LEGAL AID SOCIETY 1916 OF MILWAUKEE

10201 WATERTOWN PLANK ROAD
MILWAUKEE, WI 53226
TELEPHONE: 414/257-7159
FAX: 414/257-7742
WWW.LASMILWAUKEE.COM

COLLEEN FOLEY
EXECUTIVE DIRECTOR

GUARDIAN AD LITEM OFFICE

TO: The Honorable Judge Laura Crivello

FROM: Courtney Roelandts, Staff Attorney for Legal Aid Society

DATE: May 26, 2020 (Updated February 15, 2021)

RE: Guardianship law changes effective August 1, 2020 (Wis. Stat. § 48.9795)

The below memoranda details some changes, thoughts, and a few musings as to the new guardianship law going into effect on August 1, 2020. This law was enacted in 2019 Wis. Act 109 and is found at Wis. Stat. § 48.9795.

A few major highlights:

(1) There are four new guardianship types. There is a chart on page 2 of this memo that details the legal burden for each, the duties transferred, and the time limits assigned to them by statute.

(2) The role of the Guardian ad Litem is greatly expanded in this statutory scheme. That discussion is on page 4. The new statute section requires Guardians ad Litem to have contact with more people, and to obtain records from more sources. There are expected hurdles in receiving some of these records, and Legal Aid Society is working on contacting stakeholders to secure lines of communication to receive these records timely. There could be delays in the court process as a result of this new requirement.

(3) There are notable changes to nominations, visitation, and post-appointment hearings. There are bits about these changes throughout the memo, but specifically discussed at page 5 and 6.

(4) There are some new requirements for petitions that may cause legal sufficiency issues, and new procedures, timelines, discovery rules, and other statutory issues that will now impact these hearings with guardianships falling under Chapter 48, notably including ICWA. These are lightly discussed on page 6 et seq.

LEGAL AID SOCIETY 1916 OF MILWAUKEE

10201 WATERTOWN PLANK ROAD
MILWAUKEE, WI 53226
TELEPHONE: 414/257-7159
FAX: 414/257-7742
WWW.LASMILWAUKEE.COM

COLLEEN FOLEY
EXECUTIVE DIRECTOR

GUARDIAN AD LITEM OFFICE

	FULL	LIMITED	TEMPORARY	EMERGENCY
Burden	The court must find the parent is unwilling, unable, or unfit to provide necessary cares.	Court must find the parent needs assistance in providing necessary cares.	Court must find the parent is temporarily unable to provide necessary cares.	Court must find that the welfare of the child requires immediate appointment of a guardian.
Duties Transferred	Transfers all care, custody, and control to the guardian. The guardian must give reasonable visitation, and report changes of address/status to the court.	Transfers limited duties specific by the court by court order. Any duties not listed in that order remain with the parent(s). Shared custody between the parent and guardian is available, if in the child's best interests.	Transfers powers that are reasonably related to the reason the parent is temporarily unable to provide necessary cares.	Transfers powers reasonably related to the need for appointment of a guardian.
Time Limits	Until age of 18, or termination by the court.	Until age of 18, or termination by the court.	180 days (6 months), with one additional 180-day extension available for good cause.	60 days.

The above briefly outlines the four new types of guardianship.

LEGAL AID SOCIETY 1916 OF MILWAUKEE

10201 WATERTOWN PLANK ROAD
MILWAUKEE, WI 53226
TELEPHONE: 414/257-7159
FAX: 414/257-7742
WWW.LASMILWAUKEE.COM

COLLEEN FOLEY
EXECUTIVE DIRECTOR

GUARDIAN AD LITEM OFFICE

THOUGHTS/MUSINGS AS TO NEW SCHEME:

- A "full" guardianship seems as close to a Chapter 54 Minor Guardianship as will continue to exist.
- "Temporary" guardianships as they currently exist under Chapter 54 are likely to fall under "emergency" guardianships in the new law. In cases where DMCPS sought a temporary guardianship under Chapter 54, the DMCPS will likely now seek an "emergency" guardianship. Rather than a "permanent" guardianship under Chapter 54, the DMCPS can probably seek a 6-month "temporary" guardianship.
    - This at least makes the most sense; however, temporary guardianships may be unavailable to the DMCPS pursuant to § 48.9795(2)(b)(2) which requires the court to stay any guardianship filing while a CHIPS is pending.
    - **Update: Current interpretations of this subsection indicate that full, limited, and temporary guardianships must be stayed until a dispositional order is in place under Wis. Stat. § 48.355. Full or temporary guardianships may be available for DMCPS filing post-disposition under this interpretation, but only emergency guardianships are available pre-disposition.**
- Successor guardianships still exist, under substantially the same procedures. If a successor guardian is identified at the outset, the successor can be appointed to become guardian automatically by operation of statute under triggering events and without a hearing. If the successor is identified later, it'll be substantially the same procedures as an original petition.

