

GUARDIANSHIP OF THE PERSON AND ESTATE

Presented at the Arc of Racine
Informational Workshop
October 19, 2013

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I. Appointment of Guardian

- A. To appoint a guardian for an incompetent, the court must find:
1. Person has an impairment – DD, serious and persistent mental illness, degenerative brain disorder or other like incapacity.
 2. Guardian of person - Because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety. 54.10(3)(a)2
 3. Guardian of estate - Because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs, to the extent that any of the following applies. 54.10(3)(a)3.
 - a. The individual has property that will be dissipated.
 - b. The individual is unable to provide for his or her support.
 - c. The individual is unable to prevent financial exploitation.
 4. The individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, supportive services, healthcare, assisted devices, or other means that the individual will accept. 54.10(3)(a)4

- B. Unless the ward is unable to communicate decisions effectively in any way, the court may not appoint a guardian based on mere old age, eccentricity, poor judgment, or physical disability. 54.10(3)(b)
- C. In appointing a guardian, the court must consider all of the following:
1. The GAL report and any medical/psychological report.
 2. Whether the ward has engaged in any advance planning, (POA's).
 3. Whether appointment of guardian is least restrictive to meet needs.
 4. The preferences of the ward.
 5. The nature and extent of the ward's care and treatment needs and property and financial affairs.
 6. Whether the ward is at risk of abuse, exploitation, neglect or violation of rights.
 7. Whether the ward can understand and appreciate the nature and consequences of his/her impairment and how ward manages ADL's.
 8. The ward's understanding and appreciation of the nature and consequences of any inability he/she may have with regard to personal needs or property management.
 9. The extent of the demands placed on the individual by his/her personal needs and by the nature and extent of his/her property and financial affairs.
 10. Any physical or mental illness and alcoholism or drug dependence diagnosis that the ward has.
 11. Any medication and any effect that such medication would have on the individual's behavior, cognition and judgment.
 12. Whether the disability is likely temporary or permanent.
 13. Any other relevant evidence. 54.10(3)(c)
- D. Co-guardians are allowed, but must concur in decisions. 54.10(5)

II. Guardian Selection, Powers and Duties

- A. When the court selects a guardian, it must consider:
1. The opinions of the proposed ward and family, however, best interest controls. 54.15(1)
 2. Consider any potential conflicts of interest from the prospective guardian's employment or other areas. 54.15(1)(m)
 3. Court is required to appoint POA agent unless appointment is not in the best interest of the ward. 54.15(2) and (3)
 4. Court may appoint a non-profit corporate guardian only if there is no suitable individual available. 54.15(7)
 5. Guardian must complete a Statement of Acts form that is to be notarized which indicates if he or she has ever been convicted of a crime, ever filed bankruptcy, ever had a license suspended or revoked or has been listed in the caregiver registry. 54.15(8)
- B. General duties of guardian. 54.18
1. Guardian may exercise only those powers authorized by statute or court order and ward retains all rights not assigned to the guardian.
 2. A guardian is required to do all of the following:
 - a. Exercise a degree of care, diligence, and good faith when acting on behalf of a ward that an ordinarily prudent person would exercise in his/her affairs.
 - b. Advocate for the ward's best interest.
 - c. Exhibit the utmost degree of trustworthiness, loyalty and fidelity in relation to the ward.
 - d. Notify the court of any change of address of the guardian or ward.
 3. The guardian is prohibited from doing any of the following:
 - a. Borrowing funds from the ward for self or any other without court approval.
 - b. To purchase property from the ward unless at FMV and approved by the court.
 4. Immunity - guardians who perform their duties in good faith, in the best interest of the ward and with the degree of diligence and

prudence that an ordinarily prudent person exercises in his or her own affairs, will be immune from civil liability. 54.18(4)

C. Guardian of the person duties. 54.25(1)

1. Make an annual report to the court and county.
2. Endeavor to secure any necessary care or services through:
 - a. Regular inspection, in person, of ward's condition.
 - b. Examination of ward's healthcare and treatment records.
 - c. Attend and participate in staff meetings.
 - d. Inquire into least restrictive treatment.
 - e. Consult with providers of healthcare and social services in making all treatment decisions.

D. Guardian of person powers. 54.25(2)

1. Guardian of person has only those powers authorized by statute or court, all others are retained by ward. 54.25(2)(a)
2. Rights always retained by ward 54.25(2)(b):
 - a. Access to and communicate privately with the court and governmental representatives, including the right to have input in the plans for services and initiate grievances and participate in any court proceedings.
 - b. Access to and communicate privately with counsel.
 - c. Access to and communicate privately with representatives of advocacy agencies.
 - d. Protest a residential placement and petition for review of guardianship and services/placement.
 - e. Exercise constitutional rights such as right to free speech, freedom of association and the free exercise of religious expression.
3. Rights that can be removed from ward but not transferred to guardian 54.25(2)(c):
 - a. Right to vote.
 - b. Right to serve on a jury.
 - c. Right to execute a will.
4. Rights that can be removed or shared with guardian 54.25(2)(c):
 - a. Consent to marry.
 - b. Right to apply for an operator's or other license.

