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An Intro to Minor Guardianship Actions

Obtaining a guardianship for a minor under Wis. Stat. chapter 54 is a confusing but sometimes necessary process that attorneys should approach with caution.

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This article presents a cursory overview, from a lawyer's perspective, of the minor guardianship process under Wis. Stat. chapter 54 [hereinafter chapter 54]. Before starting, keep in mind: *The court will not impose a minor guardianship over the objections of a fit and willing parent.* More on this later.

We use minor guardianships when a minor needs a decision-maker and other alternatives do not work. Sometimes, informal arrangements are sufficient, and sometimes a power of attorney under Wis. Stat. section 48.979suffices. In situations where alternatives are inadequate, a minor guardianship may be necessary.

Statutory Framework

Wisconsin law provides two types of minor guardianship, one under Wis. Stat. chapter 48 and the other under chapter 54. Chapter 48 guardianships are for specific situations involving children under the jurisdiction of the court.[1] This article does not cover Wis. Stat. chapter 48 guardianships. Chapter 54 focuses primarily on the guardianship of incompetent adults. Chapter 54 is an exceedingly poor fit with minor guardianships, but recent efforts to create a separate statute for minor guardianships have not come to fruition. The underlying policy of chapter 54 is that any civil rights not removed from an individual remain with the individual. Of course, broadly speaking, children do not have "legal rights" in the same way as adults.

As a consequence, most of the provisions of chapter 54 are inapplicable or unworkable in the context of minor guardianships, so figuring out how to apply the provisions can be daunting. Nonetheless, minor guardianships are popular tools in estate planning for LGBT families, in grandparent or relative caregiver situations, and in other nontraditional family configurations.

Chapter 54 contemplates two types of guardianship: of the person and of the estate. In minor settlement or death-benefit situations, for example, a guardianship of the estate may be necessary. Most often, though, a minor guardianship will be of the person only.

Wisconsin currently has two choices for guardianship duration: temporary or permanent. A temporary guardianship is in effect for 60 days, with one 60-day extension possible for "good cause."[2] Any other guardianship is "permanent." Labels are important because parents who might be willing to agree to a time-limited guardianship (say, six months) may be *very* reluctant to agree to a guardianship entitled "permanent." Unfortunately, if 60 days (or 120 days with the extension) is not long enough, then the "permanent" label becomes mandatory.

The only statutory ground for a minor guardianship is that the individual is, indeed, a minor.[3] However, minor guardianships have constitutional overtones, as discussed in *Barstad v. Frazier*.[4] In this seminal decision, the Wisconsin Supreme Court held that in a guardianship case between a parent and a third party, the parent prevails unless the parent is either unfit or unable to care for the children or compelling reasons exist for awarding custody to a third party. "Compelling reasons" follow, basically, the grounds for involuntary termination of parental rights found in Wis. Stat. section 48.415. *Barstad v. Frazier* is the elephant in the room in minor guardianship cases. As warned at the beginning of this article, the bottom line is that if a reasonably fit and willing parent objects to the guardianship, the court will not grant it.

Petitioner's Attorney

Initial Guardianship Forms

After the attorney gathers enough information to determine the *Barstad* grounds for the guardianship petition, the attorney must complete the following initial forms:

- Petition, GN-3290, including the *Barstad* grounds stated in paragraph 8 of the accompanying article;
- Notice, GN-3300;
- Order Appointing Guardian ad Litem, GF-131;

Anecdotally, most minor guardianship actions are pro se. Many counties have "pro se packets" for minor guardianships that contain the necessary forms. Even if an attorney is bringing the action, though, the attorney must use the mandatory forms available on the circuit court form website.

At the outset, the petitioner's attorney must be clear about "who is my client." The attorney may represent the proposed guardian or may represent a legal parent; the attorney almost certainly may not represent both.[5] If the attorney reasonably believes that the fees associated with the matter will exceed $1,000, the fee agreement with that client should be in writing.[6] Because the minor guardianship may involve paying a filing fee (in some counties) and a guardian ad litem (GAL) fee, the attorney should generally require an advance deposit and comply with the additional rules associated with funds held in trust.[7] Before undertaking any representation, the attorney should resolve any personal-jurisdiction issues that may arise because of an absent parent.

