

# **Manual for Guardians ad Litem and Appointed Counsel**

**Adult Guardianship and Conservatorship**

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## **A. INTRODUCTION**

### **WHAT IS A GUARDIAN AD LITEM?**

A guardian ad litem is an individual appointed by probate court at the inception or during a proceeding. Responsibilities may include prosecuting an action on behalf of an individual, providing information to a respondent, conducting an investigation, and making a report and recommendation to the court.

*Ad litem* literally means "for the suit." A guardian ad litem does not have the usual powers of a guardian, e.g., the right to make medical treatment decisions for another.

### **MUST A GUARDIAN AD LITEM BE A LAWYER?**

No. Some courts by custom use only lawyers; others may choose among lawyers, nurses, social workers, and community volunteers.

### **IF A LAWYER IS APPOINTED AS GUARDIAN AD LITEM, DOES HE OR SHE REPRESENT AN INDIVIDUAL AS A LAWYER?**

No. In general, the role of guardian ad litem is to help determine the best interests of the individual, not to advocate for a position chosen by a client, as would a lawyer.

### **IN WHAT KINDS OF CASES MIGHT A GUARDIAN AD LITEM BE APPOINTED?**

This booklet focuses on appointments in adult guardianship and conservatorship matters, for petitions brought under the Estates and Protected Individuals Code. Different procedures apply to guardianships for individuals alleged to have a developmental disability. MCL 333.1600, et seq.

A guardian ad litem might also be appointed in cases involving minors, such as guardianship or settlement of personal injury claims; for individuals whose whereabouts are unknown; for a patient in a dispute concerning a durable power of attorney for health care; or in any other case the court deems it appropriate. MCL 700.1403(d).

### **WHY IS A GUARDIAN AD LITEM IMPORTANT IN ADULT GUARDIANSHIP CASES?**

The petition commencing a guardianship or conservatorship proceeding may provide little information. There may be no medical evidence presented, or only a sketchy doctor's letter. The respondent is not required to attend the hearing, and unfortunately, often does not.

A guardian ad litem's report, be it written or oral, may be the primary evidence considered by the court in rendering a decision.

### **HOW COMPLICATED IS IT TO SERVE AS A GUARDIAN AD LITEM?**

Each case is different. You should be aware serving as guardian ad litem can be a complicated, time-consuming, and frustrating task. The role can require one to be perceptive, sensitive, and patient, and to have a tolerance for conflict. Serving as guardian ad litem can also be quite a rewarding experience.

A guardian ad litem must be knowledgeable about alternatives to guardian and conservatorship, about medical conditions leading to disability, and to community resources outside the court system.

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Realize there may be a multitude of sources of information, and you may receive widely divergent renditions of events and opinions on issues. It is important to keep an open mind, often reserving judgment until all evidence is in.

You also have an obligation to "call it as you see it," without tempering your recommendation for fear of displeasing the judge, the petitioner or others involved.

## **WHAT IS MY POTENTIAL LIABILITY FOR SERVING?**

MCL 691.1407(6) provides, in part,

[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.

A guardian ad litem may still be liable for gross negligence or intentional misconduct.

## **B. APPOINTMENT**

### **IN ADULT GUARDIANSHIP PROCEEDINGS, WHEN WILL THE COURT APPOINT A GUARDIAN AD LITEM?**

The court will appoint a guardian ad litem for the respondent upon the filing of an initial petition, MCL 700.5303(2), and usually for an emergency petition. A guardian ad litem will not be appointed if the *respondent* already has a lawyer of his or her choice.

The court will appoint a guardian ad litem if an interested party other than the ward or protected individual seeks modification of an existing guardianship, including a change in the person serving as guardian, expansion of the guardian's powers, or termination of the guardianship. MCL 700.5310(4).

### **IN ADULT CONSERVATORSHIP PROCEEDINGS, WHEN WILL THE COURT APPOINT A GUARDIAN AD LITEM?**

The court will appoint a guardian ad litem upon the filing of the initial petition seeking a conservatorship or protective order. MCL 700.5406(2). The court will appoint a guardian ad litem if a conservator petitions to sell real estate, or to establish a trust.

### **IN WHAT OTHER CIRCUMSTANCES MIGHT THE COURT APPOINT A GUARDIAN AD LITEM?**

The court may appoint a guardian as litem if a guardian seeks instructions from the court, and may use a guardian ad litem to conduct a periodic review. The court may appoint a guardian ad litem to review the annual account of a conservator.

## **HOW IS A GUARDIAN AD LITEM CHOSEN IN A PARTICULAR CASE?**

The probate court maintains a list of individuals who have indicated a wish to serve as guardian ad litem. Court personnel choose from among the list, trying to spread appointments around fairly and sometimes matching the expertise of the guardian ad litem with the cause of disability of the respondent. Individuals are contacted by telephone concerning a prospective appointment.

## **DOES THE PETITIONER HAVE A ROLE IN THE CHOICE OF GUARDIAN AD LITEM IN GUARDIANSHIP CASES?**

No. State law prohibits the petitioner from nominating an individual to serve as guardian ad litem; the guardian ad litem must be neutral.

## **HOW CAN AN INDIVIDUAL GET ON THE PROBATE COURT LIST?**

One must write to the probate court and including a resume.

## **IS THERE A MINIMUM OF EXPERIENCE REQUIRED?**

No. An individual only needs the interest, sensitivity, and time to do a good job. The court does request an individual observe a few guardianship hearings before being appointed. Formal training is offered on an irregular basis, and is not a prerequisite to serving in most counties.

## **MUST I ACCEPT AN APPOINTMENT THAT IS OFFERED?**

No. You might be engaged in a trial, otherwise too busy, or going on vacation.

Even if you have time available, you should not accept an appointment if you are related to or have a personal or professional relationship with the petitioner, the respondent, or any other interested party.

**WILL DECLINING AN APPOINTMENT JEOPARDIZE MY CHANCES OF FUTURE APPOINTMENTS?**

No. However, if you consistently decline appointments, the court may remove your name from the list.

**THROUGH WHAT MECHANISM AM I APPOINTED?**

The court will issue an "Order Appointing Guardian Ad Litem." Note the back of the form, which briefly states your duties in an adult guardianship case.

## **C. UPON APPOINTMENT**

### **HOW MUCH TIME WILL I HAVE TO COMPLETE MY DUTIES?**

In non-emergencies, hearings are scheduled for a date about three weeks from the date of petition. If you find you cannot perform your duties within that time frame, you may request an adjournment from the court.

If a petitioner feels there is an emergency, he or she may bring a petition for appointment of a temporary guardian or special conservator. A hearing can be scheduled within 24 hours, and as guardian ad litem, you have to complete your duties by the time of the hearing.

One of your responsibilities will be to determine if indeed an emergency exists.

### **WHAT IS AN EMERGENCY?**

Circumstances must be viewed from the perspective of the respondent, not the needs of the petitioner. Generally in guardianship, emergencies are life or death situations. A hospital's desire to transfer a patient to a nursing home is almost never an emergency.

### **WHAT SHOULD I DO FIRST UPON BEING APPOINTED?**

Thoroughly read the papers you are given. They will include a copy of the petition or petitions, the notice of hearing, and perhaps a doctor's statement.

### **WHAT USEFUL INFORMATION MIGHT I FIND IN THE PETITION?**

By reviewing the petition, you can usually determine the age of the respondent, his or her present address, the name and relationship of the petitioner, and who, if anyone, is nominated to be guardian or conservator.

By law, the petition is to contain specific examples of recent conduct demonstrating the need for appointment of a guardian. MCL 700.5303(1). Unfortunately, such information is often lacking on the petition.

## **WHAT OTHER IMPORTANT INFORMATION SHOULD BE IN THE PETITION?**

The petition should list the names, addresses, and telephone numbers of all *interested persons* defined in court rule. Petitioners may list some but not all, or may omit addresses or telephone numbers. You may have to ask the petitioner or others for names, addresses, and telephone numbers.

Some petitions from a hospital list no interested persons; this only means the hospital was not able to identify any. Part of your role as guardian ad litem will be to try and locate family.

Note the attorney general is an interested party if the respondent has no known presumptive heirs. The Veterans' Administration is an interested party if the respondent receives any VA benefits.

In a petition for appointment of a conservator or for a protective order, a government agency paying benefits to the respondent or before which an application for benefits is pending, is an interested person. MCL 700.5104(2).

## **MUST THE PETITION BE ACCOMPANIED BY A DOCTOR'S LETTER?**

No. But there may be a letter, statement, or report from a doctor.

Ideally, a doctor's statement will include a diagnosis, some history of the individual's condition, and an explanation how the condition interferes with the individual's ability to make informed decisions.

## **HOW MUCH WEIGHT SHOULD I GIVE A DOCTOR'S LETTER?**

Be aware a report may not have been prepared with a guardianship proceeding in mind. Even if it were, the doctor may not understand the concept of legal incapacity, or may harbor stereotypic notions of older adults or individuals with disabilities. Finally, doctors' statements often only state a conclusion or offer a diagnosis such as "dementia." Even that diagnosis may be a guess; for example, symptoms of depression and dementia can be quite similar.

Remember, capacity is a legal not a medical concept. Beware of labels, and do not treat a doctor's letter as gospel.

**WILL I ALWAYS RECEIVE A NOTICE OF HEARING?**

It is the usual policy of the court to assign a hearing date and time upon a petition being filed. That information appears on the notice of hearing you receive.

**IS IT MY DUTY TO SEND THE NOTICE OF HEARING TO INTERESTED PARTIES?**

No. Sending notice to interested parties and personally delivering the notice of hearing to the respondent are responsibilities of the petitioner.

However, it is a good idea to give a copy of the petition, explanation of rights, and notice of hearing to the respondent upon meeting with him or her.

**WHAT IS THE EXPLANATION OF RIGHTS FORM?**

This form must be provided a respondent in a guardianship proceeding.

**WILL I RECEIVE A COPY OF THE ORDER APPOINTING ME?**

Yes. Use this if anyone questions your authority to conduct the investigation.

## **D. VISITING THE RESPONDENT**

### **MUST I VISIT THE PERSON?**

Yes. MCL 700.5305(1).

### **SHOULD I CONDUCT THE VISIT BEFORE SPEAKING TO INTERESTED PERSONS?**

It is often best to speak with the respondent first. Despite possible protestations, you have no obligation to first contact the petitioner or the petitioner's lawyer. You do not want your initial perceptions colored by the views of others.

If you do speak with the petitioner first, it can be useful to determine what triggered the petition. Often, family members have been told by a doctor or social worker that guardianship must be sought.

### **WHEN SHOULD I VISIT?**

It is often best to arrange a visit soon after appointment. Sometimes, there is indication the individual might have dramatic improvement in mental state in the weeks leading up to the hearing.

### **SHOULD I CALL THE RESPONDENT IN ADVANCE?**

Yes, particularly if the individual lives in a house or apartment.

In a hospital or nursing home, an individual may be difficult to reach by telephone. But if some time has passed since the date of the petition, it may be worthwhile to check whether the individual is still in the hospital or nursing home.

If you visit unannounced, recognize the possibility the individual will not be available to see you right then. He or she may be asleep or at a meal.

## **WHAT IF THE INDIVIDUAL REFUSES TO SEE ME?**

If the individual will not agree to meet with you, e.g., will not answer the telephone or refuses to open the door, see if the petitioner or other person can help set up a meeting. If unsuccessful, report back to the court. If someone else blocks your access to the individual, report back to the court.

## **SHOULD I SEE THE INDIVIDUAL PRIVATELY?**

Yes. First, it is an issue of dignity. Second, you want the individual to be as comfortable as possible in answering your questions, without fear the answers are offending anyone.

Interested persons may be hesitant to absent themselves from the meeting. Be respectful, but be firm.

## **ARE THERE EXCEPTIONS?**

If an individual has difficulty communicating, it may be necessary to have someone who knows the individual present to help interpret his or her responses. It would still be helpful to attempt part of the interview in private.

## **HOW SHOULD I BEGIN?**

Introduce yourself, and briefly explain the purpose of your visit: a guardianship and/or conservatorship petition has been brought in probate court, and you have been appointed by the court to visit and to report back to the court. Inform the individual the discussion is not confidential. MCR 5.201(E).

Rather than immediately talk about details of process and rights, try to make a connection with the individual. This may require small talk, questions about a hobby, or comments about current events.

## **WHAT IF THE INDIVIDUAL IS SUSPICIOUS?**

The individual may be agitated, unfocused or suspicious. The suspicion may be understandable, as the interview is part of a process which may result in the individual losing the power to make decisions.

Try to allay fears after introducing yourself. Attempt to communicate one of your goals is to glean his or her wishes, and his or her cooperation may be helpful in effecting those wishes.

### **WHAT SHOULD I BE COGNIZANT OF IN CONVERSING WITH THE RESPONDENT?**

The individual may have hearing or vision difficulties. Speak slowly, clearly, and loudly enough for the individual to hear. Make eye contact and look for signs of recognition. If the individual is very hard of hearing, you may be able to communicate by writing.

The individual may have difficulty keeping track of the questions. Repeat them. Be patient without being patronizing. Treat the individual as an adult.

Although you know what is relevant to your investigation, the individual does not. The individual's answers to your questions may be long and rambling; again, be patient.

### **MIGHT A SECOND VISIT BE USEFUL?**

Sometimes, yes. Recognize that individuals may have better or worse days, and better or worse times of the day. Medication can affect one's ability to comprehend and converse. An accident or stroke victim might significantly improve over a period of two or three weeks.

A second visit under different circumstances may add to your perspective.

### **WHAT IF THE INDIVIDUAL DOES NOT SPEAK?**

Do not make immediate assumptions. An individual may be unable to speak or write, but able to understand.

Some individuals may be limited to responding by squeezing your hand, or blinking her or his eyes. He or she may smile as you present certain alternatives, frown at others.

## **ARE THERE OTHER REASONS AN INDIVIDUAL MAY NOT SPEAK?**

An individual may not respond because he or she has chosen to withdraw. Sometimes the individual will begin to respond 10 or 15 minutes into the meeting.

## **WHAT IF THE INDIVIDUAL CANNOT COMMUNICATE?**

If you surmise the individual has no ability to communicate, that will be an important aspect of your report. You should still attempt to convey the required information, and then conduct the rest of your investigation.

## **WHAT IF THE INDIVIDUAL ONLY UNDERSTANDS A LANGUAGE OTHER THAN ENGLISH?**

If the person does not speak English, the court will first try to find a guardian ad litem who speaks the language. If this fails, the court will endeavor to find an interpreter, or trust the petitioner to interpret.