- c. Consent to sterilization.
 - d. Consent to organ, tissue or bone marrow donation.
- E. Transfer of powers or shared powers. 54.25(2)(d)
1. A guardian may consent to voluntary or involuntary medication and treatment including psychotropic medication as long as the guardian has made a good faith effort to discuss it with the ward and the ward does not protest. Any true involuntary administration of psychotropic meds must be done under protective placement/service order under 55.14 or Ch. 51. Protest is defined as more than one discernible negative response, other than mere silence, to the proposed medication and does not mean a discernible negative response to the method of administration of the medication.
 2. The following powers can be provided to the guardian with full authority or limited authority:
 - a. Consent to ward's participation in research unless it is clear ward would have not consented. In fact, guardian is permitted to consent to research even if it might not help the ward but might help others as long as there is no more than minimal risk to the ward.
 - b. Consent to ward's participation in research even if it involves greater than minimal risk and might not help ward but would help others if it is consistent with ward's wishes.
 - c. Consent to experimental treatment if in best interest and ward has expressed no contrary wishes.
 - d. Consent to social and supported living services.
 - e. Consent to release of confidential records.
 - f. Decisions regarding travel.
 - g. Decisions regarding choosing providers.
 - h. Decisions regarding educational and vocational services.
 - i. Decisions regarding initiating a petition for the termination of marriage.
 - j. Power to receive all notices and proceedings as an advocate.
 - k. Power to apply for protective placement.
 - l. Power to act in all proceedings as an advocate and to receive all notices.
 - m. Power to have custody of the ward, etc.
 3. Guardian is required to make decisions based on the least possible restriction on the ward's liberty, honoring previously and currently

stated preferences and whether or not the ward's estate is sufficient to pay for any needed services.

- F. Guardian of estate duties - provide the ward with the greatest amount of independence and self-determination with respect to property management in light of the ward's functional level, understanding, and appreciation of his or her functional limitations and the ward's personal wishes. 54.19 The guardian of the estate must do all of the following:
1. Take possession of the ward's real and personal property.
 2. Retain, expend, distribute, sell or invest the ward's property/income.
 3. Determine if ward executed a will, and if so, the will's location. Guardian shall also determine appropriate persons to be notified of ward's death, and if death occurs, shall notify them.
 4. Use the ward's income and property to maintain and support the ward and any dependents.
 5. Prepare and file an annual account.
 6. Deliver the ward's assets to those entitled upon ward's death.
 7. Pay the ward's legally enforceable debts including taxes.
 8. File with Register of Deeds in which the ward has real property a sworn statement that describes the property, the date the ward was found incompetent and the guardian's contact information.
 9. If no payee of any governmental benefits, apply or ensure one is appointed.
 10. Other duties as required by the court.
- G. Guardian of estate powers requiring court approval. 54.20(2).
1. Make gifts from ward only after filing a petition under 54.21. This can occur only after extensive notice and the court considers numerous factors including what the guardian and ward's position is on any transfer, past practices of the ward, whether ward has executed a will or other instrument, the effect on public assistance, etc.

2. Transfer assets of the ward to the trustee of any existing revocable living trust created by the ward for his/her benefit or his/her dependents.
 3. Establish special needs trusts.
 4. Purchase an annuity or insurance contract.
 5. Exercise rights under a retirement plan or account.
 6. Exercise any inheritance rights.
 7. Exercise any marital property rights.
 8. Provide support for someone the ward is not legally obligated to support.
 9. Convey or release an expectation interest in property.
 10. To continue the business of the ward.
- H. Guardian of estate powers that do not require court approval. 54.20(3).
1. Support another where legally obligated to do so.
 2. Enter into a contract.
 3. Exercise options to purchase securities or other property.
 4. Authorize access/release of confidential financial records.
 5. Apply for public and private benefits.
 6. Retain any real or personal property.
 7. Sell property for FMV subject to Ch. 786.
 8. Invest and reinvest proceeds of any sale of any assets.
 9. Appear for and represent the ward in any action.

III. Procedures, Notice and Hearing Requirements

- A. Venue - 54.30(2) provides a process for determining venue.

1. For state residents, county of residence or where ward is physically present.
2. For non-residents, county where proposed ward or any assets may be found or in county in which the petitioner proposes ward reside.
3. For individuals under a foreign guardianship, county where the ward resides or intends to reside.

B. Examination of ward – 54.36

1. Ward must be examined by physician/psychologist and the petitioner shall provide a copy of the report to the ward, counsel and GAL.
2. Ward is also to be informed that the ward has the right to refuse to participate in the examination and to remain silent and that any statement by the ward may be used as a basis for finding of incompetency and that the doctor will report to the court even if the ward does not speak.
3. Court may order an exam and physician has access to ward's health care and treatment records without consent.

