

**7061 PETITION FOR GUARDIANSHIP OF INCOMPETENT PERSON AND APPLICATION FOR PROTECTIVE SERVICES; WIS. STAT. § 54.10 AND 55.08(2)**

(Insert Wis JI-Civil 100, Opening)

A petition has been filed to appoint a guardian for (individual) and for protective services for (him) (her). 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 services. 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 services include: (insert services that may be ordered under the facts)

- (a) Outreach.
- (b) Identification of individuals in need of services.
- (c) Counseling and referral for services.
- (d) Coordination of services for individuals.
- (e) Tracking and follow-up.
- (f) Social services.
- (g) Case management.
- (h) Legal counseling or referral.
- (i) Guardianship referral.
- (j) Diagnostic evaluation.
- (k) Any services that, when provided to an individual with developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacity,

keep the individual safe from abuse, financial exploitation, neglect, or self-neglect or prevent the individual from experiencing deterioration or from inflicting harm on himself or herself or another person.

The fact that a petition has been filed is not evidence that (individual) is incompetent or in need of protective services. Every person is presumed to be competent. The burden of proving incompetency and the need for protective services 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 have a significant impact of (his) (her) life. 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 two 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) (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 occur); 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 2 "yes," then answer this question: Is (individual) in need of protective services?

(Individual) is considered to be in need of protective services if (he) (she) will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others if protective services are not provided.

If your answer to both of these questions in the Special Verdict is "yes," then the court may order protective services. However, protective services will be ordered only after (individual)'s needs have been comprehensively evaluated.

Do not concern yourself with the nature of the protective services.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

## SPECIAL VERDICT

Question 1: Is (individual) incompetent?

Answer: \_\_\_\_\_

Yes or No

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

Is (individual) in need of protective services?

Answer: \_\_\_\_\_

Yes or No

## COMMENT

This instruction and comment were approved in 2006 and revised in 2009 to reflect the legislative changes in 2007 Wis. Act 45. The comment was updated in 2014.

A petition for guardianship of an incompetent person shall be heard prior to ordering 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 services. 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 verdict question is based on the findings required to establish the need for protective services. 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.