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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In This Issue:

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Title: *In the Matter of the Guardianship and Protective Placement of J.J.N.*
Pierce County v. J.S.N.
Court: Court of Appeals, District III
Date: April 9, 2019
Citation: 2017AP1550 (unpublished)

Case Summary:
J.S.N. appealed protective placement and guardianship orders for his father. J.S.N also appeals the revocation of the power of attorney documents. The court of appeals affirmed the order of the circuit court.

Case Details:
On April 12, 2017, a Pierce County social worker petitioned for temporary and permanent guardianship of J.J.N.'s person and estate and protective placement including emergency protective placement. At the time petitions were filed, J.J.N was living in a two-bedroom apartment with his son who was named as both his power of attorney for finances and health care agent. The POAs were executed in 2008. The petitions alleged J.S.N. was not a fit and proper person to be agent or guardian and in an "Emergency Protective Placement Court Report", the social worker indicated they responded to a report that J.J.N. had an injury above his eye and was being physically and verbally abused. The circuit court appointed a guardian ad litem and adversary counsel and held an uncontested temporary hearing at which temporary guardians were appointed and temporary protective placement at a nursing home was ordered. The final hearing was contested. The circuit court found J.J.N. to be incompetent and appointed guardians and revoked the POAs.

The court of appeals first assumed J.S.N. had standing so they could reach merits of the case. The court found that J.S.N. was not required to file a notice of intent to pursue postdisposition relief as he is not the subject individual or ward. The court noted that J.S.N. does not represent his father in the appeal and cannot raise issues on his father's behalf.

First, J.S.N. argued he was deprived of proper notice of the temporary guardianship and emergency protective placement hearings. Wis. Stat. § 54.38(6) provides that the petitioner is required to serve notice on the proposed ward before the hearing or not later than three days after the hearing. J.S.N. is not entitled to notice as he was not the proposed ward. Similarly, under Wis. Stat. § 55.135, the individual subject to the emergency protective placement is the one that is entitled to notice.

Second, J.S.N. argued the court lost competency as timelines were not complied with. The court found that the 90-day timeline for hearing a guardianship and the 60-day timeline (with up to a 45-day extension) were properly followed. J.S.N. also argued the final hearing for protective placement was not heard within 30 days as required by Wis. Stat. § 55.135(5). The court of appeals noted that when a challenge to competency is not raised in the circuit court, it is forfeited.

Third, J.S.N. argues he was not afforded due process at the final hearing as the participation of his counsel was limited. Under Wis. Stat. § 54.44(5m), the court has discretion to limit participation of an interested party. The circuit court found J.S.N.'s position was aligned with and represented by adversary counsel for J.J.N. and therefore the due process claim was also rejected.

Lastly, J.S.N. argues the circuit court was erroneous in determining his father was a proper subject for guardianship and protective placement and revoking the POAs. These decisions are within the circuit court's discretion and the court of appeals will only overturn if clearly erroneous.

The physician did provide a report indicating J.J.N. suffers from dementia, profound hearing loss and limited mobility. It was the doctor's opinion to a

reasonable degree of medical certainty that J.J.N. needs a guardian. The social worker also testified that there were no sheets on J.J.N.'s bed and no clean clothes and that she observed a bruise and cut. The social worker testified that J.J.N. told her he was hit and that he does not feel safe. There were also past reports where the worker found a decrease in functioning, bruises, dehydration, rashes in his groin and a significant amount of dried feces in his buttocks. The worker also noticed his clothing was very dirty with food, blood, urine and feces stains and that there was poor hygiene and a smell to the house.

J.S.N. testified he never hit his father and that any marks were due to grabbing him to prevent falls. He also testified he yelled at his father because of his hearing issues and he did not keep clean clothes in the drawers because his father would throw them. J.S.N. did confirm personal care agreements in the amount of $5,000 per month but indicated he had not yet collected on them. He did indicate he intended to collect on the $390,000 arrearage owed to him.

