



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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Subscriptions to *The Guardian* are free. To subscribe, send an e-mail request to guardian@gwaar.org.

This quarter, the Guardianship Support Center received many questions about what to do when a ward passes away and how to plan for a future when current guardians or other caregivers will no longer be able to act. While it is never pleasant to think about a loved one passing away, understanding the role of each decision-maker and how to create a plan for the future will at least eliminate the stress of trying to figure out what to do during an already traumatic time. This newsletter is going to focus on planning for death or incapacity of a POA agent or guardian, and common questions about the role of a decision-maker after the principal or ward passes away. □



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2015 Wisconsin Act 300 – Digital Property Act

2015 Wisconsin Act 300, Wisconsin's Digital Property Act, went into effect April 1, 2016. The act included several updates to both the power of attorney for finance statute (Wis. Stat. § 244), and the guardianship statute (Wis. Stat. § 54).

The Act defines digital property as “an electronic record in which a person has a right or interest. ‘Digital Property’ does not include underlying property or an underlying liability unless the property or liability is itself an electronic record.” (Wis. Stat. § 711.03(10)).

Under the digital property act, a guardian who has authority to manage income and assets *may* also have authority over digital property of the ward *if* authority over digital property is included by court order and in accordance with Wis. Stat. § 711.08. A guardian of estate may only access a ward's digital property only with prior approval from the court. (Wis. Stat. § 54.20(2)(m)).

A financial power of attorney agent's authority over digital property is now included as a grant of general authority to give the agent power to take any of the actions listed in Wis. Stat. § 244.445, including accessing and managing the principal's digital property. A POA-F agent may only access the content of an electronic communication sent or received by the principal if the power of attorney expressly grants the agent authority to do so. (Wis. Stat. § 244.41)

Guardians as Paid Caregivers

Earlier this year there was discussion about changing

the conflict free case management policy to prohibit guardians from acting as paid caregivers under the IRIS program. However, on August 18th, the Division of Long Term Care released a technical memo explaining that guardians may still provide paid services to IRIS members when those services are in accordance with IRIS policies and state and federal requirements.

For more information: <https://www.dhs.wisconsin.gov/iris/guardian-caregiver.htm>

Guardianship and Voting Rights

In case you haven't heard, this year is an election year. In Wisconsin, anyone over the age of 18 is presumed to be able to register to vote and to be able to vote. For individuals under a guardianship of person, voting is one right that may have been removed through the guardianship process. To find out whether a person who has a guardian of person retained the right to vote look to the Determination and Order on Petition for Guardianship form.

For more information about guardianship and voting rights please see the GSC Volume 1, Issue 1 Newsletter: <http://gwaar.org/images/stories/GSC/Newsletters/TheGuardian-Vol-1-Issue-1-April2013.pdf>

Forms Updated

This quarter several of the Guardianship Support Center's publications were updated to reflect these changes in the law. The updated publications are available on our website:

- [Power of Attorney for Finance: Do-It-Yourself Consumer Packet](#)
- [Guardian of Estate: Duties and Powers](#) □



Funeral Planning Information

Advance Funeral Planning

The death of a loved one is a difficult time for family members. As would be expected, many people are overcome with sadness and grief following the death of a friend or relative. In order to make this process less onerous on grieving loved ones, some people elect to plan their funeral and/or burial in advance. This is a good way for a person to make his or her funeral and burial wishes known, and also alleviates the burden on family members.

If a person is receiving Medicaid or Supplemental Security Income (SSI), it is important that advance funeral planning be set up in a specific manner to ensure that it is not a countable asset which would cause the person to lose their benefits. If a person is currently on Medicaid or SSI, or it is anticipated that the person may become eligible for either program in the future, it is very important to communicate that to the funeral home.

There are several options to choose from for setting aside funeral or burial funds. The best way to start the process is for a person (or power of attorney or guardian) to make an appointment with the local funeral home of their choice. Nearly all funeral homes have a preplanning specialist on staff who is familiar with Medicaid and SSI rules.

