



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2005 Wisconsin Act 387
[2005 Senate Bill 391]

Guardianship Law Revisions

2005 Wisconsin Act 387 renumbers most of ch. 880, Stats., relating to guardianship, to newly created ch. 54, Stats. The Act also substantially revises the guardianship law. The major provisions of Act 387 are as follows:

Standards for Appointment of a Guardian

Guardian of the person: Because of impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety.

Guardian of the estate: Because of an impairment, the individual is unable to effectively receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs, to the extent that the individual: has property that will be dissipated in whole or in part; is unable to provide for his or her support; or is unable to prevent financial exploitation.

For both: The individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

Who May Be Nominated as Guardian

The court must consider the opinions of the proposed ward and the ward's family members regarding who should act as guardian. The court must also consider any potential conflicts of interest when appointing a guardian.

In most cases, if a proposed ward has an agent under a durable power of attorney, or a power of attorney for health care, that person must be appointed as guardian.

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: <http://www.legis.state.wi.us/>.

If a proposed ward has nominated a specific person as guardian, the court is required to appoint that person, unless the court finds the appointment is not in the person's best interests.

If a proposed ward is a minor, or a person with a developmental disability or a serious and persistent mental illness, that person's parent must be appointed as guardian, if the parent is willing and suitable. The court must consider any objection to the parent's appointment.

General Powers and Duties of Guardian

General: Powers are limited to those authorized by statute or court order, and that are the least-restrictive form of intervention. The ward retains all rights not expressly assigned to the guardian or otherwise limited by statute.

Guardian of Estate – Duties: A guardian of the estate has the following duties:

- Take possession of the ward's real and personal property, of any rents, income, and benefits accruing from the property, and of any proceeds arising from the sale, mortgage, lease, or exchange of the property and prepare an inventory of these. However, the title of all the income and assets, and the proceeds, remain with the ward.
- Retain, expend, distribute, sell, or invest the ward's property, rents, income, benefits, and proceeds and account for all of them.
- Determine, if the ward has executed a will, the will's location, determine the appropriate persons to be notified in the event of the ward's death, and, if the death occurs, notify those persons.
- Use the ward's income and property to maintain and support the ward and any dependents of the ward.
- Prepare and file an annual account.
- At the termination of the guardianship, deliver the ward's assets to the persons entitled to them.
- With respect to claims, pay the legally enforceable debts of the ward, including by filing tax returns and paying any taxes owed, from the ward's estate and income and assets.
- File a statement that describes real property with the register of deeds of any county in which the ward possesses real property and of which the guardian has actual knowledge.
- For a ward who receives governmental benefits for which a representative payee is appropriate, if no representative payee is appointed, apply to be appointed the ward's representative payee, or ensure that a representative payee is appointed.
- Perform any other duty required by the court order.

Guardian of the Estate: powers requiring court approval:

- Make gifts in the frequency, amount, and to donees specified by the court in approval of a petition under s. 54.21.
- Transfer assets of the ward to the trustee of any existing revocable living trust that the ward has created for himself or herself and any dependents, or, if the ward is a minor, to the trustee of any trust created for the exclusive benefit of the ward that distributes to him or her at age 18 or 21, or, if the ward dies before age 18 or 21, to his or her estate, or as the ward has appointed by a written instrument that is executed after the ward attains age 14.
- Establish a trust as specified under 42 USC 1396p (d) (4) and transfer assets into the trust.
- Purchase an annuity or insurance contract; exercise rights to elect options or change beneficiaries; and surrender the policies for their cash value.
- Ascertain, establish, and exercise any rights available to the ward under a retirement plan or account.
- Exercise any elective rights that accrue to the ward as the result of the death of the ward's spouse or parent.
- Release or disclaim any interest of the ward that is received by will, intestate succession, nontestamentary transfer at death, or other transfer.
- If appointed for a married ward, exercise any management and control right over the marital property or property other than marital property and any right in the business affairs that the married ward could exercise under ch. 766 if the ward were not an individual found incompetent, consent to act together in or join in any transaction for which consent or joinder of both spouses is required, or execute under s. 766.58 a marital property agreement with the ward's spouse or, if appointed for a ward who intends to marry, with the ward's intended spouse, but may not make, amend or revoke a will.
- Provide support for an individual whom the ward is not legally obligated to support.
- Convey or release a contingent or expectation interest in property, including a marital property right and any right of survivorship that is incidental to a joint tenancy or survivorship marital property.
- In all cases in which the court determines that it is advantageous to continue the business of a ward, continue the business on any terms and conditions specified in the order of the court.
- Apply to the court for adjustment of any claims against the ward incurred before entry of the order appointing the guardian or the filing of a *lis pendens*, as provided in s. 54.47.

