

# Legal Decision- Making and Options for Support

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WISCONSIN GUARDIANSHIP SUPPORT CENTER  
GREATER WISCONSIN AGENCY ON AGING RESOURCES, INC. (GWAAR)

## What will be covered today?

- ▶ About the WI GSC
- ▶ Core Concepts
- ▶ Advance Directives

# Guardianship Support Center

- ▶ Through a toll-free helpline, the GSC provides information on the following subjects:
  - ▶ Guardianships,
  - ▶ Powers of attorney,
  - ▶ Protective placement,
  - ▶ Other advance directives, and
  - ▶ More.
- ▶ Other services include a free quarterly newsletter, other publications, an APS listserv available to professionals working with vulnerable adults, and presentations on these topics throughout the state
- ▶ **\*Note: The GSC is a neutral entity and informational resource only. Therefore, it does not provide direct legal representation or legal advice.**

# Core Concepts: Family Consent

- ▶ **Wisconsin is not a “next of kin” or “family consent” state.**
- ▶ A family member generally does not have the legal authority to make decisions for an adult without having the specific authority given to that family member.



# Order of Restrictiveness

Least Restrictive to Most Restrictive



# Wisconsin Advance Directives

- ▶ Powers of Attorney (for Finance or Health Care)
- ▶ Living Will (Declaration to Physicians)
- ▶ Authorization for Final Disposition
- ▶ Do-no-resuscitate orders

## Example Scenario

- ▶ Betty has been diagnosed with Alzheimer's. She manages her health care and financial affairs, but wants help on her day to day decisions. Betty often brings her daughter Beka with her to medical appointments. Betty's doctors have suggested to Beka that she should petition for guardianship because of Betty's diagnosis.

# Supported Decision-making

## Theory:

- ▶ All people need and use help and support in decision-making
- ▶ If someone is able to understand information to make a decisions with help and support the right to make that decision should be left with that person

## Structure:

- ▶ Informal arrangement where individual relies on natural supports for help making decisions
- ▶ The individual is ultimately the decision-maker

## Example scenario

- ▶ Ava lives alone, does not have any family or friends involved in her life. She does not want to complete advance planning because she does not have anyone to name as power of attorney agent.

# Core Concepts: Living Wills

What is a **living will**?

A legal document signed by a person, giving instructions to physicians under very limited circumstances



# Living Wills

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- ▶ Communication directly between patient and physician
- ▶ Instructions to follow certain end of life wishes
- ▶ Authority is limited in scope compared to POA

# Living Wills: Authority

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- ▶ Authorize the withholding or withdrawal of life sustaining procedures OR of feeding tubes only when a person is a qualified patient
- ▶ 1) has a terminal condition,  
OR  
2) In a persistent vegetative state

# Living Wills

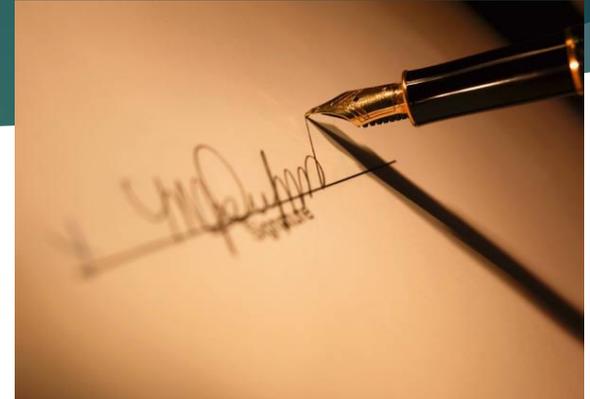
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- ▶ Can have both POAHC and living will
- ▶ BUT provisions of a POAHC supersede any directly conflicting provisions of a declaration to physicians (Living Will)
- ▶ Important tool for someone who might not have a family member or friend to be POA agent

# Living Wills: Execution

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- ▶ Sound of mind
- ▶ 18 years or older
- ▶ Voluntary
- ▶ Takes effect immediately
- ▶ Signed in the presence of 2 disinterested witnesses