Here are some options for Medicaid and SSI-compliant preplanning:

- **Irrevocable Life Insurance Funded Burial Contract**

- ◊ This is a purchase of a life insurance policy

through a funeral home, where the funeral home is listed as the beneficiary. The proceeds of the life insurance policy should cover the costs of a person's funeral and burial.

- ◊ There must be a written contract detailing the agreement.
- ◊ There must be an itemized list of goods and services and an amount of money attributed to each item.
- ◊ In order for it to be exempt for Medicaid and SSI purposes, the life insurance policy must be *irrevocably* assigned to the funeral home.
- ◊ There is no set monetary limit on how much money can be exempt in a ILIFBC; however, the funeral costs must be reasonable. Generally, \$8,000-\$10,000 is considered to be a reasonable amount.

- **Irrevocable Burial Trust**

- ◊ A trust account generally set up through a local bank where the person deposits money for the purposes of saving for one's funeral and burial costs.
- ◊ It must be irrevocable in order to be an exempt asset for Medicaid and SSI.
- ◊ If a person is on Medicaid or SSI, the exemption limit in a burial trust is \$4,500. Any additional amounts in the trust will be a countable asset.

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Funeral Planning Information

(*Advance Funeral Planning*, continued from page 3)

- ◇ It is *not* necessary to itemize services or goods that the money will be used for.
- **Burial spaces**
 - ◇ Includes caskets, burial plots, crypts, urns, niches, headstones, plaques, burial site markers, and arrangements for opening and closing the gravesite.
 - ◇ A burial space is an exempt asset (not countable), regardless of its value.
 - ◇ A person may have more than one burial space when reasonable. For example, a person could have both a casket and a mausoleum. However, a person could *not* have both a burial plot and a mausoleum.
 - ◇ A person can purchase exempt burial spaces on behalf of a spouse, minor or adult child, step-child, sibling, parent, or a spouse of any of these relatives.
 - ◇ Burial spaces must be paid for in full in order to qualify as exempt. Installment payments towards the cost of a burial space are countable assets.

- **Burial fund**

- ◇ Funds specifically intended for a person's funeral or burial expenses.
- ◇ Up to \$1,500 can be exempt as a burial fund.
- ◇ Funds must be identifiable, but not necessarily

segregated, from other funds.

- ◇ A person must sign a statement identifying the burial fund's location, type, amount, account number, as well as the month and year it was first intended to be used for burial.
- ◇ The funds must be in a bank or trust account. Cash cannot be exempt.
- ◇ A person cannot have an exempt burial fund if the person has any other form of exempt burial assets already in place.

For more information about ensuring that funeral pre-planning is exempt for Medicaid purposes, review the Medicaid Eligibility Handbook, section 16.5 available at this link: <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>

For SSI, more information can be found in the Social Security Program Operations Manual (POMS) here: <https://secure.ssa.gov/poms.nsf/lnx/0501130000> □

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 guardian@gwaar.org.



Title: *In Re the Commitment of Ollar Berry*

Appeal No.: 2015AP1668

Date: August 2, 2016

Case Summary: Berry appealed the circuit court order denying his petition for discharge from his Ch. 980 commitment. He argued there was new information sufficient to warrant a discharge trial. The Court of Appeals affirmed the denial.

Case Details: Berry was committed as a sexually violent person in 2013. He filed his petition for discharge in 2015, however, the circuit court denied his petition on the first step of the review process.

A petition for discharge from a Ch. 980 commitment may be started at any time. The petition initiates a two-step process. First, the circuit court completes a review of the petition and shall deny it unless the petition “alleges facts from which the court or jury would likely conclude the person’s condition has changed...so that the person no longer meets the criteria for commitment as a sexually violent person” Wis. Stat. § 980.09 (1). If the court finds the petition is facially sufficient, it may hold a hearing to determine if it is sufficient for discharge.

