

Juvenile Code Revision Work Group:

GUARDIAN AD-LITEM SUB-WORK GROUP

SB 230
(LC 1093)

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Guardian ad Litem Bill Report

I. Introductory Summary

This juvenile law project arose from attorney uncertainty regarding their ethical responsibilities for requesting appointment of guardians ad litem. In recent years, parties have raised issues regarding appointment of guardians ad litem (GAL) and the role of guardians ad litem for mentally ill, mentally retarded and physically incapacitated parents in dependency and termination of parental rights cases more frequently. The Juvenile Code does not delineate the role of GALs in these proceedings, nor how the attorney for the parent should work with the GAL. Increased litigation, along with confusion and a lack of consistency has resulted.

II. History of the Project

The Oregon Law Commission approved the formation of a Guardian ad Litem for Parents Work Group at its February 27, 2004 meeting. The Juvenile GAL for Parents Group is a sub-group of the Juvenile Code Revision Work Group chaired by Senator Kate Brown. Julie McFarlane, an attorney with the Juvenile Rights Project, chaired the project. Participants in the project included: Emily Cohen (private practitioner), Michelle DesBrisay (District Attorney), Kathryn Garrett (Department of Justice), Linda Guss (Department of Justice), Connie Haas (Department of Justice), Bob Joondeph (Oregon Advocacy Center), Jill Mallery (Oregon State Bar), and Ingrid Swenson (Public Defense Services). Virginia Vanderbilt, Senior Deputy Legislative Counsel, provided drafting services for the sub-group. The sub-group was also fortunate to have the participation of two persons who routinely serve as GALs: Peter Miller, an attorney working in the Portland area, and Billie Bell, a licensed social worker.

III. Statement of the Problem Area

The Juvenile Code lacks a provision that adequately addresses the issues of the appointment and the role of a GAL for a parent in a dependency or termination of parental rights proceeding. The result has been increased litigation accompanied by confusion and inconsistency.

In 1991, the Court of Appeals held that it is a violation of due process to fail to appoint a GAL for a mentally incompetent parent in a termination of parental rights proceeding. *State ex rel Juv. Dept. v. Evjen*, 107 Or App 659, 813 P2d 1092 (1991). More recently, the Court of Appeals found that the juvenile court erred in terminating parental rights based upon presentation of a *prima facie* case, where the parent had failed to appear to request trial dates, but the parent's GAL had appeared and requested that the court set trial dates. *State ex rel Juvenile Department v. Cooper*, 188 Or App 588 (2003). *Cooper* illustrates the fundamental lack of statutory guidance in the Juvenile Code sufficient to produce consistent decisions by the juvenile courts throughout Oregon.

Legal ethics issues also arise in this area. The Oregon State Bar Ethics Committee issued a formal opinion regarding "Zealous Representation: Requesting a Guardian *ad Litem* in a Juvenile Dependency Case." OSB Formal Op. No. 2000-159

(2000). The opinion states the following three conclusions with qualifications: a lawyer may not ethically request a GAL for a client; when a lawyer acts as GAL, the lawyer does not have the same ethical duties, obligations, and powers as in a regular attorney-client relationship; and after the appointment of the GAL for the mentally ill parent, the parent's lawyer is obligated to take direction from the GAL and from the parent client.

IV. Objectives

The clear objective for this sub-work group was to devise a bill that would properly answer the following questions if deemed relevant to the bill:

1. When should a GAL be appointed?
2. Who can/should request a GAL and under what circumstances?
3. What procedure should apply in determining whether to appoint a GAL?
4. Should a parent be required to submit to a competency evaluation?
5. What, if any, other parties should be able to obtain their own competency evaluation of the parent?
6. What should be the qualifications of a GAL and should the GAL be paid and by whom?
7. How should a GAL determine the position they should take on issues in the case?
8. Under what circumstances and with what procedure should the appointment of a GAL be reviewed or terminated?
9. What are the duties and authority of a GAL? Specifically, can a GAL take actions that are contrary to the stated wishes of the parent, including admitting petitions for jurisdiction and termination of parental rights, or signing voluntary relinquishments?
10. Can a GAL continue to pursue the case if the parent has disappeared? For how long?
11. What should be the GAL's relationship to the parent?
12. Should a GAL have their own counsel?

V. Existence of Legal Solutions Proposed in Other Jurisdictions

While some states have statutes dealing with the issue at hand, the group felt that no existing state statutes were adequate to properly take on the potential problems arising in Oregon. One state requires appointment of a GAL if the parent's parental rights are sought to be terminated due to mental illness or mental deficiency. Neb. Rev. St. § 43-292.01. Other states require appointment of a GAL for a parent if they are found to be mentally ill or mentally deficient, but provide no other statutory guidance for the court. California largely relies upon case law for procedures relating to appointment of a GAL for parents. See e.g., *In re Sara D.*, 104 Cal Rptr 2d 909 (2001). The group believes that none of these options were proper for formulating a GAL for parents statute.

