



How to Avoid Guardianship Pitfalls

This document discusses 1) common issues related to guardianships and the law that addresses each of these issues, 2) the court's authority and a person's rights with respect to modifying or terminating a guardianship, and 3) some practical tips for individuals who support people with guardians.

In Washington State, courts have authority to appoint guardians for individuals deemed "incapacitated" by virtue of their inability to provide for their own safety or manage their own financial affairs. While guardianships can provide protection and supports to better provide for an individual's safety and well-being, a guardianship is an undeniably drastic curtailment of any individual's rights. When a person has a guardian appointed, the person retains a few basic fundamental rights, but may lose the right to make key decisions about their finances as well as personal and private lives.ⁱ Although the guardianship laws refer to individuals as "incapacitated persons," this is an overgeneralization. Far from being "incapacitated," many individuals with guardians have significant capacities to express feelings and preferences, form various types of relationships, and manage various aspects of their day-to-day lives. For many individuals, guardianships may feel more oppressive and paternalistic than supportive and protective.

Disability Rights Washington, Washington State's designated protection and advocacy agency,ⁱⁱ receives frequent complaints about guardians from and on behalf of our constituents. These complaints often express frustration about individuals with guardians being disempowered in one or more of the following ways:

1. The guardianship is not individually tailored to the person's current, specific needs;
2. The guardian does not consult with the person, or disregards the person's preferences;
3. The guardian ignores requests for information or records about the guardianship;
4. The guardian inappropriately controls interpersonal relationships.

Fortunately, the law provides some protections to guard against these problems. Courts are not authorized to issue blanket orders that do not take individual needs into account, and guardians must not overextend their decision-making authority.

Common guardianship issues as reported to Disability Rights Washington

1. The guardianship is not individually tailored to the person's current, specific needs.

Guardianships must be individually tailored to the current, specific needs of the person.ⁱⁱⁱ Individual needs are not static, as people may gain skills and capacity over time. For example, should a person in a guardianship demonstrate improved ability to manage their health care, the person should be given greater responsibility to make health care decisions.^{iv} However, Disability Rights Washington has received a number of reports by individuals who feel that their guardianships take away their rights to make decisions that they should be able to make for themselves.

The focus on current, specific needs starts when a guardianship is first entered. When imposing a guardianship, the court must consider whether there is a risk of personal harm based on a demonstrated inability to adequately provide for nutrition, health, housing or physical safety, or a risk of financial harm based on a demonstrated inability to manage property or financial affairs.^v This is a legal decision based not on "age, eccentricity, poverty, or medical diagnosis alone," but on specific and current needs that the person demonstrates.^{vi}

This same focus on specific and current needs continues through the duration of the guardianship. Both professional and lay guardians must report to the court any changes in a person's functional abilities, and recommend corresponding changes to the scope of the guardian's authority. Professional guardians have the affirmative obligation to be alert to changes in circumstances, report to the court when a change in the guardian's authority should be considered, seek out information providing a basis for termination or limitation of the guardianship, and, if indicated, request the court's action to terminate or limit the guardianship.^{vii}

If a person demonstrates improved skills or abilities, the court should modify or terminate the guardianship as appropriate to restore the person's rights. Where the person no longer needs a guardianship or a less restrictive guardianship or other option is adequate, the guardians should ask the court for a change. The person, relatives, or others can also request that the court change or remove the guardianship.^{viii}

2. The guardian does not consult with the person, or take the

person's preferences into account.

A guardian has an affirmative duty to honor the person's autonomy and preferences.^{ix} Guardianships are to protect "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."^x A person's liberty and autonomy should be restricted through guardianship "only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs."^{xi} Liberty and autonomy can only be protected if the guardian has consulted with the person and addressed the person's preferences.

