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.

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Achieving a Better Life Experience Act

In late December 2014, President Obama signed the Achieving a Better Life Experience Act of 2014 (ABLE Act) into law. The passage of this law provides more freedom for individuals with disabilities and their families to plan for their financial future. The law will allow those with disabilities to create tax-free savings accounts to help supplement their needs without jeopardizing their receipt of other benefits.

An ABLE account can be established by an individual with a disability or a third person naming the individual as the beneficiary. Contributions by others may be made to the ABLE account. While gifts may be counted as taxable income for the individual, withdrawals made to pay for qualified purchases are not.

Qualified expenses include any expense resulting from the designated beneficiary living with a disability. Specifically, this includes "education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses that are approved by the Secretary under regulations." Sect. 529a(e)(5).

There are some limitations to the new act. For example, the individual must have been determined to have a disability before he or she turned 26. Each individual may only have one ABLE account. Only, the amount of $14,000 may be put into an account per year. If an ABLE account exceeds $100,000, any supplemental security income (SSI) will be suspended until the account is within account limits. In the past, individuals whose assets exceeded $2,000 were ineligible for certain programs so this is still a significant increase. Note that Medicaid payback rules may still apply to all accounts.

Each state will be responsible for setting up and maintaining its ABLE program. Some experts believe states will start the application to open an ABLE account process in late 2015. ❑

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Case Law

Title: In the Matter of the Mental Commitment of Zachary W.: Marathon County v. Zachary W.
Date: December 2, 2014
Citation: 2014 AP P955
Court: Wisconsin Court of Appeals

Summary: Zachary W. (hereafter "Zachary") appealed an involuntary commitment under Ch. 51, contesting the definition of "drug." Prior to his commitment, Zachary was huffing gasoline. On appeal, the Court of Appeals held the jury could find that gasoline was a "drug" and the jury was given the proper definition of "drug."

Case Detail: Zachary's father, stepmother, and aunt petitioned the Marathon County Circuit Court for examination. They alleged that Zachary was drug-dependent, dangerous, and a proper subject for treatment. The basis for their petition was Zachary's huffing of gasoline. They had found him unconscious several times the month before filing the petition. He had been stealing gasoline from any possible source and was living in the woods.

At the commitment hearing, several definitions of the word "drug" were provided to the jury. Zachary focused on the definition of "drug" provided within Wis. Stat. § 450.01. Wis. Stat. Ch. 450 is a chapter related to pharmacies and the pharmacy examining board. He also used a similar definition found within Wis. Stat. § 961.01(11), which is part of the Uniform Controlled Substances Act. The county used a definition from the Merriam-Webster Dictionary, which defines a drug as "something and often an illegal substance that causes addiction, habituation, or a marked change in consciousness." *Id.* at ¶ 5. Two experts also provided conflicting testimony on the definition. The parties argued the merit of the different definitions' applicability before the court and the county pointed out that the definitions submitted by Zachary were not for the purposes of providing treatment. While noting that Wis. Stat. Ch. 51 does not expressly define "drug," the court decided to allow both parties' definitions to be used and presented to the jury.

At the conclusion of the case, the jury found that Zachary was drug-dependent, dangerous to himself, and a proper subject for treatment.

On appeal, Zachary argued that the circuit court erred by allowing the jury to consider multiple definitions of the word "drug." The Court of Appeals held that first the evidence at trial "overwhelmingly indicated Zachary was using gasoline in a matter consistent with the definition of someone drug-dependent." *Id.* at ¶ 17. The Court went on to hold that Zachary provided no authority to support his argument that only one definition could have been adopted or that the circuit court was not allowed to consider multiple definitions. Further, if using multiple definitions was erroneous, the court found no prejudice occurred by the multiple definitions. Lastly, the court held that if any definition must have been used, it was the definition the county proposed from the Merriam-Webster Dictionary. "When a word is used in a statute but is not specifically defined, the common and approved usage of the word or phrase applies." *Id.* at ¶ 20.

Title: Disability Rights Wisconsin v. University of Wisconsin Hospital and Clinics, et al.
Date: December 11, 2014
Citation: 2014 AP 135
Court: Wisconsin Court of Appeals

Summary: Two individuals with developmental disabilities did not have their substantive due process rights infringed upon by state-employed doctors who failed to provide life-sustaining treatment. The state-employed doctors do not have a constitutional obligation to provide medical care to their patients.

