

The Guardian is a quarterly newsletter published by the Greater Wisconsin Agency on Aging Resources' (GWAAR) Wisconsin Guardianship Support Center (GSC).

The GSC provides information and assistance on issues related to guardianship, protective placement, advance directives, and more.

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In This Issue:

Case Law

- *Chippewa County v. M.M.* (Involuntary commitment reversed because evidence was insufficient to prove dangerousness) 2
- *Sauk County v. R.M.C.* (Court of appeals affirmed jury ruling that individual was incompetent and in need of protective placement) 3
- *Milwaukee County v. I.K.* (Based on the evidence, the court of appeals affirmed the circuit court's finding that involuntary commitment was appropriate). 4
- *Orlin and Craig Root-Thalman v. Guerin* (Circuit court's voiding POA-written quitclaim deed conveying house from individual to POA reversed by court of appeals). 4-5
- *Orlin and Craig Root Thalman v. Guerin* (More Information) 19-20

News

- Organizations as Authorized Representatives6-7
- Attorney General Announces Second Phase of Elder Abuse Task Force and Safe Seniors Program. 7-8
- New Medicare Card Mailing Envelope. 9
- New Medicare Cards 9-10
- Upcoming Events and Noteworthy Dates of Interest. 10
- GWAAR Awarded Senior Medicare Patrol Grant 18

Points of Interest

- Changes to Circuit Court Forms. 11
- Statutory Update 11
- What's in a Name? AFH, CBRF, RCAC, SNF, Oh my!. 11-16

Helpline Highlights

- What is a standby guardian? 16
- Can a court appoint a guardian or standby guardian over a ward or family's objection? 16
- Is an out of state Living Will valid in WI?. 17
- Can a proposed ward refuse to talk with the examiner? What happens if they do refuse? 17
- What is a spendthrift guardianship?. 17



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Title: *Chippewa County v. M.M.*

Court: Court of Appeals, District III

Date: May 1, 2018

Citation: 2017AP1325

Case Summary: In February 2017, Chippewa County pursued an involuntary commitment of M.M. under Wis. Stat. § 51.20. The jury found that M.M. was mentally ill, a proper subject for treatment, and dangerous. Thus, the circuit court entered orders imposing a six-month term of involuntary commitment and involuntary medication. M.M. appealed, arguing that the County failed to meet its burden of proof that, by clear and convincing evidence, he was dangerous. The Court of Appeals, in an opinion by Presiding Judge Stark, agreed and reversed his commitment.

Case Details: M.M. began displaying unusual behavior in January 2017. M.M.'s mother testified that M.M. had accused other persons living in M.M.'s mother's home of using drugs and poisoning him. He also began to experience physical problems and pain, which led to insomnia. In February, M.M.'s mother testified that his condition worsened and he became agitated. M.M. also began isolating himself in his room for fear of being poisoned. This behavior culminated when M.M. called 911 on March 2, 2017, making an unsubstantiated claim that he had been poisoned. He was taken into custody under an emergency detention.

At the trial, the County called one psychologist and two psychiatrists to testify. The psychologist noted that M.M. displayed "aggressive, verbal behavioral, physically a bit of boundary breaking in terms of phys-

ical boundaries," but noted that he never felt in danger, but some discomfort. The first psychiatrist testified similarly, noting that M.M. represented a substantial risk to himself or others because of his psychotic thinking. The second psychiatrist also testified that there was a substantial probability of harm due to his impaired judgment. All three agreed that M.M. was dangerous.

Under Wis. Stat. § 51.20(1)(a), 13(e), the County must prove by clear and convincing evidence that the person in question is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. The County argued that M.M. was dangerous under Wis. Stat. § 51.20(1)(a)2.c because there "is substantial probability of physical impairment or injury to himself." "Substantial probability," in the context of commitments, means "much more likely than not." The jury found that M.M. met all three conditions and the circuit court entered orders for the involuntary commitment.

The Court of Appeals agreed with M.M., holding that the evidence was insufficient to prove he was dangerous "merely because his mental illnesses would cause others to perceive him as behaving abnormally and they may respond in a way that could potentially injure M.M." First, the evidence did not show that M.M. made direct or indirect threats to himself or others. Second, the doctors' testimony only supported speculative harm, based on "potential for injury" "theoretical" violence, and "guessing" that others would perceive him as dangerous. The Court, therefore, reversed his commitment.

(Continued on page 3)



(*Case Law*, continued from page 2)

Title: *Sauk County v. R.M.C.*

Court: Court of Appeals, District IV

Date: May 3, 2018

Citation: 2017AP1860

Case Summary: The circuit court ordered permanent guardianship and protective placement. R.M.C. appealed, arguing that the circuit court improperly instructed the jury, that his counsel was ineffective, and that the Court of Appeals should exercise its discretionary power and grant a new trial. The Court of Appeals affirmed the circuit court's order.

Case Details: In June 2016, R.M.C. was detained on an emergency protective placement. The County filed petitions for permanent guardianship and protective placement because R.M.C. was incompetent due to alcohol-related dementia. The circuit court conducted a one-day jury trial featuring testimony from three police officers, a social worker, a psychologist, and R.M.C. The jury found R.M.C. to be incompetent and in need of protective placement. R.M.C. then filed a post-disposition motion to vacate based on the jury instruction. Circuit Court Judge Screnock issued a written decision concluding that the instruction clearly stated the law and denied the motion.

R.M.C. then appealed the decision, alleging that (1) the circuit court erred in providing an inaccurate and incomplete jury instruction; (2) R.M.C.'s trial counsel rendered ineffective assistance by failing to object to the jury instruction; and (3) the Court of Appeals should exercise discretionary authority under Wis. Stat. § 752.35 and grant a new trial.

