Legislative Council Staff Brief

Study Committee on Minor Guardianships

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INTRODUCTION

Wisconsin law provides for various types of guardianships, which generally authorize a person to make certain decisions or provide for another person, the person's estate, or both, depending on the type of guardianship involved. As an overview, ch. 54, Stats., governs guardianships of minors and specified types of adults, though certain, specialized guardianships of minors are authorized under ch. 48, Stats., also referred to as the Children's Code. Those involved with guardianships under ch. 54, Stats., including litigants and legal professionals, have expressed concern that ch. 54, Stats., is largely unworkable in the context of minor guardianships, in light of several inapplicable statutory provisions and the existence of relevant case law not codified in statute, among other concerns.

In response, the Joint Legislative Council has directed the Study Committee on Minor Guardianships to examine ch. 54, Stats., concerning guardianship of minors and adults, and recommend legislation that creates procedures specific to guardianship of a minor. The committee may consider whether any new provisions should apply to guardianship of a minor's person, estate, or both.

This Staff Brief provides background information, summarizes current law, and identifies preliminary considerations for the committee's review. Specifically, the Staff Brief includes the following parts:

- **Part I** provides background information on guardianships authorized under ch. 48, Stats., and the relationship between guardianships under chs. 48 and 54, Stats.
- **Part II** summarizes current law regarding minor guardianships pursuant to ch. 54, Stats., and relevant case law.
- **Part III** summarizes past legislative efforts to address minor guardianships.
- **Part IV** identifies preliminary issues that the committee may wish to consider as it deliberates potential modifications to current law.

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PART I – GUARDIANSHIPS UNDER CH 48, STATS.

Wisconsin law authorizes several types of guardianships, namely those set forth in chs. 48 and 54, Stats. Generally ch. 54, Stats., constitutes Wisconsin's guardianship law, and applies to guardianships of person, estate, or both of incompetent adults, spendthrift adults, and minors. However, guardianships of a minor's person are also authorized in certain, specialized circumstances under ch. 48, Stats.

This Part provides a brief overview of guardianships authorized by the Children's Court under ch. 48, Stats., with discussion focused on one particular form of guardianship. This Part will close with a brief explanation regarding the relationship between guardianships under chs. 48 and 54, Stats., with Part II providing more detail on current law under ch. 54, Stats.

SCOPE AND TYPES OF GUARDIANSHIPS

Unless otherwise limited by court order, a guardian of the person for a minor that is appointed by the Children's Court has the duty and authority to make important decisions in matters having a permanent effect on the life and development of the child and the duty to be concerned about the child's general welfare, including:

- The authority to consent to marriage; enlistment in the U.S. armed forces; major medical, psychiatric, and surgical treatment; and obtaining a motor vehicle operator's license.
- The authority to represent the child in legal actions and make other decisions of substantial legal significance concerning the child, subject to an exception relating to the assistance of counsel.
- The right and duty of reasonable visitation with the child.
- The rights and responsibilities of legal custody,[1] subject to certain exceptions.

[s. 48.023, Stats.]

The Children's Court has jurisdiction to appoint a guardian of the person for a minor in various circumstances. [s. 48.14 (2), Stats.] Generally, examples include when a child has been adjudicated to be in need of protection or services (CHIPS), when a parent seeks appointment of a standby guardian, when a parent's rights have been terminated, or when a child does not have a living parent and a finding as to the adoptability of a child is sought, among others. The most relevant type, a CHIPS guardianship, is described below.

[1] Under ch. 48, Stats., "legal custody" means a legal status created by the order of a court, which confers the right and duty to protect, train, and discipline the child, and to provide food, shelter, legal services, education, and ordinary medical and dental care, subject to the rights, duties, and responsibilities of the guardian of the child and subject to any residual parental rights and responsibilities and the provisions of any court order. [s. 48.02 (12), Stats.]

CHIPS Guardianship

Unlike other types of guardians, the appointment of a CHIPS guardian requires involvement of the child welfare system. Specifically, the court may appoint a CHIPS guardian only if it finds all of the following:

- The child has been adjudicated CHIPS pursuant to certain statutory grounds and has been placed outside the child's home pursuant to court order or the placement of the child in the guardian's home has been recommended.
- The nominated guardian is a person with whom the child has been placed or in whose home placement of the child is recommended, and it is likely that the child will continue to be placed with that person for an extended period of time or until the child is 18 years old.
- If appointed, the nominated guardian is likely to be willing and able to serve for an extended period of time or until the child is 18 years old.
- It is not in the best interests of the child that a petition to terminate parental rights (TPR) be filed.
- The child's parent (or both parents) is neglecting, refusing, or unable to carry out the duties of a guardian.
- Subject to certain exceptions, the agency providing services to the child has made reasonable efforts to do one of the following: (1) make it possible for the child to return to the child's home while assuring the child's health and safety are the paramount concerns, but reunification, including further reunification efforts, is unlikely or contrary to the best interest of the child; or (2) prevent removal of the child from the child's home, while assuring the child's health and safety, but continued placement of the child in the home would be contrary to the welfare of the child.

