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SENATE BILL 6005

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State of Washington                      55th Legislature                      1997 Regular Session

By Senators Roach, Hargrove, Schow, Franklin, Long and Winsley

Read first time 02/25/97. Referred to Committee on Law & Justice.

1            AN ACT Relating to guardianship; and amending RCW 11.88.045,  
2 11.88.020, 11.88.090, and 11.88.095.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4            **Sec. 1.** RCW 11.88.045 and 1996 c 249 s 9 are each amended to read  
5 as follows:

6            (1)(a) Alleged incapacitated individuals shall have the right to be  
7 represented by willing counsel of their choosing at any stage in  
8 guardianship proceedings. The court shall provide counsel to represent  
9 any alleged incapacitated person at public expense when either: (i)  
10 The individual is unable to afford counsel, or (ii) the expense of  
11 counsel would result in substantial hardship to the individual, or  
12 (iii) the individual does not have practical access to funds with which  
13 to pay counsel. If the individual can afford counsel but lacks  
14 practical access to funds, the court shall provide counsel and may  
15 impose a reimbursement requirement as part of a final order. When, in  
16 the opinion of the court, the rights and interests of an alleged or  
17 adjudicated incapacitated person cannot otherwise be adequately  
18 protected and represented, the court on its own motion shall appoint an  
19 attorney at any time to represent such person. Counsel shall be

1 provided as soon as practicable after a petition is filed and long  
2 enough before any final hearing to allow adequate time for consultation  
3 and preparation. Absent a convincing showing in the record to the  
4 contrary, a period of less than three weeks shall be presumed by a  
5 reviewing court to be inadequate time for consultation and preparation.

6 (b) Counsel for an alleged incapacitated individual shall act as an  
7 advocate for the client and shall not substitute counsel's own judgment  
8 for that of the client on the subject of what may be in the client's  
9 best interests. Counsel's role shall be distinct from that of the  
10 guardian ad litem, who is expected to promote the best interest of the  
11 alleged incapacitated individual, rather than the alleged incapacitated  
12 individual's expressed preferences.

13 (c) If an alleged incapacitated person is represented by counsel  
14 and does not communicate with counsel, counsel may ask the court for  
15 leave to withdraw for that reason. If satisfied, after affording the  
16 alleged incapacitated person an opportunity for a hearing, that the  
17 request is justified, the court may grant the request and allow the  
18 case to proceed with the alleged incapacitated person unrepresented.

19 (2) During the pendency of any guardianship, any attorney  
20 purporting to represent a person alleged or adjudicated to be  
21 incapacitated shall petition to be appointed to represent the  
22 incapacitated or alleged incapacitated person. Fees for representation  
23 described in this section shall be subject to approval by the court  
24 pursuant to the provisions of RCW 11.92.180.

25 (3) The alleged incapacitated person is further entitled to testify  
26 and present evidence (~~and~~) at a bench trial, or, upon request,  
27 entitled to a jury trial on the issues of his or her alleged  
28 incapacity. No other person involved in the proceedings is entitled to  
29 a jury trial. The standard of proof to be applied in a contested case,  
30 whether before a jury or the court, shall be that of clear, cogent, and  
31 convincing evidence.

32 (4) In all proceedings for appointment of a guardian or limited  
33 guardian, the court must be presented with a written report from a  
34 physician licensed to practice under chapter 18.71 or 18.57 RCW or  
35 licensed or certified psychologist selected by the guardian ad litem.  
36 If the alleged incapacitated person opposes the health care  
37 professional selected by the guardian ad litem to prepare the medical  
38 report, then the guardian ad litem shall use the health care  
39 professional selected by the alleged incapacitated person. The

1 guardian ad litem may also obtain a supplemental examination. The  
2 physician or psychologist shall have personally examined and  
3 interviewed the alleged incapacitated person within thirty days of  
4 preparation of the report to the court and shall have expertise in the  
5 type of disorder or incapacity the alleged incapacitated person is  
6 believed to have. The report shall contain the following information  
7 and shall be set forth in substantially the following format:

8 (a) The name and address of the examining physician or  
9 psychologist;

10 (b) The education and experience of the physician or psychologist  
11 pertinent to the case;

12 (c) The dates of examinations of the alleged incapacitated person;

13 (d) A summary of the relevant medical, functional, neurological,  
14 psychological, or psychiatric history of the alleged incapacitated  
15 person as known to the examining physician or psychologist;

16 (e) The findings of the examining physician or psychologist as to  
17 the condition of the alleged incapacitated person;

18 (f) Current medications;

19 (g) The effect of current medications on the alleged incapacitated  
20 person's ability to understand or participate in guardianship  
21 proceedings;

22 (h) Opinions on the specific assistance the alleged incapacitated  
23 person needs;

24 (i) Identification of persons with whom the physician or  
25 psychologist has met or spoken regarding the alleged incapacitated  
26 person.

27 The court shall not enter an order appointing a guardian or limited  
28 guardian until a medical or psychological report meeting the above  
29 requirements is filed.

30 The requirement of filing a medical report is waived if the basis  
31 of the guardianship is minority.

32 (5) During the pendency of an action to establish a guardianship,  
33 a petitioner or any person may move for temporary relief under chapter  
34 7.40 RCW, to protect the alleged incapacitated person from abuse,  
35 neglect, abandonment, or exploitation, as those terms are defined in  
36 RCW 74.34.020, or to address any other emergency needs of the alleged  
37 incapacitated person. Any alternative arrangement executed before  
38 filing the petition for guardianship shall remain effective unless the  
39 court grants the relief requested under chapter 7.40 RCW, or unless,

1 following notice and a hearing at which all parties directly affected  
2 by the arrangement are present, the court finds that the alternative  
3 arrangement should not remain effective.

4 **Sec. 2.** RCW 11.88.020 and 1990 c 122 s 3 are each amended to read  
5 as follows:

6 Any suitable person over the age of eighteen years, or any parent  
7 under the age of eighteen years may, if not otherwise disqualified, be  
8 appointed guardian or limited guardian of the person and/or the estate  
9 of an incapacitated person; any trust company regularly organized under  
10 the laws of this state and national banks when authorized so to do may  
11 act as guardian or limited guardian of the estate of an incapacitated  
12 person; and any nonprofit corporation may act as guardian or limited  
13 guardian of the person and/or estate of an incapacitated person if the  
14 articles of incorporation or bylaws of such corporation permit such  
15 action and such corporation is in compliance with all applicable  
16 provisions of Title 24 RCW. No person is qualified to serve as a  
17 guardian who is

18 (1) under eighteen years of age except as otherwise provided  
19 herein;

20 (2) of unsound mind;

21 (3) convicted of a felony or of a misdemeanor involving (~~moral~~  
22 ~~turpitude~~) dishonesty, theft, fraud, or the neglect, abuse, or  
23 exploitation of another person;

24 (4) a nonresident of this state who has not appointed a resident  
25 agent to accept service of process in all actions or proceedings with  
26 respect to the estate and caused such appointment to be filed with the  
27 court;

28 (5) a corporation not authorized to act as a fiduciary, guardian,  
29 or limited guardian in the state;

30 (6) a person whom the court finds unsuitable.

31 **Sec. 3.** RCW 11.88.090 and 1996 c 249 s 10 are each amended to read  
32 as follows:

33 (1) Nothing contained in RCW 11.88.080 through 11.88.120, 11.92.010  
34 through 11.92.040, 11.92.060 through 11.92.120, 11.92.170, and  
35 11.92.180 shall affect or impair the power of any court to appoint a  
36 guardian ad litem to defend the interests of any incapacitated person

1 interested in any suit or matter pending therein, or to commence and  
2 prosecute any suit in his or her behalf.

3 (2) Upon receipt of a petition for appointment of guardian or  
4 limited guardian, except as provided herein, the court shall appoint a  
5 guardian ad litem to represent the best interests of the alleged  
6 incapacitated person, who shall be a person found or known by the court  
7 to:

8 (a) Be free of influence from anyone interested in the result of  
9 the proceeding; and

10 (b) Have the requisite knowledge, training, or expertise to perform  
11 the duties required by this section.

