

Juvenile Code Revision Work Group:
RIGHTS AND PROCEDURES
FOR PARENTS IN
CERTAIN PRIVATE ADOPTION PROCEEDINGS

SB 921

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Introductory Summary

For the 2005 Legislative Session, the Oregon Law Commission's Juvenile Code Revision Work Group proposes this bill with the following objectives:

to require the petitioner in certain private adoption proceedings to serve a summons with motion and order to show cause on birth parents who do not consent to the adoption

to abandon the present outmoded requirement that the court serve a citation to show cause on these parents

to codify the substantive right to court-appointed counsel to birth parents in these private adoption proceedings and require that notice of the right to counsel be provided to the parent with the summons and motion and order to show cause

to make the procedures and the substantive provisions used in family court to handle the termination phase of these private adoption petitions clear and equivalent to procedures used in juvenile court termination of parental rights cases

History of Reform Efforts

Several members of the Juvenile Code Revision Work Group met in February 2003 and determined that there were significant problems with the existing putative father provisions in the juvenile code and with other references to fathers, parents, and paternity throughout the ORS. In June 2003, the Oregon Law Commission authorized the formation of a Putative Father Sub-Work Group of the Juvenile Code Revision Work Group. The focus of the Putative Father Sub-Work Group was to explore and define the rights that putative fathers are entitled to in juvenile court proceedings. The issues addressed in this bill were later brought to the attention of the Putative Father Sub-Work Group by Judge Maureen McKnight; the Sub-Work Group decided that the additional ORS Chapter 109 adoption issues were related enough to be included in the same law reform project because they both involved rights of fathers and putative fathers, specifically notice rights.

Sen. Kate Brown served as Chair of the full Juvenile Code Revision Work Group. KayT Garrett, an Assistant Attorney General with the Family Law Section of the DOJ, served as Chair of the Putative Father Sub-Work Group with Linda Guss, also an Assistant Attorney General, serving as Chair pro tem. The Putative Father Sub-Work Group met monthly during the legislative interim. Towards the end of that project, the Sub-Work Group determined that the issues addressed in this bill, and the statutes involved didn't fit within the relating clause of the larger putative father bill (SB 234). Additional expertise was also needed to complete this bill that now focuses on parents in adoption proceedings. Several discussions among Work Group members took place before and after the Putative Father Sub-Work Group meetings via electronic correspondence. Additional participants were included with adoption expertise. This bill was the result of email collaborations and informal meetings. The bill has been well circulated and discussed among adoption attorneys, family law attorneys, judges, legal aid attorneys, indigent defense attorneys, and state attorneys.¹ The bill with the attached revisions has the consensus of all involved.

Statement of the Problem Area

In essence, legally what happens in privately-initiated adoption petitions filed in family court is that the birth parent's parental rights are terminated and the adoptive

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Scott Adams, attorney in private practice; David Gannett, attorney in private practice; KayT Garrett, AAG, Family Law Section; Prof. Leslie Harris, University of Oregon Law School; Sybil Hebb, Oregon Law Center; Judge Maureen McKnight, Multnomah County Judge; Susan Moffett, attorney in private practice; David Nebel, OSB; Robin Pope, attorney in private practice; Robin Selig, Oregon Law Center; Ingrid Swenson, Office of Public Defense Service; and William Taylor, Judiciary Committee Counsel. Doug McKean, Deputy Legislative Counsel, provided excellent drafting services for the project.

parents are granted parental rights. These proceedings involve two stages: (1) a determination of whether the birth parent's consent has been given, or can instead be dispensed with because of neglect, desertion, or other statutorily recognized exception; and (2) a determination of whether the adoption is in the child's best interests. These proceedings are highly similar to state-initiated termination of parental rights (TPR) cases heard in juvenile court that are followed by adoption of the child. The statutory grounds are essentially similar, the standards of proof are the same, and the enormity of the parent's interest and the drastic and irrevocable nature of the State's actions are identical. The similarity of these two proceedings grounded the 1990 decision of the Oregon Supreme Court which held that indigent parents facing termination of their parental rights in private adoptions have the same right to court-appointed counsel that Oregon statute provides for parents facing termination of parental rights in juvenile court. Zockert v. Fanning, 310 Or 514 (1990) (holding that the Oregon Constitution's equal privileges guarantee required appointment of counsel).

The problem in the present law is that the Fanning decision (which establishes a right to court-appointed counsel in private adoptions) has never been codified in the ORS. In addition, there is not a statutory provision requiring notice to these parents of their right to counsel. The right to counsel is essentially meaningless if parents are not aware of the right. The procedure for these private adoptions also needs reform and updating. For example, parents are presently served notice of a pending adoption petition by what is called a citation. The citation process is archaic and disfavored by judges and lawyers. The citation generally does not provide parents with the information they need to object or not object to the adoption. The procedure should more closely follow the procedures used in termination of parental rights cases in juvenile court.

