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The Guardian

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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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Powers of Attorney: Understanding the Process

by Atty. Susan Fisher, Wisconsin GSC Managing Attorney

Recently, the Wisconsin Guardianship Support Center (GSC) has had a stream of calls and inquiries about the different processes related to Powers of Attorney (POAs). The purpose of this article is to review the applicable law related to those processes.

There are four stages in the life of a power of attorney (POA). The four stages are execution, activation, deactivation, and revocation. If valid, a POA will be involved in at least one of these stages. For example, all valid POAs must be executed. However, depending on the person and his or her circumstances, not all of the other three stages may be involved.

Execution

When discussing a POA, execution is the act of the principal consenting to the terms of the POA and signing the document. Each type of POA has specific requirements for how to sign valid a POA.

A Health Care Power of Attorney (HCPOA) must be signed by the principal (or by someone else at the express direction and in the presence of the principal). The principal must also sign the document in the presence of two disinterested witnesses. To be a disinterested witness, the witness **cannot** be a relative (by blood or marriage); the health care provider or an employee of the health care provider, unless a social worker or a chaplain; or the HCPOA agent. *See* Wis. Stat. § 155. 10. To memorialize what they have witnessed, the two witnesses then sign and date the HCPOA.

Questions sometimes arise regarding the use of a notary as a witness for a HCPOA. By law, two disinterested witnesses are required. One of those witnesses could be a notary, if one felt that was needed, or there could be two witnesses and a notary. However, having one notary as a witness does not equate to two disinterested witnesses.

A Power of Attorney for Finances and Property (POAF) must be signed by the principal (or by another in the principal's presence and upon his or her direction). While not required, the act of executing before a notary is strongly recommended. A POAF executed before a notary is presumed to be genuine. *See* Wis. Stat. § 244.05.

As stated, all POAs must be executed and executed in the manner prescribed by law to be valid. If a POA was not executed correctly, the only way to remedy the error is to execute a new POA.

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Title: Walworth County Dept. of Health & Human Services v. M.M.L.
Date: July 15, 2015
Citation: 2014 AP 2845
Affirmed

Summary

M.M.L. appealed an order for involuntary commitment and medication arguing there was insufficient evidence to find her dangerous under Wis. Stat. § 51.20(1)(a)2.c. M.M.L. argued the court erred by allowing an expert to testify about hearsay statements made by family members and contained in her treatment records. The Court of Appeals found that the circuit court did not rely on hearsay statements except as a basis for the expert's opinion. The Court of Appeals, affirming the circuit court, held that the circuit court could rely on an expert's conclusion regarding the ultimate issue of dangerousness and did not need independent evidence of recent acts and omissions showing impaired judgment.

Case Detail

In April 2014 M.M.L's aunt, Kimberly, called the police because the family could not care for M.M.L. anymore. Kimberly told the police that M.M.L. was not eating regularly, did not bathe, had been talking to her deceased grandfather, and walked around aimlessly at night. The officer reported that M.M.L. seemed confused and did not appear capable of caring for herself.

Four witnesses testified at the probable cause hearing on April 24, 2014. At the hearing, the circuit court found probable cause to find M.M.L. dangerous to herself and others.

Between the probable cause hearing and the final hearing, two court appointed doctors reviewed M.M.L.'s treatment records and emergency detention report and examined M.M.L. personally. Dr. VerWert concluded that M.M.L. had a severe degree of impaired judgment and ability to recognize reality necessary for ordinary life. Dr. VerWert stated that M.M.L. presented a "probability of physical impairment or injury to self because of impaired judgment manifested by evidence of a pattern of recent acts or omissions."

Dr. Rawski also reviewed the treatment records of M.M.L. In his testimony, he mentioned reports from M.M.L's family members of strange behavior for weeks leading up to the police intervention. He concluded that M.M.L. was a risk of harm to herself and not able to satisfy her basic needs to safety and shelter. (Wis. Stat. § 51.20(1)(a)2.c, d).

At the final hearing, Dr. Rawski testified as the only witness for the county. The circuit court then concluded that M.M.L. was dangerous under the third standard noting that the specific behaviors related to the finding of dangerousness were "the taking of proper nourishment, being a hazard, and going out into the community."

