

Guardianship

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Introduction

Guardians make decisions

Guardianship is a legal mechanism which enables one person, called a guardian, to make legally recognized and enforceable decisions for another person, called the ward. A person with a severe mental disability may be incapable of making some decisions; for instance, about whether to have an operation or how to spend money. A guardian is a person appointed through court procedures to make decisions like these on behalf of someone who is unable to make such decisions

Mental disability required

independently. However, the use of guardianships under Wisconsin law is to be limited to situations where a mental incapacity is interfering with someone's ability to make decisions. Guardianship is not intended to be used to override someone's decisions when there is no mental disability, even if most people would agree that the individual does not make "good" decisions. Wisconsin law permits people to make what others may believe are "eccentric" decisions, so long as the decisions are not the result of mental incapacity.

Court appointment required

In Wisconsin anyone over age 18 legally is an adult and is presumed by the law to be able to manage all personal and financial affairs. Once an individual turns 18, parents no longer can legally exercise rights on behalf of their son or daughter, unless a court finds that the person needs a guardian and appoints one or both parents to make important decisions. As an example, once someone is 18, his/her parents no longer are legally entitled to see their son's or daughter's medical records or make binding treatment decisions for the person. This is true even if the person is severely disabled and no one would dispute the fact that s/he is incapable of making decisions. Without a court appointment as guardian, parents, even under such circumstances, cannot legally make decisions on behalf of their son or daughter.

Eligibility

Incompetency required

Sec. 880.33(4), Wis. Stats.

Definition of incompetent

Sec. 880.01(4), Wis. Stats.

In Wisconsin an adult must be found by a court to be "incompetent" before a guardian can be appointed. Someone is incompetent if a court finds that s/he is substantially incapable of managing his/her property or caring for him/herself because of mental impairment caused by the aging process, or because of a developmental disability, or because of conditions, like mental illness or alcoholism, having similar effects. Essentially, competence may be thought of as a person's ability to understand the consequences of decisions and actions and make choices based on available information. A physical disability having minimal or no effect on mental abilities will not support a finding of incompetence.

Spendthrifts and minors

Sec. 880.03 and
Sec. 880.01(9), Wis. Stats.

Guardians also can be appointed for “spendthrifts” (people who are unable to meet their living expenses because they waste money as a result of alcohol or drug abuse, gambling or similar conduct). A guardian may also be appointed for a minor; in this situation incompetence does not have to be proved.

Caution should be exercised

Even if someone technically may qualify for appointment of a guardian, there are good reasons for being cautious about using this procedure. A person who is found to be incompetent loses the opportunity to exercise important rights and may feel a loss of dignity and respect as a result. Also, others may treat the individual with less respect or as if s/he is less capable than is the case. Also, because it focuses on a person’s disabilities, even the process of proving the need for guardianship may, at least temporarily, have a harmful impact on the person.

Each case different

However, without guardianship, it may be difficult to secure needed services like medical care. A doctor may question an individual’s ability to consent to medical procedures and be unwilling to perform them without a guardian’s signature. There may also be no one with a legal right to monitor the person’s treatment and services and defend the person’s rights. Each case is different and the need for guardianship must be weighed against any costs like loss of self respect. Also, some of the negative effects of being placed under a guardianship can be reduced for some people if the court authorizes the guardian to act only in limited areas. This concept of *limited guardianship* is discussed below. Prior to seeking guardianship one should consider whether alternatives are possible and would better meet the person’s needs.



Guardianship can be a drastic step in a person’s life. Thus, check first to see if other approaches can be effective in meeting the person’s needs.

Alternatives to Guardianship**Power of Attorney for Health Care**

Chapter 155, Wis. Stats.

This is a document that a person can complete while they are competent. In the document one names another person to make health care decisions when and if the individual becomes incapable of making his/her own decisions. One can also direct the types of decisions one would like to have made, including admission to a nursing home, end of life health care decisions, types of medications and other treatments to be administered, etc. This is a formal document which requires witnesses and a certain content which is spelled out in the Wisconsin Statutes. There are several standard forms and instructions about how to fill them out; they may be obtained from the Elder Law Center.

Elder Law Center
www.cwag.org

Living Will

Chapter 154, Wis. Stats.

In this document a person who is competent gives instructions to his/her physician about treatment to be given if the person is in a terminal condition or a persistent vegetative state. It has a narrower focus than the power of attorney for health care and many persons now incorporate end of life decisions into the power of attorney document instead of having both. Forms and instructions may be obtained from the Elder Law Center.

Power of Attorney for Finances

Sec. 243.07, Wis. Stats.

