

SERVING AS ASSIGNED COUNSEL

By

**Hon. Judy A. Hartsfield
Judge
Wayne County Probate Court**

I. INTRODUCTION

II. IN GENERAL

III. SERVING AS ASSIGNED COUNSEL IN MENTAL HEALTH COMMITMENT PROCEEDINGS

A. In General

B. MCR 5.732 - Appointed Counsel in Mental Health Code Proceedings

C. Procedures in Wayne County Probate Court for Serving as Assigned Counsel in Mental Health Code Proceedings

D. “Kevin’s Law”\Assisted Outpatient Treatment (AOT) Proceedings

E. Involuntary Commitment Proceedings

IV. SERVING AS ASSIGNED COUNSEL IN ADULT GUARDIANSHIP PROCEEDINGS

A. In General

B. Guardianship vs Patient Advocate

C. Adult Guardianship Appointment Process

D. Petition for Modification\Termination of Guardianship

V. SERVING AS ASSIGNED COUNSEL IN PROCEEDINGS FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES (DDI)

A. In General

B. Types of Guardianships for Individuals with Developmental Disabilities

C. Plenary Guardianships

D. Partial Guardianships

E. Appointment of Assigned Counsel in DDI Proceedings

VI. SERVING AS ASSIGNED COUNSEL IN MINOR GUARDIANSHIP PROCEEDINGS

VII. CONCLUSION

I. INTRODUCTION

Material covers the following topics:

- A. Serving as assigned counsel in mental health commitment proceedings.
- B. Serving as assigned counsel in adult guardianship proceedings.
- C. Serving as assigned counsel in proceedings for individuals with developmental disabilities (DDI).
- D. Serving as assigned counsel in minor guardianship proceedings.

II. IN GENERAL

- A. The role and responsibilities are different for attorneys appointed to represent parties in mental health, adult guardianship, developmental disability and minor guardianship proceedings.
- B. For additional information, see the forms and handouts found on the Court's website – www.wcpc.us – Attorney Training – 2018 Attorney Training Materials.

III. SERVING AS ASSIGNED COUNSEL IN MENTAL HEALTH COMMITMENT PROCEEDINGS

- A. In General
 - 1. The definitions of a “person requiring treatment” (including the criteria for someone to receive “assisted outpatient treatment” [AOT]) and “mental illness” under the Mental Health Code are found at **MCL 330.1401(1)** and **MCL 330.1400(g)** respectively and are included in the handout materials on the Court's website in the 2018 Attorney Training Materials.

2. **Note:** A person whose mental processes have been weakened or impaired by dementia, has a primary diagnosis of epilepsy, or an individual with alcoholism or other drug dependence is not a “person requiring treatment” unless they also meet the criteria under **MCL 330.1401(1)**. **MCL 330.1401(2)**.
3. Also note that the standard for determining someone to be a “person requiring treatment” under the Mental Health Code is different from a “legally incapacitated individual” for whom a guardian is appointed under the Estates and Protected Individuals Code (EPIC).

B. MCR 5.732 - Appointed Counsel in Mental Health Code Proceedings

1. The attorney of record must represent the person in all Mental Health Code proceedings in probate court until discharged by court order or another lawyer has filed an appearance on the individual’s behalf. **MCR 5.732(A)**.
2. The attorney must serve as an advocate for the individual’s preferred position. If the individual does not express a preference, their attorney must advocate for a disposition the lawyer believes is in the individual’s best interest. **MCR 5.732(B)**.
3. The individual may waive their right to an attorney only in open court and after consultation with an attorney. The waiver may not be accepted by the court if it appears that it was not made voluntarily and understandingly. If an attorney is waived, the court may appoint a guardian ad litem for the individual. **MCR 5.732(C)**.

C. Procedures in Wayne County Probate Court for Serving as Assigned Counsel in Mental Health Code Proceedings

1. These are spelled out in great detail in the item “Representing Respondents in Mental Commitment Proceedings in Wayne County Probate Court” included in the 2018 Attorney Training materials on the Court’s website.
2. **Important Note:** The Wayne County Probate Court conducts many hearings under the Mental Health Code at selected hospitals via interactive video technology (IVT). See the “Interactive Video Technology Program Information (Attorney Information Packet)” included on the website under the 2018 Attorney Training materials for an explanation of the procedures to be followed when you are assigned to represent respondents in IVT cases.

