

1 **AN ACT** *to amend* 155.20 (2) (a), 155.20 (2) (b), 155.20 (2) (c) 2. a., 155.20 (5) and
 2 155.40 (1); and *to create* 155.25 of the statutes; **relating to:** authorization of an
 3 agent under a power of attorney for health care to make certain decisions related to
 4 care and treatment of irreversible dementia and to consent to the admission of the
 5 principal to certain facilities.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill draft was prepared for the Joint Legislative Council’s Special Committee on Legal Interventions for Persons with Alzheimer’s Disease and Related Dementias.

Currently, any person at least 18 years of age and of sound mind may voluntarily execute a power of attorney for health care. If the person who executes the power of attorney for health care (the “principal”) is later found to be incapacitated, the person’s designated health care agent (the “agent”) may make health care decisions on behalf of the principal.

The draft changes Wisconsin law dealing with powers of attorney for health care, as follows:

Admission to Certain Inpatient Facilities

Currently, an agent under a power of attorney for health care may not consent to the admission of the principal on an inpatient basis to any of the following facilities:

- An institution for mental diseases.
- An intermediate care facility for persons with an intellectual disability.
- Any of the institutions operated by DHS for the purpose of providing diagnosis, care or treatment for mental or emotional disturbance, developmental disability, alcoholism or drug dependency including, but not limited to, mental health institutes.
- Any publicly or privately operated facility or unit thereof providing treatment of alcoholic, drug dependent, mentally ill or developmentally disabled persons, including but not limited to inpatient and outpatient

treatment programs, community support programs, and rehabilitation programs.

Currently, a principal may be admitted on an inpatient basis to any of these facilities only under the applicable requirements of ch. 51 or 55, stats.

This draft creates a new option for the admission of a principal to these facilities. The draft provides that a health care agent may consent to admission of the principal on an inpatient basis to any of these facilities if the power of attorney for health care instrument specifically authorizes the agent to do so.

Currently, a health care agent may consent to the admission of a principal to a nursing home, for recuperative care for a period not to exceed 3 months, if the principal is admitted directly from a hospital inpatient unit, unless the hospital admission was for psychiatric care.

This draft removes the exception for a hospital admission for psychiatric care, so that a health care agent may consent to the admission of a principal to a nursing home, for recuperative care for a period not to exceed 3 months if the principal is admitted directly from any hospital inpatient unit.

Care and Treatment of Irreversible Dementia

Currently, an agent must act in good faith consistently with the desires of the principal as expressed in the power of attorney for health care instrument, or as otherwise specifically directed by the principal to the health care agent *at any time*. Under this standard, a principal's protest to certain care or treatment, even if the principal has incapacity, can be interpreted as a specific direction to the principal that conflicts with the authority granted to the agent in the power of attorney for health care.

Currently, a power of attorney for health care may be revoked by the principal *at any time*.

This draft creates a new option for decisions regarding care and treatment of irreversible dementia, or any conditions or behaviors substantially related to irreversible dementia, made by an agent under a power of attorney for health care. The draft provides that—if the power of attorney for health care includes a specific authorization to that effect—with regard to any decision related to care or treatment of irreversible dementia, or any conditions or behaviors substantially related to irreversible dementia, a health care agent must act in good faith consistently with the desires of the principal as expressed in the power of attorney for health care instrument or as otherwise specifically directed by the principal to the health care agent *at a time when the*

principal does not have incapacity. “Incapacity” means 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 draft requires an agent acting under this provision to consult with appropriate care providers and consider the prognosis and acceptable alternatives regarding diagnosis, treatments, and side effects.

