

AN OVERVIEW OF LEGAL DECISION-MAKING IN WISCONSIN

This publication is for informational use only and does not contain legal advice

April 2019

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.

Reproduction of this brochure is permitted and encouraged, so long as no modifications are made and credit to the Wisconsin Guardianship Support Center of the Greater Wisconsin Agency on Aging Resources, Inc., is retained. Information contained herein is not intended, and should not be used as legal advice. Application of the law depends upon individual facts and circumstances. In addition, statutes, regulations and case law are subject to change without notice. Consult a legal professional for advice and assistance with legal issues.

