

*Joint Legislative Council Study Committee on
Minor Guardianships*

**“Relating TO Guardianships of Children-
LRB – 0921/P5”**

State Capitol- Madison, Wisconsin

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(Proposed) Minor Guardianships for Children - LRB – 0921/P5

- I. History & Background to Minor Guardianships
- II. Identify and Examine some of the legal problems challenging the courts when applying current guardianship statutes & procedures to children.
- III. Examine proposed legislation under LRB – 0921/P5. to address the issues & problems.



(Proposed) Minor Guardianships for Children - LRB – 0921/P5

History & Background:

- ❑ 1971 Chapter 880 – Guardianship - **Passed**
- ❑ 1978 – New Children's Code - **Passed**
- ❑ 1981 – TPR Statutes – **Passed**
- ❑ 1984- *Barstad v. Frazier*, 118 Wis. 2d 549 (Unfitness)
- ❑ 1996 – CH 938 Juvenile Justice Code **Passed**
- ❑ 2005 – Act 388 (Chapter 54) Adult Guardianship
- ❑ 2010 – SB 706 Minor Guardianship (*proposed*)
- ❑ 2011 - SB 560 Minor Guardianship (*proposed*)
- ❑ 2018 – Study Committee LRB -0921/P5



II. Where Are the problems in the Guardianship Process for Minors?



1. Multiple definitions of legal custody & guardianship in statutes.
2. Standards developed by case law & not statutory.
(*substantive*)
3. Chapter 54 Adult Procedures are not compatible with minors.
(*procedural*)



II. Where Are the problems in the Guardianship Process for Minors?

1. Multiple definitions of legal custody & guardianship in statutes:

- Children's code

- ☐ Legal Custody §48.02(12)
- ☐ Legal Guardianship
 - ☐ §48.023

- Probate Code

- ☐ Guardian §54.01(10)
- ☐ Guardian of Person §54.25
- ☐ Guardian of Estate

- Family Code

- ☐ Sole legal Custody
- ☐ Joint Custody
- ☐ Physical Placement
- ☐ Major Decisions



II. Where Are the problems in the Guardianship Process for Minors?



1. Multiple definitions of legal custody & guardianship in statutes.
2. Standards developed by case law & not statutory.
(substantive)
3. Chapter 54 Adult Procedures are not compatible with minors.
(procedural)



II. Where Are the problems in the Guardianship Process for Minors? – Case Law Development

- *Standards developed through case law rather than clearly delineated in the statutes.*
- *When does ‘unfitness’ & ‘best interest apply’ ?*
- *Many litigants are ‘pro se’ and don’t read case law.*
- *Barstad v. Frazier (1984)*
- *In Guardianship of Hailie E.T. 2006 AP 567*



II. Case Law Principles

- *Barstad v. Frazier (1984)*
- Standard: “Unless court finds parent is unfit or unable to care for child or there are compelling reasons for denying custody, custody must be granted to parent.”
- “Best interests is not the proper standard in custody disputes.”
- “Compelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, similar extraordinary circumstances that drastically affect child’s welfare.”



II. Case Law Principles

- *In Guardianship of Hailie E.T. (2006)*
- Minor mother (16) agreed to Grandparents having guardianship with agreement she would have supervised visits & attend parenting classes.
- 2 yrs. passed, mother changed mind, but did nothing.
- Mother sought guardianship of child to be returned to her.
- Appellate Court held that appropriate standard to review a challenge to continued guardianship is *compelling reasons* and not '*best Interests*'.
- Best interest only between both parents.



II. Case Law Principles

- *Other Types of Cases*
- Grandparents stepping up to care for grand children with current Opioid Crisis.
- Parent being deployed in military and children placed with relative.
- Adolescent child living with relative and going to school in different district.
- Emergency Surgery/ blood transfusions.
- Children studying or traveling overseas.
- Other...



II. Where Are the problems in the Guardianship Process for Minors? – Case Law Development Summary

- *Standards developed through case law rather than clearly delineated in the statutes.*
- *When does ‘unfitness’ & ‘best interest apply’ ?*
- *Many litigants are ‘pro se’ and don’t read case law.*
- Current Case Law considers unfitness only.
- Current case law does not consider best interest in a parent’s request for return of guardianship.