- Waiver & Consent, GN-3310, if applicable;
- Nomination of Guardian by a Minor, GN-3320, for minors age 14 or older, if applicable;
- Statement of Acts by Proposed Guardian, GN-3140; and
- Uniform Child Custody Jurisdiction & Enforcement Act Affidavit, GF-150 (not required in most counties).

At the initial conference, the lawyer must first determine if the guardianship is truly by consent. If it is not, then the most important thing the lawyer can do is to explain and explore the *Barstad* standards. The clients almost certainly will be unhappy, but it is better to never file the action than to be caught up in a contested dispute with parents who have a clear upper hand in the law. Indeed, third-party guardianships are becoming so difficult that many lawyers will no longer handle these cases unless the parents sign consents ahead of time.

The attorney must also decide if a temporary guardianship is necessary while awaiting resolution of the permanent guardianship. If so, then the attorney would include a request for temporary guardianship in the initial petition (see below), and follow the additional requirements of Wis. Stat. section 54.50. The balance of this article assumes that a temporary guardianship is unnecessary.

If the guardianship is not by consent, then the attorney must next gather enough information to determine the *Barstad* grounds for the petition. Then, the attorney must complete the initial forms, as shown in the accompanying sidebar. In some counties, the initial documents are filed and only then is a hearing date assigned and a GAL appointed. In other counties, the attorney coordinates the hearing date with the identified court-appointed GAL prior to filing the completed papers. The register in probate or juvenile court clerk (depending on the county) can offer assistance in learning the county's typical practice. Whatever the tradition, the petition must be heard within 90 days after it is filed.[8]

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Once the initial documents are filed, the attorney must arrange for service under Wis. Stat. section 54.38(3). The guardianship statutes do not require that the served copies be authenticated, but given the jurisdictional rules of civil procedure, it is safest to obtain and serve authenticated copies. Unlike for adult guardianships, the statutes set out no time limits for service. The attorney should create an affidavit of mailing for filing at the final hearing to confirm that service was made as required by statute. When sending out the initial documents, the attorney must remember to send copies to the GAL. The attorney should also provide the GAL with current contact information for all people involved in the guardianship and should instruct the attorney's clients to contact the GAL, who will want to meet with the proposed guardians, the parents, and potentially the child (depending on age).

Later in the process, the petitioner's attorney must complete the final forms: Determination and Order, GN-3330 (most of which makes no sense in the context of minor guardianships); and Letters of Guardianship of the Person, GN-3340, and of the Estate, GN-3345, if applicable.

Note that guardianship is *not* the same as a family court custody/placement order. Under Wis. Stat. section 54.25(2)(o), the guardian has "care, custody, and control of the ward, if a minor." The general statute provides no guidelines for setting up visitation or evaluating visitation issues. Within this vacuum, most courts agree that visitation schedules cannot be set up in guardianship orders, and that visitation is a private matter between the guardian and the parents. Some counties make exceptions, particularly if all of the involved parties enter into a voluntary agreement.

Historically, and curiously, Dane County takes the position that a guardianship does *not* affect custody or placement of the involved children. In addition, it should be noted that if a grandparent or stepparent seeks visitation of a minor under certain enumerated circumstances, then visitation *may* be granted to those individuals in an underlying guardianship action under Wis. Stat. section 54.56.

The hearing procedure in uncontested minor guardianships varies greatly from county to county. Most courts do not require testimony, granting the guardianship after hearing from counsel and from the GAL and receiving the proof-of-service documents. Other courts require only rudimentary testimony. The attorney should ask local lawyers or court personnel about the hearing procedure ahead of time. At the conclusion of the hearing, the court will sign the final documents. The attorney should obtain certified copies of the Letters of Guardianship for the clients. If the matter is contested, the court conducts a full trial that focuses on the *Barstad* factors. How to handle this contested trial is beyond the scope of this article.

To Learn More ...

Serving as a court-appointed guardian ad litem is one way to expand your law practice. For answers to the frequently asked question: Am I eligible to accept a GAL court appointment, including in Children's Court and Juvenile Court, read "How to Become Eligible for GAL Appointments," by Gretchen Viney, in the February 2013 *Wisconsin Lawyer*.

Guardian ad Litem

Minor guardianships require the appointment of a GAL.[9] Wisconsin has two supreme court rules with special requirements for GAL work, but neither applies to minor guardianships. SCR 35 sets out requirements for a lawyer acting as GAL "for a child," but does not include chapter 54 in its enumeration of statutes to which the rule applies. SCR 36 covers GAL appointments under chapter 54 but limits its application to GALs representing adults. Accordingly, the Wisconsin Supreme Court has not imposed any particular requirements on lawyers serving as GALs in minor guardianships.

