

## **NOTICE AND SERVICE REQUIREMENTS UNDER NEW CH. 54 AND AMENDED CH. 55, WIS. STATS.: APPOINTMENT OF GUARDIAN AND ORDER FOR PROTECTIVE SERVICES/PLACEMENT**

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### **I. Introduction**

This publication covers the notice and service requirements in two areas:

- **Appointment of a permanent guardian of an adult, including a change of guardian, in Wis. Stat. § 54.38 (2) and related Wis. Stat. § 54.01 (17) (a);**
- **Petitions for protective services and/or placement in Wis. Stat. § 55.09.**

This publication does not cover notice and service requirements in other types of guardianship or protective services/placement proceedings, such as receipt and acceptance of an out-of-state (foreign) guardianship, appointment of a guardian of a minor, temporary guardianship, or modifications and reviews of orders for protective services and/or protective placements.

The requirements for a permanent guardianship proceeding are, in some cases, slightly different than those for a protective services and/or placement proceeding. Read all requirements carefully to ensure that notice and service is properly delivered.

Wis. Stat. Ch. 54 rarely uses the term “permanent” but instead uses the unmodified term “guardian” or “guardianship” to refer to permanent guardianship - that is, a guardianship that does not have an automatic termination date. When the word “guardian” appears in this publication without a modifier, it refers to a permanent guardianship.

Explanatory notes are included as needed.

Local practice may vary - check with the local court and [www.wisbar.org](http://www.wisbar.org) (look for the “Legal Research” tab and “Circuit Court Rules” tab) to determine local practice and local rules.

## GUARDIANSHIP

### II. Notice and Service Is Jurisdictional Wis. Stat. § 54.38(1)

- A. Petitioner's failure to provide notice to all interested persons deprives the court of jurisdiction.
  - 1. Unless receipt of notice is waived by the interested person or is waived by the court pursuant to § 54.38(2)(b)4.

**Note:** Waiver by the court appears to be a limited option - see Section VI, N-R.

**Note:** Ensuring that all interested persons receive notice reduces the risk of challenges later in the process.

### III. What Must Be Served Wis. Stat. § 54.38(1)

- A. Notice must be in writing. Use the Order and Notice of Hearing form (form number GN-3110) available at [www.wicourts.gov](http://www.wicourts.gov) then click Forms/Circuit Court/Guardianship/Due to Incompetency.
- B. Notice of time and place of hearing must be served.
- C. A copy of the pleadings filed, including the petition, motion or other required documents, must be attached to the notice.

### IV. When Service Must Occur Wis. Stat. § 54.38(2)

- A. At least 10 days before the time set for hearing.
- B. Weekends and holidays are excluded per Wis. Stat. § 801.15(1)(b).

### V. Proof of Notice Wis. Stat. § 54.38(1) & (2)

- A. Notice is considered to be given by:
  - 1. Proof of personal delivery, *or*
  - 2. Proof that the notice was mailed to the last-known address of the recipient.

**Note:** Whether notice may be given by personal service or by mail and which type of mail may be used depends on who is being served - see below.

3. Use the Affidavit of Service form (form number GN-3120) available at [www.wicourts.gov](http://www.wicourts.gov).

## VI. Whom to Serve and How to Serve Wis. Stat. § 54.38(2) and 54.01(17)(a)

**Note:** This section integrates the list of interested persons required to be served in Wis. Stat. § 54.38(2) with the list of interested persons in Wis. Stat. § 54.01(17)(a).

### A. Proposed ward.

1. If not “in custody or confinement,” by personal service.

**Note:** the term “in custody or confinement” is not defined. See note below.

2. If “in custody or confinement” -
  - a. By registered or certified mail,
  - b. On the custodian, *and*
  - c. Who must immediately serve it on the proposed ward

**Note:** The term “in custody or confinement” is not defined. In some counties, “custody and confinement” is limited to prison, jail, or other institutions where the petitioner cannot have access to the proposed ward. In other counties, it also includes a nursing home. Check with the local court to determine local practice.

3. The person serving the proposed ward shall -
  - a. Inform the proposed ward of the complete contents of the notice and petition, motion or other required document;
  - b. Certify on the notice that the process server or custodian served and informed the proposed ward; *and*
  - c. Return the certificate and notice to the court.

**Note:** A standardized Certificate of Service is not available. The Affidavit of Service (form number GN-3120) can be used instead of the Certificate.

### B. The existing guardian, if any, by personal service or by registered or certified mail.

**The following are served -**

1. By personal service *or*
2. By mail

**Note:** The use of the unmodified term “mail” indicates that regular U.S. mail is permitted; registered or certified or receipt requested is not required. Check with the local court for local practice.

