



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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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.



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.

Wisconsin Department of Health Services Covid-19 Vaccination Guidelines

The Department of Health Services has created a [dashboard](#) to provide updates on the progress of Covid-19 vaccination throughout the state. More information about the available vaccines and proposed priority groups is also available from [DHS](#). The state has partnered with Walgreens and CVS to distribute and administer the vaccine at congregate living facilities. Please note that information about vaccine availability and group priority may change rapidly depending on doses allocated and the progress/delays in actual administration.

National Guardianship Association Guidance on Covid-19 Vaccination

The National Guardianship Association has published [guidance on Covid-19 vaccination for guardians and wards](#) (PDF) as vaccine administration begins in long-term care facilities around the country. The guidance suggests that guardians include wards in the decision to get the vaccine to the extent possible, consistent with Wisconsin's directive to guardians to honor wards' choices where possible and provide the least restrictive environment.

Free NCLER Webinar: Elder Abuse Prevention, Intervention, and Remediation

On January 21, the National Center on Law & Elder Rights will present a webinar on elder abuse prevention, intervention, and remediation. The "legal basics" training, not limited to attorneys, will provide an overview of the fundamentals of abuse, neglect, and exploitation and the signs and signals of abuse that attendees can reference in their daily lives and work. [Register online](#).

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**.



Guardianship Support Center Materials Now Available in Spanish

The GSC has published a Spanish translation of our “Guardianship Packet,” which includes “Basics of Guardianship,” “Notice and Service Requirements,” “Rights of a Proposed Ward,” and “Process of Establishing Guardianship of an Adult.” Our “Ward’s Rights” document is also now available, and “Overview of Legal Decision-Making” is forthcoming. We are also hoping to update our brochures on the powers and duties of guardianship of the person and the estate in coming months.

Second Round of Stimulus Payments Begins

The IRS [has begun distributing](#) the second round of Economic Impact Payments. As with the first round of payments in mid-2020, these payments are an advance refundable tax credit for the 2020 tax year, even if the funds are received in 2021. Because guidance on these payments can change rapidly, we recommend reviewing the IRS’ [Frequently Asked Questions page](#) for more information.

2020 Voting Retrospective

Throughout 2020, the GSC has discussed voting rights and issues relevant to older adults, people with disabilities, and people under guardianship. As we move into 2021, we want to take the opportunity to reflect on some of the issues that arose and what the future may hold.

People under guardianship and the right to vote

People under guardianship do not automatically lose the right to vote – it is one of a number of individual rights that judges must address when drafting an order for guardianship of the person. Guardianship of the estate has no effect on the right to vote at all. However, Wisconsin’s election statutes and pollworker guidance do not make this clear and do not differentiate between guardianship of the person, guardianship of the estate due to incompetency, and spendthrift guardianships (which do not require a finding of incompetency). Although we are not aware of any instances of individuals being turned away from the polls in 2020, it is possible that someone under guardianship who has retained the right to vote could potentially be incorrectly challenged at the polls. In the event of a challenge, the voter is allowed to vote a challenged ballot, which is set aside for the Board of Canvassers to address when it reviews the county’s results. The voter may address the challenge with the Board of Canvassers, which will determine whether or not the voter’s ballot will be counted.

In addition, if the right to vote *has* been removed as part of a guardianship order, it is possible for that right to later be restored. There were at least two successful petitions for restoration of the right to vote in 2020. The Disability Vote Coalition and Disability Rights Wisconsin have been working on a guide to restoration of the right to vote, and we will provide more information on that guide when it is available.

Indefinitely confined voters

Amid concerns about the increase in indefinitely confined voters in 2020, legislators have called for review of these statutes with an eye toward changing or eliminating the provision. In addition, the cancellation of special voting deputies at facilities may have created barriers for some voters. We encourage anyone who would like to provide feedback on your experience with the 2020 elections and the future of voting accessibility to reach out to your legislators.



