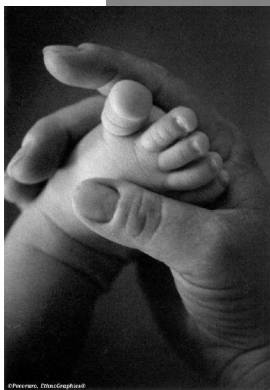


**Title 11 RCW
Adult Guardianship
COURT VISITOR/GUARDIAN AD LITEM
*HANDBOOK***

2021 EDITION

**For Washington State Superior Courts,
Court Visitors/Guardians ad Litem and Training Providers**



Written and produced by the
Guardianship & Elder Law Section of the King County Bar Association
With Oversight and Editorial Support Provided by
**Department of Social and Health Services, as well as
King and Pierce County Superior Courts,**
Consistent with the Goals of the
Title 11 Guardian ad Litem Training Advisory Committee
Established in 1997

The Title 11 RCW

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Aging and Adult Services Administration
Department of Social and health Services
Olympia, Washington 98504

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If you need legal advice, please seek a qualified attorney.

This handbook is also available on-line at: <http://www.kcba.org/CLE/T11Handbook/>

Please also note that suggestions for improvement of the *Handbook* are highly encouraged and most welcome. If you have any comments, questions or feedback, please contact the King County Bar Association.

Preface
The Title 11 RCW
Guardian ad Litem *Handbook*

Guardianship has traditionally been considered an extension of the *parens patriae* authority of the state. The presumption has been that the extension of authority in guardianship (or guardian ad litem) proceedings would be paternalistically and benevolently exercised. Unfortunately this presumption has not always proven true.

In 1975, the Washington State Legislature enacted several amendments to existing guardianship statutes to provide more protections for the alleged incapacitated person.

The legislature acknowledged that a full guardianship is not appropriate in every case. The amendments authorized limited guardianships in situations in which a full guardianship is not needed. Washington was the first state to authorize limited guardianships.

The guardianship statutes were further amended in 1977 and 1996 to expand notice requirements; to define the role of counsel; to allow psychologists to participate in the determination of capacity; to create a guardian ad litem registry system; to detail the duties of guardians; to specifically evaluate an alleged incapacitated person's ability to vote; to allow interested persons to participate in the selection of a guardian; and to restrict guardians from placing an incapacitated person in a nursing home or treatment facility against the person's will.

The 1996 amendments were adopted to require courts to give greater consideration to the use of alternatives to guardianship; to require courts generally to be objective in the appointment of guardians ad litem by establishing a rotating appointment method; to allow the alleged incapacitated person to participate in the selection of the medical professional who evaluates his or her capacities; to allow temporary injunctive relief to protect from abuse, neglect, abandonment or exploitation or to address other emergencies pending the determination of the guardianship petition; to clarify that the alleged incapacitated person has the right to be represented by willing counsel of his or her choice and to testify and present evidence at trial (bench or jury); to provide new timelines and extension procedures for the guardians ad litem; and to further define the requirements guardians ad litem must satisfy to be placed on the guardian ad litem registry in their county.

Amendments in 1999 and 2000 authorize the court to order mediation in disputed guardianships; place limits on fees charged by the guardian ad litem; direct each superior court to develop rules governing grievances made by or against guardians ad litem, and prohibit *ex parte* communication between the guardian ad litem and any judicial officer involved in the guardianship proceeding. The legislature also made provisions for certification of professional guardians. The Washington State Supreme Court adopted Rules of Court governing the conduct of guardians ad litem.

The development of legislation over the years demonstrates the critical need for fully educated and truly skilled guardians ad litem. As legislation and case law continue to develop and mold the obligations of guardians ad litem, the need for education continues. In 1996 the Washington State Legislature enacted a directive for the Department of Social and Health Services to convene an advisory group consisting of "representatives from consumer advocacy and

professional groups knowledgeable in developmental disabilities, neurological impairment, physical disabilities, mental illness, aging, legal [issues], court administration, [including] the Washington State Bar Association, and other interested parties." DSHS and an Advisory Group were to develop a Model Guardian ad Litem Training Program to be self-enforced by the Superior Courts to ensure that candidates applying for registration as a qualified guardian ad litem shall have satisfactorily completed training to attain these minimum qualifications to act as a guardian ad litem. To that end, representatives of the below-listed mandated organizations and agencies worked with DSHS to develop the Title 11 RCW Model Guardian Ad Litem *Training Program* and *Handbook* detailed on the following pages.

We must recognize and appreciate all of the representatives who diligently participated in the Advisory Group(s), and the organizations listed below that enabled them to participate.

- Adult Protective Services, Aging and Adult Services Administration
- Alzheimer's Association of Central and Western Washington
- American Association of Retired Persons
- Association of Area Agencies on Aging
- Association of Washington Superior Court Administrators
- Columbia Legal Services
- Council on Aging
- Developmental Disabilities Council
- Developmental Disabilities Services, DSHS
- King County Bar Association
- King County Self Advocates Program
- King County Superior Court
- National Association of Elder Law Attorneys
- Office of the Attorney General
- Pierce County Bar Association
- Senior Citizen Lobby
- The Arc of Washington State
- Washington Advocates for the Mentally III (WAMI)
- Washington Assembly for Citizens with Disabilities
- Washington Health Care Association
- Washington Protection and Advocacy System
- Washington State Association of Professional Guardians
- Washington State Bar Association Guardianship Study Group

The work of improving guardianship and guardian ad litem services for those vulnerable persons in need continues. Appreciation and recognition is due those who have provided leadership, time and effort in providing quality on-going education, resources and support for the 39 county registries since 1996. Additionally, please join us this year in thanking those individuals who have dedicated countless hours writing, editing, re-writing and re-editing a new, more condensed version of the *Handbook* as requested by an overwhelming majority of guardians ad litem. (And *thank you* for your comments and feedback. It was your comments that enabled us to show a need for a new manual!)

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Guardianship
Guardian ad Litem *Handbook***

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Guardian ad Litem *Handbook***

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CHAPTER I OVERVIEW AND DUE PROCESS

A. OVERVIEW

Welcome to the Title 11.130 Court Visitor training! Thank you for your interest in helping the court protect and assist persons who may be fully or partially incapacitated.

The attendees at this training have an interest in guardianship and conservatorship law for a variety of reasons and will approach this training from a variety of viewpoints. Some attendees are lawyers or social workers. Others are professional guardians. Some are experienced in the guardianship/conservatorship field. Others have come to this training because they have developed an interest in helping persons who may require the services of a guardian or a conservator.

The Title 11.130 Court Visitor Manual presumes the attendees have minimal knowledge of guardianship and conservatorship law. It is designed to be a basic reference tool. The editors hope you will find this manual a useful addition to your arsenal of guardianship and conservatorship tools long after you become an experienced Title 11 Court Visitor.

This introduction serves as a brief overview to this manual. Matters discussed briefly will be covered in greater detail in the chapters that follow. The first nine chapters of this book are organized chronologically, to follow the sequence of a Court Visitor's duties as set forth in the typical *Order Appointing Court Visitor*. Additional training material will be provided to Court Visitors each year at the second day of the training session and individual guardianship and conservatorship legal education seminars that occur throughout the year in various parts of Washington.

Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act

In 2019, the Washington State Legislature adopted the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (commonly referred to as the "UGA" or the "Act"), codified as Title 11.130. The provisions of the UGA concerning guardianships and conservatorships of adults goes into effect on January 1, 2022. *See* RCW 11.130.915. The UGA was enacted, in part, to promote person-centered terminology and to use the least-restrictive means necessary to protect individuals who are unable to fully care for themselves.

The UGA changed the role of a Guardian ad Litem ("GAL") to a Court Visitor ("CV"). Under the UGA, a GAL is "a person appointed to inform the court about, and to represent, the needs and best interest of a minor." *See* RCW 11.130.010(12). This manual will address the role of a CV, not the role of a GAL. RCW 11.130.075 gives the court discretion to appoint a GAL for an "individual" at any time. As such, a GAL can be appointed post

appointment of a guardian/conservator; however, that is beyond the scope of this manual and training.

New Terms Under the UGA

Before we get into more details, there are some new terms that were adopted under the UGA. Some of the most important terms include:

Guardian

This term refers to a person appointed by a court to make decisions with respect to the *personal affairs* of an individual.

Conservator

This term refers to a person appointed by a court to make decisions with respect to the *property or financial affairs* of an individual.

Respondent

This term replaces the term alleged incapacitated person (AIP) for an adult that is subject to a petition for guardianship/conservatorship.

Adult Subject to Conservatorship

This term replaces the term incapacitated person (IP) for an adult for whom a conservator has been appointed.

Adult Subject to Guardianship

This term replaces the term incapacitated person (IP) for an adult for whom a guardian has been appointed.

Court Visitor

This term replaces the term Guardian ad Litem (GAL) and means a person appointed by the court to report to the court with recommendations of the appropriateness of a guardianship/conservatorship, whether a protective arrangement is available to meet the respondent's needs, and whether a guardianship/conservatorship should be full or limited.

All definitions can be found in RCW 11.130.010.

What is a Court Visitor?

In short, a CV is a person appointed by the court to act as a neutral investigator and to report to the court on relevant matters.

A CV is a qualified individual whose name is obtained from a registry maintained by each county. The CV is appointed by the court: 1) to conduct a thorough investigation regarding the allegation of incapacity; and 2) to make recommendations regarding the need for a guardianship or conservatorship and the suitability of the proposed guardian or conservator.

The duties of the CV are limited to those outlined in the *Order Appointing a Court Visitor*. At the appointment of the guardian or conservator, the role of the CV is concluded unless the court orders that the CV remain active in the case.

The CV should report to the court on what the CV believes is in “the best interests” of the respondent. The CV’s conclusion regarding the best interests may be inconsistent with the wishes of the respondent and/or petitioner.

What is the Statutory Process by Which the Court Appoints a Guardian and/or Conservator?

Guardianship has traditionally been considered an extension of the *parens patriae* authority of the state. The state, in protecting its quasi-sovereign interests in the health, comfort, and welfare of its people, must provide care for those who cannot care for themselves. *Black’s Law Dictionary, Sixth Edition*. Beginning in 1975, the Washington State Legislature enacted laws to provide more protection for the rights of respondents (formerly AIPs).

The intent of the UGA is to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. RCW 11.130.001. With the passage of the UGA, the Legislature intended to further protect people with certain incapacities. The new law further emphasizes the need to explore less restrictive protective arrangements before resorting to a guardianship/conservatorship. The statute explicitly limits the court’s right to exercise its legal authority over a citizen’s life, as follows:

The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through guardianship, conservatorship, emergency guardianship, emergency conservatorship, and other protective measures only to the *minimum extent necessary* to adequately provide for their own health and safety, or to adequately manage their financial affairs.

RCW 11.130.001 (emphasis added). *Incapacity must never be assumed*. RCW 11.130.037. RCW 11.130.037 states that for the purposes of this law, an adult is presumed to have legal capacity. No restrictions will be placed on the respondent until the court enters an order. Even if a person is adjudicated to experience some incapacities, the court will consider less restrictive options and protective arrangements short of guardianship/conservatorship before ordering a guardianship or conservatorship.

Briefly, What is the CV's Role in the Guardianship or Conservatorship Process?

A guardianship/conservatorship action is commenced when a petition (a legal pleading) is filed by a petitioner seeking to have a guardian/conservator appointed for a person who lacks the ability to meet essential requirements for physical health, safety, or self-care, or for a person who has demonstrated an inability to manage their property or financial affairs. See RCW 11.130.265 (guardian) and RCW 11.130.360 (conservator). The petition must show that identified needs of the respondent cannot be met by a protective arrangement or other less restrictive alternatives.

The petitioner can be a person (*e.g.*, a friend or relative) or an entity (*e.g.*, governmental agency, hospital, or nursing home) that is concerned about the welfare of the respondent (the respondent may even be the petitioner). A petition may be filed by an attorney on behalf of the petitioner or by a petitioner *pro se* (acting without an attorney).

The appointment of a CV/GAL is discretionary for minor guardianships and minor conservatorships (with certain exceptions that require mandatory appointment, as provided in RCW 11.130.195(4)). RCW 11.130.075 and RCW 11.130.380(1). However, a court *must* appoint a CV upon a petition for an adult guardianship or adult conservatorship. RCW 11.130.280, RCW 11.130.380(2).

RCW 11.130.280 necessitates the appointment of a CV for a **guardianship**:

On receipt of a petition under RCW 11.130.270 for appointment of a guardian for an adult, the court shall appoint a court visitor. The court visitor must be an individual with training or experience in the type of abilities, limitations, and needs alleged in the petition.

RCW 11.120.380(2) also requires the appointment of a CV for a **conservatorship** of an adult: “If the respondent in a proceeding to appoint a conservator is an adult, the court shall appoint a court visitor . . .”

The court must appoint a CV from that county's registry of qualified individuals. The CV's duties are limited to those set forth in the *Order Appointing Court Visitor*, which are based upon the statutory duties of a CV as enumerated in RCW 11.130.280 and RCW 11.130.380.

Since statutes may be amended from time to time, every CV should be familiar with the current statutory requirements and have access to updates. The full text of the guardianship statute can also be found online, *see, e.g.*, <https://app.leg.wa.gov/RCW/default.aspx?cite=11.130&full=true>.

In addition, the role of a CV is governed by court rules. At the time of the update to this chapter, the court rules have not been updated. They can be found at http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=sup&setN

[ame=GALR&pdf=1](#). These rules, even if not updated, provide important information about the responsibilities of a CV.

Within five days of receiving the notice of appointment, the CV must file and serve a statement that includes training relating to the duties as a CV; criminal history as defined in RCW 9.94A.030 for the period covering ten years prior to the appointment; the CV's hourly rate, if compensated; whether the CV has had any contact with a party to the proceeding prior to the appointment; and whether the CV has an apparent conflict of interest. RCW 11.130.380(4)(a) and RCW 11.130.280(3)(a). The CV then conducts an investigation, starting by meeting with the respondent.

Within three days of the later of the actual service or the filing of the CV's statement, any party may schedule a hearing and file and serve a motion for an order to show cause why the CV should not be removed for one of the following reasons: 1) lack of expertise necessary for the proceeding; 2) hourly rate is higher than reasonable; and 3) a conflict of interest. RCW 11.130.280 and RCW 11.130.380. Notice of the hearing shall be provided to the CV and to all parties involved.

The CV must select a qualified professional to prepare a professional evaluation of the respondent's mental and physical condition and the nature, type, and extent of the respondent's cognitive and functional abilities and limitations. A professional evaluation is not required in minor guardianships and conservatorships and in adult conservatorships where the adult is missing, detained, or unable to return to the United States. If the respondent objects to the professional selected by the CV, the CV must obtain an evaluation from the professional selected by the respondent. Once the CV receives the evaluation from the professional selected by the respondent, the CV may get a supplemental evaluation from a different professional.

The CV should meet with family members, care providers, and others who may have relevant knowledge about the respondent. A CV appointed in a guardianship matter is required to visit the respondent's current home and any home where the respondent may move after appointment of the guardian. *See* RCW 11.130.280(5).

In order for the CV to evaluate the proposed guardian or conservator, the CV must be familiar with the statutory duties and limitations of a guardian or conservator contained in RCW 11.130. The CV must speak with the proposed guardian or conservator to evaluate how the proposed conservator or guardian will meet the respondent's needs. The CV must determine whether any effective alternatives or protective arrangements short of guardianship/conservatorship are available to protect the respondent.

Once the CV's investigation is completed and the professional evaluation is obtained, the CV must prepare a written report. The report of the professional evaluator and the CV is confidential and must be filed under seal.

If a **guardianship** is being requested, RCW 11.130.280(6) provides that the CV's report must include the following:

1. A summary of self-care and independent living tasks the respondent can manage without assistance or with existing supports; those the respondent could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making; and those the respondent cannot manage;
2. A recommendation regarding the appropriateness of guardianship, including whether a protective arrangement instead of guardianship or other less restrictive alternative for meeting the respondent's needs is available, and whether the guardianship should be full or limited;
 - a. If a limited guardianship is recommended, the powers that should be granted to the guardian should be included in the report.
3. A statement of qualifications of the proposed guardian and whether the respondent approves or disapproves of the proposed guardian;
4. A statement as to whether the respondent's housing meets the respondent's needs and whether the respondent has expressed a preference as to residence;
5. A statement as to whether the respondent declined a professional evaluation under RCW 11.130.290 and what other information is available to determine the respondent's needs and abilities without the professional evaluation;
6. A statement as to whether the respondent is able to attend a hearing at the location where the court usually holds hearings;
7. A statement as to whether the respondent can participate in a hearing, including whether any technology or other form of support would help respondent participate; and
8. Anything else the court directs the CV to include.

If a **conservatorship** is being requested, RCW 11.130.380(7) provides that the CV's report must include the following:

1. A recommendation regarding the appropriateness of conservatorship, including whether a protective arrangement instead of conservatorship or other less restrictive alternative for meeting the respondent's needs is available, and whether the conservatorship should be full or limited;
 - a. If a limited conservatorship is recommended, the powers that should be granted to the conservator, and the property that should be placed under the conservator's control, should be included in the report.

2. The amount of the bond or other verified receipt needed under RCW 11.130.445 and 11.130.500;
3. A statement of qualifications of the proposed conservator and whether the respondent approves or disapproves of the proposed conservator;
4. A statement as to whether the respondent declined a professional evaluation under RCW 11.130.390 and what other information is available to determine the respondent's needs and abilities without the professional evaluation;
5. A statement as to whether the respondent is able to attend a hearing at the location where the court usually holds hearings;
6. A statement as to whether the respondent can participate in a hearing, including whether any technology or other form of support would help respondent participate; and
7. Anything else the court directs the CV to include.

The CV report must be served and filed no later than 15 days before the hearing on the underlying petition, unless a request is made to “shorten” time or an extension is granted. RCW 11.130.280(6) and RCW 11.130.380(7). The professional evaluator's report may be filed and served at the same time as the CV's report. The CV must be familiar with GR 15, 22, and 31 regarding what information may be included in a record filed for public viewing and what documents must be filed under seal.

Either the respondent or the CV may ask the court to send the parties to mediation whenever the respondent could benefit from mediation. RCW 11.130.035(4). Alternatively, the court may set a trial date. The respondent has the right to trial on the issue of whether a basis exists for the appointment of a guardian or conservator and on the rights to be retained or restricted if a guardian or conservator is appointed. RCW 11.130.035(3).

In uncontested cases, after the CV report is served and filed, there is a hearing before a judge or court commissioner who may then enter an order on the guardianship or conservatorship petition. That court may adopt the recommendations of the CV, but it is not required to do so. The respondent is required to attend the hearing and the court must make reasonable efforts to hold the hearing at an alternative location convenient to the respondent or to allow the respondent to attend the hearing using real-time audio-visual technology. The hearing may proceed if there is clear and convincing evidence that the respondent has refused to attend or there is no practical way for the respondent to attend, even with supportive services and technological assistance. *See* RCW 11.130.295 or RCW 11.130.400. The CV will need to address the respondent's attendance at the hearing in the CV's report.

What is the Role of the Attorney for the Respondent?

The duties of an attorney appointed to represent a respondent are set out at RCW 11.130.285 and RCW 11.120.385. The attorney shall make reasonable efforts to ascertain the respondent's wishes; advocate for the respondent's wishes to the extent the attorney can ascertain them; and, if the attorney cannot ascertain the respondent's wishes, advocate for the result that is the least restrictive consistent with the respondent's interests.

What are Alternatives to Guardianship and/or Conservatorship?

The specific legislative intent of the UGA is to restrict the liberty and autonomy of an incapacitated person "only to the minimum extent necessary to adequately provide for" the health, safety, or adequate management of the financial affairs of the respondent. RCW 11.130.001. A CV must always be cognizant of the need to seek a resolution of the guardianship/conservatorship petition that recognizes and appropriately deals with risks to the respondent, but which least restricts that individual's liberty and autonomy. As a result, the scope of a guardianship and/or conservatorship should be crafted to permit the least possible intrusion upon the independence of the respondent and must evaluate the use of supportive decision making and technology that may be available to maintain the respondent's autonomy.

Chapter 11.130 RCW provides alternative options for guardianships or conservatorships. After a hearing on a petition for a guardianship or conservatorship, a court may issue an order for a protective arrangement instead of a guardianship or conservatorship. RCW 11.130.580. The standards for protective arrangements can be found in RCW 11.130.585 and RCW 11.130.590.

In this manual, when we discuss the role of a CV in a guardianship/conservatorship, we are also intending to refer to protective arrangements instead of guardianship/conservatorship. As such, the general reference to "guardianship/conservatorship" is meant to include the CV's role in petitions for protective arrangements as well.

B. DUE PROCESS RIGHTS OF THE RESPONDENT

Throughout the guardianship/conservatorship proceeding, the CV must be alert to the protection of the respondent's right to fundamental due process of law. A person should not be deprived of the significant rights at stake in a guardianship/conservatorship without due process of law. The duty to assert these rights lies with counsel for the respondent, if one has been appointed. However, since it is the duty of the CV to represent the best interests of the respondent, the CV must report to the court any concerns the CV has about fundamental due process that affects the respondent.

The CV's investigation, especially in cases in which the respondent is not represented by counsel, should include a determination that the court has jurisdiction to hear the

guardianship or conservatorship, that the venue is appropriate, and that all steps have been taken to ensure the rights of the respondent.

Venue and Jurisdictional Requirements

Jurisdiction

The court must have subject matter jurisdiction and also jurisdiction over the respondent. Subject matter jurisdiction is authorized under RCW 11.130.020. It grants the superior court of each county jurisdiction over a guardianship, conservatorship, or protective arrangement.

Service of Petition and Notice

Notice that a guardianship and/or conservatorship proceeding has been brought and a copy of the petition *must be personally served* on the respondent and the CV **within 5 court days after the petition has been filed**. RCW 11.130.275 and 11.130.370. Without proper service of the petition and notice on the respondent, the court lacks jurisdiction to hear the case. Because the CV is a party to the case, it is improper for the CV to personally serve the respondent with notice of the proceeding or a copy of the petition.

Venue

The guardianship/conservatorship petition must be brought in the proper county. RCW 11.130.030.

The venue for a guardianship proceeding for an adult is in the county where the adult lives; the county in which the court is located for cases where the respondent has been admitted to an institution by court order; or, on a petition for emergency guardianship, in the county where the respondent is present.

Other Procedural Due Process Requirements Under RCW 11.130

1. Petitions must be heard within 60 days unless an extension is granted for good cause shown. The request for the extension must occur before the 60 days has expired. RCW 11.130.275 and RCW 11.130.370.
2. A copy of the petition and notice of hearing on the petition must be served personally on the respondent and the CV not more than five court days after the petition has been filed. When petitioning for conservatorship, a copy of the petition and notice of hearing must also be personally served on the proposed guardian within five court days after the petition has been filed. RCW 11.130.370. There is no longer any option for certified mail or other form of serving the respondent and the CV. It may still be possible for the CV to accept alternate forms of notice, but he or she should do so in writing in a form that can be filed with the court. If notice is not personally made on the respondent, the court will not proceed with the guardianship or conservatorship hearing. RCW 11.130.275 and RCW 11.130.370.

3. There is a long list of people who should get copies of the petition and notice of hearing in RCW 11.130.270 and 11.130.365.

Note: Pursuant to RCW 11.130.070, a person may waive notice, but it must be in a record signed by the person or the person's attorney and filed with the court.

Statutory Due Process Rights of the Respondent

The respondent has the following rights under RCW 11.130:

1. To be represented by a lawyer of the respondent's own choosing or to have the court appoint an attorney at public expense if payment would result in a substantial hardship. RCW 11.130.285 and RCW 11.130.385;
2. To have a jury decide if there is a basis for the appointment of a guardian or conservator and on the rights to be retained or restricted if a guardian or conservator is appointed. RCW 11.130.035;
3. To be present in court and testify when the guardianship/conservatorship hearing is held. The statute provides that a hearing cannot go forward unless the respondent attends the hearing, unless the court finds that the respondent has refused to attend the hearing after having been fully informed of the right to attend and the consequences of failing to attend, or there is no practicable way for the respondent to attend and participate in the hearing. If it is not reasonably feasible for the respondent to go to court, the court must make reasonable efforts to hold the hearing at a convenient location to the respondent or allow the respondent to attend the hearing using real-time audio-visual technology. RCW 11.130.295 and 11.130.400;
4. To have the CV replaced. RCW 11.130.280 and RCW 11.130.380;
5. To select the professional to prepare the required professional evaluation. RCW 11.130.290 and RCW 11.130.390;
6. To have special assistance if disabled under the Americans with Disability Act. 42 USC 12101. GR 33; and
7. To expect freedom from discrimination based on a disability. RCW 49.60 and the Americans with Disability Act.

Due Process Rights Re: Decision Making During the Pendency of the Guardianship or Conservatorship

The UGA provides for the establishment of an emergency guardian or conservator in certain circumstances. However, it is important to note that the CV is not an emergency guardian or conservator. The CV cannot make decisions for the respondent unless the CV has clear authority.

If the CV has any concern regarding the CV's authority to act, the CV should seek instruction from the court.

What is Substantive Due Process?

The intent of the legislature is to protect the liberty and autonomy of all people of this state and to enable them to exercise their rights under the law to the maximum extent consistent with the capacity of each person.

To appoint a **guardian**, RCW 11.130.265 provides that the court must find *by clear and convincing evidence* that:

1. The respondent lacks the ability to meet essential requirements for physical health, safety, or self-care, even with the use of appropriate supportive services, technological assistance, or supported decision making;
2. Appointment of a guardian is necessary to prevent significant risk of harm to the respondent's physical health, safety, or self-care; and
3. The respondent's identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative.

To appoint a **conservator**, RCW 11.130.360 provides that the court must find *by clear and convincing evidence* that the adult is unable to manage property or financial affairs because:

1. There is a limitation on the adult's ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate supportive services, technological assistance, or supported decision making; or the adult is missing, detained, or unable to return to the United States;
2. Appointment is necessary to avoid harm to the adult or significant dissipation of the adult's property, or to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult or of an individual entitled to the adult's support; and
3. The adult's identified needs cannot be met by a protective arrangement instead of a conservatorship or other less restrictive alternatives.

Age, eccentricity, poverty, or medical diagnosis alone is not enough to justify a finding of incapacity. RCW 11.130.265 and RCW 11.120.360.

