Greater Wisconsin Agency on Aging Resources, Inc.

The Guardian

Volume 9, Issue 1 (April 2021)

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

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

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In This Issue:

Interested in Receiving *The Guardian?*

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

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

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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.

Save the Date for the 2021 Aging Advocacy Day Online Virtual Events

This year's Aging Advocacy events will take place in May! Join advocates from around the state to help educate state legislators about issues affecting older adults and caregivers in Wisconsin! No experience necessary; online training is provided prior to small group virtual legislative meetings with state lawmakers or staff.

Mon., May 10th, 1:00—3:00 p.m. Training Day – Join Us Virtually
Wed., May 12th, 1:00—2:00 p.m. Day of Action – Virtual Legislative Visit

The training day presentation will be recorded and posted to the event website for those who are unable to participate at the scheduled time.

Family Caregiver Training – Diverse Elders Coalition

The Diverse Elders Coalition offers free online trainings and other resources targeted to different populations. The training curriculum helps health care and social services providers identify and address caregiving challenges faced by communities of color, LGBT communities, Native American communities, and others. It also offers tips and tools for those looking to better serve diverse family caregivers and older adults.

Justice in Aging Resource Library

Justice in Aging's attorneys provide training on a wide variety of issues, targeted to aging and disability attorneys, advocates, and service providers. In addition to webinars, Justice in Aging's Resource Library provides fact sheets, issue briefs, and more on concerns facing the aging community.

Wisconsin Employment First Conference – WI Board for People with Developmental Disabilities

This year's Employment First conference, held virtually on May 13, 2021, will provide an immersion into person-centered thinking and practices. Throughout this interactive event, participants will have the opportunity to network with others and learn how genuine person-centeredness is essential for raising expectations, driving innovation and change, and supporting people to achieve meaningful lives and careers in the community.

All stakeholders are encouraged to attend, including people with disabilities and their family members, service professionals, school staff, and others who support people with disabilities to achieve employment, make connections and contribute to the community. Registration will be free for people with disabilities and their families. Registration for professionals is $25.

Article on Elder Abuse in Green Bay News

A recent article out of Green Bay investigated reports of elder abuse and complaints at facilities in Brown County. The article features comments from Gena Schupp, Brown County Adult Protective Services, as well as Doreen Goetsch, Adult Protective Services Coordinator and Alice Page, Adult Protective Services and Systems Developer, both with the Wisconsin Bureau of Aging and Disability Resources. It also notes that the state is now tracking instances of financial exploitation in addition to physical harm and neglect. For professionals, family, and friends who suspect abuse, please remember the statewide Elder Abuse Hotline, a joint effort between the Department of Justice and GWAAR.

April 16 is National Healthcare Decisions Day

(Written by the GSC team—for reprint)

Gov. Tony Evers recognized April 16 as National Healthcare Decisions Day in a recent proclamation. This movement became nationally recognized in 2008 to help raise awareness of the importance of advance care planning, to empower people to draft advance planning documents, and to encourage discussions with family members and medical professionals about healthcare wishes.

The law on advance care planning documents and authority varies by state. In Wisconsin, practitioners typically recommend the following documents:

- Power of attorney for finances
- Power of attorney for healthcare
- Living will *(optional)*
- Authorization for Final Disposition (burial & funeral arrangements)

Advance planning documents can be executed with or without an attorney. While the basic forms are available online for free, an attorney can provide legal advice and counseling regarding the person's specific circumstances to ensure that their wishes are stated and carried out as desired. It is important that the documents are signed in front of two unrelated witnesses, ideally one of those witnesses being a notary public. While the power of attorney for finances does not technically require witnesses, it is granted special protections under Wisconsin law if it is notarized when signed.

Powers of attorney provide authority for someone to make financial and healthcare decisions for another person. Unlike other states, Wisconsin is not a "next of kin" state, meaning that family members do *not* have the ability to make healthcare decisions on behalf of another person just by virtue of being a relative. Wisconsin law requires that a person be granted specific authority to act--either authority from the individual person (via a power of attorney document), or from a court (usually through a guardianship action). Powers of attorney documents are valid once they are drafted and signed. However, typically the agents nominated within the document do not have authority to act until one or two professionals (depending on the specific language and criteria stated in the document itself or by statute) later determine that the person is incapacitated. This is commonly referred to as "activation" of the power of attorney.

