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Transitioning to Adulthood: Guardianship and Children with Significant Disabilities

Most parents worry about their children's futures, wonder how will the parent-child relationship change, and try to figure out how to address potential issues that may affect their children as they age. For each of these worries, parents of children with significant disabilities have very specific concerns. While their concerns vary just as the abilities and needs of each child differ, two are frequently expressed: first, how will the parent-child relationship change when the child reaches the age of 18, and second, how to address their child's needs in the future. This document is meant to provide direction to parents with these concerns.^{1, 2}

As discussed below, the parent's legal role changes significantly as a child ages. Guardianship is required only in specific situations. If viable alternatives are available, those alternatives are required to be considered before petitioning for guardianship. Alternatives include but are not limited to, supported decision-making, powers of attorney, releases of information, or supportive services or devices. Also, be aware that as the person ages he or she may no longer need a guardian should one be appointed at 18 years of age.

This document will neither answer every question nor provide detailed guidelines to be applied in all situations. If parents have specific questions, please contact the Wisconsin Guardianship Support Center directly. For any legal matter considered, consultation with an attorney is also recommended.

1. What is guardianship?

Guardianship is a court-created legal relationship. This relationship is formed between an individual called the "proposed ward," who is the subject of the guardianship, and another person or persons called the "proposed guardian," who is the legal decision-maker for the

¹This brochure only discusses matters involving those individuals with cognitive disabilities and/or those with severe mental illnesses. Those who are physically disabled or mentally ill and competent are not proper subjects for guardianship.

²This brochure also does not discuss those who may need protective placement, protective services, or individuals who may be deemed a spendthrift in a guardianship action. Please contact the WI GSC directly if more information is needed about these subjects.

ward, after the ward is determined to be “incompetent” by the court. The relationship is created by the court when the “petitioner,” the person who files the initial guardianship pleadings, proves the required factual elements demonstrating that the ward is incompetent and in need of a guardian.

2. Who may be in need of a guardianship?

An individual who is incompetent and has no designated legally-authorized decision-maker may need to have a guardian appointed for him or her.

a. When is a person determined to be incompetent?

A court may find an individual incompetent after reviewing the specific factors listed below:

- i. The person is at least 17 years old and 9 months;
- ii. He or she has a qualifying impairment:
 - 1) Wis. Stat. § 54.01(14) defines “impairment” as a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities.
 - 2) “Other like incapacities” are those conditions produced as a “result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and that produce a condition that substantially impairs an individual from providing for his or her own care or custody.” Wis. Stat. § 54.01(22).
- iii. He or she is unable to receive and evaluate information effectively or to make or communicate decisions;
- iv. A risk of physical or financial harm exists; and
- v. The individual’s need for assistance cannot be met by a lesser restrictive alternative.

Note, that unless the individual is unable to communicate his or her decisions, a guardianship “may not be based on mere old age, eccentricity, poor judgment, or physical disability.” See Wis. Stat. §54.10(3)(b).

b. I believe my child may meet the legal standard for incompetency, but I am not sure. What else may I do?

Parents may wish to talk to their child’s social worker, transition coordinator and other school staff, and medical and mental health care providers and gain their opinion on whether a guardianship would be appropriate and necessary. Depending on the individual, he or she may

not need a guardianship if there are less restrictive ways to address his or her needs. Consultation with an attorney as well as these professionals may provide insight about measures that could be taken to assist the child and avoid a guardianship.

c. Will my role as a parent be considered in a guardianship action?

Yes. While parents are not always appointed as guardians in all guardianships, parents are the preferred guardians of their adult children³ with disabilities. The court will consider each parent to ensure he or she is suitable to be a guardian and that the parent’s appointment as guardian is in the ward’s best interest. Consideration will also be given to the ward’s opinion on the parent’s appointment. *See Wis. Stat. § 54.15(5)*. The parent is likely to be appointed as the guardian if there are no objections to his or her appointment and the parent is suitable and willing to act as the guardian.

3. Process

A. If a guardianship is needed, how do I start the guardianship process?

I. Procedural⁴

The petitioner is responsible for filing many of the required documents in a guardianship action. Initial pleadings include the following:

- 1) GN-3100: Petition for Guardianship Due to Incompetency;
- 2) GN-3110: Order and Notice of Hearing;
- 3) GF-131: Order Appointing Guardian ad Litem or Attorney; and
- 4) GN- 3120: Affidavit of Service.⁵

The pleadings are filed with the local Register in Probate.