Objective of the Proposed Bill

The objective of this bill is to amend ORS 109.330 to provide a clear statutory procedure for certain privately initiated adoption proceedings where birth parent parental rights can be terminated in family court. The goal is to provide equivalent procedures of those used in juvenile court termination of parental rights proceedings. The procedure will include notice of the right to court-appointed counsel. The bill will also codify the substantive right to court-appointed counsel articulated in Zockert v. Fanning, 310 Or 514 (1990) which is based on the pronounced similarities between privately-initiated adoptions handled by family courts and state-initiated termination of parental rights (TPR) cases heard in juvenile court.

Proposal

See SB 921 (2005) and proposed conceptual amendments attached.

Section Highlights

Section 1

Section 1 of the bill amends ORS 109.330.

An adoption petition can not proceed without the proper consent of the parents unless the court finds a basis to dispense with the necessity of that consent. See ORS 109.350, ORS 109.312. To get consent or to have consent waived, parents must receive proper notice of an adoption petition. The bill is not intended to change existing law on the two-part substantive showing requirements for entering a judgment of adoption, i.e. 1) consent or statutory exception to consent; and 2) best interests of the child. The changes in subsection (1) of this bill would require the petitioner of an adoption to properly serve the parent in the adoption cases provided for in ORS 109.330 with a summons and motion and order to show cause why the adoption should not be ordered without the parent's consent. The adoption cases covered in ORS 109.330, include parents who no longer have legal custody of the child based on divorce (ORS 109.314), parents who have been adjudged mentally ill or deficient (ORS 109.322), parents who are imprisoned under a sentence of at least three years (ORS 109.322), and parents believed to have willfully deserted or neglected the child (ORS 109.324).

Presently, parents are provided service by an archaic citation procedure where the petitioner provides the citation to the court for signature and then the petitioner serves the citation on the parent. This procedure is an anomaly that is outmoded and can be confusing. In addition, the citation that the parent receives does not clearly communicate to the parent what is happening, the parent's rights, and how the parent should properly respond. Instead the parent is served with an adoption petition that provides a citation to appear at a specific date and time. Neither the court nor the adoptive parents may know in advance if the parent plans to appear because no written response to the petition is required. This lack of knowledge impairs both docketing and litigation preparation. The bill would replace the citation procedure with the more traditional service method of service of a summons with motion and order to show cause. This person is used commonly in domestic relations cases and is familiar to courts and practitioners. Under the bill, the parent would be informed that he/she must file a written response (objecting or not objecting) within 30 days of service-- thus informing the petitioner and the court if the matter will be contested. Only if a response is filed contesting the adoption will a hearing on the consent issue be necessary; the court would then provide notice of a hearing. If no response is filed, the court will proceed in the parent's absence to take any action allowed by law: that is, the statutory exception to consent from the parent will have been met.

Subsection (1) of Section 1 would require following the ORCP 7D, E, and F service of process and proof of service rules for the service of summons, motion and order to show. There is one exception and that is that the time for response for service made by publication under ORCP 7D(6) will not be 30 days counting from the date of the first publication as ORCP 7C(2) would require. Instead, it will be 30 days from the date

of the last publication. This exception is necessary so that the requirement is consistent with the juvenile termination of parental rights provision found in ORS 419B.812(9).

The new subsection (2) details the requirements of the contents of a summons. The summons must inform the parent of the consequences for failure to timely file a written answer. The consequence is that the court may take any action authorized by law, including entering a judgment of adoption if the court finds adoption to be in the child's best interest. See subsection (2)(a). These provisions track the applicable consequences and summons provisions found in the juvenile code for termination of parental rights cases. See ORS 419B.819.

Subsection (2)(b) requires that the summons inform the parent of the requirements of a proper answer to the summons and that the answer must be filed within 30 days of service, or if service is by publication, within 30 days from the date of the last publication. See ORS 419B.819(2)(c) (analogous 30 days for response in juvenile court). To make it easier for parents (who often respond without the assistance of a lawyer), the subsection provides an answer form for parents to fill out that includes all of the required components of a proper written answer. See Section (2)(b)(B) of the bill. It allows parents to object or not object to the adoption.

Subsection (2)(c) requires notice in the summons of the hearing process, including notice that the court will schedule hearing(s) and order the parent to appear.

Subsection (2)(d) also requires the summons to include a notice of the right to be represented by an attorney in the proceeding and notice that if the parent meets the state's financial guidelines, the parent is entitled to have an attorney appointed at the state's expense. The parent's constitutional right to court-appointed counsel in adoption proceedings was recognized in Zockert v. Fanning, 310 Or 514 (1990). That right is without meaning if parents are not given notice of their right to counsel. This provision is really the heart of the need for this bill.

Subsection (2)(e) requires the summons to include a statement that the parent has the responsibility to maintain contact with the parent's attorney and to keep the attorney advised of the parent's whereabouts. This provision is analogous to the provision in the juvenile code. See ORS 419B.819(4)(d).

The new subsection (3) is simply the substantive law provision that provides 30 days for parents to respond with an answer (as described above in the summons requirements), and the answer requirements. The answer needs to include the parent's telephone or contact telephone number and address or contact address as defined in ORS 25.011, which could be the parent's residence, mailing or contact address.

