

Alternatives to Guardianships

**A Proposal for a Comprehensive Statutory Framework to
Provide Decision-Making Assistance to Persons with
Diminished Decision-Making Capability**

Report to the Washington State Legislature

December 2009

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Overview of the Office of Public Guardianship (OPG)

The 2007 Legislature passed Senate Bill (SB) 5320 establishing the Office of Public Guardianship (OPG) within the Washington State Administrative Office of the Courts (AOC) to develop and administer a public guardianship program. The Governor signed the bill with a partial veto and it became effective on July 22, 2007. Laws of 2007, ch. 364, codified at Chapter 2.72 RCW.

The OPG contracts with public and private entities and/or individuals to provide public guardianship services to persons age eighteen or older whose income does not exceed 200 percent of the federal poverty level determined annually by the United States Department of Health and Human Services, or who are receiving long-term care services through the Washington State Department of Social and Health Services and there is no one else willing and able to serve.

Initial implementation of public guardianship services was required to occur on a pilot basis in a minimum of two geographical areas including one urban and one rural area. RCW 2.72.030(1)(d). The OPG selected Clallam, Grays Harbor, Okanogan, Pierce and Spokane Counties as sites to pilot public guardianship services. In response to documented significant need for public guardianship services, in January 2009 the OPG started a pilot program in King County.

Incapacitated individuals are served based on the following priorities:

- Indigent/Homeless.
- At significant risk of harm from abuse, exploitation, abandonment, neglect, or self-neglect.
- Imminent danger of loss or significant reduction in public services that are necessary to live successfully in the most integrated and least restrictive environment that is appropriate for a specific individual.

Anticipating significant budget cuts, in June 2009 the OPG placed a moratorium on accepting new cases pending a decision on the 2009-2011 budget. The moratorium will remain in effect until additional funding is obtained.

Purpose of the Report

The Legislature directed the OPG to “report to the legislature on how services other than guardianship services, and in particular services that might reduce the need for guardianship services, might be provided under contract with the office by December 1, 2009. The services to be considered should include, but not be limited to, services provided under powers of attorney given by the individuals in need of the services.” This report fulfills said directive.

“This report is prepared and authored by the OPG with input from the Ad hoc Advisory committee members, but does not represent a consensus of or endorsement by the committee members or their respective agencies or organizations”.

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Executive Summary

Patsy*, a 63-year-old female, needs a medical procedure. Her attending physician, Dr. Bryant, has determined that Patsy lacks decisional capacity to give informed consent. Patsy has no family, has not executed an advance directive, and has no legally authorized surrogate. Who will consent to the medical procedure?

Marie*, a 58-year-old female, is concerned that she might die alone in a nursing home. She very much wants to live out her life in her home. Where can Marie obtain information, support and assistance on substitute decision-making that will allow her to plan for her future?

Jim*, a 45-year-old male with a developmental disability, recently lost his mother, his last relative and longtime financial manager. Although Jim lives alone, works and makes all his personal decisions, he never learned to manage money. Who will manage Jim's money now?

Answering these questions is the focus of the recommendations presented in this report. The recommendations included are based on the central premise that decisional capacity is not global. In the past, theories of competency and capacity were based on the principle of all or nothing. An individual was believed to either be competent or incompetent, to have capacity or to lack capacity. Thus the legal construct of guardianship was developed to accommodate this all or nothing theory. Advances in medicine, knowledge of brain function and functional ability has dispelled the all or nothing theory. Capacity is now believed to be specific to functional areas and not global. It is also believed to fluctuate, here today gone tomorrow; to be situational and contextual, occurring as a result of environmental influences or other triggering events, and can potentially be enhanced with education, training, rehabilitation, treatment (mental health and medical), therapy (occupational and physical), services (home and social), and assistive devices or accommodation. The change in capacity theory provides an opportunity to modify how guardianship and alternative programs and services are structured and delivered.

The recommendations focus on people and their needs, and emphasize that when possible any alternatives used should be reflective of the individual's personal communication mechanisms and assist them to outline their needs and wishes. This ultimately leads to greater inclusion as valued members of both community and society.

* Name has been changed for confidentiality

* Id.

* Id.

The report responds to the legislative directive to report to the Legislature on how services other than guardianship services and, in particular, services that might reduce the need for guardianship services, might be provided under contract with the Office of Public Guardianship (OPG).

Six recommendations are presented:

1) Expansion of State Aging and Disability Resource Centers.

Include the provision of information, support, counseling, assistance and education related to substitute decision-making to individuals, nominated guardians, court-appointed guardians (lay and professional), other substitute decision-makers (representative payees, agents under Powers of Attorney for Health Care and Powers of Attorney for Finances, family members) and professionals who work with these constituents in the expansion of State Aging and Disability Resource Centers (ADRC).

2) Provide protective payee/money management services to individuals who lack the ability to manage their finances.

Offer financial management assistance to socially challenged individuals, including individuals whose physical or mental illness restricts their ability to manage their own money, in an effort to reduce or eliminate financial exploitation or mismanagement of funds.

3) Endorse adoption of the Uniform Power of Attorney Act, subject to modifications developed after review by others with expertise and experience with the use and abuse of powers of attorney, including the Washington State Bar Association (WSBA) Probate and Trust committee, the WSBA Elder Law Section, the Attorney General, prosecuting attorneys, the Long-Term Care Ombudsman, the OPG, and disability and senior advocates.

The law should balance the protection of vulnerable individuals from exploitation and abuse by agents holding powers of attorney with the need to preserve the autonomy of those who create the directives.

4) Provide power of attorney services to individuals who lack the ability to manage their finances.

The usefulness of Powers of Attorney (POA) and Durable Powers of Attorney (DPOA) documents is dependent on the availability of trusted and reliable persons who agree to act for principals. Agents must be carefully selected and there should be reasonable oversight. When there are no trusted individuals, family, and friends willing and able to act for principals, reputable entities are needed to provide services.

- 5) **Create statutory surrogate decision-making committees, which empower committees of trained volunteers to evaluate the need for a surrogate decision-maker and when necessary consent to a course of treatment.**

Surrogate decision-making committees provide a quasi-judicial procedure to evaluate the provision of non-emergency major medical treatment on behalf of individuals who lack decision-making capacity, have no family or friends willing and able to assist, and have not documented preferences about medical care.

- 6) **Develop a statewide guardianship monitoring program that includes visits and field investigations, financial audits, and concise reports.**

Monitoring provides an ongoing opportunity to assess the circumstances and conditions of incapacitated persons that may change over time. It is used to provide assurance that a person is placed under guardianship only when necessary, and only to the extent required by his or her decisional incapacities.

