Minor Guardianships
Under MCL 700.5204(2)(b)

By George M. Strander

Most of us know that a guardian for a minor acts *in loco parentis* and that the establishment of a guardianship is based in some way on the parents' inability to provide for the child's care. However, many of us may not know the specific statutory grounds allowing a Michigan court to appoint a guardian for a minor, which grounds are the basis for most minor guardianships, and how the caselaw has interpreted those grounds. This article attempts to provide those answers.

Minor Guardianships and § 5204(2)(b)

Under Michigan law, there are two types of court-ordered guardianships for a minor: limited guardianships and full guardianships. A limited minor guardianship is created by the filing of a petition by the minor's custodial parent or parents, whereby they voluntarily suspend their parental rights. A full minor guardianship is created by way of a petition typically filed by someone other than a parent, and often parents do not consent to the guardianship. According to Michigan Supreme Court data, more than 70 percent of all minor guardianships created in Michigan each year are full guardianships.[1]

Full minor guardianships are created under § 5204(2) of the Estates and Protected Individuals Code (EPIC),[2] which provides:

> The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:
>
> (a) The parental rights of both parents or the surviving parent are terminated or suspended by prior court order, by judgment of divorce or separate maintenance, by death, by judicial determination of mental incompetency, by disappearance, or by confinement in a place of detention.
>
> (b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.
>
> (c) All of the following:
>
> *(i)* The minor's biological parents have never been married to one another.
>
> *(ii)* The minor's parent who has custody of the minor dies or is missing and the other parent has not been granted legal custody under court order.
>
> *(iii)* The person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.[3]

If the court finds that any of these three conditions has been satisfied, it then has the discretion to appoint a guardian for the minor; however, the court may decide not to appoint a guardian if it determines that such an appointment would be "contrary to the minor's welfare."[4]

The establishment of full minor guardianships under §§ 5204(2)(a) and (2)(c) is relatively rare. The vast majority of full guardianships are established under § 5204(2)(b). A recent review of guardianship cases in the Ingham County Probate Court showed that approximately nine of ten petitions for full guardianships were filed under § 5204(2)(b).

Subsection 5204(2)(b) actually consists of three separate elements, all of which must be found to exist by the trier of fact before a guardianship may be established:

(1) The parent or parents permit the minor to reside with another person;

Fast Facts:

The vast majority of full guardianships are established under § 5204(2)(b).

To establish a minor guardianship under § 5204(2)(b), the court must find that the parent or parents permit the child to live with another person without providing that person with the authority he or she needs to care for the child.

As *Unthank* makes clear, the filing of the guardianship petition is the relevant time for the court to consider whether the parents permit the child to live with another person without providing that person with the authority for the child's care and maintenance.

(2) In so doing, the parent or parents do not provide the other person with legal authority for the minor's care and maintenance; and

(3) The minor is not residing with his or her parent or parents when the petition is filed.

A review of the relevant caselaw can help us paint a richer picture of § 5204(2)(b) and its three requirements.

Permission to Reside

To establish a minor guardianship under § 5204(2)(b), the court must first find that "[t]he parent or parents permit the minor to reside with another person…."

What Does "Permit" Mean?

According to the Court of Appeals in *Deschaine v St Germain,*[5] the meaning of "permit" in the statute is clear—the term "permit," which is written in the present tense, means "to consent to."[6] The *Deschaine* Court considered whether one of the grandparents of a minor child could be appointed as the child's guardian under § 5204(2)(b) after the death of the child's mother. The mother (Julie), who resided with and had full physical custody of her child (Tiffany), had occasionally left Tiffany in the care of the child's grandparents (Robert and Joyce) in the past.[7] In addition, Julie had apparently stated that if she died, she wanted Tiffany to live with Robert and Joyce.[8] The *Deschaine* Court ruled that there could be no guardianship under § 5204(2)(b) because the child did not come to live with Robert and Joyce until *after* Julie had already died, and by that time Julie could not consent to the arrangement:

> In the present case, when the guardianship issue arose by Julie's death, Julie was not permitting Tiffany to reside with Robert and Joyce. When Julie died, Tiffany was living with Julie. Thus, at the time of Julie's death, Julie was not allowing Tiffany to live with Robert and Joyce, no matter what her past course of conduct or future intention was regarding this issue. Therefore, the trial court properly ruled it could not appoint Robert as guardian for Tiffany under MCL 700.5204(2)(b).[9]

It follows from *Deschaine* that the statutory term "permit" in § 5204(2)(b) contemplates only the proactive grant of permission in the present, and does not include a record of past permission or the intended grant of permission in the future.[10]

Who Must Do the Permitting?

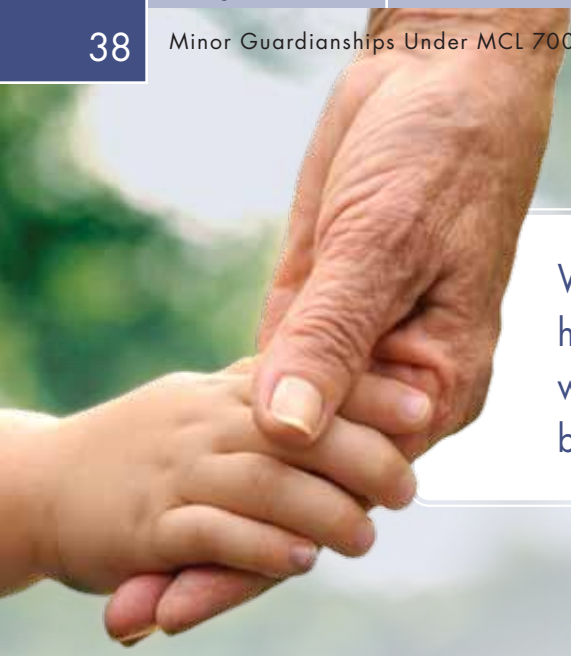
Under § 5204(2)(b), it is the "parent or parents" who must permit the child to live with another person. EPIC defines "[p]arent" as follows:

> "Parent" includes, but is not limited to, an individual entitled to take, or who would be entitled to take, as a parent under this act by intestate succession from a child who dies without a will and whose relationship is in question. Parent does not include an individual who is only a stepparent, foster parent, or grandparent.[11]

One question to ask is this: Does the concept of permission embodied in § 5204(2)(b) apply to all parents equally? The mother in *Deschaine* had full physical custody of the child and shared legal custody with the father. In assessing whether the parent or parents had permitted the child to reside with another, the *Deschaine* Court only considered the actions of the child's mother; the attitude or actions of the father seemingly played no part in determining whether there was proper permission. Therefore, one reading of *Deschaine* suggests that only parents with physical custody—i.e., those who have the right and responsibility to arrange for the child's residence—can "permit" the child to live with another person within the meaning of the statute. Under such a reading, a parent with only legal custody—i.e., one who has the right and responsibility to make important decisions concerning the child other than physical residence—would not be able to permit the child to live somewhere else.

Five years after *Deschaine,* however, the Court of Appeals, in *Unthank v Wolfe,*[12] appeared to expand the range of individuals who must give permission before a guardianship may be established under § 5204(2)(b). In *Unthank,* the custodial mother (Wolfe) gave up her child for adoption and the prospective adoptive parents (the Unthanks) sought a guardianship after genetic testing confirmed that Wolfe's former husband (Barnett) was the child's biological father.[13] After the genetic testing results were received, but before the Unthanks had filed their petition, Barnett filed a motion seeking custody of the child.[14] In assessing whether permission existed to support the establishment of a guardianship under § 5204(2)(b), the *Unthank* Court considered the positions of both parents, even the father who had yet to obtain custody:

> The Unthanks filed their first custody petition in May 2005. By then, Barnett had demonstrated unwavering opposition to their continued custody of the child, and Wolfe had revoked permission for the child to continue to reside with the Unthanks. Because neither parent permitted the child to reside with the Unthanks, the Unthanks could not possibly have qualified as the child's guardians.[15]



While the child may be permitted to reside with an aunt who has no plan to take the child permanently, another relative who is willing to care for the child on a long-term basis may be the nominated guardian.

By considering the attitude of the noncustodial father, the *Unthank* Court appeared to suggest that the view of any legal parent is relevant in assessing whether the parent or parents have "permit[ted] the minor to reside with another person" under § 5204(2)(b).

Who Can "Another Person" Be?

A typical assumption in relation to § 5204(2)(b) is that the "other person" with whom the child has been permitted to reside is the nominated guardian. After all, the "other person" who has the child is supposedly in need of the legal authority that a guardianship appointment could provide. However, there is no statutory restriction on who can be the "other person" with whom the minor has been permitted to reside. Specifically, this person can be different from the petitioner or proposed guardian. For example, while the child may be permitted to reside with an aunt who has no plan to take the child permanently, another relative who is willing to care for the child on a long-term basis may be the nominated guardian.

When Must the Permission Take Place?

The parent's or parents' permission for the child to reside with another must occur *in the present*—in other words, "when the guardianship issue arises."[16] Indeed, as the *Deschaine* Court observed, "[o]ne may consider when the guardianship petition was filed as the relevant point in time to determine permission."[17] And as the Court of Appeals further explained in *Unthank:*

> In *Deschaine*...this Court definitively construed MCL 700.5204(2)(b) as requiring that a parent have given *current* permission for the child to reside with another person before that person may seek a guardianship order.[18]

As alluded to earlier, past permission for a child to reside with another person, or a voiced desire for the child to reside with someone else in the future does not constitute *current* permission under § 5204(2)(b).[19] "The Legislature's use of the present tense… in subsection (2)(b) clarifies its intent that the circumstances are to be considered as they exist at the time the petition is filed."[20]

What Does "Reside" Mean?

According to the Court of Appeals in *Deschaine,* the term "reside," as it is used in § 5204(2)(b), means to "*permanently* reside."[21] Indeed, it has long been held that the concept of residence entails something more permanent than mere presence.[22]

No Legal Authority

To establish a minor guardianship under § 5204(2)(b), the court must also find that the parent or parents who have provided permission for the child to reside with another person "do not provide the other person with legal authority for the minor's care and maintenance…."

What Amounts to "Care and Maintenance"?

In *In re Martin,*[23] the Court of Appeals noted that "an appointed guardian of a minor 'has the powers and responsibilities of a parent' and must 'facilitate the ward's education and social or other activities, and shall authorize medical or other professional care, treatment, or advice.'"[24] Accordingly, to extrapolate from *In re Martin,* it appears that the phrase "care and maintenance" as used in § 5204(2)(b) constitutes at least the facilitation of the ward's education and social or other activities, as well as the authorization of medical or other professional care, treatment, or advice for the minor.

What Would Constitute the Provision of "Legal Authority"?

Ideally, the provision of legal authority will be in written form. In *In re Hartsell,*[25] the minors' grandparents were appointed as guardians of their grandchildren. The children's mother objected, claiming that there was no basis for the guardianship because she had provided the grandparents with "'legal authority for the care and maintenance' of her children…."[26] Specifically, the children's mother had provided the grandparents with written authorization for medical treatment and verbal authority "to act on the children's behalf."[27] The Court of Appeals, however, held that the probate

court had not clearly erred in finding that the guardianship statute applied.[28] "[T]he medical authorization, which was executed several months after respondent left the children with the [grandparents] and by law expired six months after execution, and the limited verbal authorizations with respect to the children's schooling needs, did not rise to the level of providing for the 'care and maintenance' of the minors."[29]

What is the Effect of a Subsequent Grant of Legal Authority?

As suggested by the Court of Appeals in *In re Martin,* the filing of the guardianship petition is the relevant time for the court to consider whether the parent or parents have provided legal authority to another for the care and maintenance of the minor. However, the provision of legal authority *after* the filing of the guardianship petition does not invalidate the factual basis for the guardianship and does not "divest the probate court of jurisdiction over otherwise valid guardianship petitions."[30]

Not Residing with Parents

To establish a guardianship under § 5204(2)(b), the court must lastly find that "[t]he minor is not residing with his or her parent or parents when the petition is filed." This provision was not originally contained in the precursor to MCL 700.5204(2)(b), but was added in 1999,[31] shortly before the Revised Probate Code was replaced with EPIC. Although this added requirement that the child not live with a parent at the time of the filing of the petition would seem to restrict the court's ability to appoint a guardian, it appears that it was actually proposed to clarify and broaden the court's jurisdiction in guardianship cases.[32]

Does Residence with a Noncustodial Parent Make a Difference?

As explained previously with respect to the issue of who can permit the child to live with another person, the prevailing view appears to be that the statutory term "parent" applies to *any* legal parent.[33] This should be the prevailing view here as well. Hence, even if one parent has full physical and legal custody but the child resides with the other, noncustodial parent, the court should find that the final requirement of § 5204(2)(b) has not been satisfied because the child resides with one of his or her parents.

Conclusion

To summarize, the court may appoint a guardian for an unmarried minor under MCL 700.5204(2)(b) if, *at the time the guardianship petition is filed,* all of the following are true:

(1) The minor resides with someone other than a parent, and the parent of the minor (or at least one of the two parents of the minor) consents to the minor residing with that other person;

(2) In so consenting, the parent or parents do not give the other person legal authority (which ideally would be in written form) to provide for the minor's care and maintenance; and

(3) The minor is not residing with his or her parent, or with either of his or her two parents. ■

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FOOTNOTES

1. State Court Administrative Office, *Michigan Supreme Court Annual Report 2010,* available at <http://courts.michigan.gov/scao/resources/publications/statistics/2010/2010ExecSum.pdf> (accessed February 13, 2012).
2. MCL 700.1101 *et seq.*
3. MCL 700.5204(2).
4. See MCL 700.5212.
5. *Deschaine v St Germain,* 256 Mich App 665; 671 NW2d 79 (2003).
6. *Id.* at 670 n 7; see also Black's Law Dictionary (7th ed).
7. *Deschaine,* 256 Mich App at 666–667.
8. *Id.* at 667.
9. *Id.* at 670–671.
10. See also *In re Kerr,* unpublished opinion per curiam of the Court of Appeals, issued September 26, 2000 (Docket Nos. 222784; 223328).
11. MCL 700.1106(i); see also MCL 700.2114.
12. *Unthank v Wolfe,* 282 Mich App 40; 763 NW2d 287 (2008) vacated in part on other grounds, 483 Mich 964; 763 NW2d 924 (2009).
13. *Id.* at 42–43.
14. *Id.* at 43–44.
15. *Id.* at 54–55.
16. *Deschaine,* 256 Mich App at 670.
17. *Id.* at 670 n 8.
18. *Unthank,* 282 Mich App at 54.
19. *Deschaine,* 256 Mich App at 670–671.
20. *In re Kerr,* slip op at 4.
21. *Deschaine,* 256 Mich App at 669 (emphasis added).
22. See, e.g., *Liberty Hill Housing Corp v Livonia,* 480 Mich 44, 60; 746 NW2d 282 (2008) (observing that to "reside" is to "dwell…or at least be habitually present…").
23. *In re Martin,* 237 Mich App 253; 602 NW2d 630 (1999).
24. *Id.* at 257, quoting former MCL 700.431(1)(c).
25. *In re Hartsell,* unpublished opinion per curiam of the Court of Appeals, issued March 16, 1999 (Docket Nos. 211281; 211312; 211313).
26. *Id.* at 3 (citation omitted).
27. *Id.*
28. *Id.*
29. *Id.*
30. *In re Martin,* 237 Mich App at 255–256.
31. See 1998 PA 494.
32. See House Legislative Analysis, SB 1210, December 9, 1998.
33. See *Unthank,* 282 Mich App at 54–55.