The court shall grant the guardian or conservator only those powers necessitated by the demonstrated needs and limitations of the respondent. RCW 11.120.265 and RCW 11.130.360

The respondent is entitled to legal representation. If the respondent cannot afford an attorney, one will be appointed for him or her at county expense.

C. TIMELINE SUMMARY FOR COURT VISITORS

1. Within five days after notice of appointment, the CV shall serve on the parties and file with the court a Statement of Qualifications. RCW 11.130.280(3)(a) and RCW 11.130.380(4)(a).
2. Within three days of the later of service or filing of the CV statement, any party may set a hearing and file and serve a motion to show cause why the CV should not be removed. *Id.*
3. The CV should meet and consult with the respondent as soon as practicable after being appointed. RCW 11.130.280(4) and RCW 11.130.380(5).
4. As soon as possible after appointment, the CV should select a professional to prepare the required professional evaluation, meet with the proposed guardian or conservator, interview and consult others, as needed, and investigate alternatives to guardianship/conservatorship. RCW 11.130.290 and RCW 11.130.390.
5. At least 15 days before the hearing on the underlying petition, the CV must file his or her report and provide a copy to the respondent, the petitioner, and any interested party listed in RCW 11.130.280 for guardianship and RCW 11.130.380 for conservatorship. *Exception:* The foregoing applies unless an extension or reduction of time has been granted by the court for good cause.
6. All petitions for guardianship and conservatorship must be heard within 60 days unless an extension is provided by the court for good cause shown. RCW 11.130.275 and RCW 11.130.370.

CHAPTER II CV STATEMENT OF QUALIFICATIONS

A. STATEMENT OF QUALIFICATIONS

RCW 11.130.155 requires each county to develop and maintain a registry of persons who are willing and qualified to serve as CVs in guardianship/conservatorship matters.

In order to be eligible for a CV registry, a person must present a written statement outlining their background and qualifications. 11.130.155(2). This statement is referred to as a “Statement of Qualifications” and, by law, must be updated on an annual basis. RCW 11.130.155(4).

This statement must include, but is not limited to, the following information:

1. Level of formal education;
2. Training related to the duties of a guardian ad litem or CV;
3. Number of years’ experience as a guardian ad litem or CV;
4. Number of appointments as a guardian ad litem or CV and the county or counties of appointment;
5. Criminal history, as defined in RCW 9.94A.030:
 - a. “Criminal history” means a list of a defendant’s prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.
 - b. The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.
 - c. Convictions include juvenile offenses for sex offenses and shall also include other prior convictions in juvenile court if the conviction was for an offense which is a felony or a serious traffic offense; the crime occurred at age fifteen or older; and, in juvenile class B and C felonies or serious traffic offenses, the crime was committed when less than twenty-three years of age for which a sentence was imposed.
6. Evidence of the individual’s knowledge, training, and experience in each of the following: needs of impaired elderly people, physical disabilities, mental illness, developmental disabilities, and other areas relevant to the needs of persons subject

to guardianship or conservatorship, legal procedures, and the requirements of RCW Chapter 11.130.

In addition, the Statement of Qualifications must include the names of any counties in which the person was removed from a guardian ad litem or CV registry pursuant to a grievance action, and the name of the court and the case number of any case in which the court has removed the person for cause.

A CV must submit a Statement of Qualifications along with other required documents when applying to the CV registry in each county in which the CV wishes to serve. In addition, many CVs use their Statement of Qualifications, or a modified version thereof, when meeting the requirement of RCW 11.130.280(3)(a) and RCW 11.130.380(4)(a) which state, in part:

The CV appointed under subsection (1) of this section shall within five days of receipt of notice of appointment file with the court and serve, either personally or by certified mail with return receipt, the respondent or his or her legal counsel, the petitioner or his or her legal counsel, and any interested party entitled to notice under RCW 11.130.080 with a statement including: His or her training relating to the duties as a CV; his or her criminal history as defined in RCW 9.94A.030 for the period covering ten years prior to the appointment; his or her hourly rate, if compensated; whether the CV has had any contact with a party to the proceeding prior to his or her appointment; and whether he or she has an apparent conflict of interest.

A “party” upon whom the CV must serve the Statement of Qualifications include: the petitioner (or, if represented by counsel, petitioner’s attorney); the respondent (or, if represented by counsel, the respondent’s attorney); and a person who is entitled to notice under RCW 11.130.080.

An example of the previous Statement of Qualifications and other forms useful for the CV may be found at <https://www.kingcounty.gov/~media/courts/superior-court/docs/ex-parte-probate/guardianship-forms/47-gal-statement-of-qualifications-pdf.ashx?la=en>. The forms on this site are for illustrative purpose only and not to be construed as the mandatory forms to use unless so stated. Updated forms should be available soon.

A CV should be familiar with local court rules. Some jurisdictions may have additional requirements of CVs. Local court rules cover, in part, timetables and instructions regarding filing of and distribution of documents. Many counties have websites on which they post the local rules. The local rules for many of the counties can be found at http://www.courts.wa.gov/court_rules/.

B. PRACTICE TIPS

1. Only do what you are ordered to do in the Order Appointing the CV;

2. When the petitioner's attorney first contacts you, always ask for the phone number of the proposed guardian or conservator and the respondent. Find out whether the attorney knows the respondent's medical doctor's name and number;
3. Do not skimp on the Statement of Qualifications. Complete it in full;
4. Never serve the guardianship/conservatorship petition on the respondent;
5. After you have been appointed, call immediately to set up a meeting date with the respondent;
6. Determine who will complete the professional evaluation as soon as possible. Build in enough time for the respondent to object and to obtain a professional evaluation from a professional the respondent selects and to do a supplemental evaluation from a separate professional if you think it is necessary;
7. Send the medical form early to the professional evaluator with a self-addressed, return-stamped envelope or with instructions for return via email or facsimile. Make it as effortless as possible for the professional to comply;
8. You will need to identify least restrictive alternatives and protective measures. If you recommend a guardianship and/or conservatorship, your report will need to include the reasons the less restrictive or protective measures will not provide adequate protection for the respondent;
9. Include the most important information in your sealed report and avoid including "he said/she said" details;
10. When you file the CV report, always file a working copy for the court commissioner in *Ex Parte* or judge who will conduct the hearing on the petition in accordance with applicable court rules;
11. Keep good notes and an organized file. Expect that your file will be viewed by others if the case goes to trial;
12. At the hearing, speak only when the judge/commissioner asks you to speak; and
13. Review the Order Appointing Guardian or Conservator before the hearing and be sure it has a section regarding the payment of your CV fees and your discharge.

**CHAPTER III
INTERVIEWING THE RESPONDENT AND UNDERSTANDING
IMPAIRMENTS**

A. INTERVIEWING THE RESPONDENT

As soon as practicable after appointment, the CV is required to meet and consult with the respondent. The CV must provide certain information to the respondent about the person's rights in the guardianship/conservatorship proceeding. There is also information that the CV should provide to the respondent so that the respondent better understands the process. Finally, the CV needs to obtain information from the respondent.

Information that Must be Shared with the Respondent.

The CV must inform the respondent of the respondent's rights and determine which, if any, the respondent chooses to exercise. Those rights are listed in the Notice of Petition for Guardianship or Conservatorship. RCW 11.130.657. The CV must inform the respondent of the substance of the petition for guardianship/conservatorship, and the nature, purpose, and effect of the guardianship/conservatorship proceeding(s).

The CV must inform the respondent of the following rights:

1. To be represented by a lawyer of the respondent's own choosing at public expense if the respondent cannot afford one or it would be a financial hardship;
2. To request a jury trial on the issue of capacity;
3. To be present in court and to testify at any hearing regarding the guardianship/conservatorship petition;
4. To request that the court replace the CV; and
5. To ask the court to establish a protective arrangement instead of a guardianship/conservatorship.

The CV must ascertain and report on the respondent's reaction to the petition, to the specific guardian/conservator-nominee, to the guardian/conservator's proposed powers and duties, and to the scope and duration of the proposed guardianship/conservatorship.

The CV must be prepared to discuss the rights that a respondent might lose. These are stated in the Notice of Petition for Guardianship or Conservatorship (RCW 11.130.657). A respondent may lose the right to:

1. Marry, divorce, or enter into or end a registered domestic partnership;

2. Vote or hold elected office;
3. Enter into a contract or make or revoke a Will;
4. Appoint someone to act on the behalf of the respondent;
5. Sue or be sued other than through the guardian;
6. Possess a license to drive;
7. Buy, sell, own, mortgage or lease property;
8. Consent to or refuse medical treatment;
9. Decide who shall provide care and assistance; and
10. Make decisions regarding social aspects of the respondent's life.

Finally, the CV must:

1. Consider and be prepared to discuss protective arrangements or less restrictive alternatives to guardianship/conservatorship;
2. Inform the respondent that all costs and expenses of the proceeding may be paid by the respondent; and
3. Explain the general powers and duties of a guardian/conservator.

Information that *Should* be Shared with the Respondent.

The CV should be able to explain the CV's role to the respondent, *i.e.*, to investigate, evaluate, and make a recommendation to the court about what is in the respondent's best interests. The CV should explain that there is no confidentiality between the CV and the respondent or any party. The CV should explain that any information imparted to the CV that will assist the commissioner or judge in making a ruling may be included in the CV's report. The CV should explain that the commissioner or judge is the final decision-maker. This is often a good place to start the interview.

The CV should be able to explain the guardianship/conservatorship process to the respondent. Be prepared to describe the steps of a guardianship/conservatorship proceeding: the petition and appointment of a CV and a CV's responsibilities - interviewing the respondent, obtaining a professional evaluation, interviewing others, interviewing the nominee guardian/conservator, researching less restrictive alternatives, and writing a report. Finally, the CV should be able to describe the hearing or trial.

The CV should be prepared to describe what will happen in the courtroom. The respondent may never have been in court before. Any information the CV can provide will make the respondent more comfortable with the process. Be able to describe a “hearing” and the difference between a commissioner and a judge and explain the meaning of “*ex parte*,” etc.

Information to be Obtained from the Respondent.

The CV appointed under a petition for **guardianship** needs to be able to inform the court of the respondent’s ability to manage in the areas of health, physical safety, nutrition, and housing. The CV appointed under a petition for **conservatorship** needs to be able to inform the court of the respondent’s ability to manage in the areas of property and finances.

In gathering information from the respondent, the CV must obtain information to assist the CV in determining whether a protective arrangement or less restrictive alternative would be sufficient to meet the respondent’s needs.

CVs should ask questions that will elicit this information, always being mindful of how intrusive the investigation may appear to the respondent. The CV can also obtain information by observing the respondent, the respondent’s residence, and by reviewing records in the respondent’s possession.

The following sample questions may assist in the CV’s efforts to collect information, but is not a comprehensive list:

Health

How is your health? Who are your health care providers? When were you last seen by them? Do you take any medications? What are they for?

Physical Safety

What would you do if there were a fire? Do you know the telephone number to call in an emergency? Have you had any recent accidents or falls? Have you been involved with the police?

Nutrition

Are you able to make your own meals? What did you eat for breakfast today? How do you make your favorite food? Are you able to do your own grocery shopping?

Housing

How long have you lived here? What is your monthly rent or mortgage payment? Are you able to maintain it on your own?

Finances

Do you receive any regular monthly income? What are the sources? How much is it? Is it direct deposited in the bank? What bank do you use? Do you own stocks, bonds, property? What are your monthly bills? Do you have any unpaid bills?

Driving

Do you have a current driver's license? Do you drive or intend to drive in the future? Do you have access to a motor vehicle? Do you have motor vehicle insurance?

The CV should ask questions to determine if the respondent is **oriented as to person, place, and time**.

The CV should find out if the respondent is a **veteran**. The Department of Veterans Affairs must be notified of all guardianship/conservatorship proceedings involving veterans.

The CV should find out if the respondent has any **immediate family and any friends or other family who might be contacted** in the guardianship/conservatorship investigation.

The CV should find out if the respondent has made **alternative arrangements for assistance**, such as durable powers of attorneys.

The CV should ask the respondent if the respondent has a **preference for who may serve as guardian/conservator** and should ask about the respondent's relationship with the proposed guardian/conservator.

The CV should ask the respondent if the respondent **votes** and when the respondent last voted.

The CV should ask the respondent if they will agree to a **professional evaluation**. If the respondent declines a professional evaluation, the CV should ask other questions to help determine the respondent's needs and abilities without the professional evaluation.

The CV should ask whether the respondent can **attend the hearing** and if not ask or identify whether the respondent has access to technological assistance and tools to participate in the hearing.

Potential Barriers to Comprehension.

“Legalese”

The CV needs to explain the respondent's rights, the court procedures, etc. in language that the respondent can reasonably be expected to understand. RCW 11.130.280(4) and RCW 11.130.380(5). Avoid “legalese.” Be prepared to explain or give examples. Language used by the CV should be tailored to the respondent's age and abilities. See Part B of this chapter, Understanding Common Causes of Impaired Capacity, for more information.

English as a Second Language

The respondent may not speak English as their first language or may not speak English at all. In some cases, a family member or friend may be able to translate. There are reasons, however, for the CV's interview to be private and free of potential influence. One

solution may be to use a professional interpreter. Most counties will have an Office of Interpreter Services as part of the court. Court interpreters are able to provide free translation services when there is a financial hardship. Note: Interpreters in the following languages must be court certified: Arabic (Egyptian or Levantine), Bosnian/Croatian/Serbian, Cantonese, French, Khmer (Cambodian), Korean, Laotian, Mandarin, Portuguese, Russian, Spanish, Tagalog, and Vietnamese. As such, using a family member to translate may not be possible at the guardianship/conservatorship hearing. When a court interpreter is needed, the CV should petition the court for instruction regarding payment of the interpreter's fee.

Slang and Idiom

Even among native English speakers, there are different ways to express an idea. A CV should avoid slang and idioms whenever possible. If the CV is unsure about a word or phrase used by the respondent, ask clarifying questions to confirm the interpretation.

Inability to Communicate Verbally

Some respondents will be unable to communicate verbally. If the respondent is able to use sign language, an interpreter may be necessary. Some respondents are able to communicate in writing. Some respondents may have cards or boards that enable them to respond to questions.

A CV should recognize the importance of and read nonverbal communication. Look for the respondent to nod or shake their head, to follow with the eyes, sit forward in their seat, etc. Sometimes the CV can have the respondent respond to questions by squeezing the CV's hand or blinking their eyes. Often caregivers can give the CV background on interpretation of nonverbal communication.

Inability to Hear or See

Sometimes communication is hampered by the respondent's poor hearing. If the respondent is speaking loudly, this may be an indication of partial deafness. Ask whether the respondent uses a hearing aid and whether it is in place. If the respondent's vision is poor, the respondent may not have been able to read any of the guardianship/conservatorship documents, and the CV may have to start by explaining what is in the documents.

Diversity Issues

Even the most conscientious CV must take special care to avoid making decisions that are influenced by cultural bias or by personal values. In completing an objective investigation and making appropriate recommendations, a CV must recognize their own biases, which can be based on race, ethnicity, religion, lifestyle, socioeconomic standing, subculture, gender, age, disability, and education, among others. These biases can improperly impair or skew the CV's objective assessment.

The following are some examples of cultural and value-based perspectives:

Cultural Background

Example #1: A disabled indigenous man for whom a guardianship/conservatorship is proposed has recently given away a number of his possessions, as well as a settlement he received from an auto accident. If a CV is unaware of the significance of the potlatch tradition in certain Pacific Northwest tribes, the CV will not be able to assess the meaning of the man's actions as they relate to determining whether he needs a guardian/conservator.

Example #2: A guardianship/conservatorship is proposed for a pregnant, non-English-speaking, allegedly mentally ill Arab-American woman who has been abandoned by her husband. She became distraught and physically violent when a male physician attempted to perform a physical examination. If the CV is unaware of the privacy and modesty requirements of this woman's culture, the CV may mistakenly interpret this reaction as evidence of incapacity.

Values Perspective

Example #1: A woman in her 90's with a severe hearing impairment is the subject of a guardianship. She has gone from her home, where she lived alone, to a nursing home to recover from a broken hip. She is diagnosed with advanced dementia after a physician evaluated her and found her unresponsive and uncommunicative. She consistently ignored what she considered to be impertinent and insulting questions from someone she did not know. The CV needs to be aware of the woman's hearing impairment and that the woman strongly values her privacy. The CV should be sensitive to the fact that effective communications will require formal introductions and loud, distinct communications or written communications. When the appropriate communication approach is achieved, it may be clear that her mental and intellectual capacities are intact.

Example #2: A man over the age of 80 is the subject of a guardianship/conservatorship petition. He keeps large piles of junk in and around his property. He has been cited by the city repeatedly. His neighbors are furious and believe the condition of his property lowers the values of all their properties. The CV learns that the man understands and is unperturbed by the lowered values and greatly values his lifelong collection of unusual objects, and enjoys annoying his neighbors, whom he dislikes. He understands the consequences and potential fines and is prepared to pay them. Unless the CV understands this man's values and beliefs, the CV risks mistaking eccentricity for incapacity.

Example #3: A single young man is severely injured in a motorcycle accident. Although young, he has signed a health care directive. A guardianship is sought because he has no relatives to make medical care decisions. As a result of certain strong religious beliefs, the proposed guardian believes that the provisions of the health care directive are immoral and would not take steps to enforce them. In assessing the appropriateness of this guardian, the CV would find such a person unable to exercise ethical substitute decision making for this man.

Example #4: An elderly widow begins a relationship with her younger caregiver. She gives him expensive gifts. Her children file a petition for conservatorship on the basis

that she is no longer able to make sound financial decisions. The CV learns that the woman is able to afford to pay all of her bills and is able to afford to give the gifts to the caregiver. The CV learns that the woman's children have not been involved in her life and the caregiver has been her caregiver for five years. The CV learns that the woman believes that "family" is not solely limited to someone who is biologically related and that she can create her own family. Unless the CV understands the woman's values and beliefs, the CV risks mistaking the woman's choice for incapacity.

Interview Notes

In the sealed CV report, the CV provides the court with a summary of the interview with the respondent. The court values direct quotes of the respondent. Some CVs can remember the substance of their conversation with the respondent without taking notes during the interview and believe that notetaking interferes with communication. Other CVs prefer to take notes and refer to their notes when writing the report. (Remember that all notes of the CV are discoverable, meaning you may have to make them available for review.) Another option is to tape the interview if the respondent consents. However, consider whether the respondent is competent to consent, would feel uncomfortable denying consent, or would feel uncomfortable during a taped interview.

B. UNDERSTANDING COMMON CAUSES OF IMPAIRED CAPACITY

When communicating with the respondent, the CV may encounter a person affected by one or sometimes by an array of circumstances, including physical, mental, and emotional disabilities. The CV must try to objectively assess the impact of these disabilities on the respondent's ability to function.

The following is intended to provide a non-exhaustive overview of some of the most common impairments the CV may encounter. It is important to remember that most of these disorders do not occur independently or in isolation. The majority of the cases involve persons who have multiple medical/health problems, psychological/mental health problems, and complicated psychosocial situations that affect their functions. Socioeconomic status, education, prior life experience, current support system, and many other factors can have a significant impact on the functioning of the respondent.

These brief descriptions are intended to familiarize the CV with the *general* characteristics, *general* residual capabilities, and *general* limitations relative to certain impairments. Several in-depth resources are available that provide extensive clinical descriptions of physical and mental conditions. Two commonly used resources are: The Diagnostic and Statistical Manual of Mental Disorders (DSM-5), American Psychiatric Association, and The Merck Manual of Diagnosis and Therapy, Merck Sharp and Dohme Research Laboratories.

Neurocognitive Disorders.

Neurocognitive Disorders is a term used to describe a cluster of symptoms, not a disease that causes those symptoms. Symptoms always include memory impairment

accompanied by additional loss of cognitive function that is severe enough to interfere with normal activities of living. Other terms used previously, but are no longer useful, include “organic brain syndrome,” “senility,” or “chronic brain syndrome.”

Reversible Disorders

Disorders are caused by such conditions as anemia, urinary tract infection, hyperthyroidism, tumors, metabolic disorders, depression, and the effects of medication.

Irreversible Disorders

Neurocognitive Disorders can also be caused by a variety of conditions, including Alzheimer’s Disease, stroke (which may cause multi-infarct dementia or vascular dementia), AIDS, alcoholism, long term chemical dependency (substance abuse), and Parkinson’s Disease.

A good medical evaluation is necessary to determine the cause of a dementing illness.

Many times, people with neurocognitive disorders become angry or agitated because they do not understand what is expected of them. At other times, they may be frustrated with their inability to make themselves understood.

In the early stages of a dementing illness, people may have trouble finding the words to express thoughts or may be unable to remember the meaning of simple words or phrases, but these problems are usually minor inconveniences or frustrations. The later stages of illness may be much more difficult with language skills impaired, resulting in nonsensical, garbled statements and great difficulty in understanding.

Mental Illness/Mental Disorders.

Mental disorders are defined in RCW 71.05.020(38), the involuntary commitment statute, as “[A]ny organic, mental, or emotional impairment which has substantial adverse effects on an individual’s cognitive or volitional functions.”

The mental disorders described below constitute syndromes that often lead to guardianship/conservatorship proceedings. Some of these disorders are chronic in nature and result in frequent or lengthy psychiatric hospitalizations and/or require long term treatment and support to maintain stability in the community.

Mental health professionals, such as psychiatrists, psychologists, physician assistants, nurses, and social workers working with psychiatrists, and psychiatric advanced registered nurse practitioners, should be consulted if additional diagnostic and treatment information is required. Many people with mental illness successfully manage their own affairs.

The CV should not assume that an individual needs a guardianship/conservatorship based solely on diagnosis. *See* 11.130.265(3) and RCW 11.130.360(4). The use of a Mental

Health Care Directive, a less restrictive alternative, should be analyzed in situations where recurrent episodes of mental illness create the need for intervention.

Anxiety Disorders.

Some of the more frequently encountered anxiety disorders are as follows:

Panic Disorder

This disorder is characterized by recurrent, unexpected panic attacks, which are brief episodes of intense fear with symptoms such as racing pulse, shortness of breath, and trembling.

Post-Traumatic Stress Disorder

Individuals who have been diagnosed with post-traumatic stress disorder find themselves re-experiencing an extremely traumatic event to which they have been exposed either directly (e.g., war-time combat) or indirectly (e.g., witnessing a murder). In the aftermath, the affected individual avoids situations or people that may trigger unwanted memories. Additional symptoms may include insomnia, angry outbursts, and impaired concentration.

Obsessive-Compulsive Disorder

This disorder is identified by obsessions, which focus on recurrent, persistent thoughts and impulses, and compulsions, which are repetitive behaviors resulting from these obsessions. Hoarding behaviors, or pathological collecting, such as accumulating stacks of old newspapers that almost fill an entire room or saving innumerable jars and cans so that access to the household is nearly blocked, can be evidence of an obsessive-compulsive disorder.

Bipolar Disorder

Bipolar disorder is a condition in which the patient experiences cyclic symptoms of depression and mania. The manic mental state is characterized by rapid speech, grandiosity, loose association of thoughts, hyperactivity, boundless energy, severe insomnia, occasional weight loss, and exhaustion. Between episodes of mania the patient may be normal or depressed. Some individuals with this condition may be highly productive during mild manic episodes, but may lose an objective perspective for decision making as the manic state increases in severity. Thinking can become psychotic with delusions and hallucinations. Psychotic patients generally are hospitalized involuntarily because they lack the judgment to make logical decisions about their care.

Depression.

Depression is a disorder that is characterized by the following:

Mood Impairment

Patients describe feeling low, blue, uninterested in previously enjoyed activities, hopelessness, helplessness, and apathy. They may exhibit poor self-care, poor work performance with alcohol and/or drug abuse for purposes of self-medication.

Thinking Impairment

Includes confusion, decreased concentration and memory, rumination, poor problem solving, and recurrent thoughts of death or suicide.

Physical Impairment

Change in appetite, increased or decreased sleep, low energy and fatigue, agitation or reduced motor activity, and increased physical complaints.

Schizophrenia and Schizoaffective Disorder.

People with schizophrenia typically have phases of acute onsets of the disease and periods of stability. The acutely psychotic phase, when the person may have lost touch with reality, is a time of great turmoil for the individual and for family, friends, and support providers. In the stable phase, they can often live independently without assistance. However, the person in the stable phase still has limitations and unrealistic expectations that can be a source of stress. The fact that despite the illness an individual is coping with daily life does not necessarily mean the person can hold a full-time job or get along without support services.

Minor to moderate amounts of stress can lead to severe anxiety or loss of contact with reality. There is difficulty with interpersonal relationships and a tendency towards withdrawal, excessive dependency, lack of motivation, energy, and coping skills. A propensity, when stressed, is to lose touch with reality and to develop symptoms of delusions - people may believe that they are controlled by the television or that they are famous historical or religious figures. Other characteristic symptoms include hallucinations, disorganized speech, and flat or inappropriate affect. Schizoaffective disorder is similar, but is remarkable in the inclusion of depressive or manic symptoms in addition to the above.

Treatment and support services for people with chronic mental illness are closely related to the phases of the illness. When people are acutely psychotic, an increase in the level of supervision and support services may be necessary. This may include the need for an increase in the level of medication. In some cases, hospitalization will be needed. In many cases, a strong community support program can deliver necessary support even in the acute phase of the illness, avoiding disruption in living arrangements, activities, and relationships. People who are in the non-acute phase of the illness can effectively be helped to maintain stability through medications and community support programs. The need for long-term institutional care can be avoided with a good community program that provides necessary support. However, good community support must be thought of as a long-term program, not a "cure." Although schizophrenia was once thought of as uniformly producing deterioration, many people who have had good support to retain

skills and to hold their lives together show significant improvement as they grow older. Medication, sheltered living if needed, supervised day treatment, life skills training programs if needed, and psychiatric treatment, counseling, and case management are often beneficial to the ongoing care and treatment of the person.

Developmental Disabilities.

Developmental disability is defined in RCW 71A.10.020(5) as:

[A] disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to an intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial limitation to the individual.

The categorical nature of this definition as defined by the statute makes it *exclusive* rather than *inclusive*. For example, in Washington, persons with traumatic brain injury, cystic fibrosis, spina bifida, narcolepsy, tuberous sclerosis, and numerous other disabling conditions are ineligible for services developed for persons with developmental disabilities unless they also happen to have one of the disabilities included in the statutory definition provided above.