D. “Kevin’s Law”\Assisted Outpatient Treatment (AOT) Proceedings

1. This mechanism for treatment under the Mental Health Code was originally enacted over 10 years ago as an additional option to involuntary commitment proceedings.

2. Kevin's Law was significantly amended effective February 14, 2017. These changes significantly expanded the ability to use AOT and improved the process of adjudication and involuntary treatment of persons with mental illness.
3. These changes have (1) promoted early judicial intervention before an individual reaches a crisis situation; (2) modified Kevin's Law to encourage its widespread use; and (3) streamlined the involuntary treatment process by having all proceedings filed via petition.
4. Highlights of the Kevin's Law changes:
 - a. Standard for issuing transport order\being determined to be a "person requiring treatment" has been lowered.
 - i. It used to require immediate risk of harm to self or others (i.e., suicide\violence)
 - ii. Now broadened to include substantial risk of harm due to impaired judgment, including impaired judgment for need of treatment (i.e., mental harm to self).
 - iii. This early intervention will help preserve a person's mental health and allow them to receive treatment before they have deteriorated to a critical point.
 - b. Allows AOT to be ordered in any MI petition if the individual is found to be a "person requiring treatment".
 - c. AOT can be used as a discharge tool; the Judge can issue a detailed supplemental order regarding the type of treatment\services to be provided to the patient.
5. A petition for AOT only can be filed and treatment ordered under the following circumstances (by clear and convincing evidence):

An individual who has mental illness, whose understanding of the need for treatment is impaired to the point that he or she is unlikely to voluntarily participate in or adhere to treatment that has been determined necessary to prevent a relapse or harmful deterioration of his or her condition, and whose noncompliance with treatment has been a factor in the individual's placement in a psychiatric hospital, prison, or jail at least 2 times within the last 48 months or whose noncompliance with treatment has been a factor in the individual's

committing 1 or more acts, attempts, or threats of serious violent behavior within the last 48 months. An individual under this subdivision is only eligible to receive assisted outpatient treatment.

MCL 330.1401(1)(d).

6. For additional information on AOT, See the item “Serving as Assigned Counsel in Assisted Outpatient Treatment Only Proceedings in Wayne County Probate Court” included in the Attorney Training materials on the Court’s website.

E. Involuntary Commitment Proceedings

1. In General

- a. Civil admission and discharge procedures are governed by Chapter Four of the Mental Health Code. **MCL 330.1400 et seq.**
- b. A discussion of the formal voluntary admissions process is beyond the scope of these materials.

2. Involuntary admission proceedings are initiated by filing a petition with the court.

3. For a comprehensive analysis of the involuntary commitment procedure, see the “Flow Chart for Adjudication of Mentally Ill Adults” included on the Court’s website (www.wcpc.us) under the 2018 Attorney Training materials.

4. Attorneys receive their mental health assignments and supporting documentation via e-mail.

5. Person Requiring Treatment

- a. Many people suffer from mental illness (i.e., depression, bi-polar disorder, etc.) and could benefit from receiving treatment for their condition.
- b. In order to be forced against their will to receive assistance, they must be determined to be a “person requiring treatment” under the Mental Health Code.

c. Person Requiring Treatment – Definition

An individual must be found to meet one of the following criteria in order to be considered a “person requiring treatment”:

(a) An individual who has mental illness, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.

(b) An individual who has mental illness, and who as a result of that mental illness is unable to attend to those of his or her basic physical needs such as food, clothing, or shelter that must be attended to in order for the individual to avoid serious harm in the near future, and who has demonstrated that inability by failing to attend to those basic physical needs.

(c) An individual who has mental illness, whose judgment is so impaired by that mental illness that he or she is unable to understand his or her need for treatment, and whose impaired judgment, on the basis of competent clinical opinion, presents a substantial risk of significant physical or mental harm to the individual in the near future or presents a substantial risk of physical harm to others in the near future.

