



# FUNCTIONAL CAPACITY & ALTERNATIVES

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# Legislative Intent and Statutory Mandate

## æ **RCW 11.130.001 (Effective January 1, 2021)**

“ It is the intent of the legislature 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. 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 arrangements only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.”

æ Adequate = “Legally Sufficient” per Black’s Law Dictionary

æ Adequate = “barely satisfactory or sufficient or suitable” per American Heritage Dictionary

## æ **RCW 11.130.010 (15) (Effective January 1, 2021)** “less restrictive alternative” means an 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 appointment under a power of attorney for health care or power of attorney for finances.



[illegible]

- Since 1996 the guardianship statute requires alternatives be considered and used if available
- Arrangements made by the protected person or ordered by the court instead of a guardianship
- The GAL is required to explore and evaluate alternatives to guardianship and explain why they are or are not appropriate.
- Best Practices: understand the scope and limitations of the alternatives.
- Guardianship is a last resort.

# Alternatives: Evaluating Advantages and Disadvantages

## **Powers of Attorney**

P. VII-2 Gship GAL 2018 Handbook  
RCW 11.125

- æAutonomy and privacy of choice of fiduciary
- æRetains all right and authority to act
- æCan revoke if not incapacitated
- æAgent may be at odds with Principal
- æStill vulnerable to bad actors or undue influence
- æNot viable long term option to avoid guardianship

## **Healthcare Directive (Living Will)**

P. VII-6 Gship GAL 2018 Handbook  
RCW 70.122

- æModel Healthcare Directive form available.
- æAllows direction on whether life-sustaining treatment and artificial nutrition and hydration should be withdrawn or withheld in a terminal or permanent unconscious condition
- æThey are subject to oral, written or destruction of the document regardless of mental state or competency.

# Alternatives: Evaluating Advantages and Disadvantages

## Trusts

RCW 11.97, 11.98A, 11.98B, 11.100, 11.103, 11.106

- æ Arrangement where Trustor transfers money or property to an entity (Trustee) to be managed and used as directed in a trust document for the benefit of some party (beneficiary)
- æ Allows estate to be managed by person s/he has chosen and in the manner proscribed by the trust document
- æ Lack of safeguards of assets, i.e., no bonding, accounting or oversight, etc
- æ Cost can be less or more expensive.
- æ Can recommend drafting of trust in lieu of a guardianship / conservatorship for autonomy and asset preservation
- æ Animal Trusts RCW 11.118
- æ Special Needs Trusts – complex issues involved See VII-13 to 15 in the 2018 Guardianship GAL Manual

## Informed Consent

RCW 7.70.065

- æ Invoked when lacks medical capacity to give informed consent to procedures
- æ Recent Hierarchy changes
- æ Before any person authorized to provide informed consent on behalf of a patient not competent to consent under \*RCW **11.88.010**(1)(e), other than a [minor or prohibited]..., exercises that authority, the person must first determine in good faith that that patient, if competent, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that the proposed health care is in the patient's best interests.
- æ Problems when there is conflict in a class of people or person needing consent wishes not honored

# Alternatives: Evaluating Advantages and Disadvantages

## **Case Management Services**

- æ Despite any other alternative or recommendation for guardianship, the GAL should consider the feasibility of developing a plan of care with a third party to assist the family and protected person
- æ Usually a private pay solution
- æ Protected person can be resistive to assistance
- æ Need for contract; look for DSHS options of inability to pay for services

## **Representative Payee / Bill Paying Services –**

Private, SSA, VA, DSHS, DOD, Railroad, OPM, See also: RCW 74.12.250, 74.08.280 and WAC 388-460-0025

- æ Maintains autonomy and privacy
- æ Limited functions or only specific functions
- æ Costs money
- æ Disagreements of budget
- æ Ability of Protected Person to contact or access the Rep Payee or Bill Paying Service
- æ Social Security Administration has their own rules:  
<https://www.ssa.gov/payee/>
- æ SSA handbook <https://www.ssa.gov/pubs/EN-05-10076.pdf>
- æ VA fiduciary Hub: <https://www.benefits.va.gov/fiduciary/>



# Understanding Impairments and Residual Capacity



# Evaluating Activities of Daily Living

## Activities of Daily Living (ADL)

æDressing / Bathing

æEating

æAmbulating (walking)

