

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

05/2018

### I. Introduction

This publication explains the standards for appointment of a guardian of the person for an adult alleged to be incompetent. A guardian of the person may not be appointed 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 Person Based On A Finding Of Incompetency – Section 54.10 (3) (a) Of Wisconsin Statutes

In order to appoint a guardian of the person for an adult 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:* But Section 55.06 of Wisconsin Statutes states that the procedure for protectively placing an adult may be initiated 6 months prior to an individual's 18<sup>th</sup> birthday.

- B. Because of *impairment*, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to *meet the essential requirements for his or her physical health and safety*. Section 54.10 (3) (a) 2.

- "*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 intellectual disability, cerebral palsy, epilepsy, autism or another neurological condition closely related to an intellectual disability or requiring treatment similar to that for individuals with an intellectual disability, 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 dementia that is primarily caused by degenerative brain disorder.

- “*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).
  - “*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).
- 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*” – see above.
- 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).
- 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).

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

In appointing a guardian of the person for an adult alleged to be incompetent, declaring incompetence to exercise a right, 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 nature and 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. Whether any alternatives to guardianship, including supported decision-making have been attempted, and, if applicable, the degree and 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 in question.
- P. Other relevant evidence. Section 54.10 (3) (c).

#### **IV. Decision-Making Authority – Section 54.25 (2) (c) Of Wisconsin Statutes**

If the court determines that a guardian of the person should be appointed, the court will determine which rights and powers the adult has incapacity to exercise.

##### A. Removed Rights – Section 54.25 (2) (c) 1.

The court may declare that the individual found incompetent has *incapacity* to exercise one or more of the following rights:

*Note:* Section 54.25 (2) (c) 1 uses the term “has incapacity,” while Section 54.25 (2) (c) 2 uses the term “lacks evaluative capacity.”

- “*Incapacity*” means the inability of an individual effectively to receive and evaluate information or to make or communicate a decision with respect to the exercise of a right or power. Section 54.01 (15). The statute does not define “lacks evaluative capacity.”
  1. The right to consent to marriage.
  2. The right to execute a will.
  3. The right to serve on a jury.
  4. The right to apply for an operator’s license, professional license or credentials if the court finds that the individual is incapable of understanding the nature and risks of the licensed or credentialed activity, to the extent that engaging in the activity would pose a substantial risk of physical harm to the individual or others.
  5. The right to consent to sterilization if the court finds that the individual is incapable of understanding the nature, risk and benefits of sterilization, after the nature, risk and benefits have been presented in a form that the individual is most likely to understand.
  6. The right to consent to organ, tissue, or bone marrow donation.

7. The right to register to vote or to vote in an election if the court finds that the individual is incapable of understanding the objective of the elective process. Section 54.25 (2) (c) 1.

If the court finds that a ward is not competent to exercise one of the above rights, the guardian of the person may not exercise the right on the ward's behalf. Section 54.25 (2) (c) 3.

B. Shared Rights – Section 54.25 (2) (c) 3.

The court may find that the individual is competent to exercise the right to marry, hold a license, consent to sterilization and consent to organ, tissue or bone marrow donation under some but not all circumstances. The court may order that the individual retains the right to exercise the right only with the consent of the guardian of the person.

C. Transferred Powers – Section 54.25 (2) (d).

The court may authorize a guardian of the person to exercise all or part of any of the following powers if it finds by clear and convincing evidence that the individual lacks evaluative capacity to exercise the power. The court may authorize the guardian of the person to exercise only those powers that are necessary to provide for the individual's personal needs, safety and rights and to exercise the powers in a manner that is appropriate to the individual and that constitutes the *least restrictive* form of intervention.

*Note:* The term "lacks evaluative capacity" is not defined.

The specific powers are:

1. Provide informed consent to voluntary medical examination, treatment and medication that is in the ward's best interest; provide informed consent to involuntary psychotropic medication pursuant to Section 55.14;
2. Authorize the ward's participation in research projects under certain conditions;
3. Authorize the ward's consent to experimental treatment under certain conditions;
4. Provide informed consent to social and supported living services for the ward;
5. Provide informed consent to the release of confidential records;
6. Make decisions related to mobility and travel;
7. Choose providers of medical, social and supported living services;
8. Make decisions regarding education and vocational placement and supported services of employment;
9. Make decisions regarding initiating a petition for the termination of marriage;
10. Receive all notices on behalf of the ward;

11. Act in all proceedings as an advocate of the ward; except in those proceedings that a guardian of estate would have authority to act such as those related to the ward's property or contractual rights.
12. Apply for protective placement or involuntary commitment;
13. Have custody of an adult ward and care, custody and control of a minor ward;
14. Any other power the court may specifically identify.

**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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