(d) An individual who has mental illness, whose understanding of the need for treatment is impaired to the point that he or she is unlikely to voluntarily participate in or adhere to treatment that has been determined necessary to prevent a relapse or harmful deterioration of his or her condition, and whose noncompliance with treatment has been a factor in the individual's placement in a psychiatric hospital, prison, or jail at least 2 times within the last 48 months or whose noncompliance with treatment has been a factor in the individual's committing 1 or more acts, attempts, or threats of serious violent behavior within the last 48 months. An individual under this subdivision is only eligible to receive assisted outpatient treatment.

MCL 330.1401(1).

- d. **Key Point #1:** A person whose mental processes have been weakened or impaired by dementia, has a primary diagnosis of epilepsy, or an individual with alcoholism or other drug dependence is not a “person requiring treatment” unless they also meet the criteria under **MCL 330.1401(1)**. **MCL 330.1401(2)**.
- e. **Key Point #2:** The standard for determining someone to be a “person requiring treatment” under the Mental Health Code is different from a “legally incapacitated individual” for whom a guardian is appointed under the Estates and Protected Individuals Code (EPIC).

6. Hearing Process\Rights\Burden of Proof

- a. A hearing on a petition for involuntary treatment under the Mental Health Code must be held within seven (7) days of being filed, excluding Sundays and holidays. **MCL 330.1452.**
- b. The person for whom involuntary mental health treatment is sought has the right to an attorney, a jury trial, to cross examine witnesses, to be present at the hearing (unless the Judge determines the person's behavior makes it impossible to conduct the hearing or waived based on medical testimony that attendance would expose them to serious risk of physical harm), and to an independent medical examination. **MCL 330.1454, 300.1455, 300.1458, 330.1463.**
- c. It must be shown by clear and convincing evidence that the individual is a person requiring treatment.

7. Alternatives to Hearing – Deferral\Waive and Stipulate

- a. Instead of going forward with a full hearing, the person could either defer the hearing or waive and stipulate to the petition.
- b. **Be aware of the difference between a deferral and waiver\stipulation form – do not have your client sign both forms.**
 - i. Each of these forms is included in your mental health assignment packet – PCM 235, Request to Defer Hearing on Commitment and PCM 223, Certificate of Legal Counsel\Waiver of Attendance.
 - ii. A deferral is a request to delay (i.e., defer) the hearing for up to 60 days if the patient remains hospitalized or 90 days if they agree to alternative treatment or a combination of hospitalization\alternative treatment. In order to execute a deferral, the patient must meet with their counsel, a representative from the community mental health (CMH) program, and a member of their treatment team. The form has to be signed in the presence of the patient's attorney, who must then file it with the Court. The patient must agree to one of the following treatment options:
 - 1) Inpatient hospital treatment of up to 60 days.
 - 2) Alternative (i.e., outpatient) treatment of up to 90 days.

- 3) Combined hospital\outpatient treatment of up to 90 days, with hospitalization up to 60 days.

MCL 330.1455(6).

Important Note #1: The Wayne County Probate Court no longer pays for deferral conferences at the hospital which the attorney does not attend. The appropriate box on the Affidavit of Services and Request for Attorney Fees must be checked (and initialed): “I did\did not attend a deferral conference at the hospital prior to the hearing or discharge.”

- iii. A waiver is a declaration (signed by the patient in the presence of their attorney) that they forgo their right to attend their hearing and they either (1) stipulate to the relief sought in the petition or (2) withdraw their petition for discharge, as applicable. The patient may sign a waiver as part of the attorney’s meeting at the hospital, or the day of the hearing, whether in court or at the hospital (if the hearing is to be conducted by interactive video technology) before the hearing begins.

Important Note #2: If a deferral or a waiver is signed by the patient, a copy must be FAXed and the original mailed or hand delivered as soon as possible to the Judge of record’s office. FAX numbers are as follows:

Judge Freddie G. Burton, Jr.	(313) 224-8107
Judge June E. Blackwell-Hatcher	(313) 224-8097
Judge Judy A. Hartsfield	(313) 967-6685
Judge Terrance A. Keith	(313) 224-8105
Judge David Braxton	(313) 224-8098
Judge Lawrence J. Paolucci	(313) 224-8099

At the latest, the originals should be brought to the Courtroom at the time of the hearing.

