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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Decision-Makers and the Authority to Consent to a DNR Order

The Wisconsin Guardianship Support Center (WI GSC) gets frequent questions about do-not-resuscitate (DNR) orders. When it is legally appropriate to sign a DNR order? Who can sign a DNR order? The purpose of this article is to answer these questions and clarify the current law on this subject.

What is and what is not a DNR order?

Very frequently, individuals refer to a Health Care Power of Attorney (HCPOA) or a living will containing one's end-of-life wishes as a DNR. Those documents may contain statements reflecting one's wishes about DNR-related efforts. However, they are not the same as a DNR order.

A DNR order is one defined by and given as directed under Wis. Stat. § 154.17(2). A DNR order is a "written order… that directs emergency medical technicians, first responders and emergency health care facilities personnel not to attempt cardiopulmonary resuscitation on a person for whom the order is issued if that person suffers cardiac or respiratory arrest." *Id.*

Certain events must first occur and steps then taken to have a valid DNR order. The following must occur:

1) The person's attending physician must issue the DNR order;
2) The person subject to the DNR order must be a qualified patient;

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Dear Readers:

As 2014 comes to an end, I wanted to provide an update on the Wisconsin GSC.

First, thank you to all who have utilized the GSC's services throughout the year. We have been incredibly busy and much of that is because of you. Thank you for your support!

Second, those who frequent the GSC's webpage may have already noticed some changes. We are currently in a "remodeling" process. Our goal is to make the webpage more user-friendly.

Third, many of the GSC's publications have been reviewed in 2014. (Those not reviewed will be in 2015.) Of those reviewed, many were left unchanged, and only a couple required any significant modification or updating. However, if you use our publications, you may wish to check to see if the ones you use were modified.

Lastly, several new publications were posted on the webpage during 2014. If you have not reviewed our publication list, you may want to check out the new additions. We will also continue to add new publications as the need arises. Please feel free to email me (guardian@gwaar.org) if you have a suggestion for a new publication.

Have a wonderful December and a happy New Year,

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TITLE: In the Matter of the Mental Commitment of Mark T.J.: Ozaukee County v. Mark T.J.
Date: August 27, 2014
Citation: 2014 AP 479

Summary:
Mark T.J (hereafter "Mark") appealed his involuntary commitment arguing that the statutory 72-hour period to hold the probable cause hearing after being taken into custody was exceeded. The county argued that the time period was not exceeded because it began, not when Mark entered the hospital, but when he entered the mental health unit. The county also argued that the Mark's appeal was moot because he stipulated to a recommitment order. The court of appeals held that a "hospital" was a "facility," so the 72-hour period started when he was taken to the hospital. However, the court ultimately decided that Mark's appeal was moot because he stipulated to the recommitment order.

Case Detail:
Mark was found on the side of a highway after he had attempted suicide by cutting his wrists. Police officers informed Mark that he was being taken into custody for emergency detention and took him to a hospital. Mark entered the hospital at 12:56 p.m. He was transferred to the mental health treatment at 3:00 p.m. after receiving medical treatment.

A probable cause hearing was held three days later at 3:00 p.m. Mark stipulated to the probable cause and time limits were waived. A final hearing was scheduled; at which, Mark stipulated to the commitment but contested the involuntary medication petition. The court issued 6-month orders on both. Mark gave notice of his intent to seek post-disposition relief. In December, the county filed petitions to extend both the commitment and involuntary medication orders. A day before the scheduled hearing on that petition, Mark filed a petition for postdisposition relief arguing the court lost its competency to act because the 72-hour period for the probable cause hearing started when he entered the hospital. At the hearing for the recommitment petition, Mark stipulated to the recommitment. At the hearing on the petition for postdisposition relief held several days later, the court held that Mark did not enter the facility until he entered the mental health unit and the matter was not moot because the probable cause hearing was timely. Both parties appealed.

On appeal, the Wisconsin Court of Appeals held that the 72-hour period started when Mark entered the hospital and not the mental health unit. The ordinary meaning of the word "facility," found in Wis. Stat. § 51.20(7)(a), includes a hospital. Therefore, the 72-hour period expired several hours before the probable cause hearing.

The appellate court further held that circuit court lost competency proceed but it did not lose subject matter jurisdiction over the matter. Because Mark never objected to the failure to hold the probable cause hearing in a timely matter and later stipulated to the recommitment, the appellate court held the issue was moot. Once the recommitment was in place, "the recommitment order became the basis for Mark's commitment." *Mark T.J.* at ¶ 25.

