

Legal Decision-Making Options in Wisconsin

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Spectrum of Legal Decision-Making

- WI is not a “next-of-kin” or “family consent” state – legal authority to act on behalf of another adult comes from the adult (via a POA or other agreement) or a court (via a guardianship)
- Additional tools/advance directives:
 - Declaration to Health Care Professionals (Living Will)
 - Do-Not-Resuscitate orders (DNRs)
 - Authorization for Final Disposition

Supported Decision-Making – Ch. 52, Wisconsin Statutes

- Process of supporting and accommodating an adult with a functional impairment to enable them to make life decisions without impeding their self-determination
- Individual creates a formal agreement to outline the areas in which they would like assistance
 - Does not grant the supporter the right to make decisions or sign documents on the individual’s behalf
 - Can be used in conjunction with POAs or limited guardianship or by itself
 - Can have more than one agreement with different supporters for different types of decisions
 - **Note:** Supporter may speak with healthcare providers and get information, but individual must sign a release for supporter to access medical records. Supporter may also need to sign a release for education records.
- People who rely on the agreement and act in good faith have protection from civil/criminal liability and professional misconduct, unless there is reason to believe the individual is being abused/neglected/exploited/unduly influenced by the supporter or they know or have received notice that the document was revoked or invalid

Representative Payees

- Social Security and the VA typically require someone with a guardian to have a rep payee for any benefits they receive – but it is not automatic; the guardian must still apply
- Social Security/VA rep payees can only handle those specific benefits
- Organization rep payees/protective payees can manage all of an individual’s finances and may be paid to do so; still typically cannot sign Medicaid applications, leases, or other contracts, but depends on the agency and agreement with the client

Conservatorship

- Allows an individual to petition the court to appoint someone to manage their finances with court oversight

- Powers/duties the same as a guardian of the estate
- Voluntary and the individual can request to terminate it at any time (although whether to end it is up to the court's discretion)

Power of Attorney

- Wisconsin separates into health care (Ch. 155, Wis. Stats.) and financial (Ch. 244, Wis. Stats)
- Legal contract: the **principal** (person whose document it is) gives authority to an **agent** to act on their behalf
- Agent must act according to principal's wishes at all times – if not known, "best interest" standard
- Authority exists only while person is living – agent may not make decisions after principal dies
- It is not possible to "get power of attorney" over someone – it must be given knowingly and voluntarily
- DHS has forms for both; not required to use
- Legal safeguards: Can petition for court review; court can: review conduct of agent, remove agent, order agent to follow POA, order agent to return any money and/or make restitution (POA-F)

Power of Attorney for Health Care

- Allows agent to make health care decisions (and *only* health care decisions) on behalf of the principal if the principal is unable to do so
 - Health care is any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition
 - No authority to make other decisions, such as who may visit
 - Can include specific directives for end-of-life care and admission to facilities for purposes other than rehab or respite
- Statutes define agent as "an individual designated by a principal" – co-agents not recommended and providers/facilities may decide not to accept it
- Principal can designate an alternate agent
- Validity: principal is an adult of sound mind, signs in presence of two disinterested witnesses, must be dated; principal can direct someone to sign for them in their presence if they are unable to sign themselves
 - **Sound mind:** low standard – at least some periods of lucidity; can generally understand what they are signing; determined by witnesses
 - Board on Aging & Long-Term Care position: possible after incapacity/activation
 - **Disinterested witnesses:** cannot be:
 - Related to principal by blood, marriage, or adoption
 - Health care provider of principal (other than social worker or chaplain)
 - Financially responsible for principal's care
 - One of the principal's potential heirs
 - The agent
- Activation: typically upon **incapacity**
 - "inability to receive/evaluate information and/or communicate decisions relating to health care"
 - Determined by two physicians or a physician and an advanced practice clinician (psychologist, PA, NP), unless otherwise stated on document
 - Can be activated immediately upon signing without finding of incapacity – both individual and agent may make decisions and sign consent forms/releases – SDM is a similar option
- Deactivation: no formal process – often up to facility/provider policy

