

COURT APPOINTED ATTORNEY ROLE AND DUTIES

The role and responsibilities as attorney appointed to represent parties are different in mental health, adult guardianship, developmental disability and minor guardianship proceedings.

PROCEEDINGS FOR AN ADULT GUARDIANSHIP

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 investigates the situation, informs the alleged II of their rights, and reports their findings to the Court, an attorney assigned to represent an alleged II has the role of an advocate for the person's desires and wishes.
3. As attorney for the individual you are expected to provide competent representation with adequate preparation. MRPC 1.1
4. Under the rules of professional conduct, an attorney *must* advocate for the client's expressed goals, not for what the attorney believes is best.
5. Attorney's Preparation
 - (A) Review the GAL's report.
 - (B) Meet with your client.
 - (C) Determine whether your client:
 - (i) Wishes to be present at the hearing;
 - (ii) Desires to contest the petition;
 - (iii) Wishes limits placed on the guardian's powers;
 - (iv) Objects to a particular person's appointment as guardian.
 - (D) Review and understand the law regarding incapacitated individuals.
6. Law for the Hearing Process.
 - (A) Definition of "incapacitated individual" MCL 700.1105(a).
 - (B) Definition of "legally incapacitated individual" MCL 700.1105(i).
 - (C) EPIC defines "incapacitated Individual" (II) as "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.

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

- (D) Alleged II is entitled to present evidence, cross examine witnesses, trial by jury, and representation by legal counsel. MCL 700.5304(5).
- (E) 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).
- (F) Examination by Physician/Mental Health Professional
 - (i) If necessary, the court may order an alleged II to be examined by a physical/mental health professional appointed by the court, who shall submit a report in writing to the court at least 7 days prior to the hearing. Said report will not be made part of the public record, but shall be available to the court, alleged II, the petitioner, their legal counsels, and other persons as the court directs. It may be use pursuant to the Michigan rules of evidence. MCL 700.5304(1).
 - (ii) The alleged II has the right to secure an independent evaluation, which will be paid for by the state if the alleged II is 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).
- (G) 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.
- (H) Medical Report must contain all of the following, pursuant to MCL 700.5304(3):
 - (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) List of all medications alleged II is receiving, their dosages, and description of each medication's effect on the person's behavior.
 - (iv) Prognosis for allege 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.
- (I) Trial Procedures. Procedure in probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules in MCR Chapter 5.
- (J) Burden of Proof.
 - (i) A guardian may be appointed if the court is satisfied by clear and convincing evidence that the individual 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).

- (ii) 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)
 - (iii) If the court finds by clear and convincing evidence that the individual is totally without capacity to care for himself/herself, this finding shall be specified in any order and the court may appoint a full guardian. MCL 700.5306(4).
 - (K) Powers granted to the Guardian. MCL 700.5306(2)
 - (i) 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.
 - (ii) The guardianship shall be designed to encourage the development of maximum self-reliance and independent in the individual.
 - (iii) A court order establishing the guardianship shall specify any limitations on the guardian's powers and any time limits on the guardianship.
- 7. Petition for Modification/Termination of Guardianship. MCL 700.5310.
 - (A) The ward or a person interested in the ward's welfare may petition for an order removing the guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating the guardianship.
 - (B) A request for this order may be made by informal letter to the court or judge. Upon receipt of such a request, the court is required to appoint an attorney for the ward to pursue the termination/modification.
 - (C) A person is subject to contempt of court if they knowingly interfere with the transmission of this request to the court or judge.
 - (D) Upon receiving a petition or request for such an order, the court shall set a date for a hearing to be held within 28 days after receipt of the petition or request.

