

Transitioning to Adulthood: Guardianship and Children with Significant Disabilities

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Most parents worry about their children's future, wonder how their relationship with their child will change and how they will ensure issues are properly addressed as their child gets older. For each of these worries, parents of children with significant disabilities have very specific concerns. While their concerns vary just as the abilities and needs of each child differ, two are frequently expressed: first, how the parent-child relationship will change when the child reaches age 18, and second, how to address the child's needs in the future. This document is meant to provide information to parents with these concerns.¹

A parent's legal role changes significantly as a child reaches adulthood. While a parent or guardian of a minor child may exercise considerable control over their child's life, a guardian of an adult may only exercise the authority specifically granted by the court and may not make every decision or control every aspect of the individual's life. That said, while many parents emphasize making medical decisions, attending IEP meetings, and making financial decisions, guardianship often reaches well beyond those areas, including decisions about whether the young adult can work, travel, get married someday, or even have a debit card in their own name.

Guardianship is not appropriate in every situation. If viable less restrictive alternatives are available, those alternatives must be considered before petitioning for guardianship. Alternatives include but are not limited to supported decision-making, powers of attorney, releases of information, education or training, or supportive services or technology. Also, be aware that as the individual ages and matures, they may no longer need a guardian – but terminating a guardianship can be difficult, time-consuming, and expensive. Wisconsin does not currently have guardianships that are time-limited or reviewed automatically after a set number of years. Guardianship is often permanent and could last for the rest of the adult's life.

This document will not answer every question nor provide detailed guidelines to be applied in all situations. If parents have specific questions, please contact the Guardianship Support Center directly. If you are seeking legal advice, consultation with a private attorney is recommended.

¹ This publication only discusses matters involving individuals with developmental disabilities and/or serious and persistent mental illnesses. Those who are physically disabled or mentally ill and competent are not proper subjects for guardianship. This publication does not address protective placement, protective services, or spendthrift guardianship. Please contact the WI GSC directly if more information is needed about these subjects.

I. What is guardianship?

Guardianship is a legal relationship created by a court when an individual is unable to make or communicate their own decisions regarding their personal welfare, their finances, or both. The court appoints a guardian to make certain decisions on behalf of the individual (the “ward”). Wisconsin splits guardianship of an adult into guardianship of the person (matters to do with health and safety, living and employment situations, etc.) and guardianship of the estate. An individual can have one or both. They may have the same guardian for both or different guardians for each.

Guardianship of a young adult is not an extension of parenthood. Because Wisconsin guardianship law starts from the belief that every adult has the right to make their own decisions, guardianship does not mean that an individual loses all their decision-making rights. While guardianship of a minor may provide the guardian with the authority to make all decisions in the best interests of the minor, the same is not true for adults. Part of the court process to appoint a guardian is to determine what types of decisions should be transferred to the guardian, and to what extent. The individual under guardianship retains all rights that have not been transferred to the guardian.

II. Alternatives to guardianship

A number of alternatives to guardianship exist, including supported decision-making agreements, powers of attorney, releases of information, and other informal supports to assist individuals in making decisions. In determining whether guardianship is appropriate, courts are required to consider whether any of these less-restrictive alternatives may be an option for the individual before appointing a guardian.

a. **What is supported decision-making?**

The concept of supported decision-making has always existed; however, it was formalized into law in Wisconsin in April 2018. Supported decision-making means an individual can choose a Supporter to assist them in accessing information or in making or communicating their decisions without losing the ability to make their own decisions. This can be a great option for individuals with disabilities who might just need a little extra help or assistance or who want their parents (or other chosen supporters) to continue to be involved in decisions about their health care, education, finances, and more. It can also work with a limited guardianship; an individual might need a legal decision-maker for some types of decisions but in other areas may be able to make their own decisions with support. The individual can have more than one agreement and can choose different supporters to help with different types of decisions.

The Wisconsin Board for People with Developmental Disabilities has more information on Supported Decision-Making available [on their website](#), including its use as an alternative to guardianship and a toolkit to help the individual and their supporters create and use an SDM agreement. Wisconsin has an official form available through the [Department of Health Services](#).

b. What about powers of attorney for health care and/or finances?

