

Standards for Appointment of a Guardian of the Estate

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This publication explains the standards for appointment of a guardian of the estate for an adult alleged to be incompetent and for an adult alleged to be a spendthrift. Statutory definitions are provided for all italicized terms.

I. Appointment of Guardian of the Estate – Incompetency, Wis. Stat. § 54.10(3)

a. Legal Standard – Incompetency

Before a court may appoint a guardian for someone alleged to be incompetent, the court must find by clear and convincing evidence that:

- i. The individual is aged at least 17 years and 9 months.
- ii. Because of an *impairment*, the individual is unable to effectively receive and evaluate information or to make or communicate decisions related to management of their property or financial affairs, to the extent that one of the following applies:
 1. The individual has property that will be dissipated in whole or in part;
 2. The individual is unable to provide for their support; or
 3. The individual is unable to prevent financial exploitation.
 - *“Impairment”* means a *developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities*. Wis. Stat. § 54.01(14).
 - *“Developmentally disabled person”* means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability, which has continued or can be expected to continue indefinitely, substantially impairs an individual from adequately providing for their own care or custody, and constitutes a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder. Wis. Stat. § 54.01(8).

- *“Serious and persistent mental illness”* means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support and that may be of lifelong duration. *“Serious and persistent mental illness”* includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol or drug dependence. Wis. Stat. § 54.01(30).
 - *“Degenerative brain disorder”* means the loss or dysfunction of an individual’s brain cells to the extent that she or he is substantially impaired in their ability to provide adequately for their own care or custody or to manage adequately their own property or financial affairs. Wis. Stat. § 54.01(6).
 - *“Other like incapacities”* means those conditions incurred at any age that are the 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 their own care or custody. Wis. Stat. § 54.01(22).
- iii. The individual’s need for assistance in decision-making or communication is unable to be met effectively and *less restrictively* through appropriate and reasonably available training, education, support services, health care, assistive devices, a supported decision-making agreement, or other means that the individual will accept.
- *“Least restrictive”* means that which places the least possible restriction on personal liberty and the exercise of rights and that promotes the greatest possible integration of an individual into their community that is consistent with *meeting their essential requirements for health, safety*, habilitation, treatment and recovery and protecting her or him from abuse, exploitation, and neglect. Wis. Stat. § 54.01(18).
 - *“Meet the essential requirements for physical health or safety”* means perform those actions necessary to provide the health care, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur. Wis. Stat. § 54.01(19).
 - *Note: “Individual found incompetent”* means an individual who has been adjudicated by a court as meeting the requirements above. Wis. Stat. § 54.01 (16). The terms “incompetent,” “incompetence” or “incompetency” are not defined.
- iv. Unless the proposed ward is unable to communicate decisions effectively in any way,

the determination of incompetency may not be based on mere old age, eccentricity, poor judgment, or physical disability.

- *Note:* This prohibition applies to appointment of a guardian of the estate due to incompetency, not to the appointment of a guardian due to allegations of being a spendthrift.

b. Factors the Court Must Consider

The court must consider all of the following factors:

1. The report of the guardian *ad litem*;
2. The report of the psychologist or physician, and any other evaluations ordered by the court or offered by a party and received by the court;
3. Any advance planning engaged in by the proposed ward that would avoid guardianship, including a durable power of attorney, a power of attorney for health care, a trust or a jointly held account;
 - *Note:* Wis. Stat. § 54.46(1)(a)2.2 states that the court shall dismiss the petition if the court finds that advance planning by the ward renders guardianship unnecessary.
4. Whether other reliable resources are available to provide for the individual's personal needs or property management, and whether appointment of a guardian is the least restrictive means of meeting the individual's needs for a substitute decision-maker;
5. The preferences, desires, and values of the individual with regard to personal needs or property management;
6. The nature and extent of the individual's care and treatment needs and property and financial needs;
7. Whether the individual is at risk of abuse, exploitation, neglect or violation of rights;
8. Whether the individual can adequately understand and appreciate the consequences of their impairment;
9. The individual's management of the activities of daily living;
10. The individual's understanding and appreciation of the nature and consequences of any inability they may have with regard to personal needs or property management;
11. The extent of the demands placed on the individual by their personal needs and by the nature and extent of their property and financial affairs;

12. Any physical or mental illness, alcoholism or other drug dependence and its prognosis;
13. Any medication and its effect on the individual's behavior, cognition and judgment;
14. Whether the disability is likely to be temporary or long-term and whether the effect of the disability may be ameliorated by appropriate treatment;
15. Other relevant evidence. Wis. Stat. § 54.10(3)(c).

II. Appointment of Guardian of the Estate – Spendthrift, Wis. Stat. § 54.10(2)

a. Legal Standard

Before a court may appoint a guardian for someone alleged to be a spendthrift, the court must find by clear and convincing evidence that:

- i. The individual is aged at least 17 years and 9 months.
- ii. The individual is a *spendthrift*.
 - “*Spendthrift*” means means a person who, because of the use of alcohol or other drugs or because of gambling or other wasteful course of conduct, is unable to manage effectively their financial affairs or is likely to affect the health, life, or property of themselves or others so as to endanger their support and the support of their dependents, if any, or expose the public to responsibility for their support.

b. Factors The Court Must Consider

The court must consider all of the following factors:

1. The report of the guardian *ad litem*;
2. The report of the psychologist or physician, and any other evaluations ordered by the court or offered by a party and received by the court;
3. Whether other reliable resources are available to provide for the individual's personal needs or property management, and whether appointment of a guardian of the estate is the least restrictive means to provide for the individual's need for a substitute decision maker;
4. The preferences, desires, and values of the individual with regard to personal needs or property management;

5. The nature and extent of the individual’s care and treatment needs and property and financial affairs;
6. Whether the individual’s situation places him or her at risk of abuse, exploitation, neglect, or violation of rights;
7. The extent of the demands placed on the individual by their personal needs and by the nature and extent of their property and financial affairs;
8. Any mental disability, alcoholism, or other drug dependence of the individual and the prognosis of the mental disability, alcoholism, or other drug dependence;
9. Whether the effect on the individual’s evaluative capacity is likely to be temporary or long term, and whether the effect may be ameliorated by appropriate treatment;
10. Whether any alternatives to guardianship, including supported decision-making, have been attempted, and, if applicable, the degree to which they have been attempted, the length of time they have been attempted, and whether they have been attempted in a manner sufficient to demonstrate that alternatives to guardianship are insufficient to enable the individual to adequately exercise the right or rights in question;
11. Other relevant evidence.

III. Guardian of the Estate – Decision-Making Authority, Wis. Stat. § 54.18

A guardian acting on behalf of a ward may exercise only those powers that the guardian is authorized to exercise by statute or court order. A guardian may be granted only those powers necessary to provide for the personal needs or property management of the ward in a manner that is appropriate to the ward and that constitutes the *least restrictive* form of intervention. Wis. Stat. § 54.18(1).

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