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.

To contact the GSC—

Call:
(855) 409-9410

E-mail:
guardian@gwaar.org

Website:
http://gwaar.org/guardianship-resources

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Title: *State of Wisconsin v. Johnalee A. Kawalec*
Court: Cir. Ct. No. 2012CF64, Court of Appeals, District II
Date: July 24, 2019
Citation: 2017AP798-CR (unpublished)

Case Summary:
This is an appeal from a circuit court order for Walworth County. Johnalee Kawalec (Kawalec) was a power of attorney for a former family member with whom she held a joint bank account. Kawalec was later accused of taking funds for her personal use and was convicted of the charge of theft by bailee under Wis. Stat. § 943.20(1)(b). Kawalec appeals, asserting ineffective assistance of counsel due to counsel's lack of knowledge of the applicable legal standard. The court of appeals affirmed the decision of the circuit court.

Case Details:
In 2005, Henry Kawalec (H.K.) executed a power of attorney (POA) naming Johnalee Kawalec and her then -husband as his POA agents. Kawalec and her husband were niece-in-law and nephew to H.K. The POA granted broad powers, with some limits, to give assets to others. Kawalec was prohibited from making gifts to herself or members of her immediate family without written consent from all of H.K.'s heirs. It is not disputed that Kawalec had a fiduciary duty to not engage in self-dealing.

In 2007, H.K. retitled his bank account with U.S. Bank to give Kawalec authority to act on the account. In 2010, he converted this into a joint account and named Kawalec as a joint owner. A year later, the relationship between H.K. and Kawalec fell apart. H.K. revoked his POA and contacted police to report Kawalec had stolen money from him. Kawalec was charged with two counts of theft by bailee, she was sentenced to two years of probation and ordered to pay restitution. Kawalec moved for a new trial, arguing ineffective assistance of counsel.

Since trial, Kawalec has argued that the prosecution failed to account for her status as joint owner of the account under Wis. Stat § 705.03. The state prosecuted Kawalec under the theory that she was a bailee and had fiduciary obligations not to engage in self-dealing. Under the language of Wis. Stat. § 943.20 (1)(b), the State was required to prove four elements beyond a reasonable doubt:

1. The defendant had possession of money belonging to another because of her status as a bailee,
2. The defendant intentionally used the money without the owner's consent and contrary to the defendant's authority,
3. The defendant knew that the use of money was without the owner's consent and was contrary to the defendant's authority, and
4. The defendant intended to convert the money for her own use or the use of another person.

Under Wis. Stat. § 705.03, the owner of a joint account can make withdrawals "[u]nless there is clear and convincing evidence of a different intent." The statute creates a presumption that putting funds into a joint account shows a donative intent, i.e. that the funds are intended for use by all joint owners. Kawalec argues that this statute therefore changes the requirements of the prosecution for theft by bailee and that this presumption should have applied in her criminal case. The court of appeals disagreed and noted that under the criminal statute, "property of another" included property which was jointly owned. The court found that the state did not have the burden to prove this additional element which was not present in the criminal statute.

The court also found that Kawalac failed to establish that she received ineffective assistance of counsel. The defense counsel was not deficient for failing to pursue arguments and testimony regarding donative intent or to believe that a defendant can be prosecuted for theft involving jointly owned property. Kawalac also argues that the jury instruction should not have included language stating "[a] person who acts as a power of attorney is a bailee" as it lessens the state's burden on this element. The court agreed, however, found the error was not prejudicial as the record clearly established, she was acting as a bailee due to being the POA agent.

Title: *Roppe v. Roppe*
Court: Cir. Ct. No. 2017CV36, Court of Appeals, District III
Date: July 9, 2019
Citation: 2018AP1116 (unpublished)

Case Summary:
This is an appeal from a Washburn County Circuit Court judgment. After being diagnosed with terminal cancer, Brent Roppe executed a financial power of attorney (POA) and named his sister-in-law, Jeanette Colbert-Roppe, as his agent. In this capacity, she executed a quit claim deed transferring ownership of his home to Jon Roppe, who was Brent's brother and Jeanette's husband. Brent later sued Jon and Jeanette asserting theft by fraud. The circuit court concluded that execution of the quit claim deed violated Wis. Stat. § 244.41(1)(b) and the terms of the POA. The court concluded that Jon and Jeanette committed theft by fraud. The court rescinded the quit claim deed and awarded the estate damages, including $25,000 for emotional distress.