VI. The Proposal

Section 1.

This section provides that the bill will become a part of ORS Chapter 419B. 419B is the Juvenile dependency chapter of the Juvenile Code.

Section 2.

(1) This subsection answers the question as to who may request a GAL: the court or any party. Once a party raises the issue, the court has discretion to conduct a hearing to determine the parent's competency.

(2) Subsection two provides the first method of obtaining a hearing to determine whether appointment of a GAL is appropriate. To get a hearing under this method, a party must set forth facts that establish that it is more probable than not that the parent, due to mental or physical disability, lacks substantial capacity to either understand the nature and consequences of the proceedings or give direction and assistance to the parent's attorney on decisions the parent must make.

(3) Subsection three provides an alternative method of obtaining a hearing for this issue. Under this method, the court upon its own motion may conduct a hearing if the court has reasonable belief that the parent, due to mental or physical disability, lacks substantial capacity to either understand the nature and consequences of the proceedings or give direction and assistance to the parent's attorney on decisions the parent must make.

(4) Often, a GAL appointment can prejudice a parent. Therefore, there must be a hearing before a GAL may be appointed. At the hearing, "relevant evidence" may be received by the court. The group believes that this subsection, in conjunction with subsections 2 and 3, will adequately assure that the due process rights of a parent are protected.

(5) To appoint a GAL, the court must find by a preponderance of the evidence that the parent lacks substantial capacity to either understand the nature and consequences of the proceedings or give direction and assistance to the parent's attorney on decisions the parent must make.

(6) An appointment of a GAL under this section may not be used as evidence of mental or emotional illness in any juvenile court proceeding, civil commitment proceeding, or any other civil proceeding.

Section 3.

(1) The sub-group believes that this subsection provides clarity as to the qualifications for serving as a GAL. The persons who may serve as a GAL are licensed mental health professionals, or attorneys, who are familiar with legal standards relating to competence. These persons must have skills and experience in representing persons with mental or physical disabilities. The person serving as a parent's GAL may not be a member of that parent's family. The GAL may not have an interest or stake in the representation.

(2) The GAL is not a party in the proceeding but is a representative of the parent.

(3) This provision describes the duties of the GAL. This provision delineates the decisions that a GAL may make. Additionally, the GAL must consult with the parent, if

the parent is able, and with the parent's attorney, and make any other inquiries as are appropriate. The GAL may make decisions concerning the case and litigation. This would include among other things, the ability to stipulate to terminate parental rights or a dependency petition. The GAL may also make decisions concerning the adoption of a child of the parent including release or surrender, certificates of irrevocability and consent to adoption under ORS 109.312 or 418.270, and agreements under ORS 109.305.

(4) This provision provides a guiding principle for GALs when making decisions for the parent. A GAL must make decisions consistent with what the GAL believes the parent would decide if the parent did not lack substantial capacity to either understand the nature and consequences of the proceedings or give direction or assistance to the parent's attorney on decisions the parent must make.

(5) This provision guides the attorney's interaction with the GAL, requiring the attorney to follow directions provided by the GAL on decisions that are ordinarily made by the parent.

(6) This subsection permits the GAL to have evidentiary privilege in the GAL's communications with the parent and the parent's attorney. The parent also may assert this privilege. The bill protects communications between the GAL and the parent's attorney (or representative of the attorney) and between the GAL and the parent. The sub-work group believes that such a privilege is necessary to ensure trust and free communication between the GAL and the parent.

Section 4.

(1) Subsection 1 sets out the duration of the GAL's appointment. This subsection provides that the appointment of a GAL continues until the court terminates the appointment, the juvenile court proceeding is dismissed, or the parent's parental rights are terminated, unless the court continues appointment.

(2) Subsection 2 provides a procedure for removing the GAL.

(3) The Public Defense Services Commission will compensate GALs. The group believes the cost of the procedures created in this bill will be similar to the current cost of GAL appointment procedures.

Section 5.

Section 5 amends ORS 419B.819 to require that a copy of summons for an order establishing permanent guardianship is provided to a GAL appointed under section 2 of the bill.

Section 6.

Section 6 amends ORS 419B.839 to require that a copy of summons for an order establishing jurisdiction under ORS 419B.100 be served to a GAL appointed for a parent under section 2 of this bill.

Section 7.

Section 7 amends ORS 419B.010 to include a GAL appointed under section 2 of this bill as a person who is not required to report information of child abuse communicated to that person if the communication is privileged.

Section 8.

Section 8 repeals the current GAL appointment procedure.

Section 9.

Section 9 amends ORS 419B.881 to require that information disclosed to parties under this statute is disclosed to a GAL appointed under section 2 of this bill.

VII. Conclusion

This bill addresses the lack of clarity in the law and confusion that exists in the role of the guardian ad litem (GAL) in juvenile dependency proceedings. Furthermore, the bill will reduce or limit instances where GALs are appointed erroneously.