Title: *Fruit v. Fruit*

Court: Court of Appeals, District IV

Date: November 25, 2020

Citation: [2019AP1890](#)

Case Summary:

Tim Fruit and his sister Jill Marin brought suit against their stepmother, Bonnie Fruit, alleging that funds that should have been part of their late father's probate proceeds were excluded as a result of Bonnie's self-dealing while acting as his agent under a financial power of attorney. The circuit court found in Bonnie's favor on a motion for summary judgment, from which Tim and Jill appealed questions of both fact and law. The court of appeals determined that the power of attorney document and estate plan did not permit self-dealing and that Bonnie had breached her fiduciary duty in that regard. However, the court also remanded the case to the circuit court to determine whether any of the assets in question were marital assets and whether Bonnie had acted in good faith and at her late husband's direction when transferring funds to herself.

Case Details:

This case contains a number of instances in which the underlying facts are not clear from the record, and thus may ask as many questions as it answers. Nonetheless, it provides some guidance on issues of fiduciary duty, self-dealing, and gifting under financial power of attorney statutes, and we provide a synopsis of it here.

Gerald Fruit died in December 2016 following a long illness. His will, executed in 2009, named his two children from a previous marriage, Tim and Jill, as his sole heirs for probate assets. His wife, Bonnie, was specifically excluded as both he and Bonnie intended to maintain the assets brought into the marriage separately to distribute to their respective families. A week prior to executing his will, Gerald named Bonnie as the payable-on-death beneficiary on a money market account of which he was the sole owner. All parties involved were aware of the contents of the will. In 2014, Gerald also executed a financial power of attorney designating Bonnie as his agent.

A few months before his death, Gerald received the proceeds of a medical malpractice settlement in a check made out to him and Bonnie. Bonnie, apparently at

Gerald's direction, distributed \$27,500 to Tim and \$25,000 to Jill. She deposited the remainder into the money market account and several CDs. After his death, Bonnie executed a transfer by affidavit, a procedure to settle small estates under \$50,000, to distribute the remainder of Gerald's estate to his children per the instructions in his will. Tim and Jill then brought this suit alleging that the proceeds of the medical malpractice lawsuit were Gerald's individual assets rather than marital assets and that these assets should have been distributed via probate rather than to accounts that Bonnie either owned individually or became sole owner of at Gerald's death.

One of the unsettled questions in this case is whether the proceeds of the settlement were Gerald's sole asset or a marital asset and to what if they were mixed. By statute, property acquired as a recovery for personal injury is considered individual property, even if acquired during marriage, except for any amounts attributable to loss of income. However, *some* of the funds may have been compensation on a loss of consortium claim from Bonnie – the court determined that the record is unclear, and this is one of the questions they ask the circuit court to determine on remand. Regardless, to the extent that the proceeds were Gerald's individual property and his interest in marital property, the court of appeals went on to analyze whether Bonnie had breached her fiduciary duty as Gerald's agent, both to avoid gifting Gerald's funds without express permission from the POA and to deviate from the estate plan laid out in his will.

Under Wisconsin statute, an agent for a financial power of attorney document has a duty to act solely for the benefit of the principal. Accordingly, the agent may not make gifts of the principal's funds to anyone, including for their own benefit, unless the document specifically allows. Gerald's power of attorney did provide some authority to make gifts, for purposes of estate planning and/or avoiding probate. However, this section of the POA also limited such transfers "only to those persons and in such proportions as provided in my will." Because Gerald's will named Tim and Jill as his sole heirs and specifically excluded Bonnie, the court of appeals found that Bonnie's actions in depositing funds into accounts of which she was the owner of beneficiary violated this provision of the POA.

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Bonnie then argued that by depositing the funds into an account owned solely by Gerald at the time of the deposit, she had not been making a “gift” to herself. However, the court of appeals concluded that by depositing the funds into an account in which she had a future interest, Bonnie engaged in self-dealing and breached her fiduciary duty to maintain the funds as designated in the estate plan.

Bonnie’s other main argument is that Gerald directed her to transfer a portion of the settlement proceeds to herself (which she transferred to the CD accounts), and that she thus acted in good faith at the direction of the principal. Wisconsin statutes provide that “an agent who acts in good faith is not liable to any beneficiary of the principal’s estate plan for failure to preserve the plan.” Wis. Stat. § 244.14(3). Tim and Jill conceded that Gerald, as sole owner of the money market account, had the right to distribute funds from it as he chose and that he had directed that a portion of the funds be given to each of the three parties in violation of the directives of the POA document (the \$27,500 and \$25,000 that Tim and Jill, respectively, received and \$50,000 to Bonnie). The court of appeals again found that sufficient questions of fact remained with this argument regarding any evidence of direction to distribute funds and remanded the determination to the circuit court.

