

AUTHORITY TO CONSENT TO ADMISSION (PLACEMENT) TO NURSING HOMES, CBRFs, RCACs and HOSPICE FOR INDIVIDUALS WHO ARE NOT DEVELOPMENTALLY DISABLED OR MENTALLY ILL

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I. Introduction

- A. Wisconsin law regulates who has the authority to consent to an individual's admission (the legal term is "placement") to nursing homes and certain other facilities.
- B. The circumstances under which someone can make admission decisions for another person are regulated by Wisconsin law.
- C. This publication includes the changes in Wisconsin law made by 2005 Wisconsin Act 264, effective November 1, 2006, and 2005 Wisconsin Act 387, effective December 1, 2006. All citations are to the current statutes.

II. Nursing Homes

- A. An **individual** who is legally and actually capable to consenting may consent to his or her admission for any purpose and any length of time.
 - *But* if she or he later becomes incapable of making health care decisions *and* if she or he hasn't executed a valid Power of Attorney for Health Care (see Section II, B, below), a guardianship and protective placement order is needed to continue to consent to placement (admission) and medical treatment. *Guardianship of Agnes T.*, 189 Wis.2d 520, 525 N.W.2d 268 (1995); Section 55.055 (2) of Wisconsin Statutes.
- B. A **health care agent under an activated Power of Attorney for Health Care**, executed after April 28, 1990, may consent to the admission to the principal for:
 - 1. **Recuperative care** - For three months or less for recuperative care following inpatient hospitalization, unless hospitalization was for psychiatric care, Section 155.20 (2) (c) 2. a.;



2. **Respite care** - For 30 days or less, if the principal lives with the agent *and* placement is to provide the agent with a vacation or to release the agent for a family emergency, Section 155.20 (2) (c) 2. b., or;
3. **Long-term care** - If the power of attorney document specifically authorizes admission for purposes other than the above short-term admissions *and* the principal is not diagnosed as developmentally disabled or having a mental illness at the time of the proposed admission *and* the principal is not protesting. Sections 155.20 (2) (c) 2. c. and 155.20 (5).

Note: If the principal is protesting, a guardianship and protective placement order must be obtained (see Section II, C, 3, below).

4. An agent may admit a principal to a Wisconsin nursing home pursuant to a Power of Attorney for Health Care from another state which was executed in accordance with the law of the other state for recuperative care and respite care (unless the document expressly restricts the agent's authority). An agent may admit the principal for long-term care if the document includes the specific authorization mentioned above in Section II, B, 3. Section 155.70 (10).
5. A combined Power of Attorney for Health Care and Durable Power of Attorney for Finances document created and executed prior to April 28, 1990, may not be used for admission to a nursing home or CBRF with 16 or more beds, even when the document specifically authorizes the agent to admit the principal to a nursing home or CBRF. Opinion of the Attorney General dated September 23, 1994.

C. A **guardian of the person** may admit their ward to a nursing home:

1. **For recuperative and other care** - For a period not to exceed 60 days (before November 1, up to three months) **without a protective placement order from a court** if:
 - a. Ward is in need of recuperative care *or* if unable to provide for his or her care or safety so as to create a serious risk of substantial harm to himself or herself or others, *and*;
 - b. Placement is consistent with the ward's right to placement in the least restrictive residential environment.
 - c. Before November 1, 2006, the statute required that admission must be directly from a hospital inpatient, non-psychiatric unit; effective November 1, prior hospitalization is no longer required.
 - d. Guardian has authority for 60 days (prior to November 1, 2006, three months), followed by additional 60 day period if petition for protective placement is brought or by an additional 30 days for discharge planning if no protective placement petition is brought.

- e. Admission permitted if ward has primary diagnosis of mental illness or developmental disability *unless* the primary purpose of admission is for treatment or services related to the individual's mental illness or developmental disability.

Section 55.055 (1) (b) of Wisconsin Statutes.

