

Guardianship of Adults



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In addition, this handbook draws on two other works related to decision-making support by Roy Froemming: *Making a Difference: Thinking about Decision-Making Support in the Transition Process* (Wisconsin Council on Developmental Disabilities, 2002); and *Chapter 55: Application of Wisconsin Adult Protective Services Law and Adults-at-Risk Related Statutes*, (Wisconsin Department of Health Services, 2007). The update to the material in Ch. V is based in part on materials developed by Roy Froemming and Terri Johnson on planning for provision of decision-making support for families of adults with mental illness, funded through a Graduate School Vilas Associates Award to Dr. Jan S. Greenberg, School of Social Work, University of Wisconsin-Madison.

Disclaimers

This handbook is not intended as legal advice, and is not a guide to people who are trying to bring guardianship petitions without an attorney. While it does try to describe the law in understandable language, a handbook of this kind cannot cover every detail in the law itself, or provide guidance on all the different situations that may arise in a guardianship case.

The opinions expressed in this book are those of the author, and do not represent policy positions adopted by the Department of Health Services or any funder of previous work by the author. Any errors are those of the author alone.

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INTRODUCTION

A. What is the purpose of this handbook, and who should read it?

This handbook provides an overview of guardianship of adults in Wisconsin who meet the standards for a finding of incompetence, alternative ways of providing decision-making support, and ways to tailor guardianships to individual needs. It also tries to respond to questions that are often asked about the nature, purpose and effects of guardianship of adults, about guardianship procedures, and about the powers and duties of guardians of adults. It is aimed primarily at people involved in trying to assist adults who need support in decision-making due to impairments in their ability to receive and process information, including family members, advocates, support service providers, and educators. It is not legal advice or a guide to bringing a guardianship action in court.

- **NOTE:** This handbook does not cover guardianships that are not based on a finding of incompetence. These include **guardianships of minors** (people under age 18), and **guardianships of estate of persons found to be spendthrifts**.

A major goal of this book is to help people see guardianship as just one tool in providing decision-making support and protection of rights for people with disabilities, and not as the only or final answer to providing assistance to a person who lacks capacity to make decisions safely and effectively, or to understand and protect his or her own rights. In addition, it is intended to help people design guardianships that are as unrestrictive as possible, and to recognize the importance of involving a person under guardianship in decisions that affect his or her life, not only because that is required by the law, but also because it is the best way to respect the person as an adult in our society, and to develop and/or maintain the person's decision-making abilities.

B. What if the reader wants more detail, or legal citations?

This handbook does not, for the most part, include citations to statutes, rules and court cases. Readers interested in more detail or in looking up the legal source material should refer to Roy Froemming, *Chapter 55: Application of Wisconsin Adult Protective Services Law and Adults-at-Risk Related Statutes* (Wisconsin Department of Health Services, 2007), available on the DHS website at <http://dhs.wisconsin.gov/aps/training/Chapter55/chapter55manual.pdf>. That publication, referred to in this handbook as the *Chapter 55 Manual*, provides citations to legal sources, information on where to find those sources, and more detail on potential remedies where the person may be subject to abuse, neglect, or exploitation. There is detailed a table of contents, with links to the chapter and subchapter headings. It is not available in print form.

See Part [XVII](#) for additional for additional sources of information, and links to source materials.

NOTE: The table of contents, cross references in the text between parts of this book, and the references to outside sources, are hyperlinked, to make it easier to find the reference.

C. How is the word *person* used in this book?

The statutes use the word “ward” for a person who has a guardian. Where a guardianship petition has been filed saying that a person needs a guardian, he or she is often called a “proposed ward” or “the subject of the petition.” To avoid referring to people by these legal labels, this book refers to the adult who is in need of guardianship or some other kind of

decision-making support as “*the person*” or sometimes “*the adult*,” and tries to make clear by the context if the word “person” is being used to refer to other individuals, corporations and/or agencies.

D. Why is it important to think about decision-making as a functional skill, and to treat guardianship as just one of many forms of support?

We have a shared view of the rights and responsibilities of adult citizens and residents of the United States. The following statements, drawn from the Wisconsin Constitution and from a Wisconsin Supreme Court case on rights of people under guardianship, apply to all members of our society, regardless of mental disability:

- “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness ...”¹
- There is a “common law right to self-determination,” under which “no right is held more sacred, or is more carefully guarded... , than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”²
- “[L]iberty of the person and control of one’s own property are very sacred rights which should not be taken away or withheld except for very urgent reasons.”³

The rights to liberty (freedom to control our own lives), to the pursuit of happiness (choosing and seeking to reach our own goals in life), and to control our own property are central to our idea of what it means to be an adult citizen or resident of the United States. Guardianship restricts those rights, and labels the person as someone who does not have the full rights of other adults.

The abilities to make decisions affecting a person’s life, to manage property, and to understand and exercise rights are functional skills. Like other functional skills, a person can become better at making decisions and exercising rights by receiving training and advice, and by having the opportunity to use these skills in real-life situations. Similarly, a person will never improve his or her skills, and is likely to lose skills, if he or she is excluded from decisions, or feels that his or her involvement does not matter because it has no impact on what happens in his or her life.

Within a guardian’s areas of authority, the guardian makes the final decisions that affect the person’s life. In other words, the guardian takes over and performs the task (making the decision or exercising the right) for the person. This is more restrictive of the person’s right to control his or her own life, and more likely to lead to loss of decision-making skills, than forms of support which try to support the person to make decisions for himself or herself, and to experience the consequences of those decisions. However, this level of restriction may be necessary to protect the person from a serious risk of unacceptable harm.

Guardianship is a necessary form of support for some people and under some circumstances, but it is important always to keep in mind the central importance of the rights involved, to consider whether guardianship is the best form of support, and to consider whether it may be

¹ Article 1, sec. 1, Wisconsin Constitution

² State v. McGill, (2000)

³ In re Reed’s Guardianship, (1921)

doing more harm than good. Where guardianship is necessary, it is possible to exercise the guardian's powers in ways that still allows the person to take part in decision-making.

E. What is the definition of *least restrictive*?

Throughout this book, courts (in creating guardianships) and guardians (in carrying them out) are required to act in a way that is least restrictive. In addition, people receiving treatment and support services for mental disabilities are entitled to receive treatment and support in the least restrictive way consistent with their needs.

With respect to the guardianship order and the exercise of power by the guardian, *least restrictive* means choosing the decision or approach which: (1) places the least possible restriction on the person's personal liberty and exercise of rights, and that promotes the greatest possible integration of the person into his or her community; and (2) is consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, neglect and financial exploitation. This balancing test requires the court and guardian to weigh and strike a balance between the person's interests in health and safety, freedom from abuse, personal liberty, legal rights, community integration, personal autonomy and choice, appropriate treatment and habilitation, and personal experience and growth. The goal is not to eliminate all risk from the person's life, but rather to protect the person from decisions that he or she is not capable of making, and that would result in an unacceptable risk of serious harm. (See Parts [II.D](#), [IX.D](#) and [IX.E](#), for more discussion of this balancing test.)

In the context of placement for residential and other treatment and services, the goal should be to choose the least restrictive setting in which the person's needs could effectively be met. In addition to personal liberty issues and integration in the community, a service setting should be analyzed in terms of the image of participants that it may present to others, and the extent to which it allows the person to develop or retain skills that will be useful in real-life, community situations.

In recent years, there has been a shift in the philosophy of long-term care towards a "support" model. Under earlier ideas, people were often denied access to typical homes, communities and experiences until they had received "treatment" in segregated facilities that made them "ready." Unfortunately, in many cases the "treatment" never resulted in the skills needed to meet the "readiness" test. Under a support model, the presumption is that a person should always be supported to live in his or her own community and to have normal life experiences of personal relationships, work, play, etc. This does not mean that services aimed at maintaining or developing skills and abilities should not be provided, but that they should be provided in ways that also support the person to have a normal life.

II. OVERVIEW OF GUARDIANSHIP

A. What is a guardian of an adult?

A *guardian* for an adult is a person or agency appointed by a court to act for an adult who has been found to have a functional impairment in decision-making or communication that meets the legal standard for a finding of incompetence (see Part [III](#)). **No person in Wisconsin is a guardian for an adult unless appointed by a court, and no guardian has any powers over an adult except those given by statutes and the court order.**

Any person in Wisconsin over the age of 18 is legally an adult, and is presumed to be able to manage his or her own financial affairs, choose where to live, consent to medical treatment, vote, make contracts, marry, and exercise his or her own legal rights as an adult. This presumption does not change because a person has a disability. The presumption that an adult is competent to make his or her own decisions often comes as a surprise to family members, who may find themselves with no legal right to be involved in, or even know about, care that a relative is receiving. For example, family members may be refused information about the person's needs and treatment because he or she is unable, or refuses, to give informed consent to release of the information.

For guardianship orders issued since December 1, 2006 in Wisconsin, guardianships are required to be tailored to the individual needs of the person, and to be as unrestrictive of the person's rights as possible. The court order creating the guardianship specifies the areas of decision-making where the guardian has authority to act, and any restrictions the court has imposed on the ability of the person to exercise rights. Therefore, even when it is determined that guardianship is a necessary form of support, it is still necessary to think about what rights the person can still exercise for himself or herself, and what powers the guardian really needs in order to provide the person with protection from harm.

In the areas where authority has been given to the guardian under the court order, guardianship takes away an adult's right to make decisions for himself or herself. While one of the duties of a guardian is to try to learn about and respect the person's wishes (see Part [IX.E](#)), the final authority to make decisions belongs to the guardian. However, a guardian's authority is primarily to make decisions, give consents, and act as an advocate. There are significant limits on the ability of a guardian to force the person to cooperate with the guardian's decision, if he or she refuses or physically resists. (See Part [VI.A](#), [X.B](#), and [XII](#).)

Because a guardian gets his or her powers from the state, a guardian is subject to the same constitutional limits that control a state's power to interfere in the lives of its citizens. This means that the guardian must have a compelling reason for interfering with the person's exercise of his or her constitutional rights. (See Parts [IV.B](#) and [IX.E](#).)

The guardian has a strict duty to act always in the best interests of the person. (See Parts [IX.A](#) and [XIII.A](#).) Because guardianship is created by the court, decisions by a guardian are always subject to court review and supervision. (See Part [XIV](#).)

B. What are the different kinds of guardians?

There are two basic kinds of guardians, a guardian of the estate and a guardian of the person. A court appoints a *guardian of the estate* for an adult who needs a guardian to make some or all decisions related to his or her property or money, to sign contracts, or to represent the person in a legal proceeding that has to do with money or property. A court appoints a *guardian of the person* for a person who needs a guardian to make some or all decisions related to personal decisions, such as decisions about medical care or support services, or about where to live. A court may appoint the same person(s) as guardian of both the estate and the person, or the responsibilities may be divided.

A *temporary guardian* is a guardian of either person or estate who is appointed for a limited time. An order appointing a temporary guardian must specify the particular powers that the temporary guardian has power to exercise. A temporary guardian may be appointed because there is an immediate need for a guardian, while the procedure for appointing a permanent

guardian takes place. A temporary guardianship may also be useful where the only need for a guardian is to carry out a single isolated act.

The court may also appoint a *standby guardian* for either a guardian of person or estate. A standby guardian has no authority to act unless the guardian becomes either permanently or temporarily unavailable. For example, if the guardian is going to be out of the country for an extended period, the standby guardian can act as guardian while the permanent guardian is away. If the guardian dies or resigns, the standby guardian will automatically be appointed to become permanent guardian. The standby guardian must inform the court, and get court papers recognizing his or her authority, when he or she begins to exercise the powers of a guardian.

A guardian appointed under a court order that was issued before December 1, 2006 may be either a *full* or a *limited guardian*. This is because, until the law changed on December 1, 2006, the person did not keep any rights, or any powers over any area of decision-making, unless the judge made a specific finding in the order that the person was competent to exercise the right or power. The result was that many people who could have exercised some rights or powers ended up with full guardianships because the court simply found that the person met the standard for incompetence, and never considered whether he or she still had the ability to make some decisions or exercise some rights. Any court review of a pre-12/1/06 guardianship order provides an opportunity to update the order so that it is more individualized in its treatment of rights and powers.

C. What are the positive functional purposes of guardianship?

The major functions of a guardian of an adult include:

- Making decisions the person is unable to make for himself or herself, and giving consents the person is not able to give.
- Exercising rights on behalf of the adult that the adult is unable to exercise for himself or herself.
- Acting as an advocate for the adult's best interests.
- Taking action to protect the adult from abuse, neglect, self-neglect, financial exploitation and violation of rights.

A person with the legal authority to act for the person as a court-appointed guardian can be an essential form of support:

- Some people are genuinely unable to understand or assert their legal, civil and human rights, and are at risk of being exploited or dominated by other people or by agencies and institutions. The risk is particularly great where another person, group or institution is in a position to intimidate or isolate the person. An advocate committed to the person can be an essential bulwark against abuse, neglect and exploitation, and an essential support for the person to have access to a real life. Often, that advocacy is only effective with the legal access to information and the power to act for the person that guardianship confers.
- Access to needed services may depend on informed consent or legal capacity. For example, a surgeon may refuse to perform elective surgery without informed consent, long-term support services may require informed consent to a service plan, and access to or a landlord to an apartment may require the capacity to sign a legally binding contract.

- Some people, even with the best support, will make decisions that place their health and safety at unacceptable levels of risk. Where that is a result of mental disability that makes the person unable to understand the risk or to take the risk into account in making decisions, and other forms of support are not effective, a guardian may be necessary to protect the person from serious harm.

D. What are the negative consequences of guardianship?

There is a powerful tendency on the part of the courts, the service system, and guardians themselves, to overuse the power to make decisions for other people. Understanding the reasons for this bias toward over-protection and its costs, can also help to guard against it. Guardianship and other forms of substitute decision-making tend to be overused because:

- It can be more complicated and time-consuming to help a person who needs decision-making support to understand and make a decision for him or herself, than it is to simply have someone else make the decision for the person.
- Courts, service systems, and guardians often do not like risks. If risks are taken, and things go wrong, this is likely to create more work in planning what to do next. People who are seen as responsible for the person are more likely to be blamed when a risk is taken and something “bad” happens, than when the person is denied any right to take risks.

Fears for the person’s safety are often based on real-life experience. However, family members and others involved in the person’s life often overestimate the security that guardianship can provide, fail to look to other forms of support that may provide better protection of both safety and rights, and fail to consider the benefits of risk-taking, in terms of the learning opportunity for the person in setting goals, trying new things, and learning from failures. To balance the tendency towards over-protection, it is essential to keep in mind the costs of the overuse of power to make decisions for another person:

- The process of establishing that a person is “incompetent” is often a painful one, because it emphasizes the person’s incapacity, rather than his or her strengths.
- Where guardianship is ordered, the person may feel that he or she has been labeled as a second-class citizen. A person found incompetent loses many basic, day-to-day rights, and may feel a loss of dignity and respect because he or she must seek the consent and assistance of another person for many activities that other people take for granted.
- Even where the person retains rights and powers, other people who learn that the person has a guardian may simply assume that the person is totally incapacitated, and see the person as less capable than he or she actually is.
- Loss of decision-making power reduces the person’s opportunity to learn to make choices, and thus to develop or keep decision-making skills. We all learn by making mistakes. If a person is denied the right to take risks, he or she is also denied the opportunity to learn and grow. We all take risks in the hope of gaining something we value, and we all at times get hurt in the process. If a person is denied the right to take risks, the person will never have the opportunity to pursue aspirations that are not “sure things,” to learn the real-life limits on what is possible—or to experience the joy of reaching goals others thought were unrealistic.

- A person who has been taught to rely on and accept the decisions of others, and who is unaware of his or her basic rights and of how to assert them, is at greater risk of abuse and exploitation by others. If we want the person to be able to say “no” to others, we must accept the inconvenient fact that he or she will sometimes say “no” to us.
- If someone else has power, the system and support circle are no longer challenged to always look to the person as the decision-maker, and to find imaginative ways to support him or her to understand choices and indicate preferences, and to engage in behavior that may involve some risks.
- People can “learn” incapacity. A person who is used to having decisions made by someone else is likely to lose self-confidence and see himself or herself as incapable of developing decision-making skills.
- Substitute decision-making in an area where it is not needed creates extra work for the decision-maker, who will feel responsible for any area where he or she has been given authority, and creates fertile ground for unnecessary conflict. Guardianship should not be imposed to protect the person from some risk of harm which, under his or her particular life circumstances, he or she is not likely to experience.

III. STANDARDS FOR APPOINTMENT OF A GUARDIAN BASED ON A FINDING OF INCOMPETENCE

A. What findings must a court make in deciding whether to appoint a guardian for an adult based on a finding of incompetence?

Under the law in effect since December 1, 2006, the court must make a series of findings before it can appoint a guardian for an adult based on a finding of incompetence. These findings must all be based on convincing evidence in the court record. The findings are:

- **Age.** The person must be at least 17 years and 9 months old when the guardianship order is issued. This allows the guardianship to be in place before the person becomes age 18. (The petition can be filed no more than 90 days before the date that the order is issued. (See Part [VIII.C.](#))
- **Presence of an impairment that fits a listed category.** The court must decide that the person has an **impairment**, and that the impairment fits one of four categories: **developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities.** In all cases, the impairment must be one that results in a substantial, long-term disability. A physical disability alone cannot be the basis of a guardianship order, unless it makes the person unable to communicate. The presence of an impairment is shown by an opinion provided by a doctor or a psychiatrist. The definitions of the categories are on the standard court form that the doctor or psychologist is supposed to use in preparing his or her report. (See Part [VIII.F.](#))
- **Lack of evaluative capacity.** The court must decide that, because of the impairment, **the person is unable to effectively evaluate information or to make or communicate decisions** about his or her personal health and safety (for guardianship of person) and/or about protecting and using his or her property for his or her support (for guardianship of the estate). (See Part [III.B.](#))

- **Risk of harm.** The court must decide that the person’s inability to make or communicate decisions creates a serious risk of harm to the person. The risk of harm that must be shown is different, depending on whether the petition is for guardianship of the person or guardianship of estate:
 - **Guardianship of the person.** To order guardianship of the person, the court must find that the person, because of his or her inability to make decisions, is **unable to meet the essential requirements for his or her physical health and safety**. This requires a showing that serious physical injury or illness is likely to occur because of the person’s inability to make or communicate decisions. For example, a risk to physical health may result from inability to give informed consent to medical care, a necessary requirement for access to non-emergency medical care.
 - **Guardianship of the estate.** To order guardianship of the estate, the court must find that, because of his or her inability to make decisions, the person has property that will be lost or wasted; the person is unable to provide for his or her support; or that the person is unable to protect himself or herself from being a victim of financial exploitation.
- **No less restrictive alternative under the individual circumstances.** The court must decide that it is not possible to meet the person’s need for assistance in decision-making or communication in a less restrictive way, such as training, education, support services, provision of health care or assistive devices, or reliance on advance planning that the person has done for himself or herself. (See Part [V.B](#) and [C](#).) In making this decision, the court must consider the particular character and circumstances of the person, including whether he or she would be likely to accept the alternatives, his or her social support network, and special factors that may put the person at special risk. (See Part [VI.A](#) and [D](#).)

B. What is “evaluative capacity” and what is the functional test for need for guardianship?

It is not the existence of an impairment by itself that results in a finding of need for guardianship. Rather, the central issue for the court is the impact of the impairment on the person’s functional ability to make decisions that are important to his or her health and safety.

Evaluative capacity is the functional ability to effectively take in and evaluate information, and/or to use information to make decisions. The functional test for need for guardianship requires a showing that the person lacks evaluative capacity to the extent that he or she is at risk of serious harm. To meet this test, it is not enough to simply show that a person is old or has a disability. It is also not enough to simply show that a person makes unusual decisions, or even decisions that are not in his or her best interests. Lots of people act in ways that other people think are unusual, and make decisions that other people think are bad. The opportunities to take risks, make mistakes, and do things in our own ways are all part of the right to control our own lives and property, and are important ways we all learn and grow throughout our lives. **Under the functional test, guardianship is based not on the quality of the decisions the person makes, but on the process by which he or she makes and communicates the decision.**

Incapacity may take one or more of the following three forms:

- **Inability to understand essential information.** A person may be considered unable to effectively make decisions because he or she cannot understand the information needed to make an informed decision. For example, for a person to make an informed decision about medical care, he or she must be able to understand the risks and benefits of having (or not

having) the medical care. The issue is not what the person knows, but what the person could learn, if the time and effort to were made to present the information in the way he or she is most likely to be able to understand and use.

- **Inability to use information to make decisions.** A person may be able to learn and repeat back information about risks and benefits, but then act in a way that does not take that information into account, for example because he or she is acting out of an obsessive compulsive disorder, or because he or she is experiencing delusions.
- **Inability to communicate decisions.** Very rarely, the issue is not the person's ability to make decisions, but rather his or her ability to communicate the decision. This should be the basis for guardianship only if there is no alternative means of communication or assistive device that could be used to enable effective communication.

While a person may have a permanent impairment, his or her incapacity to make decisions may or may not be permanent. A person may gain a greater understanding about a type of decision by being involved in that type of decision over time, so that he or she can regain partial control over his or her life, or reach a stage where he or she no longer needs a guardian.

