

April 2019

## Transitioning to Adulthood: Guardianship and Children with Significant Disabilities

*This document is for informational purposes only and is not legal advice.*

Most parents worry about their children's future, wonder how their relationship with their child will change and how they will ensure issues are properly addressed as their child gets older. For each of these worries, parents of children with significant disabilities have very specific concerns. While their concerns vary just as the abilities and needs of each child differ, two are frequently expressed: first, how will the parent-child relationship change when the child reaches age 18, and second, how to address the child's needs in the future. This document is meant to provide information to parents with these concerns.<sup>1</sup>

As discussed below, the parent's legal role changes significantly as a child ages. Guardianship is appropriate only in specific situations. If viable less restrictive alternatives are available, those alternatives are required to be considered before petitioning for guardianship. Alternatives include but are not limited to: supported decision-making, powers of attorney, releases of information, education, training or supportive services or devices. Also, be aware that as the individual ages and matures they may no longer need a guardian.

This document will not answer every question nor provide detailed guidelines to be applied in all situations. If parents have specific questions, please contact the Wisconsin Guardianship Support Center directly. If you are seeking legal advice, consultation with a private attorney is recommended.

### **1. What is guardianship?**

Guardianship is a legal process and relationship created through a court process. This relationship is formed between the "proposed ward," who is the subject of the guardianship, and the "proposed guardian," who is the legal decision-maker for the ward, after the ward is determined by a court to be "incompetent". The relationship is created by the court when the "petitioner", the person who files the guardianship, proves the required elements showing that the ward is incompetent and needs a guardian.

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<sup>1</sup> This publication only discusses matters involving individuals with developmental disabilities and/or serious and persistent mental illnesses. Those who are physically disabled or mentally ill and competent are not proper subjects for guardianship. This publication does not address protective placement, protective services, or spendthrift guardianship. Please contact the WI GSC directly if more information is needed about these subjects.

## **2. Who may be in need of a guardian?**

An individual who is incompetent and has no designated legal decision-maker or has insufficient or invalid advance planning.

### **A. When is a person determined to be incompetent?**

A court may find an individual incompetent after reviewing all the specific factors listed below:

- The person is at least 17 years old and 9 months;
- They have a qualifying impairment which includes a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities.
- “Other like incapacities” are those conditions produced as a “result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and that produce a condition that substantially impairs an individual from providing for his or her own care or custody.” Wis. Stat. § 54.01(22).
- They are unable to receive and evaluate information effectively or to make or communicate decisions;
- There is a risk of physical or financial harm; and
- There are no less restrictive alternatives

Unless the individual is unable to communicate decisions effectively, a guardianship “may not be based on mere old age, eccentricity, poor judgment, or physical disability.” See Wis. Stat. §54.10(3)(b).

### **B. I think my child might meet this legal standard for incompetency but I am not sure. What else can I do to ensure this is the right decision?**

Parents may wish to talk to their child’s social worker, transition coordinator and other school staff, and medical and mental health care providers to gain their opinion on whether a guardianship would be appropriate and necessary. Depending on the individual, they may not need a guardianship if there are less restrictive ways to address their needs. Consultation with an attorney as well as these professionals may provide insight about measures that can be taken to assist the child and avoid a guardianship.

### **C. Will my role as a parent be considered in a guardianship action?**

Yes. While parents are not always appointed as guardians in all guardianships, parents are the preferred guardians of the adult child with a developmental disability or serious and persistent

mental illness. The court will consider whether each parent is suitable to be a guardian and if appointment as guardian is in the ward's best interest. Consideration will also be given to the ward's opinion and objection. *See Wis. Stat. § 54.15(5)*. The parent is likely to be appointed as the guardian if there are no objections to his or her appointment and the parent is suitable and willing to act as the guardian. The proposed ward will also have a guardian ad litem (GAL), who is an independent attorney, appointed to represent their best interests. The GAL can interview the proposed guardians and make recommendations to the court if they are suitable and appropriate.

### **3. What is the process to obtain guardianship?**

#### **A. Procedural matters**

The petitioner is responsible for filing many of the required documents in a guardianship action. Initial pleadings include the following:

- 1) GN-3100: Petition for Guardianship Due to Incompetency;
- 2) GN-3110: Order and Notice of Hearing;
- 3) GF-131A: Order Appointing Guardian ad Litem or Attorney;
- 4) GN- 3120: Affidavit of Service;
- 5) GN-3140: Statement of Acts;
- 6) GN-3130: Examining Physician's or Psychologist's Report.