Power of Attorney for Finances

- Principal retains all rights to manage their own property/finances, but also allows agent to manage
- No authority for health care decisions (but typically gives authority to pay for care)
- Can have co-agents; can have successor; can allow agent to name their own successor
- Can have more than one at a time (check language to determine whether document revokes past POAs)
- Activation: typically upon signing, but can be upon incapacity or some specified event
- “Durable”: means it remains active while principal is incapacitated
- Recommended to be notarized
- Agent liability: typically no personal financial liability if acting in good faith

Revocation of Power of Attorney (Both Kinds)

- Principal can revoke at any time by destroying or defacing the document, stating intent to revoke in front of two witnesses, writing/signing a statement revoking old document
- Executing a new POA-HC automatically revokes the old one
- Executing a new POA-F does *not* automatically revoke the old one – must specifically state in document that it revokes past POA-Fs

POAs from Other States

- Wisconsin recognizes: Wis. Stat. § 155.70(10) for POA-HC, 244.06(3) for POA-F
- Signature and activation requirements may be different – read document carefully
- Limitation for POA-HC: document must include language authorizing admission to long-term care and end-of-life decisions for agent to have authority for those decisions; document still valid without but agent will not be able to make those decisions

Declaration to Health Care Providers/Living Will – Ch. 154, Wis. Stats.

- Allows individual to create specific directives for end of life care for their health care providers
- “Health care providers” includes physicians, PAs, NPs
- Directives include instructions on feeding tubes and life-sustaining treatment for terminal illness or permanent vegetative state
- Should match up with a POA-HC if one exists; if conflicts, POA-HC wins

Do-Not-Resuscitate Orders – Ch. 154, Wis. Stats.

- Only available to **qualified patients** – person has a) terminal condition, b) medical condition such that in the event of cardiac or pulmonary failure, resuscitation would either be unsuccessful or would cause significant harm that outweighs the possibility of successful resuscitation
- Health care provider (physician, PA, NP) must sign order
- Patient must wear DNR bracelet at all times; removal is considered revocation
- Health care agent and guardians *may* request an order on behalf of principal/ward if in best interests or in compliance with individual’s wishes (but note there is some case law that makes this complicated)
- Different from DNR/code status orders that patient may request on admission to a facility – this goes with the patient when they leave

Authorization for Final Disposition – Ch. 54, Wis. Stats.

- Allows individual to state wishes for funeral/burial/cremation and appoint a representative to handle matters
- Only individual of sound mind may sign – not agent or guardian
- Requires two witnesses OR notarization

Guardianship – Ch. 54, Wis. Stats.

- WI splits into guardianship of the person and guardianship of the estate – individual can have one or both, guardian can be one or both
- Court proceeding; attorney not required to file but can be helpful
 - Individual's due process rights during proceeding: right to counsel, right to jury trial, right to independent eval, right to be present at any and all hearings, right to have hearing in accessible location
- Standard: "incompetency"
 - **Only a court may determine**
 - Because of an impairment, individual is unable to receive/evaluate and/or communicate information such that their health/safety and/or financial stability are at risk and there are no less restrictive alternatives available
 - Incompetency is not old age, eccentricity, poor judgment, physical disabilities, or functional impairments for SDM agreements
- Duration: can be temporary (60 days, w/ possible 60-day extension) or permanent
- Authority: court removes particular rights from the ward and places w/ the guardian, tailored to the ward based on their capabilities and needs
 - Ward retains all rights not specifically transferred, and always maintains Constitutional rights to free association, speech, practice of religion
 - Other rights ward maintains: provide input into support services, file grievances, participate in court process, access advocacy agencies and attorneys, petition for review of court orders, withhold consent to mental health or substance abuse treatment, attend hearings, right to counsel for most post-appointment proceedings
- Guardian of the person:
 - Typically will include medical decisions, decisions about mobility/travel, educational or employment decisions, whether someone can get a driver's license, starting/ending marriage
- Guardian of the estate:
 - Typically includes management of finances and property, applying for benefits, signing contracts
 - Note: Guardian must either become rep payee for SSA/VA benefits or ensure one is appointed. It is not automatic – must apply directly with agency
- Guardian's duty: act in and advocate for ward's best interests; respect their wishes and allow them to make their own decisions where possible
- Ward or other interested person can petition court for review of guardian's conduct; otherwise no review process, but guardians required to complete annual accounting and status of ward forms
 - Ex: guardian engaging in self-dealing, failing to act in best interest of ward, knowingly isolating ward, etc.
 - Court can instruct guardian, remove guardian, order guardian to pay costs & fees, fine guardian up to \$10k, require guardian to reimburse ward

