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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Guardianship and Voting Rights in Wisconsin

With spring elections right around the corner, it's a good time for a refresher on the rules of voting rights in the context of guardianship. In Wisconsin anyone 18 years old or older is presumed by law to be able to both register to vote and to vote. There are two ways a person may lose their right to vote due to allegations of incompetency.

In the case of guardianship, an adult may have their right to vote removed by a court order under Chapter 54 of the Wisconsin Statutes. Under the guardianship process, if an adult is found by a court to be incompetent, a Guardian of the Person may be appointed. As part of this process, the judge or court commissioner will determine if the person should lose their right to vote. This determination is only raised when dealing with a Guardianship of the Person, not of the Estate. A person will lose their right to vote if the court determines that the individual is "incapable of understanding the objective of the elective process." So, even if a guardian of the person is appointed, the person will retain the right to vote if the judge or commissioner determines that the person is capable of understanding the objective of the elective process.

Under Wis. Stats. §6.03 (3), a person may lose their right to vote through a petition to the circuit court that has been filed for the sole purpose of finding the person "incapable of understanding the objective of the elective process and thereby ineligible to register to vote or to vote in an election." This petition can be brought by any other voter who lives in the person's municipality. If a petition is filed under this section, the finding of the court shall be limited to a determination as to voting eligibility. The appointment of a guardian is not required for an individual whose sole limitation is ineligibility to vote. This determination may be reviewed as provided in s. 54.64 (2) (Wis. Stats. §54.25(2)(c)1 g). Loss of the right to vote under these statutes must be based on clear and convincing evidence. Without such a finding, the right to vote is retained by the individual.

Alternatively, if an individual is declared not competent to exercise the right to vote, a guardian may not exercise the right or provide consent for exercise of the right on behalf of the person. The court's

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Case Law

Wood County v. Zebulon K.
2011AP2387
February 7, 2013
Not recommended for publication

Wood County v. Forest K.
2011AP2394
February 7, 2013
Not recommended for publication

Summary: Orders for protective placement of two brothers were not supported by sufficient evidence when nothing in the court record established they were incapable of providing for their own care or custody and nothing in the record established incapacity which created a "substantial risk of serious harm" to others or themselves within the meaning of Wis. Stats. §55.08(1)(c).

Case Detail: Forest and Zebulon K. appealed orders placing them under guardianship and protective placement by Wood County. Their appellate brief, however, was limited to a challenge of the orders requiring their protective placement, which they claim was not supported by sufficient evidence.

The guardianship petitions alleged that Zebulon and Forest were developmentally disabled and were "unable to receive and evaluate information or to make or communicate decisions to such extent that [they were] unable to meet the essential requirements for [their] health and safety." Wood County also filed petitions for protective placement for both siblings who had been residing with their father.

The Guardian ad Litem (GAL) recommended the court appoint a permanent corporate guardian for each and over each of their estates and that the court approve protective placement in a group home setting. Forest and Zebulon were examined by a psychologist who stated both were developmentally disabled and both were incompetent and in need of a guardian. The psychologist added that due to their disabilities, each were unable to meet the essential requirements for their physical health and safety, unable to prevent financial exploitation, and unable to meet the essential requirements for their physical health and safety.

The court determined both were incompetent and in need of a guardian of the person and estate. The court also determined that, because of their developmental disabilities, both Zebulon and Forest were in need of protective placement.

Zebulon and Forest challenged the protective placement order, asserting that the county failed to offer sufficient evidence to prove they needed to be protectively placed.

Before someone can be protectively placed, the petitioner must prove the following, by clear and convincing evidence: (1) the individual has a primary need for residential care and custody; (2) the individual has been deemed incompetent by a circuit court; (3) as a result of his or her impairment, the individual is so incapable of providing for his or her own care and custody as to create a substantial risk of serious harm to himself or herself or others; and (4) the disability is permanent or likely to be permanent. Wis. Stats. §55.08(1) and 55.10(4)(d).