Important Note #3: Petitions requesting assisted outpatient treatment (AOT) only cannot be deferred. **MCL 330.1455(6).**

8. For involuntary commitment proceedings under Chapter Four, a deferral conference must always be held at the hospital before the hearing.
 - a. If the date and time for the deferral conference is not included on the petition you received as part of your assignment packet, contact the hospital to obtain this information.

- b. If you are unable to attend a scheduled deferral conference, contact the hospital and inform the staff.
- c. Remember – Deferrals or waivers cannot be signed outside of the attorney’s presence.

Note: The deferral conference is to be conducted within 72 hours of the petition being filed. **MCL 330.1455(2).**

9. Closely watch the type of petition which has been filed. An involuntary treatment petition submitted for an individual with a developmental disability is called a Petition for Judicial Admission. These petitions are governed by Chapter Five of the Mental Health Code, **MCL 330.1515 et seq.** No deferral conference is scheduled, and there is no provision permitting waiver.

10. Independent Evaluation

- a. If requested prior to the first scheduled hearing (or at the first scheduled hearing before the first witness has been sworn in on an application or petition), the patient has the right to an independent clinical evaluation, at public expense if they are indigent. **MCL 330.1463.**
- b. For a list of physicians and psychologists willing to do independent clinical evaluations, check the Court’s website, www.wcpc.us, under Information – FAQs – Independent Evaluator List or the Independent Evaluator List included in the 2018 Attorney Training Materials.
- c. If you have further questions, contact the Mental Health Services Department at (313) 224-5412, 224-5825, or MentalHealth@wcpc.us
- d. You are responsible for preparing the motion and order for the independent evaluation. Include the name of the examiner in your order; make sure he or she has agreed to do the work and is acceptable to the patient.
- e. To facilitate adjudication of cases where an examination has been requested, if you plan on submitting the report into evidence please supply the Judge and Corporation Counsel with a copy of the IME five days prior to the hearing.

11. Adjournments

Adjournments are allowed only for good cause. The reason for an adjournment must be either (1) submitted in writing to the court and opposing attorney or (2) stated on the record. **MCR 5.735.**

12. Treatment Orders

- a. There are four types of treatment orders – hospitalization, alternative, combined, and assisted outpatient treatment.
- b. An order for hospitalization is one in which the patient is directed to receive treatment while being held in a medical facility. An initial order for hospitalization can be for a maximum of 60 days. **MCL 330.1472a(1)(a).**
- c. An order for alternative treatment is one where the patient is not held in a medical facility, but is instead an outpatient. An initial order for alternative treatment can be for a maximum of 90 days. **MCL 330.1472a(1)(b).**
- d. A combined treatment order is one in which the patient spends some time initially being hospitalized for treatment, and then is released and continues to receive outpatient treatment. An initial order for combined treatment can be for a maximum of 90 days, with hospitalization for up to 60 days. **MCL 330.1472a(1)(c).**
- e. An order for assisted outpatient treatment (AOT) can be for a maximum of 180 days. **MCL 330.1472a(1)(d).**
- f. A combined order for hospitalization and assisted outpatient treatment (AOT) can be for a maximum of 180 days, with hospitalization for up to 60 days. **MCL 330.1472a(1)(e).**
- g. A detailed discussion of subsequent orders is beyond the scope of this outline.

E. Payment

1. In most cases, vouchers are sent electronically along with the assignment packet.
2. Before a voucher can be submitted for payment, it must be signed by one of the Judge's Court Clerks or their Courtroom Coordinator.

Note: The Wayne County Probate Court now issues an order to reimburse attorney fees in every mental health case where the subject of the petition

utilizes a court appointed lawyer. Copies of this notice are also sent to the decedent's relatives listed on the petition.

