

GUARDIANSHIP, GUARDIANS AD LITEM AND POWERS OF ATTORNEY

This document, created by the End Domestic Abuse Wisconsin — Wisconsin Coalition Against Domestic Violence — Legal Department, does not constitute legal advice.

In Wisconsin, family members generally **do not** have the authority to make financial decisions or health care decisions for an individual when that individual can no longer make those decisions on his or her own. Wisconsin is **not** a “family consent” or “next-of-kin” state which means that financial and health care decision-making authority **does not** automatically pass on to the closest family member except in very limited situations. An individual has the power to control who he or she wants to make decisions he or she is unable to do so.

Guardianship

A guardian is an individual appointed by the court to act on a person’s behalf and to act as the legal decision-maker. Guardianship is needed when an individual needs a substitute decision-maker and has not given an advance directive (legal document expressing one’s wishes) appointing one. For example, a person would need a guardian if that person doesn’t have a Power of Attorney-Health Care (POAHC), but needs someone to make a health care decision for him or her.

The guardianship process starts when an individual files a petition at a courthouse for guardianship of a person. A guardian may be appointed for a person adjudicated (found) to be incompetent, a spendthrift, or a minor (as defined in Secs. [54.10\(3\)](#), [54.01\(31\)](#), and [54.01\(20\)](#) Wis. Stats., respectively). Spendthrifts and minors do not need to be found incompetent to have a guardian appointed for them.

- The person for whom the guardian is appointed is called the **ward**.

A guardian makes decisions for the ward according to the best interests of the ward, not according to the ward’s wishes. The guardianship process is considered a last resort, because a guardianship gives the ward’s legal decision-making authority to the guardian and takes away the majority of the ward’s decision-making power. However, the guardian is obligated to make decisions for the ward in the least restrictive manner to the ward.

- **Incompetent** is defined in [Sec. 54.10\(3\), Wis. Stats.](#): “unable to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions, including decisions about his or her post-hospital care.”

There are two basic types of guardians. **A Guardian of the Person** makes personal decisions for the ward such as where the ward will live and health care decisions. **A Guardian of the Estate**

makes financial decisions for the ward. The court can limit the authority of the guardian however it deems necessary. If a person needs a guardian but already has a POA in place, the judge may decide to keep the POA valid and give the guardian authority to make decisions not covered by the POA.

<http://www.gwaar.org/images/stories/GSC/BasicsofGship12262014.pdf>

What is a Guardian ad litem?

A “Guardian Ad Litem” (GAL) is often confused with a guardian. A GAL is a person appointed by the court to:

- Represent the best interests of the person for whom the GAL is appointed.
- Investigate a case and make a recommendation to the court.

In a **restraining order** situation, a court may appoint a GAL for:

- Child abuse, [Sec. 813.122\(3\)\(b\)1m, Wis. Stats.](#)
- Harassment, [Sec. 813.125\(2g\), Wis. Stats.](#)
- Individual at risk, [Sec. 813.123\(3\)\(b\), Wis. Stats.](#)

For a **child custody hearing**, a GAL appointed by the court will interview the child, the parents, investigate the situation, and make a recommendation to the court as to the best interests of the child. [Sec. 767.407, Wis. Stats.](#)

In a **guardianship** proceeding, after a guardianship petition is filed, the court will appoint a GAL to interview the proposed guardian, the proposed ward, any other close parties, and make a recommendation to the court on whether to grant guardianship. [Sec. 54.40, Wis. Stats.](#)

<http://www.wisbar.org/forpublic/inneedinformation/pages/guardians-ad-litem.aspx>

<http://docs.legis.wisconsin.gov/statutes/statutes/803/01/3>

Power of Attorney (POA)

A Power of Attorney (POA) document is an advance directive which allows a person to choose who makes health care and/or financial decisions when he or she is unable to make such decisions.

- **Advance directives** are legal documents that give one a way to express one’s wishes to family, friends, and health care professionals before getting sick or incapacitated.
<https://www.nlm.nih.gov/medlineplus/advancedirectives.html>
<https://gwaar.org/publications?searchterm=advance+directive>
- The creator of the POA is called the **principal**, and the person designated to make decisions is called the **agent**.

The principal can choose any person to be his or her POA agent. The POA agent does not have to be a spouse or even a family member, although many people do choose family members. The agent's duty is to follow the instructions of the principal. Therefore, it is extremely important that the principal choose an agent that he or she can trust. The principal should talk to the desired agent and make his or her wishes known.