Case Detail: This is a combined case involving two individuals with developmental disabilities.

Patient 1 was a minor who had repeatedly developed pneumonia. The parents and a doctor specializing in pediatric palliative care decided not to treat the individual because they found that Patient 1's "prognosis and quality of life were so poor that it would be very reasonable to limit medical interventions." *Id.* at ¶ 6. After developing pneumonia again, Patient 1 did not receive any treatment for his pneumonia and subsequently died.

Patient 2 was a 72 year-old woman, under guardianship, who was also believed to have pneumonia. She received treatment initially, but when her conditioned worsened, the doctors decided not to pursue feeding tubes and provid-

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ed comfort care measures only. Patient 2's condition improved on its own, treatment was resumed, and eventually she was released to the facility she was living in prior to the hospitalization.

Disability Rights Wisconsin (DRW) filed a complaint arguing that the patients' substantive due process rights had been violated because the doctors failed to provide "normal medical treatment" and for assisting the legal decision-makers make "illegal" decisions about withholding life-sustaining treatment. *Id.* at ¶ 10. The circuit court dismissed the constitutional claim and denied the motion for reconsideration for failure to state a legally enforceable claim for relief.

On appeal, DRW argued that (1) the state-employed doctors violated the patients' substantive due process rights by not providing life-sustaining treatment, and (2) the doctors encouraged the decision-makers to consent to the withholding of life-sustaining treatment.

The appellate court assumed for the purposes of reaching its decision the doctors were state actors; however, it did not provide an opinion on whether the doctors were state actors. With that assumption, the court held that DRW did not provide a legally viable claim. The court held that the *Edna M. F.*, 210 W.2d 558, and *Lenz v. L.E. Philips Career Devel. Ctr.*, 167 Wis. 2d. 53, cases were distinguishable — the cases discussed the guardians' authority and not the doctors' obligations. The court also decided other legal authority did not address the specific issue of whether the doctors had a constitutional obligation to provide medical treatment. The court held DRW did not meet its burden in "identifying a fundamental conditional right to obtain medical care from the government recognized by a federal or state court." *Id.* at ¶ 32.

The appellate court then rejected DRW's second argument, holding that whether a doctor encouraged a decision-maker did not "add anything to the constitutional issue." *Id.* at ¶ 38.

Affirmed.

Note: At the time of publication, this case was pending review by the Wisconsin Supreme Court.

Title: In the Matter of the Mental Commitment of Michael H.: Outagamie County v. Michael H.
Date: December 16, 2014
Citation: 2014 WI 127
Court: Supreme Court of Wisconsin

Summary: When looking at whether an individual meets the standards for involuntary commitment, a specific articulated suicide plan is not required to constitute a threat of suicide under Wis. Stat. § 51.20(1)(a)2.a.

Case Detail: Michael H. (hereafter "Michael") came to Wisconsin in February 2013 to celebrate several family birthdays and a belated Christmas exchange.

Michael had moved to Minnesota the previous year after being hospitalized for the treatment of a mental illness in Wisconsin, and he wanted to avoid a court order that he must take anti-psychotic medication. When he returned home, he engaged in a series of activities including walking with his 5-year old niece in cold weather to demand a car from one sister because he believed another was in danger, was taken to the hospital multiple times (although he refused medication and left each time), stated he was suicidal to a nurse at the hospital, told his mother he had a plan to commit suicide when asked, later told police officers that he wanted to hurt himself, and engaged in certain behavior indicating paranoia like purchasing multiple cell phones because he thought his phones were bugged.

Michael was placed under an emergency detention. After the probable cause hearing, a jury trial ensued and the jury found that Michael was mentally ill, a proper subject for treatment, and dangerous. An involuntary mental health commitment order was then issued for six months.

Michael appealed to the Court of Appeals, which affirmed the jury's verdict. Michael then appealed to the Wisconsin Supreme Court arguing insufficient evidence was produced to show Michael was "threat" to himself.

The county had argued that Michael was dangerous to himself under Wis. Stat. § 51.20(1)(a)2.a. and (1)(a)2.c. Wis. Stat. § 51.20(1)(a)2.a. provides that one may be dangerous "by evidence of recent threats of or attempts at suicide or

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Governor Proposes Changes to Long-Term Care, SeniorCare Programs

On February 5, 2015, Governor Scott Walker unveiled his plan for Wisconsin' 2015-2017 state budget. The proposal includes several key parts provisions that may be of particular interest to guardians and wards include the following:

Aging and Disability Resource Centers (ADRCs)

ADRCs are currently run by Wisconsin counties and tribes and provide information and assistance to older people and people with disabilities. The governor's proposal would allow counties to have the ability to contract with various entities to operate their ADRCs. Multiple entities may also be contracted with to provide ADRC services.

