Greater Wisconsin Agency on Aging Resources, Inc.

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.

To contact the GSC—

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

Website: gwaar.org

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Authority of a HCPOA Agent to Consent to Admissions Contested by the Principal

While the authority may be broad in some situations, a health care power of attorney (HCPOA) agent has only the statutorily defined authority to make health care decisions for a principal with an activated HCPOA. At times, the agent has no legal authority make certain types of health care decisions. This article will focus on the HCPOA agent's limitations on authority generally and in some specific situations.

Agent's Authority

A HCPOA agent's authority is limited to making health care decisions consistent with the principal's expressed wishes, the HCPOA document, and the law. *See* Wis. Stats. § 155.20(2)(c)2c, 155.20(5), and 155.20(1).

The HCPOA agent has the authority to make only health care related decisions. These decisions may include "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). Any decision made by an agent must be a health care decision or it is likely outside the agent's scope of authority.

The HCPOA agent's authority to make health care decisions is not unfettered. The agent must always act as would be consistent with the principal's expressed wishes, given at any time, and the HCPOA document. Wis. Stat. § 155.20(5) (The agent is required to "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…"). *Id. See also* Wis. Stat. §155.05(4) ("The desires of a principal who does not have incapacity supersede the effect of his or her power of attorney for health care at all times."); and Wis. Stat. § 155.30, ("You have the right to make decisions about your health care. No health care may be given to you over your objection…") *See also* Wis. Stat. § 155.20(1). By law, these wishes must be followed "at any time." Certain types of authority, such as making end-of-life decisions or consenting to facility admission, must be expressly stated or the agent also has no authority to act. Wis. Stat. § 155.20

Wisconsin law provides that a principal's wishes on his or her own treatment and care must be followed if those wishes are known. Wis. Stat. § 155.20(5). Only when wishes are unknown may the

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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 Protective Placement of Christopher A.G..: Sheboygan County v. Christopher A.G.
Date: February 25, 2015
Citation: 2014 AP 2489
Court: Wisconsin Court of Appeals

Summary: Christopher A.G. (hereinafter "Christopher") appealed his order for continuation of his protective placement. The court of appeals reversed and remanded, finding that the circuit court erred in holding a due process hearing on Christopher's protective placement without his physical presence or his guardian ad litem (GAL) waiving his attendance in writing prior to the hearing.

Case Detail: The court placed Christopher in protective placement in 1999 because of his requirement for round-the-clock care and supervision due to a developmental disability. On April 1, 2014, the County petitioned for an annual review of his protective placement and his GAL requested that a full due process hearing be held. Prior to the hearing, Christopher's counsel wrote a letter to the court raising concerns that the court had not previously complied with Wis. Stat. § 55.10(2), which requires Christopher's attendance at the hearing or a valid waiver by the GAL certifying the specific reasons why the individual is not able to attend.

On May 22, 2014, the court held the due process hearing without Christopher in attendance and the GAL failed to waive his attendance in writing prior to the hearing as required. Christopher's counsel objected to the court's competency, stating "if we are going to do this, let's do it right." *Id.* at ¶ 4. The County said that "if it's such a big deal," Christopher could attend by phone. The court then ordered the protective placement to be continued at the hearing; five days after the hearing the court received a letter waiving Christopher's attendance. *Id.* at ¶ 5. Christopher appealed.

When requested by the appropriate party, the circuit court "shall" hold a hearing that complies with Wis. Stat. § 55.10(2)-(4). The GAL may waive an individual's attendance after a personal interview, but the GAL is limited to considering "the ability of the individual to understand and meaningfully participate, the effect of the individual's attendance on his or her physical or psychological health in relation to the importance of the proceeding, and the individual's expressed desires." Wis. Stat. § 55.10(2). The GAL must certify his or her position waiving the individual's attendance and provide his or her reasoning about why the individual to the court in writing.

