

# Guardianship & Incapacity Issues

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# Incapacity

- What does it mean to be “Incapacitated?”

# Incapacity

- Under Washington law (RCW 11.88.010):

A person may be deemed incapacitated as to the person's estate (relating to assets/financial affairs) when the **superior court** determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

# Incapacity

- Under Washington law (RCW 11.88.010):

A person may be deemed incapacitated (for personal decisions including health) when the **superior 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.

# Incapacity

NOTES (also from RCW 11.88.010) :

- A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.
- For purposes of **giving informed consent for (only) health care** pursuant to Washington state law, an "incompetent" person is any person who is incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both; or as previously defined.

# Guardianship

- A **court-ordered** and **supervised** method of granting authority to one person (***proposed guardian***) over another person's:
  - Assets
  - Personal Decisions
  - Healthcare Decisions

# Who is Qualified to Serve as Guardian?

- RCW 11.88.020 (Qualifications)
  - Any suitable person over the age of eighteen years (or a licensed professional guardian)

# Who is NOT qualified?

- RCW 11.88.020 (Qualifications)

No person is qualified to serve as a guardian who is:

- a) under eighteen years of age;
- b) of unsound mind;
- c) convicted of a felony ***or of a misdemeanor involving moral turpitude***;
- d) a nonresident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court;
- e) a corporation not authorized to act as a fiduciary, guardian, or limited guardian in the state; or
- f) ***a person whom the court finds unsuitable.***

## How Does the Court Choose a Guardian?

- PRINCIPAL'S CHOICE BY A VALID *APPOINTMENT - DURING TIME OF COMPETENCY.*

Under RCW 11.94.010, a Principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if guardianship proceedings for the Principal's person or estate are thereafter commenced. ***The court shall make its appointment in accordance with the Principal's most recent nomination in a durable power of attorney except for good cause or disqualification.***

## How Does the Court Choose a Guardian?

- If a Principal DID NOT previously appoint a guardian in a valid document, ***then the court chooses a guardian*** based upon the recommendation of a guardian ad litem (GAL):  
“Upon receipt of a petition for appointment of guardian or limited guardian, except as provided herein, the court **shall appoint a guardian ad litem** to represent the best interests of the alleged incapacitated person.”

## Guardian Ad Litem

- Appointed from list determined by court
- GAL usually retains attorney to separately represent the Principal to file documents and make arguments in court
- Visits Principal, reviews all relevant medical reports and evidence, conducts interviews with family members and relevant witnesses, may request restrictions and temporary arrangements, may recommend a professional guardian in lieu of petitioning family members
- Files report and attends hearing

***All time spent*** by GAL and Principal's attorney is paid by the Principal's estate unless there is less than \$3,000 in the estate.

# What Happens After Guardian is Appointed?

- Standby guardian appointed
- Care plan filed
- GAL discharged
- Report of health and financial activity filed ***every 1-3 years***
- Court fines late reports

## Can Guardianship be Avoided?

- By valid Durable Power of Attorney for Financial Affairs
- By valid Healthcare/Medical Durable Power of Attorney (along with healthcare directive or living will)
- **If** guardianship is still required, the named individuals will be appointed unless disqualified

## Other Notes

- Trusts may assist management of assets in certain circumstances for an extended period of time with designated rules/terms set by the Principal.
- Carefully crafted Healthcare/Medical Durable Power of Attorney may avoid family disputes and lay out rules specially suited for the family.
  - Example: Multi-agent appointment with dispute resolution clauses

## More Information

- Guardianship Petition Info
  - <http://www.kingcounty.gov/courts/scforms/guardianship.aspx>

## Vivien K. Chang

- Ms. Chang's practice focuses primarily on estate planning, probate, and guardianship. She has extensive experience working with a wide range of clients from complex and high net-worth individuals, to young families with emphasis on protection of children and anticipated growth of family assets. She assists clients in the set-up of family trusts, credit shelter trusts, family limited partnerships/limited liability companies, foundations, charitable remainder trusts, family business succession planning, community property agreements, wills, powers of attorney, and health care directives. Her probate experience includes working with judicial and non-judicial administration of estates of small to large taxable estates, post-mortem tax planning, tax filings, and funding of testamentary trusts.

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