

CHAPTER I **OVERVIEW AND DUE PROCESS**

A. OVERVIEW

Welcome to the Title 11.88 Guardian ad Litem 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 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 field. Others have come to this training because they have developed an interest in helping persons with limited abilities.

This “Basics” handbook presumes the attendees have minimal knowledge of guardianship law. It is designed to be a basic reference tool. The editors hope you will find this handbook useful in your arsenal of guardianship tools long after you become an experienced Title 11 Guardian ad Litem (“GAL”).

This introduction serves as a brief overview to this Title 11.88 Guardian ad Litem Handbook. 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 GAL’s duties as set forth in the typical *Order Appointing Guardian ad Litem*. Practical information for GALs, such as courtroom demeanor, petitions for instructions, and procedures for payment of the GAL can be found in Chapter X. Additional training material will be provided to GALs each year at the second day training session and individual guardianship legal education seminars occur throughout the year in various parts of Washington which can help you increase your GAL knowledge.

What is the Statutory Process By Which the Court Appoints a Guardian?

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 the Alleged Incapacitated Person (“AIP”).

The intent of the guardianship statute, RCW Title 11.88, 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 11.88.005. The statute explicitly limits the court’s right to exercise its legal authority over a citizen’s life:

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 the guardianship process only to the *minimum extent necessary* to adequately provide for their own health and safety, or to adequately manage their financial affairs.

Id. (Emphasis added). *Incapacity must never be assumed.* A person is presumed to have capacity until a court enters findings of fact and conclusions of law determining that the person lacks capacity and is therefore adjudicated to be an incapacitated person (“IP”).

Briefly, What is the GAL’s Role in the Guardianship Process? A guardianship action is commenced when a petition (a legal pleading) is filed by a petitioner seeking to have a guardian appointed for a person who is alleged to be incapacitated (the Alleged Incapacitated Person or AIP). The petitioner can be a person (*e.g.*, a friend or relative) or an entity (*e.g.*, governmental agency, hospital, or nursing home) who is concerned about the welfare of the person who is alleged to be incapacitated. A petition may be filed by an attorney on behalf of the petitioner or by a petitioner *pro se* (acting without an attorney).

RCW 11.88.090(3) necessitates the appointment of a GAL: “Upon receipt of a petition for appointment of guardian or limited guardian...the court shall appoint a Guardian ad Litem to represent the best interests of the alleged incapacitated person.” (Emphasis added). The court must appoint a GAL from that county’s registry of qualified individuals. The GAL’s duties are limited to those set forth in the *Order Appointing Guardian ad Litem*, which are based upon the statutory duties of a GAL as enumerated in RCW 11.88.090. In addition, the role of a GAL is governed by court rules, *i.e.*, Guardian ad Litem Rules (GALR), as follows:

Consistent with the responsibilities set forth in Title 11. . . of the Revised Code of Washington and other applicable statutes and rules of court, in every case in which a Guardian ad Litem is appointed, the Guardian ad Litem shall perform the responsibilities set forth below....

GALR Rule 2. The full text of RCW 11.88 and the GALR can be found in Appendix A to this handbook. Since statutes may be amended from time to time, every GAL should be familiar with the current statutory requirements and have access to updates. The fulltext of the guardianship statute can be found online, see, *e.g.*,

<http://apps.leg.wa.gov/RCW/>

The Guardian ad Litem Rules (GALR) can be found at

http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=sup&setName=GALR&pdf=1.

Once notified of appointment, the GAL must file and serve a Statement of Qualifications. *See Chapter II.* The GAL then conducts an investigation, starting by meeting with the AIP. *See Chapter III.*

The GAL must select a qualified professional to prepare a medical or psychological report and see that the report is prepared by the selected professional in a timely manner. *See Chapter IV.* (No medical report is required if the sole reason for guardianship is minority (under the age of 18).) The GAL should meet with family members, care providers and others who may have relevant knowledge about the AIP. In order for the GAL to evaluate the proposed guardian, the GAL must be familiar with the statutory duties and limitations of a guardian contained in RCW 11.92. The GAL must speak with the proposed guardian to evaluate how he or she will meet the AIP's needs. *See Chapter V* and *see Appendix A* for a copy of RCW 11.92. The GAL must take special care in circumstances in which the AIP may have been subject to abuse by others and is a "vulnerable adult". *See Chapter VI.A.* The role of the GAL and the requirements may also be different if the guardianship action involves a minor. *See Chapter VI.B.* The GAL must determine whether there are any effective alternatives to guardianship available to protect the AIP that are less restrictive than a guardianship. *See Chapter VII.*