Common Developmental Disabilities include:

Autism refers to a condition in which a person exhibits some or all of the following characteristics from an early age: extreme withdrawal, communication problems (delayed or absent speech, unusual speech rhythms), unusual way of relating to surrounding people and things, and repetitive movements (hand twisting, prolonged rocking, spinning, or head banging).

Cerebral Palsy refers to a group of disabling conditions caused by damage to the central nervous system. “Cerebral” refers to the brain, while “palsy” describes lack of muscle control that is often (but not always) a nervous system symptom. It may be caused by problems during gestation or birth, or it may occur from an accident, lead poison, illness, or other factors. Four main descriptions of cerebral palsy are:

1. Spastic, the most common type, which results in tense, contracted muscles;
2. Athetoid, which is characterized by constant uncontrolled movements;
3. Ataxic, which is typified by poor sense of balance and depth perception; and
4. A combination of the above.

The effects of cerebral palsy depend on the extent and location of the brain damage. One or more of the following conditions may occur: seizures; problems in vision, hearing, or speech; abnormal sensation or perception; intellectual disability; and/or impairments in arm and leg movement. Cerebral palsy may be mild or severe, thus the range of capabilities varies widely depending on the particular individual's condition.

Epilepsy is a condition that is the result of sudden disturbances of brain function that *may* be manifested as episodic impairment or loss of consciousness. Epilepsy is typically controlled with medication and is not necessarily a debilitating condition. Seizures become problematic and can impair an individual's ability to function when medication therapy does not control the seizures.

Intellectual disability refers to significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, manifested from childhood or early adolescence. Although intellectually disabled persons are capable of learning and growing, they are likely to learn more slowly than other people. Intellectually disabled individuals may need to have even simple tasks, such as putting on a shirt, broken down into steps and taught one at a time. They may have greater difficulty retaining and recalling information and may need special cues or reminders about when to do a particular activity. They may lack judgment and insight and may require advice and guidance (or a substitute decision maker) when making complex choices. Because of poor communication and social skills, isolation, and negative stereotypes, people with intellectual disabilities may need special support to develop and maintain positive relationships with other people. In some cases, they may need long term supervision and support to carry out daily living activities and to engage in productive work. However, there is overwhelming evidence that a program of habilitation can work and that everyone, no matter the degree of severity of intellectual disability, is capable of growth and development if given adequate and suitable treatment.

Chemical Dependence.

Chemical dependency is a disease. It is characterized by dependency on alcohol or other psychoactive chemicals; loss of control over the amount and circumstances of use; symptoms of tolerance, physiological or psychological withdrawal or both, if use is reduced or discontinued; and impairment of health or disruption of social or economic functioning. Chemical dependency generally is a progressive disorder. If not treated, chemical dependency progresses from an early stage with relatively minor signs and symptoms to chronic late-stage problems that can, and quite often do, result in death.

Prevention, early intervention, and treatment for chemical dependency is available and, if applied, can interrupt the negative consequences of active addictive disease. Treatment works. Addicts that have undergone treatment and continue in recovery are able to live normal lives with few or no special needs. Following treatment, most recovering addicts need to stay involved with a self-help recovery group such as Alcoholics Anonymous or Narcotics Anonymous (commonly known as AA or NA) to assist them in staying clean

and sober. Recovering opiate addicts may need to continue in an opiate dependency treatment program for an extended period to take methadone or a similar drug to maintain their recovery.

Other Impairments.

There are varying and numerous physical and mental conditions that can lead to impaired functioning. The following impairments are representative of some of the more common conditions that may lead to guardianship/conservatorship proceedings:

Multiple Sclerosis

A chronic neurological disease in which the myelin sheath, the coating or insulation around the message-carrying nerve fibers in the brain and spinal cord, is attacked. Where myelin has been destroyed, it is replaced by plaques of hardened tissue (sclerosis); this occurs in multiple places within the nervous system. When any part of the myelin insulation is destroyed, nerve impulses to the brain are interrupted and distorted. Symptoms vary greatly depending upon where in the central nervous system (brain and spinal cord) the sclerosed patches are formed. Persons with severe physical disability caused by MS may retain intact intellectual functioning.

Parkinson's

A slowly progressive disorder without a known cause. It relates to physical function, but in older persons is often associated with mental decline. Manifestations of the disease may include: tremors (mainly at rest), slowness of movements, gait disturbance, and stiffness of neck and extremities. Depression is frequently observed in Parkinson's disease.

Stroke

Stroke is a generic term used to include cerebral vascular accidents caused by thrombosis, cerebral hemorrhage, embolism to the brain, and aneurysm. "Stroke survivor" is the appropriate term to use when referring to this population. Stroke occurs when there is an interruption of the blood flow to the brain causing temporary or permanent damage to brain cells. Generally, only one side of the brain is damaged and functioning on the opposite side of the body may be affected. Impairment can range from minor difficulties such as limb weakness to total paralysis, speech difficulties, poor judgment, seizures, and short-term memory, among other deficits.

Traumatic Brain Injury

Traumatic brain injury ("TBI") refers to a sudden insult or damage to the brain or its coverings that results when the head is hit, strikes a stationary object, or is shaken violently (as in some whiplash injuries), i.e., the injury is caused by an external physical force. The brain itself may or may not be penetrated from the outside. When the brain is penetrated from the outside (e.g., a bullet wound), the injury is called an open head injury ("OHI"). Closed head injury ("CHI") usually results when the brain itself is not penetrated but is violently shaken within the skull. The injury may result in temporary or permanent impairment.

TBI can produce symptoms that vary greatly depending upon the extent and location of the brain injury. OHI are usually located at a focal point in the brain, resulting in specific problems. For example, the person may have trouble forming speech, but have no problem writing those words on paper. CHI causes damage to nerve fibers in the brain stem (the part that connects the spinal cord to the brain) through which all messages to and from the body are sent. Consequently, CHI may cause multiple problems physically, intellectually, socially, emotionally, and vocationally.

TBI impairments are grouped into three major categories:

1. **Physical**, such as speech, vision, hearing, and other sensory impairments; headaches; lack of coordination; spasticity of muscles; paralysis of one or both sides; and seizure disorders. The two most common are the potential for seizures and decreased tolerance for alcohol and drugs.
2. **Cognitive**, such as memory deficits, short and long term; concentration; slowness of thinking; attention; perception; diminished communication, reading and writing skills, planning; sequencing; and judgment. Cognitive deficits are more troublesome than physical deficits in rehabilitation.
3. **Psycho-Social-Behavioral-Emotion**, such as fatigue, mood swings, denial, self-centeredness, anxiety, depression, lowered self-esteem, sexual dysfunction, restlessness, lack of motivation, inability to self-monitor, difficulty with emotional control, inability to cope, agitation, excessive laughing or crying, and difficulty relating to others. A combination of psychosocial impairments reflects a changed personality. Impairments can occur in any combination of the categories listed above and with varying degrees of severity, which makes TBI a very pervasive problem.

People with TBI are generally intellectually intact adults and children who have problems with memory, attention, etc. Therefore, communicating with them in a manner that respects their individuality and competence is critical. However, because of difficulties with memory and information processing speed, it is best to always check to make sure that what you're saying is what the person is perceiving and understanding. You may also suggest that information that has to be remembered be written down, or you can summarize your meetings in a follow-up letter.

Transient Incapacity

The CV should remember that capacity is not necessarily static. A change in the environment may affect capacity, or the individual's skill may improve with treatment, with training, and with greater exposure to a particular type of situation or with the passage of time.

Capacity is also an interactive concept influenced by the demands of the environment as well as the skills of the individual. For example, two persons may possess the same level

of ability, but the living arrangements of one may require more self-reliance or their finances may be more difficult to manage. The presence or absence of sources of social support such as relatives, friends, or supportive agencies may enhance or frustrate the individual's ability to function and create greater or lesser demand for self-management skills. Thus, one person may meet the standard of "able to care for self," or "able to care for property," while another person with the same level of ability may not meet the standard.¹

Reversible symptoms of incapacity may be caused by dehydration, infection, or by adverse reactions to medications. Relatively benign drugs may have adverse effects in some elderly patients. A helpful and informative booklet entitled *Medication Awareness Handbook for Older Adults* has been published by the Northwest Regional Council, Northwest Washington's Area Agency on Aging, in Bellingham. Requests for the publication can be made at www.nwrcwa.org or by calling (360) 676-6749 or (800) 585-6749.

¹ Stephen J. Anserer, *Determining Competency in Guardianship Proceedings*, American Bar Association Division for Public Services 23 (1990). Reprinted with permission.

CHAPTER IV PROFESSIONAL EVALUATION

Obtaining a Professional Evaluation

In most cases, when a petition for guardianship/conservatorship has been filed and the court has appointed a Court Visitor (“CV”), the court will also order a professional evaluation of the respondent. *See* RCW 11.130.290 and RCW 11.130.390.

RCW 11.130.290 and 11.130.390 require the CV to obtain a professional evaluation from a licensed physician, a licensed psychologist, a licensed advanced registered nurse practitioner, or a licensed physician assistant (the “examiner”). The examiner must not have a conflict of interest or be advantaged or disadvantaged by a decision to grant a guardianship/conservatorship. Care should be taken to verify that the examiner signing the report has the required credentials.

If the respondent opposes the examiner chosen by the CV, the CV shall obtain a professional evaluation from an examiner chosen by the respondent. RCW 11.130.290 and RCW 11.130.390. After receiving an evaluation from the examiner chosen by the respondent, the CV may obtain a supplemental evaluation from a different examiner.

Note: A professional evaluation is *not* required in minor guardianships/conservatorships and in adult conservatorships where the adult is missing, detained, or unable to return to the United States. RCW 11.130.390(5).

If the respondent declines to participate in the professional evaluation, the court may proceed with the hearing on the guardianship/conservatorship if the court finds that it has sufficient information to determine the respondent’s needs and abilities without the evaluation. RCW 11.130.290(4) and 11.130.390(4).

Mandatory Topics for Professional Evaluation

RCW 11.130.290(3) and RCW 11.130.390(3) identify the following issues or topics that the professional evaluation must address in a petition for guardianship/conservatorship of an adult:

1. The name, address, education, and experience of the examiner;
2. A description of the nature, type, and extent of the respondent’s cognitive and functional abilities and limitations. [When under a petition for conservatorship, it shall include the abilities and limitations with regard to the management of the respondent’s property and financial affairs.];
3. An evaluation of the respondent’s mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

4. A prognosis for improvement and recommendation for the appropriate treatment, support, or habilitation plan;
5. A description of the respondent's current medications, and the effect of the medications on the respondent's cognitive and functional abilities;
6. Identification of persons with whom the examiner has met or spoken regarding the respondent; and
7. The date of the examination(s) of the respondent.

Patient/Client Privilege in Guardianship/Conservatorship Proceeding

The UGA does not specifically create an exception to physician/patient privilege like the now repealed RCW 11.88.045 and RCW 11.88.090 did; however, as mentioned above, a respondent can decline to participate in a professional evaluation. RCW 11.130.290(4) and 11.130.390(4).

The examiner may be hesitant to release medical information to the CV because of the fear of violation of the federal law governing confidentiality of medical records. Health Insurance Portability and Accountability Act, 45 CFR Part 160 and 164, otherwise known as HIPAA. Under RCW 11.130.290 and RCW 11.130.390, the court shall order an evaluation, so theoretically the order appointing the CV should provide some authority for the CV to obtain the respondent's protected health care information.

Time Frame for Professional Evaluation

When the appointment of a **guardian** is being sought, the examiner who prepares the professional evaluation must provide the evaluation to the CV within thirty (30) days of the examination of the respondent. RCW 11.130.290(3). Then the CV shall file the evaluation in a *sealed* record with the court. *Id.*

When the appointment of a **conservator** is being sought, RCW 11.130.390(3) only provides that an evaluation shall be *promptly* provided to the CV and the CV must then file the report in a *sealed* record with the court.

If these requirements are not satisfied, the court will likely reject the professional evaluation and the hearing on the petition seeking the appointment of a guardian/conservator may be delayed. Upon receipt of a professional evaluation, the CV should always check to confirm that the report meets important statutory requirements.

Including the Examiner's Curriculum Vitae

The most efficient way to secure information about the examiner's background and experience is to request that the examiner include with the professional evaluation a curriculum vitae or resume.

Level of Detail of Report

It is important for the CV to consider whether the evaluation as furnished contains all the mandated information and will be of assistance to the court and parties. If the evaluation is not sufficiently detailed or informative, it is appropriate for the CV to ask the examiner to supplement the evaluation.

Among other things, it is helpful that the evaluation specifies whether the examiner is the respondent's treating physician. It is also helpful to summarize the history of the relationship between the examiner and the respondent, and for the examiner to include references to or copies of the opinions provided by any specialists (such as psychiatrists, physical or occupational therapists, etc.) who have treated the respondent.

An effective professional evaluation should identify the diagnosed conditions, diseases, or disabilities that affect the respondent. The evaluation should also contain information about the respondent's symptoms sufficient to answer basic questions that the court and parties may have, including:

1. What are the symptoms manifested by the respondent and when did those symptoms first appear?
2. Was there a single precipitating event, or have the symptoms progressively worsened?
3. Are the symptoms present constantly or do they appear on a sporadic basis?
4. To what extent are the symptoms of cognitive decline caused by reversible factors, such as:
 - a. **Medication (or a Lack of Medication or a Need to Adjust Medication).** Some medications can cause lethargy, confusion, forgetfulness, uncontrollable body movements, and other symptoms. In some cases, the respondent may not have been complying with the prescribed medication regime, resulting in a reappearance or exacerbation of symptoms. In other cases, medications may simply need to be adjusted. Sometimes a change in the medication regime may result in a marked improvement in the respondent's symptoms and ability to function;

- b. **Inadequate Nutrition and/or Hydration.** Inadequate nutrition and hydration can cause confusion, forgetfulness, hair loss, agitation, impaired reasoning, and other symptoms. A lack of vitamins or certain minerals can cause severe cognitive and memory impairment or lead to symptoms that may resemble severe apathy and depression. When balance is restored, cognitive functioning may improve;
- c. **Mental Illness.** For example, depression can cause insomnia, psycho-motor agitation, fatigue, diminished ability to think or concentrate, indecisiveness, and other symptoms; and
- d. **Socioeconomic Factors, Abuse, and Abandonment.** Abuse, physical, sexual, or emotional, can cause a person to act fearfully, become withdrawn, non-verbal, indecisive, dependent, and passive. In addition to physical abuse, abuse can also include withholding medication or overmedicating an individual, isolating an individual, or depriving an individual of opportunities to socialize and have human contact.

The report should also discuss the prognosis for the respondent and answer questions such as:

1. What is the projected or anticipated duration of the disability or disorder?
2. Are the symptoms expected to remain constant over time?
3. Is the disability or disorder likely to become progressively worse? If so, what are the anticipated rate and the projected long-term impact on the respondent's functional capacity?
4. In the alternative, is the disability or disorder likely to improve over time? If so, what are the anticipated rate and the projected long-term impact on the respondent's functional capacity?
5. What is the anticipated course of future treatment?

Practice Tip

If a recent chart note or specialist report contains a thorough patient history and detailed medical summary, it can be helpful to attach the chart notes as an exhibit to the professional evaluation. This applies to printed medication lists as well. In such cases, the examiner can simply write "see chart note" on the relevant sections of the report form. In many cases, this will result in more details and context than short handwritten replies on the form.

Securing the Report in a Timely Manner

There are times when the examiner fails to provide the professional evaluation in a timely manner. In order to avoid this situation, the CV should:

1. Immediately after the CV is appointed, the CV should ensure that care providers, family members, or others make arrangements for the respondent to visit with an examiner;
2. Promptly send the examiner a respectful letter describing the guardianship/conservatorship process, stressing the critical importance of the professional evaluation, and requesting the professional prepare the evaluation;
3. Provide a deadline for furnishing the evaluation well in advance of the scheduled hearing, since the CV report should be circulated and filed at least 15 days prior to the hearing on the petition seeking appointment of a guardian/conservator;
4. Send a form for the examiner to fill out so that the evaluation will cover each of the topics required by the UGA. Model professional evaluations will be available online and can be downloaded and printed with the caption for the guardianship/conservatorship and sent to the examiner; and
5. Check in with the examiner's office before sending the letter and professional evaluation form and maintain contact with their office.

The model form for King County can be found at: <https://www.kingcounty.gov/courts/superior-court/ex-parte-probate/guardianship-forms.aspx>

Flexibility in Arranging for Examination

There are also occasions when the respondent is unable or unwilling to leave their home or to visit an examiner's office. Under these circumstances, the CV may contact any number of clinics and agencies that offer programs through which an examiner will visit the respondent at their home or at locations other than a medical office or clinic.

Payment for Examinations

At times (particularly when the examination is not covered by insurance), the examiner may request payment for conducting the examination. The CV should very clearly inform the examiner that the CV is not personally responsible for the costs of the examination. Arrangements for payment can either be made by others (including a care facility or family member) or the CV can raise the issue with the court through a properly filed and served petition for instructions.

Compelling the Respondent to Attend the Examination

Occasionally, a respondent may refuse to attend an examination arranged by the CV for the purpose of securing the professional evaluation.

As noted above, pursuant to RCW 11.130.290(4) and RCW 11.130.390(4), the court may proceed with the hearing to appoint a guardian/conservator if the court finds there is sufficient information to determine the respondent's needs and abilities without a professional evaluation.

If a court finds a professional evaluation is needed, a CV may seek a court order compelling the individual to attend the examination. Under these circumstances, the best practice may require seeking the appointment of counsel for the resisting respondent.

Civil Rule (CR) 35(a)(1) provides in pertinent part that:

When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Sealing the Report to Protect Privacy

Pursuant to RCW 11.130.290(3) and RCW 11.130.390(3), once the evaluation is received by the CV, the CV shall file the report in a **sealed** record with the court. The professional evaluation may contain highly sensitive information that should be protected from the public. GR 22(f) states that the professional evaluation will be treated as a "Personal Health Care Record" and be automatically sealed by the clerk when filed with a sealing cover sheet. (The cover sheets are available at each local Clerks' Office.)

GR 22(b)(3) defines "Personal Health Care Record" as any record or correspondence that contains health care information that . . . relates to the past, present, or future physical or mental health condition of an individual. Only the cover page will be available for public viewing. In addition, GR 31 requires that certain financial and other types of information be redacted from court filings unless necessary or otherwise ordered by the court. The parties to the guardianship/conservatorship action will have access to the sealed professional evaluation, but the general public will not. Different counties may use a variety of methods for filing documents under seal. The CV must check the relevant county's local rules and procedures for filing sealed documents.

Representative at Examination

There is case law holding that an individual subject to a medical examination as a result of involvement in legal proceedings has the right to record the examination and to have their attorney present during the examination. *Tietjen v. Department of Labor & Industries*, 13 Wn. App. 86, 534 P.2d 151 (1975). *See also* CR 35(a)(2) (“The party being examined may have a representative present at the examination, who may observe but not interfere with or obstruct the examination.”).

CHAPTER V FURTHER INVESTIGATION

In addition to interviewing the respondent, any Court Visitor (“CV”) appointed for an adult guardianship/conservatorship must interview the petitioner and the proposed guardian/conservator. RCW 11.130.280(5)(a), RCW 11.130.320(11)(c)(i), RCW 11.130.380(6)(a), and RCW 11.130.430(10)(e)(i).

The CV is appointed by the court to investigate the allegations in the petition and any other matter relating to the petition that the court orders. RCW 11.130.280(5)(d), RCW 11.130.320(11)(c)(iv), RCW 11.130.380(6)(d), RCW 11.130.430(10)(e)(iv), and RCW 11.130.605(6)(g). This investigation, along with the interview of the respondent and any professional evaluation, will provide the basis for the recommendations in the CV’s report.

This chapter covers the following:

1. Who must and should be interviewed by the appointed CV;
2. Explaining the CV role to interviewees;
3. Reviewing medical, financial, and school records;
4. Investigating self-care and independent living tasks;
5. Investigating the appropriateness of guardianship/conservatorship;
6. Statutory qualifications of a proposed guardian/conservator;
7. Priority and appropriateness of a proposed guardian/conservator;
8. Visiting respondent’s dwelling;
9. Determining the existence of an emergency;
10. Co-guardians and/or co-conservators;
11. Guardians and conservators for married couples; and
12. How the CV should document their investigation.

A. WHO MUST AND WHO SHOULD BE INTERVIEWED BY THE CV

In addition to interviewing the respondent, the appointed CV must interview the following individuals when investigating a petition for guardianship/conservatorship and/or emergency guardianship/emergency conservatorship of an adult:

1. Petitioner; and
2. Proposed guardian/conservator and/or emergency guardian/emergency conservator.

The CV is not statutorily required to interview the petitioner when investigating a petition for protective arrangement instead of guardianship/conservatorship, but it is hard to imagine a case where this would not be advisable and necessary to properly investigate the allegations in the petition.

The UGA requires that all petitions for appointment of a guardian/conservator (including an emergency guardian/conservator, or protective arrangement instead of guardianship/conservatorship) include the name and address of the respondent's spouse and adult children, or if they have none, the respondent's parent(s), sibling(s), or other nearest adult relative(s) who can be identified. RCW 11.130.270(2)(b), RCW 11.130.320(2)(b), RCW 11.130.365(2)(b), RCW 11.130.430(2)(b), and RCW 11.130.595(2).

The UGA also requires the petitioner to identify anyone the respondent has lived with and "shared household responsibilities with" for more than six of the last twelve months, and any adult step-children who the respondent actively parented while they were children and with whom they have had contact within the last two years. *Id.*

While there is no mandate to interview these individuals in the UGA, their inclusion in the petition suggests that they are relevant sources from which the CV should seek information. Often, these parties can be a vital source of information about the respondent's abilities and needs. How many of these individuals the CV interviews may depend on the complexity of the case and the degree to which agreement or disagreement exists within the family about the need for guardianship/conservatorship and who should serve as the respondent's guardian/conservator. As a safe rule of thumb, if the CV opts not to interview these individuals, it still may be helpful to identify them in the report and indicate why those interviews were deemed unnecessary.

All petitions for appointment of a guardian/conservator, emergency guardian/conservator, or protective arrangement instead of guardianship/conservatorship must also include the names and contact information of:

1. A person responsible for care or custody of the respondent;
2. Any attorney currently representing the respondent;
3. Any representative payee appointed by the Social Security Administration for the respondent;

4. A guardian or conservator acting for the respondent in this state or in another jurisdiction;
5. A trustee or custodian of a trust or custodianship of which the respondent is a beneficiary;
6. Any fiduciary for the respondent appointed by the Department of Veterans' Affairs;
7. An agent designated under a power of attorney for health care in which the respondent is identified as the principal;
8. An agent designated under a power of attorney for finances in which the respondent is identified as the principal;
9. A person nominated as guardian by the respondent;
10. A person nominated as guardian by the respondent's parent or spouse or domestic partner in a will or other signed record; and
11. A person who is known to have routinely assisted the respondent with decision making during the six months immediately before the filing of the petition.

Again, the UGA does not require the CV to interview any or all of these individuals, but their expressed identification in the petition suggests the UGA contemplates these individuals being relevant to the investigation. In many cases, the same individual may be filling several of these roles, and they may overlap with the identified family members. Again, if the CV opts not to interview these individuals, it may be best to still identify them in the report and indicate why those interviews were deemed unnecessary.

In many guardianships/conservatorships, an interview of the above individuals will provide more than enough information to allow a CV to draft their report and make their recommendations. However, in some cases, it may also be useful to consider interviewing additional individuals:

1. In cases where the adult is a young adult with disabilities who is still in high school, interviewing the respondent's teacher(s) or advisor(s) can be very useful;
2. In cases where family lives far away, local long-time family friends and/or neighbors may have more of a sense of the current capacities and needs of the respondent;
3. For those involved in a religious community, clergy may be useful to contact; and
4. Financial planners, CPA, or other advisors may also have information about relevant issues.

Ideally, the CV would also interview those individuals that the respondent identifies as being good sources of information about their abilities and needs. This can help capture close friends who might fall outside the definitions of individuals required to be included in the petition. It might also capture individuals the petitioners are unaware of or whose relationship they define differently than the respondent.

B. EXPLAINING ROLE OF CV TO INTERVIEWEES

The UGA is silent about how the CV ought to explain their role to those other than the respondent. It would seem prudent for the CV to explain that they are appointed by the court to investigate the issues and are not employed by or representing any party. It is important that all parties understand that the CV only reports to the court and is not the ultimate decision-maker. It is important for individuals to understand that the CV's role is merely to conduct an investigation and to provide useful information to the court to help the court make an informed decision.

In prior case law, courts specifically found it improper for GALs to identify themselves as the “eyes and ears of the court.” *In re Guardianship of Stamm*, 121 Wn. App. 830, 91 P.3d 126 (2004). While this may not technically apply to a CV under the UGA, it is probably wise to stay away from this language and to be as clear as possible that the CV's report will be one source of information among many that the court will rely upon to make its decision.

It is also important to make sure that all people being interviewed understand that, while CV reports are filed under seal, they are shared with the respondent, the petitioner, and any other party granted access by the court. The CV cannot guarantee the confidentiality of materials shared with the CV as part of their investigation.

GALs operating under the old statute were governed by special court rules. While these have not been formally expanded to include CVs under the UGA yet, they are probably worth being mindful of as a guide. Such special rules made it clear that it is important for the GAL to inform all individuals contacted what the role of the GAL is and advise them that any information obtained may become part of the court record. GALR 2(k).

GALR 2(c-f) requires that the GAL to treat all individuals with respect, courtesy, fairness, and good faith; maintain independence, objectivity, and appearance of fairness; and to avoid any conflict of interest or even the appearance of a conflict of interest. Whether formally applicable to CVs or not, these are guidelines that should be followed by CVs in all of their interactions.

C. REVIEWING MEDICAL, FINANCIAL, AND SCHOOL RECORDS

The UGA mandates that whenever appointed under a petition for guardianship or emergency guardianship for an adult, an emergency conservatorship, or protective arrangement instead of guardianship, the CV is required to “obtain information from any physician or other person known to have treated, advised, or assessed the respondent's

relevant physical or mental condition.” RCW 11.130.280(5)(c), RCW 11.130.320(11)(c)(iii), RCW 11.130.430(10)(d)(iii), and RCW 11.130.650(6)(e). This information can be obtained by requesting medical records or through interviews.