A Living Will is a document which on its face may look similar to a power of attorney for healthcare; however, there are several important differences. In writing a Living Will a person is making a directive to his or her doctor regarding the person's end of life decisions. There is no authority given to another person to act as an agent on the principal's behalf, as is the case in the power of attorney documents. Additionally, a Living Will only contemplates and provides for actions in very specific circumstances. By contrast, a power of attorney for healthcare provides for an agent to have broad authority to make decisions in a wide range of situations. A person can have both a power of attorney for healthcare and a Living Will, if desired, or one or the other. However, it's important that if a person has both documents that the wishes expressed within them are consistent.

Finally, the Authorization for Final Disposition allows a person to indicate his or her funeral and burial preferences in writing and to appoint an agent to carry out those wishes upon the person's death. This document is recommended as part of a comprehensive estate plan because the authority under a power of attorney ends upon the principal's death. If no agent is appointed under an Authorization for Final Disposition form, Wisconsin law indicates that a surviving spouse, child, parent, or sibling (in that respective order) can make funeral and burial decisions on behalf of a decedent.

For free forms and more information on advance directives, visit the Wisconsin Guardianship Support Center's website at https://gwaar.org/guardianship-resources. The GSC provides legal information about powers of attorneys, advance directives, and guardianships via a helpline at (855) 409-9410 or email at guardian@gwaar.org.

The Department of Health Services also has the statutory power of attorney and Living Will forms available on its website. https://www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm.

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(Healthcare Decisions Day, continued from page 3)

The Wisconsin State Bar has made its "Gift to Your Family" guide available for free through April 23. The guide is available in both English and Spanish. For additional information, the Fox Valley Advance Care Planning Partnership has planned a series of virtual 'conversations' throughout the week.

Myth-busting false beliefs about POA's:

1. **I do not need a POA because my spouse or family can make decisions on my behalf.**
   a. Wisconsin is not a "next of kin" state, meaning that family members do not have inherent authority to make decisions solely based on their relationship with you. Authority must be specifically given to a person through a POA or a court order.

2. **I do not need a POA until I am older or sick.**
   a. Too often, people wait until it is too late to do advance planning. If a person no longer has the capacity to execute a POA document, then a guardianship action in court may be needed. All adults over the age of 18 should consider creating advance directives.

3. **Once I create a POA, I'm set for life.**
   a. POA documents are not locked in stone. They can be revoked or re-executed at any time. Honoring Choices recommends that advance planning documents be reviewed if any of the 4 "d's" occur:
      i. **Death** (if any of the agents named in your POA pass away)
      ii. **Decade** (if it has been more than 10 years since you drafted or reviewed your documents)
      iii. **Divorce** (if you subsequently get a divorce after drafting your POA—in Wisconsin, this invalidates your documents by law)
      iv. **Disease** (if you become sick or are diagnosed with an illness) ❒

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.**

Title: *Waupaca County v. K.E.K.*
Court: Supreme Court of WI
Date: February 9, 2021
Citation: 2021 WI 9

Case Summary:
This case examines whether the "fifth standard" for mental commitment is constitutional, either on its face or as applied to K.E.K., who had been compliant with treatment and had not shown any recent acts or omissions that would suggest dangerousness. The court concluded that it is, but did not address the sufficiency of the evidence of dangerousness under either Ch. 51 or the 14th Amendment, concluding that because it had previously interpreted Ch. 51's recommitment standard in *Portage Cty v. J.W.K.*, 2019 WI 54, there was no need to return to the question.

Case Details:
The circuit court in Waupaca County ordered an initial commitment for K.E.K. in December 2017, following a jury trial. The petition was based on the "fifth standard," which requires that the petitioner show that the individual has a mental illness, that they are a proper subject for treatment, that they cannot make an informed decision regarding treatment, and that due to recent acts or omissions, they are or likely will suffer substantial harm. Wis. Stat. § 51.20(1)(a)2.e.