Guardian of Estate: powers not requiring court approval:

- Provide support from the ward's income and assets for an individual whom the ward is legally obligated to support.
- Enter into a contract, unless otherwise prohibited by ch. 54.
- Exercise options of the ward to purchase securities or other property.
- Authorize access to or release of the ward's confidential financial records.
- Apply for public and private benefits.
- Retain any real or personal property that the ward possesses when the guardian is appointed, or that the ward acquires by gift or inheritance during the guardian's appointment.
- Subject to ch. 786, sell, mortgage, pledge, lease, or exchange any asset of the ward at fair market value.
- Invest and reinvest the proceeds of sale of any assets of the ward and any of the ward's other moneys in the guardian's possession in accordance with ch. 881.
- Invest the proceeds of sale of any assets of the ward and any of the ward's other moneys in the guardian's possession in the real or personal property that is determined by the court to be in the best interests of the ward's estate.
- Settle all claims and accounts of the ward and appear for and represent the ward in all actions and proceedings except those for which another person is appointed.
- Take any other action that is reasonable or appropriate to the duties of the guardian of the estate.

Guardian of the Person Duties: A guardian of the person has the following duties:

- Make an annual report on the condition of the ward to the court that ordered the guardianship and to the county department designated under s. 55.02 (2).
- Endeavor to secure any necessary care or services for the ward that are in the ward's best interests, based on all of the following:
 - Regular inspection, in person, of the ward's condition, surroundings, and treatment.
 - Examination of the ward's patient health care records and treatment records, and authorization for redisclosure, as appropriate.
 - Attendance and participation in staff meetings of any facility in which the ward resides or is a patient, if the meeting includes a discussion of the ward's treatment and care.

- Inquiry into the risks and benefits of, and alternatives to, treatment for the ward, particularly if drastic or restrictive treatment is proposed.
- Specific consultation with providers of health care and social services in making all necessary treatment decisions.

Guardian of the person -- powers. A guardian of the person's powers are limited to those ordered by the court.

The following rights are ***never lost*** by the ward:

- The right to have access to and communicate privately with the court and governmental representatives.
- The right to have access to and communicate privately with, and retain, legal counsel, protection and advocacy personnel, and long-term care ombudsmen.
- The right to protest a residential placement and review the need for guardianship and protective services.
- The right to exercise certain constitutional rights such as the freedom of speech and association, and free exercise of religion.

The court may declare certain rights that an individual is incompetent to exercise, but these rights are ***retained unless removed*** by a court. If that removal occurs, the ward can exercise them with guardian approval. These include the rights to:

- Consent to marry.
- Execute a will.
- Serve on a jury.
- Hold certain operator's licenses.
- Consent to sterilization.
- Consent to organ donation.
- Vote.

The following powers may be exercised by the guardian on the ward's behalf ***only*** if the court finds by clear and convincing evidence, that the individual lacks evaluative capacity to exercise the power:

- Consent to voluntary or involuntary medical examination and treatment, and voluntary receipt of medication, including psychotropic medications.
- Consent to administration of psychotropic medications unless the ward protests.

- Consent to participation in research, unless it is clear that the ward would never have consented, if it might help the ward; if it might not help the ward but it might help others, if there is no more than minimal risk.
- Consent to participation in research that involves greater than minimal risk, even if it might not help the ward, if it is consistent with the wards' wishes.
- Consent to experimental treatment, if in the ward's best interests and there is no prior expressed contrary wishes.
- Exercise all of the usual powers of a guardian of the person:
 - Provide informed consent to social and supported living services.
 - Consent to release of confidential records.
 - Make decisions about travel.
 - Consent to admission to residential facilities.
 - Choose of service providers.
 - Make decisions regarding employment.
 - Initiate a petition for divorce.
 - Act as the ward's advocate.
 - Apply for protective placement or commitment of the ward.
 - Have custody of the ward.

Procedures for Obtaining a Guardianship

Act 387 clarifies, modifies, and expands upon the procedures that must be followed in pursuing the appointment of a guardian. These procedures include the following:

- Criteria for transfer of a foreign guardianship to Wisconsin, and the process for determining venue and the county of financial responsibility.
- Due process rights of proposed ward, and provides additional due process rights for the ward during physical and psychological examinations.
- Criteria for appointment of a guardian ad litem; expands duties of a guardian ad litem; and requires continuing legal education for guardians ad litem.
- Criteria for attendance of the proposed ward and proposed guardian to be present at hearing on the guardianship petition.
- Time limits for holding a hearing on a guardianships petition.

Post-Appointment Matters

Act 387 addresses the following matters that arise after the appointment of a guardian:

- Inventory filing requirements; accounting requirements.
- Procedures for review and modification of guardianships.
- Criteria for removal of guardian.

Effective Date: Act 387 takes effect on December 1, 2006.

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