

Minor Guardianships of the Person

What is...

What was...

And what is to come...

Hon. Jason A. Rossell
Kenosha County Circuit Court



WHAT IS...

CHIPS, Parental Power of Attorney,
Chapter 54, and Case Law



What is...

- § 48.977 Guardianship
 - Requirements:
 - Child adjudicated CHIPS
 - Nominated guardian has placement and will serve for an extended time or until child is 18
 - TPR not in best interest
 - Parent neglecting, refusing, or unable to be the guardian
 - Reasonable efforts made



What is...

- § 48.977 Guardianship
 - Can be filed by child's GAL, parent, nominated guardian (as long as they have placement), agency, or DA/Corp Counsel
 - Best interests is prevailing factor, but court should consider:
 - Suitability of guardian, ability to serve until age 18, child's wishes and ICWA placement preferences, if applicable
 - §48.977(4)(g)



What is...

- § 48.977 Guardianship
 - Court can grant full powers to guardian to make important decisions listed in § 48.023 or can limit the powers and specifically designate the powers § 48.977(5)(b)
 - Guardianship can be subsidized or unsubsidized
 - If subsidized, the court must close the CHIPS case
 - If unsubsidized, CHIPS case continues on



What is...

- § 48.977 Guardianship
 - Post-judgement matters include revision of orders, appointment of successor guardian, and termination
 - Termination: Child turns 18, guardian resigns, or court removes for cause.
 - Parent can move to terminate if:
 - A substantial change in circumstances since last guardianship order;
 - Parent is able to resume being guardian; and
 - Best interest of child



What is...

- Standby Guardian of a Child – § 48.978
 - Designed for single parents who are facing medical issues which may result in their incapacitation, debilitation, or death within 2 years
 - Allows for appointment of standby guardian if no other parent, or if other parent can not be found or is unwilling to be guardian
 - Can done by the Court under sub. (2) or by the parent through a form under sub. (3)
 - Specific notice and findings are required and post judgement matters are clearly set forth in the statutes

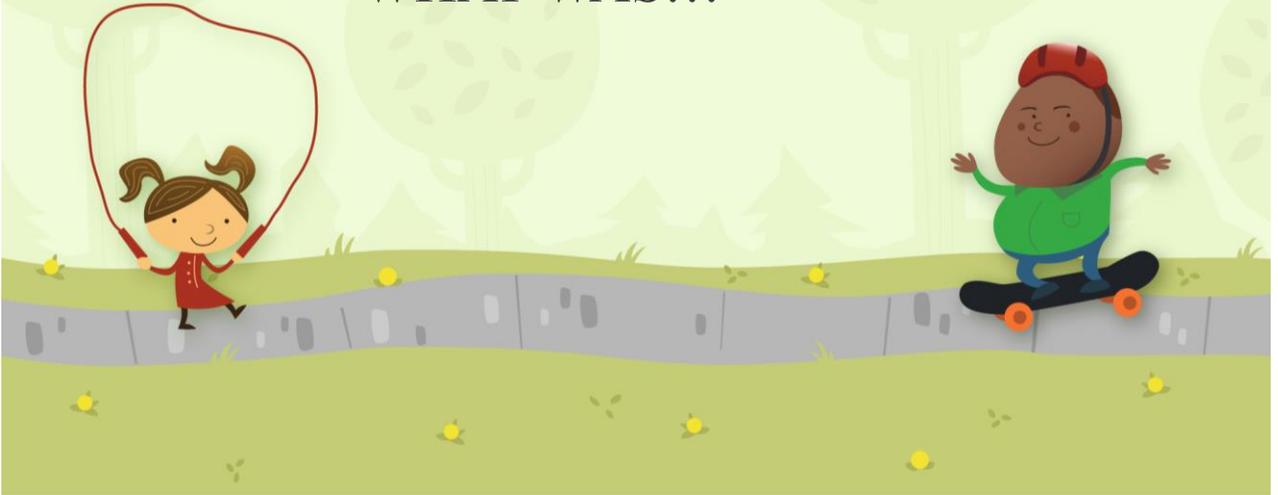


What is...

- Delegation of Parental Authority – § 48.979
 - Parent may transfer their authority to another person
 - One year or shorter unless it's a relative or if approved by court
 - Children in juvenile court (CHIPS or Delinquency) need court approval
 - Subject to the requirements of ICWA
 - Form found in statute



WHAT WAS...



What was...