Case Details:
In December 2016, Brent was diagnosed with terminal lung cancer. Soon after, he visited his brother and sister-in-law at their home in Arizona and signed the POA while in Arizona. He named Jeanette as agent and granted her the authority to "sell...quit claim...or otherwise dispose of an interest in real property." The POA however also provided:

> *"Limitations on Powers: My agent shall not exercise any of the powers for my Agent's own benefit or in satisfaction of a legal obligation of my Agent except and unless specifically provided for above."*

Brent testified during a video deposition that Jeanette pleaded with him to execute the POA and that she told him he could tear it up at "any time" and it "would be no good anymore." He testified she also promised to return to Wisconsin to help him "get through this death." Brent testified that he told them he wanted all of his property to go to his son, Ryan. The parties soon after had a falling out. Brent testified that he told Jeanette he was tearing up the POA and according to her representation to him, he believed this was sufficient to revoke his POA.

On February 1st, 2017, Jeanette used her authority as agent to execute a quit claim deed transferring ownership of the property to her husband, Jon. Brent testified that he first learned of this on February 17th or 18th. He testified this property was always supposed to go to his son. Testimony indicated Brent was very upset when he learned about what had occurred. On February 27, 2017, Brent executed a document formally revoking the POA and commenced this lawsuit. Brent passed away on June 12, 2017, and the Estate was substituted as plaintiff.

The Estate argued that 1.) the quit claim deed was invalid because Brent revoked the POA before the date of the deed; and 2.) the quit claim deed violated the POA document and Wis. Stat. § 244.41(1)(b). The circuit court agreed. The circuit court refused to hear evidence outside of the POA document since there was no ambiguity in the POA and therefore Jeanette did not have authority to transfer the property.

A bench trial occurred on the theft-by-fraud claim. Jon and Jeanette argued they did not have the intent to steal because Brent gave them repeated express consent to transfer the property to Jon. Testimony included a witness from a dinner party who heard Brent say he wanted to transfer the property to Jon and Jeanette. Evidence also included a contract signed on January 3, 2017. The contract indicated that Brent agreed to transfer the property to Jon and Jeanette so they could take over the home loan and save the property from going into foreclosure. Brent's name was handwritten but not signed on the contract. The contracted was signed by a notary and two witnesses. However, Brent testified at a deposition that he had never seen the contract and the signature was not his. The circuit court found the Estate established the elements of their theft-by-fraud claim and entered a judgment.

In *Praefke v. American Enterprise Life Insurance Co.,*

2002 WI App 235, 257 Wis. 2d 637, 655 N.W.2d 456, the court established a "bright-line rule" that an agent under a POA may not make gratuitous transfers of the principal's assets to him or herself unless the POA expressly and unambiguously grants that authority. Extrinsic evidence of the principal's intent to allow gifts is not admissible. This POA clearly states the agent cannot exercise powers for their benefit unless specifically provided for. There is no other provision which would allow the agent to transfer property to herself.

To prove a civil theft-by-fraud claim, six elements must be demonstrated:

1. False representation made to owner of the property,
2. Defendant knew the representation was false,
3. Representation was made with intent to deceive and defraud,
4. Title was obtained as a result of the false representation,
5. Owner was deceived by the representation,
6. Owner was defrauded by the representation.

There was sufficient testimony to show that Brent believed he could tear up the POA at any time to revoke it and that Jeanette would no longer have authority. Brent told the agent he did this, yet Jeanette continued to act.

The court of appeals agreed that the circuit court correctly concluded the execution of the quit claim deed violated Wis. Stat. § 244.41(1)(b) and that the property should be returned to the Estate. The court also agreed that expert testimony was not required to recover damages for emotional distress. Lastly, the court of appeals agreed there was sufficient evidence for the circuit court to find that there was civil theft by fraud under Wis. Stats. §§ 895.446 (1), 943.20(1)(d).

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 also 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 Free Legal Answers website where members of the public can ask volunteer attorneys legal questions. The State Bar of Wisconsin also offers a Modest Means Program for people with lower income levels. The legal services are not free but are offered at a reduced rate. Income qualifications must be met to qualify. For more information, visit the state bar's website or call **800-362-9082.**

Can a guardian of the person make funeral arrangements including cremation after their ward has passed away? Does the funeral home have any liability if a family member later comes and contests the guardian's decisions?

