RESPONSIBILITIES OF A HEALTH CARE AGENT UNDER A WISCONSIN POWER OF ATTORNEY FOR HEALTH CARE

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I. Introduction

You have been chosen by a loved one or friend (the **principal**), to serve as **agent** under a Power of Attorney for Health Care document. You have undertaken an important responsibility by agreeing to act as agent if the principal is ever unable to advocate because he or she is incapacitated. The principal has chosen you as agent because he or she trusts you to implement his or her health care wishes.

A health care agent makes "health care" decisions on behalf of a principal when the principal is not able to make those decisions him or herself because of incapacity. Many health care providers and individuals believe that family members, such as spouses, can legally make health care decisions on behalf of their loved ones. *However, this is not the law*. In Wisconsin, only a person's legally authorized representative – an agent under a valid Power of Attorney for Health Care document or a court-appointed guardian of the person – may provide informed consent to health care treatment on behalf of another adult. The duties of a health care agent are described in Chapter 155 of the Wisconsin Statutes. The following information explains these duties and may assist you in determining how to best fulfill your role.

II. When Does An Agent's Authority To Make Decisions Begin?

Most Power of Attorney for Health Care documents provide that the document becomes "activated" when two physicians or one physician and one psychologist personally examine the principal then sign a statement asserting (certifying) that the principal is incapacitated. Incapacity means the principal is not able 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." *See* Wis. Stat. § 155.01(08). This certification of incapacity must be attached to the document.

Some individually-tailored Power of Attorney for Health Care documents provide for an alternate method of activation. For example, an agent may have authority to make medical decisions on behalf of the principal when the principal has been determined incapacitated by only one physician. Check your principal's document to determine when your authority to make decisions begins.

III. What Types Of Decisions May An Agent Make?

As agent, you may only make "health care" decisions. "Health care" is defined as "any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition." Thus, depending on the exact language of the document, you may choose medical professionals and facilities, and consent to surgical procedures and medications. You may also make certain end-of-life decisions on the principal's behalf **if** the principal has delegated that authority to you. *Note* that you do not have authority to decide non-medical issues, such as who may visit the principal at a nursing home or whether the principal may smoke.

Keep in mind that your decision making authority is not only about end-of-life decisions. If you are an agent for an individual with a chronic illness or long-term mental disability, you may be the agent for many years.

IV. What Standard Does An Agent Use To Make Health Care Decisions?

As agent, you must act in good faith consistently with the desires of the principal as expressed in the Power of Attorney for Health Care document or as otherwise specifically directed by the principal to you **at any time** – even after certification of incapacity. You may not make medical decisions based on your own religious or moral views regarding the particular treatment. The law provides specific guidance on how you make medical decisions on behalf of a principal, as follows:

- First, you determine what the principal's current wishes are regarding his or her treatment, if the principal is capable of expressing those wishes. You are obligated to follow the treatment wishes of the principal as expressed at any time, *even after the principal has been determined incapacitated*. This is true even if the principal can only express his or her wishes by nodding his or her head or blinking his or her eyes.
- Second, if the principal is currently unable to express his or her wishes, you may rely on the principal's previously expressed treatment wishes. These wishes may be contained in the power of attorney document itself, or may have been expressed verbally to you or other family and friends.
- Finally, if the principal has never expressed his or her wishes regarding the treatment, and is currently unable to express those wishes, you may make the medical decision based on what you feel would be in the principal's best interests. You should consider the principal's values and beliefs when making this decision.

If you have not done so already, you should immediately speak with the principal about his or her wishes regarding medical treatment. Determine preferences the principal has in regards to treatment professionals and medication. Discuss end-of-life treatment at length. If the individual has a Living Will,

obtain a copy of the Living Will and discuss the decisions the principal made in that document. Learn the person's values and beliefs about various medical treatment options. If the principal is not able to discuss his or her treatment preferences, ask family and friends if the principal had discussed health care treatment with them at any time.

V. Are There Medical Decisions An Agent Is Prohibited In Making Under Any Circumstances?

Under Wisconsin law, you cannot consent to admission of the principal to an institution for mental diseases, an intermediate care facility for the mentally retarded, to a state treatment facility or a treatment facility. Additionally, you may not consent to experimental mental health research or to psychosurgery, electroconvulsive treatment or drastic mental health treatment procedures for the principal.

VI. May An Agent Make Every Health Care Decision?

Not automatically. As agent there are certain health care decisions you may not make unless the principal has given you specific authority in the document itself. These include:

- Admitting the principal to a community based residential facility or nursing home for long-term placement.
- Consenting to the withholding or withdrawal of feeding tubes.
- Making health care decisions if you know the principal is pregnant.

If the principal has not given you specific authority to admit him or her to a nursing home or community based residential facility for long-term placement, you will need to go to court to be appointed guardian and obtain a protective placement order to have this authority.

