

I. INTRODUCTION

Material Covers the Following Topics:

- A. Serving as guardian ad litem in adult guardianship proceedings.
- B. Procedure for conducting adult guardianship reviews.
- C. Serving as guardian ad litem in estate and conservatorship proceedings.
- D. Serving as guardian ad litem in minor guardianship proceedings.
- E. Serving as guardian ad litem in proceedings requesting LEIN removal and/or for electroconvulsive therapy.

II. IN GENERAL

- A. What is a guardian ad litem? Typically, a guardian ad litem (GAL) serves as the “eyes and ears” of the Court. Their duties will vary depending on the particular type of hearing.
- B. This outline (which is included in your CD) contains a summary of the statutes and court rules governing guardian ad litem appointments and the specific proceedings where appointment of a guardian ad litem is mandatory or discretionary.
- C. **Important Note:** The Court needs a copy of the GAL report at least seven business days before the scheduled hearing. The report must be sent to the office of the Judge of record. It is not acceptable to give the report to the attorney for the petitioner two days before the hearing, who then brings a copy to the Court at the hearing.
- D. **GAL Immunity from Civil Liability.**
 - 1. **MCL 691.1407(6)** provides: “A guardian ad litem is immune from civil liability for injuries to persons or damages to property whenever he or she is acting within the scope of his or her authority as guardian ad litem.”
 - 2. This provision was added by **1996 PA 143** to overturn the decision of **Bullock v Huster, 209 Mich. App. 551; 532 NW 2d 202 (1995)**.
- E. **Duties of Guardian Ad Litem**
 - 1. Before the hearing date, the GAL shall conduct an investigation and file a written report of the investigation and recommendations.

2. The GAL does not have to appear at the hearing unless required by law or directed by the court. MCR 5.121(C).

III. SERVING AS GUARDIAN AD LITEM IN ADULT GUARDIANSHIP PROCEEDINGS

- A. As part of the due process protection for the adult who is the subject of a guardianship petition, a GAL is appointed to review the situation and make a report to the Court.

After a date has been set for an adult guardianship hearing, a GAL must be appointed unless the alleged incapacitated individual (L.I.I.) has their own legal counsel. **MCL 700.5303(2).**

- B. The GAL's duties as outlined in **MCL 700.5305** include:

1. Personally visiting the individual.
2. Explaining to the individual the nature, purpose and legal effects of a guardian's appointment.
3. Explaining to the individual the hearing procedure and their rights, including (but not limited to) the following:
 - a. To contest the petition.
 - b. Request limits on the guardian's powers.
 - c. Object to a particular person being appointed guardian.
 - d. Be present at the hearing.
 - e. Be represented by a lawyer, and an attorney will be appointed for them if they cannot afford to hire their own.
4. Telling the individual the name of any person known to be seeking appointment as guardian.
5. Making determinations (and informing the Court) on the following:
 - a. Whether there are 1 or more appropriate alternatives to the appointment of a full guardian. Before informing the court of their determination on this issue, the GAL must **consider** the appropriateness of at least each of the following alternatives:

- (i) Appointment of a limited guardian, including the specific powers and limitation on those powers the GAL believes appropriate.
 - (ii) Appointment of a conservator or another protective order under EPIC.
 - (iii) Execution of a patient advocate designation, do-not-resuscitate declaration, or durable power of attorney with or without limitations on purpose, authority, or duration.
 - b. Whether a disagreement or dispute related to the guardianship petition might be resolved through court ordered mediation.
 - c. Whether the individual wants to be present at the hearing.
 - d. Whether the individual desires to contest the petition.
 - e. Whether the individual wishes limits placed on the guardian's powers.
 - f. Whether the individual objects to a particular person's appointment as guardian.
6. **Note:** The Court will appoint a lawyer for the alleged L.I.I. if they request one, desire to contest the petition, have the guardian's powers limited, object to a particular person being appointed guardian, or the GAL determines it is in the best interest of the alleged L.I.I. to have legal counsel.
7. A GAL's appointment terminates when the alleged L.I.I. has a lawyer appointed for them.
- C. A sample GAL report on an alleged L.I.I. has been included on your CD.
- D. Privilege/Subsequent Appointment of GAL as Counsel for Alleged L.I.I.
- 1. Appointment of lawyer as GAL **does not** create an attorney-client relationship, and communications between the alleged II and the GAL are not subject to attorney-client privilege. The GAL must inform the person whose interests are represented by this lack of privilege as soon as practicable after the appointment. The GAL may report or testify about any communication with the person whose interests are represented. **MCR 5.121(E)(1).**
 - 2. If the GAL's appointment is terminated and the same person is subsequently appointed attorney, the appointment as attorney creates an attorney-client relationship that **relates back** to the date of the GAL appointment. **MCR 5.121(E)(2).**

