



WISCONSIN LEGISLATIVE COUNCIL STUDY COMMITTEE MEMORANDUM

TO: MEMBERS OF THE STUDY COMMITTEE ON MINOR GUARDIANSHIPS

FROM: Steve McCarthy and Amber Otis, Staff Attorneys

RE: Description of LRB-0241/P4, Relating to Guardianships of Children

DATE: October 16, 2018

During the meeting of the Study Committee on Minor Guardianships on August 28, 2018, the committee agreed upon specific changes to the state bar working group's bill draft, LRB-0921/P5. In addition to those changes, the committee also provided general directives for committee staff to incorporate into a new bill draft for the committee's review at its next meeting on October 23, 2018.

Consistent with these directives, committee staff has distributed a new bill draft, LRB-0241/P4. This memorandum generally summarizes the key changes in the bill draft, as compared to the working group's bill draft. **Please review this summary, as well as the text of LRB-0241/P4, to ensure the changes conform to the committee's directives and intent.**

STATUTORY PLACEMENT

LRB-0241/P4 creates a new subchapter in ch. 48, Stats., in which the proposed new statute governing private minor guardianships is placed, along with the statutes that exist under current law governing stand-by guardianships and delegations of power by a parent. [ss. 48.978 and 48.979, Stats.]

SCOPE

LRB-0241/P4 omits or modifies several provisions in the working group's bill draft in light of the Joint Legislative Council's directive that the committee examine ch. 54, Stats., and recommend legislation that creates procedures specific to guardianship of a minor. Specifically, the bill draft makes the following changes:

- Omits any provisions that substantively changed statutes governing dispositions and guardianships of children in need of protection or services (CHIPS), stand-by

guardianships, and other statutes under ch. 48, Stats., when such changes were unnecessary to implement the committee's directive.

- Modifies the duty and authority granted to a guardian and limits application of those changes only to guardians appointed under the new statute, and not other types of guardians appointed under ch. 48, Stats.

INTERSECTION WITH PROCEEDINGS UNDER CHS. 48 AND 938, STATS.

LRB-0241/P4 amends certain provisions under the new statute to maintain consistency across the provisions and to clarify the intersection between the new statute and other proceedings under chs. 48 and 938, Stats., as follows:

- Adds statutory references to the types of court orders that cannot be changed by a party to a pending action under ch. 48, 51, 55, or 938, Stats., when that party files a petition for guardianship under the new statute, in order to parallel the statutory cross-references contained in the provision outlined in the next bullet point.
- Adds statutory references to the information that must be alleged in a petition for guardianship under the new statute to require disclosure of any pending cases or any court orders governing the child, in order to parallel the statutory cross-references contained in the provision outlined in the previous bullet point.
- Adds a requirement that a court's dispositional order under the new statute may not change placement of a child under s. 48.427 (3m), Stats., the statute governing the dispositional options of the court after termination of a parent's rights.

GUARDIAN AD LITEM

LRB-0241/P4 amends the provisions proposed by the working group's bill draft governing guardians ad litem (GALs) in private minor guardianships in the following ways:

- Creates a general directive that the GAL conduct an investigation appropriate to the case, with the more specific directives created by the working group's bill draft included as a non-exhaustive list of actions the GAL must undertake when conducting the investigation.
- Removes the requirement that the GAL advise a child age 12 or over that the child may request the appointment of counsel or retain counsel of his or her own choosing.
- Clarifies that the GAL's duty to report to the court is limited to matters related to the GAL's duties.
- Creates a definition for the term "suitability" which applies to the GAL's duty to report to the court concerning the suitability of the proposed guardian.
- Moves provisions that govern only GALs in private minor guardianship cases to the new statute, though the GAL's duties under s. 48.235, Stats., remain applicable.

- Clarifies the events that require, and the deadline for, the court to appoint a GAL.

PROCEEDINGS TO APPOINT A GUARDIAN

Venue

LRB-0241/P4 adds a provision to the new statute similar to the venue requirement under current law in s. 54.30 (2), Stats. Specifically, under the new statute, the proper venue is the county in which the child resides or is physically present or, if the child is a nonresident, the county in which the petitioner proposes that the child resides. However, if the child is the subject of an action pending in certain proceedings under ch. 48 or 938, Stats., the petition under the new statute must be heard by the court exercising jurisdiction over the pending action. The bill draft also allows the court to transfer the case to the county in which a dispositional order has been issued under ch. 48, Stats., upon motion and for good cause shown.

Notice

LRB-0241/P4 clarifies that, under the new statute, a petitioner's failure to provide notice to all interested persons deprives the court of jurisdiction unless notice is waived or the court finds good cause, similar to the language in current law. [s. 54.38 (1), Stats.]

Investigation

LRB-0241/P4 eliminates the provision proposed by the working group's bill draft allowing a court to order, in contested cases, the appropriate child welfare agency to conduct an investigation to determine whether the child is a proper subject for guardianship and whether the proposed guardian would be a suitable guardian for the child.

Hearing

LRB-0241/P4 amends the procedure for the fact-finding and dispositional hearing under the new statute. At that hearing, the court must first determine whether the petitioner has proven the allegations in the petition by clear and convincing evidence. After that determination, the court must immediately proceed to the appropriate disposition, either dismissing or granting the petition, after consideration of dispositional factors related to whether appointment of the proposed guardian is in the best interest of the child.

PROCEEDINGS TO TERMINATE A GUARDIANSHIP

Pursuant to the committee's request, LRB-0241/P4 modifies the procedure proposed under the working group's bill draft for terminating a guardianship, as follows:

- Requires the court to find that the petitioner has proven the allegations in the petition to terminate the guardianship, those being: a substantial change in circumstances has occurred since the last order affecting the guardianship was entered; the parent is fit, willing, and able to carry out the duties of a guardian or that no compelling facts or circumstances exist demonstrating that a guardianship is necessary; and termination of the guardianship is in the child's best interest.

- Clarifies that the parent or child that petitions to terminate the guardianship bears the burden of proof in the proceedings.
- Reduces the burden of proof from “clear and convincing evidence” to “a preponderance of the evidence.”

CHANGES TO CH. 54, STATS.

LRB-0241/P4 eliminates the authority for a guardian of a minor under ch. 54, Stats., to be granted care, custody, and control of the person of the minor.

SM:AO:ksm