[s. 48.977 (2), Stats.]

A petition for a CHIPS guardian may be filed by the child, the child's guardian or legal custodian, the child's guardian ad litem (GAL), a nominated guardian, the Department of Children and Families (DCF), a county department, a licensed child welfare agency, the district attorney, corporation counsel, or any appropriate person designated by the county board of supervisors. Within 30 days of filing the petition, the court must hold a plea hearing to determine whether any party wishes to contest the petition. The petitioner must ensure proper service of the petition and notice of the hearing. [s. 48.977 (4) (a), (c), and (cm), Stats.]

If the petition is contested, the court must conduct a fact-finding hearing within 30 days of the plea hearing, at which the court must find by clear and convincing evidence that the conditions specified in the petition, listed in the bullet points above, have been met. After the fact-finding hearing, or if the petition is not contested, the court holds a dispositional hearing at which the court considers any submitted reports, whether the person would be a suitable guardian, the willingness and ability of the person to serve as the child's guardian, and the child's wishes. However, by statute, the best interest of the child must be the prevailing factor considered by the court. After reviewing

the relevant evidence, the court may: dismiss the petition; appoint as guardian the person with whom the child is placed or whose home placement is recommended; or appoint a limited guardian, with the duties and authority of the guardian limited as specified in the court's order. [s. 48.977 (4) (cm), (d), (fm), (g), and (h), Stats.]

Unless a lesser period of time is specified, a CHIPS guardianship automatically terminates upon the child reaching age 18, or until terminated by the court, whichever occurs earlier. A CHIPS guardian may resign or be removed for cause. The child's parent may request that the guardianship be terminated, which the court must grant if it finds, by clear and convincing evidence, that a substantial change in circumstances has occurred since the last order affecting the guardianship was entered, the parent is willing and able to carry of the duties of a guardian, and termination of the guardianship is in the child's best interest. [s. 48.977 (7) (a) to (d), Stats.]

RELATIONSHIP BETWEEN GUARDIANSHIPS UNDER CHS. 48 AND 54, STATS.

Guardianships under chs. 48 and 54, Stats., have different procedural requirements and their uses vary depending on the circumstances. For example, a CHIPS guardianship may occur only when a child has been adjudicated in need of protection and services. Conversely, as described in Part II, guardianships under ch. 54, Stats., do not require involvement by the child welfare system and therefore are informally referred to as "private guardianships." That said, the child welfare system may be involved if, for example, procedural hurdles prevented pursuit of a CHIPS guardianship and, instead, the system directed interested parties to proceedings under ch. 54, Stats.

Notably, the statute governing CHIPS guardians does not prohibit an individual from petitioning a court for the appointment of a guardian under ch. 54, Stats. [s. 48.977 (8) (b), Stats.; see *In re B.C.L.-J.*, 2016 WI App 25, ¶18 (holding that while a grandmother was not an authorized petitioner for a CHIPS guardianship, this prohibition did not preclude her from petitioning for guardianship under ch. 54, Stats.).] Moreover, the statute governing CHIPS guardians provides that it "does not abridge the duties or authority of a guardian appointed under [ch. 54, Stats.]." [s. 48.977 (8) (a), Stats.]

PART II – GUARDIANSHIPS UNDER CH. 54, STATS.

Chapter 54, Stats., applies to guardianships of the person, the estate, or both, of incompetent adults, spendthrift adults, and minors. Such individuals for whom a guardian has been appointed are referred to "wards." While guardianships for incompetent or spendthrift adult wards require the court to make certain findings by clear and convincing evidence prior to appointing a guardian, the court is only required by statute to find that an individual is a minor in order to appoint a guardian of a minor ward's person, estate, or both. [s. 54.10, Stats.] However, the appointment of a guardian for a minor ward is also governed by case law that, in light of certain constitutional principles, prevails over the statutory framework. The following overview of current law summarizes both the statutory provisions and case law applicable to guardianship of a minor ward's person.[2]

POWERS AND DUTIES OF THE GUARDIAN

Chapter 54, Stats., expressly lists various powers granted to a guardian upon appointment. Several of these statutory powers are legal rights transferred from an adult ward to the guardian, which are inapplicable to minors, in that minors do not enjoy the same legal rights as adults. That said, in the context of minors, a guardian is expressly granted the power to have care, custody, and control of the minor's person. This transfer of power does not legally terminate the rights of the minor's parents.[3] [s. 54.25 (2) (d) 1. and 2. o., Stats.]