- Guardianship of the Person – Chapter 54, et. seq.
 - Allows for appointment of a guardian if the person is a minor
 - Anyone can seek guardianship
 - Must be a parent unless parent is unsuitable or unwilling or not in child's best interests
 - If parent is objecting, then need to apply the *Barstad* factors



What was...

- Guardianship of the Person – Chapter 54, et. seq.
 - *Barstad v. Frazier*, 118 Wis. 2d 549, 568-69 (1984):

“We conclude that the rule to be followed in custody disputes between parents and third parties is that 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.”



What was...

- Guardianship of the Person – Chapter 54, et. seq.
 - Powers and post dispositional matters same as adults
 - Guardian only has to file an annual report each year
 - Temporary guardianship is available but limited to 60 days; extendable for an additional 60 days, but then no guardianship may be ordered for 90 days after the expiration
 - Not written for children but for the elderly and disabled



WHAT IS NOW...

§ 48.9795 Guardianship



What is now...

- As of August 1, 2020, Minor Guardianships of the Person have moved from Chapter 54 to a new section in Chapter 48
- 2019 Wisconsin Act 109 signed on February 28, 2020 by Governor Evers was due to the leadership Children and Law Section of the State Bar, collaborating with judges, attorneys and the Legislative Joint Study Committee on Minor Guardianships
- Minor Guardianships of Estate remain in Chapter 54



What is now...

- § 48.9795 Guardianship

- Four types of guardianship: Full, Limited, Temporary and Emergency
- ICWA is fully incorporated into the new statutes and must be complied with
- May not supersede or be used to change the placement of a child under juvenile court jurisdiction (CHIPS or Delinquency)
- Does not change CHIPS guardianship or standby guardianship under Chapter 48



What is now...

- § 48.9795 Guardianship – Procedures

- Full, Limited, and Temporary Guardianships (Temp. Limited to 360 days)
 - Petition by any person or child (12 or older)
 - Fact finding hearing within 45 days
 - Disposition within 30 days or immediately
- Emergency Guardianships (Limited to 60 days)
 - Petition by any person, hearing as soon as possible
 - Court may, without a hearing, issue an order that remains in effect until the emergency guardianship hearing



What is now...

- § 48.9795 Guardianship – Timelines
 - Initial Hearing for a Full, Limited, or Temporary guardianship must be held within 45 days of the petition being filed
 - An emergency guardianship should be heard as soon as possible
 - Fact-Finding Hearing OR Fact-Finding and Dispositional Hearing must be heard within 30 days of the Initial Hearing
 - Standard: Clear and convincing evidence
 - Hearings can be adjourned for good cause under § 48.315



What is now...

- § 48.9795 Guardianship – Venue
 - In the child's county of residence; or
 - In the county in which the child is physically present; or
 - If the child is a nonresident, the county in which the petitioner proposes that the child resides
 - The court may, upon a motion and for good cause shown, transfer the case to the county in which a dispositional order has been issued under Chapter 48
 - See § 48.9795(2)(a)



What is now...

- § 48.9795 Guardianship – GAL Requirements
 - A Guardian ad Litem must be appointed for the child
 - GAL Duties:
 - Conduct a diligent investigation, which *may* include:
 - Meeting with the child, proposed guardian, and/or other interested persons
 - Visiting the home of child and/or guardian
 - Inspect reports and records relating to the child's family and proposed guardian
 - See Order Appointing GAL or Attorney (JD-1798)
 - Report of the Guardian ad Litem (JN-1512) is available to provide information on GAL duties, wishes of the child, and recommendations



What is now...

- § 48.9795 Guardianship – Adversary Counsel
 - There is no requirement for appointing adversary counsel for a child in a § 48.9795 guardianship
 - The court has the discretion to appoint counsel for the child of any age pursuant to § 48.23(3)
 - It is unclear whether the child would be appointed an attorney through the county or State Public Defender
 - "If the guardian ad litem determines that the best interests of the person are substantially inconsistent with the wishes of that person, the guardian ad litem shall so inform the court and the court may appoint counsel to represent that person."



What is now...

- § 48.9795 Guardianship – Adversary Counsel
 - SPD Adversary Counsel Appointment
 - SPD may appoint if the judge orders it or contacted by the child
 - SPD would anticipate appointing adversary counsel for children over 12 in those situations in which a request was made by the child or the court
 - It is also possible that the SPD would initiate a minor guardianship or participate in a minor guardianship case in situations where the SPD already represents the child in a CHIPS, JIPS or delinquency case



What is now...