12 The guardian ad litem shall within five days of receipt of notice  
13 of appointment file with the court and serve, either personally or by  
14 certified mail with return receipt, each party with a statement  
15 including: His or her training relating to the duties as a guardian ad  
16 litem; his or her criminal history as defined in RCW 9.94A.030 for the  
17 period covering ten years prior to the appointment; his or her hourly  
18 rate, if compensated; whether the guardian ad litem has had any contact  
19 with a party to the proceeding prior to his or her appointment; and  
20 whether he or she has an apparent conflict of interest. Within three  
21 days of the later of the actual service or filing of the guardian ad  
22 litem's statement, any party may set a hearing and file and serve a  
23 motion for an order to show cause why the guardian ad litem should not  
24 be removed for one of the following three reasons: (i) Lack of  
25 expertise necessary for the proceeding; (ii) an hourly rate higher than  
26 what is reasonable for the particular proceeding; or (iii) a conflict  
27 of interest. Notice of the hearing shall be provided to the guardian  
28 ad litem and all parties. If, after a hearing, the court enters an  
29 order replacing the guardian ad litem, findings shall be included,  
30 expressly stating the reasons for the removal. If the guardian ad  
31 litem is not removed, the court has the authority to assess to the  
32 moving party, attorneys' fees and costs related to the motion. The  
33 court shall assess attorneys' fees and costs for frivolous motions.

34 No guardian ad litem need be appointed when a parent is petitioning  
35 for a guardian or a limited guardian to be appointed for his or her  
36 minor child and the minority of the child, as defined by RCW 11.92.010,  
37 is the sole basis of the petition. The order appointing the guardian  
38 ad litem shall recite the duties set forth in subsection (4) of this  
39 section. The appointment of a guardian ad litem shall have no effect

1 on the legal competency of the alleged incapacitated person and shall  
2 not overcome the presumption of competency or full legal and civil  
3 rights of the alleged incapacitated person.

4 (3)(a) The superior court of each county shall develop and maintain  
5 a registry of persons who are willing and qualified to serve as  
6 guardians ad litem in guardianship matters. The court shall choose as  
7 guardian ad litem a person whose name appears on the registry in a  
8 system of consistent rotation, except in extraordinary circumstances  
9 such as the need for particular expertise. The court shall develop  
10 procedures for periodic review of the persons on the registry and for  
11 probation, suspension, or removal of persons on the registry for  
12 failure to perform properly their duties as guardian ad litem. In the  
13 event the court does not select the person next on the list, it shall  
14 include in the order of appointment a written reason for its decision.

15 (b) To be eligible for the registry a person shall:

16 (i) Present a written statement outlining his or her background and  
17 qualifications. The background statement shall include, but is not  
18 limited to, the following information:

19 (A) Level of formal education;

20 (B) Training related to the guardian ad litem's duties;

21 (C) Number of years' experience as a guardian ad litem;

22 (D) Number of appointments as a guardian ad litem and the county or  
23 counties of appointment;

24 (E) Criminal history, as defined in RCW 9.94A.030; and

25 (F) Evidence of the person's knowledge, training, and experience in  
26 each of the following: Needs of impaired elderly people, physical  
27 disabilities, mental illness, developmental disabilities, and other  
28 areas relevant to the needs of incapacitated persons, legal procedure,  
29 and the requirements of chapters 11.88 and 11.92 RCW.

30 The written statement of qualifications shall include a statement  
31 of the number of times the guardian ad litem has been removed for  
32 failure to perform his or her duties as guardian ad litem; and

33 (ii) Complete the model training program as described in (d) of  
34 this subsection.

35 (c) The background and qualification information shall be updated  
36 annually.

37 (d) The department of social and health services shall convene an  
38 advisory group to develop a model guardian ad litem training program  
39 and shall update the program biennially. The advisory group shall

1 consist of representatives from consumer, advocacy, and professional  
2 groups knowledgeable in developmental disabilities, neurological  
3 impairment, physical disabilities, mental illness, aging, legal, court  
4 administration, the Washington state bar association, and other  
5 interested parties.