However, the Court of Appeals was unpersuaded by all three arguments. First, R.M.C. forfeited his right to challenge the jury instruction because he did not object at trial. Because he did not preserve his right to appeal, the Court of Appeals deemed him to concede the point.

Second, R.M.C. could not prove that, but for ineffective assistance, the result of the proceeding would have been different. The Court of Appeals concluded that the evidence was sufficient to conclude that R.M.C. could not meet his basic needs. For example, when at a casino, R.M.C. informed others that he was the head of security and was an undercover agent on a secret mission. In November, he was also found in a rented room with no heat or transportation. The social worker also testified that R.M.C. suffered from memory loss, confusion, use of alcohol, health issues (having suffered a stroke and high blood pressure), and difficulty remembering to take medications and meet his basic needs. Given the evidence, the court's confidence in the opinion was not undermined.

Lastly, R.M.C. argued that the court should act in the interest of justice under Wis. Stat. § 752.35 and order a new trial because of the jury instruction. However, the Court of Appeals rejected this argument because the circuit court followed the correct statute, included the required element, and did not omit words from the required element. The circuit court decision was affirmed.

(Continued on page 4)



(*Case Law*, continued from page 3)

Title: *Milwaukee County v. I.K.*

Court: Court of Appeals, District I

Date: May 8, 2018

Citation: 2017AP1425

Case Summary: I.K. appealed the circuit court's order for involuntary commitment, arguing that the County failed to meet its burden of proof for "dangerousness." The Court of Appeals, in an opinion by Judge Brash, affirmed the circuit court's opinion.

Case Details: On September 22, 2017, at 4:00am, Milwaukee police officers responded to a report of a naked man walking around. The officers located him and asked where he lived. He responded by pointing to the sky and did not seem to know where he was. He eventually informed the officers that he lived at a rescue mission, which was not an insignificant distance away. Since he had no clothes or belongings, and was far from the rescue mission, he was taken into custody at the Milwaukee County Mental Health Complex.

There, he was diagnosed with schizoaffective disorder. His case was temporarily suspended in September 2016 when he agreed to take his medication. However, after refusing several times in December 2016, he was taken back into custody. A final hearing was held on December 30, 2017. The court-appointed psychiatrist testified that I.K. was "delusional" and had "grossly disoriented behavior movements." The treating psychiatrist also testified that I.K. presented "psychotic symptoms." Based on the evidence, the

circuit court committed I.K. for six months, and then extended the commitment for an additional nine months.

I.K. challenged whether Milwaukee County met its burden of proof for his commitment. Under Wis. Stat. § 51.20(1)(a), the County must prove that the individual is (1) mentally ill, (2) a proper subject for treatment; and (3) dangerous. The danger component is demonstrated by showing a "substantial probability" of physical harm resulting from the inability to satisfy basic needs due to mental illness. Wis. Stat. § 51.20(1)(a)2.d. I.K. argued that the County did not satisfy its burden of proving that he posed a substantial probability of physical harm due to his mental illness.

The Court disagreed. First, the state in which the police officers found him was sufficient to demonstrate that I.K.'s safety was at issue. Second, I.K., when given the opportunity, did not avail himself to the necessary treatment and services in the community. The circuit court's findings of fact were not erroneous, and therefore the opinion was affirmed.

Title: *Orlin and Craig Root-Thalman. v. Guerin*

Court: Court of Appeals, District I

Date: May 30, 2018

Citation: 2016AP2513

Case Summary: The Root-Thalmans, acting as POA for finance for J.A.H., completed a quitclaim deed conveying J.A.H.'s property to them. The quitclaim was challenged at the temporary guardianship

(Continued on page 5)



(Case Law, continued from page 4)

hearing. The circuit court voided the quitclaim, but the Court of Appeals, in a per curiam opinion, reversed, holding that the Root-Thalmans did not receive due process, and that the circuit court did not have statutory authority or personal jurisdiction over the matter.

Case Details: Orlin and Craig Root-Thalman lived next to J.A.H. Orlin served as the POA for Finances, while Craig served as POA for Health Care. On September 16, 2016, the Milwaukee County Department of Aging filed a petition for temporary and permanent guardianship because J.A.H. was suffering from dementia and incapable for making decisions for herself. The Root-Thalmans were named as interested parties in the petition.

Before the hearing the Department of Aging investigated J.A.H.'s assets and believed that the Root-Thalmans were financially exploiting J.A.H. First, the investigator found a quitclaim deed dated July 2016 that conveyed J.A.H.'s home to the Root-Thalmans. The investigator also found a "starter check" for \$212,000, which was written to J.A.H., but signed and endorsed by Orlin. The check cleared out J.A.H.'s bank account. Lastly, J.A.H. was not staying in her home but at a hotel in a different county. Based on the investigation, the Department asked for a psychological evaluation, which concluded that J.A.H. was incapable of making decisions, needed twenty-four hour supervision, and needed a guardian. The circuit court granted the temporary guardianship, appointed Guerin as J.A.H.'s guardian, and voided the quitclaim deed.

The Root-Thalmans appealed the court's order voiding the quitclaim. First, they argued that they did not receive due process. The Court of Appeals agreed, noting that they were not parties to the guardianship action and they had no notice that the quitclaim deed was going to be challenged at the temporary guardianship hearing.

Second, the Root-Thalmans argued that the circuit court did not have statutory authority to void the quitclaim. Again, the Court of Appeals agreed. Wis. Stat. ch. 54 allows the circuit court to reach current income and assets, but not previously held property. Although the Court of Appeals did not address the merits of this specific quitclaim deed, they noted that the guardian must seek to void the deed after the temporary guardianship proceedings. Third, the Root-Thalmans argued that the circuit court did not have personal jurisdiction, with which the Court of Appeals again concurred.

