

I. INTRODUCTION

Material covers the following topics:

- A. Serving as assigned counsel in mental health commitment proceedings.
- B. Serving as assigned counsel in adult guardianship proceedings.
- C. Serving as assigned counsel in proceedings for individuals with developmental disabilities (DDI).
- D. Serving as assigned counsel in minor guardianship proceedings.

II. 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 forms and handouts.

III. SERVING AS ASSIGNED COUNSEL IN MENTAL HEALTH COMMITMENT PROCEEDINGS

- A. Keep in mind that the following is a summary. Extensive handouts/exhibits are provided at the MI portion of this training seminar and are available on our website.
 - 1. The definitions of a “person requiring treatment” (including the criteria for someone to receive “assisted outpatient treatment” [AOT]) and “mental illness” under the Mental Health Code are found at **MCL 330.1401(1)** and **MCL 330.1400(g)** respectively and are included in the MI handout materials.
 - 2. **Note:** A person whose mental processes have been weakened or impaired by dementia, has a primary diagnosis of epilepsy, or an individual with alcoholism or other drug dependence is not a “person requiring treatment” unless they also meet the criteria under **MCL 330.1401(1)**. **MCL 330.1401(2)**.
 - 3. Also note that the standard for determining someone to be a “person requiring treatment” under the Mental Health Code is different from a “legally incapacitated individual” for whom a guardian is appointed under the Estates and Protected Individuals Code (EPIC).

B. MCR 5.732 - Appointed Counsel in Mental Health Code Proceedings

1. The attorney of record must represent the person in all Mental Health Code proceedings in probate court until discharged by court order or another lawyer has filed an appearance on the individual's behalf. **MCR 5.732(A).**
2. The attorney must serve as an advocate for the individual's preferred position. If the individual does not express a preference, their attorney must advocate for a disposition the lawyer believes is in the individual's best interest. **MCR 5.732(B).**
3. The individual may waive their right to an attorney only in open court and after consultation with an attorney. The waiver may not be accepted by the court if it appears that it was not made voluntarily and understandingly. If an attorney is waived, the court may still appoint a guardian ad litem for the individual. **MCR 5.732(C).**

C. Procedures in Macomb County Probate Court

1. These procedures are spelled out in great detail in the handouts/exhibits provided at the MI training seminar and available on our website.

D. Involuntary Commitment Proceedings

1. In General
 - a. Civil admission and discharge procedures are governed by Chapter Four of the Mental Health Code. **MCL 330.1400 et seq.**
 - b. A discussion of the formal voluntary admissions process and the involuntary commitment procedures are covered in the MI seminar handouts and are available on our website.

IV. SERVING AS ASSIGNED COUNSEL IN ADULT GUARDIANSHIP PROCEEDINGS

A. In General

1. Legal counsel is appointed for a person who is the subject of an adult guardianship petition under either of the following circumstances:
 - a. The alleged incapacitated individual (II) wishes to contest the petition, have limits placed on the guardian's powers, or objects to a particular person being appointed guardian. **MCL 700.5305(3).**

- b. The alleged II requests 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).**

2. Unlike the role of the GAL, who merely investigates the situation, informs the alleged II of their rights, and reports their findings to the Court, a lawyer assigned to represent an alleged II has the role of an advocate for the person's desires and wishes.

Point: Assigned counsel should review the GAL's report to determine whether the alleged II wants to be present at the hearing, desires to contest the petition, wishes limits placed on the guardian's powers, objects to a particular person's appointment as guardian, or contains any other information useful to your representation of the alleged II.

- B. The following information is provided as a general guide of the hearing process for the appointment of a guardian of an adult.

1. **Definition of "Incapacitated Individual" (II)** for Estates and Protected Individuals Code (EPIC) purposes:

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).**

Note that the key is the process of formulating and/or expressing an informed decision, not the decision itself.

2. EPIC also uses the term **Legally Incapacitated Individual (LII)**. A LII is "...an individual, other than a minor, for whom a guardian is appointed under this act or an individual, other than a minor, who has been adjudged by a court to be an incapacitated individual." **MCL 700.1105(i).**

Comment: This term is designed to clarify the difference between an alleged incapacitated individual and a person determined by the court to be an incapacitated individual. An adult for whom a guardian has been appointed under EPIC should be referred to as a LII.