The brothers did not dispute their incompetency and that it is permanent. Rather, they claimed the county failed to prove

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Meet the GSC Director

Hi! My name is Molly Fellenz and I am the new director of the Wisconsin Guardianship Support Center at the Greater Wisconsin Agency on Aging Resources. Some of you may recognize my name as until recently, I served as the Benefit Specialist Supervising Attorney for the Bay Area/Fox Valley region for several years.

As a bit of background, I am a native Wisconsinite (from Neenah) and a graduate of the University of Wisconsin-Madison for both my undergraduate degree and law school. Go Badgers!

I'm excited to get this program off to a great start at its new home and look forward to helping you with issues relating to guardianship, protective placement, and advance directives. I hope you continue to use the GSC as a resource for your needs. If you have any questions, comments, or suggestions, please contact me at guardian@gwaar.org or at our new toll-free number: (855) 409-9410.

Molly

Wood County v. Zebulon K. | *Wood County v. Forest K.*
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that (1) they have a primary need for residential care and custody, and (2) they pose a substantial risk of harm to themselves under the dangerousness standard.

Zebulon and Forest argued the county failed to prove they had a primary need for residential care and custody because they were able to provide for their own daily needs and the evidence showed they possessed basic living skills such as the ability to cook, complete chores, and work on a farm.

The court found there was sufficient evidence supporting the brothers' primary need for residential care and custody due to caselaw holding that protective placement may result from a mere inability to live independently in the community. See *Milwaukee County Protective Services Mgmt. Team v. K.S.*, 137 Wis.2d 570, 576 (1987). The court found that the psychologist's written report and testimony, stating that "neither sibling had the ability to effectively receive and evaluate information or make or communicate decisions to the extent that they were able to meet the essential requirements for their physical health and safety," and that neither "had an understanding and appreciation of the nature and consequences of any inability he may have to meet the essential requirements for his physical health or safety or to manage their finances and property," in addition to the county social worker's testimony that "neither Zebulon nor Forest had the skills to live on their own and that they are in need of 24-hour supervision due to their needs" and that "concerns were raised about their personal hygiene" provided sufficient evidence supporting their primary need for residential care and custody.

Zebulon and Forest also contended the evidence was insufficient to prove they were "so totally incapable of providing for their own care or custody as to create a substantial risk of serious harm to themselves" per Wis. Stats. §55.08(1)(c). The court of appeals agreed with the siblings on this point, finding that nothing in the record established that their incapacity created a "substantial risk of serious harm" to others or themselves within the meaning of §55.08(1)(c). The court also found that, although the record established that neither sibling had a full appreciation of the extent of their disability, which raised concerns regarding their ability to provide for their care and custody, nothing in the record established that Zebulon and Forest were incapable of providing for their care and custody, and nothing established that their incapacities created a "substantial risk of serious harm" to themselves or others. For those reasons, the court of appeals reversed the circuit court orders of protective placement as to both brothers.

Walworth County Dept. of Health & Human Services v. Kim J.I.
2012AP319
August 16, 2012
Not recommended for publication

Summary: The Juneau County Circuit Court did not err in ordering a change in respondent ward's "county of residence" from Juneau County to Walworth County (which also formed the basis for changing venue of the case) as it did not misapply the law in changing respondent's residence. The court took into account the best interests of the ward in ordering the change of residence.

Case Detail: Kim J.I. is an adult subject to protective placement and guardianship who is currently placed at a facility in Walworth County. The issue in this case was whether the circuit court in Juneau County erred in ordering a change in Kim J.I.'s "county of residence" from Juneau to Walworth County (a change which formed the change in venue in this case as well). Walworth County appealed the court order, arguing mainly the court misapplied the law based on a mistaken understanding that the law required the court to change Kim J.I.'s residence to Walworth County in order for him to remain placed there. The court of appeals affirmed the circuit court order.