The court of appeals stated that "this case reflects the unfortunate reality that easy cases result in sloppy actions." *Id.* at ¶ 9. While all parties agreed that Christopher needed protective placement, all statutory requirements should be met "so as to ensure that Christopher remained in a facility that he enjoys." *Id.* The court of appeals reversed and remanded, finding that both the County and the GAL failed in their responsibilities to Christopher, which caused "the circuit court to lose competency to proceed on the petition and enter a valid order. *Id.* at ¶ 8.

Title: In the Matter of the Mental Commitment of Brian C.: Winnebago County v. Brian C.
Date: March 11, 2015
Citation: 2014 AP 2792-FT
Affirmed

Summary: Brian C. (hereafter "Brian") appealed his involuntary medication order arguing that the County failed to prove he was incompetent to refuse medication. The appellate court, affirming the circuit court, found that, by the clear and convincing evidence presented, Brian was substantially incapable, under Wis. Stat. § 51.61(1)(g)(4), to make the informed choice to refuse psychotropic medications.

Case Detail: On September 4, 2014, Brian returned to the Wisconsin Resource Center (WRC). During his time at the WRC, he suffered from delusions and has been "decompensating," according to testimony, since being off medication. Brian did not consent to take psychotropic medications; and based upon testimony, he felt that "exercise, fresh air, and food" would keep him stable. *Id.* at ¶ 13. On September 15, 2014, the County filed a "Petition for Medication during Detention or Commitment," to involuntarily medicate Brian with psychotropic medication. The circuit court issued an order approving the petition. Brian appealed.

On appeal, Brian argued that the record failed to indicate when and if the statutorily required explanation of the mediation was provided. The appellate court rejected this argument finding that Brian's examining psychiatrist testified at the hearing that over the "last several weeks" she "attempted to explain to [Brian] the psychotropic medications," includ-

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ing sufficient explanation of the “benefits and possible side effects.” *Id.* at ¶ 9-10.

Brian also argued that the County failed to prove that he was “substantially incapable” of understanding the advantages, disadvantages, and alternatives to psychotropic medications. The court also rejected this argument. Brian testified he did not believe he had a mental illness and advantages of Abilify “are only theory-based,” which contradicted the psychiatrist’s accepted testimony. The appellate court found that because Brian did not recognize his mental illness and he was substantially incapable of applying an understanding of the benefits of a medication for that illness. *Id.* at ¶ 18.

Title: In the Matter of the Mental Commitment of P.H.: Dane County v. P.H.
Date: March 12, 2015
Citation: 2014 AP 1469
Affirmed

Summary: P.H. appealed the extension of her involuntary commitment arguing that there was insufficient evidence to support the extension because the “dated” expert testimony failed to prove that she would be a proper subject for commitment if treatment were withdrawn. The court of appeals held that P.H.’s argument was inadequate because the experts could testify to the patient’s entire treatment record as a matter of law and the evidence was sufficient to extend the commitment.

Case Detail: In February 2009, P.H. became subject to a mental health commitment order. In April 2014, the county filed a petition to extend P.H.’s current outpatient commitment order an additional 12 months citing her “long history of noncompliance with mental health treatment,” including that she has a history of stopping treatment when not subject to a court order and has “been found wandering the streets in sub-zero temperatures, without adequate clothing to protect her from the cold.” A commitment extension hearing was held where the County’s two expert witnesses testified and the circuit court ordered her commitment extended. P.H. appealed. *Id.* at ¶ 2-3.

The County must show by clear and convincing evidence that P.H. is in need of continued commitment. Wis. Stat. § 51.20(13). P.H. admitted she suffered from mental illness and is a proper subject for treatment but disputed whether there was “a substantial likelihood based on [her] treatment record, that [she] would be a proper subject for commitment if treatment were withdrawn.” *Id.* at ¶ 7. Specifically, she argued that the expert ignored her improvements since December 2012. *Id.*

The appellate court held that, as a matter of law, a circuit court may rely on older information to extend a commitment order if the order was “that the acts or omissions relied on must be recent behavior may be satisfied by showing that there is a substantial likelihood, based on the patient’s treatment record.” *Id.* at ¶ 9 [quoting *M.J. v. Milwaukee County Combined Community Services Bd.*, 122 Wis. 2d 525, 530, 362 N.W.2d 190 (Ct. App. 1984)].

