

Health Care Decision-Makers: What they can and can't do

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Core concepts

- 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



Current formal tools for people who need help with decisions



Release forms

- Person signs release forms authorizing a specific person(s) access to certain kinds of records (health, financial, etc.).
- Some release forms may allow a person to select certain records to be released while retaining privacy over others.
- Some release forms may provide one-time or time-limited access to records, others releases may remain in effect in perpetuity.



Supported Decision-Making agreements

- Person makes all their own decisions. Person identifies area in which they want support, identifies a Supporter(s) to help them gather information, compare options, and communicate their decisions to others.
- The Supported Decision-Making agreement outlines what types of decisions the Person wants support and the role of the Supporter.
- Agreement can be changed or stopped at any time by the Person or Supporter.



Representative payee

The Social Security Administration (SSA) appoints an individual/organization to receive SSI/SSDI benefits for a person who cannot manage or direct the management of their own benefits.

To change a Representative Payee, the Person must complete an application process with the SSA.



Power of Attorney

- Formal legal arrangements that permit others to act on the Person's behalf.
- Powers of Attorney (POA) designate another (agent) individual to make certain decisions (generally health care or financial) on the Person's behalf. POAs can be set up in different ways. Some POAs are activated only when a person is incapacitated.



Limited or Full Guardianship

- Transfers some or all decision-making authority from the Person to a court-appointed Guardian.
- Once guardianship is granted by the courts it is difficult (and costly) to modify or reverse the guardianship; any changes must be made through a formal court process.
- No least restrictive alternatives

Power of attorney



- Legal contract
- Gives chosen person(s)
- Authority to act on one's behalf

Power of Attorney for Health Care

- Adult of “sound mind”
 - Generally means they understand nature of the document, powers it will convey and not convey, rights and limitations 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 GP
 - Perfect memory not required
- In writing, signed and dated by Principal and witnesses
- 2 disinterested witnesses

What decisions can the POA-HC 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.
- “Health care decision” means an informed decision in the exercise of the right to accept, maintain, discontinue or refuse health care.

Wis. Stat. §155.01

Power of Attorney Health Care

- End of life care
- Decide between treatment options
- Consent to surgery
- Must follow expressed desires or direction of principal
 - If unknown, act in best interest
- Admission to nursing home or CBRF

ADMISSION TO NURSING HOMES OR COMMUNITY-BASED RESIDENTIAL FACILITIES

My health care agent may admit me to a nursing home or community-based residential facility for short-term stays for recuperative care or respite care.

If I have checked "Yes" to the following, my health care agent may admit me for a purpose other than recuperative care or respite care, but if I have checked "No" to the following, my health care agent may not so admit me:

1. A nursing home - - Yes No
2. A community-based residential facility - - Yes No

If I have not checked either "Yes" or "No" immediately above, my health care agent may admit me only for short-term stays for recuperative care or respite care.

Incapacity

- Two doctors or 1 doctor and 1 psychologist
- Unable to receive and evaluate information effectively
- or to communicate decisions
- to such an extent that they lack the capacity
- to manage health care decisions
- No court determination
- Mere old age, eccentricity or physical disability insufficient

POA-HC Agent Limitations

- An agent cannot make decisions as to who can visit
- Cannot consent to experimental mental health research or psychosurgery, electroconvulsive treatment or drastic mental health treatment procedures

An agent cannot admit to:

- Institution for mental diseases
- Intermediate care facility for persons with an intellectual disability
- An inpatient treatment facility

POA-HC Agent Limitations

An agent can make certain health care decisions only if the Principal has specifically given authority within the POA document:

- Consenting to withholding or withdrawal of feeding tubes
- Making health care decisions if Principal is pregnant
- Admit to a nursing home or CBRF

Deactivation

- Regaining capacity
- No formal process required in the statutes
- Can be done in the opposite way, ex 2 physicians sign certification that individual has regained capacity to make decisions
- Some facilities use 1 physicians or psychologist and that is probably sufficient as there are no statutory requirements

