WISCONSIN LEGISLATIVE COUNCIL
STUDY COMMITTEE MEMORANDUM

TO: MEMBERS OF THE STUDY COMMITTEE ON MINOR GUARDIANSHIPS

FROM: Steve McCarthy and Amber Otis, Staff Attorneys

RE: Information in Response to Members' Requests at Meeting on July 24, 2018

DATE: August 21, 2018

During the meeting on July 24, 2018, members of the Study Committee on Minor Guardianships requested the following information for review and discussion at the committee's next meeting scheduled for August 28, 2018:

- Statistical data on guardianships in Wisconsin.
- Comparison of minor guardianships under s. 48.977, Stats., which governs guardianships of children in need of protection or services, also known as CHIPS guardianships, and ch. 54, Stats., referred to as private minor guardianships.
- Research regarding the application of, and burden of proof for, the *Barstad* standard when a parent seeks to terminate a guardianship under ch. 54, Stats.
- Examples of other states' laws regarding the duties of a guardian ad litem (GAL) in private minor guardianships.

Each topic is addressed in more detail below.

STATISTICAL DATA ON GUARDIANSHIPS IN WISCONSIN

On July 26, committee staff met with representatives from Wisconsin State Courts to discuss the types of data available from the Consolidated Court Automation Program (CCAP). Specifically, committee staff requested data on guardianship cases filed between 2012 and 2017, broken down by county, class code, and filing year. Wisconsin State Courts staff continue to gather the CCAP data necessary to meet this request. Upon receipt, committee staff will forward the data to the committee.

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COMPARISON OF GUARDIANSHIP PROCEDURES

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. Guardianships under ch. 54, Stats., are legally distinct from CHIPS guardianships under s. 48.977, Stats. To understand their differences, committee members requested a chart that compares these two types of minor guardianships.

The attachment provides a table comparing the key provisions related to the appointment of guardians of the person for children under chs. 48 and 54, Stats. The table was originally prepared for the Juvenile Model Recordkeeping Procedures Manual and was provided to committee staff by Wisconsin State Courts.

In addition, committee members may find useful an e-learning module titled "Chapter 48 Guardianship" prepared by the Wisconsin Children's Court Improvement Program, available at: http://www.wicciptraining.com/Modules/All. While the 16-minute module focuses on proceedings for CHIPS guardianships, it addresses certain key differences between CHIPS guardianships under s. 48.977, Stats., and private minor guardianships under ch. 54, Stats.

APPLICATION OF *BARSTAD* TEST IN TERMINATION OF GUARDIANSHIP PROCEEDINGS

At the July 24 meeting, the committee discussed LRB-0921/P5, a bill draft which, in part, creates a procedure and legal standard for terminating a private minor guardianship upon the request of the child or the child's parent. Specifically, the draft contains the following standard for a court to employ when a child or a child's parent petitions to terminate a private minor guardianship order:

> The petition shall allege facts sufficient to show that there has been a substantial change in circumstances since the last order affecting the guardianship was entered, that the parent is fit, willing, and able to carry out the duties of a guardian, and that termination of the guardianship would be in the best interest of the child. . . . The court shall terminate the guardianship if the court finds, by clear and convincing evidence, that the parent has remedied the unfitness, unwillingness, or inability to provide for the care, custody, and control of the child or other compelling facts and circumstances on which the guardianship was granted and that he or she is now fit, willing, and able to carry out the duties of a guardian and the court determines that termination of the guardianship would be in the best interests of the child. [LRB-0921/P5, SEC. 25, pp. 36 and 37.]

Upon discussion of this language, committee members requested case law research regarding the application of and burden of proof for the *Barstad* standard when a parent seeks to terminate a guardianship under current law.

Background on the *Barstad* Standard

In proceedings for the initial appointment of a guardian, the burden of proof by clear and convincing evidence rests upon the party seeking guardianship. [s. 54.44 (2), Stats.; *Robin K. v. Lamanda M.*, 2006 WI 68, ¶ 17.]