The circuit court did find clear and convincing evidence that the standards for guardianship and protective placement were met and that J.S.N. was unable to provide the care his father needed. The court also properly revoked the POAs, concluding that J.S.N. had a conflict due to his financial claims. The court of appeals indicated it is not appropriate under the standard of review for them to view the evidence differently than the circuit court did.

Title: *Winnebago County v. C.S.*
Court: Court of Appeals, District II
Date: March 27, 2019
Citation: 2016AP1982 (recommended for publication)

Case Summary:
C.S. was found not competent to make informed decisions as to advantages and disadvantages of accepting medication and treatment while a prisoner. C.S. was involuntarily medicated under Wis. Stat. § 51.61(1)(g). C.S. argues the statute is unconstitutional as it does not require a finding of dangerousness for involuntary medication of a prisoner. The court of appeals affirmed the circuit court's decision and found that Wis. Stat. § 51.61(1)(g) is constitutional as it is reasonably related to the state's legitimate interest in providing care and assistance to prisoners suffering from mental illness who are found not competent to refuse medication and treatment.

Case Details:
In 2005, C.S. was convicted of mayhem as a repeater and sentenced to 20 years in prison. C.S. was diagnosed with schizophrenia. An involuntary commitment and medication orders were obtained in 2012 and extended thereafter. A petition was filed on May 22, 2015 and a psychologist confirmed the diagnosis and that the criteria for involuntary medication and commitment was met. C.S. objected and a jury trial was held in June 2015. The jury found that the six required elements under Wis. Stat. § 51.61(1)(g) were met. The court extended the commitment and entered an order for involuntary medication and treatment.

If someone is not in prison, then the required elements for involuntary commitment are: 1) the person is mentally ill, 2) a proper subject for treatment, and 3) dangerous.

When the person is a prisoner, the dangerousness element is not required, however four additional elements are required. These elements are as follows: 1) the individual is an inmate, 2) they are mentally ill, 3) they are a proper subject for treatment and in need of treatment, 4) less restrictive forms of treatment were attempted and were unsuccessful, 5) the inmate was fully informed about treatment needs, services available and his rights, and 6) the inmate had an opportunity to discuss treatment needs, services and rights with a psychologist or physician.

A prisoner who has been committed retains certain rights under Wis. Stat. § 51.61(1) which includes the right to refuse medication. The patient has the right to exercise informed consent regarding medication and treatment unless a court determines 1) they are not competent to refuse or 2) a situation exists where it is necessary to prevent serious physical harm to themselves or others, ie they are a danger. C.S. only challenges the first component which allows medication based on a finding of incompetence to refuse without a determination of dangerousness.

An individual is not competent to refuse medication or treatment if after the advantages, disadvantages and alternatives have been explained, they are substantially incapable of applying an understanding to make an informed choice to accept or refuse.

The court balanced liberty interests with relevant state interests. The liberty interest in avoiding unwanted antipsychotic medication is significant but is not absolute. The state has a compelling interest in providing care and assistance to those who suffer from mental illness and in a prison, this interest is even more compelling. The State has an obligation to provide prisoners with medical treatment and their interest is significantly stronger when a prisoner has been found incompetent to make his own treatment decisions. There are additional procedural protections in place in light of omitting the dangerousness element. The court noted the difference between this case and ***Washington v. Harper***, 494 U.S. 210, which applied a dangerousness standard when a prisoner was competent to refuse, and the state interest was the safety and security of the prison and not the care of a mentally ill inmate.

The involuntary medication and treatment of a prisoner is facially constitutional as the general welfare of the prisoner is a legitimate reason for the state to medicate/treat without a finding of dangerousness. The court of appeals affirmed.

Title: *Waukesha County v. W.E.L.*
Court: Court of Appeals, District II
Date: May 15, 2019
Citation: 2018AP1486 (unpublished)

Case Summary:
W.E.L. sought postdispostion relief from the circuit court's original commitment and involuntary medication order after stipulating to the extension. The court of appeals found the issue to be moot as W.E.L. stipulated to the recommitment and continued involuntary administration of medication. W.E.L. was no longer a subject to the original commitment orders and he did not challenge the extension.