IV. HOW DOES THE COURT DETERMINE WHAT RIGHTS AND POWERS THE PERSON KEEPS, AND WHAT POWERS THE GUARDIAN HAS?

Once a decision has been made (1) that the person has an impairment, (2) the person lacks evaluative capacity so that he or she is at risk of harm, and (3) that guardianship is the appropriate means of decision-making support, the court can appoint a guardian of person, estate, or both. Under the law in effect since December 1, 2006, **the court must then tailor its order to the individual abilities and circumstances of the person**, by determining what rights and powers he or she will keep, what rights will be lost or be subject to veto by the guardian, and what powers will be given to the guardian to exercise.

A. How does evaluative capacity affect the division of rights and powers?

In the case of each right and power, the first issue for the court is whether the person has ***incapacity to exercise*** the right or make the decisions involved. A right or power may be lost or transferred if the court finds that the person is **unable to effectively receive and evaluate information or to make or communicate a decision with respect to the exercise of that particular right or power.**

Incapacity to make decisions is not an all-or nothing concept. A person may be able to make decisions over some parts of his or her life, but not others. The level of evaluative capacity legally required to exercise a right or make a decision is different for different kinds of rights or decisions. For example, a person who is incapable of giving informed consent to a complicated medical procedure may well be capable of making a valid will, appointing an agent under a power of attorney or consenting to sexual contact. In addition, a person may be only partially incapacitated with respect to a particular right or area of decision-making. In that case, the court has authority to allow the person to exercise a right, but only with consent of the guardian, and to keep authority over some decisions in an area of decision-making, while the guardian is given authority over other decisions in the same area of decision-making.

B. What rights are retained by all adults who have guardians of the person?

An adult who has a guardian of the person based on a finding of incompetence retains the power to exercise certain rights. These rights are the same regardless of whether the guardianship was created before or after December 1, 2006. The person does not need to inform the guardian, or get the guardian's consent, before exercising them. The retained rights include:

- The right to **communicate with the court and with government officials**, including the right to have input into plans for support services, the right to initiate grievances or complaints about violations of rights, and the right to participate in administrative hearings and court proceedings, to the extent he or she is able. For example, guardianship does not prevent a person from being a witness; the judge and jury in particular cases must decide if the testimony is useful and reliable.)
- The right to **petition for court review of guardianship, protective services, protective placement, or commitment orders**. See Parts [XIV](#) and [XVI](#).
- The right to **communicate privately with a lawyer, and to ask an attorney for representation**. If there are fees, they must be paid from the income and assets of the person, but payment of any fees is subject to court approval. For example, a court might refuse to approve a fee if a lawyer represented the person on a claim that had no chance of success.
- The right to **communicate privately with rights advocacy agencies**, including Disability Rights Wisconsin and the state Board on Aging and Long-Term Care.
- The right to **protest a placement in a residential facility**, and to be discharged unless there is an emergency placement or a proceeding resulting in court-ordered protective placement. (See Parts [XI.B](#) and [XVI](#).)
- The right to **withhold certain consents and refuse treatment**. Unless there is a court order, consent of the person, in addition to the consent of the guardian, is required for treatment for mental illness, developmental disabilities, alcoholism and drug dependence that is considered experimental or drastic. (See Parts [X.C](#) and [XV.D](#).) Individuals also have the right to refuse medication and treatment for mental illness, unless medication or treatment is necessary to prevent serious physical harm to the person or others, or the person is found not competent to refuse. (See Parts [X.C](#) and [XI.C](#).)
- Any other rights **specifically reserved to the individual by statute or the constitutions of the state or the United States**, including the rights to free speech, freedom of association, and the free exercise of religious expression.

The last section makes clear that a person under guardianship keeps his or her constitutional rights as a citizen. This does not mean that a guardian or court can never take an action that overrules a person's expressed choice regarding a constitutional right. The weight to be given to a person's choice in an area of protected rights will partly depend on his or her level of understanding of the nature of the right and partly on the risks and consequences of the choice he or she is making. If the court has found that the person does not have capacity to make a decision, the guardian may overrule his or her wishes to prevent a serious threat to health and safety. (See Part [IX.E](#).)

The rights of the person overlap with the powers and duties that a guardian of the person may have, such as the responsibility to take action to protect the person's rights, and to act as an advocate in court and administrative processes. It appears that these rights are shared, e.g., either the guardian or the individual can file a grievance alleging violation of a right.

C. What personal rights can be lost by a person who lacks capacity to exercise them, but cannot be exercised by the guardian on the person's behalf?

Certain rights are personal, meaning that they can only be exercised by a person who has capacity to do so, and that they cannot be exercised by a guardian on the person's behalf. As part of the guardianship process, the court can decide that the person has incapacity to exercise one of several listed rights that fall in this category, if there is evidence to support the finding of incapacity. For some of these rights, the law recognizes that a person may have capacity to exercise the right in some circumstances but not in others, and allows the court to give the guardian a veto over exercise of the right. The listed rights in the statute are:

- **Right to vote.** The standard for incapacity to vote is that the person must be incapable of understanding the purpose of an election. No person may be denied the right to vote on grounds of incapacity unless a prior court determination of incapacity has been made.
- **Right to execute a will.** Courts have held that, in order to make a legally valid will, a person must have the mental capacity to understand what he or she owns, whom he or she might want to give things to, and the effect of the will he or she is signing.
- **Right to serve on a jury.** A juror must be able to understand the English language, and a person may be excused from serving if he or she "cannot fulfill the responsibilities of a juror."
- **Right to consent to marriage.** Marriage is a contract, and both parties must be capable of consent for a marriage to be valid. The test of capacity should be whether the person understands the nature and consequences of marriage. If the right to marry is retained, exercise of the right by the person can be made conditional on consent of the guardian.
- **Right to apply for licenses,** including a driver's license, hunting or fishing license, or a job-related license or permit. A person who is found capable of applying may, of course, still fail to qualify for the license itself. If the right to apply for licenses is retained, exercise of the right by the person can be made conditional on consent of the guardian.
- **Right to consent to sterilization.** Under Wisconsin law, neither a guardian nor a court has authority to consent on the person's behalf to a procedure for the purpose of sterilization. The only legal way that a person can undergo a procedure that is for the primary purpose of sterilization is if he or she **both** (1) has capacity to consent **and** (2) actually gives a valid, informed consent. The court may take away the right to consent if it finds that the person is incapable of understanding the nature, risk, and benefits of sterilization, after the nature, risk, and benefits have been presented in a form that the person is most likely to understand. (This is the standard definition of informed consent for any medical treatment.) If the right is retained, exercise of the right can be made conditional on consent of the guardian. For discussion of consent to **birth control** and **abortion**, see Part [XII.B](#).
- **The right to consent to organ donation.** Under Wisconsin law, neither a guardian nor a court can consent on behalf of the person to organ, tissue or bone marrow donation while

the person is living, unless there is evidence that the procedure would serve the interests of the person. It is not clear what that evidence would be, but a strong personal relationship to the recipient might meet this standard. If the court decides that the person does have capacity to exercise this right, it can make exercise of the right conditional on consent of the guardian.

- **NOTE:** Other important personal rights, such as the right to consent to involvement in sexual activity, are not on this list. See Part [XII.A](#), for discussion of the responsibility of the guardian with respect to those rights.

Except for the right to vote, the lack of a court finding of incapacity does not necessarily mean that the person's actual exercise of a retained right will be legally valid. Even if the court did not have enough evidence to find that the person had incapacity at the time of the court hearing, **the exercise of the right will only be valid if the person has capacity to understand and exercise the right at the time he or she exercises it.** For some of the rights, it is difficult to assess capacity outside of the context of an actual decision: many people will be able to express an opinion about marriage, sterilization, or transplant surgery in the context of a real decision, who could not discuss these issues in the abstract. If a right is retained, it will be important to document the person's capacity at the time of exercise, e.g., by having the person spend time with a health professional, mental health counselor, or legal professional, who can then confirm that the exercise of the right was voluntary, knowing and made with the necessary capacity. In some cases, it may be most appropriate to return to the court for a specific finding of capacity in the context of the actual decision.

D. What powers can be kept by the person, assigned by the court to the guardian of person, or shared between the person and the guardian?

Under the law in effect since December 1, 2006, a court may authorize a guardian of the person to exercise a power only if it finds, by clear and convincing evidence, that the person lacks evaluative capacity to exercise the power. See Parts [III.B](#) and [IV.A](#), above. The court may authorize the guardian of the person to exercise only those powers that are necessary to provide for the individual's personal needs, safety, and rights. If a guardian is given authority to exercise a power, the court may decide that the person has limited capacity to exercise the power, and tailor its order to allow the person to retain power to make decisions that he or she has evaluative capacity to make. For example, an order might allow a person to make routine health care decisions, but authorize the guardian to make decisions about major surgery or high-risk medications, or might reinforce the individual's right to be involved in discussion of a decision, even though the final decision is made by the guardian. The nature and extent of the powers that can be given to the guardian, and the responsibility of the guardian in exercising the powers, are discussed in more detail in Parts [IX](#), [X](#), [XI](#), and [XII](#).

Powers the guardian of the person can be authorized to exercise include:

- The powers **to give informed consent to medical and mental health examination and treatment and to choose providers of medical, social and/or supported living services.** (See Part [X](#).)
- The power **to give informed consent to medical examination and treatment over the person's objection.** This power does not extend to power to consent to mental health treatment over the person's objection. (See Part [X.C](#) and [XI.C](#).)

- The power to **authorize participation in research or to consent to experimental treatment**. These powers require case-by-case court approval of consent under some circumstances. (See Part [X.B.](#)).
- The powers to **give informed consent to social and supported living services and to make decisions about educational and vocational placement**. For a person who needs support services to live and participate in his or her community, such as Family Care, Community Options, Community Integration, and Community Support Program services active advocacy for appropriate services this is an essential part of the guardian’s role in advocating for the person, and ensuring his or her right to least restrictive conditions. (See Parts [I.E](#), [IX.C](#) and [D](#), and [XVII.C](#).)
- The power to **give informed consent to release of confidential records** other than court, treatment, and patient health care records, and to redisclosure as appropriate. (While it is probably true under other laws that any guardian of person has authority to give informed consent to release of court, treatment, and patient health care records, it is a good idea to specify that in the order as an additional power.)
- The power to **make decisions related to mobility and travel**.
- The power to **petition for divorce, annulment or legal separation** if the person is married.
- The power to **receive all notices on behalf of the person**. Notices that relate to property should be directed, or passed on, to the guardian of estate. For a person who still has capacity to receive notices, it may be a good idea for this power to be shared, so that both the person and the guardian receive notices.
- The power to **act as an advocate in proceedings**, other than proceedings about the person’s property. (See Part [IX.C](#).)
- The power to **petition for protective placement or commitment**. It is not clear why this power is listed; a guardian, as an interested person, always has authority to bring a petition for protective services, placement or commitment.
- **The power to have custody of the person**. “Custody” of an adult is not defined, so it is not clear exactly what it is. It is not the same as custody of a child. It implies an authority to choose the person’s home, and possibly to limit the person’s freedom of movement and social decisions, where necessary to protect the person from harm. It may be useful, for example, if the person is missing and the guardian wants assistance from law enforcement agencies in finding the person. If the guardian is concerned about authority over particular kinds of decisions, it is probably more useful to specify the needed powers (see next bullet).
- **Any other power** the court may specifically identify. This is a good place to put guardian power to release court, medical and treatment records, and any specific powers over freedom of movement or social decisions needed to protect the person from harm. (See Parts [IX.E](#), [XI.A](#) and [XII.A](#).)

E. What powers can either be kept by the person or assigned by the court to the guardian of estate?

An order for guardianship of the estate may only grant powers to the guardian that (1) are necessary to provide for financial management and (2) are the least restrictive form of intervention. Instead of a check-list of rights and powers that the person can keep (in whole or in part), the order appointing a guardian of estate gives the court three options:

- Leave all powers and duties with the person, except **specific powers given to the guardian in the court order**. The powers given to the guardian must be individually spelled out in the order. This might be used, for example: when the person can handle his or her daily affairs, but needs a guardian to manage large or complex property that he or she owns, such as large investments or an interest in a business; when the guardian is needed only to sign certain contracts on the person's behalf; or when the guardian is needed to represent the person about some specific claims.
- Give all powers to the guardian, except **specific powers that the person keeps under the court order**. The powers the person keeps must be individually spelled out. Examples of the kinds of powers that the person might keep include:
 - Power to manage his or her earnings from work, income from public benefits, or from a trust or annuity, that the person uses for personal expenses.
 - Power to manage a checking account, up to a limited amount.
 - Power to make contracts, for specific purposes or up to limited amounts. For example, the person might be given power to sign his or her own lease for an apartment, up to a maximum amount that he or she can afford.
- Give **all powers to the guardian**, with the person keeping no powers.

The original petition is a good time to consider whether to ask for additional special powers the guardian may need, such as court approval for any business arrangement with the guardian, authority to transfer the person's resources to a trust, or authority to make gifts on the person's behalf, and to ask for approval of reimbursement of reasonable guardian expenses, and reasonable compensation for the guardian. See Part [XIII.K](#) and [L](#) .

V. FORMS OF DECISION-MAKING SUPPORT THAT MAY BE USED TO ENHANCE OR TAKE THE PLACE OF GUARDIANSHIP

A. How and when should informal or voluntary forms of support be used to meet needs for decision-making support?

i) **Build on the strength of informal support from family, friends, and service providers.**

If the person has family or friends willing to play an active role in helping to make decisions, a person who meets the legal standard for appointment of a guardian may be able to function well without one, because he/she is able to know when help is needed and how to seek it. A person whose finances are not complicated, who is not at risk of exploitation, and who is willing to have some or all of his/her funds deposited into a dual-signature checking account, or managed by an agent, often will not need a

financial guardian. A person who is willing to share important information and brings major medical and service decisions to a support circle of family, friends and paid support workers may not need a guardian of the person, or may only need one for complex medical decisions. Even if guardianship is ordered, these kinds of support can still serve the purpose of keeping the person involved in decisions, and making sure his or her opinions and goals are taken into account.

For informal support systems to work effectively the person must be willing to accept help and the people providing support must be willing to take the time and do the work required to help the person gain needed experience, take in information in a form he or she is most likely to understand, and overcome communication barriers. In addition, the people providing the support must be working in the person's interest. A system of checks and balances may be helpful, because of the risk that an advisor or agent will use the person's trust to serve his or her own interests. (See Part [VI.C.](#))

ii) Assess the person's cooperativeness and ability to understand and consent.

Some decision-making supports require that the person cooperate and have capacity to act; others can be imposed without his/her consent. Voluntary forms of decision-making support require that the person understand his or her need for assistance, be willing to accept advice or help from others, and/or be willing to give the power to make certain decisions to other people.

For more formal types of voluntary decision-making support, the person must also have capacity to understand the nature and significance of the power he or she is assigning to someone else. For example, a legal document giving another person power of attorney is not valid if the person did not understand it when he or she signed it. The level of understanding needed varies with the type of support involved.

iii) Consider the need for checks and balances or independent oversight.

Need for a decision-making support depends not only on a person's abilities and level of cooperation but also on his/her personal situation. Some people who could clearly meet the standards of legal incompetence are functioning well without a guardian. Others who have greater skills may be in need of formal protection because they are highly vulnerable.

In considering whether any form of decision-making support will adequately protect the person, it is important to be alert for conflicts of interest. Family members may rely on the person's income to maintain their household, or expect to inherit the person's money if it is not used during his or her life. Service providers may act out of desire to minimize their own workloads or expenses. It is not possible (or desirable) to eliminate every conflict of interest, but it is important to see where they exist, and to try to reduce any impact on the person.

A person is less likely to be dominated, or taken advantage of, if he or she has multiple sources of support or advocacy that are independent of each other, e.g., both involved family, and strong ties to service providers who respect the person's right to have a say in his or her life. If one family member is given authority to manage finances, it may be a good idea for another family member to automatically get copies of financial records and accounts. If the person is isolated, or if power over the person is concentrated in the

hands of one person or agency, the procedural protections and court oversight that a guardianship provides may be necessary protections.

Heavy dependence on medical, social or mental health services may increase the importance of having a guardianship or other authoritative outside advocate. Service-providing agencies can be very powerful, and, unless the person has been able to plan ahead to appoint a health care agent, a guardian may be the only means to provide outside monitoring of how that power is used. This becomes particularly true in services, such as institutions, that are isolated from the larger society and/or have the potential to control every aspect of a person's life.

B. What tools can be used to provide decision-making support for managing money and property?

i) Restricted Bank Accounts

Either of the following types of accounts can be set up fairly easily at most banks:

- **Dual Signature Checking Accounts**-- These accounts require that both the owner of the account and a second person chosen by the person must sign any check before it will be paid. Unlike a joint account, the second signer has no ownership of the account, and no independent ability to withdraw funds from the account. A dual signature checking account can be a very useful way of letting the person retain responsibility and learn financial management while preventing major errors in judgment. The person can say who will get the money in the account when he or she dies by making out a will or transfer on death designation.
- **Joint Accounts**-- This option involves setting up a bank account with the person as one owner, and another person as joint owner. Either person can then write checks or withdraw money. The person can still make decisions, but can ask the other person whose name on is on the account to help by doing shopping, cashing checks or paying bills. There are several important reasons to be cautious in using this kind of account:
 - Under a joint account, if the person dies the other joint-owner of the account becomes the owner of everything in the account, no matter what the person's estate plan or will may say. This may not be what the person wants.
 - If the joint owner misuses funds, it may be difficult to prove because there is typically no document defining his or her authority to use funds, and he or she can argue that making him or her a joint owner was intended as a gift.
 - The person will still have total access to the account, so this will not prevent mismanagement, if he or she takes actions without first seeking advice.
 - The act of creating a joint account may have serious consequences for a person who receives SSI or Medicaid, because it will be treated as a gift to the new joint owner.

ii) Financial Power of Attorney

If the person has capacity to understand what he or she is doing, he or she can create a *financial power of attorney*, giving another person, called an **agent**, the power to

manage all or part of his or her finances or property. To create a valid power of attorney, the person needs to have an understanding of his or her financial affairs, capacity to select an agent, and an understanding of the nature of the powers he or she is giving to the agent.

A financial power of attorney can give broad powers to manage all the person's finances, or can be limited only to certain property and powers. For example, an agent could be given power to manage and rent out the person's real estate, or power to sign checks drawn from a particular bank account. Certain special powers, like the power to make gifts from the person's resources, must be specifically spelled out, or the agent will not have those powers. The simpler and more limited the powers given, the more likely that a person with limited capacity will be able to understand and make a valid decision to sign it.

An **ordinary power of attorney** can be withdrawn at any time and ends automatically if the person becomes incapacitated. It is a useful way of getting help with management tasks in the present, but it does not meet the needs of a person who is trying to plan ahead for a future time when he or she may be incapacitated.

A **durable power of attorney** continues in effect even if the person who establishes it later becomes incapacitated. It can also be written so that it only becomes effective when the person becomes incapacitated. This gives a person a way of planning ahead to provide a financial manager of his or her own choice if he or she is either temporarily or permanently incapacitated. This can be used, e.g., by a person who has cyclic periods of acute mental illness, or by any person who wants to plan ahead for the risk of brain injury or dementia. The state legislature has adopted a standard form that people can use to create a durable power of attorney. The form is available on-line from the state Department of Health Services. (<http://dhs.wisconsin.gov/forms/AdvDirectives/>)

Wisconsin recently adopted a new law governing financial powers of attorney, effective September 1, 2010, and a new standard state form. The new law provides detailed descriptions of powers that can be automatically given to an agent just by giving the agent general power over a particular area of decision-making, such as "real estate," "banking," or "stocks and bonds." To know exactly what powers he or she is and is not giving to the agent, the person must read the detail in the statute about the powers the agent will have under a general grant of authority. These are included in an appendix to the standard state form. Under the new law, it is possible to use the standard state form to limit or expand the general powers, and to give the agent special powers, like the power to make gifts, and the power to change beneficiary designations in insurance policies and other investments. To do this, the person must spell out the changes and special powers in a separate section of the form called "Special Instructions." This is also a section the person can use to state in detail how he or she wants the power of attorney to be used.

An agent has only the powers given by the creator of the power, and has a high legal duty not to misuse those powers. The law requires an agent to:

- Act within the powers given by the principal.
- Act in good faith, and act loyally to the principal.

- Act consistently with known expectations of the principal, or in principal's best interests, if the principal's expectations are not known.
- Act with care, competence and diligence.
- Keep records of money received and disbursed, and transactions completed for principal.

Unlike a guardianship, however, there is no supervising court to oversee the management and use of funds. One way to reduce the risk of abuse is to require that the agent give regular accounts to another person.

iii) Conservatorship

If the person has capacity to understand that he or she needs help with financial management, and to choose the person he or she wants as financial manager, he or she can ask a court to appoint a *conservator*. A conservator has exactly the same powers and responsibilities as a guardian of the estate. As with a guardianship, a conservatorship can be limited so that the person retains some power to manage his own finances, e.g., to manage his or her own earnings from work. (See Part [XIII.C.](#))

A conservatorship is voluntary, so there is no finding of incompetence. The person can ask the court to end the conservatorship at any time. The conservatorship will then be continued only if the court holds a hearing, finds that the person is incompetent to handle his or her finances, and appoints a guardian of the estate.