Furthermore, the appellate court held the testimony sufficient to support the circuit court’s finding that the County met its burden of proof. The experts relied on P.H.’s entire treatment record, including her episodes of “decompensation” before December 2012, her improvement on medication since, her ability to live in the community, and her belief that she does not require medication. The experts’ testimony sufficed to support the circuit court’s extension of the commitment. *Id.* at ¶ 10-15.

Title: In the Matter of the Mental Commitment of J.N.B.: Rock County v. J.N.B.
Date: March 26, 2015
Citation: 2014 AP 774
Affirmed

Summary:
J.N.B. appealed his involuntary commitment order arguing that the County failed to prove he was a danger to himself. The court of appeals, affirming the circuit court, held that the County presented sufficient evidence, including two credible medical expert witnesses, who demonstrated that J.N.B. was dangerous to himself or others.

Case Detail: On October 23, 2013, J.N.B. went to the Rock County Courthouse and requested a meeting with the district attorney. Upon learning that he was unavailable, J.N.B. became disorderly and two sheriff deputies escorted him out of the building. At the probable cause hearing, the deputies tes-

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agent apply the best interests standard. "In the absence of a specific directive by the principal or if the principal's desires are unknown, the health care agent shall, in good faith, act in the best interests of the principal in exercising his or her authority." Wis. Stat. § 155.20(5).

Any authority given, even if expressly stated in the HCPOA, is limited by the HCPOA agent's responsibility to follow the principal's expressed wishes made at any time. Per Wis. Stat. § 155.20(5), the principal has the right to change those wishes if he or she so chooses.

The agent's role in the priority of decision-makers never supersedes the principal's authority. Wis. Stat. § 155.20(1)("…[T]he health care agent who is known to the health care provider to be available to make health care decisions for the principal has priority over any individual other than the principal to make these health care decisions").

Communication of the principal's wishes is not required to be in spoken language. Physical demonstrations may reflect one's wishes. "If I am unable, due to my incapacity, to make a health care decision, my health care agent is instructed to make the health care decision for me, but my health care agent should try to discuss with me any specific proposed health care if I am able to communicate in any manner, including by blinking my eyes." Wis. Stat. § 155.30.

Consent to Nursing Home or CBRF Admissions

An agent has the limited ability to provide consent to admitting the principal into a nursing home or a community-based residential facility (CBRF). Such authority to give this consent must first be given specifically within the HCPOA. Wis. Stat. § 155.20(2)(c)2.c. If the principal later objects to the admission, that objection must be considered by law, and historically, a protective placement and guardianship has been sought if that level of care is needed.

No legal authority exists to continue on with the admission, without first obtaining a guardianship and a protective placement, if the principal objects to it. Wis. Stat. § 55.055(4) provides that an admission to a nursing home or CBRF, as allowed by the HCPOA, and "in accordance with ch. 155… is not a protective placement under this chapter." An admission to a nursing home or a CBRF based upon the agent's placement may not require a protective placement, but such an admission must be consistent with Wis. Stat. § Ch. 155 to not require guardianship and protective placement. The agent has no authority to continue the admission process without a protective placement and a guardianship if the principal's wishes have changed, the authority has been withdrawn, or if the authority was never provided within the HCPOA.

Other admissions are also prohibited. A HCPOA agent may not consent to the principal's admission into "an institution for mental diseases,… [a]n intermediate care facility for persons with an intellectual disability,…[a] state treatment facility, as defined in s. 51.01,… [a]treatment facility, as defined in s. 51.01 (19)," or a nursing home or CBRF if the principal has a diagnosed developmental disability or mental illness. Wis. Stat. § 155.20(2). The HCPOA may also not consent "to experimental mental health research or to psychosurgery, electroconvulsive treatment or drastic mental health treatment procedures for the principal." Wis. Stat. § 155.20(3).

Additional Rights Retained by the Principal

If the agent has exceeded his or her authority or the principal otherwise wishes to, a principal has the right to revoke the HCPOA "at any time." Wis. Stat. § 155.40. Wis. Stat. Ch. 155 contains no language restricting the time of revocation to capacity or to even competency.

