



Legal Decision-Making Options in Wisconsin

Polly Shoemaker, JD
Guardianship Support Center Attorney
Greater WI Agency on Aging Resources, Inc.

October 2023



Greater Wisconsin
Agency on Aging Resources, Inc.

WI Guardianship Support Center

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



Who Can Make Decisions for an Adult?

- WI is not a next-of-kin or “family consent” state
- Need legal authority to act on another’s behalf
- Authority comes from the person or the court



Supported vs. Substitute Decision-Making

- Supported Decision-Making: Individual makes their own decisions with whatever level of assistance they would like
- Substitute Decision-Making: Someone else makes decisions on behalf of individual

Supported Decision-Making Concepts:

- Adults are allowed to make bad choices;
- The more people are empowered to make choices, the better they become at it; and
- Empowering people to make choices improves their quality of life

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

- Process of supporting and accommodating 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 (state provides standard form, but not required to use that one)
 - Does not grant the supporter the right to make decisions or sign documents on the individual's behalf
 - Is not evidence of incapacity or incompetency
 - Can be used in conjunction with POAs or limited guardianship

Functional Impairments

- Wis. Stat. § 52.01(2):
 - A physical, developmental, or mental condition that substantially limits one or more of an individual's major life activities, including any of the following:
 - Capacity for independent living
 - Self direction
 - Self care
 - Mobility
 - Communication
 - Learning
 - OR Ch. 54 impairment or “other like incapacities”
- Self-attestation – no doctor’s note or clinical assessment required

SDM Agreement Requirements

- Must be in writing, dated & signed
- Requires 2 adult witnesses or notary
- Existence of document is not evidence of incapacity or incompetency
- Can be revoked at any time
 - Automatically revoked if substantiated allegations of abuse/neglect, criminal conviction for abuse/neglect, or restraining order against supporter
- Individual must still sign releases for supporter to access health care records or get any information in educational records

SDM Agreements & Liability

- Wis. Stat. § 52.30
- Protection from civil/criminal liability and professional misconduct for acts/omissions made in good faith in reliance on agreement
- Exceptions:
 - If there is reason to believe individual is being abused, neglected, exploited, or unduly influenced by supporter
 - Actual knowledge or notice of revocation of document or that it is invalid
- Also protects supporter if acting in good faith

SDM: Potential Issues

- No oversight
- Supporter may be pressuring individual into making particular decisions
- Providers/institutions may not recognize/understand what it is

Representative payee

- Can be solely for SSA/VA funds
 - Payee must be approved by SSA/VA
 - POA or guardian → still must be approved by SSA/VA
- Or can be for all of the person's income and assets
 - County-contracted agencies or private agencies
- Organizational rep payees can be paid (~\$45/month)

Conservatorship

- Voluntary
- Individual must file their own petition (can get help to do so)
- Same duties/powers as guardian of the estate
- Can ask the court to end at any time
 - Court's discretion whether to do so
 - Court can also initiate guardianship proceedings if appropriate
- Why use it?
 - POA-HC in place but no POA-F
 - Individual doesn't have anyone they want to act as POA-F
 - Individual wants more oversight than POA-F would have
 - Individual wants to avoid risks of exploitation by removing their own access to finances

Power of Attorney – Who and Why?

- Available to all adults of sound mind – power of attorney is given by the individual
- Plan for *future* decision-making needs in specific areas
- Voluntary and can be revoked at any time

Power of Attorney

- Wisconsin separates into POA for Health Care and POA for Finances
 - POA-HC: Ch. 155, Wis. Stats.
 - POA-F: Ch. 244, Wis. Stats.
- Legal contract: the **principal** gives authority to an **agent** to act on their behalf
- State provides standard forms for both (available from DHS); not required to use these forms
- **Agent** must act according to **principal's** wishes at all times

POA-HC: Requirements

- Valid signature
 - **Principal** is adult of sound mind
 - 2 disinterested witnesses
 - In writing, signed and dated
 - **Principal** can direct someone to sign for them in their presence
- Voluntary

