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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Spotlight on Mental Health

White House Conference on Mental Health Emphasizes Services, Education, and Research

What do Aurora, Colorado; Milwaukee, Wisconsin; Minneapolis, Minnesota; Portland, Oregon; and Newtown, Connecticut; all have in common? Each was the site of a shooting massacre in 2012. Since then, the media, lawmakers, and at times, the public have engaged in challenging conversations about the role mental illness may have played in these tragedies.

President Obama (with Health and Human Services Secretary Kathleen Sebelius) addresses the 2013 White House Conference on Mental Health.

In response to the national dialogue, the White House hosted the National Conference on Mental Health on June 3, 2013. The conference was meant to draw attention to those suffering from mental illness, to highlight mental illness education programs, and to promote and increase the availability of mental health services.

President Obama spoke about the expansion of mental health and substance abuse services under the Affordable Care Act, improved mental health services available to veterans, increased outreach to young people suffering from mental illness, and medical research being performed on the brain and on mental illness.

A variety of other speakers and panelists also presented on various mental health topics with an emphasis on private sector activities that increased awareness of and education about mental illness.

During the conference, the U.S. Department of Health and Human Services unveiled a new website on mental health. The website — www.mentalhealth.gov — is designed to be the first stop for those seeking information on mental health and government-related issues.

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Case Law

In the matter of the Guardianship and Protective Placement of Gerhardt T.: *Carl T. v. Susan L.*
2012 AP 2110
March 5, 2013
Not recommended for publication.

Summary: The Court of Appeals upheld a circuit court's decision allowing an individual, who was the subject of a protective placement and guardianship order, to return to the residence he shared with his spouse because it was the least restrictive environment. The circuit court determined the residence was the least restrictive environment because the individual's dementia was not so severe that nursing home placement was warranted, the spouse was an appropriate caregiver and had made dramatic improvements to the home to ensure the individual's safety, and a third party had previously been appointed the individual's guardian of the estate thereby reducing the risk of financial exploitation.

Case Details: In February 2011, Gerhardt, a seventy-four-year-old man with dementia, was found alone in his home. Twenty-nine cats, animal feces and urine, moldy food, garbage, and clutter were also found throughout the home. At the time, his wife, Susan, was not at the residence – she was away on a cruise.

Gerhardt was removed from his home under an emergency protective placement order and Langlade County petitioned for guardianship of the person and of the estate, and protective placement. In June 2011, the circuit court determined that Gerhardt was incompetent and ordered his nephew Carl T. to be his guardian of the person, an unrelated third party to be his guardian of the estate, protective placement, and that the least restrictive environment for such placement was at Cart T.'s residence.

Subsequently, Susan and Carl both petitioned the court twice for modification of the order – Susan, so Gerhardt could be returned to their home, and Carl, to have his uncle moved to a community-based residential facility (CBRF). The court granted Carl's second petition for modification and Carl was moved to a CBRF.

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From the Editor

Greetings! I hope you are all enjoying these first days of summer. My name is Susan Fisher and I am currently assisting the Guardianship Support Center. Never fear though, Attorney Molly Fellenz will be back soon and will continue to share her knowledge and insight as the editor of *The Guardian*.

As a brief description of myself, I am an attorney and have focused much of my law practice on legal issues affecting families including guardianships. On a personal note (and in no particular order), I like to bake, travel, and read. My husband and I recently traveled to Ireland. We enjoyed our trip and I even acquired a few new recipes to try!

I am excited about being able to assist the GSC at this time and to gain a heightened understanding of the law through the course of answering the many questions we receive.

As always, if you have any questions or comments for the GSC, please contact us by phone using our toll-free number — (855) 409-9410 — or by e-mail at guardian@gwaar.org.

Best wishes,
Susan

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 should speak with an attorney.

Carl T. v. Susan L., continued from page 2

At the court's annual review of the protective placement order, the parties again questioned Gerhardt's placement and an evidentiary hearing followed. At the hearing, Susan argued that placement in the CBRF was not the least restrictive environment, Gerhardt wanted to return to his home with Susan, and Gerhardt was functioning at a level that he did not need to live in a nursing home. She testified that she had made significant improvements to the home to make it safe for Gerhardt. Susan also received counseling to help her cope with Gerhardt's dementia and took caregiver classes so she could respond more appropriately to Gerhardt's needs.

Carl argued that his uncle did not know where he was living so the CBRF placement was appropriate. He also expressed concern that Susan would not allow Gerhardt's family members to visit him.

The circuit court determined Gerhardt's least restrictive environment was in the residence he had shared with Susan and that his dementia was not so severe that nursing home placement was needed. The court also considered Gerhardt's wishes to return home, Susan's efforts to make the home safe, and the nature of the couple's relationship. The court ordered Gerhardt to be supervised at all times — whether by Susan, a family member, or a trained caregiver — and that Gerhardt's family may visit him at least once per week.

