



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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Updates from the Guardianship Support Center

This issue of *The Guardian* focuses on voting and the rights of individuals under guardianship. With the 2020 election just a few weeks away and the Covid-19 pandemic continuing in Wisconsin, it is critical that everyone who wants to vote knows about their rights, obstacles, and resources. In addition to the information provided in this newsletter, the [WI Disability Vote Coalition](#) features information on accessible options for voting, rights that people with disabilities have to ask for curbside voting, permanent absentee status, ballot assistance, and more.

October also means the start of Medicare's Annual Open Enrollment period, and the health care Marketplace opens on November 1. If you, your clients, or your friends and family have insurance through Medicare or through the Marketplace, now is the time to review your plan and make sure it still meets your needs.

GSC Outreach

As the pandemic continues, our outreach programs will continue to be remote for now. If you or your organization would like us to present or record a video for you, whether it's on advance directives, supported decision-making, or guardianship, please contact us at guardian@gwaar.org. If you are attending the Department of Health Services' FOCUS conference in November, look for us – we will be presenting on powers of attorney, do-not-resuscitate (DNR) orders, and more.

Updates on Voting in Facilities

In late September, the Wisconsin Elections Commission [upheld an earlier decision](#) not to allow special voting deputies into facilities for the November election, citing concerns about the spread of Covid-19. Instead, voters in care facilities will be issued absentee ballots. The WEC has issued [guidance](#) to municipal clerks and to facilities on how to assist voters with completing their ballots and returning them to the clerk.

ABA/WINGS Action Tools: The Role of Adult Protective Services in Guardianship Cases

The American Bar Association's Commission on Law and Aging, in conjunction with the Working Interdisciplinary Network of Guardianship Stakeholders (WINGS), has published a new [action tool](#) regarding the role of Adult Protective Services in guardianship cases. This tool may be particularly helpful for new APS workers who would like to know more about their role in working with and providing services to individuals at risk throughout the court process.

Free NCLER Webinar: ABLER Accounts and more

On October 13, the National Center on Law & Elder Rights will present a "legal basics" webinar on the basics of ABLER accounts. These accounts empower people to save and invest their funds in a tax-advantaged savings vehicle to cover a wide range of qualified disability expenses, providing for a better future and enhanced quality of life. Additional NCLER webinar opportunities in October and November include sessions on student loans and older adults (a follow-up to a session earlier this year), basics of elder abuse, and Medicare supplemental benefits.

Updates to National Guardianship Association FAQ

In September, the National Guardianship Association updated its ["Frequently Asked Questions"](#) for guardians during the Covid-19 pandemic. This document is also [available in Spanish](#).





Coming Soon: Guardianship Support Center Materials in Spanish

You've asked for our materials in Spanish, and we've listened! This month, the GSC will publish several of our most frequently requested documents in Spanish, as well as updated English versions with improved readability. The new publications will include Spanish versions of "An Overview of Legal Decision-Making," "A Ward's Rights," and our Guardianship Packet ("Basics of Guardianship," "Process to Establish a Guardianship of an Adult," "Notice and Service Requirements," "Rights of a Proposed Ward"). We hope to be able to offer additional documents in the future.

In addition, we have been working with the state courts system to recommend that guardianship court forms be made available in Spanish. Currently all guardianship standard court forms are available in English only. While we do not yet have an ETA on this project, we will provide updates as these forms become available.

GWAAR Welcomes Attorney Jill Johnson

A warm welcome to Attorney Jill Johnson, who joined the staff in a part-time position in June 2020. Originally from Washington, D.C, Jill came to Wisconsin for her undergraduate degree in Economics. Wisconsin is a beloved place as both her parents and grandparents were from Spooner and Superior.

After graduation, Jill worked for an economic consulting firm in Washington, and then returned to Madison for an M.B.A. degree. The next years were busy as she raised four children while working in financial services. After retiring early, Jill ran for office and served on Madison's Common Council. This experience inspired her to enroll in Law School at the U.W., where she earned High Honors for Pro Bono service.

At the Guardianship Support Center, Jill answers questions that come in on the Helpline and researches legal issues. In addition to her work at GWARR, Jill takes private practice cases, teaches a class on estate planning for non-lawyers and volunteers for the Wisconsin State Bar's "Free Legal Answers" program. In 2019, Jill was recognized by the American Bar Association as a Pro Bono Leader. In her spare time, she likes to study languages, run, and travel with her husband, children, and two small beagles.

