



*The Guardian* is a quarterly newsletter published by the Greater Wisconsin Agency on Aging Resources' (GWAAR) Wisconsin Guardianship Support Center (GSC).

The GSC provides information and assistance on issues related to guardianship, protective placement, advance directives, and more.

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**Title:** *Waupaca County v. K.E.K.*

**Court:** Court of Appeals, District IV

**Date:** September 26, 2019

**Citation:** 2018AP1887 (not recommended for publication)

### Case Summary:

K.E.K. appealed both the court's competency to proceed given the untimeliness of the county's petition for recommitment and the circuit court's finding that she was a proper subject for commitment. The court of appeals affirmed on both counts.

### Case Details:

In December 2017, the Waupaca County circuit court entered an order committing K.E.K. for six months. In May 2018, the county filed a petition to extend her commitment for another year. However, Wisconsin statutes require that an extension petition be filed at least 21 days before the original commitment expires, and Waupaca County missed this deadline – the petition was filed 17 days before the expiration of the original order. Although the county conceded they had missed the deadline, the court nonetheless denied K.E.K.'s motion to dismiss. The court ultimately found that she met the standard for recommitment and ordered the twelve-month extension.

On appeal, K.E.K. argued that the timeframe for the petition for recommitment is mandatory (the petitioner "shall file" the recommitment petition within 21 days), and that failure to meet this timeframe deprived the court of competency to proceed. See Wis. Stat. § 51.20(13)(g)2r. The county argued, however, that the same statutory subdivision also provides that failure to file the petition for recommitment "does not affect the jurisdiction of the court over a petition for recommitment," and that preservation of jurisdiction would have no meaning if the court were to lose competency to do anything pursuant to that preserved jurisdiction.

The Court of Appeals agreed, citing *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 73. The court in *Booth* noted that while subject matter jurisdiction is conferred by the Wisconsin Constitution and may not be curtailed, the legislature may curtail the courts' competency to exercise jurisdiction. Following this argument, the Court of Appeals found that the clause regarding the court's retention of jurisdiction could not mean to address whether the court retained subject matter jurisdiction, but rather whether it was able to act on that jurisdiction. The court concluded that the legislature must have meant that the court would still be able to act even if the county's petition was untimely.

K.E.K. also appealed the finding that she was a "proper subject for commitment" and that the dangerousness standard had been met for recommitment. She argued that substantive due process requires a determination of *current* dangerousness, as distinct from a determination that there is a risk of future dangerousness or dangerousness contingent on events that have not yet come to pass.

The Court of Appeals agreed that an individual who is currently undergoing treatment often would not meet the dangerous standards of an initial commitment because they are being successfully treated. It also agreed that the recommitment standard does not require proof of recent acts of dangerousness. However, the court also found that the standard could be met by evidence showing that without treatment, the individual would once again become dangerous, citing a recent Supreme Court decision in *Portage Cty. v. J.W.K.*, 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509 (describing the recommitment standard as an alternate evidentiary path to establish that behaviors and acts manifesting dangerousness would be exhibited if treatment were withdrawn). Accordingly, the court rejected this argument as well and affirmed the recommitment order.

(Continued on page 3)





(K.E.K., continued from page 2)

K.E.K. has petitioned the Supreme Court for review in this case; however, that petition is on hold pending a decision in *Winnebago Cty v. C.S.*, which we outlined in the June 2019 edition of *The Guardian*.

**Title:** *Marathon County v. P.X.*

**Court:** Court of Appeals, District III

**Date:** June 26, 2018

**Citation:** 2017AP1497

**Case Summary:** Since 2012, P.X. has been under continual involuntary commitment and involuntary medication orders. Marathon County filed for an extension of that commitment earlier this year. The circuit court granted that extension, but P.X. appealed, contending that he was not a proper subject for commitment. However, the Court of Appeals, in an opinion by Presiding Judge Stark, rejected his argument and affirmed the circuit court.