Case Details:
In January of 2018, a family member notified law enforcement that W.E.L. was engaging in threatening behavior and showing signs of escalating mental health issues. W.E.L. was previously diagnosed with paranoid schizophrenia and bipolar disorder. Law enforcement investigated and took W.E.L. into custody on an emergency detention and a probable cause hearing was held.

W.E.L's treating psychiatrist testified that W.E.L. suffered from schizoaffective disorder and was in need of inpatient care and was incompetent to refuse medication. W.E.L. contested the continued detention and use of injectable medications. The circuit court found probable cause. At the final hearing W.E.L. waived his personal appearance and did not contest the entry of the commitment and medication orders and the court entered a six-month commitment and involuntary administration of medication orders.

In June 2018, the county petitioned for an extension of the order. W.E.L. moved for postdisposition relief from the original commitment and medication order. W.E.L. asserted ineffective assistance of counsel for waiving his appearance and stipulating to the orders. An evidentiary hearing occurred at which W.E.L. and his former attorney testified. The circuit court denied his motion.

W.E.L. reaffirmed his request for a jury trial on the extension petition. However, on the date of the trial on the extension petition, W.E.L. withdrew the jury demand and waived his right to contest the petition. The court entered a year long commitment and medication order. The court also denied the postdisposition motion on the original orders. W.E.L. did not seek relief from the extension order. The court of appeals found the issue to be moot due to W.E.L. stipulating to the recommitment and continued medication order. The court nonetheless decided the appeal notwithstanding its mootness due to W.E.L. asserting that it is of great public importance. W.E.L. argues that the court must obtain a personal waiver of the right to be present at the final hearing. The court of appeals did not find this to be an issue of first impression nor likely to evade review. The court had previously addressed and rejected the issue W.E.L. now raises in ***Price Cty. DHHS v. Sondra F.,*** No 2013AP2790 which is unpublished but persuasive. W.E.L.'s appeal was dismissed.

Title: *In re the estate of Dolores A. Kreitlow*
Court: Court of Appeals, District II
Date: June 12, 2019
Citation: 2018AP157 (unpublished)

Case Summary:
Sharlene Bertram appeals a judgment rendered in favor of the Estate of Dolores E. Kreitlow, premised on claims of breach of fiduciary duty and undue influence against her for conduct while acting as power of attorney agent for finances and property. The court of appeals affirmed.

Case Details:
Dolores Kreitlow died in 2015 at the age of eighty-three. This case concerns her daughter, Sharlene Bertram and financial transactions while Bertram acted as power of attorney for finances and property. In March 2007, Kreitlow executed a POA-F naming her son and Bertram as co-agents. The power of attorney was drafted to become effective upon incapacity or disability. Two months later, Kreitlow executed a POA-F naming Bertram as primary agent and Bertram's son as the successor agent. Unlike the prior power of attorney, this document was effective immediately. In 2011, another POA-F was signed naming Bertram as the primary agent and Bertram's son as the successor.

In 2009, while Bertram acted as Kreitlow's power of attorney, two limited liability companies were created: GPM Systems, LLC and FME Properties. According to Bertram GPM is an acronym for "Get Pissed Mom" and FME is an acronym for "Former Mendard's Employee." From September 2009 to March 2010, more than $46,000 was deposited from Kreitlow's personal bank account into GPM's account and in 2012 these funds were moved into FME's account. The money was later used to pay Bertram's legal fees.

Bertram lost her job at Menard's in 2007, the same year Kreitlow signed the POA. From 2007 to 2012, Bertram would take her mother to the bank where she would make monthly withdrawals ranging in amounts of $3,000 to $8,000. From 2008 to 2011, Bertram deposited $15,476.51 into her personal account and paid off $5,909 in credit card debt. In 2009, Bertram set up an account for her grandson and deposited $1000 in 2011 and then another $13,187.77. In 2012, Bertram petitioned for guardianship alleging her mother was incompetent due to mild to moderate dementia. Family members objected to her appointment and the court appointed Kim Haines as guardian.