Revocation of Power of Attorney

- Can revoke at any time
- Signed and dated statement
- Tear it up or burning document
- Express intent in front of 2 witnesses
- Execute new POA-HC

Alternate agents

- Act when primary is “unable or unwilling”. Wis. Stat. 155.01(4)
- These terms are not further defined
- Unable could be due to disability, incapacity or incompetency
- Probably does not mean temporarily, ie you made one phone call and can't reach them
- Primary can resign temporarily, ex: illness in their family, out of the country on vacation. Best to put this in writing and indicate it is temporary.
 - Otherwise is resignation permanent?

When do the agent's duties end?

- Upon death of Principal
- If the Principal revokes the POA
- Agent is unwilling or unable to serve
- Agent has been removed by court order
- Guardian has been appointed and the court has revoked or limited the POA

POA-HC Legal Safeguards

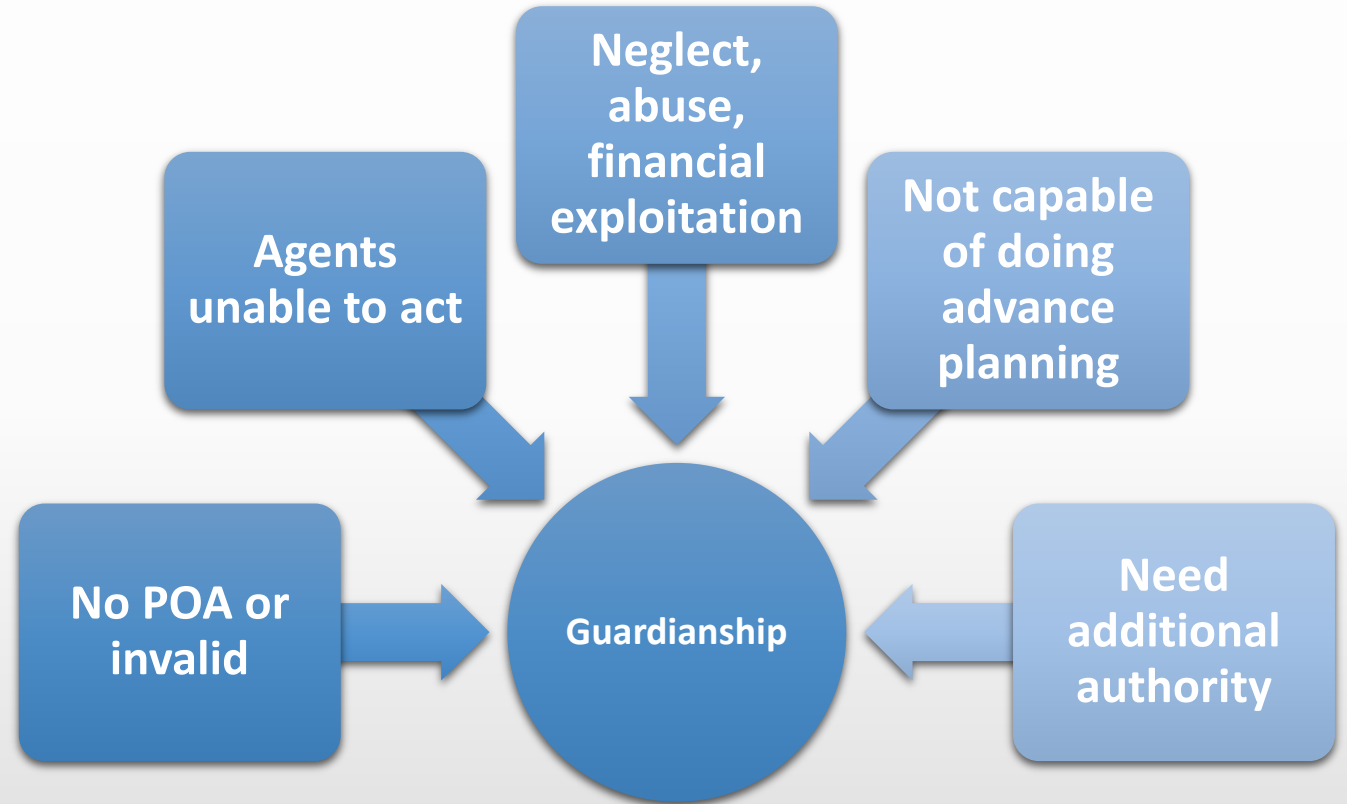
- Interested party can petition for court review
- Court can:
 - direct them to act in accordance with the POA
 - require them to report to the court periodically,
 - or rescind all powers of the agent.