If an agent (or another person) withholds knowledge of a revocation, that agent could be fined up to $1,000 or be imprisoned for up to nine months. Wis. Stat. § 155.80(4).

Any interested party may also petition to review the HCPOA agent's conduct and ask for court review. Wis. Stat. § 155.60(4). As part of the court's review, the court can direct the agent to a particular action, require the agent to report to the court periodically, or remove the agent from his or her role. *Id.*

Principal's Rights and Infringement

Placement by or continued placement by an agent raises particular issues if that principal objects to the placement. Individuals with HCPOAs may have similar physical or mental states as those under guardianship and protective placement. No annual review is afforded to a principal placed in facility by an agent. Both those protectively placed and those

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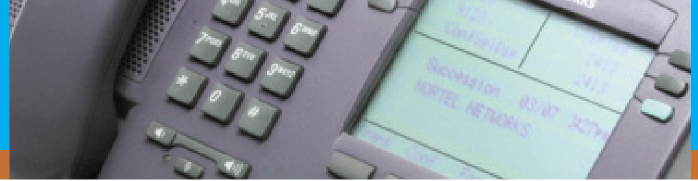
Helpline Highlights



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. Must an activated HCPOA be deactivated formally before a subsequently executed HCPOA is executed?

No, an activated HCPOA is not required to be formally deactivated before a subsequently executed HCPOA can be validly executed.

Sometimes deactivation is seen as a requirement before a new HCPOA is recognized. This specific requirement is incorrect. It appears to stem from confusion about the law regarding deactivation and the specific legal requirements for the execution of a HCPOA and incapacity.

Deactivation is a process that reflects the person's newly capacitated state after being previously deemed incapacitated and having his or her HCPOA activated. Deactivation may occur informally once the principal becomes able to make his or her own decisions.

Sometimes individuals will go through a formal deactivation process. An example of a formal deactivation process is when two doctors (or one doctor and one psychologist) meet with the individual, declare the person to be capacitated, and then sign a statement of capacity. Some follow a deactivation process that only uses one doctor; some follow a much more stringent process that requires the same two physicians who declared the person incapacitated to declare the person capacitated.

Despite these practices, there is no formal process that must be followed as a matter of law. There is no statutorily required form that must be completed. Again, once a person regains the ability to make his or her own medical decisions, that person's acquisition of this ability deactivates the HCPOA.

The GSC still finds value to formal deactivation because it clarifies the person's state and clearly removes the agent's authority to act. Should the principal become capacitated and want to execute a new will or other legal document, the deactivation documentation can be later reviewed. However, formal deactivation is not required under Wis. Stat. Ch. 155.

Whenever a new HCPOA is executed under these types of circumstances, the correct legal question that must be asked is whether the principal was sound of mind, not incapacitated, when he or she executed the HCPOA. *See* Wis. Stat. § 155.05(1) ("An individual who is of sound mind and has attained age 18 may voluntarily execute a power of attorney for health care").

Incapacity and sound of mind are two different legal standards. Incapacity is defined by Wis. Stat. § 155.01(8) which provides it is the "the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions." "Sound of mind" is not defined within Wis. Stat. Ch. 155. While not defined, a review of related case law indicates that one meeting this standard must understand the general nature of the document, the powers the document will convey and those that will not be conveyed, and the rights and limitations of the document.

Note: HCPOAs that are executed, with incapacity being the standard for activation, and then activated soon after execution (without an intervening event such as a stroke or an accident) may be invalid. Any practice related to the execution of these HCPOAs and these types of specific situations should be avoided.

2. May a guardian prohibit the ward from engaging in sexual activity?

A guardian does not have the legal right to give consent to or, generally, to prohibit sexual activity. Guardianships are not a means to prevent all risky behavior in which the ward may engage. A guardian, likewise, must be careful not to impose his or her belief system on his or her ward.