## **WHAT SPECIFIC INFORMATION DO I NEED TO CONVEY?**

Using non-technical language, explain the nature of guardianship or conservatorship, the legal effects upon the individual of the appointment of a guardian or conservator, and the name of the person seeking to become guardian or conservator. MCL 700.5305.

## **WHAT SHOULD I DETERMINE FIRST?**

Try to determine whether the individual has a durable power of attorney for health care or a durable power of attorney for finances. This information is requested on the petition, but do not rely on the petition alone.

## **WHY IS THIS IMPORTANT?**

A relatively new law prohibits a court from granting a guardian powers already held by a patient advocate, unless the patient advocate is not performing her or his duties. MCL 700.5306(5). Sometimes, petitioners have been given

incorrect information that guardianship is necessary even when the petitioner is already patient advocate.

### **IS IT IMPORTANT WHETHER THE INDIVIDUAL IS ENROLLED IN MEDICAID?**

Yes. A court can only appoint a guardian if the individual is incapacitated, **and** if appointment of a guardian is **necessary** to provide for the individual's needs. A provision of the Social Welfare Act allows the closest family member to authorize treatment for an individual not able to consent him or herself. MCL 700.66h.

### **WHAT IF THE INDIVIDUAL IS TERMINALLY ILL?**

The Michigan Dignified Death Act, as recently amended, suggests a family member may make decisions for an incapacitated individual, in the absence of a patient advocate or guardian. MCL 333.5653(c); 5655.

### **WHAT ABOUT A CONSERVATORSHIP?**

The law now requires a conservatorship to be **necessary**, not merely desirable. MCL 700.5401(3)(b). If the individual has a durable power of attorney for finances or a trust, conservatorship may not be necessary.

### **WHAT SHOULD I DO IF THE RESPONDENT ALREADY HAS THESE DOCUMENTS, IS ENROLLED IN MEDICAID, OR IS TERMINALLY ILL?**

You can explain the law to the petitioner. This will sometimes result in the petition being withdrawn.

### **WHAT SHOULD I DETERMINE NEXT?**

Statute requires you determine whether there are alternatives to full guardianship, MCL 700.5305(1)(e), or to conservatorship, MCL 700.5406(4)(a).

If you believe the individual is of sound mind and thus has capacity to sign a durable power of attorney, you should suggest that step to both respondent and petitioner. You should emphasize that step is voluntary.

### **IF A HEARING WILL OCCUR, WHAT DO I SAY TO RESPONDENT?**

Explain the court hearing procedure, including the individual's rights in the procedure. MCL 700.5305(1)(c). Remember these may be familiar to you, but a mystery to the individual.

### **WHAT SPECIFIC RIGHTS MUST I COVER?**

Disposition: The right to contest the proceeding, to request limits on the guardian's or conservator's powers, or to object to a particular person being appointed.

Hearing: To be present at the hearing, to have the site of the hearing changed if necessary, to a hearing closed to the public.

Counsel: To be represented by a lawyer of one's choice, to have a lawyer appointed by the court, to have the appointed lawyer paid by the court if individual unable to afford fee.

Evidence: To present evidence in one's own behalf, to an independent medical exam, to cross-examine any witness.

### **WHAT IS MY NEXT STEP?**

You must determine if the individual wishes to contest the petition, requests limits on the guardian's or conservator's powers; objects to the person nominated as guardian or conservator; or wants a lawyer. MCL 700.5305(1)(e).

The individual's wishes may be express or you may have to infer them from other comments. Be sensitive that many people may be anxious to please. Their responses may be colored by what they think you want to hear, or by what someone else feels is best for them.

## **IF THE INDIVIDUAL WISHES TO CONTEST, WHAT DO I DO?**

Proceed no further with your investigation. Report to the court the individual wishes to contest, or requests counsel. You may use the court form, *Acceptance of Trust and Report of Guardian Ad Litem*, and simply check the appropriate box. MCL 700.5305(3),(4).

Even if the individual expresses no wish to contest, if at any time during your investigation you believe it to be in his or her best interest to have counsel, you should recommend that step to the court. MCL 700.5305(4).

## **DO I NEED TO JUDGE WHETHER THE INDIVIDUAL IS MAKING AN INFORMED OBJECTION?**

No. If the individual expresses a specific objection, a general wish to contest, or a desire for counsel, you should take that at face value. You should not evaluate whether the individual understands what it means to object.

## **SHOULD MY REPORT INCLUDE ANY INFORMATION OTHER THAN THE INDIVIDUAL OBJECTS?**

Generally, if the individual wishes to contest the petition, your report would not include any information gleaned from your investigation, your opinion on legal incapacity, or your recommendation for disposition.

## **ARE THERE EXCEPTIONS?**

Yes. Following are issues to consider mentioning in your report even if the individual objects:

- The individual already has a durable power of attorney for health care or finances
- You believe the individual has capacity to execute a power of attorney
- You believe the petition is spurious or clearly inappropriate

- Venue is improper
- The possibility of mediation, if you believe any disagreement could be resolved in that forum. MCL 700.5305(1)
- Whether the individual wishes to be present at the hearing

**WHAT WILL THE COURT DO WITH A REPORT CITING THE EXISTENCE OF AN ADVANCE DIRECTIVE OR AN OBJECTION OF RESPONDENT?**

Prior to the hearing or at the time of the hearing, the court will likely appoint a lawyer to represent the individual. MCL 700.5303(3),(4). The court can arrange for mediation. Court staff may contact the petitioner providing the option to petitioner of withdrawing the petition.

## **E. GUARDIAN AD LITEM REPORT**

### **WHAT IF THE INDIVIDUAL DOES NOT EXPRESS A WISH TO CONTEST?**

You need to complete an investigation, and make a detailed report to the court. In this role you are a neutral party, not an advocate.

### **WHAT SHOULD I BE COGNIZANT OF IN MAKING AN INVESTIGATION?**

Be aware of your values and biases. You may have strong feelings about aging, about cleanliness, or about safety. It is also important to be sensitive to personal and cultural differences.

Realize a guardianship or conservatorship petition may be the latest salvo in a years long conflict among family members. The depth of the conflict may not be apparent at first.

You may hear very different, and sometimes shocking stories from the people to whom you speak. Do not make instant judgments regarding verity; attempt to confirm information through other sources.

### **NEED THE REPORT BE WRITTEN?**

Statute requires a guardian ad litem to make a report in writing or through recorded testimony. MCL 700.1403(d). The policy in many courts is to require both, except in emergencies.

### **WHEN IS A REPORT DUE?**

Any written report must be filed with the court at least 24 hours before the hearing, unless another time is specified by the court.

If at all possible, a report should be filed at least two days before the scheduled hearing. Filing the report early allows the court to more thoroughly consider it.

## **WHAT SHOULD THE REPORT INCLUDE?**

If the individual does not object to the petition in any way and does not request counsel, the report should include the results of the investigation, and your recommendations for disposition.

The recommendations must include any limitations on the fiduciary's powers and an appropriate review date, if less than one year. MCL 700.5305(1)(e)(i)(A); 5406(4)(b).

## **IS THERE INFORMATION THAT I SHOULDN'T INCLUDE IN THE REPORT?**

Remember, the report will become part of a public record. Use common sense. If allegations are potentially embarrassing to anyone, first determine if they are relevant to your task. If so, determine if there is some basis in fact. Finally, weigh the potential for embarrassment with the probative necessity of including the information in your report.

## **HOW LONG SHOULD A REPORT BE?**

Your report should include all pertinent information from your investigation. This may take a few paragraphs in some cases and a few pages in others.