III. Where Are the problems in the Guardianship Process for Minors?



1. Multiple definitions of legal custody & guardianship in statutes.
2. Standards developed by case law & not statutory. *(substantive)*
3. Chapter 54 Adult Procedures are not compatible with minors. *(procedural)*



3. Compatibility – *How are Guardianships How Transferred In Wisconsin?*

1. Chapter 54 formerly Chapter 880
 - ☐ Case law for children developed primarily under chapter 880
2. 48.977 requires underlying Chips & JIPS 938.13(4) only. (subsidized & County monitors)
 - ☐ No case law yet
3. 48.831 & 48.13(1) (Chips)
4. 48.427 Termination of parental rights.



3. Compatibility: Guardianship Considerations & Issues - Why not Keep Ch 54?

1. Does not require under lying CHIPS finding.
2. Not limited to who can be appointed.
3. Does not follow chapter 48 procedures
4. It was not drafted with children in mind – primary focus is adults.
5. The standard pleadings & forms don't work well for children.



3. Compatibility: Guardianship Considerations & Issues - Why not Keep Ch 54?

6. Temporary Guardianship requires hearing no earlier than 48 hours unless good cause shown.
7. Need Physician or Psychologist report as to incompetency of proposed ward.
8. The temporary guardianship procedure does not lend itself to medical emergencies for children.
9. Can be extended once or 60 days but not brought after that for 90 days.



3. Other Guardianship Considerations under Ch 54 & other issues [continued]

10. Pleadings ask unnecessary information for children.

11. Lacks grounds to remove guardian (54.68 doesn't apply to children)

12. Doesn't incorporate Barstad v. Frazier Standards.

13. Other questions not answered:

- ☐ Move out of state?
- ☐ Can it be limited or shared (i.e. Parent goes to military service or minor student athlete)?



How do we Fix this?



III. Policy & Proposed Legislation

- Policy – Guardianship is part of the permanency plan continuum for children.
- Chapter 48.976 provides more safeguards than Ch 54.

Proposed legislation:

- Children & Law -State Bar Formed Guardianship Working committee:
- LRB – 0921/P2: (introduced end of session (earlier)
- Transfers all guardianships for children to Chapter 48 except for guardianship of estate issues – that remains in Chapter 54.
- LRB – 0921/P5 & Creation of Legislative Study Committee



III.LRB – 0921/P5 – SUMMARY- QUESTIONS?

1. Guardianship Definition
2. Types of Guardianship
3. Legal standard for Appointing Guardian of the Person for child
4. Emergency Guardianship
 - A. Procedure
5. Guardianship Procedure
 - A. Petition
 - B. GAL
 - C. Notice
 - D. Time
 - E. Proposed Guardian Statement
 - F. Initial Hearing:
 - ☐ Contested
 - ☐ Not Contested
 - G. Investigation Report
 - H. Disposition
 - I. Modification
 - J. Termination



**Proposed
guardianship
legislation**

**LRB –
0921/P5**

**1.
DEFINITIONS**

- **(Clarifies
the authority)**
- **Authority
can be
limited by
the court
[1/5]**

- **48.023 Guardianship. Except as limited by an order of the court** under s. 48.977 (5) (b) or 48.978 (6) (b) 2., a person appointed by the court to be the guardian of a child under this chapter has the **duty** and **authority** to make **important decisions in matters** having a **permanent effect** on the life and development of the **child** and the duty to be concerned about the child's general welfare, including but not limited to: (1) – (4)..

Proposed guardianship legislation

LRB –
0921/P5

1. DEFINITIONS

- (Clarifies the authority)
 - Authority can be limited by the court
- [2/5]

- **48.023 Guardianship....**
- (1) The authority to consent to **marriage**, enlistment in the **U.S. armed forces**, **major medical, psychiatric and surgical treatment**, and obtaining a motor vehicle **operator's license..**

Proposed guardianship legislation
[48.023 continued]
LRB – 0921/P5
1. DEFINITIONS
<ul style="list-style-type: none">▪ (Clarifies the authority)▪ Authority can be limited by the court [3/5]

48.023 Guardianship....

(2) The authority to represent the child in **legal actions** and make **other decisions of substantial legal significance** concerning the child but not the authority to deny the child the assistance of counsel as required by this chapter.

