

Juvenile Code Revision: Guardianship Report (SB 70)

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Juvenile Code Revision Work Group Guardianship Report

I. Introductory Summary

When Congress passed the Adoption and Safe Families Act in 1997 (ASFA), it was intended that abused and neglected children who could not be safely sent home should have a permanent home. Among the permanent plan alternatives envisioned by AFSA was a “general guardianship,” that was intended to be permanent in the sense that efforts to send the child home would cease and the child protection agency would no longer be involved in the life of the child. The Oregon Juvenile Code lacks procedures for such a general guardianship.

This proposal creates a general guardianship for children who are within the jurisdiction of the juvenile court and specifies standards and procedures to establish, modify, review and vacate such guardianships. This proposal also amends the existing permanent guardianship statutes to require use of the same procedures for permanent guardianships as for general guardianships.

II. History of the Project

In 2001, the Juvenile Code Revision Work Group discussed the need to resolve issues around guardianships for children who are within the jurisdiction of the juvenile court. The project was referred to a Sub-Work Group¹ of the Juvenile Code Revision

¹ Sub-Work Group Members:

Lisa Kay, Chair	Juvenile Rights Project
Timothy Travis, Vice-Chair	State Court Administrator’s Office
John Anderson	Oregon Criminal Defense
Judge Richard Barron	Coos County Circuit Judge
Ann Christian	Indigent Defense Services
Judge Deanne Darling	Clackamas County Circuit Judge
Cheri Emahaiser	Services to Children and Family
Kathryn Garrett	Department of Justice, Family Law Section
Linda Guss	Department of Justice, Human Resources Section
Ann Holmes Hehn	Multnomah County District Attorney, Juvenile Division
Barbara Johnson	CASA of Clackamas County
Tim Loewen	Yamhill County Juvenile Department
Julie McFarlane	Juvenile Rights Project
Ted Meece	Department of Justice, Family Law Section
Mickey Serice	Services to Children and Family
Bradd Swank	State Court Administrator’s Office
Judge Elizabeth Welch	Multnomah County Circuit Judge
Judge Merri Wyatt	Multnomah County Circuit Judge

Work Group,² the Guardianship Sub-Work Group, to formulate legislation. The Guardianship Sub-Work Group met for the first time in December 2001 and continued to meet monthly through October 2002. The Sub-Work Group regularly reported on its progress to, and sought input from, the full Juvenile Code Revision Work Group during the Juvenile Code Revision Work Group's monthly meetings.

III. Statement of the Problem Area

The Oregon Juvenile Code for dependent children provides for two types of guardianships: permanent guardianship pursuant to ORS 419B.365 and temporary guardianship pursuant to ORS 419B.370. A permanent guardianship provides for the few children whose parents are unfit by termination of parental rights standards but for whom adoption is not appropriate. The temporary guardianship allows the court to grant the duties and authority of a guardian to persons or agencies with temporary custody of the child.

The Oregon Juvenile Code lacks a provision for a "general" guardianship. A general guardianship is needed for children who cannot safely return to the care of a parent within a reasonable time, yet for whom termination of parental rights and adoption are not appropriate. A general guardianship established by the juvenile court would be similar to a probate guardianship, but would provide for more safeguards to protect children, such as judicial review if the guardianship is vacated.

Due to the lack of a general guardianship in the code, the juvenile court is forced either to implement a less than optimum permanent plan for the child or to follow a less than optimum procedure for appointing a guardian. Some juvenile court judges will not grant a guardianship due to the lack of clear statutory grounds to establish, review and vacate a guardianship, even though a guardianship is the most appropriate plan for the child. Alternatively, when a juvenile court does grant a general guardianship, it is forced to rely on the temporary guardianship statute or the Probate Code.

The temporary guardianship provisions merely state that the court may grant a guardianship "if it appears necessary to do so in the interests of the child." While such a standard is sufficient for a temporary guardianship when coupled with the provisions to grant temporary custody of the child to a person or agency, it is insufficient for a general guardianship. To ensure the requirements of due process are satisfied, a general guardianship, which deprives a parent of specific parental rights, must contain clear standards to establish, modify and vacate the guardianship. Also, to ensure the ongoing safety and well-being needs of the child are met, a guardianship must be reviewed

Virginia Vanderbilt, Senior Deputy Legislative Counsel, has assisted the Sub-Work Group with drafting services. Oregon Law Commission Law Student Research Assistant, Dennis Koho, a second year law student at Willamette University College of Law, assisted the Group with research and writing.