The duties of a guardian of the person end upon the death of the ward. However, Wis. Stat. § 154.30(2) lists an order of priority as to who can make funeral arrangements after a ward has passed away. Ideally, the individual completed an advance directive called an Authorization for Final Disposition. In this document, they can name a representative to carry out their wishes regarding funeral arrangements. This document must have been completed when they were of sound mind. The state form can be found on the Department of Health Services website.

Under the statute, the order of priority for who makes funeral arrangements is as follows:

- Representative named in the Authorization for Final Disposition
- Surviving spouse
- Surviving child(ren)
- Surviving parent(s)
- Surviving sibling(s)
- Other kin
- The guardian of the person
- Any other individual who is willing and who attests in writing to making a good-faith effort, to no avail, to contact the above individuals.

Control over final disposition includes the authority to make decisions regarding a viewing, funeral ceremony, memorial service, last rite or to have a burial, cremation or donation of the decedent's body.

A funeral home may be reluctant to follow the guardian's instructions for fear that family may resurface and contest the cremation or arrangements that were made. There is a provision within Wis. Stat. § 154.30(5)(e) that addresses their liability. Unless the funeral director, crematory or cemetery authority receives written notice from someone claiming higher priority, they can rely in good faith on the instructions of another who first claims authority. There would not be any criminal or civil liability, nor would they be found guilty of unprofessional conduct if acting in good faith.

Guardians should always check to see if there are any local rules which prohibit them from making funeral arrangements.

When can an individual without a Power of Attorney for Health Care or guardian be admitted to hospice care?

Since Wisconsin is not a next of kin state, to make decisions for another, the individual must have an advance directive such as a Power of Attorney Health Care (POA-HC) or a court appointed guardian. However, there are some very limited exceptions to this rule. The hospice exception applies when the individual does not have a POA-HC or Living Will and has not been determined incompetent. The individual responsible for admission will need to sign on behalf of the incapacitated person and indicate they believe they would have elected hospice care. A physician must certify the individual is acting in accordance with the views/beliefs of the person.

Individuals can admit in the following priority:

- Spouse/domestic partner
- Adult child
- Parent
- Adult sibling
- Close friend or relative who has had sufficient contact and who is familiar with their beliefs
- Close friend or relative who has shown special care and concern

This individual can make all health care decisions related to the receipt of hospice care. The person who is incapacitated can object or revoke the hospice election. If anyone in the above section disagrees, they can apply for temporary guardianship and must show the incapacitated person would not have elected hospice care. Two physicians must determine the person is incapacitated.

Interested in Receiving *The Guardian?*

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

Signing up is easy with a link on our website: Guardian Newsletter Sign-Up.

You can also subscribe by emailing your name, email address, and organization to guardian@gwaar.org.

Points of Interest

Senior Lawyers Visitation Project Seeks Attorney Volunteers

There are over 4,500 in-state members of the State Bar who are 60-69 years of age, and another 3,000 that are 70+ years of age. The Senior Lawyers Division is connecting lawyers who are confined to nursing homes, hospitals, or their own homes, with a volunteer attorney visitor. Volunteers control the length and frequency of visits and are not caregivers. The project is also seeking information on lawyers who may like to receive a visit from a fellow lawyer.

If you are an attorney and you would like to volunteer to visit a lawyer in your area, or want to provide information on someone who would like a visitor, please email Myron LaRowe, Chairman of the initiative, at melarowe@me.com.

New Data Highlights the Long-Term Care Ombudsman Program's Legacy

The Administration for Community Living (ACL) posted new data on the Long-Term Care Ombudsman program's fiscal impact in 2017. The Ombudsman program enters its 40th year as a mandatory program of the Older Americans Act. More than 200,000 complaints were processed annually on issues such as discharge, eviction, inadequate care, violation of rights and quality of care. Ombudsman programs regularly visit 60% of all nursing homes and 30% of other residential care facilities. In fiscal year 2017, volunteers contributed 591,363 hours, the estimated equivalent of over $14 million, to Ombudsman programs. To read more, click here.

U.S. Senate Special Commission on Aging Holds Hearing on Senior Scams

The hearing examined the progress of federal, state, and local law enforcement to coordinate efforts to combat elder fraud and the steps needed to enhance that coordination. It also highlighted the need for continued action to fight fraud, including the ever-increasing number of nuisance robocalls. The committee also released its 2019 Fraud Book with information on the top 10 most common scams reported in 2018 to its Fraud Hotline (1-855-303-9470) and tips on ways to protect from scams.

