-0129(2)(d) & (e). And, the facility must "provide sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge" from a nursing home, ALF, or AFH. WAC 388-97-0120(3)(a); RCW 70.129.110(6). An ALF or AFH resident "discharged in violation of this section [RCW 70.129.110] has the right to be readmitted immediately upon the first availability of a gender-appropriate bed in the facility." RCW 70.129.110(7). In other words, if the facility has not first tried reasonable accommodations to avoid a transfer/discharge, or has not given proper notice, or not ensured a safe transfer/discharge, the resident has the right to immediately return to the facility. In theory, this prohibits hospital dumping. In practice, it does not.

Practice Tip: Assuming a phone call or letter to the facility doesn't work, one possible solution is to request an administrative fair hearing to contest the "discharge" and ask that the hearing be *expedited*. Nursing home residents have an express administrative fair hearing right. WAC 388-97-140; 42 CFR § 483.15(c)(1)(ii). The Office of Administrative Hearings takes the position that ALF and AFH residents also have this right to a fair hearing, based on RCW 70.129.005, which says: "The legislature finds that the public interest would be best served by providing the same basic resident rights in all long-term care settings. Residents in nursing facilities are guaranteed certain rights by federal law and regulation, 42 U.S.C. 1396r and 42 C.F.R. part 483. It is the intent of the legislature to extend those basic rights to residents in veterans' homes, assisted living facilities, enhanced services facilities, and adult family homes." The ALJ can order readmission of the resident, but does not have enforcement authority. That requires going to court or to DSHS.

Practice Tip: DSHS has the authority to issue daily fines for a violation. RCW 18.51.060(4)(b) ("Civil monetary penalties . . . may be assessed and collected . . . for each day a nursing home is or was out of compliance. Civil monetary penalties shall not exceed three thousand dollars per violation. Each day upon which the same or a substantially similar action occurs is a separate violation subject to the assessment of a separate penalty."); RCW 18.20.190(2)(c) (ALFs, maximum \$3,000 per day per violation); RCW 70.128.160(2)(d) (AFHs, maximum \$3,000 per day per violation). You should urge DSHS to issue a daily fine for each day that a facility refuses to readmit the resident. It is an immensely powerful motivator, if DSHS will do it. The Department's willingness to do so has fluctuated over time, but DSHS has steadily asked the Legislature for more authority to issue daily fines for violations, which has been granted, and DSHS should use it!

Bedholds. Nursing homes must inform their residents of the bedhold policy (holding the bed while the resident is temporarily gone). Medicaid residents in nursing

homes have strong bedhold rights, but often are unaware of them, or are misinformed. DSHS will pay for up to 18 days of social/therapeutic leave annually for a Medicaid resident. WAC 388-97-0160. But DSHS does not pay the nursing home for hospital leaves, which is where the problem arises. Many Medicaid NH residents sent to the hospital are told that if they want “the bed” held they must pay a bedhold fee. This is only true if they want their *specific bed* held. By contrast, the resident “may not be charged a bed-hold fee for the right to return to the first available bed in a semi-private room.” WAC 388-97-0120(4)(c). Few families or residents have this distinction explained, and unnecessarily pay a bedhold fee. In my opinion, it should only be paid if it’s an excellent nursing home and virtually full. Otherwise, they are being cheated by a deceptive practice.

Bedholds for Medicaid residents in *assisted living facilities* or *adult family homes* are governed by other laws. DSHS pays 70% of the facility’s rate to hold the resident’s bed for up to 20 days if the resident is hospitalized *or* temporarily placed in a nursing home, and is likely to return to an ALF or AFH. WAC 388-105-0045. After the 20th day, the resident or family can agree to be charged to hold the bed. If they cannot afford the charge, but meet the DSHS admission criteria, the AFH or BH Medicaid resident has the right to return to the first available and appropriate bed. *Id.*

C. Hospital Overcrowding and Consent to Care/Facility Issues⁴

The COVID-19 pandemic created tremendous problems for our health care system. Among those were overcrowding at hospitals treating COVID patients and staffing shortages at nursing homes. A related issue, according to the hospitals, was their inability to discharge “long-length” stays by adults who are ready for discharge but for one reason or another have nowhere to go. There has been media coverage with quotes from the Washington State Hospital Association saying it’s in part because our state guardianship and consent laws don’t allow family members to place people in long-term care facilities. In 2021, a bill was put forth by the hospital association, HB 2083, to address this issue. It would have allowed the surrogate decision makers listed in RCW 7.70.065,⁵ and the courts, to consent to long-term care facility placement and Medicaid, for those patients stuck in hospitals. The bill did not pass in 2021 and was not reintroduced in 2022.