## **WHAT ABOUT MY RECOMMENDATIONS?**

Make your recommendations as concise and definitive as circumstances allow. Do not argue all sides of the issue without a suggested resolution. Base your recommendations solely on your investigation, not on what you might imagine the judge wants to hear or on how vociferous the petitioner is.

## **IF THERE ARE BOTH GUARDIANSHIP AND CONSERVATORSHIP PETITIONS, NEED I FILE TWO REPORTS?**

You may file a single report. If some of your findings are specific to one of the petitions, make sure that is clear in your report. For example, you might

recommend different individuals to serve as guardian and conservator, or recommend limitations on powers specific to one or the other petition.

### **FOR GUARDIANSHIP, WHAT ARE SPECIFIC ISSUES TO ADDRESS?**

The report should address at least all the following issues:

- Does the individual meet the definition of "incapacitated individual?"
- If so, is guardianship necessary? For instance, guardianship may be unnecessary when there is an advance directive.
- If guardianship is necessary, are any limits appropriate on the guardian's power, or the term of the guardianship?
- Is the nominated guardian the choice of the respondent? Is the person the appropriate person to serve?
- Are there conflicts that might be resolved through mediation?
- Does the individual wish to be present at the hearing?

### **WHAT MIGHT BE MY SOURCES OF INFORMATION?**

You must, of course, visit the respondent. You will attempt a conversation, and you may also make observations about the respondent's living situation.

You should usually speak with the petitioner. You can speak with the other interested persons, doctors and nurses who provide care, social workers, or others involved with the individual. There may be legal documents to review or court records to check.

Some information may be easy to obtain, some may require digging.

## **DO I HAVE ACCESS TO MEDICAL RECORDS AND BANK RECORDS?**

Yes. It may be worthwhile to call in advance, and surely bring the court order appointing you when you go to review the records.

## **WHAT IF A HEALTH CARE PROVIDER WILL NOT RELEASE INFORMATION?**

A doctor or hospital may raise the issue of confidentiality, particularly since the effective date of the federal Health Insurance Portability and Accountability Act (HIPAA) with its provisions to protect patient privacy.

You can ask the court to issue a specific court order if the issue cannot be resolved through discussion.

To the extent you have access to confidential information, use it only as necessary to well perform your task.

## **IN CONDUCTING THE INVESTIGATION, CAN I RELY ON HEARSAY?**

Yes. But try to confirm any information, as your sources are unlikely to testify at the hearing. Be particularly wary of multiple levels of hearsay.

In your report, indicate what information you have received through hearsay.

## **WHAT IS THE DEFINITION OF " INCAPACITATED INDIVIDUAL?"**

The Estates and Protected Individuals Code defines an incapacitated individual as an individual -

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).

## **WHAT DOES THIS MEAN?**

The concept of legal incapacity is not simple to grasp or to measure.

An individual is incapacitated if he or she hasn't the ability to take in information, weigh alternatives, make a decision based on that information, and communicate the decision.

Whether you or other people agree with decisions made, or whether it seems decisions are in the individual's "best interest" from an "objective" perspective are not determinative. Looked at from another angle, you must determine whether the individual *can* make informed decisions, not whether he or she *does* make reasonable decisions.

## **HOW DOES THIS CONCEPT FIT WITH THE OVERALL GOAL OF GUARDIANSHIP?**

The goal of our guardianship law is arguably to protect the opportunity for maximum independence, not to ensure the greatest safety of individuals. The initial question for you to answer is emphatically *not*, "Would this person be better off with a guardian?" Though a petitioner may have the best of motives, guardianship may still be inappropriate.

## **WHAT IS AN EXAMPLE?**

An individual in the hospital may express a strong desire to return home. Hospital staff and perhaps family may believe the individual would be safer in a nursing home.

Issues for the guardian ad litem are to evaluate the risks in returning home, and to determine whether the individual recognizes those risks. Part of the evaluation is to know how those risks might be diminished through support services available in the community.

## **IS INCAPACITY AN ALL OR NOTHING CONCEPT?**

No. The ability of an individual to make a particular type of decision will not always be "yes" or "no," but fall somewhere on a continuum.

Second, an individual may be perfectly able to handle day-to-day affairs, but incapable of making complex medical treatment decisions.

Third, an individual may be able to make informed decisions on some days, but not on others. Drugs, therapy, and one's surroundings may affect one's abilities for better or worse.

### **IS THERE A SIMPLE TEST FOR INCAPACITY?**

No. Though a "mini mental exam" may have some value, one could score badly but still be able to make informed decisions.

For instance, on a mini mental exam, an individual may be asked to count backward from 100 by 7's, or to spell "world" backward. It is not clear how failure to perform these tasks is related to the ability to decide for oneself where to live or what medical treatment to receive.

Test results are also markedly affected by the ability of the scorer. One older individual, asked on December 19 for the season, replied, "Christmas." That was marked as an incorrect answer, even though the individual was quite obviously oriented to the time of year.

### **IS AN INDIVIDUAL WITH A PHYSICAL DISABILITY INCAPACITATED IN A LEGAL SENSE?**

It is imperative you distinguish between physical and mental disability, although the two are often confused.

The physical abilities of an individual - whether he or she can walk, can see, can hear - are not determinative of legal incapacity.

For instance, an individual might have no use of his or arms and legs, no way to care for needs without assistance, yet have every ability to make informed decisions. An older individual may be "frail" and perhaps in greater jeopardy of broken bones, with no affect on the ability to make informed choices.

## **WHAT CONDITIONS MIGHT LEAD TO AN INABILITY TO MAKE INFORMED DECISIONS?**

An individual might suffer a closed head injury in an automobile accident, a stroke, a degenerative condition such as Alzheimer's disease, alcoholism, or severe mental illness. The condition might be recent, longstanding, or even date back to childhood.

## **WHAT IF THE CONDITION DATES BACK TO CHILDHOOD?**

If the condition arose before age 22, the individual might meet the definition of an individual with a "developmental disability," as defined in the Mental Health Code. MCL330.1100a(19). The definition is far broader than "mental retardation;" an individual with average intelligence can still have a developmental disability.

If you believe the individual may have a developmental disability, contact the court. A separate set of procedures applies to guardianships under the Mental Health Code. MCL 330.1600, et seq. For instance, a lawyer is appointed for each respondent, and a thorough evaluation known as a "612 Report" must be submitted to the court.

## **WHERE MIGHT I LOOK FOR INFORMATION ABOUT INCAPACITY?**

You will speak with the individual him or herself. You might also speak with the petitioner, family members, doctors, nurses, and social workers. You can review medical records.

If you speak with nurses or social workers at a nursing home or hospital, do not speak with them in front of the individual as if the individual were not there.

## **WHEN I SPEAK WITH THE INDIVIDUAL, WHAT INFORMATION AM I AFTER?**

You can try to answer the following questions, recognizing some are more difficult to answer than others:

- Is the individual oriented - does he or she know his or her name; where he or she is; the season of the year; whether it is morning, afternoon, or night; the relationship of the petitioner to him or her?
- Does the individual understand the information you have provided him or her?
- How is the individual's short term and long-term memory?
- Is the individual consistent in his or her answers over the course of the discussion, that is, are the responses reliable?
- Is the individual aware of the consequences of his or her actions or inaction?

### **HOW MIGHT I DETERMINE ANSWERS TO THESE QUESTIONS?**

If an individual merely responds "yes" or "no" to your questions, it can be difficult to gauge understanding. After you have discussed a concept with the individual, it may be helpful to ask him or her to explain it back to you in his or her own words.