Electronic Visit Verification for Medicaid Personal Care Services

Federal law requires all states to start using Electronic Visit Verification (EVV) for personal care services that are funded by Medicaid. This will start in 2020 and will move forward in stages. EVV uses technology to record who provided care, who received care, and when the visit began and ended. Workers can use a mobile phone app, landline phone or EVV digital device. For more information visit: https://www.dhs.wisconsin.gov/publications/p02462.pdf.

Points of Interest

Wisconsin Supreme Court Will Review Dangerousness Standard Under Ch. 51

A petition for review in Marathon County v. D.K., 2017AP2217 was granted on July 10, 2019. The court of appeals upheld D.K.'s commitment. The Supreme Court has agreed to decide whether the testimony of the examining physician who was the sole witness in the trial was sufficient to meet the "clear and convincing" standard to find there was a "substantial probability" that D.K. was dangerous. The doctor testified to a possibility of dangerousness and labeled D.K. as "potentially dangerous." The Supreme Court will review if this meets the statutory standards. For more information click here. The Supreme Court will also review Langlade County v. D.J.W., 2018AP145FT which involves the dangerousness standard for recommitment.

Attorney General Kaul Launches Abuse in Later Life Program

The Abuse in Later Life Program, which partners with law enforcement, prosecutors, judges, victim services, culturally specific community programs, aging network professionals, faith-based programs, and adult protective services, will provide training and funding for victim services, and establish a coordinated community response to elder abuse. The program will also include establishing and enhancing Coordinated Community Response Teams in pilot communities which includes Door County, the City of Milwaukee, Outagamie County and the Oneida Nation of Wisconsin. Each of these communities will host training on elder abuse in September and October 2019. Learn more here.

News

Michigan's Guardianship System: The Fortress, Five-Part Investigation

Read more about the issues, fraud, and abuse alleged in this investigation surrounding Michigan's guardianship process, with a focus on Oakland County. Read the investigation here.

FamilyCare MCOs change in the Bay Area

The Wisconsin Department of Health Services (DHS) announced on August 8 that Inclusa and Lakeland Care managed care organizations (MCO) have been selected to provide the Family Care program in Brown, Door, Kewaunee, Marinette, Menominee, Oconto, and Shawano counties beginning January 1, 2020. Incumbent managed care organization Care Wisconsin will no longer provide the program in those counties after December 31, 2019.

Care Wisconsin will continue to provide services through the end of the year. Members do not need to take any immediate action. In the months leading up to the January 2020 transition, Care Wisconsin members will receive one-on-one counseling from either an Aging and Disability Resource Center or a Tribal Aging and Disability Resource Specialist to make informed decisions about their future services.

For more information, see the DHS website's page on FamilyCare or the news release available here: https://www.dhs.wisconsin.gov/news/releases/080819.htm.

Medicare Nursing Home Eligibility Class-Action Suit

Hospitals often admit and keep patients under "observation status" for several days before they are discharged to a skilled nursing facility. The "observation status" is considered an outpatient service, which does not qualify the individual for Medicare nursing home coverage. The claims are then disputed which results in patients being responsible for unexpected medical expenses. This lawsuit, first filed in 2011 by seven Medicare "observation status" patients, seeks to change Medicare disputes involving observation claims so they can be appealed. Find more information here.

Governor Evers' Task Force to Reduce Prescription Drug Prices

On August 20, 2019, Governor Evers signed Executive Order #39 to form a task force to address prescription drug prices and the burden placed upon Wisconsin residents. The Wisconsin Aging Advocacy Network (WAAN) "strongly supports" this initiative, citing that "nearly 1 in 4 older adults indicate it is difficult to afford their prescription medications." Read WAAN's press release and the Executive Order.

End of Legal Fight Between Buzz Aldrin and His Kids

The former astronaut sued two of his three children after they filed a petition in a Florida court. Their petition cited concerns around their fathers' cognitive function, individuals he was associating with, and his handling of finances. The lawsuit has since been dropped, so the family may resolve the concerns privately. NBC Montana News provides more information.

