

## Overview of Legal Decision-Making in Wisconsin

Updated 12/2020

### I. The Basics of Legal Decision-Making

Who will make decisions for you if you're unable to communicate for yourself? What do you want for end-of-life care? How will you make sure bills are paid if you're in the hospital or away from home? Who do you want to manage funeral/burial decisions? What happens if you don't have any advance directives, or you or a family member are unable to make them?

Wisconsin starts from the assumption that all adults are competent to make their own decisions, including decisions that family, friends, or community might not agree with or approve of. But if an individual is unable to make or communicate their wishes, someone else must have legal authority to make decisions to see to that individual's welfare. And Wisconsin is not a "next of kin" or "family consent" state, which means that in most circumstances, if an adult is unable to make their own decisions, spouses and relatives don't automatically have the right to make decisions for them.

There are two ways another person may get authority to make decisions for someone – either the individual can grant that power to another person through an advance directive such as a power of attorney document, or the court may give the authority to make decisions to a guardian. This document will review the types of decisions that can be handed over to another person and in what circumstances each may come up.

### II. Power of Attorney for Finances ("Durable" Power of Attorney)

A power of attorney for finances document authorizes another person (called the "agent" or "attorney-in-fact") to handle financial matters for the person who signed the document (called the "principal"). The principal may delegate as much or as little authority to the individual as desired. The principal can also require a bond and/or an annual accounting. A financial POA does not give the agent any authority to make health care decisions.

A financial POA is presumed to be "durable" unless the document states otherwise. "Durable" means that the document will stay in effect during a period of incapacity. The financial POA can take effect immediately upon signing, on incapacity, or when some other condition is met (e.g., the principal has traveled out of the country).

Wisconsin law does not require witnesses or a notary for the principal's signature to be valid, but it is strongly suggested to have it notarized, as many banks and other agencies will not accept it



otherwise.

### III. Power of Attorney for Health Care

Like a financial power of attorney, a power of attorney for health care document authorizes an agent to handle health care matters for the principal. A health care POA only allows the agent to make health care decisions. A POA for health care typically takes effect on incapacity, as determined by two doctors, or one doctor and a psychologist, a nurse practitioner, or a physician assistant. Incapacity means that the individual is unable to receive or process information, and/or unable to communicate their medical decisions.

The principal must be “of sound mind” while signing a health care POA, and their signature must be witnessed by two disinterested witnesses. “Disinterested” means that the witnesses are not related to the principal, financially responsible for the principal’s health care, the principal’s heirs, or the principal’s health care providers (other than social workers or chaplains). The witnesses must see the principal sign the document and sign at the same time.

Wisconsin law provides some limitations on an agent’s authority. An agent must follow the wishes of the principal where known. In addition, an agent must have specific authority to admit the principal to a facility for long-term care or to make end-of-life decisions. An agent cannot admit the principal to a facility for a mental health condition.

Wisconsin generally recognizes POAs for health care from other states; however, the document must lay out the specific authority above (long-term care and end-of-life decisions) for the agent to make those decisions here.

### IV. Guardianship

Guardianship may be necessary if an individual is unable to make their own decisions and they were never capable of doing advance planning, there is no advance planning, the advance planning is invalid or does not cover the specific issue that needs addressing, or they are the victim of neglect, abuse or financial exploitation and the health care/financial agent is the abuser/exploiter/neglector or cannot protect the individual from self-neglect, abuse, exploitation or neglect.

Guardianship requires a determination by a court that the individual is “incompetent” – that the person has an impairment that is likely to be permanent and that as a result of that impairment, the individual is unable to receive or process information or communicate their wishes. An individual may have a guardian of the person, a guardian of the estate, or both, appointed by the court.

### V. Authority of Agent vs. Authority of Guardian

Under power of attorney documents, the principal may choose their own agents and alternates



and specify what authority the agent has. An agent acting for the principal has a duty to follow the wishes of the principal where known, and to act in the principal's best interest if their wishes are unknown. A health care agent may only make health care decisions. A financial agent may only make decisions related to financial matters, to the extent authorized by the power of attorney document. A power of attorney document is essentially a contract between the principal and the agent and may be revoked at any time.

In contrast, a guardian may or may not be the person the individual would have chosen to make their decisions. A guardian is appointed and given specific authority by a court. For decisions a guardian is authorized to make, they should take the wishes of the ward into consideration, but they are not obligated to follow those wishes. The guardian must act in the best interest of the ward. Only a court can end a guardianship.

## VI. Other Advance Directives or Alternatives

Wisconsin has several other types of advance directives and alternatives to guardianship:

A **Living Will**, also called a "Declaration to Health Care Professionals," is a document executed by a principal declaring their wishes and directing their provider to refuse certain life sustaining procedures when the principal's death is imminent due to a terminal condition or when the principal is in a persistent vegetative state. This does not apply in any other health care situation. A health care POA is broader than a Living Will and can encompass what would be included in a Living Will. Individuals can have both, but they should be consistent with each other.

A **Do Not Resuscitate Order (DNR)** order may only be issued by an attending health care professional (a physician, a nurse practitioner, or a physician assistant) and only applies to a "qualified patient" (when an adult has a terminal condition or would suffer pain or harm from resuscitation or when resuscitation would be unsuccessful). The qualified patient, guardian or agent must also request the DNR order, consent to it, and sign the written order. The individual must wear a DNR bracelet is required to be worn to indicate there is a DNR order. A DNR Bracelet may be obtained from the provider (for free) or the Department of Health Services' approved vendor, StickyJ® Medical ID (for a fee).

An **Authorization for Final Disposition** is a document executed by an individual expressing special directions for religious observances, arrangements for viewing, funeral, memorial, or graveside service, and burial, cremation or other disposition of the declarant's body after death. This requires naming a representative to carry out directions. This document may only be signed by the individual – it cannot be signed by an agent or guardian.

A **Supported Decision-Making Agreement** is a tool an individual with a functional impairment can execute to formally name a Supporter to assist them in areas such as education, housing, medical decisions, or finances. The Supporter is a helper and they do not have authority to make decisions for the individual. They can help to collect information, communicate the individual's decisions, or help them understand options, responsibilities, and consequences of life decisions. Supported Decision-Making is a less restrictive alternative to guardianship.



A **Conservatorship** is a voluntary court process to appoint an individual (called a conservator) to manage finances and property with continued court oversight. An adjudication of incompetency is not required. The conservator's authority will typically be the same as a guardian of the estate. The individual may request that the conservatorship be ended at any time.

## VII. Resources

The Supported Decision-Making Agreement form be found at <https://www.dhs.wisconsin.gov/library/f-02377.htm>.

Power of Attorney, Living Will and Authorization for Final Disposition forms can be found on the Department of Health Services website at <https://www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm>.

Court forms for guardianship or conservatorship proceedings can be found here: <https://www.wicourts.gov/forms1/circuit/index.htm>.

**QUESTIONS? Call the Wisconsin Guardianship Support Center at 1-855-409-9410 or email at [guardian@gwaar.org](mailto:guardian@gwaar.org).**

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