Greater Wisconsin Agency on Aging Resources, Inc.

The Guardian

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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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Title: *Portage County. v. J.W.K.*

Court: Court of Appeals, District IV

Date: April 26, 2018

Citation: 2017AP2429

Case Summary: J.W.K. was involuntarily committed in Portage County. After the circuit court extended his commitment by twelve months, J.W.K. appealed, contending that he was not a proper subject for commitment under Wis. Stat. ch. 51. Judge Blanchard, writing for the Court of Appeals, rejected J.W.K.'s argument, holding that the record showed he would benefit from treatment.

Case Details: J.W.K.'s recommitment hearing featured both a psychiatrist and a social worker. The psychiatrist testified that J.W.K. had been diagnosed with schizophrenia and displayed symptoms of "intermittent difficulties with paranoia" and "auditory hallucinations." The psychiatrist testified that J.W.K. was currently taking medication and that J.W.K. was a proper subject for commitment. In addition, the social worker noted that J.W.K. had engaged in threatening behavior since 2000, the year the social worker began working with him. The social worker added that J.W.K. had already attempted to live in a less-restrictive setting, but this ended after he did not take his medications and engaged in threatening behavior with the landlord.

The circuit court found, based on the evidence, that J.W.K. would be a proper subject for commitment because he was suffering from mental illness and needed medication. As a result, the court extended J.W.K.'s involuntary commitment for twelve months, leading to this appeal. J.W.K. argued that Portage County failed to prove by clear and convincing evidence that he would be a proper subject for commitment under Wis. Stat. ch. 51.

Under Wis. Stat. § 51.20(1)(a)1.-2., (13)(e), the county must show that a person is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. J.W.K. argued that he did not meet the requisite standard for dangerousness and, therefore, was not a proper subject for treatment. However, Judge Blanchard disagreed, finding nothing in the record that showed the circuit court's conclusions to be clearly erroneous. Therefore, the circuit court's order extending the involuntary commitment was affirmed.

Subsequently, J.W.K. appealed the decision to the Wisconsin Supreme Court. On July 25, 2018, the Supreme Court announced that it granted the petition for review. The court will focus on two issues: (1) Is the appeal on sufficiency grounds of an extended mental health commitment moot when a subsequent extension is ordered? (2) Is a doctor's recitation of the recommitment standard, without a factual explanation as to why the individual meets the standard, sufficient to extend an individual's mental health commitment?

(Continued on page 3)

(*Case Law*, *continued from page 2*)

Title: *Langlade County v. D.J.W.*

Court: Court of Appeals, District III

Date: May 1, 2018

Citation: 2018AP145-FT

Case Summary: D.J.W. appealed circuit court orders extending his involuntary commitment for twelve months and reimposing medication and treatment on an inpatient basis. He argued that the County failed to present sufficient evidence that he was dangerous under Wis. Stat. ch. 51. The Court of Appeals rejected D.J.W.'s argument based on the evidence and affirmed the circuit court.

Case Details: On January 30, 2017, D.J.W. was committed to the County for six months with an order for involuntary medication. On June 16, 2017, the County filed for an extension of his commitment. A hearing was conducted on July 18, 2017, where both D.J.W. and a psychiatrist testified. The psychiatrist's testimony focused on D.J.W.'s significant delusions, including seeing the devil and experiencing auditory hallucinations. In fact, D.J.W. had to quit a job because he thought he was the Messiah and sent by God to save humanity.

D.J.W. only appealed the circuit court's decision that he was dangerous. Under Wis. Stat. § 51.20(1)(a)1.-2., (13)(e), the county must prove by clear and convincing evidence that the individual is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. Those same criteria apply for a commitment extension. However, the County may prove the dangerousness element by showing a "substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn."

Citing the circuit court's findings that D.J.W. believed he was the Messiah and that his delusions would put his judgment in a place that he would do significant damage to himself, the court rejected D.J.W.'s argument. Although D.J.W. argued that there had not been any recent evidence of threatening or violent behavior, the Court of Appeals noted that Wis. Stat. § 51.20(1)(am) was created to prevent a revolving door and that additional proof of recent threats or violence is not needed for recommitment. Accordingly, the circuit court's opinion was affirmed.