While the powers that a conservator can have are more limited than the powers a person can give to an agent under a power of attorney, conservatorship has several potential advantages:

- To create it, the person only needs to understand that he or she needs help with financial management, and to name the person to provide it. The court order ensures that there is no risk that the conservatorship will be found invalid, or questioned by banks, landlords, etc.
- The court oversees the conservator, can require annual (or other) accounting, and can review the conservator's actions as it would the actions of a guardian. See Part [XIV.](#)
- Conservatorship does not establish that the person is not competent to sign contracts. However, if businesses know that the person does not control his or her own funds they may be less likely to make contracts with the person.

iv) Trusts

Under a *trust*, money and/or other property is transferred by one person, called the *grantor*, to another person, called the *trustee*. The trustee has the duty to manage and use the property for the benefit of the named *beneficiary* of the trust. The trustee has legal control and management of the property, but is under a strict legal duty to manage and use the property only in the ways permitted by the grantor in the trust document, and only for the benefit of the named beneficiary. The trustee can be given broad discretion, or the grantor can be very specific about how he or she wants the money

used, both while he or she is alive and after his or her death. The trust provides a way of making resources available for the benefit of the beneficiary while leaving management and decisions in the hands of the trustee. It also provides a way for the grantor to have some assurance that his or her property will be used as he or she wishes, even when he or she is no longer exercising direct control over it.

Trusts are very flexible, and are created for a wide variety of purposes. For example:

- A parent who wants to give money to benefit a minor child or a child with a disability, or to leave money to the child in a will, can create a trust with the child as a beneficiary. The trustee will then manage and invest the money, and use it for the benefit of the child, in the way that the parent has directed in the trust document. The parent can also direct where the money will go if there is any left in the trust when the child dies.
- A person who is concerned that he or she may become incapacitated in future can put his or her own money into a trust. He or she can manage the trust while he or she is able to do so, but can appoint a successor trustee to manage the funds and use them for the benefit of the person, if he or she does become incapacitated. In some cases, even if the person is already incapacitated, a court will have authority to order transfer of some or all of his or her property into a trust for his or her benefit.
- A special kind of trust called a *supplemental needs trust* or *special needs trust* can be created so that it does not count as a resource for a person who relies on Medicaid or Supplemental Security Income, and the resources can be used to benefit the person in ways that do not replace or reduce benefits. (For more information on these kinds of trusts, see Ch. VIII of *One Step Ahead: Resource Planning for People Who Rely on SSI and Medicaid*, published by the Wisconsin Board for People with Developmental Disabilities, which can be ordered or downloaded from their website at: http://www.wi-bpdd.org/publications/pub_auth_details.cfm?pubID=74.)

Unlike guardianship or conservatorship, trusts affect only the assets that are specifically transferred to trust ownership. A trust has no effect on resources that are given or left to the person directly, and has no effect on the person's ability to manage other funds or property he or she may own.

There are several reasons why a family member might want to use a trust to hold property he or she wants to set aside for a person who has difficulty managing his or her own money, or why a person might want to use a trust to plan ahead for the possibility that he or she might be incapacitated:

- **The trust can ensure that property is only used for the intended purposes.** In a trust, the grantor can spell out in detail what the trustee can and cannot do with the property, for as long as the trust exists. These instructions can be flexible, so that the trustee can adjust use of the trust if the person's circumstances or abilities change. The grantor can also direct who will get the property, if any is left when the beneficiary dies.
- **A trust can provide support to manage the property and make decisions about how to use it.** Using a trust, rather than relying on a financial guardian, allows this to happen without a court finding of incompetence, enables the grantor to choose the

trustee to manage the property, and allows the grantor to give the trustee greater discretion (or less discretion) than a guardian would have in managing and using the property.

- **A trust can protect the beneficiary from losing the property to creditors, through marriage, or through exploitation.** A trust that is funded by someone who is not the beneficiary can be written so that the beneficiary cannot sell, mortgage or give away trust property, or lose it to creditors, and/or so that a spouse does not have any rights to trust property. (It is not possible for a trust that is funded by a person who names himself or herself as the beneficiary to give full protection against his or her creditors.)
- **A trust can be written to protect the person from actions during temporary periods of incapacity.** A person who has periods of incapacity or poor judgment (such as periods of acute mental illness) can use a trust to protect all or part of his or her property from his or her own actions, while keeping most of the control of the property at other times. For example, he can limit his or her own right to take property out of the trust, by setting limits on the amount that can be withdrawn, or by providing for a waiting-period for withdrawals. Again, this may not protect trust property from the person's creditors.

Trusts are complicated to create and manage, and the advice of an attorney should be obtained before creating a trust, especially if the beneficiary may ever need to rely on Medicaid or SSI. The attorney should be familiar with the needs of people with disabilities, the requirements of any public benefits for which the person may be eligible, and Wisconsin law.

v) **Representative Payment**

If the Social Security Administration (SSA) decides that a person is incapable of managing his or her Social Security or Supplemental Security Income (SSI) benefits, it has the authority to appoint a "representative payee" to receive the checks on the person's behalf, and to manage and use the funds for the person's support. SSA can decide to do this on its own, or because someone else asks to be made payee. SSA will usually base its decision on evidence from a physician or psychologist. No court action is needed, and a hearing is held only if the person requests it. The person can appeal both SSA's finding that there is a need for representative payment and SSA's decision about who the payee will be. (Similar representative payment procedures exist for Railroad Retirement and Veterans Administration benefits.)

The payee must hold funds for an adult in a separate account, make sure that benefits are used first for the support and maintenance of the person, and meet SSA's reporting requirements. A payee can use the money for things the person needs or wants, but only after basic needs are met. This provides some assurance that the person's basic source of income for living expenses will be protected, and will be used to meet basic needs.

Representative payment does not give the payee any control over any other funds the person may own, such as earnings from work or money received from an inheritance. It may not be a sufficient protection if the person has substantial other income or resources that are at risk of being mismanaged or lost, or if the person needs a legally

authorized substitute decision-maker to help with finances in other ways, e.g., to sign contracts or assist with legal proceedings.

Representative payment does not directly take away the person's control over other aspects of his or her life. On the other hand, control over a person's only source of income can give a representative payee powers almost as great as a guardian's, without many of the procedural protections. Accounting requirements are minimal, although the government agency may require an accounting from the representative payee and can investigate allegations of misuse of funds.

C. What tools can be used to provide decision-making support for health care and support service decisions?

i) Releases of information

The simplest way that a person can involve someone else in helping with health care decisions is by signing releases of information saying that he or she wants the other person to have access to health care, support service and/or mental health treatment records, and that he wants his or her health care and support service providers to talk to the other person and involve the other person in discussions of treatment and care. It is possible to write a blanket release that tries to apply to all providers at any time, but this kind of release has to be carefully worded to meet state and federal law, and even then may not be honored by all providers. It is more effective, even where the person has signed a blanket release, to also fill out release forms for each specific provider. Health care providers often have their own forms, which may be available on their websites, and they will be most likely to accept their own forms. A general state form for release of information about long-term support, state public benefits, and county-funded mental health services is F-82009, available at: <http://dhs.wisconsin.gov/forms/F8/F82009.pdf>. Any form that is intended to allow release of information related to treatment or support services for mental illness, developmental disabilities, alcoholism or other drug dependence should specify that on the form.

ii) Standard health care powers of attorney, effective only if the person is incapacitated

A person who has capacity to understand what he or she is doing may create a health care power of attorney (HCPOA). By signing the HCPOA, the person appoints another person as *health care agent* to make health care decisions on his or her behalf, if he or she is ever incapacitated. Under a standard HCPOA, the agent has no authority to act for the person until he or she is incapacitated. The person is considered *incapacitated* if two physicians (or one physician and one psychologist), based on personal examinations, certify that he or she is incapable of making medical decisions for himself or herself. Incapacity does not necessarily have to be permanent, and may result from a temporary physical or mental illness.

Only one person can act as health care agent at any one time, but an alternate agent can be named to act if the primary agent is unable to act. The agent(s) selected should be people who know the principal well, such as friends or family members. A health care agent may not be a health care provider for the person, or the spouse or employee of a health care provider, unless he or she is also a relative of the person. The signing of the HCPOA must be witnessed, and there are restrictions on who can be a witness.

The HCPOA document must specify what authority the agent will have to make decisions regarding admitting the principal to a nursing home or community-based residential facility for a long-term stay, withholding or withdrawing feeding tubes, or continuing to make decisions if the principal later becomes pregnant. If these items are left blank, the health care agent will not have authority to make these decisions.

In making decisions under a Power of Attorney for Health Care, the agent's job is to try to make the decision that the principal would have made if he or she had capacity. It is very important that the agent know the principal well, and that the agent spend time talking to the principal about his or her preferences regarding health care under different circumstances that might arise. The principal can also write out instructions or guidelines, in the HCPOA or in a separate memo or letter. Some useful suggestions on things to discuss are available on the website of the Coalition of Wisconsin Aging Groups, www.cwag.org, and in a publication of the State Bar of Wisconsin called *A Gift to Your Family*, available on their website, www.wisbar.org.

Because of the importance and complexity of the decisions involved, a person must have a fairly high degree of understanding to create a valid HCPOA. If the person is already too incapacitated to make health care decisions, it is likely that he or she is also too incapacitated to create a valid HCPOA.

The HCPOA is the most comprehensive health care advance planning alternative. The Living Will, discussed below, is limited to situations where the person is in a persistent vegetative state or has a terminal condition, and only applies to life-sustaining treatment and feeding tubes. A Power of Attorney for Health Care can give the agent authority regarding virtually any physical health treatment and most mental health treatments. It can also give the agent broader authority than a guardian would have to follow the person's wishes regarding withholding or withdrawal of life-sustaining treatment.

Even when the person is found to be incapacitated, the agent is required to try to involve the person in decisions and follow his or her wishes to the extent possible. The authority of an agent is primarily to consent, rather than to compel the person to accept treatment, and it may not be effective if the person protests a treatment that the agent has consented to. The law is not clear on whether the principal still has a power to revoke the HCPOA, even after he or she has been declared incapacitated.

An agent under a health care power of attorney cannot be authorized to consent to admission to a mental health treatment institution for a person who is incapacitated. The health care agent can, if authorized, consent to other kinds of mental health treatment. However, as noted above, an ordinary health care power of attorney would not give the agent authority to require treatment over the person's protest, or in a situation where the person says that he or she wants to revoke the agent's authority, and the treatment provider determines that the revocation is valid. See item (iii), below, for a way to try to deal with these issues.

The state has published a standard form that people can use to create an HCPOA. To receive a copy of the Power of Attorney for Health Care, send a self-addressed envelope to: Wisconsin DHS, Division of Public Health, P.O. Box 309, Madison, WI 53701-0309, or print it off the internet at <http://dhs.wisconsin.gov/forms/AdvDirectives/>. There is no requirement that the standard form be used, and it is also possible to ask an attorney to draft an individualized HCPOA to carry out specific wishes. A commonly-

used form is contained in the booklet *A Gift to Your Family*, mentioned above, and includes an optional addendum form to express wishes on when the person would or would not want continued treatment.

Even where the person has an agent appointed under a health care power of attorney, it is important that he or she also give the agent releases of information (see item (i), above), if the person wants the agent involved in helping with health care decisions before the person is incapacitated. This is necessary because the health care power of attorney does not give the agent any powers or access to information until the person is incapacitated.

iii) Health care power of attorneys drafted to protect the person from refusal of treatment during acute episodes of mental illness.

A person with mental illness or another condition that may cause cyclic periods of acute illness can sign a very specific HCPOA that states that, when he or she is in an acute phase of his or her illness, he or she wants to be considered incapacitated, and wants the agent to be able to consent to particular forms of care, over his or her objection, and giving up the right to revoke when he or she is incapacitated by mental illness. It is useful for the person to state that this is based on his or her past experience of what he or she needs under the circumstances, that he or she is aware of his or her rights to refuse and revoke, and deliberately wants to waive those rights in limited circumstances. While there is no specific provision for this kind of HCPOA in the law, these provisions in HCPOAs (called “Ulysses clauses”) have been effective in many cases in getting people treatment without requiring commitment, especially where there is a strong, trusting relationship between the person, his or her family, and the treating professionals.

iv) Health care power of attorneys drafted to be effective even when the person has capacity to make his or her own health care decisions.

A person may want to appoint an agent to make health care decisions even when he or she is not incapacitated, either because he or she feels too ill to make decisions, because making decisions is too burdensome due to communication barriers, or simply because the person trusts someone else to make good decisions on his or her behalf. In that case, the person can sign a health care power of attorney that states that it is effective immediately, and remains in effect regardless of whether he or she is incapacitated. This kind of power of attorney will usually state that the person always has the right to be involved to the extent he or she wishes, and that, if he or she states an opinion, that opinion will control over the decision of his or her agent, unless he or she has included the kind of “Ulysses clause” discussed in the last section. Again, the statute does not clearly recognize this kind of health care power of attorney, but they are effective in practice where there is a strong, trusting relationship between the person, his or her family, and the treating professionals.

v) Living Wills

Also known as the "Declaration to Physicians," a Living Will is a state form that an individual can fill out indicating that he or she does or does not want life-sustaining treatment and/or feeding tubes used if the signer is ever in: (1) a persistent vegetative state or (2) a terminal condition with death imminent. It does not appoint an agent or

anyone else to make decisions for the person. Rather, it is a statement from the signer to physicians telling the physicians that the signer does or does not want these treatments if ever diagnosed by two physicians to have one of these conditions. A person must have capacity to understand the medical decisions involved in order to complete a valid Living Will.

While the Living Will is an excellent and simple tool for these situations, it is less comprehensive than the Power of Attorney for Health Care (see above). Individuals may complete both documents, taking care that they do not conflict with each other. To receive a copy of the Living Will, send a self-addressed envelope to: Wisconsin Department of Health Services, Division of Public Health, P.O. Box 309, Madison, WI 53701-0309, or print it off the internet at <http://dhs.wisconsin.gov/forms/AdvDirectives/>. A Living Will form is also provided in *A Gift to Your Family*, available on the State Bar of Wisconsin website, www.wisbar.org.

vi) **Do-Not-Resuscitate Orders**

A *Do-Not-Resuscitate (DNR) Order* is a physician's written order, directing emergency medical technicians, first responders and emergency health care facilities not to attempt cardiopulmonary resuscitation on a person for whom the order is issued if that person suffers cardiac or respiratory arrest. Other types of DNR orders (e.g., those that apply in in-patient hospital settings or in nursing homes) are not covered under this law.

A competent person may request a DNR Order from his or her physician, or a guardian or agent may request a DNR order on behalf of the person. A DNR order may only be issued by a physician and then only when the person is a *qualified patient*. Under the statutes, a qualified patient is a person who:

- Is age 18 or over;
- Has a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation would be unsuccessful in restoring cardiac or respiratory function or the person would experience repeated cardiac or pulmonary failure within a short period before death occurs; and
- Has a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation of that person would cause significant physical pain or harm that would outweigh the possibility that resuscitation would successfully restore cardiac or respiratory function for an indefinite period of time.

The physician must provide the patient with written information about the resuscitation procedures that the patient has chosen not to have, and about how the patient can revoke the document. After providing this information, the attending physician or a person directed by the attending physician is required to put a Do-Not-Resuscitate Bracelet on the patient's wrist and document in the patient's medical record the specific medical condition that qualifies the patient for the order.

To receive more information about Do Not Resuscitate orders, write to: Wisconsin DHS, Division of Health, P.O. Box 309, Madison, WI 53701-0309, or find it on the internet at <http://dhs.wisconsin.gov/ems/EMSsection/DNR.htm>.

vii) Powers of Attorney for Educational and Support Services

Unlike the health care power of attorney, there is no state law concerning a person's ability to use a power of attorney to appoint an agent to make decisions about educational services and non-health-care support services, such as in-home supports and vocational support services. There is no legal reason why an adult who has capacity to understand what he is signing cannot appoint an agent for this purpose, but it may or may not be fully accepted by the school or support service agencies involved. Any power of attorney of this kind should include releases of both written and oral information and a specific request the agent to be involved in planning meetings concerning the person's education and/or support services. Even if the person must ultimately be the one to sign the individual educational or service plan, he can rely on this or her agent for advocacy in the planning process, and for advice on what to request in the plan.

VI. DECIDING WHETHER GUARDIANSHIP IS AN APPROPRIATE FORM OF RIGHTS PROTECTION FOR THE PERSON, AND WHAT RIGHTS AND POWERS THE PERSON CAN RETAIN.

- **NOTE:** *The potential positive and negative consequences of guardianship are discussed in Part [II.C](#) and [D](#), above. Other forms of support that may reduce or eliminate the need for a guardian to have or use court-ordered power to make decisions are discussed in Part [V](#), above.*

A. What kinds of problems are not likely to be solved by guardianship?

In some cases, it will be legally possible to get guardianship of the person, and legal power over a decision, and yet not be able to make a real difference in the person's life. It is always worth considering whether guardianship, even if available, is going to be a useful tool for solving a problem, and whether it may do more harm than good. Where a person who is engaging in risky behavior understands the nature of a decision or right and has a strong desire to be in control of decisions, guardianship is not only inappropriate, it is also unlikely to be effective in reducing the risk of harm and may undermine relationships so that voluntary cooperation becomes unlikely.

Even where the person lacks capacity to make an informed decision, guardianship is not likely to be an effective tool to protect a person from harm, where the person has the determination and practical ability to continue to engage in risky behaviors, such as associating with poorly-chosen friends, or engaging in risky sexual behavior, despite the objection of the guardian. This is because guardianship is primarily a form of decision-making support and substitute consent, not a way of forcing the person to engage (or not engage) in particular behaviors. Sometimes, the court order by itself will persuade the person to follow the guardian's decisions. In other cases, it is important to consider whether there will be any practical way of enforcing the guardian's authority over a person who is likely to resist, before putting the relationship through the strain of a court battle and a process of labeling the person incompetent.

Where the risk of harm is created for the person because he or she has a mental illness and is refusing medication or other treatment, guardianship may not resolve the problem, because guardianship alone does not overcome the right to refuse treatment for mental illness. (See Part [X.C.](#)) Where the person is likely to continue to refuse treatment, commitment for treatment under [Wis. Stat.](#), Ch. 51, together with a request that the person be found incompetent to refuse treatment, may be a more effective form of intervention. (See Part [XVI.C.](#))

B. What role can family and support team members play in assessment of decision-making support needs before beginning the guardianship process?

In the guardianship process, the court's finding of incompetence and the court's decisions about what rights and powers the person will keep are largely based on the opinions of the physician or psychologist who prepared the report in support of the guardianship (See Part [VIII.F](#)), especially if the case is not contested. However, the physician or psychologist typically has only limited contact with the person, in an artificial environment, and he or she is likely to rely on the opinion of the family and other people who work with the person and know him or her well, in deciding what decision-making supports are needed and appropriate. Similarly, an attorney who helps to draft the petition is going to depend on the petitioner for guidance on what to ask for in the petition.

Knowledge of the person's day to day needs, wishes and functioning skills, and of the practical issues he or she is likely to face in his or her life, are at least as important in determining his or her ability to make decisions as medical or psychological expertise. Accordingly, before beginning the guardianship process, it is useful for the family, and/or other people who know the person well, such as teachers and support service providers, to develop information and recommendations about the person's functional abilities and needs for decision-making support. This can be the basis of what the petitioner will ask the attorney to put in the petition, and if appropriate, results of the discussion can also be given to the physician or psychologist completing the report to the court, so that the report is informed by this information as well as by the medical or psychological evaluation and history.

For some people, and some powers, it may be obvious that the person can or cannot safely exercise a particular right or power. For others, who still have capacity to make some decisions, or who may gain skills as time goes on, it is worth spending time considering the rights and powers that he or she can keep. Below is a process that can be used in thinking this through.

The first step in the process is to identify the areas in which the family and/or support team believes the person may need support, either in making decisions or in asserting or defending personal rights. The rights and functional decision-making issues listed on the petition are a good place to start in making this list (see Part [IV.](#)), but there may be other concerns that are not on the petition, such as decisions related to sexual activity (see Part [XII](#)) or choice of associates. Then, for each of the functional areas, the family and/or support team should try to answer these questions:

- **Importance in person's life.** What decisions or threats to his or her rights does the person face in this issue area? What decisions or threats is he or she likely to face in the future? Are these central to protecting him or her from harm, or in helping him or her to have the life he or she wants?
- **Evaluative capacity.** Is the person able to understand significant information on the nature, risks and benefits of the various options, or on the nature and significance of his or her rights, if explained in a form the person is most likely to understand? Is the person able to use that information in making rational decisions that affect his or her life?
- **Level of risk.** If the person has a significant lack of evaluative capacity, what level of risk to health, safety, rights, possessions and access to a desired life results from his or her inability to make informed decisions or understand and assert rights?

- **Training and experience.** Has the person had the opportunity to develop or regain decision-making capacity through training and practice? Has the person had needed evaluation and support to develop or regain a functional means of communication? Has the person had a base of experience needed to make decisions or understand his or her rights? If not, would skill-building or greater experience be likely to help develop, maintain or restore decision-making ability?
- **Informal support.** Does the person have a strong informal network of support committed to identifying and realizing his or her preferences, hopes and dreams? If so, is the person able and willing to work with this network of support in a way that will allow decisions to be made on a cooperative basis without use of guardianship? If informal support is an option, is it likely to be more or less respectful of the person's voice than a guardian would be?
- **Alternative tools of support.** Can the person's need for support be met through the use of alternatives such as dual-signature checking and powers of attorney?
- **Guardianship as a solution.** Is shifting power to a guardian likely to help reduce the risk of harm? Do the benefits of shifting power to the guardian outweigh the costs?
- **Retaining partial authority.** If guardianship is appropriate, how should the guardian's power be limited to cover only those decisions and rights where the risks justify the use of guardianship?

