Greater Wisconsin Agency on Aging Resources, Inc.

The Guardian

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ABA Introduces the PRACTICAL Tool

Courtesy of GWAAR's Legal Services Team

The American Bar Association (ABA) recently released a tool to help professionals identify decision-making options for clients. The goal of the tool is to identify options that are less restrictive than guardianship for people in need of decision-making assistance.

Four ABA entities joined together to create these publications: The Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice, and the Section on Real Property, Trust and Estate law. The National Resource Center for Supported Decision-Making also provided assistance in development. Each of these entities has recognized the need to increase awareness of supported decision-making and other options apart from guardianship.

"PRACTICAL" uses an acronym outlining steps for lawyers to follow when meeting with a client. It's designed to follow along with a typical client interview. It starts by suggesting one should: "Presume guardianship is not needed." The tool provides a system to identify the target concerns of the client whether the client is a potential petitioner, the proposed ward, or another party. It allows the interviewer to pinpoint the individual's areas of strength and weakness in decision-making so that alternatives to guardianship can be presented before the need for a guardianship is proposed.

Along with the PRACTICAL tool, the ABA created a resource guide to provide background information, descriptions of each step, examples, and links to valuable resources.

For more information on the ABA PRACTICAL tool, follow this link:

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html. ❐

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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Case Law

Title: ***Kelly v. Brown (In re the Order for Attorney's Fees in IN re the Estate of Elizabeth Carpenter)***
Citation: 2016 WI App 31
Date: March 16, 2016
Reversed

Summary: Attorney John M. Kelly appealed a circuit court decision to limit his attorney fees that arose from representing Lois Noone in an action to review decisions she made as her mother's power of attorney agent. The Court of Appeals agreed with Kelly that the circuit court exceeded its authority under Wis. Stat. § 244.16(1) by ordering a reduction in attorney fees. The Court stated that granting relief under § 244.16(1) required that the relief relates to the underlying cause of action.

Case Details: Lois Noone [hereafter "Noone"] was the power of attorney agent for her mother Elizabeth Carpenter [hereafter "Elizabeth"]. Several of Elizabeth's other children brought an action under Wis. Stat. § 244.16 and § 155.60 to review decisions Noone made while acting as her mother's POA agent. Noone hired attorney John M. Kelly [hereafter "Kelly"] to defend her in this action. During the proceedings, Elizabeth passed away. The circuit court concluded that the action reviewing Noone's conduct was moot.

Though the circuit court considered the underlying action moot, it viewed the litigation as excessive and ordered Kelly's attorney fees to be limited from $25,000 to $6,000. The court stated that § 244.16(1) granted it authority to order appropriate relief in addition to reviewing the conduct of the POA agent. The respondents agreed with the court arguing that appropriate relief is broad and could include fees paid out of the principal's assets. Kelly objected to this limitation.

He argued that because Noone did not authorize any of his payments that the court did not have authority to limit his fees under § 244.16(1). He also argued that any finding of relief would have to be related to the misconduct of the agent.

Wis. Stat. § 244.16(1) states that certain people may "petition the circuit court ... to construe a power of attorney or review the agent's conduct, and grant appropriate relief." The statutes go on to specify that when an agent is found to have violated obligations owed to the principal under § 244, that the agent is "liable to the principal or the principal's successors in interest for the amount required to ...[r]eimburse ... for the attorney fees and costs paid on the agent's behalf." Wis. Stat. § 244.17(2).

The Court of Appeals stated that the circuit court exceeded its authority by limiting fees because the order to limit fees was not to provide for a remedy for the cause of action: wrongdoing of the POA agent. It found that when the language of § 244.16(1) is viewed in connection with the remedies listed in § 244.17, the statutes do not authorize the court to limit attorney's fees without a finding of misconduct or wrongdoing by the agent. The relief granted under § 244.16(1) must be related to the purpose of the cause of action. ❐

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Title: ***In the Matter of the Mental Commitment of Adam B.: Outagamie County v. Adam B.***
Appeal No.: 2015AP718
Date Filed: April 12, 2016
Affirmed

Summary: Adam B. appealed the order for his involuntary commitment for mental health treatment. He argued that the court erred by finding him dangerous because it did not conclude he met any of the dangerousness standards in Wis. Stat. § 51.20(1)(a)2. The Court of Appeals rejected all of his arguments and affirmed the order for involuntary commitment.