Wis. Stat. §155.60

Guardianship



Guardianship
is a legal
relationship
created by the
court



Incompetency

- Court determination in guardianship
- Qualifying impairment
 - Degenerative brain disorder, developmental disability, serious persistent mental illness, other like incapacities
- Because of impairment:
 - Unable effectively receive & evaluate info. OR to make or communicate decisions to extent unable to meet essential requirements of health or safety
 - Unable effectively receive & evaluate info OR to make or communicate decisions related to management of property or finances to extent that any of following applies:
 - Property dissipated in whole or part
 - Unable to provide for support
 - Unable to prevent financial exploitation
 - AND
 - Can't be addressed by less restrictive measures

Petition for Guardianship

- Initiates guardianship proceeding when filed
- Not a court order
- Explains what Petitioner is asking Court to grant
- May not reflect what the Court actually ordered

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

IN THE MATTER OF _____

Name _____

Date of Birth _____

Amended

Petition for

Temporary

Permanent

Guardianship Due to Incompetency

Case No. _____

UNDER OATH, I STATE:

- I am interested as
 - a relative. I am related to the individual as _____.
 - a public official. My authority to act as petitioner is _____.
 - Other: _____.
- This Petition is filed in the county in which the individual
 - resides.
 - is physically present.
 - Other: _____.
- The individual lives in _____ County, State of _____, [Phone Number] _____ and the individual's mailing address is [Street, City, State, Zip] _____.
- The name and mailing address of the person or institution, if any, that has care and custody of the individual or the facility, if any, that is providing care to the individual is:

Name _____ Phone Number _____

Mailing Address [Street] _____

[City, State, Zip] _____

This Petition for Guardianship is filed with a Petition for Protective Placement prior to transfer of the individual directly from a hospital to a nursing facility or community-based residential facility under §50.06, Wis. Stats.
- The names and mailing addresses of all interested parties (including the petitioner) and all others entitled to notice are as follows: See attached

Name	Relationship	Mailing Address [Street, City, State, Zip]

Letters of Guardianship

- Indicate authority and duties of guardian
- Indicate if they are guardian, co-guardian, successor guardian or standby
- Indicate if POA-HC is revoked or limited
 - Note: POA will continue to make decisions if POA remains in effect and not the guardian
- Indicate how co-guardians act together
- Indicate other authority guardian might have that is not in the standard language

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

IN THE MATTER OF _____ Amended

Name _____ **Letters of Guardianship of the Person
Due to Incompetency**

Date of Birth _____ Case No. _____

To:
Address: _____

You are appointed guardian co-guardian successor guardian of the person of the above-named ward.

You are appointed standby guardian and your authority to act is limited to the following time period:
[Starting Date] _____ through [Ending Date] _____.

Power of Attorney for Health Care is revoked. limited as follows: _____

You are issued Letters of Guardianship of the Person with the following powers or limitations:

A. Co-guardians must agree with each other when making decisions on behalf of the ward.
 Co-guardians may act independently when making decisions on behalf of the ward.
 Co-guardians may act independently when making decisions on behalf of the ward only in these limited circumstances: _____.

B. The successor guardian is authorized to exercise powers as previously authorized or modified for this ward.
 See attached Letters dated _____.

