Greater Wisconsin Agency on Aging Resources, Inc.

The Guardian

Volume 3, Issue 4 (2015)

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.

To contact the GSC—

Call: (855) 409-9410
E-mail: guardian@gwaar.org

Website: gwaar.org

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

Medicare to Pay Doctors for End-of-Life Consultations

Courtesy of GWAAR's Legal Services Team

The Centers for Medicare and Medicaid Services (CMS) issued a final rule on October 30, 2015, that adds reimbursement rates to two new billing codes established earlier this year: 99497 and 99498. Health care providers may begin using these codes to request reimbursement on January 1, 2016.

- **Code 99497** is for the first 30 minutes of advance care planning, which includes the explanation and discussion of advance directives (and can include completion of such forms) by the physician or other qualified health care professional. These conversations are face-to-face and can be with the patient, family member(s), and/or a surrogate.
- **Code 99498** is for any additional 30 minutes spent discussing advance care planning beyond the initial 30 minutes. There is currently no limit to the amount or frequency of billing Code 99498.

Prior to this ruling, Medicare did not offer payment for the time health care providers took to assist patients with advanced-care or end-of-life planning. Instead, practitioners who wanted to have these conversations with patients needed to do so on their own time and without compensation. It is unknown how much health care providers will actually be reimbursed. ❐

Sources:

www.healthways.com/navvishealthways/blog/cms-proposes-reimbursement-for-advance-care-planning-conversations

www.advisory.com/daily-briefing/2015/11/02/cms-advance-care-planning

http://healthaffairs.org/blog/2015/03/19/what-kind-of-advance-care-planning-should-cms-pay-for

www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-10-30-2.html

Madison Office:
1414 MacArthur Road
Suite A
Madison, WI 53714
ph. 608.243.5670
fax. 866.813.0974

Brookfield Office:
125 N. Executive Drive, Suite 207
Brookfield, WI 53005

Green Bay Office:
2900 Curry Lane, Suite 414
Green Bay, WI 54311

Tribal Technical Assistance Center:
Great Lakes Inter-Tribal Council
P.O. Box 9
Lac du Flambeau, WI 54538
ph. 800.472.7207
fax. 715.588.7900

Title: In the Matter of the Guardianship and Protective Placement of S.A.G: Clark County v. S.A.G.
Date: October 8, 2015
Citation: 2015 AP 793
Reversed.

Summary: S.A.G. appealed an order for protective placement and involuntary administration of psychotropic medications. The Court of Appeals reversed the circuit court holding that the county did not show the need for protective placement and the circuit court lost competency to order administration of psychotropic medications when the hearing was not held within thirty days of the petition.

Case Detail: S.A.G. had a history of depression and one documented suicide attempt. While living in a facility in September 2014, staff noted that she was having delusions that staff members were "monitoring her, talking about her, or trying to harm her." The County later successfully petitioned for guardianship, protective placement, and an order for the involuntary administration of psychotropic medications. S.A.G. appealed those orders.

The petitioner of a protective placement action must prove by clear and convincing evidence the following: 1) the individual has a primary need for residential care and custody, 2) the individual has been deemed incompetent, 3) as a result of his or her impairment, the individual is so totally incapable of providing for his or her own care and custody as to create substantial risk of serious harm to himself, herself, or others, and 4) the disability is permanent or likely to be permanent. S.A.G. challenges that the county did not prove her disability is permanent or likely to be permanent. WIS. STAT. § 55.08(1).

The Court of Appeals reversed the circuit court, stating that "the County failed to present expert testimony that she suffers from a permanent or likely to be permanent disability." *Id.* at ¶ 8. To prove that an individual's disability is permanent or likely to be permanent, the petitioner must prove the individual is not treatable. At the hearing, Dr. Starr testified that "S.A.G.'s underlying depression is permanent, but that the symptoms of her depression may be treated and that over time her depression may improve." He further testified that S.A.G.'s psychosis is what is rendering her incompetent, but they are usually treated with medications. *Id.* at ¶ 9.

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.

S.A.G. also argued that the order for involuntary administration of psychotropic medications should not have been granted because the court lacked competency due to the expired thirty-day time limit. The county admitted that "the circuit court lacked competency to enter the order for involuntary administration of psychotropic medication because a hearing on that petition was more than thirty days after petition was filed." The order was then reversed. *Id.* at ¶ 13-14.