In this document a person can give another person the authority to make decisions about his/her financial affairs. It can take effect immediately or only upon the person becoming incapacitated. It also can go into effect while the person is competent and then continue to be valid when and if the person becomes incapacitated. In this case it is called a *durable power of attorney*. One can tailor the document to fit an individual's particular needs and circumstances by being quite specific about the powers given to the agent. There are specific legal requirements for the document to be valid. Thus, contact an attorney or obtain the standard form and instructions about how to fill it out from the Elder Law Center.

Conservator

Sec. 880.31, Wis. Stats.

A person can voluntarily request the court to appoint a conservator, who has the same powers and duties as a guardian of the estate. A conservatorship ends on the person's request, unless the court holds a hearing and finds that the person is incompetent.

Representative Payee

20 CFR §§ 404.2001 and 416.610

The Social Security Administration can appoint a representative payee for someone who receives Social Security or Supplemental Security Income (SSI) benefits if it finds this would be in the person's best interests due to mental or physical incapacity. This avoids a finding of legal incompetence and is limited to only handling the funds from the government benefits. The payee is to use the money for the person's benefit; s/he is accountable to the Social Security Administration for the use of the funds.

Dual Signature Accounts

This is one of the least restrictive approaches since it only necessitates having a bank account that requires two persons to sign the checks or other withdrawals. In this way the person retains some control over decision-making, but someone else is involved to ensure that the funds are spent appropriately.

Court Guardianship Procedures

Petition
Sec. 880.07, Wis. Stats.

The process for appointing a guardian is started when a relative, public official or other interested person files a petition with the court

explaining why a guardian is needed. If the person is at risk of abuse, neglect or exploitation or is institutionalized, the county may have an obligation to bring the petition as a protective service. (*See Chapter 55: Protective Services and Placement chapter, pg. 343.*)

Evaluation required
Sec. 880.33(1), Wis. Stats.

An evaluation report by a physician or psychologist who has examined the person is necessary to prove mental disability. It is generally filed with the petition. Once the petition is filed, the court will arrange for notification of the individual for whom guardianship is being sought. The notice will set a date for the hearing which may be held no sooner than ten days after the notice. The court also will appoint an attorney to act as guardian ad litem to investigate the need for guardianship, to inform the individual of his/her hearing rights, and to learn whether the individual opposes appointment of a guardian. The guardian ad litem will usually appear at the hearing and argue for what s/he thinks will be in the person's best interests. The court may require representation of the individual by another attorney to argue for what the person wants, and the court must do so if the individual opposes appointment of a guardian. People unable to afford an attorney will have one appointed at government expense.

Notice
Sec. 880.08, Wis. Stats.

Guardian ad litem required
Secs. 880.33(2)(a)1 and 880.331, Wis. Stats.

Defense counsel
Sec. 880.33(2)(a), Wis. Stats.

Other rights
Sec. 880.33(2), Wis. Stats.

Wisconsin law also gives the individual the right to a medical or psychological evaluation, performed by an expert chosen by the individual, which will be provided at government expense if the person is unable to pay. Other rights available to the individual include having a jury trial; being present and cross-examining witnesses, including the medical examiners; and appealing. The individual must be at the hearing if s/he is able to attend.

Presence at hearing
Sec. 880.08(1), Wis. Stats.

Sec. 880.33(4), Wis. Stats.

The results of the professional examination and other evidence will be presented during a hearing. Based on the evidence presented, the court will decide whether or not to appoint a guardian. The need for guardianship must be demonstrated by clear and convincing evidence.

Appointment of the Guardian

Types of guardians
Sec. 880.03, Wis. Stats.

Sec. 880.33(5), Wis. Stats.

If the hearing demonstrates that the individual is incompetent, the court may appoint a guardian of the person or a guardian of the estate, or a guardian of both the person and the estate. One person may serve as guardian of both the person and the estate or there may be two individuals. In choosing who will act as guardian, the court will consider the opinions of the proposed ward and family members, but the court must make a final decision based on the best interests of the individual. At the time of appointment it is also a good idea to name someone as a standby guardian. If the original guardian dies, resigns or becomes incapacitated, the standby guardian can take over. In Wisconsin it is possible for a non-profit organization which has been certified as a corporate guardian to be appointed as the person's

Standby guardian
Sec. 880.36, Wis. Stats.

guardian. In this situation individuals working for the organization or supervised volunteers perform the guardian's duties.

Rights During Guardianship Hearings

During guardianship hearings individuals have rights to:

- an attorney
- their own expert evaluation
- a jury trial
- be present
- cross-examine witnesses
- appeal

Temporary guardian

Sec. 880.15, Wis. Stats.

If, after a petition has been filed but before the hearing takes place, it appears that the welfare of the individual requires immediate appointment of a guardian, the court may appoint a temporary guardian to act for up to 60 days. One 60 day extension is possible. The temporary guardian, may exercise only the powers given by the court in the order of appointment.

Powers and Duties of the Guardian

Guardian of the Estate

Requirements for handling estate

Secs. 880.18-880.22, Wis. Stats.