Family Care

Family Care is currently available in 57 of Wisconsin's 72 counties and has been approved to expand to an additional seven counties. The governor's proposal would make Family Care available statewide by January 1, 2017. Other proposed changes would impact its oversight, structure, and types of care provided. Managed Care Organizations (MCOs) would be able to provide acute and chronic care as well as long-term care. MCOs will be required to provide their services statewide and not regionally. Oversight of Family Care and MCOs would transfer from the Wisconsin Department of Health Services (DHS) to the Office of the Commissioner of Insurance (OCI). Family Care enrollees would also be prohibited from switching their MCOs except during a specific open enrollment period.

Include, Respect, I-Self Direct (IRIS)

Over 11,000 adults are served through the IRIS program at this time. The budget proposal eliminates the IRIS program. IRIS enrollees may be able to enroll in Family Care.

SeniorCare

The proposal modifies the SeniorCare prescription drug program requiring older people with SeniorCare drug coverage to also purchase a Medicare Part D plan. *Find more information about proposed changes in SeniorCare on page 10.*

The full budget proposal may be reviewed on the Wisconsin Department of Administration website: http://doa.wi.gov/Divisions/Budget-and-Finance/Biennial-Budget/201517-Executive-Budget/

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serious bodily harm." Wis. Stat. § 51.20(1)(a)2.c. states that one may be dangerous through the occurrence of "recent acts or omissions that, due to mental illness, he or she is unable to satisfy basic needs... 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. Ch. 51 does not expressly define "threat;" the Court adopted its common meaning in which a threat is "an express of an intention to inflict injury" and "an indication of impending danger or harm." *Id.* at ¶ 4. Upon review of the record, Court then found there was sufficient credible evidence to justify the jury's decision and that threat existed.

The Court further held that "an articulated plan is not a necessary component of a suicide threat. If [the Court] were to hold otherwise, it would require a person in a confused mental state to articulate a plan before obtaining treatment through involuntary commitment." *Id.* at ¶ 6. Likewise, going to the hospital but "declining help" does not "satisfy the statute's exception concerning a person's willingness to avail himself of community services." *Id.* at 41.

The Court found that the same evidence used to support dangerousness under Wis. Stat. § 51.20(1)(a)2.a. could be used to support a finding of dangerousness under Wis. Stat. § 51.20(1)(a)2.c. ❐

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. Can a HCPOA agent enroll a principal in a Medicaid program?

Generally no, unless the health care power of attorney (HCPOA) agent is also the power of attorney for finances (POAF) agent, guardian of the estate or conservator, or the designated authorized representative for Medicaid.

A HCPOA agent only has the authority to make health care decisions. Wis. Stat. § 155.01(4) & Wis. Stat. § 155.20. A "health care decision" is defined by Wis. Stat. § 155.01(5), which states a health care decision is "an informed decision in the exercise of the right to accept, maintain, discontinue, or refuse health care."

This definition provides that the HCPOA agent's authority is specific to making decisions about the principal's care. The agent may make a decision that then results in a medical bill that will need to be paid. However, the HCPOA agent does not have the legal authority to pay the bill. This definition also does not include the right to enroll the principal in a benefit program like Medicaid that will require examination of the principal's finances and obligate the principal (or his estate) for the receipt of that benefit.

While the HCPOA agent does not have authority, the POAF agent can be given the authority, as part of the general powers, to enroll the principal in a benefit program. Per Wis. Stat. § 244.54(2)(c), the POAF agent has the authority to "enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program." The law further requires the POAF agent to work with the HCPOA agent when coordination between the two is necessary (e.g., when selecting health insurance where the HCPOA agent may be better aware of the principal's medical needs).

However, the Wisconsin Medicaid Eligibility Handbook (MEH) goes beyond what is stated expressly in the Wisconsin statutes. The MEH says "that someone acting responsibility for the individual signs the form on behalf of the individual" may provide a signature on the Medicaid application after the guardian or conservator, POAF agent, or authorized representative. MEH 2.5.1(4). It is the GSC's position that this is an option that should be explored after other viable options, consistent with state law, are explored. In addition, there are several questions that should be considered before relying on this position.