A guardian of the person has a duty to annually report to the court regarding the ward's condition. The report must include the ward's location and health condition, a statement as to whether the ward is living in the least restrictive environment consistent with the ward's needs, and any recommendations regarding the ward. Court Form GN-3485, titled "Annual Report on the Condition of the Minor Ward," is used for this purpose.[4] [s. 54.25 (1) (a), Stats.]

COMMENCEMENT OF A GUARDIANSHIP ACTION

Petition

Any person may file a petition for appointment of a guardian. The term "proposed ward" is used to describe an individual for whom a petition for guardianship is filed. Among other requirements, the petition must contain specific information about the proposed ward, the person nominated as guardian, and any interested parties. The petitioner must also indicate whether a full

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[2] Because minors are not typically legal custodians of financial assets, guardianships of a minor's estate are relatively rare and therefore, for the sake of brevity, are excluded from this overview.

[3] Parental rights may only be terminated by the specific procedures set forth in subch. VIII, ch. 48, Stats.

[4] The use of standard court forms is mandatory in guardianship proceedings under ch. 54, Stats. The Staff Brief will refer to a select number of forms that exist by referencing the court form's number and title. All court forms for minor guardianships are available here: https://wicourts.gov/forms1/circuit/formcategory.jsp?Category=17.

or limited guardianship is required and, if limited, the specific authority sought for the guardian. Court Form 3290, titled "Petition for Guardianship of Minor," contains the petition form. [ss. 54.01 (26) and 54.34 (1), Stats.]

In addition, the petitioner must request either a temporary or permanent guardianship. The court may, in particular situations, appoint a temporary guardian for up to 60 days, the appointment of which may be extended for good cause for one additional 60-day period. Any other guardianship is considered permanent. A petition for a temporary guardian is governed by an independent procedure, and this overview focuses on permanent guardianships. [ss. 54.34 (1) and 54.50, Stats.]

The petition, along with several other forms, must be filed in probate court, which is the circuit court that has subject matter jurisdiction over petitions for guardianship under ch. 54, Stats.[5] The petitioner may file with the court that is in the proposed ward's county of residence or the county in which the proposed ward is physically present. The statutes provide specific procedures for change of venue, should a proposed ward change residence from one county to another. [ss. 54.01 (4) and 54.30, Stats.]

Notice

Once the petition and accompanying documents are filed, the petitioner must arrange for written notice to all of the following:

- The proposed ward's spouse, if any.
- The proposed ward's parent, unless the parent's parental rights have been terminated.
- The proposed ward, if over 14 years of age.
- Any other person that has the legal or physical custody of the minor.

[s. 54.38 (3), Stats.]

Failure to provide notice to all interested persons deprives the court of jurisdiction, unless receipt of notice is waived.[6] An "interested person" includes those listed above, as well as any individual nominated as guardian, any individual nominated to act as fiduciary for the minor in a will or other written instrument executed by the minor's parent, and the corporation counsel of the county in which the petition is filed, among others. [ss. 54.01 (17) and 54.38 (1), Stats.] Court Form 3300, titled "Order and Notice of Hearing Petition for Guardianship of Minor" is used to provide notice.

Rights of the Proposed Ward

Chapter 54, Stats., provides various rights to the proposed ward. For example, the proposed ward has the right to counsel and the right to be present at any hearing regarding the guardianship.

[5] While ch. 54, Stats., defines "court" to mean the court assigned to exercise probate jurisdiction, ch. 48, Stats., also grants the Children's Court jurisdiction over "the appointment and removal of a guardian of the person for a child under . . . ch. 54, Stats." [s. 48.14 (2) (b), Stats.] Practitioners report that the appropriate court of jurisdiction varies by county.

[6] Court Form 3310, titled "Waiver and Consent to Petition for Guardianship of Minor," is used for waiving notice. Note that by signing this form, the parent or interested person also must consent to the guardianship.

Also, the proposed ward has the right to a jury trial, if requested by the proposed ward, his or her attorney, or the GAL at least 48 hours before the hearing. [s. 54.42, Stats.]

GUARDIAN AD LITEM

Appointment and Qualifications

Generally, the court must appoint a GAL once the petition for guardianship is filed, regardless of whether the petitioner seeks a permanent or temporary guardianship. To qualify as a GAL in a minor guardianship proceeding, the GAL must be an attorney admitted to practice in this state. [ss. 54.40 (1) and (2) and 54.50 (3) (b), Stats.]

Responsibilities and General Duties

A GAL does not have the rights or duties of a guardian. Rather, the GAL serves as an advocate for the best interest of the proposed ward and must function independently, in the same manner as an attorney for a party to the action. The GAL must consider, but is not bound by, the wishes of the proposed ward or the positions of others as to the best interest of the proposed ward. [s. 54.40 (3), Stats.]

