

*The Guardian* is a quarterly newsletter published by the Greater Wisconsin Agency on Aging Resources' (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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## Survey on Guardianship Alternatives in Wisconsin

**T**he Wisconsin Board for People with Developmental Disabilities (BPDD) was established to advocate on behalf of individuals with intellectual and developmental disabilities, foster welcoming and inclusive communities, and improve the disability service system.



The board is interested in learning more about the use of guardianship and supported decision-making for adults with intellectual and developmental disabilities in Wisconsin. This survey is intended to gather information from a variety of stakeholders about their knowledge of and experience(s) with Wisconsin's adult guardianship system and children transitioning into adulthood to assist BPDD in better understanding which issues should be prioritized for short- and long-term planning and action. All responses and/or personal information provided will remain confidential. The survey should take 12-14 minutes to complete. Thank you for your assistance with this important project.

PLEASE use this link ([surveymonkey.com/r/yhwcjtq](https://surveymonkey.com/r/yhwcjtq)) to take a quick survey about guardianship alternatives in Wisconsin. Your input is important. Feel free to share this survey with your networks as you deem appropriate. They will continue to collect survey responses through Tuesday, August 1, 2017.

**Please consider taking the survey yourself and share with your networks. A good sample size is important to help direct future work. ☐**



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plication process can be confusing. In particular, guardians and POA agents of applicants who own assets in excess of the limit must be especially careful when spending down those excess assets in order to make the applicant eligible for long-term care MA.

Divestment is defined as the transfer of income, assets, or property for less than fair market value for the purpose of becoming eligible for a long-term care MA program. Guardians and POA agents should understand how divestment may impact an individual’s eligibility for long-term care MA. However, divestment is a very complicated issue. This article will provide general information to answer the most frequently-asked questions about divestment. If you have specific questions about transfers of income, assets, or property, **please consult with an elder law attorney with estate and long-term care planning experience.**

### Medicaid Eligibility

In general, unmarried applicants must have no more than \$2,000 in countable assets in order to be eligible for MA, and married applicants must have no more than \$3,000. (Note: A married person applying for institutional long-term care MA can retain assets and income that are above the regular MA financial limits due to spousal impoverishment protection provisions.)

Some assets do not count toward this limit. These include: the home and its adjoining land (if the applicant/spouse live there or intend to return home), one vehicle, personal effects and household goods, irrevocable burial trusts and irrevocable life insurance funded burial contracts, life insurance policy with a face value of \$1,500 or less, business assets, and the IRA of a spouse not applying for MA.

### How does divestment affect Medicaid eligibility?

If an applicant owns assets over the eligibility limit, the solution is not to give away assets in order to become eligible for MA. An individual should always receive fair market value for any items transferred or sold. Even paying a family member for providing care and assistance

*(Divestment, continued on page 3)*

## What Guardians and POA Agents Should Know About Divestment

Many guardians and Power of Attorney (POA) agents look to Medicaid (MA) as a way to pay for nursing home care and community-based, long-term care programs. However, MA eligibility criteria and the ap-



(Divestment, continued from page 2)

with various chores can be seen as a divestment, unless there is a notarized contract in place before the duties have begun. Some other examples of divestment include avoiding income, such as waiving pension income, disclaiming an inheritance, or not accepting injury settlements.

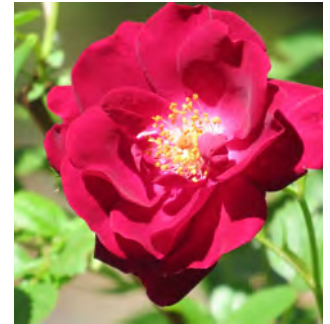
As of January 1, 2014, the divestment look back period is 60 months. This means that income maintenance staff will look back 60 months (5 years) prior to the date of an MA application to determine whether any income or assets have been given away or transferred for less than fair market value. Any gifts or transfers for less than fair market value may trigger a divestment penalty period and a period of ineligibility for MA. The penalty period is calculated by dividing the amount given away for less than fair market value by \$278.05 (as of 7/1/17), the current average daily nursing home cost for a private pay patient. The penalty period begins on the date the person applies for MA and is otherwise eligible, except for the divestment penalty. There is no limit on how long a divestment penalty period can last. The length of time depends on the value of the gifts made or item(s) given away.

