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.

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GSC

Navigating the Journey of Family Caregiving – ADRCs of Rock and Dane County

The ADRCs of Rock and Dane County will be offering a year-long virtual family caregiver education series. Webinars will be offered the 3rd Thursday of each month, 12-1 pm, starting January 18, 2024. There is no cost, but registration is required to get the Zoom link. For more information, including the schedule of topics, contact Rock County Dementia Care Specialist Karen Tennyson at 608-741-3615 or karen.tennyson@co.rock.wi.us, or Dane County Dementia Specialist team at danedcs@countyofdane.com.

Justice in Aging Webinar: Resident Rights in Medicaid-Funded Assisted Living and Group Homes

Medicaid increasingly can pay for assisted living services or for comparable services provided in a group home or other residential facility for persons with disabilities. As a condition of accepting Medicaid payment, the facility must honor resident rights set by federal law. This webinar aired on December 14 but is available to watch through Justice in Aging's website; the link also includes the slides and a transcript. Justice in Aging also provides a Fact Sheet on this topic.

Save the Date: "Working Together to Protect Wisconsin Consumers" Conference – March 14, 9am-4pm

The Department of Agriculture, Trade and Consumer Protection's Bureau of Consumer Protection is hosting a free conference for organizations that work with diverse and traditionally underserved communities. The conference will include current consumer protection issues in Wisconsin, information on consumer reporting from the FTC, and opportunities to network, brainstorm, and collaborate with other organizations. The conference will take place at Madison College's Goodman South Campus. An agenda and link to register will be available in February 2024.

Advocating for Rights and Better Care in Nursing Homes: Tips for Residents and Families – Fact Sheet

The National Consumer Voice for Quality Long-Term Care recently published a fact sheet for residents of nursing facilities and families. Nursing home residents have a right to quality, person-centered care, and nursing homes are required by federal law to provide necessary care and services to residents. Residents may find themselves in situations where their rights are being violated and their needs are not being met. This fact sheet provides steps residents, families, and guardians can take to advocate for themselves and their loved ones, both within a facility and advocating for change on a broader level.

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.

Wisconsin Supreme Court Accepts Two Ch. 51 Cases for Review

The Wisconsin Supreme Court will review two recent court of appeals decisions on Ch. 51 mental commitment cases. The first, *Winnebago Cty v. D.E.W.,* addresses a conflict in existing case law regarding the type and sufficiency of information about a medication that must be given to a patient before a provider may conclude that the patient is incompetent to refuse medications. Some courts of appeals have held trial court judges to a very high standard, requiring the specific name of the medication, dosage, and alternatives be discussed; others, including the court in this case, have found that only a bare minimum of discussion about "some medication" is required. More information and a summary of the court of appeals' opinion is available from the State Public Defender's blog post on this case.

The second case, *Waukesha Cty v. M.A.C.,* involves questions about providing adequate notice of a recommitment hearing to the subject of that hearing and whether default judgments are possible in Ch. 51 cases. The Court of Appeals relied on past precedent from the WI Supreme Court in determining that notice was adequately provided when served on M.A.C.'s lawyer; however, that case is in conflict with a 1980 case from the U.S. Supreme Court that compels a different result. For more information, see the PD's blog post on the case.

Both cases are scheduled for oral argument on March 20. ❒

Class Action Lawsuit Filed Against United Healthcare
By the GWAAR Legal Services Team (for reprint)

On Tuesday, November 14, a class action lawsuit was filed against United Healthcare (UHC) and naviHealth regarding their erroneous reliance on an algorithm to direct patient care. The complaint was filed by two families of deceased Wisconsin residents who suffered harm as a result of these denials at Skilled Nursing Facilities (SNFs).

The complaint states that UHC's use of the "nH Predict" tool overrides real doctors' determinations as to the amount of care a patient needs to recover, and employees using the tool are disciplined and terminated if they deviate from its projection, regardless of whether a patient requires more care.

The complaint alleges that because UHC wrongfully terminated coverage in SNFs, it breached the duties of good faith and fair dealing, putting its own economic self-interest above the interest of the insured individuals.