1) Is there a current POAF agent, guardian of the estate, conservator, or authorized representative? If so, that decision-maker cannot be supplanted through this provision. This is consistent with the structure of this MEH provision, the application, and state law about who can act as a legal decision-maker.

2) Is there no feasible way a POAF agent, guardian of the estate, conservator, or authorized representative can be legally obtained? If so, those options should be first explored.

3) Does the person signing have actual knowledge about the individual's finances? Can he or she make an informed decision? Is this person willing to assume any liability if his or her perceived knowledge about the individual's finances is incorrect? Also, note, the example included within the MEH includes a facility staff member and not a general member of the public providing the signature.

The GSC has been informed that the use of this provision, in any situation, would be highly disfavored in some areas of the state. A significant review of the situation should be performed before relying on provision MEH 2.5.1(4).

2. I am my mother's guardian. She needs nursing home-level of care and will be admitted to a nursing home soon. Through a friend, I heard I have to be careful how I sign as a guardian. Is this true? As I look at signing my mother's admission agreement, does it matter how I sign if the facility is aware that I am a guardian?

Guardians (and agents acting under POAs) must be cautious when signing any document as the legal decision-maker. Considering the expense that can be incurred by receiving long-term care, such forethought is especially important when signing an admission agreement.

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Under federal law, nursing homes receiving any funding from Medicaid are prohibited from requiring a financial guarantor as a condition of admission or continued stay. 42 U.S.C § 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii). This is also reflected in Wisconsin law. Per Wis. Stat. § 49.498(7)(a)4, "[a] nursing facility may not require a third-party guarantee of payment to the nursing facility as a condition of admission or expedited admission to or continued stay in the nursing facility." Therefore, by law, guardians or other relatives (not including spouses) cannot be forced to be responsible for unpaid expenses as part of the admission agreement or to secure further stay. While a person is free to choose whether to guarantee the resident's expenses, he or she cannot be compelled to assume those expenses.

How a decision-maker signs the agreement directly affects whether he or she has assumed any additional liability. If the legal decision-maker who signs the admission agreement does not identify his or her role within the admission agreement, the legal decision-maker may be held responsible for the unpaid expenses. In Wisconsin, the average private-pay rate for nursing home care is $241.78[1] per day.

Considering the substantial costs that could be incurred, the decision-maker could incur a significant amount if he or she does not sign the agreement properly.

Traditionally recognized ways to sign an agreement appropriately include, "John Smith as guardian for Jane Smith" or "John Smith, guardian for Jane Smith." Do not sign as only "John Smith," which indicates that one is signing personally rather than as the decision-maker.

Many decision-makers are emotional about the prospect of having to put a loved one in a nursing home. Often, they have little background in the area of long-term care and do not always fully understand their role as the decision-maker. They rely on the facilities to direct them through the admission process.

Facilities should review the decision-maker's authority to consent to the admission prior to the admission. A guardian is required to petition for and obtain a protective placement order to provide the consent to long-term stays in nursing homes.[2] Facilities are required to ask about the existences of advance directives[3] upon admission. Therefore, the status of the legal decision-maker should be clear when the applicable paperwork is provided to the facility. Despite this, some courts have strictly required decision-makers to clearly sign in a way that distinguishes their role although that status is already known and relied upon. Rather than relying on any earlier notification of their role for support, legal decision-makers should clearly identify their roles within the admission agreement.

Decision-makers may ask for a copy of the unsigned agreement and review it with an attorney if they are unsure about the language or ramifications of the document.

3. Can a ward execute a HCPOA?

Only individuals who are "sound of mind" may execute a HCPOA. Wis. Stat. § 155.05(1). A person who has been adjudicated as incompetent (i.e., a ward) is presumed not to be sound of mind. *Id.*

4. Will a guardian have control of the ward's final remains if the ward dies? Can a ward sign an Authorization for Final Disposition of Final Remains form?

