

STANDARDS FOR APPOINTMENT OF A GUARDIAN OF THE ESTATE UNDER CHAPTER 54 OF WISCONSIN STATUTES

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I. Introduction

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. Certain provisions are annotated with notes.

II. Appointment Of Guardian Of The Estate Based On A Finding Of Incompetency – Section 54.10 (3) (a) Of Wisconsin Statutes

In order to appoint a guardian of the estate for an individual alleged to be incompetent, the court must find, by clear and convincing evidence (the truth of the facts asserted is highly probable), that:

- A. The individual is aged at least 17 years and 9 months. Section 54.10 (3) (a) 1.
Note: Section 55.06 states that the procedure for protectively placing an adult may be initiated 6 months prior to an individual's 18th birthday.
- B. Because of an *impairment*, the individual is unable to effectively receive and evaluate information or to make or communicate decisions related to management of his or her 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 his or her support; or
 3. The individual is unable to prevent financial exploitation. Section 54.10 (3) (a) 3.
 - *"Impairment"* means a *developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities*. Section 54.01 (14).
 - *"Developmentally disabled person"* means any individual having a disability attributable to mental retardation, cerebral palsy, epilepsy, autism or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals, which has continued or can

be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody and constitutes a substantial handicap to the afflicted individual. The term does not include a person with degenerative brain disorder, as defined in Section 55.01 (1v) and Section 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. Section 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 his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her own property or financial affairs. Section 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 his or her own care or custody. Section 54.01 (22).

C. 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, or other means that the individual will accept. Section 54.10 (3) (a) 4.

- “*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 his or her community that is consistent with *meeting his or her essential requirements for health, safety*, habilitation, treatment and recovery and protecting her or him from abuse, exploitation, and neglect. Section 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. Section 54.01 (19).

Note: “Individual found incompetent” means an individual who has been adjudicated by a court as meeting the requirements of Section 54.10 (3) – the above requirements. Section 54.01 (16). The terms “incompetent,” “incompetence” or “incompetency” are not defined.

- D. 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. Section 54.10 (3) (b).

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.

III. Factors The Court Must Consider – Section 54.10 (3) (c) of Wisconsin Statutes

In appointing a guardian of the estate for an adult alleged to be incompetent, or determining what powers are appropriate for the guardian of the estate to exercise, the court shall consider all of the following:

- A. The report of the *guardian ad litem*;
- B. 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;
- C. 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: Section 54.46 (1) (a) 2 states that the court shall dismiss the petition if the court finds that advance planning by the ward renders guardianship unnecessary.

- D. 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;
- E. The preferences, desires, and values of the individual with regard to personal needs or property management;
- F. The nature and extent of the individual’s care and treatment needs and property and financial needs;

- G. Whether the individual is at risk of abuse, exploitation, neglect or violation of rights;
- H. Whether the individual can adequately understand and appreciate the consequences of his/her impairment;
- I. The individual's management of the activities of daily living;
- J. The individual's understanding and appreciation of the nature and consequences of any inability she or he may have with regard to personal needs or property management;
- K. The extent of the demands placed on the individual by his or her personal needs and by the nature and extent of his or her property and financial affairs;
- L. Any physical or mental illness, alcoholism or other drug dependence and its prognosis;
- M. Any medication and its effect on the individual's behavior, cognition and judgment;
- N. Whether the disability is likely to be temporary or long-term and whether the effect of the disability may be ameliorated by appropriate treatment;
- O. Other relevant evidence. Section 54.10 (3) (c).

IV. Decision-Making Authority When An Individual Is Found Incompetent – Section 54.18 Of Wisconsin Statutes

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. Section 54.18 (1).

- “*Least restrictive*” – see above.

V. Appointment Of Guardian Of The Estate Based On A Finding That An Individual Is A Spendthrift – Section 54.10 (2) Of Wisconsin Statutes

In order to appoint a guardian of the estate for an adult alleged to be a spendthrift, the court must find, by clear and convincing evidence (the truth of the facts asserted is highly probable), that:

- A. The individual is at least 18 years of age. Section 54.10 (2) (a).



B. The individual is a *spendthrift*. Section 54.10 (2) (a).

- “*Spendthrift*” 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 his or her financial affairs or is likely to affect the health, life, or property of himself, herself, or others so as to endanger his or her support and the support of his or her dependents, if any, or expose the public to responsibility for his or her support. Section 54.01 (31).

VI. Factors The Court Must Consider – Section 54.10 (2) (b) Of Wisconsin Statutes

In appointing a guardian of the estate for an individual alleged to be a spendthrift, or determining what powers are appropriate for the guardian of the estate to exercise, the court shall consider all of the following:

- A. The report of the GAL;
- B. 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;
- C. Whether other reliable resources are available to provide for the individual’s personal needs or property management, and whether the appointment of a guardian of the estate is the least restrictive means to provide for the individual’s need for a substitute decision-maker;
- D. The preferences, desires and values of the individual with regard to property and financial affairs;
- E. The nature and extent of the individual’s care and treatment needs and property and financial affairs;
- F. Whether the individual’s situation places her or him at risk of abuse, exploitation, neglect, or violation of rights;
- G. The extent of the demands placed on the individual by his or her personal needs and by the nature and extent of his or her property and financial affairs;
- H. Any mental disability, alcoholism, or other drug dependence of the individual and the prognosis;
- I. 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;
- J. Other relevant evidence. Section 54.10 (2) (b).



VII. Decision-Making Authority When An Individual Is Found To Be A Spendthrift – Sections 54.10 (2) (d) and 54.18 Of Wisconsin Statutes

The court shall authorize the guardian of the estate for a spendthrift to exercise only those powers that are necessary to provide for the individual's personal needs and property management and to exercise the powers in a manner that is appropriate to the individual and that constitutes the *least restrictive* form of intervention. Section 54.10 (2) (d).

- “Least restrictive” – see above.

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. Section 54.18 (1).

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

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