Of particular use might be any mental capacity evaluation, lists of current medications, and ADL assessments. If the respondent is a resident or patient in a care facility, it may be useful for the CV to review other records, such as the social file, patient log, or care facility notes maintained in the respondent’s chart. If the medical situation of the respondent is particularly complex, the CV may feel it is necessary to have the medical records reviewed by professional third parties, such as mental health professionals or physicians. The CV should obtain court approval for a third-party review, particularly if a charge is anticipated for such a review.

A CV for a petition for conservatorship or protective arrangement instead of conservatorship must review relevant financial records. RCW 11.130.380(6)(b) and RCW 11.130.605(6)(f). This is a new requirement that did not exist under the prior statute. The easiest way to access financial records is to ask the respondent or petitioner to provide them. However, if the respondent refuses or is unable to provide them and/or the petitioner does not have access to them, the CV may need to request instructions from the court and/or subpoena power to get them.

In cases of younger respondents who are still in high school, getting a student’s Individual Education Plan (IEP) can be very useful. They often contain a good examination of the respondent’s skills and/or deficiencies.

D. INVESTIGATING SELF-CARE AND INDEPENDENT LIVING TASKS

The UGA requires that a CV appointed under a petition for guardianship or emergency guardianship include in their report a “summary of self-care and independent living tasks that the respondent can manage without assistance or with existing supports, could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making, and cannot manage.” RCW 11.130.280(6)(a) and RCW 11.130.320(11)(d)(i). A similar summary is required in CV reports for petitions for protective arrangements “[t]o the extent relevant to the order sought.” RCW 11.130.605(7)(a).

Information for the required summary will likely be obtained during the interview with the respondent and/or the professional evaluation, but the CV should supplement this with information learned from interviews of the petitioner, proposed guardian/conservator, and other third parties.

The UGA does not define the “self-care and independent living tasks,” and these are not terms of art that are consistently defined by service providers or professionals. Until these are better defined by case law and practice, the CV will need to use their best judgment to determine what they need to include.

It may be helpful to think of the self-care tasks as being somewhat equivalent to activities of daily living (ADLs) which is a widely understood term and includes:

1. Bathing and showering;
2. Choosing appropriate clothes and getting dressed;
3. Using the bathroom without assistance;
4. Walking, and getting in and out of furniture and baths; and
5. Eating meals independently.

It may also be helpful to think of independent living tasks as being roughly equivalent to instrumental activities of daily living (IADLs) which are often used to assess what assistance individuals who can still manage their own ADLs may need. Examples of IADLs include:

1. Managing a budget;
2. Using the ATM or writing checks;
3. Paying basic household bills on time;
4. Making and remembering to go to medical appointments;
5. Taking medications as prescribed;
6. Planning and preparing meals;
7. Performing basic housework;
8. Shopping – be it for groceries, clothing, or other necessities;
9. Using the telephone and computer as a means of communication;
10. Calling for assistance in case of fire or medical emergency;
11. Managing transportation – be it driving, hiring cabs/ride shares, or taking public transportation;
12. Managing a household in its entirety – including pet care, if the person has any pets, or care for other dependent family members;
13. Maintaining hobbies or interests; and

14. Socializing with friends, family, and peers.

Remember that simply being unable to independently manage ADLs or IADLs should not automatically necessitate a guardianship. Needing help with some areas of life when aging is relatively common. According to research, approximately 18% of adults over the age of 75 require assistance with one or more IADLs, while nearly 11% require ADL assistance.¹ Many younger adults with disabilities require assistance in these areas as well. In many cases, individuals who may not be able to independently manage these areas of their life may be able to arrange for informal or formal assistance. But the list of ADLs and IADLs can provide a useful checklist as the CV conducts interviews and asks which of these the respondent can manage independently, with assistance, or cannot manage.

E. INVESTIGATING THE APPROPRIATENESS OF GUARDIANSHIP AND LIMITATIONS

RCW 11.130.280(6) and RCW 11.130.320(11)(d)(ii) require that the CV appointed for a petition for guardianship or emergency guardianship include in their report:

a recommendation regarding the appropriateness of guardianship, including whether a protective arrangement instead of guardianship or other less restrictive alternative for meeting the respondent's needs is available; (i) If a guardianship is recommended, whether it should be full or limited; and (ii) If a limited guardianship is recommended, the powers to be granted to the guardian.

As a reminder, to appoint a **guardian**, RCW 11.130.265 provides that the court must find *by clear and convincing evidence* that:

1. The respondent lacks the ability to meet essential requirements for physical health, safety, or self-care, even with the use of appropriate supportive services, technological assistance, or supported decision making;
2. Appointment of a guardian is necessary to prevent significant risk of harm to the respondent's physical health, safety, or self-care; and
3. The respondent's identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative.

Information necessary to determine appropriate alternatives and limitations will be in large part obtained by the interview with the respondent and professional evaluation, but it should be a subject explored in each of the CV's interviews as appropriate. In order to provide the court with the best possible information, it is a good idea to ask all interviewees

¹ *QuickStats*: Percentage of Adults with Activity Limitations, by Age Group and Type of Limitation — National Health Interview Survey,† United States, 2014. MMWR Morb Mortal Wkly Rep 2016;65:14. DOI: http://dx.doi.org/10.15585/mmwr.mm6501a6external_icon.

about their experience regarding the respondent's recent decision-making and communication skills.

Example Questions: Decision - Making and Communication Skills

Describe how the respondent has been participating in recent medical appointments. Do they ask questions? Do they appear to be able to track the pros and cons of options? Do they remember information from one appointment to another? Are they able to come to a decision? How much do they rely on others? Have there been choices that needed to be delayed or were not made because of confusion on their part?

The CV might also ask interviewees about other complex decisions that the respondent might be able or unable to make—are decisions negatively impacted by short-term memory issues? Does the respondent exhibit the ability to weigh costs and benefits of choices or apply long-standing values and beliefs to new decisions?

Applying Guardianship Standard to Respondents

Sometimes an individual's ability to engage in complex thinking is retained while their short-term working memory is diminished. In a situation like this, a protective arrangement that cues the person or assists them in marshaling information for their own choices may be appropriate. Sometimes memory is intact but cognitive impairment limits their ability to make complex choices at all. In a situation like this, a guardianship where decision making is more fully delegated may be appropriate.

To the extent that guardianship is necessitated by communication issues, it is important to gather details such as what verbal ability the respondent maintains and whether they can consistently and successfully communicate by other means like blinking, squeezing hands, or pointing to answers.

If English is not the respondent's first language and the respondent has age-related cognitive impairment or a TBI, it may be possible that, even though the respondent mastered English at some point, they now communicate more effectively in their first language. In such situations, an interpreter may be necessary. It can also be useful to see if the respondent suffers from a hearing impairment and amplification is needed. Depending on what the CV learns on this front, it may be necessary to reinterview the respondent using information the CV has gathered from others to maximize the respondent's ability to understand and respond.

To establish whether the respondent is at significant risk of harm, the CV may want to question interviewees about dangers the respondent has faced in recent months. That might include asking about any falls, injuries related to self-neglect or carelessness, getting lost, interactions with the police, or other problems. Ask for specifics about what interviewees fear might happen and the basis for those fears.

Lastly, the CV must consider less restrictive options and ask interviewees about those options to have them help evaluate what might or might not work for the respondent.

If the CV believes that guardianship is going to be necessary, ask about what rights might be retained. Is the limitation on marriage necessary? Should the respondent retain the right to vote?

Be sure to ask interviewees what the respondent is capable of as well as what they are not capable of when it comes to decision making, communication, and protecting themselves so the CV can give an accurate and balanced report.

F. INVESTIGATING THE APPROPRIATENESS OF CONSERVATORSHIP AND LIMITATIONS

Under RCW 11.130.380(7)(a), a CV under a petition for conservatorship is required to include in his or her report a recommendation:

regarding the appropriateness of conservatorship, or whether a protective arrangement instead of conservatorship or other less restrictive alternatives for meeting the respondent's needs is available; (ii) If a conservatorship is recommended, whether it should be full or limited; (iii) If a limited conservatorship is recommended, the powers to be granted to the conservator, and the property that should be placed under the conservator's control; and (iv) If a conservatorship is recommended, the amount of the bond or other verified receipt needed under RCW 11.130.445 and 11.130.500.

As previously stated in Chapter I, to appoint a **conservator**, RCW 11.130.360 provides that the court must find **by clear and convincing evidence** that the adult is unable to manage property or financial affairs because:

1. There is a limitation on the adult's ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate supportive services, technological assistance, or supported decision making; or the adult is missing, detained, or unable to return to the United States;
2. Appointment is necessary to avoid harm to the adult or significant dissipation of the adult's property, or to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult or of an individual entitled to the adult's support; and
3. The adult's identified needs cannot be met by a protective arrangement instead of a conservatorship or other less restrictive alternatives.

In these cases, the court can only grant a conservator:

those powers necessitated by demonstrated limitations and needs of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish a full conservatorship if a limited conservatorship, protective arrangement instead of conservatorship, or other less restrictive alternative would meet the needs of the respondent.

RCW 11.130.360(3).

When it comes to conservatorships, finding that the respondent meets the legal standard to appoint a conservator will be based on the interview of the respondent and the professional evaluation. However, the CV will want to supplement those sources of information with the information gathered through the CV's interviews of other parties and review of supporting documentation.

The CV's evaluation of the respondent's ability to gather information, evaluate options, and communicate choices is going to be fairly similar to the one described above for guardianships; however, in these cases you will want to focus on the respondent's financial and legal lives.

The complexity of the respondent's assets may lead to different levels of needed skills. A respondent who is solvent but has limited income and assets may only need to pay regular monthly bills and balance a check book. A respondent with a large investment portfolio may need to understand investment risk, tax consequences, and be relied upon to take minimum distributions from retirement accounts.

A respondent dependent on public benefits may need to be able to understand the rules related to those benefits and how to report appropriately. Again, the respondent may need to rely upon daily money managers, CPAs, and financial advisors to help with tasks, explain options, and provide support.

For purposes of determining if an individual is missing, detained, or unable to return to the United States, the CV may need to gather police and court records and/or immigration records. It is important to note that an adult who resides in a long-term care facility, resides in another care setting, or is the subject of an involuntary commitment order is not considered missing or detained. RCW 11.130.360(5).

In determining if the appointment is necessary to "avoid harm" to the respondent, it is important to determine how any impairments are currently causing harm or putting the respondent at risk.

Example Questions: Financial Affairs

What do you know about the respondent's current capacity to track and do basic math? Their ability to understand or stick to a budget? How consistent they are about paying bills?

Example Questions: Risk of Vulnerability to Exploitation

Is the respondent making large gifts uncharacteristic of their long-term behavior that puts them at risk of not be able to meet their needs? Are they falling for internet scams or other fraud? Could they be easily manipulated into giving money to a stranger? Would they be able to determine if an advisor was stealing from them? In such cases, any less restrictive alternative would need to be protective enough to avoid these harms.

Example Questions: Risk of Failing to Manage Funds

Is the respondent behind in their rent and bills despite having funds? Have their utilities been cut or do they face possible risk of eviction or foreclosure? These risks are more easily addressed by a wider range of less restrictive alternatives which should be explored.

G. STATUTORY QUALIFICATIONS OF A PROPOSED GUARDIAN/ CONSERVATOR

A CV report must confirm that the proposed guardian/conservator is legally qualified to serve. Most of this information will come from the interview with the proposed guardian/conservator themselves and a review of their disclosures. Qualifications differ for lay persons versus professional guardians/conservators.

With regard to lay guardians or conservators, the UGA requires that they be at least 21 years of age or over the age of 18 if a parent serves for their child. RCW 11.130.090(1).

Lay guardians/conservators must have also completed the mandatory training prior to appointment. RCW 11.130.090(2). The court may defer successful completion of the training to a date no later than 90 days after appointment "if the petitioner requests expedited appointment due to emergent circumstances." RCW 11.130.090(2)(a). A standard interview with the proposed guardian/conservator should ensure the individual completed the training and feels comfortable with the responsibilities of a guardian/conservator.

Individual professional guardians/conservators must also be 21 years of age. RCW 11.130.090(1). Both professional individuals and corporations must meet any certification requirements established by the administrator for the courts with the exception that a financial institution subject to the jurisdiction of the department of financial institutions and authorized to exercise trust powers, and a federally chartered financial institution when authorized to do so, "may be appointed to act as a guardian or conservator of a person subject to guardianship, conservatorship, or both without having to meet the certification requirements established by the administrator for the courts." *Id.*

Out-of-state proposed guardians/conservators must designate a resident agent prior to appointment. RCW 11.130.090(1)(c).

Under RCW 11.130.085, before accepting appointment as a guardian/conservator, a person must disclose to the court whether the person has been convicted of any crime involving dishonesty, neglect, violence, or use of physical force; or other crimes relevant to the functions the individual would assume as guardian/conservator. Making sure this disclosure has occurred should be a part of any interview of a proposed guardian/conservator. The CV can also ask the proposed guardian/conservator to prepare and sign a declaration of proposed guardian/conservator, which would state all of the information required to determine that the proposed guardian/conservator is suitable to serve.

As a general rule, those crimes cited above disqualify anyone, lay or professional, from serving as a guardian/conservator. RCW 11.130.090(1)(b). However, a court may, upon consideration of the facts, find that a relative convicted of such crime is qualified to serve as a guardian/conservator. RCW 11.130.090(1)(b)(ii). The UGA is silent about what those factors might be, but it is probably safe to assume that factors could include the age of the conviction and history of rehabilitation. These factors should be explored when a family member who would otherwise appear to be a good option discloses the existence of a conviction for one of the disqualifying crimes.

The UGA also says that no one is statutorily qualified to serve as a guardian/conservator if the court finds them “otherwise unsuitable.” RCW 11.130.090(1)(e). RCW 11.130.085 mandates that any proposed guardian/conservator should also disclose if they have:

1. Been a debtor in a bankruptcy, insolvency, or receivership proceeding;
2. Been convicted of any felony; or
3. Any court finding of a breach of fiduciary duty or a violation of any state’s consumer protection act, or violation of any other statute proscribing unfair or deceptive acts or practices in the conduct of any business.

The UGA does not state that these render a proposed guardian/conservator unsuitable in and of themselves, but their inclusion in the required disclosures suggests that they should be brought to the court’s attention as part of the investigation and addressed in any recommendations about the proposed guardian/conservator.

It may be worth considering as part of this analysis the disproportional impact of the criminal justice system on families of color and the racial wealth gap. The CV should fully explore these issues but also ensure the court has full information about them so this does not result in respondents of color not being able to select family members as guardians/conservators.

RCW 11.130.305(4) and RCW 11.130.415(4) state that a person that provides paid services to the respondent, or is employed by or is a close family member of an individual who provides paid services to the respondent, may not be appointed as guardian/conservator unless:

1. The individual is related to the respondent by blood, marriage, or adoption; or
2. The court finds by clear and convincing evidence that the person is the best-qualified person available for the appointment and the appointment is in the best interest of the respondent.

Similarly, the owner, operator, or employee of a long-term care facility at which the respondent is receiving care may not be appointed as guardian/conservator unless the owner, operator, or employee is related to the respondent by blood, marriage, or adoption. RCW 11.130.305(5) and RCW 11.130.415(5).

H. PRIORITY AND APPROPRIATENESS OF GUARDIAN/CONSERVATOR

RCW 11.130.305 prioritizes who should be appointed as the **guardian** of an adult. Priority is as follows:

1. A guardian, other than a temporary or emergency guardian, currently acting for the respondent in another jurisdiction;
2. A person nominated as guardian by the respondent, including the respondent's most recent nomination made in a power of attorney;
3. An agent appointed by the respondent under a power of attorney for health care;
4. A spouse or domestic partner of the respondent;
5. A relative or other individual who has shown special care and concern for the respondent; and
6. A certified professional guardian/conservator.

RCW 11.130.415 lays out a similar ranking of priority for who should be appointed as a **conservator** for an adult. That order is:

1. A conservator, other than a temporary or emergency conservator, currently acting for the respondent in another jurisdiction;
2. A person nominated as conservator by the respondent, including the respondent's most recent nomination made in a power of attorney for finances;

3. An agent appointed by the respondent to manage the respondent's property under a power of attorney for finances;
4. A spouse or domestic partner of the respondent;
5. A relative or other individual who has shown special care and concern for the respondent; and
6. A certified professional guardian/conservator or other entity the court determines is suitable.

In both cases, the UGA addresses circumstances where more than one individual falls within each category. In such cases, the preference would be whoever is "best qualified." RCW 11.130.305(2) and RCW 11.130.415(2).

In determining the best-qualified person, the UGA calls on the court to consider:

1. The person's relationship with the respondent;
2. The person's skills;
3. The expressed wishes of the respondent;
4. The extent to which the person and the respondent have similar values and preferences; and
5. The likelihood the person will be able to perform the duties of a guardian/conservator successfully.

The court is also empowered to act in "the best interest of the respondent" by declining to appoint a person having priority under RCW 11.130.305 and RCW 11.130.415, and instead appointing a person having a lower priority or no priority. RCW 11.130.350(3) and RCW 11.130.415(3).

In order to provide the court with the information necessary to make an assessment about the respondent's best interest in appointing a guardian/conservator, the CV will want to consider the following about the potential candidate:

1. Where the candidate falls in the order of statutory priority;
2. How long they have known the respondent;
3. How frequently they have visited or communicated in recent years;
4. Their own and others' assessment of how aligned their values are with the respondent's values; and

5. What professional or personal skills or experience they would bring to the job.

To determine the candidate's likelihood of performing the duties of a guardian/conservator successfully, it may be useful to go over those duties and also to explore their understanding and willingness to engage in appropriate substitute decision making and to comply with fiduciary duties.

While the specific duties of a **guardian** may be limited or further defined by order, the following are some key duties the CV should ensure a proposed guardian is willing and able to perform:

1. Make medical choices where the respondent cannot provide informed consent;
2. Arrange safe housing, nutrition, and basic hygiene care for the respondent;
3. Regularly visit the respondent to know their needs and wishes;
4. Facilitate and support the respondent's relationships with others;
5. Care for the respondent's personal property, pets, and other resources;
6. Arrange appropriate education and recreational opportunities; and
7. Inform the court of any significant changes in the respondent's life and make necessary annual reports to the court.

See RCW 11.130.325; RCW 11.130.330; RCW 11.130.340, and RCW 11.130.345.

It is also important that the proposed guardian know the limitations in RCW 11.130.335, which prohibit the guardian from doing the following things without further court order:

1. Involuntarily commit the respondent or force them to live somewhere against their wishes;
2. Consent to certain psychiatric surgeries, treatments, or medications; and
3. Restrict respondent from social contact with people of their choosing.

Similarly, the CV should make sure that any proposed **conservator** is willing and able to perform those duties contained in RCW 11.130.505-530, which are:

1. Prudently invest and manage the respondent's assets;
2. Create a budget and pay the respondent's bills and expenses;

3. Manage the respondent's insurance needs;
4. Complete necessary tax returns for the respondent;
5. Apply for public benefits where applicable and maintain eligibility; and
6. Create regular reports and accountings for the court.

It is important that the proposed conservator also be aware of all of the actions contained in RCW 11.130.435 that require specific court authorization, including, but not limited to:

1. Selling the respondent's real estate;
2. Changing the respondent's estate planning or beneficiaries; or
3. Making gifts (except gifts of de minimis value).

For both guardians and conservators, the level of skill needed may vary greatly depending on the complexity of the respondent's needs and assets. It is also possible for the proposed guardian/conservator to employ professionals to assist and advise them as long as they would remain the ultimate decision makers. RCW 11.130.125. If the issues involved are complex, asking how they would go about getting necessary assistance may be useful. It can also be useful to determine if they plan to retain counsel to provide advice on their duties and obligations and to assist them in reporting.

Fiduciary Requirements of All Guardians and Conservators

As important as expertise and skills are, it is equally important to make sure that the proposed guardian/conservator understands what would be expected of them as fiduciaries.

All appointed guardians/conservators are fiduciaries. RCW 11.130.325 and RCW 11.130.505. A guardian owes "the highest duty of good faith and care" to the respondent. RCW 11.130.325. A guardian "shall not substitute his or her moral or religious values, opinions, or philosophical beliefs" for those of the respondent. RCW 11.130.325 and RCW 11.130.505. A conservator owes "duties of prudence and loyalty to the individual subject to conservatorship." RCW 11.130.505.

The guardian/conservator is required to "promote the self-determination of the adult and, to the extent reasonably feasible, encourage the adult to participate in decisions, act on the adult's own behalf, and develop or regain the capacity to manage the individual's personal affairs." RCW 11.130.325 and RCW 11.130.505. The UGA provides guidance on how a guardian/conservator is supposed to consider the express interests of the respondent and how they should make decisions when they cannot determine those wishes. RCW 11.130.505(2)-(5) and 11.130.325 (4)-(5). It can be useful to ask the proposed guardian/conservator how they would make difficult choices.

If the CV is considering recommending a professional guardian/conservator, it is important to confirm that the proposed professional is properly certified. It may also be useful to see their disciplinary records (if any). While it is not uncommon for certified professionals to face a reprimand for a late report or failure to timely report on their CLEs, and such discipline should not preclude appointment, these issues may be worth noting and asking about in the interview.

Example Questions: Proposed Professional Guardian/Conservator

Has the proposed guardian/conservator met the respondent? What is their experience with similar cases? How often would they be able to visit and what do they anticipate their first steps would be?

Professionals come with a wide range of skill sets, experiences, and communication styles. Making sure that they are a good fit to the respondent's needs is just as important as ensuring a family member or friend would be a good fit.

The process of finding a suitable professional guardian/conservator to recommend can be challenging for a CV, particularly if the respondent has little or no assets or income, difficult family dynamics, or challenging behaviors. It may also become necessary to call professional guardians/conservators and request that they take the case without charge or with charging only what is allowed by DSHS. Many professional agencies have established a level of charitable work they can provide to the industry. If no suitable guardian/conservator can be found, notify the court of the dilemma and request instructions.

The CV also has the option of investigating the appointment of a public guardian/conservator for the respondent. However, the Office of the Public Guardianship and Conservatorship may or may not be accepting new cases depending upon the funding of the office by the state legislature at any given time.

If, after investigation, the CV concludes that the respondent would best be served by the appointment of a professional guardian/conservator with whom the CV has had previous dealings, the CV should disclose this information to the court and parties.

J. VISITING THE RESPONDENT'S DWELLING

If the CV is required to visit the respondent's dwelling, the CV will want to talk to the respondent and petitioner early in the case about how best to arrange that. It is also a good idea to ask the petitioner about the general conditions of the house so you can take necessary precautions, such as using a respirator if there is a great deal of fecal contamination. If there are issues with hoarding, it is a good idea to bring sturdy shoes. It is also worth asking if there are weapons in the home.

Example Questions and Observations: Respondent's Dwelling

While the UGA is not specific as to what should be explored in these dwellings, relevant areas of inquiry would seem to include: Is the respondent keeping the house clear enough that there is easy ingress and egress in case of an emergency? Does there appear to be food in the home and is that food fresh and being stored safely? Are medications stored in a safe and organized way that would support them being taken safely? Are any medications expired? Are there large quantities of unopened mail that suggests that they may not be checking it regularly for bills? Is there a large quantity of unopened packages that might be suggestive of manic purchasing? Is the home clean enough to be safe or is there sufficient pet waste, mold, or dirt that it might be a safety hazard? Does the CV see evidence that their financial records are being stored in an organized and rational way? Does the CV see unsecured guns or other items of concern?

If the CV is using the state of the dwelling as a basis for your findings, the CV may wish to document what they observe with digital photos.

K. DETERMINING THE EXISTENCE OF AN EMERGENCY

When appointed under a petition for emergency adult guardianship or emergency conservatorship, the CV must also include in their report information to allow the court to determine if a true emergency exists.

For **guardianships**, under RCW 11.130.320, that would include:

1. A detailed summary of the alleged emergency 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;
2. A statement as to whether the alleged emergency and the respondent's alleged needs are likely to require an extension of 60 days as authorized under this section; and
3. The specific powers to be granted to the emergency guardian and how the specific powers will address the alleged emergency and the respondent's alleged need.

For **conservatorships**, under RCW 11.130.430, that would include:

1. A detailed summary of the alleged emergency and the substantial and irreparable harm to the respondent's property or finances that is likely to be prevented by the appointment of an emergency conservator;
2. A statement as to whether the alleged emergency and the respondent's alleged needs are likely to require an extension of 60 days as authorized under this section; and

3. The specific powers to be granted to the emergency conservator and how the specific powers will address the alleged emergency and the respondent's alleged need.

L. CO-GUARDIANS AND CO-CONSERVATORS

RCW 11.130.050 allows for the appointment of co-guardians and/or co-conservators. In the case of such appointments, absent different directions in the order, "co-guardians or co-conservators shall make decisions jointly." RCW 11.130.050.

If the petition proposes co-guardians/co-conservators or if the CV's investigation leads the CV to believe that this is the best option for the respondent, the CV's report should include an analysis of whether the parties are likely to work well together. In general, "co" appointments should be limited to cases where both proposed guardians/conservators are equally appropriate, get along well, and have a demonstrated history of making decisions well as a team.

M. GUARDIANS AND CONSERVATORS FOR SPOUSES/DOMESTIC PARTNERS

Guardianship/conservatorship petitions for married couples or domestic partners may sometimes be filed simultaneously and the court may appoint one CV to serve for both individuals or separate CVs for each. Petitions may also ask that a single guardian/conservator be appointed as guardian/conservator for both of the spouses or domestic partners.

The CV should consider the conflicts of interest that may exist or may arise between spouses or between domestic partners and the ability of one guardian/conservator to advocate for competing interests.

The Certified Professional Guardian Board issued Ethics Advisory Opinion 2002-03, which is summarized by the Board as follows:

The appointment of the same Guardian to act simultaneously in the best interests of both spouses in a marital relationship, domestic partners, or persons in a meretricious relationship presents, at a minimum, the appearance of a potential conflict of interest, and should only be done with great caution by a Guardian. If the parties are not married, appellate case decisions have implied and applied certain community property principles to such relationships and legal presumptions may apply. The issues are complex and the circumstances dynamic. Often, actual conflicts may not become apparent until it is too late to seek instruction from the court or for the Guardian to take remedial action. The advice of counsel should be sought prior to accepting such an appointment.