The temporary guardian attempted to argue that the Root-Thalmans waived or forfeited their arguments because they did not seek a rehearing under Wis. Stat. § 54.50(3)(d). However, the Court of Appeals rejected that argument because the statute only refers to a rehearing on the issue of the appointment of a temporary guardian. Therefore, the Court of Appeals, reversed the circuit court's order voiding the quitclaim.

****For more information on other cases involving these parties, see page 19. □**



Organizations as Authorized Representatives

In Affordable Care Act regulations enacted in 2013, the Centers for Medicare and Medicaid Services defined an authorized representative as an individual or organization that acts responsibly on behalf of the beneficiary in assisting with the application, renewal of eligibility, and ongoing communication with the agency. See 42 C.F.R. § 435.923(a)(1).

Starting June 23, 2018, DHS will allow both individuals and organizations to serve as authorized representatives for Wisconsin Medicaid, BadgerCare Plus, FoodShare, Family Planning Only Services, Caretaker Supplement, and SeniorCare.

The regulation allows anyone from the appointed organization to act on the member's behalf, however they must provide the name and contact information of a single contact person. If the organization's contact person changes, either the individual or the organization must notify the agency of the change.

Responsibilities

The responsibilities of the authorized representative are limited to: applying for or renewing benefits, reporting changes, working with the individual's agency on any benefit-related matters, and filing eligibility-related grievances and appeals. Additionally, individuals can elect to have their authorized representative receive copies of their eligibility and benefit letters.

Individuals who are enrolled in Wisconsin Medicaid, BadgerCare Plus, Family Planning Only Services, or SeniorCare may also have their authorized representa-

tives: get their ForwardHealth card on their behalf, enroll them in a HMO, contact the agency regarding a bill, service, or other medical information, and file grievances and appeals about their health care services. These options are limited to individuals serving as authorized representatives due to the disclosure of protected health information.

Who Can Serve

An individual can only have one authorized representative at a time. Authorized representatives must comply with state and federal laws relating to conflicts of interest and confidentiality and provide accurate and truthful information.

The following individuals cannot serve as an authorized representative:

- Anyone disqualified for an intentional FoodShare program violation during their disqualification period.
- Homeless meal providers cannot serve as authorized representatives for a homeless food unit.
- Agency employees who are involved in determining eligibility or benefits without special written approval.
- Retailers authorized to accept FoodShare benefits.

Appointing, Changing, and Removing an Authorized Representative

An individual can appoint an authorized representative through four ways: ACCESS at initial application, Federally Facilitated Marketplace, Form F-10126A (Authorized Representative: Person) or F-10126B (Authorized Representative: Organization).

(Continued on page 7)



(Authorized Representatives, continued from page 6)

However, there are two program-specific notes. First, SeniorCare authorized representatives can only be appointed using the “Appoint, Change, or Remove a SeniorCare Authorized Representative” form, F-10080A (Person) or F-10080B (Organization). A SeniorCare authorized representative can only act on behalf of the individual for SeniorCare. Second, form F-10126, “Authorization of Representative for Medicaid/BadgerCare Plus/FoodShare” will be discontinued on June 25, 2018 and will be replaced by the form F-10126A (Authorized Representative: Person) and form F-10126B (Authorized Representative: Organization).

Members can change or remove their authorized representative at any time by completing and submitting to their agency either form number F-10126A (Person) or F-10126B (Organization) entitled: “Appoint, Change or Remove an Authorized Representative.” A member can also remove their representative by submitting a signed letter indicating the removal. Only the member’s signature is required for removal. If the organization’s contact person changes, the member or the organization must notify the member’s agency, either by phone or in writing, of the change.

For an authorized representative to be valid, all required fields must be completed with all signatures (including one witness or, if the individual signs with an “X,” two witnesses). If the required information is not provided, then the appointment is invalid and the representative cannot act on the member’s behalf.

If a member is represented by a legal guardian, conservator, or power of attorney, the legal guardian, conser-

vator, or power of attorney must appoint the authorized representative.

Lastly, if a member only wants a person or organization to have access to his or her eligibility information, but not to act on his or her behalf, the member must complete and submit the “Confidential Release of Information Authorization for Wisconsin Medicaid, BadgerCare Plus, FoodShare, Family Planning Only Services, SeniorCare, and Caretaker Supplement” form, F-02340, to authorize his or her agency to disclose the eligibility information.

Forms can be found at <https://www.dhs.wisconsin.gov/forms/index.htm>. □

Attorney General Announces Second Phase of Elder Abuse Task Force and Safe Seniors Program

By the GWAAR Legal Services Team (for reprint)

Elder abuse is a vastly underreported problem. Only one in 44 cases of elder financial abuse is ever reported. Even when elder abuse is reported, it does not always result in holding perpetrators accountable for their actions or being prosecuted for the crime. Recognizing Wisconsin’s growing older adult population and the need for immediate action, Wisconsin Attorney General Brad Schimel is working to strengthen the state’s response to elder abuse.

In August 2017, Attorney General Brad Schimel assembled a task force dedicated to combating elder abuse in Wisconsin.

(Continued on page 8)



(Task Force, continued from page 7)

The task force is studying the impact of elder abuse in Wisconsin, compiling resources from various programs, and assessing ways to improve outcomes for elder abuse situations. The task force is also charged with developing strategies to address barriers in investigation and prosecutions of elder abuse, and strengthening consumer protections for seniors.

The task force is made up of a multi-disciplinary team of professionals including representatives from the WI Dept. of Justice, WI Dept. of Health Services, WI Dept. of Ag, Trade & Consumer Protection, WI Dept. of Financial Institutions, the WI State Legislature, law enforcement, the WI Court System, the Board on Aging and Long-Term Care, the WI Bankers Association, crime victim services, adult protective services, senior living facilities, elder law attorneys, and senior advocacy services. Jayne Mullins from GWAAR is a member of the task force.