Abbreviations

AAA	Area Agency on Aging
ADRC	Aging and Disability Resource Centers
AoA	Administration on Aging
AOC	Administrative Office of the Courts
CIDL	Center for Independent Living
CPG	Certified Professional Guardian
DD	Developmental Disability
DMM	Daily Money Management
DPOA	Durable Power of Attorney
OPG	Office of Public Guardianship
POA	Power of Attorney
SDMC	Surrogate Decision-Making Committee
SSI	Supplemental Security Income
TBI	Traumatic Brain Injury
VA	Veteran's Administration

Definitions

Activities of Daily Living	Things adults normally do in daily living including any daily activity performed for self-care (feeding, bathing, dressing and grooming), work, homemaking, and leisure.
Advance Health Care Directives Agent	A health care advance directive combines the health care power of attorney and living will document into one document. A person granted authority to act for a principal under a power of attorney, whether nominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, co-agent, successor agent, and a person to which an agent's authority is delegated.
Best Interest	A decision-making standard where the surrogate makes a decision for a person with a mental incapacity based on an objective determination as what will provide the best benefit for the person and promote their welfare.
Capacity	An ability to comprehend both the nature and consequences of one's acts. An ability to adequately provide for nutrition, health, housing, physical safety, and manage property and financial affairs.
Daily Money Management (DMM)	Daily money management services help people with their financial affairs, including check depositing and writing, checkbook balancing, bill paying, insurance claim preparation, tax preparation and counseling, public benefit applications and counseling. DMM is voluntary. A person must be capable of asking for or accepting services.
Durable Power of Attorney (DPOA)	A power-of-attorney with a statement that the agent's authority will remain in effect even if the principal becomes mentally incapacitated. Without a durable provision, a power of attorney (POA) terminates when the principal becomes mentally incapacitated. POAs are often used to cover health care and end-of-life decisions. An agent's authority ends if the principal revokes the DPOA or dies.

Guardian	<p>A guardian is a person appointed by a court to manage the affairs of a person who is incapacitated.</p> <p>A guardian may be appointed to manage the financial affairs of a person at significant risk of harm because of a "demonstrated inability to adequately manage property or financial affairs." A guardian may be appointed to make health care and other non-financial decisions for a person at significant risk of harm because of a "demonstrated inability to adequately provide for nutrition, health, housing or physical safety." (The quoted language is from the Washington State law, Revised Code of Washington 11.88.010.)</p>
Health Care Power of Attorney	A health care power of attorney enables a person to name an agent or proxy to make health care decisions if he or she becomes unable to do so. It may address any type of health care decision, and may include guidance to the agent about the type and extent of health care desired.
Health Care Surrogate or Family Consent Laws	Health care surrogate or family consent laws provide legal authority for certain groups of persons (e.g., spouses, children, parents) to make health care decisions for an adult who cannot make or communicate such decisions due to disability, illness or injury, and who has not authorized someone else to do so.
Health Care	Any care, service, or procedure provided by a health care provider.
Health Care Facility	A hospital, clinic, nursing home, laboratory, office, or similar place where a health care provider provides health care to clients.
Health Care Provider	A person who is licensed, certified, registered or otherwise authorized by the law of Washington State to provide health care in the ordinary course of business or practice of a profession.
Power of Attorney	A writing where a mentally capable person, (the "principal") grants authority to another person (the "agent") to act in place of the principal. An agent's authority ends if the principal revokes that authority, becomes mentally incapacitated, or if the principal dies.
Principal	An individual who grants authority to an agent in a power of attorney.
Representative Payee	A representative payee is appointed by a government agency to receive, manage, and spend government benefits for a beneficiary. A beneficiary may request a representative payee, but usually the agency requires one when a beneficiary is incapable of managing benefits. The representative payee's authority is limited to the government funds for which he or she is the payee.

Substitute Judgment Standard	A decision-making standard where the surrogate decision-maker makes a decision for a person with a mental incapacity based on what the person would have wanted if the person were able to make the decision his or herself. The surrogate may consider information such as the person's past statements, beliefs, values, and prior life style.
Supplemental Security Income	Supplemental Security Income (SSI) is a federal income supplement program funded by general tax revenues (not Social Security taxes): <ul style="list-style-type: none"> • It is designed to help aged, blind, and disabled people who have little or no income; and • It provides cash to meet basic needs for food, clothing and shelter.
Surrogate	A person or entity that functions as a substitute for another.
Traumatic Brain Injury	Involves a blow or jolt to the head or a penetrating injury that disrupts brain function. Traumatic brain injury (TBI) may cause death and short- and long-term injuries. It affects thinking, language, learning, emotions, behavior, memory, and general independent body functions. ¹

¹ US Center for Disease Control and Prevention, Traumatic Brain Injury Prevention, <http://www.cdc.gov/ncipc/tbi/TBI.htm>

Introduction

According to the *New England Journal of Medicine*² there are four levels of capacity³: (1) the ability to communicate a choice; (2) the ability to understand information; (3) the ability to appreciate one's personal situation; and (4) the ability to weigh information in a rationally defensible way. If one were to ask oneself what should happen to me if I lost one of the above capacities, it is doubtful loss of autonomy and appointment of a guardian would be chosen. Unfortunately, under the current statutory framework, that may be the most probable result. This report recommends a comprehensive statutory framework emphasizing *assistance* in decision-making where appropriate, rather than assuming the need for substituted decision-making, thus preserving self-determination to the greatest extent possible.

Today in Washington State the number of persons with diminished capacity in one or more of the areas above is growing as illustrated by the following demographic trends:

- Washington's population will age rapidly over the next two decades. The state's elderly population, age 65 and older, is expected to grow from 662,000 (or 11.2 percent of the population) in 2000, to 1.66 million (or 19.7 percent of the population) by 2030.⁴ At the same time, forms of dementia are becoming more prevalent. Today, approximately 110,000 persons in Washington State have been diagnosed with Alzheimer's disease, the most common type of dementia.⁵ That number is estimated to increase to 130,000 by 2020 and 150,000 by 2025.⁶
- National estimates indicate that about 2 percent of the US population live with long-term or lifelong traumatic brain injury (TBI)-related disability and need help

² Applebaum, PS and Grisso, T., *Assessing Patients' Capacities to Consent to Treatment*, *New England Journal of Medicine*, Vol. 319:1635, Dec. 1988.