IV. PROCEDURE FOR CONDUCTING ADULT GUARDIANSHIP REVIEWS

- A. The Court generates an Order Appointing Attorney to Review/Investigate Guardianship (Form PC 635) and mails a copy to the lawyer.
- B. **Within 28 days of appointment**, the attorney must:
 1. Review the probate file to obtain information on the ward. See attached materials for the guardianship review file retrieval process.
 2. Conduct an investigation, during which the lawyer must visit the ward.
 3. File a report with the Court. (Form PC 636 - Report on Review of Guardianship of Legally Incapacitated Individual)
 - a. Indicate due date at top of the report.
 - b. Include names, addresses, and telephone numbers of the ward, guardian, and conservator, if any.
 - c. Report must reflect ward's financial status.
 - d. For additional information on the requirements for completing Guardianship reviews, see "Notice to Attorneys Participating in Guardianship Reviews" which is included in your seminar handouts on your CD.
- C. If the ward is found to be a minor, the order is vacated. If the ward is deceased, the guardian is discharged.
- D. The Court will informally review the report. Depending on the attorney's findings, it will enter one of the following orders (Form PC 637 - Order Following Review of Guardianship):
 1. To continue the guardianship. A copy of the report and order will be mailed to the ward and guardian.
 2. To appoint an attorney to represent the ward for filing a petition for modification of the guardianship. The lawyer appointed may be different than the attorney who conducted the review.
 - a. A copy of the report and order will be mailed to the ward, the guardian and the attorney appointed for the ward.

- b. **Within 14 days**, the attorney must:
 - i) File pleadings with the Court.
 - ii) Obtain hearing date.
 - iii) Make service on interested persons.

V. **SERVING AS GUARDIAN AD LITEM IN ESTATE AND CONSERVATORSHIP PROCEEDINGS**

A. Estate Proceedings

1. The most frequent reason that a GAL is appointed in estate proceedings is to review contested accountings.
 - a. In estates under supervised administration, accountings must be filed annually. Unless all interested persons consent, the matter must be set for hearing.
 - b. Items to look for when reviewing accountings as GAL
 - i) Receipts for all items?
 - ii) Math verification - check subtotals and totals. (Note that the Court no longer audits accountings for decedent's estates.)
 - iii) Reasonableness of expenses - use your common sense.
2. Attorney and Fiduciary Fee Disputes
 - a. This may be part of an accounting, and may often be at the heart of the controversy between the interested persons.
 - b. A detailed overview of this topic is beyond the scope of this outline.
3. Miscellaneous Scenarios
 - a. In these situations, the judge of record will be looking for you to be their "eyes and ears" by reviewing the situation and making a recommendation regarding the relief requested.

b. Petition Examples

- 1) Reform/amend trust instrument.
- 2) Exercise certain rights/elections under a trust.
- 3) Appoint/remove personal representative.
- 4) Sale of real estate.
- 5) Petition to authorize settlement of a cause of action.

B. Conservatorship Proceedings

1. In General

- a. The following material contains an overview of the circumstances under which a conservatorship may be established for a minor and an adult, along with relevant terms.
- b. See attached sample GAL report Recommending Denial of Petition for Appointment of Successor Guardian and Conservator.

2. Circumstances Under Which a Conservator may be Appointed

- a. A minor conservatorship is used to manage assets on behalf of a child until they reach age 18.

A conservator may be appointed in relation to the estate and affairs of a minor if the court determines that the minor:

- i) Owns money or property that requires management or protection which cannot otherwise be provided;
- ii) Has or may have business affairs which may be jeopardized or prevented by minority; or
- iii) Funds are needed for the minor's support and education and that protection is necessary or desirable to obtain or provide money.