In May 2018, the county sought an extension of K.E.K.'s commitment, which required an additional finding that she would once again become a subject of a commitment if treatment were withdrawn. Past case law has found that the "recent acts or omissions" requirement can be shown through an opinion of a treating provider that the individual would not voluntarily continue treatment without a court order. *See Portage Cnty. v. J.W.K.*, 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509. In this case, both K.E.K.'s treating psychiatrist and her case manager opined that K.E.K. likely would stop treatment and decompensate if treatment were withdrawn.

K.E.K. appealed on two separate issues: whether a violation of the 21-day deadline to file a petition for recommitment deprived the court of competency to proceed, and whether there was sufficient evidence to justify the recommitment. As we outlined in the December 2019 issue of *The Guardian*, the court of appeals found that the violation of the deadline did not deprive the court of competency to proceed and that K.E.K. was a proper subject of recommitment.

Before the Supreme Court, K.E.K. argued that precedential cases from the United States Supreme Court require a showing of *current* dangerousness, rather than speculation on future dangerousness. She argued that the fifth standard is unconstitutional on its face (i.e., that it cannot be enforced at all, under any circumstances) or, in the alternative, that it is unconstitutional as applied to her. She also argued that she had been deprived of substantive due process under the 14th Amendment. The state Supreme Court held that her due process arguments were really questions about the sufficiency of the evidence and that they had already interpreted this commitment/recommitment standard in *Portage Cty v. J.W.K.*, and thus could not interpret it again. Ultimately, the court found that K.E.K.'s arguments failed – that, per existing case law, the court had correctly applied the standards for recommitment based on opinion evidence about the likelihood of future harm if treatment were withdrawn.

A dissent from Justice Dallet notes that K.E.K.'s argument was not regarding the sufficiency of the evidence, but whether the Constitution allows the government to extend a commitment based on a record of past behavior and future predictions, as permitted by *J.W.K.*, rather than a showing of current dangerousness. She argues that this "alternative" evidence, or speculation on the person's future dangerousness, does not allow the individual to readily contest the evidence against her or provide any ready defense that might overcome the opinion of court-ordered psychiatrists. Justice Dallet would have found the recommitment standard based on a prediction of future dangerousness facially unconstitutional, as it is not based on actual evidence of dangerousness, but rather an opinion based on the person's treatment record.

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Title: *Fond du Lac County v. J.L.H.*
Court: Court of Appeals, District II
Date: March 24, 2021
Citation: 2020AP2049-FT

Case Summary:
The line between mental commitment and protective services for an individual under guardianship is sometimes unclear, as is shown in here. This case involves a recommitment for an individual who has a mental illness and who also may receive protective services or be protectively placed under Ch. 55. In a previous Dane County case, *Dane County v. Kelly M.*, 2011 WI App 69, 333 Wis. 2d 719, 798 N.W.2d 697, the court of appeals for District II found that a Ch. 55 involuntary medication order for an individual under guardianship might satisfy the language in Ch. 51 regarding provision of services that could protect an individual from harm due to their mental illness. The court in this case remanded the case to circuit court to determine whether J.L.H.'s protective placement order might sufficiently reduce the likelihood of harm to eliminate the need for a recommitment.

Case Details:
J.L.H. has both cognitive and physical disabilities as a result of a stroke she suffered as a teenager, as well as a delusional disorder with manic and psychotic features. She has received mental health treatment for decades, is under a guardianship, and lives in a group home. There is some factual discrepancy as to whether she has a protective placement order; however, the circuit court referred to one during its proceedings, so this opinion assumes that she does. The county filed for an extension of J.L.H.'s mental commitment and involuntary medication orders in April 2020, which the circuit court granted. J.L.H. appealed, arguing that the court did not consider whether the provision of services under Ch. 55 might be sufficient to protect her from further harm.