More information and a link to the full complaint is available here: https://news.bloomberglaw.com/health-law-and-business/unitedhealthcare-accused-of-using-ai-to-wrongfully-deny-claims ❒

Hearing Loss Increases Fall Risks
By the GWAAR Legal Services Team (for reprint)

Injuries from falls are one of the top causes of death among people aged 65 and older, and research shows that even mild hearing loss more than doubles the risk of falls. It is not clear why hearing loss increases fall risks. It may be that hearing loss affects the balance centers in our ears, or it may simply be that sound is an important cue we rely on to navigate our environments. The good news is that research published in the Journal of the American Geriatrics Society shows that using hearing aids can dramatically reduce the risk of experiencing a fall.

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*(**Hearing Loss Fall Risk**, continued from page 3)*

According to the study, people who used hearing aids at all cut their fall risk nearly in half. Those who used hearing aids consistently – meaning at least four hours per day – cut their fall risk by nearly 65 percent.

Apart from reducing fall risks, hearing aids can help address other challenges associated with hearing loss, such as social isolation, reduced enjoyment of social activities, and mental health concerns. Although people often delay getting hearing aids or are reluctant to wear them due to the way they look or sound, evidence of the health benefits may help convince more seniors to consider taking steps to help address hearing loss. ❒

Divestments: What are They and Why are They Important?

By the GWAAR Legal Services Team (for reprint)

What is a Divestment?

Divestment is a term related to long-term care Medicaid. It is defined as the giving away of something for less than fair market value. This could mean giving something away as a gift or for less than the item is worth in the commercial market. A divestment can be done intentionally by giving someone money, or unintentionally by not doing something that the person should have done.

Here are some examples of divestments:

- selling one's home at a discounted price;
- adding a person's name to the deed of a house if they did not pay towards the purchase of it;
- giving away a life estate or remainder interest in a home property without being paid for it;
- agreeing to waive a debt that is owed by another person;
- adding a person's name as a joint owner to a bank account, and then allowing that person to withdraw money from the account for their own personal spending;
- paying off debts or loans that the person is not legally obligated to pay for;
- donating more than 15% of a household's annual income to a religious or charitable organization;
- refusing to accept an inheritance, settlement, or other lump sum of money the person is entitled to;

Why is it important to be aware of divestment policy issues?

If a person makes a divestment, a divestment penalty period may be imposed upon them if they later apply for long-term care Medicaid benefits. For example, if a person makes a $100,000 divestment, then they will be ineligible for long-term care Medicaid for 323 days—that's almost a full year!

Do divestment penalties apply to all forms of Medicaid?

No, divestment penalties only apply to long-term care Medicaid, including institutional Medicaid (in the nursing home or hospital), FamilyCare, IRIS, PACE, and Partnership. Divestment penalties do not apply to card-services Medicaid (BadgerCare+, MAPP, Medicaid deductible, categorically needy Medicaid, etc.). Under federal law, divestment penalties also do not apply to Medicare Savings Programs such as QMB, SLMB, and SLMB+.

If a divestment penalty is assessed but inaccurate, how can that be resolved?

A person who is assessed a divestment penalty but believes it to be inaccurate can call the local Income Maintenance Consortium to discuss the situation. They can also file an appeal with the Division of Hearings and Appeals, a state agency that decides Medicaid appeals in Wisconsin. Be aware that there is a 45 calendar day appeal window and there are no provisions for late appeals.

Where can more information on divestments be found?

For more information, look at the Medicaid Eligibility Handbook, section 17 or the WI DHS website. ❒

1. What happens to power of attorney documents when a guardian is appointed? Which takes priority?

By law, the court is required to look at whether there is any existing, valid, and sufficient advance planning in place when hearing a petition for guardianship. *See* Wis. Stat. § 54.10(3)(c)3 and § 54.46(1)(a)2. If there is advance planning that meets all three requirements and renders the guardianship unnecessary, the court is required to dismiss the petition for guardianship. If the advance planning exists and is valid but is not sufficient to meet the person's needs, then the guardianship may be necessary although it should be limited to the person's needs and the particular power that needs to be addressed. The POA agents will be appointed as guardian unless the court finds it is not in the person's best interest to do so. *See* Wis. Stats. §§ 54.15(2-3).

A common example is a situation in which an individual has not granted their health care agent the authority to admit them to a nursing home or community-based residential facility for long-term care. If the individual then needs long-term residential care, the agent may pursue guardianship and protective placement orders to grant the authority to admit the individual to the facility. The agent has the authority to make healthcare decisions consistent with the HCPOA, the law, and the person's wishes; the guardian has authority to make all other personal well-being decisions (consistent with the terms of the order and letters as well as Wisconsin law).