In *Barstad v. Frazier*, 118 Wis. 2d 549, 568-69 (1984), the Wisconsin Supreme Court articulated the following legal standard to be applied in custody disputes between a parent and a third party:

> 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. 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.

In 2009, the Wisconsin Court of Appeals held that the enactment of ch. 54, Stats., effective December 1, 2006, did not affect the applicability of the *Barstad* test and, therefore, that the *Barstad* test remains the legal standard governing a petition for guardianship of a minor. [*Cynthia H. v. Joshua O.*, 2009 WI App 176, ¶ 37.]

The *Barstad* Standard in Proceedings to Terminate a Guardianship

Applicability

Section 54.64 (3), Stats., lists certain events upon which a guardianship of a person terminates, but the statute does not expressly identify the circumstances under which a parent may petition the court seeking termination of a minor guardianship.[1] If a parent pursues such a termination, the statutes do not provide a legal procedure or standard to apply. However, case law has clarified that if a parent petitions the court seeking to terminate a guardianship, the *Barstad* standard applies. [See *Howard M. v. Jean R.*, 196 Wis. 2d 16 (Ct. App. 1995).]

In *Howard M.*, a mother requested that the court terminate a guardianship of her minor child, which had been ordered based on the mother's petition for guardianship approximately three years prior. [*Id.* at 20-21.] The trial court found the mother was fit and terminated the guardianship. [*Id.* at 21.]

On appeal, the guardian asserted that *Barstad* concerned an initial custody determination, not a reevaluation of custody, and that the legal standard under ch. 767, Stats., for revisions of

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[1] A separate provision in ch. 54, Stats., suggests that a rehearing may be held to determine if a ward is a proper subject to continue under guardianship, but no procedure or legal standard for such a request is provided in statute. [See s. 54.38 (4), Stats.]

legal custody and physical placement orders, should apply rather than the *Barstad* standard. [*Id.* at 22.] Based on the constitutional underpinning of *Barstad*, the Court of Appeals rejected this argument, reasoning that ch. 767, Stats., employs a "best interest" test, a standard which *Barstad* rejected in cases involving third parties in favor of one which makes it more difficult to separate a child from a parent. [*Id.* at 24.] Thus, the court held that "when a guardianship is terminated, a parent is entitled to custody of a child unless the trial court finds that the parent is unfit or compelling reasons exist for awarding custody to a third party."[2] [*Id.* at 19.]

Subsequent appellate cases, both published and unpublished, have positively cited to the *Howard M.* case. In particular, one case concluded that *Howard M.* directly controlled the case's outcome. [*Britni E. v. Wallace R.T.*, No. 2006AP567, unpublished slip op. (Wis. Ct. App. Dec. 12, 2006).[3]] In *Britni E.*, a mother consented to the appointment of her child's paternal grandparents as permanent guardians. [*Id.* ¶ 3.] Less than one year later, the mother petitioned to terminate the guardianship, and the parties disagreed over whether the applicable standard was the child's best interest or the mother's fitness to be a parent. [*Id.* ¶ 4.]

On appeal, the *Britni E.* majority opinion acknowledged the guardians' argument that *Howard M.* "failed to address the distinction between the establishment of a guardianship and the termination of a guardianship, and assumed that *Barstad* applied" and further acknowledged that the dissenting opinion of *Howard M.* expressed a similar concern. [*Id.* ¶ 10.] However, the *Britni E.* court stated it was bound by *Howard M.*, which controlled the result. [*Id.* ¶ 11.] Thus, the case was remanded to the trial court with instructions to apply the *Barstad* standard to the termination proceedings. [*Id.*]

In sum, when a parent petitions the court seeking termination of the guardianship, case law requires application of the *Barstad* standard at such proceedings, meaning that a parent is entitled to custody unless the parent is unfit or other compelling reasons exist. Notably, Court Form GN-3650, titled "Petition for Termination of Guardianship," does not expressly include parental fitness as a basis for terminating guardianship, though the form includes a line titled "Other" in which the petitioner could assert that claim.