This issue commonly arises with respect to housing. The guardian must care for and maintain the person in the setting that is appropriate to the person's personal care needs, and least restrictive to the person's freedom.^{xii} The guardian must consider the person's preferences in where to live.^{xiii} For example, in one case, Washington's State Supreme Court upheld the guardian's good-faith determination that the person in the guardianship would not have wanted to be placed in a nursing home for long-term care instead of receiving care in her home.^{xiv} Additionally, under the Guardianship Standards of Practice, a professional guardian may remove the person from his or her home, or separate the person from family and friends, only when necessary to prevent significant harm or because of financial constraints.^{xv} A guardian may not force a person to live in an institution, including a nursing home, against their will.^{xvi}

3. The guardian is not responsive to requests for information or records about the guardianship

Individuals seeking to prevent, modify, or terminate a guardianship must have information about the guardianship in order to participate meaningfully in the proceedings. Guardians should provide copies of all material filed with the court and notice of all hearings in the guardianship to the person subject to guardianship, unless otherwise directed by the court.^{xvii} If material is requested, the guardian should provide any other information to the person, unless the guardian is reasonably certain that providing the information would cause substantial harm to the person.^{xviii}

4. The guardian does not allow the person to choose interpersonal relationships

A guardian must maintain the person under a guardianship in a setting that is appropriate to the person's rights and needs, and is the least restrictive to the person's freedom.^{xix} The

guardian must protect the person’s civil rights and “foster growth, independence, and self-reliance.”^{xx} The guardian must consult with the person, treat their feelings, values, and opinions with respect, and acknowledge the person’s preferences.^{xxi} Further, the guardian must defer to the person’s residual capacity to make decisions whenever appropriate.^{xxii}

Additionally, individuals with guardians still have the right to choose their personal relationships. Unless there is a demonstrated reason for restriction, or a court otherwise orders protective action, the person retains this right^{xxiii} This is especially important when the person is choosing individuals with whom to have a close or intimate relationship.^{xxiv} The right to have interpersonal relationships includes, but is not limited to, the right to freely communicate and interact with other people, whether through in-person visits, telephone calls, electronic communication, personal mail, or other means.^{xxv} Under the Vulnerable Adult Protection Act, preventing an individual from communicating or visiting with people of his or her choosing is considered “isolation” and a form of mental abuse.^{xxvi}

Disability Rights Washington commonly encounters examples of guardians restricting individuals’ personal relationships out of concern for the individuals’ safety and best interest. However, if a guardian thinks a personal relationship is harmful to the person, the guardian may seek a protective order, such as a Vulnerable Adult Protection Order,^{xxvii} or seek relief under domestic violence statutes.^{xxviii} A Vulnerable Adult Protection Order is appropriate to protect against abandonment, abuse, financial exploitation, or neglect, or the threat thereof,^{xxix} and should only be used where there is a genuine concern about the safety of the person. Use of protective orders preserves the person’s right to choose interpersonal relationships by making the court, not the guardian, the arbiter of harm.

Authority of the Superior Court & Rights of a Person Under Guardianship

If a guardianship is inappropriate or too broad for a person’s specific support needs, superior courts have extensive authority to modify or terminate guardianships. A court may modify or terminate a guardianship any time after the establishment of the guardianship if the guardian dies or “for any good reason.”^{xxx} The court should grant relief “as it deems just and in the best interest” of the person under guardianship.^{xxxi} A thorough exploration of a request to modify or terminate a guardianship also requires that the person subject to guardianship be heard in court. The court must act based on the evidence, fully considering the rights of the person in the guardianship. Honoring that person’s request to testify and present evidence ensures that the court fully considers the person’s rights and all relevant evidence.

When asking the court to modify or terminate a guardianship, a person in a guardianship may have the right to counsel and the right to be heard under Superior Court General Rule 33 (GR 33). GR 33 provides for “representation by counsel, as appropriate or necessary” as a reasonable accommodation for a person with a disability who is party to a proceeding.^{xxxii} In most, if not all, proceedings for modification or termination of a guardianship, it would be appropriate or necessary to provide counsel as a reasonable accommodation for the person’s disability.

In addition, state guardianship law provides that the court shall appoint counsel at public expense to a person over whom a guardianship is being sought if the individual cannot afford to pay for counsel, hiring counsel would result in substantial hardship, or the individual does not have practical access to funds to pay for counsel.^{xxxiii} The court must protect the rights and interests of persons subject to guardianship proceedings who are without counsel, whenever they cannot otherwise be adequately protected and represented, and “shall appoint an attorney *at any time* to represent such person.”^{xxxiv}

Practical Tips for Supporting People with Guardians

Guardians, guardians ad litem, courts, support and service providers, and family members can all do things to help maximize the independence and autonomy of individuals with guardians. Below are some practical tips for empowering people to exercise their rights and express their preferences:

- Encourage individuals to participate in all guardianship proceedings and to review periodic reports, court materials, and related documents regarding their guardianships.