<p>Proposed guardianship legislation</p> <p>[48.023 continued]</p>
<p>LRB – 0921/P5</p>
<p>1. DEFINITIONS</p>
<ul style="list-style-type: none"> ▪ (Clarifies the authority) ▪ Authority can be limited by the court <p>[4/5]</p>

48.023 Guardianship....

(3) The **right and duty of reasonable visitation** with the child and, subject to an order of a court of competent jurisdiction, the **authority to determine reasonable visitation with the child**. The **guardian's decision** regarding visitation is **presumed** to be in the best interest of the child and, if the 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.

**Proposed
guardianship
legislation**

**LRB –
0921/P5
(Changes
Underlined)**

**1.
DEFINITIONS**

- **Determine
Visitation**
 - **Out of State
move**
- [5/5]**

- **48.023 Guardianship.**
- 48.023 (4) The rights and responsibilities of physical custody and legal custody which include the **right to change the residence** of the child from this state to another state, except when physical custody or legal custody has been vested in another person or when the child is under the supervision of the department of corrections under s. 938.183, 938.34(2),(4h), (4m) or (4n), or 938.357 (4) or the supervision of a county department under s. 938.34 (4d) or (4n)..

(proposed) Types of Guardianships [LRB-0921/P5]

TITLE/TYPE	AUTHORITY	LENGTH
<u>EMERGENCY</u> <i>“Welfare Requires Immediate Appointment”</i>	SPECIFICALLY <u>LIMITED</u> TO COURT ORDER	<u>60 days</u> 48.976(2)(c)4. & (5)(a)
<u>TEMPORARY</u> <i>“Inability to provide care, custody, control <u>temporary period</u>”</i>	<u>SPECIFIC AUTHORITY</u> – PARENT <u>RETAINS</u> CERTAIN RIGHTS	<u>180 days</u> - May be extended <u>Once</u> for good cause 48.976(2)(c)3. & (4)(a)
<u>LIMITED</u> <i>“Needs <u>specific</u> assistance in providing care, custody & control” - Limited authority -</i>	RIGHTS UNDER <u>48.023</u> EXCEPT AS <u>MODIFIED</u> BY COURT	As Specifically Determined By Judge – <u>Extended</u> for Good Cause 48.976(2)(c)2. &
<u>FULL GUARDIANSHIP</u> <i>“parents unfit, unwilling, unable or other compelling facts”</i>	RIGHTS UNDER <u>48.023</u> Except As <u>Modified</u> by Court <u>Chart No. 1</u>	<u>AGE 18 OR LESS</u> as <u>Determined By Judge</u> 48.976(2)(c)1.

4. EMERGENCY GUARDIANSHIP

Proposed
guardianship
legislation

LRB – 0921/P5

3. Legal Standard for
Appointing Guardian
of Person for Child

48.976(3)(b)7.
48.976(2)(c)4.

Petition...

7.emergency guardianship,
the facts and circumstances
establishing that the welfare of the
child requires the immediate
appointment of an emergency
guardian.



4 A. Emergency Guardianship Procedure

- ☐ File Petition
- ☐ Give notice **as soon as possible** after filing by most **practical** means:
 - ☐ personal, electronic, telephone (types)
- ☐ Include right to counsel & to petition for reconsideration or modification of order
- ☐ Appoint **GAL** as soon as possible **prior** to hearing or if **exigent circumstances** apply, then **after** hearing.
- ☐ GAL meet with child **before** hearing, if not able, then **within 3** days of hearing & **report** to court on advisability of order
- ☐ Hold hearing **ASAP** but if **not possible**, then issue order and schedule hearing.
- ☐ Any interested person may file for rehearing or reconsideration within **30** days
- ☐ Order not to exceed **60 days**.