Kenosha County, WI: Handyman Alleged to Have Exploited 75-Year-Old Woman

Andrew Wade was hired by a 75-year-old single woman to provide handyman services at her home. He was then asked to watch over her home while she recovered from heart surgery. Per the criminal complaint, Wade visited the woman in the rehabilitation center, promising to take care of her finances and home, and allowing her to reside in the home through the remainder of her life if she transferred ownership to him. Power of attorney for finance and documents to transfer the home were signed while the woman was recovering in the facility. Upon her recovery and release, the woman was unable to live in her home, and her bank account was cleaned out. Wade appeared in court earlier this year on charges of felony theft, obstructing police, and false swearing. Read more here.

Upcoming Events and Noteworthy Dates That May Be of Interest:

- 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
- AIRS Conference, November 7th- 8th, Tundra Lodge, Green Bay
- FOCUS Conference, November 20th-21st , Kalahari Convention Center

Capacity and Execution of Powers of Attorney

The Guardian Support Center (GSC) frequently receives calls about capacity in the context of Powers of Attorney (POA). We commonly get questions about the capacity needed to execute a POA as well as the ability to execute POAs after incapacity. This article is meant to provide further details on these issues.

Is an individual automatically precluded from executing a Power of Attorney for Finance (POA-F) after their Power of Attorney for Health Care (POA-HC) has been activated due to incapacity?

No. Whether an individual has the capacity to understand and sign a document will depend on that specific person and their circumstances. When an individual has a POA-HC activated upon incapacity, this means that two physicians, or one physician and one psychologist, have conducted a personal examination and determined they are unable to "receive and evaluate information effectively or to communicate decisions to such an extent" that they lack capacity to manage "health care decisions." Wis. Stat. § 155.01(8). This is not an automatic determination that an individual is unable to make financial decisions or access and manage their funds or assets.

Everyone over age 18 is presumed competent, unless shown otherwise. To execute a POA-F, the individual must be able to give "legally operative consent." The test for this is whether they have sufficient mental ability to know what they are doing, and the nature of the act done. In other words, do they understand the document and any benefits and consequences? Consideration of the complexity of the estate and the need for the POA-F could also be a factor. For example, an individual might not have the capacity to understand complex financial management and investment, however, they might be able to name an agent to manage their assets, establish a trust or to collect financial information for a Medicaid application.

Activation of a POA-F is different. Many individuals draft a POA-F that becomes active once they sign the document without any other activation procedure. Some individuals, however, want their POA-F active only if they become incapacitated. In this case, the POA-F document must include specific language and instructions on how that document is activated. If incapacity is not further defined, then under Wis. Stat. § 244.02(7)(a), it means "an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance." This is determined by one physician or one psychologist. This is a separate incapacity determination than what is done to activate a POA-HC. **The certification of incapacity for health care decisions cannot be used to deprive an individual of making their own financial decisions or accessing their accounts.**

The principal also has the right to request information from their agent. If the principal requests the agent to disclose receipts, disbursements or transactions, then the agent is required to provide this information within 30 days or show why an additional 30 days is needed. Wis. Stat. § 244.14.

Careful execution should be conducted when there is a question of capacity. Although a doctor's opinion is not required, it could help determine if the individual can understand the document. A POA-F is technically not required to be witnessed or notarized; however, it is highly recommended that it be notarized. In

Capacity and Execution of Powers of Attorney, continued

addition, a person could also secure two witnesses to the execution to further document the person had a full understanding of the document and was doing so voluntarily. Consultation with a private attorney is recommended when there is a question of incapacity.

If an individual agrees they need help managing their finances, but they want court oversight, they can also petition the court to appoint a conservator. There is no determination of incompetency in a conservatorship proceeding. It is a completely voluntary process.

If an individual no longer can execute a POA-F, and there are no other alternatives that are sufficient such as a trust, representative payee, authorized representative and/or release forms, then petitioning for guardianship of the estate might be necessary.

If a Power of Attorney for Health-Care (POA-HC) has been activated, can the principal execute a new POA-HC?

Any individual over age 18 that is of sound mind can execute a POA-HC. The only time someone is presumed not to be of sound mind is if they have a court-appointed guardian of the person. Wis. Stat. § 155.05(1). In certain cases, an individual could have an activated POA-HC yet still be of sound mind to understand and execute a POA-HC. The capacity to make health care decisions is a different standard than the capacity to execute a POA-HC. The mere fact that an individual cannot make health care decisions does not automatically mean they are not of sound mind to understand a POA document.