Title: In the Matter of the Mental Commitment of T.B.: Dane County v. T.B.
Date: October 1, 2015
Citation: 2015 AP 799

Summary: T.B. appealed his order of commitment, involuntary medication and treatment, and order denying his postdisposition relief. He argued the circuit court erred in denying his postdisposition motion to vacate the order for commitment because no verbatim record was created at the probable cause hearing. The Court of Appeals affirmed, finding that T.B is not entitled to a verbatim record of his probable cause hearing under Wisconsin Supreme Court Rule 71.01(2)(a) which is excepted from the recording requirement.

Case Detail: On November 4, 2013, T.B. was detained for an examination following a petition from Dane County under Wis. Stat. § 51.20(1)(a)2.e. A probable cause hearing was held on November 6, 2013. The court commissioner found "probable cause to believe that T.B. is dangerous under Wis. Stat. § 51.20(1)(a)2.e." *Id.* at ¶ 3. The circuit court ordered T.B to be committed for 6 months and ordered involuntary administration of medication and treatment. T.B. filed a motion for postdisposition relief under WIS. STAT. § 809.30(2)(h). The motion was denied

continued on page 3

Case Law, continued from page 2

on the basis of mootness because T.B. is no longer under the original commitment order but to a stipulated extension of the commitment. T.B. appealed.

On appeal, T.B. argued that the circuit court "lost competency to adjudicate [his] case when it failed to make a verbatim record of [his] probable cause hearing, as mandated by WIS. STAT. § 51.20(5)" *Id.* at ¶ 6. The county argued the stipulated extension of commitment renders the appeal moot and no record of the probable cause hearing is required.

The Court of Appeals affirmed the denial of T.B.'s motion for postdisposition relief, holding that even if the claim was not moot, a record of the probable cause hearing is not required by the rule. Under Wisconsin Supreme Court Rule 71.01(2)(a) a "proceeding before a court commissioner that may be reviewed de novo" is an exception to the rule requiring verbatim records.

Title: In the Matter of the Mental Commitment of C.Y.K.: Ozaukee County v. C.Y.K.
Date: September 9, 2015
Citation: 2015 AP 1080

Summary: C.Y.K. appealed her involuntary medication and treatment order arguing that there was insufficient evidence showing she was incapable of understanding the advantages and disadvantages and alternative treatments of her mental illness to make an informed choice to accept or refuse medication or treatment. The Court of Appeals affirmed stating that even with the psychiatrist's statement that C.Y.K. was not substantially incapable of applying her understanding to make an informed choice, there was sufficient evidence for the court to order involuntary medication and treatment.

Case Detail: C.Y.K. had a history of mental illness and had multiple hospitalizations prior to this case. C.Y.K. had voluntarily gone to the hospital on June 19, 2014; but when she refused treatment, the staff felt that she could be dangerous if she was discharged. On July 3, 2014, she was committed as outpatient for six months with an order for involuntary medication and treatment.

To Ozaukee County Department of Human Services, C.Y.K had been uncooperative with treatment and continued to have no insight into her mental illness in October and December 2014. Ozaukee County DHS believed that should the commitment be withdrawn, C.Y.K would discontinue taking her medications and become a danger to herself and others. On December 15, 2014, the county petitioned to extend C.Y.K. commitment and order for medication. Based on the testimony and report of court-appointed psychiatrist, Dr. Rawski, the circuit court decided that she should be committed for another twelve months including involuntary medication. C.Y.K. appealed.

On appeal, C.Y.K. argued that the court's finding was clearly erroneous because the court appointed psychiatrist testified that C.Y.K. was not substantially incapable of applying her understanding to make an informed choice. The Court of Appeals affirmed, finding that the opinion of the psychiatrist does not negate the remaining evidence supporting the circuit court's determination. The Court added that a finding of fact is not clearly erroneous merely because a different finding could have been reached and that a court is not obligated to accept any opinion. The Court of Appeals found that the circuit court did not err in the determination because the decision was based on the totality of the evidence in the case.

Title: In the Matter of the Mental Commitment of M.L.G: Ozaukee County v. M.L.G
Date: September 23, 2015
Citation: 2015AP1469-FT
Affirmed.