The petitioner is expected to provide all appropriate parties with proper service. This means the petitioner must give copies of the filed guardianship pleadings within the statutorily required period (at least ten days before the hearing excluding holidays and weekends) and by the appropriate means (personal service, regular mailed service, or certified /registered mailed service depending on whom is being served). *See Wis. Stat. §54.38. See also WI GSC publication, “Notice and Service Requirements under New Ch. 54 and Amended 55, Wis. Stat.; Appointment and Order for Protective Services/Placement.”*

³The term “adult child” is a legal term used to describe the child of the parent who has reached the age of majority (i.e., the age of 18). The term does not refer to an adult exhibiting childlike behavior but the legal relationship between the two people.

⁴Some counties may have legal practices particular to that county. This document only reviews general practice, and it is always important to inquire about the local county practice. For example, some counties have certain forms that are required to be used by parties or to be submitted with the initial pleadings.

⁵All forms mentioned within this document may be found on the Wisconsin Circuit Court Access website (<http://wicourts.gov/forms1/index.htm>) or obtained through the local Register in Probate

The following pleadings are required to be filed at least ninety-six hours before the hearing:

- 1) GN-3140: Statement of Acts; and
- 2) GN-3130: Examining Physician's or Psychologist's Report.

The petitioner may submit these documents with their initial pleadings. If that is not done, the petitioner is required to provide copies of the documents to each party in a timely manner. The petitioner will also be required to provide proof of proper service to the court. This specifically includes filing Affidavits of Service, which may be filed before or at the hearing.

B. Are there any other pre-hearing matters?

The proposed ward will have a guardian ad litem (GAL), who is an independent attorney, appointed to represent his or her best interests. The GAL will provide the court with his or her opinion on the guardianship. The GAL will discuss the guardianship with the proposed ward and will try to obtain the proposed ward's opinion on the guardianship. The GAL will also inform the person of his or her rights. Should the ward dispute the guardianship or the proposed guardian, the GAL will notify the court of the proposed ward's opinion and request the appointment of "advocacy counsel," who is an attorney appointed to represent the proposed ward and advocate for his or her wishes.⁶

C. Hearing

At the hearing, the petitioner will present his or her case stating why he or she believes the guardianship is necessary. The petitioner should be prepared to present evidence and to argue his or her position. The GAL will also provide his or her opinion on the guardianship and have the opportunity to present evidence. The proposed ward, proposed guardian, experts (including the doctor or psychologist who completed the Examining Physician's or Psychologist's Report), and others may give testimony. Upon review of the evidence presented, the court will enter its judgment on the petition for guardianship as well as the suitability of the proposed guardian.

If the petition for guardianship is granted, the newly-appointed guardian will receive two to three forms⁷ reflecting the court's order:

- 1) GN-3170: Determination and Order on Petition for Guardianship Due to Incompetency;
- 2) GN-3200: Letters of Guardianship of the Person; and
- 3) GN-3210: Letters of Guardianship of the Estate Due to Incompetency.

The guardian may wish to obtain a certified copy of the Determination and Order and Letters.

⁶ "Advocacy counsel" and "adversary counsel" are the same and have the same responsibilities to perform. The term "adversary counsel" has been recently replaced by "advocacy counsel" by some practitioners and courts

D. Post hearing: What will be expected from me if I become the guardian?

All guardians have certain duties.⁸ These duties include the following:

- 1) Be an advocate for the ward's best interest;
- 2) When acting as a guardian, exercise care, diligence, and good faith;
- 3) Provide fidelity and loyalty to the ward; and
- 4) Notify the court of any change of address by the ward.

See Wis. Stat. §54.18.

Guardians should also review their paperwork closely. They may only exercise those powers given to him or her as the guardian.

Guardians should become familiar with their specific reporting responsibilities. For example, a guardian of the estate must file an inventory, which describes the ward's estate as it exists on the date of the guardian's appointment and must be filed within sixty days of that appointment, and an annual account, which describes the ward's finances and yearly expenditures. The guardian of the person must also file an annual report, which describes the ward's personal health and living conditions.