Adults who are “of sound mind” may create and sign power of attorney documents. “Sound mind” is not defined in statute, but generally means the person understands the purpose and effect of the document. It is not possible to “get power of attorney over” another person; it must be given. Every aspect of a power of attorney is up to the individual, including the decision to create one, the choice of agent, and what the agent can do.

If the adult child understands the nature of the Power of Attorney and wishes to sign it, they may do so. If there is a question about the adult child’s capacity, consultation with an attorney is strongly recommended before any Power of Attorney is completed. Powers of Attorney are a less restrictive alternative to guardianship and therefore must be considered before petitioning for guardianship.

c. Are there other types of supports?

Other types of supports, formal and informal, do exist, depending on the individual’s needs. For finances, the individual may have a representative payee to handle public benefits or may use other tools such as Special Needs Trusts, ABLE accounts, or other accounts created specifically for people with disabilities that may be able to limit spending to specific categories (some of these tools are described in more detail in Section V below). In employment and housing situations, the individual may be able to request accommodations under the Americans with Disabilities Act. Independent Living Centers and county Aging & Disability Resource Centers may have or be able to refer families to peer mentorship programs, technology tryout or rental programs, advocacy services, and more.

III. Who may need a guardian?

Wisconsin is not a “next of kin” or “family consent” state, which means that in most circumstances, if an individual is unable to make their own decisions, spouses and relatives don’t automatically have the right to make decisions for them. These are a few instances in which friends and family can make decisions without having to get the court involved:

- Delegation of authority to others via previously completed power of attorney for health care and/or power of attorney for finances documents;
- Admission to hospice is needed and the individual does not have a power of attorney;
- Implied consent in emergency situations;
- Representative payees appointed to manage Social Security/SSI benefits.

If the individual is not able to make or communicate their own decisions and does not have a power of attorney, the agent and alternates are unavailable, or the power of attorney document doesn’t grant the agent sufficient authority to act, guardianship may be necessary to make sure that someone has the authority to make decisions for the individual. For a permanent guardianship, the court must find that an individual is “incompetent.”

a. When is a person determined to be incompetent?

Only a court may determine that a person is incompetent. This means that for anyone at least 17 years and 9 months of age, the court must decide that the person has an impairment that is probably permanent, that the impairment causes the individual to be unable to make or communicate decisions with informed consent, and that the individual's physical or financial well-being are at risk. The court must also determine whether less-restrictive options are available or acceptable to the individual, including a power of attorney or supported decision-making agreement, support services, technological assistance, and training or education.

An impairment is defined as "a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities." Note that old age, physical disability, eccentricity, etc. are not sufficient without evidence that they impact the individual's decision-making ability. See Wis. Stats. §§ 54.01(14), 54.10(3).

b. I think my child might meet the legal standard for incompetency, but I am not sure. What else can I do to ensure this is the right decision?

Talk with your child's support professionals about your child's abilities and needs and whether less restrictive options might be enough to address their needs. Social workers, school transition coordinator and other school staff, medical and mental health care providers, vocational rehab staff, and others who have worked with your child in different contexts may be able to provide opinions on your child's ability to understand and weigh risk and consequences of various decisions. Other professionals who work with adolescents and young adults with developmental and intellectual disabilities may also be able to weigh in on the ongoing impacts of those disabilities as individuals continue to age.

If possible, talk with your child, too – how independent do they want to be? What do they want help with? What are their own desires and goals for their life? A guardian of an adult must provide the least restrictive environment and must consider the individual's wishes where possible, so having this conversation with your child will be helpful regardless of whether you choose to pursue guardianship.

It may be helpful to speak with an attorney as well. Some options to assist an adult with disabilities, such as a special needs trust, will require attorney assistance; other options may not, but parents may still benefit from an attorney's explanation of the strengths and limitations of various options for legal decision-making and support.

c. Will my role as a parent be considered in a guardianship proceeding?