C. How should the person's circumstances and preferences be considered in the decision as to whether the person needs a guardian, and what powers the guardian should have?

Whether a person needs a guardian depends not only on his or her evaluative capacity, but also on his or her personal situation. Some people who could meet the legal test for needing a guardian may have needs for decision-making support that are already being met in other ways, or could be better met in other ways. Others may be at special risk of harm, and may need a high degree of protection. These considerations are important in considering both whether to petition for guardianship, and what to ask for in the petition. The law requires the court to consider individual circumstances, and any interested person can bring them to the attention of the guardian ad litem or court, to help ensure that the guardianship order is tailored to meet the person's individual needs.

Some individual circumstances that may affect the need for guardianship and the level and type of guardianship needed include:

- Whether the person has **other reliable resources to assist the person in meeting personal needs or managing property**, and whether these are less restrictive. (See Part [V.A](#) and [VI.C](#).) Resources can include paid or unpaid help, and voluntary or involuntary forms of decision-making support. It is important to know whether support providers (paid or unpaid) are respectful of the person's rights and preferences, and whether risk factors for abuse are present (see next bullet).
- Whether the person is **at risk of abuse, exploitation, neglect, or violation of rights**. A person may be at higher risk because he or she is **isolated**, is **dependent on a single individual or agency for support**, is supported by other people who have **conflicts of interest**, and/or because he or she is not able to recognize and protect against abuse and

exploitation. (See Part [VI.C.](#)) These risks can often be reduced if there are checks and balances in the person's life, so that no one person or agency has control of the person. A person with less severe impairments may be at higher risk because he or she is more mobile and more likely to engage in risky behavior.

- Whether the person **understands the nature of his or her disability and the risks it may create, and is able and willing to seek help when risks arise.**
- Whether the person **can meet or arrange for others to meet basic needs** for an adequate diet, health care, personal care and a safe and healthy place to live. If resources are not available, the person may need an advocate to help get access to needed services.
- Whether the person **has a high level of support and treatment needs.** Dependence on other people for intense supports may bring with it a greater need for assistance with the decision-making involved in choosing providers and planning services. Support providers can have a lot of power in the person's life, and a guardian may be a means to provide outside monitoring of how that power is used, and an outside voice to assert the person's rights. This is particularly true of services, such as institutions, that are isolated from the larger society and/or have the potential to control every aspect of a person's life. While family caregivers are often also the most appropriate guardians, consideration should be given to whether appointing a caregiver as guardian may have the effect of over-concentrating power in a single individual.
- Whether the person has been competent in the past and has done **advance planning for financial and health care decision making.** (See Part [V.B.ii](#)) and [V.C.](#), above.) Examples of advance planning include a durable power of attorney for management of property, a power of attorney for health care, or a trust to provide property management. Advance planning can eliminate or reduce the need for a guardian, and can provide guidance to a guardian in determining what decisions are in the person's best interests, as he or she herself saw them. (See Part [X.F.](#)) Preserving the advance directives, if possible, is important because the person can give authority to an agent that a guardian may not have. Where guardianship is ordered, the order can also be written to preserve all or part of the advance planning, or to ensure that the guardian has authority to follow the wishes expressed in the advance planning.
- The **nature and extent of person's property and financial affairs.** Greater wealth and complexity of affairs will require more skill in management. On the other hand, it may also mean that the person can afford some risk of loss, so that he or she can continue to manage at least part of his or her finances.
- The person's **personal preferences, desires and values.** The goals of a guardianship should be those of the person, consistent with protecting the person from abuse, exploitation and neglect, and not the goals imposed by society or family. The way a person has lived and used his or her property before becoming incapacitated provides a guide for how he or she most likely wishes to continue to live.
- Whether the person has a **physical illness**, and whether it can be treated effectively. If the person's incapacity is a result of a temporary or treatable physical illness, it may mean that no guardian, or only a temporary guardian, is needed. Some physical health conditions, including common illnesses like flu and urinary tract infections, can produce temporary incapacity, especially in a person who is already debilitated. On the other hand, the risk

created by a decision-making impairment may be a much greater for someone with a complex illness that requires careful monitoring, or a strict treatment regimen.

- Whether the person has **mental illness, alcoholism, or other drug dependence** and the chances for improvement. These conditions are often treatable, and may be better dealt with through a Ch. 51 commitment instead of, or in addition to, guardianship. (See Part [XVI.C.](#)) In other cases, long-term mental illness may be grounds for guardianship. Long-term substance abuse may also result in permanent brain damage and need for guardianship.
- Whether the person is **experiencing effects of medication**. A person's actual evaluative capacity may be masked (or enhanced) by the effects of medication. Need for guardianship may be increased if taking medication is essential to health or safety, or if the medications themselves, if taken inappropriately or abused, create a risk to health and safety.

VII. CHOICE OF GUARDIAN

A. Who can serve as guardian or co-guardian of person, estate or both?

With very few restrictions, a court can appoint any adult to serve as guardian of either person or estate of the person. The court can appoint the same person as guardian of both person and estate, or can divide the responsibilities between two people. Certain nonprofit corporations and associations may be appointed by the court, if they have been found by the Department of Health Services to meet the DHS rules governing corporate guardians. A court should appoint a corporation or association only if no suitable individual is available.

The court can appoint any two people to act as *co-guardians*, and can specify in the order whether the co-guardians must join in decisions, or can act independently. Having co-guardians helps to protect against conflicts of interest and may improve decision-making, because of the legal authority of the co-guardians to monitor each other. Having guardians who can act independently divides the workload, and helps to ensure that someone will be available when a guardian is needed. It is also possible to split guardianship, appointing as guardian of the person a relative or friend familiar with the person's needs, and as guardian of the estate a person skilled in financial management.

There are a few absolute restrictions on who may be appointed guardian. No individual can be a guardian for more than 5 people. No person or agency who is a provider of protective services or protective placement to the individual may act as guardian.

B. What should the court consider in choosing the person or agency to act as guardian?

The decision of the court as to the person(s) chosen to act as guardian is made based on the best interests of the person. No one has a right or absolute claim to be guardian. The statute provides for several preferences (see next section), and the court must consider the opinions of the person and of his or her family, but the court does not have to follow a preference if it finds that it would not be in the person's best interests. The court must consider any conflicts of interest (such as employment of the proposed guardian by a service provider), but the court may appoint a person who has a conflict of interest if the appointment remains in the person's best interests despite the conflict.

The guardian should be someone who is, or is willing to become, familiar with the person's needs and situation and who will keep in frequent contact with the person. The most important issues are whether the person will be able to effectively carry out the powers and duties of the

guardian, will exercise good judgment in doing so, and will act in the person's best interests. The fact that a guardian does not live in the state (or even in the country) does not disqualify him or her from being appointed or continuing as guardian. However, it does lead to issues about how her or she will fulfill his or her duty to know what is going on with the person, to visit him or her personally, to participate in planning for services, and to be available when decisions need to be made that only the guardian can make. Despite these issues, it may still be in the person's interest to have an out-of-state guardian who knows the person well and is actively concerned, than to have someone recruited just for the sake of having a local guardian.

A concentration of power and conflict of interest is created when the person lives with the guardian, especially if the guardian is a paid provider or relies on the person's income for household expenses. This does not mean that all such situations should be avoided: often the person lives with someone because he or she has the closest personal connection, and payment for services may be essential to hold the household together. However, to avoid problems of conflict of interest, landlords and paid residential providers should not be appointed as guardians unless there is a strong, preexisting personal relationship, a demonstrated record of positive concern and, ideally, a source of independent advocacy for the person.

A barrier to appointment of effective guardians in many places is the lack of a pool of suitable, trained individuals to act as guardian. The protective service system in a county can make an important contribution by recruiting volunteers and providing ongoing training and support, but there is wide variation among counties in efforts to find and support guardians. Where there is a serious lack of individual guardians, organizations of family members or friends may want to consider offering corporate guardianship, or offering training and back-up to volunteers from the community willing to act as individual guardians.

C. Who has legal preference to be appointed guardian?

The law lists certain people as having preference in selection of the guardian by the court. These are not binding on the court, and the court can refuse to appoint a person with preference, if the court finds it would not be in the person's best interests. The legal preferences include:

- Appointment of an **agent under a durable power of attorney** as guardian of estate.
- Appointment of an **agent under a power of attorney for health care** as guardian of person.
- Appointment of a person **nominated by the person**, if the person has sufficient capacity to form a reasonable and informed preference. This allows a person to nominate a guardian, even at a point when he or she may otherwise meet the standard for guardianship. The nomination must be in writing and must be signed in front of two witnesses, in the same way that a will is signed.
- Appointment of the **parent of the person**, if the person has a developmental disability or serious and persistent mental illness.
- Appointment of a person **nominated in the will of the parent of the person**, if the person has a developmental disability or serious and persistent mental illness.

VIII. PROCEDURE FOR APPOINTMENT OF A GUARDIAN

- **NOTE:** *The procedural duties of the petitioner are usually carried out by his or her attorney. This section is not intended either as a guide to attorneys filing a petition, or as a guide for people filing petitions who are not represented by an attorney. Its primary purpose is to help petitioners and other members of the support team be well prepared for working with an attorney, so that they know what to expect and can advocate for the best result. Each case is different, and this handbook cannot cover all of the legal requirements in detail, or substitute for a thorough knowledge of the statutes and court cases that govern guardianship law.*

A. Why are due process procedures required in all cases?

Family members who have been providing support to a person with severe disabilities, and who want to continue to do so as guardian, often ask why they (and the person) must go through all the formal steps of the court process. The answer is that an adult is presumed to have control of his or her life, and is entitled to due process of law before a court can take this liberty interest away. This means that the court decision must be based on evidence, and that the person, and others who may have an interest, must have a meaningful opportunity to be heard. While the need for a substitute decision-maker for the person may be obvious to people who know the person, the court does not know that until after proof is in the court record. It might help to ask: “What kind of protection would I want, if my parent, child or sibling filed a petition asking a court to give him or her authority to make decisions about how I conduct my life?”

B. Why are the court forms important?

The state courts have adopted forms for the guardianship process. Where a form exists, people are required to use the form. The forms are not supposed to be altered, but information and special requests can be typed into the forms, or added by attachment. Some local probate courts also have their own forms, in addition to the state forms. The forms provide some guidance on what information will need to be provided to the court, and on what the court will consider in making its decision. However, the forms are not a substitute for knowing what the law requires. The forms for use in guardianship proceedings in circuit court are found at: <http://www.wicourts.gov/forms1/circuit.htm#guard>.

C. Who can act as the petitioner, what forms must the petitioner file, where and when?

The formal guardianship process begins with filing the *petition*, which is the document that asks the court to appoint a guardian. The petition must be on the standard court form, available at <http://www.wicourts.gov/forms/GN-3100.DOC>.

The petition states that the person meets the standard for guardianship, nominates one or more people to be appointed as guardian of person and/or estate (see Part [VII](#)), and sets out the rights and powers that the petitioner thinks the person should keep, and the powers that the guardian should have authority to exercise on the person’s behalf (see Part [IV](#)). As discussed in Part [VI.B](#), it is useful for people who know the person well to think about what powers are needed to provide effective support and protection for the person, before deciding what will go in the petition. The petition also must identify the people who are entitled to get notice, and gives their names and addresses (see Part [VIII.D](#)).

Anyone may petition a court to appoint a guardian for a person. The petitioner can nominate himself or herself to be guardian. Sometimes, the county (see Part [VIII.L](#)), or a health care or support service provider will act as petitioner. The petitioner does not have to have personal

knowledge of everything on the petition form, and can fill out the petition based on reliable information that he or she gets from other people. A petitioner also can leave out information that is asked for on the petition, if it is not available, as long as the petition states that the essential grounds for guardianship exist. Some types of information that may not be available to the petitioner include information on what the person owns, his or her income, and benefits he or she receives. If confidential information is essential to complete the court process, the court may order that it be released for purposes of the guardianship case.

The petition is filed at the office of the county Register in Probate in the county where the person resides. Under some circumstances, it can also be filed in the county where the person is present, even though he or she is not a permanent resident there. The petition can be filed no more than 90 days before the hearing at which the order is to be issued. This means that the person must be at least 17 ½ years old when the petition is filed, because the person must be at least 17 ¾ years old at the time when an order for adult guardianship is issued. The petitioner, or his or her attorney, is responsible for working with the county Register in Probate to get a hearing date and guardian ad litem assigned, and usually drafts needed notices and orders for the court to sign. (See next section.)

D. What is notice of the proceeding, who gets it, and how is it given?

Notice is the process of ensuring that people who have a legal interest in the guardianship proceeding know about it, and know when and where the hearing will be. The petitioner is responsible for arranging for notice. If notice is not given as required under the statute, the court will not be able to order guardianship, and the petitioner may have to reschedule the hearing, or start the process over. A guardianship that does get ordered without proper notice may later be found invalid, if anyone challenges it.

After the petition is filed, the court issues an **Order for Notice and Hearing**, which is the form used to officially inform other people that a court action for guardianship has been filed, and about the date and location of the hearing. The court also issues an order appointing an attorney as guardian ad litem for the person. The Order for Notice and Hearing and a copy of the petition must be given to the individual **in person** at least 10 business days before the hearing. The person who gives notice to the person must inform the person orally of the complete contents of both the notice and the petition. The petitioner may not give the notice himself or herself. Notice may be given by a professional process-server, but it is often appropriate to arrange for notice to be given by someone who knows the person well, such as a teacher, case manager, or support service provider. If the person is in a residential facility, nursing home, or hospital, the statute provides a special process under which the notice is given by an employee of the facility. Whoever gives the notice must complete an affidavit saying that he or she gave the person notice of the petition and informed him or her of what it said.

Notice must also be given at least ten days before the hearing to the guardian ad litem, the person's attorney, if he or she has one, to any person nominated to be a guardian or standby guardian, and to other people who are considered to be **interested persons**. These include:

- Any agent the person has appointed under a durable financial power of attorney for power of attorney for health care.
- A parent, if the person is under age 18, or is unmarried and has no adult children. (This means **both** parents, if both are alive, and have not had parental rights terminated.)

- The person’s spouse, if he or she is currently married.
- The person’s children, if he or she has children and there is no spouse.
- If the person is not married and does not have parents or children, then other next-of-kin (usually brothers and sisters and/or children of brothers and sisters who have died).
- Any person having “legal or physical custody” of the person.
- Any government or private agency from which the person gets aid or assistance. This includes the county department of human services or social services, if the person receives long-term support services funded through the county.
- The county corporation counsel of the county of residence and of the county where the petition is filed, if that is different.
- The state or federal department of veteran affairs, if the person is eligible for veteran benefits.

If a person entitled to notice cannot be identified or located with a reasonable effort to do so, the court should be informed of the lack of notice. The court may be able to waive notice based on the petitioner’s inability to identify or locate a person, or for other good cause. If the court does not waive notice, it may still decide to go ahead with the guardianship. However, this may mean that the person who was entitled to notice will later be able to reopen the case.

E. What is petitioner’s responsibility for filing statements of acts?

Each person nominated to be a guardian or standby guardian must complete a *Statement of Acts*, on a required court form, giving information about any criminal record, record of bankruptcy, or record of certain kinds of abuse, neglect or exploitation. This must be filed with the court at least 96 hours (4 full days) before the hearing, not counting week-ends and holidays. A copy should also be given to the guardian ad litem and to the person’s attorney, if he or she has one)

F. What is petitioner’s responsibility for obtaining a physician’s or psychologist’s report?

The petitioner must arrange for a physician or licensed psychologist to complete a report stating whether the person meets the standards for appointment of a guardian, giving an opinion about what rights and powers the person has capacity to exercise, and providing other information about the person’s functional ability to make and communicate decisions. The report should be on the required court form, [GN-3130](#), but the doctor can attach existing records or a separate report to the standard form, and refer to it in answers on the standard form.

The doctor who does the report must have seen the person personally. If an examination is made for the purpose of the guardianship, the person must be told of the purpose, and that he or she has certain rights not to participate. In many cases, the doctor’s report can be based on his or her past treatment of the person, and information from others who know the person, without a specific examination for the purpose of the guardianship report. If the doctor has not seen the person recently, the court will consider how much time has passed since the examination, and whether the person’s condition is likely to have changed, in deciding whether to rely on the report. If an examination is needed, and the person refuses to attend, the court can order that the person go to the examination, and that the doctor have access to information.

State law authorizes the doctor to provide the report to the petitioner and the court, if it supports the need for guardianship. However, many physicians and medical records custodians will require a court order authorizing release of the report, unless the person is still under age 18 and has a parent who signs a release, or is an adult who has capacity to sign a release, and does so knowingly and voluntarily.

As discussed in Part [VI.B](#), above, it may be helpful for family members and/or the support team to provide information about risks the person faces, the person's ability to make decisions in real-life situations, and their opinions about what rights and powers the person should keep.

The report of the physician or psychologist must be provided to the guardian ad litem and to the person (or his or her attorney, if he or she has one) at least 96 hours (4 full days) before the hearing, not counting week-end days and holidays.

G. Who is the guardian ad litem, and what is his or her role?

The *guardian ad litem* is an attorney appointed by the court to represent the person's best interests. The guardian ad litem is chosen by the court from a list of attorneys who have training and experience. The guardian ad litem must be a person who has not been involved in any other way with the case, and does not have any conflict of interest due to prior work for any party.

The guardian ad litem advocates for the person's best interests in the guardianship process, makes sure the person is informed of his or her rights (whether or not the person fully understands those rights) and makes sure that the person's voice is heard, if he or she states an opinion about the guardianship, or says that he or she wants to exercise his or her rights. The guardian ad litem must consider the person's opinions about the need for guardianship, but does not have to follow them in deciding what the guardian ad litem recommends to the court. A guardian ad litem has no authority to make decisions for the person outside the legal proceeding in which he or she is appointed, but can get access to confidential information needed to do his or her job. The guardian ad litem's duties include:

- **Meeting with the person** to explain what the guardianship petition means, to inform the person (orally and in writing) about his or her rights in the guardianship process (see Part [VIII.H](#)), and to find out if the person has any objection to the proposed guardianship.
- **Interviewing the proposed guardian**, and any other person who is seeking appointment as guardian, to evaluate the fitness and suitability of the proposed guardians.
- **Reviewing any advance planning** for financial or health care decision-making done by the person, and interviewing any agent appointed under a power of attorney for health care or durable financial power of attorney, to evaluate whether the advance planning makes guardianship unnecessary, and to what extent the authority of agents under the advanced planning documents should remain in effect if guardianship is ordered.
- **Requesting that the court order additional evaluation**, if the guardian ad litem feels that this would be in the person's interests, or if the person has requested an independent evaluation.
- **Informing the court** and petitioner's attorney (or petitioner) if the person objects to the guardianship, or to the person proposed as guardian, and/or if the person asks to exercise any of his or her rights.

- **Making independent judgments and recommendations** about whether guardianship is the least restrictive way to meet the need for decision-making support, what rights and powers the person has the capacity to exercise, and who should be appointed guardian.
- **Attending all hearings.** The guardian ad litem can present evidence, and can cross-examine witnesses called by other parties.

H. What rights does the person have in the guardianship process?

The person's rights include:

- The right **to his or her own attorney.** If the person asks for an attorney but does not have one, the court will appoint one. If the person is indigent, the attorney fee will be paid by the county. The role of the lawyer for the person is to represent what the person says he or she wants, to the extent this is clear, and/or to argue for the person to retain his or her civil rights as an adult.
- The right **to be present at the hearing.** If the person chooses not to come to the hearing, or has no opinion, the person can be excused from attending by the guardian ad litem. This is often done for health reasons, or if the person would not benefit from attending, and would be upset by attending a court hearing he or she does not fully understand. If the person's inability to attend or participate is related to a disability, the court has an obligation to provide reasonable accommodations, for example by moving the hearing to a place that is accessible to the person, or by providing an interpreter.
- The right **to an independent medical or psychological examination** on the issue of whether he or she is competent. The county must pay for the evaluation if the person is indigent.
- The right **to a jury trial** on the issue of whether he or she meets the standard for a finding of incompetence and **to appeal.**

If the guardian ad litem reports that the person objects to having a guardian, or to the choice of guardian, the court will treat the case as contested, and will automatically appoint an attorney for the person. Usually, the attorney will then help the person decide whether to ask for an independent evaluation. Often, where the person or guardian ad litem object to something in the petition, it is possible to reach a compromise under which the person keeps rights and powers that are most important to him or her.

I. What is the role of an interested person in the guardianship proceeding?

An interested person does not have to respond to the notice of the guardianship proceeding in any way. If the interested person does want to have input into the proceeding, the best way to start is usually to contact the guardian ad litem, the petitioner's attorney, and/or the person's attorney, to talk about any concerns or evidence he or she thinks should be brought to the attention of the court. If an interested person attends the hearing, it will be up to the court to decide to what extent he or she can participate. The court will usually allow an interested person to make a statement, but may or may not allow an interested person (or his or her attorney) to present evidence and ask questions of witnesses. An interested person who does have a concern, and who does not feel that his or her concern will be represented by the guardian ad litem, petitioner, or attorney for the person, has a better chance of being allowed to

participate if he or she files a petition with the court, in time to give proper notice to other parties, saying what it is that he or she wants the court to do, and why.

J. When must the hearing be held, and what happens at the hearing?

The hearing must be held within 90 days after the petition filed. **If the time limit goes by, it will be necessary to re-file and re-serve the petition**, so it may be better to delay a petition until the petitioner is sure he or she can get everything ready for the hearing within 90 days.