## COMPARISON OF WISCONSIN'S LIVING WILL AND POWER OF ATTORNEY FOR HEALTH CARE

03/2011, updated 12/2014

### LIVING WILL (DECLARATION TO PHYSICIANS) *Ch. 154, Wis. Stats.*

### POWER OF ATTORNEY FOR HEALTH CARE *Ch. 155, Wis. Stats.*

<b>What it is</b>	Document signed by a patient giving instructions to physicians under certain circumstances.	Document signed by a "principal" appointing another individual as "agent" to make health care decisions for principal.
<b>When it becomes effective</b>	When two physicians personally examine patient and sign statement that he or she is "terminal" and death is imminent, <u>or</u> is in a "persistent vegetative state."	When two physicians (or one physician and one psychologist) personally examine patient and sign statement that he or she is incapacitated (not able to make health care decisions).
<b>Conditions under which document is effective</b>	<ul style="list-style-type: none"> <li>• "Terminal" and death imminent; or</li> <li>• "Persistent vegetative state."</li> </ul>	Anytime incapacitated. <b>A Power of Attorney is more comprehensive than a Living Will because it covers more situations.</b>
<b>Procedures covered</b>	<ul style="list-style-type: none"> <li>• "Life-sustaining" procedures to be used or withheld/withdrawn if in "persistent vegetative state."</li> <li>• Feeding tubes to be used or withheld/withdrawn if "terminal" or in "persistent vegetative state."</li> </ul>	Almost anything. Agent may consent to or decline procedure. <i>Authority must be specifically authorized for:</i> <ul style="list-style-type: none"> <li>• Long-term nursing home/CBRF admissions;</li> <li>• Tube feeding withholding/withdrawal; and</li> <li>• Continued effect during pregnancy.</li> </ul>
<b>Does not apply</b>	<ul style="list-style-type: none"> <li>• Neither "terminal" nor in "persistent vegetative state;" or</li> <li>• Terminal but death not imminent; or</li> <li>• Pregnant.</li> </ul>	<ul style="list-style-type: none"> <li>• Electroshock therapy;</li> <li>• Experimental mental health, drugs and treatment; and</li> <li>• Admission to mental facilities, certain treatment facilities, or intermediate care facilities for person with intellectual disabilities.</li> </ul>
<b>Use of alternative forms</b>	Permitted, but no immunities for health care providers apply.	Permitted, and immunities for health care provider apply.
<b>Individuals who may be agent or alternate agent</b>	<b>NOT APPLICABLE</b>	Anyone, other than health care provider, employee of a provider or facility where patient or resident, or spouse of provider/employee, unless also a relative. Usually a family member or close friend.
<b>Witnessing requirements</b>	Two disinterested persons. May <u>not</u> be: relative, person who will inherit or has claim on estate, directly financially responsible for patient's health care, or health care provider/facility employee (except social worker or chaplain).	Two disinterested persons. May <u>not</u> be: relative, person who will inherit or has claim on estate, directly financially responsible for patient's health care, or health care provider/facility employees (except social worker or chaplain).
<b>Distribution and storage</b>	Sign one original and make several copies. Copies to doctor/clinic, hospital, a family member. Original at safe place at home; may file with Register in Probate for small fee. Complete wallet card.	Sign one original and make several copies. Copies to doctor/clinic, hospital, agent, alternate agent, family member. Original at safe place at home; may file with Register in Probate for small fee. Complete wallet card.

# Powers of Attorney, Basic Terms and Concepts

- ▶ What is a power of attorney?
  - ▶ **Power of Attorney (POA):** A legal document signed by a person (**Principal**) to give another person (**agent**) the ability and legal authority to act on the behalf of the signor.



## Example Scenario

- ▶ Betty is fearful of what will happen if someday she is unable to make her own decisions or needs help to manage her finances and health care. She wants her daughter Beka to take over if it is someday needed.