The freedom to engage in sexual activity is a constitutional right, specifically including the right to privacy and the freedom of association. In addition, Wis. Stat. § 54.25(3) requires the guardian to "place the least possible restriction on the [ward's] personal liberty and exercise of constitutional and statutory rights..." and "to make diligent efforts to identify and honor the individual's preferences with respect to choice of place of living, personal liberty and mobility, choice of associ-

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ates, communication with others, personal privacy, and choices related to sexual expression and procreation." *Id.*

A guardian considering whether to limit the ward's sexual activity must use great care and fully consider all applicable law before acting.

If this issue arises, several questions that should be asked include the following:

A) **Does the ward have the capacity to consent to the sexual activity? If so, is the ward consenting to sexual relations with the specific person?**

If the person is not capable of consenting to or is not consenting to the sexual activity with a specific person, the sexual activity is sexual assault. A guardian should then act as the advocate for the person and pursue the necessary recourse that would be in the ward's best interest.

The Board of Aging and Long Term Care Ombudsmen Program has several publications on sexual activity, consent, and capacity. Find materials here: http://longtermcare.wi.gov/docs_by_cat_type.asp?doccatid=644&locid=123&linkid=1016. Ombudsmen Julie Button and Amy Panosh have also written a guest article describing their work on sexuality and consent. Find the article on page 7 of this newsletter. The assessment of the ward's capacity is a key factor.

B) **Did the court, as part of the guardianship, remove the ward's right to consent to sexual activity?**

As a matter of law, the ward retains all rights not specifically removed by the court. Wis. Stat. § 54.18(1). Most guardianship orders and letters of guardianship do not discuss or review the ward's ability or right to be sexually active. Should the right not be removed, a guardian may consider whether to pursue petitioning the court, if he or she deemed it necessary and appropriate, for the right to prohibit sexual activity.

C) **Pay attention to other applicable systems as well.** There are specific rules regarding the limitation and denial of visitors for those wards who are also in a facility. Visitation should be generally allowed unless there is good cause for the limitation or denial and there is a specific treatment, safety, or a security reason allowing the action. The limitation or denial may only be imposed for as long as necessary and when done in the least restrictive way as possible. That type of action also requires a specific procedure to be followed before it can be permitted (i.e., it is not allowable simply because a guardian says visitation is prohibited). Included within that procedure is the ward's right to file a grievance against such limitation or denial and have his or her grievance heard and the receipt of notice of his or her rights. A limitation or a denial should also be reviewed periodically. *See* Wis. DHS Admin. Code Ch. 94.

3. Can a guardian resign?

There is little legal authority describing the resignation process. Statutory provisions regarding stand-by and successor guardians suggest that a guardian may resign. *See* Wis. Stat. § 54.52-54. However, no specific procedure is articulated within Wis. Stat. Ch. 54. Typically, the resignation is accompanied by or followed by a petition for a successor guardian (if there is no stand-by guardian).

It is generally recognized that a guardian may resign from his or her position. Such resignation must be first accepted by the court. Beyond a court possibly rejecting a resignation, a court may also require a guardian to complete certain tasks before accepting the guardian's resignation. A guardian is not excused from his or her responsibilities until the resignation has been approved of by the court.

4. May a first cousin sign as a witness to a HCPOA?

No, a first cousin may not witness the execution of a HCPOA. Wis. Stat. § 155.10(1)(c) requires that the principal execute a HCPOA before two witnesses. Wis. Stat. § 155.10(2)(a) provides that no witness may be related by blood, marriage, adoption, or be the principal's registered domestic partner. Wis. Stat. § 155.01(12) defines a "relative: as one who is related to the principal by blood within the third degree of kinship." ❐

Relationships in Long-Term Care

by Julie Button and Amy Panosh, Ombudsmen - Wisconsin Board on Aging & Long Term Care, *guest writers*

Nationwide there has been recent discussion about an elderly person's right to engage in a sexual relationship. There have been prominent news reports and court cases. The Wisconsin Board on Aging and Long Term Care's (BOALTC) Ombudsman Program, which provides advocacy services for elderly people receiving long-term care in any setting, supports the rights of individuals to engage in relationships. However, the ability of a person to consent to sex is a critical factor that needs to be addressed.