A guardian of the estate takes possession of all of the ward's property and income. The guardian should carefully note what is in the estate and the approximate value of each asset. The guardian then is responsible for making all spending and investment decisions with regard to the property in the estate. The only exception to this rule is if the court decides the ward is able to handle some part of the estate by him/herself. If it reaches this decision the court may permit the ward to receive and spend all earnings from employment and to sign binding contracts for up to \$300 or one month's wages, whichever is higher. This is called limited guardianship of the property. The guardian remains responsible for the remainder of the estate.

Limited guardianship

Sec. 880.37, Wis. Stats.

Managing estate for ward's benefit

In managing a ward's estate the guardian is to use any property or income which may be necessary for the ward's education and living expenses or for the expenses of his/her dependents. In making decisions about managing the estate the guardian is required to protect and preserve its assets, and to act as a reasonable and careful person would act in managing his/her own property. Additional standards apply to some decisions, but the key to the guardian's actions always is in maximizing the use of the estate for the ward's benefit. Each year the guardian must file with the court an accounting of how s/he managed the estate during the year, showing the income to and expenditures from the estate.

Annual report

Sec. 880.25 Wis. Stats.

Guardian of the Person

A guardian of the person has the responsibility to make personal decisions for the ward, like what kind of medical care or other services are needed, where s/he will live, and what kind of education s/he will receive. However, these decisions are limited by the fact that personal guardians may not spend their ward's money unless they also are the guardian of the ward's estate or the representative payee for federal benefits, or have the approval of the estate guardian to spend the ward's money. The guardian may decide to place a ward who does not object in a residential program of less than 16 beds or into a nursing home for a 3-month stay after hospitalization. Placements to larger facilities and long term nursing home placement require court approval under Chapter 55, Wisconsin Statutes. (*See Chapter 55: Protective Services and Placement chapter, pg. 349.*) Personal guardians also may file grievances for rights violations under Section 51.61, Wisconsin Statutes, and should act as advocates for their wards. A personal guardian who is not also an estate guardian cannot use the ward's resources to pay for an attorney or court fees unless the financial guardian agrees or the court orders it.

Decisions which can be made

Sec. 880.38 Wis. Stats.

Sec. 55.06(5), Wis. Stats.

Personal decisions

Sterilization

Mental health treatment

Sec. 51.61(1)(k), Wis. Stats.

End of life decisions

Some decisions are so personal that guardians do not have the power to make them for the ward. The best examples may be that a guardian may not approve sterilization operations for their wards when the sole purpose is to prevent conception of a child¹, and may not consent to marriage for their wards. Under state law they also may not consent to certain mental health treatments such as electroshock therapy, psychosurgery, or involuntary administration of psychotropic medications.²

A guardian may make end of life decisions for a ward who is in a chronic vegetative state. These decisions may include the cessation of artificial ways of giving the person food and water as well as the withdrawal of life sustaining medical treatment.³ The determination that the person is in a chronic vegetative state must be made by the person's own physician and two independent physicians. If the ward's wishes about end of life treatment are clearly known, then it is in the person's best interests to follow these wishes. If his/her opinion is not known, then the guardian must decide what is in his/her best interests. In doing so the guardian must start with the presumption that life is in the person's best interests. This presumption can be overcome by examining objective factors, including the degree of humiliation, dependence and loss of dignity likely to result from the person's condition and treatment, the life expectancy and prognosis for recovery with and without treatment, the various treatment options and risks, side effects, and benefits associated with them.

The guardian does not have to obtain court approval to make the decision to terminate life supports. However, if feasible, notice must

be given to “interested parties”, including the person, his/her spouse, next of kin, close friends, physician, agency or health care facility responsible for the person’s care or treatment, an agent under a health care power of attorney, and any guardian ad litem. Any interested party who objects to the guardian’s decision can petition the court for review.

Limited guardianship

Sec. 880.33(3) Wis. Stats.

Just as in the case of guardianships of the estate, guardianships of the person may be limited in scope. In fact, the court is required to make specific findings of which rights a ward is competent to exercise. The rights which a court must consider include, but are not limited to, the rights to marry, to vote, to obtain driver and other licenses, and to testify at judicial-type hearings. It is important for the guardian, and others involved in planning a guardianship, to ask the court only for the powers s/he needs to protect the person, and to ask the court to restore rights when the person is able to exercise them.



Having a limited guardian of the estate or of the person can help people retain the ability to make certain choices in their lives. It is important to ask the guardian ad litem or other attorneys in the case to request this option.

Must seek care

Sec. 880.38(2), Wis. Stats.

