

Juvenile Code Revision:

ORS Chapter 419B Summons Clean-Up

LC 1538

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From
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STATEMENT OF THE PROBLEM

(1) *Former* ORS 419B.917(2) (2001) provided: “Except by express permission of the court, for a jurisdictional or termination of parental rights trial or related mandatory court appearances, summoned parties may not waive appearance or appear through counsel.” In 2003, that statute was repealed by HB 2272 (the OLC summons clean-up bill) and was replaced, in part, by ORS 419B.918. The provisions in *former* ORS 419B.917 regarding a party or parent’s non-appearance were broken out into several different statutory provisions. *See* ORS 419B.815(7) and ORS 419B.819(7). The language in *former* ORS 419B.917(2) about waiving appearance or appearing through counsel, however, was not explicitly included in the amended statutes. Anecdotal information from some members of the OLC sub-work group that developed HB 2272 in 2003 indicates that the group did not intend to change the policy that was stated in *former* ORS 419B.917(2) (2001).

The absence of any explicit statutory provision regarding appearance through counsel has led to confusion for both the court and juvenile court practitioners about how to proceed when a person or parent fails to appear at a jurisdictional or termination of parental rights trial or related mandatory court appearance. Such confusion has led to inconsistency in practice from county-to-county about (1) whether the State may proceed on a jurisdictional or termination petition when a person or parent fails to appear but counsel is present and (2) the attorney’s role in the hearing when his or her client (the person or parent) has failed to appear.

(2) Although ORS 419B.815(2)(a), (b) and ORS 419B.819(2)(a), (b) require the parent or person to “appear personally” (if that is the manner of appearance chosen by the

particular court), the sample summons form uses only the term “appear.” ORS 419B.818 (dependency summons form); ORS 419B.822 (permanent guardianship or termination of parental rights summons form). Additional language in the sample summons forms is needed to be consistent with the other summons statutes and to provide further notice to the parent or summoned person that he or she must appear *in person*.

(3) While ORS 419B.918 now provides a process for a parent or other person to obtain permission from the court to appear by alternate means (*e.g.* telephonic) or to reschedule a mandatory appearance, there is no reference to that statute in the sample summons forms (ORS 419B.818; ORS 419B.822) or in the statutes addressing the summons requirements and the appearance requirements (ORS 419B.815; ORS 419B.819). Additional language in the sample summons forms and in the statutes addressing the summons requirements and the appearance requirements is needed to further notify a parent or person of the option for appearance by means other than personal appearance.

(4) Finally, there is currently no provision in ORS Chapter 419B that expressly authorizes an attorney to move to withdraw, when appropriate or ethically required. A specific concern for attorneys has been when the attorney’s client (the parent or person) fails to appear, without reasonable explanation, for a mandatory court appearance and the attorney does not have enough direction to ethically represent the client. There also is no provision that authorizes the court to grant a motion to withdraw when appropriate. The absence of explicit statutory language has led to confusion for both the court and juvenile court practitioners about how to proceed particularly when a person or parent fails to appear at a hearing to which the parent or person has been summoned or ordered to appear. Such confusion has led to inconsistency in practice from county-to-county about whether the court may grant an attorney’s motion to withdraw when the parent or person fails to appear as summoned or ordered to appear. That is, some courts believe they have authority and others do not. The Oregon Rules of Professional Conduct provide for lawyers’ ethical obligations, including withdrawal provisions, but a process in statute regarding withdrawal would clear up any confusion.

HISTORY OF PROJECT

On March 31, 2006, the OLC Program Committee granted general approval to the Juvenile Code Revision Work Group to address clean-up issues related to past bills recommended by the OLC Juvenile Code Revision Work Group (JCRWG). Wendy J. Johnson (OLC, Deputy Director) determined that a clean-up to the summons statutes in ORS Chapter 419B, fell within that authority.

At the May 12, 2006 meeting of the JCRWG, AAG Kathryn Garrett (DOJ, Civil Enforcement: Family Law Section) presented a memo to the work group outlining the issues for which clean-up amendments might be needed. At that meeting, Judge Deanne Darling raised an additional issue related to withdrawal of counsel upon a summoned person’s non-appearance. Discussion ensued and Senator Kate Brown asked work group members to solicit input for a draft proposal that would address the issues raised.

Over the next two months, comments were gathered and a draft proposal was submitted to the JCRWG for its consideration. At the July 14, 2006 meeting of the JCRWG, Senator Brown encouraged additional discussion and resolution of issues by e-mail. On July 19, 2006, Wendy Johnson presented the issue to the OLC and received approval for a sub-work group to be formed to address the juvenile dependency code summons statutes.

On August 3, 2006, inquiries were sent on the four issues outlined above to judges from several counties, the Office of Public Defense Services, Juvenile Rights Project, private defense attorneys, OJD, DOJ, OLC, and Legislative Counsel. The questions were accompanied by the draft proposal that the JCRWG addressed at the July 14, 2006, meeting. Further discussion ensued and a revised draft proposal was submitted to the JCRWG for consideration at the September 15, 2006 meeting.