Unless a court directs otherwise, always offer to provide or help get copies of all court materials to the individuals subject to the guardianship. Even if people need assistance reading or understanding paperwork, ensuring they have access to copies will allow them to take the records to people they want to help them. Offer to read over the records with the individual and explain what each section means. Answer questions as thoroughly as you can, and refer the individual to call an advocate or attorney if they have questions about their rights. You can always refer individuals to call Disability Rights Washington for information and technical assistance.

- Provide individuals with support in the legal process and information about accommodations under General Rule 33.

If an individual expresses an interest in changing or terminating a guardianship, offer information about alternative supported decision making options. Here is resource that may be useful to explore: <http://bit.ly/2yLTV4w>. If a person believes a guardian is not necessary for making certain decisions, a functional assessment may be helpful to request. If an individual wants to go to court to request a change or termination, provide information about individuals' rights to have an accessible court hearing. This is another resource that explains GR 33: <http://bit.ly/2iJulwW>. Individuals who are interested in the outcome of the guardianship may also submit a Request for Special Notice. A form for this is available here: <http://bit.ly/2jbRCRc>.

- If necessary, file a complaint with the court and with the Certified Professional Guardianship (CPG) Board.

If a guardian is not meeting guardianship standards or obligations, it may be necessary to file a complaint. Forms for filing a complaint with the court and with the CPG Board are available online at <http://bit.ly/2jeiMHP> and <http://bit.ly/2jgioYB>. For more information about how to complain about a guardianship, please see Disability Rights Washington's publication at <http://bit.ly/2hftZOJ>.

- Look for person-centered planning strategies to identify and document personal choices about where they want to live, work, socialize, and relax.

Person-Centered Planning is an approach that focuses on each individuals' strengths, skills, and goals. Case managers and providers should be using a person-centered approach when developing service and support plans. In Washington, individuals with developmental disabilities can use My Life Plan at <http://mylifeplan.guide/>, an online tool that offers a person centered planning guide for various life stages from childhood through retirement. Ask and encourage guardians to document the values and preferences of the person subject to guardianship, and review that documentation.

- Explore the use of various communication modes and assistive technology to support individuals' expression of preferences and desires.

Many people with disabilities are able to express their preferences and goals with the right accommodations. Use photos, videos, or onsite visits to communicate options for people in a concrete way that makes it easier for them to evaluate. If a person has difficulty verbalizing or articulating how they feel, consider a referral for an assessment to determine if there is any assistive technology that the individual would like to try. For more resources about assistive technology, check out Disability Rights Washington's Tools to Help You at <http://bit.ly/2ymzgQg>.

- Review letters of guardianship to verify scope of guardian's authority.

Check court documents to make sure the decisions that guardians are making are within their authority. If a guardian is a guardian of the estate, for example, the guardian should not make decisions about where a person lives, works, etc. Even if there is a guardianship of the person, the guardianship may be either a limited or a full guardianship. Also, individuals with guardianships entered after 2005 retain the right to vote, unless the guardianship order specifically removes that right.

Conclusion

Guardianship pitfalls are avoidable. Guardians have obligations to avoid limiting individuals' abilities to express and pursue their own preferences about how and where they want to live, and individuals have rights to receive information and accommodations to advocate for their choices. With the right kind of support and advocacy, individuals can exercise autonomy over their own daily lives, regardless of whether they have a guardian.

End Notes

Disability Rights Washington's staff attorneys Meghan Apsbaga and Michael J. Smith produced this publication. The information is current as of September 2017.

The following federal funding partners shared in the cost of producing this publication: the Department of Health and Human Services Administration, Substance Abuse and Mental Health Services Administration, Center for Mental Health Services (Award #3X98SM005397-17S1); and the Rehabilitation Services Administration (Award #H240A170048). These contents are the sole responsibility of Disability Rights Washington and do not necessarily represent the official views of SAMHSA or RSA.