C. The guardian of the person has all the duties specified under §54.25(1), Wis. Stats. The ward retains the right to exercise the following right(s) only with consent of the guardian of person to
 (1) consent to marriage.
 (2) apply for an operator's/driver's license.
 (3) apply for a fishing license.
 (4) apply for a license under Ch. 29, Wis. Stats., other than fishing.
 (5) apply for any other license or credential under §54.25(2)(c)1.d., Wis. Stats. Specifically: _____
 (6) consent to sterilization.
 (7) consent to organ, tissue, or bone marrow donation.

D. The guardian of the person is authorized to exercise the following specific powers in full or in part to
 1.A. give informed consent to the voluntary receipt by the ward of a medical examination, medication, including any appropriate psychotropic medication, and medical treatment that is in the ward's best interest, if the guardian has first made a good-faith attempt to discuss with the ward the voluntary receipt of the examination, medication, or treatment and if the ward does not protest.

How can I check if someone is under guardianship or if court forms are still valid?

- No expiration
- There is no review of guardianship unless someone petitions
 - Note: there is an annual review of protective placement
- Guardian can get certified copies at the Register in Probate
- Court records are closed, but if someone has been found incompetent and who their guardian is can be released if demonstrate a need. Wis. Stat. § 54.75.

Guardian duties (Guardian of the Person)

- Place least restriction on liberty and exercise of rights
- Promote greatest integration into community
- Diligent efforts to identify and honor preferences with respect to:
 - choice of place of living,
 - personal liberty and mobility,
 - choice of associates,
 - communication,
 - personal privacy,
 - choices related to sexual expression and procreation.
- In making a decision to act contrary to what the ward wants, consider:
 - ward's understanding of the nature and consequences of the decision,
 - the level of risk,
 - the value of the opportunity to develop decision-making skills,
 - need for wider experience.

Wis. Stat. § 54.25

Guardian duties (Guardian of the Person)

- Care, diligence, and good faith that an ordinarily prudent person exercises
- Advocate for best interests.
- Endeavor to secure necessary care/ services in ward's best interests based upon:
 - regular in-person inspection of the ward's condition, surroundings, and treatment;
 - examination of ward's health care and treatment records;
 - attendance at staffings;
 - inquiry into the risks and benefits and alternatives to proposed treatment; and consultation with providers of health care and social services.

Guardianship—Rights of the Ward

- Vote
- Serve on jury
- Execute will

- Marriage
- Drivers license
- Hunting & fishing license
- Professional license
- Consent to organ donation
- Consent to sterilization



Guardian Transferred Powers

- Check Letters to see if power has been transferred
- Consent to voluntary or involuntary medical examination and treatment, if in the ward's best interest. This includes the voluntary receipt of medication, including psychotropic medication in ward's best interest, if ward in agreement
 - For involuntary medical treatment must consider invasiveness, benefits and side effects
- Involuntary administration of psychotropic medication only with protective service order
- Consent to participation in research under certain conditions.

The WI Supreme Court observed that, “where a ward’s wishes regarding medical treatment can be determined by a preponderance of the evidence, then it is in the ward’s **best interest** to have those wishes honored.”

Spahn vs Eisenberg, 210 Wis.2d 557, 569, (1997)



Guardian Transferred Powers

- Consent to social and supported living services.
- Consent to release of confidential records.
- Mobility and travel.
- Choose providers of medical, social, and supported living services.
 - Ward retains right to give input into support services
- Receive all notices on behalf of the ward.
- Act in all proceedings as an advocate of the ward.
- Apply for protective placement or commitment.
- Have custody of the ward.
- Any other powers the court has indicated.

Guardian's access to health care records

- Guardian can access records under HIPAA, they are considered a “personal representative” 45 C.F.R. Sec. 164.502(g)(2).
- Wisconsin requires a guardian of the person to examine the ward's patient health care records and treatment records. Wis. Stat. § 54.25(1)(b)(2).
- A guardian has the right to see only records that are relevant to their authority as stated in the Letters.

