

7060 PETITION FOR GUARDIANSHIP OF INCOMPETENT PERSON AND APPLICATION FOR PROTECTIVE PLACEMENT; WIS. STAT. § 54.10 AND 55.08(1)

(Insert Wis JI-Civil 100, Opening)

A petition has been filed to appoint a guardian for (individual) and for (his) (her) protective placement. The petition alleges that (individual) is an incompetent person by reason of (a developmental disability) (degenerative brain disorder) (serious and persistent mental illness) (or other like incapacities) and needs a guardian appointed and protective placement. A guardian is a person appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and the personal needs of an individual found incompetent. Protective placement means a placement that is made to provide for the care and custody of an individual.

The fact that a petition has been filed is not evidence that (individual) is incompetent or in need of protective placement. Every person is presumed to be competent. The burden of proving incompetency and the need for protective placement is upon (petitioner). The evidence must show the incompetence exists at the time of this hearing.

This is a civil, not a criminal case. While (individual) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could result in a loss of personal liberty. Therefore, you should approach your task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

At the end of the trial, you will be given a special verdict consisting of three questions. You must answer them according to the evidence and to the instructions I will give you.

Wis JI-Civil 205, Burden of Proof: Middle

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

Question 1 in the verdict reads: Is (individual) incompetent at the time of this hearing?

To answer question 1 “yes,” you must find the following:

- a. That (individual) is aged at least 17 years and 9 months; and
- b. That (individual) suffers from (“a developmental disability”) (“degenerative brain disorder”) (“serious and persistent mental illness”), or (“other like incapacities”); and
- c. That because of (impairment), (individual) is unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that (he) (she) cannot (meet the essential requirements for (his) (her) physical health and safety).

“Meet the essential requirements for health or safety” means perform those actions necessary to provide the healthcare, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur¹; and

- d. That (individual)’s need for assistance in decision-making or communication cannot 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.

[A “developmental disability” means a disability attributable to mental retardation, cerebral palsy, epilepsy, or autism or any other neurological conditions closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation which has continued or can be expected to continue indefinitely. The condition must substantially impair the individual so that he or she cannot adequately provide for his or her own care or custody; it must constitute a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.]

[“Degenerative brain disorder” means the loss or dysfunction of an individual’s brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs.]

[“Serious and persistent mental illness” means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration. It includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol or drug dependence.]

[“Other like incapacities” means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability, or continued

consumption or absorption of substances, and that produce a condition which substantially impairs an individual from providing for his or her own care or custody].

Unless (individual) is unable to communicate decisions effectively in any way, your determination of incompetency may not be based on mere old age, eccentricity, poor judgment, or physical disability.

Question 2 of the verdict reads: If you answer question 1 “yes,” then answer this question: Is the condition permanent or likely to be permanent?

You should answer “yes” if (individual)’s incompetence is likely to continue for the balance of (his) (her) life.

Question 3 of the verdict reads: If you answer question 2 “yes,” then answer this question: Is (individual) in need of protective placement?

A person is considered to be in need of protective placement if that person:

1. As a result of (insert incapacity), is so totally incapable of providing for (his) (her) own care or custody as to create a substantial risk of harm to (himself) (herself) or others; and
2. Has a primary need for residential care and custody.

Serious harm may be evidenced by overt acts or acts of omission.

If your answer to each of the questions in the Special Verdict is “yes,” then the court may order a protective placement. However, a protective placement will be ordered only after (individual)’s needs have been comprehensively evaluated, and (individual) will be placed in the least restrictive environment consistent with (his) (her) needs.

Do not concern yourself with the length or nature of the protective placement.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

SUGGESTED VERDICT

Question 1: Is (individual) incompetent?

Answer: _____

Yes or No

Question 2: If you answer question 1 "yes," then answer this question:

Is (his) (her) condition permanent or likely to be permanent?

Answer: _____

Yes or No

Question 3: If you answer question 2 "yes," then answer this question:

Is (individual) in need of protective placement?

Answer: _____

Yes or No

COMMENT

This instruction was approved in 2006 and revised in 2009 and 2019. The comment was updated in 2012 and 2019.

A petition for guardianship of an incompetent person shall be heard prior to ordering protective placement or protective services. Wis. Stat. § 55.075(3).

The middle burden of proof (clear, satisfactory, and convincing) applies to the determination of incompetency and to the need for protective placement. Wis. Stat. § 54.44(2) and § 55.10(4)(d) .

The terms “individual found incompetent,” “developmental disability,” “degenerative brain disorder,” “serious and persistent mental illness”), and “other like incapacities” are defined in Wis. Stat. §§ 54.01(16), 54.01(8), 54.01(6), 54.01(30), and 54.01(22) respectively.

The second and third verdict questions are based on the findings required to establish the need for protective placement. Wis. Stat. § 55.08(1).

Alzheimer's disease is a "degenerative brain disorder" and does not fall within the definition of a mental illness under Ch. 51. Alzheimer's is properly addressed under the provisions of Ch. 55. Ch. 51 provides for "active" treatment for those who are proper subjects for treatment while Ch. 55 provides for residential care and custody of those persons with mental disabilities, such as Alzheimer's, that are likely to be permanent. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179.

1. Wis. Stat. § 54.01(19)

©2019, Regents, Univ. of Wis.