ⁱ RCW 11.88.030

ⁱⁱ See 42 U.S.C. § 15041-45; 42 U.S.C. § 10801-51; 29 U.S.C. § 794e; RCW 71A.10.080. Consistent with its mission, "to promote dignity, equality, and self-determination for people with disabilities," Disability Rights Washington's involvement in issues relating to guardianship is longstanding. DRW helped develop curricula for both the Certified Professional Guardianship and guardians ad litem training courses. Disability Rights Washington has also participated in numerous policy-making activities to increase the accountability of guardians to the people they serve, including serving on the Washington State Bar Association Guardianship Task Force and helping to develop and revise the Office of Public Guardianship statute. In addition, Disability Rights Washington has participated as Amicus Curiae in several guardianship cases. Through this work, Disability Rights Washington has improved the effectiveness of guardians in appropriately discharging their responsibilities.

ⁱⁱⁱ See RCW 11.88.030; see also RCW 11.88.010(1).

^{iv} See RCW 11.88.030; see also RCW 11.88.010(1).

^v RCW 11.88.010(1)(a), (b).

^{vi} RCW 11.88.010(1)(c).

^{vii} Certified Prof'l Guardianship Bd., *Standards of Practice Regulations* 411.1-3 (2013) [hereinafter SOP]; see also SOP 411.4 (providing that a guardian "shall" assist the person in terminating or limiting the guardianship and in obtaining independent representation "when necessary").

^{viii} S.B. 5691, 65th Leg., 2017 Reg. Sess. (Wash. 2017).

^{ix} See, e.g., RCW 7.70.065(1)(c) (setting forth the substitute decision-maker standard for healthcare decisions); RCW 11.92.190 (prohibiting placement in a residential treatment facility of a person in a guardianship against that person's will); *Raven v. Dept. of Social and Health Svcs.*, 177 Wn.2d 804, 822 (2013) (en banc) (guardian honored the person's preference not to be placed in a nursing facility).

^x RCW 11.88.005.

^{xi} *Id.*

^{xii} RCW 11.92.043(4).

^{xiii} See SOP 407.7 (requiring that a professional guardian consult the person before moving the person to a new residence).

^{xiv} *Raven*, 177 Wn.2d at 822. The court also held that the guardian’s decision not to place the ward in a nursing home was not neglect. *Id.*

^{xv} SOP 407.5.

^{xvi} See RCW 11.92.190.

^{xvii} SOP 403.5 (requiring such disclosure for Certified Public Guardians). RCW 11.88.120(1) and (2) also require notice of court action including reasonable notice of hearings, notice of any complaint filed (whether or not filed by the person under the guardianship), and notice of the person’s right to counsel of their choosing. This does not, however, remove the guardian’s obligation to keep the person fully informed.

^{xviii} SOP 403.6.

^{xix} RCW 11.92.043(4); SOP 403.3; see generally SOP 407 (requiring the guardian to ensure that the person under the guardianship resides in the least restrictive environment that is appropriate and available).

^{xx} SOP 403.1.

^{xxi} SOP 403.2.

^{xxii} SOP 403.4.

^{xxiii} See generally SOP 403; see also SOP 403.8.1; RCW 11.92.195(1)

^{xxiv} SOP 403.8.1 directs the guardian to “take reasonable steps to ensure that a private environment conducive to [interpersonal relationships and sexual expression] is provided.”

^{xxv} RCW 11.92.195.

^{xxvi} RCW 74.34.020.

^{xxvii} See RCW 74.34.110.

^{xxviii} See RCW 26.50.030.

^{xxix} See RCW 74.34.110.

^{xxx} RCW 11.88.120(1). Under RCW Title 11 the decision to remove a guardian is within the trial court's discretion. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 23 (2006) (citing *In re Guardianship of Dodson*, 135 Wn. 625, 628, (1925)).

^{xxxi} RCW 11.88.120(1).

^{xxxii} Sup. Ct. Gen. R. 33(a)(1)(C). The intent of GR 33 is to provide representation by counsel at no charge as a reasonable accommodation whenever necessary to make participation in the court proceeding “readily accessible to and usable” to a party with a disability.

^{xxxiii} RCW 11.88.045(1)(a).

^{xxxiv} *Id.* (emphasis added).