In October 2010 Juneau County Circuit Court issued an order for protective placement of Kim J.I. and appointed his daughter as guardian of his person and estate. He was found to suffer from a degenerative brain disorder caused by chronic alcohol abuse. Kim's county of residence at the time of protective placement was Juneau County where he owned property and lived for a period of time. However, he
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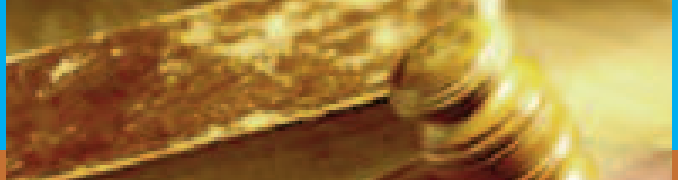

Walworth County Dept. of Health & Human Services v. Kim J.I.
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was placed in a Walworth County nursing home where his guardian and other relatives live and where he had lived for a long time before moving to Juneau County. As part of the annual review of his placement, it was proposed Kim be transferred to a less restrictive environment in Walworth County. Kim's GAL filed a report stating Walworth County would not facilitate a nearby community placement if venue for Kim's case remained in Juneau County. The GAL also suggested it would be in his best interest for Kim to remain placed close to family in Walworth County.

Juneau County also submitted a statement by Kim's guardian requesting a change of his county of residence (and venue) from Juneau to Walworth County. For a ward such as Kim, a guardian is authorized under Wis. Stats. §51.40(2)(f)3 to declare the ward's county of residence, subject to court approval, under certain circumstances. Kim's guardian provided several reasons why it was in Kim's best interests for his placement to remain in Walworth County. For example, many family members, including the guardian, lived in Walworth County and it would be difficult for them to visit in Juneau County. Also, Kim had only moved to Juneau County (from Walworth Co.) "because he was an alcoholic and felt safe. . .to drink himself to the point he is now."

Walworth County argued there was no reason to change his county of residence because there is no legal requirement Kim be a resident of Walworth County in order to remain placed in the Walworth County area. The county expressed concern regarding potential costs to Walworth County if Kim's county of residence was changed. However, Juneau County noted the implications of county of residence for Family Care purposes. The county said if venue were to remain in Juneau County, it would mean the Family Care system for Juneau County pays for and administers his care, which would lead Juneau County to decide to place Kim closer to that county.

The circuit court changed Kim's residence (and the county of venue) from Juneau to Walworth. The court determined it was quite likely that Kim would be relocated to Juneau County if his county of residence continued to be Juneau. The court noted that although funding concerns identified by Walworth County were important, they were secondary to Kim's best interests.

Walworth County appealed, stating the court operated under the misunderstanding there is a legal requirement that Kim's county of residence must be Walworth County in order for him to be placed in that area. The appeals court did not find that persuasive as Walworth County cited nothing in the decision that suggested the judge misunderstood any legal requirement.

Walworth County additionally argued the court disregarded a DHS memo regarding tax implications and funding mechanisms for people in adult long-term care programs in Wisconsin. The court of appeals stated the judge actually did cite to this memo in his decision. Walworth County also argued there must be new facts to change a ward's residence or venue under Wis. Stats. §51.40(2); however, Walworth County cited to cases that did not apply to Kim's case.

Dane County Dept. of Human Services v. Daniel L.C.
2012AP400-FT
August 9, 2012
Not recommended for publication

Summary: The court of appeals reversed the appellant's protective placement order because there was no proper waiver of appellant's appearance at the hearing, but affirmed the guardianship order because the guardianship statute does not include the same requirements for waiver of appearance.

Case Detail: Daniel argued the circuit court lacked competency to proceed in his protective placement petition because there was not a proper waiver of his appearance at the hearing on the petition. He cited to Wis. Stats. §55.10(2) which states "the petitioner shall ensure that the individual sought to be protected attends the hearing on the petition unless, after a personal interview, the guardian ad litem (GAL) waives the attendance and so certifies in

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writing to the court the specific reasons why the individual is unable to attend." In this case, the GAL made an oral statement to the court "asking the court to waive" Daniel's appearance. Additionally, Daniel's advocacy counsel submitted a waiver of appearance signed by Daniel.

Daniel argued the GAL's actions were insufficient to comply with §55.10(2) because it was not a certification in writing and did not include specific reasons why Daniel was unable to attend the hearing.