Once appointed, the GAL in a minor guardianship has several duties, including the following:

- Interview the proposed ward and explain the contents of the petition, the applicable hearing procedure, the right to counsel, and the right to request or continue a limited guardianship.
- Advise the proposed ward, both orally and in writing, of that person's rights to be present at the hearing, to a jury trial, to an appeal, and to counsel.
- Interview the proposed guardian, the proposed standby guardian, if any, and any other person seeking appointment as guardian and report to the court concerning the suitability of each individual interviewed to serve as guardian.
- If the proposed ward requests representation by counsel, inform the court and the petitioner or the petitioner's counsel, if any.
- Attend all court proceedings related to the guardianship.
- Present evidence concerning the best interests of the proposed ward, if necessary.
- Report to the court on any matter that the court requests.

[s. 54.40 (4), Stats.]

A written report from the GAL to the court is not automatically required by statute. However, the existence of Court Form 3325, titled "Report of the Guardian ad Litem Guardianship of Minor," results in some courts requesting that the GAL complete and file this document, consistent with the GAL's duty to report any matter upon the court's request.

PROPOSED GUARDIAN

While the petitioner must nominate a proposed guardian, the court has a statutory obligation to consider the opinions of the proposed ward and the members of the proposed ward's family as to what is in the proposed ward's best interest. A minor who is 14 years of age or older may provide a written nomination of his or her own guardian, but the court may dispense with the minor's nomination if good reason exists or if other circumstances apply. If neither parent of a minor who is 14 years of age or older is suitable and willing to be appointed guardian, the court may appoint the nominee of the minor. [s. 54.15 (1) and (4), Stats.]

However, if one or both of the parents of a minor are suitable and willing, the court must appoint one or both as guardian unless the court finds that the appointment is not in the proposed ward's best interest. [s. 54.15 (5), Stats.] Importantly, this statutory provision is subject to constitutional principles imposed by case law that require a finding that the parents are unfit, as discussed in detail below.

The proposed guardian is subject to several disclosures to the court. Specifically, the proposed guardian must inform the court whether the proposed guardian: (1) is currently charged with or has been convicted of a crime; (2) has filed for or received protection under federal bankruptcy laws; (3) has had a professional license suspended or revoked; or (4) is listed in the Caregiver Misconduct Registry. The proposed guardian must make disclosures to ensure compliance with a statutory prohibition against an individual being the guardian of the person for more than five nonfamily, adult wards, subject to certain exceptions. [s. 54.15 (8) and (9), Stats.]

The proposed guardian discloses this information by filing a sworn and notarized statement with the petition, or any time after, but at least 96 hours before the hearing, using Court Form 3140, titled "Statement of Acts by Proposed Guardian and Consent to Serve as Guardian." Note that by signing the form, the proposed guardian not only discloses the requisite information, but consents to serve as guardian.

HEARING

Procedural Requirements

A hearing on the petition for guardianship must be held within 90 days after it is filed. The hearing is generally closed to the public. The proposed guardian and any proposed standby guardian must be physically present at the hearing, unless the court excuses attendance or allows appearance by telephone. A minor proposed ward is not required to attend the hearing. An interested person may participate in the hearing at the court's discretion. [s. 54.44 (1) (a), (3), (4) (b), (5), and (5m), Stats.]

If the petition for guardianship is uncontested, the court may not require testimony and instead appoint the proposed guardian upon determining that the notice requirements have been met. However, if the matter is contested, the court will conduct a trial on the petition and receive evidence relevant to the standards by which the court is bound under both statutory and case law.

Required Findings

Statutory Requirements: Proposed Ward is a Minor

By statute, the court must determine at the hearing only that the proposed ward is a minor. This finding must be made by clear and convincing evidence.

If the court finds that the proposed guardian is unsuitable, the court must request that a petition proposing a suitable guardian be filed, set a date for a hearing within 30 days, and require the GAL to investigate the suitability of a new proposed guardian. As previously mentioned, the statutes require the court appoint a suitable and willing parent as guardian, unless the court finds that the appointment is not in the proposed ward's best interest. [ss. 54.15 (5) and 54.44 (2) and (6), Stats.]

Constitutional Requirements: The Barstad *Case*

The court's primary determination at the hearing is governed by case law, not statute. The Wisconsin Supreme Court has held that "'the best interests of the child' is not the proper standard in custody disputes between a natural parent and a third party." [*Barstad v. Frazier*, 118 Wis. 2d 549, 554-55 (1984).] Rather, relying upon the principle that the relationship between a parent and child is a constitutionally protected right, the *Barstad* court set forth the following rule:

> [A] parent is entitled to custody of his or her children unless the parent is either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party. Compelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child.[7] If the court finds such compelling reasons, it may award custody to a third party if the best interests of the children would be promoted thereby. [*Id.* at 568-69.]

