



A TECHNICAL SUPPORT BULLETIN FOR JUDICIAL OFFICERS:

JUVENILE GUARDIANSHIP - 2003 LEGISLATIVE REFORM

Juvenile Court Improvement Project
Oregon Judicial Department

SCOPE OF BULLETIN:

This Bulletin addresses reforms to ORS Chapter 419B that created juvenile guardianship procedures in ORS 419B.366 during the 2003 legislative session. The Oregon Law Commission and all sectors of the juvenile court community developed and promoted these improvements. Before 2003, the Oregon Juvenile Code lacked a provision for a “general guardianship;” instead, it provided for permanent guardianship under ORS 419B.365 and “temporary guardianship” under ORS 419B.370.

Many courts hesitated to establish temporary guardianships because

- ORS 419B.370 lacked procedures and standards,
- temporary guardianships could easily be challenged, and
- temporary guardianships were not durable enough to provide permanency for children in need of a long term plan, especially after *Kelly v. Gibson*, 184 Or App 343 (2002), where the Court of Appeals held that the juvenile court lacked authority to hear or grant a guardianship petition brought under ORS chapter 125, the probate code.

THE JUVENILE COURT GUARDIANSHIP:

Senate Bill 70 authorizes juvenile guardianship

under ORS chapter 419B. It specifies the standards and procedures to establish, modify, review, and vacate general guardianships on behalf of children for whom parental rights termination is not appropriate, but who cannot safely return home within a reasonable time.

ORS 419B.366(1) defines who can file a guardianship motion:

- a party, or
- a person granted rights of limited participation for the purpose of filing a guardianship motion.

The motion must be in writing and include the factual and legal grounds for the motion. The court may grant the motion if a preponderance of the evidence supports the motion, unless an Indian child is involved. In that case, the guardianship proceeding must comply with the Indian Child Welfare Act and use a clear and convincing evidence standard. The court may receive testimony and reports as in disposition hearings (ORS 419B.325); evidence must be relevant to be admissible.

ORS 419B.366(5) grounds for guardianship are:

1. the child cannot safely return to a parent within a reasonable time,
2. adoption is not an appropriate plan for the child,
3. the proposed guardian is suitable to meet the child’s needs and is willing to accept a guardian’s duties and authority, and
4. guardianship is in the child’s best interests.

Note: The first two grounds are established at a permanency hearing that precedes any hearing on the guardianship itself.

The court should re-address these two findings at an actual guardianship hearing only to the extent that there has been a change in the situation since the court made these findings at the permanency hearing. Otherwise, the purpose of the guardianship hearing is not to determine whether guardianship is the appropriate plan, but rather whether the particular person seeking guardianship is appropriate and the parameters of the guardianship.

GUARDIANSHIP MONITORING:

ORS 419B.367 specifies a form for “letters of guardianship,” which must be issued after a motion for guardianship is granted, and the order appointing the guardian must require that annual written reports be filed with the court. The court may specify the frequency and nature of visitation or contact with parents and other relatives. In addition, the court may order the parents to child support, and may “make any other order to provide for the child’s continuing safety and well-being.” The court is also required to make the guardian’s report a part of the juvenile court file, may direct local citizen review board (CRB) review in place of court review, or appoint a court visitor to file a report with the court.

The provision that the CRB, rather than the court, may review the reports from the guardian, was intended by the legislature to blunt the fiscal impact of the bill. The assumptions upon which the cost of the bill were based predicted that at least 75% of the reviews would be held by the CRB.

The court or the CRB may review any or all of the cases, based upon review of the annual report. However, the guardian’s failure to file a report in a timely manner requires court review, CRB review, or a report of a court visitor.

Note: The provisions allowing for a court visitor were included so that a local court wishing to expend money, or order a guardian to expend money, on a visitor may do so, but no funding was provided for such appointments.

Before establishing guardianship when the child is in DHS custody, DHS must conduct a guardianship study of the proposed guardian’s home and report on two things:

- the proposed guardian’s suitability, and
- whether guardianship is in the child’s best interests.