**Case Details:** P.X. was first placed under involuntary commitment in 2012 due to his autism, intellectual and developmental disability, obsessive compulsive disorder, and pica. The County filed for its fifth extension and a hearing was held on March 10, 2017.

The only issue at the hearing was whether P.X. was capable of rehabilitation and, therefore, was a proper subject for treatment. Only two witnesses testified at the hearing. First, a psychiatrist, testified that P.X. was capable of rehabilitation because he could be chemically restrained and the medication could control his behavior. However, the psychiatrist also explained that P.X.'s intellectual disability, obsessive compulsive disorder, and autism "all combine to make treatment very difficult."

Next, a psychologist testified that the intellectual disability would remain unchanged but his other

conditions could be controlled. The psychologist also testified that P.X. had improved under the order because he had been less aggressive, needed fewer medications, and had been more compliant and less destructive. The psychologist testified that the treatment was habilitative, because it kept P.X. safe in a stable environment, but that P.X. was incapable of rehabilitation because he could not gain the requisite intellectual capacity to continue to improve. Based on the evidence, the circuit court found that P.X. was a proper subject for treatment and entered an extension order.

Under Wis. Stat. § 51.20(1)(a)1., (13)(e), the County must prove by clear and convincing evidence that the individual is (1) mentally ill or developmentally disabled, (2) a proper subject for treatment, and (3) dangerous. To be a proper subject for treatment, the individual must be capable of rehabilitation. If the treatment does not help in controlling or improving the disorder, then there is no rehabilitative potential. *See Fond du Lac Cnty. v. Helen E.F.*, 2012 WI 50, ¶ 36, 340 Wis. 2d 500, 814 N.W.2d 179. If the treatment will go to controlling the disorder and its symptoms, then the subject is a proper subject for treatment. *Id.* P.X. argued that his treatment only maximized his functioning and maintenance, but did not control his disorder.

The court disagreed and held that while several aspects of P.X.'s disorders required protective placement (and that he was subject to one), *Helen E.F.* did not disallow simultaneous placement under Ch. 51 and Ch. 55. Finding that the county presented clear and convincing evidence that P.X. was capable of rehabilitation because his pica and his obsessive-compulsive disorder had improved through treatment, the court held that P.X. was a proper subject for treatment. □





## What happens to my voting rights if I am under guardianship?

The right to vote is one of the most fundamental rights under our Constitution. However, a ward may have that right removed if the guardianship court finds that they do not understand the objective of the voting process. Wis. Stat. § 54.25(2)(c)1.g. Once a court has made this finding, the clerk of court is responsible for sending notice of the removal to the appropriate election official and/or the Elections Commission.

If guardianship is terminated or the individual requests that the court review their understanding of the voting process, the right can be restored. Once an order to that effect has been signed, the clerk of courts sends the information to the appropriate election official. Wards whose right to vote has been restored and individuals whose guardianships have been terminated may also request a copy of the order restoring their right to vote to take with them when they register to vote.

*Note:* Guardians may not vote on behalf of their wards. The right to vote belongs only to the individual and may not be exercised by anyone else if the individual has lost the right to vote.

*(Continued on page 5)*

## 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**.



## **My ward is moving from another state to Wisconsin. Is the guardianship still valid? What steps need to be taken to transfer the guardianship?**

Wisconsin, along with a number of other states, has adopted a uniform statute on transferring guardianship across state lines. See Wis. Stat. § 53.32. There are two different options: registration of a “foreign” guardianship, or transfer of the guardianship. Both involve courts in both states. An attorney who is licensed in both states may be helpful in navigating the process, if one is available.

Registration of a foreign guardianship may be appropriate when the guardian needs to make decisions in two states at the same time. For example, a ward might own property in both the state of origin and WI and in order to make decisions or sell property in the other state, the guardianship order would have to be registered. It is also an available option while a transfer is pending, if the move isn't intended to be permanent/long-term, or if the individual has long-term concerns regarding assets or other issues in the originating state.