On appeal, M.M.L. argued the circuit court erred in finding the county met its burden to present sufficient evidence of dangerousness because the circuit court relied on inadmissible hearsay testimony. M.M.L. argued that without the hearsay testimony there was no evidence of recent acts and omissions showing dangerousness.

The third standard for dangerousness requires an individual to display "such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals." Wis. Stat. § 51.20(1)(a)2.c. The county argued that reliance on the hearsay statements is admissible because the same judge presided in both hearings, the same counsel represented M.M.L., and the witnesses in the probable cause hearing were subject to cross examination.

The Court of Appeals found that the circuit court did not rely on the hearsay statements in Dr. Rawski's report, except as a basis for Dr. Rawski's conclusions. Wisconsin Statute § 51.20(9)(a)5 states "the subject individual's treatment records shall be available to the examiners." The Court of Appeals held the county met its burden to show that M.M.L. was dangerous to herself under Wis. Stat. § 51.20(1)(a)2.c because it is permissible for a court to rely on the expert's observations and conclusions regarding the issue of dangerousness. The Court of Appeals concluded that independent evidence of recent acts and omissions showing impaired judgment were not necessary.

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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.

Title: In the Matter of the Mental Commitment of Kent F.: Milwaukee County v. Kent F.
Date: August 18, 2015
Citation: 2015 AP 388
Affirmed

Summary

Kent F. (hereinafter "Kent") appealed an order extending his Ch. 51 mental health commitment arguing Milwaukee County failed to prove by clear and convincing evidence that he was a proper subject for treatment. Kent argued he was not a proper subject for treatment because he was not capable of rehabilitation. The Court of Appeals affirmed the circuit court finding that the county presented sufficient evidence that Kent is capable of rehabilitation through continued treatment.

Case Detail

Milwaukee County Department of Health and Human Services filed a motion on August 27, 2014, requesting an extension of Kent's commitment. To extend a Ch. 51 mental health commitment, the county must prove that Kent was 1) mentally ill, 2) dangerous, and 3) proper subject for treatment. The definition of treatment includes "psychological, educational, social, chemical, medical or somatic techniques designed to bring about rehabilitation of a mentally ill...person." (Wis. Stat. § 51.01(17)).

To meet this burden, the county called two witnesses — Dr. Kozewski and Dr. Rainey — to testify. Dr. Kozewski testified that Kent "functions far better" when he is taking medication. Dr. Kozewski further explained that when Kent does not take medication at a "therapeutic level" he has intense hallucinations and hears voices. Dr. Kozewski opined that Kent could be placed in a less restrictive facility if he continued to take his medications.

Dr. Rainey testified that if treatment were stopped, Kent would be a proper subject for commitment. Dr. Rainey said that Kent's mental illness was treatable and explained that treatment could improve Kent's symptoms and prevent his condition from reoccurring.

On appeal, Kent concedes that he meets the first two requirements for commitment extension, but argued that he was not a proper subject for treatment. Kent argued that medication can only control his symptoms, not rehabilitate. He asserted that an inability to rehabilitate makes him inappropriate for commitment under Ch. 51 basing his argument on the Supreme Court decision in Fond du Lac County v. Helen E.F, 2012 WI 50, 340 Wis. 2d 500.

The Wisconsin Supreme Court in Helen E.F. stated "if treatment will 'go beyond controlling ... activity' and will 'go to controlling [the] disorder and its symptoms,' then the subject individual has rehabilitative potential, and is a proper subject for treatment." The Court of Appeals understood Helen E.F. to mean that "an individual is capable of rehabilitation and thus a 'proper subject for treatment' under Ch. 51 if treatment will control or improve the individual's underlying disorder and its symptoms." The Court of Appeals found that Dr. Rainey and Dr. Kozewski's testimony that Kent is capable of improvement if he remains in the facility with a medication structure to be sufficient evidence that Kent is a proper subject for treatment. ❒

Hello everyone!

My name is Grace Knutson — I am filling in for Susan Fisher this fall as the interim managing attorney for the Wisconsin Guardianship Support Center. I have been working at the GSC since July, so my name might be familiar to some of you. I also previously externed at the Greater Wisconsin Agency on Aging Resources through a program at UW law school. I'm very happy to be back.