What does sound mind mean?

Whether or not someone is of sound mind is a case by case determination. This is a judgment call of the two disinterested witnesses. Perfect memory is not required, and a period of lucidity could potentially be enough for the principal to be of sound mind. Sound mind is not defined in the statutes, but based on related case law, it means the principal must understand the general nature of the document, the powers the document will convey, and those it will not, and the rights and limitations of the document.

A witness cannot be a relative, health care provider (unless they are the chaplain or social worker), the agent or anyone that has a legal interest in the estate or is responsible for payment of health care. An opinion by a doctor or psychologist is not required, however, it could be helpful when there is a question of capacity. Whenever capacity is an issue, caution should be used, and careful execution should be conducted. Consultation with a private attorney is recommended. If an individual is no longer of sound mind and there is an issue with the POA-HC, i.e. it was not witnessed properly, then a guardianship may be necessary.

Frequently, the GSC receives inquiries regarding a principal who wants to switch the order of their primary and alternate agent, change who the agent is, or decide to check “yes” to the box for admission to a nursing home or community based residential facility. An individual might be able to clearly understand and express that they want to switch the order of their agents yet be unable to make complex medical decisions. It is necessary to draft a new POA to make these changes.

Capacity and Execution of Powers of Attorney, continued

What is deactivation?

Deactivation of a document is not required before a new POA-HC has been completed. If an individual has regained the capacity to make health care decisions it is a best practice to deactivate the POA. Although not required, it is certainly clearer that someone can execute a new POA-HC document if their prior document has been deactivated. There is no required formal process for deactivation in the statutes; however, we recommend the use of two doctors, or one doctor and one psychologist, to evaluate the individual and certify they are again able to make their own health care decisions.

If the document has been activated and they create a new POA-HC document, the new document will also have to be activated. The old certification of incapacity cannot be used to activate the new document. Unless otherwise specified, there must be a personal examination by two physicians, or a physician and a psychologist, to certify an individual is unable to make their own health care decisions. This document should then be attached to the POA-HC document.

When can the principal revoke their POA document?

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 witnesses, 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.

Where can I find more information?

The American Bar Association (ABA) has a publication titled "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers" and "The Ten Commandments of Mental 'Capacity' and the Law." The ABA also has a PRACTICAL guide that helps attorneys identify and implement decision making options for persons with disabilities that are less restrictive than guardianship. These resources, and more, can be found at the ABA's website here.

The National Center on Law and Elder Rights also has free webinars and publications on their website here. You can also visit our website, where we have numerous publications on POAs, guardianship and Supported Decision-Making.

Domestic Violence Later in Life

October is National Domestic Violence Awareness Month. As the percentage of older Americans increases, the number of older adults experiencing abuse later in life is also on the increase. Oftentimes power and control dynamics are present; however, some cases involve unintentional harm due to caregiver stress.

Overview of the issue

Domestic violence is present throughout adult life, occurring around the world, regardless of race, religion, economics, ethnicity, or cultural background. Typically, women are victims of domestic violence; however, older men are victims as well.

Many times, domestic violence and elder abuse co-exist.

The Administration for Community Living (ACL) defines domestic violence, also known as intimate partner violence as "...physical violence, sexual violence, stalking, and psychological aggression (including coercive acts) by a current or former intimate partner."

The National Clearinghouse on Abuse in Later Life (NCALL) defines abuse in later life as "...the willful abuse, neglect, abandonment, or financial exploitation of an older adult who is age 50+ by someone in an ongoing, trust-based relationship (i.e., spouse, partner, family member, or caregiver) with the victim."

With the co-existence of domestic violence later in life and elder abuse, the ACL encourages domestic violence and aging networks to "...maximize the capacity of both systems by partnering to meet older victims' unique needs."

Definitions

National Clearinghouse on Abuse in Later Life (NCALL), *Abuse in later life*: "The willful abuse, neglect, abandonment, or financial exploitation of an older adult who is age 50+ by someone in an ongoing, trust-based relationship (i.e., spouse, partner, family member, or caregiver) with the victim. NCALL also considers sexual abuse of an older adult by anyone (including strangers) to be abuse in later life. [NCALL's] definition of abuse in later life does not include other types of abuse committed by strangers, or self-neglect. With these considerations in mind, NCALL's definition of abuse in later life intentionally calls attention to the nexus between domestic violence, sexual assault, and elder abuse."