While the guardian of the estate will need to file a final account, the authority to act ends at death for both guardians of the estate and guardians of the person. Who has control of the ward's final remains depends on whether any person higher in the statutory list of priority wishes to assume control of the remains. Wis. Stat. § 154.30(2) provides the priority of those who may consent to the final disposition of the remains. The order, in priority, as follows:

1) The representative (or a successor representative) designated by the deceased ward on his or her executed authorization for final disposition;
2) A surviving spouse;
3) A surviving child. If there are more than one child surviving, the majority of the children has control unless the minority has made reasonable efforts to the other surviving children and is not aware of the majority's opposition;
4) Surviving parents or parent;

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[1] Wisconsin DHS Ops-Memo 14-35, (December 1, 2014), www.dhs.wisconsin.gov/dhcaa/memos/index.htm.
[2] Wis. Stat. § 55.055.
[3] 42 CFR 489.102(b)(2).

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5) A surviving sibling;
6) Another relative as allowed by law;
7) The guardian of the person;
8) Another individual other than those listed above who is willing to control the final disposition and who states in writing that he or she cannot find any of the preceding individuals after making a good-faith attempt to find them.

Therefore, a surviving spouse or child would have the legal authority to assume the remains over a guardian of the person who was not also a surviving spouse or child.

Control of final disposition is limited to the following:

1) A funeral ceremony, memorial service, graveside service, or other last rite;
2) Disinterment;
3) Reinterment, cremation and reinterment, or other disposition of the decedent's body. Wis. Stat. § 154.30(2)(b).

Note, only one who is sound of mind can execute an authorization for final disposition. *See* Wis. Stat. § 154.30(8)(a). A ward, a person who has been adjudicated as incompetent, is presumed not to be sound of mind. *Id.*

5. May the primary POAF agent and the successor agent trade off and assume authority as they wish?

Wis. Stat. § 244.11(2)(b) provides that the successor agent cannot assume the role as the primary agent until all other predecessor agents have "resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve." *Id.* With this statutory language, there is finality to the change of agent. The assumption of the role as primary agent cannot occur until the primary agent is clearly unable or does not wish to act.

Also, important to remember is that the law currently provides the principal with the authority to designate POAF co-agents who may act independently of each other. Wis. Stat. § 244.11(1). If the principal wished to allow the agents to act interchangeably, such authority could have been written into the document.

6. If a HCPOA is not revoked as part of a guardianship (of the person), who has medical decision-making authority? In addition, if the HCPOA has not been activated at the time the person is adjudicated as incompetent, is the adjudication of incompetency equivalent to the activation and are no further steps to activate required?

By law, the court is required to look at whether there is any existing, valid, and sufficient advance planning in place when hearing a petition for guardianship. *See* Wis. Stat. § 54.10(3)(c)3 and § 54.46(1)(a)2. If there is advance planning that is all three and renders the guardianship unnecessary, the court is required to dismiss the petition for guardianship. If the advance planning is only existing and valid but not sufficient, then the guardianship may be necessary although it should be limited to the person's needs and the particular power that needs to be addressed.

A common example of where a HCPOA and a guardianship of the person is in place occurs when nursing home admission has not been expressly consented to within the HCPOA. Wisconsin law requires the consent to be stated within the HCPOA for the agent to be able to exercise this authority. Wis. Stat. § 155.20 (2)(c)2.c. Because in this example it is not, the agent may not consent to the admission and the agent often pursues a guardianship and protective placement. The guardianship of the person, if ordered, should be limited to specific authority to consent to the nursing home admission.

Remember that each decision-maker has only the authority granted to him or her under the law. The agent has the authority to make healthcare decisions consistent with the HCPOA, the law, and the person's wishes; the guardian has authority to make all other personal well-being decisions (consistent with the terms of the order and letters as well as Wisconsin law).

Incompetency and incapacity are two separate things. Incompetency is a court finding that requires looking at specific statutory factors including incapacity, risk of harm, the proposed ward's age, the applicable impairment(s), and the need for less restrictive measures. Incapacity is a medical state determined by doctors (and/or psychologists) focusing specifically on one's ability to understand and to communicate.

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FAQs on Temporary Guardianships

Unfortunately, family members and friends sometimes are in the position of needing a temporary guardianship for a loved one who has no legal decision-maker, did not perform any advance planning or the advance planning performed is insufficient, and who needs significant and immediate assistance with decision-making. This article is intended to answer some of the frequently asked questions for those in that position.

Who can file a petition for temporary guardianship?

"Any person" may file a petition for temporary guardianship. See Wis. Stat. § 54.50(3)(a). A non-lawyer as well as an attorney may file a petition for temporary guardianship.

What is the standard for obtaining a temporary guardianship?