- f. Guardian of ward found incompetent in another state may admit to facility for up to 60 days for recuperative and other care if ward is resident of Wisconsin; if longer stay, petition to transfer foreign guardianship and petition for protective placement must be filed within 60 days after admission. Section 55.055 (1) (c).
 - g. Resident of Wisconsin who is guardian of ward found incompetent in another state and who resides in another state may admit to a facility for up to 60 days for recuperative and other care if intending to move the ward to Wisconsin within 30 days of consent to admission; if longer stay, petition to transfer guardianship and petition for protective placement must be filed in Wisconsin within 60 days of the ward's admission. Section 55.055 (1) (d).
 - h. If the ward verbally or otherwise actively protests the admission, the facility must immediately notify the county protective services unit, which must visit the person within 72 hours. If the individual continues to protest, she or he must be released within 72 hours or procedures must be followed for involuntary emergency placement or protective placement. Section 55.055 (3).
2. **For a temporary stay** - Up to 30 days (may be extended by court for total maximum of 60 days) **without a protective placement order from the court** *if* the ward lives with the guardian and the placement is to provide the guardian with a vacation or to temporarily release the guardian for a family emergency. Section 55.055 (5).
3. **Long-term care** – Pursuant to a **protective placement order from the court (called "protective placement")** if the individual:
- a. Has a primary need for residential care and custody;
 - b. Has been determined by a court to be incompetent;
 - c. As a result of developmental disabilities, degenerative brain disorder, serious and persistent mental illness or other like incapacities, is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to oneself or others (serious harm may be by overt acts or acts of omission); and
 - d. Has a disability that is permanent or likely to be permanent. Section 55.08 (1).
 - e. The petition for protective placement is usually part of the petition for guardianship, although can be petitioned for after the guardianship has been granted. If guardianship is older than one year, the court must review the finding of incompetency. Section 55.075 (3).

4. **Emergency care** - Pursuant to an **emergency protective placement** (see Section II, D, below).

D. A **sheriff, police officer, fire fighter, guardian or authorized representative of a protective services agency** may admit an individual to a nursing home pursuant to an **emergency protective placement** under Section 55.135.

1. A person may be taken to an appropriate medical or protective placement facility if a sheriff, police officer, fire fighter, guardian, or authorized representative of a protective services agency determines, based either on a reliable report made to them or personal observation, that the person is so totally incapable of providing for own care or custody as to create a substantial risk of serious harm to self or others as a result of developmental disabilities, infirmities of aging, chronic mental illness, or other like incapacities if not immediately protectively placed.

Note: The standard prior to November 1, 2006, was “likely to suffer irreparable injury or death or will present a substantial risk of serious harm to others.”

2. The person taking the individual into custody and transporting the individual to the facility must present a written “statement” (form is available at www.wicourts.gov) specifying the basis for the emergency placement to the facility director.
3. The director of the facility or the director’s designee must inform the individual, both orally and in writing, of his or her right to contact an attorney and a member of his or her immediate family and the right to have an attorney provided at public expense if indigent. The director or designee shall provide the individual with a copy of the statement.
4. A petition for protective placement must be filed immediately.
5. A preliminary hearing must be held within 72 hours (excluding Saturdays, Sundays and legal holidays) to determine whether there is probable cause to believe that the grounds for protective placement exist.
6. If probable cause is found, a final protective placement hearing must be held within 30 days. For that 30-day period, the court may order temporary protective placement or other protective services as may be needed. Section 55.135.

