
Wisconsin Legislative Council

ACT MEMO



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March 3, 2020

2019 Wisconsin Act 109
[2019 Assembly Bill 47]

Private Minor Guardianships

BACKGROUND

Under prior law, guardianships of the person or estate of a minor or adult were all generally governed by ch. 54, Stats. Unlike certain specialized minor guardianships under ch. 48, Stats., minor guardianships under ch. 54, Stats., do not require involvement by the child welfare system and therefore are informally referred to as “private” guardianships.

Prior law granted a private guardian of a minor’s person the authority to exercise care, custody, and control over the minor. The court could appoint either a temporary guardian, for a duration up to 60 days and one additional 60-day period, or a permanent guardian, with the appointment terminating only upon certain events specified by statute and case law.

2019 WISCONSIN ACT 109

The act creates a new statute governing private guardianships of a child’s person in a new subchapter under ch. 48, Stats. This change transfers jurisdiction over private minor guardianships from the probate court under ch. 54, Stats., to the children’s court under ch. 48, Stats. Under the act, guardianships of a child’s estate remain governed by ch. 54, Stats., but may be consolidated with actions under the new procedure. The act does not change the process or standard for the appointment of a guardian in the specialized circumstances under ch. 48, Stats., and contains several provisions addressing the relationship between the new statute governing private minor guardianships and other types of procedures under chs. 48 and 938, Stats.

Types of Guardianship

The act creates four types of private guardianships of a child’s person: full; limited; temporary; and emergency. Under the act, a parent retains all rights and duties that are not assigned to the guardian or otherwise limited by statute or court order. The act specifies the standards for and duties upon appointment for each type of guardian, as follows:

- A **full** guardianship requires a finding that the child’s parents are unfit, unwilling, or unable to provide for the care, custody, and control of the child or that other compelling facts and circumstances demonstrate that a full guardianship is necessary. Once appointed, a full guardian is granted the duties and authority granted to other guardians under ch. 48, Stats., as well as the following: the authority, subject to a court order, to determine reasonable visitation with the child; the right to change the child’s residence from this state to another state; and the duty to report to the court immediately regarding any address changes and annually regarding the child’s condition.
- A **limited** guardianship requires a finding that the child’s parents need assistance in providing for the care, custody, and control of the child. The court must specify the limited guardian’s duties and authority, and may limit such authority to allow a parent to retain certain decision-making powers.

If in the child's best interest, the court may also allow shared physical custody among the limited guardian and the parent.

- A **temporary** guardianship requires a finding that the child's particular situation, including the inability of the child's parents to provide for the care, custody, and control of the child for a temporary period of time, requires the appointment of a temporary guardian. A temporary guardian may be appointed for a period not to exceed 180 days, though the court may grant one additional 180-day period if good cause is shown. In its order, the court must limit the temporary guardian's authority to those acts that are reasonably related to the reasons for the appointment.
- An **emergency** guardianship requires a finding that the child's welfare requires immediate appointment of an emergency guardian. The court may appoint an emergency guardian for a period not to exceed 60 days and must limit the emergency guardian's authority to those acts reasonably related to the reasons for the appointment.

Procedure for Full, Limited, and Temporary Guardianships

Under the act, any person, including a child age 12 years or older, may petition for the appointment of a guardian for a child. The petition must contain certain information including the type of guardianship sought, the facts and circumstances establishing that a guardianship is needed, the name and address of a proposed guardian, and other information as specified in the act. The court must appoint the person nominated as the guardian by the parent, unless the court finds that appointment of the person nominated is not in the child's best interest.

An initial hearing must be held within 45 days after a petition is filed. At least 96 hours before the initial hearing, the proposed guardian must submit a sworn and notarized statement to the court regarding the proposed guardian's existing parental, guardianship, or custodial responsibilities, financial information, and whether he or she is currently charged with, or has been convicted of a crime, or determined to have abused or neglected a child, along with a description of the circumstances surrounding the charge, conviction, or determination.

At the initial hearing, the court must first determine whether any party wishes to contest the petition. If the petition is not contested, the court must immediately proceed to a fact-finding and dispositional hearing, unless an adjournment is requested. If the petition is contested and all parties consent, the court may proceed immediately to a fact-finding and dispositional hearing. If any party does not consent or if an adjournment is requested, the court must set a date for a fact-finding and dispositional hearing no more than 30 days after the initial hearing.

At the fact-finding and dispositional hearing, any party may present evidence, including expert testimony, and argument relating to the allegations in the petition. The court must determine whether the petitioner has proven the allegations in the petition by clear and convincing evidence and must immediately proceed to determine the appropriate disposition.

