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By Michael Kleps, an attorney in Bellingham, Washington focusing on legal issues facing the elderly, disabled and their families

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In determining whether a guardianship is necessary a person is deemed incapacitated when the individual faces a significant risk of personal or financial harm due to their inability to provide for themselves.

In a Guardianship proceeding, a potential conflict exists for the court between its duty to uphold the constitutional rights of individual privacy and independence on the one hand, and the need to assure a full investigation regarding the protection of the individual.

A guardianship proceeding begins with a petition being filed which explains the need for a guardian to be designated to care for an incapacitated person. The court will determine whether or not a reasonable basis exists for the requested guardianship. The court may immediately appoint a Guardian ad Litem (GAL) to conduct an investigation. However, since the process is so intrusive the court may set a hearing to decide if there is a reasonable basis to appoint a GAL.

The court is focused on the alleged incapacitated person (AIP)'s rights rather than the convenience of any other parties. If less restrictive measures can be taken through the use of other estate planning documents then a GAL will not be appointed. Alternatives to guardianship may include: (1) a health or property power of attorney; (2) a trust; (3) Joint Bank Accounts; or (3) Representative Payee arrangements.

A GAL will conduct an investigation which includes: (1) obtaining evidence from qualified professionals to determine the medical condition of the AIP; (2) meeting with relatives; and (3) investigating alternatives.

An AIP has a right to an attorney and trial. A guardianship does not allow anyone to force medical treatment on the AIP. If the AIP refuses treatment, then the issue must be brought before the court.

A guardianship proceeding, where the AIP or other interested parties contest the petition, can be extremely time consuming and expensive. The burden of proof in a guardianship trial is on the petitioner to prove the need for the guardianship by clear, cogent, and convincing evidence.