Burden of Proof

While the aforementioned case law requires application of the *Barstad* standard in minor guardianship termination proceedings under ch. 54, Stats., appellate courts have not provided direct instruction as to which party bears the burden of proof in such proceedings and the level of proof necessary to meet that burden.

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[2] The facts and analysis of the *Howard M.* opinion demonstrate that the action reviewed in the case was a termination of guardianship and a resulting change in custody, not a custody contest that arose after the guardianship was terminated.

[3] The Rules of Appellate Procedure provide that unpublished opinions may not be cited in any court of this state as precedent or authority, subject to certain exceptions. [s. 809.23 (3), Stats.] Despite this limitation, practitioners generally find guidance in such opinions, given that relatively few guardianship cases receive appellate analysis. The *Britni E.* case is available at: https://wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=27367.

The majority opinion in *Howard M.* closes with a statement that, once it accepted the inferences drawn by the trial court, "the conclusion that Howard had not met the *Barstad* test follows." [*Howard M.*, 196 Wis. 2d at 11.] This sentence suggests that a guardian opposing a parent's petition to terminate a minor guardianship bears the burden of proof, but lacks any accompanying legal analysis or explanation as to the level of proof required to meet the burden.

A search of case law succeeding *Howard M.* does not provide any further guidance. A recent, unpublished opinion by the Court of Appeals references a party's assertion that a father "failed to meet his burden of proof to establish by clear and convincing evidence that the guardianship be terminated." [*D.H. v. N.K.E.*, Nos. 2017AP1282, 2017AP1289, 2017AP1309, unpublished slip op., ¶ 28 (Wis. Ct. App. June 21, 2018) (per curiam).] However, the court did not address the merits of this assertion, due to the appellant's failure to develop a legal argument. [*Id.*]

In the absence of any instructive case law in the context of minor guardianships, cases in which a ward's incompetency was the basis for the guardianship may provide guidance. Specifically, in proceedings to terminate such guardianships, the ward bears the burden of proof to establish the ward's competence by a preponderance of the evidence. [*Colliton v. Colliton*, 41 Wis. 2d 487, 493 (1969).] Under this standard, the burden is shifted to the ward at the time of termination, but the level of proof is reduced from "by clear and convincing evidence" to "by a preponderance of the evidence." The *Colliton* court explained:

> The burden upon the ward at the termination proceedings is to establish his competence by the preponderance of the evidence as distinguished from the higher burden at the initial guardianship proceedings requiring proof of mental incompetence by clear and convincing evidence. This court has consistently held to the view that the "liberty of the person and the right to the control of one's own property are very sacred rights which should not be taken away or withheld except for very urgent reasons." [*Id.* (quoting *In re Guardianship of Reed*, 173 Wis. 628, 632 (1921)).]

Discussion

Wisconsin appellate courts have made clear that the *Barstad* test applies in proceedings to terminate a guardianship of a minor under ch. 54, Stats. However, no appellate court has engaged in a legal analysis as to which party bears the burden of proof at the termination proceeding, nor has any appellate court identified whether such proof must be by clear and convincing evidence or by a preponderance of the evidence, a lesser standard. Several, plausible arguments exist in support of each of these alternatives.

For example, one could argue that, procedurally, it is a well-established rule that the party petitioning the court generally bears the burden of proof. Proponents of this position would argue that if a parent petitions the court to terminate a guardianship, the burden of proof should rest with the parent, and not with an adversarial party left to prove the opposite of the petitioner's claim. Proponents of this argument may also draw parallels to the termination

procedure in CHIPS guardianships under s. 48.977 (7) (d), Stats., which employs similar language to LRB-0921/P5 and appears to require a petitioning parent to show by clear and convincing evidence that the parent is willing and able to carry out the duties of a guardian, among other requirements.