Administration for Community Living, *Domestic violence*: "Domestic violence, also called intimate partner violence, describes physical violence, sexual violence, stalking, and psychological aggression (including coercive acts) by a current or former intimate partner. It can occur across the lifespan to victims of all ages, including older adults."

The United States Department of Justice, *Domestic Violence*: "Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with

Domestic Violence Later in Life, continued

whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction."

The United States Department of Justice, Elder Justice Initiative, *Elder Abuse*: "Elder abuse is an intentional or negligent act by any person that causes harm or a serious risk of harm to an older adult. It is a term used to describe five subtypes of elder abuse: physical abuse, financial fraud, scams and exploitation, caregiver neglect and abandonment, psychological abuse, and sexual abuse."

Statistics

Intimate Partner Violence in late Life: An Analysis of National News Reports[1]

- Of the 7,450,260 IPV victimizations against women recorded between 1993 and 1999, 118,000 (2%) victimizations (i.e., assault, intimidation, homicide, and forcible sex offense) were committed against women aged 55 and older (National Crime Victimization Survey as cited in Rennison & Rand, 2003).
- The National Crime Victimization Survey estimated that 671,110 women over the age of 65 were abused by an intimate partner in 1999 and accounted for 21% of victims of homicide committed by an intimate partner (Rennison, 2001).
- One type of IPV, murder-suicide, is rare in the general population, but is found at higher rates among older adults than younger or middle-aged adults.

National Coalition Against Domestic Violence[2]

1. Every year, approximately 4 million older Americans are victims of physical, psychological and/or other forms of abuse and neglect.
2. Older adults who require assistance with daily life activities are at increased risk of being emotionally abused or financially exploited.
3. Approximately 50% of older adults with dementia are mistreated or abused.
4. An estimated 13.5% of older adults have suffered emotional abuse since the age of 60.
5. Victims of elder financial abuse lost an estimated $2.9 billion in 2011.
6. 76.1% of physical abuse toward older adults is perpetrated by a family member.
7. A majority of elder sexual abuse cases involve female victims and male perpetrators.
8. Only 1 out of every 24 cases of elder abuse is reported.
9. Only 15.5% of elder sexual abuse is reported to police.

The United States Department of Justice[3]

- In the United States it is estimated that over 10% of those age 65 and older experience some form of elder abuse in a given year.

[1] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3641680/#R21
[2] https://ncadv.org/blog/posts/quick-guide-domestic-abuse-in-later-life
[3] https://www.justice.gov/elderjustice/about-elder-abuse

Domestic Violence Later in Life
Articles and Resources

Articles

US National Library of Medicine, National Institutes of Health: Intimate partner Violence in Late Life: An Analysis of National News Reports
NCALL: An Overview of Elder Abuse: A Growing Problem
VAWnet: Elder Abuse: A Growing Problem
U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Criminal Victimization, 2017
Administration for Community Living: Late Life Domestic Violence

Resources

National Domestic Violence Hotline: 1-800-799-7233 or TTY 1-800-787-3224
Rape, Abuse, and Incest National Network: 1-800-656-4673 (HOPE)
National Clearinghouse on Abuse in Later Life

- Safety Planning Tips
- Am I being Harmed?
- Dynamics

Guardianship: Involvement of Family and the Exercise of Rights

For a multitude of reasons, a corporate or volunteer guardian may be appointed by the court instead of a family member. In that instance, what is the role or duty of the guardian to include the family in conversations and decisions regarding the individual under guardianship and what guidance is available to guardians on this issue?[1]

In first selecting a guardian, the court must consider the opinion of the proposed ward and their family as to what is in the best interests of the ward. The best interests of the proposed ward are what controls in appointing a guardian. However, the court is not required to abide by what the proposed ward or the family wants. This can lead to a contentious start if the family and ward are not in agreement with a corporate or volunteer guardian being appointed.

Even if an individual is under a guardianship, they still retain certain statutory and constitutional rights. This includes the right to free speech, freedom of association and the free exercise of religious expression.[2] This can sometimes come in conflict with the guardian's authority to make decisions in areas of mobility, travel, and to have custody of the individual. These terms are not further defined in the statutes, so it can leave it unclear just exactly what they mean and the extent of the guardian's authority when placing limitation in those areas. In exercising their duties, the guardian of the person is required to balance the protection of the individual with the individual's exercise of their rights. Fortunately, the guardianship statutes do provide some guidance in this area.