The criteria for a commitment of a sexually violent person are (1) the person was convicted of a sexually violent offense, (2) has a mental disorder, and (3) is dangerous to others because of the mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence. Wis. Stat. § 980.01(7). Berry argued that he was not a sexually violent person because his expert reported that he did not meet the third standard.

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.

An expert’s opinion must depend on something more than facts, professional knowledge or research considered by an expert testifying in a prior proceeding. Berry’s expert, Dr. Lodl, utilized the Structured Risk Assessment-Forensic Version (SRA-FV) and Violence Risk Assessment-Sex Offender Version (VRA-SO) actuarial tools. The Court of Appeals agreed with the state that the results of those tools did not qualify as new evidence. The Court found these tests insufficient as new evidence because two other doctors used the SRA-FV test when preparing their reports for the initial commitment. None of the experts in the initial commitment had used the VRA-SO but the tools were available at that time. Dr. Lodl also used historical facts, not new facts about Berry to score him on the VRA-SO. Based on the lack of new evidence the Court found that it could not say a jury would be more likely than not to conclude that Berry no longer meets the criteria for a Ch. 980 commitment and denied his petition.

Title: *Estate of Miller v. Storey*

Appeal No.: 2014 AP 2420

Date: August 16, 2016

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(Case Law, continued from page 5)

Case Summary: The circuit court ordered Storey to pay more than \$50,000 after the jury found she stole money from her uncle (Miller) while acting as his caregiver. Storey appealed the small claims judgment awarding Miller's estate an amount including restitution damages, exemplary damages, double statutory costs and attorney fees. The Court reversed the judgment because it agreed that the award exceeded statutory limits for small claims and that the circuit court erred in ordering attorney fees, double costs and deeming the judgment restitution.

Case Detail: Storey moved in with her uncle (Miller) in 2010 to help him with necessary daily tasks. After Miller passed away, his personal representative grew concerned when she noticed Miller had signed up for online banking because he did not have access to the Internet. During the year Storey lived with Miller, funds were withdrawn from Miller's bank account in large amounts, and checks were written out to cash. His estate was able to correlate checks from Miller's account to amounts deposited in Storey's bank account.

At trial, the jury found that Storey had taken \$10,000 from Miller prior to his death. The circuit court ordered a money judgment including \$10,000 for misappropriation of funds, exemplary damages of \$20,000, double taxable costs of \$814.95 and attorney fees of \$20,000.

Storey made numerous arguments on appeal, some of which were rejected by the Court of Appeals. However, the Court agreed with several of Storey's other arguments. The Court agreed with Storey that the judg-

ment exceeded the small claims limit. It found that the circuit court should have limited the amount of compensatory damages to \$5,000. Storey also argued that the \$20,000 exemplary damages exceeded the small claims limit, however the Court did not address this claim because it reversed the exemplary damages on other grounds. The Court agreed with Storey that there is a well-settled rule that a jury, not the circuit court, must award exemplary damages.

Storey also challenged the court-awarded attorney fees pursuant to § 895.446(3)(b). The Court found that § 895.446(3)(b) does not specifically mention attorney fees when it states that "if the plaintiff prevails in a civil action ... he or she may recover all of the following: ... (b) All costs of investigation and litigation that were reasonably incurred, including the value of the time spent by any employee or agent of the victim." The Court interpreted this to exclude attorney fees because of the addition of specific language allowing for attorney fees in a related subsection.

Finally, the Court of Appeals found that holding the judgment as restitution was inappropriate. It reversed the circuit court judgment and remanded for the circuit court to amend the judgment to \$5,000 plus statutory costs of \$814.95. □



Authorization for Final Disposition

An Authorization for Final Disposition is an advance directive that allows an individual (called the declarant) to designate a person (called the representative) to make decisions about the final arrangements of his or her remains upon death. It provides an opportunity for the declarant to control what happens to his or her remains after death and to give a specific person authority to make arrangements for viewing, funeral ceremony, memorial service, burial, cremation or other dispositions and religious observances based on the declarant's instructions and preferences.

a) What are the requirements for a valid Authorization for Final Disposition?