Affirmed.

Title: In the Matter of the Mental Commitment and Order for Involuntary Medication and Treatment of William A.M.: Winnebago County v. William A.M.
Date: September 10, 2014
Citation: 2014 AP 977-FT

Summary:
William A.M. (hereafter "William") challenged his involuntary mental health commitment arguing that the county had not proved him to be dangerous. The appellate court, affirming the circuit court, found that clear and convincing evidence presented showed William exhibited dangerousness, under Wis. Stat. § 51.20(1)(a)(2)(c), through pattern of recent acts or omissions that indicated there was a substantial probability of physical harm to himself or others.

Case Detail:
On October 23, 2013, a barbershop owner called the police complaining that William entered his business, talked incoherently, and then left. The police looked for him, eventually after receiving another dispatch about William being at a cheese store and "causing a disturbance," found him on a local highway. William attempted to go into the road. He was soon detained by police. The testifying officer stated that William at been at a daycare on October 22nd trying to see the children there. When he was later stopped by the police on the 23rd, William became upset, yelled profanities, and accused the officers of trying to poison him.

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Winnebago County vs. William A.M., continued from page 2

One of the witnesses, the examining psychiatrist, testified he diagnosed William with schizoaffective disorder bipolar-type which is characterized by disorder of thought, mood, and perception. The witness stated such disorders substantially impaired William's ability to meet his needs and he was unable to understand the advantages, disadvantages, and alternatives to treatment to make an informed choice. The witness also read William's self-report that stated, "They told me that I would be killed by the oncoming traffic on the main road. However, I told them that my life is in the hand of the super power and nothing can happen to me."

The court found that William was a danger to himself and to others. William challenged this finding.

William was found to be dangerous under Wis. Stat. § 51.20(1)(a)(2)(c), which states dangerousness may be shown by an individual who "evidences 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…"

Upon review of the record, the court of appeals found that William engaged in "incoherent and disruptive behavior" over a two-day period. Those acts "evidence. . . incoherence, impaired judgment, and lack of orientation to the dangers of the highway, along with resistance to efforts to take protective measures. The pattern of disoriented behavior culminated in a roadway incident that put both William and others at a substantial probability of harm." *William A. M.* at ¶ 13.

Affirmed.

Title: In re the Conservatorship of Norman Wicke: Debra James v. Robert Wicke
Date: October 7, 2014
Citation: 2014 AP 78

Summary:
An adult child, Robert Wicke (hereafter "Robert"), of a conservatee contested the court's approval of an asset preservation plan that included the gifting of portions of his father's estate to him and his siblings. Robert argued the court did not have the authority to approve of the asset preservation plan. On appeal, the court rejected his argument holding that a conservatee does not need court approval to gift.

Case Detail:
Norman Wicke (hereafter "Norman") petitioned for the appointment of his daughter, Debra James (hereafter "Debra") to be his conservator.

As his conservator, Debra petitioned the court for approval of an asset preservation plan distributing his assets unequally among his six children. The purpose of the plan was to assist with qualifying Norman for certain benefits through the Department of Veterans Affairs. Four of the six children consented to the plan, including one's power of attorney for finances agent. Robert and one other sibling did not consent to it. At a nonevidentiary hearing, Debra submitted an affidavit by Norman that stated he did not wish to distribute the money equally and that he wished all of his children to be beneficiaries of his estate. (Robert's proposed plan excluded one of Norman's children.) The circuit court issued an order approving the asset preservation plan. Robert appealed.

On appeal, Robert argued that the court did not have authority to approve of the plan. The appellate court rejected that argument. As a matter of law under Wis. Stat. § 54.76(3), court approval is not required – only the conservator is required to give approval for the conservatee's intended gifts.

Robert also argued that Debra, as the conservator, would be the gift giver and not Norman. The court also rejected this argument. Robert did not provide any legal or evidentiary support for this argument.

Robert lastly argued that the asset preservation plan failed to comply with the requirements under Wis. Stat. § 54.21(2). The court rejected this argument because it was first raised on appeal and the plain error rule did not apply.

Affirmed.