VII. What Authority Does An Agent Have To Admit A Principal To A Residential Facility?

As agent, you may admit a principal to a nursing home or community based residential facility for **long-term care** only if the principal has given you that specific authority in the Power of Attorney for Health Care document, **and** if the principal is <u>not</u> diagnosed as developmentally disabled or as having mental illness at the time of the proposed admission. As agent, you may admit a principal to a nursing home for a **short-term stay** (up to 90 days) for recuperative care if the principal is admitted directly from a hospital inpatient unit, unless the hospital admission was for psychiatric care, regardless of whether or not the principal has specifically authorized you to admit the principal for long-term care in the principal's

document. Also, if you and the principal live together, you may admit the principal to a nursing home or community-based residential facility temporarily for up to 30 days to go on vacation or to deal with a family emergency.

All of the above statutory ways to admit a principal to a facility may only be used when the principal is **not objecting** to the admission. If the individual objects, and you still believe it is necessary to place the individual in a nursing home or community based residential facility, you must go to court to obtain a guardianship and protective placement order.

VIII. How Can An Agent Best Advocate For The Principal In Making Medical Decisions?

To assure that the principal is receiving adequate care, an agent should:

- Prior to admitting an individual to a nursing home or other facility, explore all possible options to determine the best residential setting for the principal that least imposes restrictions on the individual's liberty, and provides as many activities and amenities as possible. Check out staff ratios and qualifications and the facility's general reputation for quality care.
- Visit the principal as often as possible, but at least once a month, and more often if the principal is experiencing rapidly changing medical conditions. **You may be the only sentinel to protect the individual from abuse or neglect whether the individual lives at home or in a facility**.
- Attend facility staffings related to medical care for the principal.
- Become knowledgeable about the principal's medical conditions through resources such as medical dictionaries, medical journals and the Internet. Be advised of and research possible treatment options, risks and benefits of various treatments, and side effects of medication. Review the principal's medical records, and get second medical opinions where appropriate. Release medical records to appropriate professionals.
- Provide informed consent or refusal for all of the principal's health care needs. Insist that providers contact you with details about any change in the principal's medical condition, adverse medication reactions, and injuries.
- Become familiar with the resident's rights in the facility where the principal resides. You should be given a copy of these rights when admitting a principal to a facility.

IX. When Do My Duties As Agent Come To An End?

Your duties as agent may come to an end in any one of the following ways:

- If the **principal dies**, your authority ceases by law.
- If the **principal revokes** his or her Power of Attorney for Health Care document, you authority ceases when you (or your principal's health care providers) receive notice of the revocation. A

principal may revoke a Wisconsin Power of Attorney for Health Care document **at any time**, even after incapacity, by doing any of the following: 1) canceling, defacing, obliterating, burning, tearing or otherwise destroying the document, or directing another in his or her presence to so destroy it; 2) executing a signed and dated written statement, expressing his or her intent to revoke the document; 3) verbally expressing his or her intent to revoke the document in the presence of two witnesses; or, 4) executing a subsequent Power of Attorney for Health Care document. Additionally, the principal's document is automatically revoked and invalid if you and the principal are married and your marriage is later annulled or you divorce. You are obligated by law to notify all of the principal's health care providers if the principal's document is revoked. The provider must record this revocation in its files.

- You may become **unwilling or unable to serve as agent** because of death, disability or other reason. If so, the person designated as alternate agent will begin to serve as agent. If there is no alternate agent, the principal will need to have a court-appointed legal guardian.
- In some cases, as agent under a Power of Attorney for Health Care document you **may be removed in judicial proceedings**, such as where a legal guardian has been appointed (see below), or as a result of an interested person petitioning the court to review your performance as agent.

X. What Is The Role Of The Alternate Agent?

The principal may have chosen an alternate agent to serve when the primary agent is unable or unwilling to serve. Decision making for an incapacitated principal is not joint between an agent and alternate agent but successive. This means that the alternate agent's authority only begins when the primary agent has died or becomes otherwise unable or unwilling to serve. Having one person at a time serve as agent helps promote continuity of care for the principal through consistent and informed decision making, and avoids family conflict possibly resulting in guardianship.

XI. What Is The Relationship Between Guardianship And A Power Of Attorney For Health Care Document?

One of the most important reasons individuals execute Power of Attorney for Health Care documents is to avoid the need for invasive, costly and time-consuming court procedures to appoint a guardian if they become incompetent. Family, friends or other interested persons, however, may seek guardianship of the person and/or estate despite the principal having executed a Power of Attorney for Health Care document. For example, a family member of the principal may feel, rightly or wrongly, that the agent is not fulfilling his or her duties as agent and file a petition to become the individual's guardian. Or, a decision may be needed in an area that the power of attorney does not address.

Where a petition for guardianship has been filed, the court must consider appointing the agent named by the principal as guardian of the person, although it need not if it is not in the best interests of the

incompetent person. If the principal is adjudicated incompetent in this state the POAHC remains except that a court may, for good cause, revoke and invalidate the POA for Health Care or limit the authority of the agent under the POAHC. If the court does not revoke or limit the power of attorney, the guardian for the individual may not make health care decisions for the ward that may be made by the health care agent, unless the guardian is also the health care agent.

XII. As Health Care Agent, When Are You Liable?

You are not personally liable for medical costs incurred by the principal, including the cost of the nursing home or other facility, unless you are the spouse of the principal.

No health care agent may be charged with a crime or held civilly liable for making a decision in good faith under a Power of Attorney for Health Care document.

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