Summary: M.L.G. appealed his involuntary medication and commitment order arguing that the County had insufficient evidence that he was dangerous and incompetent to refuse medication. The Court of Appeals, affirming the circuit court, found that there was clear and convincing evidence that M.L.G. was substantially incapable, under WIS. STAT. § 51.61(1)(g)(4), to make the informed choice to refuse psychotropic medications.

continued on page 4

Case Law, continued from page 3

Case Details: M.L.G. was pulled over for going twenty miles over the legal speed limit in Port Washington, Wisconsin. M.L.G. told the officer that he was hurrying home because he felt like he was going to slip into a diabetic shock. He was then transported to a hospital where he stated that he was receiving disturbing messages from a coworker who had tried to convince him to sexually assault women. During this time, M.L.G. was diagnosed with schizophrenia. However, he did not believe that he was diagnosed correctly and suspended taking his medication. Clinical psychologist Dr. Kojis reviewed M.L.G.'s documents and testified that she was concerned about M.L.G's delusions, specifically those that involved his fear of becoming a diabetic. Dr. Kojis stated that, while some antipsychotic medications involve blood sugar monitoring, this was "not going to be a problem for him." *Id.* at ¶ 3. Forensic psychiatrist Dr. Rawski testified that he believed M.L.G. had demonstrated harm to himself or to others due to the delusions and that they impair his ability to operate a car safely. *Id.* at ¶ 4. The court found M.L.G. posed a substantial risk of harm and was incompetent to refuse medication, and it signed orders for his commitment and involuntary medication. M.L.G. appealed.

M.L.G. argued that there was insufficient evidence to establish that he was dangerous under WIS. STAT. § 51.61(1)(a)2.c or that he was substantially incapable of applying his understanding of antipsychotic medicine to his mental illness under WIS. STAT. §51.61(1)(g)4.b. The Court of Appeals, affirming the circuit court, rejected these arguments finding that M.L.G. was dangerous and presented evidence of acts where he refused to take his medication and that this was the cause of his delusions of having diabetes and hallucinations that urged him to commit sexual assault. In addition, expert witnesses stated that this unsafe behavior was a risk to himself and others especially because of his impaired judgment which caused him to speed excessively. The Court stated that the ability to identify side effects of medication is not equivalent to applying that understanding to a personal mental illness.

Points of Interest

Federal legislation is now pending that may address concerns affecting financial institutions and the reporting of elder financial abuse. U.S. Senators Claire McCaskill (R-ME) and Susan Collins (D-MO) introduced legislation that will allow financial institutions to report suspected financial abuse and be immune from civil and administrative liability so long as those reports are made in good faith and with reasonable care. Entities that financial institutions may share this type of information with will include law enforcement and adult protective services. Financial institutions will also be required to provide training to their employees about the reporting of financial abuse if this legislation is passed. Find more information about this legislation at www.congress.gov/bill/114th-congress/senate-bill/2216/text *(last visited November 18, 2015)*.

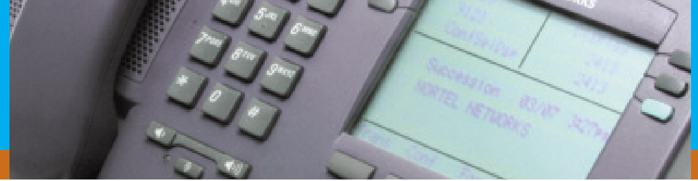
Speaker's Task Force on Alzheimer's and Dementia created a website to post updates and information about the task force: http://legis.wisconsin.gov/2015/committees/assembly/ad/public-hearings/ *(last visited November 24, 2015).*

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.

Title: In the Matter of the Mental Commitment of C.M.M: Kenosha County v. C.M.M
Date: September 23, 2015
Citation: 2015AP504
Affirmed.

Summary: C.M.M. appealed her involuntary administration of medication order specifically arguing that the County had "failed to proffer sufficient evidence to prove her dangerous." *Id.* at ¶ 7. The Court of Appeals, affirming the circuit court, found that there was clear and convincing evidence to support that C.M.M. was dangerous under Wis. Stat. § 51.20(1)(a)2.d.

continued on page 6



If a health care power of attorney (HCPOA) was activated based upon incapacity but a new HCPOA is executed, can the same activation papers be used for the new HCPOA? (Can an activation carry over from an old HCPOA to a new HCPOA?)

No. The activation from a prior HCPOA cannot be used to activate a subsequent HCPOA. Each activation is specific to HCPOA and is not transferrable.