The hearing will be very different if it is *contested* (someone objects to the guardianship, the division of rights and powers, and/or to the choice of guardian), than if it is *uncontested* (everyone agrees on what the order should say).

In larger counties, an uncontested hearing may be conducted by a court commissioner, rather than a judge. In an uncontested hearing, the judge or court commissioner can rely on the reports of the doctor and the guardian ad litem, without taking any evidence, so that the hearing only involves making sure that needed documents are in the record, getting the report of the guardian ad litem, and giving any interested person an opportunity to speak. This typically takes 15 minutes or less, but court hearings do not always start when scheduled.

If the hearing is contested, it will be conducted by a judge. Typically, the doctor who made the report and the doctor who did the independent evaluation will testify, and there may be other witnesses about the person's capacity, risk of harm, and choice of guardian. The petitioner's attorney, the guardian ad litem, and the person's attorney may all present evidence and ask questions.

K. Does the petitioner need an attorney to bring a guardianship action?

There is no legal requirement that a petitioner have an attorney. However, it is usually more work for the court to deal with someone who is not familiar with the process and courts vary widely in how helpful they are to people who do not have attorneys. Court staff must be careful not to give legal advice or take sides in a case. Guardianship law is complicated, and involves a lot of procedural technicalities. Having an attorney will help the petitioner ensure that needed evidence is in the record, that the case does not get dismissed or delayed because notice was not given in the right way, or a needed document was not filed in time, and help to make sure that the guardian has the powers needed to provide needed support and protection.

Disability and aging advocacy organizations will often know the names of attorneys who do guardianship work. Before hiring someone, a petitioner should feel free to call more than one attorney to ask about experience with guardianship and fees. Fees vary, and will be higher if the guardianship is contested. There may also be costs for medical or psychological evaluations, if a special evaluation is needed for the guardianship, and is not covered by insurance or Medicaid.

In some counties, the county corporation counsel will represent the petitioner, in a limited number of cases. This is usually in situations where the county has determined that the person is at risk of abuse, neglect, self-neglect or exploitation, and no family member or other concerned person is able to pay the cost of bringing a petition. Under those circumstances, the county can consider assistance with guardianship to be a protective service, or to be a necessary part of getting an order for protective placement or other protective services.

L. Who pays the costs of bringing a guardianship petition?

The petitioner must pay the costs of his or her attorney, and any witness fees, unless the court orders that a guardian be appointed for the person, the person has funds, and the court agrees that it would be fair for the costs to be paid out of the estate of the person. The cost of the guardian ad litem and attorney (if any) for the person will be charged to the person, if he or she can afford to pay, or will be paid by the county, if the person is indigent. However, if the guardianship petition is unsuccessful, the petitioner is responsible for paying these costs. This adds financial risk to bringing a guardianship petition, if it is contested and there is real doubt about whether the petition will be granted.

IX. DUTIES OF A GUARDIAN OF THE PERSON

A. What standard is a guardian held to, in carrying out his or her duties, and when can the guardian be sued?

Guardians of both person and estate are held to very high standards. In carrying out the powers that have been delegated to the guardian, the guardian must:

- Be as careful, diligent, and honest when acting on behalf of the person as an ordinarily careful person would be in managing his or her own person or property.
- Advocate for the person's best interests, including protection and exercise of his or her legal rights. (See Parts [IV.B](#), [IX.E](#) and [XV](#).)
- Exhibit the “utmost degree of trustworthiness, loyalty and fidelity” towards the person.
- Exercise powers in a manner that is appropriate to the person and that is the least restrictive form of intervention. (see Parts [I.E](#) and [IX.E](#).)

More detail on specific duties and best practices is in Part [C](#), below.)

A petition can be brought in the guardianship action to ask the court to remove the guardian, or to order the guardian to act or stop acting in a particular way, if the guardian fails to perform his or her duties under this standard. (See Part [XIV](#).)

A somewhat lower standard applies if a guardian is sued for money damages for actions as guardian that someone says have caused harm to the person or to someone else. A guardian of person or estate is immune from *personal civil liability* if he or she acts in good faith, in the person’s best interests, and with the degree of diligence and care that an ordinarily careful person exercises in his or her own affairs.

B. Is the guardian responsible for supporting the person, or for providing direct care to the person?

A guardian is not responsible for using his or her own money to support the person, and is not responsible for providing direct care for the person. As discussed in the next section, the guardian is responsible for learning about the person and what the person needs. The guardian of person is responsible for trying to access sources of financial support, health care and services that can help meet his or her needs, and the guardian of estate is responsible for using the person’s resources to meet his or her needs and for applying for benefits that can help pay for those needs. (There is overlap in these responsibilities, e.g., both the guardian of person and

estate may be responsible for making sure that all steps are taken to that the person is eligible for Medicaid, for a person who needs Medicaid for his or her health care or support services.)

C. What are the duties of a guardian of the person?

As outlined in Part [A](#), above, the guardian must act in the best interests of the person, and must decide what a reasonable person would do, if he or she were in the situation of the person under guardianship. This is only possible if the guardian takes time to learn about the person's situation and wishes, and the choices available to him or her. A guardian does not need special expertise, but does need basic common sense and a willingness to learn, not only about the person's needs and rights, but also about his or her hopes and dreams, and the sources of support and services that may help to achieve them. To be an effective advocate for benefits and services, the guardian will need to be familiar with service needs and sources of benefits and supports for people with the particular disabilities and support needs of the person. See Part [XVII](#), for sources of information.

The responsibility of the guardian is far more than arranging for food and a warm place to live. A guardian is responsible for seeking services that will help the person to reach or maintain his or her fullest potential, and that will allow the person to live and work in the least restrictive environment possible. The guardian is also responsible for assuring that the persons' rights and dignity as a person are defended.

Knowing the circumstances and condition of the person, and what supports and services are needed, will mean consulting with the person, learning about the disability, and talking to professionals and others involved in the person's life. Guardians should try to attend all staffings, and should learn to ask questions and seek more than one opinion. If the guardian does not know the person well, it is important to try to see the person in a variety of settings, such as at home, at work, at a restaurant, etc. A guardian who lives far away should arrange either to make visits or to find someone locally who is independent of service providers and can visit the person regularly and report to the guardian.

The law requires the guardian to take time to know the person, to keep up-to date on his or her situation, needs and preferences, and to act as an active advocate. A guardian of the person is obligated to:

- **Try to get any necessary care or services** for the person that are in the person's best interests. As noted in the last section, the guardian does not have to provide care or services, but he or she does have to make a diligent, good faith effort to identify unmet needs and sources of services, to apply for services and, where appropriate, to appeal denials or seek advocacy assistance. The responsibility of a guardian is far more than arranging for food and a warm place to live. A guardian is responsible for seeking services that will help the person to reach or maintain his or her fullest potential, or to retain existing abilities as long as possible, and that will allow the person to live and work in the least restrictive environment possible. In deciding how hard to try and what strategies to use, a guardian again should ask him or herself what a reasonable person would do if he or she had the needs of the person. This will depend on the importance of the service to the person, the chances of winning, and the cost, in terms of damaged relationships with service providers and others important in the person's life. A guardian is not obligated to provide "advocacy" that will do more harm than good.

- **Make regular, in person visits** to learn about the person's condition, surroundings, and treatment. As a rule of thumb, this should mean in-person visits at least once every three months, and more often if there are concerns about care or safety. This requirement may be difficult to meet if the guardian does not live near the person. Fewer in-person visits may be acceptable if the person is in a stable, well-monitored situation, the guardian has other effective ways of staying informed about the person's situation (such as information from another family member or independent advocate who visits the person) and the guardian can be involved in planning treatment and care through written communication and attendance at meetings by telephone.
- **Advocate for the person's best interests, including advocacy in legal and administrative proceedings.** In addition to advocacy in areas like service planning and access to needed supports, the guardian of the person typically receives notices of legal proceedings, and represents the person's interests, in cases that do not have to do with the person's property. The guardian may also need to bring complaints or start legal proceedings to advocate for the person's rights, including client rights for people receiving services for mental illness, developmental disabilities and substance abuse and people who are under protective service or protective placement orders, and resident rights for people living in covered residential facilities. (See Part [XV](#).) The decision to bring legal proceedings, or to assert a defense if a legal proceeding is brought against the person, should be made based on the usual question: "What would a reasonably prudent person do, if he or she were making a decision about how far to take a case, or about how far to defend a case?" It is important to get good advice on the likelihood of success, and to consider whether the costs of the proceeding will outweigh the possible benefits. When a guardian of a person is bringing or defending a legal action, the costs of litigation can usually be paid out of the person's estate, subject to court review for reasonableness of the costs. Therefore, it is important for the guardian of the person consider cost, and to discuss payment of costs with the guardian of the estate.
- **Review the person's patient health care, treatment and support service records.** This should be done more often, if the person's condition is unstable or there are issues about need for changes in treatment. The guardian is often the only person outside the service system who has full access to all of the files and records kept on the person, and a legal right to get information about what support service and treatment agencies are doing, and why. For example, the guardian can review pharmacy records to make sure he or she knows what has been prescribed for the person, and whether medication is being given as prescribed. Reviewing records on a regular basis helps to avoid the impression that the guardian is requesting records because he or she thinks something is wrong.
- **Make an annual report** to the court and designated county protective services department, covering the location of the person, the health condition of the person, any recommendations regarding the person, and whether the person is living in the least restrictive environment consistent with the needs of the person. There is a standard court form for this report (GN-3480), which the court should send to the guardian each year.
- **Participate in staff meetings** about the person's treatment and care if the person is in a residential facility or is receiving long-term support services in the community through Family Care, a home and community based services waiver, Community Support Program, or similar programs.

- **Learn about the risks and benefits of treatment and services, and about treatment alternatives**, if consent to health care, mental health treatment or support services is required.
- **Consult with providers of health care and social services** in making all necessary treatment and service decisions.

D. What duties does the guardian have to act in a way that is least restrictive of freedom and as respectful of preferences as possible?

In exercising his or her powers, the guardian of the person is obligated to act in a way that is appropriate to the individual person and that is the least restrictive form of intervention. The guardian must, consistent with meeting the person's essential requirements for health and safety and protecting the person from abuse, exploitation, and neglect, act in the following ways:

- **Least restrictiveness.** Place the least possible restriction on the individual's personal liberty and exercise of constitutional and statutory rights, and promote the greatest possible integration of the person into his or her community. (See Part [I.E.](#), above, for the definition of *least restrictive*.)
- **Identify and honor preferences.** Make a real and persistent effort to identify and honor the person's preferences with respect to choice of place of living, personal liberty and mobility, choice of associates, communication with others, personal privacy, and choices related to sexual expression and procreation. "Honor" does not mean the guardian must always follow the person's choices: a guardian may overrule the person's wishes under the circumstances discussed in the next section, but may not do so without first making the effort to identify and consider the person's preferences.
- **Consider cost.** Consider whether the person's estate is sufficient to pay for the needed care or services.

These provisions recognize that a person may have preferences, even if he or she does not understand all of the consequences of a choice. They recognize the importance of involving the person in decisions, even in areas where the person has been found not to have capacity to make decisions, and the importance of respecting choice, where possible. The choices the person is permitted to make may carry some risk, provided that essential requirements of health and safety are still met and the person is protected from abuse and neglect. A person is most likely to develop, maintain or regain communication skills if the things he or she communicates have a real impact on meaningful decisions in his or her life. A person is most likely to develop, maintain or regain decision-making skills if he or she can make decisions and experience the consequences.

E. Under what conditions does a guardian have authority to make a decision that is contrary to the person's expressed wishes about where to live, choice of friends, use of birth control, sexual activity and similar choices?

A guardian must sometimes decide whether to make choices that are contrary to the person's expressed wishes with regard to decisions related to choice of place of living, personal liberty and mobility, choice of friends, communication with others, personal privacy, and choices related to sexual expression and procreation. The right of a person to make these kinds of choices is protected by the U.S. Constitution. Because the guardian gets his or her authority

from the state, he or she must protect the person's genuine exercise of a right, unless there is a compelling reason to overrule the choice the person makes. This involves first identifying and considering the person's preferences. A guardian may then act contrary to the person's expressed wishes in these areas only if all of the following conditions are met:

- Power to act in the area of decision-making is **authorized by court order**.
- The decision is necessary **to meet the person's essential requirements for health and safety and/or to protect the person from abuse, exploitation or neglect**.
- The decision is made in a way that **respects the person's preferences and opportunity to develop decision-making skills**. In making a decision contrary to the person's expressed wishes, the guardian must take several factors into account:
 - **Person's level of understanding**. The greater the person's understanding of the nature and consequences of the decision, the more weight should be given to his or her preferences.
 - **Level of risk**. Where there is low risk, it may be better to permit the person to make the decision and experience the consequences. On the other hand, even constitutionally protected rights can be restricted where there is a compelling interest at stake, such as a substantial threat to health and safety.
 - **Opportunity to develop decision-making skills**, by making decisions and experiencing consequences, where the risk is acceptable.
 - **Need for wider experience**. This recognizes that, if a person is permitted to refuse new experiences and developmental or rehabilitative activities, the effect may be to limit rather than promote choice.

This balancing test can provide a useful formula for analyzing and discussing disputes between the guardian and the individual (or between the guardian and other people, such as support service providers) about whether a guardian is being overly restrictive or overly permissive.

X. POWERS AND DUTIES OF A GUARDIAN IN GIVING INFORMED CONSENT TO PHYSICAL AND MENTAL HEALTH CARE.

A. What is informed consent?

A primary role of the guardian of the person is to give informed consent to needed treatment, care and services, for a person who lacks capacity to give the consent himself or herself. In many cases, a provider cannot legally give the person nonemergency treatment or services without informed consent, so the existence of someone authorized to give informed consent is essential for the person to have access to needed care. ***Informed consent*** has two parts to it:

- First, there must be a genuine ***consent***, meaning that the person who gives it must do so voluntarily and must not be subject to any kind of coercion, including a threat to refuse or withdraw other services because of the refusal to consent to a particular service. A voluntary consent can be withdrawn at any time.

- Second, it must be *informed*. This means that the person giving the consent must have received specific, complete and accurate information concerning the proposed treatment or services. This should include:
 - The benefits of the proposed treatment or services.
 - The way the treatment or services will be provided.
 - Any risks or side effects which are a reasonable possibility.
 - Alternative treatments and services.
 - The probable consequences of not receiving the proposed treatment and services.

Informed consent to treatment or services related to the person's mental illness, developmental disability, alcoholism or drug dependence, is covered by special rules in [Wis. Admin. Code](#), § DHS 94, and must be in writing, except in an emergency, or where a temporary oral consent is in place while written consent is obtained from a guardian who is not physically present. The consent must include notice of the right to withdraw informed consent in writing, at any time. In addition, a person under guardianship still retains a right to refuse treatment or services for mental illness, developmental disability, alcoholism or drug dependence unless a court, in a commitment or protective services proceeding, has found the person incompetent to exercise that right (See Part [X.C.](#))

B. What powers can the court give to the guardian related to giving informed consent to treatment of physical health conditions?

The court can give the guardian power to give informed consent to voluntary medical and health care services for physical health conditions. The court can also, **as a separate power**, give the guardian power to consent to involuntary medical and health care services for physical health conditions, **over the person's objection**.

Separate requirements apply to consent by a guardian either to experimental **treatment or to participation by the person in research** that is not expected to help the person and involves more than minimal risk to the person. Even if the order appointing the guardian gives the guardian general authority in these areas, the guardian must always get case-by-case court approval for any participation by the person in experimental treatment or research that involves risk but no expected benefit to the person. (See next section for limitations on guardian authority to consent to treatment related to mental illness, developmental disability, alcoholism or drug dependence, including psychotropic medications and inpatient treatment.)

Before a guardian gives consent to either voluntary or involuntary medical care or treatment, he or she is required to discuss the care with the person, and to find out if the person objects in any way. If the person agrees to the care, or is silent about it, the guardian can give informed consent to the care. If the person objects, the guardian can give consent to physical health care and treatment over the person's objection, but only if the guardian has authority under the court order to consent to involuntary care. The authority to consent to physical health care over the person's objection includes authority to consent to sedation or temporary restraint of the person so that essential physical health treatment can be given safely, if the person is physically resistant. It also includes authority to consent to medication for physical health conditions without the person's knowledge, e.g., by putting it in the person's food or drink, but only after

the medication was first discussed with the person and the person was given the opportunity to take it voluntarily.

Special restrictions apply to consent by a guardian to admission of the person to a nursing home or large residential facility, or to any admission for residential care over the person's objection. See Part [XI](#).

- **NOTE:** The guardian cannot be given authority to consent on the person's behalf to donation of organs or tissue to benefit another person, or to a procedure for the purpose of sterilization. See Parts [IV.D](#) and [XII.B](#).

C. What power can be given to a guardian to consent to treatment or services related to the person's mental illness, developmental disability, alcoholism or drug dependence?

A court can give the guardian authority to consent on the person's behalf to treatment or services related to the person's mental illness, developmental disability, alcoholism or drug dependence, including administration of psychotropic medication. However, **even a person who has been found to have incapacity to consent has a right to refuse treatment for mental illness, developmental disabilities, alcoholism and other substance dependence**, unless a court separately finds that he or she is incompetent to refuse treatment and medication, as part of an order for commitment or an order for administration of medication as a protective service. The right to refuse does not apply in a situation where medication is necessary to prevent serious physical harm to the person or others.

- **NOTE:** The term *treatment for mental illness, developmental disabilities, alcoholism and other substance dependence* includes "rehabilitation" services but not "habilitation" services. This can be thought of as the difference between a treatment that tries to change the way the person thinks or behaves, and a service that tries to support the person or teach new skills. The line between treatment and other kinds of support services is not precise. Some things that clearly are treatment include psychotropic medication, psychiatric treatment, psychotherapy, and invasive behavioral treatment programs. Some things that are clearly not treatment are residential support services and vocational support services.

The law requires that, before giving consent to administration of psychotropic medication to the person, the guardian must make a good-faith attempt to talk to the person about taking the medication voluntarily. (As a practical matter, if the guardian lives at a distance from the person, it may necessary for this to be done by telephone, or through a person acting as agent for the guardian.) The medication can then be administered to the person based on the guardian's consent only if the person does not protest receiving the medication. A protest can be made by words, facial expression or gestures. Silence is not considered a protest, and there is no requirement that the person understand the decision being made. If the person does protest, the guardian can ask the person again, and does not have to honor a protest that is not repeated more than once. If there is a protest, the guardian does not have authority to consent to nonemergency administration of psychotropic medication either through force or by trying to give it to the person without his or her knowledge.

If a proposed mental health treatment is considered to be a **drastic treatment** (such as psychosurgery or electroconvulsive therapy), or is considered **experimental research**, informed consent of both the person and guardian is required. This means the person must be able to understand the risks and benefits of the treatment, and make an informed decision. For both experimental and drastic treatment, consent of the person is valid only after consultation

with his or her legal counsel. For experimental treatment, consultation with independent specialists is also required. There is an exception that allows a guardian to consent on behalf of a person who does not have capacity to give informed consent to treatment, if the person has a life-threatening condition that is likely to be improved by the treatment, and other alternatives have been exhausted.

The guardian's authority to consent to treatment includes authority to consent to admission to acute-care inpatient facilities and residential treatment facilities, for a person who is not objecting. See Parts [XLB](#) and [XLC](#).

D. What are the guardian's responsibilities in identifying the person's health care needs, planning for health care, monitoring care, and giving informed consent to treatment, including intrusive or restrictive measures?

The guardian's duty is not simply to consent to whatever is recommended by health care providers. A guardian should be an active advocate for the person's access to care, and for his or her safety in the process of getting it. A guardian can play a very valuable role as historian: the guardian will often be the one constant person in medical decisions over time. A guardian should make an effort to learn the person's medical history and should tell the doctors if the ward is allergic to medications, or has a history of particular medical problems or complications. In addition, by monitoring the person's condition and reviewing treatment records, a guardian can play a valuable role in ensuring that care is being administered as prescribed, that no care has been prescribed without informed consent, and that any signs of side-effects of medication are being noted and considered.

Before giving consent, a guardian must make sure that he or she has been given the information required for the consent to be informed (see Part [XA](#), above), and must make a determination that the proposed treatment or care is in the person's best interests. A guardian should give the same kind of careful thought that a reasonable person would give in consenting to care for himself or herself. Some considerations in determining best interests, in addition to the benefits and risks of the procedure itself, include:

- The **invasiveness** of the medication or treatment, including not only the direct effects of the medication or treatment, but also whether there will be a necessity for sedation or restraint, and the potentially traumatic effects of treatment the person does not understand.
- If the person has had capacity to make health decisions in the past, **expressions of personal preferences made when the person was competent**. In general, following clear expressions of the person's wishes, made when he or she had capacity, should be considered to be in his or her best interests, even if the guardian would make a different choice for himself or herself in the same situation.

The amount of time a guardian will need to spend on a decision will depend on the nature of the procedure. Some medical decisions, such as the decision to follow a doctor's advice to have your appendix out, are reasonably straightforward: you can be pretty sure that you need the operation, that it will work, and that there are no other good choices. On the other hand, some decisions, such as whether to have surgery for back pain, may be much harder: you can live with some back pain, an operation may not work, there are significant risks that you might be worse off, and there are alternative approaches, such as exercise, physical therapy, chiropractic services, acupuncture, etc., that might be worth trying first. Typically, you would want to take

some time about this kind of decision, and to seek other opinions, perhaps from other kinds of professionals with other, less drastic approaches.

