



## WISCONSIN LEGISLATIVE COUNCIL STUDY COMMITTEE MEMORANDUM

TO: MEMBERS OF THE STUDY COMMITTEE ON MINOR GUARDIANSHIPS

FROM: Steve McCarthy and Amber Otis, Staff Attorneys

RE: Topics for Committee Discussion

DATE: October 16, 2018

This memorandum lists various topics identified by committee staff regarding the committee's first preliminary bill draft, LRB-0241/P4, that may serve as discussion points for the committee's next meeting on October 23, 2018. This memorandum is not exhaustive; committee members may have additional issues they wish to discuss that are not described in this memorandum.

### **STATUTORY PLACEMENT**

At the meeting on August 28, 2018, committee members discussed concerns from the Department of Children and Families (DCF) regarding placement of the new statute governing private minor guardianships in ch. 48, Stats. Ultimately, the committee reached consensus that the bill draft should place the new statute in ch. 48, Stats. In light of that directive, the committee may wish to consider the issues described below.

### **Purpose of ch. 48, Stats.**

Chapter 48, Stats., opens with the following directive: "[i]n construing this chapter, the best interests of the child or unborn child shall always be of paramount consideration." [s. 48.01 (1), Stats.] Wisconsin case law has "rejected the 'best interests' standard in custody disputes between parents and third parties" and held that for guardianships under ch. 54, Stats., a "best interest" standard that does not consider a parent's constitutional rights is incomplete. [*Cynthia H. v. Joshua O.*, 2009 WI App 176, ¶¶ 40-44; *Nicholas C.L. v. Julie R.L.*, 2006 WI App 119, ¶¶ 14-16; *Barstad v. Frazier*, 118 Wis. 2d 549, 568-69 (1984).]

The committee may consider whether a conflict exists between the statutory directive that a child's best interest must always be of paramount consideration and the constitutional bounds

imposed by the *Barstad* case and its progeny. If the committee determines such a conflict exists, the committee may consider changes to the bill draft to address the conflict.

### **Definitions**

As currently drafted, the new statute creates three defined terms: “interested person”; “party”; and “suitability.” But for these specific definitions, the definitions under s. 48.02, Stats., would apply to the new statute. The committee may consider whether application of these definitions to the new statute is consistent with the committee’s intent.

### **Procedural Requirements**

Certain statutes currently in ch. 48, Stats., govern various aspects of proceedings under that chapter, which may also apply to proceedings under the new statute. The bill draft includes changes to some, but not all, of such provisions.

The following list contains examples of provisions under ch. 48, Stats., that may apply to proceedings under the new statute:

- Requiring that a petition initiating proceedings be signed by a person who has knowledge of the facts alleged or is informed of them and believes them to be true. [s. 48.25 (1), Stats.]
- Allowing service of summons or notice to be made by any suitable person under the direction of the court. [s. 48.273 (2), Stats.]
- Excluding the public from hearings unless the child demands a public hearing and certain parties do not object, along with other provisions related to closed hearings. [s. 48.299 (1) (a) and (ag), Stats.]
- Subjecting a person who divulges information that would identify the child or family to contempt proceedings. [s. 48.299 (1) (b), Stats.]
- Allowing the court to order that a record be made of any testimony of the child’s mother related to the child’s paternity. [s. 48.299 (8), Stats.]
- Excluding certain periods of delay when computing time periods. [s. 48.315 (1), Stats.]
- Stating that failure by the court or a party to act within any specified time period does not deprive the court of jurisdiction. [s. 48.315 (3), Stats.]
- Allowing the court to impose costs, fees, and surcharges against a child 14 years of age or older. [s. 48.37, Stats.]

The committee may wish to consider whether the application of various general provisions under ch. 48, Stats., to the new statute is consistent with the committee’s intent.