³ The capacity to consent to treatment and or to make a decision should not be confused with legal capacity determinations made in the guardianship context. While the capacity to consent and to make decisions should inform capacity determination in guardianship they are not equivalent. RCW 11.88.010 (1) (a) & (b) state "a person may be deemed incapacitated as to person 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" and "a person may be deemed incapacitated as to the person's estate 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."

⁴ Office of Financial Management, *The 2009 Long-Term Economic and Labor Force Forecast for Washington*, June 2009, Ch. 2 Pg 14. <http://www.ofm.wa.gov/economy/longterm/2009/lt09ch2.pdf>

⁵ Alzheimer's Association, *2009 Alzheimer's Disease Fact and Figures*, pg 25, to be published in *Alzheimer's & Dementia*, Volume 5, Issue 3.

⁶ *Id.*

- to perform activities of daily living.⁷ If these national estimates hold true in Washington State, there are a total of 123,750 residents living with TBI-related disabilities.⁸ Every year there are approximately 5,500 TBI hospitalizations. This translates to 280 more persons annually living with a lifelong TBI related disability.
- The Washington State Health Department reports that from 2003 to 2005, the prevalence of disabilities in Washington increased for those ages 16 and over.⁹ In 2005, there were 783,000 Washingtonians age 16 and over with a disability.¹⁰
- The Washington State Developmental Disabilities (DD) Council reports that there are 106,000 persons in Washington State with a developmental disability.¹¹ Similar to the general population, the DD population is living longer, experiencing a 247 percent increase in life expectancy from 19 years in the 1930s to 66 years in 1993.¹² The DD Council further reports that 67 percent of all individuals with developmental disabilities live with family, and in at least one-quarter of these households the primary caregiver is 60 years or older.¹³ Over the next twenty years, large numbers of primary caregivers will be unable to care for the family member who has a developmental disability.¹⁴

⁷ Thurman, D. J., Alverson, C. A., Dunn, K. A., Guerrero, J. & Sniezek, J. E. (1999). *Traumatic Brain Injury in the United States: a public health perspective*. *Journal of Head Trauma Rehabilitation*, 14(6), 602-615; U.S. Centers for Disease Control and Prevention. *Traumatic Brain Injury Prevention*. Retrieved January 20, 2009 from <http://www.cdc.gov/ncipc/tbi/Overview.htm>

⁸ Washington State Department of Health, *Traumatic Brain Injury: Prevalence, External Causes, and Associated Risk Factors*, February 2009 <http://www.doh.wa.gov/hsga/ocrh/har/TBIfact.pdf>

⁹ Washington State Department of Health, 2007, *People with Disabilities*, The Health of Washington State, <http://www.doh.wa.gov/hws/doc/GHS/GHS-PWD2007.pdf>

¹⁰ Washington State Department of Health, May 2006, *Disability in Washington State* http://depts.washington.edu/cdpr/docs/Disability_Report.pdf

¹¹ Washington State Developmental Disabilities Council, 2008 *Task Force Recommendations, Aging with Developmental Disabilities*, pg 3, http://www.ddc.wa.gov/Publications/090211_AgingTFReport.pdf

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

- The Joint Legislative Audit and Review Committee reported in its 2006 review of the need for a specialized regional jail facility that at least 16 percent of persons in jails are mentally ill.¹⁵ This population is believed to be at increased risk for suicide; present increased problems to custody staff; and are likely to reoffend.¹⁶

The rates at which these populations are increasing emphasize the importance of creating a comprehensive statutory framework that can provide the specific decision-making assistance needed while utilizing existing services and resources.

¹⁵ State of Washington Joint Legislative Audit and Review Committee (JLARC), *Analysis of Establishing a Regional Jail Facility for Offenders with Mental Health or Co-Occurring Mental and Chemical Dependency Disorders*, pg 1, February 2006, <http://www.leg.wa.gov/reports/06-2.pdf>

¹⁶ *Id.*

Current: Need for a Comprehensive Framework for Decision-Making Assistance

There is currently no comprehensive statutory framework for making decisions on personal welfare matters on behalf of people with diminished decision-making capabilities. These individuals may need assistance making decisions for a number of reasons, including: they were born with a learning disability, have a mental illness, developed dementia or a similar condition such as Alzheimer's, suffered a stroke or other trauma, or some other degenerative condition.

The lack of a statutory framework results in an "all or nothing" approach to decision-making assistance. Generally, individuals who have diminished decision-making abilities are deemed to lack the ability to make *any* decisions. The assistance most often available is appointment of a full guardian. Often full guardianship unnecessarily restricts and inhibits the autonomy and self-determination of individuals who need special assistance with specific issues.

The risks resulting from the absence of a comprehensive statutory framework are:

- a) Increasing caseloads within the jurisdiction of probate, civil and criminal courts, including disputes over eligibility for, and the scope of governmental services, mental health matters, abuse, and exploitation.
- b) Increasing numbers of vulnerable adults at risk for exploitation.
- c) Increasing financial and other abuse that is difficult to detect because there is no individual or institution willing and able to intercede, resulting in harm to human dignity.
- d) Incarceration becomes a replacement for treatment resulting from the inability of individuals to access needed services without the assistance of an appropriate surrogate.
- e) Inconsistent, and sometimes poor decision making by well-meaning, but unqualified surrogates.
- f) Subjecting individuals to over-treatment or under-treatment, or treatment that does not reflect their values, choices and preferences, or best address their well-being.

- g) Healthcare decisions may be drawn out as no one is willing to assume the risk associated with making a decision. There is anecdotal evidence that without client consent, facilities may be reluctant to request treatment, and clinicians may be reluctant to provide treatment until the need for treatment becomes an emergency.
- h) Placement in settings more restrictive than individual need demands.
- i) Repeated emergency hospitalizations resulting from the inability of individuals to obtain preventive healthcare without the assistance of an appropriate surrogate.

These risks have both a human and a financial cost that may be minimized, and in some cases eliminated, by adoption of the following proposed solutions.

Future: Reducing the Need for Guardianships

Addressing the need for decision-making assistance requires solutions that include an opportunity to plan for a time when capacity may diminish as well as solutions for individuals whose capacity has already diminished.

TASH, an international advocacy association of people with disabilities, families, and other advocates, urges developing alternatives to guardianship through “the development and promotion of the use of accommodations and supports individual’s need to make choices and decisions, to have their preferences honored and recognized, and to have their rights to self-determination protected.” The solutions provided herein seek to honor this principle.