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Case Law, continued from page 3

Title: State of Wisconsin v. Kimberly M. Ecker
Date: September 30, 2014
Citation: 2013 AP 2254-CR

Summary:
After stealing $40,000 from her ward, guardian Kimberly Ecker (hereafter “Kimberly”) was convicted of theft of greater than $10,000 in a business setting.

Case Detail:
Kimberly was the appointed guardian of the estate for her father, Bryan Wolf (hereafter “Bryan”). Kimberly acted as the guardian of the estate for less than a year. Carol Wolf (hereafter “Carol”), Bryan’s wife, told police that $40,000 had disappeared from Bryan’s estate. The police investigated and found discrepancies in Kimberly’s accounting. She had designated some money as spousal support, but Carol had never received it. Further, a truck had been transferred to a relative, a significant amount of checks were made out to cash, and Kimberly used Norman’s money toward some of her divorce expenditures, gifts, and personal expenses.

The court found that Kimberly had stolen over $25,000 identified as spousal support and cash to the ward. She had also misappropriated the truck and related payments and had used the ward’s funds to pay for her divorce attorney.

Kimberly appealed arguing ineffective assistance of counsel and that erroneous evidentiary rulings were made. The appellate court denied her argument for ineffective assistance of counsel. The court also rejected her arguments on the evidentiary rulings. Specifically, Kimberly argued the court “impermissibly aided the prosecution when it was decided, as a matter of law, that the state need not prove lack of consent by the victim to sustain a conviction,” that Bryan was never subpoenaed, and that Carol was not a victim because she was not her ward. *State v. Ecker*, at ¶ 42. The court rejected these arguments. No legal authority was used to support her position, and she presented no argument as to why the letters of guardianship were not appropriate to show, as a matter of law, that Bryan was incapable of giving consent.

Affirmed.

Title: In the Matter of the Mental Commitment of Steven H.: Kenosha County v. Steven H.
Date: October 15, 2014
Citation: 2014 AP 1435-FT

Summary:
Opposing an order for involuntarily commitment, Steven H. (hereafter “Steven”) argued insufficient evidence was submitted to prove him dangerous. The appellate court affirmed the circuit court finding “ample” evidence in the record to support the finding of dangerousness.

Case Detail:
A three-party petition was filed contesting that Steven was mentally ill, a proper subject for treatment, and dangerous. Evidence was submitted that Steven suffered from schizophrenia, believed other residents were eating children, and made multiple statements that he would like to kill those residents and one in particular.

When a petition for involuntary commitment is filed, clear and convincing evidence must be submitted demonstrating that the individual is mentally ill, a proper subject for treatment, and dangerous. Wis. Stat. § 51.20(1)a & (13)e. “Dangerousness” can be shown “by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.” Wis. Stat. § 51.20(1)(a)2.b.

Threats made to a third party, who is not the subject of the threat, are sufficient. *Steven H.* at ¶ 9. The threat does not have to be made to the subject of the threat to be considered. *Id.*

Steven argues that the evidence submitted was insufficient. However, he did not contest the petitioner’s report of “homicidal ideations” or other evidence demonstrating his wish to kill another resident. The court determined that the repeated threats to kill people was homicidal behavior, and the testimony of the witnesses and appointed examining physician was sufficient to prove dangerousness.

Affirmed.

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Helpline Highlights

The following are examples of some of the questions received and responses given through the Guardianship Support Center.

If a ward is protectively placed and the guardian wants to move the ward to a new facility, can the guardian just move the ward or does the ward need to do anything before the move?
The guardian must follow certain appropriate procedure before transferring the ward under a protective placement order.

The guardian must provide written notice to certain parties including any other guardian(s), the county department or agency that provided protective placement to the individual, the department, or the facility. Wis. Stat. § 55.15(5)(a) and (2).

Such notice must be given at least 10 days before the transfer. The notice must also include the right of individual, his or her attorney, or any other interested person to petition the court for a hearing on the transfer.

If a person receiving the notice objects to the transfer, he or she may petition the court for a hearing to be held on the transfer. The petition must state the reasons for objecting to the transfer. Such hearing must be held within 10 days of the petition's filing. At the hearing, the court will look to make sure the procedural requirements are fulfilled, whether the transfer is in the ward's best interests, and whether the transfer will be a setting that is as least restrictive as possible. Wis. Stat. § 55.15(8)(b).