For a little background on myself, I was raised in Madison, Wisconsin, and recently graduated from the University of Wisconsin Law School. I have my bachelors in French and Global Studies from the University of Wisconsin-Eau Claire. Throughout law school, I was involved in research on children's civil rights, worked on the *Wisconsin International Law Journal*, and worked as a research assistant in the family law program.

I hope you will continue to use the GSC as a resource for your questions on guardianship, protective placement, and other advance directives. I have enjoyed working with some of you already and look forward to interacting with more of you this fall.

Sincerely,
Grace Knutson

Powers of Attorney, *continued from page 1*

Activation

Activation is the process that gives the POA agent the authority to act on the principal's behalf as allowed by the POA.

The process used to activate a POA can be very specific to each POA. For example, a POAF may be activated when it is signed (i.e., upon execution), if the principal is declared incapacitated, upon another event such as a deployment, or for a specific period of time. *See* Wis. Stat. § 244.09. Unless otherwise stated in the HCPOA, many HCPOAs are often activated upon the principal being declared incapacitated by two physicians or one physician and one psychologist. *See* Wis. Stat. § 155.05(2).

Deactivation

The next stage – deactivation – is often misunderstood. First, deactivation generally applies to POAs that have been activated upon incapacity. Deactivation is the process that reflects the principal being able to make his or her own medical or financial decisions once again. It does not result in the invalidation of the POA; it just removes the agent's authority to act. A deactivated POA may also be activated at a later time if the principal becomes incapacitated.

Deactivation may occur informally, when an incapacitated person regains the ability to make his or her decisions. It may also be shown through a formal process. For example, one method that is often followed to deactivate a HCPOA is to have two doctors examine and determine in their medical opinion the person has regained his or her capacity. There is no statutory deactivation procedure or provision within either Wis. Stat. Ch. 155 or 244; therefore, there is no statutorily required deactivation process that must be followed.

Revocation

The final POA stage is revocation. Revocation is the act of terminating the POA so that it is invalid and can longer be used. Upon revocation, the agent no longer has authority to act through that POA.

Only the principal or the court (including as a result of a court's action such as granting a divorce) may revoke a POA. The method used to revoke a POA depends on the type of POA one has.

A HCPOA may be revoked by the principal in several ways, including defacing, obliterating, or destroying the HCPOA; writing a short statement describing the principal's intent to revoke that is then signed and dated by the principal; verbally expressing his or her intent to revoke in front of 2 witnesses; or the execution of a new HCPOA. *See* Wis. Stat. § 155.01(a-d).

A POAF may terminate when the principal revokes the document or the agent's authority[1]. *See* Wis. Stat. § 244.10(1)(c) and 244.10(2)(a). Wis. Stat. Ch. 244 does not provide any express guidance on how to revoke a POAF. A commonly accepted revocation method is for the principal to write and sign a short statement describing his or her intent to revoke the POAF. Examples of this type of statement for both types of POAs may be found on the Wisconsin GSC's webpage – www.gwaar.org/wi-guardianship-support-center

A question that often is asked about POAs is: when may they be revoked? Per Wis. Stat. § 155.40(1), "a principal may revoke his or her power of attorney for health care and invalidate the power of attorney for health care instrument at any time..." *Id.* No provision requires the principal to be capacitated – the law states the principal may revoke his or her HCPOA "at any time."

A valid question regarding the "at any time" language could be raised when the principal has also been adjudicated as incompetent, the court does not revoke the POA, but a guardian is still appointed to handle some specific responsibility. Considering there is no statutory language excluding situations involving guardianships within Ch. 155 and the court had the legal authority to revoke under Ch. 54 for good cause, a strict reading of the law would require the ability to revoke after guardianship and the guardian, or another, to pursue the expansion of the guardian's powers. Like Wis. Stat. Ch. 155, Wis. Stat. Ch. 244 contains no reference to when a principal may or may not revoke his or her POAF. The statute simply provides the agent no longer has authority to act when the principal revokes the document or

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[1] A POAF may also terminate for other reasons such as death of the principal, the end of a specific period articulated within the POAF. For a full review of when a POAF may terminate or when an agent's authority may end, *see* Wis. Stat. § 244.10.