- C. The proposed ward’s attorney, if any.
- D. The guardian ad litem (GAL).
- E. The spouse of the proposed ward.
- F. If no spouse, the adult children of the current marriage.\*

**\*Note:** It appears that the adult children of the current marriage do not need to be served if the proposed ward’s spouse (the children’s other parent) is living because Wis. Stat. § 54.01(17)(a)2. defines interested persons to include “the spouse **or** adult child of the proposed ward...” Although presumptive adult heirs are required to be served, adult children are not considered “heirs” when the spouse (the other parent) is alive. However, serving all adult children of the current marriage ensures that they cannot challenge the jurisdiction of the court to proceed.

- G. The adult children of any previous marriages, even if the proposed ward’s spouse is living.
  - 1. Service on “any presumptive adult heirs, as specified in s. 851.09...” is required by Wis. Stat. § 54.38(2)(b)3.
  - 2. Wis. Stat. § 851.09 defines *heir* as “any person, including the surviving spouse, who is entitled under the statutes of intestate succession to an interest in property of a decedent...”
  - 3. The children of previous marriages are heirs under the laws of intestate succession, even if there is a surviving spouse. Wis. Stat. § 852.01(1)(a).
- H. If no spouse and no adult children, the parents.
- I. If no spouse, no adult children, and no parents, any presumptive adult heirs as specified in Wis. Stat. § 851.09.
  - 1. Service on “any presumptive adult heirs, as specified in s. 851.09...” is required by Wis. Stat. § 54.38(2)(b)3. “...An heir, as defined in s. 851.09,... that may be reasonably ascertained with due diligence” is considered an interested person, per Wis. Stat. § 54.01(17)(a).
  - 2. Heir – see above.

3. Wis. Stat. Ch. 852 contains the rules of intestate succession.

J. Agent under any Power of Attorney document (whether the document is activated or not).

K. Any person who has legal or physical custody of the proposed ward.

**Note:** This is in addition to the notice provided to the custodian for a proposed ward who is in custody or confinement - see A, above.

L. Any public or private agency, charity or foundation from which the proposed ward is receiving aid or assistance.

M. The proposed guardian.

N. Trustee for trust established by or for the proposed ward, if any, unless waived by the court.

O. Federal Dept. of Veterans Affairs if benefits paid or payable, unless waived by the court.

P. State Dept. of Veterans Affairs if benefits paid or payable, unless waived by the court.

Q. County Dept. Of Human/Social Services, if receiving long-term support services/benefits, unless waived by the court.

R. County Corporation Counsel, unless waived by the court.

**Note:** All of the above can waive service.

**Note:** N - R are not contained in Wis. Stat. § 54.38(2), but in Wis. Stat. § 54.01(17)(a), and thus can be waived by the court.

S. Any other person that the court requires.

## PROTECTIVE SERVICES/PLACEMENT PROCEEDINGS

### VII. Notice In Protective Services/Placement Proceedings Wis. Stat. § 55.09

A. Notice must be served upon the individual by personal service at least 10 days before the hearing.

1. Person serving notice must inform the individual of the complete contents of the notice and return a certificate to the circuit judge verifying that the petition has been delivered and notice given. The notice must include the name of the petitioner(s).

**Note:** A standardized certificate of service is not available. The Affidavit of Service (form number GN-3120) can be used instead.

- B. Notice also served personally or by mail at least 10 days before the hearing to the following:
1. Guardian ad litem, legal counsel, and guardian, if any.
  2. Agent under an activated Power of Attorney for Health Care.
  3. Presumptive heirs, if any.
    - a. No definition is provided in Wis. Stat. Ch. 55 for the term *heir*.
    - b. *Heir* means “any person, including the surviving spouse, who is entitled under the statutes of intestate succession to an interest in property of a decedent...” Wis. Stat. § 851.09.
    - c. Intestate succession is found in Wis. Stats. Ch. 852.
  4. Persons who have physical custody of the individual.
  5. County department responsible for planning and provision of protective services and placement.
  6. Any governmental or private body or group from whom the individual is receiving aid.
  7. Any other person that the court may require.
  8. Wisconsin Dept. of Health Services, if the individual might be placed in one of the state centers for people with developmental disabilities.
  9. County department participating in Community Integration Program if individual has a developmental disability and might be placed in an intermediate facility or nursing facility.
- C. Use court form titled “Order and Notice of Hearing” (form number GN-3110).
- D. Weekends and holidays are excluded per Wis. Stat. § 801.15(1)(b).

**QUESTIONS? Call the Wisconsin Guardianship Support Center at 1-855-409-9410 or email at [guardian@gwaar.org](mailto:guardian@gwaar.org).**

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