For the last several years, Ombudsmen Amy Panosh and Julie Button have provided training statewide on this topic. The consent content of their presentations leans on Wisconsin case law and analysis done by professionals working in this field. This case law indicates that for a person to consent to sex, the person must be able to know s/he is engaging in a sexual act, must recognize the right to refuse, and must understand the possible medical and social implications of that sexual act. The case law doesn't dictate who should complete this assessment or how that assessment should occur, but it does, at least, provide guidance for the focus of the content of the consent assessment. This seems to imply that traditional cognition screens — such as the mini-mental or clock draw or animal fluency — are not adequate tools for determining consent capability. Assessment of a person's ability to consent to sex must be directly related to the sexual act.

Besides ability to consent, there are many issues that may enter into sexual relationships such as personal history and experiences, culture, religion, genetics, and family relationships. For anyone who conducts the consent assessment, it is critical that one's personal attitudes about sex do not influence the outcome. Team efforts in conducting assessment can be helpful to eliminate any personal biases. Similar to all good assessment practices, recognizing the uniqueness of each individual person is important to assure relationship rights are respected and when necessary, protection for the vulnerable adult is extended accordingly.

Long-term care (LTC) providers are responsible to both respect and promote consumer rights, and also to protect vulnerable adults from exploitation or abuse. To do this, as it relates to personal relationships, the Ombudsman program recommends that every LTC provider develop a policy on client relationships and educate staff, residents, and responsible parties so that rights can be honored and safety is extended to those who need protection. For assistance in policy development, the BOALTC's Ombudsman Program has developed guidance, which can be found at: http://longtermcare.wi.gov. Click on publications and review "Resident Relationships Guidelines", Appendix 1 "Intimacy Sexuality History" and Appendix 2 "Assessment for Consent" as these might assist providers in development of policies. A long-term care provider may also contact their regional Ombudsman at (800) 815-0015. With planning and effort, providers can assure that all persons experience the benefits of healthy relationships. ❒

HCPOA Authority, continued from page 4

subject to mental health commitments have their statuses reviewed periodically. Under both systems, the person is also allowed access to the court, to an attorney, and to contest the placement or commitment. If the admission is against the principal's wishes, the placement is much more likely to be permanent. The agent, the principal's chosen advocate, has consented to the placement although contrary to the principal's chosen wishes, and no periodic review will be performed for a HCPOA principal placed in a facility, consistent with or against his or her wishes.

Execution of a HCPOA does not equate to consenting to placement or to continued placement in a facility against the principal's wishes. While a principal may be informed of the lack of an annual review upon execution, he or she may also be signing the document with the knowledge of the other legal rights maintained by the principal and the realistic belief that those rights would be protected.

If an agent or other entity can ignore or conceal a revocation of the HCPOA or deny the principal's wishes, then these and other provisions, such as the right to petition the court for a review, are illusory. How well a principal would be able to access, let alone successfully navigate the judicial system, would be severely compromised by the placement alone.

Agents are required to act within the scope of their authority. Exceeding the authority granted to him or her by the law and the principal is not permitted. ❑

tified that after being escorted outside, J.N.B. appeared angry and stepped into the street forcing an oncoming vehicle to slam on its brakes to avoid hitting J.N.B. *Id.* at ¶3.

At the final commitment hearing, the County called two medical expert witnesses. The first expert testified that J.N.B. exhibited a "pattern of dangerous behavior," based on the incident, as well as J.N.B.'s interview with the doctor, and his disruptive behavior in the medical unit. *Id.* at ¶ 9. The second expert's testimony included a report indicating that J.N.B caused a number of recent disturbances that required police contact, which indicated a "substantial" risk of danger to himself or others. *Id.* at ¶ 10. J.N.B. also testified on his own behalf, but the circuit court found his answers to be incoherent and unresponsive. Thus, the circuit court found the expert witnesses to be "far more credible" than J.N.B. *Id.* at ¶ 11.