### **Access to Records by the Guardian ad Litem**

Generally, under current law, all records relating to a child that are relevant to the subject matter of a proceeding under ch. 48, Stats., must be open to inspection by the guardian ad litem

(GAL) or counsel for any party, upon demand and presentation of releases when necessary, at least 48 hours before the proceeding. The court may instruct the GAL not to disclose specified material to the child or the parent, if the court reasonably believes that disclosure would be harmful to the interest of the child. [s. 48.293, Stats.]

The bill draft requires that the GAL, to the extent necessary to fulfill the GAL's duties under the new statute, inspect reports and records relating to the child and, upon presentation of necessary releases, the child's family and the proposed guardian, including the following, non-exhaustive list: law enforcement records; court records in proceedings under chs. 48 and 938, Stats.; social welfare agency records; abuse and neglect reports and records; pupil records; mental health records; and health care records. The bill draft requires the court to order the custodian of any report or record to permit the GAL's inspection of the types of records specified in the non-exhaustive list above. The GAL must keep the information confidential and may only use or further disclose the information for the purpose of the proceedings.

In light of this background, the committee may wish to consider the following:

- While the new statute contains its own provisions concerning the GAL's access to records, the provisions that exist under current law may arguably apply to the new statute, as well. Is this consistent with the committee's intent?
- Is it the committee's intent to give GALs in private minor guardianship cases broader access to records than GALs in other proceedings under ch. 48, Stats.?
- If the provision regarding access to records under current law is applicable to proceedings under the new statute, is it the committee's intent to allow counsel for any party in private minor guardianship cases access to the child's records?
- As outlined above, current law and the bill draft have different requirements regarding the disclosure of and deadline for access to records. If both provisions remain applicable to the new statute, does the committee wish to address these differences?

### **Appellate Procedure**

Under current law, civil appeal procedures apply to guardianships under ch. 54, Stats., while the criminal appeal procedures apply to proceedings under ch. 48, Stats., with certain exceptions. [ss. 48.465 and 809.30 to 809.32, Stats.] If a new statute is created in ch. 48, Stats., does the committee wish to create an additional exception to the applicability of the criminal appeal procedures for proceedings under the new statute, or is it the committee's intent for the criminal appeal procedures to apply to such cases?

### **Intersection With Other Proceedings Under chs. 48 and 938, Stats.**

LRB-0241/P4 contains several provisions regarding the intersection between proceedings under the new statute and other proceedings under chs. 48 and 938, Stats.,

For example, if the child is the subject of an action pending under ch. 48 or 938, Stats., the court must stay any proceeding under the new statute until the action pending is resolved. Thus,

any person that files a petition for guardianship must state if certain types of cases are pending, or if the child is subject to various court orders related to such proceedings.

In addition, a petition for guardianship may not seek to change an order entered pursuant to a finding related to a child alleged to be in need of protection of services (CHIPS), a juvenile alleged to be delinquent, a juvenile alleged to be in need of protection or services (JIPS), or an order transferring guardianship to an agency in a proceeding regarding the termination of parental rights (TPR).

If certain proceedings are pending under ch. 48, 51, 55, or 938, Stats., a petition under the new statute may be filed by any party to the pending action if the petition is consistent with the child's permanency plan and does not change the requirement of certain court orders relevant to the pending proceeding.

Moreover, the court's dispositional order appointing a guardian under the new statute may not change the placement of a child under the supervision of the court in certain types of proceedings, including CHIPS, TPR, adoption, delinquency, and JIPS, among others.

In light of these various provisions, the committee may wish to consider the following questions:

- The bill draft does not uniformly cite to various provisions in chs. 48 and 938, Stats. In light of the provisions outlined above, is it the committee's intent for proceedings under the new statute to not change any orders under chs. 48 and 938, Stats.?
- Relatedly, the bill draft does not uniformly address the intersection of the new statute with proceedings regarding an expectant mother of an unborn child alleged to be in need of protection or services (UCHIPS). Does the committee wish to add cross-references to those provisions uniformly throughout the draft where other types of pending actions under ch. 48, Stats., are referenced? Alternatively, should references to any UCHIPS provisions be removed?
- Is it the committee's intent to allow any person to file a petition for guardianship under the new statute, **unless** certain proceedings are pending under ch. 48, 51, 55, or 938, Stats., in which case **only** a party to the pending action may file the petition, and only if the petition is consistent with the child's permanency plan and certain court orders under chs. 48 and 938, Stats.?