The respondents argued Daniel's reading of the statute conflicts with legislative intent, stating the legislature intended only to make sure a procedure exists for persons subject to petitions to attend the hearing if they choose to, and not to take away their right to decide whether to attend. They argued such individuals retain their rights as ordinary citizens, including in this case, the right for Daniel to decide, along with advocacy counsel, to waive the court appearance regardless of whether the GAL agreed to waive it.

The aourt of appeals found the respondents' argument insufficient to disregard the "plain language" of the statute. The court stated there was no reason to believe the legislature intended people to be protected to have the final right to decide whether to attend the hearing and said the respondents failed to note the inconsistency in this case – that the petition alleged Daniel was "incompetent" and "so totally incapable of providing for his. . .own care or custody as to create a substantial risk of serious harm to himself . . .or others." The court stated that the respondents' argument assumes all people to be protected are competent when it comes to deciding whether to attend the hearing. Instead, the statute assumes the person to be protected may not be competent to decide whether to attend the hearing; therefore, the default is that the person must attend the hearing but the GAL can waive that appearance after considering certain statutory factors and certifying these in writing.

Dear Readers,

The Wisconsin Guardianship Support Center is back after a hiatus and you have by now likely noticed there is a new leader at the helm. My friend and colleague, Molly Fellenz, is a phenomenal resource for you and will continue the good work of the GSC. She has graciously allowed me to write to you to say my farewells.

My decision to take some time with my family and not return as the director of the GSC was one of the most difficult decisions I've been faced with, for I have truly loved this job. Please know how much I have valued the opportunity to work with you, to learn from and with you, and to help you with your questions and concerns.

This program has been my heart and soul for three years and an incredible experience. I wish you all the best and sincerely hope to work with you down the road.

Until we meet again,

Maren Beermann

Furthermore, the respondents argued that a GAL's failure to certify the reasons for non-attendance by the person to be protected doesn't result in incompetency to proceed. The court noted that this question has already been decided by case law (see Knight v. Milwaukee County, 2002 WI App. 194, 256 Wis.2d 1000).

The court of appeals affirmed the guardianship order, however, stating that unlike the protective placement statute, the parallel statute for guardianship cases does not include the requirement that the GAL waive the proposed ward's attendance in writing, with reasons. See Wis. Stats. §54.44(4)(a). It states only that the petitioner shall ensure that the proposed ward attends the hearing "unless the attendance is waived by the GAL." The court found that in this case, such a waiver occurred for purposes of the guardianship order.

Helpline Highlights

Following is a sample of the calls received (and answers given) through the Guardianship Support Center helpline:

I have Power of Attorney for Health Care (POA-HC) for my mother. She has been determined incapacitated due to a diagnosis of Alzheimer's and the POA-HC has been activated. Her POA-HC specifically authorizes admission to a nursing home for purposes other than short-term admission. However, lately she has been strenuously protesting nursing home placement. What should I do? Can I place her in the nursing home over her (strong) objections?

It is the position of the Wisconsin Guardianship Support Center that if the principal is protesting admission to a nursing home, even with an activated POA for Health Care that authorizes long-term nursing home admission, a guardianship and protective placement order must be obtained. Although the agent's power has been activated due to a determination of incapacity in this case, the agent must still follow the principal's current expression of wishes if the principal is still able to express his or her wishes. Wis. Stats. §155.20(1) states, in part, "the health care agent who is known to the health care provider to be available to make health care decisions for the principal has priority over any individual other than the principal to make these health care decisions." Additionally, Wis. Stats. §155.20(5) states "the health care agent shall act in good faith consistently with the desires of the principal as expressed in the power of attorney for health care instrument or as otherwise specifically directed by the principal to the health care agent at any time."

Can a family force a family member into a conservatorship when the family does not like the way the person is spending money?

No person can be forced into a conservatorship. Asking the court for a conservator is a voluntary action on the part of that person. The court makes no finding of competency or incompetency. Instead, the judge talks with the individual to make sure he or she wants a conservator and then determines whether the nominee is suitable. The court may not select someone who has not been nominated to be your conservator; it may only accept or reject your nomination.