In addition, if the transfer is to a facility in another state, consultation with a local attorney familiar with the new state's guardianship laws (and state benefit programs) is strongly recommended. Some states recognize out-of state (or foreign) orders and some do not. Some, like Wisconsin, require a formal process to be followed when transferring a guardianship to that state. Such consultation should be performed well before the intended transfer. Notice must still be given if the guardian intends to move the ward out of the state.

I am a ward wishing to review my guardian's conduct. I have sufficient funds and would like to hire my own attorney to initiate the review. Does my guardian need to approve my choice of attorneys before I hire him or her?
In a petition to review the guardian's conduct, a ward may hire his or her own attorney if:

1) The selection of the attorney is approved by the court; and
2) The contract for the attorney's fees is approved by the court. See Wis. Stat. § 54.68(6)(b). The court gives the approval and not the guardian. The right to hire an attorney also remains regardless of whether the guardian consents to hiring an attorney or whether there is sufficient cause to remove the guardian. *Id.*

I am going to file a petition for adult guardianship. What constitutes proper service on a proposed ward?
The proposed ward, if not living in confinement, must be personally served. If a ward is in custody or confinement, the petitioner must provide certified or mail service on the proposed ward's custodian. In turn, the custodian shall immediately personally serve the proposed ward. Whomever serves the proposed ward must inform the proposed ward of the complete contents of the notice, petition, and any other required documents. Wis. Stat. § 54.38(2)(a).

An affidavit of service is usually filed indicating the proposed ward (as well as the interested parties) have been served. The current state form, GN-3120: Affidavit of Service, does not provide any specific spot to describe how the proposed ward was served, particularly whether the affiant certifies that he or she has informed the proposed ward of the competent contents of the petition and notice. Solely relying on the form may not be sufficient to show proper service was performed. Petitioners may need to utilize other means to show this, including submitting an attachment about how the actual service performed.

What are the guardian ad litem's duties and responsibilities in an adult guardianship action?
A guardian ad litem (GAL) has specific responsibilities that must be performed, including the following:

1) A GAL must be an advocate for the proposed ward's or ward's best interests and function independently to

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Helpline, continued from page 5

represent those best interests. *Note:* Being an advocate for the proposed ward's best interests is not the same as being an advocate for the proposed ward's expressed wishes. Advocacy counsel may be appointed to represent a proposed ward's expressed wishes. Wis. Stat. § 54.40(3). However, if the proposed ward requests the appointment of counsel, the GAL must inform the court and the petitioner about this request. Wis. Stat. § 54.40(4)(g).

2) The GAL must meet with the proposed ward and explain the contents of the petition, the nature of the guardianship proceeding, and the proposed ward's rights, including the right to counsel, to appear at the hearing, to request or continue a limited guardianship, and to an independent examination. Wis. Stat. § 54.40(4)(a-b).

3) The GAL must interview any person seeking to be appointed as the guardian and report to the court the suitability of each individual. Wis. Stat. § 54.40(4)(c).

4) The GAL must inform the court on the proposed ward's position on the guardianship action, whatever that may be. Wis. Stat. § 54.40(4)(f).

5) The GAL must review any power of attorney, interview all applicable agents, and report to the court about the advance planning's adequacy and whether it is sufficient or not. Wis. Stat. § 54.40(4)(d).

6) Act as an independent attorney in the action with the ability to attend and participate in hearings, present evidence, present and cross-examine witnesses, receive copies of pleadings filed, and to request an independent evaluation. Wis. Stat. § 54.40(4)(ds),(h), and (i). The GAL may also request court to order additional evaluations. Wis. Stat. § 54.40(4)(e).

Is an out-of-state HCPOA valid in Wisconsin?
An out-of-state HCPOA may be valid in Wisconsin and enforced like any other HCPOA if it was validly executed in the state of origin and the power to be exercised is consistent with Wisconsin law. Wis. Stat. § 155.70(10).

Upcoming Events

December 31, 2014: Coverage ends for 2014 Marketplace plans. Open enrollment for the Marketplace will end on February 15, 2014. More information may be found at www.healthcare.gov/marketplace-deadlines/2015/.

The WI GSC will be closed December 20 - December 29, 2014.

If your organization or agency is hosting a statewide event related to commonly-discussed topics in *The Guardian* and you would like to spread the word about the event, contact the GSC at guardian@gwaar.org. We may include it in our next quarterly publication.

Sometimes, issues come up with provisions that are required to be expressly written in Wisconsin HCPOAs but are not required by the state of origin. Examples of those provisions include the removal of a feeding tube or the admission into a nursing home or CBRF. A close review of the HCPOA is always recommended.

May a guardian consent to an admission to a facility under Wis. Stat. § 50.06?
No, a guardian may not provide consent to an admission specified under Wis. Stat. § 50.06. Wis. Stat. § 50.06 (2) provides, "An individual under sub. (3) may consent to admission directly from a hospital to a facility, of an incapacitated individual who does not have a valid power of attorney for health care and who has not been adjudicated incompetent in this state,…" *Id.* The statute provides that the person subject to such an admission must not have been adjudicated as incompetent, and therefore, has no guardian.

Petitions for guardianship and protective placement must also be filed before consent is given to this type of admission.

If the ward needs a certain level of care and admission to a facility is necessary, a guardian may pursue, as appropriate, an applicable admission without a protective placement order under Wis. Stat. § 55.055 or an order for protective placement. ❒

Case Law, continued from page 4

Title: In the Matter of Guardianship Elizabeth M.H., a Person under the Age of 18: Richard H. v. Tina B.
Date: November 11, 2014
Citation: 2013AP002600, 2013AP002534

Summary:
In a minor guardianship action filed under both Wis. Stat. Chs. 48 and 54, the circuit court dismissed the Ch. 54 guardianship petition. The guardianship had not been completed within the 90-day requirement found within Wis. Stat. § 54.44(1)(a). The appellate court upheld the dismissal. The court lost its competency to proceed after the 90-day period had been exceeded. Further, the time period could not be waived by stipulation, failure to object, or for good cause.

Case Detail:
Elizabeth H., a minor child, was removed from her parents' custody. After living with her foster parents for years, her foster parents brought guardianship petitions under Wis. Stat. Ch. 48 and 54 after her father, Richard H. (hereafter "Richard") filed a petition for a change of placement. The actions were consolidated. The circuit court denied Richard's petition for a change of placement and granted the foster parents' guardianship petitions under Chs. 54 and 48. After Richard filed a post-disposition challenging all of the decisions, the circuit court dismissed the Ch. 54 guardianship. The circuit court determined that it had lost competency because it had not been completed within 90 days of its filing of the petition. However, the circuit court left in place the Ch. 48 guardianship order and its decision to deny the change in placement.

Both Richard and the foster parents appealed these decisions.

The Wisconsin Court of Appeals affirmed the circuit court's ruling. The appellate court determined that the circuit court lost its competency to proceed when the guardianship was not completed within the 90-day time limit.

Wis. Stat. § 54.44(1)(a) provides, "A petition for guardianship, other than a petition under par. (b) or (c) or s. 54.50 (1), shall be heard within 90 days after it is filed."

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.

Although Richard's attorney agreed to have a hearing after the 90 days expired, the appellate court held that statutory limitation periods cannot be waived or altered by stipulation. Relying on previous case law, it rejected an argument that failing to object waived the rule. It also rejected statutory differences between Wis. Stat. Chs. 48 and 54 holding that Wis. Stat. § 48.315(3) (specifically the provision stating "Failure by the court or a party to act within any time period specified in this chapter does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction...) does affect Wis. Stat. § 54.44(1)(a). It held that the law does not expressly provide any exception for good cause within the law and cannot be read into the law now; it determined that whether a good cause exception should be within the law was for the legislature to decide.

The appellate court went on to affirm the decision to consolidate the guardianship petitions and the motion to change placement; the decision to maintain placement with the foster parents using the best interest standard; and the sequestration of witnesses. It also denied Richard's general request for a new trial based upon issues never tried before the circuit court. ❒

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3) The person, the qualified patient, must request the DNR order;
4) The qualified patient must consent to the DNR order;
5) The qualified patient must sign the DNR order.
6) The qualified patient is not known to be pregnant by the physician;
7) The DNR order must be in writing; and
8) The DNR must be documented in the medical record and also be reflected in a form, like a bracelet worn by a qualified patient, recognized by Wisconsin law. Wis. Stat. § 154.19(1-2).

A "qualified patient" is a statutorily defined term. A "qualified patient" is one who has a terminal condition, has a medical condition that could make resuscitation efforts unsuccessful, or has a condition that could cause significant harm to the individual if resuscitation efforts were made. Wis. Stat. § 154.17(4).

Statements about DNR-related matters in a HCPOA or a living will are significant because they demonstrate the principal's wishes about specific end-life-matters. While those statements may contain specific directions related to a possible DNR order, those statements are not the equivalent to a DNR order under Wis. Stat. § 154.19. The two should not be confused, and careful choice of language and clarification may be necessary when assisting others reviewing this subject.

Can a Health Care Agent or a Guardian of the Person Provide Consent to a DNR?

Yes, under certain circumstances. Per Wis. Stat. § 154.225, a guardian of the person or Health Care Power of Attorney (HCPOA) agent may request on the person's behalf, provide the consent to, and sign a DNR order after receiving the information specified within Wis. Stat. § 154.19(2)(a). Wis. Stat. § 154.19(2)(a) requires the attending physician to "provide the patient with information about the resuscitation procedures that the patient has chosen to forego and the methods by which the patient may revoke the DNR order." *Id.*

However, each type of decision-maker has certain parameters to consider when giving this type of consent.

A DNR Order and a Health Care Agent

A HCPOA agent may only provide consent that is consistent with the principal's wishes.

End-of-life treatment wishes must be expressly stated within the HCPOA to provide the agent with the authority to give consent to actions carrying out those wishes. For example, an agent "may consent to the withholding or withdrawal of a feeding tube for the principal if the power of attorney for health care instrument so authorizes it." Wis. Stat. § 155.20(4). Note, the HCPOA must expressly provide that authority for the agent to give consent.

A HCPOA that does not contain any end-of-life treatment wishes or prohibits the removal of such treatment would not provide the agent with the needed authority to consent to any type of removal of life-sustaining treatment or to consent to a DNR order.

A HCPOA that provides the authority to make end-of-life treatment decisions, most clearly those that provide one's wishes about having a DNR order when eligible or other specific end-of-life wishes, may provide the agent with sufficient authority to consent to a DNR order.

Agents and those professionals working with individuals who are facing these types of decisions must also be aware that a principal retains the right to change his or her wishes, withdraw the agent's authority to make end-of-life decisions, and revoke the HCPOA at any time. See Wis. Stat. § 155.20(5) and 155.40.

A DNR Order and a Guardian

It is the GSC's position that a guardian may provide consent to a DNR when the ward has made a clear statement about his or her end-of-life wishes or is in a persistent vegetative state (PVS).

Under current Wisconsin law, in the absence of a clear statement on this subject made by the ward while competent, a guardian may only withhold or remove life-sustaining treatment if the ward is a PVS and the removal would be in the ward's best interest. *Spahn v. Eisenberg*, 210 Wis.2d 557 (1997), 563 N.W.2d 485. See also *In the Matter of Guardianship of L.W.*, 167 Wis.2d 53 (1992), 482 N.W.2d 60.

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A ward who had made a clear statement on his or her end-of-life wishes, prior to incompetency, but is not in a PVS may have his or her wishes followed. *Spahn* at ¶ 21.

The existence of a PVS is determined by medical professionals. The *L.W.* court provided that, to determine whether a PVS exists, the ward's attending physician, as well as "two independent neurologists or physicians, must determine with reasonable medical certainty that the patient is in a [PVS] and have no reasonable chance of recovery to a cognitive sentient life." *Id.* at ¶ 17.

Sometimes there is confusion about what is "life-sustaining treatment" and the procedures possibly withheld by a DNR order. Life-sustaining treatment is not expressly defined in *Edna M.F.* or *L.W.* However, "life-sustaining procedure" is defined within Wis. Stat. § 154.01(5), as

> [A]ny medical procedure or intervention that, in the judgment of the attending physician, would serve only to prolong the dying process but not avert death when applied to a qualified patient. "Life-sustaining procedure" includes assistance in respiration, artificial maintenance of blood pressure and heart rate, blood transfusion, kidney dialysis and other similar procedures, but does not include:
>
> (a) The alleviation of pain by administering medication or by performing any medical procedure.
> (b) The provision of nutrition or hydration.

Id.

"Resuscitation" is defined within Wis. Stat. § 154. 17(5) and is

> [C]ardiopulmonary resuscitation or any component of cardiopulmonary resuscitation, including cardiac compression, endotracheal intubation and other advanced airway management, artificial ventilation, defibrillation, administration of cardiac resuscitation medications and related procedures. "Resuscitation" does not include the Heimlich maneuver or similar procedure used to expel an obstruction from the throat.

Id.

It is the GSC's position that resuscitation techniques, such as CPR, that are used to sustain life may qualify as "life-sustaining procedure" under Wis. Stat. § 154.01(5) and other law. In *Montalvo v. Borkovec*, the Wisconsin Court of Appeals held that a doctor's emergency resuscitation efforts were life-sustaining treatment, and that such life-sustaining treatment could not be withheld in the "absence of proof of persistent vegetative state." *Montalvo v. Borkovec*, 256 Wis.2d 472, at 17, 25-27.

Life-sustaining procedure is defined as "any medical procedure or intervention." Wis. Stat. § 154.01(5). Simply put, without the administration of CPR in specific situations, a person could die.

Life-sustaining procedure also includes "assistance in respiration." *Id.* By definition, CPR is cardiopulmonary resuscitation, and it combines rescue breathing and chest compression to assist with the maintenance of oxygen in the blood until further medical treatment can be performed.

No law has overturned either the *Edna M.F.* or the *L.W.* cases in Wisconsin. Subsequent case law has reaffirmed the parameters outlined within *Edna. M.F.* and *L.W.* describing when a guardian can consent to the withholding or removal of life-sustaining treatment. *Montalvo v. Borkovec*, 256 Wis.2d 472.

What if the agent's or guardian's authority was strictly construed by Wis. Stat. § 154.225 and other law was not considered?

While no case has expressly responded to this issue, very significant issues exist if Wis. Stat. § 154.225 were to be read without looking at *Edna M.F.* or *L.W.* or current law under Wis. Stat. Chs. 154-155.

For example, if Wis. Stat. § 154.225 was interpreted to limit *Edna M.F.* or *L.W.* (or not to apply at all), a guardian could sign a DNR order without following any clear statement made by the ward or a medical determination of a PVS. In that case, a foreseeable result would be a guardian ignoring or revoking a living will or a HCPOA that contains the clear statement on the ward's end-of-life wishes. Such a result

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This fall the **Wisconsin Guardianship Association (WGA) formally adopted model standards of practice for guardians**.

For those unfamiliar with the WGA, this organization aims to provide education on, promote improvement of related matters affecting, and further discussion about guardianships in Wisconsin. Membership is open to all types of guardians, including family or volunteer guardians as well as the corporate guardians.

Among other things, these standards are meant to improve practices and to provide an improved understanding of the guardian's role. The standards incorporate a broad range of topics including 1) the guardian's role and relationship to others; 2) legal principles to follow such as the best interest standard for legal decision-making and self-determination; 3) conflict of interest; 4) guardianship service fees, and more.

WGA members will receive training on these standards. Those members who are guardians will also be required to follow these standards. Standards are modeled after the best practice standards drafted and adopted by the National Guardianship Association (NGA). The primary difference between the NGA and the WGA standards is the NGA standards are drafted using the substituted judgment standard while the WGA standards are drafted using the best interest standard.
A copy of the standards may be found at the WGA's website located at: www.wisconsinguardianshipassociation.com/.

Other items of interest . . .

On November 12, 2014, the **Joint Finance Committee approved contracts allowing for the expansion of Family Care** to Brown, Door, Kewaunee, Marinette, Menominee, Oconto and Shawano Counties.

On November 13, 2014, **Governor Walker announced an award of $600,000 to be applied to worker training grants** meant to assist individuals with disabilities acquire and/or develop skills to improve their employment opportunities.

The **U.S. Department of Justice, Office of Justice Programs, released a special report entitled "Crimes Against the Elderly, 2003-2013."** Those interested in reviewing this report may find it at: www.bjs.gov/index.cfm?ty=pbdetail&iid=5136.

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would be directly contradictory to current law. Only the declarant may revoke a living will. Wis. Stat. §154.05(1). Only a court or the principal may revoke a HCPOA. Wis. Stat. § 155.40.

Likewise, if Wis. Stat. § 154.225 were to read without review of Wis. Stat. Ch. 155, an agent could ignore the principal's wishes or the HCPOA itself — neither of which is allowed by law.

Can a guardian of health care agent or a guardian revoke a DNR?
Yes, as allowed by Wis. Stat. § 154.225(2) and as would be consistent with the law.