4. What other considerations should I look at as my child ages?

a. Stand-by Guardians and Successor Guardians

Petitioners may propose a stand-by guardian as well as a guardian within the petition for guardianship. A stand-by guardian may step into the role of guardian immediately upon the guardian's "death, unwillingness, or inability to act, or resignation or court's removal" or if the guardian is unable to act for an extended period of time due to an extended vacation or illness. See Wis. Stat. § 54.52(2). The stand-by guardian may be approved by court at the same hearing⁹ the initial guardian is appointed. The stand-by guardian is given the same powers and responsibilities as the guardian. If a stand-by guardian is designated within the initial pleadings and approved of by the court, no other hearing is necessary. The stand-by guardian notifies the court of the guardian's inability to serve, when appropriate, (for example, the guardian has died) and the stand-by guardian then receives the necessary letters of guardianship from the court.

⁷ Review of local practice is especially important before the hearing on the petition for guardianship. Some counties require the petitioner to draft the Determination and Order and Letters while others allow different parties to draft.

⁸ Additional information about duties of guardian of the person and guardian of the estate may be found on the GSC webpage on the GWAAR website (www.gwaar.org).

A successor guardian is appointed when the initial guardian is no longer able to serve and a new guardian needs to be selected. Before the successor guardian's appointment, a hearing will be scheduled for the court to review the appointment, and the proposed successor guardian will need to be approved of by the court. Of the two types of guardians, the appointment of a stand-by guardian provides greater stability for the ward since it can be done before the need for a new guardian arises.

5. What other considerations should I look at as my child ages?

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c. Estate Planning and Special Needs Trusts

Regardless of the appointment of a guardian, consultation with an attorney may be beneficial when considering an adult child's long-term personal and financial needs. The adult child may benefit from having a special needs trust set up in his or her name. Also, exploration of the effects of being an heir to your (or another's) estate is very important. Inheritance received could affect your child's eligibility to receive certain benefits. An attorney may also assist parents with drafting a will. Per *Wis. Stat. § 54.15(6)* a parent may nominate a testamentary guardian in his or her will. While this nomination does not guarantee the person will be appointed as the guardian, the nomination does carry significant weight if the court appoints a new guardian after the parent's death.

Note, if any guardian is appointed for your child, that guardian will have to obtain the court's permission to establish a special needs trust before creating one. See Wis. Stat. § 54.20(2)(c).

d. Benefits

A child may become eligible for new or different benefits once he or she turns 18. To assist with the transition to adulthood, it is important that his or her benefits and/or eligibility for benefits are reviewed. A parent may wish to contact his or her local Disability Benefit Specialist (DBS) to have the adult child's eligibility for benefits evaluated. The local DBS may be located by going to the following website: <https://www.dhs.wisconsin.gov/benefit-specialists/counties.htm>.

6. Common Questions:

A. Why do I as a parent need to obtain guardianship of my adult (or soon-to-be adult) child who has a disability to be able to make decisions for my child?

Wisconsin is not a "next of kin" state, where parents and family members can make decisions for the individual involved. All adults are presumed competent upon turning 18 and that presumption of competency is not overcome until a court reviews the allegations, and the evidence presented finds the individual incompetent, and a legal decision-maker (i.e., a guardian) is appointed. In other words, regardless of the nature of the individual's disability and even if the individual does not have the capability to do so, he or she has the right to make his or her own decisions until an appropriate adult has been appointed the individual's guardian.

B. Why can't my adult child sign a Power of Attorney for Health Care and/or for Finances?

Adults may only execute powers of attorney when they have the capacity to understand the nature of the documents. A person must be "sound of mind" to be able to execute a valid power of attorney.

If the adult child understands the nature of the Power of Attorney and wishes to sign it, he or she may choose to sign it. If there is a possibility the adult child's competency could be questioned, consultation with an attorney is strongly recommended before any Power of Attorney is completed.

⁹ A petition for a stand-by guardian may be filed at any time. See Wis. Stat. §54.52(1)

C. Why do I as a parent of an adult child need to obtain guardianship to be able to make decisions for my child?

Wisconsin is not a “next of kin” state, where parents and family members can make decisions for the individual involved. All adults are presumed competent upon turning 18 and that presumption of competency is not overcome until a court finds the individual incompetent, and a legal decision-maker (i.e., a guardian) is appointed. In other words, regardless of the nature of the individual’s disability and even if the individual does not have the capability to do so, he or she has the right to make his or her own decisions until an appropriate adult has been appointed the individual’s guardian.