(*Continued on page 4*)

DMS Operations Memo Private Pay Nursing Home Rates update

The Department of Health Services Division of Medicaid Services released DMS Operations Memo 18-18 regarding Private Pay Nursing Home Rates. This Memo provides updates to the institutional cost of care. The daily average nursing home rate is used to determine a divestment period for Medicaid and the monthly average private pay nursing home rate.

A divestment penalty period applies when a Medicaid applicant or member transfers an asset for less than fair market value. The calculation of this penalty period is based on the average monthly private nursing home rate. The new daily nursing home private pay rate is $286.15 per day or $8,703.73 per month. The daily rate must be used starting with Medicaid applications filed on July 1, 2018 to calculate penalties for divestments occurring after January 1, 2009. The Medicaid Eligibility Handbook will be updated in the future to reflect these changes. For more information go to: https://www.dhs.wisconsin.gov/dhcaa/memos/18-18.pdf ❐

(*Case Law*, *continued from page 3*)

Title: *Jackson County v. C.S.W.*

Court: Court of Appeals, District IV

Date: June 28, 2018

Citation: 2017AP1994

Case Summary: Jackson County filed for protective placement and guardianship of person and estate for C.S.W. The circuit court, based on the evidence, ordered guardianship of the person and estate and protective placement. C.S.W. appealed, arguing that there was insufficient evidence for both orders. In a per curiam decision, the Court of Appeals affirmed the orders.

Case Details: At the hearing, only a psychiatrist testified. In her opinion, C.S.W. suffered from a major neurocognitive disorder and an unspecified psychotic disorder. Her conclusion was based off information gained through an in-person evaluation, a review of his medical records, and speaking to C.S.W.'s daughter. C.S.W. did not testify, but did interject several times at the hearing. Following the hearing, the circuit court entered orders for guardianship and protective placement. C.S.W. appealed, contending that the County had insufficient evidence.

First, for a court to grant a guardianship order, four elements must be met by clear and convincing evidence under Wis. Stat. § 51.10(3)(a). In addition, the County must present at least one witness who is a licensed professional to testify. The Court of Appeals found that C.S.W. met the statutorily-required four elements. Specifically, the Court of Appeals found that the evidence was sufficient to find him impaired and unable to effectively receive and evaluate information. Likewise, the Court found him incapable of effectively receiving and evaluating information relating to his financial affairs. Finally, the Court of Appeals found that guardianship was appropriate and no less restrictive options were available.

Second, the Court of Appeals analyzed the protective placement order. Under Wis. Stat. §55.08(1), the County must prove four different elements by clear and convincing evidence. The Court of Appeals, once again, held that the County produced sufficient evidence to prove each element. C.S.W. was found to be incompetent, had a permanent disability, was incapable of providing his own care as to create a substantial risk of harm, and had a primary need for residential care and custody. Additionally, the Court of Appeals found the protective placement to be in the least restrictive manner. Therefore, the orders for guardianship and protective placement were affirmed.

(Continued on page 5)

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. ❐

(***Case Law**, continued from page 4*)

Case Name: *Ida Hautop v. County of Bayfield et al.*

Court: Court of Appeals, District III

Date: July 24, 2018

Citation: 2017AP1181

Case Summary: The County of Bayfield and two other parties foreclosed on Ida Hautop's house due to property tax delinquency. Hautop sought relief from the tax lien foreclosure judgment two years later on the basis of incompetence. Since she was not "adjudicated" incompetent, the circuit court denied the motion. While she appealed that decision, she brought a second suit alleging the unconstitutionality of a foreclosure statute because it failed to adequately protect individuals who are "incompetent but have not been adjudicated as such." The Court of Appeals affirmed the first case, and, in a per curiam decision, affirmed the second case, discussed below.

Case Details: In 2013, the County of Bayfield, RM Bay Logging, and the Department of Natural Resources foreclosed on Ida Hautop's home because she was delinquent for property tax purposes. Prior to the foreclosure, the circuit court appointed a Guardian ad Litem (GAL) to serve all minors and individuals adjudicated incompetent at the date of filing. The GAL was required to check if any incompetency notices were filed for any of the foreclosed homes. The GAL also sent a notice of the right to redeem and a request to contact the GAL if the owner was a minor or incompetent.

Hautop did not respond to the GAL. As a result, the circuit court entered a foreclosure judgment in favor of the County. Two years later Hautop filed a motion for relief, which was denied. She alleged that she was entitled to relief since she was incompetent, but both the circuit court and the Court of Appeals rejected this argument because the text required an individual to be "adjudicated" incompetent.