The pleadings are filed with the local Register in Probate. Some counties have legal practices particular to that county. This publication only reviews the general practice and procedure. It is important to always follow local procedure.

The petitioner is expected to provide all appropriate parties with proper service. This means the petitioner must give copies of the filed guardianship pleadings within the statutorily required period (at least ten days before the hearing excluding holidays and weekends) and by the appropriate means (personal service, regular mailed service, or certified /registered mailed service depending on whom is being served).<sup>2</sup> *See Wis. Stat. §54.38*.

The Statement of Acts and Examining Physician's or Psychologist's Report must be submitted 96 hours before the hearing. The petitioner may submit these documents with their initial pleadings. If that is not done, the petitioner is required to provide copies of the documents to each party in a timely manner. The petitioner will also be required to provide proof of proper service to the court. This specifically includes filing Affidavits of Service, which may be filed before or at the hearing.

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<sup>2</sup> *See also* WI GSC publication, "Notice and Service Requirements under New Ch. 54 and Amended 55, Wis. Stats. Appointment of Guardian and Order for Protective Placement/Services" at [www.gwaar.org/gsc](http://www.gwaar.org/gsc)

## **B. Are there any other pre-hearing matters?**

The Guardian ad Litem will provide the court with his or her opinion on the guardianship. The GAL will discuss the guardianship with the proposed ward and will try to obtain the proposed ward's opinion on the guardianship. The GAL will also inform the person of their rights. Should the ward dispute the guardianship or the proposed guardian, the GAL will notify the court of the proposed ward's opinion and request the appointment of "advocacy counsel." Advocacy or adversary counsel is an attorney appointed to represent the proposed ward and advocate for what that individual wants.

## **C. Hearing**

At the hearing, the petitioner will present their case stating why they believe the guardianship is necessary. The petitioner should be prepared to present evidence and to argue their position. The GAL will also provide an opinion on the guardianship and can present evidence. The proposed ward, proposed guardian, experts (including the doctor or psychologist who completed the Examining Physician's or Psychologist's Report), and others may give testimony. Upon review of the evidence presented, the court will enter a judgment on the petition for guardianship as well as the suitability of the proposed guardian.

If the petition for guardianship is granted, the newly-appointed guardian will receive two to three forms<sup>3</sup> reflecting the court's order:

- 1) GN- 3170: Determination and Order on Petition for Guardianship Due to Incompetency;
- 2) GN-3200: Letters of Guardianship of the Person; and
- 3) GN-3210: Letters of Guardianship of the Estate.

The guardian may wish to obtain a certified copy of the Determination and Order and Letters at the Register in Probate office for a small fee.

## **D. Post hearing: What will be expected from me if I become the guardian?**

All guardians have certain duties.<sup>4</sup> These duties include the following:

- 1) When acting as a guardian, exercise care, diligence, and good faith;
- 2) Be an advocate for the ward's best interest;
- 3) Provide fidelity and loyalty to the ward; and

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<sup>3</sup> Review of local practice is especially important before the hearing on the petition for guardianship. Some counties require the Petitioner to draft the Determination and Order and Letters while others allow different parties to draft.

<sup>4</sup> Additional information about duties of guardian of the person and guardian of the estate may be found on the GSC webpage on the GWAAR website ([www.gwaar.org/gsc](http://www.gwaar.org/gsc)).

- 4) Notify the court of any change of address of the ward or guardian.

See Wis. Stat. §54.18.

Guardians should also review their paperwork closely. They may only exercise those powers granted to them by the court. All wards under guardianship retain certain rights such as providing input into support services, associating with those of their choice, attending court hearings, withholding consent for mental health, alcohol or substance treatment, and communicating privately with our state advocacy agency, Disability Rights Wisconsin.<sup>5</sup>

Guardians should become familiar with their specific reporting responsibilities. For example, a guardian of the estate must file an inventory, which describes the ward's estate as it exists on the date of the guardian's appointment and must be filed within 60 days of that appointment. They must also file an annual account which describes the ward's finances and yearly expenditures. This is typically due on April 15<sup>th</sup> unless otherwise indicated by the court. The guardian of the person must also file an annual report which describes the ward's personal health, living conditions and if they are in the least restrictive environment.