While a court may consider a well-supported petition for a dual Guardian, endorsed by the GAL for one or each of the AIPs, the circumstances upon which the decision was based could change quickly or unknowingly and present a conflict of interest necessitating the removal of the dual Guardian from both cases and two new independent Guardians being appointed. The latter action would foreseeably result in significant additional costs to the estate of the incapacitated person and potentially to the retiring Guardian as well. Only in well-justified cases and after a hearing supported by recommendations of the Guardians ad Litem for each of the alleged incapacitated persons, and assurance that there would be only de minimus conflicts if any, should a Guardian accept such an appointment.

While this opinion uses the language of the old statute, the analysis would appear relatively unchanged with the UGA and is a good summary of a list of considerations for a CV to consider when making their recommendations.

N. HOW TO DOCUMENT THE CV'S INVESTIGATION

The CV should try to take good notes during all interviews, dwelling visits, and document reviews so that they can access this information while drafting their reports and in answering the court's questions throughout the legal process. These notes may be required to be shared with the parties so making sure they are legible and use professional language is important.

Parties in these cases are often emotional and may not be focused on the issues most relevant to the recommendations that a CV needs to make. As a result, interviews can tend to go off on tangents or cover items in a seemingly random order. It is recommended to use checklists during interviews to help conversations flow naturally and allow parties to share what is most important to them. Checklists help ensure everything that needs to be covered has been addressed. The following checklists are possible starting points for the CV to use, although the CV should feel free to modify them to fit the CV's own needs and style.

O. CHECKLIST OF QUESTIONS FOR A POTENTIAL GUARDIAN/ CONSERVATOR

General Questions

1. Have you had any prior contact with the respondent?
2. Based on your prior contact, how would you propose to meet the needs of the respondent?
3. What other issues do you believe need to be addressed?
4. Do you believe that you are the right guardian/conservator for this respondent? If not, is there someone else you would recommend?

5. If the CV does not recommend that a guardian/conservator be appointed, is there another less restrictive role that could meet the needs of the respondent? (power of attorney, representative payee, trust, protective arrangement, or supported decision making agreement)
6. If you do not feel that you are qualified to act as guardian and conservator of the respondent, can you fill one of these roles?
7. If you are only qualified to fill one of these roles but the CV recommends that both a guardian and conservator should be appointed, who should fill the other role? How would you work with that person?
8. How would you involve the respondent in decision making?
9. What would be your recourse if you believed a particular decision was essential, but the respondent refused to accept your decision?

**Additional Questions Specifically for a
Lay (Non-Certified) Guardian/Conservator**

1. If you were named in the petition, why were you named? (Be sure the individual understands that the CV is under no obligation to recommend the proposed guardian/conservator, even if they are the petitioner.)
2. Do you agree with the summary of the respondent's needs as compiled by the CV?
3. Are you familiar with the duties of a guardian/conservator?
4. Are you prepared to make a personal care plan, follow through on it, and report to the court on a regular basis for as long as you are the guardian?
5. What steps would you take to ensure the decisions you make are independent decisions, free of influence from family members, friends, or other "well-meaning" persons?
6. Do you understand that a guardian/conservator does not have the authority to decide where a respondent lives (*i.e.*, you cannot put a respondent in a nursing home if the respondent does not want to go there)?
7. Do you have special skills or expertise that would be useful in meeting the needs of the respondent in your role as guardian/conservator (*i.e.*, nursing skills, social work, accounting skills)?

8. Do you know what the “substituted judgment standard” is? Can you make choices for the respondent using the substituted judgment standard rather than on the basis of your own values, even if your values are in conflict with the standard?
9. Do you have the energy and resources to meet the needs of the respondent?
10. Do you expect to be paid for your services? If yes, how much?
11. Are you the respondent’s caregiver? Have you considered caregiver burnout? How would you meet the respondent’s needs if you burn out?
12. Have you ever been convicted of a crime?
13. Have you ever applied for a bond and been refused? Do you reside in, own property in, and/or have an agent in Washington State?
14. Have you ever filed for bankruptcy?
15. Have you ever been sued for breach of a fiduciary duty?
16. Have you completed the required training for lay guardians/conservators?
17. Do you understand that a conservator is required to report to the court and account for all use of the respondent’s resources?

**Additional Questions Specifically for a
Certified Professional Guardian/Conservator**

1. Does your agency have a general philosophy that you apply in acting as guardian/conservator? If so, how would that philosophy apply to this respondent?
2. Is your staff sufficient to meet the needs of this respondent?
3. What is the structure of your organization?
4. How would you be contacted in event of an emergency?
5. What is the company’s fee schedule? What is the estimate of the fees you would charge during the first 90 days, the first year, and in subsequent years for this guardianship/conservatorship?
6. If called upon to work with family members as co-guardians/co-conservators, how should the court order define the duties and obligations of each co-guardian/co-conservator?

7. Is your certification current and have you ever had a disciplinary action filed against you?
8. How often are reports of transactions sent out?
9. How do you assist individuals who need help finding resources for medical, therapeutic, educational, personal care, or other services related to disabilities?
10. For a beneficiary with limited family involvement, what is your practice for staying in touch with the client?
11. If there is a need to pay for home care: How would you find someone to fill this role? What is it likely to cost? How do you arrange to pay the person? Are there government programs for this?
12. How do you manage cases that are, say, 50 miles from your office? 100 miles? In another state? What geographical areas do you serve? How would you communicate with the respondent? Are you in close enough proximity to meet with the respondent at least monthly?
13. What is your knowledge of: disabilities, Medicare, Medicaid, and SSI?
14. Who represents you in court? Are you audited? If so, is the audit performed by an independent auditor?
15. If the respondent's family or friends are dissatisfied with how the guardianship/conservatorship is being handled, who would they contact? What if they remain dissatisfied? If they ask you to resign, what will you do?
16. What services other than managing guardianships/conservatorships does your organization provide?
17. Are you required by the CPG Board to carry errors and omissions insurance?
18. Do you have errors and omissions insurance? If so, what are the limits of the insurance policy?

**CHAPTER VI
SPECIAL SITUATIONS: VULNERABLE ADULTS**

A. PROTECTION OF VULNERABLE ADULTS

RCW 74.34 (the “vulnerable adult statute”) is intended to protect vulnerable adults from abuse, neglect, financial exploitation, or abandonment.

The need for this statute is based upon the legislature’s finding in RCW 74.34.005 that:

1. Vulnerable adults may be subjected to abuse, neglect, financial exploitation, or abandonment;
2. Vulnerable adults may be homebound or otherwise unable to represent themselves or to obtain the relief available through the courts;
3. Vulnerable adults may lack the ability to obtain necessary services due to lack of capacity to consent; and
4. Vulnerable adults may have health problems that place them in a dependent position.

A vulnerable adult is defined in RCW 74.34.020(21) as a person who:

1. Is 60 years of age or older who has the functional, mental, or physical inability to care for themselves;
2. Is subject to a guardianship under RCW 11.130.265 or an adult subject to a conservatorship under RCW 11.130.360;
3. Has a developmental disability as defined under RCW 71A.10.020;
4. Is admitted to any facility;
5. Is receiving services from home health, hospice, or home care agencies licensed or required to be licensed under RCW 70.127;
6. Is receiving services from an individual provider; or
7. Self-directs their own care and receives services from a personal aide under RCW 74.39.

B. ROLE OF COURT VISITOR IN VULNERABLE ADULT ACTION

A provision existed under the former guardianship statute (RCW 11.88) that authorized a

Court Visitor (“CV”) 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.” RCW 11.88.090(9).

However, RCW 11.130 *et. seq.* does not contain a similar provision specifically authorizing a CV to move for temporary relief under the vulnerable adult statute during the pendency of a guardianship/conservatorship investigation. Still, the CV should be familiar with such statute and the available relief therein. A CV who believes that protection under the vulnerable adult statute is necessary during the pendency of the investigation to protect the respondent should report such need to the court and request instructions. The court, after being apprised of the facts and allowing other parties the opportunity to be heard, may direct the CV to initiate a vulnerable adult protection action or to take other action intended to provide temporary relief during the investigation period.

To address terminology changes under the UGA, portions of the vulnerable adult statute were amended by legislative action. Certain amendments go into effect on January 1, 2022, while others go into effect on July 1, 2022.

In addition to changes in light of the enactment of the UGA, a second law going into effect in 2022 (RCW 7.105) makes additional changes, and in some instances will supersede and replace provisions in RCW 74.34. HB-1320, which was passed and signed into law in 2021, consolidates and harmonizes laws governing domestic violence protection orders, sexual assault protection orders, stalking protection orders, anti-harassment protection orders, vulnerable adult protection orders, and extreme risk protection orders under a new chapter governing all protection orders. Pursuant to this new law (codified at RCW 7.105), courts are creating one form that can be used for all the various types of protection orders. These forms should be available on the court’s website (under court forms) no later than June 30, 2022.

C. PROCEDURE FOR VULNERABLE ADULT ACTION

A vulnerable adult protection action (VAPA) is always a separate cause of action from the guardianship/conservatorship action; thus it requires a separate petition. Sometimes, a VAPA petition is filed at the same time as a guardianship/conservatorship petition. It could also be the case that a VAPA leads to a guardianship/conservatorship petition, or vice-versa. In cases where a VAPA involves an incapacitated individual, the court *may* appoint a guardian ad litem in the VAPA proceeding. RCW 11.96A.160. Often times, the same person will be appointed as the CV in a guardianship/conservatorship matter. *See* Practice Tips 2 and 3, below.

Note: As used in this section, the term “respondent” may refer to the respondent in the guardianship/conservatorship (formerly referred to as the alleged incapacitated person) or the respondent in the VAPA matter (the respondent in a VAPA is the individual who allegedly exploited, abused, abandoned, or neglected the vulnerable adult).

Practice Tip #1

When there is a guardianship/conservatorship action as well as a VAPA, put the guardianship/conservatorship cause number on the VAPA pleadings and the VAPA cause number on the guardianship/conservatorship pleadings, so that they are cross-referenced.

Practice Tip #2

Unless the petitioner in either the VAPA or the guardianship/conservatorship proceeding has included language that authorizes a CV investigation into, or participation in, the VAPA, DO NOT presume the CV has any authorization in the VAPA, such as billing for time for investigating the allegations or attending the VAPA hearing. If the CV believes they need to be involved, the CV may present an order requesting that authority.

Practice Tip #3

A CV appointed in a guardianship/conservatorship proceeding in which a petition for protection of a vulnerable adult is filed must proceed carefully. There is no provision in either RCW 74.34 or RCW 7.105 for the appointment of a CV. If the CV is also appointed in the VAPA, it should be by separate order under the VAPA cause number. If the CV does petition for a VAPA, it is advisable for the CV to keep separate billing records for each matter as the court may order the respondent in the VAPA matter, through the relief granted under RCW 74.34 or RCW 7.105, to pay all the fees and costs related to the VAPA action, including the CV's fees.

Petition

RCW 74.34.210 provides that a petition for an order for protection may be brought by the vulnerable adult, the vulnerable adult's guardian or legal fiduciary, the department, or any "interested person."

An "interested person" is defined as "a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests." RCW 74.34.020(11). A separate evidentiary hearing may be required to establish that the vulnerable adult is unable to protect their own interests.

Under RCW 7.105, a petition “must allege that the petitioner, or person on whose behalf the petition is brought, is a vulnerable adult and that the petitioner, or person on whose behalf the petition is brought, has been abandoned, abused, financially exploited, or neglected, or is threatened with abandonment, abuse, financial exploitation, or neglect by the respondent.” RCW 7.105.100(1)(d). If the petition is filed by an interested person, the affidavit or declaration must also include a statement of why the petitioner qualifies as an interested person.

The court must find that the person was a vulnerable adult at the time the allegation of abandonment, abuse, financial exploitation, neglect, or the threat thereof occurred. *In re the Guardianship of Emma Endicott v. Saul*, Div I, docket No. 58435-9, (2008).

Practice Tip #4

Include in the petition allegations of how the respondent fits the definition of a vulnerable adult, as it is necessary to establish that the respondent was a vulnerable adult at the time they were exploited, abused, abandoned, or neglected.

Mandatory Forms

VAPA pleadings must appear on mandatory court forms available through the court website (www.courts.wa.gov.) As noted above, updated forms to comply with RCW 7.105 should be available by no later than June 30, 2022.

Service

Upon making a *prima facie* case for the entry of a temporary order of protection, the court may restrain a respondent to the VAPA from acting in certain ways. The court then orders a hearing on the petition to be held within 14 days, at which time the court may enter final orders of relief.

Service – January 1, 2022, through July 1, 2022

Requirements for service on the vulnerable adult effective until July 1, 2022, are contained in RCW 74.34.120(3).

When a petition under RCW 74.34.110 is filed by someone other than the vulnerable adult, notice of the petition and hearing must be personally served upon the vulnerable adult not less than six court days before the hearing. In addition to copies of all pleadings filed by the petitioner, the petitioner shall provide a written notice to the vulnerable adult using the standard notice form developed under RCW 74.34.115.

When good faith attempts to personally serve the vulnerable adult or respondent have been unsuccessful, the court can permit service by mail or by publication. If timely service

cannot be made, the court will continue the hearing date until the substitute service approved by the court has been satisfied.

Service – July 1, 2022, and After

Under the new law (RCW 7.105), service must be completed upon the respondent and vulnerable adult (unless the vulnerable adult is the petitioner) within five court days of the hearing. RCW 7.105.150 contains further information on acceptable forms of service.

Relief

Relief – January 1, 2022, through July 1, 2022

The list of available relief under RCW 74.34.130, which is effective until July 1, 2022, is as follows:

1. Restraining respondent from committing acts of abandonment, abuse, neglect, or financial exploitation;
2. Excluding respondent from petitioner’s residence for a specified period or until further order of the court;
3. Prohibiting contact by respondent, including third party contact on respondent’s behalf, including keeping a certain distance (500 foot maximum);
4. Requiring an accounting by respondent of the disposition of petitioner’s income or resources;
5. Restraining the transfer of property for a specified period not to exceed ninety days;
6. Requiring respondent to pay filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney’s fee; and
7. Restraining respondent from exercising authority under a Power of Attorney or Health Care Directive.

Under RCW 74.34, permanent relief is limited to five years from the entry of the order.

Relief – July 1, 2022, and After

RCW 7.105.310, which becomes effective on July 1, 2022, states that the court has “broad discretion to grant such relief as the court deems proper, including an order that provides relief as follows”:

1. Restrain respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against a vulnerable adult;

2. Restrain the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location (the specified distance is presumptively 1,000 feet, unless the court for good cause finds that a shorter specified distance is appropriate);
3. Require an accounting by the respondent of the disposition of the vulnerable adult's income or other resources;
4. Restrain the transfer of either the respondent's or the vulnerable adult's property, or both, for a specified period not exceeding 90 days;
5. Order financial relief and restrain the transfer of jointly owned assets; and
6. Require the respondent to pay the administrative court costs and service fees and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorney fees.

Under RCW 7.105.310, the court must specify the date the order expires. Unlike RCW 74.34, which limits relief to five years, RCW 71.105 authorizes the court to issue a permanent protection order, which expires 99 years from the issuance date.

Practice Tip #5

If the vulnerable adult/respondent in the guardianship/conservatorship is being financially exploited, consider utilizing other means of protection. For example, recording the guardianship/conservatorship petition and note for hearing with the county auditor provides notice to third parties that the vulnerable adult's/respondent's capacity is in question and that the guardianship/conservatorship hearing will be held on a given date. RCW 30A.22.210 may also prove helpful if the CV can demonstrate to the financial institution that there is uncertainty as to whom is entitled to the funds in the account. If a CV freezes the vulnerable adult's/respondent's bank account, consider how their bills will be paid pending the hearing. A less formal approach might be to write a letter to the person who appears to be making unauthorized withdrawals.

Practice Tip #6

Because the vulnerable adult statute not only allows entry of restraints against a third party, but may also have the effect of interfering with the alleged vulnerable adult's rights (such as the right to associate with the restrained person or to spend money), the CV should proceed cautiously. If the alleged vulnerable adult has not yet been determined to be incapacitated and is not joining in the request for relief, the CV should consider proposing that any relief afforded in the VAPA be reviewed by the court at the final hearing on the guardianship/conservatorship petition.

Vulnerable Adult/Respondent Disagrees

RCW 74.34.135(4) (effective until July 1, 2022) and RCW 7.105.220(4) (effective July 1, 2022) provide specific guidance for the situation in which the vulnerable adult/respondent in the guardianship/conservatorship disagrees with the relief requested.

RCW 74.34.135(4) and RCW 7.105.900(4) provide:

If the court determines that the vulnerable adult is capable of protecting his or her person or estate in connection with the issues raised in the petition, and the individual continues to object to the protection order, the court shall dismiss the order or may modify the order if agreed to by the vulnerable adult. If the court determines that the vulnerable adult is not capable of protecting his or her person or estate in connection with the issues raised in the petition or order, and that the individual continues to need protection, the court shall order relief consistent with RCW 74.34.130 as it deems necessary for the protection of the vulnerable adult.

If an order is inconsistent with the expressed wishes of the vulnerable adult, the court should be governed by the legislative findings in RCW 74.34.005 (through July 1, 2022) or RCW 7.105.900 (July 1, 2022, and after).

When the vulnerable adult opposes the issuance of a vulnerable adult protection order, the standard of proof is clear, cogent, and convincing evidence, because the order impedes the vulnerable adult's due process rights. *In re the Matter of Dagmar O. Knight*, 178 Wash. App. 929, 937, 317 P. 3d 1068 (2014).

Adult Protective Services/Attorney General

Adult Protective Services (APS) is the branch of the Department of Social and Health Services (DSHS) that investigates allegations of vulnerable adult abuse, neglect, abandonment, and financial exploitation. Some persons who deal with vulnerable adults are required to report suspected abuse. RCW 74.34.020. Permissive reporters may report to the department or a law enforcement agency when there is reasonable cause to believe that a vulnerable adult is being or has been abandoned, abused, financially exploited, or neglected. RCW 74.34.035. A CV is a "permissive reporter," i.e., a person who is not required to report abuse. *Id.* However, the King County Guardian ad Litem Registry Code of Conduct provides that the CV "shall report" any child abuse or neglect or adult abuse as found by the CV.

To report suspected vulnerable adult abuse, call 1-866-ENDHARM. After an initial intake of a complaint, an investigator may be assigned. The investigation may result in the filing of a guardianship/conservatorship petition or action for other relief. Thus, the petitioner in some guardianship/conservatorship and VAPA proceedings may be the State of Washington. When the petitioner in a guardianship/conservatorship or vulnerable adult

protection proceeding is DSHS, an Assistant Attorney General (AAG) will represent DSHS as the client.

CV Safety

If the CV is uncomfortable visiting the home of the respondent in a guardianship/conservatorship proceeding for any security reasons, and if it is known that APS is involved in the case, an APS investigator may be willing to introduce the respondent and stay nearby. If there are more serious security concerns, a CV may request law enforcement assistance.

APS Records

APS reports and investigative notes are confidential but often contain vitally important information. If the CV wants to review APS records or speak with the APS investigator about the case, the CV may obtain the APS records by forwarding all requests for records to the inbox for the APS unit that processes record requests: apspublicrecords@dshs.wa.gov. Any records received by the CV from DSHS may not be disseminated to anyone without court order.

Practice Tip #7

It is helpful for the order appointing the CV to include specific authority for the CV to access APS records. If this is not in the order appointing the CV and the CV has any difficulty obtaining APS records, he or she should seek a court order granting specific authority to receive the necessary records.

**CHAPTER VII
ALTERNATIVES TO GUARDIANSHIP/CONSERVATORSHIP**

A. OVERVIEW OF CONCEPT OF LESS RESTRICTIVE ALTERNATIVES

In all guardianship/conservatorship investigations, CVs must consider the availability and suitability of less restrictive alternatives. Thus, CVs should become familiar with alternatives that would prevent the need for a guardianship, conservatorship, or limited guardianship or conservatorship.

This chapter describes various means by which every competent person can minimize the circumstances in which a guardian/conservator will need to be appointed. Sometimes, one of the alternatives can be executed by the respondent during the pendency of a guardianship/conservatorship proceeding, thereby eliminating the need for appointment of a guardian/conservator, or at least allowing the guardianship/conservatorship to be substantially limited.

Legislative Intent

RCW 11.130.001 states as follows:

The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian . . .” However, “[a person’s] liberty and autonomy should be restricted through guardianship, conservatorship, emergency guardianship, emergency conservatorship, and other protective arrangements *only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.*

RCW 11.130.001 (emphasis added).

Under the UGA, a “less restrictive alternative” is defined as:

[A]n approach to meeting an individual’s needs which restricts fewer rights of the individual than would the appointment of a guardian or conservator. The term includes supported decision making, appropriate technological assistance, appointment of a representative payee, and appointment of an agent by the individual, including under a power of attorney for health care or power attorney for finances.

RCW 11.130.010(15).

Need to Inquire Into and Consider Less restrictive Alternatives

A petition for guardianship/conservatorship of an adult must include a statement regarding “any protective arrangement instead of [guardianship or conservatorship] or other less restrictive alternative for meeting the respondent’s alleged need which has been considered or implemented.” RCW 11.130.270(2)(d)(ii); RCW 11.130.365(2)(e)(iii). If no protective arrangement or other less restrictive alternative has been considered or implemented, the petition must state the reasons for such and why, in the opinion of the petitioner, a protective arrangement or less restrictive alternative would be “insufficient to meet the respondent’s alleged need.” RCW 11.130.270(2)(d)(iii); RCW 11.130.365(2)(e)(iv).

The CV’s report must contain “[a] recommendation regarding the appropriateness of [guardianship/conservatorship] including whether a protective arrangement instead of [guardianship or conservatorship] or other less restrictive alternative for meeting the respondent’s needs is available . . .” RCW 11.130.280(6)(b); RCW 11.130.370(7)(a)(i).

The CV should analyze all of the available alternatives to guardianship/conservatorship. It is good practice to incorporate this analysis into the CV report as a way of bolstering the CV’s position for or against a guardianship/conservatorship.

The prior guardianship statutes did not provide any express alternatives to a guardianship or conservatorship. Generally, options for less restrictive alternatives were conferred by commonly used estate planning documents – including health care and general powers of attorneys and living trusts.

Conversely, the UGA directly addresses other protective arrangements. Specifically, Article 5 (RCW 11.130.580 – 11.130.635) addresses other protective arrangements and Article 7 (RCW 11.130.700 – 11.130.755) addresses supported decision making agreements. Given that no caselaw exists on the UGA, there will be no citations to case law in these materials. Instead, the materials will provide a procedural and substantive summary of the specific statutes addressing alternatives to guardianship/conservatorship.

B. POWERS OF ATTORNEY

A power of attorney is a written delegation by one person, known as the principal, to another person or entity, known as the agent (also known as “attorney-in-fact”) of limited or general authority, to act on behalf of the principal. The power can be for a specific one-time purpose. For instance, to sign a deed for the sale of real estate while the principal is out of the country. In that case, the power of attorney is called a special and limited power of attorney. On the opposite extreme, the power of attorney can be general and encompass the authority to act on behalf of the principal at all times in all matters permitted by law.

A power of attorney must be signed and dated by the principal, and the signature must be either acknowledged before a notary public or attested by two or more witnesses. RCW 11.125.050 (1). A durable power of attorney intended to confer authority over real property must be notarized.

A power of attorney is “durable” if it withstands the incapacity of the principal. In Washington, to be durable, a power of attorney must state that it is not affected by the disability of the principal or that it will only take effect upon disability or use similar language. RCW 11.125.040. When the durable power of attorney states it will become effective only upon the finding of incapacity of the principal or other such language, it is called a “springing” power of attorney because it springs into effect only in the circumstance described in the document.

A durable power of attorney can be a viable less restrictive alternative to a guardianship/conservatorship where the respondent has previously executed, or is willing to execute, such a document and is believed to have sufficient capacity to do so.

The standard of capacity to execute a durable power of attorney is the subject of some debate. Generally, the respondent should have some knowledge of the person being named as the agent and understand that they are entering into a fiduciary relationship with that person regarding the powers granted to the agent. Under Washington law, a person of legal age is presumed to possess full legal capacity to enter into a power of attorney until adjudged incapacitated.

Some of the **advantages** to powers of attorney are as follows:

1. The principal maintains autonomy and privacy by personally selecting a friend or family member to act as his or her fiduciary;
2. The principal retains all right and authority to continue to act; and
3. The principal retains the power to revoke the power of attorney at any time as long as he or she is not incapacitated.

Disadvantages include:

1. The agent may not act in concert with the principal;
2. The agent may be unavailable or later become incapacitated;
3. Because the principal remains able to act on his or her own behalf, e.g., to contract, the principal may be vulnerable to abuse by and/or the undue influence of others; and
4. Because the principal can revoke the power of attorney at will, it may not be a viable long-term alternative to avoid guardianship or conservatorship in some cases.

A durable general power of attorney usually grants to the agent the power to act for the principal in a myriad of matters. Durable powers of attorney may be broad and general, or can be limited and specifically tailored to certain actions.

A general power of attorney does not permit the agent to make health care decisions unless it *specifically* grants to the agent the power to make health care decisions for the principal. *See* RCW

11.125.400. In addition, RCW 11.125.400(3) excludes certain persons from acting as agent for health care matters for a principal.

Some people want to give very specific instructions to their agent regarding health care. Since a copy of a power of attorney is usually kept in the medical chart, many attorneys recommend that a separate durable power of attorney for health care be executed. Separate durable powers of attorney for health care and financial matters also allow the principal to name different agents for each function.

Resolution of Problems Involving Powers of Attorney

Some guardianship/conservatorship petitions are brought because there is a conflict involving the exercise of a durable power of attorney for the benefit of a respondent. CVs should be familiar with RCW 11.125.160, which provides for the filing of a petition to resolve matters regarding the application and use of powers of attorney. The petition is filed in court seeking an order regarding the actions of the agent. The persons who have standing to file such a petition are enumerated in RCW 11.125.160(1).

The CV who is appointed in a guardianship/conservatorship case involving a respondent who previously executed a durable power of attorney is not one of those persons specifically authorized to file a petition under RCW 11.125.160; however, the CV would qualify as an “interested person” under RCW 11.125.160 (1)(d). If there is a question about the agent’s acts or management of assets, a CV could probably file a motion for instructions seeking an order for an accounting in the guardianship proceeding, citing RCW 11.125.160 as the basis for the CV’s request.

If a durable power of attorney document exists, but there are certain issues or concerns to be addressed for the durable power of attorney to be effective, such proposals can be made by the CV to the court citing the court’s authority under RCW 11.125.160(2) and RCW 11.96A.020(1)(a).