MENTAL HEALTH COMMITMENT PROCEEDINGS

1. Civil admission and discharge procedures are governed by Chapter Four of the Mental Health Code, MCL 330.1400 *et seq.* This is required reading prior to accepting an appointment in mental health commitment proceedings.
2. The attorney of record must represent the individual on all probate court proceedings under the Mental Health Code until the attorney is discharged by court order or another attorney has filed an appearance on the individual's behalf. MCR 5.732(A)
3. The attorney must serve as an advocate for the individual's preferred position. If the individual does not express a preference, the attorney must advocate for the position that the attorney believes is in the individual's best interest. MCR 5.732(B)
4. The individual may waive an attorney only in open court and after consultation with an attorney. The court may not accept the waiver if it appears that the waiver is not voluntarily and understandingly made. MCR 5.732(C).
5. As attorney for the individual you are expected to provide competent representation with adequate preparation. MRPC 1.1
6. When representing an individual who may have significant problems making decisions, it may be difficult for you to adopt the formal adversarial stance one would use in all other settings. Also, there may be a strong urge to do what is best for the apparently ill and impaired person, even though effective advocacy could result in dismissal of the claim. Remember, under the rules of professional conduct, an attorney *must* advocate for the client's expressed goals, not for what the attorney believes is best.
7. Attorney's Role.
 - (A) Review Initial Paperwork. Review the petition, clinical certifications, notice of hearing, Notice of Hospitalization and Certification of Service on the patient, and any other documents. Make certain the patient's procedural rights were not violated (e.g., certifications filed in required time frame, evaluations performed within the statutory time frames, etc.
 - (B) Client Meeting / Deferral Meeting. MCL 330.1454 and MCL 1455.
 - (i) Attorney must meet with client at least 24 hours before the court hearing.
 - (ii) Attorney must meet with the client within 72 hours, excluding Sundays and holidays, after the traditional initial petition and 2 clinical certifications have been filed with the court.
 - (iii) Client may defer to a specific treatment plan; the maximum period of hospitalization on a deferral is 60 days.
 - (iv) A deferral allow the client to voluntarily accept treatment and avoids an adjudication of mental illness, thus eliminating entry on the LIEN system.
 - (v) Deferral is not a waiver of attendance. Be certain your client signs the correct forms at your client meeting.

- (C) Appearance at the hearing and Patient Rights.
- (i) Jury demand must be made before testimony is received. MCL 330.1458; MC 5.740.
 - (ii) IME. Demand for independent evaluation must be made before the first witness is sworn. MCL 330.1463. The evaluation or testimony of the evaluator can only be introduced with the consent of the patient. MCL 330.1433.
 - (iii) Attorney should review the alternative treatment report. Is there a more appropriate and lesser restrictive alternative to hospitalization?
 - (iv) Patient has a right to attend the hearing. The patient's presence is waived if it would expose him/her to a serious risk of physical harm (illness) based on a doctor's letter. The right to attend is also waived if the patient fails or refuses to attend the hearing, has been given proper notice, and has consulted with an attorney. MCL 330.1455.
 - (v) No involuntary drug treatment prior to the hearing (especially on day prior to and day of hearing), except to prevent injury as circumstances may require. Patient can voluntarily accept treatment or drugs prior to hearing. MCL 330.1718.
- (D) Jury Trial.
- (i) Advocate on behalf of the patient.
 - (ii) Present proofs as you normally would at trial.
 - (iii) Probate court will serve your witness subpoenas, if any, if you are court appointed. Attorney prepares their own subpoenas and should have them ready in a timely manner for service. The court typically serves a subpoena on the treating psychiatrist, with notice of hearing for the petitioner and the CMH Liaison to appear.

PROCEEDINGS FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES

1. MCL 330.1100a(25) defines “developmental disability” as either of the following:
 - (A) If applied to an individual older than 5 years, with 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
 - (h) 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.

Or

- (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 development disability as defined in MCL 330.110a(25)(a).

2. Types of Guardianships for Individuals with Developmental Disabilities

- (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).
 - (i) Plenary guardianships continue until further order of the court.
 - (ii) They are not reviewed unless a petition for modification is filed.
 - (iii) “Guardian of the person” is similar to a guardian under EPIC.
 - (iv) “Guardian of the estate” is similar to a conservator under EPIC.
- (B) 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).
 - (i) Partial guardianships are for a term of no more than 5 years. MCL 330.1626(2),
 - (ii) At the end of the 5 year term, the partial guardianship terminates and a new guardianship proceeding is commenced. MCL 330.1626(3).
- (C) When the court appoints a plenary guardian of the estate or a partial guardian with powers or duties respecting real or personal property, that guardian is considered a fiduciary for the purposes of EPIC, and must file an annual accounting with the court. MCL 330.1632.

