

## THE FUTURE OF COURT-ORDERED DECISION-MAKING ASSISTANCE: PERSPECTIVES FROM THE WASHINGTON STATE OFFICE OF PUBLIC GUARDIANSHIP

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*Increases in three populations—the elderly, persons with disabilities, and the homeless—will require courts to rethink and revise approaches to decision-making assistance.*

Across the nation, the provision of public guardianship services—unlike well-established professions such as law, social work, and medicine—lacks a comprehensive body of knowledge, standards of practice, and code of ethics to guide performance. Thus, there is a great need to document what public guardians do for individuals served, to develop uniform policies and procedures for the provision of service, and to test the procedures developed over time through application and document how this work improves the quality of life of persons with diminished capacity. Developing this body of work requires collaboration between practitioners in the field, researchers, and policy makers.

In 2007 Washington joined the list of states providing public guardianship services with the passage of Senate Bill (SB) 5320, which established an Office of Public Guardianship (OPG) within the Administrative Office of the Courts (AOC). SB 5320 resulted from multiyear efforts of a task force established by

### Public Guardianships

Guardianship is a relationship established by the court where a duty is created for the guardian (the person authorized to make decisions on behalf of another) to act in a manner appropriate for the circumstances and the decision-making abilities of the incapacitated person (the person with diminished capacity).

Public guardianship occurs when persons with diminished capacity are adjudicated incapacitated, unable to make decisions about person, health care, safety and finances, no family or friends are willing and able to serve, and the incapacitated person lacks the funds to employ a private guardian. Public guardianship is funded by the government, either through state appropriations, county funds, fees, or Medicaid funds.

the Elder Law Section of the Washington State Bar Association to propose a solution to the problem faced by Washingtonians who need guardianship services but could not afford them. A broad-based group of stakeholders, including members of the judiciary, the elder network, and advocates of persons with disabilities, supported the work of the task force and helped to pass legislation.

### Implementation of the Washington State Office of Public Guardianship

Legislation directed the OPG to contract with certified professional guardians to provide public guardianship services in pilot programs in at least one urban and one rural area. To satisfy this requirement, the OPG issued a request for proposals (RFP) encouraging certified professional guardians to identify preferred service areas and propose methods to provide public guardianship services. Limited response to the RFP slightly delayed implementation as the OPG pursued another avenue to identify pilot sites and to contract with certified professional guardians for the provision of public guardianship services.

The OPG used a two-part process to identify pilot locations: (1) identify indicators of the need for public guardianship services and prioritize areas based on the indicators and (2) contact professional guardians working in the prioritized areas and conduct interviews jointly with stakeholders. The indicators used were (1) percentage of the population age 18 and over living in poverty, (2) percentage of the population age 65 and over, (3) disability prevalence of the population, and (4) percentage of adults within the population receiving Department of Social and Health Services (DSHS) long-term care services. The pilot locations selected were Clallam, Grays Harbor, Okanogan, Pierce, and Spokane counties. King County was added later in response to a documented need for public guardianship services.

### Office of Public Guardianship Mission Statement

To act as a conduit for the provision of qualified surrogate decision makers for low-income individuals.

In June 2008, professional guardians under contract with the OPG began providing public guardianship services to incapacitated persons age 18 or older whose income does not exceed 200 percent of the federal poverty level as determined annually by the United States Department of Health and Human Services (US DHHS), or

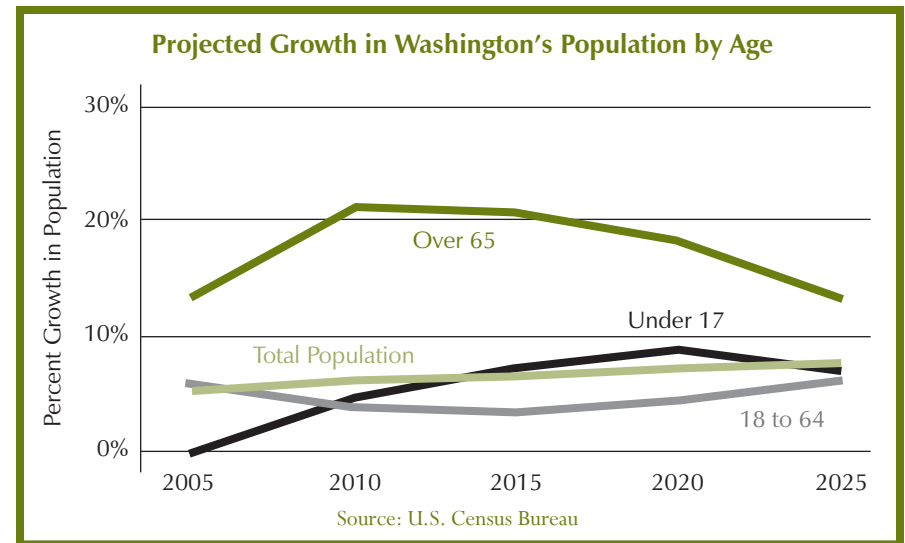
who receive long-term care services through Washington State DSHS. In addition, because the OPG is considered the guardian of last resort, it asks that there be no one else willing and able to provide guardianship services and assigns priority status to individuals satisfying the following criteria: (1) indigent/homeless; (2) at significant risk of harm from abuse, exploitation, abandonment, neglect, or self-neglect; and (3) 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.