In January 2018, a public awareness campaign was initiated through radio ads to teach people to recognize the signs of elder abuse and encourage reporting of suspected elder abuse. Attorney General Schimel has announced the second phase of the initiative, which includes a new website (launched May 23), and additional online advertising across various platforms to increase public awareness.

To learn more about elder abuse, visit www.ReportElderAbuseWI.org. To report suspected elder abuse, contact your county elder adult-at-risk agency or call 1-800-488-3780. If you witness an act of abuse, neglect, or exploitation that requires immediate attention, please call 911.

Lastly, in February 2018, Attorney General Brad Schimel initiated “Safe Seniors,” a program that allows Wisconsin residents to request a covert camera to provide surveillance if they suspect caregiver abuse. In doing so, Wisconsin becomes just the second state to provide cameras for suspected caregiver abuse.

The Department of Justice will provide the cameras, with memory cards, for an individual to have for up to thirty days. The recordings must be saved daily and the Department of Justice or local law enforcement must be notified if the surveillance shows any illegal conduct.

To receive a camera, individuals must contact the Wisconsin Department of Justice by calling (608) 267-1313 or by visiting the website at <https://www.doj.state.wi.us/dci/safe-seniors>.

Sources:

<https://www.doj.state.wi.us/news-releases/ag-schimel-launches-online-media-campaign-elder-abuse-awareness>

<https://www.dhs.wisconsin.gov/aps/ear-agencies.htm>

<http://www.napsa-now.org/policy-advocacy/exploitation/>

<https://www.doj.state.wi.us/dci/safe-seniors> □



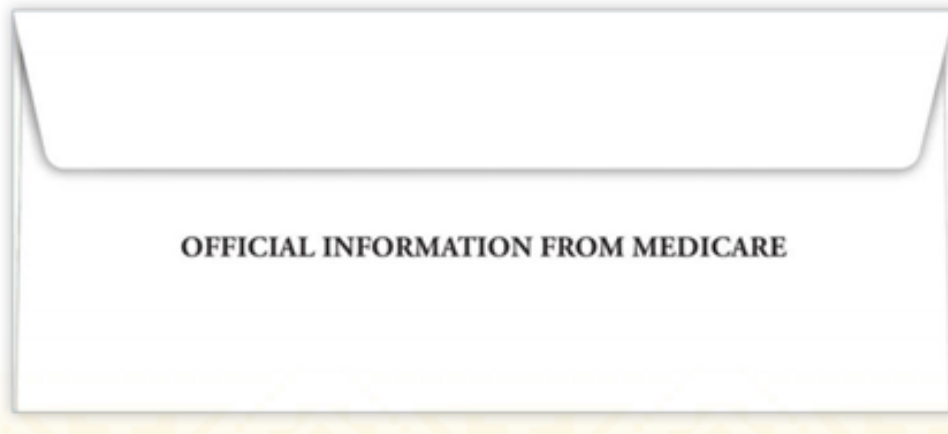


New Medicare Card Mailing Envelope

Envelope Front



Envelope Back



New Medicare Cards

Medicare is removing a person’s Social Security number from the Medicare ID number to reduce the likelihood of identity theft. This means that 54 million Medicare beneficiaries will receive new Medicare ID cards with a new, randomized Medicare ID number. The new cards are being sent out in geographical waves across the country by the Centers for Medicare & Medicaid Services (CMS). Wisconsin beneficiaries will be receiving their new cards sometime after June 25, 2018. One of the biggest hurdles with sending out the new Medicare cards is ensuring that Medicare beneficiaries are not the target of scams. Here are some important highlights about the new Medicare cards:

- The new Medicare ID number is a randomized mixture of letters and numbers that does not correlate with the beneficiary’s Social Security number, date of birth, or personal identity in any way.

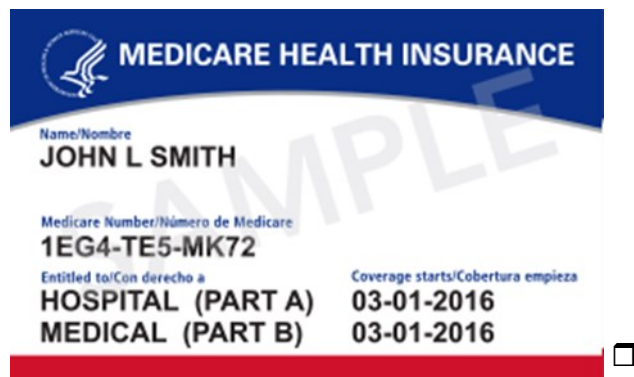
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(*New Medicare Cards, continued from page 9*)

- The new Medicare cards are being sent out to the address that beneficiaries have on file with the Social Security Administration.
- No one will call Medicare beneficiaries before the cards are mailed out to confirm a person's former Medicare number, Social Security number, address, or any other personal information.
- There is no cost for the new Medicare card.
- Once beneficiaries receive their new Medicare ID card, they can shred their old Medicare card.
- Medicare beneficiaries should bring their new Medicare ID card to their medical providers (doctors, hospitals, therapists, etc.) in future visits to show the updated Medicare ID number.
- For the next year, Medicare providers will accept either/both Medicare ID numbers (old or new) while the transition to the new system is underway.