3. Representing Individuals with Developmental Disabilities.
 - (A) An attorney is appointed for an individual with developmental disabilities within 48 hours of a petition being filed, unless a private attorney has already filed an appearance. MCL 330.615(2).
 - (B) The respondent has the right to request the attorney he or she wants. MCL 330.1615(3).
 - (C) As the court-appointed attorney, you are to advocate for the respondent.
 - (i) The attorney of record must represent the individual on all probate court proceedings under the Mental Health Code until the attorney is discharged by court order or another attorney has filed an appearance on the individual's behalf. MCR 5.732(A)
 - (ii) The attorney must serve as an advocate for the individual's preferred position. If the individual does not express a preference, the attorney must advocate for the position that the attorney believes is in the individual's best interest. MCR 5.732(B)
 - (iii) The individual may waive an attorney only in open court and after consultation with an attorney. The court may not accept the waiver if it appears that the waiver is not voluntarily and understandingly made. MCR 5.732(C).
 - (iv) As attorney for the individual you are expected to provide competent representation with adequate preparation. MRPC 1.1
 - (D) Review initial paperwork to ensure that the respondent's procedural rights were not violated (e.g., hearing was set within required time frame).
 - (E) Attorney does not receive copies of the medical reports/evaluations with the initial mailing. These confidential reports must be reviewed by the attorney at court prior to the hearing.
 - (F) Attorney must meet with their client prior to the hearing. It is recommended that the meeting occur as soon as possible upon the attorney's receipt of the initial paperwork, and definitely no later than 24 hours prior to the hearing. *It is the court's policy that this meeting occur at the client's place of residence.* This allows you to assess the home environment to determine whether it appears adequate to meet the client's needs.
 - (G) At the client meeting:
 - (i) Ascertain the client's level of understanding.
 - (ii) Explain why you are there.
 - (iii) Make a reasonable effort to inform the client of their rights. MCL 330.1634.
 - (iv) Inform the client that if guardianship is ordered at the hearing, the client can request termination, dismissal or modification of the guardianship at a later date.
 - (v) Notice of Right to Request Dismissal of Guardian or Modification of Guardianship (PC 661) must be served on the client.
 - (vi) Explain to the client what a guardian is and does.
 - (vii) Discuss the client's preference for a choice of guardian.
 - (viii) Get to know your client as much as possible in the short time you meet with him/her.
 - (ix) Gather enough information to assess what type of guardianship, if any, if needed, and whether a guardianship is in the client's best interests.
 - (x) Inquire into the client's assets and income.
See attached Initial Client Consultation (Alleged DD)

4. Individual's Presence at the Hearing.

- (A) Individual must be present at the hearing.
- (B) Individual may be excused by the court only on a showing, supported by affidavit from a physician/psychologist who recently examined the individual, that attendance would subject the individual to serious risk or physical or emotion harm. MCL 330.1617(4).
- (C) The affidavit must be filed with the court by the hearing date.

5. Other Rights at Hearing.

- (A) Individual has the right to present evidence, and to confront and cross-examine all witnesses.
- (B) Attorney or the respondent may request that the hearing be closed to the public. MCL 330.1617(2) and (3).

6. Attorney Role at Hearing.

- (A) Prior to start of hearing, talk to the evaluator, especially if there is a concern over the guardianship recommendation.
- (B) Discuss with prosecutor whether to stipulate to the expertise/qualification of the testifying evaluator.
- (C) On cross exam of the evaluator, elicit testimony as to the individual's understanding of money or other activities of daily living. This will help to establish what rights, if any, the respondent should retain if a partial guardianship is granted.
- (D) Call the petitioner as a witness if guardianship of the estate is requested. Rarely does the psychologist or evaluator have knowledge of the individual's financial situation or assets.
 - (i) Testimony will need to center on the estate assets, the respondent's expenses, etc. for the court to make a finding as to whether a guardian of the estate is appropriate.
 - (ii) Address the issue of bond/restricted account.
- (E) Closing presentation should include the client's preference for a guardian. If the individual cannot express a preference, the attorney should advocate in the client's best interests.