POA-HC: Valid Signature Standard

- What does “of sound mind” mean?
 - Generally means they understand nature of the document and at least have periods of lucidity
 - Low standard
 - Judgment call of the 2 witnesses
 - Only time presumed not to be of sound mind is if they have a guardian of the person
- Board on Aging & Long-Term Care position – sound mind can exist after activation

POA-HC: Activation

- Typically activated on incapacity
 - Inability to receive/evaluate information and/or communicate decisions relating to health care
 - Determined by 2 physicians or physician and advanced practice clinician (psychologist, nurse practitioner, physician's assistant) OR as stated on POA document itself
- Can also be activated on signing w/o determination of incapacity
 - Both principal and agent may sign consents and releases

POA-HC: Agent

- “An individual designated by a principal”
 - Wis. Stat. § 155.01
- That means:
 - One named person
 - Co-agents not recommended but some other states do allow
- Principal can name one or more alternates

POA-HC: What Decisions Can Agent Make?

- Agent can only make health care decisions.
- “Health care” means any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition. Wis. Stat. § 155.01
- Wisconsin’s specific directives:
 - End of life care
 - Admission to nursing home or CBRF for purposes other than rehab following inpatient stay or respite if principal lives with agent
- Principal can add special instructions, limits, specific wishes, etc.

POA-HC: Decisions Agent Can't Make

- Non-health care decisions (e.g., who can visit)
- Decisions that override individual's wishes if known
- Admit to psych unit/facility
- Admit/keep individual in a nursing home against their wishes
- Admit/hold individual in a locked unit
- Change health insurance or sign financial documents
- Designate a successor agent
- Any decisions after death of the principal

Make Sure POA-HC is Valid!

- Must be in writing
- Must name an individual agent (may name an alternate as well, but only one person should be able to act at a time)
- If person cannot physically sign, someone may sign on their behalf but must be at their direction and in their presence
- Witnesses must see the person sign – dates must match
- No changes after signing

Power of Attorney for Finances and Property

- AKA “Durable Power of Attorney”
- Principal retains their own rights to manage property/finances
- Does not give any authority for health care decisions (but does give authority to pay for care)
- Allows agent to manage property and finances
 - State law provides some limits/protections – may wish to consult with attorney if any specific needs
- Recommended to be notarized
- No witnesses required
- Can have more than one

POA-F: Activation

- Immediately upon signing, or
- On some specified event (aka “springing”)
 - Travel
 - Incapacity – statutory definition is much broader than for POA-HC and includes:
 - Person unable to make decisions (1 physician can determine)
 - Person is missing
 - Person is incarcerated/detained
 - Person is outside US and cannot return

POA-F: Agent

- Can be a named person or an organization/office/position, e.g., “trustee officer at XYZ Bank”
- Can have co-agents and can decide if they can act independently or must act together
- Can name one or more successors
 - Can also grant agent authority to name their own successor

Agent Liability

- POA agents should not have personal financial liability for performing their duties as agent
- If agent signs a contract and does not indicate they are signing as the POA agent, the nursing home might try to go after them for payment
- Guardians should not have personal liability for actions taken as guardian when performing their duties in good faith and in the best interests of the ward

Make Sure POA-F is Valid!

- Must be in writing
- If using the state form, make sure appropriate boxes are initialed
- If activated on incapacity, needs its own statement of incapacity, cannot use HC POA activation – that does not look at financial decision-making capacity
- Must specifically state if it revokes previous financial POAs
- If multiple financial POAs, make sure they don't conflict with each other

Deactivation vs. Revocation

- Deactivation
 - Means individual has regained capacity
 - No formal process – up to facility/provider to determine how they want to note this
 - Document available to use if individual becomes incapacitated again
- Revocation
 - Individual removes authority from the agent(s)
 - Can be done at any time – even after incapacity
 - Methods: destroy document, sign statement indicating intent to revoke, state intention to two witnesses, execute new POA-HC (but POA-F does not automatically revoke previous POA-F!)



End of Agency

- An **Agent** may be in place until:
 - Capacity regained
 - Expiration of event for some POA-Fs
 - Revocation
 - Resignation
 - Removal by court
 - Death
 - Guardianship (possibly)

POA Legal Safeguards

- Interested party can petition for court review
- Court can:
 - Determine whether POA is valid
 - Settle conflicts between competing POA-Fs
 - Review conduct of agent
 - Remove agent
 - Order agent to follow the POA document
 - Order agent to return money

POAs From Other States

- WI will recognize both POA-HC and POA-F from other states as long as validly executed in that state
- Signature requirements may be different
- Activation requirements may be different – follow document
- Lack of WI specific directives for long-term care/end of life doesn't invalidate – agent just doesn't have authority in those areas

Top Issues with POAs:

- Dates of principal and witness signatures don't match
- Didn't actually give agent authority
- POA-HC and POA-F agent do not agree
- Didn't list alternates or alternates unable, unwilling, or have passed away
- Missing pages
- Crossing things out after execution
- Agent exceeds authority

SDM vs Powers of Attorney

- POAs are a form of substitute decision-making
- Agent for POA-HC typically not directly involved in decisions until activation on incapacity – at which point they are a substitute decision-maker
- POA-F often activated immediately upon signing; individual may make their own decisions but agent can also act on their behalf
- What about a POA-HC that is activated on signing, rather than incapacity?
 - 155.05(4): The desires of a principal who does not have incapacity supersede the effect of his or her power of attorney for health care at all times

Limitations of POAs

- Financial does not take away individual's ability to manage finances/property even if activated on incapacity
- Agent must follow wishes if stated at any time, even if they don't think the person understands
- Health care agent cannot make non-health care decisions
- Limited oversight

Living Will

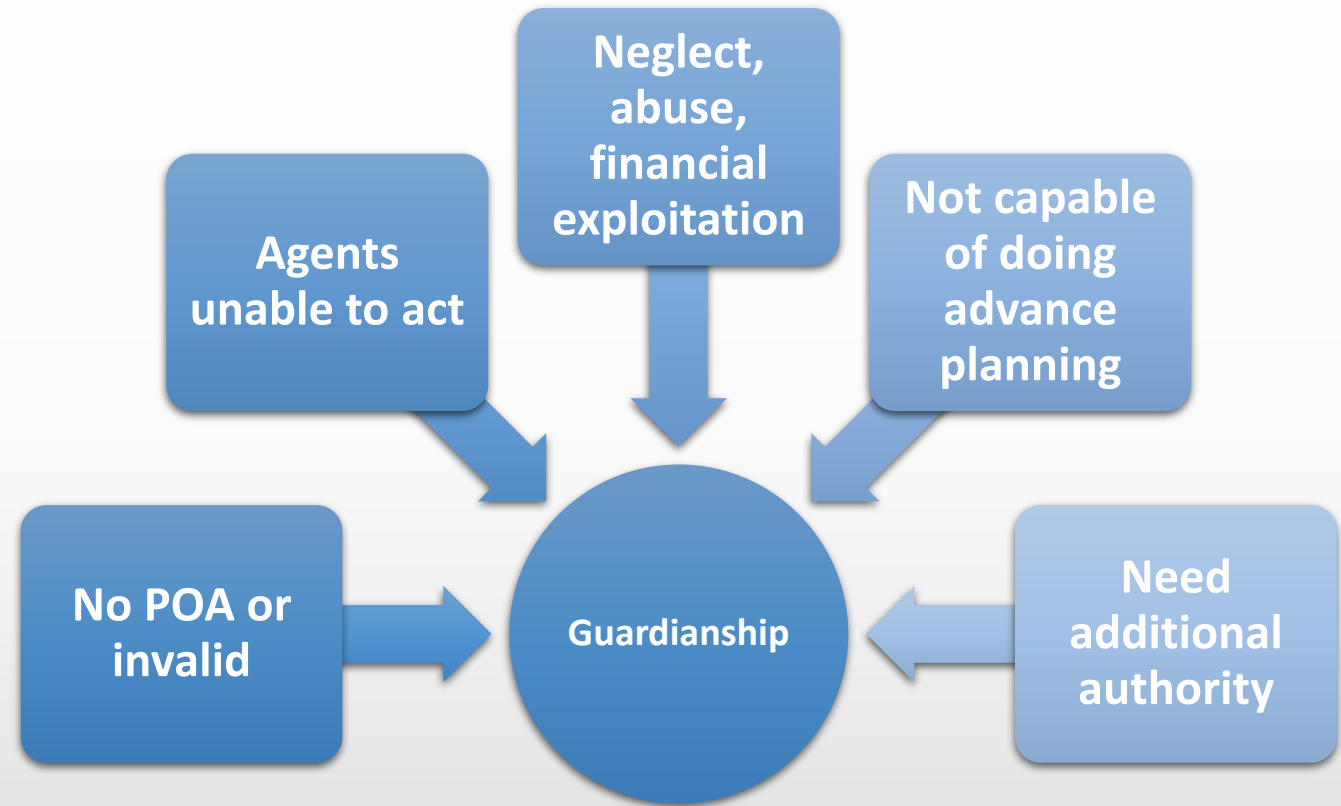
- Directive to a health care provider – physician, PA, NP
- What the patient's wishes are
- Circumstances must fit exactly the question asked
- No agents designated
- If also have a POA, choices must match
- (POA-HC provides *much broader* authority)
- Requires two witnesses