PROPOSED EMERGENCY GUARDIANSHIP Wis. 48.976(5) –PROCEDURAL FLOW CHART
Prepared by Henry J. Plum, J.D. 2018 [LRB-0921/P5]

PROPOSED EMERGENCY GUARDIANSHIP Wis. 48.976(5) –PROCEDURAL FLOW CHART
Prepared by Henry J. Plum, J.D. 2018 [LRB-0921/P5]

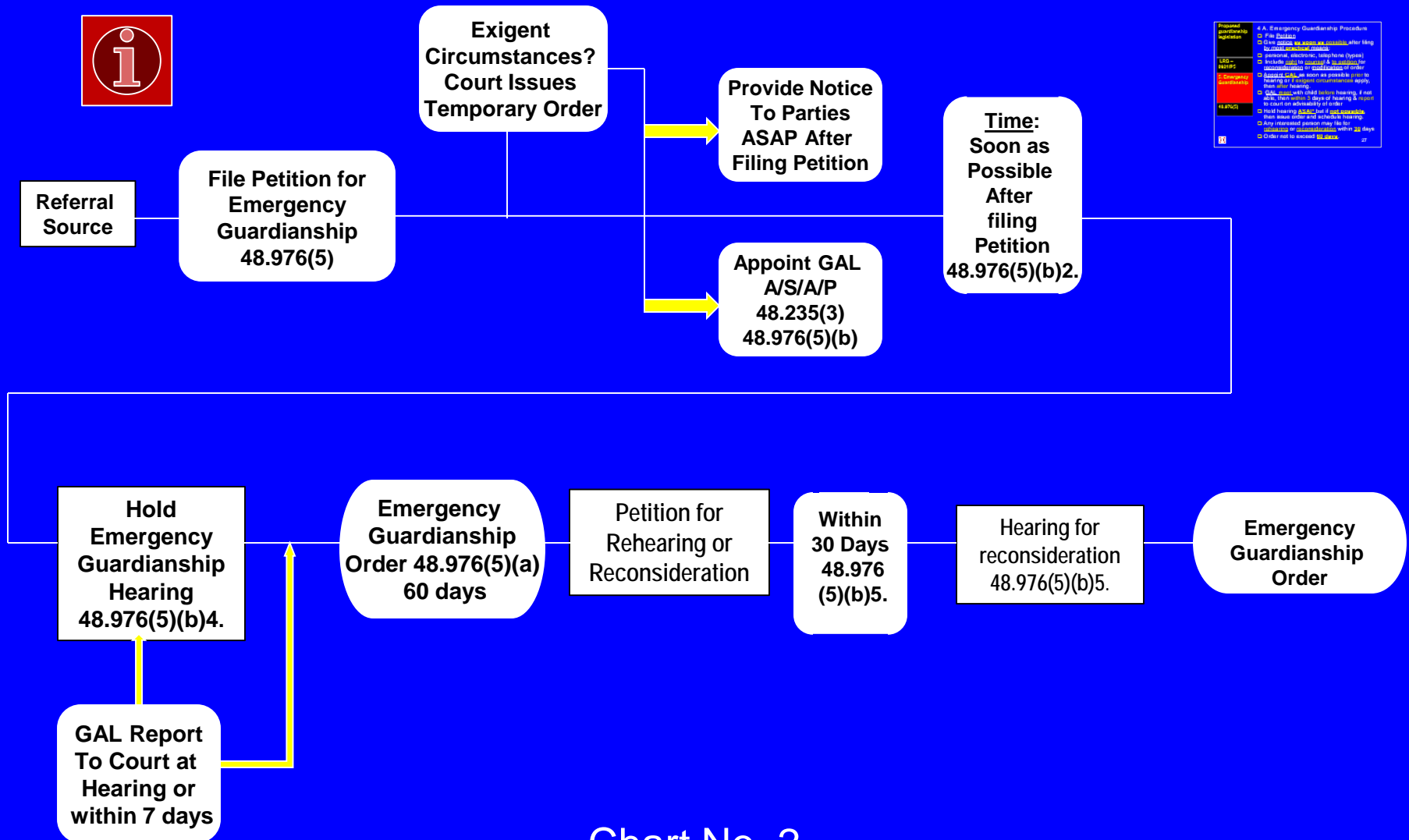


Chart No. 2

Questions?

- Emergency
- Procedure
- Grounds
- Other?



(proposed) Types of Guardianships [LRB-0921/P5]

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<u>FULL GUARDIANSHIP</u> <i>“parents unfit, unwilling, unable or other compelling facts”</i>	RIGHTS UNDER <u>48.023</u> Except As <u>Modified</u> by Court <u>Chart No. 1</u>	<u>AGE 18 OR LESS</u> as <u>Determined</u> By Judge 48.976(2)(c)1.

**Proposed
guardianship
legislation**

LRB – 0921/P5

**3. Legal
Standard for
Appointing
Guardian of
Person for
Child**

**48.976(3)(a)
Petition...**

48.976(2)(c)3. &
48.976(3)(b)6.

48.976(3)(b)5. &
48.976(2)(c)2.

6. ...**temporary guardianship**, the facts and circumstances establishing 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; the reasons for the appointment of a temporary guardian; and the powers requested for the temporary guardian. *[180 days & 1 extension]*

5.**limited guardianship**, the facts and circumstances establishing that the child's parents need assistance in providing for the care, custody, and control of the child and a statement of the specific duties and authority under s. 48.023 sought by the petitioner for the proposed guardian and the specific parental rights and duties that the petitioner seeks to have transferred. *[Extended]*

Proposed
guardianship
legislation

LRB –
0921/P5

3. Legal
Standard for
Appointing
Guardian of
Person for
Child

48.976(3)(b)4.
48.976(2)(C)1.
Petition...

FULL GUARDIANSHIP

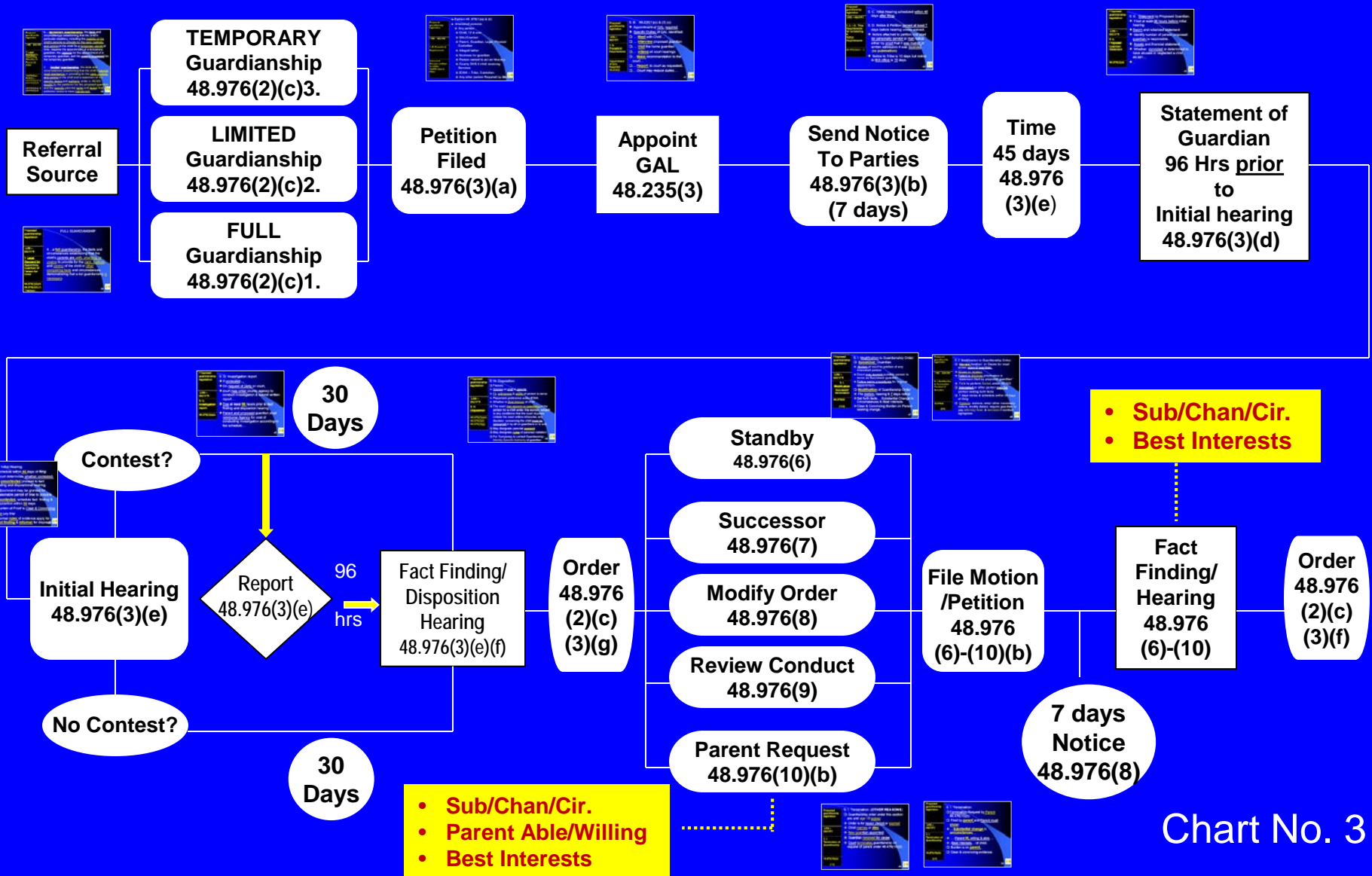
4. ..a full guardianship, the facts and circumstances establishing that the child's parents are unfit, unwilling, or unable to provide for the care, custody, and control of the child or other compelling facts and circumstances demonstrating that a full guardianship is necessary. *[age 18]*