IV. SERVING AS ASSIGNED COUNSEL IN ADULT GUARDIANSHIP PROCEEDINGS

A. In General

1. Legal counsel is appointed for a person who is the subject of an adult guardianship petition under either of the following circumstances:
 - a. The alleged incapacitated individual (II) wishes to contest the petition, have limits placed on the guardian's powers, (including objecting to having a do-not-resuscitate (DNR) order or a physician order for scope of treatment (POST) form executed on their behalf) or objects to a particular person being appointed guardian. **MCL 700.5305(3).**
 - b. The alleged II requests legal counsel, or the GAL determines it is in the person's best interest to have legal counsel and it has not yet been secured. **MCL 700.5305(4).**
2. Unlike the role of the GAL, who merely investigates the situation, informs the alleged II of their rights, and reports their findings to the Court, a lawyer assigned to represent an alleged II has the role of an advocate for the person's desires and wishes.

Tip: Review the GAL's report to determine whether the alleged II wants to be present at the hearing, desires to contest the petition, wishes limits placed on the guardian's powers, objects to a particular person's appointment as guardian, or contains any other information useful to your representation of the alleged II.

B. Guardianship vs Patient Advocate

1. The appointment of a patient advocate pursuant to a durable power of attorney for health care does not necessarily eliminate the need for a guardianship or cover the range of duties and responsibilities of a guardian. **MCL 700.5506-5515.**
2. If an individual executed a patient advocate designation before they were determined to be legally incapacitated, a guardian appointed for the person does not have the power or duty to make medical or mental health treatment decisions that the patient advocate is designated to make. **MCL 700.5306(5).**

3. However, the Court could modify the guardianship to grant these powers to a guardian if, on the petition for guardianship or a petition to modify the guardianship, it is alleged and the Court finds that the patient advocate designation was not validly executed, the patient advocate is not complying with the terms of the designation or the statute, or that the patient advocate is not acting consistently with the ward's best interests. **MCL 700.5306(5).**
 4. If a guardian is appointed who is not the same person as the patient advocate, the guardian must defer to the patient advocate's decisions.
 5. If a guardian is also the patient advocate, he or she must make medical or mental health treatment decisions in accordance with the provisions of that designation.
 6. Key Point: The guardian is responsible for a range of decisions beyond the scope of any patient advocate designation. These include where the incapacitated individual will live (including placement in a nursing home), who they interact with, where they worship, and basic physical needs (i.e., food, clothing, etc.).
- C. A detailed discussion of the hearing process for the appointment of an adult guardian is beyond the scope of these materials. However, the following information is provided as a general guide.
1. **Definition of "Incapacitated Individual" (II)** for Estates and Protected Individuals Code (EPIC) purposes:

An individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions. **MCL 700.1105(a).**

Note that the key is the process of formulating and/or expressing an informed decision, not the decision itself.
 2. **Note:** EPIC also uses the term **Legally Incapacitated Individual (LII)**. A LII is "...an individual, other than a minor, for whom a guardian is appointed under this act or an individual, other than a minor, who has been adjudged by a court to be an incapacitated individual." **MCL 700.1105(i).**

Comment: This term is designed to clarify the difference between an alleged incapacitated individual and a person determined by the court to be an incapacitated individual. An adult for whom a guardian has been appointed under EPIC should be referred to as a LII.

3. The alleged II is entitled to present evidence, cross-examine witnesses (including the court appointed physician or mental health professional, if any), trial by jury, and representation by legal counsel. **MCL 700.5304(5).**
4. The alleged II is entitled to be present at the hearing and to see or hear all evidence bearing on the person's condition. If they wish to be present at the hearing, all practical steps shall be taken to ensure their presence, including moving the hearing site if necessary. **MCL 700.5304(4).**
5. Examination by Physician\Mental Health Professional
 - a. If necessary, the court may order an alleged II to be examined by a physician or mental health professional appointed by the court who shall submit a report in writing to the court at least 5 days before the hearing. A report prepared pursuant to this provision will not be made part of the public record, but shall be available to the court (or an appellate court), the alleged II, the petitioner, their legal counsels, and other persons as the court directs. It may be used per the Michigan rules of evidence. **MCL 700.5304(1).**
 - b. The alleged II has the right to secure an independent evaluation, which will be paid for by the state if they are indigent. **MCL 700.5304(2).** A party offering a report must promptly inform the parties that the report is filed and available. **MCR 5.405(A)(1).**
 - c. Waiver of Privilege
 - i) A report ordered by the court may be used in guardianship proceedings without regard to any privilege.
 - ii) Any privilege regarding a report made as part of an independent evaluation at the respondent's request is waived if the respondent seeks to have the report considered in the proceedings.
MCR 5.405(A)(2).
 - d. Report (whether court ordered or independent) must contain all of the following:
 - i) Detailed description of alleged II's physical or psychological infirmities.
 - ii) Explanation of how and to what extent any infirmities interfere with the alleged II's ability to receive or evaluate information in making decisions.

- iii) Listing of all medications alleged II is receiving, their dosages, and description of each medication's effect on the person's behavior.
- iv) Prognosis for alleged II's condition and a recommendation for the most appropriate rehabilitation plan.
- v) Signatures of all persons who performed evaluations on which the report is based.

MCL 700.5304(3).

6. Trial Procedures

Procedure in probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules in this chapter. **MCR 5.001(A).**

7. Burden of Proof

- a. A guardian may be appointed if the court is satisfied by **clear and convincing evidence** that the individual for whom a guardian is sought is an incapacitated individual, and the appointment is necessary as a means of providing continuing care and supervision of the person of the II. Alternatively, the court may dismiss the proceeding, or enter another appropriate order. **MCL 700.5306(1).**
- b. The court may appoint a limited guardian (but not a full guardian) if it finds by **clear and convincing evidence** that the individual is incapacitated and lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself. **MCL 700.5306(3).**
- c. If the court finds by **clear and convincing evidence** that the individual is totally without capacity to care for himself or herself, this finding shall be specified in any order and the court may appoint a full guardian. **MCL 700.5306(4).**

Note: A guardian shall be granted only those powers and only for that period of time as is necessary to provide for the demonstrated need of the II, and the guardianship shall be designed to encourage the development of maximum self-reliance and independence in the individual. A court order establishing the guardianship shall specify any limitations on the guardian's powers and any time limits on the guardianship. **MCL 700.5306(2).**

D. Petition for Modification\Termination of Guardianship

1. If the ward petitions to modify or terminate their guardianship, the court will appoint an attorney to represent them.
2. Brief Overview of Modification\Termination Procedure
 - a. The ward or a person interested in the ward's welfare may petition for an order removing the guardian, appointing a successor, modifying the guardianship's terms, or terminating the guardianship. **A request for this order may be made by informal letter to the court or judge.** A person is subject to contempt of court if they knowingly interfere with the transmission of this request to the court or judge.
 - b. Except as otherwise provided in the order finding legal incapacity, the court shall schedule a hearing to be held within 28 days of receipt of the petition or request.
 - c. An order finding incapacity may specify a minimum period of up to 182 days during which a petition for modification or termination may not be filed without special leave of the court.

MCL 700.5310(2)&(3).

3. Burden of Proof\Litigation Process
 - a. If the legally incapacitated individual files a petition to terminate their guardianship, the guardianship is in essence "rebooted" – i.e., it is treated as a petition to appoint a guardian, and the same procedures to safeguard the ward's rights apply. **MCL 700.5310(4).**
 - b. The guardian must re-establish, by clear and convincing evidence, that the ward is still a legally incapacitated individual. **MCL 700.5306.** The ward's rights include an attorney (if they do not have their own), presence at the hearing, jury trial, cross-examination, to present evidence, and an independent medical examination (IME). **MCL 700.5304(2), (4)&(5); MCR 5.408(B)(1).**
 - c. If someone other than the legally incapacitated individual files a petition to modify or terminate the guardianship, a different standard is utilized. The court must appoint a guardian ad litem (GAL). If the GAL determines that the legally incapacitated individual contests the requested relief, the GAL appointment is terminated and the court appoints an attorney for the legally incapacitated individual. **MCR 5.408(B)(2).**

V. SERVING AS ASSIGNED COUNSEL IN PROCEEDINGS FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES (DDI)

A. An individual with a developmental disability is defined in **MCL 30.1100(a)(21)**:

"Developmental disability" means either of the following:

(a) If applied to an individual older than 5 years, a severe, chronic condition that meets all of the following requirements:

(i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

(ii) Is manifested before the individual is 22 years old.

(iii) Is likely to continue indefinitely.

(iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(v) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

(b) If applied to a minor from birth to age 5, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided.