The requirement that care and treatment be discussed with the person before consent is given can be burdensome. (See Part [X.B](#) and [C](#), above.) In some cases it may seem like wasted time, because the person gives no indication of understanding what is being said. It may even seem counter-productive, because the person will be upset by the discussion, and more likely to resist treatment that is going to be given regardless of his or her opinion. In the case of treatment related to the person's mental illness, developmental disability, alcoholism or drug dependence, it is not possible to avoid the discussion, because the person's right to refuse is only meaningful if he or she knows about the treatment. In the case of physical health care, where the court order gives the guardian authority to consent to involuntary care, it may be legitimate for a guardian to reduce time spent on these kinds of discussions, based on experience that the person does not understand or respond, or that he or she is upset by them. In general, however, the guardian should try to keep the person as informed as possible, even where there is uncertainty about how much information the person is really receiving. Where the guardian lives at a distance, the discussion may have to be done through an agent, who can let the guardian know of the person's response.

E. What special considerations apply to consent to plans that include use of seclusion, restraint or restrictive measures?

If the guardian is asked to consent to a plan that includes seclusion, restraint or aversive behavior management techniques, it is important that the guardian ensure that these are used only in an emergency or for genuine treatment purposes, and then only when the provider has clearly shown that other more positive methods will not work. In addition, these methods should be used only:

- When less restrictive measures have been tried and were not effective.
- In combination with a positive environment and activities, and with positive reinforcement for alternative, desired behaviors.
- With adequate support, monitoring and supervision to keep the person safe and make the program effective.
- With a reasonable plan for phasing out use of the restrictive measure.

If a program has not produced positive behavioral changes, a guardian should question whether it is useful to continue the program, whether another approach should be looked at, or whether other things about the person's environment and activities should be changed. Human service programs, including nursing homes, licensed residential facilities, and publicly funded day activity and residential support programs, have strict restrictions on use of restraints. The guardian can contact the Division of Quality Assurance, the Clients Rights Office, Disability Rights Wisconsin and the Board on Aging and Long Term Care for guidelines and grievance procedures (see Part [XVII.D](#) for contact information). A source of guidelines on the use of restrictive measures for people with developmental disabilities or traumatic brain injury is contained in [*Guidelines and Requirements for the Use of Restrictive Measures*](#) (Wis. Dept of Health Services, Feb. 2009), on-line at http://dhs.wisconsin.gov/bdds/waivermanual/app_r.pdf. A useful pamphlet for guardians of nursing home residents is [*Avoiding Physical Restraints*](#):

[What All Nursing Home Residents and Families Need to Know](http://dhs.wisconsin.gov/publications/p6/pqa3113.pdf) (Wis. Dept of Health Services, March, 2008), on-line at <http://dhs.wisconsin.gov/publications/p6/pqa3113.pdf>.

F. What power can be given to a guardian of person to refuse life-sustaining treatment, or to consent to withdrawal of life-sustaining treatment?

Under Wisconsin law, a person who is not incapacitated has the right to refuse life-sustaining treatment, including artificial ways of giving the person food and water. If the person is incapacitated, but he or she clearly expressed his or her wishes as to what he or she would want done in a particular situation, it is **in the best interests of the person that his or her wishes be followed**. Ideally, the wishes will be expressed in a declaration to physicians or power of attorney for health care document, or in the instructions the person has given to his or her agent under a power of attorney for health care. However, a guardian also has authority to follow wishes expressed by the person in other ways when he or she had capacity, such as in conversations with family members, as long as those wishes are clear.

Where the person never had capacity, or never stated his or her wishes clearly, a guardian has the authority to refuse life-sustaining medical treatment, including artificial ways of giving the person food and water, only if (1) the person's physician, and two independent physicians, determine with reasonable medical certainty that the person is in a **chronic vegetative state**, which is defined as a complete and irreversible cessation of all cognitive functioning, consciousness and behavioral responses, **and** (2) the guardian determines in good faith that withholding treatment is in the person's best interests.

In determining best interests for a person in a chronic vegetative state who has not expressed his or her wishes while competent, the guardian is required to begin with the presumption that it is in the best interests of the person to continue to live. This presumption can be overcome by the person's circumstances, including information on chances of recovery and effectiveness of any possible treatment. If possible, the guardian must give notice of the decision to withhold treatment to a list of interested parties, including the person's spouse, next of kin or close friend, the physician, the health care facility, and others, give them time to respond, and consider the opinion of those persons. Any interested party who objects to the guardian's decision to withdraw treatment can request court review of the decision.

It is not clear in Wisconsin what the guardian's authority is in cases involving consent to withhold or withdraw of treatment other than artificial nutrition or hydration, where an individual who is not in a vegetative state has a terminal illness, the treatment will only prolong the process of dying (without providing other benefits in terms of restored health, restored functioning, or comfort), and the treatment itself is painful or highly intrusive. **It is clear that a decision to withdraw treatment should not be based on a determination that life for a person with a disability has a lower quality or is somehow less worth living than life for other people.** A guardian may not substitute his or her own view of the quality of life of the person. Whenever a guardian feels unsure of his or her authority, or whenever there is a conflict with medical providers, family or other interested people, the guardian can petition the court for a decision defining his or her authority.

It is not uncommon for health care facilities to ask guardians to sign "do not treat" or "do not resuscitate" orders for people who are not in a persistent vegetative state and do not have conditions that are expected to result in imminent death. Unless these orders reflect known wishes of the person expressed when competent, they exceed the guardian's authority, especially if treatment would be standard for people of the same age and physical health status

who are not incapacitated. The do-not-resuscitate orders that are authorized by state statute are very limited. (See Part [X.F.](#))

XI. POWER TO DECIDE WHERE THE PERSON WILL LIVE, AND TO ADMIT THE PERSON TO A RESIDENTIAL FACILITY OR INPATIENT TREATMENT FACILITY

A. What authority can be given to a guardian to determine where the person will live?

A guardian has authority to make decisions about where the person will live, unless the court order reserves that power for the individual. Guardian power to have custody and make decisions related to mobility indicate authority to over choice of residence. At the same time, the choice of where to live is a protected liberty that is not lost simply because a person is under guardianship, and the guardian is specifically required to try to identify the person's wishes related to choice of place of living, and to honor those choices to the extent possible, consistent with the person's health and safety. See Part [IX.C](#) and [E](#). The guardian can overrule the person's decision only under the factors discussed in Part [IX.E](#). Many people under guardianship are capable of choosing between available, safe places to live, and should not be deprived of that choice. In addition, a guardian's authority to admit the person to larger facilities, and to require the person to live someplace over the person's objection, is restricted and may require a separate court order for protective placement.

Where the guardian and the person share a home, it is not clear to what extent the guardian can require the person to stay if the person continues to ask to leave, particularly if any kind of physical force or restraint is needed. As a practical matter, if the person is at imminent risk of serious physical harm if he or she leaves, the guardian needs to do what is necessary in the short term to keep the person safe. However, if the person is clearly objecting to living in the guardian's choice of home, or if physical restraint of any kind is needed, that should be reported to the county adult protective services agency (see Part [XVI.A](#) and the [Chapter 55 Manual](#)), and/or the court, so that the agency and/or court can review whether there is a need for an order clarifying the guardian's responsibility, or a court protective placement order (see Part [XVI.B](#) and the [Chapter 55 Manual](#)).

- **Comment:** Unfortunately, not all guardians have the best interests of the person as their first priority. Unreasonable confinement may be a form of abuse, and may be a warning sign of other forms of abuse, neglect or exploitation, especially if it is part of a pattern of isolation of the person. A person's attempt to leave, or seek a different residence, should not be ignored or discounted, without further investigation, simply because he or she is under guardianship. If the person refuses to return to a home of the guardian's choice, but is willing to accept a safe alternative, he or she should not be deprived of that choice while the issue is resolved, especially if there is reason to believe that abuse or neglect may have occurred.

B. What authority can be given to a guardian to consent to admission to nursing homes and residential facilities?

A guardian of the person can have authority under the court order to consent to **admission of a person to an adult family home or community-based residential facility** that is licensed to serve 16 people or fewer, but only if all of the following conditions are met:

- The placement **implements the person's right to the least restrictive residential environment**. The guardian must review whether the placement is least restrictive at least annually.

- The person **does not verbally object or otherwise actively protest** the placement. If the person objects to the admission, by words or actions, the person in charge of the home or facility must immediately notify the adult protective services (APS) agency for the county in which the person is living. The APS agency will then visit the person, decide whether he or she is still objecting, talk to the guardian about the placement decision, and decide whether it is appropriate to start a protective placement proceeding (see Part [XVI.B](#)), in order for the person to be able to stay in the placement or to get an appropriate alternative placement.

A guardian of the person may have authority under the court order to give consent to **temporary admission to a nursing home or community residential facility that has more than 16 beds for up to 60 days**, only if **all** of the following conditions are met:

- The person is in need of recuperative care, or there is a serious risk of substantial harm to the person or others that would be prevented by the admission.
- The primary purpose of the admission is not for treatment or services related to mental illness or developmental disability.
- The person does not indicate an objection. (If the person does object, the guardian or facility staff should contact the county adult protective services agency, or seek emergency protective placement through the county or a court.)
- The placement implements the person's right to the least restrictive residential environment.

If a petition for protective placement is brought after the admission, the admission can be extended for another 60 days to allow the protective placement process to be completed. If a petition for protective placement is not brought, the admission can be extended for 30 days beyond the original 60, in order for discharge planning to be carried out.

If the person lives with his or her guardian, the guardian may make a **temporary respite placement** of the person, to provide the guardian with a vacation or to allow the guardian to deal with a family emergency. This kind of placement could apparently be to any kind of residential facility or nursing home, but not to an inpatient mental health treatment facility. The placement can last for up to 30 days, but the guardian can apply to the court that established the guardianship to extend the placement for a total of no more than 60 days. The court can direct what information is required in the application.

If none of these provisions apply, but placement to a residential facility or treatment is needed, the guardian, facility, county, or other interested person will need to file a petition with the court for a court order for protective placement. See Part [XVI.B](#) and the [Chapter 55 Manual](#).

C. What authority can be given to a guardian to consent to admission for inpatient psychiatric treatment?

A guardian with authority under the court order to make health care decisions may admit the person to a **facility for acute mental health care**, but only if the guardian consents and the person either also consents, or does not indicate any objection. The admission must be recommended by a physician, and the physician must go through a special process of informing the person of his or her right to leave, and of making sure that the person does not express any objection to the admission.

If none of these provisions apply, but placement to an inpatient treatment facility is needed, a petition for commitment will be necessary. See Part [XVI.C](#).

XII. DECISIONS RELATED TO SEXUAL EXPRESSION, SEXUAL CONTACT AND PROCREATION

A. What power can be given to a guardian of the person to decide whether the person may or may not have sexual contact with another person?

The fact that a person has a guardian of the person does not by itself answer the question of whether he or she can consent to sexual contact, unless the court order specifically indicates that he or she does not have capacity to consent. There are many people under guardianship experiencing consensual, positive, sexual relationships. There are also many people who have guardians and lack capacity to consent to sexual contact, and/or are at high risk of sexual abuse.

Where disputes over sexual decision-making are likely to arise, it may be helpful if the question of the person's capacity to consent can be resolved in the court order. If the person has capacity to consent to sexual contact, he or she will be better off if that right is clearly stated, and the guardian will be better off if it is clear where his or her responsibility begins and ends. If the person cannot give consent, but is at high risk of engaging in risky conduct, it is again in the interests of both the person and guardian for the guardian's authority to be clear. Because the form for the court guardianship order does not have a section dealing with sexual decision-making, this will have to be added under "custody" or "other powers," or through an attachment or separate order.

For some people, it will be difficult to determine the person's capacity to consent outside of a particular situation, so that the issue cannot be resolved for all situations by a general court order. It is a challenge for the guardian to support and protect a person who has capacity to give a voluntary and knowing consent under some circumstances, but not others, and who is likely to engage in risky behaviors or to be in situations where he or she may be subject to abuse or exploitation. For a guardian in this situation, two rules of law pull in opposite directions:

- A person who has capacity to consent to sexual activity has a **constitutionally protected right to consent to engage in knowing and voluntary sexual activity**, both as a protected liberty interest and as part of the right to privacy. This applies even to a person who is under guardianship, and is reflected in the fact that a guardian must consider and try to honor the person's wishes regarding participation sexual activity, where possible consistent with protecting the person from abuse. See Part [IX.E](#), above.
- **Sexual contact with a person who lacks capacity to consent to the contact is abuse** and, if the perpetrator knows of the person's incapacity, it is a criminal sexual assault. A guardian cannot consent to sexual contact on behalf of a person who cannot give a knowing and voluntary consent for himself or herself. The guardian has a duty to try to protect the person from abuse.

The test for evaluative capacity to give a knowing consent is whether the person is able to understand the nature and consequences of the sexual contact involved. Elements of what the person must be capable of understanding have not been precisely defined by Wisconsin courts, but may include:

- The physical nature of the sexual contact involved, and that it enjoys a special status as “sexual.”
- That the person’s body is private and that he or she has the right to refuse to engage in sexual activity.
- That sexual contact of some types may result in pregnancy, and an understanding of the health risks of sexual contact.
- That there are social standards and potential social consequences that apply to the sexual contact.

Where the person is expressing a wish to be in a situation where sexual contact might occur, and the guardian believes that the person has capacity to consent under the circumstances, the guardian must make any decision to overrule the person’s choice under the criteria in Part [IX.E](#), above.

B. What power can be given to a guardian of the person to consent on the person’s behalf to birth control or abortion?

Like the choice to engage in sexual activity, the choice by a competent person to procreate or to prevent procreation is a constitutionally protected, fundamental personal decisional choice. Except for authority to consent to sterilization where the person also consents, guardian authority to make decisions related to use of birth control, and whether to have an abortion, are rarely spelled out in the court order. Where birth control issues are likely to be a source of conflict, it may be a good idea to clearly spell out the guardian’s authority (or lack of it) under the court order.

As discussed in Part [IV.C](#), above, a guardian in Wisconsin cannot give consent on behalf of the person for a medical procedure, where the purpose of the procedure is sterilization. In order for the person to be sterilized, the court must find that he or she retains the capacity to consent, and the person must in fact give an informed consent. This should be carefully documented, e.g., by having the person see an independent counselor before giving consent.

Where the guardian has authority under the court order over health care decisions, the guardian can consent to other forms of birth control that are not permanent, unless that power is reserved to the person. Where the guardian has authority to consent to medication without the person’s consent, this also could extend to birth control. These powers are still subject to the general duty to discuss decisions related to health care with the person. In addition, because the right to make decisions about procreation are protected personal rights, the guardian has a duty to make diligent efforts to identify the person’s preferences regarding use of birth control, and to honor those preferences when consistent with protecting the person’s health and safety (see Part [IX.E](#), above.)

It is difficult to predict how a Wisconsin court would deal with the question of a guardian’s authority to consent to an abortion, and the decisions of courts are likely to be very fact-specific. Among the alternatives:

- If the person retains capacity to consent to an abortion, a court could make a specific finding that she is able to consent. This is most likely to happen in the context of an actual decision to have, or not to have, an abortion. It will probably be helpful for the court if the

person has had counseling, and the counselor can report that the person understands the nature of the decision and its risks and consequences, and has a consistent opinion.

- If the person lacks capacity to make a decision, and an abortion is necessary to protect the person from a serious risk to her health or life, it is likely that a guardian can consent to an abortion under a general authority to make health related decisions. However, like any decision related to procreation, the decision must be discussed with the person, and the person's opinion must be considered in making the final decision.
- In a case where the person lacks capacity, and there is no serious health risk to the person, the guardian should seek court guidance, in the context of the particular situation, before making a decision to consent to an abortion. If the person is able to express an opinion of any kind regarding whether to have an abortion, that opinion should carry great weight with both the guardian and court. Other factors the court might consider include: whether the pregnancy resulted from sexual assault; any opinion the person may have expressed in the past about abortion; and the likelihood of emotional trauma to the person if the pregnancy goes to term.

XIII. POWERS AND DUTIES OF A GUARDIAN OF THE ESTATE

A. What standard is a guardian of estate held to, in carrying out his or her duties, and when is the guardian personally responsible for costs?

The general standard of care that a guardian of estate must meet is the same as the standard for a guardian of person (See Part [IX.A](#), above). The basic guidelines to remember are to **always be at least as careful with the person's property and financial interests as a reasonably careful person would be if it were his or her own property**, and to **always act loyally in the best interests of the person**.

A guardian of estate is not personally responsible for paying for the person's expenses. However, a guardian of estate may be personally responsible to the person if the guardian acts in bad faith, or fails to take reasonable care in managing the person's property or finances, not only for losses of property but also for failure to get access to income or benefits which the person might otherwise have received. For example a guardian of estate may be held personally responsible for losses to the person that result from:

- Health care costs that are charged to the person because the guardian was negligent in failing to apply for eligibility for Medicaid, or in failing to appeal an incorrect denial of benefits.
- Failure to invest property in a reasonable way that would have produced income. (See Part [XIII.E](#).)
- Damage to property because it was not maintained or stored in a safe location, or losses because property was not properly insured.

B. What are the powers and duties of a guardian of estate?

Unlike guardianship of the person, an order for guardianship of the estate gives the guardian the full duties and powers available under the statute (see list below), except as limited in the order. The court is required to tailor its order so that it grants only powers that (1) are necessary to provide for financial management and (2) are the least restrictive form of intervention. Some

powers of a guardian of estate may only be exercised with specific approval of the court, including powers to make gifts, put money in trust, or purchase real estate (see list below).

The primary duties of the guardian of the estate are: **to make sure the person's funds are used to meet his or her needs, to preserve the funds from waste or exploitation by others, and to manage and invest the funds in a responsible way.** A guardian of estate is responsible for making sure that whatever money the person has is used wisely and only for the person's own benefit, or for the benefit of legal dependents of the person. The person's property should be used to enable the person to live at the standard of living he or she can reasonably afford and would choose if he or she were competent, if that is possible while keeping a reasonable level of funds for future needs. While many people would also want their funds preserved so that they have something to leave at death for their family or other beneficiaries, the primary job of the guardian is to see to the person's support and welfare, not to preserve funds for future beneficiaries.

The guardian of estate does not have the responsibility to support the person out of the guardian's own money. However, the guardian does have the responsibility of making sure that applications are made for all local, state, and federal income support programs (such as Unemployment Compensation, disability insurance benefits, Social Security, Supplemental Security Income, Food Stamps, veterans' benefits, Medicare and Medical Assistance, and other supportive programs such as the Community Options Program) that could assist in supporting the person.

A guardian of estate has the following duties:

- The guardian must **post a bond** to protect the person from loss due to the guardian's actions, unless this has been waived by the court. Courts will often waive the requirement of a bond where the size of the estate is small.
- The guardian must **take possession of the person's property and income** over which he or she has been given authority under the guardianship order (this property is sometimes called the *guardianship estate*), and of any income that is earned on the property (such as rent, interest or dividends). The person continues to be the owner, and title to the property should remain in the person's name, but the guardian has possession and control. (See Part [XIII.E](#), for how the guardian should hold and invest property.)
- The guardian must **make and file an inventory of everything the person owns** at the time the guardianship is created. If the guardian later discovers additional assets, the guardian must file an amended inventory to include those assets. See Part [XIII.F](#).
- The guardian must use the guardianship estate to **provide for the maintenance and support for the person and his or her dependents.** This is a primary protective purpose of guardianship. The guardian does not need court permission to provide support to people the person is legally obligated to support, but would need prior written court permission use the person's property to provide support to other dependents, e.g., grandchildren who have lived with the person, or adult children with disabilities. The guardian should also be aware of the potential impact on public benefits of gifts of this kind. See Part [XIII.J](#), on power to make gifts.
- The guardian must **keep track of money received and spent, and file accounts with the court**, including annual accountings, unless waived by the court, a final accounting, and

any other accounting that the court may require. (See Part [XIII.G.](#)) The guardian is **responsible for transferring remaining property at termination of guardianship.**

- The guardian of estate must **act as an advocate for the person in legal proceedings that relate to the person's finances.** Considerations in whether to bring or defend against legal proceedings are similar to those faced by a guardian of person. (See Part [IX.C.](#))
- The guardian must **find out if the person has a will, and where it is.** If the person dies, the guardian must **make sure that the appropriate people know that the will exists and that the person has died.** (Note that the guardian's power to make decisions about the person's property ends when the person dies. See Part [XIII.M.](#))

Unless otherwise specified in the order, a guardian of estate for an individual has the following powers, but as noted some powers may require individual, case-by-case court approval:

- **To make contracts** that obligate the person. This is a power that may be limited by the court order. For example, the person might keep power to make contracts, but only up to a certain amount of money, or only for certain purposes, like renting a place to live. Even if the guardian has full authority, court permission is required for some kinds of contracts, including purchase or mortgaging of real estate.
- **To pay the person's debts, claims and taxes.** The guardian is responsible for making sure that claims are legitimate, and disputing questionable claims. The guardian's power includes **power to settle claims and represent the person in legal actions on debts and claims.**
- **To keep, sell, and invest the person's property.** See Part [XIII.E.](#)
- **To authorize access to confidential financial records.**
- **To apply for public and private benefits that are available to the person, and to act as representative payee,** if appointed to do so by the benefits agency. The guardian has a duty to make sure the person gets available benefits, and is not spending his or her own money on things that could be covered by benefits. The guardian also has a duty to act as representative payee, if a payee is needed and there is no other appropriate person or agency willing to be payee.
- **To make gifts and disclaim interests, under limited circumstances.** A *disclaimer* is a decision not to take property that the person has a right to receive, such as an inheritance from someone who has died, and is treated the same as giving away property the person already has. Any time the guardian makes a gift to another person or gives up an interest that the person has in property, without getting market value in return, the guardian must get prior written approval of the court. The conditions under which a court can approve gifts and disclaimers, other than for support of family members or transfers to a spouse, are very limited. (See Part [XIII.J.](#)) If the person gets public benefits, the guardian should find out whether the gift or disclaimer will affect the benefits, before making any kind of gift or disclaimer.
- **To purchase or cash in annuities and insurance, and make changes of beneficiaries.** Any of these kinds of changes **require prior written court approval** because they may change plans that the person had as to who would benefit from his or her property at his or

her death. These kinds of actions, especially concerning annuities, can also have an effect on public benefits.