E. A **family member/friend** may admit an individual *if*:

1. The proposed ward is **transferring from a hospital to a nursing home**, and all of the following requirements of Section 50.06 (Act 187), are met.
 - a. An individual is in a hospital (not their home, not another nursing home);
 - b. The individual is personally examined by two physicians or a physician and a psychologist who certify in writing that the patient is “incapacitated,” which is defined as “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, including decisions about his or her post-hospital care;”
- c. The individual is not diagnosed as developmentally disabled or having a mental illness;
 - d. There is no valid Power of Attorney for Health Care **and** the person has not been found incompetent in this state;
 - e. A petition for guardianship and protective placement has been **filed** prior to the admission.
 - i. The petition does not need to have been granted prior to admission; it needs only to have been filed with the court prior to admission.
 - ii. The hearing must be held within 60 days of filing or as soon as possible, (per Section 54.44 (1) (b), if the individual or another person protests the admission.
 - iii. If the incapacitated person is in the facility 60 days after admission and a guardian has not been appointed, the authority of the individual continues for 30 days to provide for discharge planning for the incapacitated individual.
 - f. The individual can be admitted even if verbally objecting or otherwise actively protesting. **But if** the ward verbally or otherwise actively protests the admission, the facility must immediately notify the county protective services unit, which must visit the person within 72 hours. If the individual continues to protest, she or he must be released within 72 hours or procedures must be followed for involuntary emergency placement or protective placement. The court, with the permission of the facility, may order that the incapacitated individual remain in the facility pending the outcome of protective placement proceedings.
2. The priority order (in relation to the proposed resident) for the person authorized to give consent for admission is spouse, adult child, parent, adult sibling, grandparent, adult grandchild, and adult close friend.
 - No individual at the same or higher priority order can disagree with the admission, and no individual who resides with the individual, no matter what level in the priority order, can disagree with the admission. Section 50.06 (6).
 3. The person who consents to admission may make health care decisions to the same extent as a guardian of the person and may authorize expenditures for health care to the same extent as a guardian of the estate (unless there is an existing Durable Power of Attorney for Finances). This authority continues until the earlier of the following occurs:
 - a. 60 days after admission,
 - b. Discharge of the person from the facility, or
 - c. Appointment of a guardian for the incapacitated person.

- Because Section 50.06 grants the person admitting the resident the authority of a guardian of the person and guardian of the estate, there is no need for the appointment of a temporary guardian pending the outcome of the petition for permanent guardianship and protective placement.

F. By **conversion of a Chapter 51 of Wisconsin Statutes civil commitment** proceeding to a protective placement proceeding.

1. If the court determines at the probable cause hearing under Section 51.20 (7) (d), that the individual subject to civil commitment proceedings is a fit subject for guardianship and protective placement or services, the court may, without further notice, appoint a temporary guardian for the subject individual and order temporary protective placement or services under Chapter 55 of Wisconsin Statutes for a period not to exceed 30 days, and shall proceed as if the petition had been made for guardianship and protective placement or services.
2. A final hearing for guardianship and protective placement must be held within 30 days.

III. Community Based Residential Facilities (CBRFs)

A. An **individual** who is legally and actually capable of consenting may consent to his or her admission for any purpose and any length of time.

- *But* if he/she later becomes incapable of making health care decisions *and* if she or he hasn't executed a valid Power of Attorney for Health Care (see Section III, B, below), a guardianship and protective placement order is needed to continue to consent to placement and to consent to medical treatment if CBRF is licensed for 16 or more beds. *Guardianship of Agnes T.*, 189 Wis.2d 520, 525 N.W.2d 268 (1995). If CBRF is licensed for fewer than 16 beds, only guardianship, but not protective placement, is needed. Sections 55.055 (1) (a) and (2).

B. A **health care agent under an activated Power of Attorney for Health Care** may consent to the admission of the principal for:

1. **Recuperative care** – For three months or less for recuperative care following inpatient hospitalization, unless hospitalization was for psychiatric care, Section 155.20 (2) (c) 2. a.;
2. **Respite care** – For 30 days or less, if the principal lives with the agent *and* placement is to provide the agent with a vacation or to release the agent for a family emergency, Section 155.20 (2) (c) 2. b., or;
3. **Long-term care** – If the power of attorney document specifically authorizes admission for purposes other than the above short-term admissions *and* the principal is not diagnosed

as developmentally disabled or having a mental illness at the time of the proposed admission *and* the principal is not protesting, Section 155.20 (2) (c) 2. c.

Note: If the principal is protesting, a guardianship and protective placement order must be obtained (see Section II, C, 3, below).