B. Types of Guardianships for Individuals with Developmental Disabilities

1. There are two types of guardianships for Individuals with Developmental Disabilities: **plenary** and **partial**.
2. A **plenary guardian** possesses the legal rights and powers of a full guardian of the person, or of the estate, or both. **MCL 330.1600(d)**.

Note: Guardian of the person is akin to a guardian under the Estates and Protected Individuals Code (EPIC). Guardian of the estate is analogous to a conservator under Michigan's Probate Code.

3. A **partial guardian** possesses fewer than all of the legal rights and powers of a plenary guardian, and whose rights, powers, and duties have been specifically enumerated by court order. **MCL 330.1600(e)**.

Note: Whenever the court appoints a plenary guardian of the estate or a partial guardian with powers or duties respecting real or personal property, that guardian shall be considered a fiduciary for the purposes of the estates and protected individuals code. **MCL 330.1632**. (i.e., they must file an annual accounting with the Court.)

C. Plenary Guardianships

1. A very small percentage of the DDI guardianships in the Wayne County Probate Court are **plenary guardianships**.
2. **Plenary guardianships** continue until further order of the court. They are not reviewed unless a petition for modification is filed.

D. Partial Guardianships

1. The overwhelming majority of the DDI guardianships in the Wayne County Probate Court are **partial guardianships**.
2. **Partial guardianships** can be created for a term of no more than five (5) years. **MCL 330.1626(2)**.
3. At the end of the term, the partial guardianship terminates and a new guardianship proceeding is commenced. **MCL 330.1626(3)**.

E. Appointment of Assigned Counsel in DDI Proceedings

1. Attorneys are appointed to represent alleged DDIs in petitions for appointment of plenary and/or partial guardians.

2. Lawyers assigned to represent alleged DDIs serve in the role of advocate for the DDIs' desires, wishes, and/or best interests.

VI. SERVING AS ASSIGNED COUNSEL IN MINOR GUARDIANSHIP PROCEEDINGS

- A. Typically, a lawyer is appointed to represent parties in minor guardianship proceedings only in the following situations:
 1. For a minor mother and/or father.
 2. For a mentally incompetent adult mother and/or father.
- B. Only a small portion of the Court's minor guardianship cases fall within either of these scenarios.
- C. **Note:** In reality, appointments under the circumstances in A are as guardian ad litem. They are technically not assigned counsel.
- D. **Lawyer-Guardian ad Litem**
 1. A position has been created in minor guardianship proceedings - the lawyer-guardian ad litem - which can be appointed by the court to represent a child during appointment, resignation, or removal proceedings.
 2. Appointment may be made at any time during these proceedings if the court determines the minor's interests are inadequately represented (consideration must be given to minor's preference if they are at least 14 years old). **MCL 700.5213(4), 700.5219(4).**
 3. The lawyer-guardian ad litem represents the child and has the powers and duties in relation to their representation per Section 17d of the Juvenile Code, **MCL 712A.17d**. The provisions of Section 17d apply to a lawyer-guardian ad litem appointed under the Probate Code. **MCL 700.5213(5).**
 4. A lawyer-guardian ad litem may file a written report and recommendation in a proceeding in which they represent a child. The court may read the report and recommendation, and the parties may utilize them for purposes of a settlement conference, but they shall not be admitted into evidence unless all the parties so stipulate. **MCL 700.5213(5)(a).**
 5. After a determination of ability to pay, all or part of the costs may be assessed by the court against one or more of the parties or against the money allocated from marriage license fees for family counseling services per **MCL 551.103**. A lawyer-guardian ad litem shall not be paid a fee

unless it is first reviewed and approved by the court. **MCL 700.5213(5)(b).**

6. The ability to appoint a lawyer-guardian ad litem in minor guardianship appointment, termination, and resignation proceedings gives the court another mechanism to protect the child's interests in those circumstances where it is determined that additional safeguards are desirable.

VII. CONCLUSION

This presentation has provided you with a brief overview of the duties involved in serving as an assigned counsel in mental health, adult guardianship and minor guardianship proceedings in Wayne County Probate Court. This outline and the other items on the Court's website under the 2018 Attorney Training materials may be used as a "road map" or "cheat sheet".

Rev. 9\18