- **To make decisions about management and ownership of marital property**, but only with **prior written court approval**. See Part [XIII.H](#).

C. How can guardianship of the estate be tailored to the person’s needs, and how can the guardian continue to involve the person in management of property?

See Part [IV.E](#), above, for ways in which the powers over the estate can be divided between the person and the guardian, to reflect individual circumstances and needs.

The fact that a guardian has all or most powers over property does not prevent the guardian from finding ways for the person to be involved in financial decision-making and practice and learn greater skills in financial management. The guardian can still involve the person in paying bills, discussing financial decisions, meetings about leases or home purchases, etc. The guardian can also decide to give the person spending money in an amount that he or she can safely handle, and/or to establish a bank account in the name of the person that he or she manages directly, and uses for personal needs. This can be an important way to enable the person to maintain as much control and dignity as possible, or to learn skills in using and managing money. However, the guardian should remain aware of his or her potential liability if the person’s support needs are not met, or there are major losses to the estate.

If the person lives in a nursing a nursing home or other residential setting, and receives public benefits, he or she may be required to use his or her income for the costs of the facility, and be allowed to keep only a small personal needs allowance. The fact that the amount is small makes use of this amount particularly important. Sometimes, these funds are not spent because no one takes time to think about what the person might need or want, and the guardian should be active in identifying ways that the funds can benefit the person, and should make sure that they do not accumulate to the point of threatening benefits, or get used for the benefit of other people. It is possible for residents to pool money to buy something for the benefit of all, but the person should not pay more than his or her fair share, or pay for something that should have been provided by the facility.

D. How do the responsibilities of the guardian of person and guardian of estate overlap, and how do they need to work together?

It is important that the guardian of estate and guardian of person work together, because of the overlap between their different powers and duties. For example:

- A guardian of person may apply for Medicaid as part of his or her duty to ensure access to needed health care, but will need information about the person’s finances to make the application. A guardian of estate may be responsible for the same thing, as a way of protecting the person from the costs of health care, may need to make changes in what the person owns in order to meet eligibility tests, and may need to know what services the person needs, in order to know what benefits to seek.
- The guardian of person may have power to decide where the person will live, but the guardian of estate will have to decide whether the costs of the home are affordable, to sign the lease or mortgage, and to make arrangements with utilities.

- A guardian of person is required to consider cost among other factors in making best interests decisions. Whenever arrangements for nonemergency needs and wants involves contracting, or a commitment to pay, the guardian of person must remember that signing contracts is a power of the guardian of estate.
- Agencies and other that send out notices about services, financial accounts, and legal or administrative proceedings are not always good at knowing which guardian to send them to. These notices may have implications for both guardians, and it is important that each guardian think about whether a notice needs to be shared with the other guardian.
- Whenever either guardian is involved in advocacy in legal proceedings, or in applying for public benefits or services, it is important to think about whether the other guardian needs to be informed and involved.

In general, a guardian of estate should not use his or her power over funds to control personal decision-making, whether or not the person has a guardian of person. For example, it is appropriate for the guardian of estate to refuse to pay for a particular choice of housing because it is not affordable in the long term, or because there is a need to conserve the estate for other reasonably anticipated future needs of the person. It is not appropriate to use control of funding to control where the person chooses to live, or as a way to coerce the person into accepting treatment or support services that the guardian of estate thinks are appropriate.

As a rule, a guardian of estate may never use the person's funds for his or her own benefit, by making gifts or loans to himself or herself, or by using the person's property for his or her own use. Some exceptions are described in Part [XIII.K](#) and [L](#). The guardian should avoid self-dealing--selling something, or paying himself or herself for a service other than his or her services as guardian. If self-dealing is genuinely in the person's best interest, the guardian should seek court authorization.

E. What are the guardian's powers and duties in setting up accounts and investments, and in buying and selling property?

The assets of the person must be held and accounted for separately from any assets of the guardian. This means that all bank accounts and other investments must be titled in the name of the person, with the guardian of estate shown in his or her role as guardian. This means that the property belongs to the person, but is controlled by the guardian. The guardian should not hold the person's property in the guardian's personal accounts, as that has the appearance of a transfer of funds to the guardian.

In making investments of the person's property, the guardian is required to follow the Uniform Prudent Investor Act, unless the guardian has obtained special permission from the court that other investments are in the person's best interests. The Uniform Prudent Investor Act in Wisconsin is [Wis. Stat.](#), § 881.01. The basic requirement of the Act is: "A fiduciary shall invest and manage assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the estate, trust, conservatorship, or guardianship. In satisfying this standard, the fiduciary shall exercise reasonable care, skill, and caution." A guardian is responsible for making sure that assets that are not needed for immediate needs are put into income-producing investments. A guardian should not make investments that are too risky under the person's circumstances. The investment decisions are evaluated in light of the person's circumstances, and over-all financial situation. For example, a guardian for a person with limited resources, who needs them to meet his or her needs, may decide to choose

investments that produce little income in order to minimize risk. A guardian may keep funds enough funds, to meet reasonably anticipated needs in a form that is readily accessible, even if income on the liquid investments is low.

The guardian must take possession of **real property** (buildings and land), provide for its management and collect rent. If the person owns any real estate, the guardian must file notice of the fact that the person has a guardian with the register of deeds in the county where the property is located, giving a legal description of the real property. The guardian must get prior court authorization for **any decision to buy, sell or mortgage real estate**.

F. What is the guardian of estate's responsibility to file an inventory?

Within 60 days after he or she is appointed, the guardian of estate must file an *inventory* that lists all the interests in property that the person owned on the date that the guardianship was created. The inventory is important, because it is used by the court as the basis for future accounting by the guardian about how the guardian has managed and spent the property. There is a required court form for the inventory (GN-3440). Helpful information on filling out the inventory is available in the Coalition for Wisconsin Aging Groups, publication, *Guardian of the Estate: How to Complete an Inventory*, available on their website at: http://www.cwag.org/uploads/Guardianship_Support_Center/Guardian_Estate_-_Inventory_June_2007_lite.pdf. If the guardian discovers other property after the inventory is filed, he or she should file an amended inventory.

The inventory must include things that the person owns with other people, such as land owned in a tenancy in common, or interests in a business. If the person is married, much of his or her property may be marital property (owned half by each spouse), and this needs to be shown on the inventory. (See next section.)

If the powers of the guardian of estate are limited, the guardian may not be responsible for all of the person's property. In that case, the guardian should be careful to separate out property on the inventory for which he or she is not responsible, and list that separately, so that he or she is not held responsible for accounting for the property to the court. Similarly, if the person only owns something that may or may not have value (like a claim in a lawsuit that has not been decided) that should be listed separately, and the inventory can be amended when the guardian knows the real value. It is a good idea to discuss issues like this with staff at the county Register in Probate to find out how things are done in a particular county.

G. What are the responsibilities of the guardian of estate to keep track of the person's property, and account for the property to the court?

The guardian has to keep track of the person's property, new money or property received (such as interest income), and how and when property is used or money is spent. It is a good idea to get a notebook to write all this in since there must be reports filed with the probate court each year. Ask for separate receipts when buying things for the person and keep these receipts (write on the back of the receipt what it was for) so that it is easier to keep the accounts.

The guardian of estate must also file an annual accounting with the court, unless the accounting is waived by the court. (The guardian can ask the court to waive annual accounting when he or she files the inventory. Usually, the court will waive annual accounting for an estate that has a value of less than \$50,000.) Whether or not the annual accounting is waived, the court can at any time ask the guardian to do an accounting. The *accounting* shows income or new assets

that came into the estate, how the money is invested, and what was spent during the year. The guardian will be asked to produce evidence of the accounts and investments shown in the inventory showing the balances at the end of the accounting period.

If the guardian is representative payee for Social Security or SSI benefits, he or she will need to do an accounting to Social Security. It may be useful to have a separate account for this, to make the account for Social Security easier. This account can then be used for most of the person's minor living expenses. If the guardian is not representative payee, he or she should not be responsible for accounting for the Social Security payments, but should monitor the representative payee to make sure payments are properly applied to the person's needs, and to ensure that funds held by the payee do not accumulate to an amount that would affect eligibility for needed benefits.

There is a required court form for the accounting (GN-3500). Helpful information on filling out the accounting is available in the Coalition for Wisconsin Aging Groups, publication, *Guardian of the Estate: How to Complete an Account*, available on their website at:

http://www.cwag.org/uploads/Guardianship_Support_Center/Guardian_Estate_-_Account_June_2007_lite.pdf. A final accounting is required prior to discharge of the guardian. For smaller estates (under \$50,000), the court will usually only require a listing of assets that the person owns at the time the guardian is discharged or the guardianship is terminated.

H. What special rules apply to use and management of the estate if the person is married?

Each spouse has a legal obligation to support the other spouse. A guardian has authority to use the person's assets to support his or her spouse, without getting special court permission.

Wisconsin is a *marital property* state. This means that assets that appear to belong to one spouse or the other in a married couple actually belong to both of them, with each having a one-half interest. It is important to get advice on marital property interests before taking action that affects marital assets.

With permission of the court, the guardian can take any action that the person could have taken, with regard to transfers to and from the other spouse, and with regard to agreements about how the property is owned. This means that it is possible to make (or receive) substantial gifts to (or from) the other spouse, and to reclassify property so that it is the sole property of one or the other spouse, or so that ownership is shared. These powers can be extremely important if one spouse or the other needs long-term care funded by Medicaid, or may need such care in the future, as it provides a potential way to protect property and income for the other spouse. (It is essential to get expert advice before making any kind of transfer, as the rules and policies that affect Medicaid long-term support are very complicated.) It may also be possible to transfer resources to a family trust that was created to manage resources for the couple. (See next section.)

If a person under guardianship gets married, the court must review the guardianship. This allows the court to determine whether guardianship is still needed and whether the duties of the guardian, or the choice of guardian, should change, should change to reflect the person's changed circumstances.

I. When can a guardian of estate transfer resources to a trust for the person?

A transfer to a trust can be a way to provide for use and management of funds more in line with the person's wishes, or a way to better protect funds for the person's use, while allowing the

person to get needed public benefits. Any transfer of funds to a trust requires court permission, based on a finding that the transfer is in the person's best interests. Transfers to trust that a court can approve include:

- Transfer of resources from the guardianship estate to a **revocable living trust that was established by the person for his or her benefit and the benefit of any dependents**. If the person (or a married couple) has planned ahead, he or she (or they) may have established a revocable living trust (see Part [V.B.iv](#)), above.). These kinds of trusts usually provide for management and use of assets if the person (or either spouse) is incapacitated during his or her life, as well as for distribution of assets at death. The trust can be much more individualized than guardianship, in terms of carrying out the specific wishes of the person (or couple).
- Transfer of resources to a **self-funded supplemental needs trust** for the person (see Part [V.B.iv](#)). The guardian must have court permission both to establish the trust and to transfer the resources. This is a very important step that the guardian can take to qualify the person for Medicaid or Supplemental Security Income, if he or she has excess resources, or to maintain the person's eligibility for Medicaid or SSI if he or she receives assets in his or her own name, through an inheritance or Social Security backpayment.
- If the guardianship estate is less than \$50,000, transfer to any trust that has been created for the person's benefit. (This is usually done as an alternative to guardianship.)

J. When can a guardian use funds to make gifts or provide support to other people?

Generally, the guardian's duty is to use the person's funds only for his or her benefit, and otherwise to preserve and protect the property. This means that the guardian cannot make gifts that the person would ordinarily have wanted to make, even presents to family members on gift-giving occasions or continuations of gifts the person made while competent, unless the guardian gets special permission from the court. (One possible option, where the person has the remaining capacity, is to give the person spending money, which he or she can then use to pick out and buy small gifts for family members.)

The guardian, without getting special court permission, can use the person's property provide support to someone that the person is legally obligated to support, including a spouse and minor children. As discussed in Parts [XIII.H, I](#) and [J](#), a guardian can also seek permission from the court to transfer resources of the person to a spouse, or to a trust for the person and other dependents, even though that transfer may not be purely for support. A guardian may also seek permission from the court to allow use of funds for the support of someone the person does not have a legal obligation of support. For example, this might be used for permission to use funds for support of an adult child or grandchild who is still in high school or college, or who is not self-supporting and has in the past received support from the person.

A guardian must get court permission for any other gifts (including gifts to a child that are not for the purposes of support), and the court can approve these gifts only under very narrow circumstances. In considering a proposal to make a gift, the court will consider the person's wishes, the benefit to the person or his or her immediate family, whether the gift is consistent with other planning the person has done, and any other factors the court thinks are important.

K. When can a guardian be reimbursed for expenses or be paid for his or her services as guardian?

A guardian can use the person's funds to pay the guardian back for reasonable costs of being guardian. This can include the reasonable cost of travel to see the person, and the cost of hiring an attorney, accountant, financial adviser or tax preparer to provide advocacy, advice or assistance to the guardian. A record detailing mileage and other expenses should be kept, including receipts wherever possible. The court is supposed to approve the reasonableness of all expenses before the guardian is reimbursed, but courts vary in how this is interpreted and applied. It is a good idea to check with your local court about when the court wants the guardian to get approval for reimbursement.

The guardian should be careful not to abuse the right to reimbursement, e.g., by paying for trips the guardian would have made anyway, for other purposes, or incurring costs that are unreasonable, given the amount of money the person has. The guardian should consider whether he or she would have expected a non-disabled friend or relative to pay travel or other costs in similar circumstances, and whether the trip was largely for other purposes (like visiting other relatives) in deciding whether it is fair to charge the guardianship estate. The guardian should seek court approval in any case where there is a question about the reasonableness of an expense.

A guardian of person and/or a guardian of estate can also receive compensation for his or her services as guardian. Any compensation must be approved in advance by the court, based on what the court decides is fair and reasonable. This approval can be obtained at the time the guardianship is established.

L. When can a guardian charge the person for other kinds of services the guardian provides, or sell things to the person?

A different issue is presented when the guardian enters into any kind of business arrangement with the person, where the guardian is providing a paid service to the person (other than his or her duties as guardian), selling something to the person, renting to the person, or making a loan to the person. This kind of arrangement is called *self-dealing*. Not all self-dealing is prohibited, but any self-dealing should be clearly part of carrying out the guardian's duties to meet the person's needs and wants, and should never be done if the only purpose is to assist the guardian in some way. Examples include:

- The guardian and the person may **live together and share expenses**. Often, this means that the person lives in the guardian's home, and the guardian uses the person's resources to pay his or her share of living expenses, such as rent, mortgage interest, real estate taxes, utilities and the cost of food and household supplies. This can be seen as part of the guardian's duty to use the person's funds for his or her support, and usually does not require prior court approval, unless the guardian makes a profit from the amount charged, or the person is subsidizing the costs of any other household member (other than a spouse or minor child). If the guardian lives in the home of the person, he or she should get approval of the financial arrangement from the court, to ensure that it is fair to the person.
- The guardian may be **providing personal care or other services to the person**, and may feel that he or she should be paid for those services. Any arrangement of this kind should get prior approval of the court to make sure it is in the best interests of the person, e.g., that

the paid services are needed, the guardian is an appropriate provider, and the guardian is not being paid more than the typical cost of similar services.

- The guardian may want to **rent a condo or home to the person**. It can be a great advantage to the person to rent from a family member on favorable terms (see [One Step Ahead](#), Ch. IX) but if the guardian is the landlord he or she should get approval of the arrangement from the court.
- The guardian may want to **sell something to the person**. This should only happen when it is the most favorable arrangement, e.g., the guardian is willing to sell something to the person on very favorable terms, and only with prior court approval.
- The guardian may want to **make a loan to the person and to charge interest**. The ability to get loans easily from friends and family members to cover unusual expenses can be a great advantage to the person, especially if he or she relies on public benefits (see [One Step Ahead](#), Ch. V.D). If the guardian is the lender, court approval should be obtained for any large or long-term loan, any loan that involves interest and any loan that involves a mortgage. It may be possible to get blanket approval, if loans will be made over time, e.g., to pay home repair costs or real estate taxes.

In any of these arrangements, prior notice to the court, or a request for court approval, will help to explain why the guardian is writing checks to himself or herself from the guardianship estate.

M. What is the guardian of estate's responsibility when the person dies?

For a person who has an estate over \$50,000, the guardian's authority to manage and spend the person's money ends when the person dies, and the guardian should turn over assets to the person appointed as personal representative for the person's estate. The guardian can petition to have a personal representative appointed, if that is necessary. If there is a will, the guardian is responsible for making sure that the appropriate people know about the will, and that it gets filed with the probate court. The guardian is responsible for making sure that the property is transferred to the person who is entitled to it, either because of a will, the law that applies when there is no will, or other laws or contracts that apply.

If the estate is under \$50,000, the guardian of estate can usually work with the probate court to settle the estate, pay any debts, and distribute remaining assets, without having to go through the formal probate court process and without appointment of a personal representative.

XIV. COURT REVIEW OF NEED FOR GUARDIANSHIP AND PERFORMANCE OF THE GUARDIAN

A. How can the rights of the person and the powers of the guardian be changed, to restore rights and powers to the person, or to give more powers to the guardian?

Over time, the person may gain or lose decision-making skills, or his or her situation may change, so that he or she needs greater (or less) protection, or so that his or her ability to make a particular decision on his or her own becomes more important. In these cases, the court can be asked to review and modify the guardianship order. For example, if the person wants to marry, it will be more important to clarify whether he or she has the capacity to do so. If the person does marry, the court is required to review the guardianship for its appropriateness to the changed circumstances. The different ways in which a court can modify a guardianship order include:

- The court can **remove rights that are reserved to the person, or increase the powers assigned to the guardian.** A guardian or any interested person may submit a statement to the court requesting removal of rights or transfer of powers to the guardian. The statement should include reasons for the change, and the facts that support it. This could be in the form of a physician’s statement about changes in the person’s condition, or a statement by the guardian about risks to the person’s health or safety that have occurred. The court must appoint a guardian ad litem to look into the issue and report to the court about whether the change is in the person’s best interests. If no one objects to the change within 10 days (or a shorter period set by the court), the court can order the change without a hearing. If there is an objection within 10 days of the notice, or the court decides that a hearing should be held, the court will hold a hearing to decide whether to grant the request.
- The court can **restore rights to the person, reduce the powers assigned to the guardian, or terminate the guardianship.** The guardian, the individual, or any person acting for the individual, may file a petition asking the court to review whether the person has capacity to exercise particular rights or make particular decisions, and/or whether the person continues to meet the test for a finding of incompetence,. If the person is found to have capacity to exercise a right or power, the court can amend the guardianship order so that his or her authority to exercise the right or power is restored. If the court finds that the person is no longer incompetent, the court must end the guardianship. The court must appoint a guardian ad litem to look into the issue and report to the court about whether the change is in the person’s best interests. The court must hold a hearing before taking any action, and the person has rights very much like the rights he or she has in the original guardianship proceeding. (See Part [VIII.H.](#)) The court can refuse to do a review of this kind, if one has happened within the past 180 days.

The petition to restore a right can sometimes be used to allow the person to make a specific decision. For example, the person may have decided that he or she wants to marry, or to be sterilized, or to donate an organ to another person. It is sometimes easier to show capacity in the context of this kind of a specific decision. One way to do this is to have the person spend time with an independent counselor, so that the counselor can say that the person understands the nature, risks and benefits of the decision, and has been consistent about what he or she wants to do.

B. When can a court order the guardian to carry out his or her responsibilities, or order removal the guardian?

A court can remove a guardian of person or guardian of estate, or make an order telling the guardian to carry out his or her responsibilities, for any failure by the guardian to carry out his or her duties, including a failure to act in the person’s best interests, or to exhibit “utmost loyalty” to the person. A court’s decision to remove the guardian is based entirely on its findings about the person’s best interests. The court does not have to find that the guardian did anything illegal, or that the guardian acted in bad faith, in order for the guardian to be removed. Examples of reasons the guardian can be removed, or ordered to act in a particular way, include:

- Failing to file an accurate inventory, accounting or other report when it was due.
- Failing to protect the person’s property, or using it to benefit someone other than the person.

- Failing to take action to prevent abuse or neglect of the person.
- Paying himself or herself out of guardianship funds, in a way that is not permitted by the statute or the court.
- Failing to provide adequately for the personal needs of the person from the person's available assets and income.
- Failing to take action to try to assure that the person is cared for in the least restrictive environment consistent with his or her needs and incapacities.