Here is a sample of what the new Medicare card looks like:



This year, the United States Special Committee on Aging annual report will focus on the issue of guardianship. According to the National Center for State Courts, approximately 1.3 million adult guardianship cases exist in the United States and an estimated \$50 billion of assets are under the care of a guardian. Very little data on guardianship exists. The Committee is requesting comments, data, policy analysis, options, model programs and any other relevant information from older Americans, academics, advocacy organizations, and others who have experiences related to guardianship. Written comments can be sent via email to comment@aging.senate.gov and will be part of the official public record. The deadline to send comments is July 20, 2018. □

Upcoming Events and Noteworthy Dates That May Be of Interest:

- ◇ National Minority Mental Health Month, July
- ◇ National Health Center Week, August 12-18
- ◇ Senior Citizens Day, August 21
- ◇ Women's Equality Day, August 26
- ◇ Aging and Disability Network Conference, September 12-14, Kalahari Resort, WI Dells
- ◇ Ready, Set, Retirement, September 29, 9:00 a.m. - 12:30 p.m., Verona, WI
- ◇ National Preparedness Month, September
- ◇ WI Self-Determination Conference, October 29-31, WI Dells □





Changes to circuit court forms made

- Most of the circuit court forms for guardianship, protective placement, and conservatorship have been updated. The updates were made on May 3rd, 2018 and were made available on June 13th, 2018.
- You can find the most current versions of the forms under their respective sections at: <https://www.wicourts.gov/forms1/circuit/index.htm>.

Statutory update

- The Uniform Adult Guardianship Jurisdiction statute was signed into law in April 2018 and is now found in Wis. Stat. ch. 53 regarding interstate transfer of guardianships.
- The court forms for foreign transfer under the prior version of ch. 54 have been removed from the WI Courts website.
- Supported Decision-Making was also signed into law in April 2018. The Supported Decision-Making law can now be found in Wis. Stat. ch. 52.
- Wisconsin statutes can be found online at: <https://docs.legis.wisconsin.gov/statutes>. □

What's in a name? AFH, CBRF, RCAC, SNF, Oh my!

There are different types of living facilities in Wisconsin for individuals who need some level of care, monitoring or assistance. Some of these individuals may require 24-hour access to nursing services and others live in a setting where less care is needed, such as an assisted living facility. Oftentimes, there is confusion over the types of placements or facilities in Wisconsin when an individual, guardian or power of attorney agent is considering a move to a facility. Frustration can come when a new residence is found and an individual is told they cannot live there because they have an activated power of attorney for health care or they are under a guardianship. So, what is in a name? It turns out, a lot!

This article will explore the differences between the different types of facilities within Wisconsin. Wisconsin licenses and regulates different types of assisted living facilities and programs. There are four specific types of assisted living: Adult Day Care (ADC), Adult Family Home (AFH), Community-Based Residential Facility (CBRF) and a Residential Care Apartment Complex (RCAC). There are also Nursing Homes, which provide a greater level of care than an Assisted Living facility.

(Continued on page 12)

Disclaimer

This newsletter contains general legal information. It does not contain and is not meant to provide legal advice. Each situation is different and this newsletter may not address the legal issues affecting your situation. If you have a specific legal question or want legal advice, you may want to speak with an attorney.



(*What's in a name?*, continued from page 11)

Adult Day Care

Adult Day Care is a day program that provides services for adults when caregivers are at work or need extra help. Day care programs seeking to serve participants with waiver funding must be certified. Typically, the types of services an ADC provides are assistance with activities of daily living, personal care and supervision, meals, transportation, and activities. These services may be provided within the family home, a free-standing center or a multi-use facility such as a senior center. Some services may be available on the nights and weekend, but typically most services are provided during regular business hours.

Adult Family Home

An Adult Family Home regulated by the state under Wis. Stat. § 50.01(1) is a private residence which provides care and maintenance above just providing room and board. In general, the care provider lives in the home with three or four adults. The AFH either does not provide nursing care or nursing care may include up to seven hours per week per resident. *Id.* One or two bed AFH's are regulated by county Human Services departments and not the Department of Health Services.

AFHs can admit people of advanced age, persons with dementia, developmental disabilities, mental health problems, physical disabilities, traumatic brain injury, AIDS, alcohol and other drug abuse, correctional clients, pregnant women needing counseling and/or the terminally ill. Upon preadmission, the prospective new resident must be given the opportunity to meet

current residents and spend time in the home which could include day visits or an overnight stay. Wis. Admin. Code DHS § 88.06(1). An AFH must be in a residential area with easy access or transportation to activities and services. Wis. Admin. Code DHS § 88.05. A bedroom can have no more than two persons per room. *Id.* An AFH must provide a homelike environment that is safe, well maintained and clean. *Id.*

An AFH can terminate placement only after providing 30 days written notice that is consistent with any service agreement. Wis. Admin. Code DHS § 88.08. The 30-day notice is not required for an emergency termination necessary to prevent harm to the resident or other household members. *Id.*

Residents of an AFH do have resident rights under Wis. Admin. Code DHS §§ 88.10(3)(a)-(u), which include but are not limited to the right to privacy, fair treatment, self-direction, choice of social activities, use of the phone, access to unopened mail and to have private visitors. A resident of an AFH also has the right to be presumed competent unless there is a guardianship. A resident under a guardianship still must be allowed decision-making participation to the extent they are capable. Residents have the right to file a grievance and receive help from an advocacy agency in filing that grievance. Wis. Admin. Code DHS § 88.10(5).

Community Based Residential Facility

A Community Based Residential Facility is a facility where five or more adults receive care, treatment or services above receiving room and board. Wis. Stat. § 50.01(1g). Care needs do not rise above needing

(Continued on page 13)





(What's in a Name?, continued from page 12)

intermediate level nursing. *Id.* Nursing care cannot be provided more than three hours per week per resident. *Id.* A CBRF excludes facilities such as those operated by members of a religious order specifically for care or treatment of members of that order, a group home for minors or domestic violence shelters. *Id.*

Intermediate level nursing care means periodic skilled nursing services or physical, emotional, social or restorative care required by a person with a long-term illness or disability that is at a relatively stable plateau. Wis. Stat. § 50.01(1t). *See also* Wis. Stat. § 50.01(1e).