## RIGHT TO COUNSEL

LRB-0241/P4 omits the requirement from the state bar working group's bill draft that a GAL advise a child age 12 or older that the child may request the appointment of counsel or retain counsel of his or her own choosing. Relatedly, other provisions concerning notice of the right to counsel were also omitted from the bill draft, as the bill draft does not provide a right to counsel.

Under current law, a proposed ward, whether a minor or an adult, has a right to counsel upon request and in other circumstances. [s. 54.42, Stats.] In contrast, under current law and under LRB-0241/P4, a child subject to a minor guardianship proceeding does not have a right to counsel under ch. 48, Stats.

However, under current law, the court has discretion to appoint counsel for a child, upon request or upon its own motion. In addition, if a GAL appointed to represent a person's best interests determines that the person's **best interests** are substantially inconsistent with the person's **wishes**, the GAL must inform the court of the inconsistency and the court **may** appoint counsel to represent that person. These provisions would apply to the new statute. [ss. 48.023 (3) and 48.235 (3), Stats.]

The committee may wish to consider whether it intends for a child subject to a proceeding under the new statute to not have a right to counsel, subject to the provisions under current law that allows the court to appoint counsel in certain circumstances.

### SUITABILITY OF PROPOSED GUARDIAN

LRB-0241/P4 requires the GAL to report to the court concerning the suitability of the proposed guardian or, if the proposed guardian is found not to be fit, willing, and able to serve as guardian, the suitability of a new proposed guardian to serve as guardian of the child. Under current law, the term "suitability" is not defined under s. 48.02 or 54.01, Stats.

Pursuant to the committee's request, the bill draft creates a definition for the term "suitability." Specifically, under the bill draft, "suitability" means "whether the proposed guardian is fit and qualified to care for the child, exercises sound judgment, does not abuse alcohol or drugs, and displays the capacity to successfully nurture the child." This proposed definition is based on the standard under current law for evaluating the suitability of a proposed adoptive family's home for a child's adoption. [s. 48.88 (2) (aj) 1., Stats.]

With regard to this new definition, the committee may wish to consider the following questions:

- The proposed definition comes from the context of adoption, a permanent legal mechanism, unlike guardianship. Is it the committee's intent to apply the same standard to guardianship?
- The bill draft requires the GAL to report on the proposed guardian's **suitability**, while the petition for guardianship must state, and the court must consider, whether the proposed guardian is **fit, willing, and able to serve** as the child's guardian. For consistency, should the term "suitable" replace "fit, willing, and able"? Alternatively, should the bill draft eliminate use of the term "suitability"?

### INVESTIGATION

LRB-0241/P4 omits the provision proposed by the state bar working group's bill draft allowing the 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.

For this issue, the committee could consider the following options, among others:

- Maintain the omission of express judicial authority to order an investigation, other than that which is required by the GAL.

- Authorize the court to order an investigation more tailored in scope than that which was originally proposed, such as limiting the investigation to a discrete list of tasks.
- Authorize courts in contested cases to approve use of and payment for an expert witness, as allowed under current law. Specifically, current law allows a court, upon motion by the GAL, to order either or both of the child's parents to pay the fee for an expert witness used by the GAL, if the GAL shows that the use of the expert is necessary to assist the GAL in performing the GAL's functions or duties. [s. 48.235 (8), Stats.]