Jill likes the fact that through GWAAR, she can honor the 'The Wisconsin Idea': "The idea that Wisconsin citizens support our great University, and then graduates go on to serve their communities is a wonderful tradition," she stated. "I like to think we make a contribution to that legacy through the work of the Guardianship Support Center."



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.





A Ward's Rights

The Guardianship Support Center frequently gets questions about the rights of a person who has been deemed incompetent by a court. Once a guardianship has been commenced, the person under guardianship is referred to as a "ward."

A ward retains many rights under the law. Section 54.25 of the Wisconsin Statutes is labeled "Duties and Powers of the Guardian of the Person," but if you read past the first couple paragraphs that describe a guardian's duties, you will also see the large section of the statute under (2)(b) called "*Rights retained by individuals determined incompetent.*"

Here, Wisconsin law tells us that a ward has the right to do many things **without the consent of the guardian**. That last phrase is key, because sometimes people think that a ward must ask permission of the guardian for all things, and that is simply not true.

Here are just a few of the important rights that a ward keeps:

- 1) A ward can have access to and can communicate with the court.
- 2) A ward has the right to talk privately with an attorney.
- 3) A ward can have access to and can communicate privately with a protection and advocacy agency and with the board on aging and long-term care.
- 4) A ward can protest a residential placement made under a protective placement order.
- 5) A ward can petition the court to review his or her guardianship.
- 6) A ward retains constitutional rights such as the right to free speech, the right to freedom of association and the right to religious expression.

This is not the complete list of rights. The full statute is [available online](#) for reference.

During a guardianship proceeding, the court will tailor a guardianship order to the ward based on their abilities and needs, and that may include taking away a particular right. For example, the court might decide that a ward is not capable of processing information in order to serve as a juror. In that case, the guardianship order will take away the right to serve on a jury.

The overall philosophy of guardianship is to begin with the individual ward and strive to create an environment that offers the least restrictive solution. The law supports choices that are in the best interest of the ward. It is the duty of a guardian to "make diligent efforts to identify and honor the individual's preferences," to quote from a later section of the same statute.

The guardian must balance safety needs with the need to allow the ward to live the fullest life possible. If the guardian opposes a choice that the ward makes or wants to make, the guardian should balance the ward's ability to understand risks against the potential value of an experience. The guardian must consider that some choices may develop a ward's decision-making skills even if they present some risk. In the end, the guardian should try hard to allow the ward to enjoy the richest possible life – something that we all hope to have. □



Medicare Annual Enrollment Period

Each year from October 15 through December 7, there is an Annual Enrollment Period (AEP) for Medicare beneficiaries to and change their Part C (Advantage plans) and/or Part D drug plans.

During the AEP, a person can make any of the following changes:

- Join a Part D plan (if not already enrolled);
- Drop a Part D plan;
- Switch to a new Part D plan;
- Drop a Medicare Advantage plan and return to Original Medicare; or
- Join a Medicare Advantage plan with or without drug coverage

Changes made during the AEP will become effective on January 1, 2021. Even if a person is happy with his or her current plan, he or she should still re-evaluate to determine if that plan will best meet their needs for 2021. Since Part D plans are privatized, they are allowed to change the terms of coverage every year. New plans may become available, and some plans stop offering coverage in our state. Even if a plan continues to offer coverage into the following year, it's monthly premium, formulary, pharmacy network, deductible, and copay amounts could all change! It's important that Medicare beneficiaries review their Annual Notice of Change (ANOC) which is mailed on or before September 30th. This document notifies Medicare beneficiaries of the upcoming changes to their plan.

The [Medicare Plan Finder](#) is a tool created by the Center for Medicare and Medicaid Services (CMS) to help people view and examine the drug plans and health plans available in each county. People can compare plan premiums, co-pays, estimated annual out-of-pocket costs, as well as coverage of the medications taken. If a person would like to privatize their Medicare benefits into an Advantage health plan, they can examine the coverage options, costs, and provider networks.