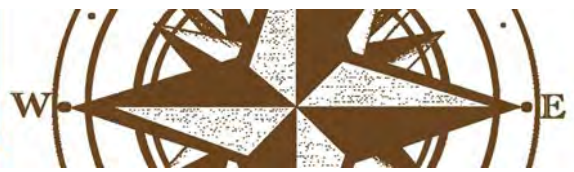
## Who should be concerned about divestment rules?

Applicants for long-term care MA and currently eligible long-term care MA participants *who reside in nursing homes or certain other institutional settings or who receive services through a long-term care MA program* are subject to divestment rules. Institutional settings include hospitals, nursing homes, intermediate care facilities, community-based residential facilities, and skilled nursing facilities. In these situations, the MA program covers many of the costs related to the individual's long-term care. Individuals who participate in the state long-term care MA programs are also subject to divestment rules. Long-term care MA includes the Community Options Program (COP), the Community Integration Program (CP), Family Care, Wisconsin Partnership Program, IRIS, and PACE.

## What are some ways to avoid divestment?

- *Spend assets on permitted expenditures.* Example: Mrs. Smith is entering a nursing home and is applying for institutional long-term care (ILTC) Medicaid. She is widowed and has \$15,000 in her checking and savings accounts. She intends to return home after her nursing home stay. The Medicaid asset limit for an unmarried individual is \$2,000. She would like to give each of her 5 grandchildren \$1,000. However, that would be a divestment and would cause a divestment penalty period. Instead, she puts \$10,000 in an irrevocable burial trust, spends \$2900 on home repairs, and buys \$100 worth of new clothes.
- *Use a Power of Attorney for finances document instead of a joint bank account.* Example: Ms. White is 88 years old. Last year when she stopped driving, she added her son onto her bank account as a joint owner so that he could help her pay her bills. Although this arrangement is convenient, if her son takes any money out of that account for himself, it will be a divestment if Ms. White needs to move into a nursing home and apply for Medicaid. Instead, she should consider making her son her Power of Attorney for finances.
- *Don't transfer real estate interests for less than fair market value.* Example: Mr. Green is 90 years old. He wants his daughter to have his house when he passes away, so he signs a quit claim deed naming his daughter as grantee. He reserved a life estate for himself so he could continue to live in the house. However, if his daughter does not purchase the remainder interest for fair market value, the quit claim deed would be a divestment if Mr. Green moves into a nursing home and applies for Medicaid within the next five years. □





## World Elder Abuse Awareness Day: June 15

**W**orld Elder Abuse Awareness Day falls on June 15 every year. The event aims to raise awareness and understanding of abuse and neglect of older adults. Follow the link below to see stories of WEAAD events around the world.

[eldermistreatment.usc.edu/weaad-home/events](http://eldermistreatment.usc.edu/weaad-home/events)

### Upcoming Events

**(NAPSA) National Adult Protective Services Association Conference**

**August 28-31**

Hilton City Center | Milwaukee, WI

[napsa-now.org/about-napsa/annual-conference](http://napsa-now.org/about-napsa/annual-conference)

**Aging and Disability Network Conference**

**September 6-8**

Madison Marriott West | Middleton, WI

**Self-Determination Conference**

**November 1-3**

Kalahari Resort | Wisconsin Dells, WI

[wi-bpdd.org/index.php/wisconsin-self-determination-conference](http://wi-bpdd.org/index.php/wisconsin-self-determination-conference)

