

The Guardian is a quarterly newsletter published by the Greater Wisconsin Agency on Aging Resources, Inc. (GWAAR) Wisconsin Guardianship Support Center (GSC).

The GSC provides information and assistance on issues related to guardianship, protective placement, advance directives, and more.

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CMS Finalizes Plan to Pay for Care Planning and Cognitive and Functional Assessments for Individuals with Cognitive Impairments

The aging and disability communities are celebrating the Center for Medicare and Medicaid Services (CMS) finalized 2017 Physician Fee Schedule which includes important care and services for in-



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dividuals living with cognitive impairments.

Under this rule, individuals with a cognitive impairment have access to cognitive functional assessments and care planning. Care planning can be critical for coordinating care and managing chronic conditions. It is one important part of improving outcomes and quality of life for individuals diagnosed with cognitive impairments and their caregivers. Care planning also aids in controlling costs and creating plans to respond to future needs.

The new services will go into effect in 2017.

For more information, please see the CMS press release: <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-11-02.html> □

Nursing Home Arbitration Clauses

On September 28, the Centers of Medicare & Medicaid Services (CMS) issued a final rule revising the conditions of participation for long-term care facilities in Medicare and Medicaid programs. These are the first major revisions since 1991 and stand to improve the care and safety for upwards of 1.5 million long-term care residents nationwide.

One part of this rule that may be of interest to guardians and agents is the prohibition against any nursing home that receives federal funding from requiring resi-

dents to agree to binding arbitration as an alternative to the courts for resolving disputes. The changes are effective November 28, 2016.

Before this rule, many nursing home admission contracts contained provisions that the resident or legal decision-makers would have to sign upon admission agreeing to forego the right to bring a lawsuit against the home in court. For many, the time of admission to a nursing home is stressful and chaotic. It might be a time when the person is experiencing a sudden decline, or maybe the caregiver has passed away and the search for a nursing home with an opening has taken a long time. Often people sign the nursing home contract without realizing that it contained an arbitration clause.

Several organizations are challenging CMS' ban on arbitration agreements including the American Health Care Association. The AHCA filed a lawsuit in federal court stating the rule is unnecessary to protect residents and exceeds the authority of CMS. The United States Supreme Court decided that it will hear the case and a decision is expected in June 2017.

For more information, please see:

- <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2016-Press-releases-items/2016-09-28.html> or
- http://www.nytimes.com/2016/09/29/business/dealbook/arbitration-nursing-homes-elder-abuse-harassment-claims.html?_r=0 □



Updated and New Publications

This quarter the GSC published several new publications and edited a few others. Follow the links below to see the updates:

- [Medicare Part D: What Guardians and Agents Need to Know](#)
- [Temporary Guardianships](#) **New!**
- [Responsibilities of a Health Care POA Agent](#)
- [Roles and Responsibilities of a Guardian, APS Worker, and MCO Case Worker](#) **New!**
- [An Overview of Advanced Directives](#)

Starting on
January 3, 2017,
call ERP at **one**
statewide phone
number for in-
takes and refer-
als:
844.614.5468

Wisconsin Supreme Court Repeals “Deadman’s Statute”

For more than 100 years, the “Deadman’s Statute” (Wis. Stat. §§ 885.16 and 885.17) has prevented interested witnesses from testifying about their conversations or other communications with a person who is no longer competent to testify about it or has passed away.

The Wisconsin Judicial Council petitioned the Court to repeal the “Deadman’s Statute” along with several other changes to the rules of procedure. The Wisconsin Supreme Court approved the petition repealing the Deadman’s Statute. This change is effective July 1, 2017. □

Elder Rights Project

Courtesy of the Elder Rights Project

Legal Action of Wisconsin and Wisconsin Judiciary are pleased to announce that we will provide statewide civil legal aid to elder abuse victims

through the Elder Rights Project (ERP). The Elder Rights Project seeks to help elder abuse victims in Wisconsin become safe and independent, stabilize their lives, and meet their emotional and physical needs by resolving their critical civil legal problems. Fees and fines imposed on criminals (through the Victims of Crime Act or VOCA)

are making these civil legal aid lawyers for elder abuse victims possible.

“As part of a coalition of providers throughout the state, we found that Wisconsin’s elder abuse victims were facing critical civil legal problems, with virtually no legal services available to solve them,” said ERP Director Nicole Zimmer. “The gap was too dangerous to ignore. Civil legal problems affect elder abuse victims’ safety, physical/mental health, and their overall quality of life. But with the help of a lawyer, these elders can get to safety, access health care, and stabilize their lives.”

