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## WISCONSIN LEGISLATIVE COUNCIL

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### MEETING MINUTES

### STUDY COMMITTEE ON MINOR GUARDIANSHIPS

Legislative Council Conference Room  
One East Main Street, Suite 401  
Madison, WI

October 23, 2018  
10:10 a.m. – 2:55 p.m.

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#### Call to Order and Roll Call

Chair Steineke called the meeting to order. A quorum was determined to be present.

COMMITTEE MEMBERS PRESENT: Rep. Jim Steineke, Chair; Sen. LaTonya Johnson, Vice Chair; Reps. Paul Tittl and Debra Kolste; and Public Members Susan Conwell, Megan DeVore, Henry Plum, Theresa Roetter, Michael Rosborough, and Gretchen Viney.

COMMITTEE MEMBER EXCUSED: Public Member Carrie Schneider.

COUNCIL STAFF PRESENT: Steve McCarthy and Amber Otis, Staff Attorneys.

#### Approval of the Minutes of the Meeting on August 28, 2018

*Ms. Viney moved, seconded by Representative Kolste, to approve the minutes from the committee's meeting on August 28, 2018. The motion passed by unanimous consent.*

#### Description of Materials Distributed by Legislative Council Staff

Steve McCarthy, Staff Attorney, described the following materials distributed by Legislative Council staff in advance of the meeting: a bill draft, LRB-0241/P4, relating to guardianships of children; a Legislative Council Study Committee Memorandum, *Description of LRB-0421/P4, Relating to Guardianships of Children* (October 16, 2018); and a Legislative Council Study Committee Memorandum, *Topics for Committee Discussion* (October 16, 2018).

Legislative Council staff answered questions regarding the changes made to the state bar working group's bill draft to create the committee's bill draft, LRB-0241/P4.

### **Discussion of Committee Assignment**

Chair Steineke, Vice Chair Johnson, and Legislative Council staff facilitated discussion regarding LRB-0241/P4, the topics identified in Legislative Council Study Committee Memorandum, *Topics for Committee Discussion*, and other topics raised by committee members.

First, the committee discussed the bill draft's standard for terminating a guardianship when requested by a parent or child. Specifically, committee members acknowledged that current statutory law does not address the standard to be applied when a parent seeks to terminate a guardianship. Some committee members expressed concern that requiring a parent to show that the termination is in the child's best interest may conflict with the *Barstad* case and its progeny. Committee members generally acknowledged that litigation could occur and that ultimately a court would have to address whether any conflict exists. Several committee members supported including the best-interest requirement, stating that it provides a more child-centered approach, that certain case law has acknowledged that a child's best interest is relevant, and that use of the lower burden of proof strikes an appropriate balance. Ultimately, committee members reached consensus to maintain the bill draft's language regarding the standard and proceedings for termination of a guardianship upon request of a parent or child.

The committee then discussed issues related to inserting the new statute governing private minor guardianships in ch. 48, Stats., as outlined on pages 1-4 of the Legislative Council Study Committee Memorandum, *Topics for Committee Discussion*. After discussion, the committee instructed Legislative Council staff to amend the bill draft as follows: clarify that s. 48.293, Stats., governing discovery of records, does not apply to a guardian ad litem (GAL) appointed under the new statute; create certain statutory exceptions so that civil, rather than criminal, appeal procedures apply to appeals of private minor guardianships, as is required under current law; modify various cross-references throughout the bill draft, with the intent that proceedings under the new statute will not affect court orders under chs. 48 and 938, Stats.

Next, the committee discussed whether a child subject to proceedings under the new statute should have a right to counsel. The committee agreed not to include such a right, though members confirmed that current law gives courts discretion to appoint counsel for a child subject to proceedings under the new statute in certain circumstances.

The committee also reviewed the proposed definition for "suitability," a term used in the new statute when requiring the GAL to report to the court concerning the "suitability" of the proposed guardian. The committee disapproved of both the proposed definition and use of the term in the new statute. The committee instructed Legislative Council staff to remove the term from the bill draft and instead employ the "fit, willing, and able" standard as used elsewhere in the new statute.

The committee then discussed the concept of a third-party investigation in contested cases under the new statute. While the committee approved of the bill draft's omission of any investigation by child welfare agencies, several committee members commented that some type

of third-party investigation would be useful to the court. Ultimately, the committee instructed Legislative Council staff to amend the bill draft to clarify that, in contested cases under the new statute, a GAL may request court approval for use of and payment for an expert witness, as allowed under current law in ch. 48, Stats.

The committee also addressed various topics concerning visitation, custody, and physical placement, as outlined on pages 6-8 of the Legislative Council Study Committee Memorandum, *Topics for Committee Discussion*. The committee requested removal of any references to ch. 767, Stats., in the new statute. With regard to custody, the committee agreed that a parent should retain any rights not granted to a guardian and that the bill draft's language governing limited guardianships reflected that intent. With regard to physical placement, the committee requested removal of that term on page 35 of the bill draft, because physical placement is not contemplated elsewhere in the new statute.

The committee then discussed the bill draft's provisions relating to modification of guardianship orders. Specifically, because current law does not contain a statutory mechanism for modifying a guardianship order, committee members discussed certain procedural aspects of this new provision. Committee members agreed to maintain the bill draft's language and not specify the types of issues for which a party could seek a modification. The committee also instructed Legislative Council staff to amend the bill draft as follows: require appointment of a GAL only if a hearing will be held on a request for modification; and eliminate, for purposes of avoiding a hearing on a request for modification, the requirement that a written waiver of objection be signed by the child subject to the guardianship.

Next, the committee discussed the bill draft's nonstatutory sections. While some members expressed interest in employing a delayed effective date of three months, rather than six months, the committee ultimately agreed to maintain the bill draft's use of a six-month delayed effective date, in order to provide sufficient time for changes to mandatory court forms.

Finally, the committee discussed issues related to the role of the GAL in proceedings under the new statute. Ms. Viney expressed concern regarding the bill draft's requirements of the GAL, because a GAL is an attorney serving as a trial advocate for the best interest of the child and, under the ethical rules, cannot be a witness at a proceeding. Ms. Viney proposed alternative language governing GALs, arguing that such language would clarify the GAL's legal position, as well as the scope and duties of the GAL's investigation. Committee members requested that Ms. Viney's proposed language be distributed at the next meeting for consideration in the committee's final bill draft.

### **Other Business**

The committee will meet again to finalize the bill draft and vote whether to recommend that the Joint Legislative Council introduce the bill draft in the 2019-20 legislative session.

Legislative Council staff will inform members of the next meeting date, after consulting with Chair Steineke and polling committee members' availability. There was no other business brought before the committee.

## **Adjournment**

The committee adjourned at 2:55 p.m.

AO:ksm

[The preceding is a summary of the October 23, 2018 meeting of the Study Committee on Minor Guardianships, which was recorded by WisconsinEye. The video recording is available in the WisconsinEye archives at <http://www.wiseye.org/Video-Archive>.]