This case may make another appearance before the court of appeals once the circuit court has completed its fact-finding. In the meantime, however, there are several takeaways from this case: first, that a power of attorney document must expressly provide authority for making gifts, and in what circumstances, for an agent to do so. Second, depositing funds into an account in which the agent has a future interest may be considered self-dealing if authority to do so is not expressly stated in the document. Finally, the fact that Tim and Jill were given different amounts apparently at Gerald’s direction, while the will specified that they were to receive equal shares, may have also violated the gifting provision of the POA. This leaves open the question as to whether a direction to the agent to gift money to herself is still barred, or whether the analysis changes because of Bonnie’s status as agent and the amounts transferred.

Title: *Outagamie County v. R. W.*

Court: Court of Appeals, District III

Date: December 17, 2020

Citation: [2020AP1171-FT](#)

Case Summary:

R.W. (Rachel) appealed an extension of a mental commitment and involuntary medication order, arguing that the county had not presented clear and convincing evidence to support a finding of dangerousness for recommitment. Although Rachel testified that she had been compliant with medications and intended to continue treatment, the court of appeals upheld the finding of the circuit court that Rachel’s history of stopping medication and decompensation would make her a likely subject for recommitment if she were not subject to court orders.

Case Details:

Rachel, who has a diagnosis of schizoaffective disorder or schizophrenia, was subject to a mental commitment and involuntary medication order in July 2019 after reports from her family that she had stopped taking her medications and had made threats against them. In December 2019, Outagamie County petitioned to extend her orders for another year. The circuit court held a hearing and granted the petition.

At the hearing, a county Community Support Program supervisor who had worked with Rachel off and on over a decade testified that prior to her commitment, while he was not directly responsible for her care, he would occasionally receive calls from law enforcement requesting assistance with issues involving her because he had a rapport with her. He also testified that he did not believe she would take her medications voluntarily, noting that after the expiration of four previous commitments, Rachel had stopped taking her medication and decompensated, ultimately leading to the next commitment. In addition, Rachel’s treating psychiatrist testified that she had a history of stopping taking her medications over time, which had, in the past, led to “dangerous psychotic incident[s]” and rehospitalization. Neither the county worker or psychiatrist testified to any direct knowledge that Rachel had stopped taking her medication during the current commitment.

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(Outagamie v. R.W., continued from page 5)

Rachel testified that during the time period prior to this commitment, she hadn't been hospitalized for the year and a half since the previous order had expired and that she had been working with an outside psychiatrist. She testified that her medications kept her symptoms in remission and that she would voluntarily continue her treatment if she were not recommitted.

The circuit court found that Rachel was a proper subject for treatment and that she met the "fifth standard" for dangerousness, wherein "requirements of a recent overt act, attempt, or threat to act" could be shown instead through a substantial likelihood, based on her treatment record, that she would again become a proper subject for commitment if treatment were withdrawn.

Based on testimony from the county's witnesses, the court of appeals agreed that Rachel exhibited a "cycle of dangerous behavior" that demonstrated that she is dangerous. The court of appeals relied on its previous decision in *Winnebago County v. S.H.*, 2020 WI App 46, finding that that published decision was virtually identical in material facts. Despite noting that Rachel's arguments had merit and that she had testified that she would continue to take her medication and had generally remained stable during the last period in which she had been independent, the court held that it was bound by *S.H.* and thus upheld the circuit court's decision. The court further noted that the state Supreme Court's decision in *Langlade County v. D.J.W.*, 2020 WI 41, which held that the court must make specific factual findings with reference to the grounds for recommitment, was decided after Rachel's commitment and thus did not apply to this case.

One final note on this case: the question of the constitutionality of the "fifth standard" and whether a court can recommit someone who is currently medication-compliant and has not behaved dangerously during the current commitment is currently before the state Supreme Court in *Waupaca County v. K.E.K.*, 2018AP1887, with a decision pending. □

Helpline Highlights



My family member has an activated power of attorney for health care. What does this mean?