On the other hand, *Howard M.* arguably provides guidance that the guardian bears the burden, given the court's statement that the guardian in that case "had not met the *Barstad* test." [196 Wis. 2d at 11.] Regardless, one could argue that because *Howard M.* requires application of the *Barstad* test at termination proceedings, the parent should not bear the burden of proof, because *Barstad* mandates that the parent is entitled to custody unless the court finds unfitness or other compelling reasons. In other words, under this argument, the application of *Barstad* means that the court must presume the parent is entitled to custody, and the party opposing the award of custody to the parent must overcome the presumption by showing unfitness or other compelling reasons.

With regard to the standard of proof, one could argue that the "clear and convincing standard" should apply, as that level of proof is required for the initial petition for guardianship under current statutory law and LRB-0921/P5, as currently drafted. However, one could argue for a standard similar to that which applies to termination of guardianships based on incompetency. Under this argument, the parent petitioning for termination of the guardianship would bear the burden of proof, but by a preponderance of evidence, rather than by clear and convincing evidence. Proponents would argue that the reduced standard of proof acknowledges the applicable constitutional principles, similar to the reasoning in *Colliton*, which shifted the burden to the ward to prove his or her competency, but applied a lower standard of proof, in light of the liberty interest involved.

Ultimately, a future court must decide these matters based on the facts and arguments presented by a specific case under appellate review. While current law lacks certainty, the committee may consider the various arguments outlined in this memorandum when determining whether to recommend or modify the language in LRB-0921/P5, should it use LRB-0921/P5 as a starting point for its legislative proposal. Note that legislative enactments enjoy a presumption of constitutionality, and a challenge on constitutional grounds must be proven beyond a reasonable doubt. [*Wis. Ret. Teachers Ass'n v. Wis. Educ. Ass'n Council*, 207 Wis. 2d 1, 18 (1997).]

GAL Appointment and Duties in Private Minor Guardianships in Other States

At the July 24 meeting, the committee heard testimony from committee member Professor Gretchen Viney on the GAL's role in minor guardianships in Wisconsin. Professor Viney emphasized to the committee that, under Wisconsin law, a GAL is an attorney who is a trial advocate for the best interests of the child. As such, a GAL is bound by the rules of evidence and constrained by the Rules of Professional Conduct from advising any of the participants as to law or procedure.

Upon discussion of Professor Viney's presentation, committee members requested information on other states' laws on the appointment and duties of a GAL in a private minor guardianship similar to that which exists under ch. 54, Stats. Members expressed particular interest in states that, like Wisconsin, require GALs be licensed attorneys.

Variation Among Other States' GAL Laws

Because states have implemented varied approaches to GAL laws, it is difficult to compare other states' laws regarding the role and duties of a GAL in a private minor guardianship, even in states that require a GAL to be an attorney, as is required in Wisconsin. According to one commentator, the term "guardian ad litem" is used in all of the United States' jurisdictions, but in no two of them does it have exactly the same meaning.[4]

Though the precise role of a GAL differs from state to state, the GAL has been generally defined by commentators as a "person, not necessarily a lawyer, who in a litigated matter stands in the place of a party deemed legally incompetent with the specific authority to act within a peculiar combination of a court's delegation under the applicable law of that jurisdiction." The role of the GAL has been further described as a "gyrating function of advocate, educator, evaluator, mediator, investigator, expert witness, social science consumer, and recommender."[5]

States That Require a GAL Be an Attorney

According to research collected by the National Conference of State Legislatures, 15 states, the District of Columbia, and the Virgin Islands require that the GAL be an attorney in cases of child abuse and neglect.[6] Though the research surveyed only state laws regarding child abuse and neglect cases, and not private minor guardianships, it appears that these states generally require a GAL to be an attorney regardless of the type of case.