Appellate courts routinely rely upon *Barstad*, explaining that any standard that does not consider a parent's constitutional rights would be incomplete. [See, e.g., *Nicholas C.L. v. Julie R.L.*, 2006 WI App 119, ¶ 16.] In 2009, the Wisconsin Court of Appeals reiterated that *Barstad* remains the legal standard for guardianship of a minor, despite the enactment of ch. 54, Stats., effective December 1, 2006.[8] [*Cynthia H. v. Joshua O.*, 2009 WI App 176, ¶ 37.] Specifically, in *Cynthia H.*, the court rejected the appellant's assertion that the enactment of ch. 54, Stats., created a legislative requirement that the "best interest of the child" is the standard to be applied to minor guardianship petitions. [*Id.* ¶¶ 37-48.] The court reasoned that, if a best-interest standard applied, a fit and able parent may lose custody of his or her child, resulting in an absurd result that the Legislature could

[7] This nonexhaustive list of "compelling reasons" includes several of the grounds for involuntary TPR. [See s. 48.415, Stats.]

[8] 2005 Wisconsin Act 387 created ch. 54, Stats., and renumbered much of ch. 880, 2005 Stats., relating to guardianship, to the newly created ch. 54, Stats. The Act also substantially revised the state's guardianship law, though the major provisions were focused on adult guardianships.

not have intended. [*Id.* ¶ 42.] Moreover, the court declined to read ch. 54, Stats., in a manner that would undermine the constitutional principles set forth in *Barstad*. [*Id.* ¶ 48.]

In sum, at the hearing, the court will not appoint a guardian over the parents' objection, unless the court finds by clear and convincing evidence that both parents are unfit or compelling reasons warrant the appointment of a guardian. Unlike other areas of law in which the best interest of the child is of paramount concern, the applicable constitutional principles prompt a bifurcated procedure in which the court must first find either parental unfitness, parental inability, or the existence of "compelling reasons." After a finding of unfitness, inability, or compelling reasons, the court considers whether awarding custody to the guardian would promote the proposed ward's best interest.

Disposition

After the hearing, the court will either dismiss the petition or appoint a guardian. Specifically, the court will dismiss the petition if the grounds for guardianship have not been shown by clear and convincing evidence. If the court finds that the petitioner has shown the grounds for guardianship by clear and convincing evidence, the court will enter the following two documents that together establish the legal authority of the guardian: (1) the Determination and Order, which provides the court's findings and legally appoints the guardian as a court order; and (2) the Letters of Guardianship, which authorizes the guardian to exercise the duties granted by statute and sets forth any additional, specific powers that are transferred either fully or partially to the guardian. [s. 54.46, Stats.] The court will use Court Form GN-3330, titled "Determination and Order on Petition for Guardianship of a Minor," and Court Form GN-3340, titled "Letters of Guardianship of the Person of a Minor."

POST-APPOINTMENT

Removal of Guardian

Certain actions or omissions by a guardian (such as, failing to act in the best interest of the ward, failing to perform duties, or performing prohibited acts) may constitute cause for removal of the guardian, among other remedies. Specifically, if petitioned by any party or on the court's own motion, the court may, after notice and a hearing determining whether just cause exists, remove the guardian or enter any other order that may be necessary or appropriate to compel the guardian to act in the best interest of the ward or to otherwise carry out the guardian's duties. [s. 54.68, Stats.]

Successor Guardian

The court, on its own motion or upon petition of any interested person, may appoint a competent and suitable person as successor guardian in any of the following circumstances:

- The guardian dies.
- The guardian is removed by court order.
- The guardian resigns and the court accepts the resignation.

The court may direct that a petition for appointment of a successor guardian be heard in the same manner and subject to the same requirements as an original appointment of a guardian. If the court appoints a successor guardian without a hearing, the successor guardian must, no later than 10 days after the appointment, provide notice by personal service or mail to the ward and all interested persons of the appointment, the right to counsel, and the right to petition for reconsideration of the successor guardian. [s. 54.54, Stats.]

Termination of Guardianship

Generally, termination of a guardianship requires a court order. Permanent guardianships do not have specific end dates, though grounds for termination may exist upon the occurrence of certain events. Specifically, by statute, a minor guardianship terminates when the ward attains age 18, marries, dies, or changes residence to another state and a guardian is appointed in the new state of residence. [s. 54.64 (3), Stats.] Additionally, pursuant to *Barstad* and subsequent case law, parents may petition the court to end the guardianship on the basis that they are fit, suitable, and willing to resume exercising responsibility for the minor, and termination of the guardianship is in the best interest of the minor.