- § 48.9795 Guardianship – Required Findings
 - Full Guardianship
 - The child's parents are unfit, unwilling, or unable to provide for the care, custody and control of the child or other compelling facts and circumstances that demonstrate a full guardianship is necessary
 - AND
 - Dispositional Factors: Nominations, opinions, fitness of proposed guardian, placement preferences for an Indian child, best interests of the child
 - Limited Guardianship
 - The parents need assistance in providing for the care, custody and control of the child. Parent may retain certain decision-making powers and may share placement with guardian
 - AND
 - Dispositional Factors: Nominations, opinions, fitness of proposed guardian, placement preferences for an Indian child, best interests of the child



What is now...

- § 48.9795 Guardianship – Required Findings

- Temporary Guardianship
 - The child's particular situation, including the inability of the child's parents to provide for the care, custody and control of the child for a temporary period of time, requires appointment of a temporary guardian
- Emergency Guardianship
 - The child's welfare requires immediate appointment of an emergency guardian

AND

- Dispositional Factors: Nominations, opinions, fitness of proposed guardian, placement preferences for an Indian child, best interests of the child



What is now...

- § 48.9795 Guardianship – Burdens and Rules

- The burden is on the moving party by clear and convincing evidence
- At fact finding hearings the rules of evidence apply; HOWEVER...
 - At a termination hearing the rules of evidence do not apply except for privilege
 - Like many CHIPS hearings, the court shall admit all testimony having reasonable probative value



What is now...

- § 48.9795 Guardianship – Authority Granted

- Full Guardianship

- Authority granted to other guardians under Ch. 48 and visitation, move out of state with child, duty to report change in address to court immediately and report status update to court annually

- Limited Guardianship

- Court must specify the duties; may allow parent to retain certain decision-making powers and allow shared physical custody, if in the child's best interest



What is now...

- § 48.9795 Guardianship – Authority Granted

- Temporary Guardianship

- Court must limit the authority to those acts reasonably related to the need for a guardianship

- Emergency Guardianship

- Court must limit authority to those acts related to the reasons for the appointment



What is now...

- § 48.9795 Guardianship – Key Provisions
 - Nomination of Guardian by Parent or Child (JN-1510)
 - A parent can nominate a proposed guardian of the child and/or a successor guardian
 - A child 12 or older can nominate a proposed guardian
 - The court may dispense with child's nomination if the child is out of state or good reason exists
 - Statement by Proposed Guardian (JN-1514) must be filed at least 96 hours prior to the initial hearing on the petition
 - This is similar to the Statement of Acts under Ch. 54



What is now...

- § 48.9795 Guardianship – Key Provisions
 - The Letters of Guardianship and Dispositional Order Appointing Guardian are combined for § 48.9795 guardianships.
 - The court can order:
 - Reasonable rules of parental visitation;
 - Amount of support to be paid by the child's parent(s); and/or
 - Successor guardian
 - None of these guardianship orders can change the placement of a child under the supervision of the court pursuant to Chs. 48 or 938



What is now...

- § 48.9795 Guardianship – ICWA
 - ICWA is incorporated into § 48.9795
 - Registered mail notice must be sent to the parents, Indian custodian, and tribe
 - Findings related to serious damage (QEW Testimony), active efforts, and placement preferences are required
 - An Emergency guardianship only requires an imminent harm finding
 - ICWA findings are included in the forms, with ICWA forms created where applicable



What is now...

- § 48.9795 Guardianship – Post-Judgment Matters
 - Provides for the Court to review the Guardian's conduct and provide for orders to remedy the problems
 - Hearings on review must be held within 30 days
 - Successor Guardianship procedure in place
 - Court may modify the order if it finds that there has been a substantial change in circumstances since the last guardianship order and it's in the best interests of the child



What is now...

- § 48.9795 Guardianship – Consolidation with Guardianship of Estate
 - Minor guardianship of the estate and of the person cases can be consolidated under Ch. 48
 - If consolidated, the estate case is consolidated into the person case and is under the jurisdiction of the juvenile court
 - A request to consolidate can be made on the § 48.9795 Guardianship Petition (JN-1501)
 - If the court orders consolidation, use Order to Consolidate Minor Guardianships (JN-1516)



What is now...

- § 48.9795 Guardianship – Request to Modify Full, Limited, or Temporary Guardianship (JN-1540)
 - Request may be made by any interested person or any other person approved by the court
 - The burden of proof is on the requestor
 - Petitioner must prove:
 - There has been a substantial change in circumstances since last order affecting the guardianship; and
 - The proposed modification is in the best interests of the child
 - Standard: Clear and convincing evidence
 - Modification may not change placement of the child is otherwise under the supervision of a court in another Ch. 48 or Ch. 938 case



What is now...