An Authorization for Final Disposition must be voluntarily executed by someone who is at least 18 years old and of sound mind. The declarant must sign and date the document in front of two witnesses unrelated to the declarant OR be acknowledged before a notary public. The document must list the name and last known address of each representative and successor representative named. It also must be signed by each representative.

b) Are there any restrictions for who can be named as representative?

Yes, unless related to the declarant, a person in the following list who has a direct professional relationship or provides professional services directly to the declarant may not serve as representative:

- Funeral director
- Crematory authority
- Cemetery authority
- Employee of one of the above
- Health care provider
- Social worker

c) What are the duties of a representative?

The representative named in the Authorization for Final Disposition controls the decedent's final disposition including location, manner and conditions of final disposition. The representative is required to follow the directions specified in the document unless there is no realistic possibility of compliance, it is unlawful to do so or the cost of following the directions would exceed available resources from the decedent's estate.

A representative may decline appointment, decline to exercise control after accepting, or resign from appointment. It is also possible to name an alternate representative should the primary be unable to unwilling to act.

d) Can a person who has been declared incompetent through a guardianship order execute a Authorization for Final Disposition? Can a guardian?

No, a person declared incompetent is presumed not to be of sound mind for the purposes of an Authorization for Final Disposition. A guardian also may not execute an authorization on behalf of the ward. The statutes specify that an authorization must be executed by the declarant.

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Authorization for Final Disposition

(Authorization, continued from page 7)

e) **What happens if a person passes away and has not executed an Authorization for Final Disposition?**

There is a statutory list of priority for who might have control of the final disposition. As prioritized in the following order, someone on the below list who is at least 18 years old and has not been adjudicated incompetent could have control over the final disposition:

1. A representative of the decedent acting under the authority of the Authorization for Final Disposition, or the successor representative;
2. Surviving spouse of the decedent;
3. Surviving child of the decedent. If more than one surviving child, the majority of the surviving children may control. Fewer than the majority may control if that minority has put forth reasonable effort to notify all other surviving children and is not aware of opposition by the majority to the intended disposition;
4. Surviving parent or parents of the decedent;
5. Surviving sibling of the decedent. If more than one, the majority controls. The minority of surviving siblings may control if reasonable effort to notify other siblings and no known opposition by the siblings to the intended disposition;
6. An individual in the class of next degree of kinship, in descending order (Wis. Stat. § 990.001(16));

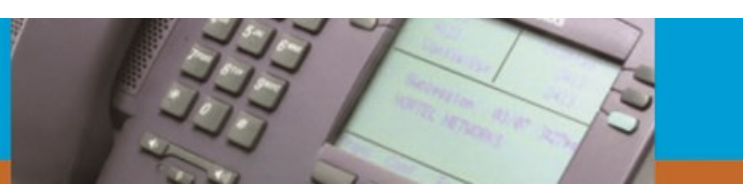
7. The guardian of the person of the decedent; or
8. Any individual other than specified in 1-7 who is willing to control the disposition and will attest in writing that he/she made a good faith effort to contact the individuals in 1-7.

f) **Where can I find an Authorization for Final Disposition form?**

The state Authorization for Final Disposition form is available on the Wisconsin Department of Health Services website. The link to the form can be found below. The form must be properly executed to be valid.

<https://www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm>





1) What is a guardian's responsibility when a ward dies?

Guardian of the Person: The authority of a guardian of the person ends at the death of the ward. The guardian is required to notify the court of the ward's death, but any other duties are fairly limited. As noted above in the article on Authorization for Final Disposition, a guardian is on the list of individuals who may have authority to control the final disposition of the ward's remains, however the guardian of the person is near the bottom of this list of priority.