The principal may write specific instructions for the agent in the POA document. If a situation arises where the agent does not know the principal's wishes, then the agent's duty is to act in the principal's best interest. Because the agent has the duty to follow instructions of the principal, the agent must listen to the principal even when the POA is activated.

The Power of Attorney for Health Care (POAHC) allows a principal to give an agent authority to make health care decisions for the principal. In Wisconsin, a POAHC becomes active when two physicians (or a physician and a licensed psychologist) find the principal to be incapacitated. [Sec. 155.05\(2\), Wis. Stats.](#)

- **Incapacity** as it relates to a POAHC is defined in [Sec. 155.01\(8\), Wis. Stats.](#): the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions.

The Power of Attorney for Finances (POAF) allows a principal to give an agent authority to make financial decisions for the principal. In Wisconsin, a POAF becomes activated upon the execution/creation of the POAF unless otherwise stated in the POAF document. This is important to consider as many people only want a POAF to become activated when they become incapacitated.

- **Incapacity** as it relates to a POAF is defined in [Sec. 244.02\(7\), Wis. Stats.](#): inability of an individual to manage property, finances, or business affairs because the individual meets one of the following criteria:
 - (a) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.
 - (b) Is missing.
 - (c) Is detained, including incarceration in a correctional facility.
 - (d) Is outside the United States and unable to return.

A POAF gives an agent broad powers to handle the principal's finances. A principal may want to provide specific and detailed instructions as to what an agent can or cannot do in the POAF in order to limit the possibility of the agent abusing his or her power.

- **Springing**: The principal may provide for "springing" power, which means that the POA "springs" into effect when the principal is incapacitated, not when it is signed.
- **Durable**: A durable POA allows the POA to remain in effect if the principal becomes incapacitated or incompetent.

Creating a POA

A person can create a POA on his or her own. One does not have to go to court or hire an attorney, but an attorney will be able to answer questions and create a more detailed POA according to one's wishes. No one can create a POA for someone else without consent. When the POA becomes activated, the agent has the authority to make health care/financial decisions for the principal as authorized in the POA document.

After the principal creates a POA, distribute copies of it to the appropriate facilities and institutions. For a POAHC, this means the principal's hospital, doctor, and any other facility dealing with his or her health care. For a POAF, this means the principal's bank and any other institution dealing with his or her finances.

Create a Power of Attorney for Health Care (POAHC)

<https://www.dhs.wisconsin.gov/forms/advdirectives/index.htm>

<https://www.dhs.wisconsin.gov/forms/advdirectives/f00085.pdf>

Create a Power of Attorney for Finances (POAF)

<https://www.dhs.wisconsin.gov/forms/advdirectives/index.htm>

Revoke or Deactivate a POA

Because an agent receives decision-making authority from a POA, it is important to realize that there is the possibility that the agent will abuse that authority. A principal must trust the agent he or she chose and talk to the agent about the potential decisions he or she will be making. If the principal no longer trusts the agent, he or she can remove the agent by revoking the POA. The principal may revoke his or her POA at any time.

There is a difference between revocation of the POA document and deactivation of the POA document. Revoking a POA will cancel the document entirely and will mean that the POA is no longer valid. Deactivation, on the other hand, simply means that the principal has regained capacity to make decisions on his or her own. If a POA is deactivated, it is still a valid document, but the agent does not obtain any authority to make decisions for the principal until it is activated.

Revoke a Power of Attorney for Finances (POAF)

No form available

Revoke a Power of Attorney for Health Care (POAHC)

<https://gwaar.org/revoking-a-power-of-attorney-for-health-care>

Other Internet Resources

Guardianship and Power of Attorney Information

<http://wilawlibrary.gov/topics/familylaw/guardian.php>

<http://wilawlibrary.gov/topics/estate/poa.php>

Guardianship Explanation

<http://www.dhs.wisconsin.gov/publications/P2/p20460.pdf>

<http://www.disabilityrightswi.org/wp-content/uploads/2008/09/guardianship.PDF>

Guardianship Process Flowchart

<https://gwaar.org/process-for-establishing-guardianship-of-an-adult>

Guardianship of a Minor by County

<https://www.kidsmatterinc.org/get-help/for-families/guardianship/guardianship-minor-wisconsin-county/>

Guardianship Support Center

<https://gwaar.org/guardianship-resources>

Wis. Stat. Chapter 51- State Alcohol, Drug Abuse, Developmental Disabilities, and Mental Health Act

<https://docs.legis.wisconsin.gov/statutes/statutes/51>