Registration notifies the state of Wisconsin that the guardianship exists and allows the guardian to continue to exercise any powers under the original guardianship, provided those powers are legal under WI law. The guardian will typically need to notify the court that appointed them of the intent to register the guardianship here. The original state maintains jurisdiction over further actions that may impact the ward or guardian.

Transfer of guardianship allows the originating court to cede venue to Wisconsin and close its guardianship case. The process must start in the state which currently has jurisdiction over the guardianship with a provisional order of transfer from that state.

Once that order has been obtained, the guardian may petition WI to accept the out-of-state guardianship. The petition needs to include the provisional order, as well as a proposed order and sworn statement specifying the powers to be granted in this state, which must be consistent with the order from the originating state. The guardian will have to provide notice to all those that would be entitled to notice in WI and the originating state. The court can hold a hearing if someone requests it or on the court's own request. The court will grant a provisional order accepting the transfer unless someone objects, the proposed powers are significantly expanded, or the guardian is ineligible for appointment in WI. The court will issue a final order in WI once they have received a final order from the originating state transferring the guardianship to WI. There is then a 60-day period to determine if the guardianship in WI needs to be further conformed.

### Overview of steps:

- Obtain provisional order for transfer from state of origin
- Provide notice (GN-3120)
- Petition WI to accept transfer and provisional order (GN-3904)
- Obtain provisional order from WI granting petition (GN-3905)
- File provisional order in state of origin
- Obtain final order in state of origin
- File the final order in WI
- Petition for additional authority in WI if necessary
- Obtain final order from WI (GN-3906)
- Transfer complete, original state can close guardianship case. □







## ***New Medicare Number Requirements Take Effect January 1, 2020***

As of January 1, 2020, all Medicare beneficiaries must use their new, randomized Medicare number to access covered benefits, services, and supplies. Providers must also use the new Medicare cards for all billing of Medicare claims. As of November 15th, only 80% of Medicare claims were being billed using the new Medicare numbers. All claims filed with a Medicare beneficiary's old Medicare number after January 1, 2020, will be automatically denied.

## ***Social Security Updates***

A 1.6% cost of living allowance (COLA) [takes effect](#) on January 1, 2020 for all Social Security beneficiaries. In addition, [starting January 8](#), all SSA field offices will be open Wednesday afternoons. Previously, the offices were closed on Wednesday afternoons so that staff could catch up on paperwork.

## ***Family Care Waiver Renewal Approved***

On November 23, 2019, the Centers for Medicare & Medicaid Services approved Wisconsin's 1915(b) and 1915(c) waiver application renewals. The new waivers are effective from January 1, 2020 to December 31, 2024, and are available on the [Family Care: State and Federal Requirements page](#).

## ***Wisconsin Supreme Court Reviewing Dangerousness Standard Under Ch. 51, Due Process for Ch. 51 Cases***

The Supreme Court recently heard argument in an appeal of *Marathon County v. D.K.*, 2017AP2217, and the case is now pending a decision. The court of appeals upheld D.K.'s commitment. The Supreme Court 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 Supreme Court is also reviewing *Langlade County v. D.J.W.*, 2018AP145-FT which involves the dangerousness standard for recommitment.

The Supreme Court has also agreed to review *Waukesha County v. J.J.H.*, 2018AP168. There [are four issues for review](#); of particular note is the second issue, which asks whether the circuit court violated due process when it held a Ch. 51 probable cause hearing without providing J.J.H. with a sign language interpreter. The case also reviews whether the mootness doctrine applies to commitment orders and due process requirements for a conversion of a mental commitment order to a guardianship/protective services & placement proceeding. Oral arguments for this case are scheduled for February 10, 2020.

## ***National Healthcare Decisions Day—April 16, 2020***

Celebrate [National Healthcare Decisions Day](#) – review your advance planning documents, or create them if you don't have any! Everyone over the age of 18 should plan for the possibility of incapacity. Take the time to discuss your wishes with your agent, family, and friends, and communicate your wishes to your providers.