CBRFs can admit and provide services to people of advanced age, persons with dementia, developmental disabilities, mental health problems, physical disabilities, traumatic brain injury, AIDS, alcohol and other drug abuse, correctional clients, pregnant women needing counseling and/or the terminally ill. Upon admission, the CBRF shall determine if the resident has any advance directives. Wis. Admin. Code DHS § 83.28(7). However, they cannot require this as a condition of admission or of receiving health care services. *Id.*

A person who is incapacitated cannot be admitted unless there is a valid activated power of attorney for health care or there is a guardian, unless they are being admitted directly from the hospital.¹ Wis. Admin. Code DHS § 83.27(2)(h). A person who has been de-

clared incompetent under a guardianship cannot be admitted long-term to a CBRF with more than 16 beds unless there is a court ordered protective placement under Wis. Stat. §55.12. Wis. Admin. Code DHS § 83.27(2)(i).

A CBRF cannot admit or retain anyone who has an ambulatory or cognitive status incompatible with the licensure, a person who is destructive of property or self or mentally abusive to others unless the CBRF has sufficient resources to provide care and protection. Wis. Admin. Code DHS §§ 83.27(2)(a)-(b). A CBRF also cannot admit a person who has needs incompatible with the client group described in the program statement, or a person who needs more than three hours of nursing care per week unless it is temporary or a waiver is granted. Wis. Admin. Code DHS §§ 83.27(2)(c)-(d).

A CBRF can involuntarily discharge a resident under certain circumstances, however, they must provide a 30-day written notice and assistance in finding a new residence for the individual that is suitable to meet their needs before they are discharged. Wis. Admin. Code DHS § 83.31(4). Residents of a CBRF have resident rights under DHS §§ 83.32(3)(a)-(n) and Wis. Stats § 50.09 which include, but are not limited to, the right to self-determination, the right to be in the least restrictive environment, the right to private communications and confidentiality.

(Continued on page 14)

¹ Under Wis. Stat. 50.06(1), a person with an incapacity who does not have a valid power of attorney can be admitted directly from a hospital if all the statutory requirements are met. For more information, see our publication titled, "Authority to Consent to Admission to Nursing Homes, CBRF, RCAC and Hospice for Individuals who are not Developmentally Disabled or Mentally Ill" located at <https://gwaar.org/gsc>.





(What's in a Name?, continued from page 13)

Residential Care Apartment Complex

A Residential Care Apartment Complex means a facility where five or more adults reside that contains independent apartments. Wis. Stat. § 50.01(6d).

Each apartment has an individual lockable entrance and exit, kitchen with a stove, individual bathroom, sleeping and living areas. *Id.* A RCAC provides not more than 28 hours per week of services that are personal, supportive and nursing services. *Id.* A RCAC is not the same thing as a CBRF or a Nursing Home, however, it can be part of the same structure. *Id.*

A RCAC will not accept an individual with an activated Power of Attorney for Health Care, an individual under a guardianship, or an individual who has been found by a physician or psychologist to be incapable of recognizing danger, summoning assistance, expressing need or making care decisions. Wis. Admin. Code DHS § 89.29(1). An exception exists if a person being admitted shares an apartment with a competent spouse or a person who is legally responsible for them. *Id.* This requirement is included for a RCAC because tenants need to be competent to understand their needs and preferences, enter into a service agreement and understand and accept risk. *Id.*

A RCAC can retain an individual that later becomes incompetent or incapable of recognizing danger, summoning assistance, expressing need or making care decisions. Wis. Admin. Code DHS § 89.29(2)(b). To do so, the facility must ensure that there is sufficient oversight, protection and services and that the individual has an activated power of attorney for

healthcare or a durable power of attorney, or both.

Id. The power of attorney must substantially cover the person's areas of incapacity. *Id.* There also needs to be a service agreement and risk agreement signed by the guardian and/or healthcare agent. *Id.*

A tenant of a RCAC has tenant rights which include, but are not limited to, privacy, self-direction, choice of services, to freely receive visitors and have access to their records. Wis. Admin. Code DHS § 89.34.

Nursing Home

A nursing home is a facility where five or more persons receive care and treatment because of physical or mental health conditions that require access to 24-hour nursing services. This can include facilities that provide nursing care, intermediate level of nursing care or skilled nursing services. Wis. Stat. §50.01(3). Medicare Part A covers skilled nursing care provided in a skilled nursing facility (SNF) under certain conditions for a limited time. *See generally* Medicare Benefits Policy Manual 100-20, ch. 8. All residents of a nursing home have a right to admission information and nondiscriminatory treatment. Wis. Admin. Code DHS § 132.31(1).

Skilled nursing includes providing services to a resident under a doctor's order. Wis. Stat. § 50.01(6v). The services that are ordered require the skills of and are provided directly or under the supervision of an individual who is licensed/certified to the equivalent level of licensed practical nurse (LPN). *Id.* Skilled nursing care is provided under three circumstances.

(Continued on page 15)





(What's in a Name?, continued from page 14)

Wis. Stat. § 50.01(6v)(b). The first circumstance is if a service is so complex that for it to be done safely and effectively it must be performed by a registered nurse (RN) or LPN. *Id.* Secondly, full recovery or medical improvement is not possible but services are needed to prevent deterioration or sustain current capacities. *Id.* Thirdly, skilled nursing services are used when there are special medical complications. *Id.* See generally Wis. Admin. Code DHS ch. 132.

An individual with an incapacity can be admitted to a nursing home long-term if their activated power of attorney for health care authorizes admission or there is a guardianship and protective placement. No resident may be housed in a locked unit unless they consent, there is a protective placement order under Wis. Stat. ch. 55 with a specific finding of the need for a locked unit, or there is an emergency and 72-hour confinement is necessary to protect the resident or others. If a resident consents, they can only be housed in a locked unit for 90 days and consent can be revoked at any time.² Wis. Admin. Code DHS § 132.33.