To terminate the guardianship, Court Form GN-3650, titled "Petition for Termination of Guardianship," is filed with the court, and the court conducts a hearing to determine the basis for termination and whether the request should be granted. Depending on the basis for the request, the court may appoint a GAL.

If a parent petitions to end the guardianship based on a claim that the parent is fit, suitable, and willing, the court will apply the *Barstad* standard, as the constitutional concerns mandate application of that standard in such cases. [See *Howard M. v. Jean R.*, 196 Wis. 2d 16, 24 (Ct. App. 1995).] In such circumstances, while the parent filed the petition and prompted the hearing, the current guardian must prove that the parent is unfit or unable, or that compelling reasons exist, to maintain the guardianship.

ISSUES WITH CURRENT LAW

Parties to guardianship matters and legal professionals report that ch. 54, Stats., is ill-suited to minor guardianships for several reasons. First, the chapter focuses primarily on incompetent and spendthrift adults, rendering many of the provisions inapplicable to minors. Second, despite this inapplicability, the mandatory court forms reflect the statutory framework and, thus, are largely unworkable in the context of minors, though several guardianship forms were recently modified to alleviate some confusion. Third, a large body of constitutional case law exists in the context of minor guardianships, yet does not appear in statute. Fourth, the chapter fails to provide guidance on common issues related to minors, such as establishing or modifying a visitation schedule,[9] and

[9] Chapter 54, Stats., contains two sections that address visitation in certain, narrow circumstances. [See s. 54.56, Stats. (allowing a grandparent or stepparent of a minor to petition for visitation privileges if one or both parents are deceased and the minor is in custody of the surviving parent or any other person), and s. 54.57, Stats. (prohibiting a court from granting visitation or physical placement rights with the minor to a parent that is convicted of certain crimes of homicide of the other parent, subject to certain exceptions).]

addressing emergency situations in which the process for obtaining a temporary guardianship is insufficient.

PART III – RECENT LEGISLATIVE PROPOSALS

In recent legislative sessions, bills have been introduced that propose significant changes to the minor guardianship system in Wisconsin. 2009 Senate Bill 706 (2009 bill) was introduced by Senator Lena Taylor on April 22, 2010, and 2011 Senate Bill 560 (2011 bill) was introduced by Senator Fred Risser on March 14, 2012. Both bills were drafted with significant input from a working group composed of members of the Children & the Law Section of the State Bar of Wisconsin. According to a memorandum from the State Bar describing the 2011 bill, the working group is comprised of practitioners who work on children's issues in the courts on a daily basis.

Both the 2009 and 2011 bills were introduced near the end of the respective legislative sessions, and did not receive a public hearing. More recently, the State Bar working group has continued its efforts to craft a proposal addressing minor guardianship, including work on a bill draft greatly influenced by the 2009 and 2011 bills. Below is a brief description of both past and ongoing legislative efforts to update Wisconsin's minor guardianship statutes.

PAST LEGISLATIVE EFFORTS TO ADDRESS MINOR GUARDIANSHIPS

Though the 2009 and 2011 bills differ in some respects, such as their treatment of GAL duties and procedures for when a proposed guardian is found to be unfit, both bills take a similar general approach to modifying Wisconsin's minor guardianship system. Specifically, the bills both do all of the following: place the private minor guardianship statutes into ch. 48, Stats., the Children's Code; create four distinct types of guardians for minors; update procedural requirements; and codify certain aspects of case law.

Placement Into Children's Code

The primary change to current statutory organization proposed by the 2009 and 2011 bills is to separate the minor guardianship statutes from the existing guardianship statutes affecting adults in ch. 54, Stats. (except for the statutes relating to guardianships of the estate of minors), and place the private guardianship laws for minors in ch. 48, Stats., the Children's Code. Importantly, placing the minor guardianship statutes in the Children's Code explicitly places these cases under the jurisdiction of the Children's Court, which solely handles matters relating to children.

As mentioned in Part II, the current placement of minor guardianship statutes among the statutes for guardianship for adults has created issues for practitioners and courts, as many of the adult guardianship statutes are practically inapplicable to minors. The State Bar working group asserts that placing minor guardianship laws within the Children's Code is designed to eliminate confusion and increase ease of access and application for all of the guardianship laws applicable to minors.

Creation of Four Distinct Types of Guardians for Minors

Both the 2009 and 2011 bills propose to create four specific types of guardianships of the person for minors: full; limited; temporary; and emergency. The bills prescribe the duties and authority the court may grant by order to each type of guardian.

According to the State Bar working group, these distinct types of guardianships are necessary because they are tailored for situations that do not exist with adult guardianships. For example, under the bills, a court may appoint a guardian to be a child's **limited** guardian if the child's parents need assistance in providing for the care, custody, and control of the child, and may appoint a **temporary** guardian if the child's particular situation, including the inability of the child's parents to provide for the care, custody, and control of the child for a temporary period of time, requires the appointment of a temporary guardian.