On appeal, J.N.B. argued that the single incident where he "stood in the middle of the street in front of an oncoming car" failed to meet the standard under Wis. Stat. § 51.20(1)(a)2.c., which requires a "pattern of recent acts" demonstrating an individual is dangerous to himself. The Court of Appeals noted that an appellate court must "give substantial deference to the [circuit] court's better ability to assess the evidence." *Id.* at ¶ 12 [quoting *Weiss v. United Fire & Cas.* Co., 197 Wis. 2d 365, 388-89, 541 N.W.2d 753 (1995)]. The Court of Appeals held that the unrebutted expert testimony sufficed to support the circuit court's finding that J.N.B. "is a danger at least to himself" within the meaning of the statute. *Id.*

Title: In the Matter of the Mental Commitment of F.E.K.: Waushara County v. F.E.K
Date: April 30, 2015
Citation: 2014 AP 2987
Court: Wisconsin Court of Appeals
Affirmed.

Summary: On appeal, F.E.K. challenged whether the County met its evidentiary burden of proving him incompetent to refuse medication or treatment. Affirming the circuit court, the Court of Appeals held the County met its burden. F.E.K. was not required to receive an explanation about medically unaccepted unrecognized alternatives to treatment.

Case Detail: F.E.K. appealed an order for continuation of his involuntary medication and treatment arguing the County did not prove him incompetent to refuse medication or treatment under Wis. Stat. § 51.61(1)(g)(4).

At the final hearing, the psychologist who evaluated F.E.K. testified for the County and F.E.K. testified on his own behalf. At the conclusion, the court held that the County met its burden of proving that F.E.K. was not competent to refuse medication or treatment by clear and convincing evidence.

On appeal, F.E.K. argued the County did not meet its burden to prove incompetency because the testifying psychologist, allegedly, did not "explain the alternatives" to F.E.K.'s medication and treatment. *Id.* at 9.

Reviewing the record, the Court of Appeals noted testimony that the psychologist testified that she discussed medications that she opined were "appropriate and necessary," that she discussed the advantages and disadvantages of multiple medications and treatment, that she discussed the potential benefits and side effects of those medications, and that F.E.K. did not believe his schizophrenia was real.

The Court of Appeals held "mental health professionals are not required to explore medically unaccepted and unrecognized alternatives…" and "it is unreasonable to require F.E.K. be informed of unacceptable alternatives that do not exist." *Id.* at 12 (internal citations omitted).

Title: In the Matter of the Guardianship of Josephine L.: Frank L. v. Josephine L.
Date: April 29, 2015
Citation: 2014 AP 1238
Court: Wisconsin Court of Appeals
Affirmed.

Summary: Josephine L. (hereafter "Josephine") appealed an order granting Frank L. (hereafter "Frank") guardianship of her person and estate, arguing the court lost competency to proceed without the ward present at the hearing and the GAL's previously submitted waiver was insufficient. The Court of Appeals affirmed the lower court relying on the statutory provisions providing GAL with the authority to waive the proposed ward's attendance and current waiver was sufficient. The law only requires a valid waiver if the proposed ward chooses not to attend.

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Case Detail: At the time the petition was filed in January 2014, Josephine was alleged to have suffered from a degenerative brain disorder, could be financially exploited, required the appointment of a guardian, and no guardian was previously appointed.

After the first hearing on March 3rd was adjourned, a subsequent hearing was held on March 4th. Josephine did not attend the March 4th hearing and informed her advocate counsel that she would not attend. The GAL waived her appearance, citing her earlier written waiver which had been filed on February 27, 2014. As a result of the evidence presented, a guardian of the estate and person was appointed — her son, Frank, was named her guardian.

At a motion for relief from a guardianship order and on appeal, Josephine argued the court's acceptance of the GAL's waiver violated Josephine's due process right to attend the guardianship hearing, and as a result, the court lost competency to proceed without her presence.

The Court of Appeals held that the circuit court did not lose its competency to proceed without the proposed ward's presence at the guardianship hearing. The GAL performed her statutory responsibilities, under Wis. Stat. § 54.40, and provided her rationale for waiving Josephine's appearance in the cover letter accompanying her report. In addition, the court held there is no requirement that there must be proof submitted that the proposed ward did not make a conscious and voluntary decision when deciding whether or not to attend.