This draft also provides that if a power of attorney for health care instrument contains the authorization regarding care and treatment of irreversible dementia and related conditions and behaviors referred to above, the instrument may only be revoked by the principal *at a time when he or she does not have incapacity.*

This draft also provides that if a power of attorney for health care instrument contains the authorization regarding care and treatment of irreversible dementia and related conditions and behaviors referred to above, the agent may consent to the involuntary administration of psychotropic medication to the principal for care or treatment of irreversible dementia or behaviors or conditions substantially related to irreversible dementia, for a period of time not to exceed 45 days. If the agent provides such consent, no further consent to the administration of psychotropic medication may be given for the following 180 days. During this 180-day period, involuntary administration of psychotropic medication may occur only through applicable procedures under ch. 51 or 55. Also, an agent may consent, on behalf of the principal, to the voluntary administration of psychotropic medication to the principal at any time.

COMMENTS: In addition to the changes reflected here, and unless the committee determines otherwise, the next version of this draft, which will be prepared for the committee’s review, will include amendments to the power of attorney for health care form provided in s. 155.30, stats., to reflect the changes made in the draft.

The committee should consider the date or dates upon which the draft’s provisions will first apply to a power of attorney for health care. With respect to the provision in SECTION 3 of the draft, which does not require a specific authorization in the instrument, should the change be applied only to powers of attorney for health care executed on or after the effective date of the Act? With respect to the remaining provisions of the draft, the committee may follow the same rule, or, alternatively, the committee could consider also applying the provisions of the draft to powers of attorney for health care, if any, that were executed prior to the Act’s effective date but that contain an authorization similar to that required under the draft.

1 **SECTION 1.** 155.20 (2) (a) of the statutes is amended to read:

2 155.20 (2) (a) A health care agent may not consent to admission of the principal on an
3 inpatient basis to any of the following unless the power of attorney for health care instrument
4 specifically authorizes the health care agent to provide that consent:

COMMENT: The committee may wish to consider whether an agent's consent to the admission of the principal to an inpatient facility should be reviewed by a court in certain cases such as long-term admissions. By analogy, in the protective placement context, placement decisions are reviewed at an annual *Watts* hearing. Also, in the case of an involuntary commitment under ch. 51, the initial period of commitment may be no longer than 6 months, and each subsequent extension requires court approval and may be no longer than one year. On the other hand, because an agent would be acting pursuant to the express wishes of the principal expressed in the power of attorney for health care document, an agent's consent to the admission of the principal to an inpatient facility may be more analogous to an admission by a guardian under s. 51.10 (8), stats., relating to voluntary admissions of adults, for which no review is required.

5 **SECTION 2.** 155.20 (2) (b) of the statutes is amended to read:

6 155.20 (2) (b) A principal may be admitted or committed on an inpatient basis to a
7 facility specified in par. (a) 1. to 4. only under the applicable requirements of ch. 51 or 55 or
8 pursuant to the provisions of a power of attorney for health care instrument that authorizes the
9 health care agent to provide consent to admission of the principal to the facility.

10 **SECTION 3.** 155.20 (2) (c) 2. a. of the statutes is amended to read:

11 155.20 (2) (c) 2. a. To a nursing home, for recuperative care for a period not to exceed
12 3 months, if the principal is admitted directly from a hospital inpatient unit, ~~unless the hospital~~
13 ~~admission was for psychiatric care.~~

14 **SECTION 4.** 155.20 (5) of the statutes is amended to read:

15 155.20 (5) The health care agent shall act in good faith consistently with the desires of
16 the principal as expressed in the power of attorney for health care instrument or as otherwise

1 specifically directed by the principal to the health care agent at any time, except as provided
2 in s. 155.25 (3). The health care agent shall act in good faith consistently with any valid
3 declaration executed by the principal under subch. II of ch. 154, except that the provisions of
4 a principal's valid power of attorney for health care instrument supersede any directly
5 conflicting provisions of a valid declaration executed by the principal under subch. II of ch.
6 154. In the absence of a specific directive by the principal or if the principal's desires are
7 unknown, the health care agent shall, in good faith, act in the best interests of the principal in
8 exercising his or her authority.