GENERAL INFORMATION

- Wis. Stat. § 48.977 "CHIPS" guardianships can be "full" guardianships or "limited" guardianships that could order shared custody. **Update: With the framework given for limited guardianships in Wis. Stat. § 48.9795, limited guardianships may have more utility in 977 cases.**
- A petitioner in a Wis. Stat. § 48.9795 guardianship cannot try to modify a CHIPS case via a guardianship filing. Any petition for "full," "limited," or "temporary" guardianship filed against an open CHIPS case must be stayed by statute. § 48.9795(2)(b)(2).
    - **Update: Current interpretation of this section is that this limitation is in place until a dispositional order has been entered under Wis. Stat. § 48.355.**
    - Emergency guardianships are the only exception, and even an emergency guardianship cannot seek to change placement of a child in a pending CHIPS matter.

LEGAL AID SOCIETY 1916 OF MILWAUKEE

10201 WATERTOWN PLANK ROAD
MILWAUKEE, WI 53226
TELEPHONE: 414/257-7159
FAX: 414/257-7742
WWW.LASMILWAUKEE.COM

COLLEEN FOLEY
EXECUTIVE DIRECTOR

GUARDIAN AD LITEM OFFICE

- Nomination changes: Any parent OR child over 12 can nominate a guardian. If a parent nominates the proposed guardian, the court MUST appoint that individual unless it is not in the child's best interests.
- Barstad?: The statute does not expressly overrule Barstad v. Frazier. The statute does, however, outline specific grounds for each guardianship, and dispositional considerations and factors for the court to consider that likely displaces Barstad as the most immediately controlling standard.

ROLE OF THE GUARDIAN AD LITEM

(1) The attorney or trained designee must meet with: the child, the proposed guardian, and any "interested person" as defined in § 48.9795(1)(a). This includes visiting the home of the child, AND the home of the proposed guardian, if they are different.
(2) The attorney must inspect the reports and records of the child AND the child's family AND the proposed guardian, to the extent necessary to fulfill the duties and responsibilities of the Guardian ad Litem. Those reports include:
    a. Law enforcement reports and records
    b. Court records
    c. Social welfare agency records
    d. Abuse and neglect records
    e. Pupil records (school)
    f. Mental health records
    g. Health care records.

At least at the outset, it seems likely that records requests could be a hurdle for GAL practitioners in timely receiving those documents for the initial appearance, until more streamlined processes can be put in place. Legal Aid Society is working on contacting appropriate stakeholders in the community to try to set this up prior to the new law going into effect.

EMERGENCY GUARDIANSHIPS

Emergency guardianships are probably the most foreign in the new set up. As reflected on page 2, the standards here: (1) court must find that child's welfare requires immediate appointment of a guardian; (2) the guardianship may only transfer powers reasonably related to the need for the appointment; (3) the guardianship can only last for 60 days.

Here, the court can appoint an emergency guardian without a hearing and until a hearing can be held. This seems similar to a temporary restraining order situation. The court shall attempt to

LEGAL AID SOCIETY 1916 OF MILWAUKEE

10201 WATERTOWN PLANK ROAD
MILWAUKEE, WI 53226
TELEPHONE: 414/257-7159
FAX: 414/257-7742
WWW.LASMILWAUKEE.COM

COLLEEN FOLEY
EXECUTIVE DIRECTOR

GUARDIAN AD LITEM OFFICE

appoint a Guardian ad Litem prior to any hearing on the petition, but "may appoint the GAL after the hearing if the court finds that exigent circumstances require the immediate appointment of an emergency guardian."

If the court appoints the proposed guardian immediately, then the GAL may petition for reconsideration or modification.

Notable:

(1) A court may deny a petition for emergency guardianship and act as an intake worker if the court believes that a CHIPS case is appropriate.
(2) Emergency guardians are immune from civil liability for acts or omissions as guardian if they act in good faith, in the best interests of the child, and with due diligence as an ordinarily prudent person. → This makes it important to look into modification or reconsideration if the GAL has information that the court may not have received.