#### **4. What other considerations are there as my child ages?**

##### **A. Standby Guardians and Successor Guardians**

Petitioners may propose a standby guardian as well as a guardian in the petition for guardianship. A standby guardian may step into the role of guardian immediately upon the guardian's "death, unwillingness, or inability to act, or resignation or court's removal" or if the guardian is unable to act for an extended time due to an extended vacation or illness. See Wis. Stat. § 54.52(2). The standby guardian may be approved by court at the same hearing the initial guardian is appointed or a petition for standby can be filed at a later point. If there is an individual suitable and willing to be named as standby at the time of the filing of the guardianship, it may be prudent to nominate them at that time to avoid having to come back to court later.

The standby guardian is given the same powers and responsibilities as the guardian. If a standby guardian is designated within the initial pleadings and approved of by the court, no other hearing is necessary. The standby guardian notifies the court of the guardian's inability to serve, when appropriate, (for example, the guardian has died) and the standby guardian then assumes their duties and receives the necessary Letters of Guardianship from the court.

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<sup>5</sup> [54.25\(2\)\(b\)](#)

A successor guardian is appointed when the initial guardian is no longer able to serve, and a new guardian needs to be selected. Before the successor guardian's appointment, a hearing may be scheduled for the court to review the appointment, and the proposed successor guardian will need to be approved of by the court. The appointment of a standby guardian can provide stability for the ward since it can be done before the need for a new guardian arises.

### **B. Estate Planning, ABLE and Special Needs Trusts**

Regardless of the appointment of a guardian, consultation with an attorney may be beneficial when considering an adult child's long-term personal and financial needs. The adult child may benefit from having a special needs trust set up in his or her name. If a guardian is appointed for your child, that guardian will have to obtain the court's permission to establish a special needs trust before creating one. See Wis. Stat. § 54.20(2)(c).

There is also now an option of establishing an ABLE account. ABLE stands for Achieving a Better Life Experience which was enacted in federal law and was adopted in part by Wisconsin. This permitted states to establish tax-advantaged savings accounts for certain individuals with disabilities to use for certain disability-related expenses while maintaining eligibility for benefits. An individual who became blind or disabled before the age of 26 is eligible to open an ABLE account. For more information see <https://www.revenue.wi.gov/Pages/FAQS/ise-ABLEAccounts.aspx>.

Also, exploration of the effects of being an heir to your (or another's) estate is very important. Inheritance received could affect your child's eligibility to receive certain benefits. An attorney may also assist parents with drafting a will. Per Wis. Stat. § 54.15(6) a parent may nominate a testamentary guardian in his or her will. While this nomination does not guarantee the person will be appointed as the guardian, the nomination does carry weight if the court appoints a new guardian after the parent's death.

### **C. Benefits**

A child may become eligible for new or different benefits once he or she turns 18. To assist with the transition to adulthood, it is important that his or her benefits and/or eligibility for benefits are reviewed. A parent may wish to contact his or her local Disability Benefit Specialist (DBS) to have the adult child's eligibility for benefits evaluated. The local DBS may be located by going to the following website: <https://www.dhs.wisconsin.gov/benefit-specialists/counties.htm>.

## 5. Common Questions:

### A. Why do I need to obtain guardianship of my adult or soon-to-be adult child in order to make decisions for them?

Wisconsin is not a “next of kin” state, where parents and family members can make decisions for another individual. All adults are presumed competent upon turning 18 and that presumption of competency is not overcome until a court finds the individual incompetent, and a legal decision-maker (i.e., a guardian) is appointed. In other words, regardless of the nature of the individual’s disability and even if the individual does not have the capability to do so, he or she has the right to make his or her own decisions until a legal decision-maker has been appointed.

### B. Can my adult child sign a Power of Attorney for Health Care and/or for Finances?

Adults may execute powers of Attorney when they have the capacity to understand the nature of the documents. A person must be of “sound of mind” to be able to execute a valid Power of Attorney for Health Care. In general, this means they understand the nature of the document, the authority it would give and can indicate who they want as their agent.

If the adult child understands the nature of the Power of Attorney and wishes to sign it, he or she may choose to sign it. If there is a question about the adult child’s capacity, consultation with an attorney is strongly recommended before any Power of Attorney is completed. Powers of Attorney are a less restrictive alternative to guardianship and therefore must be considered before petitioning for guardianship.

### C. Do I need to hire an attorney to obtain guardianship?

An attorney is not required to start a guardianship action. One may wish to hire an attorney for several reasons, including consultation and legal advice; knowledge of available doctors to complete the court ordered evaluation; the drafting of the pleadings; their advocacy skills and representation throughout the court proceeding; and technical assistance in following the notice, service and timeline requirements.