All of the information below reflects a search of only those states that require a GAL to be an attorney.

Appointment of a GAL in Private Minor Guardianship

Current Wisconsin law requires a GAL be appointed when a petition for private minor guardianship is filed. [s. 54.40 (1), Stats.] However, it appears that, of the states that require a GAL be an attorney, many do not **require** the appointment of a GAL in a private minor guardianship. Rather, these states' laws typically either give courts discretion to appoint a GAL in a minor guardianship or require appointment of a GAL under certain circumstances other than a private minor guardianship.

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[4] Katherine Hunt Federle, *The Curious Case of the Guardian Ad Litem*, 36 U. Dayton L. Rev. 337, 348 (2011).

[5] Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians ad Litem for Children*, 67 Me. L. Rev. 93 (2014).

[6] Alabama, Arkansas, Colorado, Kansas, Michigan, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, Utah, Virginia, Wisconsin, and Wyoming. [Child Welfare Information Gateway, *Representation of Children in Child Abuse and Neglect Proceedings*, available at: https://www.childwelfare.gov/pubPDFs/represent.pdf.]

For example, Michigan law provides that the court **may** appoint a lawyer-guardian ad litem to represent the minor either if the court determines that the minor's interests are or may be inadequately represented or if the court needs assistance in determining a child's best interest. [Mich. Comp. Laws s. 700.5213 (4) and (6).] It is unclear how often a GAL is actually appointed in practice in states where appointment of a GAL is discretionary in a private minor guardianship.[7]

Other states require the appointment of a GAL, but only under certain circumstances, such as abuse, neglect, or custody disputes, and not in a private minor guardianship. For example, New Jersey court rules provide that, in all cases in which parenting time or visitation is an issue, a GAL may be appointed by court order to represent the best interests of the child or children if the circumstances warrant such an appointment. [N.J. Court Rule 5:8B.] Virginia requires the appointment of a "discreet and competent attorney-at-law as guardian ad litem" in cases where a child is alleged to be abused or neglected, is the subject of an entrustment agreement or a petition seeking termination of residual parental rights, or seeking an abortion. [Va. Code Ann. s. 16.1-266 A.] It appears that these states do not utilize a GAL in private minor guardianship cases.

Still, other states have different models for the appointment of the GAL in private minor guardianships. In Utah, a GAL may be appointed only in cases of child abuse, child sexual abuse, neglect, or when time with a parent is at issue. [Utah Code Ann. s. 78A-2-705 (1).] However, Utah's minor guardianship laws provide that if, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney (not a GAL) to represent the minor, giving consideration to the preference of the minor if the minor is 14 years of age or older. [Utah Code Ann. s. 75-5-207 (4).]

Missouri's private minor guardianship laws appear to deviate from the common understanding of the term GAL. The Missouri probate code provides for an appointment of a GAL if a natural or appointed guardian is not effectively performing his duties and the court finds that the welfare of the minor requires immediate action. If appointed, a "guardian ad litem of the person" is entitled to the **care and custody of the ward**. [Mo. Rev. Stat. s. 475.097 (1).]

Duties of a GAL in a Private Minor Guardianship

Wisconsin

The duties of a GAL in a Wisconsin private minor guardianship are listed in statute. Specifically, Wisconsin law requires, among other things, that the GAL do all of the following in a private minor guardianship:

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[7] Committee members also inquired whether states treat the duties of a GAL differently depending on whether the guardianship is contested or uncontested. No states were identified that prescribe different rules for a GAL in a contested or uncontested guardianship. However, it seems possible that a court with discretion to appoint a GAL may decide to exercise its discretion to appoint a GAL in a contested guardianship.

- Interview the proposed ward or 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 or ward, both orally and in writing, of that person's rights to be present at the hearing, to a jury trial, to an appeal, to counsel, and to an independent medical or psychological examination on the issue of competency, at county expense if the person is indigent.
- 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.