Regardless of who has been nominated to serve as a guardian/conservator in the petition, the person designated by the respondent in the respondent’s most recent power of attorney document as guardian or conservator has to be considered ahead of the nominee named in the petition. *See* RCW 11.130.305(1)(b); RCW 11.130.415(1)(b). *See also* RCW 11.125.080(1).

Practice Tip

If the reason that the petition for conservatorship has been filed is because an otherwise valid power of attorney is not being honored by a bank, a title company, or other financial institution, the CV may make a recommendation to the court that steps be taken under RCW 11.125.190-200 to establish the validity of the power of attorney.

Under former guardianship laws, the court order appointing a guardian or conservator generally revoked any previously-executed powers of attorney. However, the UGA contemplates that, in some cases, there may be a guardian and an agent under a health care power of attorney or a

conservator and agent under a durable general power of attorney. *See* RCW 11.130.335 and RCW 11.130.435.

C. INFORMED CONSENT STATUTE

Occasionally, a guardianship is sought by health care providers or third parties who believe that the patient lacks the legal capacity to give informed consent to proposed health care procedures and therefore needs a guardian. A guardianship, however, is not always needed to give consent to health care.

The informed consent to treatment of a patient who is not legally competent to give it may be given by another person who is authorized to provide such consent. RCW 7.70.065. A statutory hierarchy of persons who can grant consent is set forth in section (1)(a) of that statute:

1. The appointed guardian of the patient, if any;
2. The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions;
3. The patient's spouse or state registered domestic partner;
4. Children of the patient who are at least eighteen years of age;
5. Parents of the patient;
6. Adult brothers and sisters of the patient;
7. Adult grandchildren of the patient who are familiar with the patient;
8. Adult nieces and nephews of the patient who are familiar with the patient;
9. Adult aunts and uncles of the patient who are familiar with the patient; and
10. An adult who:
 - a. Has exhibited special care and concern for the patient;
 - b. Is familiar with the patient's personal values;
 - c. Is reasonably available to make health care decisions;
 - d. Is not any of the following: A physician to the patient or an employee of the physician; the owner, administrator, or employee of a health care facility, nursing home, or long-term care facility where the patient resides or receives care; or a person who receives compensation to provide care to the patient; and

- e. Provides a declaration under RCW 7.70.065(a)(x)(B).

Difficulties may arise if members of the class of persons (*e.g.*, the children) disagree on a course of treatment. If agreement cannot be reached, a guardianship petition may be needed.

The authority of a person under RCW 7.70.065 is limited to informed consent to health care treatment. Informed consent would not allow someone to, for example, withdraw treatment, or make placement decisions regarding rehabilitative or long-term care.

Some of the **advantages** to informed consent are:

1. Health care providers view the informed consent statute as clear and concise in providing direction. It alleviates confusion in the event of a medical emergency; and
2. No document or forethought on the part of the respondent may be required if the respondent has family who is able to provide informed consent.

Disadvantages include:

1. Health care providers may seek court direction when there is conflict among the classes of persons and no consensus is reached;
2. Medical decisions are frequently made in emergency situations; the emotional reaction to the situation may interfere with the ability of others to make informed consent; and
3. Informed consent is limited and may not apply to all situations in a health care setting (*see above*).

D. HEALTH CARE DIRECTIVE (LIVING WILL)

When a petition for guardianship is filed, particularly when the respondent has a critical or chronic illness, the willingness of a guardian-nominee to honor the wishes contained within a health care directive is vital information for the CV to have.

The Washington Natural Death Act permits persons to direct whether life-sustaining treatment and artificial nutrition and hydration should be withdrawn or withheld *in the event they are in a terminal condition or permanent unconscious condition*. See RCW Chapter 70.122. The statute provides a model health care directive form, which can be used as is or with changes. See RCW 70.122.030.

Health care providers that receive Medicare and Medicaid funds are required by the federal Patient Self-Determination Act (42 CFR § 489.102) to inform individuals of their right to make choices about health care in advance. This law applies to hospitals, rural primary care hospitals, nursing homes, hospices, home health agencies, personal care programs, health maintenance organizations (HMOs), and residential rehabilitation centers that are licensed in Washington. However, an

individual is *not* mandated to make such an advance directive and may not be required to do so as a precondition to admission into a facility or as a precondition to the receipt of services.

If a person has executed a health care directive pursuant to RCW 70.122.030, then no appointment of a guardian should be necessary to effectuate the individual's desire to withhold or withdraw life-sustaining treatment in the event he or she is in a terminal or permanent unconscious condition and the mandatory physician verification has taken place.

Even if the person has failed to execute a health care directive or similar writing, the Washington Supreme Court has stated that "a guardian need not be appointed to make the decision to withhold life-sustaining treatment if the incompetent patient's immediate family members all agree that such treatment should be withheld." *In re Grant*, 109 Wn.2d 545, 566 n.4 (1987), citing *In re Hamlin*, 102 Wn.2d 810 (1984).

Practice Tip

Health care directives are subject to revocation (oral, written, or destruction of the document) by the declarer regardless of the declarer's mental state or competency. *See* RCW 70.122.040(1).

E. MENTAL HEALTH ADVANCE DIRECTIVE

If a respondent suffers from debilitating psychological or psychiatric disorders, a mental health advance directive (MHAD) may be a suitable alternative to a guardianship of the person. A MHAD describes what a person wants to happen if they become so incapacitated by mental illness that their judgment is impaired and/or they become unable to communicate effectively. *See* RCW 71.32.

Similar to a health care directive, the MHAD informs others about what treatment may or may not be permissible and identifies a substitute decision maker for the principal. Using this advance directive, a person who suffers from mental health disorders that are periodically incapacitating may make decisions in advance about mental health treatment, including medications, short-term admission to inpatient treatment, and electroconvulsive therapy.

A person identified as an agent for mental health decisions must be notified of this appointment. Upon accepting appointment, this agent must act in a manner that is consistent with the principal's wishes. If the agent does not know what the principal's wishes are, the agent must act in the principal's best interests. The agent can withdraw from the appointment at any time. In addition, a MHAD may be withdrawn by the principal in writing at any time.

Washington law requires mental health providers to respect a properly executed MHAD, but they are not mandated to follow the directives in all cases. Directives may be disregarded if following express instructions or preferences would be against hospital policy, would violate state or federal law, or would create a risk of harm to third parties. Also, if a person is involuntarily hospitalized

under the Involuntary Treatment Act or incarcerated in jail, MHADs may not be fully honored. RCW 71.32.150.

In view of the limitations of authority of a guardian of the person, a MHAD may be an appropriate alternative to a guardianship of the person where the primary risk is created by mental health disorders.

F. TRUSTS

As an alternative to a conservatorship, a CV may recommend that a trust be created or continued for the benefit of a respondent. The court can require court supervision of a trust for the benefit of an adult subject to conservatorship. When there is a preexisting trust, an alternative to a conservatorship could include recommending a change of trustees, requiring an accounting to resolve specific questions, and using the trust instead of a conservatorship, but requiring the trustee to submit to some degree of court supervision.

A trust is an arrangement whereby a person (called the trustor or settlor) transfers money or property to another person or entity (called the trustee) to be managed and used as directed in the trust document for the benefit of some party (called the beneficiary). If the trustor creates the trust while alive, it is called a “living trust;” if the trust is created by the trustor’s last will, it is called a “testamentary trust.” The same person can be the trustor, trustee, and beneficiary of a living trust.

The trust document typically directs the trustee to spend the trust funds as may be necessary for the care and support of the beneficiary. It may identify one or more successor individuals to act as the successor trustee if the original trustee becomes incapacitated, dies, or is otherwise unable to continue acting as trustee.

Trustees (including successor trustees in the context of typical living trusts) are recognized as fiduciaries under the law and must act always in good faith and with honest judgment. The court has inherent equity power to sanction or remove trustees if they breach their fundamental fiduciary responsibilities, responsibilities under the trust document, or statutory responsibilities that have not been waived by the trustor. The problem, however, is that, other than court created trusts, few trusts are subjected to scrutiny by the courts except when an interested party commences litigation or other judicial proceeding.

If a person has set up a living trust arrangement for the management of their financial affairs in the event of their incapacity, the person’s wishes in that regard should be respected in most cases by the CV and the courts. If a particular trustee is found to have breached their fiduciary responsibilities, courts have ample power to remedy the breach by sanctions or by replacing the trustee with another trustee.

Some of the **advantages** to trusts are:

1. Allows a person’s estate to be managed by the person they have chosen and in the manner they have chosen; and

2. Can be less expensive to administer than a conservatorship.

Disadvantages include:

1. May not have the same safeguards as a guardianship, i.e., bonding, accounting, court scrutiny, etc.;
2. Arrangement may no longer be appropriate for the management of the person's estate; and
3. Certain assets cannot be titled in a trust (like retirement accounts), thus may not be an effective mechanism to control the respondent's entire estate.

Special Needs Trust

In limited circumstances, the CV may recommend that a special needs trust be established for the benefit of the respondent with or without the appointment of a guardian/conservator. The special needs trust really has only one central purpose: to preserve ongoing means-tested benefits (like SSI and Medicaid, which require the respondent to have below a certain amount in countable resources to qualify) for a disabled person who is receiving or may be eligible to receive certain government benefits.

A court-created first-party special needs trust may be appropriate when the intended beneficiary is disabled as defined by Social Security law, is under 65 years of age, is on or is eligible to receive SSI, SSDI and/or Medicaid, and the disabled person anticipates receiving settlement proceeds from a personal injury case, inheritance, or some other source. If receipt of funds would result in a loss of SSI and Medicaid benefits, a determination should be made that placing the funds into a conservatorship (with resultant loss of benefits) would be harmful to the intended beneficiary – more harmful than locking them up in a trust.

If the disabled person is not on benefits, or the disabled person's costs of care are well under control, it may be appropriate to keep the assets in a conservatorship instead of a trust and take a wait and see approach. A first-party special needs trust may be created at any time prior to the disabled person's 65th birthday, even after receipt of funds. There is no penalty attached to this approach at this time.

Special needs trusts are very complex and must be drafted or amended by an experienced attorney familiar with government benefit law. The court, guardians and conservators, and CVs should insist on using an independent, qualified special needs trust drafter. It is often recommended that trust counsel be appointed by the court and, as part of that appointment, counsel's duties should be outlined in the order. This clarifies the work to be performed, the responsibilities of the various parties, and fee ranges. It also ensures trust counsel will be paid for the work performed and that the report or testimony of counsel will be considered by the court.

If a CV is involved in matters involving the approval, amendment, administration, or reformation of a special needs trust and does not feel qualified to handle these issues, the CV should approach

the court and ask that a more experienced CV be appointed or that trust counsel be appointed to assist the CV.

G. DRIVER'S LICENSE RE-EXAMINATIONS

A guardianship proceeding may be started primarily to restrict a respondent's right to drive a motor vehicle. The Washington Department of Licensing (DOL) form titled "Recommendation for Driver Re-examination" may be submitted by any person with personal knowledge of a driver who has physical or mental disabilities that could affect his or her safe driving. The form is available online at <http://www.dol.wa.gov/forms/500008.pdf>.

Upon receipt of the recommendation, the Department of Licensing acts to reassess driver competency. The DOL may require a full written and driving re-examination and certification of the driver's fitness by a physician or approved medical professional. A driver's license may be revoked, restricted, or renewed by the DOL. RCW 46.20.305 and 46.20.041.

Some of the **advantages** to driver's license re-examinations are:

1. Safety concerns for driving can be resolved in a less restrictive alternative to guardianship; and
2. The respondent may be more amenable to accepting services in the home if his or her right to drive is removed.

Disadvantages include:

1. A copy of the Recommendation for Driver Re-examination is provided to the driver if the driver requests it. The form includes the signature of the petitioning party. This may create additional conflict;
2. Removal of the respondent's right to drive may not deter the respondent from driving without a license; and
3. The respondent may need protection in other areas that are not addressed by the Department of Motor Vehicle action.

Practice Tip

While a guardianship is not needed if the sole purpose is to deal with a driver's license issue, every CV should be aware that the licensing statute, RCW 46.20.031(4), provides that a driver's license may not be issued to anyone who has been adjudged to be "mentally ill, insane, or incompetent" due to mental disability or disease. A driver's license may be issued, however, if the person "(a) has been restored to competency by the methods provided by law; or (b) The superior court finds the person able to operate a motor vehicle with safety upon the highways during such incompetency." *Id.*

The CV should consider including in the report information about whether the respondent drives or intends to drive, has access to a car, has a current driver's license, and has auto insurance.

H. CARE/ CASE MANAGEMENT SERVICES

Whether the recommendation by the CV calls for the appointment of a guardian or conservator, limited guardian or conservator, or continuance of management of the respondent's affairs under a durable power of attorney or trust, the CV may recommend that the family contract with a professional care manager to develop a plan of care to be followed by a health care agent who will then routinely report to the family. Sometimes the personal and medical needs of a respondent can be met through care or case management services alone, so that the individual can continue functioning with autonomy, but with the supervision that is needed to ensure the safety of the respondent. A case or care manager is usually a private pay solution and is therefore only available in cases in which the respondent has the funds to pay for the manager.

Care/case management involves assessing an individual's needs and developing and implementing a plan to meet those needs. The manager maintains ongoing contact with the impaired individual to enable prompt response to needs or changes in condition. The care/case management contract requires the impaired individual's acceptance and agreement with the plan of care and the payment agreements. An agent acting under a power of attorney can generally sign agreements for these services on behalf of the principal. A CV can identify potential care/case management providers through online searches or seek recommendations from professional guardianship agencies, governmental agencies, or charitable groups established for the particular impairment from which the respondent suffers, *e.g.*, The Alzheimer's Association.

It should be noted that the success of care/case management services as an alternative to a guardianship of the person will vary. The degree and extent of care/case management services varies widely. Fees for such services are affected by the nature and degree of incapacity and the respondent's willingness to accept services.

Some of the **advantages** to care/case management services are:

1. The respondent maintains their autonomy;
2. Appropriate services are secured; and
3. May enable the respondent to remain at home.

Disadvantages include:

1. The respondent may not fully understand the contract for services or may resist signing an agreement;
2. Services may be too expensive;

3. The respondent may terminate the care/case manager's services at any time;
4. The care/case manager may terminate the services at any time; and
5. The care/case manager may be unwilling to contract with the respondent without an agreement with the agent or the surrogate decision maker.

Practice Tip

Be aware that there are professional associations and certification credentials for care/case managers: apply consumer safeguards.

If the respondent is already receiving case management services through the Department of Social and Health Services (DSHS), additional services should not be duplicative.

I. OTHER PROTECTIVE ARRANGEMENTS

A “protective arrangement” is an alternative to guardianship/conservatorship that allows a court to enter an order that is tailored to the individual's circumstances/needs. Thus, a protective arrangement can be a way to address a specific issue and/or authorize a delineated act. A protective arrangement is more limited in scope and duration than a guardianship/conservatorship.

Who Can Petition?

Any person “interested in an adult's welfare” may petition for a protective arrangement instead of a guardianship. RCW 11.130.580(2).

However, only the following persons can petition for a protective arrangement instead of a conservatorship:

1. The individual for whom the protective arrangement is sought;
2. A person interested in the property, financial affairs, or welfare of the individual, including a person that would be adversely affected by lack of effective management of property or financial affairs of the individual; and
3. The guardian for the individual.

It may be the case that a petitioner directly seeks a protective arrangement instead of a guardianship/conservatorship. It could also be the case that a petitioner seeks the appointment of a guardian/conservator, but at the hearing on the petition, the court orders a protective arrangement instead of a guardianship/conservatorship. *See* RCW 11.130.580.

Protective Arrangements Instead of Guardianship

Under RCW 11.130.585, the court can enter a protective arrangement instead of a guardianship if the court finds by clear and convincing evidence that:

1. Respondent is unable to care for themselves even with appropriate supportive services, technological assistance, or supported decision making; and
2. The respondent's identified needs cannot be met by a less restrictive alternative.

The UGA requires that “the respondent's identified needs cannot be met by a less restrictive alternative” prior to a protective arrangement. RCW 11.130.585(1). Thus, the CV must consider the availability of other less restrictive alternatives, such as a durable power of attorney, prior to considering the suitability of a protective arrangement.

The statute lists examples of potential protective arrangements instead of guardianships. Under RCW 11.130.585(2), instead of appointing a guardian, the court may:

1. Authorize or direct a transaction necessary to meet the respondent's needs for health, safety, or care, including:
 - a. A particular medical treatment or refusal of a particular medical treatment; or
 - b. Visitation or supervised visitation between the respondent and another person.
2. Restrict access to the respondent by a specified person whose access places the respondent at serious risk of physical, psychological, or financial harm; and
3. Reorder other arrangements on a limited basis that are appropriate.

The use of the word “including” can be reasonably interpreted as meaning that the above list is non-exhaustive.

Protective Arrangements Instead of Conservatorship

Under RCW 11.130.590(1), the court can enter a protective arrangement instead of conservatorship if the court finds by clear and convincing evidence that:

1. The adult is unable to manage property or financial affairs, even with appropriate supportive services, technological assistance, or supported decision making; or the adult is missing, detained, or unable to return to the United States;
2. That an order is necessary to avoid harm to the adult or significant dissipation of the property of the adult; or obtain funds for the benefit of the respondent; and
3. The respondent's identified needs cannot be met by a less restrictive alternative.

Similar to a protective arrangement instead of a guardianship, the CV still must consider the availability of less restrictive alternatives prior to considering the suitability of a protective arrangement.

The statute lists examples of potential protective arrangements instead of conservatorships. Under RCW 11.130.590(3), instead of appointing a conservator, the court may authorize or direct a transaction necessary to protect the financial interest or property of the respondent, including:

1. An action to establish eligibility for benefits;
2. Payment, delivery, deposit, or retention of funds or property;
3. Sale, mortgage, lease, or other transfer of property;
4. Purchase of an annuity;
5. Entry into a contractual relationship, including a contract to provide for personal care, supportive services, education, training, or employment;
6. Addition to or establishment of a trust;
7. Ratification or invalidation of a contract, trust, will, or other transaction, including a transaction related to the property or business affairs of the respondent;
8. Settlement of a claim; or
9. Restrict access to the respondent's property by a specified person whose access to the property places the respondent at serious risk of financial harm.

Similar to the above note, the use of the word “including” can be reasonably interpreted as meaning that the list is non-exhaustive.

RCW 11.130.590(4) allows a court to order a protective arrangement even without a finding that: 1) the respondent is unable to manage property or financial affairs, and 2) that the protective arrangement is necessary to avoid harm or significant dissipation of the property of the adult or to provide for the needed support, care, education, health, and welfare for the adult or another individual entitled to the adult’s support.

RCW 11.130.590(4) allows the court to issue an order “to restrict access to the respondent or the respondent’s property by a specified person that the court finds by clear and convincing evidence: (a) Through fraud, coercion, duress, or the use of deception and control caused or attempted to cause an action that would have resulted in financial harm to the respondent or the respondent's property; and (b) Poses a serious risk of substantial financial harm to the respondent or the respondent's property.”

Petition for Protective Arrangement

RCW 11.130.595(4)-(5) sets forth the list of information that should be included in a petition for a protective arrangement. While the contents of the petition, for the most part, are similar to a petition for appointment of a guardian/conservator, a petition for a protective arrangement should also include:

1. Nature of the protective arrangement sought; and
2. The reason the protective arrangement sought is necessary, including a brief description of:
 - a. The nature and extent of the respondent's alleged need;
 - b. Any less restrictive alternative for meeting the respondent's alleged need which has been considered or implemented; and
 - c. The reason for the insufficiency of existing less restrictive alternatives.

Notice; Hearing

Hearings on a petition for a protective arrangement instead of guardianship/conservatorship, just as with petitions for guardianship/conservatorship, are heard within 60 days of filing the petition unless extended for good cause. RCW 11.130.600. The persons who are entitled to notice of a petition for a protective arrangement instead of a guardianship/conservatorship are the same as the persons entitled to notice of a petition for guardianship/conservatorship. RCW 11.130.595.

Rules regarding service on the respondent and CV are the same as described in Chapter I for petitions for guardianship/conservatorship. RCW 11.130.600. Specifically, a copy of the petition and notice of hearing on the petition for a protective arrangement must be served on the respondent and CV not more than five court days after the petition has been filed.

Appointment and Role of Court Visitor

Pursuant to RCW 11.130.604, the court shall appoint a CV upon the filing of a petition for protective arrangement. The role of the CV in a petition for a protective arrangement instead of a guardianship/conservatorship is substantially the same as the role of the CV in a guardianship/conservatorship matter.

CVs must still file a statement of qualifications. *See* RCW 11.130.605. CVs must still also obtain a professional evaluation. *See* RCW 11.130.615.

Rules regarding attendance at the hearing are the same as attendance rules for a hearing on a petition for guardianship/conservatorship. *See* RCW 11.130.620.

If appointed under a petition for a protective arrangement, CVs should carefully review RCW 11.130.605(6)-(7). RCW 11.130.605(6) includes directions for the CV when interviewing the respondent. RCW 11.130.605(7) states what the CV must include in the report for a protective arrangement (such as a recommendation regarding the appropriateness of the protective arrangement sought”). RCW 11.130.605(7)(b).

Role of Special Agent

If a protective arrangement is ordered, “[t]he court may appoint a special agent, to assist in implementing a protective arrangement.” RCW 11.130.635. If so appointed, the “special agent has the authority conferred by the order of appointment and serves until discharged by court order.” *Id.*

J. SUPPORTED DECISION MAKING AGREEMENTS

A “supported decision-making agreement” is a new concept under the UGA. Provisions concerning supported decision-making agreements (SDMA) are located under Article 7 (RCW 11.130.700-755). A SDMA is “an agreement between an adult with a disability and one or more supporters entered into under this chapter.” RCW 11.130.700(2). The purpose of a SDMA is to provide for a “less restrictive alternative to a guardianship for adults with disabilities who need assistance with decisions regarding daily life.” RCW 11.130.705.

Under RCW 11.130.700, disability is defined, with respect to an individual, as “a physical or mental impairment that substantially limits one or more major life activities.” RCW 11.130.700(1). The supporter is a person “who has entered into a supported decision-making agreement with an adult with a disability.” RCW 11.130.700(3).

Scope

Under RCW 11.130.715, a SDMA can authorize a supporter to:

1. Provide supported decision making, by providing assistance in understanding the options, responsibilities, and consequences of the adult’s life decisions, without making those decisions on behalf of the adult with a disability;
2. Assist in accessing, collecting, and obtaining information that is relevant to a given life decision;
3. Assist the adult in understanding the information collected pursuant to the above bullet point; and
4. Assist in communicating the adult’s decisions to appropriate persons.

The supporter under a SDMA will only have authority as to the specific items granted in the SDMA. RCW 11.130.720.

Termination of SDMA

The supporter's authority to act will terminate under the terms of the SDMA. The SDMA can also be terminated as detailed in RCW 11.130.725, if the supporter is found to have abused, neglected, or exploited the person with a disability. The SDMA may also be terminated by the person with a disability (orally, in writing, through an assistive technology device, or by any other means or act showing a specific intent to terminate the SDMA). The supporter can also terminate the SDMA as it relates to that supporter by providing written notice to the person with a disability.

Presumption of Capacity

RCW 11.130.710(1) states that "all adults are presumed to be capable of managing their affairs." Further, "the manner in which an adult communicates with others is not grounds for deciding that the adult is incapable of managing the adult's affairs." RCW 11.130.710(2). "Execution of a [SDMA] may not be used as evidence for the petition or appointment of a guardianship/conservatorship." RCW 11.130.710(3). Thus, a CV should not consider the existence of a SDMA as evidence that an adult is incapacitated under the provisions of the UGA.

Form/Execution of SDMA

RCW 11.130.740 and RCW 11.130.745 provide further information on the form of the SDMA and execution formalities.

CHAPTER VIII THE COURT VISITOR REPORT

The goal of this chapter is to assist the Court Visitor (“CV”) in creating a report that is readable and useful to the parties and the court.

A. SEALING OF REPORTS

Because court records in many counties may be available online as well as for review in the courthouse, the Washington Supreme Court adopted a rule to assure that certain private or sensitive information is not made public. GR 22.

RCW 11.130.410(3) further clarifies the confidential nature of the CV’s report:

A report under RCW 11.130.380 of a court visitor or professional evaluation under RCW 11.130.390 is confidential and must be sealed on filing, but is available to: (a) The court; (b) The individual who is the subject of the report or evaluation, without limitation as to use; (c) The petitioner, court visitor, petitioner’s and respondent’s attorneys, and proposed guardians, for purposes of the proceeding; (d) Unless the court directs otherwise, an agent appointed under a power of attorney for finances in which the respondent is identified as the principal; and (e) Any other person if it is in the public interest or for a purpose the court orders for good cause.

GR 22(e)(2) requires that certain reports be filed as two separate documents, one public and one sealed, as follows:

Public Document

The public portion of any report shall include a simple listing of:

1. Materials or information reviewed;
2. Individuals contacted;
3. Tests conducted or reviewed; and
4. Conclusions and recommendations.

Sealed Document

The sealed portion of the report shall be filed with a coversheet designated: “Sealed Confidential Report.” The material filed with this coversheet shall include:

1. Detailed descriptions of material or information gathered or reviewed;
2. Detailed descriptions of all statements reviewed or taken;
3. Detailed descriptions of tests conducted or reviewed; and
4. Any analysis to support the conclusions and recommendations.

The CV should exercise care to insert in the public report only that information which is required by GR 22 and avoid setting forth any information that is of a private or confidential nature. Such information is intended by the rule to be kept from public viewing and should be placed in the sealed report. A CV should be familiar with the local rules in their county regarding the sealing of the CV's confidential report and the professional evaluation.

See also GALR 2(n)¹ which states as follows:

Maintain privacy of parties. As an officer of the court, a guardian ad litem shall make no disclosures about the case or the investigation except in reports to the court or as necessary to perform the duties of a guardian ad litem. A guardian ad litem shall maintain the confidential nature of identifiers or addresses where there are allegations of domestic violence or risk to a party's or child's safety. The guardian ad litem may recommend that the court seal the report or a portion of the report of the guardian ad litem to preserve the privacy, confidentiality, or safety of the parties or the person for whom the guardian ad litem was appointed. The court may, upon application, and under such conditions as may be necessary to protect the witnesses from potential harm, order disclosure or discovery that addresses the need to challenge the truth of the information received from the confidential source.