Review Conduct of Guardian

- Court can review conduct of guardian if they are engaging in self-dealing, failing to act in ward's best interest, knowingly isolating ward, etc.
- Court can remove guardian, order guardian to pay costs, fine guardian, require guardian to reimburse ward, etc.

See Wis. Stat. § 54.68

Power of Attorney

- Voluntary
- Person chooses agent and authority of agent
- Decisions based on person's wishes
- No rights removed
- Generally no supervision of agent

Guardianship

- Involuntary, court ordered
- Court appoints guardian
- Decisions based on person's best interest
- Many rights possibly removed
- Court oversight

Who makes the ultimate decisions?

Guardianship	Power of Attorney-HC (activated)
<ul style="list-style-type: none">• Guardian is decision-maker in areas where authority was granted• Get input from ward• Best interest standard	<ul style="list-style-type: none">• Agent makes decision based on expressed wishes of Principal• Health care only!• Principal can express at any time, including after activation• Follow what Principal wanted according to what is in their POA document• Best interest standard only when wishes are unknown

WI Guardianship Support Center

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



WI Guardianship Support Center

Contact us:

Phone: 855-409-9410

Email: guardian@gwaar.org

Website: gwaar.org/gsc



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AN OVERVIEW OF LEGAL DECISION-MAKING IN WISCONSIN

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I. The Basic Rules of Legal Decision-Making for Adults in Wisconsin

- A. An adult (18 years or older) is the ONLY one who can make decisions for that adult.
- B. Wisconsin law treats family members, including spouses, as strangers for decision-making purposes.
- C. Family members are NOT authorized to make decisions for any adult family members. (Wisconsin is NOT a “next of kin” or “family consent” state for adults).
- D. Decision-making authority can be delegated to others (often called “surrogates”) by a principal who is of “sound mind.” Power of Attorney for Health Care is one example.
- E. The law also delegates decision-making authority to surrogates. Examples are Guardianship, Conservatorship and Representative Payees for Social Security.

II. Power of Attorney for Finances (a.k.a. Durable Power of Attorney)

- A. A document that authorizes another person (called the “agent” or “attorney-in-fact”) to handle the financial affairs of the person executing the document (called the “principal”), consistent with the terms of the document or as expressed by the principal. No witnesses or notary is required, but having this document notarized is highly recommended.
- B. All POA-Fs are presumed to be durable unless otherwise stated the POA-F. The term “durable” means the document remains in effect during a period of incapacity. The current statutory state form POA-F is automatically durable.
- C. A private arrangement between the principal and the agent; the court is only involved if trouble arises.
- D. Typically takes effect immediately unless otherwise specified.

- E. If a POA-F is not executed or other suitable arrangements made (e.g., supported decision-making, a trust or the appointment of a representative payee), a Guardian of the Estate must be appointed if the principal loses the mental ability to make financial decisions or does not have capacity to execute a POA-F.

III. Power of Attorney for Health Care

- A. A document that authorizes another person (called the “agent”) to make health care decisions for the person executing the document (called the “principal”), consistent with the terms of the document and based on the wishes of the principal.
- B. By default, the document is activated when the principal becomes incapacitated.
- C. Executed by a person over 18 years of age who is of “sound mind”. Two disinterested witnesses are required to witness the execution and signature.
- D. Can include a statement of wishes regarding future care or end of life care. It is essential that principals talk to their agents about their wishes.
- E. If a POA-HC is not executed, and there are no other options to provide decision-making support, a Guardian of the Person must be appointed by the court if the principal loses the mental ability to make health care decisions.

IV. Guardianship

- A. A guardianship is needed if a person is incompetent (legal determination) and they were never capable of doing advance planning, there is no advance planning, the advance planning is invalid or does not cover the specific issue that needs addressing or they are the victim of neglect, abuse or financial exploitation and the health care/financial agent is the abuser/exploiter/neglecter or cannot protect the individual from self-neglect, abuse, exploitation or neglect.
- B. Guardianship is a legal relationship created by the court. A petitioner must prove necessary factual elements. The ward must be provided due process rights. There can be a guardian of the person and/or guardian of the estate.