RECOMMENDATION ONE: Expansion of State Aging and Disability Resource Centers.

Include the provision of information, support, counseling, assistance, and education related to substitute decision-making to individuals, nominated guardians, court-appointed guardians (lay and professional), other substitute decision-makers (representative payees, agents under Powers of Attorney for Health Care and Powers of Attorney for Finances, family members) and professionals who work with these constituents in the expansion of State Aging and Disability Resource Centers (ADRC).

Overview of Aging and Disability Resource Centers (ADRC) Expansion

The Aging and Disability Resource Center Program (ADRC) is a collaboration effort of the U.S. Administration on Aging (AoA) and the Centers for Medicare and Medicaid Services (CMS) to implement in all states Aging and Disability Resource Centers:

- (A) To serve as visible and trusted sources of information on the full range of long-term care options that are available in the community, including both institutional and home and community-based care;
- (B) To provide personalized and consumer-friendly assistance to empower people to make informed decisions about their care options;
- (C) To provide coordinated and streamlined access to all publicly supported long-term care options so that consumers can obtain the care they need through a single intake assessment and eligibility determination process;
- (D) To help people to plan ahead for their future long-term care needs; and

(E) To assist, in coordination with the State Health Insurance Assistance Program, Medicare beneficiaries in understanding and accessing the Prescription Drug Coverage and prevention health benefits available under the Medicare Modernization Act.

The U.S. Administration on Aging (AoA) has established the goal of using ADRCs to empower consumers to make informed decisions about their long-term service and support options. ADRCs are created to provide information and access “programs” or “systems” that involve networks of state and community organizations that work together in a coordinated manner to provide consumers with a single point of entry to all long-term services and supports. One model which AoA strongly endorses and supports is a “one stop shops” or “no wrong door” approach where ADRCs serve as single entry points to address many of the frustration consumers and their families experience when trying to find needed information, services, and supports. It is critical in creating an ADRC system that there be close partnering between Area Agency on Aging (AAA), Centers for Independent Living (CIL), Public Guardianship programs and other community organizations such as local chapters of the Arc of Washington, advocates for the rights of citizens with disabilities, supported living, and employment providers and self-advocacy organizations.

Need to Partner to Expand ADRCs

Understanding the options available to the elderly and persons with disabilities affords these individuals and their families the opportunity to make choices and decisions which honor and recognize their right of self-determination. Educating the elderly and people with disabilities, family, and service providers about the benefits, alternatives, supports and accommodations available allows them to continue living in the community and helps to mitigate the need for guardianship. Absent that knowledge, decisions may not occur in a timely fashion and may result in decision-making by persons unfamiliar with the preferences of the individual.

Due to the complicated nature of benefits, services and substitute decision-making, there is a unique need for communication at a level that is understandable to each consumer requesting information. Communication at this level is best performed by individuals with a significant level of subject matter expertise. Because no one entity or organization is thoroughly versed in all relevant topics, partnering is required to provide the best quality service.

Method

To assist ADRCs provide “one-stop shopping” sources of information, one-on-one counseling, and streamlined access to programs services and information, the Washington State Administrative Office of the Courts (AOC) and OPG would provide information, support, counseling, assistance, and education related to substitute decision-making to:

- Individuals;
- Nominated guardians;
- Court-appointed guardians (lay and professional);
- Other substitute decision-makers (representative payees, agents under powers of attorney for health care and finances, family members); and
- Professionals who work with these constituents.

Assistance would be provided via a service model that incorporates advanced care planning into regular family and community conversations. AOC/OPG would seamlessly integrate its core competencies, subject-matter expertise in substitute decision-making, into the services provided by an existing elder network, thirteen (13) Area Agencies on Aging (AAA) and a disability network (six (6) Centers for Independent Living [CIDL]). Integration will include leveraging the communication resources and tools (help lines, websites, listservs, newsletters and other publications, events, presentations and other face-to-face interaction) of the thirteen AAAs and six CIDLs to provide information, support, counseling, assistance, and education to target populations. The OPG will serve as a clearinghouse, a central agency for the collection, classification, and distribution of information on substitute decision-making. Information will be shared through help lines, Web sites, listservs, newsletters, trainings, and publications.

Advantages

The impact of the project will be multifaceted:

- (1) Appropriate advanced care planning will enable individuals to access the services and protections needed to effectively and efficiently continue living in their homes and communities even if their decision-making capacity diminishes;
- (2) The availability of a support service will improve the quality of decisions made by individuals with disabilities and the surrogates of persons with disabilities;
- (3) Will increase awareness and knowledge of substitute decision-making, including decision-making standards such as best interest and substituted judgment and the standards and procedures governing guardianship, representative payeeship, advance directives, family consent, and powers of attorney;
- (4) Will increase the number of individuals, families and professionals gaining knowledge about the effect and use of Powers of Attorney, and the requirements for executing valid documents; Court-appointed guardians and agents will learn more about their legal obligations and restrictions;
- (5) Will potentially reduce the need for court intervention on behalf of persons believed to have diminished capacity, including petitions for guardianship; and
- (6) Will potentially reduce exposure to abuse, neglect, and exploitation.

Disadvantage

ADRCs are new entities, largely unknown to the communities they are to serve. A great deal of community education is needed before ADRCs are considered effective sources of information.

RECOMMENDATION TWO: Provide protective payee/money management services to individuals who lack the ability to manage their finances.

Overview and Need

A representative payee (RP) or sometimes called *protective payee* is an individual or organization that receives Social Security and/or Supplemental Security Income (SSI) payments, veteran's, civil service, or Black Lung benefits for someone who cannot manage or direct the management of his or her finances in a manner that ensures that basic living needs are met.¹⁷ These agencies generally look for family or friends to serve in a protective payee capacity, but when friends and family are not able to serve as payee, qualified organizations are sought to be a protective payee.

Most protective payee organizations are paid by fees assessed to clients' benefits. Social Security has set payment on client benefits at no more than \$37 per client or, up to ten percent of clients' benefit under \$370. The Veteran's Administration (VA) has set at payment at a maximum of \$66 per client benefit.

Method

The public guardianship administrator (OPG) would be authorized to establish and administer a protective payee program as follows:

- The office shall contract with public or private entities or individuals to provide protective payee services to persons age eighteen or older.
- The office shall adopt eligibility criteria to enable it to serve individuals with the greatest need.
- The office shall adopt minimum standards of practice for entities providing protective payee services. An overarching standard will be respect for the client's autonomy. RPs will be expected to communicate with each client; to understand and respect his or her values, preferences and choices; and to explain all decisions made on the client's behalf.
- The office shall monitor and oversee the use of state funding.

