



Balancing Protection & Power in Health Decision-Making

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Greater Wisconsin
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WI Guardianship Support Center

- Legal information provided to attys, guardians, APS, families, professionals, and vulnerable adults
- Guardianships, POAs, protective placement, DNR, living wills
- Free quarterly newsletter
- Consumer publications
- No court representation or legal advice



Understanding Health Decision-Making

- Planning for future decision-making needs as part of healthy aging
- Supported Decision-Making: formal & informal assistance
- Substitute Decision-Making: options and limitations

Supported Decision-Making – Ch. 52, Wis. Stats.

- Formal agreement to allow the individual to have support in making various decisions
- Individual remains the legal decision-maker for areas covered by the document
- Available to any adult with a functional impairment
- Provides legal protection to providers and supporters
- Can be a useful tool for transitions in decision-making

SDM: Potential Issues

- No oversight
- Supporter may be pressuring individual into making the decision the supporter wants
- Providers/institutions may not recognize/understand what it is
- May not be recognized in other states

Power of Attorney for Health Care

- What is it?
 - A plan for future health care decision-making needs
 - Only applies to health care decisions
 - Appoints an agent to make decisions on the person's behalf
- Who can create it?
 - An adult of sound mind – and entire process must be voluntary
 - It is not possible to create a POA for another adult
 - Sound mind ≠ incapacity for health care decisions
- Signature requirements
 - Witnessed by two disinterested witnesses

POA-HC – Limits

- Agent's Decision-Making Standard
 - Follow wishes of individual as expressed in document or at any time (Wis. Stat. 155.20(5)) – cannot override
 - Attempt to discern individual's wishes
 - If wishes unknown, make decisions in best interest
- Limited to health care decisions only
 - Agent may not make decisions that aren't health care, e.g., visitation
- Statutory limits:
 - Long-term care admissions
 - Withdraw/withhold feeding tubes; agent may not withhold orally ingested nutrition/hydration unless medically contraindicated
 - Make decisions if principal is known to be pregnant

POA-HC: Protections

- Right to have stated wishes followed
 - Provides a check on agent authority – POA does not remove rights; agent authority is not unlimited
- Revocation
 - Individual may revoke at any time – even after incapacity
 - May or may not be able to create a new one
- Court review of agent's actions
- Other court action: guardianship/protective placement

Guardianship

- Court process – only a court can appoint a guardian
- Can be temporary (60-120 days) or permanent
- Determines whether an adult meets the standard for incompetency
- Determines whether individual's advance directives (if any) are valid and sufficient to meet their needs
- Appoints a legal decision-maker, who is subject to court oversight and review
- Determines what authority the legal decision-maker will have

Guardian Authority for Medical Decisions

- Must secure any necessary care in the ward's best interest based on the risks and benefits and alternatives especially if drastic or restrictive treatment is proposed

Typically:

- Guardian of person can consent to voluntary medical treatment
 - Must make good faith effort to discuss & determine if there is a protest
- Guardian of person can consent to involuntary medical treatment (except psych)
 - Consider invasiveness, benefits, and side effects

Guardianship Limitations

- Guardian cannot consent to psych treatment or psych meds over individual's objection
- Guardian cannot place for long-term care in facility ≥ 16 beds, or a facility of any size if ward objects
- Guardian cannot place for short-term care (60-120 days) if primary purpose is treatment of mental illness or developmental disability
- Guardian has only authority granted to them in the order

Competing Interests

- Protection

- Ensure adequate and timely access to health care
- Prevent abuse/exploitation
- Protect from neglect/self-neglect

- Self-Determination

- Ensure that individual's wishes are honored
- Ensure individual has a voice in treatment decisions and living situation
- Protection from decision-maker overreach

Working with Vulnerable Adults

- Decisional capacity for specific issue (understanding of risk)
- Foreseeable harm
 - Nature of harm, likelihood of harm, person's willingness to accept mitigation options
- Negotiating risk
 - What options exist?
 - Reasonable steps taken to prevent harm?
 - Conditions that could lead to risk, education/motivation to reduce risk
- Medical/mental health prognosis

Right to Refuse Care

- POAs:
 - Ch. 155 retains right to refuse care – POA standard notice reiterates “no care may be given or withheld over your objection”
 - What if the refusal puts individual at risk of imminent harm?
- Guardianship:
 - Guardian has authority to override in at least some situations – but should they?
- Both:
 - What if it is not clear whether individual is actually objecting to care?
 - Is it possible to determine the reasons for refusal and address in a way that will allow care to move forward?

Recap – Options

- SDM
 - individual makes decisions with help if desired
- POA
 - individual chooses agent to act on their behalf if unable to make own health care decisions or need assistance with financial; agent must follow wishes/abide by reasonable expectations; no loss of rights
- Guardianship
 - Involuntary; individual loses some civil rights; guardian must decide in best interest; much broader authority than POA (but not unlimited)

Contact the GSC

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