Locked unit is a unit designed as a protective environment that is secured to prevent residents from leaving at will. Wis. Admin. Code DHS § 132.33(1)(a). A physical restraint is not a locked unit. *Id.* If a resident may exit at will, a facility is not locked. *Id.*

A nursing home can discharge a resident only under certain circumstances such as for medical reasons as ordered by a doctor or for nonpayment of charges following a reasonable opportunity to pay.³ Wis. Admin. Code DHS § 132.53(2). A 30-day notice of trans-

fer or discharge must be provided. *Id.* No resident may be involuntarily discharged unless there is an alternative placement arranged. *Id.* Residents of a nursing home have resident rights under Wis. Admin. Code DHS § 132.31 and Wis. Stat. § 50.09 which includes but is not limited to the right to receive unopened mail, have private visits, and be free from discrimination.

Of Note:

No individual may be required to execute a power of attorney for health care as a condition for receipt of health care or admission to a health care facility. Wis. Stat. § 155.70(2). A health care facility includes but is not limited to a hospital, CBRF or Nursing Home. Wis. Stat. § 155.01(6).

Any person receiving services for mental illness, developmental disability, alcoholism or drug dependency, or an individual under a ch. 55 Protective Placement, has additional patient rights, including the right to refuse medication or treatment under Wis. Stat. § 51.61.⁴

Complaints with regulated facilities or caregivers can be directed to the Division of Quality Assurance at 1-800-642-6552 or DHSwebmailDQA@wisconsin.gov

A Long Term Care Ombudsman (advocate) is available through the Board on Aging and Long Term Care for long term care consumers over age 60 at 1-800-815-0015. A Family Care and IRIS Ombudsman is available through Disability Rights Wisconsin for individuals ages 18-59 at 1-800-928-8778.

(Continued on page 16)



Helpline Highlights



(*What's in a Name?*, continued from page 15)

Sources:

<https://www.dhs.wisconsin.gov/guide/assisted-living.htm>

<https://www.dhs.wisconsin.gov/regulations/nh/introduction.htm>

<https://www.medicare.gov/coverage/skilled-nursing-facility-care.html>

² The resident's consent is effective only for 90 days, unless revoked. Consent can be renewed for 90-day periods. A resident can revoke consent at any time and the resident must be transferred to an unlocked unit promptly following the revocation. Wis. Admin. Code DHS § 132.33(4).

³ Additional conditions apply to involuntary transfer or discharge for nonpayment under certain circumstances as found in DHS § 132.53(2)(b)(2).

⁴ Court orders are required for involuntary psychotropic medication under Wis. Stat. ch. 54 and for medication or treatment under Wis. Stat. ch. 51 unless it is necessary to prevent serious physical harm to patient or others. □

Helpline Highlights

What is a standby guardian?

Under Wis. Stat. §54.52, a person at any time may bring a petition for appointment of a standby guardian of the person or estate. A standby guardian's appointment would become effective immediately upon the death, unwillingness or inability to act, resignation or court removal of the guardian. A standby guardian may also act during a period when the guardian is temporarily unable to fulfill their duties due to an extended vacation or illness. The powers and duties of the standby guardian will be the same as those of the initially appointed guardian.

When the initial guardianship is ordered, the standby guardian will receive a copy of the Order and the Order designating them as standby. When they assume office, the standby guardian must notify the court. They can do so by submitting court form GN-3220, Notification to Court of Assumption of Duties by Standby Guardian. They can indicate the reason why they are assuming duties and if it is on a permanent or temporary basis. The court must then issue new Letters of Guardianship and indicate whether it is

permanent or for a limited time.

Can a court appoint a guardian or standby guardian over a ward or family's objections?

Yes. When considering appointment of a guardian or standby guardian, the court must consider numerous factors under Wis. Stat. §54.15. Only one of those factors is the opinion of the proposed ward and family. The court must take the opinions of the proposed ward and family into consideration; however, the best interests of the proposed ward controls. Other factors that the court must consider include potential conflicts of interest, whether there is a power of attorney for finances or health care, if the ward has nominated a person, if the person seeking nomination is a parent of an individual with a developmental disability or serious and persistent mental illness or if there was a testamentary nomination by proposed ward's parents. The court will also consider information contained within the Statement of Acts which is a court form that is required to be completed by anyone seeking to be guardian. This form considers information such as criminal convictions, bankruptcies and caregiver misconduct.

(Continued on page 17)



Helpline Highlights



(*Helpline Highlights*, continued from page 16)

Is an out of state Living Will valid in WI?

Yes. Under Wis. Stat. §154.11, a document that authorizes the withholding or withdrawal of life-sustaining procedures or feeding tubes that was executed in another state or jurisdiction is valid and enforceable in Wisconsin if it was executed in compliance with the other jurisdiction's laws. It is valid and enforceable in WI to the extent it is consistent with the laws of our state.

Can a proposed ward refuse to talk with the examiner? What happens if they do refuse?

Under Wis. Stat. §54.36(1), when there is a guardianship petition based on grounds of spendthrift or incompetency, a physician, psychologist, or both are required to examine the proposed ward and provide a written report to the court. Before conducting the examination, the examiner is required to inform the proposed ward that they have a right to refuse to participate in the examination and the right to refuse to speak with the examiner absent a court order. The examiner is required to inform the ward that regardless of whether they participate, the examiner is required to report to the court. Under §54.36(3), the petitioner or Guardian ad Litem can request a court order for examination. A ward's rightful refusal to

participate in that court ordered evaluation will not obstruct a guardianship or protective placement proceeding. The examiner is still required to report to the court and is required to engage in an independent review of all records and independently confirm the facts those opinions are based upon. *Walworth Cnty. v. Therese B.*, 2003 WI App 223, 267 Wis. 2d 310, 671 N.W.2d 377.