MCL 700.5401(2).

MCL 700.5401(3).

- b. Appointment of a conservator or other protective order may be made in relation to the estate and affairs of an individual if the court determines both of the following:
 - i) The individual is unable to manage his or her property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance;
 - ii) The individual has property which will be wasted or dissipated unless proper management is provided; **or** money is needed for the individual's support, care and welfare or for those entitled to be supported by the individual **and** that protection is necessary to obtain or provide money.
- c. **Physically Infirm.** Appointment of a conservator may be made in relation to the estate and affairs of an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment. **MCL 700.5401(4).**

3. Relevant Probate Terms

- a. A **conservator** is a person appointed by the court to manage a protected individual's estate. **MCL 700.1103(h).**
- b. A **protected individual** is a minor or other individual for whom a conservator has been appointed or other protective order made pursuant to the Estates and Protected Individuals Code. **MCL 700.1106(t).**
- c. A conservator is a **fiduciary** for purposes of the Estates and Protected Individuals Code. **MCL 700.1104(e).**
- d. A **protective proceeding** is a proceeding under the provisions of sections 5401-5433 of the Estates and Protected Individuals Code. **MCL 700.1106(u).**
- e. A **protective order** may be issued by the court to authorize, direct, or ratify a transaction necessary or desirable to achieve a security, service, or care arrangement meeting the protected individual's foreseeable needs. **MCL 700.5408.**

4. Attorney/Guardian Ad Litem for Minor

- a. The Court may appoint an attorney to represent the minor if at any time in the proceeding the Court determines the interests of the minor are or may be inadequately represented. The Court is to give consideration to the minor's choice if they are at least 14 years old. **MCL 700.5406(1).**
- b. An attorney appointed by the Court has the powers and duties of a guardian ad litem. **MCL 700.5406(1).**
- c. An attorney is rarely appointed for a minor in conservatorship proceedings.

5. Conservatorship and Protective Order Proceedings.

A GAL appointed in a conservatorship or other protective order proceeding who meets, examines, or evaluates the alleged protected individual must:

- a. Consider whether there is an appropriate alternative to conservatorship.
- b. If conservatorship is appropriate, consider whether or not it would be advisable to limit the scope/duration of conservator's authority.
- c. Report to the court on these considerations.

MCL 700.5406(4).

6. Conservatorship Accountings

- a. Unless otherwise ordered by the court, a conservator is required to file an account of fiduciary (PC Form 583 or 584) annually within 56 days of the anniversary of the conservator's appointment. **MCL 700.5418; MCR 5.409(C)(1)&(2).**
- b. A Petition and Order Allowing Account (PC Form 585) must also be filed in order to have the accounting approved by the Court.
- c. Refer to the GAL estate materials for a discussion of the items to look for when you are appointed to review an accounting for the Court.

VI. SERVING AS GUARDIAN AD LITEM IN MINOR GUARDIANSHIP PROCEEDINGS

- A. Typically, counsel is appointed to represent parties in minor guardianship proceedings under the following circumstances:
1. As guardian ad litem for a minor mother and/or father.
 2. As guardian ad litem for a mentally incompetent adult mother and/or father.

B. Lawyer-Guardian ad Litem

1. A lawyer-guardian ad litem can be appointed by the court to represent a child during appointment, resignation, or removal proceedings.

The appointment of a lawyer-guardian ad litem under these scenarios actually constitutes an assignment of an attorney to represent the child and is not simply an appointment as a guardian ad litem.

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 Estates and Protected Individuals 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 received 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.

D. Minor Guardianship Reviews

Guardianships for minors under age 6 must be reviewed annually. **MCL 700.5207(1)**. In Macomb County the review is usually done by the Guardianship Department. The Department of Human Services (DHS) [formerly the Family Independence Agency (FIA)] may also conduct these reviews.