GR 22(e)(3) further provides that the sealed portion of the report may not be placed in the court file or used as an attachment or exhibit to any other document except under seal.

B. CONTENTS OF SEALED CV REPORTS

Guardianship

RCW 11.130.280(6) requires that the CV report for a **guardianship** include:

1. A summary of self-care and independent living tasks the respondent can manage without assistance or with existing supports, could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making, and cannot manage;

¹ This Chapter assumes the Superior Court Guardian ad Litem Rules and General Rules will apply equally to CVs.

2. A recommendation regarding the appropriateness of guardianship, including whether a protective arrangement instead of guardianship or other less restrictive alternative for meeting the respondent's needs is available, and
 - a. If a guardianship is recommended, whether it should be full or limited; and
 - b. If a limited guardianship is recommended, the powers to be granted to the guardian;
3. A statement of the qualifications of the proposed guardian and whether the respondent approves or disapproves of the proposed guardian;
4. A statement as to whether the proposed dwelling meets the respondent's needs and whether the respondent has expressed a preference as to residence;
5. A statement as to whether the respondent declined a professional evaluation under RCW 11.130.290 and what other information is available to determine the respondent's needs and abilities without the professional evaluation;
6. A statement as to whether the respondent is able to attend a hearing at the location court proceedings typically are held;
7. A statement as to whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent's ability to participate; and
8. Any other matter the court directs.

Conservatorship

RCW 11.130.380(7) requires that the CV report for a **conservatorship** include the following:

1. A recommendation:
 - a. Regarding the appropriateness of conservatorship, or whether a protective arrangement instead of conservatorship or other less restrictive alternative for meeting the respondent's needs is available;
 - b. If a conservatorship is recommended, whether it should be full or limited;
 - c. If a limited conservatorship is recommended, the powers to be granted to the conservator, and the property that should be placed under the conservator's control; and

- d. If a conservatorship is recommended, the amount of the bond or other verified receipt needed under RCW 11.130.445 and 11.130.500. (*Note:* The UGA now includes a formula for calculating bond amounts.)
2. A statement of the qualifications of the proposed conservator and whether the respondent approves or disapproves of the proposed conservator;
3. A statement as to whether the respondent declined a professional evaluation under RCW 11.130.390 and what other information is available to determine the respondent’s needs and abilities without the professional evaluation;
4. A statement as to whether the respondent is able to attend a hearing at the location court proceedings typically are held;
5. A statement as to whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent’s ability to participate; and
6. Any other matter the court directs

Practice Tip #1

If there is not a standard form for use in a specific county, a good practice tip is to communicate with an experienced CV in such county to obtain a template or sample form that the CV can adopt for their use. The sample forms provide only a suggested format although the forms are not themselves required by the statute.

Some CVs find it helpful to create a “table” with the required topics of investigation in one column and the narrative answers in the next column. This makes the topics of investigation clear to the court and ensures that no sections are omitted.

Practice Tip #2

At the beginning of the report, the CV should set out a *brief summary* of recommendations to include: the nature and extent of guardianship/conservatorship, if any, reasons supporting guardianship/conservatorship, and the identity of the nominee guardian(s)/conservator(s).

Other Important Information to Include in the Report

The CV should carefully review the statute and use that as the basic template for the report. That way, the CV will not miss any required information. The parties and the court can also more easily verify that all required information is contained in the written record. Include basic demographic information about the respondent, including their family, living situation, education, marital status, and occupation. The CV should note in the report whether any issues or allegations of exploitation or abuse exist, and whether the respondent is a vulnerable adult.

Other topics to cover include whether the respondent is a member of a Native American or Native Alaskan tribe (which can trigger other investigations), and whether the respondent is a veteran.

Nomination of Guardian or Conservator

The CV's report should contain a section concerning the suitability of the proposed guardian/conservator. Any information that could potentially impact suitability should be addressed in the CV's report.

Findings of Fact

Under the UGA, a court order appointing a full guardian/conservator must “state the basis for granting a full [guardianship/conservatorship] and include specific findings that support the conclusion that a limited [guardianship/conservatorship] would not meet the functional needs of the adult subject to [guardianship/conservatorship].” RCW 11.130.310(3) and RCW 11.130.420(4).

In light of the requirement under the UGA for the court to make such extensive findings of fact, a CV that recommends a full or limited guardianship/conservatorship should include in their report facts to address each right the CV is recommending the respondent not retain. This information will aid the court and parties in drafting orders that must contain such information. If the CV cannot think of any facts that would support the basis for losing a specific right, the respondent should generally retain such right.

Right to Vote and Marry

The UGA requires specific findings to revoke the respondent's right to vote and/or marry. If a guardianship is imposed on a respondent, they do not lose the right to vote or marry unless the court makes a finding of fact that supports removing the right to vote or marry. Specifically, as to the right to vote, the court must find “that the adult cannot communicate, with or without support, a specific desire to participate in the voting process.” RCW 11.130.310.

If the order revokes the respondent's right to vote, the court must notify the appropriate county auditor so the person can be removed from the voting rolls. In some counties, the local rule requires that the CV or the guardian notify the county auditor about removal of the person from the list of registered voters.

Protective Agreement Reports

The CV may be appointed in a petition for a protective agreement instead of guardianship/conservatorship and asked to investigate and make recommendations. RCW 11.130.605 outlines such appointments and lists the information that should be included in a report.

The same deadline of filing the report 15 days prior to the hearing and the same service requirements apply. Even if the case is not filed as a petition for protective agreement instead of guardianship/conservatorship, such recommendations may be appropriate to include in a guardianship/conservatorship matter as possible less restrictive alternatives.

RCW 11.130.605 requires the CV to include in their report the following information:

1. To the extent relevant to the order sought, a summary of self-care, independent living tasks, and financial management tasks the respondent:
 - a. Can manage without assistance or with existing supports;
 - b. Could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making; and
 - c. Cannot manage.
2. A recommendation regarding the appropriateness of the protective arrangement sought and whether a less restrictive alternative for meeting the respondent's needs is available;
3. If the petition seeks to change the physical location of the dwelling of the respondent, a statement as to whether the proposed dwelling meets the respondent's needs and whether the respondent has expressed a preference as to the respondent's dwelling;
4. A statement as to whether the respondent declined a professional evaluation under RCW 11.130.615 and what other information is available to determine the respondent's needs and abilities without the professional evaluation;
5. A statement as to whether the respondent is able to attend a hearing at the location court proceedings typically are held;

6. A statement as to whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent's ability to participate; and
7. Any other matter the court directs.

Suggestions for Reports

Provide Basic Information at the Beginning of the Report

Identify significant parties and representatives, state the residential location and age of respondent, and outline the presenting reason(s) why the petition was filed. This background summary should also include marital status, any issues of exploitation or abuse, and whether the respondent lives with other people, or the level of care the respondent currently needs or has.

Use Topic Sentences

The CV should use basic writing composition techniques to identify the subject of the information contained in each area of the report. The CV should edit the report so that the CV avoids rambling compilations of information collected in the investigation. The CV should use the information from the investigation to support the general points the CV is trying to make. A chronological rendition of your investigation is **not** helpful to an understanding of the issues, and it causes the reader to wonder what relevance the particular recitation has to the subject of the guardianship/conservatorship proceeding. Formatting the topics of investigation in a table helps to keep the report organized and succinct.

Write the Report to Show That the CV Has Made a Complete Investigation

The CV should make sure that they actually collect information on the issues required by the statute and any other relevant information necessary to support the CV's recommendations. For example, when considering whether to recommend a professional guardian/conservator, do not assume that a Certified Professional Guardian is appropriate simply on the basis of certification. Other factors may affect the CPG's ability to serve in the particular case.

Be Respectful

The CV should be respectful of how the CV expresses their opinions and in how the CV summarizes information learned in the investigation. Even though the CV's confidential report is sealed, it will still be read by the court, the respondent, and other parties. The CV should give the court information to support the recommendations, but be mindful of how that information is presented. For example, the CV should not say: "The sisters hate each other's guts because of an incident where one sister stole money from the other sister and can't put their feelings aside to take care of mom." Instead, say, "The family is unable to put aside personal disputes and work together for the best interest of their mother." While it is important to give the court an accurate picture of the respondent's situation, it is not always necessary to include details of family conflict which are peripheral and which would only serve to upset family members or parties.

Review Work

The CV should leave enough time before the report is due to ensure that the report contains the information necessary to assist the court in resolving all issues. Failure to adequately investigate and present the information may cause a continuance and a denial of fees the CV would have otherwise earned. The CV's fees may be denied where proof of investigation of best interest has not occurred. *Marriage of Swanson*, 88 Wn. App. 128, 944 P.2d 6 (1997). Worse yet, if a party unnecessarily causes increased costs to other parties, the court could assess that increase against the offending party. RCW 11.130.380 and 11.130.280.

Be Brief and to the Point

The CV should take extra time to edit the report to correct errors and to make the report as readable as possible. The CV should remove any information that does not explain or support the recommendations. One failing that many reports have is the tendency to reflect *everything* the CV has learned in the investigation so that the report serves as a record. The notes that the CV has compiled will serve to make the record while the report is solely designed to support the CV's recommendations.

Serve the Confidential Report and Public Report

The CV should serve the confidential report and public report (and professional evaluation) on the respondent (or respondent's attorney), the court, petitioner and their attorney, and any interested parties entitled to notice under RCW 11.130.080. RCW 11.130.280(6) and RCW 11.130.380(7).

With regard to "interested parties," RCW 11.130.080 authorizes a person who is not otherwise entitled to notice to file a request for notice if the person is "interested in the welfare of a respondent, individual subject to guardianship or conservatorship, or individual subject to a protective arrangement...." RCW 11.130.080(1)(b). The court must approve the request for notice in order for the individual to be entitled to notice. RCW 11.130.080(3).

If there is a person with whom the CV consulted as part of the investigation that requests a copy of the report, but that person is not an "interested party" as that is defined in RCW 11.130.080(3) or a party entitled to a copy of the confidential report under RCW 11.130.280(6) and RCW 11.130.380(7), the CV may want to send them a copy of the public report.

File the Report on Time

The statute requires the timely filing and service of the CV report on those parties entitled to receive it. The CV report must be filed and served 15 days prior to the hearing date. If the CV needs additional time to complete the investigation and report, they can petition the court for an extension of the hearing date, if good cause exists. RCW 11.130.370(1), RCW 11.130.275(1), RCW 11.130.280(6), and RCW 11.130.380.

Practice Tip

If the CV is certain that the report will not be filed on time and the CV has a good reason for the delay, the CV should seek agreement from all the statutory parties to a reduced period for filing the report or attempt to obtain an agreement from all parties for a continuance of the hearing.

If the CV needs additional time to finalize the report, then the CV must petition the court for a postponement of the hearing or, with the consent of all other parties, an extension or reduction in time for filing the report.

Provide Working Copies to the Court

The CV should look to the court rules in the county in which they are appointed for rules on providing “working papers” or “bench copies” to the court. Working Papers must be provided to the court prior to the hearing, so that the judge/commissioner has the opportunity to review your report and the professional evaluation prior to the hearing.

CHAPTER IX RESPONDENT'S RIGHT TO COUNSEL

A. QUESTIONS AND ANSWERS

What is the Respondent's Right to Counsel?

RCW 11.130.285 (guardianships), RCW 11.130.285 (conservatorships), and RCW 11.130.610 (protective arrangements) detail the appointment and role of attorneys for respondents.

The respondent has the right to be represented by willing counsel at any stage of a guardianship, conservatorship, or protective arrangement proceeding.

Thus, even though a respondent may initially decline to be represented by an attorney, the respondent may change their mind at any time during the proceeding and exercise their right to be represented by counsel.

When is an Attorney Appointed for the Respondent?

Counsel for the respondent can be appointed upon the court's own motion, or upon a petition for appointment of counsel filed by the CV, by an attorney purporting to represent the respondent, by the respondent themselves, or by any other party to the proceeding.

Upon the filing of a petition for a guardianship, conservatorship, or protective arrangement and the court's review of the petition, if the court determines that the respondent is unable to afford or pay for an attorney, the court **must** appoint an attorney for the respondent at public expense. Based on the language in the UGA, it is believed that in every case where the filing fee is waived, the court will appoint an attorney for the respondent at public expense. RCW 11.130.285, RCW 11.130.385, and RCW 11.130.610. However, at this time, it is unknown how each county will interpret the language of RCW 11.130.285, RCW 11.130.385, and RCW 11.130.610.

Immediately upon the filing of a petition for an emergency guardian or emergency conservator, the court **must** appoint an attorney to represent the respondent.

In addition, at any time during the proceeding, the court can appoint an attorney for the respondent if the court determines that the rights and interests of the respondent cannot otherwise be adequately protected and represented in the proceeding. *Id.*

How Does the Court Select an Attorney to Appoint for the Respondent?

When the respondent does not request a specific attorney, or when an attorney has not otherwise petitioned for appointment in the proceeding, the court selects an attorney to represent the respondent. How the court selects the attorney may vary from county to

county. The court may appoint the next-named attorney on the CV Registry. If the CV believes the circumstances warrant appointment of counsel with special expertise, the CV should inform the court of the circumstances.

Who Can Serve as Attorney for the Respondent?

A respondent is entitled to willing counsel of their choosing at any point in the proceeding. Any attorney for the respondent *must* be appointed by the court (though not necessarily selected by the court) on the court's own motion or by separate petition.

What are the CV's Duties Regarding the Respondent's Right to Counsel?

As soon as practicable following appointment, the CV must meet with the respondent and inform them of their right to counsel, the right to be represented by an attorney of their choosing, and to have an attorney appointed by the court to represent them in the proceeding. The CV must inform the respondent of each element of their right to counsel, even if counsel has already been appointed for the respondent.

If an attorney has not otherwise been appointed for the respondent, it is the duty of the CV to investigate and report to the court if the respondent requests to be represented by counsel or the CV believes that it is in the respondent's best interest that an attorney be appointed for them.

Similarly, if, at any point in the proceeding, the respondent objects to the proceeding, states that they want an attorney, or otherwise expresses a desire for legal assistance, the CV must take appropriate steps to ensure the respondent will be represented by counsel.

If an attorney has not been appointed for the respondent, and during the CV's initial visit with the respondent they state that they want an attorney, the CV should first determine if the respondent is represented or desires to be represented by a specific attorney. The CV should then explain the next steps the CV will take to ensure the respondent will be represented by counsel. The CV should suspend the meeting with the respondent and explain that the meeting will be resumed after the appointment of counsel for the respondent.

If the respondent indicates that they already have an attorney or want to be represented by a specific attorney, the CV should contact that attorney, if named by the respondent. If the respondent is unable to name the attorney, the CV should consider consulting with the respondent's friends or family regarding the name of the attorney. The CV should contact the attorney to inquire whether they are willing to represent the respondent in the proceeding. The attorney may decline to serve if the representation is beyond the attorney's expertise or would pose a conflict of interest. If the attorney agrees to represent the respondent in the proceeding, the attorney should petition the court for their appointment by the court. If the attorney fails to do so within a reasonable time period, the CV should follow up with the attorney or petition the court for instructions, as necessary.

In general, if counsel for the respondent has not otherwise been appointed, the CV should petition the court for instructions regarding the appointment of counsel for the respondent if:

1. The CV is unable to determine whether the respondent wants to be represented by an attorney;
2. The respondent affirmatively states that they do not wish to be represented by counsel, but the CV believes that the rights and interests of the respondent cannot otherwise be adequately protected and represented without the appointment of an attorney; or
3. The CV otherwise believes that the rights and interests of the respondent cannot be adequately protected and represented without the appointment of an attorney.

As addressed in other chapters, it is very important for the CV to be aware that *ex parte* communications (i.e., contacting the court directly without including other parties on communications or providing notice of filings or hearings) may be grounds for the CV's removal. Thus, if the CV intends to petition for the appointment of an attorney for the respondent or instructions from the court, the CV must inform the petitioner and any other party of the CV's intentions and provide notice of the filing and hearing on the petition to the petitioner, the respondent, and any other parties. The CV must inform the court that they have properly provided notice.

If the petitioner and any other parties who have appeared in the matter have no objection to the CV's petition for the appointment of counsel, it may be possible to present an agreed order to the court without the need to note a hearing on the petition.

Forms for petitioning the court for appointment of an attorney for the respondent should be available on the Washington Court Forms website or the local county Superior Court website.

If the CV is contacted at any point during the proceeding by an individual claiming to be the attorney for the respondent, the CV should inform such individual that they must be appointed by the court before they can act on behalf of the respondent in the proceeding.

If an attorney has been appointed by the court, and subsequently another attorney of the respondent's choosing petitions for appointment as respondent's counsel, the prior attorney appointed by the court would be discharged upon the court order appointing the newly appearing attorney.

What Happens After an Attorney is Appointed for the Respondent?

An attorney for the respondent must have adequate time for consultation with the respondent and preparation prior to the final hearing. Absent a convincing showing in the

record to the contrary, and with the exception of emergency guardianship or conservatorship proceedings, a period of less than three weeks prior to the final hearing is presumed to be inadequate time for respondent's counsel to consult with the respondent. RCW 11.130.285, RCW 11.130.385, and RCW 11.130.610.

Once counsel for the respondent is appointed, when the CV seeks contact with the respondent, the CV shall notify the attorney in advance of such contact. The CV's access to the respondent shall be permitted by the respondent's attorney.

As stated above, the respondent is entitled to have their attorney present at any meeting with the CV. However, the attorney for the respondent shall not impede or impair the CV's investigation, including the CV's interview of the respondent.

What are the Duties of Appointed Counsel for the Respondent?

The attorney for the respondent must advocate for the expressed preferences of the respondent, to the extent reasonably ascertainable, regardless of whether the attorney believes those preferences are in the respondent's best interest.

If the attorney cannot ascertain the respondent's wishes, the attorney shall advocate for the "*result that is the least restrictive in type, duration, and scope, consistent with the respondent's interests.*" RCW 11.130.285(2)(c), RCW 11.130.385(2)(c), and RCW 11.130.610(2)(c).

The respondent's attorney should ensure compliance by all parties and the CV with all procedural and substantive requirements of the law, including all due process requirements.

Any failure of the petitioner or the CV to comply with the procedural or substantive requirements of the law are subject to challenge by the respondent's attorney, and any such challenge could result in removal of the CV, an award of fees against the petitioner, or even dismissal of the pending proceeding.

What if the Respondent Refuses or is Unable to Communicate with Their Court-Appointed Counsel?

If the respondent refuses to communicate with their appointed attorney or is unable to communicate with the attorney even with appropriate accommodations and assistive devices, the attorney is thus unable to receive direction from the respondent. While this circumstance may typically preclude an attorney-client relationship, the appointed attorney still has a role and duty in the proceeding. If the attorney cannot ascertain the respondent's wishes, the attorney *shall* advocate for the "*result that is the least restrictive in type, duration, and scope, consistent with the respondent's interests.*" *Id.*

How is Counsel for the Respondent Compensated?

An attorney for the respondent is entitled to reasonable compensation for services and reimbursement of reasonable expenses from the assets/property of the respondent. The entitlement to “reasonable compensation” may be limited for DSHS/HCA, Office of Public Guardianship clients, or in proceedings in which the attorney is appointed at public expense.

Except as detailed in the next paragraph, whether an attorney is to be paid from the assets of the respondent or at public expense, attorney fees and costs must be submitted for court approval prior to payment. Attorneys should submit a declaration regarding incurred fees and costs supported by detailed billing statements.

However, in any proceeding for the appointment of a guardian/conservator or for a protective arrangement that does not result in an adjudication of incapacity and resulting guardianship, conservatorship, or protective arrangement, the respondent’s attorney’s fees and costs may not be subject to court review.

The court has plenary discretion to award attorney fees against or to any party in the proceeding.

Counsel for the respondent will be appointed and paid at public expense if:

1. The respondent is unable to afford an attorney;
2. The expense of an attorney would result in substantial hardship to the respondent;
or
3. The respondent does not have “practical access” to funds to pay an attorney. If the respondent can afford an attorney, but lacks access to funds, the court may order reimbursement as part of the final order.

When is Court-Appointed Counsel for the Respondent Discharged?

In most cases, the court-appointed attorney for the respondent is discharged by the court at the final hearing on the petition. In some cases, the court may determine there is good cause for the attorney to continue to represent the respondent for a period of time, or even indefinitely.

B. SUMMARY OF STATUTORY AUTHORITY UNDER RCW 11.130.

Right to Counsel

A respondent has the right to be represented by an attorney of their choosing at any stage of the proceeding. RCW 11.130.285(1)(a), RCW 11.130.385(1)(a), and RCW 11.130.610(1)(a).

Any attorney purporting to represent a respondent must petition the court to be appointed. RCW 11.130.285(1)(a), RCW 11.130.385(1)(a), and RCW 11.130.610(1)(a).

The court **must** appoint an attorney for the respondent unable to afford or pay for an attorney. RCW 11.130.285(1)(c), RCW 11.130.385(1)(c), and RCW 11.130.610(1)(c).

If counsel has not otherwise been appointed for the respondent who is able to afford and pay for an attorney, the court is not required but may appoint an attorney to represent the respondent. RCW 11.130.285(1)(b), RCW 11.130.385(1)(b), and RCW 11.130.610(1)(b). However, “(w)hen, in the opinion of the court, the rights and interests of the respondent cannot otherwise be adequately protected and represented, the court on its own motion must appoint an attorney at any time to represent the respondent.” RCW 11.130.285(1)(c)(ii), RCW 11.130.385(1)(c)(ii), and RCW 11.130.610(1)(c)(ii).

Adequate Time for Consultation and Preparation

Representation requires adequate time for consultation with client and preparation – at least three weeks before any final hearing. RCW 11.130.285(1)(c)(iii), RCW 11.130.385(1)(c)(iii), and RCW 11.130.610(1)(c)(iii).

Roll (Duties) of Attorney

An attorney for a respondent must make reasonable efforts “to ascertain the respondent’s wishes (and) advocate for such wishes to the extent reasonably ascertainable.” If the attorney cannot ascertain respondent’s wishes, the attorney *shall* advocate for the “*result that is the least restrictive in type, duration, and scope, consistent with the respondent’s interests*” (emphasis added). RCW 11.130.285(2), RCW 11.130.385(2), and RCW 11.610(2).

Appointment of Attorney: Emergency Conservator and Guardian Proceedings

Immediately on filing of a petition for appointment of an emergency guardian or emergency conservator, the court *shall* appoint an attorney to represent the respondent. RCW 11.130.320(9); RCW 11.130.430(9).

Petitioner must personally serve the respondent, appointed attorney, and the CV with the petition for emergency guardian/conservator and notice of hearing within 48 hours. A hearing on petition must be held within 14 days. RCW 11.130.320(9); RCW 11.130.430(9).

However, the court may, under certain circumstances (*see* RCW 11.130.320(10)), appoint an emergency guardian without advance notice to the respondent and respondent’s attorney. If an emergency guardian is appointed without advance notice to the respondent and respondent’s attorney:

1. Notice of the appointment of an emergency guardian without advance notice must be given to the respondent and respondent's attorney within 48 hours. RCW 11.130.320(10)(a).
2. A hearing must be held within five days of appointment on the appropriateness of the appointment of an emergency guardian. RCW 11.130.320(10)(b).

Unlike in emergency guardianship proceedings, RCW 11.130.430 (regarding emergency conservatorships) does not allow for the appointment of an emergency conservator without advance notice of the petition and hearing on the appointment of an emergency conservator to the respondent and appointed counsel.

Temporary Substitute Guardian and Temporary Substitute Conservatorship Proceedings – Appointment of Counsel

An adult subject to guardianship/conservatorship has the right to be represented by counsel of their choosing in any temporary substitute guardianship or conservatorship proceedings. RCW 11.130.130(3).

Termination or Modification of Guardianship/Conservatorship – Appointment of Counsel

Before terminating a guardianship/conservatorship, the court shall follow the same procedures to safeguard the rights of the individual subject to guardianship/conservatorship which apply to a petition for guardianship/conservatorship. RCW 11.130.355(6) and RCW 11.130.570(8).

An individual subject to guardianship/conservatorship who seeks to terminate or modify the terms of the guardianship or conservatorship has the right to choose an attorney to represent the individual. RCW 11.130.355(7) and RCW 11.130.570(9).

Compensation and Expenses – Attorney for Respondent

Attorney Compensation and Expenses – In General

The attorney for the respondent is entitled to reasonable compensation for services and reimbursement of reasonable expenses from the assets/property of the respondent. RCW 11.130.100(1)-(2).

See limitations for DSHS/HCA, Office of Public Guardianship clients, RCW 11.130.100(3)-(4), and appointment at public expense, below.

If a guardian/conservator is appointed for the respondent, attorney fees and costs must be submitted for court approval prior to payment. RCW 11.130.100(5).

Appointment at Public Expense

An attorney for the respondent must be paid at public expense when:

1. The respondent is “unable to afford” an attorney;
2. The expense of an attorney would result in “substantial hardship” to the respondent; or
3. The respondent does not have “practical access” to funds to pay an attorney. If the respondent can afford an attorney, but lacks access to funds, the court may order reimbursement as part of final order.

RCW 11.130.285(1)(c), RCW 11.130.385(1)(c), and RCW 11.130.610(1)(c).

Supported Decision-Making Agreements

Supported decision-making agreements (SDMAs) do not need to be established through a court proceeding and are not subject to court supervision. In this regard, the right to and appointment of counsel is inapplicable. However, within a guardianship, conservatorship, or protective arrangement proceeding, a SDMA may be determined to be a suitable less restrictive alternative to a guardianship, conservatorship, or protective arrangement, and the right to counsel/appointment of counsel provisions under guardianships/conservatorships/protective arrangements may thus be applicable, accordingly.

CHAPTER X FINAL WORDS OF WISDOM

A. COURT HEARINGS

Attendance at Legal Proceedings

Superior Court Guardian ad Litem Rule¹ (GALR) 2(i) requires the CV to attend **all** hearings unless excused by court order.

In guardianship/conservatorship proceedings, the respondent's presence at the final hearing on the petition is required. RCW 11.130.295(1) and RCW 11.130.400(1). Under the UGA, the presence of the proposed guardian/conservator is also required unless excused for good cause. RCW 11.130.295(6) and RCW 11.130.400(6).

Pursuant to RCW 11.130.295(1) and RCW 11.130.400(1), if it is not reasonably feasible for the respondent to attend a hearing at the location where hearings are typically held, the court shall make reasonable efforts to hold a hearing at a location convenient to the respondent or to allow the respondent to attend using real-time audio-visual technology.