Hospital overcrowding is a serious problem that has existed for years but was exacerbated during the pandemic. Its source is multifactorial, including: LTC facilities that are understaffed and/or not appropriate for complex psychiatric patients or patients with significant behavioral challenges or chronically homeless patients. It is unclear how many of these people sitting in hospitals are unable to make their own decisions. There’s a clear lack of professional guardians, especially public and pro bono guardians, so if these patients stuck in hospitals are on Medicaid (or need to be) and have no decision maker, that is a huge issue we’ve been unable to fix in Washington state for a long time.

⁴ My thanks to Amy Freeman, attorney for the LTC Ombudsman Program, for her many insights on this issue, and some of the exact wording in this section.

⁵ In order: guardian; DPOA health; spouse; adult children; parents; adult siblings; adult grandchildren; adult nieces and nephews; adult aunts and uncles; and a close concerned adult. RCW 7.70.065(1)(a).

However, our current surrogate consent statute *already* authorizes LTC facilities to obtain consent from a family member or friend of a person needing long-term care. The statute authorizes “health care providers” to obtain consent from a surrogate decision maker. RCW 7.70.065(1) and (1)(a). The statute defines “health care providers” to be: (1) a person licensed to provide health care or related services, such as a doctor, nurse, or physical therapist; (2) an employee or agent of a health care provider; and (3) an entity that employs a health care provider, “including a hospital, clinic, . . . or nursing home.” RCW 7.70.020. Thus, the statute provides specific authorization for consent to health care in nursing homes, as well as other LTC facilities that employ or use health care providers.

If the current surrogate decision maker is a guardian, conservator, or DPOA agent, the order or document establishing their authority usually contains all the necessary verbiage to consent not only to the health care services and procedures, but also to pay for them. Likewise, a guardian, conservator, or DPOA agent order or document usually has verbiage allowing them to apply for Medicaid and other benefits.⁶ The problem is that the other people listed in the RCW 7.70.065 hierarchy, such as children, grandchildren, or nieces and nephews, may not have any document or authority giving them legal access to the incompetent adult’s funds, so the LTC facility can rely upon them to consent to admission but not to consent to pay for the care. That was the roadblock HB 2083 tried to address, but the bill had too many problems in how it was drafted to pass.

A related issue is whether DSHS interprets RCW 7.70.065 to allow all the people in that list to consent to Medicaid. Some have said that DSHS has changed how it handles this question. When recently asked, DSHS says it has not changed and uses federal law to determine “who” can consent to Medicaid on behalf of another. One definition that DSHS may use, though I am curious as to other’s experience, is the definition of “individual’s representative” for the Community First Choice program. It is:

‘Individual’s representative’ means a parent, family member, guardian, advocate, or other person authorized by the individual to serve as a representative in connection with the provision of CFC services and supports. This authorization should be in writing, when feasible, or by another method that clearly indicates the individual’s free choice. An individual’s representative may not also be a paid caregiver of an individual receiving services and supports under this subpart. 42 CFR § 441.505

This clearly allows someone other than a guardian, conservator, or DPOA agent to consent to CFC benefits. It would also appear to allow a person to give verbal consent to a family member or advocate to fill out the paperwork, but it would appear to prohibit a hospital or nursing home social worker from doing so. Could the individual’s attorney?

Discussion Point: What is your experience with this?

The Uniform Guardianship, Conservatorship, and Protective Arrangements Act, effective this year, provides new emergency legal tools that could shorten the time patients

⁶ I understand some health care DPOAs are narrowly written and there may also need to be a financial DPOA. A general DPOA may contain both powers.

linger in hospitals waiting for guardianship or conservatorship proceedings to be completed. Under the new provisions, the court must hold a hearing within 14 days of a petition for *emergency* guardianship or conservatorship. This is a significant reduction from the up to 60-day period required for “regular” guardianship or conservatorship proceedings. See RCW 11.130.320(9) (emergency guardianship); RCW 11.130.430(9) (emergency conservatorship).