It can be useful to ask the same question in more than one way at different points in the discussion, to see if responses are consistent.

### **WHEN I SPEAK WITH DOCTORS OR REVIEW MEDICAL RECORDS, WHAT SPECIFICALLY AM I AFTER?**

Note how recently the individual saw the doctor, and over what period of time the doctor has had a relationship with the individual.

You want to find out what medical conditions the individual suffers from, and how and to what extent these conditions affect the ability to make informed decisions. You would like to find out how long the person has suffered the condition, how definite the diagnosis, the treatment the individual is undergoing, and the medications he or she is receiving.

Finally, you would like an opinion on the prospects for improvement.

## **HOW MUCH WEIGHT DO I GIVE TO A DOCTOR'S OPINION ON INCAPACITY?**

Consider for how long the doctor has known the individual; the opportunity for the doctor to have seen changes over time.

Realize a doctor may not understand the concept of *legal* incapacity, may see incapacity as all or nothing, have stereotypic notions about older adults, be unaware how the individual functions in everyday life, or have little knowledge about alternatives to guardianship or the perimeters of a guardian's powers.

The opinion of particular specialists, e.g., psychiatrists or neurologists, may not always be more reliable than those of other doctors. Certainly do not be satisfied with mere conclusions about incapacity or the need for guardianship, without background information.

## **HOW MUCH WEIGHT SHOULD I PUT ON MEDICAL RECORDS OR EVALUATIONS?**

Obviously, the older the records, the less relevant the records are. Also consider the purpose for which an evaluation was done.

## **UPON COMPLETING MY INVESTIGATION, WHAT IF I AM STILL UNSURE OF INCAPACITY?**

Obviously, an individual's competence cannot be quantified, and its evaluation is a difficult matter.

You can recommend the court order an evaluation of the individual. MCL 700.5304(1). The evaluation, conducted by a physician or mental health professional, or both, should address the infirmities of the individual, how the infirmities interfere with decision-making, a prognosis for improvement, and a recommended rehabilitation plan. MCL 700.5404(3).

## **WHAT IF I DETERMINE AN INDIVIDUAL IS NOT INCAPACITATED?**

You need go no further in your investigation, and you should report your finding to the court.

If an individual is not *presently* incapacitated, guardianship is not appropriate. Guardianship is not a mechanism to provide for future incapacity, whatever its probability.

You may in your report suggest the respondent consider voluntarily signing an advance directive.

### **IF I CONCLUDE AN INDIVIDUAL IS INCAPACITATED, WHAT IS MY NEXT STEP?**

In order for the court to appoint a guardian, the court must find my clear and convincing evidence -

both that the person for whom a guardian is sought is an incapacitated individual, **and** that the appointment is necessary as a means of providing continuing care and supervision of the person of the incapacitated individual, with each finding supported separately on the record. (emphasis added) MCL 700.5306(1).

### **IN WHAT CIRCUMSTANCES MIGHT A GUARDIANSHIP NOT BE NECESSARY?**

The individual may have executed a durable power of attorney for health care (also known as a health care proxy or patient advocate designation). MCL 700.5506 et seq. The patient advocate may have authority to make all the same personal care and medical treatment decisions as a guardian, obviating the need for a guardian. Indeed, unless a patient advocate is remiss in performing her or his duties, a court **cannot** grant a guardian those powers held by a patient advocate. MCL 700.5306(5).

The individual may have signed a living will, clearly expressing his or her wishes concerning care during terminal illness or permanent unconsciousness.

Even if the petition does not indicate the existence of an advance directive, it is important to speak with the respondent, the petitioner, the nursing home, and the doctor, to see if such documents exist.

## **ARE THERE OTHER CIRCUMSTANCES WHEN A GUARDIANSHIP MAY NOT BE NECESSARY?**

Yes. The triggering event for a guardianship petition is often the need for informed consent to medical treatment. Another person may have authority through statute to make health care decisions for the individual. See MCL 400.66h, applicable to individuals enrolled in Medicaid, and MCL 333.5652, et seq., applicable to individuals with a terminal illness.

A petitioner may be seeking authority a guardian does not have, e.g., hospitalizing an individual for mental treatment when the individual objects.

There may be informal arrangements for surrogate decision-making that are well serving the individual.

It is important for the guardian ad litem to be aware of community resources which might postpone or prevent the need for guardianship.

## **IF GUARDIANSHIP IS NECESSARY, WHAT IS THE NEXT ISSUE FOR ME TO ADDRESS?**

An individual may be able to make informed decisions in some areas but not others. One necessary goal of the court is to tailor the guardian's powers to the demonstrated needs of the individual. MCL 700.5306(2).

State law requires the guardian ad litem consider the possibility of limited guardianship, and if appropriate, recommend the specific powers the limited guardian should have. MCL 700.5305(1)(e)(i)(A). This is particularly important, because the perimeters of a full guardian's powers are not clear.

The court will rely heavily on your report in making this determination.

## **HOW MIGHT THE COURT LIMIT A GUARDIAN'S POWERS?**

It is often appropriate to limit a guardian's powers to medical treatment decisions and determining appropriate residence. In some cases it is appropriate to suggest court review before a guardian can admit an individual to a nursing home, or before a guardian can make a decision to terminate life-sustaining treatment.

Remember a full guardian has the right to handle an individual's money if a conservator is not appointed. MCL 700.5314(d)(ii). You should address whether the individual is capable of handling a small amount of his or her funds without supervision.

### **CAN A GUARDIANSHIP BE LIMITED IN TIME?**

The need for a guardian may not be permanent. For example, an individual may have been in an accident or suffered a stroke, from which recovery is possible. Or the cause of incapacity may be a potentially reversible condition such as over use or under use of medication, malnutrition, depression, or withdrawal.

Your report can recommend whether a guardianship should be time-limited, through suggesting a review date in three months or six months.

### **WHAT IS THE NEXT ISSUE TO CONSIDER?**

You must recommend who should serve as guardian. The petition may nominate an individual, but it for the court to make the determination.

### **WHO HAS PRIORITY FOR APPOINTMENT AS GUARDIAN?**

MCL 700.5313(2), (3), sets forth the following priorities:

- A person designated now by the respondent
- A person the respondent has named as agent in a durable power of attorney
- Spouse
- Adult child
- Parent
- Relative respondent has been living with at least last six months
- Person nominated by person caring for respondent or paying respondent benefits
- Any other person able and wiling to serve

## **MAY THE COURT APPOINT A PROFESSIONAL AS GUARDIAN?**

Yes. The court may appoint a professional guardian, but only if it is in the individual's best interest and there is no other person suitable and willing to serve. MCL 700.5106(2).

## **HOW IS *PROFESSIONAL GUARDIAN* DEFINED?**

Broadly. A professional guardian is an individual or organization that provides guardianship services for a fee to individuals not related to the guardian. MCL 700.MCL 700.1106(r).

A professional guardian could be an individual serving one individual, or a large corporation serving as guardian for 700 people.

## **ARE THERE STANDARDS FOR PROFESSIONAL GUARDIANS?**

There are no education or experience requirements, no caseload limits, no licensure, or certification by the state.

## **WHOM MAY THE COURT NOT APPOINT?**

The court may not appoint an agency that financially benefits from directly providing housing, medical, or social services to the individual. MCL 700.5313(1).