After Kreitlow passed away, the guardianship was ended, probate was opened and the court appointed Attorney Michael Kaiser to serve as personal representative for the estate. Kaiser retained counsel to pursue claims against Bertram for breach of fiduciary duty, undue influence, lack of capacity and competency and theft. Bertram filed a motion for summary judgment which the court granted in part and denied in part. It denied summary judgment for the undue influence and breach of fiduciary claims and dismissed the theft claim. The estate withdrew lack of capacity and competency claims. The case proceeded, and a three-day bench trial occurred. The circuit court found the evidence supported the undue influence and breach of fiduciary claims and entered judgment in the amount of $42,165 plus attorneys' fees and costs.

Undue influence
The circuit court properly found Bertram unduly influenced Kreitlow. Undue influence is proved with either a two-element or four-element test. The two-element test is proven by 1) the existence of a confidential or fiduciary relationship and 2) suspicious circumstances. The first element was not disputed. The court of appeals agreed the record was sufficient to show suspicious circumstances. The court found it suspicious that just two months after being named as co-agent on a POA activated upon incapacity that Bertram was named sole agent on a POA that was active immediately. The court also found there were numerous financial transactions that were not in the best interest of Kreitlow, Bertram did not provide a credible accounting and was not a credible witness.

Breach of fiduciary duty
The circuit court properly found Bertram breached her fiduciary duty as agent. The court rejected Bertram's argument that the court was reading an additional duty into the statute. Under Wis. Stat. § 244.14(1)(a), the agent must act in accordance with the principal's reasonable expectations and when those expectations are unknown, they must act in the principal's best interest.

Helpline Highlights

Are there any exceptions to the requirement that a guardian of the estate submit an annual account each year?

There are some very limited exceptions to the annual account requirement, but those only apply to small estates or married couples and must be approved by the court in advance. A small estate would be one under $50,000 gross value. For a married ward, the court may waive filing of an annual account upon request or permit the filing of a modified account which is required to be signed by the ward's guardian and spouse. See Wis. Stat. § 54.62.

What is the difference between deactivation and revocation of a Power of Attorney for Health Care?

Deactivation would occur when the principal has regained capacity to make their own health care decisions. Revocation occurs when the principal has decided to rescind their POA document.

Deactivation may occur informally once the principal again becomes able to make his or her own health care decisions. The term "deactivation" is not mentioned in the statutes, therefore, no formal process is technically required. However, it can be helpful for a formal process to be used. This could consist of two physicians or one physician and one psychologist signing a statement or certification that the individual has regained capacity to make their own health care decisions. Since a formal process is not required, some facilities and providers use only one signature and this is probably sufficient. The desires of an individual without an incapacity always supersedes the effect of their POA.

A principal retains the right to revoke their POA-HC document at any time, including after their document has been activated due to an incapacity. A principal could revoke his or her document in several ways, including by expressing the intent to revoke before two witness, burning or tearing up the document, signing and dating a statement indicating their desire to revoke the document, or by executing a new POA-HC document. For more information on revocation of Powers of Attorney, you can visit our website at www.gwaar.org/gsc.

A health care power of attorney has been activated and the primary agent is unable to continue to perform this role. Can the agent add a second agent onto the POA document by attaching an addendum?

No. An agent under a POA-HC does not have the ability to delegate their authority to another. A POA is a legal document of the principal's and the agent only has authority because it was given to them by the principal. The only one that can make changes to the document is the principal. If the principal is of sound mind and wants to change agents or add an alternate, they must create a new POA document with those changes. An addendum cannot be added by another after the execution of the original document. A principal can name an alternate to act in the event the primary agent is "unable or unwilling" but under Wis. Stats. § 155.01(4),155.05(5), an alternate agent is one designed by the principal only.

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Do you want more information about guardianship, POAs and related issues?

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Points of Interest

Wisconsin Bar Ethics: My Client Needs a Guardian. May I Represent Someone Seeking that Appointment?