Yes. While parents are not always appointed as guardians, parents are the preferred guardians for an adult child. The court will consider whether each parent is suitable to be a guardian and if appointment as guardian is in the proposed ward's best interest. Consideration will also be given to the proposed ward's opinion and objection. See Wis. Stat. § 54.15(5). The parent is

likely to be appointed as the guardian if there are no objections to his or her appointment and the parent is suitable and willing to act as the guardian. Throughout the legal process to establish guardianship, a proposed ward will also have a guardian *ad litem* (GAL), an independent attorney appointed to represent their best interests. The GAL will interview the proposed guardians and make recommendations to the court if they are suitable and appropriate.

IV. What is the process to obtain guardianship?

Guardianship is a court process completed through the probate office at the county courthouse. The court case begins with a petition to ask that the court find that the individual is incompetent, order a guardianship, and appoint a particular person or agency to act as guardian. The person who completes and signs the petition is called the petitioner. The petitioner has certain responsibilities throughout the case, including making sure that other required documents are filed and that all interested persons receive notice of any hearings and copies of certain documents.

The proposed guardian or co-guardians must also complete a training program offered through UW-Green Bay. The training is free and available on-demand online.²

a. **Procedural matters**

The petitioner is responsible for filing many of the required documents in a guardianship case. Required documents typically include the following:

- 1) GN-3100: Petition for Guardianship Due to Incompetency;
- 2) GN-3110: Order and Notice of Hearing;
- 3) GF-131A: Order Appointing Guardian ad Litem or Attorney;
- 4) GN-3120: Affidavit of Service;
- 5) GN-3130: Examining Physician's or Psychologist's Report;
- 6) GN-3135: Certificate of Completion of Guardian Training Program;
- 7) GN-3140: Statement of Acts and Consent to Serve.

All court documents are filed with the register in probate for the local county. Some counties have their own particular rules and practices; check with the probate office to find out if anything different is required.

The case begins with the first three documents in the list. The last three must be filed with the court at least 96 hours before the hearing, but some counties may require them to be filed with the petition. Once the petition has been filed, the probate office will schedule a hearing and return a copy of the hearing notice and a file-stamped copy of the petition to the petitioner.

The petitioner must then ensure that all interested persons are served with these documents.

² <https://www.uwgb.edu/guardianship-training/>

This means the petitioner must give copies of the filed guardianship pleadings within the statutorily required period (at least ten days before the hearing excluding holidays and weekends) and by the appropriate means (personal service, regular mailed service, or certified /registered mailed service depending on who is being served).³ See Wis. Stat. § 54.38. Once all parties have been served, the petitioner must complete and file the Affidavit of Service (may be filed at or before the hearing).

If the Statement of Acts and Examining Physician’s or Psychologist’s Report are not filed with the initial petition, the petitioner must ensure that the proposed ward, their counsel (if any), and the guardian *ad litem* receive copies in a timely manner before the hearing.

b. Are there any other pre-hearing matters?

The guardian *ad litem* will provide the court with their opinion on the guardianship. The GAL will discuss the guardianship with the proposed ward and will try to obtain the proposed ward’s opinion on the guardianship. The GAL will also inform the person of their rights. If the proposed ward disagrees with the need for guardianship or the proposed guardian, the GAL will notify the court of the proposed ward’s opinion and request the appointment of an attorney to represent the person’s wishes (usually called advocacy or adversary counsel).

c. Timelines

Guardianship cases must be completed within 90 days of the date the petition is filed; it is not possible to extend that time limit. If the case is not complete within that time frame, it may be necessary to refile the petition. It may be helpful to get an evaluation completed before filing the petition to ensure that the evaluation does not hold up the process.

d. Hearing

At the hearing, the petitioner will explain why they believe the guardianship is necessary. The petitioner should be prepared to present evidence and to argue their position. The GAL will also provide an opinion on the guardianship and can present evidence. The proposed ward, proposed guardian, experts (including the doctor or psychologist who completed the Examining Physician’s or Psychologist’s Report), and others may give testimony. The judge or court commissioner will review the evidence and enter a judgment on the petition for guardianship as well as the suitability of the proposed guardian.