*Note: If your organization or agency is hosting a statewide event related to commonly-discussed topics in The Guardian and you would like to spread the word about the event, contact the GSC at [guardian@qwaar.org](mailto:guardian@qwaar.org). We may include it in our next quarterly publication.*

## Helpline Highlights

**What happens when the person nominated to become guardian discloses a felony conviction in the Statement of Acts?**

Disclosing a felony or misdemeanor conviction, a previous bankruptcy, or listing on the caregiver misconduct registry does not automatically disqualify the proposed guardian from being appointed as guardian. The information must be disclosed so that the guardian ad litem has the opportunity to investigate the facts and make a recommendation of the suitability of the proposed guardian to the court. The court may decide that one of the disclosures from the statement of acts renders the proposed guardian unfit to act as guardian. However, the statutes are vague as to what standard the court should use to interpret this information.

**What form is used in temporary guardianships for the examining physician or psychologist report?**

There is not a standardized physician or psychologist report specifically designed for temporary guardianships. A report or testimony from the physician or psychologist is required to indicate that there is a “reasonable likelihood that the proposed ward is incompetent.” Wis. Stat. 54.50(3)(c).

**A guardian was appointed for an adult ward who has a minor child. Does the guardian appointed for the parent automatically become the guardian of the minor child?**

No. A separate court process is required to name a guardian for a minor. The guardian of an adult found

*(Highlights, continued on page 5)*





*(Highlights, continued from page 4)*

to be incompetent does not automatically become the guardian for the ward’s minor children. The guardian of an adult only has the authority that is identified within the guardianship order and letters of guardianship. The adult ward also only loses the decision-making rights specifically identified within the guardianship orders. □

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## State of Wisconsin v. McGee (In re the Commitment of Michael L. McGee)

**Court:** Court of Appeals

**Appeal No.:** 2016AP 1082

**Date:** May 17, 2017

### Case Summary:

The State of Wisconsin and Kenosha County brought suit to rescind the supervised release plan approved by Racine County for the residential placement of Michael McGee. McGee had been convicted of sexually-violent offenses and is therefore subject to guidelines if he is to live outside of an institution. It was determined that Racine County did not follow the required statutory guidelines in seeking to place McGee at a residence in Kenosha, therefore invalidating the court-mandated supervised release plan.

### Case Details:

Back in 1987 Michael McGee was convicted of 2nd degree sexual assault and burglary in Racine County. He was eventually released on parole, but in 1992 he was again charged with 4th degree sexual assault of an adult female and 1st degree sexual assault of a child. Even though both charges were dismissed, McGee’s

### 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 may want to speak with an attorney.

parole was revoked and he was returned to prison. In 2003, in preparation for his release, the Racine County District Attorney sought and obtained a civil commitment to detain McGee as a sexually-violent person. According to Wis. Stat. § 980.08(1), a person determined to be a sexually-violent individual may petition for “supervised release,” thereby allowing that person to reside within a community subject to certain requirements. McGee petitioned for this supervised release in 2013 and it is undisputed that he met all statutory requirements.

Per Wis. Stat. § 980.08(4)(cm), the committing court must place the sexually-violent person in his or her county of residence unless “good cause” is shown to place them in a different county. “Good cause” has never been defined. Racine County determined that there was no suitable housing for McGee in the entire county due to a litany of restrictive zoning ordinances, but found a residence in Kenosha that they ended up pursuing. However, Kenosha County was never consulted about the placement. In February 2016, the Wisconsin Legislature passed Act 156, which amended Chapter 980 to prohibit a finding of “good cause” based on local ordinances, directly impacting the possible placement of McGee in Kenosha. Nevertheless, the circuit court in

*(McGee, continued on page 6)*



(McGee, continued from page 5)

Racine approved and signed the supervised release order for residence in Kenosha on May 4, 2016.