### Lessons Learned

The team in Washington State consists of seven certified professional guardians who contract with the Office of Public Guardianship to provide public guardianship services; a community of concerned advocates in the elder network and the disabilities community; a handful of elder-law attorneys and judicial officers; and a small staff. Each individual contributes his or her expertise in data collection, assessment, policy and legislation, advice, or practice to ensure development of a successful program.

Each member of an effective team brings unique and valuable skills and perspectives to the collaboration. Working together the team should produce a body of knowledge addressing the challenges and barriers faced in providing services to this growing population. While the primary focus of the body of knowledge is guiding guardian action, a secondary use of the knowledge is to inform the decisions of policy makers for the elderly and for persons with developmental disabilities, physical disabilities, and mental illness. The body of knowledge is expected to be transferable from program to program and state to state, but should allow flexibility for modification to accommodate special circumstances.

The team determined that a thorough capacity assessment is a key element of an effective public guardianship program. In the past, theories of competency and capacity were based on the principle of all or nothing. An individual was believed to be either 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 and in the knowledge of brain function and functional ability have 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 to have the potential to 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 acknowledgment that capacity is not global begs for a comprehensive assessment process to inform judicial determination of capacity. Currently, guardians ad litem, or GALs (court investigators), are charged with investigating the need for a guardianship after a petition is filed. The GAL investigation is the primary source of information used to inform judicial determination of capacity. As part of their investigation, GALs must obtain a medical report and may request reports from other professionals. The medical reports rarely provide the level of detail contained in comprehensive assessments, and limited resources hinder GALs from regularly requesting reports from other professionals. Requiring comprehensive assessments by qualified professionals will address the inadequacies of the current process.

Medical, mental health, and legal professionals have responded to the call for more comprehensive assessments with the development of assessment tools and instruments that aid the assessment process. Currently, these tools are used by professionals in various fields of study and often come with a hefty price tag. The challenge is to incorporate comprehensive assessments into the investigative phase of guardianship petitioning and to provide more data to judicial officers and guardians. If the court determines that a guardian is needed, the comprehensive assessment can be used to craft a limited-guardianship order that affords the individual with diminished capacity the greatest possible autonomy and control while providing needed protections. The same assessment can be used by the guardian to develop a comprehensive plan of care, including specific treatments, services, or habilitation needed to address the specific capacity issues described in the assessment. Assessments, though expensive, have the potential to provide cost savings because they facilitate concentration of resources on the specific, diminished decisional domain (care of self, financial, health care, safety, civil, or legal), rather than the shotgun method of attacking all decisional domains.

Recognizing the value of comprehensive assessments, the OPG requires completion of a comprehensive assessment by an independent assessor for each person served. The assessor serves as a consultant to the public guardian, providing advice and guidance regarding the provision of public guardianship services.

### Plans for the Future

The OPG executed a strategic-planning process that produced a modified vision statement encouraging provision of broad, customer-centered decision-making assistance to individuals with diminished capacity.

The new mission is: *To act as a conduit for the provision of qualified surrogate decision makers for low-income individuals.* The OPG envisions that within 10 years, qualified surrogate decision makers will be available statewide

#### Office of Public Guardianship Vision Statement

Within 10 years, qualified surrogate decision makers will be available statewide to meet the needs of low-income individuals with limited capacity who require assistance making decisions related to health, safety, and financial affairs.

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To fulfill its mission and vision, the OPG plans to recommend a comprehensive statutory framework to provide decision-making assistance to persons with diminished decision-making capability who have no relatives or friends who are qualified or willing to be involved in the decision-making process. The act should cover major decisions about property and affairs, health-care treatment, and place of residence.

The shift from a global concept of capacity to a specific functional decisional concept made the mission modification possible and removed the barrier to service resulting from the requirement to label individuals “incompetent” or “incapacitated”

#### Potential Services Provided by Office of Public Guardianship

**Money Management:** Assisting low-income individuals with budget creation, bill sorting and paying, checkbook balancing, and tax and benefit preparation.

**Representative Payee:** Individuals are appointed or authorized to receive and manage public benefits on behalf of another, e.g. Social Security, Supplemental Security Income (SSI), veteran’s benefits, or civil-service and railroad pensions. Funds are deposited in a designated account and managed by the payee, who pays bills and tracks bank statements.

**Care Management:** Trained professionals develop personalized care plans and evaluate, plan, locate, coordinate, and monitor services.

**Health-Care Surrogates:** Individuals are appointed or hired to assist with or make health-care decisions.

**Power of Attorney or Attorney-in-Fact:** A legal tool enables the principal or grantor (person authorizing another to act) to give legal authority, as broadly or narrowly as desired, to an agent or attorney-in-fact with a document (a power of attorney).

before guardianship services can be provided. The shift facilitated the development and provision of a range of supports and services focused on each decisional domain, without a finding of incapacity.

### Conclusion

According to the U.S. Census Bureau, the number of Washingtonians age 65 and older will double over the next 20 years. This population and the population of persons with disabilities represent a potential tidal wave of persons needing assistance making decisions. The actions taken by the OPG position the courts to respond to the tidal wave.

The current financial downturn presents great challenges for the provision of decision-making assistance to low-income individuals. Faced with more than a 19 percent cut to the AOC budget, the OPG anticipates a significant budget reduction. In the future, other service providers, like the OPG, may be challenged to find effective methods to stretch limited resources to deliver the same quality service. Potential cost-saving initiatives to consider are better use of technology and effective recruitment and management of volunteers. Balancing the risks of providing no services and the risks of providing services in other ways will be critical.

### RESOURCES

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