The ERP will help address the large gap in Wisconsin’s crime victim services system, as seniors increasingly find themselves targets of financial exploitation and physical/emotional abuse. The Wisconsin De-

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Title: *In the Matter of the Mental Commitment of J.M.*

Appeal No.: 2026AP619

Date: November 9, 2016

Case Summary: J. M. appealed an order extending his Wis Stat. Ch. 51 commitment. He asked for a new trial based on ineffective assistance of counsel because his attorney did not arrange for him to wear civilian clothing at trial. Secondly, he argued that a new trial was warranted “in the interests of justice.” The appellate court disagreed and upheld the extension of his commitment.

Case Details: J.M. was involuntarily committed in 2014 for one year. As the expiration date for his commitment approached, Winnebago County filed a petition to extend it. J.M. asked for and received a jury trial.

At trial, two physicians testified that J.M. suffered from mental illness and that he believed he was “Lord.” His primary doctor testified that he was prone to violent behavior. J.M. testified on his own behalf that he was not mentally ill. He also stated that he believed he was “Jesus the Lord” and that he had the ability to damn people. The jury found that J.M. was mentally ill, a danger to himself or others, and a proper subject for treatment. The circuit court extended his commitment and then denied his motion for new trial. J.M. based his request on an ineffective assistance of counsel claim and the interest of justice. He appealed the denial.

Ineffective assistance of counsel claims are evaluated with a two-part test based on a 1984 case, *Strickland v.*

Disclaimer

This newsletter contains general legal information. It does not contain and is not meant to provide legal advice. Each situation is different and this newsletter may not address the legal issues affecting your situation. If you have a specific legal question or want legal advice, you may want to speak with an attorney.

Washington. There is a presumption that counsel has performed reasonably. To succeed with his claim, J.M. needed to overcome this presumption and show that certain acts or omissions were outside the broad range of competent legal assistance. J.M. had to show not only that his attorney’s performance was so poor that it prejudiced his case, but also that the final outcome of his case would have been different if he had had different representation.

Prior to the trial, J.M.’s attorney contacted the facility where J.M. was being held to arrange for civilian clothes that J.M. could wear to his trial. For unknown reasons, this was not done and J.M. appeared at trial in his prison clothing. His attorney did arrange to have his shackles removed and also explained to the jury that J.M. was in prison clothing because he was serving a sentence for a prior crime. Additionally, the attorney questioned jurors as to whether the fact that J.M. was an inmate would affect their ability to fairly decide the case. Finally, in her opening statement, the attorney stated that J.M. was serving a prison sentence and added, “that’s really not our affair.”

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The Court noted that J.M. was unable to cite any cases in Wisconsin or elsewhere showing that an attorney in a mental health commitment proceeding must provide civilian clothes to his client. The Court went on to point out that even if there had been a showing that J.M.'s representation was deficient, it would not have changed the outcome because overwhelming evidence was presented testifying to his mental illness, response to treatment and potential danger to himself and others. As to J.M.'s request for a new trial "in the interests of justice," the court stated that this was not an exceptional case that would merit a new trial and that the matter had been fully and fairly tried. □

Title: *Nashawn Harp v. Department of Health Services*

Appeal No. 2015AP2013

Date: September 28, 2016

Case Summary: Nashawn Harp (Harp) appealed a ruling denying her challenge to a decision issued by a Division of Hearings and Appeals that ultimately removed her from a program for alleged fraud. The administrative law judge (ALJ) upheld Harp's disenrollment from a program providing financial assistance to persons with disabilities. This decision was then judicially reviewed and the circuit court affirmed the ALJ's ruling citing sufficient evidence of fraud. On appeal, the Court of Appeals for District I reviewed the agency's decision.

Case Details: Harp is an adult who needs assistance with all aspects of activities of daily living. She lives with her mother and legal guardian, Rebecca Harp (Rebecca). Harp qualified for Medical Assistance under the Wisconsin Department of Health Services' (DHS) program, "Include, Respect, I Self-direct" (IRIS). She received \$6,705.09 monthly for both supportive home care (SHC) and personal care worker (PCW) services. Her twin sister, Nishawn, was one of her caregivers.

Her mother and guardian, Rebecca, signed the timesheets for both types of care. SHC timesheets went directly to IRIS and PCW timesheets were submitted to Independence First, a private agency, and then forwarded to IRIS. Independence First terminated Nishawn's employment after discovering that she had billed time for more than 24 hours per day.