² Senator Kate Brown, an Oregon Law Commissioner, chairs the Juvenile Code Revision Work Group.

periodically. The temporary guardianship statute falls short of these demands because it lacks standards to establish, review, modify and vacate the guardianship.

The Probate Code can also fall short of meeting the ongoing safety and well-being needs of juvenile court wards. The Probate Code calls for limited court review of guardianships for minors. While guardians of adults are required to submit annual reports, there is no such requirement for guardians of minors. See ORS 125.325. Some local court rules require annual reports from guardians of minors. However, some probate departments vacate guardianships, without judicial review, when a guardian fails to file an annual report. A motion to terminate a guardianship may be filed at any time. See ORS 125.325. Upon filing a motion to vacate, the guardian must prove that the guardianship is still necessary and the guardian may be required to obtain a visitor's report, at their expense. See ORS 125.325. This procedure allows a parent, who remains unable to adequately care for the child, to file a motion to vacate simply because they are dissatisfied with the guardianship.

It is important to note that the above analysis of the failures of the Probate Code to adequately protect juvenile court wards may be moot. The recent appellate decision in *Kelley v. Gibson*, 184 Or. App. 343, 56 P.3d 925 (2002), states that the juvenile court lacks the authority to hear or grant a guardianship petition brought under the Probate Code.

ORS 419B.365 governs the establishment and monitoring of a permanent guardianship. This guardianship is appropriate when the grounds for terminating a parent's parental rights exist, but adoption is not appropriate. Once established, a parent cannot move the court to vacate the guardianship. The current statute requires the court to follow the Probate Code procedures to establish and review a permanent guardianship.³ As described above, the Probate Code procedures are ill-suited for children within the jurisdiction of the juvenile court.

The juvenile code needs a procedure for general guardianships, which contains clear standards and procedures to establish, review, modify and vacate such guardianships. Furthermore, courts should not follow the procedures of the Probate Code when granting a permanent guardianship. The Oregon Law Commission Juvenile Code Revision Work Group and the Guardianship Sub-Work Group recommend the proposed legislation (SB 70). The proposal satisfies the requirements of due process by clearly stating the standards and procedures for establishing, modifying and vacating general guardianships for children who are within the jurisdiction of the juvenile court and monitors children's ongoing safety and well-being needs with periodic judicial review.

³ ORS 419B.365(2)

IV. Objectives of the Proposal

This proposal seeks to create a general guardianship in the juvenile code. The bill specifies the standards and procedures to establish, modify, review and vacate general guardianships for children who cannot safely return home within a reasonable time, yet for whom termination of parental rights is not appropriate. This proposal also seeks to amend the permanent guardianship statute to require courts to follow the procedures in the proposed general guardianship statutes instead of the probate guardianship procedures.

V. Review of Legal Solutions Existing or Proposed Elsewhere

Members of the Guardianship Sub-Work Group reviewed existing statutory schemes in several states, including New York, California, Arizona, Washington, Delaware and Idaho.⁴ The members also reviewed the Adoption and Safe Families Act of 1997 and several articles on guardianships.

VI. The Proposal: See SB 70 (2003).

VII. Conclusion

This bill provides a much-needed tool for juvenile courts in assisting those children who cannot return home safely within a reasonable time, but for whom adoption and termination of parental rights are inappropriate. The bill creates the necessary standards and procedures for juvenile courts to establish, modify and vacate general guardianships for children within the court's jurisdiction, and provides for periodic review. The bill also amends the permanent guardianship statutes to require courts to follow the new proposed procedures as opposed to the probate guardianship procedures.

⁴ Oregon Law Commission Law Student Research Assistant, Tiffany Davidson, then a third year law student at Willamette University College of Law, assisted the Group with research of other state statutes from January to May 2002.