A person is not determined to be incompetent as part of a temporary guardianship. In a temporary guardianship, the court must determine whether there is a "reasonable likelihood that the proposed ward is incompetent." Wis. Stat. § 54.50(3)(c). This is shown by the petitioner presenting a report or the testimony of a physician or psychologist evidencing the person's state. *Id.*

What information must be contained within the petition for temporary guardianship?

Certain information must be provided including the proposed ward's name, date of birth, and address; the identity and address of all interested persons; the proposed ward's assets and income; whether the proposed ward had performed any advance planning; and details about the person's alleged incapacity. Wis. Stat. § 54.50(3)(a) and 54.34(1).

What type of situations might necessitate a temporary guardianship?

There is not one specific situation that might require a temporary guardianship; often, the appointment of a temporary guardian is fact-dependent. Situations where the GSC has seen the reoccurring need for a temporary guardianship include when an individual has had a serious accident or injury, does not have the ability to communicate, and needs a decisions-maker because no advance planning was performed. There may be times where the individual's state has diminished significantly because of a progressive illness, no advance planning was performed, and a decision-maker was also needed to make decisions to help prevent harm to the individual. A temporary guardian might also be needed in specific situations involving invalid or insufficient advance planning or an issue with a POA agent.

What forms are typically filed with the court to initiate a temporary guardianship?

Forms often used to initiate a temporary guardianship in Wisconsin are as follows:

1) GN-3100: Petition for Guardianship Due to Incompetency;
2) GN-3110: Order and Notice of Hearing;
3) GF-131: Order Appointing Guardian ad Litem or Attorney;
4) GN-3140: Statement of Acts; and
5) GN-3230: Consent to Serve as Temporary Guardian.

Another form that could be filed with these forms is the form GN-3115: Waiver and Consent, which can be signed by an interested person who supports the petition for guardianship. Once service has been performed, the petitioner should also prepare the form GN- 3120: Affidavit of Service as would be appropriate.

Because each county may have its own practices related to guardianship, a review of local practices is also recommended before petitioning for any guardianship.

May a temporary guardianship be petitioned for at the same time as a permanent guardianship?

Yes, both types of guardianships may be petitioned for at the same time. The same form, GN-3100: Petition for Guardianship Due to Incompetency, can be used for both. If both types of guardianship are petitioned for at the same time, careful review of the applicable requirements for each type must be performed. For example, in a temporary guardianship, the petitioner might provide a physician's or psychologist report or their testimony. The report or testimony is about the proposed ward's likelihood of incompetency. In a permanent guardianship, the petitioner must

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submit a completed examining physician's or psychologist's report, as least 96 hours before the hearing, as well ensure the applicable expert can provide testimony at the hearing.

What are the service requirements for a temporary guardianship on the proposed ward?

The petitioner is required to provide notice of the petition to the proposed ward. With that notice, the petitioner must include notice of the proposed ward's right to counsel and notice of the proposed ward's right to petition for reconsideration or modification of the temporary guardianship at any time. The petitioner must perform service of the notice of hearing on the proposed ward before the hearing; or, if service before is not possible, no later than three calendar days after the hearing. However, if service is performed after the hearing, the petitioner must also provide the ward with the court order for temporary guardianship. Wis. Stat. § 54.38(6).

Will a guardian ad litem be appointed?

Yes, a guardian ad litem (GAL) will be appointed. The GAL will report to the court on whether temporary guardianship is advisable either at the hearing or, if afterward, within ten calendar days after the hearing. The GAL is required to try to meet with the ward before the hearing or as soon as possible after the hearing. If the GAL meets with the ward after the hearing, the GAL must meet with the ward within the first seven calendar days after the hearing. Wis. Stat. § 54.50(3)(b).

What timelines might apply?

A hearing for temporary guardianship cannot be held any earlier than 48 hours after the petition was filed unless good cause is shown. Wis. Stat. § 54.50(3)(c). How soon after the 48-hour period the hearing is held often depends on local practices.

The period for a temporary guardianship may not exceed sixty days except, upon the showing of good cause, the court can extend the temporary guardianship for another sixty days. The possible total length for a temporary guardianship is one hundred and twenty days.

After the expiration of the temporary guardianship and any extension, no other temporary guardianship may follow for at least ninety days. Wis. Stat. § 54.50(2).

When does a temporary guardianship end?

A temporary guardianship will end (1) at the expiration of the time period for which it was ordered, (2) when the court has determined a temporary guardianship is no longer needed and terminates the temporary guardianship, (3) when the ward dies, or (4) when an order for a permanent guardianship is entered.