Case Details: An emergency detention was filed in September 2014 for Adam after he told his mom he was thinking of hurting someone. Dr. Bale diagnosed Adam with schizoaffective disorder, acute psychosis and paranoia, and an anxiety disorder. Dr. Bale testified that Adam was "very paranoid and suspicious," "his thoughts were disorganized," and Adam had told Dr. Bale that "his medication makes him suicidal." There was no evidence that Adam had ever taken any actions to harm himself or others.

The circuit court found that the County met its burden to prove that involuntary commitment was necessary including that Adam was mentally ill, was a proper subject for treatment and was dangerous. The court stated that Dr. Bale's testimony that Adam had suicidal and homicidal ideas, and that he was unable to care for himself as shown by not eating or drinking, were sufficient evidence of dangerousness.

Adam argued that the court failed to find he was dangerous under any one of the five statutory standards articulated in § 51.20(1)(a)2.a.-e. He states that the court found him dangerous based on aspects of several different statutory standards. The Court of Appeals disagreed stating that even though the court did not articulate which standard the County had proven, the comments of the court show that it found Adam dangerous due to a pattern of recent acts or omissions under § 51.20(1)(a)2.c.

The Court also reviewed the facts independently to determine if the facts found by the circuit court met the statutory standard for an involuntary commitment. It found that the record proved by clear and convincing evidence that Adam was dangerous due to a pattern of recent acts or omissions... based on Dr. Bale's testimony about Adam's suicidal thoughts and inability to meet his own basic needs.

Adam also argued that his thoughts of harming someone and that his medication made him suicidal were not enough under Wis. Stat. § 51.20(1)(a)2.a.-b. basing his argument on *Outagamie County v. Michael H.* The Court of Appeals stated that the case Adam relied on actually undermines his argument as that case is an acknowledgement that an individual is suicidal is enough to constitute a threat of suicide. ❐

Title: ***In the Matter of the Mental Commitment of J.W.J.: Waukesha Co. v. J.W.J***
Appeal No.: 2016AP46-FT
Date filed: May 4, 2016
Affirmed

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Summary: J.W.J. appealed the order extending his involuntary commitment and involuntary medication and treatment. He argued there was insufficient evidence to prove that he was a proper subject for treatment under Wis. Stat. § 51. The Court affirmed stating there the county presented clear and convincing evidence that J.W.J. was a proper subject for treatment.

Case Details: J.W.J. appealed the order from Waukesha County ordering an extension of his involuntary commitment and involuntary medication and treatment. To extend an involuntary commitment the County is required to establish that 1) the individual is a proper subject for treatment, 2) the individual is mentally ill, and 3) the individual is dangerous. However, one difference between ordering an involuntary commitment and extending an involuntary commitment is that dangerousness can be shown by proving that based on the individual's treatment record, there is a substantial likelihood that if treatment were withdrawn the individual would be a proper subject for treatment. Wis. Stat. § 51.20(1)(am).

The Court stated that based on the "proper subject for treatment" standard articulated in *Helen E.F.*, the County proved by clear and convincing evidence that J.W.J. is a proper subject for treatment. The Court based its conclusion on testimony from Dr. Koch who explained that J.W.J. suffers from paranoid schizophrenia and has a history of inconsistent use of psychotropic medication. Dr. Koch testified that when J.W.J. is not properly medicated, he has hallucinations demanding him to harm himself or others. ❐

Title: ***In the Matter of the Guardianship and Protective Placement of E.L.: M.L., R.L. v. Outagamie County Dept. of Health and Human Services***
Appeal Nos.: 2012AP2464; 2013AP2681
Date filed: April 12, 2016
Affirmed

Summary: M.L. and R.L. appealed the order placing their mother (E.L.) under a guardianship and the order denying their Wis. Stat. § 806.07 motions for relief from the guardianship order. The Court of Appeals found that the circuit court reasonably rejected all of M.L. and R.L.'s arguments as either having been addressed previously and rejected, being unsupported by the court, or without merit. The Court of Appeals concluded that the circuit court did not erroneously exercise its discretion in denying relief under § 806.07.