The IRIS policy manual at the time stated that DHS could disenroll an IRIS participant for possible fraud, misrepresentation or willful inaccurate reporting. During an investigation, Rebecca claimed that the first time she knew of a problem was when she received Notice of Action dated October 31, 2014. She claimed she had not been trained to prepare timesheets and that she signed only for services performed, not for hours claimed. DHS determined that from January through May 2014, Rebecca intentionally signed off on Nishawn's timesheets that reported more than 24 hours of care in a 24-hour period. The Notice of Action stated that Harp would be disenrolled from the program as of November 18, 2014.

At a review hearing, the ALJ affirmed the decision to

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disenroll Harp, finding that Rebecca intentionally signed off on timesheets over-reporting hours. This decision was then reviewed by the circuit court, which also affirmed the ALJ ruling.

Harp then appealed the circuit court decision. The appellate court stated that when presented with an appeal from a circuit court order affirming or reversing an administrative agency ruling, its role was to review the agency decision, not the circuit court decision. Further, the reviewing court is bound by an agency's findings of fact if they are based on substantial evidence.

The parties disagreed as to the level of deference that should be accorded the ALJ's conclusions of law. Harp argued that the Department of Health Services had no expertise to determine whether the facts alleged proved fraud. DHS argued that it should be given "great weight" because it developed the IRIS program and policies. The appellate court agreed with DHS.

Next, Harp argued that the overbilling was not in-

tentional. The ALJ found that at a 2013 meeting regarding billing discrepancies, IRIS staff advised Nishawn of her billing limits and further, that Rebecca signed an IRIS Checklist at the meeting. Rebecca continued to sign off on timesheets with overbilling. In July 2014 alone, Nishawn never billed for less than 19 hours despite the fact that other PCW providers were caring for Harp during this time. On review, the appellate court found that by signing the Checklist, Rebecca acknowledged that she understood the timesheets and how to complete them and that they were correct.

Finally, Harp argued that DHS violated her due process rights under the Constitution. Here, the appellate court found that Harp did not establish that the State had interfered with a fundamental liberty or property interest in IRIS benefits. Harp was given an opportunity to be heard and an IRIS policy stated that a participant may be disenrolled for fraud. The appellate court also noted that Harp was given the ability to appeal to the agency, the circuit court and the appellate court. □

Do you know someone who would like to receive the Guardian newsletter? Do you want more information about guardianship and related issues? Signing up is easy with the link on the Guardianship Support Center website: [Guardian Newsletter Sign Up](#). You can also subscribe by emailing your name, email address and organization to teresa.bull@gwaar.org.



1) Can a ward request a new guardian when they are unhappy with their current guardian?

Yes, it is possible to change guardians after the court orders the original guardian. The GSC receives many calls from individuals under guardianship and their family members with questions about how to change guardians. There are a variety of reasons for these calls, maybe the person does not feel that they get along with their guardian, the guardian is unresponsive, the person feels that their guardian is too restrictive, or a family member or friend wants to be more involved in decision-making.

If the problems cannot be resolved, there are several options for petitioning the court to change guardians. The guardian can petition the court to resign and have a successor guardian appointed. It is possible to petition the court to review the guardian's conduct and request removal if the guardian has acted in a way that meets one of the statutory causes of action, or if a previously unavailable volunteer is now available to replace a paid guardian. The criteria for removal due to misconduct is found in Wis. Stat. § 54.68.

Petitioning the court to remove a guardian who is not willing to resign is a contentious process. Working with an attorney is recommended. A ward has the right to an attorney. Wis. Stat. § 54.42(1). If they are unable to obtain an attorney and request legal counsel the court will appoint one.

Someone petitioning to be appointed successor guardian is required to submit the Statement of Acts Form GN-3140. The court has discretion for whether or not to appoint the proposed successor guardian. If the court finds the proposed successor guardian would not be in the ward's best interest, it does not have to appoint that person.

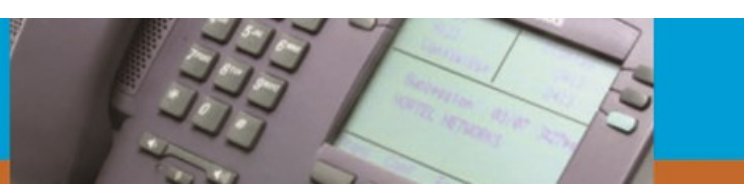
For more information about how to request a new guardian see [Asking the Court to Review the Conduct of a Guardian](#) or [How to Ask the Court to Change or End Your Guardianship](#).

2) Is a POA-Health Care that is “activated” immediately upon execution valid?