C. Notice – 54.38

1. Failure of petitioner to provide notice to all interested persons shall deprive the court of jurisdiction unless the notice is waived. Notice is considered to be given by proof of personal delivery, by certified mail with return receipt requested, or by fax. Notice to ward by personal service and any existing guardian, by personal service or by registered or certified mail at least 10 days before the time for hearing.
2. The following individuals are to be personally served or by mail at least 10 days before the hearing:
 - a. The ward's counsel.
 - b. GAL.
 - c. Presumptive adult heirs.
 - d. Other interested persons.
 - e. Agents under POA's.
 - f. Any person who has legal/physical custody of the ward.
 - g. Any agency providing the ward assistance.
 - h. The proposed guardian.
 - i. Any other person the court requires. 54.38(2)

- D. GAL appointment and duties. 54.40
1. Requires appointment of a GAL.
 2. Duties – GAL must meet with proposed guardian and/or standby guardians and report to court whether or not individuals are suitable to serve as guardian. In addition, they are required to review any existing powers of attorney and interview any agents under those documents and report to court whether or not guardianship is necessary. In addition, GAL is required to attend all court hearings. 54.40(4)
- E. Rights of the proposed ward - Right to counsel, a jury, independent exam, to pay for expenses in contested proceedings, right to be present at hearing and right to hearing in accessible location. 54.42
- F. Hearing requirements. 54.44
1. A petition for guardianship shall be heard within 90 days after it is filed. However, for petitions filed under Act 187, a hearing is still required within 60 days. See also Ch. 55 which requires protective placement/service petitions to be heard within 60 days of filing and involuntary medication hearings within 30 days. See 55.10(1) and 55.14(7), respectively. Hearing is closed unless requested open.
 2. Guardians are required to be present at hearing unless excused for good cause. Petitioner has responsibility to ensure that ward attends hearing unless GAL waives appearance after considering ward's ability to understand and meaningfully participate, the effect of ward's attendance on his/her physical or psychological health and ward's expressed desires. If unable to attend due to inaccessibility or lack of transportation, court must be moved to a place where can attend.
 3. Court to dismiss petition if ward had advanced planning and guardianship unnecessary.
 4. POA's remain in effect unless good cause to revoke or limit them.
 5. Petitioner's fees and costs can be paid by ward's estate and the fact that ward had done advanced planning is not a complete bar to recover fees.

G. Temporary, standby and successor guardianships.

1. Temporary guardianships – GAL is required and hearing must be held no earlier than 48 hours after the filing unless for good cause. Court must specify the powers delegated to the temporary guardian and the temporary guardian may not sell real estate or spend more than \$2,000 unless court approves and orders bond. Temporary guardianships will continue for 60 days with an additional 60 days as needed. However, there must be a 90 day period between any subsequent temporary guardianship filing. 54.50
2. Standby guardianships – may act when permanent guardian is unable or unwilling to act, and after the previous guardian's removal, resignation or death. Standby guardian is required to notify court and court will issue new letters of guardianship. 54.52
3. Successor guardianships – guardian appointed to take over for previous guardian. 54.54

IV. Post appointment matters

- A. Inventory is required within 60 days after appointment unless court modifies and such inventory shall include marital property. 54.60(1) and (2).
- B. Guardian of estate required to file accounts unless waived. For small estates of less than \$50,000, court may determine accounting is not needed and may waive or allow for a modified annual account of a married ward. 54.62(3) and (4).
- C. Review of incompetency and termination of guardianship – ward over 18 may petition for review of guardianship if at least 180 days since last hearing or court determines exigent circumstances exist. If petition is filed, presence of ward and GAL required. Ward also has right to counsel and jury. 54.64
- D. Expansion of guardianship - if guardian or other believes ward's incapacity has expanded and additional rights should be taken away, the statute provides a procedure with notice and a hearing regarding the same. 54.63
- E. Review of conduct and removal of guardian – guardian may be removed for cause for failing to file an inventory or account on a timely basis; fraud, waste or mismanagement; abusing or neglecting the ward or allowing others to do so; engaging in self-dealing; failing to provide adequately for the needs of the ward; failing to exercise due diligence and reasonable

care in assuring the ward's needs are met in the least restrictive environment; failing to act in the best interest of the ward; failure to disclose conviction of a crime that would have prevented the person as serving as guardian; failing to disclose the guardian was listed on the caregiver registry. If the court finds any of these failings, court may order accounts or reports, require guardian to reimburse ward, impose a forfeiture of up to \$10,000, remove the guardian and order guardian to pay attorney's fees and costs. 54.68

- F. Guardian compensation and reimbursement – court may allow a guardian compensation and reimbursement of expenses but court is to look at a number of criteria such as the reasonableness and fair market value of the services, any conflict of interest, availability of another to provide these services, the value of the ward's assets and income, whether the ward's basic needs are being met, and the hourly rate proposed by the guardian. 54.74

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REV: 10-15-13