The court may revoke or limit existing POAs for good cause, which will be noted on both the Determination and Order and Letters of Guardianship. If the documents remain in effect, the POA takes priority – a guardian may not make health care or financial decisions covered by the POA, unless the guardian is the agent. *See* Wis. Stats. §§ 54.46(2)(b-c).

Courts often will revoke a power of attorney if appointing someone other than the agent to be guardian, but there may be reasons to leave it in place even if the agent and guardian will be different people – for example, if a power of attorney for finances is limited to a specific type of property or transaction, the court may allow the agent to continue to handle that matter while giving the guardian of estate authority to handle all other matters. The court may also decide to revoke POAs even if the agent is appointed as guardian to try to avoid any confusion from having multiple decision-making documents. If the POA remains in effect, however, it is important to review both it and the Letters of Guardianship to determine the limits of each decision-maker's authority, especially if the agent is not also the guardian.

2. If I am guardian, does my ward need a power of attorney document? Can I create one for the ward?

Guardians cannot create power of attorney documents for their wards. Only the individual can sign a power of attorney document, and they must be of sound mind to do so. An individual who has been found incompetent is presumed not to be of sound mind to create POAs. In addition, a guardian for an individual who did not create POAs prior to incompetency likely already has most, if not all, authority that could be granted under a POA.

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3. Who can sign a Medicaid application for an incapacitated individual?

The BadgerCare Plus and Medicaid Eligibility Handbooks outline who may sign applications and renewals. The list includes the following:

a. The individual, if able to understand the application;
b. A power of attorney for finances, provided they have been granted the authority to manage public benefits;
c. A guardian of the estate or conservator;
d. A guardian of the person who has been granted explicit authority to manage public benefits;
e. An authorized representative, if the individual is willing to appoint someone and can understand the form sufficiently to sign it.

The handbooks do allow a "person acting responsibly" to sign an application. This could include a power of attorney for health care, a guardian of the person who has not been granted benefits management authority, or a concerned family member; it could also include an employee of a facility currently providing care to the individual. However, their authority is typically limited to signing the application; they may not be able to make further decisions about the person's benefits. In particular, the "person acting responsibly" provision does not apply to Family Care or IRIS enrollments/disenrollments – those decisions can only be made by an individual in the list above. ❒

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: *Douglas County v. M.L.*
Court: Court of Appeals, District III
Date: 12/28/2023
Citation: 2022AP141

Case Summary

Petitioner "Mason" alleges that there was a timing violation with the filing of his annual review of the protective placement that had caused the lower court to lose competency to proceed, and that there was insufficient evidence to extend his protective placement. On review, he raised several questions: Is expert testimony required to establish the four elements for a protective placement? Can the competency of the court be challenged on appeal if it was not raised at the lower court? Said another way, is a court competency violation waived if not raised at the lower court, or is it a violation that cannot be waived? The Court of Appeals held that he had waived the violation by not raising it earlier and affirmed the lower court.

Case Details

Mason has been under a guardianship since 2015 due to severe schizoaffective disorder, a cognitive impairment, and polydipsia (a condition causing him to drink excessive amounts of water). He also had a tendency to engage in violent and aggressive outbursts and eat inappropriate objects such as drywall and cleaning supplies.

In June 2021, Douglas County filed a petition for continued protective placement. The full annual review hearing was held in September 2021, and the court ordered that the protective placement be extended. On appeal, Mason argued two things: a) that the court lacked competency to order the continued protective placement because the petition to extend it was not filed timely according to the requirements in Wis. Stat. § 55.18(1), and b) that there was insufficient evidence to extend the protective placement due to the fact that there was no expert testimony.

The Court of Appeals considered the time violation issue first. Wis. Stat. § 55.18(1) states that the petition to extend a protective placement must be filed by "not later than the first day of the 11th month after the initial order is made. . ." The parties agreed that the order for protective placement from the previous year was entered on June 30, 2020; therefore, pursuant to the statute, the petition should have been filed not later than May 1, 2021. However, the county filed the petition on June 21, 2021. Mason did not raise a concern about the filing date at the time. On appeal, Mason argued that since the petition was filed after May 1, it was in violation of the statute, and the order to extend the protective placement should be void. Mason also cited to a case that held that certain violations of statutory timeframes in guardianship and protective placement cases are not waived by a failure to raise the issue at the lower court. However, the Court of Appeals distinguished that case from the current case because that case involved a guardianship and protective placement order that had already expired, whereas the order in the current case was still in place. The Court of Appeals ruled that since Mason had not raised the issue of timeliness at the circuit court level that it had been waived.