V. Authority of Agent or Guardian

- A. With a **Power of Attorney for Health Care**, the authority of the agent is to implement the wishes of the principal (called substituted judgment) which have been communicated orally or in writing prior to incapacity or communicated during

incapacity by the principal to the agent or someone else. When wishes are unknown, the agent uses a best interest standard. The agent makes health care decisions only.

- B. A **Power of Attorney for Finance** agent is required to follow the reasonable expectations of the principal to the extent known and if not known, the agent uses a best interest standard. The agent only has the authority that has been given to them in the document.
- C. With a **guardianship**, the guardian is to make decisions for the ward based on the best interests of the ward after consultation with the ward and consideration of what the ward wants.
- D. If the guardian can demonstrate by a preponderance of the evidence a clear statement made by a ward, while still competent, of the ward's desires regarding end-of-life decision-making, it is in the best interests of the ward to honor those wishes. *Edna M. F.*, 210 Wis. 2d 558, 563 N.W.2d 485 (1997).

VI. Incapacity and Incompetency

- A. **Incapacity** is a determination by two doctors or one doctor and a licensed psychologist that an individual is "unable to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions." Wis. Stat. § 155.01 (8). Typically, this is the standard used to activate a Power of Attorney for Health Care, unless otherwise specified within the document.
- B. **Incompetency** is a legal determination where the court has determined there is a qualifying impairment and because of that impairment the individual is unable to receive and evaluate information or make or communicate decisions to the extent their health, safety and/or finances are at risk and there are no less restrictive alternatives.

VII. Other Advance Directives or Alternatives

- A. A **Living Will** is a document executed by a principal declaring his or her wishes and directing his or her physician to refuse certain life sustaining procedures when the principal's death is imminent due to a terminal condition or when the principal is in a persistent vegetative state. This does not apply in any other health care situation. This is a directive to the physician not an agent. A Power of Attorney-Health Care is broader than a Living Will and can encompass what would be included in a Living Will. You can have both, but they should be consistent with each other.

- B. **A Do Not Resuscitate Order (DNR)** order may only be issued by an attending physician and only applies to a “qualified patient” (when an adult has a terminal condition or would suffer pain or harm from resuscitation or when resuscitation would be unsuccessful). The qualified patient, guardian or agent must also request the DNR order, consent to it, and sign the written order. A DNR bracelet is required to be worn to indicate there is a DNR order. A DNR Bracelet may be obtained from the physician (for free) or StickyJ® Medical ID (for a fee).
- C. **Authorization for Final Disposition** is a document executed by an individual expressing special directions for religious observances, arrangements for viewing, funeral, memorial, or graveside service, and burial, cremation or other disposition of the declarant’s body after death. This requires naming a representative to carry out directions.
- D. A **Supported Decision-Making Agreement** is a tool an individual with a functional impairment can execute to formally name a Supporter to assist them in areas such as education, housing, medical or finances. The Supporter is just a helper and they do not have authority to make decisions for the individual. They can help to collect information, communicate the individual’s decisions or help them understand options, responsibilities and consequences of life decisions. Supported Decision-Making is a less restrictive alternative to guardianship. The Supported Decision-Making Agreement form be found at <https://www.dhs.wisconsin.gov/library/f-02377.htm>.
- E. **Conservatorship** is a voluntary court process to appoint a conservator to manage finances and property with continued court oversight. An adjudication of incompetency is not required.
- F. Power of Attorney, Living Will and Authorization for Final Disposition forms can be found on the Department of Health Services website at <https://www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm>.
- G. Court forms for guardianship or conservatorship proceedings can be found here: <https://www.wicourts.gov/forms1/circuit/index.htm>.

QUESTIONS? Call the Wisconsin Guardianship Support Center at 1-855-409-9410 or email at guardian@gwaar.org.

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