6 (e) The superior court shall require utilization of the model  
7 program developed by the advisory group as described in (d) of this  
8 subsection, to assure that candidates applying for registration as a  
9 qualified guardian ad litem shall have satisfactorily completed  
10 training to attain these essential minimum qualifications to act as  
11 guardian ad litem.

12 (4) The guardian ad litem appointed pursuant to this section shall  
13 have the following duties:

14 (a) To meet and consult with the alleged incapacitated person as  
15 soon as practicable following appointment and explain, in language  
16 which such person can reasonably be expected to understand, the  
17 substance of the petition, the nature of the resultant proceedings, the  
18 person's right to contest the petition, the identification of the  
19 proposed guardian or limited guardian, the right to a jury trial on the  
20 issue of his or her alleged incapacity, the right to independent legal  
21 counsel as provided by RCW 11.88.045, and the right to be present in  
22 court at the hearing on the petition;

23 (b) To obtain a written report according to RCW 11.88.045; and such  
24 other written or oral reports from other qualified professionals as are  
25 necessary to permit the guardian ad litem to complete the report  
26 required by this section;

27 (c) To meet with the person whose appointment is sought as guardian  
28 or limited guardian and ascertain:

29 (i) The proposed guardian's knowledge of the duties, requirements,  
30 and limitations of a guardian; and

31 (ii) The steps the proposed guardian intends to take or has taken  
32 to identify and meet the needs of the alleged incapacitated person;

33 (d) To consult as necessary to complete the investigation and  
34 report required by this section with those known relatives, friends, or  
35 other persons the guardian ad litem determines have had a significant,  
36 continuing interest in the welfare of the alleged incapacitated person;

37 (e) To investigate alternate arrangements made, or which might be  
38 created, by or on behalf of the alleged incapacitated person, such as  
39 revocable or irrevocable trusts, or durable powers of attorney; whether

1 good cause exists for any such arrangements to be discontinued; and why  
2 such arrangements should not be continued or created in lieu of a  
3 guardianship;

4 (f) To provide the court with a written report which shall include  
5 the following:

6 (i) A description of the nature, cause, and degree of incapacity,  
7 and the basis upon which this judgment was made;

8 (ii) A description of the needs of the incapacitated person for  
9 care and treatment, the probable residential requirements of the  
10 alleged incapacitated person and the basis upon which these findings  
11 were made;

12 (iii) An evaluation of the appropriateness of the guardian or  
13 limited guardian whose appointment is sought and a description of the  
14 steps the proposed guardian has taken or intends to take to identify  
15 and meet current and emerging needs of the incapacitated person;

16 (iv) A description of any alternative arrangements previously made  
17 by the alleged incapacitated person or which could be made, and whether  
18 and to what extent such alternatives should be used in lieu of a  
19 guardianship, and if the guardian ad litem is recommending  
20 discontinuation of any such arrangements, specific findings as to why  
21 such arrangements are contrary to the best interest of the alleged  
22 incapacitated person;

23 (v) A description of the abilities of the alleged incapacitated  
24 person and a recommendation as to whether a guardian or limited  
25 guardian should be appointed. If appointment of a limited guardian is  
26 recommended, the guardian ad litem shall recommend the specific areas  
27 of authority the limited guardian should have and the limitations and  
28 disabilities to be placed on the incapacitated person;

29 (vi) An evaluation of the person's mental ability to rationally  
30 exercise the right to vote and the basis upon which the evaluation is  
31 made;

32 (vii) Any expression of approval or disapproval made by the alleged  
33 incapacitated person concerning the proposed guardian or limited  
34 guardian or guardianship or limited guardianship;

35 (viii) Identification of persons with significant interest in the  
36 welfare of the alleged incapacitated person who should be advised of  
37 their right to request special notice of proceedings pursuant to RCW  
38 11.92.150; and



1 (ix) Unless independent counsel has appeared for the alleged  
2 incapacitated person, an explanation of how the alleged incapacitated  
3 person responded to the advice of the right to jury trial, to  
4 independent counsel and to be present at the hearing on the petition.