9 **SECTION 5.** 155.25 of the statutes is created to read:

10 **155.25 Care and treatment of irreversible dementia.** (1) This section shall apply
11 to a power of attorney for health care only if specifically so authorized in the power of attorney
12 for health care instrument.

13 (2) In this section:

14 (a) "Involuntary administration of psychotropic medication" means any of the
15 following:

16 1. Placing psychotropic medication in an individual's food or drink with knowledge that
17 the individual protests receipt of the psychotropic medication.

18 2. Forcibly restraining an individual to enable administration of psychotropic
19 medication.

20 3. Requiring an individual to take psychotropic medication as a condition of receiving
21 privileges or benefits.

NOTE: This definition of "involuntary administration of psychotropic medication" is the same definition used in s. 55.14 (1) (a), stats., pertaining to involuntary administration of psychotropic medication as a protective service.

1 (b) "Irreversible dementia" means deterioration or loss of intellectual faculties,
2 reasoning power, memory, and will due to organic brain disease characterized by confusion,
3 disorientation, apathy, or stupor of varying degrees that is not capable of being reversed and
4 from which recovery is impossible. Irreversible dementia includes, but is not limited to,
5 Alzheimer's disease.

NOTE: This definition of "irreversible dementia" is the same definition used in s. Ins 3.46 (3) (i), Wis. Adm. Code, pertaining to standards for certain insurance coverage.

6 (c) "Protest" means make more than one discernible negative response, other than
7 mere silence, to the offer of, recommendation for, or other proffering of voluntary receipt of
8 psychotropic medication. "Protest" does not mean a discernible negative response to a
9 proposed method of administration of the psychotropic medication.

NOTE: This definition of "protest" is the same definition used in s. 55.14 (1) (c), stats., pertaining to involuntary administration of psychotropic medication as a protective service.

10 (d) "Psychotropic medication" means a prescription drug, as defined in s. 450.01 (20),
11 that is used to treat or manage a psychiatric symptom or challenging behavior.

NOTE: This definition of "psychotropic medication" is the same definition used in s. 55.14 (1) (d), stats., pertaining to involuntary administration of psychotropic medication as a protective service.

12 (3) With regard to any decision related to care or treatment of irreversible dementia, or
13 any condition or behavior substantially related to irreversible dementia, made by a health care
14 agent acting under a power of attorney for health care instrument containing the authorization
15 described in sub. (1), including a decision to consent to the admission of the principal on an
16 inpatient basis to a facility under sub. (2), the health care agent, after consultation with
17 appropriate care providers and after consideration of the prognosis and acceptable alternatives
18 regarding diagnosis, treatments, and side effects, shall act in good faith consistently with the

1 desires of the principal as expressed in the power of attorney for health care instrument or as
2 otherwise specifically directed by the principal to the health care agent at a time when the
3 principal does not have incapacity.

NOTE: “Incapacity,” for purposes of ch. 155, is defined in s. 155.01 (8),
stats., as follows:

155.01 (8) “Incapacity” means 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.

4 (4) A health care agent acting under a power of attorney for health care instrument
5 containing the authorization described in sub. (1), may subject to sub. (3), authorize the
6 involuntary administration of psychotropic medication to the principal for care or treatment
7 of irreversible dementia, or any condition or behavior substantially related to irreversible
8 dementia, for a period not to exceed 45 days. Upon the conclusion of that period, and
9 continuing for a period of 180 days, the agent may not authorize or consent to the involuntary
10 administration of psychotropic medication to the principal except as provided in ch. 51 or ch.
11 55. Nothing in this subsection shall prevent an agent from consenting to the voluntary
12 administration of psychotropic medication on behalf of the principal at any time.

13 (5) With respect to a power of attorney for health care under an instrument containing
14 the authorization described in sub. (1), the principal may revoke his or her power of attorney
15 for health care and invalidate the power of attorney instrument only at a time when he or she
16 does not have incapacity.

17 **SECTION 6.** 155.40 (1) of the statutes is amended to read:

