

SERVING AS ASSIGNED COUNSEL

By
Hon. Macie T. Gaines
Judge
Wayne County Probate Court

- I. IN GENERAL
 - II. SERVING AS ASSIGNED COUNSEL IN ADULT GUARDIANSHIP PROCEEDINGS (GA/GL)
 - a. In General
 - b. Guardianship v. Patient Advocate
 - c. General Guide to Hearing Process
 - d. Petition for Modification or Termination of Guardianship
 - III. SERVING AS ASSIGNED COUNSEL IN PROCEEDINGS FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES (DD)
 - a. In General
 - b. Types of Guardianships for Individuals with Developmental Disabilities
 - c. Plenary Guardianships
 - d. Partial Guardianships
 - e. Appointment of Assigned Counsel in DD Proceedings
 - IV. SERVING AS ASSIGNED COUNSELING IN MINOR GUARDIANSHIP PROCEEDINGS (GM/LG)
 - V. CONCLUSION
-

I. IN GENERAL

- A. The role and responsibilities are different for attorneys appointed to represent parties in mental health, adult guardianship, developmental disability, and minor guardianship proceedings.
- B. For additional information, see the form and handouts found on the Court's website, www.wcpc.us, under Attorney Training – Attorney Training Materials.

II. SERVING AS ASSIGNED COUNSEL IN ADULT GUARDIANSHIP PROCEEDINGS (GA/GL)

a. In General

- i. Legal counsel is appointed for a person who is the subject of an adult guardianship petition under either of the following circumstances:
 - 1. The alleged incapacitated individual wishes to contest the petition, have limits placed on the guardian's powers, or objects to a particular person being appointed guardian or designated as standby guardian. **MCL 700.5305(3).**
 - 2. The alleged incapacitated individual request legal counsel, or the GAL determines it is in the person's best interest to have legal counsel and it has not yet been secured. **MCL 700.5305(4).**
- ii. Unlike the role of the GAL, who merely investigates the situation, informs the alleged ward of their rights, and reports their findings to the Court, a lawyer assigned to represent an alleged ward has the role of an advocate for the person's desires and wishes.

b. Guardianship v. Patient Advocate

- i. The appointment of a patient advocate pursuant to a durable power of attorney for health care does not necessarily eliminate the need for a guardianship or cover the range of duties and responsibilities of a guardian. **MCL 700.5506-5515.**
- ii. If an individual executed a patient advocate designation before they were determined to be legally incapacitated, a guardian appointed for the person does not have the power or duty to make medical or mental health treatment decisions that the patient advocate is designated to make. **MCL 700.5306(5).**
- iii. However, the Court could modify the guardianship to grant these powers to a guardian if, on the petition for guardianship or a petition to modify the guardianship, it is alleged and the Court finds that the patient advocate designation was not validly executed, the patient

advocate is not complying with the terms of the designation or the statute, or that the patient advocate is not acting consistently with the ward's best interests. **MCL 700.5306(5).**

- iv. If a guardian is appointed who is not the same person as the patient advocate, the guardian must defer to the patient advocate's decisions. If a guardian is also the patient advocate, he or she must make medical or mental health treatment decisions in accordance with the provisions of that designation.

c. General Guide to Hearing Process:

- i. Incapacitated Individual: an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions. **MCL 700.1105(a).**
- ii. Rights of the alleged incapacitated individual:
 - 1. The alleged ward is entitled to present evidence, cross-examine witnesses (including the court appointed physician or mental health professional, if any), trial by jury, and representation by legal counsel. **MCL 700.5304(5).**
 - 2. The alleged ward is entitled to be present at the hearing and to see or hear all evidence bearing on the person's conditions. If they wish to be present at the hearing, all practical steps shall be taken to ensure their presence, including moving the hearing site, if necessary. **MCL 700.5304(4).**
- iii. Examination by Physician or Mental Health Professional
 - 1. If necessary, the court may order an alleged ward to be examined by a physician or mental health professional appointed by the court who shall submit a report in writing to the court at least 5 days before the hearing. A report prepared pursuant to this provision will not be made part of the public record but shall be available to the court (or an appellate court), the alleged ward, the petitioner, their legal counsels, and other persons as the court directs. It may be used per the Michigan rules of evidence. **MCL 700.5304(1).**
 - 2. The alleged ward has the right to secure an independent evaluation, which will be paid for by the state if they are indigent. **MCL 700.5304(2).** A party offering a report must promptly inform the parties that the report is filed and available. **MCR 5.405(A)(1).**
 - 3. Waiver of Privilege