Each act of activation is specific to the principal's state at the time of the examination. Wis. Stat. § 155.05(2) states, "Unless otherwise specified in the power of attorney for health care instrument, an individual's power of attorney for health care takes effect upon a finding of incapacity by 2 physicians . . . who personally examine the principal and sign a statement specifying that the principal has incapacity." This language refers only to one HCPOA and to only the then-applicable finding of incapacity.

Also remember the execution of a new HCPOA revokes a previous HCPOA. Wis. Stat. § 155.40(1)(d). Use of a previous activation would mean using an activation from a revoked document.

A principal, who is later sound of mind enough to execute a valid HCPOA, is unlikely to meet the standard for incapacity. While the standards for execution and activation are different, they can be seen as related when viewing a person's actual state. It is possible that one who is unable to make health care decisions and needs his or her HCPOA activated is also unable to understand the terms of a HCPOA and is not sound of mind. Care should be used when reviewing newly executed HCPOAs that are soon activated after their execution because of incapacity.

Can a health care POA agent admit the principal to an assisted living facility against the principal's wishes?

No, a HCPOA agent may not exceed the authority given to him or her under the law and through the HCPOA itself. Regardless of whether the HCPOA provides the authority to admit the principal, the principal retains the right to withdraw that authority. Should that authority have never been given, the agent has no and never had any authority to admit the principal. At all times, the agent must "act in good faith consistently with the desires of the principal as expressed in the power of attorney for health care instrument or as otherwise specifically directed by the principal to the health care agent at any time." Wis. Stat. § 155.20(5).

The ward objects to organ donation. However, the guardian of the person wishes to donate the ward's organs. Can the guardian of the person consent to this despite the ward's objections?

No. Organ donation is a shared right meaning that both the ward and the guardian must consent to the donation. If the ward objects to the exercise of a shared right, such as organ donation, the guardian may not provide the consent to it over the ward's objection. To donate, both parties must consent if the right is shared. *See* Wis. Stat. §54.25(2)(c)1. f. and 54.25(2)(c)3.

Are psychiatric advanced directives valid in Wisconsin?

All Wisconsin HCPOAs must reflect Wisconsin law. Considering this basic premise, note the applicable law.

A HCPOA agent may make health care related decisions. See Wis. Stat. § 155.20(1). Health care decisions are defined as "informed decision in the exercise of the right to accept, maintain, discontinue or refuse health care." Wis. Stat. § 155.01(5). Health care is defined as "any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition." Wis. Stat. § 155.01(3). Therefore, an agent may make decisions related to the care, treatment, etc. of the principal's mental health as are consistent with the document, Wisconsin law, and the principal's wishes.

Note, a HCPOA agent may not make certain decisions related to mental health. By law, a HCPOA agent may not consent to the principal's admission into a mental health institution or to specific types of mental health treatment. Wis. Stat. § 155.20(2)(a)(1) and 155.20(3). Should a HCPOA allow for the exercise of a prohibited power, the HCPOA provision is invalid.

continued on page 6

Case Law, continued from page 4

Case Detail: On August 8, 2014, a Kenosha Police officer responded to a disorderly conduct call at C.M.M.'s residence. The officer reported that the individual said she was "bipolar, had not taken her medication for three days, was throwing items out the window of her trailer, having hallucinations, and was unable to care for herself." *Id.* at ¶ 2. The officer then took C.M.M. to the hospital under an emergency detention. On August 13, 2014, C.M.M. agreed to comply with a stipulated hold open agreement requiring all prescribed medications and refraining from ingesting any controlled substances. Approximately two weeks later, C.M.M had another emergency detention, when the hospital requested a WIS. STAT. Ch. 51 subject hold. The officer reported to C.M.M.'s residence where she said she had suicidal thoughts, she then was taken to Winnebago Mental Health Institute. Drug tests revealed that she was taking illegal drugs and breached the hold open agreement. Kenosha County requested the court revoke the agreement and schedule a final hearing. At the hearing, the court-appointed doctor did not find C.M.M. to be dangerous. She was released subject to the hold open agreement on September 11, 2014. Just four days later C.M.M. was detained again where she tested positive for cocaine, marijuana, and had indicated that she had not taken her required medication. Kenosha County requested another revocation of the hold open agreement. The court found C.M.M. to be a proper subject for commitment under WIS. STAT. § 51.20(1)(a)2.d. and entered an order for commitment and involuntary medication.

C.M.M. requested that the court dismiss both the order for commitment, involuntary medication, and treatment because there was no clear and convincing evidence showing she was dangerous. However, the circuit court found C.M.M. to be dangerous under the fourth standard. Dangerousness under the fourth standard requires individual to [e]vidence behavior manifested by recent acts or omissions that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. Wis. Stat. § 51.20(1)(a)2.d.