Mason also argued that there was insufficient evidence to extend his protective placement order, and that expert testimony was needed to establish the four requirements for a protective placement under Wis. Stat. § 51.08(1). For his argument regarding the witness testimony, Mason cited *Walworth County v. Therese B.,* 2003 WI App 223, ¶13, 267 Wis. 2d 310, 671 N.W.2d 377. However, the Court was able to distinguish it from the current case because that case involved the establishment of a guardianship order, which does require medical expert testimony.

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*(**Mason**, continued from page 7)*

However, a protective placement order does not require expert testimony to establish the four requirements under Wis. Stat. § 51.08(1). The Court of Appeals cited several prior unpublished decisions as persuasive authority on this matter.

The Court of Appeals affirmed the lower court's ruling extending the protective placement order. ❒

Title: *Douglas County v. J.M.*
Court: Court of Appeals, District III
Date: 11/28/23
Citation: 2022AP2035

Case Summary

"James" appealed an order extending his protective placement. Like Mason, James argued that Douglas County presented insufficient evidence to support the continued placement because it failed to present testimony from a medical professional. He also argued that that failure violated his due process rights to cross-examination. The Court of Appeals disagreed and affirmed the order, finding that the statute does not require a medical professional to affirm the standards for a protective placement.

Case Details

James was referred to County protective services in October 2019 following a decline in his cognitive functioning that had led to mismanagement of medical and financial affairs, dramatic mood shifts, and memory impairments. He was diagnosed with dementia and placed under guardianship and protective placement in February 2020. The following year, the County submitted its annual report and recommended continued protective placement, noting numerous medical diagnoses, a history of falls, aggressive behavior toward other residents, and ongoing needs for support with medications, finances, and bathing. The court held a due process hearing, after which it ordered the protective placement to continue, finding that James continued to meet the standards for protective placement.

In February 2022, the County filed another annual review petition. The court held a full due process hearing at which both James and his guardian testified. The guardian noted that James had continued to have a history of aggressive behavior, resulting in altercations with other residents, property destruction, and several evictions from facilities. She also testified that he struggled with meal preparation, including food safety and recognizing that food had expired, and with taking his medication. She did note that he was able to do a number of tasks independently, however. James disputed her testimony, noting he had always been able to prepare his own meals and did not have problems remembering to take his medication. The court found the guardian's testimony to be credible and concluded that he continued to meet the standards for protective placement, citing his repeated evictions and the other reports and documents on file in its written order.

On appeal, James argued that the County had presented insufficient evidence for three of the four elements needed to prove a continued need for protective placement, arguing that the County was required to have a medical professional testify to at least some of the elements required. Before addressing his arguments about the specific elements, the Court of Appeals noted that a court may rely on all reports and documents previously admitted into evidence in the individual's prior protective placement proceedings, in addition to documents submitted with the petition and testimony at the hearing, subject to any contrary evidence that may be presented. This would include prior doctors' reports and other evaluations.

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*(**James**, continued from page 8)*

James pointed to two cases that had discussed the requirement for a medical opinion; here the court differentiated both. The first, *Walworth Cty v. Therese B.,* 2003 WI App 223, 267 Wis. 2d 310, N.W.2d 377, required the testimony of a physician or psychologist because the case involved an initial guardianship and protective placement, and such testimony is required to establish a guardianship. The second, *J.C. v. R.S.,* No. 2022AP1215 (WI App Feb. 16, 2023) involved a problem with and challenge to the guardianship underlying the protective placement (the GSC summarized this case in a previous issue of The Guardian). Neither case involved a protective placement where there was no challenge to the guardianship itself, and here James did not contest that he was incompetent – only whether his incompetency rose to the level of needing protective placement.

The Court of Appeals did note a couple of concerns, however. First, the County argued that James' testimony and that of the guardian provided sufficient evidence to conclude that James met the elements for protective placement. The Court disagreed, but noted that the record included additional evidence that supported the trial court's conclusion, including the County's annual evaluation submitted with the petition and evidence from previous hearings. The Court did note that the circuit court should more clearly explain on the record that it is basing its findings, at least in part, on previously admitted documents within the record or prior adjudicative facts and explain why and how it is doing so. Here, the court did make a record of its findings, but did not clearly state that it was relying on documents in the record.