E. Circumstances Under Which Full and Limited Minor Guardianships may be Created/Terms and Definitions

1. Full Guardianship

- a. An individual appointed by the Court with full authority over the minor, including ability to consent to adoption and marriage of minor.
- b. Full guardian can be appointed if either:
 - i) Parental rights of both parents (or the surviving parent) are terminated/suspended by prior court order, divorce, death, adjudication of mental incompetence, disappearance or imprisonment. **MCL 700.5204(2)(a)**.
 - ii) Parent or parents have permitted the minor to reside with another person and have not provided the person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents. **MCL 700.5204(2)(b)**.
 - iii) If the minor's biological parents have never been married to each other, the custodial parent dies or is missing and the other parent has not been given legal custody, and the nominated guardian is related to the minor within the fifth (5th) degree by marriage, blood, or adoption. **MCL 700.5204(2)(c)**.

Example: Unwed drug addict mother leaves child with grandmother and disappears for some appreciable period of time. Grandmother could seek full guardianship.

2. Limited Guardianship is based on the consent of the custodial parent(s).

- a. Limited guardian can be appointed only if all of the following requirements are satisfied:
 - i) Parent(s) with custody consent to appointment. **MCL 700.5205(1)(a)**.
 - ii) Parent(s) voluntarily consent(s) to suspension of parental rights. **MCL 700.5205(1)(b)**.

- iii) Court approves a limited guardianship placement plan which is also agreed to by custodial parent(s) and proposed limited guardian(s). **MCL 700.5205(1)(c).**
- b. Limited guardian cannot consent to the adoption, release for adoption, or marriage of the minor. **MCL 700.5206(4).**

Example: Drug addict mother with custody of child is entering treatment program. She voluntarily consents to suspension of parental rights by having child's grandmother appointed limited guardian. Placement plan is submitted outlining how she will ultimately regain full parental rights over the child.

3. Definitions

- a. **Ward** - An individual for whom a guardian is appointed. **MCL 700.1108(a).**
- b. **Guardian Ad Litem (GAL)** - An attorney whom the Court appoints to represent the minor's interest in a proceeding and/or investigate a situation on behalf of the Court.
- c. **Temporary Guardian** - If necessary, the Court can appoint an individual temporary guardian with the status of a full guardian, but the authority of a temporary guardian cannot exceed six months. **MCL 700.5213(3).**

F. Petition and Order for Authority to Adopt

- 1. If a full guardian of a minor desires to adopt their ward, Family Court requires they file a petition to obtain authorization from the Court to adopt. In Macomb County their authority under the statute is recognized.
- 2. The appointment of a Guardian Ad Litem under these circumstances is discretionary with the Judge; determinations are made on a case-by-case basis.

VII. SERVING AS GUARDIAN AD LITEM IN PROCEEDINGS REQUESTING LEIN REMOVAL AND/OR FOR ELECTROCONVULSIVE THERAPY

A. Removal of Mental Health Proceeding Orders from LEIN **MCL 330.1464a.**

- 1. Section 464a of the Mental Health Code provides:

(1) Upon entry of a court order directing that an individual be involuntarily hospitalized or that an individual involuntarily undergo a program of alternative treatment or a program of combined hospitalization and alternative treatment, the court shall immediately order the department of state police to enter the court order into the law enforcement information network.

(2) The department of state police shall immediately enter an order into the law enforcement information network or shall immediately remove an order from the law enforcement information network as ordered by the court under this section.

2. What is the LEIN system?

- a. It is a computer network maintained by the Michigan State Police. This database allows law enforcement officials throughout the state to obtain information on an individual, typically when they are pulled over for a traffic stop, arrested, seeking a gun permit, etc.
- b. The above Mental Health Code provision is intended to prevent individuals from being granted a gun permit and/or legally purchasing a gun while they are subject to a mental health order.

3. LEIN Order Removal Procedure

- a. Petition is filed in the Mental Health Division
 - 1) If the person is under an existing order, including alternative treatment or combined hospitalization/alternative treatment, the petition is not accepted, since anyone on a current order cannot be removed from LEIN.
 - 2) If the petitioner has any new petitions for hospitalization pending, the LEIN removal petition is not accepted.
 - 3) If the petitioner is not under a treatment order, and no hearing on a hospitalization petition is pending, a hearing will be set on the LEIN removal request.
- b. Filing Fee – None.
- c. Form Used – MC 239, Removal of Entry From LEIN
- d. The petitioner fills out the form. There is no right to a court appointed attorney for this type of petition.
- e. Petition will be set for hearing in same manner as any other item on the mental health docket.
- f. At Court's discretion (case-by-case basis) a GAL may be appointed prior to or at the hearing to investigate and report findings in writing

to the Judge handling the hearing. The GAL does not represent the person seeking the LEIN removal order.