4. An agent may admit a principal to a Wisconsin CBRF pursuant to a Power of Attorney for Health Care from another state which was executed in accordance with the law of the other state for recuperative care and respite care (unless the document expressly restricts the agent's authority). An agent may admit the principal for long-term care if the document includes the specific authorization mentioned above in Section III, B, 3 above.

C. A **guardian** may consent to admit a ward to a CBRF:

1. **For small facilities** –

- a. If the CBRF is licensed for fewer than 16 beds, the guardian may consent to admission for any purpose and for any length of time **without a protective placement order from the court**. Section 55.055 (1) (a), HFS 83.06 (5) of Wisconsin Administrative Code.
- b. When ward is a resident of Wisconsin, but under foreign guardianship, guardian has authority to admit to CBRF licensed for fewer than 16 beds for up to 60 days; if longer stay, petition to transfer foreign guardianship must be filed within 60 days after admission. Section 55.055 (1) (c).
- c. When the ward is not a resident and is under foreign guardianship, but guardian is resident, guardian has authority to admit to CBRF licensed for fewer than 16 beds if intending to move ward to Wisconsin within 30 days of consent to admission; if stay is longer than 60 days, petition to transfer foreign guardianship must be filed within 60 days of admission. Section 55.055 (1) (d).
- d. Prior to providing that consent, and annually thereafter, the guardian must review the ward's right to the least restrictive residential environment and consent only to admission to a home or facility that implements those rights.
- e. If the ward verbally or otherwise actively protests the admission, the facility must immediately notify the county protective services unit, which must visit the person within 72 hours. If the individual continues to protest, she or he must be released within 72 hours or procedures must be followed for involuntary emergency placement or protective placement. Section 55.055 (3).

2. **For recuperative and other care** – For a period not to exceed 60 days (before November 1, up to three months) for a CBRF licensed for 16 or more beds **without a protective placement order from a court** *if*:
- a. Ward is in need to recuperative care *or* is unable to provide for his or her care or safety so as to create a serious risk of substantial harm to himself or herself or others, *and*;
 - b. Placement is consistent with the ward's right to placement in the least restrictive residential environment.
 - c. Before November 1, 2006, the statute required that admission must be directly from a hospital inpatient, non-psychiatric unit; effective November 1, prior hospitalization is no longer required.
 - d. Guardian has authority for 60 days (prior to November 1, 2006, three months), followed by additional 60 day period if petition for protective placement is brought or by an additional 30 days for discharge planning if no protective placement petition is brought.
 - e. Admission permitted if ward has primary diagnosis of mental illness or developmental disability *unless* the primary purpose of admission is for treatment or services related to the individual's mental illness or developmental disability.

Section 55.055 (1) (b) of Wisconsin Statutes.

- f. Guardian of ward found incompetent in another state may admit to CBRF licensed for 16 beds or more for up to 60 days for recuperative and other care if ward is resident of Wisconsin; if longer stay, petition to transfer foreign guardianship and petition for protective placement must be filed within 60 days after admission. Section 55.055 (1) (c).
- g. Resident of Wisconsin who is guardian of ward found incompetent in another state and who resides in another state may admit to CBRF licensed for 16 beds or more for up to 60 days for recuperative and other care if intending to move the ward to Wisconsin within 30 days of consent to admission; if longer stay, petition to transfer guardianship and petition for protective placement must be filed in Wisconsin within 60 days of the ward's admission. Section 55.055 (1) (d).
- h. If the ward verbally or otherwise actively protests the admission, the facility must immediately notify the county protective services unit, which must visit the person within 72 hours. If the individual continues to protest, she or he must be released within 72 hours or procedures must be followed for involuntary emergency placement or protective placement. Section 55.055 (3).

3. **For a temporary stay regardless of facility size** - Up to 30 days (may be extended by court for total maximum of 60 days) **without a protective placement order from the court** *if* the ward lives with the guardian and the placement is to provide the guardian with a vacation or to temporarily release the guardian for a family emergency. Section 55.055 (5).
4. **With a protective placement order from the court.** See Section II, C, 3, above.