This article from Tim Pierce, ethics counsel for the State Bar, explores a lawyer's ethical duties when representing a client with diminished capacity. The article explores the WI Supreme Court Rules rules that apply as well as an American Bar Association formal opinion. Read more here.

National Center for State Courts Online Training Support: Decision-Making Supports and Guardianship

The National Center for State Courts, with the assistance of the American Bar Association has launched Finding the Right Fit: Decision-Making Supports and Guardianship, an online training to support someone who needs help making decisions. This course is meant for friends and family members, guardians, and individuals who want to plan for their own future or need help now. The course includes three tracks: supporting decisions, using legal options to support or substitute decision-making, and serving as a guardian. The training also offers realistic scenarios to help users develop strategies for their own lives. Information and guidance are included on how to become a guardian, how a guardian can support an individual's decision-making and identifying and understanding risk. The training is available at https://eji.courtlms.org

National Center on Law and Elder Rights Webinar: When the Guardian is an Abuser

View the free webinar and materials here. Additional free webinars on guardianship and alternatives to guardianship are also available on NCLER's website at https://ncler.acl.gov/

Upcoming Events and Noteworthy Dates That May Be of Interest:

- Dane County and State Triad Conference, September 27th, https://www.triadofwisconsin.org/
- Adult Protective Services Conference, October 10th-11th, Wilderness Glacier Canyon
- WI Statewide Transition Academy conference, October 16th, Wilderness Glacier Canyon
- Self-Determination Conference, October 14th-16th, Kalahari Convention Center
- FOCUS Conference, November 20th-21st , Kalahari Convention Center

What is the Guardianship Support Center able to help with?

The GSC is a neutral statewide informational helpline for anyone throughout the state. We can provide information on topics such as Powers of Attorney, Guardianship, and Protective Placement. The GSC is unable to provide information on minor guardianships, wills, trusts, property division or family law. The GSC is unable to give legal advice or specific direction on completing court forms such as the inventory and annual accounting. The GSC does not have direct involvement in cases nor are we able to provide legal representation. ❒

What are some other free or low-cost legal resources?

Other resources include the American Bar Association's website where members of the public can ask legal questions to volunteer attorneys. The website is https://wi.freelegalanswers.org/. An attorney can also be found through the Lawyer Referral Information Service (LRIS) or the modest means program with the Wisconsin State Bar if income qualifications are met. You can find more information on these programs at https://www.wisbar.org/. ❒

Governor Evers Announces SeniorCare Program Will Continue for the Next Decade.

The Centers for Medicare and Medicaid Services (CMS) announced that they have approved a 10-year extension for the SeniorCare prescription drug program. SeniorCare is a prescription drug assistance program for WI residents who are over 65 years of age and who meet eligibility criteria. The annual enrollment fee is $30 and co-pays range from $5 to $15. Nearly 50,000 WI seniors are enrolled in this program. The program will continue to operate through December of 2028.

List of Under-Performing Nursing Homes Released

The Centers for Medicare and Medicaid Services (CMS) for the first time have released a list of underperforming nursing homes after an inquiry by Senators Casey and Tomen. The published report - Families' and Residents' Rights to Know: Uncovering Poor Care in America's Nursing Homes – includes a list of 395 facilities.

Transnational Elder Fraud Strike Force created

Attorney General William P. Barr announced the creation of the Transnational Elder Fraud Strike Force, a joint law enforcement effort that brings together the resources and expertise of the Department of Justice's Consumer Protection Branch, the U.S. Attorneys' Offices for six federal districts, the FBI, the U.S. Postal Inspection Service, and other organizations. The Strike Force will focus on investigating and prosecuting individuals and entities connected with foreign-based fraud schemes that disproportionately affect American seniors. These include telemarketing, mass-mailing, and tech-support fraud schemes. Read more: https://www.justice.gov/opa/pr/justice-department-announces-new-transnational-elder-fraud-strike-force

Thanks to everyone who made Aging Advocacy Day 2019 a success!

https://gwaar.org/aging-advocacy-day-2019