Additionally, the bills specify the allowable duties and authority for each type of guardian. For example, a **full** guardian may exercise the same duties and authorities as a guardian under ch. 48, Stats., including, among other things, the authority to consent to marriage, enlistment in the U.S. armed forces, major medical, psychiatric and surgical treatment, obtaining a motor vehicle operator's license, and the rights and responsibilities of legal custody, subject to certain exceptions. [s. 48.023, Stats.] A **limited** guardian, as implied by its name, may exercise the duties and authority of a full guardian to the extent relevant to the duties or authority, except as limited by court order. For a limited guardianship, the court may limit the authority of a guardian with respect to any power to allow the parent to retain such power to make decisions as is within the parent's ability to exercise effectively. The court may also limit the physical custody of a guardian to allow shared physical custody with the parent if shared physical custody is in the best interests of the child.

Updated Procedural Requirements

The 2009 and 2011 bills also include detailed procedural requirements designed to respond to the specific time frames required by the appointment of each particular type of guardianship. Specifically, the bills include procedural requirements for all of the following: filing a petition for guardianship; notice for "interested persons," including an updated definition of that term; appointment of a GAL; required statements to the court by a proposed guardian; the court hearing on a guardianship petition; and post-appointment issues, such as appointing a successor guardian, modifying a guardianship order, reviewing the conduct of a guardian, and terminating a guardianship.

Additionally, the 2009 and 2011 bills contain detailed procedures for the appointment of an emergency guardian, which is not contemplated by current law. The bills allow for an emergency guardian to be appointed for up to 60 days if the child's welfare requires immediate appointment of a guardian. The corresponding procedural requirements are tailored to accompany the emergent nature of the situation, and include accelerated notice and hearing requirements, opportunity for those required to receive notice to petition for reconsideration or modification of an emergency guardianship order, and immunity from civil liability for an emergency guardian who performs his or her duties in good faith, in the best interests of the child, and with the degree of diligence and prudence that an ordinarily prudent person exercises in his or her own affairs.

Incorporation of Case Law

As described above in Part II, current statutes do not incorporate the longstanding case law that requires a court to find by clear and convincing evidence that both parents are unfit or compelling reasons warrant the appointment of a guardian.

The 2009 and 2011 bills seek to incorporate this required finding into the statutes by requiring a petitioner for full guardianship to prove by clear and convincing evidence, among other things, that the child's parents are unfit, unwilling, or unable to provide for the care, custody, and control of the child or that other compelling facts and circumstances demonstrate that a full guardianship is necessary. The bills also outline allegations a petitioner must prove by clear and convincing evidence in a limited, temporary, or emergency guardianship petition.

According to the State Bar working group, the addition of language from case law in the statutes will eliminate speculation and inconsistent application of the minor guardianship laws statewide and provide better notice to those seeking a minor guardianship that a minor's parents have certain constitutional rights.

Ongoing Work on Minor Guardianship Legislation

As mentioned above, the State Bar working group has continued to work on a bill draft addressing minor guardianships. Working group members will present to the Study Committee at its first meeting about the current status of their efforts on the bill draft. Below is a brief summary of the current version of the bill draft, including some differences between it and the 2009 and 2011 bills.

Current Version of Bill Draft

The current version of the bill draft, LRB-0921/P5, retains the same basic structure as the 2009 and 2011 bills described above. The bill draft still inserts private minor guardianships statutes into the Children's Code, creates four types of guardians, updates procedural requirements, and codifies certain aspects of case law.

However, the current version of the bill draft makes a number of changes and additions to the 2009 and 2011 bills, including the following:

- Modifies the requirement that certain notices be served upon all interested parties from at least 10 days in advance to at least seven days in advance.
- Allows contested cases to proceed immediately to a fact-finding and dispositional hearing if all parties consent.
- Adds to the list of dispositional factors the court must consider when deciding whether the grounds for full, limited, or temporary guardianship were proven by clear and convincing evidence.
- Includes additional language concerning the interaction of a private minor guardianship case with a simultaneous child welfare or juvenile justice case.

- Clarifies that the court may act as an intake worker in cases where the court finds the allegations in the petition were not proven by clear and convincing evidence or that appointment of the proposed guardian is not in the child's best interest.
- Allows the court to dismiss a petition for emergency guardianship if it determines that the welfare of the child does not require immediate appointment of a guardian.
- Clarifies that the court may impose a remedy against an appointed guardian if the guardian fails to follow or comply with the court's order.
- Allows the court to terminate a guardianship upon adoption of the child.
- Permits any child subject to a guardianship to petition for termination of the guardianship.