(proposed) Types of Guardianships [LRB-0921/P5]

TITLE/TYPE	AUTHORITY	LENGTH
<u>EMERGENCY</u> <i>“Welfare Requires Immediate Appointment”</i>	SPECIFICALLY <u>LIMITED</u> TO COURT ORDER	<u>60 days</u> 48.976(2)(c)4. & (5)(a)
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<u>LIMITED</u> <i>“Needs <u>specific</u> assistance in providing care, custody & control” - Limited authority -</i>	RIGHTS UNDER <u>48.023</u> EXCEPT AS <u>MODIFIED</u> BY COURT	As Specifically Determined By Judge – <u>Extended</u> for Good Cause 48.976(2)(c)2. &
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PROPOSED GUARDIANSHIP Wis. 48.976 –PROCEDURAL FLOW CHART

Prepared by Henry J. Plum, J.D. 2018 [LRB-0921/P5]



III.LRB – 0921/P5 – SUMMARY- QUESTIONS?

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 - G. Investigation Report
 - H. Disposition
 - I. Modification
 - J. Termination



Questions?

- Full, Limited, Temporary
- Procedure
- Grounds
- Other?



**THE END & GOOD LUCK to
the Committee!**



LINKED SLIDES TO FLOW CHART

**Proposed
guardianship
legislation**

LRB – 0921/P5

**3. Legal
Standard for
Appointing
Guardian of
Person for
Child**

**48.976(3)(a)
Petition...**

48.976(2)(c)3. &
48.976(3)(b)6.

48.976(3)(b)5. &
48.976(2)(c)2.

6. ...**temporary guardianship**, the facts and circumstances establishing 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; the reasons for the appointment of a temporary guardian; and the powers requested for the temporary guardian.

5.**limited guardianship**, the facts and circumstances establishing that the child's parents need assistance in providing for the care, custody, and control of the child and a statement of the specific duties and authority under s. 48.023 sought by the petitioner for the proposed guardian and the specific parental rights and duties that the petitioner seeks to have transferred.



FULL GUARDIANSHIP

Proposed
guardianship
legislation

LRB –
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3. Legal
Standard for
Appointing
Guardian of
Person for
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48.976(3)(b)4.
48.976(2)(C)1.
Petition...

4. ..a full guardianship, the facts and circumstances establishing that the child's parents are unfit, unwilling, or unable to provide for the care, custody, and control of the child or other compelling facts and circumstances demonstrating that a full guardianship is necessary.



**Proposed
guardianship
legislation**

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**4. B. Procedural
Requirements**

**Interested
Persons entitled
to notice
48.976 (1)(a) &
(3)(a)**

- Petition 48 .976(1)(a) & (b)
- Interested persons:
 - ❖ Any person
 - ❖ Child, 12 & over
 - ❖ GAL/Counsel
 - ❖ Parent, Guardian, Legal, Physical Custodian
 - ❖ Alleged father
 - ❖ Nominee for guardian
 - ❖ Person named to act as fiduciary
 - ❖ County DHS if child receiving Services
 - ❖ ICWA – Tribe, Custodian
 - ❖ Any other person Required by Court



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**5. B.
Procedural
Requirements**

**Appointment
of GAL
Required
48.235(3)**

5. B. 48.235(1)(c) & (3) (c)

- Appointment of GAL required
- Specific Duties of GAL Identified:
 - ❑ ... Meet with Child ...
 - ❑ ... Interview proposed guardian
 - ❑ Visit the home guardian
 - ❑ ... Attend all court hearings
 - ❑ ... Make recommendation to the court...
 - ❑ ... Report to court as requested...
 - ❑ ... *Court may reduce duties...*



Proposed guardianship legislation
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5. C. – D. Time Requirements for Scheduling & Notice Requirements
48.976(3)(c)1.- 3.