D. Can my adult child sign a Power of Attorney for Health Care and/or for Finances?

Adults may execute powers of attorney when they have the capacity to understand the nature of the documents. A person must be “sound of mind” to be able to execute a valid power of attorney.

If the adult child understands the nature of the Power of Attorney and wishes to sign it, he or she may choose to sign it. If there is a question about the adult child’s competency, consultation with an attorney is strongly recommended before any Power of Attorney is completed.

E. Do I need to retain an attorney to obtain the guardianship?

An attorney is not required to start a guardianship action. One may wish to hire an attorney for several reasons, including the consultation and legal information they can provide before, during, and after the guardianship; the drafting of the pleadings; their advocacy skills; and the technical assistance in following the statutorily-defined procedure.

Parents should also review what local legal services resources are available. A very small number of Wisconsin counties have legal services programs that may assist a parent in obtaining an adult guardianship of a younger adult child or a soon-to-be adult child who is likely to be deemed incompetent.

F. What types of expenses may I accrue if I file a petition for guardianship?

The costs accrued vary with each guardianship. It is possible for the petitioner to accrue his or her attorney’s fees and costs, filing fees, expenses related to completing the Examining Physician’s or Psychologist’s Report, expert witness fees, service fees, bonding fees, other attorney fees, and an initial deposit fee for the GAL (or all of the GAL fees if the petition is unsuccessful).

If a guardian is appointed, the court may allow for reimbursement of the petitioner's attorney's fees and costs from the ward's estate. The court will look at several factors in this determination, including the ability of the ward's estate to pay and the petitioner's interest in obtaining the guardianship. *See Wis. Stat. § 54.46(3).*

If a guardian is appointed, the GAL fees are paid by the ward, if he or she has sufficient assets to pay, or, if not, the county. If no guardian is appointed, the petitioner is responsible for the GAL fees. *See Wis. Stat. § 54.74.* If a guardian is appointed, the petitioner will not be responsible for any advocacy counsel fees.

While the petitioner may be responsible to pay some (or all) of these fees, it is important to inquire about each county's local practice before filing the initial guardianship pleadings.

G. May the court appoint coguardians?

Per Wis. Stat. § 54.10(5), the court may appoint coguardians. The court may impose additional conditions when appointing coguardians and enter orders clarifying their roles. Unless modified by the court, coguardians are required to agree with the decisions made by the other coguardian or those decisions are void. *See Wis. Stat. § 54.46(2)(a).* The petitioner should review whether the appointment of coguardians would best serve the ward and his or her needs before petitioning for coguardianship.

H. My adult child has no significant income and does not own any property. Do I need to petition for guardianship of the estate as well as the person?

Significant consideration should be performed before determining a guardianship of the estate unnecessary. Guardians of the estate have both statutory duties and specific powers that may assist the ward even if the ward has a modest estate or no estate. The guardian of the estate's duties include the right to pay legally enforceable debts, file income taxes, prepare and file the annual account, and take possession of the ward's personal property. *See Wis. Stat. § 54.19.* A guardian's powers also include establishing a special needs trust (with the court's permission), applying for public and private benefits, entering into contracts, and authorizing the release of the ward's records. *See Wis. Stat. § 54.20.* The failure to appoint a guardian of the estate may inhibit the person's ability to enroll in subsequent benefit programs, plan for the future through a special needs trust, manage inherited funds, pay debts, file income taxes, or respond to any other financial situation that may occur.

I. If I will need to petition for guardianship for my child. When should I consider filing my petition?

A petition for guardianship may be granted when the ward is at least 17 years and 9 months old or older. See Wis. Stat. 54.10(3)(a). If the child is younger than 17 years and 9 months, the parent may want to start reviewing the applicable requirements before the child turns that age.

J. Where may I find available resources?

1. Wisconsin Guardianship Support Center:
Helpline Telephone Number: (855) 409-9410
Email: guardian@gwaar.org
2. Wisconsin Department of Health Services:
<http://www.dhs.wisconsin.gov/>
3. Wisconsin Circuit Court Access: <http://wicourts.gov/forms1/circuit/index.htm>
4. Wisconsin State Law Library-
<http://wilawlibrary.gov/>
5. WisPACT - <http://www.wispact.org/>
6. Your local Register in Probate

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

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