The person, health care agent, or guardian may revoke by giving a direction to resuscitate the patient; by defacing, burning, cutting, or destroying the DNR bracelet; or by removing the bracelet. Wis. Stat. § 154.21 and 154.225(2)(a-c).

This distinction between a DNR order under Wis. Stat. § 154.19 and a HCPOA or living will containing a DNR-related statement is especially important when considering revocation. A DNR order can be revoked by a guardian, agent, or the person; only the principal or a court can revoke a HCPOA and only the declarant (or someone acting upon the declarant's direction in the declarant's conscious presence) can revoke a Living Will. Wis. Stat. § 154.05(1), Wis. Stat. § 154225(2), and Wis. Stat. § 155.40. ❐

This publication refers to specific end-of-life matters only. For further review, you may wish to read the GSC publication titled *May a Guardian Consent to the Withholding or Withdrawal of Life-Sustaining Medical Treament from Her or His Ward?*

The GSC's publication, *Decision-Making and the Authority to Consent to the DNR Order.*

Scientists Suggest Changes to Strengthen U.S.'s National Plan to Address Alzheimer's Disease

by GWAAR's Legal Services Team

A workgroup of nearly 40 scientists, researchers, and advocates have come together to challenge the U.S. government's plan to address Alzheimer's disease by broadening its scope, increasing its scale, and adequately funding research and scientific efforts. The plan was released in 2012 after the 2011 passage of the National Alzheimer's Project Act. The plan outlined a set of milestones and initiatives to provide improved tools for doctors, assist caregivers and individuals with Alzheimer's and other dementias, raise public awareness about the disease, and advance research. The plan's goal is to "prevent and effectively treat Alzheimer's Disease by 2025."

Currently, there are more than 5 million Americans living with Alzheimer's, which is estimated to cost the national economy $214 billion. As the population continues to age, some projections estimate that this number will soar to as many as 16 million people at a cost of $1.2 trillion by 2050. As the plan's goal is 11 years away, an expert-laden workgroup suggests revising the U.S.'s plan in an article published by *Alzheimer's & Dementia: the Journal of the Alzheimer's Association* – a peer-reviewed medical journal.

Maria Carrillo, Ph.D., Alzheimer's Association vice president of Medical and Scientific Relations and a co-author of the article, believes that the plan's initiatives must be refined if the 2025 goal is to be met. "While our workgroup does not believe the milestones, as they currently stand, are sufficient to reach the 2025 goal," says Carrillo, "if the suggested updates are swiftly implemented and funded we believed prospects for being able to prevent and effectively treat Alzheimer's by 2025 will increase dramatically."

The workgroup's recommendations include enlarging the scale of Alzheimer's research and clinical trials, expanding the scope of current and future research, and improving coordination, data sharing, and collaboration. The authors suggest revising a majority of the plan's current milestones and also propose 25 new milestones which they say will increase the chances the plan will succeed. The changes the group believes are most urgent with the highest potential impact are in the areas of drug development, risk reduction, and new conceptual models of Alzheimer's.

Because of the challenges involved in getting new drug treatments into clinical trials, the workgroup suggests identifying, characterizing, and validating 23 new drugs and/or targets, while the Plan currently calls for only six. They also call for additional drugs trials in both symptomatic and asymptomatic individuals.

Existing studies have provided a great deal of research on many possible exposures that may influence the risk of developing Alzheimer's and other dementias, including genetic, vascular, psychosocial, dietary, and other lifestyle factors. A prevention trial performed in Finland examined many of the possible exposure events. The workgroup is requesting that a study echoing the Finnish trial be undertaken in the U.S., to account for the larger, more diverse population.

Finally, the group challenges researchers to expand their conceptual models to explore mechanisms which may cause or contribute to Alzheimer's disease beyond those currently recognized as most likely. By exploring new possible pathways and causes of Alzheimer's, new ways of understanding and treating the disease may become apparent, the group says.

The group hopes that its suggestions of broadening the Plan's scope, increasing its scale, and providing sufficient funding will be taken seriously. The group has targeted the Alzheimer's Disease Research Summit, which will be held in February 2015, as an event at which its suggestions and proposed plan revisions may be updated.

To read more: www.eurekalert.org/pub_releases/2014-10/aa-ssn101714.php

For more information on Alzheimer's research and the National Alzheimer's Plan, please visit: alz.org ❒