Parents should also review what local legal resources are available. A very small number of Wisconsin counties have legal services programs that may assist a parent in obtaining an adult guardianship of a younger adult child or a soon-to-be adult child who is likely to be deemed incompetent. Information on obtaining an attorney can also be obtained through the Wisconsin State Bar Lawyer Referral Information Service at (800) 362-9082 or [www.wisbar.org](http://www.wisbar.org). The Guardianship Support Center can provide legal information; however we do not provide legal advice or representation.

#### **D. What types of expenses might I accrue if I file a petition for guardianship?**

The costs accrued vary with each guardianship. It is possible for the petitioner to accrue his or her attorney's fees and costs, filing fees, expenses related to completing the Examining Physician's or Psychologist's Report, expert witness fees, service fees, bonding fees, other attorney fees, and an initial deposit fee for the GAL (or all of the GAL fees if the petition is unsuccessful).

If a guardian is appointed, the court may allow for reimbursement of the petitioner's attorney's fees and costs from the ward's estate. The court will look at several factors in this determination, including the ability of the ward's estate to pay and the petitioner's interest in obtaining the guardianship. *See Wis. Stat. § 54.46(3).*

If a guardian is appointed, the GAL fees are paid by the ward, if there are sufficient assets to pay, or, if not, the county. If no guardian is appointed, the petitioner is responsible for the GAL fees. *See Wis. Stat. § 54.74.* If a guardian is appointed, the petitioner will not be responsible for any advocacy counsel fees.

While the petitioner may be responsible to pay some (or all) of these fees, it is important to inquire about each county's local practice before filing the initial guardianship pleadings.

#### **E. Can the court appoint co-guardians?**

Per Wis. Stat. § 54.10(5), the court may appoint co-guardians. The court may impose additional conditions when appointing co-guardians and enter orders clarifying their roles. Unless modified by the court, co-guardians are required to agree with the decisions made by the other co-guardian or those decisions are void. *See Wis. Stat. § 54.46(2)(a).* The petitioner should review whether the appointment of co-guardians would best serve the ward and his or her needs before petitioning for co-guardianship.

#### **F. My adult child has no significant income and does not own any property. Do I need to petition for guardianship of the estate as well as the person?**

Significant consideration should be given before determining a guardianship of the estate unnecessary. Guardians of the estate have both statutory duties and specific powers that may assist the ward even if the ward has a modest estate or no estate. The guardian of the estate's duties include the right to pay legally enforceable debts, sign a lease, file income taxes, prepare and file the annual account, and take possession of the ward's personal property. *See Wis. Stat. § 54.19.* A guardian's powers also include establishing a special needs trust (with the court's permission), applying for public and private benefits, entering into contracts, and authorizing the release of the ward's financial records. *See Wis. Stat. §54.20.* The failure to appoint a



guardian of the estate may inhibit the person's ability to enroll in subsequent benefit programs, plan for the future through a special needs trust, manage inherited funds, pay debts, file income taxes, or respond to any other financial situation that may occur.

### **G. When should I consider filing the petition?**

The earliest a petition for guardianship can be granted is when the ward is at least 17 years and 9 months old. See Wis. Stat. 54.10(3)(a). If the child is younger than this, the parent may want to start reviewing the applicable requirements before the child turns that age.

### **H. What is Supported Decision-Making?**

The concept of supported decision-making has always existed; however, it was formalized into law in Wisconsin in April 2018. Supported decision-making means an individual can choose a Supporter to assist them in accessing information or in making or communicating their decisions without losing the ability to make their own decisions. This can be a great option for individuals with disabilities that might just need a little extra help or assistance. This is a less restrictive alternative to guardianship that must be considered before a guardianship would be ordered by the court. Wisconsin has an official state form which is available through the Department of Health Services: <https://www.dhs.wisconsin.gov/forms/f02377.pdf>.

### **I. Where may I find additional resources and information?**

- a. Wisconsin Guardianship Support Center: (855) 409-9410, [guardian@gwaar.org](mailto:guardian@gwaar.org)
- b. Wisconsin Department of Health Services <http://www.dhs.wisconsin.gov/>
- c. Wisconsin Circuit Court Access: <http://wicourts.gov/forms1/circuit/index.htm>
- d. Wisconsin State Law Library: <http://wilawlibrary.gov/>
- e. WisPACT: <http://www.wispact.org/>
- f. Your local Register in Probate
- g. Aging and Disability Resource Centers: <https://www.dhs.wisconsin.gov/adrc/index.htm>

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