If the petition for guardianship is granted, the newly appointed guardian will receive several forms⁴ reflecting the court’s order:

³ See also WI GSC publication, “Notice & Service Requirements for Appointment of Guardian and Order for Protective Services” at www.gwaar.org/gsc.

⁴ Review of local practice is especially important before the hearing on the petition for guardianship. Some counties require the Petitioner to draft the Determination and Order and Letters while others allow different parties to draft.

- 1) GN- 3170: Determination and Order on Petition for Guardianship Due to Incompetency;
- 2) GN-3200: Letters of Guardianship of the Person; and/or
- 3) GN-3210: Letters of Guardianship of the Estate.

The Determination and Order contains the court's findings and outlines the rights removed from the individual. The Letters of Guardianship outline the guardian's authority. Health care providers, schools, employers, banks, and others may require the Letters of Guardianship to be presented before the guardian may act, so it is important to keep a copy in a safe place. The guardian may wish to obtain a certified copy of the Determination and Order and Letters at the Register in Probate office for a small fee.

e. Post-hearing: What will be expected from me if I become my child's guardian?

All guardians have certain duties.⁵ These duties include the following:

- 1) When acting as a guardian, exercise care, diligence, and good faith;
- 2) Be an advocate for the ward's best interest;
- 3) Provide fidelity and loyalty to the ward; and
- 4) Notify the court of any change of address of the ward or guardian.

See Wis. Stat. § 54.18. For more information on the specific duties and responsibilities of a guardian, please also review the guardian training program provided by UW-Green Bay.

Guardians should also review their paperwork closely. They may only exercise those powers granted to them by the court. All wards under guardianship retain certain rights such as providing input into support services, associating with those of their choice, attending court hearings, withholding consent for mental health, alcohol or substance treatment, and communicating privately with their attorney, elected officials, and our state advocacy agency, Disability Rights Wisconsin.⁶

Guardians should become familiar with their specific reporting responsibilities. For example, a guardian of the estate must file an inventory, which describes the ward's estate as it exists on the date of the guardian's appointment and must be filed within 60 days of that appointment. They must also file an annual account which describes the ward's finances and explains how the guardian has managed the ward's money over the past year. This is typically due on April 15th unless otherwise indicated by the court. The guardian of the person must also file an annual report which describes the ward's personal health, living conditions and if they are in the least restrictive environment. The probate office typically mails these to guardians with instructions on how to complete them and information about deadlines, but new guardians should check with their probate office to be sure.

⁵ Additional information about duties of guardian of the person and guardian of the estate may be found on the GSC webpage on the GWAAR website (www.gwaar.org/gsc).

⁶ [54.25\(2\)\(b\)](#)

V. What other considerations are there as my child ages?

a. **Standby and Successor Guardians**

Because guardianship of an adult may last that adult's entire life, it is important for parents considering guardianship to plan for the future as well, including selecting someone to take over if the parent is no longer able or willing to serve as guardian. A standby guardian can step into the role of guardian either temporarily or permanently if the initial guardian is unable or unwilling to act, resigns, dies, or is removed by the court. The initial guardianship petition can name a standby guardian if there is an individual suitable and willing to serve when it is filed. It is also possible to ask the court to name a standby later, although it will require a separate petition and possibly an additional hearing. Standby guardians must complete the same training requirements as initial guardians.

The standby guardian has the same powers and responsibilities as the initial guardian. If a standby guardian is named in the initial petition and approved by the court, no other hearing is necessary. If the standby needs to assume their duties, they can notify the court of the circumstances and expected dates/duration (if known). The court will then issue Letters of Guardianship to the standby outlining their authority and the effective date/duration of the appointment.