Case Details: This is the second time that M.L. and R.L. have appealed an order placing their mother (E.L.) under a guardianship. In 2010 the court granted the petition from the Outagamie County Department of Health and Human Services (hereafter Outagamie County) to appoint for E.L. a guardian of the person and estate, and also to invalidate a power of attorney naming R.L. her agent, due to financial abuse and lack of competency to execute the POA. Together, M.L. and R.L. appealed that guardianship and protective placement order, which the Court of Appeals reversed due to failure to complete the hearing within the ninety-day period required in § 54.44(1). Outagamie County then filed a second petition for temporary and permanent guardianship and protective placement. After a final hearing on these petitions in August 2012, the

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circuit court granted the petition for permanent guardianship over E.L's person and estate, invalidated the powers of attorney, and ordered R.L. to return $17,000 to E.L. The petition for protective placement was denied. M.L. and R.L. filed notice of appeal from the permanent guardianship order and also moved for relief from the order under §§ 806.07(1)(a),(b),(c), and (h).

Despite the fact the E.L. passed away, the many procedural and legal errors M.L. and R.L. alleged are not moot claims due to three other issues: 1) R.L. argued the circuit court erred by requiring him to return $17,000 to E.L.; 2) M.L. argued the court erred by ordering GAL payment from E.L.'s guardianship estate; and 3) the argument that the court mishandled Outagamie County's motion for sanctions. The validity of the guardianship order would have an impact on whether the court erred in requiring R.L. to return the money to E.L. or requiring E.L.'s guardianship estate to pay the GAL fees. The procedural and legal arguments are therefore not moot.

One of the arguments raised on appeal was that the court lacked competency to hear the guardianship petition because it was not a new proceeding. M.L. and R.L. argued that the old guardianship case was reopened because the petition was given the same case number. They argued reopening the case was impermissible because it was reversed on appeal. The Court of Appeals found this argument to be incorrect because the letter "A" was added to the files for the current proceeding.

M.L. and R.L. also incorporated many other arguments including: issue preclusion, error in suspending the POAs without a finding of good cause, failure to appoint their mother's nominees for guardian as temporary guardians, service by an unqualified GAL in that case, prevention from their meaningfully participating in the de novo hearing on the temporary guardianship, several arguments about the effectiveness of E.L.'s adversary counsel, and still other arguments about judicial notice of witness testimony and transcripts.

The Court of Appeals found that the arguments related to the temporary guardianship were moot because whether the temporary guardianship was ordered or not there still would have been a hearing on the permanent guardianship. In regards to the other mentioned arguments, and the arguments not listed in the summary, the Court of Appeals found them to be previously addressed and rejected or properly rejected by the circuit court. ❐

Title: ***In The Matter of the Guardianship of C.L.K.: Milwaukee Co. v. C.L.K.***
Appeal No.: 2015AP2031
Date filed: May 24, 2016
Affirmed

Summary: C.L.K. appealed the order extending her Ch. 55 protective placement. C.L.K argued her trial counsel was ineffective because he failed to object to the judicial review of her protective placement on the grounds that her constitutional rights were violated when an annual Watts review was not completed within one year. The County argued that there is not a re-

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quirement that the Watts review is *completed* within one year and therefore the counsel was not ineffective. The Court of Appeals agreed with the county and affirmed the order extending protective placement.

Case Details: C.L.K. was first placed under a protective placement in March 2013. She was placed in a community based residential facility (CBRF). In November 2013 the County completed an annual review, recommended continued placement, and then petitioned for the annual review in December 2013. The appointed GAL filed his report recommending continued placement in February 2014, but also requested an attorney be appointed for C.L.K. At the contested Watts hearing in July 2014 the court ordered continued protective placement. In May 2015 C.L.K. filed a motion to vacate the protective placement order.

