

## AN OVERVIEW OF AUTHORIZED DECISION-MAKERS AND ADVANCE DIRECTIVES IN WISCONSIN

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### **I. The Basic Rules of Law of Decision-Making for Adults in Wisconsin**

- A. An adult (18 years or older) is the ONLY one who can make decisions for that adult.
- B. Wisconsin law treats family members, including spouses, as strangers for decision-making purposes.
- C. Family members are NOT authorized to make decisions for capacitated or incapacitated adult family members (Wisconsin is NOT a “next of kin” or “family consent” state for adults).
- D. Decision-making authority can be delegated to others (often called “surrogates”) by a principal who is “of sound mind.” Below are several examples:
  - 1. Joint tenancy of property including bank accounts
  - 2. Powers of Attorney for Finances and Health Care
  - 3. Power of Attorney bank accounts
  - 4. Trusts
- E. The law also delegates decision-making authority to surrogates.
  - 1. Guardians of the Person or Estate
  - 2. Court orders pursuant to Chapters 51 (mental health) and 55 (protective placement/services) of Wisconsin Statutes
  - 3. Representative Payees for Social Security Administration benefits
  - 4. Implied consent in medical emergencies

### **II. Power of Attorney for Finances (a.k.a. Durable Power of Attorney)**

- A. Chapter 244 of Wisconsin Statutes regulates POA-Fs and includes a statutory form.
- B. A document that authorizes another person (called the “agent” or “attorney-in-fact”) to handle the financial affairs of the person executing the document (called the “principal”), consistent with the terms of the document as expressed by the principal.

- C. All POA-Fs are presumed to be durable unless otherwise stated the POA-F. The term “durable” means the document remains in effect during a period of incapacity. The current statutory state form POA-F is automatically durable.
- D. Essentially a private arrangement between the principal and the agent; the court is only involved if trouble arises.
- E. If a POA-F is not executed or other suitable arrangements made (e.g., a trust or the appointment of a representative payee), a Guardian of the Estate must be appointed if the principal loses the mental ability to make financial decisions.

### **III. Living Will (a.k.a. Declaration to Physicians)**

- A. Wisconsin Statute 154 regulates Living Wills.
- B. A document executed by a principal declaring his or her wishes and directing his or her physician to refuse certain life sustaining procedures when the principal’s death is imminent due to a terminal condition or when the principal is in a persistent vegetative state.
- C. Does not apply in any other health care situation.
- D. Does not include the appointment of an agent; it is a directive to the treating physician.

### **IV. Power of Attorney for Health Care**

- A. Chapter 155 of Wisconsin Statutes regulates POA-HCs and includes a statutory form.
- B. A document that authorizes another person (called the “agent”) to make health care decisions for the person executing the document (called the “principal”), consistent with the terms of the document and based on the wishes of the principal, effective when the principal is unable to make health care decisions.
- C. Can include – but need not – a statement of wishes regarding future care.
- D. It is essential that principals talk to their agents about their wishes as well.
- E. If a POA-HC is not executed, a Guardian of the Person must be appointed if the principal loses the mental ability to make health care decisions.

## V. DNR Orders

- A. Chapter 154 of Wisconsin Statutes regulates DNR orders.
- B. A DNR order may only be issued by an attending physician and only applies to a “qualified patient” (when an adult has a terminal condition or would suffer pain or harm from resuscitation or when resuscitation would be unsuccessful). The qualified patient must also request the DNR order, consent to it, and sign the written order.
- C. The DNR bracelet communicates to EMTs, first responders or ER staff that the patient’s physician has issued a DNR order. A DNR Bracelet may be obtained from the physician (for free) or StickyJ® Medical ID (for a fee). For an updated request form, please see the Wisconsin DHS website: <https://www.dhs.wisconsin.gov/ems/dnr.htm>

## VI. Authorization for Final Disposition

- A. Wisconsin Statute 154 regulates authorizations for final disposition.
- B. A document executed by an individual expressing special directions for religious observances, arrangements for viewing, funeral, memorial, or graveside service, and burial, cremation or other disposition of the declarant’s body after death.
- C. Requires a representative to carry out the directions.

## VII. Oral Advance Directives

- A. In the context of a Power of Attorney for Health Care
  - 1. The authority of the agent is to implement the wishes of the principal (called “substituted judgment”) which have been:
    - i. Communicated orally prior to incapacity by the principal to the agent or to someone else.
    - ii. Communicated in writing prior to incapacity by the principal in the Power of Attorney for Health Care document or another document.
    - iii. Communicated during incapacity by the principal to the agent or to someone else.

2. When the wishes of the principal are unknown, the agent is to make decisions based on the “best interests” of the principal.

B. In the context of Guardianship

1. The guardian is to make decisions for the ward based on the “best interests” of the ward.
2. If the guardian can demonstrate by a preponderance of the evidence a clear statement made by a ward, while still competent, of the ward’s desires regarding end-of-life decision-making, it is in the best interests of the ward to honor those wishes. *Edna M. F.*, 210 Wis. 2d 558, 563 N.W.2d 485 (1997).

## VIII. What Is Incompetency? What Is Incapacity?

A. “Incompetency” (Wis. Stat. § 54.10)

1. To be determined incompetent by a judge or court commissioner in a **guardianship** proceeding, the following must be met:
  - a) The individual is at least 17 years and 9 months old;
  - b) The individual has a qualifying impairment;
  - c) Because of that qualifying impairment, the individual is
    - i. “unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety,” or
    - ii. “unable effectively to receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs, to the extent that any of the following applies:
      - 1) The individual has property that will be dissipated in whole or in part.
      - 2) The individual is unable to provide for his or her support.
      - 3) The individual is unable to prevent financial exploitation.
  - d) The individual has needs that cannot be addressed by less restrictive measures.
2. Must be based on medical and other expert opinions.

B. “Incapacity”

1. Determination by two doctors or one doctor and a licensed psychologist that an individual is “unable to receive and evaluate information effectively or to communicate decisions to

such an extent that the individual lacks the capacity to manage his or her health care decisions.” Wis. Stat. § 155.01 (8).

2. Used to “activate” a **Power of Attorney for Health Care**.
3. Note: Current POA-Fs take effect immediately, unless otherwise specified within the POA-Finances.

**QUESTIONS? Call the Wisconsin Guardianship Support Center at 1-855-409-9410 or email at guardian@gwaar.org.**

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