Access to Guardianship Court Records to Determine Validity

- Very limited – Wis. Stat. § 54.75 – if reason for info, can find out that person has been found incompetent and get contact info for guardian
- Letters of guardianship don't expire – note that guardianship laws were overhauled in 2006-2007; earlier letters of guardianship still valid

Placements under POA-HC

- General authority: can place for rehab if admitted directly from hospital
 - Limitations: no more than three months, cannot place if admission was for psychiatric care
 - Can also place for up to 30 days for respite if principal lives with agent
- Optional authority: can place for long-term care past above limitations *if* principal has granted authority to do so
 - Limitation: cannot place if principal is diagnosed w/ mental illness or developmental disability at time of admission; cannot place if principal objects

Placements under Guardianship – Ch. 55, Wis. Stats.

- Can place in group home, adult family home, or community-based residential facility of fewer than 16 beds w/o court approval – unless ward protests placement
- Can place in other facilities (for up to 60 days) w/o court involvement if stay is for rehab or if individual is unable to provide for their own care/safety so as to create a serious risk of substantial harm to self or others
 - Possible 30 day extension for discharge planning, or 60 if protective placement petition filed
 - If ward protests, must contact APS for review and possible protective placement
 - Cannot place for treatment/services related to mental illness or developmental disability
- Protective Services/Placement: court order that individual under guardianship be placed for treatment or services
 - Court process is designed to protect rights of ward – must be least restrictive environment and necessary for protection of ward
 - Annual review of placement is required
 - Involvement of Adult/Elder Protective Services required

Mental Commitments vs. Protective Placements – Ch. 51 vs. Ch. 55

- Ch. 51, Mental commitments: process used for placement in facility for treatment of mental illness or developmental disability
- Ch. 51 can allow for involuntary administration of psychotropic medication
- Ch. 55, Protective placements: process used for placement in facility for treatment/services for other concerns – even if person has diagnosis of mental illness or developmental disability
- Guardian cannot consent to involuntary administration of psychotropic medication unless court specifically orders as a protective service under Wis. Stat. § 55.14

Placements in Hospice – Wis. Stat. § 50.94

- Exception to guardianship rules for individuals w/o POA-HC
- If individual is incapacitated and does not have a POA-HC or living will, and has not been adjudicated incompetent, a family member or close friend may be able to admit them to hospice care and make medical decisions
 - Family member or close friend must certify that it is their belief that the incapacitated person would have selected hospice care

- Physician must certify that the incapacitated individual has a terminal condition and that they believe the family member or close friend is acting in accordance with the wishes of the patient
- Incapacitated individual may object to or revoke hospice care at any time; anyone else who objects to decisions of admitting individual may file petition for temporary guardianship

Resources

- State forms: <https://www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm>
- Guardianship Support Center (info on POAs, SDM, guardianship, free helpline) <https://gwaar.org/guardianship-resources>
- WI Board for People with Developmental Disabilities SDM and Guardianship Alternatives: <https://wi-bpdd.org/index.php/SupportedDecision-Making/>
- Board on Aging & Long-Term Care: Position Statement on HCPOA Revocation/Re-Execution after Activation is included here: <https://longtermcare.wi.gov/Pages/Media/Publications.aspx>