D. A **family member/friend** may admit an individual *if*:

1. The proposed ward is **transferring from a hospital to a CBRF**, and all of the requirements of Section 50.06 (Act 187), are met. See Section II, E, above.

IV. Residential Care Apartment Complexes (RCACs)

- A. An **individual** who is legally and actually capable of consenting may consent to his or her admission.
1. *But* an individual's contract can be terminated if the resident is later adjudicated incompetent or if the resident's Power of Attorney for Health Care is activated. HFS Section 89.29 (3) (a) 4. of Wisconsin Administrative Code.
 2. However, the RCAC may continue to allow the resident to reside in the complex, even if the individual becomes incompetent or incapacitated, if:
 - a. The facility or another service provider can continue to meet the service needs of the individual, and;
 - b. The facility can ensure:
 - i. That adequate oversight, protection and services are provided for the individual.
 - ii. That the individual has a guardian appointed or has an activated Power of Attorney for Health Care under Chapter 155 or a Durable Power of Attorney under Section 243.10, or both. The activated Power of Attorney for Health Care or Durable Power of Attorney shall, either singly or together, substantially cover the person's areas of incapacity.
 - iii. That both the service agreement and risk agreement are signed by the guardian and by the health care agent or the agent with power of attorney, if any.
 3. Facilities are permitted to retain residents who become incompetent or incapable of recognizing danger, summoning assistance, expressing need or making care decisions because to do so accommodates aging in place and familiar surroundings and routines are important components of dementia care.

- B. A **health care agent under an activated Power of Attorney for Health Care** may consent to the admission of the principal to an RCAC only if the principal shares the apartment with a competent spouse or another person who has legal responsibility for the principal. DHS Section 89.29 (1) (b). Specific authorization is not required in a Power of Attorney for Health Care.
- C. A **guardian** may consent to admit a ward to an RCAC only if the ward shares the apartment with a competent spouse or another person who has legal responsibility for the ward. DHS Section 89.29 (1) (a).

V. Hospice

- A. An **individual** who is legally and actually capable of consenting may consent to any placement of himself or herself.
- B. An **agent under an activated Power of Attorney for Health Care** may admit their principal.
- C. A **guardian of the person** may admit their ward:
 - 1. **Without a protective placement order from the court** if services will be provided in the ward's home or a hospice facility.
 - 2. **Pursuant to a protective placement order from the court** if services will be provided in a nursing home.
- D. A **family member or close friend** may admit pursuant to Section 50.94 *if*:
 - 1. Two physicians or one physician and one licensed psychologist certify that the individual's terminal condition will cause death within six months, and that she or he believes the individual who is admitting the incapacitated person is acting in accordance with the views or beliefs of the person who is incapacitated. Incapacity is determined in the same way incapacity is determined under a Power of Attorney for Health Care.
 - 2. The individual may not have a valid Power of Attorney for Health Care or Living Will or have been adjudicated incompetent under Chapter 54 of Wisconsin Statutes.
 - 3. The priority order (in relation to the patient) for the role for the person authorized to give consent for admission is spouse, adult child, parent, an adult sibling, and a close friend or relative of the person who is incapacitated, who is age 18 or over and who has maintained sufficient regular contact with the person to be familiar with the person's activities, health and beliefs, and who has exhibited special care and concern for the person.
 - 4. The individual who admits an incapacitated person to hospice must certify that it is his or her belief, to the best of his or her knowledge, that, if able to do so, the person who is incapacitated would have selected hospice care.

5. The person subject to the admission may object to or revoke the admission at any time.
6. A person who disagrees with the decision to admit the individual may file for temporary guardianship and has the burden of proving that the person who is incapacitated would not have consented to admission to a hospice or hospice care.
7. The person who admits the individual to hospice may make decisions related only to hospice care which is defined in Section 50.94 (1) as “palliative care, respite care, short-term or supportive care.”

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

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