PART IV – ISSUES FOR CONSIDERATION

The Study Committee is directed to examine ch. 54, Stats., concerning guardianship of minors and adults, and recommend legislation that creates procedures specific to guardianship of a minor. The committee may consider whether any new provisions should apply to guardianship of a minor's person, estate, or both. The issues for consideration detailed below are intended to provide a starting point for the committee's deliberations.

USE OF PREVIOUS LEGISLATIVE EFFORTS

The Study Committee may want to discuss whether, or to what extent, it might use previous legislative efforts as the basis for the committee's work product. Given the current statutes' silence on many issues specific to guardianship of minors, the Study Committee will likely need to discuss many broad areas of law addressed by the working group regardless of whether the committee ultimately decides to use part or all of the bills that have already been drafted. For example, the Study Committee will likely need to decide the statutory placement of any new minor guardianship laws and how to strike the most appropriate balance of duties and responsibilities among guardians, GALs, courts, and other relevant actors.

Additionally, as evidenced by the changes and additions made from the 2009 bill to the 2011 bill to the current version of the draft, there are also many details the Study Committee will likely need to discuss. For example, the 2009 and 2011 bills require certain notices to be given to interested parties at least 10 days in advance, but the current version of the draft only requires notice to be given seven days in advance. The Study Committee will likely need to grapple with how to appropriately treat many of these details.

SCOPE OF STUDY COMMITTEE'S CHARGE

As the Study Committee reviews its options on how to proceed, it may want to consider whether any action it takes or legislation it recommends falls within the Study Committee's charge.

For example, the 2011 bill and the current version of the State Bar working group's bill draft include language relating to CHIPS guardianships under ch. 48, Stats., and protective placement under ch. 55, Stats. Though arguments could be made that inclusion of this language is integral to fulfilling the Study Committee's charge to examine ch. 54, Stats., and recommend legislation that creates procedures specific to guardianship of a minor, other arguments could be made that changes to these areas of law is outside the scope of the Study Committee's charge.

CODIFICATION OF CASE LAW

As mentioned in Part II, the 2009 and 2011 bills and the current version of the State Bar working group's bill draft seek to codify certain principles outlined in *Barstad* and other cases. Since the holdings in *Barstad* and its progeny are based in the principle that the relationship between a

parent and child is a constitutionally protected right, any statutory scheme offered by the Study Committee must comport with this principle or risk being unenforceable by a court.

Additionally, the Study Committee may want to consider whether the placement of the minor guardianship statutes in the Children's Code by the most recent version of the working group's draft adequately incorporates the constitutional principles applicable to minor guardianships. As noted, the applicable constitutional principles from *Barstad* require a bifurcated procedure in which the court must first find either parental unfitness, parental inability, or the existence of "compelling reasons" before it may consider whether appointing a guardian would promote the proposed ward's best interest.

The most recent version of the bill draft seeks to codify this standard in part by creating a new section within ch. 48, Stats., that requires that a petitioner for full guardianship prove the facts and circumstances establishing that the child's parents are unfit, unwilling, or unable to provide for the care, custody, and control of the child or other compelling facts and circumstances demonstrating that a full guardianship is necessary. Additionally, the bill draft contains a list of dispositional factors that a court must **consider** before appointing a guardian, including whether the petitioner proved the facts alleged in the petition relating to unfitness, unwillingness, or compelling facts by clear and convincing evidence. However, the language of the bill draft does not appear to require that the court must **find** that the petitioner proved the alleged facts relating to unfitness, unwillingness, or compelling facts by clear and convincing evidence, which is what is required by *Barstad*.

Though some sections in ch. 48, Stats., such as CHIPS guardianships, include enhanced procedures that contemplate a parent's fitness, ch. 48, Stats., is largely rooted in the principle that the best interests of the child, and not in a parent's constitutional rights, are the paramount concern. [See s. 48.01 (1), Stats.] Therefore, placement of the minor guardianship laws in a new section in ch. 48, Stats., without clarification that, in these cases, the best interest of the child is **not** the paramount concern, may cause confusion among practitioners and courts.

In order to avoid unintended application of any Study Committee legislation, the Study Committee may want to consider whether explicit language should be included in legislation to acknowledge that the best interests of the child do not trump a parent's constitutional rights in minor guardianship cases. The Study Committee may also want to consider whether placement of the minor guardianship laws is more appropriate in another part of the statutes, such as a subchapter within ch. 48 or 54, Stats.

RIGHTS OF THE MINOR

The 2009 and 2011 bills and the current version of the State Bar working group's bill draft prescribe certain rights for minors not found in current law. For example, the most recent draft explicitly provides for a minor of any age to petition for termination of a guardianship. The Study Committee may want to consider what, if any, new rights should be afforded to a minor subject to a guardianship order, and whether minors of a certain age should be treated differently than minors who have not attained that age.