DHS is authorized to adopt rules to carry out this provision. When the child is not in DHS custody, the court may (but is not required to) order the proposed guardian to obtain a DHS or other study at the proposed guardian’s expense.

The guardian has legal custody of the child and the “duties and authority of legal custodian and guardian under ORS 419B.373 and 419B.376.” However, the guardian has limited liability for the child’s acts. ORS 419B.367(4).

GUARDIANSHIP REVIEW AND MODIFICATION:

The court may review, modify, or vacate a guardianship order. ORS 419B.368(1). Modification is appropriate when the court determines that it is in the best interests of the child.

If the court vacates the order to return the child to the parent, the court must find that (1) the parent is able and willing to adequately care for the child, (2) the conditions giving rise to the guardianship have been eliminated, and (3) returning the child is in the child’s best interests. ORS 419B.368(3).

In considering the best interests of the child to modify or vacate a guardianship, the court must

consider the following:

- the child’s emotional and developmental needs,
- the child’s need to maintain existing attachments and relationships and to form attachments and relationships,
- the child’s health and safety, and
- the child’s wishes.

When a parent has been unable to change conditions or circumstances within a “reasonable time” and the court places the child in a guardianship as a result, the parent must do more than become a “fit parent.” ORS 419A.004(21). The parent must also show that the return of the child will not result in attachment disorders or other emotional and developmental problems for the child.

State law also permits the court to vacate the order if the guardian is no longer willing or able to serve. In this event, the court must order a new disposition of the child within a specified period of time: the court must hold a shelter hearing within 14 days and a permanency hearing within 90 days. ORS 419B.368(4).

Motions to vacate the guardianship must be served on DHS to ensure that services will be available to either transition the child to a new permanent placement or to ensure planning will begin to find a new permanent placement. ORS 419B.368(6).

THE “PERMANENT” GUARDIANSHIP:

The bill that created the new general guardianship also modified permanent guardianship (ORS 419B.376). *They are separate and distinct remedies.* Language was added to the permanent guardianship statute to require that only “a party or person granted rights of limited participation for the purpose of filing a guardianship petition” may petition for permanent guardianship. Deleted were

references to the probate code’s guardianship duties and authorities.

These changes eliminate the procedures of ORS chapter 125 as governing the permanent guardianship. Previously, unless a specific provision of the permanent guardianship statute provided otherwise, the probate code governed. The new legislation provides that permanent guardianship is to be governed by the general guardianship statutes beginning with ORS 419B.366, except where the permanent guardianship statute specifically differs. For example, the permanent guardianship continues to prohibit a parent from moving to vacate for the purpose of returning the child to the parent; the new guardianship is open to challenge by the parent, pursuant to its procedures, at any time.

Finally, because the law restricts a parent’s ability to challenge a permanent guardianship, and this amounts to a serious interference with a parent’s 14th Amendment liberty interest in family relationships permanent guardianships must comport with the Indian Child Welfare Act. Changes to ORS 419B.365(4) clarify that permanent guardianships require a showing beyond a reasonable doubt that continued custody by the parents or Indian custodian “would result in serious or emotional or physical harm to the child.” This is the standard necessary to deprive an Indian parent or custodian of custody of an Indian child. The standard in cases involving a non Indian child remains clear and convincing evidence.

CRB REVIEW:

ORS 419A.109 requires the local CRB to review guardianships subject to available funding. The bill assured that the CRB would be funded to hold 75% of all reviews. The CRB must hold a review within 45 days of receiving a request. The Supreme Court has authority to adopt rules governing CRB review procedures

for 419B guardianships, as the court adopts rules for other CRB functions. The CRB must forward its findings and recommendations to the court and all parties. These findings and recommendations become a part of the juvenile court legal file, just as the CRB forwards its written findings and recommendations for foster care review.

CONFIDENTIALITY:

The legislature amended ORS 419A.255 to allow a guardian to disclose and provide copies of the letters of guardianship when required to fulfill the duties of a guardian.