While that appeal was pending, Hautop brought this suit, alleging that Wis. Stat. § 75.521(12)(b) was unconstitutional because it did not protect individuals who are "incompetent but have not been adjudicated as such." The circuit court granted summary judgment for the County and declined the vacate the 2013 judgment.

The Court of Appeals affirmed the decision. Wisconsin courts disfavor allowing lawsuits based on the same facts to proceed after a final judgment has already been entered. This doctrine, known as claim preclusion, has three elements designed to weed out repetitious and needless claims from meritorious ones. The Court applied these three elements and determined that the suit was barred due to this doctrine. Since the case arose from the same facts as the initial foreclosure suit, the GAL had no reason to know Hautop was a minor or adjudicated incompetent, and the facts that give rise to the current suit were in existence then, the Court of Appeals agreed that the final judgment should not be disturbed. ❒

Webinar on False Confessions

Disclaimer: Some facts of this case may be disturbing to some readers.

On July 10th, 2018, The Arc and Disability Rights Wisconsin presented a webinar giving an update on the Brendan Dassey case which included an overview of concerns for people with intellectual or developmental disabilities in the criminal justice system as well as resources for individuals. This article will summarize the information provided in that webinar.

In 2005, Steven Avery and Brendan Dassey were convicted of the rape, murder, and corpse mutilation of Teresa Halbach in Manitowoc County, Wisconsin. This case was the subject of Netflix's 2015 documentary series *Making a Murderer*. Part two of the series will premiere on October 19th, 2018. A central issue in the case was the confession of Brendan Dassey, who, at the time was a sixteen-year-old with cognitive and social disabilities. His confession raised an important discussion regarding individuals with intellectual and developmental disabilities in the criminal justice system.

Update on Brendan Dassey Case

Teresa Halbach was raped, murdered, and burned on October 31, 2005. In early November, police investigators spoke with several of Steven Avery's relatives, including his nephew, Brendan Dassey. The initial interview last one-hour and resulted in very little information. However, several months later, investigators learned that Dassey had lost forty pounds and was uncontrollably crying. The investigators decided to re-interview him on February 27, 2006. After signing and initialing a *Miranda* waiver, and with his mother's consent, investigators interviewed him three times that day. During the interview, he admitted that he had gone over to Avery's trailer to help with a bonfire, that he had seen parts of a human body in the fire, and that he helped Avery clean up a spill on the garage floor that night.

On March 1, 2006, Dassey was interviewed again with his mother's permission, but without the presence of a friendly adult. The interview lasted three hours, with breaks occurring at one-hour intervals. The first hour resulted in Dassey's confession. Dassey provided inconsistent statements regarding what had happened and how he was involved.

After confessing, the investigators took a break, during which Dassey was able to rest and use the restroom. The second hour of interrogation focused on confirming details from the first hour, but investigators only had limited success. At the end of that hour, Dassey ate a sandwich and briefly fell asleep. The third hour of questioning followed the theme of the second. After the interview was complete, Dassey was taken into custody.

At trial, Dassey contended that the confession was involuntary and could not be used at trial. However, the judge admitted the confession. During trial, Dassey contradicted the confession and denied any knowledge or involvement in the murder of Teresa. The jury found Dassey guilty of participating in rape and murder, and mutilation of a corpse. He was sentenced to life in prison in 2007. In the eleven years since, Dassey's case has been appealed to every court

(Continued on page 7)

(***Webinar***, *continued from page 6)*

in Wisconsin and the United States. The focus of his appeals has centered on the confession.

At first, following his conviction, Dassey's counsel filed a motion for postconviction relief, seeking a new trial and suppression of the confession. The motion was denied by the Wisconsin Circuit Court and the Wisconsin Court of Appeals affirmed, holding that the confession was voluntary and was not coerced.[1] Dassey's petition for review to the Supreme Court was rejected[2], and Dassey exhausted his appeals at the state-level.