After the GAL's investigation is completed and the medical report is obtained, the GAL must prepare two written reports: one sealed, one public. *See Chapter VIII.* The GAL report synthesizes the findings of the GAL's investigation. 1) Is the AIP at risk as to his or her person and/or estate? 2) To what extent? 3) Are less restrictive alternatives currently in place; if so, are they working, and if not, why not? 4) Are there other less restrictive alternatives that might work? 5) If a guardianship is needed, should the scope be limited (full/limited person/estate)? 6) What is the GAL's evaluation of the guardian-nominee? If the GAL does not believe the guardian-nominee is suitable, the GAL should make a recommendation to the court about an alternate appointee. When a guardianship of the estate is sought, the GAL must make a recommendation to the court regarding protection of the AIP's assets, e.g., bonding and/or blocking *See Chapter V.*

The GAL reports 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. See Timelines at the end of this Chapter and *see Chapter VIII.* The medical/psychological report may be filed and served at the same time as the GAL report. The GAL must be familiar with GR15, 22, and 31 regarding what information may be included in a record filed for public viewing and what documents must be filed under seal. *See Chapters IV, VIII and X.*

If an AIP is opposed to the guardianship and requests an attorney, the GAL must ask the court to appoint an attorney. The GAL may also seek appointment of an attorney in other circumstances. *See Chapter IX.* If the opposition to the guardianship is initiated by anyone other than the AIP, that party usually hires independent counsel. The Petitioner and other parties to the proceeding may seek to have their attorney's fees and costs paid from the estate of the AIP or may seek to have these allocated against each other under RCW 11.96A.150. The court may award fees from the estate of an Incapacitated Person

when it determines that the actions have conferred a benefit upon that person or his estate.

Either the AIP or the GAL may ask the court to sent the parties to mediation upon a showing that the AIP's estate could benefit from mediation and such mediation would likely result in overall reduced costs to the estate. RCW 11.88.090(2). RCW 11.88.090(2). Alternatively, the court may set a trial date. Basic information concerning contested guardianships and the GAL's role therein is provided in Chapters IX and X. The AIP has the right to trial on the issue of capacity and may request a jury decide that issue. RCW 11.88.045(3). Other parties to the guardianship (Petitioner, Counter-Petitioner) may also seek a trial on issues such as the guardian-designee.

In uncontested cases, after the GAL report is served and filed, there is a hearing before a judge or court commissioner who may then enter an order on the guardianship petition. That order may adopt the recommendations of the GAL, but is not required to do so.

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

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

What is the Difference Between a Guardian ad Litem and a Guardian? The GAL investigates, interviews, evaluates, and makes recommendations to the court regarding the necessity of appointing a guardian, the scope of a guardianship, and the identity of a guardian. The duties of the GAL are limited to those outlined in the *Order Appointing Guardian ad Litem*. GALR 4. Except for the power to authorize emergency *life saving* procedures, the authority of the GAL to act on behalf of the AIP is strictly limited. At the appointment of the guardian, the role of the GAL is concluded unless the court orders that the Guardian ad Litem remain active in the case. By contrast, once appointed, the *Guardian* is granted authority -- limited or sometimes nearly unlimited -- to *act on behalf* of the Incapacitated Person into the future.

What is the Role of the Attorney for the Alleged Incapacitated Person? The duties of an attorney appointed to represent an AIP are set out at RCW 11.88.045(1)(b) (emphasis added), as follows:

Counsel for an alleged incapacitated individual shall act as an advocate for the client and shall not substitute counsel’s own judgment for that of the client on the subject of what may be in the client’s best interests. Counsel’s role shall be distinct from that of the guardian ad litem, who is expected to promote the *best*

interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's *expressed preferences*.

In contrast, the Guardian ad Litem Rule 2(a) states:

The guardian ad litem shall not advocate on behalf of or advise any party so as to create in the mind of a reasonable person the appearance of representing that person as an attorney.