## **HOW DO I PROCEED?**

When you speak with the respondent, ask who he or she would prefer to serve as guardian. Try to probe whether this is an honest answer, rather than the individual just trying to please someone. An individual may not be explicit in his or her preference, but you might glean it from other information or behavior. Finally, the individual may be firm on someone he or she doesn't want to be guardian.

If you cannot determine a preference, check who has priority in statute.

## **WHAT SHOULD I DO THEN?**

Contact the person preferred by the individual, or the person who has statutory priority when no preference is expressed. You may first need to explain the duties of a guardian to that person. Determine if that person is both willing and able to serve. Ask what the person's plans are for the care of the individual, and where that care should take place.

## **CAN MORE THAN ONE PERSON SERVE AS GUARDIAN?**

Yes. If this is the individual's preference, or would be in his or her best interests. Make sure you recommend whether the co-guardians should act only in concert or should have authority to act independently of one another.

## **WHAT IF THERE IS A CONFLICT AMONG FAMILY MEMBERS?**

You may find individuals with equal priority - usually siblings - or with different priorities in strong disagreement as to who should serve as guardian. Indeed, the guardianship petition may inflame long simmering family disputes.

Such cases of conflict may be amenable to mediation. If you believe so, you must in your report suggest the court refer the case for formal mediation. You may, in addition or as an alternative to mediation, suggest a neutral, non-family member serve as guardian.

## **WHAT IF A PROFESSIONAL GUARDIAN IS NOMINATED?**

Appointment of a professional guardian, including a public administrator, is only appropriate if there is no individual willing and suitable to serve. That a professional guardian is nominated by a *petitioner* has no bearing on its priority.

Unfortunately, there have been organizations in Michigan which have not adequately performed their fiduciary duties, or have financially exploited those in their care. The court has a duty to minimize the risk of nonfeasance misfeasance by guardians. Check carefully the reputation of any entity nominated, and for how many individuals the guardian is responsible.

Every guardian - family, volunteer or professional - has a statutory duty to

visit the individual at least once every three months. MCL 700.5314(a); 700.5106(5). If you believe a nominated guardian cannot or will not meet this obligation, so inform the court.

### **WHAT IF NO INDIVIDUAL OR ORGANIZATION IS NOMINATED IN THE PETITION?**

Remember, do not rely on blank spaces on the petition as proof there is no family. In some cases, a respondent may actually have no family or close friends, or relations may be unable or unwilling to serve as guardian.

If guardianship is appropriate, you can recommend to the court whether the individual's needs can be met by a volunteer from the community, a person who will be responsible for only one of two guardianships, or a particular professional guardian.

### **NEED I DETERMINE THE INDIVIDUAL'S FINANCIAL STATUS?**

Yes. Sometimes a guardianship petition is accompanied by a conservatorship petition, sometimes not. In either case, you want to recommend to the court whether a conservatorship is appropriate.

A guardian has the power to deal with an individual's income and property if a conservator is not appointed.

You should determine the income of the individual, and the nature and approximate value of his or her assets. If there is income beyond that needed for food, clothing, and shelter; or there are substantial assets, suggest to the court a conservatorship is probably appropriate.

### **WHAT OTHER RECOMMENDATIONS HINGE ON RESPONDENT'S FINANCIAL STATUS?**

The court would like your input on whether the guardian ad litem fee should come from the estate of the respondent or from the court. If the individual's only income is Social Security or SSI and there are not substantial liquid assets, the court will ordinarily pay.

## **ARE THERE OTHER ISSUES TO ADDRESS IN THE REPORT?**

Yes. Although the presence of the respondent at the hearing is not required, he or she has an absolute right to attend. MCL 700.5303(4). The individual may wish to attend even if he or she is not contesting the petition.

You must state in your report whether the respondent wishes to exercise this right. MCL 700.5305(1)(e)(i).

## **WHAT IF A RESPONDENT IS UNABLE TO TRAVEL TO COURT?**

Statute provides for moving the site of a hearing if necessary. MCL 700.5304(4). The court can hold session in a hospital or nursing home, for instance, for an individual unable to travel. Advise the court if this accommodation is appropriate.

An individual may be physically able, but have no means of getting to the hearing. You may as guardian ad litem arrange for transportation.

## **WHAT IF THE INDIVIDUAL HAS A HEARING DISABILITY?**

The Americans with Disabilities Act applies to the courts. If the individual wishes to attend the hearing, include in your report what measures are necessary to allow or encourage meaningful participation. For an individual with no hearing, for instance, a sign language interpreter might be helpful.

## **WHAT IF A RESPONDENT DOESN'T SPEAK ENGLISH?**

Although not being able to understand or speak English is not a disability covered by the ADA, the court has an obligation to try to find an interpreter.

## **DOES THE INDIVIDUAL HAVE THE RIGHT TO HAVE A CLOSED HEARING?**

Yes. Either the individual or his or her attorney can request the hearing be closed to the public. MCL 700.5304(6).

You should inform the individual of this right, and tell the court if the individual wishes to exercise it.

## **WHAT IS MY ROLE ON A PETITION OR LETTER SEEKING MODIFICATION OR TERMINATION OF A GUARDIANSHIP?**

Modification may involve a change in the powers of a guardian, or appointment of a successor guardian. You still need to speak with the respondent. If the respondent does not contest the modification, your investigation can focus on the specific issues involved.

If the individual seeks modification or termination, the court should appoint you as attorney, not guardian ad litem.

## **ONCE I COMPLETE MY REPORT, WHAT SHOULD I DO?**

File the report with the court. Send a copy to the petitioner or petitioner's attorney. Once the report is part of the court file, any interested persons have access to it.

## **FOR CONSERVATORSHIP, WHAT ARE SPECIFIC ISSUES TO ADDRESS?**

An individual may petition for appointment of a conservator for him or herself. MCL 700.5401(4). Through your investigation you should determine whether the individual is acting voluntarily and understands what he or she is asking the court to do. Also determine whether the individual does need assistance to manage property effectively, and whether the person nominated to serve as conservator is willing and able to serve.

## **WHAT IF SOMEONE ELSE PETITIONS FOR CONSERVATORSHIP?**

You will need to proceed similar to guardianship - to determine if the individual contests the petition, whether conservatorship is appropriate, whether the individual is able to handle some funds independently, and who should serve as conservator.

## **WHEN IS CONSERVATORSHIP APPROPRIATE?**

Conservatorship is appropriate if an individual is unable to manage his or her property or business affairs effectively, and protection is necessary to prevent waste or to provide for care and support of the individual or dependents. MCL 700.5401(3).

You must explore the individual's ability to manage money, the amount of income and assets he or she has, and alternatives to conservatorship that may be viable. MCL 700.5406(4)(a). For example, the individual may already have a durable power of attorney for finances, or have the present capacity to execute one. In some cases, a protective order may suffice instead of a conservatorship. MCL 700.5408.

### **WHAT IF AN INDIVIDUAL HAS A DURABLE POWER OF ATTORNEY BUT THE BANK IS NOT HONORING IT?**

Try to determine whether there is reason for the bank's action, e.g., fear the document was signed under duress.

Banks sometimes refuse to honor documents which are not on the bank's own form, or are "too old." If gentle persuasion is ineffective, the court can issue a protective order concerning the validity of the document.

### **WHAT IS A PROTECTIVE ORDER?**

A court can authorize a particular transaction, such as establishment of a trust. Or a court could find an existing durable power of attorney to be valid and binding.

After the court issues an order, there is often no need for continued court involvement. Neither an inventory nor account is required.