Any particular concerns with the temporary order?

The court must specify the temporary guardian's authority and that authority must be reasonably related to the reasons for appointment stated in the petition for temporary guardianship. Unless approved of by the court, the guardian may not sell real estate or expend more than $2,000. Wis. Stat. § 54.50(2).

Careful review of the proposed ward's needs prior to filing the petition is recommended. ❑

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A HCPOA can only be activated by the terms stated within the HCPOA. A HCPOA is a legal document, such as a contract, that provides specific terms, including how the document may be activated.

The procedures followed for determining incompetency and incapacity differ. For example, an adjudication of incompetency does not follow the same criteria as the activation requirement in a HCPOA. As stated, only a court may find a person incompetent after reviewing all of the applicable statutory factors. Most HCPOA activations do not require any court review and the most typical standard followed usually requires two doctors or one doctor and one psychologist to determine incapacity.

A finding of incompetency would not equate to the activation for a HCPOA nor does the determination of incapacity equate to an incompetency adjudication. Note: all professionals involved should look at whether the HCPOA has been activated if a petition for guardianship has been filed before the final hearing (ideally before filing the petition). ❐

Points of Interest

Governor Scott Walker's 2015-2017 state budget proposal includes changes to SeniorCare — Wisconsin's prescription drug program — that would require SeniorCare participants to purchase a Medicare Part D plan.

Nearly 85,000 seniors are currently enrolled in SeniorCare. Unlike Medicare Part D plans that require an annual review to determine the plan that best covers prescriptions for the lowest monthly premium, SeniorCare offers administrative simplicity and accepts enrollments year-round. The program requires a $30 annual fee, and offers low copays of $5 for generics and $15 for brand name prescriptions.

Enrollment in the SeniorCare program counts as creditable coverage for Medicare Part D. Many people enroll in SeniorCare as a cost-effective way to avoid a late enrollment penalty under Medicare Part D.

In 2015, Medicare Part D plans available in Wisconsin range from $15.70 to $130 per month, with an average of $59 per month. Requiring enrollment in a Medicare Part D plan would increase annual consumer out-of-pocket costs by $708.

The Joint Committee on Finance is expected to hold public hearings in late March to seek consumer input on the proposed changes before the budget is finalized. A similar change to SeniorCare was proposed in 2011 and rejected by the Joint Committee on Finance on a 15-1 bipartisan vote. Consumers are encouraged to attend the public hearings and contact their local legislator to share their stories. The state of Wisconsin has a website dedicated to helping consumers locate their district and legislators: http://maps.legis.wisconsin.gov/

For more information on the 2015-2017 proposed budget changes visit: http://docs.legis.wisconsin.gov/2015/related/proposals/ab21.pdf

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On March 2, 2015, the **U.S. Government Accountability Office (GAO) released a study on the use of antipsychotic medication to treat adults with dementia.** The study found there is an overuse antipsychotic medication prescribed to individuals with dementia who are in nursing homes and that amount was over two times greater than those with dementia but not living in a nursing home. Find the full report on the GAO website — www.gao.gov/products/GAO-15-211 (last reviewed March 5, 2015).

Upcoming Events

Monthly: March is National Developmental Disabilities Awareness Month.

2015 ADRC Conference
Date: April 15-17, 2015
Location: La Crosse Center, La Crosse, WI

2015 Rehabilitation & Transition Conference
Date: Thursday, April 30, 2015, 7:30 a.m. – 6:00 p.m.
Location: KI Convention Center, Green Bay, Wisconsin
Sponsor: Rehabilitation for Wisconsin
Contact: Nicole Hoffmann (920) 593-4330

2015 Wisconsin Network Conference on Alzheimer's Disease and Related Dementias
Date: May 17-19, 2015
Location: Kalahari Conference Center, Wisconsin Dells, Wisconsin
Registration: www.alzwi.org

Living a Self-Determined Life 2015: A Conference on Empowerment for Older Adults
Date: June 1-2, 2015
Location: Glacier Canyon Lodge Conference Center at the Wilderness Resort, Wisconsin Dells, WI
Contact: Peggy Rynearson at (608) 446-4206 or email at prynearson@gmail.com

2015 Adult Protective Services Conference
Date: October 14-16, 2015
Location: Glacier Canyon Lodge Conference Center at the Wilderness Resort, 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.

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.