C.L.K. argued her counsel was ineffective because he failed to "object to the Watts annual review on the grounds that it was not completed within one year of the initial protective placement order." She argued this violated her constitutional equal protection rights. Milwaukee County argued that a Ch. 55 order does not require completion of the annual review within one year as is required under Ch. 51. The trial court denied the motion without an evidentiary hearing. C.L.K. appealed.

In an ineffective assistance of counsel challenge the court first looks at whether the counsel's performance was deficient and then whether the client was prejudiced. The Court of Appeals stated that C.L.K.'s ineffective assistance of counsel argument rests entirely on the issue of whether her constitutional equal protection rights described in ***Watts*** require an annual judicial review of a protective placement order to be *completed* within one year of the initial order.

C.L.K. argued that the different one-year time limits to extend a Ch. 55 order compared to a Ch. 51 order violate the equal protection standards. She relied in part on the word "annual" and a sentence within ***Watts*** that required an annual review of protective placement for people already under protective placements to be "accomplished within one year from the mandate date of this opinion." The County argued ***Watts*** did not require an annual review to be completed within one year and that completing the reviews within one year would not be practical. The Court of Appeals agreed with the County that completing an annual review within one year is not required under either equal protection or the ***Watts*** standards. As the Court concluded that completion of the annual review within one year was not required and did not violate equal protection, it also found that C.L.K.'s trial counsel was not ineffective. ❐

Statutory Update

This spring there was an addition to the Wisconsin Statutes that may be of interest to guardians and those who work with vulnerable or elder adults. This statute, Wisconsin Statute § 50.085 "Visitation by Family Members," outlines a mechanism by which family members who are being denied visitation with a resident of certain facilities or an individual receiving care in any home can petition the court to compel visitation. Under this statute, the court may not issue an order compelling visitation if it finds that the resident has capacity to evaluate and communicate decisions regarding visitation AND expresses a desire to not have visitation with that family member, OR if the court finds that visitation between the family member and resident is not in the resident's best interest.

A related section was included in the guardianship statutes. Wisconsin Statute § 54.68(2)(cm) was added as a cause of action against a guardian who is "Knowingly isolating a ward from the ward's family members or violating a court order under § 50.085(2)."

For more information please see the following:
Wisconsin Statute § 50.085:
https://docs.legis.wisconsin.gov/statutes/statutes/50/I/085
Wisconsin Statute § 54.68(2)(cm):
https://docs.legis.wisconsin.gov/statutes/statutes/54/V/68

Guardianship Forms Update

In February of this year several updates were included to the mandated guardianship petitioning forms. The forms are still available on the Wisconsin Circuit Court website, here:
https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=17

- Order on Petition for Temporary Guardianship
- Letters of Guardianship of the Estate Due to Incompetency
- Petition for Temporary/Permanent Guardianship Due to Incompetency
- Examining Physician's or Psychologist's Report
- Determination and Order on Petition for Guardianship Due to Incompetency
- Letters of Guardianship of the Person Due to Incompetency

2nd WINGS Summit

In the June 2015 issue of *The Guardian*, an article was published introducing our readers to a new workgroup forming in Wisconsin. Wisconsin's Working Interdisciplinary Network of Guardianship Stakeholders (WINGS) group has been working diligently this past year. On May 25 the second Wisconsin WINGS summit was held in Madison. The event brought WINGS participants together from across the state to discuss important issues related to guardianship in Wisconsin and to learn about the progress of the WINGS subgroups. There was a presentation from the Social Security Administration and a panel of professionals discussing a guardian's ability to consent to certain end of life care decisions on behalf of the ward. Each subgroup gave an update of their progress from the past year. A few highlights include a new online resource created by the competency subgroup providing a brief description of various decision-making options other

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than guardianship, progress on a guidance document for medical staff on completing the guardianship competency evaluation, and progress on a training manual for guardians that will compile already existing materials into an easy to use format.