- Review any power of attorney for health care, any durable power of attorney executed by the proposed ward, and any other advance planning for financial and health care decision-making in which the proposed ward had engaged. Interview any agent appointed by the proposed ward under any document specified above. Report to the court concerning whether or not the proposed ward's advance planning is adequate to preclude the need for guardianship.
- Notify the guardian of the right to be present at and participate in the hearing, to present and cross-examine witnesses, to receive a copy of any evaluation, and to secure and present a report on an independent evaluation.
- Request that the court order additional medical, psychological, or other evaluation, if necessary.
- If applicable, inform the court and petitioner's attorney or, if none, the petitioner that the proposed ward or ward objects to a finding of incompetency, the present or proposed placement, or the recommendation of the GAL as to the proposed ward's or ward's best interests or that the proposed ward's or ward's position on these matters is ambiguous. If the GAL recommends that the hearing be held in a place other than a courtroom, the GAL shall provide the information under this paragraph as soon as possible.
- If the proposed ward or 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 or ward, if necessary.
- Report to the court on any matter that the court requests.

[s. 54.40 (4), Stats.]

Other States

It appears that, unlike Wisconsin, many states do not prescribe GAL duties specific to private minor guardianships. Rather, these states often apply GAL duties in child abuse and neglect cases to GALs in private minor guardianships.[8] Other states may not utilize a GAL in a private minor guardianship, but may prescribe GAL duties for child abuse, neglect, or custody cases.

Though states differ greatly on whether they require a GAL to be an attorney and what circumstances require appointment of a GAL, states' GAL duties are typically very similar. Most states require the GAL to interview the proposed ward and other parties, review relevant records and documents, conduct an investigation to obtain an understanding of the needs of the minor, attend court proceedings, report to the court, and provide recommendations to the court as to the minor's best interests.[9]

Certain states include rather unique GAL duties. For example, Utah requires a GAL to identify community resources to protect the best interests of the minor and advocate for those resources. [Utah Code Ann. s. 78A-2-705 (12) (f).] Virginia requires its GALs to advise the child, in terms the child can understand, of the court's decision and its consequences for the child and others in the child's life. [*Standards to Govern the Performance of Guardians Ad Litem for Children*, Virginia Judicial Council, June 23, 2003.]

One particularly notable variation on private minor guardianship GAL practice is found in Michigan law, which provides that "in a proceeding in which a lawyer-guardian ad litem represents a child, he or she may file a written report and recommendation. The court may read the report and recommendation. **The court shall not, however, admit the report and recommendation into evidence unless all parties stipulate the admission.** The parties may make use of the report and recommendation for purposes of a settlement conference." [MCL 700.5213 (5) (a).]

Discussion

The divergent state approaches to the GAL in private minor guardianships make it difficult to identify trends or common models of GAL practice. There appears to be significant variation among states on questions posed by committee members, including whether a GAL must be an attorney, whether a GAL is appointed in a private minor guardianship, and what duties are required of a GAL in a private minor guardianship.

Despite this variation, Wisconsin's prescribed GAL duties are generally in line with many other states, even though other states may provide for optional appointment of a GAL in a private minor guardianship or use a GAL only in child abuse, neglect, or custody cases.

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[8] See, e.g., MCL 700.5213 (5).

[9] See, e.g., Neb. Rev. Stat. s. 6-1469 (E); NJ Court Rule 5:8B (a); Utah Code Ann. s. 78A-2-705 (12); and *Standards to Govern the Performance of Guardians Ad Litem for Children*, Virginia Judicial Council, June 23, 2003.

Ultimately, the committee may choose to treat the GAL in any way it sees fit. This may include retaining certain or all provisions of current law, implementing provisions or models from other states, or crafting new provisions for a GAL in private minor guardianships. For reference, SECTION 11 of LRB-0921/P5 contains the provisions concerning GALs in private minor guardianships.

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Attachment