Helpline Highlights

The Wisconsin GSC receives many calls and emails about guardianships, powers of attorney, other advance directives, and more. The following are examples of some of the questions received and responses given through the Guardianship Support Center. All personal and identifying information has been removed from each selection to protect the privacy of the individuals involved.

1. What are the requirements for when a proxy can sign a HCPOA for the principal? Who can be the proxy?

A principal may sign his or her own HCPOA in front of two disinterested witnesses. If the principal has a physical disability that impacts his or her ability to sign, the principal may still execute a valid HCPOA. Someone else may sign for the principal so long as the person signing 1) is an adult, 2) is signing at the principal's express direction, and 3) signs in the principal's presence. Wis. Stat. § 155.10(1)(b).

There are no other specific guidelines about this individual. Arguably, it may be better to not have an interested person, such as a family member, agent, or health care employee sign. It may also be preferable to document any specific information about the individual that may apply. However, the law is silent in this regard and does not specify any other requirements than the three listed within the statute.

2. Who must file a report of financial, physical, or verbal abuse?

Wisconsin Statute §46.90(4) governs the elder abuse reporting system. Included in the list of individuals that are **mandatory** reporters are:

- An employee of an entity licensed, certified, approved by, or registered with the Department of Health Services;
- Health care providers (defined in Wis. Stat. § 155.01(7));
- Social workers, professional counselors, or marriage and family therapists.

According to the statute, if any of the above listed individuals has seen an elder adult at risk in the course of the person's professional duties, he or she shall file a report if the elder adult at risk has requested the person to make a report, or if the mandatory reporter has reasonable cause to think that any of the following situations pertains:

- The elder adult at risk is in imminent risk of serious bodily harm, death, sexual assault, or significant property loss AND is unable to make an informed judgment about whether to report the risk

An individual specified above as a mandatory reporter is not required to file a report if any of the following applies:

- If the person believes that filing a report would not be in the best interest of the elder adult at risk. In this case, the person shall document the reasons for this belief in the case file.
- If a health care provider gives treatment by spiritual means through prayer for healing in lieu of medical care in accordance with a religious tradition and his or her communications with patients are required by his or her religious denomination to be held confidential.

Following the language of the statute, a report **must** be filed if there is reasonable cause to believe the elder adult at risk is in imminent risk of serious bodily harm, death, sexual assault, or significant property loss and is unable to make an informed judgment about whether to report the risk, unless the mandatory reporter believes it would not be in the best interest of the elder adult at risk to file a report. A reason for the belief that reporting would not be in the best interest must be documented.

3. Are Powers of Attorney executed in foreign languages valid?

Executing a power of attorney in English is not one of the requirements in the Wisconsin statutes to create a valid power of attorney. A foreign language version of a power of attorney document can be used assuming the requirements for valid execution are met. The state POA form is not translated into languages other than English, however several organizations provide foreign language versions of advanced directive forms.

To ensure the validity of any advanced directive, the notice statement found in Wis. Stat. § 155.30 (1) must be included.

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4. When should parents start to think about adult guardianships over their minor children?

In Wisconsin when a person turns 18, he or she is considered his or her own decision-maker. Wisconsin is not a "next of kin" state where parents and family members can make decisions for one another. All adults are presumed competent upon turning 18. The presumption of competence is not overcome until a court determines an individual is incompetent, and appoints a legal decision-maker. An individual has to be at least 17 years and 9 months old to be deemed incompetent. Wis. Stat. § 54.10(3)(a)1. Ideally, a petition for guardianship would be granted before or on a child's 18th birthday. Without a guardianship, regardless of the individual's capabilities, he or she has a right to make his or her own decisions upon turning 18.

For more information, please consult the Guardianship Support Center publication titled, "Transitioning to Adulthood: Guardianships and Children with Severe Disabilities."

5. Is an individual who was adjudicated incompetent able to complete a valid HCPOA?

No. According to Wisconsin Statute § 155.05(1), an individual who has been deemed incompetent by the court is presumed not to have the required soundness of mind to validly execute a health care power of attorney in Wisconsin.

6. What is the procedure for transfering a guardianship from another state into Wisconsin?

Wisconsin does not recognize foreign guardianships (guardianships from another state) without formal acceptance. There are two options to initiate formal acceptance of an out-of-state order in Wisconsin.