The new subsection (4) is to be modeled after ORS 419B.518 which provides the right to counsel provision for termination of parental rights proceedings. The substantive right to court-appointed counsel for parents in private adoption proceedings was recognized in Zockert v. Fanning, 310 Or 514 (1990), but that right has never been

codified in statute. Putting the right in statute will put courts and practitioners on clear notice of the right.

The new subsection (5) provides substantive provisions regarding the hearing process and duties of the court in informing the parent of hearing or hearings relating to the motion and order to show cause or the adoption petition. The provision gives flexibility to the courts by allowing an oral order or a written order. The provision is analogous to that used for termination of parental rights proceedings in ORS 419B.820.

The new subsection (6) provides a substantive law provision that provides that if the parent fails to file the required written answer or fails to appear for a hearing, the court, without further notice, may take any action that is authorized by law, including moving towards entry of a judgment of adoption without the parent's consent. This provision is analogous to ORS 419B.820(3) used for termination of parental rights proceedings.

The new subsection (7) is the present subsection (2), just renumbered with legislative counsel drafting clarifications. The provision allows the court to also provide notice to others deemed necessary when the child has no living parent, guardian, or next of kin in the state.

Section 2

This section is a conforming amendment section, amending ORS 109.308. The reference to the present citation procedure is deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1.

Section 3

This section is provided by Legislative Counsel to ensure proper ordering of the statutes when published.

Section 4

This section is a conforming amendment section, amending ORS 109.314. The reference to the present citation procedure is deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1. Additional non-substantive form and style changes are made to the statute that follow Legislative Counsel drafting protocols and provide terminology consistency to the ORS. For example, the term "divorce" is changed to "marital dissolution."

Section 5

This section is a conforming amendment section, amending ORS 109.322. The references to the present citation procedure are deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1. Additional non-substantive form and style changes are made to the statute that follow Legislative Counsel drafting protocols and provide terminology consistency to the ORS. For example, the phrase “welfare of the child will be best promoted” is substituted with “best interests of the child.”

Section 6

This section is a conforming amendment section, amending ORS 109.324. The reference to the present citation procedure is deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1. Additional non-substantive form, style, and numbering changes are made to the statute that follow Legislative Counsel drafting protocols and provide terminology consistency to the ORS.

Section 7

This section is a conforming amendment section, amending ORS 109.326. The reference to the present citation procedure is deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1. Additional non-substantive form and style changes are made to the statute that follow Legislative Counsel drafting protocols and provide terminology consistency to the ORS.

Section 8

This section provides that the substance of the bill applies to petitions for adoptions filed on or after the effective date of the Act. The bill does not contain an emergency clause and thus the effective date would be the traditional date of January 1, 2006.

PROPOSED CONCEPTUAL AMENDMENTS TO LC 1649

Section 1

On page 1, at line 19, delete the reference of (2)(b) and replace it with (3).

On page 2, subsection (2)(a) should be rewritten to emphasize the two separate levels of consideration prior to entry of a judgment of adoption: 1) consent or consent is not required; 2) adoption is in the best interests of the child.

On page 2, at line 21, insert “or contact telephone number” after “telephone number.”

At page 3, at line 5 add the following to the form: “I do not object to the proposed adoption.” Also insert a box before the sentence “ I do not consent to the proposed adoption.” (Having alternative boxes for parents to check makes the process easy and makes the parent’s decision clear.)

On page 3, at lines 17-19, amend so that it states ADDRESS OR CONTACT ADDRESS:
TELEPHONE OR CONTACT TELEPHONE:

On page 4, at (4), replace the present text which is modeled after ORS 419B.205 (dependency provision regarding right to counsel) with the wording modeled after ORS 419B.518 (termination of parental rights provision regarding right to counsel), which provides as follows:

“If the parents are determined to be financially eligible, and request the assistance of appointed counsel, the court shall appoint an attorney to represent them at state expense. Appointment of counsel under this section is subject to ORS 135.055, 151.216 and 151.219.”

Section 5

At line 26, delete the extra “the.”

Section 7

ORS 109.326, as amended in the bill, requires a summons and a motion and order to show cause in accordance with ORS 109.330 to be served on the husband who is not the father. However, the sample answer in the amended ORS 109.330 doesn’t apply exactly because the father will be served with a motion and order to show cause why his “parental rights should not be terminated,” not a motion and order to show cause why the “proposed adoption should not be ordered without his consent.” Either the sample needs to be amended or ORS 109.326 needs to be amended by the Legislative Counsel drafter to take care of this problem.

Amendment Note

Amendments to this bill were made in the Senate that reflect the proposed conceptual amendments discussed above that were approved by the Law Commission. Another amendment was made in the House, and that amendment had the endorsement of the Putative Father Sub-Work Group. The amendment provides that service of summons by posting is one of the acceptable methods of service. Service by posting requires a court order. The bill specifically referenced service by publication (which also requires a court order) and thus the context suggested that posting might not be permitted. The House amendment clearly allows for posting and thus when a parent cannot be found, a court may permit service by posting which is far less expensive than publication.