SUCCESSOR GUARDIANSHIPS

Successor guardianships are substantially the same. Parties can still petition for appointment or identification of a successor at the initial guardianship hearings, and if that is the case, the successor would automatically assume duties if one of the following occurs: (1) death of guardian, (2) unwillingness/inability of guardian, (3) resignation of guardian (but presumably we would still need a court hearing for this), and (4) extended vacation or illness causing temporary inability.

Otherwise, process as per usual where a successor guardianship petition is filed subject to same requirements as a regular guardianship.

POST-APPOINTMENT MATTERS

The new statute does clean up burdens a bit on post-appointment matters. Specifically:

Modification of Order: Burden is substantial change in circumstances, and whether the modification is in the child's best interests.

Termination by Parent: Burden is: (1) substantial change in circumstances; (2) the parent is fit, willing, or able to resume parental duties; OR (3) there are no compelling facts or circumstances that exist to demonstrate the continued need for guardianship; AND (4) the termination is in the best interests of the child.

LEGAL AID SOCIETY 1916 OF MILWAUKEE

10201 WATERTOWN PLANK ROAD
MILWAUKEE, WI 53226
TELEPHONE: 414/257-7159
FAX: 414/257-7742
WWW.LASMILWAUKEE.COM

COLLEEN FOLEY
EXECUTIVE DIRECTOR

GUARDIAN AD LITEM OFFICE

Review of Conduct: This is essentially the burden that there are fact sufficient to show cause that a remedy is needed based on factual circumstances establishing that there was abuse or neglect by guardian, that there was a failure to disclose information, that there was a failure to comply with orders, or that the guardian otherwise failed to perform duties. More information can be found at s. 48.9795(10)(b) and (d) for the grounds for a remedy and the remedies available.

OTHER NOTABLE CHANGES

The child does NOT need to attend the hearing, even if they are nominating a guardian. Nominations are now 12+ years of age. The GAL can give the nomination to the court, but the GAL must have sufficient information to prove the nomination is in the child's best interests.

Visitation: The guardian's decision regarding visitation is *presumed* to be in the best interests, and if there is a review of conduct petition, the petitioner has the burden to prove by clear and convincing evidence that the guardian's decision-making was not in the child's best interests. (This is quite interesting, considering the recent grandparent visitation law from last year from WI Supreme Court – to be continued as the law is implemented.)

ISSUES OF PROCEDURE AND LEGAL SUFFICIENCY

The statute includes a lot of procedural requirements – the most notable things to watch out for initially:

- Initial appearance within 45 days of filing. The fact finding and disposition must be within 30 days of the initial appearance. This is a shorter timeline than current guardianship law. If the petition is not contested, the court MUST proceed immediately to fact finding and disposition. Only get adjournments for notice issues or contest.
    - But! Guardianships are now in chapter 48. The tolling statute, § 48.315, has NOT been revised. As such, that statute just states that any of the circumstances operate to toll "under this chapter" which encompasses guardianships.
- The type of guardianship requested and the facts and circumstances establishing it must be in the petition. This is already required, but is likely to require more specific facts than currently given to establish the specific TYPE needed.
- The Indian Child Welfare Act more succinctly applies to guardianships now that guardianships are in chapter 48. The application of ICWA must be in the petition, and placement preferences will apply.

LEGAL AID SOCIETY 1916 OF MILWAUKEE

10201 WATERTOWN PLANK ROAD
MILWAUKEE, WI 53226
TELEPHONE: 414/257-7159
FAX: 414/257-7742
WWW.LASMILWAUKEE.COM

COLLEEN FOLEY
EXECUTIVE DIRECTOR

GUARDIAN AD LITEM OFFICE

- Discovery: Wis. Stat. § 48.293 was affirmatively revised to exclude guardianships—which is to say, guardianship parties are NOT entitled to DMCPS records.
- Guardianships are more clearly a two part process as they are in § 48.977 guardianships; there is a grounds/fact-finding phase, and a disposition phase. The grounds phase requires looking at the type of guardianship requested and the court determining whether the facts and circumstances have successfully proven up the guardianship type and duties needed by the guardian, which must be proven by clear and convincing evidence.
- Disposition: Rather than the language from Barstad as the compass, there are now statutory dispositional factors to consider:
    (1) First, any nominations made, and "the opinions" of the parents and child (over 12 years of age) as to what is in the best interests of the child. However, the court's determination of the child's best interests shall control as to whether the nominations of the parents/child or the opinions of the parent/child are contradictory.
    (2) Whether the proposed guardian is fit/willing/able.
    (3) Whether the child is an Indian child, and if so, whether placement preferences are satisfied, or whether there is good cause to deviate from the placement preferences.
    (4) Whether the appointment of the proposed guardian is in the child's best interests.