## **PROVISIONS RELATED TO CUSTODY, VISITATION, AND PLACEMENT**

In various contexts, LRB-0241/P4 employs the terms legal custody, physical custody, visitation, and physical placement. Under current law, the terms "visitation" and "physical placement" are not defined terms under ch. 48, Stats., though the terms are used throughout the chapter, with "visitation" more frequently used. The definition of "legal custody" under ch. 48, Stats., differs significantly from the definition under ch. 767, Stats., the chapter governing divorce and other actions affecting the family. [ss. 48.02 (12) and 767.001 (2), Stats.<sup>1</sup>] "Physical custody" is defined as "actual custody of the person" when the physical custodian does not have legal custody. [s. 48.02 (14), Stats.] "Physical placement" generally means the right to have a child physically placed with that party. [s. 767.001 (5), Stats.]

The committee may wish to consider the following issues related to use of these terms in the bill draft.

### **Visitation**

Among other duties, the bill draft authorizes guardians appointed under the new statute to "determine reasonable visitation with the child" subject to a court order, and the right to change the residence of the child from this state to another state, regardless of the relocation requirements governing parents under ch. 767, Stats. Furthermore, the bill draft requires the court to include, if applicable, "reasonable rules of parental visitation" in its dispositional order, in accordance with the applicable factors specified under s. 767.41 (5), Stats. The bill draft creates a presumption, unless otherwise ordered by the court, that a guardian's decision regarding visitation is in the child's best interest. The bill draft further provides that "if a court reviews the decision, the petitioner has the burden of proving by clear and convincing evidence that the decision of the guardian is not in the best interest of the child." In light of these provisions, the committee could consider the following:

- The new statute grants a guardian appointed under the new statute the authority to determine reasonable visitation with the child. Does the committee intend this provision to govern parental visitation or visitation by any other person? If the former,

---

<sup>1</sup> Under ch. 48, Stats., "legal custody" generally confers the right and duty to protect, train, and discipline the child, and to provide food, shelter, legal services, education, and ordinary medical and dental care. [s. 48.02 (12), Stats.] Under ch. 767, Stats., "legal custody" generally means the right and responsibility to make major decisions concerning the child. [s. 767.001 (2), Stats.]

the committee could consider inserting the term “parental,” to align with the court’s dispositional authority, which refers expressly to “parental visitation.”

- The bill draft requires the court to consider applicable factors under s. 767.41 (5), Stats., when setting “reasonable rules of parental visitation” in its dispositional order. The referenced statute lists 16 factors for courts to consider when determining legal custody and periods of physical placement, generally among parents, in divorces and other actions affecting the family. The committee may consider whether those factors adequately advise the court when setting visitation by a parent with a child for whom legal custody is vested with a guardian.
- The bill draft creates a presumption to apply “if a court reviews the decision” but does not specify the avenue in which the court would conduct such review of the guardian’s decision on visitation. Is this provision intended to refer to proceedings regarding the guardian’s conduct, allegations of contempt proceedings, or a request for modification, among others? Alternatively, is it the committee’s intent for this provision to generally encompass any form of judicial review, if sought by a person opposing the guardian’s decision regarding visitation?

### **Custody**

The bill draft generally provides that a guardian has the rights and responsibilities of legal custody, and that a parent retains all rights and duties accruing to the parent as a result of the parent-child relationship that are not assigned to the guardian or otherwise limited by statute or court order. The committee could consider the following:

- The bill draft creates the concept of a “limited guardianship,” in which the court may limit a guardian’s duty and authority. For example, the bill draft authorizes a court to “limit the physical custody of a guardian to allow shared physical custody with the parent if shared physical custody of a guardian is in the best interest of the child.” In light of the definitions of “physical custody,” which means “actual custody of the person in absence of a court order granting legal custody to the physical custodian,” is this provision workable? Would it be consistent with the committee’s intent to change the first use of the term “physical custody” to “legal custody” when describing the authority the court may limit?
- Under the bill draft’s parameters for a full guardianship, the guardian has the authority, subject to a court order, to determine reasonable visitation with the child. Is it clear from this provision, combined with the general directive that a parent retains all rights not assigned to the guardian, that the guardian determines visitation, and not the parent? Is it the committee’s intent to not allow “co-custody” situations except when provided by a limited guardianship?