Left with no other option, Dassey filed a petition for a writ of habeas corpus in the Federal District Court for the Eastern District of Wisconsin. Magistrate Judge Duffin found the confession was coerced and involuntary and granted the writ of habeus corpus, ordering Dassey released from prison.[3] The State of Wisconsin appealed the decision to the United States Circuit Court for the Seventh Circuit. Initially, a divided panel affirmed the writ in a lengthy decision by Judge Rovner.[4] However, the Seventh Circuit took the case up en banc and reversed the panel's decision by a 4-3 vote. Judge Hamilton, writing for the majority, found that Wisconsin courts did not apply the law unreasonably in reaching that conclusion that the confession was voluntary.[5] Chief Judge Wood wrote a fiery dissent, calling the decision a "travesty of justice." Judge Rovner, the author of the original affirming opinion, also wrote a tendentious dissenting opinion calling attention to new understandings of confessions and coercion.

As a final step, Dassey appealed to the Supreme Court of the United States. However, his petition for certiorari was denied on June 25, 2018. That denial concluded the appeal options available for Dassey, unless new evidence is discovered. Dassey is eligible for parole in 30 years, when he is 58.

Pathways to Justice

The webinar featured two individuals from The Arc's National Center for Criminal Justice and Disability (NCCJD). The NCCJD was created in 2013 with a grant from the Bureau of Justice Assistance and works on behalf of individuals with disabilities, both as victims and as accused. The NCCJD's advocacy attempts to reach a full range of professionals and uses Disability Response Teams (DRTs), which include representatives from law enforcement, the legal profession, disability advocacy, victim advocacy, and individuals with disabilities.

Through their research, the NCCJD has found that individuals with intellectual and developmental disabilities are over-represented on both sides of the system, both as victims and as those charged with crimes. Their statistics show that individuals with emotional, physical, cognitive, or sensory disabilities are **44% more likely to be arrested** before the age of 28, and those with mental disabilities are 8 times more likely to falsely confess to crimes. Individuals with I/DD represent 4-10% of the prison population, compared to being just 1.5% of the general population. In addition, 32% of prisoners, and 40% of jail inmates have at least one disability, compared to just 11% of the general population.

For more information, visit: https://www.thearc.org/NCCJD

(Continued on page 8)

(*Webinar*, *continued from page 7)*

Victim Advocacy Program

Lastly, the webinar featured a representative from Disability Rights Wisconsin, which houses the Victim Advocacy Program through a grant from the Victims of Crime Act. The program provides direct service to individuals with disabilities, of any age, who experience a crime, regardless of whether it has been reported. A Victim Advocacy Specialist works to ensure that each person can find justice in whatever form the victim needs.

The Victim Advocacy Program also works with other local advocates to provide disability specific support. The VAP is not intended to duplicate services, but to serve as a co-advocate when needed. Advocacy services are free and confidential. The program has advocates across the state, with stations in Milwaukee, Madison, Rice Lake, and Northeast Wisconsin.

For more information, visit: http://www.disabilityrightswi.org/learn/victim-advocacy-program/

To watch the webinar, visit: https://arcwi.org/2018/06/14/the-arc-wisconsin-webinar-series-false-confessions-an-update-on-the-wi-making-a-murderer-case-and-people-with-i-dd-in-the-criminal-justice-system/

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[1] *State v. Dassey*, 2013 WI App 30, 346 Wis. 2d 278, 827 N.W.2d 928 (per curiam) (unpublished disposition).

[2] *State v. Dassey*, 2013 WI 82, 350 Wis. 2d 703, 839 N.W.2d 866 (review denied).

[3] *Dassey v. Dittman*, 201 F. Supp. 3d 963 (E.D. Wis. 2016).

[4] *Dassey v. Dittman*, 860 F.3d 933 (7th Cir. 2017).

[5] *Dassey v. Dittman*, 877 F.3d 297 (7th Cir. 2017). ❐

Upcoming Events and Noteworthy Dates That May Be of Interest:

- ◊ October – National Special Needs Law Month
- ◊ October – Long Term Care Residents' Rights Month
- ◊ October - Down Syndrome Awareness Month
- ◊ November - National Family Caregivers Month
- ◊ October 9, 2018 - Brown County Transitions Fair at Northeast Wisconsin Technical College
- ◊ October 16-17, 2018 - Transitions Academy at the Wilderness, WI Dells
- ◊ October 29-31, 2018 - WI Self-Determination Conference, Kalahari, WI Dells
- ◊ November 14-15, 2018 - Annual FOCUS Conference, Kalahari, WI Dells ❐

In the News:

Buzz Aldrin's two children have petitioned to make financial decisions for him because of the alleged-decline of his mental health. However, Mr. Aldrin has filed a law suit against those children for elder exploitation, misusing his money for their personal use, and slandering him by stating that he suffers from dementia and Alzheimer's disease.

https://www.msn.com/en-us/news/us/legendary-astronaut-buzz-aldrin-files-lawsuit-against-two-of-his-children-who-are-trying-to-take-control-of-his-finances/ar-AAz8pZv?li=BBnbcA1

An 87-year old woman became the first person in the District of Columbia to have her guardianship terminated and replaced with a Supported Decision-Making Agreement. Initially, she agreed to have a guardian for finances after falling behind on rent and facing possible eviction. After regaining financial stability, however, she successfully petitioned the court to restore her financial decision-making.

https://www.washingtonpost.com/local/this-87-year-old-dc-woman-just-made-it-easier-for-you-to-keep-your-independence/2018/06/26/92636ce6-7962-11e8-80be-6d32e182a3bc_story.html?noredirect=on&utm_term=.ad04fed9de9b

As Baby Boomers age and the caregiver shortage increases, millions of Americans will have to care for an aging parent or loved one. Often, in addition to providing this care, families are left juggling increasing costs of care, full-time jobs, and caring for their own children. While this problem is glaring, few solutions have been proposed or enacted to assist family members in this endeavor.

https://www.jsonline.com/story/news/investigations/2018/08/03/invisible-workforce-caregivers-wearing-out-boomers-age/879214002/

Attorney General Brad Schimel released a new training video aimed at educating tellers and banking professionals about financial elder abuse, how to spot it and how to report it. A report from 2015 estimates that elders lose nearly $35 billion annually to elder financial abuse. The video will be made available for download for any financial institution or can be viewed on Attorney General Schimel's Respect Your Elders Report Abuse website at www.reportelderabusewi.org.

https://www.doj.state.wi.us/news-releases/ag-schimel-partners-wisconsin-banks-and-credit-unions-curtail-elder-financial-abuse ❐

Helpline Highlights

Can a guardian of the estate manage marital property of a married ward?

Yes, with court approval. Wisconsin is a martial property state so assets belonging to one spouse generally also belong to the other. When a guardian of the estate is appointed for a married ward, they can exercise any management and control right over marital property and any right in the business affairs as the ward would have been able to do if they had not been found incompetent. The guardian can consent to act together or join in any transaction for which consent of both spouses is needed. The guardian needs to submit court form GN-3610, "Petition for Approval Prior to Exercise of Powers over Estate of a Married Ward".

An example for when prior court permission would be needed would be if the guardian wanted to reclassify property or transfer an asset from one spouse to the other. The court will look at whether the proposed action will benefit the ward, estate or members of the ward's immediate family. Wis. Stat. §54.20(2)(h).

Since a spouse has a legal obligation to support the other spouse, the guardian can use the ward's assets to support the spouse without getting prior court approval. The court can also waive the filing of an annual account or permit the filing of a modified annual account for a married ward under Wis. Stat. §54.62.

If an individual already under guardianship later gets married, is the guardianship automatically terminated?

No. A guardianship is a court process and therefore any modifications or terminations would have to be done through the court. The ward or an interested person can file a petition to terminate the guardianship based upon a subsequent marriage. The court is required to review the guardianship and the court may terminate the guardianship since a ward is now married to a person who is not under a guardianship. Wis. Stat. §54.64(2)(d).

An individual's ability to consent to marriage could have been removed from them by court order in the guardianship process or they may have retained the ability to consent to marriage with guardian approval. Wis. Stat. §54.25(2)(c)1.a.

How do I know what authority a guardian has? Is there paperwork I can ask for?

Before a guardian can act or make a decision for their ward, they should be providing documentation of their authority. Providers and other individuals working with the guardian and ward can and should ask for documentation of a guardian's authority. Court paperwork should be reviewed to determine what rights have been removed from the ward and what authority been transferred to the guardian. The guardianship order should be as least restrictive as possible and therefore individuals under a guardianship may still retain many of their rights or be under a limited guardianship.