Title: In the Matter of the Mental Commitment of Thomas. F.W.: Dane County vs. Thomas F.W.
Date: April 23, 2015
Citation: 2014 AP 2469
Court: Wisconsin Court of Appeals
Affirmed.

Summary: Thomas F.W. (hereafter "Thomas"), on appeal, argued that the jury did not have sufficient evidence that he could be rehabilitated because he was not capable of being treated. The Court of Appeals held that the County presented sufficient evidence to prove that Thomas was a proper subject for treatment.

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.

Case Detail: Thomas was committed on a mental commitment in 2001 in Dane County. His commitment was extended every year since his initial commitment. He had been at Mendota Mental Health Institute since 2004.

In 2014, the County filed a petition to extend Thomas's commitment. Thomas requested and received a jury trial. Three psychologists testified. All three testified that Thomas has a schizoaffective disorder, meets the definition of mental illness for the purposes of a Wis. Stat. Ch. 51 civil commitment, behaves aggressively towards other staff and patients, and is a proper subject for treatment.

On appeal, Thomas argued that he was not a proper subject for treatment because he was not capable of being rehabilitated through treatment (i.e., his underlying condition was only "blunted" by treatment). Therefore, Thomas argued that he could have been a candidate for a protective placement under Wis. Stat. Ch. 55. *Id.* at 14.

The Court of Appeals found that there was sufficient evidence within the record to show that Thomas was capable of rehabilitation. All three psychologists has testified that Thomas's mental illness could be controlled and that he was a proper subject for treatment. ❒

On May 27, 2015, the first WINGS Wisconsin Summit was held. The purpose of the WINGS movement is to review and propose ways to improve guardianships and related matters. Guardianship stakeholders across Wisconsin were invited to attend. The day included speakers Dr. Brenda Uekert, with the National Center for State Courts (NCSG), and Jonathan Martinis, Legal Director of the Quality Trust for Individuals with Disabilities, who spoke about the national WINGS movement, guardianship practices, and the concept of supported decision-making.

Later in the afternoon, attendees broke into small work groups revolving around a focus area to work on specific issues and develop recommendations. These work groups will focus on competency, legal issues, and recruiting and supporting guardians. Updates will follow about this project in the future.

The Wisconsin Department of Health Services has changed its health care power of attorney (HCPOA) form and related materials. Specifically, the instructions section expressly states that the "notice page," or page 1 of the HCPOA form itself must be included with the remaining pages.

To see the form online, go to:
www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm

On January 6, 2015, the **Administrative Conference of the United States released a publication entitled "SA Representative Payee: Survey of State Guardianship Laws and Court Practices."**

For a full review of that document, visit:
www.acus.gov/report/ssa-representative-payee-survey-state-guardianship-laws-and-court-practices

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In the March 2015 issue, the GSC wrote about legal decision-makers, who may sign a Medicaid application, and provision 2.5.1 within the Medicaid Eligibility Handbook (MEH). On June 10, 2015, this MEH provision was updated. *See* Wisconsin DHS, Division of Health Care Access and Accountability, MEH Release 15-01.

Specifically, in March, the GSC wrote about the language "someone acting responsibly for the individual signs the form on behalf of the individual if the individual is incompetent or incapacitated." This provision was amended as part of the recent update. The provision now states "someone acting responsibly for an incompetent or incapacitated individual pending a guardianship determination." The newly added language, "pending a guardianship determination," clarifies that the individual acting responsibility must be acting only during the pendency of a guardianship action. Note, the example provided still has a professional signing for an individual in a facility.

In total, the following individuals may sign the application within the revised MEH 2.5.1: the applicant, a guardian of the estate, an authorized representative, a POAF agent, a person acting responsibly for an incompetent or incapacitated individual pending a guardianship determination, a superintendent of a state mental health institute or a center for the developmentally disabled, a warden or warden's designee for an inmate of a state correctional institution where the individual has been a hospital impatient for more than 24 hours, and the superintendent of the county psychiatric institution who has been designated by the county social or human services director. *Id*.

A general review of the entire update is recommended for those that regularly work with Medicaid.

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.