What are the Alternatives to Guardianship? The specific legislative intent of the guardianship statute 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 AIP. A GAL must always be cognizant of the need to seek a resolution of the guardianship petition that recognizes and appropriately deals with risks to the AIP, but which least restricts that individual's liberty and autonomy. As a result, the scope of a guardianship should be crafted to permit the least possible intrusion upon the independence of the AIP. Chapter V deals with limitations on guardianships. Chapter VII addresses alternatives to guardianship.

The guardianship statute recognizes that some persons may be partially or fully incapacitated only with respect to handling their financial affairs. Other individuals may be fully or partially incapacitated with respect to management of personal care but have capacity to manage their financial affairs. Therefore the statute provides that the court may appoint a full or limited guardian of the estate and/or a full or limited guardian of the person. The Guardian of the Estate and Guardian of the Person may be the same person or entity or not, depending on the needs of the AIP, the recommendations of the GAL, and the court's final determination. *See* Chapter V.

B. DUE PROCESS RIGHTS OF THE ALLEGED INCAPACITATED PERSON

Throughout the guardianship proceeding, the GAL must be alert to the protection of the Alleged Incapacitated Person's right to fundamental due process of law. A person should not be deprived of the significant rights at stake in a guardianship without due process of law. The duty to assert these rights lies with counsel for the AIP, if one has been appointed. Since it is the duty of the GAL to represent the best interests of the AIP, however, the GAL must report to the court any concerns the GAL has about fundamental due process that affect the AIP.

The GAL's investigation, especially in cases in which the AIP is not represented by counsel, should include a determination that the court has jurisdiction to hear the guardianship, that the venue is appropriate, and that all steps have been taken to ensure the rights of the AIP.

Venue and Jurisdictional Requirements

Jurisdiction. The court must have subject matter jurisdiction and also jurisdiction over the person. Subject matter jurisdiction is authorized under RCW 11.88.010(1). It grants the superior court “power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estate of nonresidents of the state who have property in the county needing care and attention.”

Service of Petition and Notice. Notice that a guardianship proceeding has been brought and a copy of the petition *must be personally served* on the Alleged Incapacitated Person and the Guardian ad Litem **within 5 court days after the petition has been filed**. RCW 11.88.030(5)(a). Without proper service of the petition and notice on the AIP the court lacks jurisdiction to hear the case. Because the GAL is a party to the case, it is improper for the GAL to personally serve the AIP with notice of the proceeding or a copy of the petition.

Venue. The guardianship petition must be brought in the proper county. RCW 11.88.010(3). The petition may be brought in any of the following counties: i) where the AIP lives; or ii) where the facility is located, when the AIP resides at a facility; or iii) where the AIP lived prior to stay at the facility; or iv) where a parent, or spouse, or registered domestic partner of the AIP lives. If the AIP’s residency changed within the year prior to the filing of the petition, a request to change venue to the last place of residency over one year may be made by any interested person.

Other Procedural Due Process Requirements Under Title 11.88

- a. 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 11.88.030 (6).
- b. At least ten (10) days prior to any hearing, notice of the hearing must be given by registered or certified mail, return receipt requested or by personal service to:

Alleged incapacitated person, or minor, if under 14 years of age;
Parent, if Alleged Incapacitated Person is a minor;
All known children not residing with a notified person;
Spouse or registered domestic partner of Alleged Incapacitated Person;
Guardian or limited guardian; and
Person with whom the Alleged Incapacitated Person resides.

Note: Notice does not need to be given to a parent, child, spouse, registered domestic partner, guardian, limited guardian, or person with whom the AIP resides if that person has signed the petition or has waived notice of the hearing. RCW 11.88.040.

Statutory Due Process Rights of the Alleged Incapacitated Person

The AIP has the following rights under RCW 11.88:

- a. To be represented by a lawyer of his or her own choosing or to have the court appoint an attorney if payment would result in a substantial hardship. RCW 11.88.045(1)(a).
- b. To have a jury decide capacity. RCW 11.88.045(3).
- c. To be present in court and testify when the guardianship hearing is held. If the AIP cannot come to court, the court may remove itself to the residence of the AIP. RCW 11.88.040.
- d. To have the GAL replaced. RCW 11.88.090(3)(b).
- e. To select the health care professional to prepare the required medical report. RCW 11.88.045(4).
- f. To have the GAL present at all hearings on the petition unless all parties provide a written waiver of the requirement to appear. RCW 11.88.090(12).
- g. To have special assistance if disabled under the Americans with Disability Act. 42 USC 12101. GR 33
- h. 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. The GAL has statutory authority to act in certain circumstances for the AIP. The GAL is not a temporary guardian. The GAL cannot make decisions for the AIP unless the GAL has clear authority.