### **WHAT ARE GENERAL CONSTRAINTS ON THE COURT IN CONSERVATORSHIP PROCEEDINGS?**

EPIC provides...

The court shall exercise authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected individual and shall make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure.

MCL 700.5407(1).

## **WHAT SPECIFIC LIMITS MIGHT BE PLACED ON A CONSERVATOR'S POWERS?**

The court may authorize an individual with a conservator to handle part of his or her money or property without consent or supervision by the conservator. MCL 700.5407(1). The court may order the conservator to place part or all the funds in a restricted account, requiring court approval for withdrawals.

## **CAN A CONSERVATOR SELL REAL PROPERTY?**

A conservator can be given authority to sell real property only if, after notice and hearing, the court finds the selling price reasonable, and the sale to be in the best interest of the individual. MCL 700.5423(3).

## **WHO HAS PRIORITY FOR APPOINTMENT AS CONSERVATOR?**

Statute provides the following priorities:

- Fiduciary appointed in another jurisdiction
- Person designated now by the respondent
- Spouse
- Adult child
- Parent
- Relative respondent has been living with past six months
- Person nominated by person caring for respondent or paying respondent benefits
- Any other person able and willing to serve

Except for a person designated by the individual, a person with priority can nominate in writing another person to serve in his or her stead. MCL 700.5409.

## **WHAT OTHER ISSUES NEED I ADDRESS?**

You should inform the court whether you think a bond is appropriate, and if so, the amount of the bond. MCL 700.5410. In lieu of a bond, you might suggest part of the estate be placed in a restricted account.

## **IS IT MY RESPONSIBILITY TO DRAFT PROPOSED GUARDIANSHIP AND CONSERVATORSHIP ORDERS?**

No. Often, proposed orders are prepared by court staff. If the attorney for the petitioner has submitted a draft order, check to see if it comports with your recommendations. If not, point this out to court staff so a note may be included in the file.

## **DO I NEED TO APPEAR AT THE HEARING?**

Yes, usually. An exception is when the respondent objects, counsel has been appointed, and you have been discharged as guardian ad litem prior to the hearing.

If a scheduling conflict arises or you fall ill, inform the court so the hearing may be adjourned.

## **WHAT MIGHT OCCUR AT THE HEARING?**

One of the following could occur:

- Appointment of counsel
- Adjournment for mediation to occur, or for an evidentiary hearing
- Testimony, findings, and disposition

## **F. SERVING AS COUNSEL**

### **IN WHAT CIRCUMSTANCES WILL THE COURT APPOINT COUNSEL?**

If you have indicated the individual contests the petition or requests counsel, or if you think it is in her or his best interests, the court must appoint counsel to represent the individual. MCL 700.5305(3), (4).

The court will also appoint counsel if the individual, himself or herself, seeks modification or termination of a guardianship or conservatorship. MCR 5.768(B)(1).

### **HOW IS MY ROLE AS GUARDIAN AD LITEM AFFECTED BY THE APPOINTMENT OF COUNSEL?**

Unless otherwise directed by the court, your role as guardian ad litem ends upon the appointment of counsel. MCLA 700.5305(5).

### **WILL THE COURT APPOINT THE GUARDIAN AD LITEM AS COUNSEL?**

This varies with the court, the circumstances, and the wishes of the guardian ad litem.

The role of guardian ad litem and of legal counsel are quite different; in particular cases it may be difficult for a person to "shift gears."

### **WHAT IS MY ROLE AS ATTORNEY?**

The guardian ad litem has an investigative function and is charged with recommending what is in the individual's best interests.

Your role as attorney is to act as an advocate for the individual. You must try to discern his or her wishes and attempt to effect them. Try not to be influenced by what you feel the judge or interested parties might think is best.

## **WHAT IF I BELIEVE MY CLIENT TO AN INCAPACITATED INDIVIDUAL?**

Your role remains to vigorously advocate for the expressed wishes of your client, not to recommend to the court what you feel is in the best interests of your client.

## **ARE MY DISCUSSIONS WITH THE INDIVIDUAL CONFIDENTIAL?**

Yes. Conversations with your client and information you obtain are protected from disclosure.

If an individual serving as guardian ad litem is then appointed attorney, the attorney client privilege dates back to the time the person was appointed guardian ad litem. MCR 5.201(E)(2).

## **WHAT SHOULD I DO UPON BEING APPOINTED?**

If you are present at the hearing, you often ask for an adjournment.

## **HOW MIGHT I APPROACH THE TASK OF REPRESENTING MY CLIENT?**

First, confer with your client and review the court file. Then do whatever further investigation is appropriate. Consider garnering evidence on your client's behalf.

The Michigan Rules of Professional Conduct provide -

When a client's ability to make adequately considered decisions is impaired, whether because of minority or mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

## **WHAT IF MY CLIENT WON'T COOPERATE WITH ME?**

Further investigation may reveal wishes expressed in the past. You might also be able to infer such wishes from past behavior.

## **WHAT ELSE SHOULD I INCLUDE IN MY INVESTIGATION?**

If you know of evidence the petitioner will present on the issue of incapacity, try to find means to rebut it. You should also think of arguments why guardianship or conservatorship is not necessary.

## **MAY I ASK THE GUARDIAN AD LITEM FOR INFORMATION?**

Yes.

## **DO I HAVE ACCESS TO MEDICAL AND FINANCIAL RECORDS OF MY CLIENT?**

Yes. The order appointing you authorizes such access. You can, in addition, have your client execute a release.

## **MAY I REQUEST AN INDEPENDENT EVALUATION?**

Yes. Your client (or you, if your client has no preference) can choose what doctor or mental health professional is to perform the evaluation. If the individual is going to pay for the evaluation out of his or her own funds, you needn't ask the court's permission.

If the individual has insufficient funds, request court approval before having the evaluation done. The individual has a right to secure such evaluation at public expense. MCL 700.5304(2).

## **ARE THE RESULTS OF THE INDEPENDENT EVALUATION ADMISSIBLE?**

After the evaluation is completed, you can decide whether or not to introduce it as evidence at the hearing.

## **MAY I EMPLOY DISCOVERY?**

Although discovery is rarely used in guardianship and conservatorship proceedings, general discovery rules apply.

## **G. MEDIATION**

### **HOW MIGHT A CASE REACH MEDIATION?**

Court staff might suggest mediation. It is part of the guardian ad litem's statutory duties to recommend mediation in appropriate circumstances. MCL 700.5305(1)(e)(ii). Mediation could occur days prior to, or just before the hearing. At the court hearing, the judge can suggest mediation.

For instance, the guardian ad litem report might recommend mediation in a case in which the individual does not contest the proceeding, but there is a fight among siblings about who is going to serve as guardian or conservator.

If the individual does contest the proceeding, the judge might review the file and ask the lawyer appointed to consider mediation.

### **MUST AN INDIVIDUAL PARTICIPATE IN MEDIATION?**

No. Mediation will only occur if all interested persons agree to this forum. Mediation has shown promise in guardianship proceedings. It gives participants opportunities not available in the courtroom - the time to air long-standing grievances in an informal, non-judgmental atmosphere.

### **WHAT TYPES OF RESOURCES ARE AVAILABLE FOR MEDIATION?**

The county community dispute resolution center may offer guardianship mediation. In some areas, there are private mediation services available. Finally, there may be court personnel experienced in mediation. The cost varies; there is only a nominal charge for community dispute resolution.