- a. A report ordered by the court may be used in guardianship proceedings without regard to any privilege.
 - b. Any privilege regarding a report made as part of an independent evaluation at the respondent's request is waived if the respondent seeks to have the report considered in the proceedings. **MCR 5.405(A)(2).**
- 4. Report (whether court ordered or independent) must contain all the following:
 - a. Detailed description of alleged ward's physical or psychological infirmities.
 - b. Explanation of how and to what extent any infirmities interfere with the alleged ward's ability to receive or evaluate information in making decisions.
 - c. Listing of all medications alleged ward is receiving, their dosages, and description of each medication's effect on the person's behavior.
 - d. Prognosis for alleged ward's condition and a recommendation for the most appropriate rehabilitation plan.
 - e. Signatures of all persons who performed evaluations on which the report is based. **MCL 700.5304(3).**
- iv. Trial Procedures
 - 1. Procedure in probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules in this chapter. **MCR 5.001(A).**
- v. Burden of Proof
 - 1. A guardian may be appointed if the court is satisfied by **clear and convincing evidence** that the individual for whom a guardian is sought is an incapacitated individual, and the appointment is necessary as a means of providing continuing care and supervision of the person of the ward. Alternatively, the court may dismiss the proceeding, or enter another appropriate order. **MCL 700.5306(1).**
 - 2. The court may appoint a limited guardian (but not a full guardian) if it finds by **clear and convincing evidence** that the individual is incapacitated and lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself. **MCL 700.5306(3).**

3. If the court finds by **clear and convincing evidence** that the individual is totally without capacity to care for himself or herself, this finding shall be specified in any order and the court may appoint a full guardian. **MCL 700.5306(4).**
- d. Petition for Modification or Termination of Guardianship **MCL 700.5310(2)&(3).**
 - i. If the ward petitions to modify or terminate their guardianship, the court will appoint an attorney to represent them.
 1. This request from the ward may be made by an informal letter or any other method.
 2. A person is subject to contempt of court if they knowingly interfere with the transmission of this request to the court or judge.
 - ii. Brief Overview of Modification\Termination Procedure
 1. The ward or a person interested in the ward's welfare may petition for an order removing the guardian/standby guardian, appointing a successor, modifying the guardianship's terms, or terminating the guardianship.
 2. Except as otherwise provided in the order finding legal incapacity, the court shall schedule a hearing to be held within 28 days of receipt of the petition or request.
 3. An order finding incapacity may specify a minimum period of up to 182 days during which a petition for modification or termination may not be filed without special leave of the court.
 - iii. Burden of Proof\Litigation Process
 1. If the legally incapacitated individual files a petition to terminate their guardianship, the guardianship is in essence "rebooted" – i.e., it is treated as a petition to appoint a guardian, and the same procedures to safeguard the ward's rights apply. **MCL 700.5310(4).**
 - a. The guardian must re-establish, by clear and convincing evidence, that the ward is still a legally incapacitated individual. **MCL 700.5306.** The ward's rights include an attorney (if they do not have their own), presence at the hearing, jury trial, cross-examination, to present evidence, and an independent medical examination (IME). **MCL 700.5304(2), (4)&(5); MCR 5.408(B)(1).**

2. If someone other than the legally incapacitated individual files a petition to modify or terminate the guardianship, a different standard is utilized. The court must appoint a guardian ad litem (GAL). If the GAL determines that the legally incapacitated individual contests the requested relief, the GAL appointment is terminated, and the court appoints an attorney for the legally incapacitated individual. **MCR 5.408(B)(2).**

III. SERVING AS ASSIGNED COUNSEL IN PROCEEDINGS FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES

- a. An individual with a developmental disability is defined in **MCL 330.1100(a)(25):**

- i. **"Developmental disability"** means either of the following:

1. If applied to an individual older than 5 years, a severe, chronic condition that meets all the following requirements:
 - a. Is attributable to a mental or physical impairment or a combination of mental and physical impairments.
 - b. Is manifested before the individual is 22 years old.
 - c. Is likely to continue indefinitely.
 - d. Results in substantial functional limitations in 3 or more of the following areas of major life activity:
 - i. Self-care.
 - ii. Receptive and expressive language.
 - iii. Learning.
 - iv. Mobility.
 - v. Self-direction.
 - vi. Capacity for independent living.
 - vii. Economic self-sufficiency.
 - e. Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.
 2. If applied to a minor from birth to age 5, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided.