However, one potential limitation in the *emergency guardianship or conservatorship procedure* (though I do not profess to be an expert) is in the possible interpretation of what constitutes an “emergency.” The petition must set forth “the nature and extent of the emergency situation” and “the substantial and irreparable harm to the respondent’s health, safety, welfare, or rights that is likely to be prevented by the appointment of an emergency guardian.” RCW 11.130.320((2)(d); similarly, RCW 11.130.430(2)(d). A patient stuck in a hospital awaiting discharge is not necessarily suffering substantial and irreparable harm. If they are on private pay status, they may be at risk of substantial financial harm due to the mounting hospital bill, or they may be at risk of hospital acquired infections the longer they stay, or at risk of severe depression if they languish indefinitely. So, it all depends on how this emergency provision is interpreted by the courts. It also will vary depending on how long it takes to find a guardian, if the person has no family, friends, or funds. **Discussion Point:** How are the courts interpreting this emergency provision?

The *protective arrangements* provision of the new law holds promise to address the problem of an incompetent adult with no surrogate decision maker needing consent for admission to a care facility or for a Medicaid or other benefits application. RCW 11.130.585(2)(a) appears to give such authority to the court, which can, after a hearing, “Authorize or direct a transaction necessary to meet the respondent’s need for health, safety, or care.” The potential limitation to this protective arrangements law (again, I am no expert) is that it does not provide for *emergency* protective arrangements, i.e., actions by the court that could occur within 14 days, because the new law appears to require the regular 60 day hearing timeline. RCW 11.130.585(1). **Discussion Point:** How are the courts interpreting these provisions? Are the proceedings sometimes being expedited?

D. COVID Visitation Restrictions in Nursing Homes & Facilities

COVID-19 created tremendous isolation for nursing home and other residents as facilities battled to lessen the spread of the virus. Federal, state, and local health authorities issued a dizzying array of restrictions on visitation, sometimes overlapping and conflicting, and the official guidance of DSHS was to follow whatever was most restrictive. Facilities were allowed to have their own policies that could be even more restrictive. The net result, in hindsight, was an unprecedented level of resident isolation in facilities, with many residents dying from conditions related to depression, withdrawal, and failure to thrive.

The Preamble to a bill passed in our state in 2021 and meant to address this problem, SHB 1218, 2021 c 159 § 1, read in part:

- (1) Residents in licensed long-term care facilities have been disproportionately impacted and isolated by the COVID-19 pandemic and over 50 percent of all COVID-19 deaths in Washington have been associated with long-term care facilities;
- (2) According to a University of Washington report, social isolation creates a “double pandemic” that disrupts care and exacerbates the difficulties of dementia, depression, suicide risk, chronic health conditions, and other challenges faced by long-term residents and providers; . . .
- (3) The COVID-19 pandemic has exposed systematic weaknesses in the state’s long-term care system and there is a need to enact additional measures to protect and improve the health, safety, and quality of life of residents.

One of the reforms in SHB 1218 was the creation of a new category of visitors, the Essential Support Person, an individual who could visit with the resident in-person, inside, despite restrictions on others. The essential support person is defined in RCW 70.129.190(5) as a person designated by the resident or resident’s representative, who is:

- (c) Necessary for the resident's emotional, mental, or physical well-being during situations that include, but are not limited to, circumstances involving compassionate care or end-of-life care, circumstances where visitation from a familiar person will assist with important continuity of care or the reduction of confusion and anxiety for residents with cognitive impairments, or other circumstances where the presence of an essential support person will prevent or reduce significant emotional distress to the resident.

This helped, but only partly addressed the problem of isolation. It only applied to one person for the resident. It did not necessarily include a DPOA agent, attorney, or multiple family members. [The visitation guidelines also allowed visits for compassionate care, but that often was narrowly interpreted to mean just end-of-life care visits.]

DSHS and the state Department of Health (DOH) issued a series of guidelines regarding visitation restrictions in 2020, 2021, and 2022. For a while they were called *Safe Start for Long-Term Care Recommendations and Requirements Documents*, and then on February 23, 2022, were updated and called *Long-Term Care COVID Response Plan*. With this update, all facilities were supposed to allow for open visitation, unless there was a reasonable clinical or safety cause for restriction. This remains the current set of guidelines/requirements (in addition to the federal ones). They can be found here:

[NH ICF IID Safe Start CDC Guidance.pdf \(wa.gov\)](#) [nursing homes]

[AFH-ALF-ESF Safe Start CDC Guidance.pdf \(wa.gov\)](#) [ALFs and AFHs]

All of this is about to change. As of October 27, 2022, all COVID related visitation restrictions will be lifted. On July 29, 2022, Governor Inslee announced that the COVID-19 pandemic state of emergency will be rescinded, effective October 27, 2022. DSHS has informed providers that the LTC COVID Response Plans will no longer be

effective, beginning October 27, 2022. Per DSHS, “Long-term care facilities, homes, and providers must resume regular visitation, group activities, and communal dining on that date. Facilities must continue to meet infection prevention guidelines from the Centers for Disease Control and Prevention and the Department of Health.” DSHS, ALTSA, AFH #2022-037, ALF #2022-032, NH #2022-049 (Sept. 9, 2022). [022-09-09-1.pdf \(wa.gov\)](#)

E. *Raven* and the Uniform Guardianship and Conservatorship Act

The case of *Raven v. Dept. of Social & Health Services*, 177 Wn.2d 804, 306 P.3d 920 (2013), addressed the question, among others, of whether a guardian was guilty of neglect for not placing her ward in a nursing home over her opposition, in the context of her care at home often being poor, she was bedbound, and suffered frequent pressure sores. The ward, Ida, had a long history of opposition to nursing home placement, voiced multiple times while competent. Her medical care team felt that Ida often required more care than could be delivered in a home setting. DSHS argued that Raven should have asked Ida at certain points—when her pressure sores were at their worst, for example—whether she would reconsider her opposition to a nursing home. There was no substantial evidence though that Ida would have changed her mind, given her continued hostility toward caregivers and repeated past opposition to out-of-home placement.

The Supreme Court in *Raven, id.* at 819, closely followed the standard in RCW 7.70.065(1)(c), which the Court says directly addresses a guardian’s duties. The statute says that before a substitute decision maker provides informed consent for an incompetent patient, the decision maker “*must first determine in good faith that that patient, if competent, would consent to the proposed health care.* If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that the proposed health care is in the person’s best interest.”

The *Raven* Court likewise followed the precedent of *In re Guardianship of Ingram*, 102 Wn.2d 827, 689 P.2d 1363 (1984), a case in which the question was whether a ward could be forced to submit to a laryngectomy, which was far more likely to treat the ward’s throat cancer, versus radiation, which ward preferred. The Court in *Ingram*, quoted at length in *Raven*, said:

[T]he ‘goal is to do what the ward would do, if she were competent to make the decision.’ . . . ‘The goal is not to do what most people would do, or what the court believes is the wise thing to do, but rather what this particular individual would do if she were competent and understood all the circumstances, including her present and future competency.’ . . . In other words, courts cannot apply a ‘reasonable person’ test, but must apply a subjective test based on the ward’s ‘attitudes, biases, and preferences.’ *Raven, id.* at 818 (internal citations omitted).

Finally, the Court in *Raven* pointed out that RCW 11.92.190 prohibited the guardian (and a court) from placing her ward in a nursing home “against her will” unless she were involuntarily committed to the facility under RCW 71.05, etc., which the ITA professionals had refused to do. *Raven, id.* at 821-22.

New Standards under the New Guardianship/Conservatorship Act?

RCW 11.130.330(1)(c) authorizes a guardian to “Consent to **health** or other care, treatment, or service for the adult.” RCW 11.130.325(4) states that:

In making a decision for an adult subject to guardianship, the guardian shall make the decision the guardian reasonably believes the adult would make if the adult were able *unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the adult.* . . . (emphasis added)

RCW 11.130.330(1)(b) authorizes a guardian to “establish the adult’s place of **dwelling.**” In exercising this power, RCW 11.130.330(5)(a) says the guardian shall:

Select a residential setting the guardian believes the adult would select if the adult were able, in accordance with the decision-making standard in RCW 11.130.325(4) and (5). If the guardian does not know and cannot reasonably determine what setting the adult subject to guardianship probably would choose if able, or the guardian reasonably believes the decision the adult would make would *unreasonably harm or endanger the welfare or personal or financial interests of the adult, the guardian shall choose in accordance with RCW 11.130.325(5) a residential setting that is consistent with the adult's best interest.* (emphasis added)

RCW 11.130.325(5) says that in determining the “best interests” of the adult, the guardian is to consider information from interested professionals, information the adult would have considered if able to, and “other factors a reasonable person in the circumstances of the adult would consider, including consequences for others.”

The Act appears to replace the *Ingram* and *Raven* tests, which emphasized the right of the individual’s decision to prevail, even if unwise, with a “best interests” test if the individual’s decision is unwise. It replaces a subjective standard with a reasonable person test (if the subjective decision by the ward would endanger the ward’s health or finances). **Discussion Point:** Under this new standard, the guardian in *Raven* likely would have been able to place Ida in a nursing home, given that she probably needed the 24/7 hour skilled services of a nursing home. Do you agree?

RCW 11.130330(7) incorporates the prior language of RCW 11.92.190, stating:

Notwithstanding subsection (1)(b) of this section no care setting which provides nursing or other care may detain a person within such facility *against their will.* Any court order, other than [under the involuntary treatment laws], which purports to authorize such involuntary detention or purports to authorize a guardian . . . to such involuntary detention . . . shall be void and of no force or effect.

Discussion Point: Under the new law, can a guardian place a ward in a nursing home over her opposition, but then if she continues to resist, the nursing home can’t keep her? What will a guardian then do for placement?

Note, the 2019 and 2020 Guardianship/Conservatorship Acts, effective 1/1/2022, made no mention of and did *not* amend RCW 7.70.065(1)(c). That long-standing law still directs surrogate decision makers to choose what they think the incompetent person would choose. The “best interests” test is allowed as a fall back only if one cannot determine what the person would choose. **Discussion Point:** Because RCW 11.130.325 and .330 are more recent law, they likely supersede the RCW 7.70.065 decision making standards *for guardians*. However, for *other decision makers*, the old law presumably still applies. How is this going to work for DPOAs? RCW 11.130.330(6)(b) allows for the continuation of DPOAs and instructs the guardian to “Defer to a decision by an agent under a power of attorney for health care.” Which standards will apply for a health care decision?

CHAPTER TWO

Guardianship

September 2022

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MINTA ANDREVE is a partner at Rehmke Andreve, PS as has been specializing in Elder Law, with a focus on Guardianship for the last four years. She actively works with 5 different independent CPSs and Agencies. Minta graduated from Concord Law School in California with an Executive Juris Doctorate and completed the WSBA Rule 6 Law Clerk Program before passing the bar and going to work in the Elder Law field.

MARY SHOBE has over 15 years of customer service and management experience. Her broad experiences, knowledge of account management, work with local and federal agencies and proficiency with current technology enable her to provide supportive and individualized care for our clients. She is driven to ensure every client is treated with the respect and dignity they need and deserve. She is passionate, caring, and treats every client as if they were a part of her family.

CLARE BROWN has been a certified professional guardian since 2015. She works primarily in South King and North Pierce counties. Prior to guardianship, Clare worked as a senior special investigator in the fraud divisions of major property and casualty insurance companies. She also worked as a paralegal specializing in commercial litigation, real estate and business law. Clare has been an active community volunteer all her life working as a Pierce County CASA, a domestic violence shelter volunteer and as a Girl Scout troop co-leader and area council member.

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CHAPTER THREE

Updates from the Washington Office of Public Guardianship

September 2022

Thai Kien
Administrative Office of the Courts

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THAI KIEN is a Senior Court Program Analyst at the Administrative Office of the Courts (AOC), where she serves as the coordinator of the Office of Public Guardianship (OPG). OPG contracts with certified professional guardians to provide guardianship services to low-income/indigent individuals in need of a decision-maker. In addition to coordinating OPG, Ms. Kien also provides some staff support to the Certified Professional Guardianship and Conservatorship (CPGC) Board. The CPGC Board certifies and regulates all professional guardians in the state of Washington.

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CHAPTER FOUR

Unique Changes Under the UGA

September 2022

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ERMIN CIRIC has been an Associate Attorney with Regeimbal, McDonald & Young since August, 2010. He received an Associates of Arts Degree from Green River Community College, Bachelor of Arts in Philosophy from the University of Washington, and his Juris Doctorate from Seattle University School of Law. His areas of focus include representation in transactional matters related to elder law, construction, real estate and contracts, as well as litigation in these matters. His goal in representing any client is to leave them in a better position than when engaged, this starts with cost-effective representation.

NOTES

CHAPTER FIVE

Access to Justice in Guardianship and Elder Law and Pro Bono Opportunities

September 2022

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MELINDA MANN is the Chief Development and Stewardship Officer, LFW and the Endowment for Equal Justice. Melinda has been actively raising funds and creating cultivation programs for social justice issues such as equal civil justice, equity in public schools, and increasing diversity in outdoor education for the past 25 years. Her experience ranges from political candidate and initiative campaigns to building robust major giving and stewardship programs for social profit organizations. Melinda has served on the board of the Seward Park Audubon Center, Communities and Parents for Public Schools, HistoryLink.org, and was a founding board member of Community Center for Education Results.

HUY NGUYEN is the Executive Director, Benefits Law Center which he joined in July 2022. He received a law degree from the University of Washington School of Law and he brings over two decades of experience serving as an advocate for social justice. Huy has 16+ years of experience working with clients in the public benefits space at Northwest Justice Project, and spent five years at the University of Washington School of Law, where he was the Director of the W.H. Gates Public Service Law Program. He has taught Public Benefits and Poverty Law at Seattle University and UW School of Law.

Biographies cont.

MICHAEL J. LONGYEAR has over 30 years of experience helping clients make important decisions regarding their personal and estate planning, guardianship proceedings, probate and trust administration, as well as elder law issues. Mike was a past chair and served on the Executive Committee for the Real Property, Probate & Trust section of the King County Bar Association (KCBA). He is also currently a member of the Executive Committee for the Washington State Bar Association's (WSBA) Elder Law section. He is Past-Chair of the Elder Law Section of the Washington State Bar Association and served on the Executive Committee in various capacities from 1999 to 2008 and from 2015-Present. He previously served on the executive committee of the Real Property, Probate and Trust Section of the Washington State Bar Association.

MICHAEL TERASKI (he/him/his) is the pro bono council manager of the Pro Bono Council. Michael spent the past years directly representing pro bono and low bono clients, primarily in employment, health insurance denial, disability discrimination, and homeowner foreclosure matters. He has litigated on behalf of hospitals and patients when insurance companies failed to pay for services, and prior to law school, Michael worked in legal technology and data forensics. Having worked with underserved populations in the Seattle area and in Grant, Lincoln, and Spokane Counties, Michael understands the wide range of challenges facing low-income clients and the organizations that serve them. He strives to reinforce the effectiveness of the Pro Bono Council and develop new and creative ways to strengthen services.

ASHLEY GREENBERG Ashley has been a staff attorney at Northwest Justice Project (NJP) since 2008, after graduating from the University of Washington School of Law. Ashley's work at NJP has focused on public benefits and health law. Since joining NJP's Medical-Legal Partnership in 2015, Ashley has been engaged in individual and systemic advocacy around Medicaid EPSDT benefits for children, Developmental Disabilities Administration (DDA) supports to help people with developmental disabilities live at home and in the community, and protecting vulnerable residents of long-term care facilities. Ashley's passion for health law work comes from her personal experience as a long-term Seattle Children's patient as a child and teenager. Before law school, her work focused on housing and homelessness issues, and during law school she was awarded the American Bar Association Commission on Homelessness & Poverty's John J. Curtin, Jr. Fellowship to support her work starting civil rights legal clinics in soup kitchens for New Yorkers experiencing homelessness. She lives in Seattle with her husband, two small kiddos, and one large cat.

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