Without the respondent's attendance, the hearing may not proceed unless the court finds by clear and convincing evidence that (1) the respondent has consistently and repeatedly refused to attend the hearing after being provided notice of the right to attend and the potential consequences of not attending; (2) there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services or technological assistance; or (3) only in a conservatorship for a minor, the respondent is a minor who has received proper notice and attendance would be harmful to the minor. RCW 11.130.295(2), RCW 11.130.400(2), and RCW 11.130.205(1)(b).

The respondent cannot be forced to attend the hearing and may simply refuse to do so. The CV should always ask the respondent if the respondent wishes to attend the hearing and include the respondent's response in the CV's report. The respondent has the right to be represented by an attorney of the respondent's choice at the hearing. RCW 11.130.295(4) and RCW 11.130.400(4).

If the respondent is unable to arrange for transportation to the hearing, the CV can assist with making arrangements to have a third party transport the respondent to the hearing, if necessary. However, the CV should generally not transport the respondent to the hearing. The CV should not take action that would appear as though the CV is serving in a representative capacity for the respondent, rather than a neutral party who is advocating for the respondent's best interests.

¹ This Chapter assumes the Superior Court Guardian ad Litem Rules and General Rules will apply equally to CVs.

At the hearing, the respondent has the right to present evidence and subpoena witnesses and documents, the right to examine witnesses, including any court-appointed evaluator and the CV, and otherwise has the right to participate in the hearing. RCW 11.130.295(5) and RCW 11.130.400(5).

Courtroom Demeanor

The CV should be aware of and adhere to certain basic rules with regard to courtroom demeanor. The CV should maintain an appearance of impartiality by not sitting next to or appearing with the petitioner or the respondent, or otherwise give the impression that the CV favors one party (the petitioner, the respondent, other family members, etc.) over the other. Although individuals involved in the process know that with whom the CV sits is not an indication of favoritism, lay individuals involved in this process may see this in a very different manner.

When the CV enters the courtroom area, the CV should greet the parties, introduce themselves to any parties or attorneys that the CV has not met, and attempt to resolve any issues related to the proposed order before the hearing.

The CV should maintain their dignity and decorum. The CV should dress in a manner that shows respect for the process and the parties, regardless of whether the hearing is in a physical courtroom or virtual medium.

The CV should be aware of and obey posted rules such as no food or drink in the courtroom, no chewing gum in the courtroom, and turning off or silencing cell phones before entering the courtroom. During virtual hearings, the CV should treat the court and other parties with the same respect they would if they were in the courtroom, and the CV should not engage in other tasks while present in the virtual courtroom.

The court will give each party an opportunity to speak. The CV, when given the opportunity to address the court, should explain their point of view and be prepared to respond to any questions the court may have. The CV should present a clear and concise account of the facts and the CV's recommendations. Normally, referencing the report and summarizing recommendations is sufficient, but if the CV has received additional information after completion of the report, it is appropriate to mention this information and indicate whether it has any impact on the recommendations contained in the report.

Emotions can run high in a guardianship/conservatorship proceeding. The CV should not inflame the situation by arguing with the other parties, their counsel, or the court. Throughout the process it is critical that the CV take all precautions to maintain an appearance of neutrality, including in the CV report and in any court appearance. In addition, the CV should be mindful of the impact of words on a situation that is often difficult and emotionally charged. The CV should avoid over-generalizations and the inclusion of inflammatory statements. Occasionally, however, repeating a negative statement or description of a person's conduct is relevant and necessary to support the CV's recommendation. Usually, in a bench hearing on the petition, the court will have read the

full CV report prior to the hearing. Consequently, the CV should keep any comments in open court brief and directly responsive to the court's questions. The CV should not interrupt the court or any other party.

Working or Bench Copies

The CV should review the local rules for each county on which the CV's name appears on the registry for guardians ad litem and CVs. The local rules will inform the CV of the "working paper" or "bench copy" requirements for each county. If a local rule does not exist stating the "working copy" or "bench copy" procedure, the CV should ask the attorneys involved in the case.

If a hearing is continued, the CV should not assume that the working papers or bench copies will be automatically moved to the next hearing date. Unless the CV can request and receive confirmation that the working copies or bench copies have been moved to the continued hearing date, it is best to forward a second set.

***Ex Parte* Communication**

"A guardian ad litem [or CV] shall not engage in *ex parte* communications with any judicial officer involved in the matter for which he or she is appointed during the pendency of the proceeding, except as permitted by court rule or statute for *ex parte* [communications]." RCW 11.130.150; *see also* GALR 2(m). *Ex parte* communication may result in the CV's removal from the case or the CV registry, and may even require forfeiture of any fees for professional services in the pending case. RCW 11.130.150.

Ex parte communication occurs when a judicial officer or their staff is contacted by one party to a proceeding and the other party or parties to the proceeding are not present and have not been provided notice. This includes email. When emailing the court, all parties to the matter must be copied.

Certain *ex parte* contact is permitted, such as in cases of extreme emergency or when injunctions or orders of protection are needed. A CV should evaluate the situation very carefully and determine if other alternatives exist that will serve the best interests of the respondent before engaging in *ex parte* communication with the court. Unless the CV is convinced that advance notice to the parties would harm the respondent, the CV should always give advance notice to all parties (consistent with court rules) or obtain a written waiver of notice from all parties.

All communication with judicial officers about a proceeding should be in open court and on the record.

If the respondent requests and/or the CV recommends the appointment of an attorney for the respondent, the CV should seek the appointment expeditiously. If there is an objection to the proposed order appointing an attorney for the respondent, a hearing must be noted with notice to all parties as required by local rules. In most cases, no one will be objecting

to the proposed order, in which case the CV may be able to submit the order as agreed using the court's *ex parte* via the Clerk system, if any.

Practice Tip

Depending on the county, if the CV receives an email from a party or attorney authorizing the CV to sign the proposed order on the party or attorney's behalf, it may be advisable or required to attach a copy of the email to the order. If the CV does attach such an email, the CV should request the party's permission to do so as a matter of professional courtesy.

B. PETITION FOR INSTRUCTIONS

It may become necessary to seek court direction prior to establishment of a guardianship/conservatorship.

The authority of a CV is limited by the guardianship/conservatorship statutes and the order appointing the CV. GALR 2(j). Occasionally, a CV may believe an action is necessary that is beyond the scope of RCW 11.130.280 and RCW 11.130.380 or the order of appointment.

Before taking any unauthorized action, the CV should petition the court for instructions. The petition for instructions is a useful tool. Use it sparingly, however. The CV should first be thoroughly familiar with their statutory duties and powers and the authority granted to the CV in the order appointing before seeking specific direction from the court. The CV should not seek an order authorizing actions the CV is already permitted or directed to do, unless the CV believes that the permissions or directives in the order appointing the CV exceed the scope of their authority as limited by statute. It is not uncommon for petitioning attorneys to include expansive authority for CVs, and the CV should not feel pressured by other parties to take any actions that the CV feels exceeds the scope of the CV's authority.

Before petitioning for instructions, it is wise to discuss the situation with another experienced CV (or former GAL). If a petition for instructions is brought, the petition should suggest possible alternative courses of action, and the proposed order should reflect those alternatives. It is also a good idea to leave space in the form of blank lines on the proposed order so the court can insert its own instructions if the ruling does not agree with any of the CV's proposals. The CV should not become too invested in any one possible course of action.

Notice should be provided to any persons or entities interested in the petition for instructions. At a minimum, it is necessary to provide notice to the petitioner and the respondent or their attorney. Other persons who have filed a notice of appearance should also receive a copy of the CV's petition for instructions and notice of any hearing on the petition; however, it is important that the CV only provide sealed information to those individuals required to receive notice under the UGA.

Common areas for petitions for instructions include problems in getting a professional evaluation, emergency housing or financial needs, and non-emergency medical issues. The petition for instructions should be supported with a declaration made under penalty of perjury and any other documents, if needed.

C. PRIVACY ISSUES

Private vs. Public Information

There is an inherent conflict between the public's right to know and the individual's right to privacy. There is a presumption that all cases are, and should be, open to the public. Wash. Const. art. I, § 10; *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d 861 (2004).

However, the public's right to information may be limited to protect other significant and fundamental rights. *Id.* at 909. Specific findings by the court must support the decision to close hearings and seal documents or entire files. *Id.* at 907–908. GR 22 requires the sealing of confidential medical records, financial records, and detailed GAL (CV) reports in guardianship as well as family law cases. Although GR 22 has not yet been amended to include CV reports or replace GAL with "CV," the CV should comply with the directives of GR 22.

GR 31

Courts have or are in the process of making most court records available via internet to any individual with a computer. At the same time, guardianship/conservatorship – by its very nature – deals with confidential information, which could easily be misused. Internet access to personal information contained in court records could make abuse easier.

While the court in a guardianship/conservatorship action must be aware of the nature and extent of the respondent's estate, there should never be enough identifying information in unsealed files to provide the public access to financial accounts.

GR 31(e) provides:

(1) Except as otherwise provided in GR 22, parties shall not include, and if present shall redact, the following personal identifiers from all documents filed with the court, whether filed electronically or in paper, unless necessary or otherwise ordered by the Court.

(A) Social Security Numbers. If the Social Security Number of an individual must be included in a document, only the last four digits of that number shall be used.

(B) Financial Account Numbers. If financial account numbers are relevant, only the last four digits shall be recited in the document.

(C) Driver's License Numbers.

It is the CV's responsibility to comply with these rules. Do not expect the court to assume responsibility for applying these rules. The CV should consult GR 31 as well as GR 22 and the local rules for each county court on which the CV's name appears on the registry. The CV should also be familiar with GR 15, "Destruction, Sealing, and Redaction of Court Records."

D. FEES

Amount Allowed

The court, in the order appointing a CV, must specify the hourly rate of the CV and the maximum amount the CV may charge without additional court review and approval. RCW 11.130.280(2) and RCW 11.130.380(3).

If the order appointing the CV does not establish the maximum fee, the CV should, before proceeding further, present the court with a petition and order on instruction establishing the hourly rate and the maximum amount that the CV may charge.

Should the CV determine that the maximum amount of CV fees set forth in the order appointing CV will not be sufficient for the CV to fulfill their duties, the CV should seek court approval for additional time *before* working the additional time. Failure to secure court approval for additional time may result in the CV not receiving payment for services provided over the maximum amount allowed by court order.

To Whom Charged

Typically, the CV's fees will be charged to the estate of the respondent. 11.130.280(2) and RCW 11.130.380(3). If the court finds that such payment would result in substantial hardship upon such respondent, the county will be responsible for payment of the CV's fees. *Id.* If the court finds that the petition for guardianship/conservatorship is frivolous or not brought in good faith, the court shall charge the CV's fees to the petitioner. The court may allocate the CV's fees to the respondent, any person appearing in the guardianship/conservatorship action, or may otherwise allocate fees as the court deems just. *Id.*

If the CV's fees will be paid by the county in which the CV practices, the CV should become familiar with the procedure that the county uses to review and approve fees. Each county has different procedures. For example, in King County, the CV should provide a motion, fee declaration, and proposed order to the Ex Parte Coordinator in order to process their fees and costs incurred and to obtain payment.

Petition or Declaration for Fees

The CV must keep accurate and legible time and expense records. The CV must submit their time records to the court as part of a petition or declaration for fees along with a fee statement. A petition or declaration for fees is a sworn statement by the CV attesting to the services provided, the time expended, estimated time to be expended, the hourly rate, and costs, if any, incurred.

The CV should file and serve on all parties a declaration and statement as to fees and costs, setting out the services provided, time charged, and actual costs incurred in service as a CV. If the CV's fees are not included in the guardianship/conservatorship order, the CV will need to submit a separate order for fees, with advance notice to all parties, and have a separate hearing. That results in extra time, effort, and expense that, with a little planning, is usually avoidable.

The petition or declaration for fees should be filed with the court and working papers or bench copies provided for the bench prior to any hearing seeking approval of the CV's fees and costs. The petition or declaration for fees may be filed at the same time that the CV files their report. A copy of the petition or declaration for fees should be provided to all parties to the guardianship/conservatorship action prior to the hearing. The fee declaration can include an estimate of the time it will take to conclude the CV's investigation, review the proposed order, and attend the court hearing. As long as that time is reasonable and does not exceed the time previously authorized by the court, the fees will likely be approved. If the time does exceed the time previously authorized by the court, the CV should include a detailed explanation regarding the circumstances that necessitated the extra time in their fee declaration.

If fees are to be paid by the county, local rules may require that the declaration and the request for fees follow a different procedure and may not need to be presented at the time of entry of the order appointing the guardian/conservator. CVs should contact the registry manager in each county of practice for information about local procedures. A list of court contacts by county is available online at: <https://www.courts.wa.gov/content/PublicUpload/Guardian%20Ad%20Litem/GALProgramManagers.pdf>.

In King County, for example, after discharge, the CV should prepare a motion, fee declaration, and proposed order for compensation that should be submitted to the Guardian ad Litem Registry Manager. The motion, fee declaration, and proposed order do not need to be filed in advance of submission.

E. CV AUTHORITY

The duties of a CV are set forth in RCW 11.130.280 and 11.130.380 and the order appointing the CV.

The CV acts under the supervision and control of the court. So long as the CV acts as directed by the court, the CV will have “quasi-judicial immunity” from any claim for damages arising out of the performance of their duties. *See Barr v. Day*, 124 Wn.2d 318, 332, 879 P.2d 912 (1994) (relating to GAL’s quasi-judicial immunity). Should a CV take any action outside the authority granted to them by the court, the CV could lose immunity and be personally liable for damages that arise out of the unauthorized conduct.

As previously discussed, if the CV believes they need to take certain action not specifically authorized in the order appointing the CV and in applicable statutes, the CV must bring the situation to the attention of the court by filing a petition for instructions.

Under the former RCW 11.88.090, the GAL had statutory authority to make *emergency life-saving* medical decisions on behalf of the AIP (respondent) if such person was unable to give informed consent due to incapacity prior to the appointment of a guardian. Such authority does not exist under Chapter 11.130 RCW. Notably, the list of individuals who may provide informed consent under RCW 7.70.065 does not include a CV.

As such, if called upon in an emergency event, the CV should inform the medical providers that they do not have the authority to make such decisions. The medical staff should first determine whether or not the respondent has granted authority to someone else to make medical decisions for the respondent. In practice, if it is a true emergency, it is likely the hospital will take action without obtaining informed consent. Informed consent is presumed in true emergencies.

The CV has no authority to make any other medical decisions or to terminate the care for the respondent, and may be subject to liability for doing so as it is outside of the scope of the CV’s authority. If a health care provider asks a CV to make medical decisions or to terminate the care for the respondent, the CV must first advise the requester of the CV’s limited authority. As in all situations where the CV believes actions exceeding their statutory and court ordered authority may be in the respondent’s best interest, the CV must file a petition for instructions and obtain court authority in advance for any action to be taken.

F. EMERGENCY GUARDIAN/CONSERVATOR

Rather than providing informed consent or making any health care decisions on the respondent’s behalf, the CV should strongly consider whether the appointment of an emergency guardian under RCW 11.130.320 is appropriate. A standard petition for emergency guardianship requires 14 days’ notice of the hearing on the petition. However, under RCW 11.130.320(10), the court may appoint an emergency guardian for an adult *without notice* to the adult and any attorney for the adult if the court finds from an affidavit or testimony that the respondent's physical health, safety, or welfare will be substantially harmed before a hearing with notice on the appointment can be held. The court is required to immediately appoint an attorney for the respondent upon the filing of a petition for the appointment of an emergency guardian. RCW 11.130.320(9).

An emergency guardianship petition may be filed by any person interested in the respondent's welfare. RCW 11.130.320(1). In practice, the CV should first approach the petitioner to request that the petitioner take lead on filing the emergency guardianship petition. In the unlikely event the petitioner refuses, the CV may presumably file as a person interested in the respondent's welfare.

Similarly, a person interested in the respondent's welfare may file a petition for the appointment of an emergency conservator if, *inter alia*, an emergency exists such that appointment of an emergency conservator is likely to prevent substantial and irreparable harm to the individual's property or financial interests. *See* RCW 11.130.430.

If appointed as CV in an emergency guardianship or conservatorship proceeding, the CV must be willing and able to act expeditiously to carry out their duties and should immediately inform the petitioner if they are unable to do so to allow the petitioner to seek the appointment of a replacement CV.

In emergency guardian/conservator situations, the timeline for completion of the CV's investigation is significantly shortened. CV reports are due seven days in advance of the hearing, leaving only up to a week (or sometimes as little as five days due to the fact that service notifying the CV of his or her appointment may be made up to two days after appointment) for the CV's investigation. RCW 11.130.320(11)(d) and RCW 11.130.430(f).

In emergency guardianships/conservatorships, the CV should carefully review RCW 11.130.320 and RCW 11.130.430 in preparing the CV's report, as certain additional information is required in the CV reports in emergency situations as opposed to non-emergency petitions.

Expediting the Guardianship/Conservatorship Matter

If expediting the matter is believed to be required, the CV should first consider whether the appointment of an emergency guardian/conservator is in the respondent's best interest. If an emergency guardian/conservator is not needed, then the CV can work with the parties to expedite the matter on a non-emergency basis.

In general, all hearings under RCW 11.130 require 14 days' notice. Under RCW 11.130.275 and RCW 11.130.370, all guardianship/conservatorship petitions must be heard within 60 days unless a party or the CV obtains an order extending the 60-day period for good cause.

In all cases, the respondent and CV must be personally served not more than five court days after the petition has been filed. RCW 11.130.275(2)(a) and RCW 11.130.370(2)(a). Thus, if a professional evaluation has been prepared, it is possible to have a final hearing 14 days after filing and providing notice to the respondent, with the CV's report filed on shortened time. However, if counsel is appointed to represent the respondent, a continuance of the hearing may be required. Absent a convincing showing to the contrary, a period of

less than three weeks shall be presumed to be an inadequate time for a newly-appointed attorney to consult with the respondent. RCW 11.130.285(1)(c)(iii) and RCW 11.130.385(1)(c)(iii).

Staying Neutral

Someone who acts as a guardian/conservator without court approval or without proper appointment becomes a “guardian de facto” and has the same duties and liabilities of a properly appointed guardian. *King v. Sells*, 193 Wash. 294, 75 P.2d 130 (1938); *In re Bouchat*, 11 Wn.App. 369, 522 P.2d 1168 (1974). A CV should not exceed their statutory duties or the duties set forth in the order appointing the CV or any order on a petition for instructions. If the CV exceeds such duties, the CV would become a “guardian de facto” for the respondent and lose any quasi-judicial immunity.

Practice Tip

Hospitals should know that the CV has limited authority, but it is not unusual for a CV to receive a request to authorize the release of the respondent to a skilled nursing home or other care facility. The CV should clearly advise the individual making the request that the CV does not have authority to make this decision (making this decision frequently involves signing paperwork that the CV will be financially responsible for the care of the respondent). The choice of care facility may impact the respondent for many months into the future so making these decisions is better left to the guardian/conservator after their appointment. If emergency circumstances exist, it is preferable to contact the attorney for the petitioner about appointing an emergency guardian/conservator or shortening time on the hearing. If the petitioner objects, it may be necessary to file a petition for instructions.

The filing of the guardianship/conservatorship matter and appointment of a CV in and of itself does not divest the respondent of authority to act on their own behalf, but other parties may be reluctant to deal directly with the respondent when the guardianship/conservatorship matter is pending. *See* RCW 11.130.280(8) and RCW 11.130.380(8).

In some situations, it may be possible or advisable to obtain authority from the court, through a petition for instructions, to allow the respondent to handle a matter on their own or with additional assistance from and authority by the CV. For example, if a home sale is pending and must be closed before the conservatorship hearing is held, and if everyone is in agreement that the sale is in the best interest of the respondent, an order that authorizes the CV to sign the final papers with a requirement that the proceeds be held in escrow until the conservatorship issues are resolved could benefit the respondent and satisfy the title company. However, again, it would likely be far more appropriate for an emergency conservator to be appointed to take such emergency actions, and the CV should only petition the court for such authority under extenuating circumstances in which the appointment of an emergency guardian/conservator is impossible or impractical.

G. TRIAL ON GUARDIANSHIP/CONSERVATORSHIP PETITION

RCW 11.130.035 provides “[a]n adult respondent may demand a jury trial ... on the issue of whether a basis exists for the appointment of a guardian ... or a conservator and on the rights to be retained or restricted if a guardian or conservator is appointed.” Consequently, the CV should conduct every investigation as if the CV will be called to testify at a trial.

The role of the CV has been generally discussed elsewhere in this manual. There is no case law on the role of a CV, but case law concerning the role of a guardian ad litem as a witness can be consulted for persuasive authority on the CV’s role in trial. The role of the CV (GAL) as a witness is addressed in *In re Guardianship of Stamm*, 121 Wn. App. 830, 91 P.3d 126 (2004). The GAL, and presumably a CV, may be permitted by the court to give opinion evidence as an expert witness if the court so allows.

Generally, a petition for guardianship/conservatorship is not automatically noted for trial. In King County, a court commissioner must certify the matter for trial if requested by the respondent. Most cases are resolved in the initial, less formal hearing on the petition. If the guardianship/conservatorship is contested and a trial is sought, often mediation is helpful. RCW 11.130.035(4) permits the CV or respondent to request that the court order mediation prior to the appointment of a guardian/conservator, if it appears that the respondent could benefit from mediation. However, if the respondent demands a jury trial, that is his or her right. The respondent is not required to submit to mediation in lieu of a trial.

If mediation or trial is likely and the order appointing the CV has a fixed time limit, the CV will likely need to petition, prior to incurring the additional time, for authorization to expend more time.

It has been said elsewhere, but deserves repeating, that the CV must keep accurate notes during the course of the investigation and must be prepared to produce those notes in response to discovery requests.

Once the investigation has been completed and the CV’s report has been filed, if the matter is contested, the CV may need to restrict contact in order to maintain the appearance of impartiality.

Prior to discussing the investigation and recommendations, the CV should always review their notes taken during the investigation. The CV should resist making statements based on memory unless the CV’s memory is clear on the question. If the answer is not in the notes, and the CV is not sure, then it is better to acknowledge such than to speculate.

In a contested case, it is likely that one or more of the parties (or more likely their attorneys) will dispute all or a portion of the CV’s report. The CV should always remember the attorney has a job to do. In many cases, the attorney’s job will be to show why the CV’s recommendations should not be followed by the judge or the jury. The CV should not take this effort personally.

At trial, the CV should speak clearly, professionally, and politely, and always address the jury (or judge, if it is a bench trial) directly.

H. MISCELLANEOUS PRACTICAL CONCERNS

Address of Respondent

Although the address for the respondent contained in the petition should be correct, it is wise to verify the address in advance of driving to the location. The CV should not rely on the respondent to give the CV directions to the respondent's home, especially if the respondent has gotten lost driving or is no longer driving. Sometimes in larger facilities, there is a specific entrance that should be used, or in city locations there may be parking restrictions. If possible, try to talk to a responsible person and verify the address and any unique factors to consider in reaching the address. The petitioner or their attorney should generally be able to provide the CV with instructions on the best way to arrange a meeting with the respondent.

Due to the ongoing COVID-19 pandemic, many courts allow CVs to meet with the respondent virtually. If the CV does conduct a virtual meeting, the CV should state they did so in the CV's report. If the respondent is unable to arrange and manage the virtual meeting themselves, often a family member, caregiver, social worker, or hospital staff member can assist with the meeting. However, keep in mind, if someone helps facilitate the meeting, you should politely ask them to step out of the room so that you can meet independently with the respondent.

RCW 11.130.280(5)(b) states that the CV, in guardianship matters, is required to "visit the respondent's present dwelling and any dwelling in which it is reasonably believed the respondent will live if the appointment is made." It remains to be seen whether courts will apply this provision strictly, particularly in light of the pandemic. Beyond the obvious risk to the CV and respondent's health due to COVID-19, it may also be impractical or dangerous to visit the respondent's dwelling, or the respondent may object to such a visit due to privacy concerns. If the CV does not visit the respondent's dwelling, the CV should explain the reasons why they did not do so in the CV's report.

Respondent in Prison or Other Limited Access Facility

If a respondent is in jail, at Western State Hospital, or in another restricted access facility, before meeting with the respondent, the CV should make certain that they understand any limitations on access to the respondent.

1. Call the facility in advance and ask about any rules that might apply to meeting with the respondent.
2. If ID is required, determine what ID is acceptable. Some facilities require only a driver's license, while others may require proof of the professional status of the

- CV, such as an attorney identification card. Due to the ongoing COVID-19 pandemic, some facilities require proof of vaccination or negative COVID-19 test.
3. Find out where in the facility the individual is located. (Western State has many buildings and knowing the building number and where the building is located in advance can save a great deal of time once the CV arrives at Western State.)
 4. Find out if any equipment (such as a cell phone or computer) is permitted in the facility.

Sometimes a facility will require an officer to be present to protect the CV and prevent the respondent from escaping. While this is not ideal, unless there is some sort of unique issue involved, having an officer present is not critical to the case, but the presence of the third party must be mentioned in the CV's report.

Dress for the Situation

While it is important when appearing in court to dress professionally, this may not be the best way to meet with a respondent in the respondent's home since a respondent may not be open to an individual in a suit or other professional/formal attire. The CV should consider the individual circumstances of the respondent and whether dressing casually would make the respondent more comfortable. The role of the CV is to obtain meaningful information from the respondent and if that means sitting on the floor and playing with a young adult who functions at the age of a young child, then the CV should be prepared to do so. Some homes may be very cluttered and contain things such as bed bugs that could present problems to the respondent. While the CV sometimes cannot avoid entering these homes since the condition of the home is a factor that the CV must consider, sitting on a wood or metal chair is safer in some places than a stuffed cushion.

Use of Technology

While most CVs likely rely on emails and text messages in their personal and professional lives, many respondents, especially older people, may prefer not to use this technology or are not able to do so effectively. If the respondent does not respond in a reasonable time, use the telephone for contact and do not criticize the individual for not responding. It should go without saying, but as a general rule, do not ever criticize the respondent. Even if the respondent knows how to use the technology, it is not uncommon for a respondent to avoid responding to the CV if the respondent does not want a guardian/conservator and believes that by not responding to the CV the process can be avoided. It is important that the CV use whatever method is necessary to reach the respondent, which may also include an unannounced drop-in.