At the September 15, 2006 meeting of the JCRWG, the group agreed to the following:

(1) Add language to ORS 419B.815 *et seq.* to clarify that a parent or person cannot appear through counsel.

(2) Add language to ORS 419B.818 and 419B.822 (sample summons forms) to clarify that a parent or person must appear personally.

(3) Include in the summons forms notice of the option of telephonic appearance by adding a reference to ORS 419B.918.

(4) Create a new statute that confirms an attorney's ability to move to withdraw when the parent or person fails to appear at a hearing to which the parent or person has been summoned or ordered to appear and confirms the court's authority to grant the motion to withdraw, when appropriate. The group agreed that whether an attorney should move to withdraw as counsel when his or her client (the parent or person) fails to appear should be left to the attorney's discretion. That is, the attorney is not required to withdraw if his or her client fails to appear. Moreover, the group agreed that whether to grant or deny the motion should be left to the court's discretion.

PROPOSED SOLUTION

Withdrawal of Counsel When Person or Parent Fails to Appear

The Group proposes creating a new provision for ORS Chapter 419B that clarifies an attorney's ability to move to withdraw when the parent or person fails to appear at a hearing to which the parent or person has been summoned or ordered to appear, and confirms the court's authority to grant the motion to withdraw when appropriate.

Prohibition on Appearance through Counsel

The Group recommends the following amendments to current law to make it clear that one must personally appear and not rely on the appearance of counsel in dependency, permanent guardianship, and termination of parental rights cases:

(1) Amend the list of summons content requirements in ORS 419B.815(4) (juvenile dependency summons requirements) and ORS 419B.819(4) (permanent guardianship/termination of parental rights summons requirements) to clearly require notice in the summons that the person or parent served with a summons may not appear through counsel at any hearing where the person or parent is required to appear. In ORS 419B.815(4) only, provide an exception to personal appearance for children who must be served with a dependency summons as provided by ORS 419B.839(1)(f) (child is 12 years of age or older); that is, the child’s attorney may appear on behalf of a summoned child who is at issue in the case.

(2) Amend ORS 419B.815 and ORS 419B.819 to provide new substantive law provisions that provide that if a summons or order requires personal appearance, the person or parent may not appear through counsel. Again, for ORS 419B.815 only, provide an exception for appearance through counsel for the child at issue in the proceeding who has been served with the dependency summons.

(3) Amend ORS 419B.816 (contesting petition to establish jurisdiction) and ORS 419B.820 (contesting petition to establish permanent guardianship or termination of parental rights) to require the court by written or oral order to inform the person or parent that for future hearings the person or parent may not appear through counsel. Again provide for an exception for both ORS 419B.816 and ORS 419B.820 that allows a child’s attorney to appear on behalf of a child served with summons pursuant to ORS 419B.839(1)(f).

(4) Amend ORS 419B.818 (form of dependency summons) and ORS 419B.822 (form of permanent guardianship or termination of parental rights summons) to notify the parent or person summoned that if he or she is summoned to appear in person, the parent or person may not appear through counsel. For ORS 419B.818 only, provide again an exception for a child’s attorney to appear on behalf of the child at issue in the proceeding.

Opportunity for Appearance by Telephone or Other Electronic Means

Several amendments are also needed to accurately reflect that while personal appearance is generally required, exceptions can be made for telephonic or other electronic appearance.¹ Authority for such appearance is authorized already by ORS 419B.918. Recommended amendments are as follows:

(1) Amend ORS 419B.918(1) by adding ORS 419B.816 (contesting petition to establish jurisdiction) to the “Notwithstanding” list of provisions – so as to allow telephonic or other electronic means of participation for required appearances under ORS 419B.816. This provision seems to have been inadvertently left out.

(2) Amend the list of summons content requirements in ORS 419B.815(4) (juvenile dependency summons requirements) and ORS 419B.819(4) (permanent guardianship/termination of parental rights summons requirements) to require notice in

¹ For example, persons in prison often appear telephonically.

the summons that if the court has granted an exception in advance under ORS 419B.918, the person or parent may appear in any manner permitted by the court under ORS 419B.918.

(3) Amend ORS 419B.816 (contesting petition to establish jurisdiction) and ORS 419B.820 (contesting petition to establish permanent guardianship or termination of parental rights) to require the court by written or oral order to inform the person or parent that if the court has granted an exception in advance under ORS 419B.918, the person or parent may appear in any manner permitted by the court under ORS 419B.918.

(4) Amend ORS 419B.818 (form of dependency summons) and ORS 419B.822 (form of permanent guardianship or termination of parental rights summons) in the “RIGHTS AND OBLIGATIONS” section to provide that when summoned, the parent or person must personally appear unless the court grants an exception in advance under ORS 419B.918.

CONCLUSION

The proposed amendments further clarify for parents and other persons their rights and responsibilities regarding hearings to which they are summoned or ordered to appear. The proposed amendments and creation of a new statute in ORS Chapter 419B will also clarify the rights and responsibilities of attorneys for parents and other persons when their clients fail to appear. Such amendments should lead to more consistency statewide in how courts and juvenile court practitioners proceed when parents or other persons fail to appear at hearings to which they have been summoned or ordered to appear.