- § 48.9795 Guardianship – Request to Modify Emergency Guardianship (JN-1540)
 - If an Emergency guardianship is granted, the following may petition for reconsideration or modification:
 - The child (if 12 or over);
 - The child's guardian ad litem;
 - The child's counsel;
 - The child's parents, guardian, or legal custodian; or
 - The person nominated as emergency guardian
 - GAL may petition if appointed after the hearing on petition (exigent circumstances existed to hold hearing prior to appointment)
 - Hearing must be held within 30 days of filing petition for reconsideration or modification



What is now...

- § 48.9795 Guardianship – Request to Extend Guardianship (JN-1540)
 - Applies to limited and temporary guardianships only
 - Request may be made by the petitioner in the original guardianship
 - Burden of proof is on the petitioner
 - Petitioner must prove:
 - Good cause to support the request
 - Standard: Clear and convincing evidence
 - For **Temporary** guardianships, only one extension is available for up to an additional 180 days



What is now...

- § 48.9795 Guardianship – Termination
 - Occurs when:
 - Child turns 18 (Full and Limited) or termination date (Temporary and Emergency);
 - Child marries or dies or moves to another state and a new guardianship in that state is entered;
 - Guardian dies or is removed and no successor appointed; or
 - Child is adopted.



What is now...

- § 48.9795 Guardianship – Termination
 - Parent or child requests termination then:
 - Moving party must show by a preponderance of the evidence that:
 - a substantial change in circumstances since the last order affecting the guardianship was entered; **AND**
 - that the parent is fit, willing, and able to carry out the duties of a guardian **OR**
 - that no compelling facts or circumstances exist demonstrating that a guardianship is necessary; **AND**
 - that termination of the guardianship would be in the best interests of the child



Frequently Asked Questions

1. Can you file both an emergency and a full guardianship at the same time? On same petition?

- Yes and no...
 - Can request an emergency guardianship, if grounds exist, pending a full guardianship
 - A separate Emergency Guardianship Petition has been released (JN-1504)
 - JN-1501 contains the Full, Limited, or Temporary Guardianship Petition
- Use of separate petitions is necessary due to different timeframes to hold the Initial Hearing
- § 48.9795 does not have any language allowing conversion of one type of guardianship into another
 - This is different than a Ch. 54 Guardianship where you can convert a temporary into a permanent guardianship



Frequently Asked Questions

2. Do two separate petitions and cases have to be filed for a minor guardianship of the person and minor guardianship of the estate?

- Yes

3. Is the Statement by Proposed Guardian (JN-1514) required for Emergency guardianships?

- Statement by the Proposed Guardian is required to be filed at least 96 hours before an initial hearing for a Full, Limited, or Temporary Guardianship under § 48.9795
- § 48.9795 (4)(d) (re: Statement) references § 48.9795 (4)(e), the initial hearing on a petition for guardianship, other than a petition for emergency guardianship
- Those statutory references are ambiguous regarding whether the Statement is required at some point for an Emergency guardianship



Frequently Asked Questions

4. Can co-guardians be nominated or appointed in a § 48.9795 guardianship?

- Yes, the court may appoint co-guardians of the person for a child under § 48.9795(2)(b)4.
- Both of the co-guardians can be inserted on the nomination of guardian section of the petition
- Include both names on the Letters of Guardianship and Dispositional Order

5. Is the UCCJEA required to be filed with the petition?

- Yes, on the bottom of the petition it states the Uniform Child Custody Jurisdiction and Enforcement Act Affidavit (GF-150) is attached



Frequently Asked Questions

6. Can the parents be ordered to pay the GAL Fees under § 48.9795?

- Under § 48.9795, the provisions of Ch. 48 would apply to reimbursement of the GAL.
- Under § 48.235(8), the court may order the parents to provide reimbursement for the GAL fees, but it is not required
 - “.the court may order either or both of the parents of a child for whom a guardian ad litem is appointed under this chapter [Ch. 48] to pay all or part of the compensation of the guardian ad litem.”
- Under § 48.9795(10)(d)5., the court may order the guardian to pay attorney fees if there is a motion to review the conduct of the guardian and the guardian's conduct is found to be egregious
 - This is the only section within s. 48.9795 that addresses GAL or attorney fees
 - Case law holds that it would fall on county to pay unless statutes specify how GAL fee is paid. See *Romasko v. Milwaukee*, 108 Wis. 2d 32 (1982).