A successor guardian is appointed when the initial guardian is no longer able to serve, there is no standby or the standby is unavailable, and a new guardian needs to be selected. Before the successor guardian's appointment, a hearing may be scheduled for the court to review the appointment, and the proposed successor guardian will need to be approved of by the court. The appointment of a standby guardian can provide stability for the ward since it can be done before the need for a new guardian arises.

b. **Estate planning, ABLE accounts, and Special Needs Trusts**

For parents who are considering their adult child or soon-to-be adult child's long-term personal and financial needs, it may be helpful to consult with an attorney regardless of whether guardianship may be necessary. Parents may also want to consult with an attorney for their own estate planning to minimize the impact of a future inheritance on their adult child's benefits. In addition, a parent may nominate a testamentary guardian in their will. *See Wis. Stat. § 54.15(6)*. While this nomination does not guarantee the person will be appointed as the guardian, the nomination does carry weight if the court appoints a new guardian after the parent's death.

Special needs trusts in the child's name are one option. These trusts typically do not count toward asset limits for means-tested public benefits, may limit the purposes for which disbursements may be made (e.g., health care, education, and living expenses), and generally do not allow cash to be disbursed directly to the beneficiary. A special needs trust can be

created using either the parents' income/assets or the adult child's, although if the child is under guardianship, the court must first grant permission to use their income/assets to fund the trust (*see* Wis. Stat. § 54.20(2)(c)). Wisconsin has two pooled trust options for adults with disabilities, Wispact and Life Navigators, and private options exist as well. An attorney is required to establish the trust.

ABLE accounts are another option. ABLE stands for Achieving a Better Life Experience which was enacted in federal law and was adopted in part by Wisconsin. ABLE accounts are tax-advantaged savings accounts for certain individuals with disabilities to use for certain disability-related expenses while maintaining eligibility for benefits. Any individual who became blind or disabled before the age of 26 is eligible to open an ABLE account.⁷ Wisconsin does not currently have its own ABLE account program, but it is possible to establish one using another state's program.⁸

c. Benefits

A child may become eligible for new or different benefits at age 18. Disability Benefit Specialists at county Aging & Disability Resource Centers (ADRCs) can help review benefits eligibility and may be able to assist with applications for some benefits. For benefits such as SSI (Supplemental Security Income), this process may start as soon as 17 and 6 months. Contact information for Disability and Tribal Benefit Specialists around the state is available through the state Department of Health Services: <https://dhs.wisconsin.gov/benefit-specialists/counties.htm>.

VI. Common questions

a. How do I get an evaluation for my child?

Any physician or licensed psychologist can complete the evaluation (note: Wisconsin's statutes do not allow nurse practitioners, physician assistants, or clinical behavioral health staff who are not licensed as psychologists to complete the evaluation). It may be helpful to start with your child's primary care provider or professionals who work with your child; they may be willing to perform the evaluation or they may be able to make a referral to a provider who can. Note also that insurance may not cover an evaluation; this will be an important question to ask when scheduling an appointment.

Finding a provider and scheduling an evaluation can sometimes take several months, so it may be helpful to start this process well ahead of filing a petition for guardianship.

⁷ More information is available from the Wisconsin Department of Revenue: <https://www.revenue.wi.gov/Pages/FAQS/ise-ABLEAccounts.aspx>

⁸ For more information, including a comparison of different states' programs, visit <https://www.ablenrc.org/compare-states/>.

b. Do I need to hire an attorney to obtain guardianship?

An attorney is not required to petition for guardianship, but it may be a good idea to consult one, particularly if there are complex benefits or property issues or the guardianship or choice of guardian is likely to be contested, either by the adult child or by other family members. Attorneys who regularly take guardianship cases may be able to provide information on doctors or psychologists who can perform an evaluation and will have experience in completing the required court forms, making sure all interested parties are served appropriately, and presenting evidence in court.

Parents should also review what local legal resources are available. A very small number of Wisconsin counties have legal services programs that may assist a parent in obtaining an adult guardianship of a younger adult child or a soon-to-be adult child who is likely to be deemed incompetent. Information on obtaining an attorney can also be obtained through the Wisconsin State Bar Lawyer Referral Information Service at (800) 362-9082 or www.wisbar.org. The Guardianship Support Center can provide legal information; however, we do not provide legal advice or representation and cannot assist with completing forms.

c. What types of expenses are associated with petitioning for guardianship?