A court form called "Letters of Guardianship Due to Incompetency" should be provided before a guardian can act for their ward. The "Determination and Order on Petition for Guardianship Based on Incompetency" can also be provided to document what the court ordered. Whether an individual has been

(Continued on page 11)

(*Helpline Highlights*, *continued from page 10*)

appointed as a co-guardian or standby guardian will also be indicated in the Letters of Guardianship. The court will indicate whether co-guardians must act together or if they can act independently. A court can also issue a temporary guardianship Order and Letters which gives the guardian the authority to act only on a temporary basis.

The Letters of Guardianship and Determination and Order should not be confused with the "Petition for Guardianship Due to Incompetency" which is merely asking the court to grant certain things. The Petition for Guardianship is what is filed to initiate the guardianship proceeding and it does not actually document the guardian's legal authority to act. Information requested in the Petition may not end up being what the court ordered.

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

☐ Amended

IN THE MATTER OF

_____
Name

_____
Date of Birth

Petition for
☐ Temporary
☐ Permanent
Guardianship Due to Incompetency

Case No. _____

Each court form has a specific form number. These form numbers can be found in the lower left-hand corner of the document. The title of the document will also be indicated in the top of the document by the case caption. For example, the Petition for Guardianship is court form GN-3100, the Letters of Guardianship are GN-3210 (Guardian of the Estate) and GN-3200 (Guardian of the Person) and the Determination and Order is GN-3170. Certified copies can be obtained by the Guardian through the Register in Probate.

7. The individual
☐ does ☐ does not have a current, valid Financial Durable Power of Attorney ☐ activated.
Financial Agent Name _____ Phone Number _____
Mailing Address [Street] _____
[City, State, Zip] _____
☐ See attached

☐ does ☐ does not have a current, valid Power of Attorney for Health Care ☐ activated.
Health Care Agent Name _____ Phone Number _____
Mailing Address [Street] _____
[City, State, Zip] _____
☐ See attached

GN-3100, 05/18 Petition for Temporary Guardianship and/or Permanent Guardianship Due to Incompetency §§50.06, 54.10(3), 54.34, 54.44(1), 54.47, 54.50, 54.852(7) and Ch. 54, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 1 of 5

Circuit court forms can be found online here: https://www.wicourts.gov/forms1/circuit/index.htm ❐

Of Note:

Flooding

With all the flooding happening recently in Wisconsin, members of the public are remined by The National Center for Disaster Fraud to be diligent before giving out personal or financial information or trusting anyone purporting to be working on behalf of disaster victims. Illegal activity such as impersonation of federal law enforcement officials, identity theft, fraudulent solicitations for donations, contractor fraud, etc can be reported to the National Center for Disaster Fraud Hotline at 866-720-5721 or disaster@leo.gov. You can file a complaint with the Department of Agriculture, Trade, and Consumer Protection here or by calling 800-422-7128.

DNRs

The GSC frequently receives calls about do-not-resuscitate orders. We have recently created a publication called "Decision-Makers and the Authority to Consent to a DNR Order" which is now available at our website under "Find What You Need" at www.gwaar.org/gsc.

Hoarding

Did you know that Eau Claire County has a Hoarding Task Force?

The Task Force is a multi-agency effort to address the needs of persons who hoard in Eau Claire County and their families. For more information, including finding out how to become a volunteer you can contact the Eau Claire County Department of Human Services at 715-839-7118 or the Aging and Disability Resource Center of Eau Claire County at 715-839-4735 or find more information online here. ❒

Time-Limited Guardianship: Guardianship and Restoration of Rights

In Wisconsin, a ward may lose substantial rights when a guardianship is ordered. For example, the court may limit the ward's right to consent to marriage, execute a will or have a driver's license. In addition, the ward may lose the right to consent to certain medical procedures or the right to choose certain educational or vocational opportunities. Given the restrictions that guardianship imposes, restoration of rights is an important issue to be considered.

In Wisconsin, modification or termination of a guardianship order takes places under the statutory procedures outlined in Wis. Stat. § 54.64(2). To initiate a review of guardianship, a ward, someone acting on behalf of the ward, or the ward's guardian, must petition the court for review. At that time, the court will appoint a Guardian ad Litem, provide notice and hold a review hearing. When the hearing takes place, the court has a statutory obligation to provide counsel if the ward is unable to personally obtain counsel. Once the hearing is complete, the court may terminate, retain, or modify the guardianship order, which may include restoring certain rights.