- b. Types of Guardianships for Individuals with Developmental Disabilities

- i. Guardian of the person is akin to a guardian under the Estates and Protected Individuals Code (EPIC). Guardian of the estate is analogous to a conservator under Michigan's Probate Code.
 - 1. Whenever the court appoints a plenary guardian of the estate or a partial guardian with powers or duties respecting real or personal property, that guardian shall be considered a fiduciary for the purposes of the estates and protected individuals' code. **MCL 330.1632.** (i.e., they must file an annual accounting with the Court.)
- ii. There are two types of guardianships for Individuals with Developmental Disabilities: **plenary** and **partial**.
 - 1. A **plenary guardian** possesses the legal rights and powers of a full guardian of the person, or of the estate, or both. **MCL 330.1600(d).**
 - 2. A **partial guardian** possesses fewer than all the legal rights and powers of a plenary guardian, and whose rights, powers, and duties have been specifically enumerated by court order. **MCL 330.1600(e).**
- c. Plenary Guardianships
 - i. A very small percentage of the DDI guardianships in the Wayne County Probate Court are **plenary guardianships**.
 - ii. **Plenary guardianships** continue until further order of the court. They are not reviewed unless a petition for modification is filed.
- d. Partial Guardianships
 - i. The overwhelming majority of the DD guardianships in the Wayne County Probate Court are **partial guardianships**.
 - ii. **Partial guardianships** can be created for a term of no more than five (5) years. **MCL 330.1626(2).**
 - iii. At the end of the term, the partial guardianship terminates, and a new guardianship proceeding is commenced. **MCL 330.1626(3).**
- e. Appointment of Assigned Counsel in DD Proceedings
 - i. Attorneys are appointed to represent alleged wards in petitions for appointment of plenary and/or partial guardians.
 - ii. Attorneys are also appointed to represent wards in petitions for modification or termination of an established DD guardianship.
 - iii. Attorneys assigned to represent the alleged wards serve in the role of advocate for the alleged ward's desires, wishes, and/or best interests.

IV. SERVING AS ASSIGNED COUNSEL IN MINOR GUARDIANSHIP PROCEEDINGS (GM/LG)

- a. Typically, a lawyer is appointed to represent parties in minor guardianship proceedings only in the following situations:
 - i. For a minor parent.
 - ii. For a mentally incompetent adult parent.
- b. Only a small portion of the Court's minor guardianship cases fall within either of these scenarios.
 - i. **Note:** In reality, an appointment under these circumstances is as a guardian ad litem and not technically as assigned counsel.
- c. Lawyer-Guardian ad Litem
 - i. A lawyer-guardian ad litem (L-GAL) can be appointed by the court to represent a child during appointment, resignation, or removal proceedings.
 - ii. Appointment may be made at any time during these proceedings if the court determines the minor's interests are inadequately represented (consideration must be given to minor's preference if they are at least 14 years old). **MCL 700.5213(4), 700.5219(4).**
 - iii. The lawyer-guardian ad litem represents the child and has the powers and duties in relation to their representation per Section 17d of the Juvenile Code, **MCL 712A.17d**. The provisions of Section 17d apply to a lawyer-guardian ad litem appointed under the Probate Code. **MCL 700.5213(5).**
 - iv. A lawyer-guardian ad litem may file a written report and recommendation in a proceeding in which they represent a child. The court may read the report and recommendation, and the parties may utilize them for purposes of a settlement conference, but they shall not be admitted into evidence unless all the parties so stipulate. **MCL 700.5213(5)(a).**
 - v. After a determination of ability to pay, all or part of the costs may be assessed by the court against one or more of the parties or against the money allocated from marriage license fees for family counseling services per **MCL 551.103**. A lawyer-guardian ad litem shall not be paid a fee unless it is first reviewed and approved by the court. **MCL 700.5213(5)(b).**
 - vi. The ability to appoint a lawyer-guardian ad litem in minor guardianship appointment, termination, and resignation proceedings gives the court another mechanism to protect the child's interests in those circumstances where it is determined that additional safeguards are desirable.

V. CONCLUSION

This presentation has provided you with a brief overview of the duties involved in serving as an assigned counsel in adult guardianship and minor guardianship proceedings in Wayne County Probate Court. This outline and the other items on the Court's website under the Attorney Training materials may be used as a "road map" or "cheat sheet".