# Types of Powers of Attorney

## Powers of Attorney for Health Care

- ▶ A legal document that allows the agent to handle matters related to the principal's care



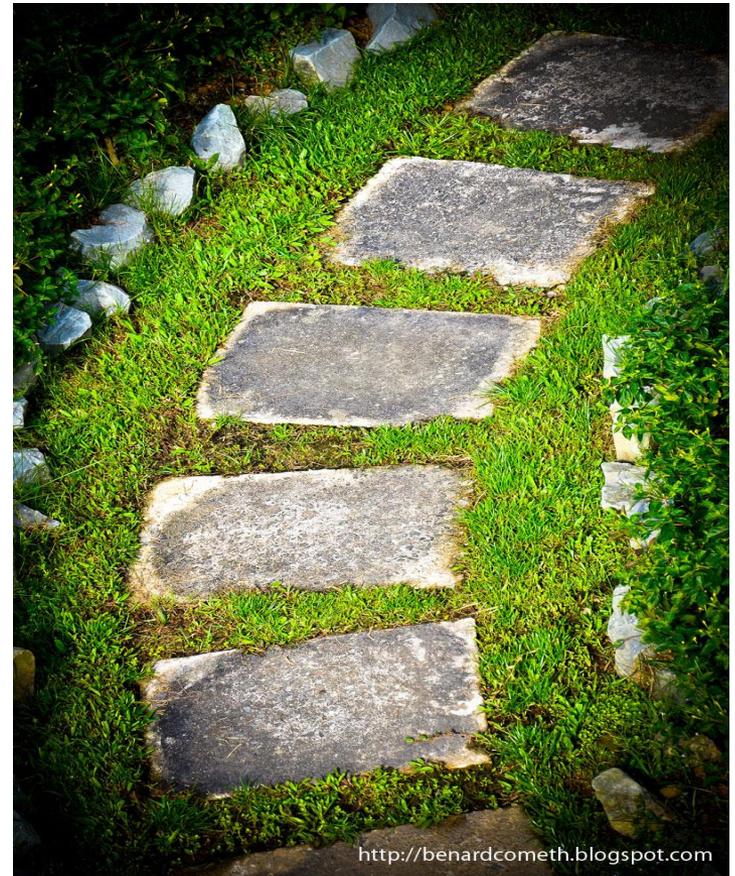
## Powers of Attorney for Finance

- ▶ A legal document that allows the agent to handle matters related to the principal's finances and property



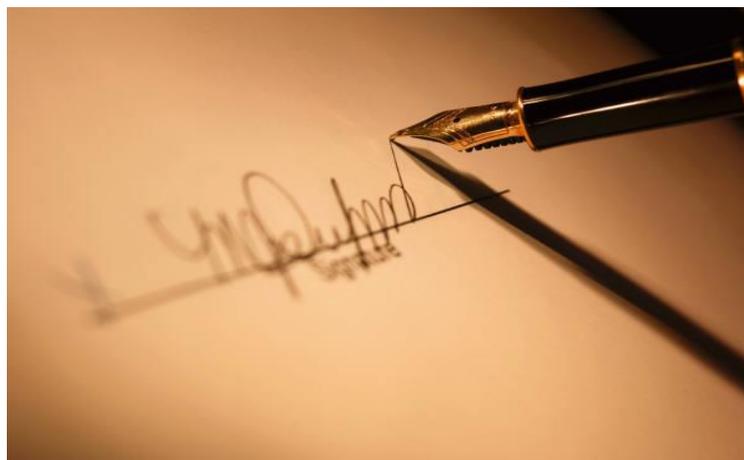
# POA Progression

- ▶ Execution
- ▶ Activation
- ▶ Deactivation
- ▶ Revocation



# Execution of POA

- ▶ **Execution:** Legal action of principal consenting to terms of POA and signing the document
- ▶ The two types of POAs have different execution requirements.
- ▶ Failure to execute correctly can invalidate the entire document.



# Execution

## Power of Attorney for Health Care:

- Signed by principal, OR
- Signed by an adult at the principal's express direction and in his or her presence
- Signed in presence of 2 disinterested witnesses
- Witnesses must sign

# Execution

## Power of Attorney for Finance:

- ▶ Signed by principal, OR
- ▶ Signed by another adult upon the principal's direction and his or her “conscious presence”
- ▶ Not required to be notarized (but strongly recommended)
- ▶ No witnessing requirement

# Activation

Process giving the agent authority to act.