Serving as GAL in a minor guardianship is difficult. Often, the GAL is the only lawyer involved and is constrained by the Rules of Professional Conduct from advising any of the participants as to law or procedure.[10] If the petitioners are pro se, the GAL is put in the unfortunate position of explaining the *Barstad* standards to well-meaning people who see nothing about "unfit" or "compelling circumstances" in the pre-printed, mandatory forms. The GAL may receive incomplete contact information, if any, for the parties. Making arrangements to speak with the child may be time-consuming and frustrating. Generally, though, the GAL will:

- Meet with the petitioners to confirm that they understand the process and the *Barstad* standards.
- If the matter is not by consent, confirm that the *Barstad* factors are properly alleged (unlikely) or are at least provable by the petitioner.
- Decide what to do if the *Barstad* factors cannot be proven.
- Confirm that notice has been provided to all interested persons (but *not* volunteer to provide notice or to correct notice issues).
- Meet with the child and explain the Nomination form (GN-3320) if the child is 14 or older, and determine if the child should attend court (optional under Wis. Stat. section 54.44(4)(b)).
- Attempt to contact the parents of the minor to determine, or confirm, their positions.
- Complete any investigation that may be necessary.
- Decide whether to use Form GN 3325 and, if so, fill out the form.
- Attend the hearing.

GN-3325 is the "Report of the Guardian ad Litem." The statutes do not require the GAL to file a written report, but the existence of this "mandatory form" means that some counties require the GAL to complete and file this document. GN-3325 is nearly incomprehensible in its application to minor guardianships. The problems with the form far exceed the space available for this article. If the court requires the GAL to use the form, it is best to leave most of the blocks blank and, at the end, to insert language something like the following: "I did not advise the minor of the rights under paragraph 1 because those rights do not apply in this minor guardianship. I did not advise the minor of rights that are particular to adult guardianship proceedings based on grounds of incompetency, and I did not undertake any duties that would apply only in those types of guardianship. Most of the paragraphs on this mandatory form do not apply to minor guardianships." Better yet, the GAL might convince the court to allow the GAL to make an oral report at the uncontested hearing.

Postjudgment Matters

Once a guardianship is entered, it can be dissolved only by court order. If a guardian no longer wants to be the guardian, the guardian would "resign" (using Form GN-3440) and the court would appoint a new guardian. Anecdotal reports indicate that some counties do not allow the guardian for a minor to "resign," although the legal authority for this is tenuous.

If a parent wants to end the guardianship, the parent would file a petition (GN-3650) or, in some counties, simply write a letter to the court. The court would then appoint a GAL and hold a hearing on the request pursuant to Wis. Stat. section 54.64. These hearings can be complicated and frustrating. The *Barstad* rule and factors apply: the current guardians have the burden of proof to show that the parent or parents are unfit or unwilling *at the current time*. Because the party with the burden of proof presents evidence first, the guardians – typically pro se and confused about the proof required – must present evidence showing that the parent, about whom they may have little information, is currently unfit or that there are other compelling reasons (pursuant to *Barstad*) that the guardianship should continue. The court-appointed GAL is often the only attorney in the courtroom.

Particularly in situations in which the county avoided a chapter 48 case by encouraging a chapter 54 private guardianship, the guardians will feel betrayed by the legal system. Overall, the postjudgment guardianship proceedings are difficult for the court, the parties, the GAL, and ultimately, for the child.

Conclusion

Chapter 54 minor guardianships are challenging for all involved. Until the laws are revised, lawyers and courts will continue to struggle with the statutes, forms, and case law, and the process will continue to vary widely from county to county. The only sure bet is that the court will not impose a minor guardianship over the objections of a fit and willing parent.

Endnotes

[1] Wis. Stat. § 48.977.

[2] Wis. Stat. § 54.50.

[3] Wis. Stat. § 54.10(1).

[4] 118 Wis. 2d 549, 348 N.W.2d 479 (1984).

[5] SCR 20:1.7.

[6] SCR 20:1.5.

[7] SCR 20:1.15.

[8] Wis. Stat. § 54.44(1).

[9] Wis. Stat. § 54.40(1).

[10] SCR 20:4.3.