5 Within forty-five days after notice of commencement of the  
6 guardianship proceeding has been served upon the guardian ad litem, and  
7 at least fifteen days before the hearing on the petition, unless an  
8 extension or reduction of time has been granted by the court for good  
9 cause, the guardian ad litem shall file its report and send a copy to  
10 the alleged incapacitated person and his or her counsel, spouse, all  
11 children not residing with a notified person, those persons described  
12 in (f)(viii) of this subsection, and persons who have filed a request  
13 for special notice pursuant to RCW 11.92.150. If the guardian ad litem  
14 needs additional time to finalize his or her report, then the guardian  
15 ad litem shall petition the court for a postponement of the hearing or,  
16 with the consent of all other parties, an extension or reduction of  
17 time for filing the report. If the hearing does not occur within sixty  
18 days of filing the petition, then upon the two-month anniversary of  
19 filing the petition and on or before the same day of each following  
20 month until the hearing, the guardian ad litem shall file interim  
21 reports summarizing his or her activities on the proceeding during that  
22 time period as well as fees and costs incurred;

23 (g) To advise the court of the need for appointment of counsel for  
24 the alleged incapacitated person within five court days after the  
25 meeting described in (a) of this subsection unless (i) counsel has  
26 appeared, (ii) the alleged incapacitated person affirmatively  
27 communicated a wish not to be represented by counsel after being  
28 advised of the right to representation and of the conditions under  
29 which court-provided counsel may be available, or (iii) the alleged  
30 incapacitated person was unable to communicate at all on the subject,  
31 and the guardian ad litem is satisfied that the alleged incapacitated  
32 person does not affirmatively desire to be represented by counsel.

33 (5) If the petition is brought by an interested person or entity  
34 requesting the appointment of some other qualified person or entity and  
35 a prospective guardian or limited guardian cannot be found, the court  
36 shall order the guardian ad litem to investigate the availability of a  
37 possible guardian or limited guardian and to include the findings in a  
38 report to the court pursuant to subsection (4)(f) of this section.

1 (6) The parties to the proceeding may file responses to the  
2 guardian ad litem report with the court and deliver such responses to  
3 the other parties and the guardian ad litem at any time up to the  
4 second day prior to the hearing. If a guardian ad litem fails to file  
5 his or her report in a timely manner, the hearing shall be continued to  
6 give the court and the parties at least fifteen days before the hearing  
7 to review the report. At any time during the proceeding upon motion of  
8 any party or on the court's own motion, the court may remove the  
9 guardian ad litem for failure to perform his or her duties as specified  
10 in this chapter, provided that the guardian ad litem shall have five  
11 days' notice of any motion to remove before the court enters such  
12 order. In addition, the court in its discretion may reduce a guardian  
13 ad litem's fee for failure to carry out his or her duties.

14 (7) The court appointed guardian ad litem shall have the authority,  
15 in the event that the alleged incapacitated person is in need of  
16 emergency life-saving medical services, and is unable to consent to  
17 such medical services due to incapacity pending the hearing on the  
18 petition to give consent for such emergency life-saving medical  
19 services on behalf of the alleged incapacitated person.

20 (8) The court-appointed guardian ad litem shall have the authority  
21 to move for temporary relief under chapter 7.40 RCW to protect the  
22 alleged incapacitated person from abuse, neglect, abandonment, or  
23 exploitation, as those terms are defined in RCW 74.34.020, or to  
24 address any other emergency needs of the alleged incapacitated person.  
25 Any alternative arrangement executed before filing the petition for  
26 guardianship shall remain effective unless the court grants the relief  
27 requested under chapter 7.40 RCW, or unless, following notice and a  
28 hearing at which all parties directly affected by the arrangement are  
29 present, the court finds that the alternative arrangement should not  
30 remain effective.