Unfortunately, research shows that fewer than 10% of Medicare beneficiaries are enrolled in the most cost-effective Part D plan. Name recognition or looking at a plan's monthly premium alone are not good ways to choose a plan. If a person is unsure how to pick and evaluate a plan, the person can utilize the following resources:

- ◇ Case manager or social worker
- ◇ Call 1-800-MEDICARE
- ◇ Board on Aging and Long-Term Care Part D helpline (ages 60+) at (855) 677-2783
- ◇ Board on Aging and Long-Term Care Medigap helpline at (800) 242-1060
- ◇ Disability Rights Wisconsin Part D helpline (ages 18-59) at 800-926-4862



Title: *Langlade Cty v. D.J.W.*

Court: Supreme Court of Wisconsin

Date: April 24, 2020

Citation: [2020 WI 41](#)

Case Summary:

This case changes the standard for an extension of a mental commitment under Wis. Stat. § 51.20(1)(am). Prior to this case, many counties had relied on testimony of examining professionals to extend a commitment by finding that an individual would stop medication and decompensate, and thus once again become a proper subject for commitment. After this decision, counties must specify *which* standard of dangerousness they rely on for the recommitment and courts must make specific factual findings with reference to the standard on which the recommitment is based.

Case Details:

Langlade County initially committed D.J.W. in January 2017, following a diagnosis of schizophrenia. When his commitment came up for review, the county relied on the testimony of an examining doctor. The doctor's report was never submitted into evidence. The doctor testified that D.J.W. had lost a job, relied on his parents for housing, and received disability benefits due to schizophrenia and delusions. Notably, however, the doctor's conclusions about D.J.W. were based on his receipt of benefits and housing situation as evidence for his inability to care for himself; the doctor did not testify that D.J.W. was homicidal or suicidal. When asked, he stated that his concern was primarily that "people when they're acutely psychotic are unpredictable and their actions are unpredictable." D.J.W. disagreed that his receipt of benefits and housing situation made him "dangerous;" however, the county argued and the court found that taken as a whole, it was sufficient to determine that he would be a proper subject for commitment if treatment were withdrawn.

On appeal, the court of appeals "observed the circuit court's findings that (1) D.J.W. experienced significant symptoms due to his schizophrenia; (2) if treatment were withdrawn, D.J.W.'s hallucinations and delusions would 'take their course' and make him a significant danger to himself; and (3) D.J.W. was incapable of understanding the advantages and disadvantages of treatment." It

affirmed the decision of the circuit court. The court of appeals did not have the doctor's report to rely on, only his testimony, as the report was never entered into evidence.

On review, the Supreme Court noted that a review of these cases is a mixed question of law and fact. First, the court will affirm the factual findings of the circuit court unless they are "clearly erroneous." Next, it will determine whether those facts meet the statutory standard for recommitment. Earlier this year, the Supreme Court held in *Portage Cty. v. J.W.K.* that a finding of dangerous requires evidence of *current* dangerous – not merely that the individual was once dangerous to themselves or others. *Portage Cty. v. J.W.K.*, 2019 WI 54, ¶ 24 386 Wis. 2d 672, 927 N.W.2d 509.

Building on that standard, the Supreme Court noted that in this case, the county not only did not cite a particular standard under Wis. Stat. § 51.20(1)(a)2 for the recommitment in its brief, it argued a different standard in oral argument from that of the original commitment, while D.J.W. relied on the standard of the initial commitment. As a result of the conflicting information available, the Supreme Court had to guess which standard to apply. It held that the circuit court must specify which standard it relies on for the recommitment, as well as specific factual findings for that standard. In order to meet due process requirements and provide clarity to the courts during appeals, the individual must know what standard the county relies on and what evidence it relies on to support that standard. In other words, if the county and court were to rely on an extension of the initial standard in this case (2.d, that the individual is unable to provide for his shelter, nourishment, medical care, or safety to the point of substantial risk of death or physical injury, disease, or debilitation), it must find that the individual is actually at substantial risk because of his situation.

In this case, there was no evidence to suggest that D.J.W. was actually at risk of death or serious physical harm. The expert's testimony suggested only that D.J.W. struggled to care for himself, and that people with schizophrenia were statistically more likely to exhibit dangerousness.