On May 18, Kenosha County fought the supervised release order, arguing that the Department of Health Services (DHS) and the circuit court failed to abide by the statutory requirements. In addition, it was revealed that the proposed Kenosha property was within 1,500 feet of a bike trail frequented by families and children, and it was also adjacent to another property where a 1-year-old child resided. Along with these crucial facts, the Court of Appeals invalidated the supervised release order primarily because Kenosha County and the proper officials were not provided proper notice of Racine's intentions to place McGee in that residence and were not afforded an adequate opportunity to be involved in the process. Wis. Stat. § 980.08(4) states that "the court and DHS are obligated to involve the county of intended placement, its law enforcement, the local government where the proposed placement exists, and others in the preparation of the supervised release plan." Racine simply failed to follow these requirements. This includes providing information relating to the specific sexually-violent person seeking residence so the new placement site takes the person's past offenses into account. As a threshold matter, Act 156 effectively eliminated any "good cause" that Racine may have had in seeking to place McGee in Kenosha County, as their rationale for doing so primarily revolved around prohibitive zoning ordinances. For those reasons, the Court of Appeals invalidated the supervised release order. □

**Court:** Court of Appeals

**Appeal No.:** 2013AP2551

**Date:** May 11, 2017

### Case Summary:

Michael, Jacqueline, and Jon Coyle are all children of Hubert Coyle. They sued Amanda Coyle, Hubert's daughter and POA agent, after he died in 2007. The siblings brought suit against Amanda claiming that her actions as POA agent reduced the size of Hubert's estate to the detriment of both him and the eventual heirs of the estate. The circuit court found Amanda liable for breach of her duties under the power of attorney as she exercised undue influence over Hubert, as well as conversion and theft of his funds under Wis. Stat. § 895.446(1). Amanda's arguments on appeal were eventually dismissed.

### Case Details:

Michael, Jacqueline, and Jon Coyle sued Amanda Coyle after their father's death, alleging that between 1996 and 2007 she engaged in acts that reduced the value of his estate, thereby reducing the assets they would receive in the will. Amanda defended herself by arguing, among other things, that Hubert did not intend for all his estate to be subject to the will, that his financial accounts were not abused, and that Amanda, as acting agent, had no duty to potential heirs. The circuit court held that Amanda had indeed engaged in acts that breached her duty under the power of attorney as well as acts that constituted theft and the improper conversion of Hubert's funds. The siblings were awarded \$430,824 in compensatory damages, \$8,000 in exemplary damages, \$232,846 in attorney's fees, and \$26,099.64 in attorney's costs.

(Coyle, continued from page #)

(Coyle, continued on page 7)

*Coyle v. Coyle*





On appeal, Amanda brought five new arguments, none of which were brought up in the previous circuit court phase. Four of these five new arguments claimed the siblings' arguments were time-barred. Amanda's other argument was that the siblings lacked the necessary standing for their conversion and theft claims.

The Court of Appeals, in affirming the ruling of the circuit court, dismissed all five of Amanda's arguments because she failed to raise them in the circuit court. According to longstanding legal precedent, there are both administrative and policy rationales for dismissing arguments that are brought forth for the first time at the appellate level. It was clear that Amanda had not previously made these arguments either at trial, in her briefs, or at any prior important motion, and that she could not persuade the court that this should be one of the rare exceptions to this rule. The Court of Appeals dismissed her arguments and affirmed the ruling in favor of Michael, Jacqueline, and Jon. □

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### *Waukesha County v. J.W.J. (In the matter of mental commitment of J.W.J.)*

**Court:** Supreme Court of Wisc.

**Citation:** 2017 WI 57

**Date:** June 8, 2017

#### **Case Summary:**

J.W.J. is a 55-year-old man who has suffered from severe mental health and substance abuse issues throughout the majority of his life. These issues have resulted in continual commitment orders as well as prison time. On June 6, 2015, Waukesha County filed a petition to extend his involuntary commitment and treatment orders for the sixth time. In granting the

extension, the circuit court noted Mr. J.'s extensive history of problems that were resultant of these mental health and drug issues.