1. The GAL has the authority to consent to *emergency life-saving* medical services when the AIP is unable to consent. RCW 11.88.090(8).
2. The GAL has the authority to move for temporary relief under RCW 7.40 to protect the AIP from abuse, neglect, abandonment or exploitation. RCW 11.88.090(9).
3. The GAL has the authority to address emergency needs of the AIP. RCW 11.88.090(9).

If the GAL has any concern regarding his or her authority to act, the GAL should seek instruction from the court. *See Chapter X.* Note: Expediting the guardianship hearing is often a good solution when the AIP will need a series of decisions made urgently.

Another possibility is to locate someone with authority under the informed consent statute to provide consent for the incapacitated person. RCW 7.70.065. *See Chapter VII.*

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. RCW 11.88.005. Substantive due process requires the following:

1. A person may be deemed incapacitated as to person **when the court determines** the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. RCW 11.88.010(1)(a).
2. A person may be deemed incapacitated as to estate **when the court determines** the individual has a significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs. RCW 11.88.010(1)(b).
3. The court must be presented with a medical report. RCW 11.88.045(4). It must also be presented with a written GAL report. RCW 11.88.090(5)(f). A copy of the medical report must be filed unless the basis of the guardianship is minority. RCW 11.88.045(4)(i). A determination of incapacity, however, is a legal not a medical decision. Age, eccentricity, poverty, or medical diagnosis alone is not enough to justify a finding of incapacity. RCW 11.88.010(1)(c).
4. In a contested case, the petitioner must prove by clear, cogent, and convincing evidence that the person is at risk of harm to person and/or estate. RCW 11.88.045(3).
5. The court may find that an incapacitated person has some ability to manage in certain specific areas and the court may appoint a limited guardian. The court shall impose only such specific limitations and restrictions on an incapacitated person as the court finds necessary for the person's protection and assistance. RCW 11.88.010(2).
6. The court must state the period of time for which a limited guardianship is applicable. RCW 11.88.010(2).
7. Persons who are developmentally disabled, impaired by chronic alcoholism or drug abuse, or suffering from dementia shall not be detained for evaluation and treatment or judicially committed unless such condition causes a person to be gravely disabled or there is the likelihood of serious harm. RCW 71.05.040.

TIMELINE SUMMARY FOR GUARDIANS AD LITEM

1. Within five (5) days after notice of appointment, the GAL shall serve on the parties and file with the court a Statement of Qualifications. RCW 11.88.090 (3)(b).
2. Within three (3) days of the later of service or filing of the GAL statement, any party may set a hearing and file and serve a motion to show cause why the GAL should be removed. *Id.*
3. The GAL should meet and consult with the AIP as soon as practicable after being appointed. RCW 11.88.090(5)(a).
4. Within five (5) court days after meeting the AIP, the GAL shall advise the court of the need to appoint an attorney for the AIP. RCW 11.88.090(5)(g).
5. As soon as possible after appointment, the GAL should select a professional to prepare the required medical/psychological report, RCW 11.88.090(5)(b); meet with the proposed guardian, RCW 11.88.090(5)(c); interview and consult others, as needed, RCW 11.88.090(5)(d), GALR (g); and investigate alternatives to guardianship. RCW 11.88.090(5)(e).
6. Forty-five (45) days after notice of commencement of the guardianship proceeding and at least fifteen (15) days before hearing on the underlying petition, the GAL must file his or her report. Exception: The foregoing applies unless an extension or reduction of time has been granted by the court for good cause. RCW 11.88.090(5)(f).
7. If the hearing does not occur within sixty (60) days of filing the petition, the GAL should file an interim report. If the interim report contains confidential information, it should be filed under seal. Thereafter, the GAL should file an interim report each month until the hearing on the petition takes place. *Id.*