31 (9) The guardian ad litem shall receive a fee determined by the  
32 court. The fee shall be charged to the alleged incapacitated person  
33 unless the court finds that such payment would result in substantial  
34 hardship upon such person, in which case the county shall be  
35 responsible for such costs: PROVIDED, That if no guardian or limited  
36 guardian is appointed the court may charge such fee to the petitioner  
37 or the alleged incapacitated person, or divide the fee, as it deems  
38 just; and if the petition is found to be frivolous or not brought in  
39 good faith, the guardian ad litem fee shall be charged to the

1 petitioner. The court shall not be required to provide for the payment  
2 of a fee to any salaried employee of a public agency.

3 (10) Upon the presentation of the guardian ad litem report and the  
4 entry of an order either dismissing the petition for appointment of  
5 guardian or limited guardian or appointing a guardian or limited  
6 guardian, the guardian ad litem shall be dismissed and shall have no  
7 further duties or obligations unless otherwise ordered by the court.  
8 If the court orders the guardian ad litem to perform further duties or  
9 obligations, ~~((they shall not))~~ the duties of the guardian ad litem may  
10 be performed at county expense with prior court approval.

11 (11) The guardian ad litem shall appear in person at all hearings  
12 on the petition unless all parties provide a written waiver of the  
13 requirement to appear.

14 (12) At any hearing the court may consider whether any person who  
15 makes decisions regarding the alleged incapacitated person or estate  
16 has breached a statutory or fiduciary duty.

17 **Sec. 4.** RCW 11.88.095 and 1995 c 297 s 5 are each amended to read  
18 as follows:

19 (1) In determining the disposition of a petition for guardianship,  
20 the court's order shall be based upon findings as to the capacities,  
21 condition, and needs of the alleged incapacitated person, and shall not  
22 be based solely upon agreements made by the parties.

23 (2) Every order appointing a full or limited guardian of the person  
24 or estate shall include:

25 (a) Findings as to the capacities, condition, and needs of the  
26 alleged incapacitated person;

27 (b) The amount of the bond, if any, or a bond review period;

28 (c) When the next report of the guardian is due;

29 (d) Whether the guardian ad litem shall continue acting as guardian  
30 ad litem;

31 (e) Whether a review hearing shall be required upon the filing of  
32 the inventory;

33 (f) The authority of the guardian, if any, for investment and  
34 expenditure of the ward's estate; and

35 (g) Names and addresses of those persons described in RCW  
36 11.88.090(~~((+5)+(d))~~) (4)(d), if any, whom the court believes should  
37 receive copies of further pleadings filed by the guardian with respect  
38 to the guardianship.

1 (3) If the court determines that a limited guardian should be  
2 appointed, the order shall specifically set forth the limits by either  
3 stating exceptions to the otherwise full authority of the guardian or  
4 by stating the specific authority of the guardian.

5 (4) In determining the disposition of a petition for appointment of  
6 a guardian or limited guardian of the estate only, the court shall  
7 consider whether the alleged incapacitated person is capable of giving  
8 informed medical consent or of making other personal decisions and, if  
9 not, whether a guardian or limited guardian of the person of the  
10 alleged incapacitated person should be appointed for that purpose.

11 (5) If the petition requests reasonable attorneys' fees be paid  
12 from the estate of the ward, or if any other party to the proceedings  
13 petitions for award of attorneys' fees to be paid from the ward's  
14 estate, the court may, at the time of the disposition of a petition for  
15 guardianship or at another appropriate time, make a finding whether the  
16 attorneys' fees requested are just and reasonable and properly payable  
17 from the ward's estate and whether any such fees should be charged to  
18 any other party. In determining whether the attorneys' fees requested  
19 are just and reasonable and properly payable from the ward's estate,  
20 the court, in its discretion, may consider whether the person or estate  
21 of the ward was benefited by the proceedings and any other factors the  
22 court considers relevant.

23 (6) Unless otherwise ordered, any powers of attorney or durable  
24 powers of attorney shall be revoked upon appointment of a guardian or  
25 limited guardian of the estate.

26 If there is an existing medical power of attorney, the court must  
27 make a specific finding of fact regarding the continued validity of  
28 that medical power of attorney before appointing a guardian or limited  
29 guardian for the person.

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