C.M.M. argued there was no evidence of a recent act or omission indicating an inability to satisfy basic needs. The County argued her record had numerous instances in which she was dangerous including three hospitalizations within the previous six to eight weeks, the inability to meet the ordinary demands of life, and the need for management in a structured setting to meet her daily needs. The Court of Appeals affirmed that there was sufficient evidence to show dangerousness under the fourth standard. ❒

Help Line, continued from page 5

May a guardian sign a HCPOA on the ward's behalf?

No, a guardian may not sign a POA on the ward's behalf. Only the person may execute his or her own POAs. As part of the guardianship action, a ward is found to be incompetent by the court and is deemed to not have the capacity to make certain decisions. See *Production Credit Ass'n v. Kehl*, 148 Wis. 2d 225, 434 N.W.2d 816 (Ct. App. 1988) (one must have capacity to consent to create an agency). A person who has been adjudicated as incompetent is presumed not to be sound of mind, and then, is unable to execute a valid HCPOA. *See* Wis. Stat. 155.05(1).

A POAF contains a provision nominating a guardian. If the agent is deceased, does the person named as the proposed guardian become guardian automatically?

No, the nominated guardian is not the actual guardian. A guardianship action is still necessary if (a) a decision-maker is needed because of the individual's incapacity and (b) no other decision-maker or lesser restrictive option is available. Wis. Stat. § 244.08(1) allows the principal to name a proposed guardian should a guardianship ever be pursued for the principal. This provision only informs the court who the principal wishes to be his or her guardian if a guardianship is ultimately needed. It does not mean a guardian has been or will be appointed, and it does not necessarily result in the named person becoming the guardian. The person named is "for consideration by the court" during the guardianship action. *Id.* The court will appoint whomever it believes will be in the proposed ward's best interest. ❒

Wisconsin Attorney General Reviews Emergency Detention

Questions Submitted by Wisconsin Speaker of the House

On November 12, 2015, Wisconsin Attorney General Brad D. Schimel provided an opinion on emergency detention. *See* WI OAG-04-15 (2015). AG Schimel reviewed three questions asked by Speaker Robin Vos, Wisconsin State Representative, Chairperson of the Assembly Committee on Organization, and as part of the Speaker's Task Force on Mental Health.

The opinion reviewed the following three issues:

1. The right of the individual to make health care decisions when in custody by a law enforcement officer during an emergency detention;

2. The authority of the law enforcement officer to make health care decisions for the individual in custody; and

3. The duty of the health care provider to the individual and public when the county and law enforcement officer do not proceed with the emergency detention. *Id.* at ¶ 1.

AG Schimel reached the following opinions:

1. **Right of Individual to Make Health Care Decisions** A competent individual in custody has the right to make his or her own healthcare decisions. Absent an adjudication of incompetency, an individual is presumed able to make decisions about his or her medication and treatment and may make his or her own healthcare decisions. Such an ability stems from the person's rights to self-determination and informed consent and is recognized by Wisconsin law. *Id.* at ¶4-8.

2. **Authority of Law Enforcement Officer.** The law enforcement officer has no authority to make health care decisions (assuming the officer is not the health care power of attorney agent or guardian of the person) for the individual in custody. No statutory authority exists to justify the officer making health care decision. The officer's role is to transport the detained individual in custody only. *Id.* at ¶ 9-14.

3. **Duty of Health Care Provider.** The questions asked assume the county and officer declined to take the individual into custody. Considering this, the AG reviewed the duty of care to the patient and the liability exemption under Wis. Stat. § 51.15(11) provided to health care providers when an individual is detained. Wis. Stat. § 51.15(11) provides that an individual acting in accord with the law is not liable for those actions taken in good faith. However, the application of this is not unqualified. If health care provider does not consider a commitment, the statutory provision does not apply. If the health care provider acts in a matter beyond the scope of the statutory authority, this provision also does not apply. When Wis. Stat. § 51.15(11) does not apply, the health care provider has the duty to provide the appropriate standard of care and must take "reasonable steps to prevent harm." statutory provision does not apply.

The full opinion may be found at the Attorney General's website:
https://docs.legis.wisconsin.gov/misc/oag/recent/oag_4_15) *(last visited November 24, 2015).* ❑