Yes, giving the agent authority immediately when the POA-HC is signed is valid. The statutory default for POA-HC is to withhold authority from the agent until the principal is determined to be incapacitated. The statutes state that “unless otherwise specified in the power of attorney for health care instrument” the document takes effect upon incapacity as determined by two physicians, or one physician and one psychologist. It is important to read the POA-HC to find out whether the principal included a different method to “activate” the agent's authority.

Wis. Stat. § 155.05(2).

(Helpline Highlights continued on page 8)



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3) My parents named me in their will to be the guardian of my adult sister who has a disability. Do I still need to go to court to be appointed her guardian?

Yes. This is called a *testamentary nomination*. Wis. Stat. § 54.15(6) provides that a parent may nominate a guardian by will for an adult child who is “found to be in need of a guardian by reason of a developmental disability or serious and persistent mental illness.” Testamentary nominations are one factor in the list of options the court must consider when deciding who to appoint as guardian.

Someone named in a testamentary nomination to become guardian of an adult still must go through the court to be appointed. The court has discretion for whether to appoint the nominee based on the ward’s best interest. □



Upcoming Events

2017 At A Glance:

- **April 16** National Health Care Decisions Day
- **April 27—29** Autism Society of Wisconsin Annual Conference—Wisconsin Dells
- **May 4 - 5** Circles of Life Conference - Stevens Point
- **June 15** World Elder Abuse Awareness Day
- **August 28 – 31** National Adult Protective Services Conference – Milwaukee, Wisconsin

If your organization or agency is hosting a statewide event related to commonly-discussed topics in *The Guardian* and you would like to spread the word about the event, contact the GSC at guardian@gwaar.org. We may include it in our next quarterly publication. □



(Elder Rights Project, continued from page 3)

partment of Health Services (DHS) reported that 6,347 reports of elder abuse were reported in 2014, a 95 percent increase from 2001. It is also estimated that for each case reported, five remain unreported—and our state’s elderly pay the price.

“Elder abuse does not discriminate. It happens to men. It happens to women. City dwellers and rural citizens are at risk, and more often than not, the abuse occurs in the home at the hands of a perpetrator the victim knows and trusts,” said Zimmer. “The Elder Rights Project now has attorneys stationed in both rural and urban communities to help with the legal fallout of abuse.”

The civil legal problems that stem from elder abuse can be severe. Civil legal aid attorneys at the ERP will protect elders’ rights by helping trusted, non-abusive representatives obtain conservatorships, guardianships, and powers of attorney. When appropriate, ERP attorneys can file Petitions to review the conduct of Powers of Attorney and seek revocation of abusive Powers of Attorney. Elder abuse survivors can find themselves facing eviction, needing help in obtaining injunctions against their abusers, and working to repair their credit and recoup money, property or other assets that were stolen by abusers through exploitation or identity theft. Attorney advocates can provide critical assistance with these issues.

“Depending on their age and health, elder abuse victims may be facing physical and mental limitations that make tackling complex legal issues virtually impossible, especially when they’re up against an abuser who has scared and intimidated them. We are proud to bring

them free legal services, provided by attorneys who have in-depth knowledge of victimization, trauma, and the impact diminished capacity can have on a case,” said Zimmer.

Starting on January 3, 2017, the ERP will have one statewide phone number for intakes and referrals: 844-614-5468. Before January 3, 2017, people may call the following attorneys at Legal Action of Wisconsin and Wisconsin Judicare for more information or to get civil legal aid for elder abuse victims age 60 and over (regardless of income):

- **Legal Action-Milwaukee** (414) 278-7722
Attorney Chris Donahoe, Attorney Matt Plummer, and Attorney Benita Anderson
- **Legal Action-Madison** (608) 256-3304
Attorney Lauren Hamvas and Attorney Sam Wegleitner
- **Legal Action-Green Bay** (920) 432-4645
Attorney Andrea Gage and Paralegal Jolene Umentum
- **Legal Action-Oshkosh** (920) 233-6521
Attorney Kristi Ebbott
- **Legal Action-La Crosse** (608) 785-2809
Attorney Nikki Swayne
- **Legal Action-Racine** (262) 635-8836
Attorney Ann Rufo
- **Wisconsin Judicare** (715) 842-1681
Attorney Will Baynard and Attorney Aimee McGinty

ERP staff is also actively engaged in educating the public on the devastating impact of elder abuse, and how we can work together as a community to combat the problem. Community groups and civic organizations that are interested in joining the effort should contact ERP Director Nicole Zimmer at 414-278-7722. □