A commitment under the "fifth standard" requires the county to prove the following: 1) that the individual is mentally ill, drug dependent, or developmentally disabled; 2) that the individual is a "proper subject for treatment;" and 3) that the individual is dangerous, which, under the fifth standard, Wis. Stat. § 51.20(1)(a)2.e., means that the person cannot make an informed decision as to treatment, demonstrates through recent acts or omissions that treatment is necessary to prevent further harm, and that there is a substantial probability that without treatment, the person will lack services necessary for their health and safety. The statute further notes that the probability of harm is "not substantial" if community services are available or, as relevant to this case, if the individual may be provided protective placement or services under Ch. 55. A recommitment under this standard requires that the county show that if treatment were withdrawn, the individual would once again become a proper subject for commitment.

In *Kelly M.*, a 2011 Dane County case, the court noted that the latter clause could include an involuntary medication order under Wis. Stat. § 55.14. The court remanded the case to circuit court to make findings as to whether this might be possible for Kelly. The court also noted that the individual need not currently have such an order – if the individual *could* be provided protective placement or services that would meet their treatment needs, it might sufficiently reduce the risk of harm to the person that a commitment or recommitment would be unnecessary. However, the circuit court never had the opportunity to rule, as Kelly M. had passed away by the time the case returned to its jurisdiction.

Relying on *Kelly M.*, the court of appeals in this case noted that the circuit court had not addressed whether J.L.H.'s placement and/or additional services might sufficiently protect her from harm or deterioration, and thus had not sufficiently proven the need for a recommitment. The court remanded the case to circuit court to make these findings. ❒

How can I get power of attorney over my family member who has dementia?
This is a common question for the GSC and a common misconception about what a power of attorney is and how it works. A power of attorney document is a contract between the person who signs it (the principal) and the person they designate as their agent. The principal must give decision-making authority to their agent voluntarily, and they must understand the effect of the document before they sign it. If an individual cannot understand the purpose of a power of attorney document or make decisions about the authority their agent should have, they cannot sign a POA.

Further, a POA extends authority to another person, rather than removing it from the principal. A financial POA is often activated immediately upon signing. The principal may still exercise control over their finances and property – a financial POA that is activated immediately simply means an agent may *also* make decisions. A health care POA, in contrast, is typically only activated upon incapacity of the principal, when they are no longer able to make or communicate informed decisions. But even after a health care POA has been activated, the agent *must* follow the wishes of the individual if known or if the individual can communicate them. This means the principal may still refuse care, for example, even if they are otherwise incapacitated.

If an individual isn't able to sign a POA or decisions must be made beyond the authority of a POA, the individual's loved ones must ask a court to appoint a guardian instead.

Can my in-laws witness my health care power of attorney?
No. Wisconsin statutes state that witnesses cannot be related to the principal by blood, marriage, or adoption, or via a domestic partnership. Wis. Stat. § 155.10(2)(a). Further, the statutory definition of "relative" in the health care POA statutes extends this blood/marriage/adoption relationship to the third degree of kinship. Wis. Stat. § 155.01(12).

Who can consent to vaccines for someone who has an activated health care power attorney or a guardian of the person?
A health care agent may consent to a vaccine on behalf of the principal. However, because an agent must follow the wishes of the principal if known, if the principal protests, the agent may not consent to involuntary administration of a vaccine. Conversely, if the principal wishes to receive a vaccine, the agent may not refuse consent.

A guardian of the person who has authority to make health care decisions may consent to a vaccine if receipt of the vaccine is in the ward's best interests. To the extent possible, the National Guardianship Association recommends including the ward in decisions around their care, including whether they wish to receive a vaccine.

Do the paper inserts for a plastic DNR bracelet need to be printed in color? What happens if the insert is damaged?
The Department of Health Services provides a fillable PDF that providers may use to generate paper inserts for patient Do-Not-Resuscitate bracelets. Although the PDF is in color, providers may print in black-and-white and on any paper they choose.

If the insert is damaged, e.g., it gets wet, the patient must receive a new insert with an original signature from the ordering provider – the insert must not be a photocopy. If the bracelet is removed for any reason, the DNR order is considered to be revoked and the patient must have a new DNR order signed.

For more information on DNRs, including whether a substitute decision-maker may request a DNR on behalf of an individual, please see the GSC's publication Decision-Makers and the Authority to Consent to a DNR Order. ❒