Along with these behavioral issues, Mr. J. also showed an intense unwillingness to take his prescribed medication. Dr.

Koch, who examined Mr. J.'s file, stated to

the court that he did not believe that J.W.J. would take his medications without a court order to do so. He went on to say that "when not ordered to take psychotropic medications . . . he doesn't do it . . . [and] without his medications [,] Mr. J. would require confinement for inpatient care." However, it was noted that when Mr. J. did indeed take his medications, he could function quite normally amidst society.



The court of appeals utilized the *Helen E.F.* test as the controlling authority with regards to mental health commitments. Applying this framework, the court affirmed the ruling of the circuit court in granting the extension, saying that "because Mr. J. has rehabilitative potential, he was a 'proper subject of treatment.'" Mr. J. then appealed this ruling and the Supreme Court of Wisconsin agreed to hear the case.

The Court began by noting that when involuntary mental health commitments are at play, there are competing interests that must be weighed: the liberty interests of the person being committed and the safety of the general public. Because of these competing interests, Wisconsin

*(J.W.J., continued on page 8)*



(J.W.J., continued from page 7)

statutes say that no one who can be properly treated outside of a hospital or other inpatient institution may be involuntarily treated in such a facility. Wis. Stat. §51.20(1). Furthermore, the Wisconsin statutes “provide for involuntary treatment when: (1) the individual is mentally ill [,] drug dependent [,] or developmentally disabled *and is a proper subject for treatment*; and (2) the individual is dangerous.” (Emphasis added) Wis. Stat. § 51.20(1).

Mr. J.’s argument against the extension revolved around the application of the *Helen E.F.* framework and the italicized portion of the test just described. He argues that due to the nature of his afflictions, he cannot be rehabilitated, therefore he cannot be a proper subject of treatment for an involuntary commitment order.

The pertinent portion of *Helen E.F.* that relates to rehabilitation states that “if treatment will go beyond controlling activity and will go to controlling the disorder and its symptoms, then the subject individual has rehabilitative potential, and is [therefore] a proper subject for treatment.” *Helen E.F.*, 340 Wis.2d 500, ¶36. That case also distinguished between “activities” and “symptoms,” the latter being the only category where the potential for improvement is needed to find rehabilitative capability. Mr. J. argued that this understanding of rehabilitation cannot properly account for some of the unique characteristics of paranoid schizophrenia. The Supreme Court, however, disagreed.

In a highly technical linguistic discussion, the Court distinguished between habilitation and rehabilitation by delineating whether the focus of the treatment is “endogenous” (symptoms) or “exogenous” (activities). According to the Court, endogenous treatment revolves around the amelioration of harmful effects that manifest from within the patient. It is these symptoms that are harmful in and of them-

selves. On the other hand, exogenous treatment involves the improvement of a person’s ability to engage in specific activities such as grooming, eating, dressing, etc. The Court ruled that due to the nature of mental health issues in this context, rehabilitation refers only to the betterment of a patient’s condition with regards to the endogenous treatment of symptoms and behaviors flowing from those symptoms. Because Mr. J.’s symptoms were shown to have been helped by mental health treatment and medication, the Court ruled that he had rehabilitative potential and was a proper subject for treatment under the *Helen E.F.* framework and the Wisconsin statutes.

Thus, the Supreme Court affirmed the ruling of the circuit court in granting Waukesha County their desired extension of J.W.J.’s involuntary mental health commitment and medication orders.

Justice Abrahamson concurred in the result, but wrote separately to highlight the murkiness of the *Helen E.F.* framework when it comes to distinguishing between controlling activity versus controlling the symptoms of the disorder. She calls upon the legislature to clear up the vagueness in this realm by reassessing the goals and intended scope of the Wisconsin statutes that deal with these issues. □

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