However, petitioning for review can be a complicated process. A multi-state study has shown the process for

(Continued on page 13)

(***Time-Limited Guardianship***, *continued from page 12)*

restoration and review is "little known and little used." *See* Erica Wood, Pamela Teaster & Jenica Cassidy, *Restoration of Rights in Adult Guardianship: Research and Recommendation*, ABA Commission on Law and Aging, 37 (2017). The American Bar Association found that, over the course of three years in four states, only 275 restoration petitions were granted. *Id.* Despite the limited size of the study, the results comport with other research showing infrequent use of the restoration process. For instance, in North Carolina, over a five-year period, only 223 restoration petitions were granted. *Id.* The Florida Developmental Disabilities Counsel found only a "minuscule number of cases." *Id.* The study found that the average age of the individual subject to guardianship was 40 years at the time of appointment of a guardian with the age range being 17 to 87. *Id.* at 7. In nearly 80% of the restoration cases, the individual was between the ages of 17 and 59. *Id.*

Some states have taken an alternative approach by having a process for automatic review of guardianship orders. This review process can respond to the ward's changing capacity and to due process concerns. For instance, according to the American Bar Association, Missouri conducts annual reviews and the District of Columbia conducts reviews every three years. *Id.* at 41. Similarly, Connecticut and Michigan require a guardianship to be reviewed one year after the initial order and every three years thereafter. *Id.* New Mexico reviews the status of the person's capacity every ten years. *Id.* Texas requires a physician to state whether improvement in functioning is possible and to state a period in which there should be a re-evaluation. *Id.* In North Dakota, an order is effective up to five years with a required court hearing on continuation. *Id.* at 42. Kentucky also has an option for a limited guardian for a five-year period with a possibility of additional appointment. *Id*

Additionally, 2017 saw two states adopt a simplified petition process. Texas passed a law that reduced the legal formalities and allowed a ward to request a guardianship review with an informal letter. *State Adult Guardianship Summary: Directions of Reform – 2017*, ABA Commission on Law and Aging, 31 (2017). Likewise, South Carolina passed a measure that allows for an informal request for modification or termination of a guardianship order. *Id.* at 32. Only Arkansas made the restoration process more complex in 2017, by requiring the court to find a guardianship order no longer necessary and also no longer in the ward's best interest before terminating guardianship. *Id.* at 31. Previously, the court only had to find one of these factors. *Id.*

In June 2018, Indiana, for the first time in the state's history, restored the rights of Jamie Beck, formerly one of the state's nearly 7,000 individuals under guardianship. *See* Mike Emery, *28-year old Jamie Beck makes Indiana history as 1st to regain decision-making rights*, Richard Palladium-Item (last visited June 18, 2018). The Court determined that Ms. Beck could make her own decisions and implemented a Supported Decision-Making agreement instead. *Id.* Under the Agreement, which was also a first in Indiana, Ms. Beck will make her own decisions with the help of a personally-selected team. *Id.*

(Continued on page 14)

(***Time-Limited Guardianship***, *continued from page 13*)

In conclusion, these measures can provide a potentially less-restrictive option while recognizing that changing circumstances may mean that a guardianship order may need to be modified or terminated. The simplification of the petition process and required-review hearings can be an important step in advancing a ward's ability to restore his or her rights in such cases. The National Center in Law and Elder Rights (NCLER) has a free webinar on this topic available here: https://ncler.acl.gov/Legal-Training.aspx

Sources:

Erica Wood, Pamela Teaster & Jenica Cassidy, *Restoration of Rights in Adult Guardianship: Research and Recommendation*, ABA Commission on Law and Aging (2017).

Link: https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf

See Mike Emery, *28-year old Jamie Beck makes Indiana history as 1st to regain decision-making rights*, Richard Palladium-Item (last visited June 18, 2018).

Link: https://www.pal-item.com/story/news/local/2018/06/13/jamie-beck-makes-state-history-1st-regain-decision-making-rights/698874002/

State Adult Guardianship Summary: Directions of Reform – 2017, ABA Commission on Law and Aging (2017).

Link: https://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_legislative_summary_fnl.authcheckdam.pdf ❒

Mark your calendars for these events in 2019!

Disability Advocacy Day: March 20, 2019

Watch for more information at www.survivalcoalitionwi.org

Aging Advocacy Day: May 14, 2019

Watch for more information at www.gwaar.org ❒