7. Jury Trial Request.

- (A) Alleged DD can demand a jury trial to decide issues of fact. MCL 330.1617.
 - (i) Jury consists of a panel of six.
 - (ii) No jury fee.
 - (iii) It is rare to have a jury trial for a DD guardianship hearing.
 - (iv) If jury trial is demanded, the hearing would be adjourned.

8. Independent psychological evaluation.

- (A) Client may request an independent evaluation (IE) at his/her own expense, unless indigent, then at the expense of the state. MCL 330.1617(6).
- (B) The attorney must request the IE before an adjournment order and order for the IE are prepared.
- (C) The court keeps a list of evaluators that have agreed to perform IE's and who are available.

- (D) The attorney contacts the evaluator to check availability, and within 24 hours lets the court know the evaluator's name and address so the Order can be prepared by court staff.
- (E) The evaluation is defense material, its contents confidential, and cannot be introduced into evidence without the client's consent.

MINOR GUARDIANSHIP PROCEEDINGS

1. Typically, an attorney (lawyer guardian ad litem) is appointed to represent parties in minor guardianship proceedings only in the following situations:
 - (A) The mother and/or father is a minor.
 - (B) The mother and/or father is a mentally incompetent adult.

2. Lawyer Guardian ad litem
 - (A) 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.
 - (B) Appointment may be made at any time during these proceedings if the court determines the minor's interests are inadequately represented. MCL 700.5213(4).
 - (C) A lawyer guardian ad litem represents the child and has powers and duties as set forth in MCL 712A.17d. MCL 700.5213(5).
 - (D) The lawyer guardian ad litem may file a written report and recommendation, and the court may read that report and recommendation. The report and recommendation is not admitted into evidence unless all parties stipulate the admission. The parties may use the report and recommendation for purposes of a settlement conference. MCL 700.5213(5)(a)
 - (E) A guardian ad litem may be appointed for the child to assist the court in determining a child's best interest. MCL 700.5213(6).
 - (F) After a determination of ability to pay, the court may assess all or part of the costs and reasonable fees of a lawyer guardian ad litem against one or more of the parties involved in the proceedings. MCL 700.5213(5)(b).

3. Duties. When appointed, the lawyer guardian ad litem should:
 - (A) Review the file, and in particular the order containing the LGAL appointment for instructions on the issue at hand.
 - (B) Meet with the minor, guardian, parent(s), and any other interested persons.
 - (C) Prepare a written report for the court, and be certain to have it filed at least 7 days prior to the next court hearing, or by the date ordered by the Court.
 - (D) Include your invoice with your report.

INITIAL CLIENT CONSULTATION (ALLEGED DD)

Client Name:

Date:

Location:

Meeting time:

Persons present at the meeting:

- (F) Discuss with client:
 - (i) Notice of Right to Request dismissal of Guardian. Explain the notice.
 - (ii) Advise client that you are court appointed attorney, and their right to have an attorney.
 - (iii) Court hearing is set for _____ at _____ o'clock a Macomb County Probate Court
 - (iv) Discuss the petition.
 - (v) Discuss what a guardian is and does.

- (G) Personal information regarding client.
 - (i) Age/birth date
 - (ii) Where they reside
 - (iii) With whom do they reside.
 - (iv) How long have they resided at that location
 - (v) Other family members
 - (vi) Least restrictive environment?

- (H) Nature of Disability.
 - (i) Origination of disorder (birth, accident)
 - (ii) Medications

- (I) Educational history/currently still in school?

- (J) Job/employment history; workshop programs

- (K) Able to self-care, groom self, bath, dress, drive.

- (L) Cook, clean, feed self?

- (M) Able to take their own medications?

- (N) Read, write, count, understand money?

- (O) Communication skills
 - (i) Verbal or non-verbal
 - (ii) IQ level
 - (iii) Age equivalent level

- (P) Client's physical appearance and dress.
- (Q) Client's behavior (quiet, withdrawn, violent, cooperative, nervous, shy, etc)
- (R) Income
 - (i) Public assistance
 - (ii) SSD, SSI
 - (iii) Assets
- (S) Client's preference
- (T) Client's concerns/questions
- (U) Guardian's concerns/questions