### **WHAT IS MY ROLE AS GUARDIAN AD LITEM?**

If a lawyer has not been appointed, it is important you explain mediation to the individual. The individual should know he or she has the choice whether mediation occurs. If mediation happens, the individual is not bound by any result unless he or she agrees to it.

## **AS GUARDIAN AD LITEM, SHOULD I PARTICIPATE IN MEDIATION?**

Yes, unless you feel you would not be helpful in the process, or the individual would be better served by having an attorney.

## **AS ATTORNEY, WHAT IS MY ROLE IN MEDIATION?**

After you explain the process to your client, you should determine whether your client is amenable to mediation. If the individual expresses no choice, determine as advocate whether mediation serves your client's interest.

Nothing prevents you as attorney from suggesting mediation to your client, even if the court has not mentioned it.

## **WHAT IS MY ROLE AS ATTORNEY DURING MEDIATION, ITSELF?**

You should be present. Whether you take an active or passive role in the session is an issue to be negotiated at the outset, and depends on a number of factors. These factors include the abilities of your client, your preference, whether other parties have counsel, and the experiences of the mediators.

Upon completion of mediation, if a tentative agreement has been reached, review it carefully with your client.

## **IF AN AGREEMENT IS SIGNED, HOW IS IT ENFORCED?**

The full content of the mediation agreement may or may not be reflected in the court record, depending on the subject matter. Regardless, the agreement is enforceable as a contract, though success is more likely dependent on the good faith of the participants.

## **H. THE HEARING**

### **AS GUARDIAN AD LITEM, WHAT IS MY ROLE AT THE HEARING?**

Your role is to briefly state your findings and recommendations, and to add any other information relevant to disposition of the case. Remember the judge may not have yet read your report.

If the individual contests the guardianship or conservatorship, make sure the court is aware so it may appoint an attorney. If the individual expressed a desire to be at the hearing, but is not present, alert the court to that fact.

The judge may ask you about housing and services options which would benefit the individual. It will be helpful for you to be familiar with community resources.

### **IF AN ATTORNEY HAS ALREADY BEEN APPOINTED, NEED I ATTEND THE HEARING?**

In most circumstances, no. Court staff will indicate when there is an exception.

### **AS ATTORNEY, WHAT IS MY ROLE?**

You can request a hearing be closed to the public. MCL 700.5304(6); 5406(4).

If the individual does not want a guardian, contest whether the petitioner meets his or her burden. For guardianship, it is petitioner's burden to show by clear and convincing evidence the individual is a legally incapacitated individual *and* guardianship is necessary. The burden in conservatorship is also clear and convincing evidence.

If the individual objects to a particular person being guardian, or wants limits placed on the guardian's powers, advocate for those outcomes.

## **HOW MIGHT I ACCOMPLISH THESE ENDS?**

If the petitioner is not represented by counsel, realize he or she is probably unfamiliar with the rules of evidence. You still have the right to object to proffered testimony on the basis of relevance or hearsay, but be sensitive in your approach and tone.

You have the right to cross-examine the petitioner and any witnesses the petitioner calls. If a report from a court ordered evaluation is presented as evidence, you have a right to cross-examine the physician or mental health professional who prepared the report. MCL 700.4304(5); 5406(4).

If the guardian ad litem testifies, you may cross-examine. You may also call the guardian ad litem as a witness.

## **MAY I PRESENT EVIDENCE IN MY CLIENT'S BEHALF?**

Yes. You can ensure the presence of a witness or availability of documents through subpoena.

## **SHOULD THE INDIVIDUAL BE PRESENT AT THE HEARING?**

You should discuss with your client his or her wishes in this regard, and whether you think it is advantageous for him or her to be present.

## **DOES THE INDIVIDUAL HAVE RIGHT TO A JURY TRIAL?**

Yes. It is the individual's choice whether or not to have a jury trial, a choice which can be asserted by counsel. MCL 700.5304(5),(6); 5406(4).

If you wish to assert the right, you should file a written demand immediately, and at least 4 days before the hearing. The jury fee of \$30.00 must be paid at the time the demand is filed. MCL 600.857(3). You can request the jury fee be waived if the individual is indigent or unable to pay. MCL 600.880d.

There are very few jury trials, but there may be instances when having a jury would be advantageous to your client.

## **WHEN DOES MY ROLE AS COUNSEL END?**

Your role ends upon disposition, unless the court instructs you otherwise. As a final act, ensure the court order and letters of guardianship or conservatorship drafted by petitioner's counsel or court staff comports with the judge's findings.

## **I. PAYMENT**

### **WHEN DO I GET PAID FOR MY WORK AS GUARDIAN AD LITEM OR ATTORNEY?**

You are due payment after the court reaches a disposition.

### **WHO IS RESPONSIBLE FOR PAYING FOR MY SERVICES?**

If the estate of the individual is sufficient, and the petition results in an order appointing a guardian or conservator, payment is due from the estate. MCL 600.875. Otherwise, payment is due from the court.

If you are guardian ad litem, you should note in your report the financial circumstances of the individual. The financial status of the petitioner is irrelevant.

### **WHAT GUIDELINES MIGHT I USE?**

In order for payment to be due from the estate, there must be income aside from social security, or liquid assets exceeding a small bank account.

If the estate is not sufficient to merit a conservatorship, it may well be the estate is too small to require payment.

### **HOW DO I OBTAIN PAYMENT FROM THE ESTATE?**

By statute, the court may charge the estate. On a practical level, you directly bill the conservator, or the guardian if a conservator has not been appointed. You should send a copy of your itemized bill to the court.

### **WHAT IF ESTATE NOT SUFFICIENT TO REQUIRE PAYMENT?**

The court will reimburse you upon your submission of a request.

## **HOW MUCH WILL I BE PAID AS GUARDIAN AD LITEM?**

If the court is paying, the court may have a set fee. The court might approve a higher fee in unusual circumstances.

The following expenses may be payable in addition to the set fee: travel outside the county and long distance telephone charges.

## **HOW MUCH WILL I BE PAID AS COURT APPOINTED ATTORNEY?**

The court may have a fee schedule based on the number of hours spent.

The following expenses may payable in addition to the hourly charge: travel outside the county and long distance telephone charges.

## **WHAT IF I AM GUARDIAN AD LITEM, THEN APPOINTED AS ATTORNEY?**

You should base your charges on the attorney fee schedule.

## **HOW MUCH MAY I CHARGE FOR MY SERVICES IF THE ESTATE IS PAYING?**

Since the court appoints the guardian ad litem and attorney, it is the court's responsibility to try to ensure charges are reasonable.

If an interested person questions your fee, the court will make a determination as to what is reasonable. The court on its own motion can reduce the fee requested.

If the court feels you are generally charging unreasonable amounts, you will no longer be appointed as guardian ad litem or attorney.

## **WHAT IF I BILL THE FIDUCIARY AND HE OR SHE WON'T PAY?**

If after repeated efforts to collect, the fiduciary won't pay, contact the court for advice on how to proceed.

The court has authority to issue an order permitting you to withdraw payment from the individual's bank account.

**WHAT IF AM NOT COURT APPOINTED, BUT RETAINED DIRECTLY BY THE INDIVIDUAL?**

Your charges are then a matter for agreement between you and your client, and your client is responsible for paying them.

**IF A PETITIONER IS REPRESENTED, WHO IS RESPONSIBLE FOR PETITIONER'S COUNSEL FEES?**

The petitioner, not the estate, may be responsible for those costs.