### **Physical Placement**

The bill draft renumbers and amends a provision that prohibits courts from granting “visitation or physical placement rights” to a parent that has been convicted of certain homicidal crimes of which the other parent is the victim, subject to certain exceptions. Under current law,

this provision exists in ch. 54, Stats., with a parallel provision in ch. 767, Stats. [ss. 54.57 and 767.44, Stats.]

Is it the committee's intent to maintain use of the term "physical placement" in this context? Note that the court may generally lack authority to grant physical placement, as the term is not used elsewhere within the proposed new statute.

### **MODIFICATION OF GUARDIANSHIP ORDERS**

LRB-0241/P4 maintains language from the state bar working group's bill draft relating to modification of guardianship orders. This language, which appears on pages 26-27 of LRB-0241/P4, does not exist under current law.

Is the language in LRB-0241/P4 consistent with the committee's intent? For example, the committee could consider identifying the issues subject to modification, such as the scope of the guardian's duty and authority, or the visitation rules established by the court in its disposition. Alternatively, the committee may intend for the modification procedure to apply broadly and not limit its use to certain types of legal issues.

Additionally, under the bill draft, the court must hold a hearing on the modification request if "new information is available that affects the advisability of the court's guardianship order" unless the court approves waivers signed by all interested persons. However, the bill draft also requires appointment of a GAL when a request for a modification order is filed. Is this procedure consistent with the committee's intent?

### **STANDARD FOR TERMINATING A GUARDIANSHIP**

Generally, Wisconsin case law has held that the *Barstad* test applies in proceedings to terminate a guardianship of a minor, in that "when a guardianship is terminated, a parent is entitled to custody of a child unless the trial court finds that the parent is unfit or compelling reasons exist for awarding custody to a third party." [*Howard M. v. Jean R.*, 196 Wis. 2d 16, 19 (Ct. App. 1995).] However, no appellate court has engaged in a legal analysis as to which party bears the burden of proof at the termination proceeding, nor has any appellate court identified whether such proof must be by clear and convincing evidence or by a preponderance of the evidence, a lesser standard.

At its last meeting, the committee engaged in a robust discussion on the appropriate standard for terminating a guardianship. Consistent with the committee's directive, LRB-0241/P4 requires a petitioner seeking to terminate a guardianship to prove, by a preponderance of the evidence, all of the following:

- There has been a substantial change in circumstances 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.
- Termination of the guardianship would be in the best interest of the child.



During its last meeting, the committee also discussed an alternative standard that would not include the requirement that the petitioner allege, and the court find, that the termination is in the child's best interest, but would require the petitioner to prove the remaining allegations in the petition by clear and convincing evidence, rather than by a preponderance of the evidence.

In light of the case law and the committee's previous discussion, does the bill draft's standard for termination of a guardianship conform to the committee's intent? Does the committee wish to recommend the alternative standard or another standard?

### **NONSTATUTORY SECTIONS**

LRB-0241/P4 generally maintains the nonstatutory sections contained in the state bar working group's bill draft, including a delayed effective date of approximately six months.

With regard to the transition from ch. 54, 2017 Stats., or ch. 880, 2003 Stats. (referred to below as "prior law"), to the new law governing minor guardianships, the bill draft provides as follows:

- Minor guardianships completed under prior law that are in effect on the effective date of the new law remain in effect and are considered guardianships under the new law, until terminated.
- Minor guardianship proceedings that were commenced under prior law and pending as of the effective date must be completed under prior law.
- All orders appointing a guardian of a minor under prior law that are entered beginning on the effective date of the new law are considered guardianships under the new law.
- The new law applies to petitions for guardianship filed on or after the new law's effective date, except the provisions under the new law governing the guardian's duties and authority, which apply to guardianships in effect on the effective date.

Are these provisions governing the transition to and application of the new law consistent with the committee's intent?

SM:AO:ksm