## Immediate

- ▶ POA takes effect upon signing



## Springing

- ▶ POA does NOT take effect at the time of signing
- ▶ Most POAHCs and some POAFs are activated only if (and when) the principal is determined to be incapacitated and other necessary steps are performed.

# Activation

## Power of Attorney for Health Care:

- ▶ Typically, a HCPOA may be activated when 2 physicians or 1 physician and 1 psychologist find the principal incapacitated
- ▶ **Incapacity** means the inability to receive and evaluate info or to communicate decisions to the extent the person cannot manage his or her health care decisions

## Power of Attorney for Finances:

- ▶ Unless otherwise stated in POAF, the POAF is activated when executed.
- ▶ Activation may also be upon the occurrence of a future event or when incapacitated.

# Selection of Agents, Co- and Alternate Agents

## Power of Attorney for Health Care:

- ▶ Per Wis. Stat. § 155.05(5), a principal may designate an alternate agent if the first is unwilling or unable to act.
- ▶ Co-agents: legal validity ambiguous.

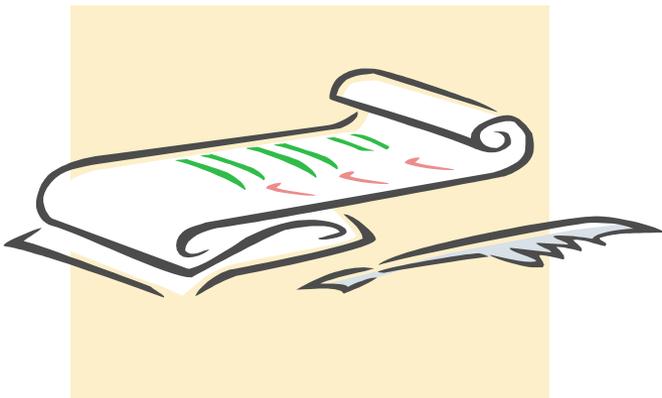
## Power of Attorney for Finances:

- ▶ Per Wis. Stat. § 244.11, a principal may choose (a) 2 or more co-agents and (b) to designate successor agents if an agent resigns, dies, becomes incapacitated, is no longer qualified to serve, or has declined to serve.
- ▶ Co-agents are generally not recommended.

# Agent's Authority

All agents:

- ▶ must act according to the principal's expressed wishes (and the law).
- ▶ If the principal's wishes are not known, then the agent must act in manner reflective of the principal's best interests and the law.



# Health Care Agent's Authority

## ▶ The agent may:

- ▶ Make health care-related decisions only
- ▶ Make end-of-life treatment decisions if specified in HCPOA
- ▶ Consent to nursing home or CBRF admission if specified in HCPOA

## Powers of Attorney: POA-HC Powers

- ▶ **Health Care Decisions:** Informed decision in the exercise of the right to accept, maintain, discontinue or refuse health care. See Wis. Stat. § 155.01 (5).
- ▶ **Health care** “means any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition.” See Wis. Stat. § 155.01 (3).

# Powers of Attorney: POA-HC Powers, cont'd

- ▶ The agent may not:
  - ▶ Consent to the principal's admission into mental health facility, intermediate care facility if DD/ID, or a treatment facility
  - ▶ Consent to experimental mental health research or to psychosurgery, electroconvulsive treatment or drastic mental health treatment procedures for principal
  - ▶ Act in manner inconsistent with POA-HC or principal's expressed wishes or make non-healthcare related decisions.



# Powers of Attorney for Finances

**General powers** may include power to manage the following:

- ▶ Real property,
- ▶ **Digital property,**
- ▶ Personal property,
- ▶ Stocks and bonds,
- ▶ Bank accounts,
- ▶ The operation of entity or business,
- ▶ Estates,
- ▶ Trusts,
- ▶ Other beneficial interests,
- ▶ Claims and litigation,
- ▶ Personal/family maintenance,
- ▶ **\*\*\*Benefits,**
- ▶ Retirement plans, and
- ▶ Taxes.