The guardian is required to exercise their powers and duties to meet the individual's essential requirements for health and safety and to protect the individual from abuse, exploitation, and neglect.[3] In doing this, they must place the least possible restriction on the individual's liberty and rights while promoting the greatest integration into the community. The guardian must make diligent efforts to identify and honor the ward's preferences concerning their choice of living, personal liberty, mobility, choice of associates, communication, privacy and sexuality. This means if the ward wants their family involved or wants to have regular unrestricted communication and visits with their family, and the guardian does not believe it is in the ward's best interest, the guardian needs to be conducting this analysis as required by law.

To make a decision that the ward does not agree with, the guardian must have considered the ward's understanding of the nature and consequences of the decision, the level of risk involved, the value of the opportunity for the individual to develop decision-making skills and their need for wider experience.[4] An individual under guardianship also has the right to petition the court to have their guardianship reviewed to determine if some rights can be restored or if the guardianship can be terminated.[5] Along with the right to have their guardianship reviewed, the individual under guardianship also has the right to have an attorney appointed for them.

[1] Wis. Stat. § 54.15(1)
[2] Wis. Stat. § 54.25(2)(b)7
[3] Wis. Stat § 54.25(2)(d)3
[4] Id.
[5] Wis. Stat. § 54.64

Guardianship: Involvement of Family and the Exercise of Rights, continued

The Wisconsin Guardianship Association (WGA) and National Guardianship Association (NGA) provide a Standards of Practice publication to provide guidance for corporate and independent guardians.[6] The guardian is encouraged to "promote social interactions and meaningful relationships consistent with the preferences of the person under guardianship" which includes promoting contact with family and friends "unless it would substantially harm the person."[7]

WGA's Standard 4 further provides that:

- The guardian shall make reasonable efforts to maintain the person's established social and support networks during the person's brief absences from the primary residence.
- When disposing of the person's assets, the guardian may notify family members and friends and give them the opportunity, with court approval, to obtain assets (particularly those with sentimental value).
- The guardian shall make reasonable efforts to preserve property designated in the person's Will and other estate planning devices executed by the person.
- The guardian may maintain communication with the person's family and friends regarding significant occurrences that affect the person when that communication would benefit the person.
- The guardian may keep immediate family members and friends advised of all pertinent medical issues when doing so would benefit the person. The guardian may request and consider family input when making medical decisions.

The guardian is also required to keep information on the person under guardianship confidential and the individual under guardianship, rightfully so, should expect their information to remain confidential. The guardian does however have the authority to release confidential records and redisclose these records as they see appropriate.[8] A guardian has discretion and is not required to disclose confidential information or involve family if they do not feel it is in the best interest of the person under guardianship.

If visitation or communication is being unreasonably restricted, the family could consider filing a Petition for Review of Conduct of Guardian[9] with the circuit court. They could also file a petition for a visitation order under Wis. Stat. § 50.085. Family members can file when their family is a resident of a facility, including a hospital, hospice, nursing home, community-based residential facility, or any home or residential dwelling where they are receiving care and services. A visitation order could include an order for an in-person meeting or any communication over the phone or in written or electronic form. The court will consider if the resident has expressed a desire not to have visitations and whether the visitations would be in their best interest.

[6] https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf
[7] http://www.wisconsinguardianshipassociation.com/information-training.php
[8] Wis. Stat. § 54.25(2)(d)2.f
[9] Form GN-3670, Wis. Stat. § 54.68

Guardianship: Involvement of Family and the Exercise of Rights, continued

Supported Decision-Making (SDM) can also be used as a tool to support the preferences, wishes, and decisions of an individual under guardianship in areas where they have retained rights. SDM allows an individual with a functional impairment to pick a Supporter of their choice to help them communicate decisions, gather information, and make informed decisions. This formalizes their decision that they want a certain person to remain involved to help them. Wisconsin now has a state form which can be found on the Department of Health Services website. If you would like further information on SDM, a webcast is available online.

Where can I find more information?

To find more information on this topic, please visit our website where we have a multitude of publications including "Supported Decision-Making," "Rights of a Ward," "Asking the Court to Review the Conduct of a Guardian," "How to Ask the Court to Change or End Your Guardianship," and "Transitioning to Adulthood." The Department of Health Services also has a guardianship publication entitled "Guardianship of Adults."