Guardian of the Estate: The guardian of estate's authority to make decisions about the ward's money and property typically ends when the ward passes away. The guardian is required to turn over assets to the person appointed as personal representative for the ward's estate or those entitled to them. If there is a will, the guardian is responsible for making sure that the necessary people are notified of the will and notified of the ward's death. The guardian of estate is also required to complete a final account to the court, and the deceased ward's personal representative. If the ward dies and the guardian is the deceased ward's personal representative or special administrator, the deceased ward's personal representative or special administrator shall give notice of the termination and rendering of the final account to all interested persons of the ward's estate

For an estate under \$50,000 the court may approve the settlement and distribution by the guardian of the estate without appointing a personal representative. This is called a summary settlement and information about this process can be found in Wis.

Stat. § 867.

2) What are the power of attorney agent's responsibilities when the principal dies?

A power of attorney document only gives the power of attorney agent (whether financial or health care) authority to act on behalf of the principal while the principal is living.

A health care power of attorney however is able to make an anatomical gift of the principal's body when the principal is near death or has died unless prohibited in the POA document or by some other record. (see. Wis. Stat. §§ 155.20(8); 157.06(4)(b) and (9)(a)1.)

3) Are there any methods to establish advance planning for when a guardian passes away or is otherwise unable to act?

One method to create a plan for a time when the current guardian will be unable or unwilling to act is to name a standby guardian. The standby guardian does not have any authority to act as guardian until the primary guardian has died, is unwilling or unable to act, resigns, or is removed by the court. The standby guardian is able to act during a period as determined by the initially appointed guardian when he or she is temporarily unable to act. The duties and powers of the standby guardian are the same as the initially appointed guardian.

A petition to have a standby guardian appointed can be filed at any time. The court must approve the proposed standby guardian. If there is ever a

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(*Helpline Highlights*, continued from page 9)

time when the standby guardian must assume the duties of guardian, he or she must notify the court and receive the modified letters of guardianship indicating the time period for the standby guardianship.

When there is not a standby guardian and the initially appointed guardian dies, resigns or is removed by the court, a successor guardian may be appointed.

Anytime there is a change in guardians it is important to ensure that the newly appointed guardian will receive any useful information and history about the ward. Wis. Stat. Ch. 54 provides little guidance on how long records should be kept by the guardian or how the records should be kept. While it discusses when certain records can be released, it does not clearly discuss how records should be maintained or transferred to a stand-by or successor guardian. Only general guidance can be found through Wis. Stat. § 54.18. For example, Wis. Stat. § 54.18(2) (a) requires a guardian to exercise the degree of care an ordinarily prudent would use in his or her affairs. Considering this, guardians are required to use some care when deciding how to maintain and transfer their records. Corporate guardians should note that they are required to maintain certain records under Wis. DHS Admin. Code § 85.15.

If a guardian dies the court should be notified immediately of the guardian's death. When a guardian of the estate dies, the guardian's personal representative or special administrator is required to pro-

vide the court, the ward and the successor guardian with a final account of the guardianship estate.

4) Can a guardian execute a will on behalf of the ward?

The right to execute a will is one right that may be removed in a guardianship proceeding. If the right to execute a will is removed from the ward, no one, including the guardian, is able to exercise that right on behalf of the ward.

Wis. Stat. § 54.25(2)(c)(3). □

Upcoming Events

October 1, 2016—International Day of Older Persons

The United Nations designated October 1st as the International Day of Older Persons in order to recognize the important contributions older people make to our world, while raising awareness of aging issues. This year's theme is "Take a Stand Against Ageism."

Self-Determination Conference

Date: November 8—10, 2016

Location: Kalahari Resort, Wisconsin Dells

The conference participants include people with disabilities and family members, direct care providers, and professionals from Wisconsin's disability community.

*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.* □