# Powers of Attorney for Finances: Powers, cont'd

- ▶ Unless **expressly and specifically stated**, the agent cannot:
  - ▶ Create/amend/revoke/terminate an inter vivos trust,
  - ▶ Gift,
  - ▶ Create /change rights of survivorship or beneficiary designation,
  - ▶ Delegate authority granted under the power of attorney,
  - ▶ Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan,
  - ▶ Exercise fiduciary powers that the principal has authority to delegate, create or change a beneficiary designation, and
  - ▶ Disclaim property.

## Example Scenario

- ▶ Mary has been taking care of her mother Martha for many years. Martha has advanced dementia. Mary cares for Martha in her home, arranges all of her appointments, and makes decisions about Martha's care. Mary does not feel that she can provide enough care for Martha at her home any longer.

# Guardianship - what is it?

- ▶ **Guardianship** is
  - ▶ A legal relationship;
  - ▶ Created by a county circuit (probate) court pursuant to Wis. Stat. Ch. 54;
  - ▶ When the ward is determined by the court to be “**incompetent**;”
  - ▶ After the petitioner proves the necessary factual elements and the proposed ward has been provided his or her due process rights;

## Incompetency Factors, cont'd

- ▶ Because of that impairment, he or she is unable effectively to receive and evaluate information or to make or communicate decisions (i.e., incapacity);
- ▶ A risk of physical or financial harm exists; and
- ▶ **\*\*The individual's need for assistance cannot be met by a lesser restrictive alternative\*\***

## But Not Incompetent When...

- ▶ Wis. Stat. § 54.10(3)(b) (b) Unless the proposed ward is unable to communicate decisions effectively in any way, the determination under par. (a) may not be based on mere old age, eccentricity, poor judgment, or physical disability.