Authorization for Final Disposition

- Allows you to state your wishes for burial/cremation/funeral, including who you want to handle matters
- Designate special requests for religious observances, source of funds, etc.
- Requires two witnesses or a notary

Guardianship
is a legal
relationship
created by the
court



Why Guardianship?

- Concerns about validity of POA documents (e.g., undue influence/coercion, person didn't understand what they were signing, document is deficient)
- POA document doesn't give authority to make certain decisions
- POA document gives authority (e.g., admission to long-term care) but principal objects
 - Sauk County v. W.B., 21AP322, Sept. 9, 2022
- Medicaid planning situation that requires spend-down or changing a policy but POA document doesn't allow
- Person has POA-HC but no POA-F
- Agent shenanigans

Guardianship – Ch. 54, Wis. Stats.

- For adults, WI splits into Guardianship of the Person and Guardianship of the Estate
 - An individual can have one or both; a guardian can be one or both
- Standard: “incompetency”
- Can be temporary (if only needed for a short period, or while full proceeding is pending) or permanent
 - Temporary: 60 days w/ option to extend another 60, for a max of 120 days.

Standard for Guardianship: Incompetency

- Individual has an impairment
 - Developmental disability
 - Serious and persistent mental illness
 - Degenerative brain disorder
 - “Other like incapacities” – e.g., TBI, stroke, ongoing substance abuse, any condition that impairs individual from providing for their own care/custody
- Impairment results in inability to receive/evaluate information or communicate decisions
- Unable to meet essential needs for health and safety and/or
- Unable to provide for own support or prevent financial exploitation
- No less restrictive alternatives available

Only a court determines whether this standard is met

Guardianship: Court Process

- Guardianship is a court proceeding
- Does not require an attorney to file but can be helpful
- Must be completed w/in 90 days – no extensions
 - Timeline for Protective Placement: 60 days but can be extended another 45
- Court records are confidential
- If guardian is appointed, court issues “Determination and Order” and “Letters of Guardianship” – these outline the guardian’s authority

Verifying Guardianship

- No expiration for adult guardianship
 - Note: minor guardianship orders typically do not extend past 18th birthday
- There is no review of guardianship unless someone petitions
 - Note: there is an annual review of protective placement
- Guardian and/or ward can view file and get certified copies from courthouse
- Court records are closed, but anyone who can demonstrate a need for the information can find out if someone has been found incompetent and get contact information for the guardian

Guardianship – General Duties & Powers

- Guardian only has authority that was given to them
- Powers must be necessary to provide for ward's needs and be least restrictive
- Guardian must act with care, diligence, and good faith
- Guardian must attempt to ascertain ward's wishes
- Advocate for best interests
- Advocate for ward's rights

Guardianship – “Least Restrictive” Standard

- Wis. Stat. § 54.01(18):
- “Least restrictive” means that which places the least possible restriction on personal liberty and the exercise of rights and that promotes the greatest possible integration of an individual into his or her community that is consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, exploitation, and neglect.

