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The information contained in this document expresses the understanding of the law being discussed and the position of the agency respecting that law. This position has been drafted by the legal and program staff of the agency and adopted by the appointed members of the Board on Aging and Long Term Care.

BOALTC Position on the Rights of a Person under Guardianship  
Relating to Involuntary Medical Treatment

A guardian is not without limitation when consenting to forcible, involuntary administration of medical care to an unwilling ward. In general, this agency holds to the concept that a ward does not lose all of her or his rights upon an order of guardianship. While some wards may be unable to express any coherent thought, others are clearly capable of doing so and persons treating the ward should be considerate of the ward's wishes as an indicator of what is in the best interests of the individual. This agency believes that case law and other authorities support this concept.

Specifically, in *Spahn vs Eisenberg*, 210 Wis.2d 557, 569, (1997) the Supreme Court observed that, "where a ward's wishes regarding medical treatment can be determined by a preponderance of the evidence, then it is in the ward's best interest to have those wishes honored." A judgment of incompetence does not necessarily preclude the ward from making a valid expression of her wishes. The Wisconsin Supreme Court, in *Jones vs Gerhardstein*, 141 Wis. 2d 710, 744, (1987) agreed with a New York court that ". . . neither the fact that appellants are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being." Citing *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337, 341-42 (1986). Without drawing a direct analogy between commitment and a finding of incompetency for purposes of guardianship, where a guardianship is ordered on the basis of a mental illness, the comparison is apt.

Because it is the opinion of the Supreme Court that honoring the ward's intent is in her best interest (acting in the ward's best interest being the required goal of the guardian's efforts), and where it is evident that a ward has made explicit her or his wish to refuse the proposed medical treatment, it would appear that any question is best resolved by a court of competent jurisdiction.

The Attorney General of Wisconsin, in OAG 5-99 (Revised), discussed the issue of forcible or involuntary administration of psychotropic and non-psychotropic medication or treatment on a resisting ward. Although Attorney General Doyle does not explicitly find an unlimited authority of the guardian to force non-psychotropic medication or treatment, he does refer to the *Spahn* decision, again utilizing the “best interests” analysis, and acknowledges that this issue will eventually need to be decided by the courts. Until it is, BOALTC will continue to fulfill our state and federal mandates to advocate for the rights and interests of elderly and disabled residents to be treated with dignity and respect. We believe that forcible administration of medication or treatment of any sort to an unwilling ward in the absence of specific court approval or extraordinary emergent circumstances denies the dignity and respect that the ward deserves and is an improper exercise of a guardian’s authority.

The Attorney General, in the same opinion, also notes that the use of “sleight of hand” techniques to administer medication is still an involuntary process. Placing “the pill in the pudding” as a means to make administration simpler for a ward who is aware of and who does not resist the medication is one thing. Using this deception to force medication on the unwilling ward strongly suggests an attitude of paternalism and ignores the retained rights of the person, even if he or she has been judicially determined to be incompetent. In the words of the Supreme Court in *The Guardianship of L. W.*, 167 Wis. 2d 53, 74 (1992), “[a]n incompetent individual does not relinquish the right to refuse unwanted treatment by virtue of incompetency.” Further, the Court in *L. W.* noted that, because the guardian derives all of her or his authority from an action of the state, he or she is subject to all of the constitutional limits ordinarily applicable to state action.

It is evident that there is a thread of paternalism running through the argument that a guardian has extremely broad authority in these cases. An article used as a guideline in one Wisconsin county (written in 1990 by a circuit court judge) as support for a broad definition of a guardian’s authority, states that a guardian operates as a parent in relation to the ward. While no case law is available to affirmatively support this assertion, there is documentation of a countering position. 39 CJS [Guardian and Ward] @ § 31 notes that “while a general guardian of the person of a minor has been deemed virtually to occupy the position of a parent, the legal relationship of Guardian and Ward is not in all respects identical with that of parent and child.” Citing: *In Re. Denny’s Guardianship*, 218 P2d 792. (Ca., 1950). [emphasis added] In Wisconsin law, we have the case of *In Re. Guardianship of Agnes T.*, 189 Wis.2d 520, (1995) which holds that “[w]hile a guardian has custody and control of an incapacitated ward, the ward is not the guardian’s prisoner, and a guardian cannot, without good reason, deny the ward such freedom as is essential to her/his welfare.” Again, the best interests of a ward being best served by honoring her explicitly stated wishes, it would take an unusually “good reason” to refuse to listen to those wishes, let alone to simply ignore them.

Finally, as to the issue of the use of physical restraint, The Department of Health Services, Division of Quality Assurance, in BQA numbered memo 95-047 (1995), (@ Item 20) affecting HFS 132.60(6), provides guidance in reference to the strict limits on the use of physical restraints as a means to facilitate medical treatment when there has been “a valid refusal of the treatment in question.” This language directly references federal HCFA Transmittal # 274, (1995). HFS 132.31(k) firmly expresses the state’s position that the use of restraints is a significant invasion of the resident’s person and should be done only in the most limited circumstances.

Summary:

As expressed by the State Bar of Wisconsin in their desk reference, *Advising the Older Client*, Vol. II, § 16.110, a guardian “probably does not have authority to force medical treatment on an unwilling ward” Citing *Roberta A. S. vs Waukesha County*, 171 Wis. 2d 266 (Ct. App., 1992). Supporting this are the Supreme Court’s ruling in *Spahn* and the cited opinion of the Attorney General. All of these sources find that the wishes of the ward, if known, are an indicator of an action in her best interests. Absent a substantial life-threatening situation, conflicts between a guardian’s intent and a ward’s wishes should be resolved in favor of the ward or by the appropriate court.

We will continue to advocate from this position until the courts of this state rule otherwise or until the Legislature speaks on the issue.