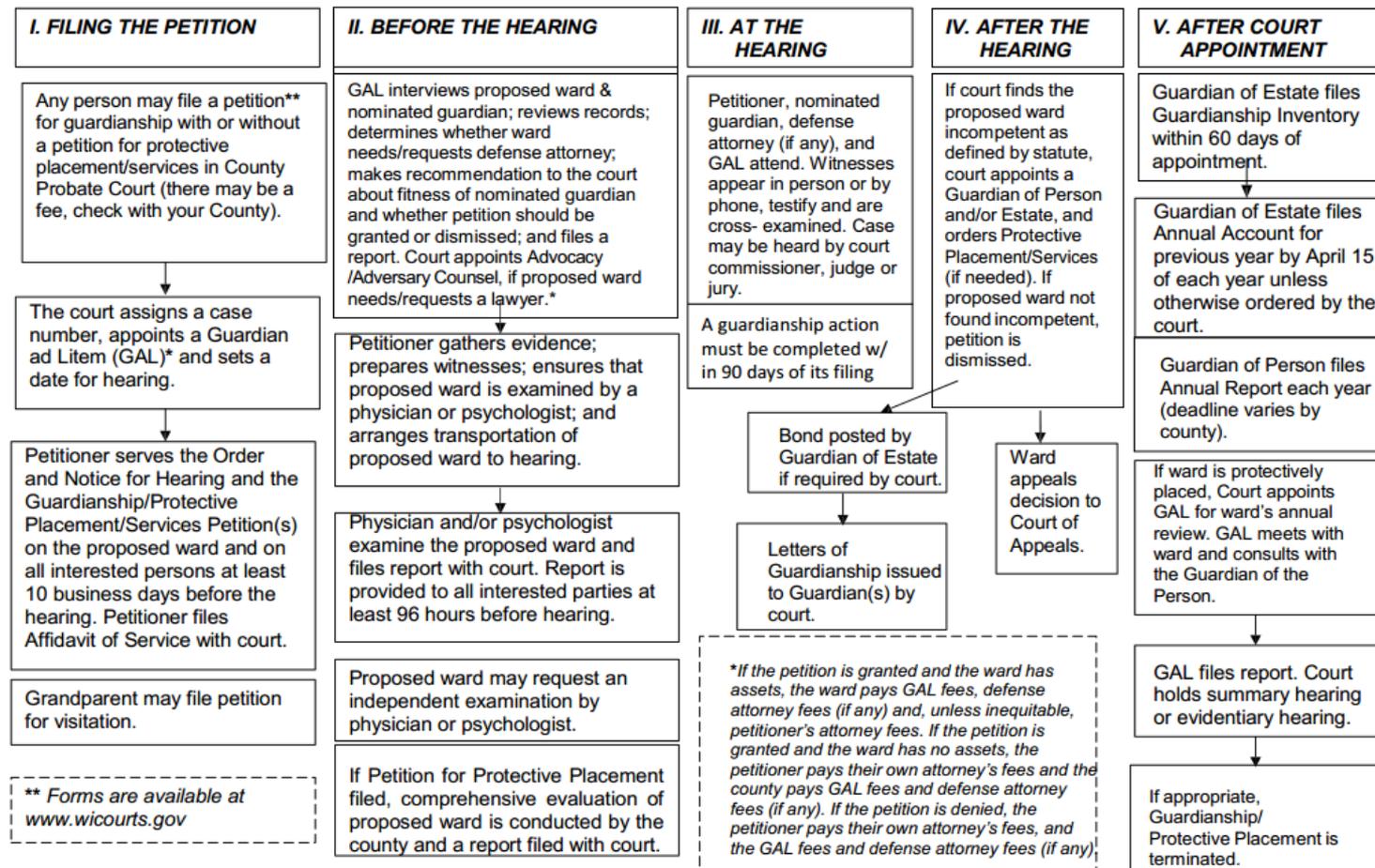
# Selection of a Guardian

- ▶ Any legal person present who is given preference?
  - ▶ A POA agent
  - ▶ Parent of an adult disabled child
  - ▶ Person nominated by parent of an adult disabled child within a will
- ▶ Court to consider:
  - ▶ Ward's preferences
  - ▶ Preferences of ward's family members
- ▶ Conflicts of interest- should be reviewed prior to appointment

## Guardianship: Types of, cont'd

- ▶ **Co-guardians:** not required to be married
- ▶ **Stand-by Guardian:**
  - ▶ Individual who will step into the shoes of the guardian upon the guardian's death, unwilling or inability to act, resignation, court removal, or during period in which initial guardian unable to fulfill his or her duties
- ▶ **Successor Guardian:**
  - ▶ Appointed after the guardian has been removed, dies, or resigns (and the resignation is accepted)

## The PROCESS for ESTABLISHING GUARDIANSHIP of an ADULT



Greater Wisconsin Agency on Aging Resources, Inc.  
Guardianship Support Center 1-855-409-9410 or email [guardian@gwaar.org](mailto:guardian@gwaar.org)

05/01/11 Reviewed &  
Updated 12/2014

## Other Duties of All Guardians

- ▶ **Best interests standard:** The guardian has a legal duty to act in the ward's best interests.
- ▶ Duty to “exercise degree of care, diligence, and good faith when acting on behalf of the ward that an ordinarily prudent person exercises in his / her own affairs”
- ▶ Be an advocate - Not just a “rubber stamp” for suggestions of providers
- ▶ Loyalty to ward
- ▶ Notify court of change of address (guardian or ward)

## Guardian: Duties, Rights, and Powers

- ▶ **Authority:** Guardian has only the authority granted by the court
- ▶ **Important: Wards retain all rights not specifically removed by the court.** See Wis. Stat. § 54.18 and 54.25(2)(a).
- ▶ Default is limited guardianship. Each guardianship petition and order should reflect the individual's needs and abilities.

# Guardianship Support Center

- ▶ **How to reach the GSC?**
- ▶ By phone: (855) 409-9410
- ▶ By email:  
[guardian@gwaar.org](mailto:guardian@gwaar.org)
- ▶ By fax: (866) 561-2652



## USE OF THIS PRESENTATION:

THIS POWERPOINT MAY BE ONLY USED AS A REFERENCE TOOL IN THE FUTURE BY THOSE WHO ATTENDED THIS PRESENTATION.

THIS POWERPOINT IS NOT INTENDED FOR GENERAL CONSUMER USE, AND IT MAY NOT BE USED IN ANY OTHER PRESENTATION WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE WI GUARDIANSHIP SUPPORT CENTER