(Continued on page 7)





(*Langlade v D.J.W.*, continued from page 6)

The court noted that an inability to care for one's self does not equate with a "substantial probability" of death or serious physical consequence, and that statistical generalizations were not sufficient with regard to D.J.W. specifically. Accordingly, the court reversed the decision of the court of appeals.

One additional note: D.J.W. died during the appeal process; however, the court went ahead with its decision because of the evidentiary concerns and the opportunity to provide clarity to the lower courts.

Title: *J.W. v. R.B.*

Court: Court of Appeals, District III

Date: July 7, 2020

Citation: [2019AP197](#)

Case Summary:

R.B., who had a diagnosis of dementia, appealed an order appointing guardians of the person and estate for him, as well as a court order for protective placement. The court of appeals, in reviewing testimony from the circuit court proceedings, upheld the circuit court's findings of fact that R.B. was incapable of making his own decisions and exhibited sufficient dangerousness and volatility to justify a protective placement.

Case Details:

R.B., 87, had a documented history of dementia and was hospitalized after brandishing firearms at his wife during an argument. Subsequently, R.B.'s granddaughter filed petitions for guardianship and protective placement in an unlocked assisted living facility. Both the guardian *ad litem* and examining psychologist, Dr. Galli, filed reports recommending appointment of a guardian and protective placement.

The psychologist's report found that R.B. suffered from a degenerative brain disorder – dementia – and that his incapacity was likely permanent. In addition, the report noted that when the psychologist had examined R.B., he was not sure how long he had been at the facility, why he was there, or who had placed him there. Although he was prescribed psychotropic medication, he refused to take it, because he believed that the people who gave it to him did not know what they were doing. As a result, Dr. Galli opined that R.B. did not understand his impairment and that his impairment interfered with his judgment to the point where he was unable to care for himself or protect himself from financial exploitation. Dr. Galli further opined that R.B. needed control or supervision by others in order to assist him with his personal care and daily needs.

R.B. testified that he did not want a guardian and that he did not want to be placed. He disputed the description of the firearms incident. However, he struggled with dates and facts during the hearing, and ultimately the court found that he was incompetent and needed a guardian.

On appeal, R.B. argued that his granddaughter could not rely on Dr. Galli's testimony, as he had given "conclusory, one-word testimony" at the hearing – namely answers of "yes" or "no." However, R.B. could not cite any specific authority. Further, R.B. did not challenge Dr. Galli's qualifications. The court of appeals concluded that its role is not to reweigh evidence or assess credibility – rather, to look at the record to see whether it supports the findings of the circuit court. The court of appeals concluded that the evidence on record supported the need for a guardian and placement, and affirmed the decision of the circuit court. □



Can an individual with an activated health care power of attorney still vote?

Yes, as long as they understand the objective of the elective process. See Wis. Stat. § 6.03(1)(a). Activation of a power of attorney document, by itself, is not enough to demonstrate that an individual does not understand the purpose of an election. In addition, even though a power of attorney document has been activated, the individual may have periods of lucidity, or the situation that required the activation of the POA document may resolve itself by Election Day.

However, if another elector in the municipality believes the individual does not have capacity to vote, that elector may file a petition with the county circuit court to ask the court to find that the individual is not competent to vote. See Wis. Stats. §§ 6.03(3),

Can someone under guardianship vote? Can they regain the right to vote if the right was previously removed?

It depends. Guardianship in Wisconsin revolves around restricting as few rights as possible for the wards. One of

the specific rights that a court must consider in tailoring the guardianship to the individual is the right to vote. As mentioned above, to remove the right to vote, the court must find through clear and convincing evidence that the individual does not understand the objective of the elective process before this right can be removed.

If the right to vote is removed as part of a guardianship order and the individual later believes that they should have that right restored, they may petition the court for a hearing on the matter. The fact that an individual does understand the elective process does not necessarily mean that the individual no longer needs guardianship; they may still struggle with making other types of decisions, such as managing money or complex health care needs. The fact that the individual may need assistance in completing the ballot also is not indicative that they should not be able to vote; the state provides accessibility options for individuals who may need assistance both with voter registration and with the voting process, and the registration form and ballots both have a space to document that the individual received assistance.

One final note: if the court removes the right to vote from an individual, **no one**, including the guardian, may exercise that right on the individual's behalf. □

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**.