Typically, the conservatee would voluntarily petition the probate court to have a conservator appointed. This action might be taken when the conservatee wants someone to make his or her financial decisions, but also wants the court to have oversight of the actions of that individual. Often the nominated conservator is someone from outside the applicant's family, who might be unwilling to act under a Power of Attorney for Finances because of the lack of court oversight.

A conservator has the same powers and duties as a Guardian of the Estate. However, unlike a ward under guardianship where the guardian needs court authority to make a gift on behalf of the ward, a conservatee may make gifts of his or her income and assets subject only to approval of the conservator.

The conservator's duties end upon removal of the conservator by the court or when the conservatee dies. The conservatee can also ask the court to terminate the conservatorship. The court will do so, unless it is clearly shown that the applicant is incompetent. In that situation, the court might continue the conservatorship or appoint a successor conservator. A conservator may also be terminated if the court appoints a guardian for the individual whose income and assets are conserved or the conservatee changes residence to another state. A conservatorship cannot be revoked or terminated by the conservatee without the permission of the court.
NOTE: In some states a conservator is the same as Wisconsin's Guardian of the Estate.

If an individual executed a Power of Attorney for Health Care and then a guardian of the person was appointed, which decision-maker has priority?

It depends on when the guardianship was granted. If the guardianship of the person was ordered on or after December 1, 2006, then a previously executed Power of

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Helpline Highlights, continued

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Attorney for Health Care (POA-HC) remains in effect unless the court orders that it be revoked or the authority of the health care agent limited. If the court made no order regarding the POA-HC, it remains in effect and the agent would have decision-making authority over health care decisions to the extent authorized in the POA-HC, rather than the guardian of the person (unless the guardian is also the agent under POA-HC). If the guardian of the person contends that the court revoked or limited the POA-HC, he or she should be asked to produce the court order (Determination and Order Appointing Guardian) doing so.

However, a Guardianship of the Person granted prior to December 1, 2006, caused a previously-executed POA-HC to be automatically revoked unless the guardianship court affirmatively ordered the POA-HC should remain in effect. If a provider or facility is being asked to honor a POA-HC when a guardianship was granted before December 1, 2006, they should ask to see the court order concerning the POA-HC. If none can be produced, the POA-HC was revoked by the granting of the guardianship of the person and the guardian of the person is the decision-maker. However, if the court ordered that the document remain in effect, the agent under the POA-HC is the decision-maker over health care decisions.

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decision regarding the right to vote will be recorded in a court form called a "Determination and Order on Petition for Guardianship due to Incompetency."

Lost voting rights may be restored in two ways. Someone with a guardian who has lost the right to vote may petition the court to restore their voting rights under Wis. Stats. §54.64(2)(a). The form to petition the court can be found at: www.wicourts.gov > forms > circuit court > guardianship > all guardianship forms > form GN-3655 and GN-3665. The court will then appoint a Guardian ad Litem and schedule a hearing. The person shall be present and has the right to a jury trial and the right to advocacy counsel. The court shall appoint counsel if the person is unable to obtain counsel, and if the person is indigent, the court shall provide counsel at its expense.

Those who are found incompetent and are protectively placed can also ask to have their right to vote restored at an annual Watts review. This is a yearly review of placement. During the Watts review, the person should tell the Guardian ad Litem that they want their voting rights restored. The person has the right to advocacy counsel, and if indigent, the attorney will be paid for by the county.

A note about powers of attorney for health care and voting rights

A person who has an activated Power of Attorney for Health Care still has the right to vote as long as the right has not been taken away through a guardianship proceeding or proceeding to determine voting eligibility.

Finding out whether you have the right to vote

If you are under guardianship, look to the Determination and Order form to see whether you have the right to vote. Ask your guardian for this document or ask the probate court for a copy — they are inexpensive to obtain. You can also ask your attorney or another person who has a signed release from you or your guardian to request a copy.

From "Competency, Guardianship, and Voting in Wisconsin" – a Disability Rights Wisconsin publication available on the Web at: http://www.disabilityvote.org/node/47