A power of attorney for health care typically is activated upon *incapacity*, which means that two doctors or a doctor and a psychologist, nurse practitioner, or physician assistant have found that the individual is not able to receive and evaluate information and/or communicate their health care decisions. The named agent then has authority to make health care decisions on behalf of the individual.

However, this authority is not absolute. First, the agent may only make decisions related to health care, which Wisconsin statutes define as "informed decision[s] in the exercise of the right to accept, maintain, discontinue or refuse health care." Wis. Stat. § 155.01(5). The agent may not make decisions that are not related to health care, such as who may visit the individual or whether the individual has access to electronic devices. In addition, the agent must follow the wishes of the individual as expressed in the document or as directed by the individual at any time. If the individual has not and cannot express their wishes, the agent must act in the individual's best interests. See Wis. Stat. § 155.20(5).

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My sister wants me to be her agent on her power of attorney for finances. Am I personally responsible for any of her debts? Do I have to pay her bills if she dies?

Generally, no. An agent acting in good faith within the authority of the power of attorney document is generally not personally liable for bills or debts incurred by the principal, or for any failure to preserve the principal's estate plan. *See generally* Wis. Stat. § 244.14.

In addition, under Wisconsin law, a financial power of attorney terminates when the principal dies. Wis. Stat. § 244.10(1)(a). Any outstanding bills or financial liabilities may be filed as claims against the principal's estate. The estate's personal representative or administrator is responsible for directing the estate to pay claims in the order set out by statute or as ordered by a court, to the extent the estate has available funds. For more information on estate proceedings, we recommend consulting a private estate planning or probate attorney.

However, if the agent has not acted in good faith, has engaged in impermissible self-dealing, or has overstepped the authority of the power of attorney document, they may be held liable to reimburse the principal and/or restore the value of the principal's property. Wis. Stat. § 244.17.

What if I am appointed her guardian – can I be held personally liable for her bills or debts?

Generally, no. With regard to the ward's bills and debts, one of the duties of a guardian of the estate is to pay any legally enforceable debts of the ward "from the ward's estate and income and assets." Wis. Stat. § 54.19(7). As with powers of attorney, a guardian's authority ends if the ward dies, and a personal representative or administrator is responsible for directing any remaining costs/bills be paid from the ward's estate to the extent funds are available. Wis. Stat. § 54.64(3)(e).

With regard to other types of liability, a guardian of the person or the estate is "immune from civil liability for his or her acts or omissions in performing the duties of the guardianship if he or she performs the duties in good

faith, in the best interests of the ward, and with the degree of diligence and prudence that an ordinarily prudent person exercises in his or her own affairs." Wis. Stat. § 54.18(4). For example, if a ward with a driver's license gets into a car accident, it is unlikely that the guardian will be liable as long as they have performed their duties in good faith and in the best interests of the ward. A guardian who knowingly allows a ward without a valid driver's license to operate a vehicle, however, might be found liable if an accident happens. In addition, as with powers of attorney, a guardian who engages in self-dealing or mismanagement of the ward's funds may be ordered to reimburse the estate and/or may be removed as guardian. Wis. Stat. § 54.68.

Can I be paid for the work I do as a guardian?

Yes. Wisconsin law allows guardians to receive compensation and/or reimbursement for expenses incurred in the performance of their duties. This compensation typically comes from the income/assets of the ward, if available. *See* Wis. Stat. § 54.72. The court will use a variety of factors to determine the amount of compensation, including the reasonableness and fair market value of the services provided, whether there is any conflict of interest of the guardian, and the value and sources of the ward's income/assets and whether they are sufficient to provide compensation/reimbursement while also ensuring the ward's needs are met. Reimbursement for expenses can include costs such as mileage and compensation paid to other professionals on the ward's behalf.

Note that while a court must approve compensation and reimbursement before the guardian can receive payment, the guardian does not need court approval before the expense is incurred. This means that a guardian could spend their own money on behalf of the ward and *not* be reimbursed if the court feels it is unreasonable or unnecessary. It also means that guardians cannot simply pay themselves back out of the ward's income/assets without first asking the court. ☐