The costs incurred vary with each guardianship. Some possible costs may include the petitioner's attorney's fees (if an attorney assists with the case); costs for an evaluation, if not covered by insurance; fees for expert witnesses, if any; an initial deposit toward the GAL's fees (or all of the GAL's fees and possibly other costs of the proceeding if the guardianship is not granted); and other costs such as those related to mailing or serving court forms on interested persons.

If a guardian is appointed, the court may allow for reimbursement of the petitioner's attorney's fees and costs from the ward's estate. The court will look at several factors in this determination, including the ability of the ward's estate to pay and the petitioner's interest in obtaining the guardianship. *See Wis. Stat. § 54.46(3).*

If a guardian is appointed, the GAL fees are paid by the ward, if there are sufficient assets to pay, or, if not, the county. If no guardian is appointed, the petitioner is responsible for the GAL fees. *See Wis. Stat. § 54.74.* If a guardian is appointed, the ward is also entitled to have any costs associated with contesting the petition paid out of their income and assets (if sufficient to pay). These costs are paid before GAL or other attorney fees.

While the petitioner may be responsible to pay some (or all) of these fees, it is important to inquire about each county's local practice before filing the initial guardianship pleadings.

d. Can the court appoint co-guardians?

Per Wis. Stat. § 54.10(5), the court may appoint co-guardians. The court may impose additional

conditions when appointing co-guardians and enter orders clarifying their roles. Unless modified by the court, co-guardians are required to agree with the decisions made by the other co-guardian or those decisions are void. *See Wis. Stat. § 54.46(2)(a)*. The petitioner should review whether the appointment of co-guardians would best serve the proposed ward's needs before petitioning for co-guardianship.

e. My adult child has no significant income and does not own any property. Do I need to petition for guardianship of the estate as well as of the person?

Significant consideration should be given before determining a guardianship of the estate unnecessary. Guardians of the estate have both statutory duties and specific powers that may assist the ward even if the ward has a modest estate or no estate. Without a guardian of the estate, there might not be anyone with legal authority to sign contracts such as leases, create a special needs trust with the ward's funds, handle taxes (including refundable tax credits such as stimulus checks), or apply for some public or private benefits on the ward's behalf. In addition, establishing a guardian of the estate also can protect the ward from liability for any contracts the ward may sign, such as a credit card application. A guardian of the estate can also work with credit agencies to monitor and/or freeze the ward's credit to help prevent credit cards from being issued to the ward or identity theft in the ward's name.

There are some statutory alternatives to establishing a guardian of the estate for wards who have less than \$50,000 in assets. Some counties may have lower limits for these options. It may be helpful to consult with an attorney both to understand local practice rules and to discuss the most appropriate option for a particular ward.

f. When should I consider filing the petition?

The earliest a petition for guardianship can be granted is when the ward is at least 17 years and 9 months old. *See Wis. Stat. § 54.10(3)(a)*. If the child is younger than this, the parent may want to start reviewing the applicable requirements before the child turns that age.

g. Where may I find additional resources and information?

- Wisconsin Guardianship Support Center: <https://gwaar.org/guardianship-resources>, (855) 409-9410, guardian@gwaar.org
- Wisconsin Department of Health Services <http://www.dhs.wisconsin.gov/>
- Wisconsin Court Forms: <https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=17>
- Wisconsin State Law Library: <http://wilawlibrary.gov/>
- Wispact: <http://www.wispact.org/>
- [Life Navigators Special Needs Trust program: https://lif navigators.org/trust-program/](https://lif navigators.org/trust-program/)
- Register in Probate Directory: <http://www.wripa.org/directory-of-wisconsin-probate-offices.html>

- Aging and Disability Resource Centers:
<https://dhs.wisconsin.gov/adrc/consumer/index.htm>
- Wisconsin Independent Living Centers:
<https://dhs.wisconsin.gov/disabilities/physical/ilcs.htm>
- Regional Centers for Children & Youth with Special Health Care Needs (can serve children and young adults up to age 21):
<https://dhs.wisconsin.gov/cyshcn/regionalcenters.htm>

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