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Guardianship Support Center

**Advance Directives: What They Are and Why You Need Them**

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***Disclaimer:*** *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.*

What is the Guardianship Support Center?

* A division of GWAAR contracted with the state of Wisconsin to provide legal information and resources to attorneys, guardians, APS, families, professionals, and vulnerable adults
* We address questions about guardianships, POAs, protective placement, DNRs, and living wills
* No court representation or legal advice

What is a Power of Attorney?

* Legal contract: the **principal** gives authority to an **agent** to act on their behalf
* Agent must act according to principal’s wishes (if known) at all times
* Wisconsin separates into health care (Ch. 155, Wis. Stats.) and financial (Ch. 244, Wis. Stats)
* State provides standard forms, but not required to use

Why You Need POAs

* Wisconsin is not a “next-of-kin” state – family/friends cannot make decisions for you without authority from you (POA) or a court (guardianship)
* You can limit the authority of your agent (or not) as you wish
* You may still make your own decisions
* May avoid the need for guardianship
* Make both – POA for Health Care and POA for Finances!

Agents: Basics

* Factors in who to choose:
  + Trustworthiness
  + Particular skills
  + Location/availability
  + Can have different agents for POA-HC and POA-F
  + For POA-HC, **must be a specific person**
  + For POA-F, may designate an individual, an organization, a position by title, etc.
* Co-Agents:
  + Allowed for POA-F but **not allowed** for POA-HC
  + Can specify that they may act independently or must agree on all decisions
* Successor agents:
  + POA-HC **cannot** designate a successor, but principal may name an alternate
  + POA-F may have an alternate; principal may decide whether agent(s) have authority to designate a successor

Power of Attorney for Health Care

* Allows agent to make health care decisions (and *only* health care decisions) on behalf of the principal
  + Health care is any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition
  + No authority to make other decisions, such as who may visit
  + Can include specific directives for end-of-life care and admission to facilities for purposes other than rehab or respite
* Principal can designate an alternate agent
* Validity: principal is an adult of sound mind, signs in presence of two disinterested witnesses, must be dated; principal can direct someone to sign for them in their presence if they are unable to sign themselves
* Activation: typically upon **incapacity**
  + “inability to receive/evaluate information and/or communicate decisions relating to health care”
  + Determined by two physicians or a physician and an advanced practice clinician (psychologist, PA, NP), unless otherwise stated on document
* Deactivation: no formal process
  + Some facilities simply reverse process – have two clinicians sign off; some only use one; some don’t have a process at all

Power of Attorney for Finances

* Principal retains all rights to manage their own property/finances, but also allows agent to manage
  + State law provides some limits/protections; consult attorney w/ specific concerns
* Activation: typically upon signing, but can be on incapacity or some specified event
* “Durable”: means it remains active while principal is incapacitated
* Recommended to be notarized

Revocation of Power of Attorney

* Principal can revoke at any time
  + Executing a new POA-HC automatically revokes the old one – but executing a new POA-F does *not* automatically revoke the old one – must specifically state in document that you intend it to

POA Legal Safeguards

* Can petition for court review
* Court can: review conduct of agent, remove agent, order agent to follow POA, order agent to return any money and/or make restitution (POA-F)

Top Issues

* Incorrect dates
* Didn’t actually give agent authority
* POA-HC and POA-F agent not getting along
* Didn’t list alternates or alternates unable, unwilling, or have passed away
* Missing pages
* Not picking someone who is trustworthy
* Crossing things out after execution of document
* Agent exceeds authority

Declaration to Health Care Providers/Living Will – Ch. 154, Wis. Stats.

* Allows individual to create specific directives for end of life care for their health care providers
* “Health care providers” includes physicians, PAs, NPs
* Directives include instructions on feeding tubes and life-sustaining treatment for terminal illness or permanent vegetative state
* Grants **no** other authority to health care providers
* Should match up with a POA-HC if one exists; if conflicts, POA-HC wins

Do-Not-Resuscitate Orders – Ch. 154, Wis. Stats.

* Only available to **qualified patients** – person has a) terminal condition, b) medical condition such that in the event of cardiac or pulmonary failure, resuscitation would either be unsuccessful or would cause significant harm that outweighs the possibility of successful resuscitation
* Health care provider (physician, PA, NP) must sign order
* Patient must wear DNR bracelet at all times; removal is considered revocation
* Health care agent and guardians *may* request an order on behalf of principal/ward if in best interests or in compliance with individual’s wishes
* Different from DNR orders that patient may sign on admission to a facility – this goes with the patient when they leave

Guardianship – Ch. 54, Wis. Stats.

* WI splits into guardianship of the person and guardianship of the estate – individual can have one or both, guardian can be one or both
* Standard: “incompetency”
  + Because of an impairment, individual is unable to receive/evaluate and/or communicate information such that their health/safety and/or financial stability are at risk and there are no less restrictive alternatives
* Duration: can be temporary (60 days, w/ possible 60-day extension) or permanent
* Authority: court removes particular rights from the ward and places w/ the guardian, tailored to the ward based on their capabilities and needs
  + Ward retains all rights not specifically transferred, and always maintains Constitutional rights to free association, speech, practice of religion
* Guardian’s duty: act in and advocate for ward’s best interests; respect their wishes and allow them to make their own decisions where possible

Resources

* Senior Medicare Patrol, 888- 818-2611
* Disability, Elder Benefits (60+) or Dementia Care Specialist, ADRCs
* American Bar Association Free Legal Answers, <https://wi.freelegalanswers.org/>
* Lawyer Referral Information Service (LRIS), (800) 362-9082
  + Modest means program
* Disability Rights Wisconsin, 800-928-8778
* Board on Aging Long-term Care (BOALTC) Ombudsman, 1-800-815-0015
  + 60+, Family Care, IRIS or in long-term care facility
  + Investigate complaints, assistance with grievances, individual case advocacy, resident rights, guardian issues
* Elder Rights Project, Legal Action or Judicare, 844-614-5468
  + WI Resident, 60+, Victim of crime or abuse