

# ***Legal Decision Making Tools: Substitute Decision-Making***



## ***A PROFESSIONAL'S GUIDE***



# Webcast: Legal Decision Making Tools: Substitute Decision-Making

Competency/skill – Ability to explain basic concepts relating to Advance Directives and other legal decision making tools

## Objectives:

1. List three different legal decision making tools.
2. Explain the role of the “agent” in the power of attorney for health care.
3. Describe key factors to consider when selecting an individual to serve as the agent in the power of attorney for health care.
4. Describe what powers are delegated when completing financial durable powers of attorney.
5. Explain what guardianship means.

## Sample discussion questions:

1. What are the differences between a power of attorney for health care and a living will?  
Role play how you would explain these two advance planning tools to a consumer.
2. Selecting a person to serve as someone’s agent as it relates to a power of attorney for health care is an important decision. Role play how you would discuss factors for a consumer to consider in making that selection.
3. What are the different types of guardianships?
4. It may be helpful to refer to printed material when discussing legal decision making tools. Discuss what printed material is available on this subject in your Aging & Disability Resource Center.

# SUBSTITUTE DECISION-MAKING



**By Betsy Abramson, Attorney**

## SUBSTITUTE DECISION- MAKING

- **Advance planning for health care decision-making**
- **Advance planning for financial decision-making**
- **If incompetent, court-ordered guardianship**



## Why Plan Ahead?

- To select own decision-maker
- To identify preferences
- Avoid costs and time of guardianship
- **NO FAMILY CONSENT LAW in Wisconsin – Really!**

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## Wisconsin's Health Care Advance Directives

- Living Will  
(Declaration to Physicians)
- Power of Attorney for Health Care
- Do-Not-Resuscitate Orders

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## **LIVING WILL**

- **Only applies in two medical situations:**
  1. **Terminal with death “imminent”**
  2. **“Persistent Vegetative State”**
- **Only applies to two “treatments”**
  1. **Life-sustaining Treatment**
  2. **Feeding Tubes**

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## **Living Will Doesn't Apply...**

- **Declarant pregnant**
- **Not in PVS or Terminal with death imminent....**
  - Exs: post-stroke, Alzheimer's, head injury....**
- **Not life-sustaining treatment or tube feedings involved...**
  - Exs: admission to facilities, home care, bone-setting, medications...**

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## Completing a Living Will

- Declarant – makes three decisions by checking boxes
- Two “disinterested” witnesses
- Signs in front of witnesses
- Discussion with family, friends, docs
- Distribution and Storage

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## CHOICES IN LIVING WILL

- Life-sustaining when terminal - No choice
- Feeding tubes when terminal - Choice
- Life-sustaining when in PVS - Choice
- Feeding tubes when in PVS - Choice

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## **Power of Attorney for Health Care**

- **“Principal” appoints an agent.**
- **Effective not at certain medical diagnoses; rather, when “incapacitated”**
- **Not just for certain medical procedures; rather, *almost* any procedure/service**

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## **Power of Attorney for Health Care, cont'd**

- **“Principal” appoints an “agent”**
- **Effective not at certain medical diagnoses; rather, when “incapacitated”**
- **Therefore, more comprehensive than Living Will**

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## Selecting POAHC Agent

- **Trustworthiness; will follow principal's, not own preferences**
- **Geographically close**
- **Assertive, strong**
- **Good communicator**
- **Not health care provider, spouse or employee of**

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## Before Completion

- **Consider agent choices**
- **Consider alternate**
- **TALK with Agent & Alternate**
- **Three specific decisions –**
  - **Authority to admit to NH/CBRF**
  - **Authority to withhold/withdraw feeding tubes**
  - **Continued effect if/when pregnant**

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## Completing a POAHC

### ***Before:***

- **Identify agent and alternate**
- **Discuss of preferences with agent / alternate**
- **Make three decisions on delegation**

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## Completing a POAHC

### ***Sign, talk, talk, talk:***

- **Two “disinterested” witnesses**
- **Sign in front of witnesses**
- **More discussion with family, friends, docs**
- **Distribution and Storage**

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## **Do-Not-Resuscitate Orders**

- **“Qualified patient”**
- **Patient, guardian or agent asks physician to order**
- **Bracelet issued**
- **EMTs, First Responders, Emergency Personnel: *“No CPR, please!”***

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## **Financial Durable Powers of Attorney**

- **Why needed?**
- **“Principal” appoints “agent” or “attorney-in-fact”**
- **“Durable”**
- **Effective “immediate” or “springing”**
- **Powers – narrow or broad**

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## **Powers to Delegate**

- **Banking**
- **Bill paying**
- **Real estate**
- **Investments**
- **Insurances**
- **Public benefit applications**

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## **More Powers....**

- **Pensions**
- **Borrowing / Collecting loans**
- **Gifting – *Caution!***
  - **Limit to whom?**
  - **Limit amounts?**
  - **Limit Frequency?**
  - **Third party consent?**

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## Selecting Agent

- **Honesty, honesty, honesty**
- **Will follow principal's wishes**
- **Good financial management skills**
- **Still more honesty**

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## Protections

- **Choice of Agent**
- **Limits on Gifting**
- **Monitorings / Accountings**
- **Fiduciary duty – signed**
- **Authority of others to bring action**

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## What if never did advance planning?

- Ignorance
- Invincibility
- Perceived costs
- Procrastination
- Never had competence

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## GUARDIANSHIP

**“Incompetent” means adjudged by a court to be substantially incapable of managing his or her property or caring for self by reason of infirmities of aging, developmental disabilities, or other like incapacities.**

880.01(4), Wis. Stats.

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## **Types of Guardianship**

- **Guardian of the PERSON**
- **Guardian of the ESTATE**
  
- **PLENARY Guardianship**
- **LIMITED Guardianship**

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## **More Terms....**

- **Proposed Ward**
- **“Stand-by” Guardian**
- **“Successor” Guardian**
- **Register in Probate**

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## **Roles of Attorneys**

- **Petitioner's Attorney**  
*represents Petitioner*
- **Guardian ad Litem**  
*represents proposed ward's  
"best interests"*
- **Defense / Advocacy Counsel**  
*represents proposed ward*

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## **Court Procedure**

- **Pre-Petition**
- **Filing Petition**
- **Pre-Hearing**
- **Hearing**
- **Order / Letters of Guardianship**
- **Post-Appointment**

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## **Decision-Making Standard for Guardian**

- **“BEST INTERESTS of the Ward”**
- **Example:**  
*Guardian of Estate*
- **Example:**  
*Guardian of Person*

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## **Accountability**

- **G/E: Annual Account**
- **G/P: Annual Report**
- **Complaints / Calls / Letters to Register in Probate or County Adult Protective Services**

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## **Resources**

- **Health Care Advance Directives**
- **Financial Power of Attorney**  
**Forms: <http://dhfs.wisconsin.gov/forms/AdvDirectives/index.htm>**
- **Guardianship**  
**[www.cwag.org](http://www.cwag.org) - Legal Rights and Benefits / Wisconsin Guardianship Support Center - 1-800-488-2596**

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