Wisconsin provides [free basic forms](#) for the following:

- Power of Attorney for Finances and Property
- Power of Attorney for Healthcare
- Declaration to Physicians (aka Living Will)
- Authorization for Final Disposition (burial & funeral arrangements)

These forms don't require an attorney, but an attorney can provide legal advice and counseling for your specific circumstances to make sure your wishes are stated and carried out appropriately. The power of attorney for healthcare must be signed and dated, and must also be signed before two unrelated and disinterested witnesses. While the power of attorney for finances does not technically require witnesses or a notary, many banks and other agencies will not accept it unless it has at least been notarized. If you choose to complete your documents on your own, many banks, post offices, etc. may have notaries on staff who can help. ☐





### ***Guardianship Support Center Welcomes New Attorney***

GWAAR welcomes its newest addition to the Guardianship Support Center, Attorney Polly Shoemaker, who joined us in November 2019 as the GSC's Managing Attorney. Originally from Colorado, Polly received her undergraduate degrees from Lawrence University and her law degree from the University of Wisconsin Law School. For the past 4 years, Polly has worked as a staff attorney at ABC for Health, a non-profit organization in Madison dedicated to helping individuals access health care coverage and benefits. Polly represented both older adults and children with special healthcare needs with Medicaid applications and appeals of inappropriate denials from administrative hearings to appellate work. Polly has a passion for legal writing, systems advocacy, and doing volunteer work for underrepresented groups; she is a board member of Trans Law Help Wisconsin. In her spare time, Polly is an avid knitter and helps coordinate the country's largest knitters' guild. She also plays for the Middleton Community Orchestra. GWAAR is excited to have Polly on the team!

### ***Fading Away: Wisconsin's Dementia Crisis***

In November, the Wisconsin State Journal featured [a series of articles](#) on the growing challenge of caring for Wisconsin residents with dementia, particularly in areas of the state facing shortages of caregivers and available services. The Wisconsin State Journal has also produced a [podcast](#) following up on the article series.

### ***Helping Older Adults Help Themselves: The Provision of Aging Services in Wisconsin***

The Wisconsin Counties Association's [December 2019](#) magazine features articles, photos, and maps relating to concerns about aging throughout Wisconsin and efforts to provide services to meet the needs of older adults. The articles include the following:

- *County Aging Services*—Cindy Piotrowski, Director, Aging & Disability Resource Center, Portage County
- *Working to Protect Wisconsin's Seniors*—Senator Testin & Representative Macco, Wisconsin State Legislature
- *Helping Older Adults Help Themselves*—Kris Krasnowski, Director of Communications & Community Relations, Wisconsin Institute for Healthy Aging
- *Transportation as We Age*—Carrie Diamond, Transportation Specialist, GWAAR
- *Wisconsin's Elder Benefit Specialist Program*—Cheryl Batterman, AAA of Dane County
- *An EBS Client Story*—Jane De Broux, AAA of Dane County



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at 1-888-818-2611 or email [smp-wi@gwaar.org](mailto:smp-wi@gwaar.org)



### **Upcoming Events:**

- Feb 11: Alzheimer's Association Advocacy Day, Capitol, Madison
- Feb 28: Supported Decision-Making training, Madison
- Mar 5: Health Watch WI conference, Masonic Center, Madison
- Mar 10: Dane County Guardianship Training, Alliant Energy Center, Madison
- Mar 24: Disability Advocacy Day, Capitol, Madison
- Mar 28: Ready, Set, Retirement!, Madison
- May 3-5: Alzheimer's Association Conference, Kalahari, Wisconsin Dells
- May 7-8: Circles of Life Conference, Wilderness, Wisconsin Dells
- May 12: Aging Advocacy Day, Capitol, Madison
- June 2: Senior Americans Day, Eau Claire
- June 3-4: WI Institute for Healthy Aging Summit
- Sept 23-25: DHS Aging & Disability Conference □