MEH Update

On June 10, 2016, several revisions were made to the Medicaid Eligibility Handbook. One update of particular interest to individuals who work with vulnerable, elderly or adults under a guardianship is an update to the provision on who can sign an application for MA. (MEH 2.5.1.1) The provision formerly read: "someone acting responsibly for an incompetent or incapacitated individual pending a guardianship determination." Now, the last part of that sentence has been removed to read "someone acting responsibly for an incompetent or incapacitated individual." http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm

Report from Speaker's Task Force on Alzheimer's and Dementia:

In August 2015 Assembly Speaker Robin Vos created the Task Force on Alzheimer's and Dementia. The group was tasked with identifying needed improvements for in-home care, thinking of ways to improve and promote various community-based resources for individuals with Alzheimer's and dementia, and determining how to lower the cost of long term care while ensuring future quality of care. On June 14 the Speaker's Task Force on Alzheimer's and Dementia released a memorandum summarizing its work. Included in the memo are recommendations from the Task Force chairperson, Representative Mike Rohrkaste. His recommendations include: promoting the dementia system redesign, addressing the shortage of dementia-capable health care providers, addressing Alzheimer's and dementia-related crises, funding dementia and Alzheimer's research, promoting education on Alzheimer's and dementia for K-12 students, and reviewing guardianship laws in Wisconsin and other states to identify areas that patient, guardian and family rights could be balanced.

The report from the Speaker's Task Force on Alzheimer's and Dementia can be found at: http://legis.wisconsin.gov/2015/committees/assembly/ad/media/1079/speakers-task-force-on-alzheimers-and-dementia-report.pdf ❐

Upcoming Events

2016 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.

2016 Wisconsin Aging Network Conference
Date: September 21-23, 2016
Location: Kalahari Resort, Wisconsin Dells

This conference for professionals in the field of aging provides the opportunity to discuss issues impacting aging programs and services and also learn new methods to help older adults live healthier lives.

How many times can a Power of Attorney for Health Care be activated and deactivated?

A power of attorney for health care (POA-HC) can be activated and deactivated as many times as is appropriate and needed. There is no limit to the number of times these actions can occur within the statutes. This question usually comes up when someone is asked to execute a new POA-HC when the person's existing POA-HC was activated but the person has since regained capacity. Deactivating a POA-HC is not equivalent to revoking the document. A deactivated POA-HC could be reactivated in the future if needed.

What is the difference between the terms "incapacity" and "incompetence"?

There continues to be confusion around the use of the terms "incapacity" and "incompetence." It is important to understand the difference between these two terms and how they relate to different legal processes.

"**Incapacity**" is the term used to describe the standard to activate – give the agent authority – under a power of attorney for health care, and sometimes a power of attorney for finances. It is defined as "an inability to receive and evaluate information effectively or to communicate decisions so that the individual lacks the capacity to manage his or her health care or financial decisions." (Wis. Stat. § 155.01(8) and § 244.02(7)). A health care POA is activated upon the finding of incapacity by two physicians, or one physician and one licensed psychologist, unless otherwise stated in the document. Incapacity is a medical determination.

"**Incompetence**" on the other hand is a legal determination. A court can declare an individual is incompetent after finding several required factors. These factors include: the individual is at least 17 years old and 9 months, the person has a qualified impairment, and due to that impairment he or she lacks evaluative capacity, there is a risk of harm to that person, and that there are no lesser restrictive alternatives available to meet that person's need for assistance. One of these factors closely resembles the definition of "incapacity." When a court is looking at whether an individual lacks evaluative capacity it is looking at whether "the individual is unable effectively to receive and evaluate information or to make or communicate decisions," either to provide for his/her own health and safety or to manage his/her own property or financial affairs.

Does the person who is appointed guardian become liable for the ward's outstanding debt?

No, a guardian is not personally liable for the ward's debts. Exceptions to that rule would include if the guardian voluntarily accepts personal liability, or if the guardian acts criminally or negligently in managing the ward's estate. It is possible for a court to order the guardian to reimburse the ward or ward's estate for losses due to a breach of duty owed to the ward. (Wis. Stat. § 54.68(4)(b)). ❐