The court may act because someone files a petition requesting review of the guardian's conduct, or because the court decides on its own that a review is needed. The court must always appoint a guardian ad litem to investigate and report to the court on the person's best interests, and must always hold a hearing. After the hearing, if it finds that grounds exist, the court can:

- Order the guardian to file or correct an inventory, accounting, or other required report.
- Order the guardian to pay the person back for losses caused by the failure of the guardian to act with reasonable care (see Parts [IX.A](#) and [XIII.A](#), above, or order that the guardian will not be paid.
- Order the guardian to act in a way that is in the best interests of the person.
- Remove the guardian, and appoint someone else as guardian.
- Require the guardian to pay the costs of the proceeding, including the attorney fees of other people involved in the proceeding.

XV. RESPONDING TO ABUSE, NEGLECT, EXPLOITATION AND VIOLATIONS OF RIGHTS

A. How does someone make reports of abuse, neglect, self-neglect or exploitation of a person under guardianship?

Wisconsin has two systems for reporting physical and sexual abuse, neglect, self-neglect and financial exploitation, one system for elder adults-at-risk (people over 60), and one system for younger adults-at-risk (people under age 60 who have disabilities and are at risk). Any adult who is under guardianship based on a finding of incompetence meets the definition of being an adult-at-risk. In most ways, the two systems are the same: every county must designate one or more agencies to receive reports of abuse, neglect, self-neglect or financial exploitation of an adult-at-risk or elder adult-at-risk, and is required to respond to reports by investigating and offering needed services to prevent abuse. The person making the report is protected from liability if he or she made the report in good faith. For detail on the abuse reporting systems, the required county response, and protective service laws, see Ch. II and IV of the [Chapter 55 Manual](#).

B. What if the guardian is suspected of participating in abuse, or tolerating abuse by someone else?

In most cases, if the person reporting abuse is not the guardian, he or she will want to alert the guardian as soon as possible to the abuse, neglect or exploitation. However, if the guardian is suspected of participating in, or tolerating, the abuse or neglect, informing the guardian could

place the person at greater risk of harm, or make it likely that the guardian would try to prevent an effective investigation. There is no requirement that a reporter obtain permission of the guardian before making a report, and the county can begin an investigation without informing the guardian. Provider agencies may be subject to other rules that require them to inform guardians about changes in the person's situation, but the paramount consideration should be protection of the person from harm.

In some cases, where the person lives with the guardian, there may be a need to get a protective order, or to provide someplace else for the person to go, in order to protect the person from harm. Where the person expresses a wish not to return home because of an allegedly abusive situation, an effort should be made to find a safe, neutral place for the person to stay while the alleged abuse is investigated. It may also be appropriate to seek a domestic abuse or adult-at-risk restraining order from court to prevent further abuse, or interference with the investigation. More information on restraining orders and emergency protective orders is in of the [Chapter 55 Manual](#). If the guardian may be the abuser, or may be ignoring the abuse, it may be appropriate to apply to the guardianship court for review of the guardian's conduct (see Part [XIV.B](#)) and immediate appointment of a guardian ad litem. A person who cannot take action to protect himself or herself from harm may be appropriate for emergency protective services or emergency protective placement. See Part [XVI](#).

C. What is the guardian's responsibility to advocate for the rights of a person in a licensed or certified residential facility?

While a residential facility may provide a protective environment, it also creates a situation in which the person is dependent on a single entity—the facility—for most of his or her daily needs, and an environment in which the person may be isolated from the larger community. This is especially true if the person does not go out to a separate program for daytime activities. Because of the power of the facility, the individual, other residents, and facility employees may be unable or unwilling to assert the person's rights. The risk that the person may be overmedicated for the convenience of staff, or that medication or negative behavioral interventions may be used as a substitute for positive activities, is often higher in residential facilities. The role of the guardian as an independent, outside observer and advocate for the person is therefore particularly important, and the guardian should ensure that the guardian, or at least an agent of the guardian independent of the facility, sees the person regularly, and reviews records regularly, especially if the person receives psychotropic medication or behavioral treatment, or is subject to restraint or seclusion. See Part [X.D](#) and [E](#), above. The guardian should also ensure that he or she is aware of all of the rights that apply the person in the service setting involved.

Any person who lives in a nursing home, facility for persons with developmental disabilities (FDD or ICF-MR), or community-based residential facility (CBRF) is protected by a state statutory bill of rights. The rights are found at [Wis. Stat. § 50.09](#). In addition, there are administrative rules that give further detail on these rights in the following chapters of the [Wisconsin Administrative Code](#): Ch. DHS 132 (nursing homes); DHS 134 (facilities for the developmentally disabled); and DHS 83 (community-based residential facilities. Where a person is under guardianship, power to enforce and protect the person's rights passes to the guardian, although the person may still assert rights or make complaints on his or her own behalf. Protected rights include rights to:

- Have private and unrestricted communications, by mail, telephone, and personal visits.

- Present grievances to operators and public officials.
- Manage personal finances and/or delegate this responsibility.
- Be notified of per diem rates, other charges and services.
- Courtesy, respect and dignified treatment by all staff.
- Physical and emotional privacy in treatment and living arrangements including privacy in visits and in medical examinations, discussions and records.
- Not be required to perform non-therapeutic work for the facility.
- Choice of participation in social, religious and community activities, unless medically contraindicated.
- Retain and use personal clothing and property (within space limits).
- Be transferred or discharged, and be given advance notice of planned transfer, discharge or alternatives. If discharge is involuntary, it must be based on failure to pay or inability of the facility to meet the person's needs, and it is subject to an appeal process.
- Be free from mental or physical abuse and unauthorized physical or chemical restraints.
- Receive adequate and appropriate care within the capacity of the facility.
- Choose his or her health care providers.
- Be fully informed of and participate in planning treatment and care.

A complete copy of the rights and the facility's grievance procedure must be provided to the person and the guardian at the time of admission. The guardian of person has authority to exercise and advocate for the person's rights. The person also retains the authority to advocate for his or her own rights, and to make complaints concerning alleged rights violations.

If a guardian believes the person's rights are being violated, he or she can use the facility's grievance procedure, complain to the Board on Aging and Long Term Care, and/or a state agency which investigates and mediates complaints, and/or complain to the regional office of the Bureau of Quality Assurance at the Department of Health Services, which is the agency responsible for enforcing state and federal rules in nursing homes. To find the responsible regional office, go to: <http://dhs.wisconsin.gov/bqaconsumer/HealthCareComplaints.htm> .

A person in a residential facility who is receiving treatment or services for certain mental disabilities, or a person under a protective placement order, also has the rights described in the next section.

D. What is the guardian's responsibility in advocating for the rights of a person who is receiving services or treatment for mental illness, developmental disabilities services, alcoholism or other drug dependence?

See Part [X.C](#), above, for discussion of the guardian's authority and role in consenting to and monitoring treatment and services for mental illness, developmental disabilities, alcoholism and other substance dependence.

When a person receives services or treatment for mental illness, developmental disabilities, alcoholism or other drug dependence, he or she is entitled to a list of rights, commonly referred to as *client rights*. These rights apply whether the person is receiving services in the person's home, in a community setting, or in a private or state facility. The rights are set out in [Wis. Stat. § 51.61](#) (titled "Patients Rights") and [Wis. Admin. Code Ch. DHS 94](#). The rights also apply to any person who is under a court order for protective placement or protective services, even if he or she does not have a diagnosis of mental illness, developmental disability or substance dependence. Covered settings include community services under contract with county community program departments, such as residential and vocational support service agencies, and other providers, such as outpatient clinics.

Because these rights are specific to treatment and services for people with mental illness, cognitive disabilities and/or protective service needs in a wide range of settings, it is important for the guardian to become familiar with them. The guardian of person has the power and responsibility to exercise the rights on the person's behalf and to advocate for the person's rights. The person always retains the right to assert his or her rights and make complaints on his or her own behalf. In some cases, even though the guardian has the power to consent, the concurrent consent of the person is required, and/or the person retains the right to refuse treatment to which the guardian has consented. See [X.B](#) and [C](#).

[Wis. Admin. Code Ch. DHS 94](#), creates a grievance procedure which each provider and county is required to adopt. A grievance should first be investigated by the agency you are complaining against, and you have a right to a prompt and written response. Grievances can be appealed for review by the county and then by the state, so that there is a review independent of the agency. The person or guardian can also bring a lawsuit to stop violations of rights and to recover actual and exemplary damages for any harm from rights violations. If the lawsuit is successful, the agency involved may also be required to pay the attorney fees of the person who brought the lawsuit.

Complaints about rights violations that occur in state facilities go to the state Department of Health Services' Clients Rights Office after internal review in the facility. A summary of rights, links to the statutes and rules, and information on the grievance process are available on the state Clients Rights Office web pages at <http://dhs.wisconsin.gov/clientrights/intro.htm>

Rights protected by § 51.61 and DHS 94 include rights:

- This right may now be limited in county-funded services due to funding considerations. See [Chapter 55 Manual](#), Ch. V., Part D.3.
- To adequate and appropriate treatment, rehabilitation and educational services. This should include the right to learn basic living skills, as well as more formal treatment.
- To have the least restrictive treatment condition needed to carry out the purpose of his or her commitment or admission. This right also may now be limited in county-funded services due to funding considerations. See [Chapter 55 Manual](#), Ch. V., Part D.3.
- To be informed about treatment and care and participate in planning treatment and care.
- To live in a comfortable and safe physical place, and to have people treat him or her with respect.

- To be free of excessive or inappropriate medication and to refuse to take any psychoactive medications or participate in treatment, except under certain circumstances. See Part [X.C.](#)
- To not have psychosurgery or other drastic treatment, and to not take part in experimental research, unless he or she gives informed consent, in addition to consent of the guardian. See Part [X.B.](#)
- To be free from physical restraint and isolation, except as part of treatment or in an emergency. Restraint and isolation should never be used for convenience of staff or as a substitute for active programming. See Part [X.E.](#), above.
- To have his or her conversations with staff, and all medical and care records kept confidential, and to have access to treatment records. (Confidentiality and access to treatment records are covered by [Wis. Stat.](#) § 51.30 and [Wis. Admin. Code](#) Ch. DHS 92.)

XVI. RELATIONSHIP OF GUARDIANSHIP TO PROTECTIVE PLACEMENT AND COMMITMENT

A. What are protective services?

Protective services are services provided or arranged by the county for people with mental illness, developmental disabilities, degenerative brain disorders or other like disabilities, to prevent abuse, neglect, self-neglect and exploitation. A person who is under guardianship based on a finding of incompetence will, by definition, be in a disability group that is eligible for protective services. There is very little separate funding for protective services, so they are generally funded by other existing funding programs. Where there is a risk of abuse, neglect or exploitation, the protective services responsibility of the county may give the person higher priority to receive services, where there are limited funds for services.

Protective services may be either voluntary or court-ordered. If a person under guardianship based on a finding of incompetence is at risk of serious harm as a result of a refusal to accept protective services, a court may order protective services. This is done by the same court that ordered the guardianship, but requires a separate petition. See *Ch. 55 Manual*, Ch. IV.

B. What is protective placement?

Protective placement is a court order, under which a person under guardianship based on a finding of incompetence, who is at risk of serious harm in the absence of residential placement and services, may be ordered to live in a particular residence or to enter a residential facility, for purposes of receiving care and support services. Protective placement may not be used for placements for acute care for mental illness, or for placements to psychiatric hospitals. Protective placement may be used if there is a need for admission to a facility for which a guardian cannot give consent, such as long-term nursing home care or care in a large residential facility (see Part [XI.B](#)). However, protective placement can also be used for placements to a home setting, supported apartment, or adult family home, either because the person is protesting the placement, or as a way to get court review of the question of whether the county has an obligation under the circumstances to provide appropriate or less restrictive care or services to the person. See [Chapter 55 Manual](#), Ch. IV., Part H.2.

C. What is commitment, and how does it relate to guardianship?

A commitment order is a court order that requires the person to receive inpatient and/or outpatient placement and treatment for mental illness, developmental disabilities, alcoholism or other substance abuse. Where the person's primary need is for treatment, and he or she refuses to agree to treatment, commitment may be the most appropriate way to require him or her to accept treatment. (Although even with commitment the person may retain the right to refuse certain kinds of treatment unless he or she is found incompetent to do so. See Part [X.C](#), above.) In all cases, commitment requires a showing of a risk of serious harm to self or others unless treatment is given. Commitment is more strictly time-limited, and does not affect the person's other civil rights in the way that guardianship often does. While it carries its own stigma, it does not label the person as someone who is permanently incapacitated.

Commitment is in many cases more effective as a way to get treatment for the person than the use of guardianship. A guardian can consent to treatment, but does not have the authority to compel treatment over the person's objection. See Part [X.C](#). Protective services and placement orders, are primarily aimed at providing long-term support and protection, and not at forcing short-term treatment over a person's objection. In some cases, however, multiple failures to cooperate with treatment, resulting in long-term need for support services or residential care, may mean that guardianship and protective services or placement are more appropriate than commitment.

A guardian's role in commitment proceedings is often very limited. The person will have his or her own attorney, who will look primarily to the person, as his or her client, to tell him or her what to do. The petition is usually brought by the county corporation counsel, who again may not follow guardian wishes. Courts vary on the extent to which a guardian is involved, but will usually at least allow the guardian to state an opinion as to what should happen. The guardian does, however, have a role to play in trying to identify and advocate for the most effective and least restrictive services, in working with all the parties arrive at a service plan with which the person will cooperate, and in making sure that the person's rights and interests are protected while he or she receives treatment and services.

XVII. LEARNING MORE AND GETTING ADVOCACY OR LEGAL ASSISTANCE

A. How can the reader find court forms, and why are they important?

The state court system has adopted forms to be used in guardianship proceedings, petitions for protective services, and petitions for injunctions to prevent abuse, financial exploitation and neglect of elder adults/adults at risk. People trying to bring cases to court are required to use these forms. The forms cannot be changed, but additional information can be typed into the forms, or added by attachment. Because the forms are designed to provide the court with the information it needs to proceed and a template for setting out its decision, the forms provide some guidance on what information will need to be gathered, and on what the court will consider in making its decision. The forms for use in guardianship proceedings in circuit court are found at: <http://www.wicourts.gov/forms1/circuit.htm#guard>.

B. How can the reader learn more about guardianship, alternatives to guardianship and protective services, or look up laws and rules?

- An excellent resource, both for learning about the basic responsibilities of being a guardian, and for help in decision-making on difficult issues, is the state-funded [Guardianship](#)

[Support Center](#) at the Coalition of Wisconsin Aging Groups. The Center is staffed by an attorney who provides information and technical assistance to guardians of adults of any age, by telephone 800.488.2596 ext. 314 or by e-mail through their website. In addition, publications on a variety of issues of concern to guardians are available on the website.

- Readers interested in more detail on guardianship, protective services, and adult abuse reporting and response, or in getting citations to legal source material, should refer to the [Chapter 55 Manual](#), described above in Part [I.B](#)).
- Disability Rights Wisconsin publishes [A Guardian ad Litem's Guide to Placing People with Disabilities or Mental Illness In the Community](#).
- Parents of young adults with developmental disabilities may want to look at [Making a Difference: Thinking about Decision-Making Support in the Transition Process](#) (by Roy Froemming, Board for People with Developmental Disabilities, 2002). This book, written before the guardianship changes in 2006, provides a model for families and individuals to use in thinking about what kinds of decision-making support would help an individual, whether guardianship is needed, and how extensive a guardianship should be.
- For information on health care decision-making:
 - The Guardianship Support Center publishes detailed papers on medical consent issues, and on use of advance directives to reduce the need for guardianship, including [Do-It-Yourself Consumer Packet Planning for Future Health Care Decision-Making](#).
 - [Health Care: Answering Your Legal Questions](#) is available on the State Bar of Wisconsin website.
 - The standard Wisconsin [statutory forms](#) for health care power of attorney forms are available on the Wisconsin Department of Health Services website.
- For information on use of trusts, financial powers of attorney and representative payees:
 - Use of trusts for people who rely on Medicaid and SSI is discussed in Ch. VIII of [One Step Ahead](#) (see full cite in Part [XVII.C](#)).
 - [Powers Of Attorney And Trusts: Duties and rights as agents and trustees](#) (State Bar of Wisconsin, 2008) is available on the State Bar website. This booklet provides background for people who are considering taking on the role of trustee or agent under a financial power of attorney.
 - [Financial Independence: What you can expect from Payeeships](#), a publication available on the Disability Rights Wisconsin website, answers questions regarding Social Security representative payees.
 - The standard Wisconsin [statutory forms](#) for financial power of attorney forms are available on the Wisconsin Department of Health Services website.

C. How can the reader learn more about community support services and public benefits programs?

In order to carry out his or her responsibilities as guardian for a person who relies on public benefits or long-term support services, the guardian will need to become familiar with the programs, not only that the person is involved in, but also that might be available to assist the person, but for which no application has yet been made. Community services are services that help people live, learn and work in their own communities as independently as possible, while at the same time helping the person to develop or retain skills. For people with significant mental disabilities, they can often mean the difference between institutionalization and life in a normal home and can provide meaningful, productive activities. Some of the sources of information include:

- [The Wisconsin Department of Health Services](#) is the agency that administers Medicaid and the long-term support services that serve adults in community residential and work settings. Information available on this website includes information on guardianship, abuse and neglect issues, benefit programs, long-term support programs for people in community settings, including various types of residential care settings, and programs to help people work without losing needed benefits. It all so contains information on Aging and Disability Resource Centers that now serve a majority of Wisconsin counties.
- The [Board for People with Developmental Disabilities](#) has a website that contains an extensive catalog of publications that can be downloaded or ordered in print version, including many related to guardianship, transition and financial planning, housing, and advocacy.
- [Disability Rights Wisconsin](#) is a statewide advocacy agency for children and adults with disabilities. Their website has a variety of information on individual rights, benefits programs, and protection from abuse and neglect, including the publication [*Understanding The Funding System for People with Developmental Disabilities or People With Mental Illness*](#).
- Where the guardian is concerned with issues about access to public benefits, or about how a particular event or decision will affect future benefits, he or she may be able to get benefits counseling from one of several programs. Currently existing benefit counseling programs include:
 - [Elder Benefit Specialists](#) provide information and advocacy for people age 60 or older on issues related to public benefits. Benefit specialists work with back-up from staff attorneys. Elder benefit specialist services are available in every county.
 - [Disability Benefit Specialists](#) provide information and advocacy for people ages 18 through 59 on issues related to public benefits. Disability benefit specialists are available in every county served by an [Aging and Disability Resource Center](#).
 - [Health and Employment Counseling](#) for people with disabilities who are working, or planning to work is available through programs around Wisconsin. Programs are not available in all counties, and some programs focus on people with certain types of disabilities.

- [One Step Ahead: Resource Planning for People with Disabilities Who Rely on Supplemental Security Income and Medical Assistance](#), by Roy Froemming (Wisconsin Board for People with Developmental Disabilities, 2009) is available on-line, or free hard copies can be ordered, from [WBPDD](#)'s website. This booklet provides information on financial eligibility requirements for programs that provide income, health care and support services to people with disabilities, including ways that families and others can provide supplemental assistance to people without affecting their essential benefits. Chapter VIII provides information on supplemental needs trusts, and CH. IX discusses home ownership.

D. How can the reader find resources and referral sources for legal assistance?

- If the person has low income he or she may be eligible for free legal services. [A list of legal service agencies for people with low incomes](#), and specialized programs that provide advocacy for certain groups or certain types of legal problems is on the Wisconsin State Bar website. A person with a disability may be able to get advocacy assistance, regardless of income, from [Disability Rights Wisconsin](#), which is funded by the federal and state governments to protect rights and provide advocacy in the benefits and service systems for people with disabilities. All of these programs have limited resources, and have priorities for the kinds of cases they will accept.
- If no legal services program is available, a private attorney may be willing to take on a case that presents a clear denial of legal rights, either on a no-fee or reduced-fee basis, on a contingency-fee basis, or in the hope of recovering attorney fees. Attorney fees may be available in personal injury cases, discrimination and other civil rights cases, denials of rights under [Wis. Stat. § 51.61](#), and cases where counties or the state make clearly wrong decisions in denying or reducing public benefits and long-term support services.

E. What are some other websites of potential interest to guardians?

Some places to get started on learning about disabilities and other available resources include (this is not an exhaustive list):

- [The Wisconsin Department of Health Services](#) website, in addition to information about programs, support services and protective services, has information about various types of disabilities.
- The [Greater Wisconsin Chapter of the Alzheimer's Association](#) website has information and resources on aging and dementia.
- [Movin' Out](#) is a non-profit organization that assists people with disabilities and their families and guardians to find safe, accessible, affordable housing.
- Information on mental illness and resources and advocacy for people with mental illness and their families is available from [NAMI Wisconsin](#) and [Mental Health America of Wisconsin](#).
- [Family Voices of Wisconsin](#) is a statewide network of families with children who have [special](#) health care needs and/or disabilities. Their recently updated website contains downloadable information related to community-based supports and Medicaid programs, and a list of additional resources and links that may be helpful.

- Sponsored by the Waisman Center at the University of Wisconsin-Madison, [Family Village](#) includes an extensive library of on-line resources for parents.
- For guardians concerned with transition from high school to adult services:
 - The state Department of Public Instruction’s website contains links to [transition-related resources](#) and the [Wisconsin Statewide Transition Initiative](#), a project aimed at improving results for students with disabilities as they transition from high school to post high school.
 - “Opening Doors to Self-Determination Skills: Planning for Life After High School,” a 24-page publication, which can be downloaded from <http://dpi.wi.gov/sped/pdf/tranopndrs-self-determination.pdf>.