

**STANDING OF LIMITED GUARDIAN OR "GENERAL" GUARDIAN
TO BRING ACTION FOR CUSTODY OF MINOR CHILD**

By: Kenneth E. Prather, Sr.

The legal risk and negative result of a third party, a paternal grandmother, seeking custody of her five (5) year old grandson as a limited guardian from the child's natural mother is demonstrated in the attached Plaintiff's Motion for New Trial, Amendment of December Amendment of December 27, 2002 Order and Stay of Proceedings filed in the Macomb County Circuit Court.

There is a distinct difference in the standing or legal rights of a "general" guardian as compared to a limited guardian in a contested child custody case. A "general" guardian of a minor child has the same powers and responsibilities as a custodial parent of an unemancipated minor, except that a guardian is not legally obligated to provide child support and is not liable to third parties for the child's actions. MCL §700.5215.

The term "general" guardian is not used in the Michigan Statutes but is used here to distinguish it from a limited guardian.

The statutory grounds for the appointment of a "general" guardian provides that a guardian may be appointed when:

- (a) The parental rights of both parents, or surviving parent, have been terminated or suspended by prior court order, divorce judgment, separate maintenance, death, judicial determination of mental incompetency, disappearance, or confinement in a place of detention.
- (b) The child has been permitted by the parent(s) to reside with another person and the other person has not been provided with legal authority for the care and maintenance of the minor child and the minor is not residing with his or her parents when the Petition is filed.

- (c) All of the following:
 - i. The minor's biological parents have never been married to one another.
 - ii. The minor's parent who has custody of the minor dies or is missing and the other parent has not been granted legal custody under court order.
 - iii. The person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption. MCL §700.5204.

Procedurally, the Court shall appoint a "general" guardian when venue and notice are proper, the above statutory grounds are met and the child's welfare will be served by the requested appointment. MCL §700.5213.

The appointment of a limited guardian is authorized by statute. The statute provides that the court may appoint a limited guardian for a child on the parent or parents petition when:

- (a) The custodial parent or parents of the minor consent to the appointment of a limited guardian.
- (b) The parent or parents voluntarily consent to the suspension of their parental rights.
- (c) The Court approves a limited guardianship placement plan agreed to by both the custodial parent or parents and the person or person to be appointed limited guardian.

The distinguishing feature for a limited guardianship is that it can only be created with the consent of the parent(s) with custody, the proposed limited guardian, and the court. A placement plan must also be attached to a petition to appoint a limited guardian. MCL

§700.5205.

When the third party in a contested child custody case is a “general” guardian, he or she is entitled to the same legal remedies afforded a natural parent, namely:

- (1) Under MCR 2.517(A)(1) Findings of Fact and Conclusions of Law;
- (2) Under the terms and provisions of the Child Custody Act of 1970, MCL 722.21 *et. seq.*, determination by the trial court as to what is in the child’s best interests under the Twelve Best Interest Factors. MCL §722.23;
- (3) The child’s established custodial environment under MCL §722.27 of the Child Custody Act of 1970.

On the other hand, the rights of a limited guardian are extremely limited in scope. A limited guardian does not have standing to bring an action for custody of a minor child if the parent or parents of the child have substantially complied with the Limited Guardianship Placement Plan. MCL §722.26(b); MSA §25.312(6)(b).

Before a limited guardian is entitled to a hearing under the terms and provisions of the Child Custody Act of 1970, a limited guardian has the burden of proof to establish that the parent(s) did not substantially comply with the Limited Guardianship Placement Plan.

PRACTICE

1. If you have third party child custody case try to develop a strategy where the third party will be appointed a “general” guardian of the child so the third party guardian is placed on equal legal footing with the natural parent or parents.
2. The legal risks to a limited guardian are demonstrated in the *Nagengast* case:
 - a. Judge Nowicki, Probate Court Jurisdiction, Sua Sponte decided that

Judge Maceroni, Circuit Court Judge, had no jurisdiction to enter the Ex Parte Custody and Support Orders;

- b. When Judge Nowicki made that decision, the scope of proofs was severely limited. The paternal grandmother Cheryl Nagengast could attempt to prove that the natural parents failed to comply with the limited guardianship parenting plan in that they failed to substantially support the child.
3. The stakes for Deryk Nagengast, five (5) years of age, in human terms were extremely high. From a warm and secure environment with his paternal grandparents, he was placed in a home with his natural mother and step-father who could not provide him with the same guidance, discipline, personal comfort and necessities of life.
4. In *DeRose v DeRose*, 249 Mich App 388, 634 NW2d 259 (2002), the Michigan Court of Appeals held that Michigan's grandparenting time statute is unconstitutional because it authorizes a judge to issue a visitation order to a grandparent whenever the judge deems it to be in the best interests of the child, regardless of the custodial parent's decision. This is an improper injection of the state into the private realm of the family, under *Troxel v Granville*, 530 US 57 (2000). The *DeRose* Decision is now on appeal with the Supreme Court of Michigan. In March 2003, oral arguments were heard in the Supreme Court.
5. If the case involves a custody dispute between a natural parent of a child and a third-party custodian, a strong presumption exists that parental custody serves the child's best interests. In *Heltzel v Heltzel*, 248 Mich App 1, 638 NW2d 123 (2001), the court of appeals held that to properly recognize the fundamental constitutional nature of the parental liberty interest, while at the same time maintaining the statutory focus on the child's best interest, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third-party custodian proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns, taken together, clearly and convincingly demonstrate that the child's best interests require placement with the third person. Only when such a clear and convincing showing is made should a trial court infringe upon the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person. *Id.*
6. The introduction to the Child Custody Act of 1970 states:

An act to declare the inherent rights of minor children; to establish rights and duties to their custody, support, and parenting time in disputed actions; to establish rights and duties

to provide support for a child after the child reaches the age of majority under certain circumstances; to provide for certain procedure and appeals; and to repeal certain acts and part of acts.

7. Section 4 of the Child Custody Act of 1970 states:

In all actions involving dispute of a minor child's custody, the court shall declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act.

8. It is unfortunate that the legislative intent of the Child Custody Act has been lost in the *DeRose* and *Heltzel* decisions. Hopefully, the Michigan Supreme Court will reverse the Court of Appeals and hold that the Michigan Grandparenting Statute is constitutional.

In *Ramon v Pena*, 208 Mich App 610, 528 NW2d 831 (1995), a probate court's order granting temporary custody to the child's maternal grandparents was not tantamount to designating the grandparents as limited guardians.

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Respectfully submitted,

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