- Petition for receipt and acceptance of the foreign guardianship
- Petition for a new guardianship in Wisconsin

In situations where a guardianship will be transferred from one state to another, both states are often involved. It is necessary to coordinate the requirements of the home state with Wisconsin's requirements for accepting a guardianship.

In practice, there are sometimes reasons to petition for a new guardianship rather than filing a petition for the receipt and acceptance of a foreign guardianship. These reasons could include time-related delays with a foreign court involving certified copies, problems with the court's review of the guardian's standing, or the need for a clarified order or a guardianship order reflecting the law in Wisconsin. It is also important to note that the issue of competency will be reviewed by the court within new guardianship proceedings. ❐

Upcoming Events

2015 Adult Protective Services Conference

Date: October 14-16, 2015
Location: Glacier Canyon Lodge Conference Center at the Wilderness Resort, Wisconsin Dells, WI

Self Determination Conference

Date: November 9-11, 2015
Location: Kalahari Resort, Wisconsin Dells, WI
More information: WI-BPDD.org

FOCUS Conference

Date: November 17-19, 2015
Location: Wisconsin Dells, WI

If your organization or agency is hosting a statewide event related to those commonly discussed subject in *The Guardian* and you would like to spread the word, contact the GSC at guardian@gwaar.org.

Update! State Budget 2015-2017

The article, "Governor Proposes Changes to Long-Term Care, SeniorCare Programs" published in the March 2015 issue of *The Guardian* outlined proposed changes to several state benefit programs. On July 12, 2015, Governor Walker signed the 2015-17 budget into law. The 2015-17 budget includes several changes that may be of interest to guardians and wards.

Aging and Disability Resource Centers (ADRCs)

The Governor's budget proposal allowed counties the option to contract with various entities to provide ADRC services instead of counties and tribes providing the services. The final budget requires DHS to evaluate the functional screening and options counseling programs for reliability and consistency among ADRCs. It also required DHS to provide a report by January 1, 2017, to evaluate which responsibilities of ADRC governing boards are repetitive with the current DHS procedures and propose changes to remove any duplications no later than July 1, 2016.

Family Care

The final budget provides for the possibility of change in oversight and structure of Family Care. The budget gave DHS the authority to determine the number of managed care regions, without requiring a minimum number of regions. This leaves the option to move forward with one statewide area, but does not prevent DHS from maintaining the current managed care regions.

DHS is required to submit a waiver requesting changes to Family Care and IRIS. If the new waiver is approved, programs such as COP, CIP, and CORP will be eliminated when the new Family Care benefit system is available statewide. Additional requirements include: 1) specifying that consumers receive both long-term care and acute care services, 2) requiring multiple integrated health agencies (IHAs) in all regions, 3) allowing for audits of providers, and 4) preserving the "any willing provider" requirement for long-term care providers for a minimum of three years after the implementation date of the program in each region.

Points of Interest

Update! In the March 2015 issue of *The Guardian*, we published an article on the ABLE Act. On August 10, 2015, Wisconsin signed the ABLE Act into law.

The Act allows individuals who became disabled prior to age 26 to establish a tax-free savings account to later be used for "qualified disability expenses." The U.S. Treasury Department is currently drafting regulations to clarify the details of the Act. ABLE accounts are expected to be available in Wisconsin sometime in 2016.

The remaining counties that run legacy waiver programs will transition to the current Family Care and IRIS programs by January 2017 or a later date determined by DHS. When the new system is authorized, all counties will transition to the new system.

Include, Respect, I-Self Direct (IRIS)

IRIS will be eliminated as a separate program, although not immediately. Self-direction will be included in managed care when the new long-term care system is approved. Along with Family Care, the new self-direction option will be provided by the newly mandated integrated health agencies (IHAs).

SeniorCare

The Governor proposed to require adults aged 65 and older needing prescription drug coverage to apply for, and if qualified, enroll in Medicare Part D instead of automatically enrolling in SeniorCare. However, this change was not included in the budget. SeniorCare will remain as it is now. ❑

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the authority. *See* Wis. Stat. § 244.10(1)(c) and 244.10(2)(a). As there is no provision limiting the principal's authority to revoke, this statute could also be read to allow revocation at any time. ❑