Guardianship of the Person

- Duty: make sure the individual's essential needs for health and safety are met with the least possible restriction
- Complete annual report on condition of ward
- Typically includes:
 - Medical decisions
 - Licenses – e.g., driver's, hunting, fishing
 - Decisions about starting or ending marriage
 - Decisions related to employment/vocational training

Guardianship of the Estate

- Duty: manage the individual's finances to ensure basic needs are met
- Individual retains ownership interest; guardian manages on their behalf
- Initial inventory and annual accounting to the court
- May also become representative payee for Social Security benefits
- Some decisions require prior court approval – e.g., selling real estate, purchasing or changing insurance policies, creating a special needs trust, gifting

All Wards Retain Rights!

- Provide input into support services
- File grievances
- Participate in court hearings
- Access advocacy agencies
- Petition for review of court orders
- Withhold consent to mental health or substance abuse treatment under ch. 51
- Exercise federal constitutional rights
- Limited guardianship-To exercise any right not expressly removed by the court or statute

Common Issues

- Visitation
- Intimate relationships
- Alcohol/smoking
- Taking away phones/access to a phone
- Personal choices – food, haircuts, clothing, spending money
- Guardianship as a means to try to force mental health, substance abuse treatment or restrict choices/bad decisions
 - Poor judgment is not enough! Wis. Stat. § 54.10(3)(b)

Placements – POA-HC

- Agent can place:
 - For post-inpatient rehab if admitted directly from hospital IP unit (60 days)
 - For respite, if principal lives with agent (30 days)
 - For long-term care beyond those time limits if document grants authority
- Agent cannot place:
 - Hospital admission was for psychiatric care
 - Placement is for treatment of mental illness or developmental disability
 - Principal protests placement (agent must follow wishes of principal)

Placements – Guardianship

- Guardian can place:
 - In facility < 16 beds w/o court approval
 - Can place in other facilities for up to 60 days w/o court involvement for rehab or if individual is unable to provide for own care/safety so as to create serious risk of substantial harm to self or others – but not for treatment/services related to mental illness or developmental disability (Wis. Stat. § 55.055(1)(b))
- Guardian cannot place:
 - Long-term care is needed in facility greater than 16 beds
 - Short-term care is needed in facility greater than 16 beds if placement is for treatment of mental illness or developmental disability
 - Ward protests placement in facility any size

Protective Placement – Ch. 55, Wis. Stats.

- Protective Placement:
 - Court order that individual be placed for treatment or services
 - Only available for individuals under guardianship
 - Standard: individual has impairment/incapacity (developmental disability, degenerative brain disorder, serious and persistent mental illness, or other incapacity) that makes them incapable of providing for their own care
- But...
 - May not be placed to facility for treatment of acute mental illness (e.g., IMD or inpatient mental health unit)

Ch. 51 vs. Ch. 55

- Ch. 51: Mental commitment
 - Process used for placement in facility for treatment of mental illness
- Ch. 55: Protective placement
 - Process used for placement in facility for treatment/services for other concerns – even if person has diagnosis of serious & persistent mental illness
 - Cannot place in IMD/inpatient mental health unit
- Ch. 51/55: Involuntary psychotropic meds
 - Guardian cannot consent over individual's objection w/o protective services court order OR commitment + involuntary meds order
- The line between these is not always clear
 - E.g., what about an individual who has a developmental disability or brain injury and also treatable mental illness?

Contact the GSC

Contact us:

Polly Shoemaker, Managing Attorney

Phone: 855-409-9410

Email: guardian@gwaar.org

Website: gwaar.org/gsc

Email me or visit the website to sign up for our newsletter!

