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MAY A GUARDIAN CONSENT TO THE WITHHOLDING OR WITHDRAWAL OF LIFE-SUSTAINING MEDICAL TREATMENT FROM HER OR HIS WARD?

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I. Introduction

Guardians of the Person are sometimes called upon to decide whether or not to consent to the withholding or withdrawal from a ward of life-sustaining medical treatment, including artificial nutrition and hydration. The following questions are designed to assist guardians in considering this difficult issue.

These questions are based on the following Wisconsin Supreme Court cases:
In the Matter of the Guardianship of L.W., 167 Wis.2d 53, 482 N.W.2d 60 (1992) and
In the matter of the Guardianship and Protective Placement of Edna M.F., 210 Wis.2d 558, 563 N.W.2d 485 (1997).

Note: All questions are labeled with letters – A., B., C., etc. – to facilitate the proper sequencing of the questions. All readers should begin with question A., but not all subsequent questions will need to be asked. The exact questions that must be asked will vary depending on the answers.

II. Questions to Ask

A. Has the ward's attending physician, together with two independent physicians, determined with reasonable medical certainty that the ward is in a persistent vegetative state and has no reasonable chance of recovery to a cognitive sentient life?

- ***If the answer to A is Yes,*** *that is, the ward is in a persistent vegetative state,* ***go to B.***
- ***If the answer to A is No,*** *that is, the ward is not in a persistent vegetative state,* ***go to G.***

B. If the ward is in a persistent vegetative state, did the ward prior to incompetency make a clear statement of his or her wishes[1], either to withhold or withdraw life-sustaining medical treatment, or not to withhold or withdraw life-sustaining medical treatment?

- ***If the answer to B is Yes,*** *that is, the ward prior to incompetency made a clear statement of his or her wishes,* ***go to C.***

- ***If the answer to B is No,*** *that is, the ward prior to incompetency did not make a clear statement of his or her wishes,* ***go to D.***

C. If the ward made a clear statement prior to incompetency, the guardian must follow the wishes of the ward.

D. If the ward did not make a clear statement prior to incompetency, is withholding or withdrawing life-sustaining medical treatment in the ward's best interests?

To answer this question, the guardian must begin with the presumption that continued life is in the best interests of the ward. This presumption can be overcome by a good faith consideration of the following factors from the standpoint of the patient, not from the guardian's own view of the quality of life of the ward:

1. The degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment;

2. The life expectancy and prognosis for recovery with and without treatment;

3. The various treatment options;

4. The risks, side effects, and benefits of each of those options;

5. The opinion of an ethics committee, if one is available at the facility where the ward is receiving medical care;

6. The opinions of a spouse, next of kin or close friend or associate over a significant period of time.

- ***If the answer to D is Yes,*** *that is, withholding or withdrawing life-sustaining medical treatment is in the ward's best interests,* ***go to E.***
- ***If the answer to D is No,*** *that is, withholding or withdrawing life-sustaining medical treatment is not in the ward's best interests,* ***go to F.***

E. If withholding or withdrawing treatment is in the best interests of the ward, the guardian may withhold or withdraw life-sustaining medical treatment, but only after:

Giving notice of the decision to withhold or withdraw life-sustaining medical treatment to any "interested party."[2] Formal notice is not required, but the notice must inform the interested parties of the decision and allow adequate time for parties to respond.

If no interested party objects, the guardian may make the decision without court approval.

If an interested party objects, the court will review the guardian's decision. The court will presume that continued life is in the best interests of the ward. The burden will rest on the guardian to show both the existence of a persistent vegetative state to a high degree of medical certainty and that the decision to withhold or withdraw treatment is in the ward's best interests and is being made in good faith.

F. If withholding or withdrawing treatment is not in the ward's best interests, the guardian may not authorize the withholding or withdrawal of life-sustaining medical treatment.

G. If the ward is not in a persistent vegetative state, did the ward ever have a period during which she or he was competent?

- ***If the answer to G is Yes,*** *that is, the ward had a period during which she or he was competent,* ***go to H.***
- ***If the answer to G is No,*** *that is, the ward did not have a period during which she or her was competent,* ***go to K.***

H. If the ward was at one time competent, did the ward prior to incompetency[3] make a clear statement of his or her wishes[4], either to withhold or withdraw life-sustaining medical treatment, or not to withhold or withdraw life-sustaining medical treatment?

- ***If the answer to H is Yes,*** *that is, the ward prior to incompetency made a clear statement of his or her wishes,* ***go to I.***
- ***If the answer to H is No,*** *that is, the ward prior to incompetency did not make a clear statement of his or her wishes,* ***go to J.***

I. If the ward did make a clear statement, the guardian must follow the wishes of the ward.[5]

J. If the ward did not make a clear statement, the guardian may not authorize the withholding or withdrawal of life-sustaining medical treatment.[6]

K. If the ward was never competent, the guardian may not authorize the withholding or withdrawal of life-sustaining medical treatment.[7]

**This publication refers to these specific end-of-life matters only. For further review, you may wish to review The Guardian publication (located on the Guardianship Support Center webpage), "Decision-Makers and the Authority to Consent to a DNR Order."

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

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The information contained herein is not intended, and should not be used, as legal advice. Application of the law depends upon individual facts and circumstances. In addition, statutes, regulations and case law are subject to change without notice. Consult a legal professional for assistance with individual legal issues.

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[1] The Court indicated that the ward's wishes could be expressed in an advance directive such as a Living Will or a Power of Attorney for Health Care or an oral communication by the ward to another person. The Court did not further clarify what a "statement" was. Other than to state that the ward's wishes must be demonstrated by a preponderance of the evidence, the court did not state how specific the advance directive or oral communication needed to be in order to be considered "clear." If the guardian is not aware of any statement of wishes made prior to incompetency, the guardian will need to question the ward's family and friends and any others who might have evidence of the ward's wishes.

[2] "Interested parties" include the ward; the ward's spouse; next of kin; close friend or associate over a significant period of time; the ward's physician and the facility/agency where the individual is receiving his or her medical care; the individual's guardian ad litem, if any; an agent under a health care power of attorney; and any official or representative of a public or private agency, corporation or association concerned with the ward's welfare.

[3] If the ward did not make a clear statement prior to incompetency, but is expressing his or her wishes about the withholding or withdrawing of life-sustaining medical treatment while incompetent, consideration should be given to having a medical evaluation conducted to determine if the ward is competent to make this decision and, if so, asking the court to declare the ward competent for this purpose.

[4] See footnote 1.

[5] The court did not set forth any procedure for the guardian to follow when she or he decides to withhold or withdraw life-sustaining treatment based on the ward's wishes when the ward is not in a persistent vegetative state. We recommend that the guardian provide notice to interested parties as noted in the above section about persistent vegetative state. Any interested party should be given an opportunity to seek a court decision regarding the proposed withholding or withdrawal of treatment.

[6] The "best interest" analysis that is used when a ward is in a persistent vegetative state, but did not make a clear statement of his or her wishes prior to incompetency, is not allowed when the ward is not in a persistent vegetative state.

[7] See footnote 6.