Frequently Asked Questions

7. Can a Ch. 54 stand-by guardian be appointed in a § 48.9795 guardianship?

- § 48.9795 does not have a stand-by guardian
- If a stand-by guardian was named in a previous Ch. 54 case, a successor guardian will likely have to be appointed.
- JN-1581 includes an “Other” line under the Court Orders
- Courts can explain a successor was appointed since there are no longer standby guardian procedures under § 48.9795



STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

IN THE INTEREST OF _____ Amended

Order for Appointment of Successor Guardian (§48.9795, Wis. Stats.)

Name _____
Date of Birth _____ Case No. _____

A Petition for Appointment of Successor Guardian (§48.9795, Wis. Stats.) was filed.

THE COURT FINDS:

1. A successor guardian was previously ordered on the Letters of Guardianship and Dispositional Order Appointing Guardian. was not previously ordered on the Letters of Guardianship and Dispositional Order Appointing Guardian.

2. The person nominated for appointment as successor guardian:
Name _____
Address _____
Phone Number _____
filed a sworn and notarized Statement by Proposed Guardian (§48.9795, Wis. Stats.) and is a competent and suitable person to serve as successor guardian of the child.

3. The current guardian (Name) _____ is no longer able to serve as guardian of the child due to death, unwillingness or inability to act, resignation accepted by the court, removal by the court.

THE COURT ORDERS:

1. The Court appoints (Name) _____ as successor guardian of the child.

2. See attached new Letters of Guardianship and Dispositional Order Appointing Guardian dated _____.

3. If a hearing did not occur, the successor guardian of the child shall provide notice to all interested persons of the appointment and the right to petition for reconsideration of appointment of the successor guardian. The notice shall be served personally or by mail not later than 7 days after the appointment.

4. Other: _____

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL IF SIGNED BY A CIRCUIT COURT JUDGE.

DISTRIBUTION:

1. Court
2. Child
3. Child's Parents
4. Child's Guardian
5. Child's Legal Custodian
6. Child's Guardian ad Litem/Advisory Counsel
7. Title (if any)
8. Index Custodian (if any)
9. Additional Interested Persons (if any) _____

JN-1581, 11/03 Order for Appointment of Successor Guardian (§48.9795, Wis. Stats.) §48.9795 (5), Wisconsin Statutes
This form shall not be modified. It may be supplemented with additional material.

Frequently Asked Questions

8. Can a court commissioner hear a guardianship hearing?

- A court commissioner is NOT allowed to hear § 48.977 guardianship proceedings
 - See § 757.69(1m)(e)
- A court commissioner is allowed to hear uncontested § 48.9795 proceedings
 - See § 757.69(1)(g)



Frequently Asked Questions

9. What are the notice requirements for alleged fathers in a minor person & estate case?

- Ch. 54 – Minor Estate
 - The alleged father is not an interested party under Ch. 54, unless he falls into the category of “any other person required by the court” (§ 54.01(17)(a)10); or
 - if he is “the individual who has exercised principal responsibility for the care and custody of the proposed ward during the period of 60 consecutive days immediately before the filing of the petition” (§ 54.01(17)(a)5.)
 - If he didn’t have care and custody of the child prior to the filing of the guardianship, the court will ultimately need to make that decision
- Ch. 48 – Minor Person
 - The alleged father is an interested person and entitled to notice under s. 48.9795 (2)(a)1.c.



The screenshot shows the Wisconsin Court System website. At the top is a banner with the text 'WISCONSIN COURT SYSTEM' and a navigation bar with links: 'about the courts', 'case search', 'opinions', 'rules', 'forms', 'services', 'eFile / eCourts', and 'publications'. Below the banner, the breadcrumb trail reads 'home > forms > circuit court > guardianship'. The main heading is 'Circuit court forms' followed by 'Guardianship'. A link says 'View all guardianship forms'. Under 'Categories:', there are three main items: 'Guardianships (Chapter 48)', 'Guardianships (Chapter 54)', and 'Chapter 55'. Each has a list of sub-items with links: Chapter 48 includes 48.831, 48.977, and 48.9795; Chapter 54 includes Conservator, Due to Incompetency, Minor Estate, Temporary, and Pending Chapter 54 Minor Guardianship of the Person (Pre-Appointment); Chapter 55 includes Protective Placement/Protective Services.



Minor Guardianship Resources – www.wiccuptraining.com

- E-Learning Activities
 - Includes both § 48.977 and § 48.9795 Guardianship modules
- Minor Guardianship Webinar
 - The on-demand link is available on the Training Calendar page
 - This training has been approved for 1 CLE on-demand credit