- 1) Unless directed by the Judge, the GAL is not required to attend the hearing.

g. Court Hearing

- 1) Judge will determine whether it is appropriate to grant the petition to remove the order from the LEIN.
- 2) If the petition is granted, the Court will prepare the order of removal and forward it to the State Police.

B. Request for Electroconvulsive Therapy (ECT)

1. Section 717 of the Mental Health Code addresses consent for electroconvulsive therapy or similar procedure:

(1) A recipient shall not be the subject of electroconvulsive therapy or a procedure intended to produce convulsions or coma unless consent is obtained from the following:

- (a) The recipient, if he or she is 18 years of age or older and does not have a guardian for medical purposes.
- (b) The recipient's parent who has legal and physical custody of the recipient, if the recipient is less than 18 years of age.
- (c) The recipient's guardian, if the guardian has power to execute a consent to procedures described in this section.
- (d) The recipient's designated representative, if a durable power of attorney or other advance directive grants the representative authority to consent to procedures described in this section.

(2) If a guardian consents to a procedure described in this section, the procedure shall not be initiated until 2 psychiatrists have examined the recipient and documented in the recipient's medical record their concurrence with the decision to administer the procedure.

(3) If a parent or guardian of a minor consents to a procedure described in this section, the procedure shall not be initiated until 2 child and adolescent psychiatrists, neither of whom may be the treating psychiatrist, have examined the minor and documented in the minor's medical record their concurrence with the decision to administer the procedure.

(4) A minor or an advocate designated by the minor may object to the administration of a procedure described in this section. The objection shall be made either orally or in writing to the probate court. The procedure shall not be initiated before a court hearing on the minor's or advocate's objection.

(5) At least 72 hours, excluding Sundays or holidays, before the initiation of a procedure described in this section, a minor shall be informed that he or she has a right to object to the procedure.

(6) If a procedure described in this section is considered advisable for a recipient and an individual eligible to give consent for the procedure is not located after diligent effort, a probate court may, upon petition and after a hearing, consent to administration of the procedure in lieu of the individual eligible to give consent.

ECT Procedure:

- a. Occasionally, a guardian or a hospital (if no guardian) will file a petition under MCLA 330.1717(6) when they believe that electroconvulsive therapy (ECT) is necessary for a patient's mental health treatment. If the patient does not agree to the procedure, the guardian or the hospital will submit a Petition for Authority to obtain permissions for the guardian to consent to the procedure.
- b. Petition is filed in the Wills & Estates Division of the Court under the existing guardianship file. If no existing guardianship file then a petition for Guardianship with appointment of a Public Administrator, along with the Petition for Authority is filed.
- c. Filing fee: none.
- d. Form used: No official SCAO form; however, PC586 Petition and Order may be utilized. The petition for Authority typically describes the mental illness the patient suffers from; an allegation that traditional treatment is not working or patient is not responding; and a reason for the ECT. The Petitioner requests that the guardian be granted authority to consent to the treatment. Typically, a doctor's letter is also attached as an exhibit setting forth the need for ECT and to support the petitioner's request.
- e. The Petition for Authority to consent to ECT is set for hearing in the same manner as other Probate petitions.

- f. Although there is no statutory right for a Court appointed attorney, this Court does appoint an attorney for the patient. Further, a GAL is appointed to investigate and submit a written report with a recommendation to the Court as to what's in the patient's best interest. Attorney and GAL must attend the hearing.

- g. Court hearing.
 - 1) At the hearing, the testimony of the treating psychiatrist is taken (live or via telephone testing with pre-approval).
 - 2) The Judge rules whether the petition should be granted. The Court does not order the ECT therapy but rather authorizes the guardian to consent to the ECT treatment.
 - 3) Sample order attached.