Carl T. and the GAL appealed the circuit court's judgment arguing (1) placement with Susan fails to protect Gerhardt from neglect and financial exploitation, and (2) Susan and Gerhardt's residence is not the least restrictive environment because there was no order about nonrelative visitation and that relative visitation outside of the weekly mandatory visitation could be denied.

The Court of Appeals affirmed the circuit court's order and rejected both arguments. Evidence within the record supports the circuit court's decision that Gerhardt could safely return home and reside with Susan. Such evidence includes expert testimony that Gerhardt could reside in a private residence if appropriately supervised and that he was still high-functioning and mobile, history of his twenty-year relationship with Susan, his wishes to live with Susan, Susan's efforts to improve the home, and the previous appointment of a third party as the guardian of his estate.

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Upcoming Events

2013 Wisconsin Healthy Aging Summit
August 15-16, 2013
Location: Holiday Inn & Convention Center
Stevens Point, WI
Sponsor: Wisconsin Institute for Healthy Aging
Contact: Anne Hvizdak at
Anne.Hvizdak@wisconsin.gov or by phone
at (715) 677-3037

Institute on Aging 25th Annual Colloquium
September 17, 2013
Location: University of Wisconsin-Madison
Monona Terrace, Madison, WI
Sponsor: Institute on Aging
University of Wisconsin-Madison
Contact: (608) 262-1818

Adult Protective Services/Elder Abuse Conference
October 10-11, 2013
Theme: Partnerships and Protection: Opportunities and Challenges in a Multi-Disciplinary Approach to Adults at Risk
Location: Glacier Canyon Lodge Conference Center, Wilderness Resort, Wisconsin Dells, WI
Sponsor: Wisconsin Department of Health Services
Contact: Peggy Rynearson at
prynearson@charter.net or
by fax at (608) 267-3203

WI Adult Day Services Annual Conference
October 25-26, 2013
Theme: Empowering Lives Through Adult Day Services
Location: Green Bay, WI
Sponsor: N.E.W. Curative Rehabilitation
Contact: Sarah Kramer by phone at (920) 593-3576 or at skramer@newcurative.org

Carl T. v. Susan L., continued from page 3

The Court of Appeals also disregarded the argument that Susan and Gerhardt's residence was not the least restrictive environment available because Susan could control visitation with nonrelatives and prohibit visitation with relatives beyond the court-ordered minimum of once a week. The court rejected this argument as speculation.

In the Matter of the Guardianship and Protective Placement of Sandra N.:
Brown County Department of Human Services v. Sandra N.
March 5, 2013
Case No.: 2012-AP-812
Not recommended for publication.

Summary: Sandra N. appealed the Brown County's Circuit Court decision finding her incompetent and in need of protective placement. She argued there was insufficient evidence to establish her incompetency because the psychologist who testified did not recall who diagnosed Sandra with bipolar disorder. Specifically, her counsel cited *Walworth County v. Theresa B.*, 2003 WI App 223, and argued that under *Theresa B.*, the psychologist was required to make an independent diagnosis and could not rely on the medical opinion of others. The appellate court rejected her argument and found the doctor could rely on Sandra's medical records to assist her with forming her medical opinion. Further, the psychologist also discussed Sandra's prognosis, which inherently meant that the psychologist had also performed an independent diagnosis.

Case Details: Brown County Circuit court found that Sandra was incompetent, in need of a guardian, and should be protectively placed in a nursing home.

Two witnesses gave testimony about Sandra at the hearing. A county adult protective services worker testified and filed a comprehensive evaluation stating that Sandra was "in complete denial of her limitations and unwilling to accept help." Her risk of self-neglect was "severe" and that she was "independently unable to perform requirements for health and safety."

A psychologist also testified and presented a report based upon her interview with Sandra and her review of Sandra's medical record. The psychologist's report stated that Sandra suffered from bipolar disorder and had a history of drug and alcohol abuse. She then gave her prognosis of the bipolar disorder. During the hearing, the psychologist stated that she did not know who made the initial diagnosis. Sandra's counsel objected and moved to strike the testimony as hearsay because the psychologist did not make an independent diagnosis. The court overruled the objection concluding that the psychologist appropriately evaluated the medical records and Sandra, formed her own diagnosis and prognosis, and decided on Sandra's incompetency.

The Court of Appeals affirmed the circuit court's decision. The psychologist's testimony was property admitted and was not hearsay. The record shows the psychologist made an independent evaluation. The psychologist met with Sandra. She relied on Sandra's medical records consistent with Wisconsin law. Her testimony on Sandra's prognosis inherently meant that she had also diagnosed Sandra.