æToileting

æHygiene

## Instrumental Activities of Daily Living (IADL)

æShopping

æHousekeeping

æAccounting

æFood preparation

æTransportation



# Example in GAL Report

- æ The undersigned considered the Basic Activities of Daily Living (ADL's) which generally consists of self-care tasks. The undersigned considered the ADL's [AIP] is able to perform. These are: **Functional mobility** (moving from one place to another while performing activities). For most people, functional mobility is measured as the ability to walk, get in and out of bed, and get into and out of a chair.
- æ **Communication** with or without an assistive device is essential to discuss. Expand on sensory deficits or strengths.
- æ **Bathing and showering** (washing the body) **Dressing; Self-feeding** (does not include cooking or chewing and swallowing) **Personal hygiene** and grooming (including brushing / combing/ styling hair) **Toilet hygiene** (getting to the toilet, cleaning oneself, and getting back up)
- æ **These are the things she can generally perform in a sequence:** get up in the morning and get ready to go out of the house: get out of bed, go to the toilet, bathe, dress, groom, eat and travel to known locations. However, medical history revealed chronic urinary tract infections that give the impression she needs cueing or reminders regarding personal hygiene or bathing schedule. The odors the undersigned experienced in the home support this impression.

# GAL evaluation of residual capacity

- æ In assessing [AIP] Instrumental activities of daily living (IADLs), which are not necessary for fundamental functioning, but allow an individual live independently in a community.
- æ There are some concerns discussed below and appear to center around her cognitive or memory impairments. These are **areas she cannot perform without assistance** and/or where there are demonstrated management insufficiencies over time revealing significant risks of an inability to manage her own person or finances.
- æ **Managing money** – unable to manage or perform basis tasks due to memory impairment. There are significant concerns from each collateral source contacted. This issue was the impetus for the guardianship petition and the undersigned considers this is a significant problem.
- æ **Shopping for groceries or clothing** – Her ability to drive is compromised in that it has been reported she has become lost while driving and is a reckless fast driver. Use of telephone or other form of communication – she gives anyone who calls her personal or financial information. This is how she has been “scammed” by nefarious third parties. Despite her phone number being changed they “scammers” are still calling as witnessed by collateral sources. [AIP] denies the involvement of “scammers.” Yet, banks and credit unions have confirmed to the undersigned unknown third parties attempts to access her financial accounts with and without her present.
- æ **Transportation within the community** – she is not persuaded she needs assistance with transportation in the community. The undersigned disagrees.
- æ **Housework**– her home is immaculate and she employs a housekeeper, gardener and lawn service. However, she cannot recall how much she pays them, whether she paid them on time, or that the cost of the service is appropriate. Collateral sources stated to the undersigned she was either behind on these payments or there was concern about the payments for these services.
- æ **Preparing meals** – There is concern [AIP] is impaired in that she is known to forget she is cooking and cannot follow through on complicated meal preparation. Her ability to nourish herself appropriately is in question.
- æ **Taking medications as prescribed** – this area is lacking as she reported taking no medications, which is inconsistent with the medical information.

# Dementia Guidelines based on GAL Experience

- æ **Mild** – people may often lose the ability to remember recent events in their lives but can be a great historian. Routine tasks can become more dangerous, such as cooking or driving.
- æ **Moderate** – People begin to exhibit the inability to have conversations and their communication becomes more limited. They are demonstrating the loss or inability to understand what is going on around them. People in this stage generally require some form of daily assistance with their activities of daily living (ADL or IADL).
- æ **Severe** – People are no longer able to recognize loved ones, friends or family members. Sometimes they are awake during the night, can be disruptive, uninhibited or exhibit behaviors inconsistent with their relevant past behaviors, that includes yelling, swearing or sexual aggressiveness. Folks can be calm or serene, then become agitated other times and even violent toward people they love or care about before these symptoms worsened. Here, folks generally need assistance with all ADL's and simple tasks we take for granted, like getting dressed, toileting or getting out of bed.



# Questions?

The GAL should be served and read all the relevant pleadings associated with the guardianship petition. Read the scope and order appointing the GAL

Guardianship

Residual Capacity

Alternatives?

With Guardianship considered a “last resort” the residual capacity of the individual allows the GAL to evaluate, recommend or explain why alternatives are not in the best interest of the protected person.

Need to know if any alternative would be applicable based on the individual’s strengths and weaknesses to achieve adequate provision for their own health, safety, or financial management