While the guardian is not required to financially support the person, s/he is required to try to get necessary care, services and appropriate placement for the person. This means that the guardian will need to understand and monitor the person’s needs for supports and services, and to understand the service system. A guardian should make the same kind of efforts to know the person’s needs and rights and to try to protect them as a reasonable and careful person would do for him/herself, and should always act in the best interests of the person. The chapter on values that affect advocacy strategies provides a good way of looking at what best interests means. *(See Rights and Values in the 21st Century chapter, pg. 3.)*

Annual reports

Sec. 880.38(3) Wis. Stats.

Guardians of the person are required to file annual reports with the court which appointed them and with the county protective services agency. The guardian must report where the ward is living, including whether it is the least restrictive environment, the ward’s health status and any recommendations. The county protective service agency should be able to help the guardian in this process.

Payment of guardians

Guardians may be reimbursed for their time and expenses out of the ward’s estate if the court authorizes it. Frequently guardians volunteer their time and are only reimbursed for out of pocket expenses.

Elements of a Guardianship Proceeding

Guardianship proceedings include:

- the filing of a petition
- an evaluation
- notification to the proposed ward
- appointment of a guardian ad litem and sometimes a defense attorney
- a hearing
- a decision whether a guardianship is needed
- if a guardianship is needed, a decision about whether to limit the guardian's power

Replacement of Guardians

Sec. 880.16, .192 & .251 Wis. Stats.

Guardians may be removed by a court for failing or neglecting to fulfill their duties. Examples of actions which could lead to removal include: not filing reports with the court on time, wasting or mismanaging guardianship funds or becoming physically or mentally incapable of performing guardianship duties. A court should also be able to remove a personal guardian for failure to carry out the responsibility of trying to get needed care and services and an appropriate place for the ward to live. A ward age 18 or over, any interested person or a guardian may petition the court to have a guardian discharged and a new guardian appointed.

Sec. 880.34(3), Wis. Stats.

Termination of Guardianship

Sec. 880.34, Wis. Stats.

A ward or other interested person may ask a court to decide that the ward has become competent and terminate the guardianship. A hearing must be held on the question and a ward unable to pay a lawyer is entitled to have counsel appointed at government expense for the hearing. At the completion of the hearing the court may decide to terminate the guardianship if the ward has gained competence or to modify it.

A guardianship of a child terminates when the person becomes 18. If a person under guardianship marries a person who does not have a guardian, the court is required to review the guardianship and may terminate it.

Limited Guardian for Psychotropic Medications

Standard
Sec. 880.07(1m), Wis. Stats.

There is a special provision in the statutes for limited guardianships and protective services orders to require persons with mental illness to take psychotropic medications and to participate in outpatient treatment programs. This proceeding requires a petition that alleges

that the person is an adult with a chronic mental illness, that s/he is incompetent to refuse psychotropic medications, that s/he is likely to respond positively to the medication, that s/he is unable to provide for his/her care in the community without the medication, and that s/he will incur a substantial probability of physical harm, impairment, injury or debilitation or will present a substantial probability of physical harm to others unless protective services, including psychotropic medications are provided. The substantial probability of harm to self or others must be based on evidence of at least two episodes, one of which was in the last 24 months, of the person's failure to participate in treatment which resulted in a finding of probable cause for commitment, a settlement agreement to obtain treatment or an actual civil commitment.

Court procedures
Sec. 880.33(1) and (2), Wis. Stats.

The court procedures are essentially the same as those for a guardianship case. However, the person must have defense counsel as well as a guardian ad litem, the hearing must be held within 30 days of the filing of the petition, and s/he must be warned prior to speaking to an examiner that his/her statements may be used as a basis for a finding of incompetency and that s/he can refuse to speak with the person.

Court order
Sec. 880.33(4m), Wis. Stats.

If the court finds that s/he meets all the elements of the standard set out above, it can appoint a limited guardian to consent to or refuse medication on the person's behalf, order the person to receive psychotropic medication on an involuntary basis and to participate in outpatient treatment, and order the county Department of Human Services (also called Department of Community Programs) to develop a treatment plan for the person. The guardianship is subject to annual court review to determine whether the person continues to meet the standard and whether there should be any change in the person's treatment plan. The review is conducted by a guardian ad litem who reports to the court. An independent evaluation and a court hearing are possible if the individual, guardian, or guardian ad litem requests it or if the court determines it is necessary.

Annual review
Sec. 880.34(6), Wis. Stats.

For information and technical assistance on guardianship, protective services, and advanced directives for guardians, wards, and others:

Wisconsin Guardianship Support Center
800-488-2596
608-224-0660

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1. In Re Eberhardy, 102 Wis. 2d 539, 307 N.W. 2d 881 (1981)
 2. State ex rel. Roberta A.S. v. Waukesha DHS, 171 Wis. 2d 266, 491 N.W. 2d 114 (Ct. App. 1992)
 3. In the Matter of the Guardianship of L. W., 167 Wis. 2d 53, 482 N. W. 2d 60 (1992)