In the Matter of the Mental Health Commitment of Boe H.: *Polk County Department of Human Services v. Boe H.*
May 7, 2013
Case No.: 2012 AP 2612
Not recommended for publication.

Summary: An individual on an order extending a Wis. Stat. Ch. 51 mental health commitment under Wis. Stat. § 51.20(1)(a)2.e. could not be ordered by the circuit court to remain in a residential group home for the duration of his commitment. However, once the circuit court identified the maximum level of inpatient facility, the local Department of Human Services could require him to live there as part of its plan to treat him and transition him back to the community.

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Helpline Highlights

The following are examples of some of the recent calls we received through the Guardianship Support Center and the information given to callers.

Several months ago I petitioned for guardianship of a relative. A party contests the petition and the hearings keep getting rescheduled. No final decision has been made on my petition. Is there a mandatory period in which this guardianship action must be completed?

Yes. Per Wis. Stat. § 54.44(1)(a), a petition for guardianship shall be heard within 90 days after it is filed. Generally, the failure to reach a final decision within the 90 days denies the court of its competency to hear the matter and to reach a decision.

The dramatic consequence of not finishing a guardianship action within this period was seen in the *Lipp* decision. An order for guardianship and protective placement involving an elderly woman with progressive dementia was overturned because the guardianship was completed in 119 days and not within the statutory period of 90 days. The circuit court lost its competency to act on the petition because the action ended after the statutory period. *In the matter of the Guardianship and Protective Placement of Elizabeth L.: Mary Beth Lipp and Richard L. v. Outagamie County.*, 2012 AP 44, ¶ 16 (unpublished). The appellate court also rejected the argument that an extension beyond the 90 days could be allowable if for a "good cause" because the statute contains no good-cause exceptions allowing an extension beyond the 90-day period. *Id.* at ¶ 14.

Lipp highlights the importance of timeliness. All parties involved must be aware of the ticking clock. If the 90-day mark is near, the petitioner, or any other party, may want to notify the court of the approaching deadline and request the appropriate relief.

Note: The court may only deviate from the 90-day period in two situations. First, a guardianship action involving an individual who has already been placed in a nursing home must be heard within 60 days of filing the petition for guardianship and not 90 days. Wis. Stat. § 54.44(1)(b). Second, a petition for the receipt and acceptance of a foreign guardianship may be extended if a person receiving the notice of the petition questions the validity of the foreign guardianship or the authority of a foreign court to appoint a foreign guardian, the court may stay the proceeding so the interested person has an opportunity to have the foreign court hear his or her challenge. Wis. Stat. § 54.44(1)(c)3.

A family member wrote on the power of attorney for health care (POA-HC) several months after it was executed by the principal designating herself as the alternative agent. Her actions were only discovered after the principal became incapacitated. The family member admitted she acted without the principal's consent. Further, the principal does not want the family member to act as the alternative agent. There is no question about the validity of the document when it was executed in December 2012. Is the 2012 document still a valid POA-HC? Should a previously-executed POA-HC be used instead?

The Guardianship Support Center's stance is that a previously valid document should not be invalidated by a third party's illegal action. Only those portions added by the third party should become invalid and the remaining document should stand. Further, a person caught defacing a power of attorney for health care could face serious consequences. Wisconsin law states that whoever falsifies a POA-HC with the intent to create the impression that he or she is the agent can be fined or imprisoned. Wis. Stat. § 155.80(3).

In addition, this POA-HC contained the notice provision provided by Wis. Stat. § 155.30. This notice provision contains language stating the POA-HC revokes any prior POA-HC the principal may have had. Therefore, when the POA-HC was validly executed, the previous POA-HC was revoked. There is no question as to the principal's intent and no party questioned the POA-HC until the discovery of the third party's actions. Considering these factors, the Guardianship Support Center does not believe the preceding instrument can or should be revived.

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Helpline Highlights, continued

Helpline, continued from page 5

Death and Powers of Attorney:

We received a couple of calls about how death affects a power of attorney for health care or finances.

Does a power of attorney for health care or finances remain in effect after the principal dies?

No. An agent ceases to have authority to act once the principal dies and the agent has actual knowledge of the principal's death. Wis. Stat. § 244.10. An agent for the power of attorney for finances (POA-F) may want to provide financial information to the principal's estate after the principal's death. The POA-F agent may also want to notifiy other parties who are acting under the POA-F of the principal's death. Third parties may continue to act as if the POA-F is still in effect, without liability, if they are acting in good faith and do not have actual knowledge of the principal's death. *See* Wis. Stat. § 244.19.

The agent for a power of attorney for health care is terminally ill and is no longer able to perform. Does the agent have to die before other options may be pursued?