3. The alleged II 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).**
4. The alleged II is entitled to be present at the hearing and to see or hear all evidence bearing on the person's condition. 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).**

5. Examination by Physician/Mental Health Professional

- a. If necessary, the court may order an alleged II 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 7 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 II, 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).**
- b. The alleged II 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).**
- c. Waiver of Privilege. **MCR 5.405(A)(2)**
 - i) A report ordered by the court may be used in guardianship proceedings without regard to any privilege.
 - ii) 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.
- d. Report (whether court ordered or independent) **MCL 700.5304(3)** must contain all of the following:
 - i) Detailed description of alleged II's physical or psychological infirmities.
 - ii) Explanation of how and to what extent any infirmities interfere with the alleged II's ability to receive or evaluate information in making decisions.
 - iii) Listing of all medications alleged II is receiving, their dosages, and description of each medication's effect on the person's behavior.
 - iv) Prognosis for alleged II's condition and a recommendation for the most appropriate rehabilitation plan.
 - v) Signatures of all persons who performed evaluations on which the report is based.

6. Trial Procedures

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).**

7. Burden of Proof

- a. 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 II. Alternatively, the court may dismiss the proceeding, or enter another appropriate order. **MCL 700.5306(1).**
- b. 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).**
- c. 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).**

Note: A guardian shall be granted only those powers and only for that period of time as is necessary to provide for the demonstrated need of the II, and the guardianship shall be designed to encourage the development of maximum self-reliance and independence in the individual. A court order establishing the guardianship shall specify any limitations on the guardian's powers and any time limits on the guardianship. **MCL 700.5306(2).**

C. Petition for Modification/Termination of Guardianship

1. If the ward petitions to modify or terminate their guardianship, the court will appoint an attorney to represent them.
2. Brief Overview of Modification/Termination Procedure
 - a. The ward or a person interested in the ward's welfare may petition for an order removing the guardian, appointing a successor, modifying the guardianship's terms, or terminating the guardianship. **A request for this order may be made by informal letter to the court or judge.** A person is subject to contempt of court if they knowingly interfere with the transmission of this request to the court or judge.

- b. 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.
- c. 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.

MCL 700.5310(2) & (3).

V. SERVING AS ASSIGNED COUNSEL IN PROCEEDINGS FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES (DDI)

- A. Generally, this is just a summary. Extensive handouts/exhibits are provided at the DD training portion of the seminar and are available on our website. An individual with a developmental disability is defined in **MCL 330.1100(a)(21)**:

"Developmental disability" means either of the following:

- (a) If applied to an individual older than 5 years, a severe, chronic condition that meets all of the following requirements:
 - (i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.
 - (ii) Is manifested before the individual is 22 years old.
 - (iii) Is likely to continue indefinitely.
 - (iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:
 - (A) Self-care.
 - (B) Receptive and expressive language.
 - (C) Learning.
 - (D) Mobility.
 - (E) Self-direction.
 - (F) Capacity for independent living.
 - (G) Economic self-sufficiency.

- (v) 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.
- (b) 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

1. There are two types of guardianships for Individuals with Developmental Disabilities: **plenary** and **partial**.
2. 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). Plenary guardianships** continue until further order of the court. They are not reviewed unless a petition for modification is filed.

Note: 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.

3. A **partial guardian** possesses fewer than all of 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).**
4. **Partial guardianships** can be created for a term of no more than five (5) years. **MCL 330.1626(2).**
5. At the end of the term, the partial guardianship terminates and a new guardianship proceeding is commenced. **MCL 330.1626(3).**

Note: 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.)

C. Appointment of Assigned Counsel in DDI Proceedings

1. Attorneys are appointed to represent alleged DDIs in petitions for appointment of plenary and/or partial guardians. The appointment process, duties and responsibilities of the attorney are discussed in detail in the DD seminar handouts and are available on our website.

2. Lawyers assigned to represent alleged DDIs serve in the role of advocate for the DDIs' desires, wishes, and/or best interests.

V. **SERVING AS ASSIGNED COUNSEL IN MINOR GUARDIANSHIP PROCEEDINGS**

- A. Typically, a lawyer is appointed to represent parties in minor guardianship proceedings only in the following situations:
 1. For a minor mother and/or father.
 2. For a mentally incompetent adult mother and/or father.
- B. **Note:** Appointments under the above circumstances are as guardian ad litem. They are technically not assigned counsel.
- C. **Lawyer-Guardian ad Litem**
 1. In minor guardianship proceedings a lawyer-guardian ad litem can be appointed by the court to represent a child during appointment, resignation, or removal proceedings.
 2. 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), .5219(4).**
 3. 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).**
 4. 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).**
 5. 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).**

6. 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.

VII. CONCLUSION

The intent of this presentation is to provide you with a brief overview of the duties involved in serving as an assigned counsel in mental health, adult guardianship and minor guardianship proceedings in Macomb County Probate Court.