¹⁷ Daniel Luchins, David Roberts & Patricia Hanrahan, *Provision of Protective Payee Status*, pg 2, Illinois Department of Human Services' Office of Alcoholism and Substance Abuse.

- The office shall collect uniform and consistent basic data elements regarding service delivery. This data shall be made available to the Legislature and Supreme Court in a format that is not identifiable by individual(s) to protect confidentiality.
- The office shall adopt a process for receipt and consideration of and response to complaints against the office and contracted providers of protective payee services. The process shall include investigation in cases in which investigation appears warranted in the judgment of the administrator.
- The office shall develop standardized forms and reporting instruments.
- The office shall identify training needs for protective payees it contracts with. The office may offer training to entities providing protective payee services.
- The office shall establish a system for monitoring the performance of protective payees it contracts with. The office may conduct further monitoring, including in-office visits as the administrator deems appropriate. For monitoring purposes, office staff shall have access to any information relating to a protective payee client that is available to the protective payee.

Advantages

A representative payee (RP) can be helpful for individuals who, because of disability, are unable to meet their basic living needs. In the case of mental illness, RP provision can improve community tenure by ensuring that rent is paid consistently and on time. It can also ensure that clients have enough money to provide food for themselves from one check to the next, and can help clients learn to budget their money so they can save for personal items and larger purchases. But representative payees—especially agency-based programs—are in a position to provide more for their clients than assistance in meeting basic living needs. Some effective programs bundle RP provision with other services, such as skills training in the areas of budgeting, bill paying, shopping, and working with banks. RP programs can also provide advocacy by assisting clients to secure entitlements and by helping to negotiate with debtors, landlords, and other financial institutions. The benefits of RP beyond meeting basic living needs may include:

- Reduced inpatient and emergency hospitalization.
- Increased treatment compliance.
- Improved quality of life.
- Reduced victimization related to money.
- Increased use of community services.

- Decreased substance abuse.
- Reduced physical health symptomatology.

The protective payee arrangement is simple, inexpensive, and a potential least restrictive alternative to guardianship for people with little income. Appointment is limited to the handling of specific government funds and does not affect other areas of decision-making. The RP process does not require a formal, judicial finding of incompetency/incapacity like a guardianship. The beneficiary may also request a change in payee. In addition, services provided under contract with OPG will adhere to established standards and OPG will provide oversight.

Disadvantages

- The protective payee still has great control over the beneficiary's affairs without being subject to judicial oversight. A payee also may be appointed against the beneficiary's will.
- Payment amounts set by government benefit providers may not represent sufficient compensation, thus additional funding may be needed. Potential funding sources are addressed on page 36.

Funding

SSA and VA need the help of qualified organizations to serve as representative payees and are continually recruiting social service agencies, institutions, and state or local government agencies to provide fee-for service representative payees.

RECOMMENDATION THREE: Endorse adoption of the Uniform Power of Attorney Act, subject to modifications developed after review by others with expertise and experience with the use and abuse of powers of attorney, including the Washington State Bar Association (WSBA) Probate and Trust committee, the WSBA Elder Law Section, the Attorney General, prosecuting attorneys, the Long-Term Care Ombudsman, the OPG, and disability and senior advocates.

Overview of the Uniform Power of Attorney Act (2006)

A study conducted by the Uniform Law Commission (ULC) (formerly the National Conference of Commissioners on Uniform State Laws [NCCUSL]) revealed differing approaches to powers of attorney provisions in state statutes.¹⁸ State provisions addressing multiple agents, the authority of later-appointed guardians, the impact of dissolutions or annulments of the principal's marriage to the agent, activation of

¹⁸ Unif. Power of Atty Act. Preface (2006) http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm

contingent powers, the authority to make gifts, and standards for agent conduct and liability were increasingly non-uniform.

The Joint Editorial Board for the Uniform Trust and Estate Acts (JEB) conducted a national survey of probate and elder law sections of all state bar associations, the fellows of the American College of Trust and Estate Counsel, the leadership of the American Bar Association (ABA) Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys and to special interest listservs of the ABA Commission on Law and Aging to determine the rules that should guide development of a uniform power of attorney statute.

Seventy percent of survey responders agreed that a power of attorney statute should:

- (1) Provide for confirmation that contingent powers are activated;
- (2) Revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
- (3) Include a portability provision;
- (4) Require gift making authority to be expressly stated in the grant of authority;
- (5) Provide a default standard for fiduciary duties;
- (6) Permit the principal to alter the default fiduciary standard;
- (7) Require notice by an agent when the agent is no longer willing or able to act;
- (8) Include safeguards against abuse by the agent;
- (9) Include remedies and sanctions for abuse by the agent;
- (10) Protect the reliance of other persons on a power of attorney; and
- (11) Include remedies and sanctions for refusal of other persons to honor a power of attorney.

The ULC drafted the Act, incorporating the knowledge gained from its study and survey.

Need

While the power of attorney (POA) can be a simple and effective means of handling surrogate decision-making, it is considered by many to be a "license to steal" because it provides an easy means to commit abuse. The 2008 AARP report, *Power of Attorney Abuse: What States Can Do About It*, lists the following characteristics of powers of attorney which make it easy for an agent to commit financial abuse:

- (1) "Broad decision-making authority." The agent must have broad decision-making authority for the POA to be an effective tool.
- (2) "Lack of monitoring." There is no third party monitoring, thus it is difficult to detect abuse of authority.
- (3) "Unclear standard for agent conduct." POA laws do not provide specific legal standards about the duty of the agent to the principal.

The AARP reports that evidence of POA abuse can be found in anecdotal reports from professionals, requests for help from victims of abuse, family members of victims, and media stories.¹⁹ The report concluded that POA abuse occurs everywhere: it may or may not be considered a crime and may be perpetrated by family and nonfamily members.²⁰ The report further states that due to the lack of national data collection on the incidence and prevalence of POA abuse, it is difficult to definitively pinpoint the extent of the problem.²¹ Adult Protective Services reports and surveys from lawyers and other professionals are used to gather information about the problem.²²

Analysis of 2003 APS data indicates that 20.8 percent of reports made to state APS agencies about persons age 60 and older concerns financial exploitation.²³ National surveys of lawyers and other professionals and anecdotal evidence provide more clarity about the extent of the problem.²⁴

Referencing an article by Linda S. Whitten, UPOAA reporter, the article lists the following three categories of abuse:

- (1) "Transactions exceeding the intended scope of the agent's authority," such as gift making without explicit authority;
- (2) "Transactions conducted for self-dealing purposes," for example when the agent purchases items for his or herself with the principal's resources;
- (3) "Transactions conducted in contravention of the principal's expectations," when the agent makes gifts that significantly diminish the principal's estate plan.

¹⁹ Lori Stiegel and Ellen VanCleave Klem. *Power of Attorney Abuse: What States Can Do About It*, 4 AARP (November 2008).

²⁰ *Id.* at 4.

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 7.

Provisions of the Uniform Power of Attorney Act (UPOAA) that Protect Against Abuse

According to the AARP's analysis, the UPOAA has 21 provisions that protect individuals and preserve autonomy. Several of these provisions have already been adopted in whole or in part in Washington State.

- Section 108, which defines the relationship between an agent and a fiduciary subsequently appointed by a court (such as a guardian of the estate). **RCW 11.94.010 (1) is substantially similar.**
- Section 109, which authorizes the springing POA and provides guidance on how to determine whether the future event or contingency specified in the POA has occurred.
- Section 111(a), which allows the appointment of co-agents and provides guidance on how and whether co-agents are to act jointly or independently.
- Section 111(b), which addresses the termination of a spouse-agent's authority if the marriage ends, recognizing that a spouse-agent may have conflicting interests in such circumstances.
- Section 111(d), which addresses the responsibility of co-agents or successor agents to protect the principal if another agent breaches or is about to breach his or her fiduciary duty.
- Section 113, which clarifies when an individual who has been named as an agent has accepted the responsibility of acting as agent.
- Sections 114 (a), (b), and (h), which clarify the mandatory and default duties of the agent and indicate under what circumstances an agent must disclose information about his or her actions to a third party (including courts, other fiduciaries, or APS or other protective agencies). **RCW 11.94.050 is substantially similar to Section 114 (h).**
- Section 115, which addresses the circumstances under which a principal's attempt to exonerate an agent from liability will not be binding.
- Sections 116 (a) and (b), which indicate who may petition a court to construe a POA or review an agent's conduct and restrict a court from dismissing such a petition at the principal's request if the principal lacks capacity to revoke the agent's authority or the POA. **RCW 11.94.090 and 100 are substantially similar to Section 116(a).**
- Section 117, which governs liability for agents who violate the POA law. RCW 11.94.120

- Section 118, which provides guidance to an agent who resigns his or her role to protect an incapacitated principal from being left without a decision maker.
- Section 119, which addresses third-party acceptance of and reliance upon a POA.
- Sections 120(b)/(c) and (c)/(d), which list circumstances under which a third party may legitimately refuse to accept a POA and provide sanctions for unlawful refusals. ***RCW 11.94.040 is substantially similar to Section 120 (b) and equivalent to Sections 120(c) and (d).***
- Section 123, which states that the remedies under the POA law are not exclusive and do not limit the rights or remedies provided under other state laws.
- Section 201 and 301, which set forth the powers that an agent cannot exercise unless the POA expressly authorizes the agent to do so because of the harm that can occur to the principal's property and estate plan if the powers are misused. ***RCW11.94.050 is substantially similar to Section 201(a).***

The UPOAA also includes a statutory form that spells out in plain language what the POA does, and a form listing the duties of the agent that can be signed by the agent to acknowledge his/her acceptance of responsibilities.

The UPOAA has many features that do not relate to protecting vulnerable adults or preserving their autonomy. Implementation of this alternative would therefore involve other stakeholders (e.g., real estate and elder law attorneys, banks, and other businesses).

Advantages

Reduces the risks associated with establishing a POA such as:

- The agent may not understand his/her duties.
- The agent may steal or self-deal.
- It may be difficult or impossible to hold the agent accountable.
- Banks and others may not honor valid exercise of POA authority.
- Banks and others may not respond effectively to financial exploitation.

Disadvantages

- Increases the complexity in developing a POA, which may reduce its availability to those without access to legal assistance.
- Does not address the authority to make health care decisions. In Washington, the Power of Attorney statute (RCW 11.94) covers both financial and health care issues.

RECOMMENDATION FOUR: Provide power of attorney services to individuals who lack the ability to manage their finances.

Overview and Need

Adoption of the Uniform Power of Attorney Act would institute tougher safeguards to protect individuals from power of attorney abuse and increase the usefulness of DPOAs. POAs and DPOAs only apply in situations where an individual (the “principal”) has the mental capacity to sign one and voluntarily chooses to do so. POAs and DPOAs allow the principal to appoint an agent to work at the pleasure and direction of the principal. If the principal’s direction or wishes cannot be determined, the agent should act in accordance with the “best interests” of the principal. Because powers of attorney are voluntary, a principal who has the mental capacity to do so may revoke the power at will.

The usefulness of POAs and DPOAs is dependent on the availability of a trusted and reliable person who agrees to act for the principal. Principals must choose agents carefully and there should be reasonable oversight. In the absence of trusted individuals, family, and friends reputable entities are needed to provide services. The OPG could fulfill that role.

Method

The public guardianship administrator (OPG) would be authorized to establish and administer a power of attorney program as follows:

- The office shall contract with public or private entities or individuals to provide power of attorney services to persons age eighteen or older.
- The office shall adopt eligibility criteria to enable it to serve individuals with the greatest need.
- The office shall adopt minimum standards of practice for entities providing power of attorney services.
- The office shall monitor and oversee the use of state funding.

- The office shall collect uniform and consistent basic data elements regarding service delivery. This data shall be made available to the Legislature and Supreme Court in a format that is not identifiable by individual to protect confidentiality.
- The office shall adopt a process for receipt and consideration of and response to complaints against the office and contracted providers of power of attorney services. The process shall include investigation in cases in which investigation appears warranted in the judgment of the administrator.
- The office shall develop standardized forms and reporting instruments.
- The office shall identify training needs for agents it contracts with. The office may offer training to entities providing power of attorney services.
- The office shall establish a system for monitoring the performance of power of attorneys it contracts with. The office may conduct further monitoring, including in-office visits, as the administrator deems appropriate. For monitoring purposes, office staff shall have access to any information relating to a power of attorney client that is available to the agent.

Advantages

- Services are available to anyone who cannot identify a reliable, trustworthy person to appoint.
- Provides an opportunity for the individual to plan and select an agent based on his or her preferences.
- Entities acting as agent are monitored and regulated.
- Doesn't require court intervention.
- May reduce the need for guardianship.

Disadvantages

- The grantor must have capacity to establish a power of attorney.
- Funding will be needed. Potential funding sources are addressed on page 36.

RECOMMENDATION FIVE: Create statutory surrogate decision-making committees, which empower committees of trained volunteers to evaluate the need for a surrogate decision-maker, and when necessary consent to a course of treatment.

Overview of Surrogate Decision-Making Committees (SDMC)

A Surrogate Decision-Making Committee (SDMC) is comprised of regional panels of volunteers from the community who convene to review specific cases where the client is not able to consent to a routine medical procedure. The SDMC evaluates the need for a surrogate decision-maker and if so then evaluates and recommends a course of treatment for the client. Considering the order of priority of decision-makers defined by Washington State statute,²⁵ the SDMC would be last on the list, interceding only when no other legally authorized decision maker is available. Ideally the SDMC would help to avoid a medical emergency by managing health care decisions in a proactive manner.

Need for Surrogate Decision-Making Committees (SDMC)

SDMCs are needed to respond to a population that a 2002-2003 study by the American Bar Association Commission on Law and Aging²⁶ described as client individuals who:

- Lack decisional capacity to give informed consent to the recommended treatment;
- Have not executed an advance directive; and
- Have no legally authorized surrogate, and no family or friends willing and able to assist in the decision-making process.

Today, in the absence of an emergency, obtaining treatment for members of this population requires appointment of a guardian. Guardianship can be costly, time-consuming and procedurally difficult. With respect to low income individuals, public guardianship services are only available in six counties. Guardianship may also unnecessarily restrict the individual's ability to make decisions in other areas of his or her life, as guardianship appointments are usually plenary and wrongly assume that an inability to consent to a recommended treatment equates to an inability to make other decisions.

The size of the population described above in Washington State is not known, but experts estimate that 3-to-4 percent of the total nursing home populations are members of this group.²⁷ In 2008 the Office of Financial Management reports a nursing home population of 11,044 which translates to 332-to-441 persons in nursing homes who are

²⁵ RCW 7.70.065 Informed consent – Persons authorized to provide for patients who are not competent – Priority.

²⁶ Naomi Karp and Erica Wood, *Incapacitated and Alone*, July 2003

²⁷ *Id.*

members of the population described in the ABA study.²⁸ The Department of Housing reports that 2,729 of Washington State's 11,929 homeless populations are dealing with mental health issues.²⁹ These persons are also likely members of the population described above.

Washington State Developmental Disabilities Council reports that over the next twenty years approximately one-quarter or approximately 18,000 family members caring for persons with developmental disabilities will reach age 80 and be unable to appropriately care for the person with a developmental disability.³⁰ If appropriate decisions around surrogate decision-making have not been addressed, these individuals will become members of the population described in the ABA study.

Surrogate Decision-Making Committee (SDMC) Jurisdiction

SDMCs would have a narrow focus. Jurisdiction would include major medical, surgical, or diagnostic treatment where a general anesthetic is used, including necessary dental care or treatment which involves significant risk. Jurisdiction would exclude the administration of medications including antipsychotic medications, mental health and psychiatric treatment, electroconvulsive therapy, withdrawal of life sustaining treatment, sterilization, and termination of pregnancy.

Eligible Agency Participants

- Hospitals
- Psychiatric Centers
- Developmental Centers
- Long-term Care Facilities
- Home and Community Based Waiver Clients

Surrogate Decision-Making Committee (SDMC) Make Up

Each panel will be comprised of four disinterested third party volunteers. Panels will include one health care professional, one attorney admitted to practice law in Washington State, one lay person, and one advocate with a recognized expertise in the care and treatment of persons with disabilities. The advocate will assist the person believed to lack capacity to consent, to express his or her wishes, and improve their ability to understand the proposed treatment and make healthcare decisions. Professionals (health care, legal, and residential) involved with each case, and any individual with a conflict of interest will be excluded from panel participation.

²⁸ Washington State Office of Financial Management, *State-Supported Nursing Home Caseload*, <http://www.ofm.wa.gov/trends/tables/fig406.asp>

²⁹ www.commerce.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&

³⁰ http://www.ddc.wa.gov/Publications/090211_AgingTFReport.pdf

Surrogate Decision-Making Committee (SDMC) Proceeding

An informal, user-friendly process requiring client attendance should be developed. The steps of a process currently used in New York are as follows:³¹

1. Declarant files declaration on behalf of a client believed to need major medical treatment and believed to lack capacity to consent to, or refuse treatment.
The declaration:
 - i. Shall be signed by the declarant.
 - ii. States the client does not have a parent, spouse, adult child, committee of the person, conservator or legal guardian, or if he or she does have one, that person is willing to allow the panel to step in as surrogates.
 - iii. State reasons showing lack of capacity including factual and professional bases.
 - iv. Provide a description of the major medical treatment proposed and the declarant's opinion as to the client's best interests.
2. When the committee receives the declaration, it will send a copy to any family members, and the chairperson of the committee will assign the declaration to a panel.
3. Prior to the panel hearing, panel members shall review the declaration and decide if they need additional information.
 - i. They may request information from a physician, health care facility or health care professional.
 - ii. They may request an independent assessment of the client.
 - iii. They may consult with other persons who might have further information about the client's values, preferences and choices.
4. When the hearing is conducted, the client is present, as well as any person the client requests to be present.
5. If practical, panel members interview and observe the client before making their decision.
6. The panel determines based on clear and convincing evidence if the client is in need of surrogate decision-making. Three of the four member panel must agree that the client needs surrogate decision-making; otherwise, the client will be found not to have this need.

³¹ Commission on Quality of Care and Advocacy for Persons with Disabilities
<http://www.cqc.state.ny.us/sdmcforms/sdmc.htm>

7. If the panel determines the client needs surrogate decision-making, if possible it must determine the values, preferences and choices of the individual and how those relate to the major medical treatment being considered. If the panel is unable to determine the values, preferences, and choices of the individual, it should determine what is in the best interest of the client based on a fair preponderance of the evidence.
8. If the panel decides to consent to the treatment, the consent is considered a legally valid consent as if the client, he or she, had capacity and consented.
9. At any time, a parent, child, spouse, committee of person, conservator, or legal guardian may object to the panel and proceedings will be ended.
10. A copy of the determination with a description of the right to appeal is given to the client.

The average time from SDMC's receipt of a case to a hearing and decision is fourteen (14) days, and expedited hearings are also available.

Advantages

- Allows for informal and thus more responsive decision-making for individuals who need some form of treatment.
- Provides a neutral party to review and make decisions. Can provide another layer to facilitate decision-making. Panel may want more information from experts or recommend "sub-process" such as guardian ad litem. Panels help guide everyone through the process in a more thoughtful and rational way.
- Cost effective when compared to guardianship proceedings.

Disadvantages

- Does not address the need for routine decision-making on behalf of persons with diminished capacity.
- Does not address the need for a thorough assessment to determine capacity, nor provide a referral procedure for consideration of guardianship.
- Recruitment and training of volunteers is essential. Potential funding resources are addressed on page 36.

RECOMMENDATION SIX: Develop a statewide guardianship monitoring program that includes visits/field investigations, financial audits and concise reports.

Overview of Guardianship Monitoring Programs

Guardianship monitoring has been included as a means to reduce the need for guardianship because an individual's circumstances and condition may change over time. Monitoring is a form of assessment, and assessment of the need for guardianship is an ongoing process meant to ensure that a person is placed under guardianship only when necessary, and only to the extent required by his or her decisional incapacities.

The purpose of a guardianship monitoring program is to collect and evaluate information about the well-being and property of persons who have been adjudicated incapacitated by the courts. The information collected is to be used to protect and preserve the interests of the incapacitated person. A guardianship monitoring program provides the opportunity to look beyond required paper reports to onsite visits.

Onsite visits afford an opportunity for impartial third parties to observe incapacitated persons in their homes and provide information that could answer the following questions:

- Are there signs of abuse or neglect?
- Is the incapacitated person receiving adequate food and shelter?
- Does the medical, psychiatric, and physical treatment received by the incapacitated person appear to be appropriate?
- Is the care being provided to the incapacitated person consistent with the plan?
- Is the incapacitated person receiving any rehabilitation services and/or therapies?
- Are the preferences of the incapacitated person being considered?
- Does the placement of the incapacitated person appear to be appropriate?

Need for Guardianship Monitoring

Guardianship matters, unlike other cases, may remain open for years or even decades, particularly in cases involving individuals with developmental disabilities or mental disorders. Once incapacity has been determined, there are usually no "adversaries" to alert the court to potential problems. The absence of adversaries encumbers the court to be proactive to discover and respond to disputes and issues. The need to be

proactive is even more important when the incapacitated person has no family or friends involved in his or her life.

The role of a guardian is highly complex, involving legal, medical, social, financial and psychological dimensions, while many guardians are lay persons, inexperienced with the guardian process and unfamiliar with professional ethics and standards. The eyes and ears of a guardianship monitor can assist the court in detecting and correcting minor issues before they become big problems. These minor corrections can help to preserve and protect the autonomy of incapacitated persons as well as conserve judicial resources.

Method

To efficiently and effectively report on the well-being of the incapacitated person and to protect his or her assets, the court should use court or volunteer investigators to monitor all cases or a random selection of cases, post-appointment, and develop a financial auditing program with various levels of review, depending on the needs and circumstances of the incapacitated person.

A good guardianship monitoring program requires cooperative effort between the County Clerk, court administration, and a dedicated monitoring team comprised of a minimum of four positions: program coordinator, records researcher, court visitor, and court auditor. The duties of each are briefly described below:

- The program coordinator is the designated manager. The coordinator recruits and selects qualified individuals for other positions, is responsible for training, scheduling, case tracking, and reporting.
- Records researchers review guardianship records and verify the information contained in the records. Verifying involves investigating via phone calls and written communication to obtain correct information -- last known address of incapacitated person, updated annual reports, etc.
- Court visitors visit guardians and incapacitated persons and report on the care of the incapacitated person.
- Court auditors review annual returns and related financial records, note problems and concerns, and follow-up as needed.

Advantages

- Aids in assuring proper care and protection for incapacitated adults.
- Acts as a deterrent to abuse, neglect, and exploitation.
- Improves the court's image and inspires public confidence.

- Provides a means to tracking guardianship and gauging the effect of court orders.
- Assists guardians in meeting their duties to incapacitated persons.
- Ensures the accuracy and completeness of guardianship reports.

Disadvantages

- Need for volunteers, training, and funding. Potential funding sources are addressed on page 36.
- Potential liability issues associated with volunteers.

Potential Sources of Funding

Due to the current economic crisis locally and nationally, securing funding during a time of severe budget cutting will be difficult. Thus, creative funding sources must be aggressively considered and pursued. Unfortunately, time constraints hindered a review of funding sources by OPG's ad hoc Advisory Committee. The following potential sources are presented by OPG as a basis for further discussion.

Harness Escheat Funds

Escheat is the reversion of property to the state when a person dies without a Will or any known heirs. Washington State Department of Revenue reports the collection of \$1,700,000 between 2004 and 2008 in escheat funds. The Department includes escheats collected when a decedent died without a Will and there were no known heirs or a decedent died listing specific heirs in their Will and those heirs were not located. Developing a plan to harness escheat funds should be explored.

Establish a Charitable Foundation and a Pooled Trust

A charitable foundation is a distinct legal body, authorized to collect funds from donors and other bodies, receive gifts, grants, and bequests of assets or property solely for the benefit of a trust. A charitable foundation could establish and manage a pooled trust with separate trust accounts established for the benefit of any individual who is disabled. Any funds that remain in a beneficiary's account at his or her death would be retained by the trust or used to reimburse the state. Establishing a pooled trust should be explored.

Secure Funding via the Older Americans Act

Congress passed the Older Americans Act (OAA) in 1965, in response to concern by policymakers about a lack of community social services for older persons. The legislation established authority for grants to states for community planning and social services, research and development projects, and personnel training in the field of aging. The law also established the Administration on Aging (AoA) to administer the newly created grant programs and to serve as the federal focal point on matters concerning older persons. The OAA authorizes a wide array of service programs through a national network of state agencies on aging, area agencies on aging, service providers, and Tribal organizations. The OAA also includes community service employment for low-income older Americans; training, research, and demonstration activities in the field of aging; and vulnerable elder rights protection activities. Guardianship services and alternatives represent relevant recipients for OAA funds and this funding source should be explored.

Conclusion

State law states:

“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 the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs”. (RCW 11.88.005)

Legislative intent recognizes that decisional capacity is not global and that decisions concerning the liberty and autonomy of individuals should be person-centered and individualized. Implementing the recommendations included, honors the intent of the Legislature.