No. Several options exist. Is the principal incapacitated? If the principal is not incapacitated, he or she can revoke the document and make a new POA-HC. If the principal is incapacitated, did the principal designate an alternate agent? If so, the alternate agent may assume the agent's duty if he or she is either unwilling or unable to perform his or her duties. Wis. Stat. § 155.05(5). Lastly, if a new POA-HC cannot be drafted or there is no alternate POA-HC, a guardianship can be pursued.

I was very ill recently and my power of attorney for health care was activated. Luckily, I have recovered and no longer need any assistance. What should I do?

The Guardianship Support Center's first question to this caller was did the caller want to revoke the POA-HC or to keep it and have her current state of capacity acknowledged. If the caller had no longer wanted the POA-HC, the caller could revoke the document. Per Wis. Stat. § 155.40, a principal may revoke his or her POA-HC at any time. The principal may do so by destroying or defacing the document, writing a statement expressing his or her intent to revoke the POA-HC, orally revoking it in the presence of two witnesses, or executing a new document. *Id.* at (1).

If the caller had wanted to revoke her POA-HC in writing, she could have used the sample revocation form found www.gwaar.org/home/10-articles/aging-programs-and-services/206-wi-guardianship-support-center.html. After the statement is completed, copies should be given to the agent and to appropriate medical care providers and other applicable professionals.

(Note: Problems may come up if revocation occurs and the principal is not able to able to make her own decisions and is unable to execute a subsequent POA-HC. In such situations, a guardianship may be needed.)

In this case, the caller only wanted to clarify that she was no longer incapacitated. The statute is silent on this matter. The presumption is that a POA-HC is not longer in effect once the principal regains capacity. However, if a principal wants to use the same POA-HC, a prudent act may be to obtain a statement describing her current capacitated state. The clearest way to do this may be to follow the reverse procedure for activation of the POA-HC. This would require the two doctors (or one doctor and one psychologist) who deemed the caller incapacitated write statements that she is no longer incapacitated in their medical opinion and the POA-HC is no longer needed. Other methods include obtaining a written statement from any two doctors about her capacity or have just one of the original doctors who deemed her incapacitated write about her renewed state of capacity.

Regardless of the method used, the written statement(s) should be included in the caller's medical file. Copies should also be given her agent, medical providers, and to any other relevant person. ❐

Polk County Department of Human Services v. Boe H., continued from page 4

Case Details: A jury found Boe to be mentally ill, a proper subject for treatment, and dangerous per Wis. Stat. § 51.20(1)(a)2. The circuit court then committed him for six months and determined the maximum level of treatment would be a locked inpatient facility. After 30 days in the hospital, Boe was transferred to a group home. Six months from the initial commitment, the Department petitioned to extend the mental health commitment. Boe contested the petition.

At the extension hearing, testimony was given that 1) Boe was still suffering from paranoid schizophrenia,2) it was unlikely he would continue to take his medication if he returned home, 3) it was unlikely that he would improve or stabilize if he was not in a structured environment, 4) there was a lack of family support for Boe's treatment, and 5) he had freedom to come and go in the group home.

The court granted the request for extension and authorized placement in an unlocked inpatient facility. Boe filed a post disposition motion. He argued that the court exceeded its authority and that he could only be treated on an outpatient basis after 30 days and the group home was an inpatient facility. After a hearing, the court found that Boe did not receive treatment in the group home and then signed an amended order designating the maximum level of treat as "outpatient with conditions" but that he will remain at the group home on an outpatient basis. Boe appealed.

The Wisconsin Court of Appeals held the circuit court lacked authority to order Boe to remain at the group home. The court should have only designated the maximum level of inpatient facility that could be used for treatment and it was up to the Department to then arrange for treatment in the least restrictive manner consistent with the court order and Boe's specific needs. Wis. Stat. § 51.20(13)(c)2.

The appellate court then went on to decide the second issue – whether the department could place an individual who may only be provided treatment on an outpatient basis in a group home. The court held that the department could place Boe in the group home. He was not placed in an inpatient facility. Inpatient treatment is treatment provided in a hospital setting, thus distinguishable from the group home. The group home did not provide treatment; that was received by off-site providers. Placement in the group home was also not habilitation, as opposed to rehabilitation, because the placement was meant to stabilize him on his medication and to reintroduce him into the community. Boe also retains the ability to leave if he wishes, which further distinguishes the group home from a hospital admission. ❐

White House Conference on Mental Health, continued from page 1

Additional information about the conference and its attendees can be found at www.whitehouse.gov. Find more information on mental health at these sites:

Disability Rights Wisconsin:
www.disabilityrightswi.org

Mental Health of Wisconsin:
www.mhawisconsin.org

National Alliance on Mental Illness (Wisconsin):
www.namiwisconsin.org

National Institute of Mental Health:
www.nimh.nih.gov/index.shtml

Substance Abuse and Mental Health Services Administration:
www.samhsa.gov