What is a spendthrift guardianship?

A guardianship petition can be filed on grounds that an individual is incompetent or is a spendthrift. Under Wis. Stat. §51.01(31) "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. A spendthrift guardianship does not require a finding of incompetency. A court may appoint a guardian of the estate if the court finds by clear and convincing evidence that the individual is aged at least 18 years and is a spendthrift. A medical or psychological report is still required. Wis. Stat. §54.10(2)(a)(b). □

Save the Date! **September 12-14, 2018**



Attend the 2018 Aging & Disability Network Conference

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info@gwaar.org or gwaar.org





GWAAR Awarded Senior Medicare Patrol Grant

On June 8, 2018, the Administration for Community Living announced the award of the Senior Medicare Patrol (SMP) grant to the Greater Wisconsin Agency on Aging Resources, Inc. (GWAAR). This five-year grant is designed to raise awareness and identify Medicare fraud, errors, and abuse. Grant projects focus on educating Medicare beneficiaries about the signs of Medicare fraud and what to do if fraud is suspected.

The Senior Medicare Patrol project began in 1997 with 12 pilot projects and expanded to the 54 SMP grants currently funded across the United States. Each state, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands all receive grants. Grantee SMP projects provide local outreach, education, and counseling to Medicare beneficiaries through a trained volunteer workforce.

The Department of Health and Human Services Office of Inspector General estimates that Medicare loses billions of dollars each year to errors, fraud, and abuse. Although it is hard to quantify the savings derived from this program, the Office of Inspector General has documented over \$124.8 million in savings

attributable to the SMP program since its inception 21 years ago.

If you have reason to suspect Medicare fraud, errors, or abuse, contact the Wisconsin Senior Medicare Patrol at:

Toll-free helpline: (888) 818-2611

Email: smp-wi@gwaar.org

Website: <https://gwaar.org/senior-medicare-patrol>

GWAAR is also seeking SMP volunteers in all 72 counties and tribes to assist with Medicare outreach and beneficiary educational events. Check out our website for more information.

Interested in Receiving *The Guardian*?

Do you know someone who would like to receive the *Guardian* newsletter? Do you want more information about guardianship and related issues? Signing up is easy with the link on the Guardianship Support Center Webpage: [Guardian Newsletter Sign-Up](#). You can also subscribe by emailing your name, email address, and organization to guardian@gwaar.org.





In our case law section, you can find a summary of *Orlin and Craig Root-Thalman. v. Guerin*, 2016AP2513, which is a court of appeals decision from May 30, 2018. We wanted to provide some additional information regarding these parties. In the court of appeals case, circuit court decision which voided a quitclaim deed during a temporary guardianship proceeding was reversed as it was done without proper jurisdiction and notice.

State of Wisconsin v. Orlin J. Root-Thalman, 17CF5550

State of Wisconsin v. Craig P. Root-Thalman, 17CF5558

The defendants were charged as party to a crime with Criminal Slander of Title, Class H Felony, Attempted Theft >\$10,000, Class G Felony, and Theft > \$10,000, Class G Felony. Upon conviction, the total maximum imprisonment between all counts is 21 years and a fine not to exceed \$47,500.

These are the facts as alleged in the criminal complaint:

- The alleged victim, J.H, is a 93-year-old woman who lived in her home for 73 years. Defendants Orlin Root-Thalman and Craig Root-Thalman (hereinafter referred to as “Orlin” and “Craig”) moved to the neighborhood in 2012. On July 11, 2016, they obtained J.H.’s signature on a quit claim deed transferring J.H.’s home to them without payment. On July 15, 2016, J.H. signed a power of attorney naming defendant Orlin as agent. J.H. had a previous power of attorney for finances which named her cousin as her agent.
- J.H. had more than two million dollars saved in fourteen local bank accounts. The defendants used the financial power of attorney to gain access to the accounts. Orlin changed the payable on death designation on one of J.H.’s accounts (balance of \$247,953.35) for 20% of the balance to be paid to Craig upon J.H.’s death. Defendants also unsuccessfully attempted to change another payable on death designation.
- Checks were written to Orlin and Craig for caretaking services in the amounts of \$17,640.00 and \$8,064.00. The amount of \$62,719.34 from J.H.’s funds was also used to improve her home after it was deeded to the defendants.
- The month after J.H. signed the quit claim deed, two doctors signed statements of incapacity.
- Defendants made videos in attempts to fabricate evidence that J.H. was mentally competent but the camera recorded notes provided to J.H. to help her be able to identify the defendants.
- A video was recorded of J.H. executing a power of attorney for health care. J.H. was mistaken on the date and year even with a desk calendar next to her open on the current date.
- Defendants changed the locks on J.H.’s home and told relatives when they visited that their help was no longer needed.

(Continued on page 20)





(Root-Thalman, continued from page 19)

These criminal cases are currently pending in Milwaukee Circuit Court. Orlin’s case is set for a jury trial in September 2018 and Craig’s case is scheduled for a plea hearing in July 2018.

Milwaukee County Case No. 18CV5285

The court appointed guardian for J.H., filed a temporary restraining order and injunction against Craig and Orlin Root-Thalman. A Milwaukee County Judge granted the temporary restraining order preventing the couple from entering the home. A hearing on the injunction is scheduled for August 2018.

Sources & additional information:

<https://www.cbs58.com/news/couple-befriends-elderly-woman-takes-her-home-and-life-savings>

<https://www.jsonline.com/story/news/crime/2018/06/14/appeals-court-probate-judge-overreached-guardian-case/695591002/>

<https://www.jsonline.com/story/news/crime/2018/06/14/appeals-court-probate-judge-overreached-guardian-case/695591002/> □