When determining the appropriate disposition, the court must consider all of the following factors:

- Any nomination of a guardian made by a parent or the child, if age 12 years or older, and the opinions of the parents and child as to what is in the child's best interests.
- Whether the proposed guardian would be fit, willing, and able to serve as the child's guardian.
- If the child is an Indian child, the order of placement preference required for an Indian child in an Indian child custody proceeding, unless the court finds good cause for departing from that order.
- Whether appointment of the proposed guardian is in the child's best interests.

Procedure for Emergency Guardianships

Under the act, any person may petition for the appointment of an emergency guardian for a child. The petition must contain the same information required for a full, limited, or temporary guardianship, and must specify the reasons for the appointment of and the powers requested for an emergency guardian.

The act requires the court to hold a hearing on an emergency petition as soon as possible after the filing of the petition or, if good cause is shown, the court may issue a temporary order appointing an emergency guardian without a hearing, which remains in effect until a hearing is held. Any person who receives notice of the emergency guardianship petition has a right to a hearing for reconsideration or modification of an emergency guardianship.

Role of the Guardian ad Litem

The act requires appointment of a guardian ad litem (GAL) in proceedings to appoint a guardian or terminate a guardianship, as well as in proceedings to modify a guardianship, if a hearing will be held.

The GAL represents the child's best interests throughout the proceedings but must apply in all court proceedings the applicable standard specified in the act. In addition to certain specific duties and responsibilities required of a GAL under ch. 48, Stats., the GAL must conduct a diligent investigation sufficient to represent the child's best interests in court. As appropriate to the circumstances, this investigation may include, personally or through a trained designee, meeting with or observing the child, meeting with any proposed guardian, meeting with interested persons, and visiting the homes of the child and the proposed guardian.

The GAL is required to attend all court proceedings relating to the guardianship, present evidence concerning the child's best interest, if necessary, and make clear and specific recommendations to the court at every stage of the proceedings. To the extent necessary to fulfill the GAL's duties and responsibilities, the act requires the GAL to inspect certain reports and records relating to the child and, upon presentation of necessary releases, the child's family and the proposed guardian. When ordering appointment of the GAL, the court must also order that the custodians of certain reports or records permit the GAL to inspect and copy any reports or records relating to the child.

Post-Appointment Matters

Successor Guardians

The act allows a court to appoint a successor guardian after a guardian has died, been removed, or resigned, or as a part of the original appointment or any time after, even while the current guardianship is still in place.

The act also authorizes the court to impose certain remedies if the guardian abuses or neglects the child or knowingly permits others to do so, fails to disclose information that would have prevented his or her appointment as guardian, fails to follow or comply with the court's order, or otherwise fails to perform any of his or her duties as guardian. Authorized remedies include removal of the guardian and appointment of a successor guardian, modification of the guardian's duties and authority, or entry of any other order necessary to compel the guardian to carry out the guardian's duties. The court may also require the guardian to pay any costs of the proceeding if the guardian's conduct was egregious.

Modification of a Guardianship Order

The act authorizes a court to modify a guardianship order, if the court finds that there has been a substantial change in circumstances since the last order affecting the guardianship was entered and that the proposed modification is in the child's best interests.

Termination of a Guardianship Order

Under the act, a guardianship continues until the child attains the age of 18 years unless one of the following circumstances apply:

- The guardianship is for a lesser period of time and that time has expired.
- The child marries or dies.
- The child's residence changes from this state to another state and a guardian is appointed in the new state of residence.
- The guardian dies, or resigns and the resignation is approved by the court, and a successor guardian is not appointed.
- The guardian is removed for cause and a successor guardian is not appointed.
- The guardianship is terminated on the request of a parent or the child.
- The court terminates the guardianship upon the adoption of the child.

The act also allows a parent or child to petition for termination of a guardianship. Specifically, the court must terminate the guardianship if it finds that the petitioner has shown by a preponderance of the evidence that a substantial change in circumstances since the last order affecting the guardianship was entered, that 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 that termination of the guardianship would be in the best interests of the child.

Applicability to Guardianships Under Prior Law

The act clarifies the applicability of the newly created statute to guardianships of a minor's person, as follows:

- Guardianships of a minor's person that are in effect on the act's effective date remain in effect and are considered guardianships under the new law, until terminated.
- Proceedings relating to guardianship of a minor's person that have been commenced and are pending on the act's effective date must be completed as provided under prior law.
- All orders appointing a guardian of a minor's person entered beginning on the act's effective date must be considered guardianships under the new law.
- The act first applies to a petition for guardianship filed on the act's effective date, except the act's provisions governing a guardian's duties and authority first apply to guardianships of a minor's person that are in effect on the act's effective date.

Effective date: The act takes effect on August 1, 2020. The act clarifies the applicability of the new statute to current and pending guardianships, as described above.

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