James also argued that the failure to provide a medical professional's opinion violated his due process rights, as he was denied the opportunity to cross-examine on the nature of his diagnosis, including whether the diagnosis meant he required residential care, caused aggressive behaviors, and was likely to be permanent (all of which had previously been litigated in the guardianship case and prior protective placement hearings). The Court noted that while James had the right to request an independent evaluation or present witnesses to dispute the existing record, he had not done so. Further, the Court noted that while he had disagreed with the guardian's testimony, he had not objected to its inclusion in the record or to her qualifications and thus had forfeited this argument.

Under the circumstances of this case – a continued protective placement without a challenge to the underlying guardianship – the Court found that the County had met its standard and provided sufficient evidence to show James' need for continued placement and affirmed the lower court opinion. ❒

Title: *Racine County v. B.L.M.*
Court: Court of Appeals, District II
Date: 11/22/23
Citation: 2023AP757

Case Summary

"Bonnie" appealed an order extending her protective placement, which has been in place for a number of years. This case concerns the question of whether a single order to appoint a guardian *ad litem* is sufficient for multiple years when there has not been an order to terminate the appointment, or whether the court loses competency to proceed with the review by relying on a past order of appointment rather than issuing a new one. Bonnie argued that the court had lost competency; the Court of Appeals disagreed and affirmed the order.

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(**Bonnie**, *continued from page 9)*

Case Details

Bonnie has been under a guardianship since 2000 and a protective placement order since 2005. She has had court reviews of her protective placement with a report and recommendation from a guardian *ad litem* each year since it has been in place. However, a review of the prior records shows that when the same GAL served on this case for several years in a row, that GAL was not always officially reappointed by court order. The GAL still acted appropriately in meeting with the ward, filing the appropriate forms with the court, and fulfilling the necessary statutory duties. But the record does not hold an order officially reappointing the GAL for each successive year.

Bonnie appealed the 2021 order which extended her protective placement based on a lack of competency for the court to proceed with the hearing due to not having formally appointed (or reappointed) a GAL, which is required under Wis. Stat. § 55.18(2). Bonnie asserted that this was a timing violation, and like Mason in the previous case, argued that it could not be waived and therefore the fact that it was not raised at the lower court should not be fatal to her argument.

The Court of Appeals found Bonnie's arguments to be "absurd" and "unreasonable." It determined that while § 55.18(2) states that the court shall appoint a GAL and describes the qualifications of a GAL, it does not state the duration of a GAL appointment. The statute is silent as to how long the appointment of a GAL lasts, and there is no stated limitation on the timeframe contained within the statute. Therefore, the Court of Appeals reasoned that it is acceptable for a previous year's appointment of a GAL to remain in place when the attorney serving in that role remains the same. It should be noted that there was not an order terminating the GAL's appointment after the annual review.

The Court of Appeals felt strongly that GAL appointments should not be terminated immediately after the annual review hearing as matters could arise mid-year that could require their attention. It also pointed out that the infamous *Helen E.F.* and *Watts* cases sought to ensure that individuals under a protective placement order had access to an advocate and "second set of watchful eyes" to safeguard that adequate supports were in place and that due process rights are not removed unnecessarily. These protections would be removed for 10 months out of the year if counties were to immediately remove GALs after the annual hearing. Moreover, the Court of Appeals found it beneficial for the same attorney to repeatedly serve as GAL for subsequent years as they would have more insights into that person's situation, their needs, and whether their condition has improved or worsened over the past year.

The Court of Appeals held that "in general, the appointment of a Wis. Stat. ch. 55 guardian ad litem continues until a circuit court terminates the appointment, appoints a new guardian ad litem, or the guardian ad litem withdraws from the appointment." The Court of Appeals also held that Bonnie's argument was not specifically a timing or court competency issue, thereby necessitating that the issue be raised at the lower court in order to preserve it for appeal.

As a side note, the standard court form for the GAL's report requires the GAL to certify that it was completed within 30 days of their appointment; this verbiage mirrors the statute regarding the GAL appointment for an annual review. The Court of Appeals did not address this issue. ❒