5. C. Initial Hearing scheduled within 45 days after filing..
5. D. Notice & Petition served at least 7 days before hearing unless waived..
- Notice attached to petition and shall be personally served or mail notice either by proof that it was mailed or written admission it was received... **(no publication)**
 - Notice to Tribe is 10 days but notice to BIA office is 15 days.



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legislation**

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**5. E.
Proposed
Guardian
Statement**

48.976(3)(d)

5. E. Statement by Proposed Guardian.

- Filed at least 96 hours before initial hearing
- Sworn and notarized statement
- Identify number of person proposed guardian is responsible..
- Assets and financial statement...
- Whether convicted or determined to have abused or neglected a child 49.981...
- ..



Proposed guardianship legislation

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5. F. Initial Hearing

48.976(3)(e)1.

5. F. Initial Hearing.

- Schedule within 45 days of *filing*
- Court determines whether contested.
- If uncontested proceed to fact finding and dispositional hearing.
- Adjournment may be granted for reasonable period of time to prepare.
- If contested, schedule fact finding & disposition within 30 days.
- ❑ Burden of Proof is Clear & Convincing
- ❑ No jury trial
- ❑ Formal rules of evidence apply for fact finding & informal for disposition



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legislation**

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**5. G.
Investigation
report.**

48.976(3)(e)2.

5. G. Investigation report

- If contested ...
- On request of party or court,
- court may order county agency to conduct investigation & submit written report ...
- Due at least **96** hours prior to fact finding and disposition hearing.
- Parent and proposed guardian shall reimburse Agency for cost of conducting investigation according to fee schedule...



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5. H. Disposition

48.976(2)(a)4.
48.976(3)(f)
48.976(3)(g)

5. H. Disposition

❑ Factors:

- Opinion of child & parents
- Fit, willingness & ability of person to serve
- Placement preference under ICWA
- Whether in Best Interest of child

❑ The court may appoint co guardians of the person for a child under this section, subject to any conditions that the court imposes. Unless the court orders otherwise, any decision concerning the child must be concurred in by all co guardians or is void.

❑ May designate parental support

❑ May designate rules of parental visitation

❑ For Temporary & Limited Guardianship -
Identify Specific Authority of guardian



**Proposed
guardianship
legislation**

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**5. I.
Modification
Successor
Termination**

48.976(8)

[1/2]

5. I. Modification to Guardianship Order:

❑ **Successor** Guardian

- ❖ Motion of court or petition of any interested person
- ❖ Court may appoint suitable person to serve as Successor guardian.
- ❖ Follow same procedures for original appointment.

❑ **Modification** of Guardianship Order

- ❖ File motion, hearing & **7** days notice
- ❖ Set forth facts... Substantial Change in Circumstances & Best Interests
- ❖ Clear & Convincing Burden on Person seeking change.



5. I. Modification to Guardianship Order:
- ☐ **Review** conduct or Cause for court action against guardian.
 - ❖ **Abuse or neglect**
 - ❖ Failed to **disclose** information in “statement filed by proposed guardian”
 - ❖ **Fails** to perform **Duties** under 48.023
 - ☐ Interested or other person may file petition setting forth facts
 - ☐ 7 days notice & schedule within 30 days of filing
 - ☐ **Options**: remove, enter other necessary orders, modify duties, require guardian to pay **attorney fees** & **services** if conduct egregious.



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guardianship
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**5. I.
Termination of
Guardianship**

48.976(10)(a)

[1/2]

5. I. Termination: (OTHER REASONS)

- ❑ Guardianship order under this section are until **age 18 unless**:
 - ❖ Order is for lessor period or **expired**
 - ❖ Child **marries** or **dies**
 - ❖ **New guardian** appointed
 - ❖ Guardian **removed** for cause
 - ❖ Court **terminates** guardianship on request of parent under 48.476(10)(b)



**Proposed
guardianship
legislation**

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**5. I.
Termination of
Guardianship**

48.976(10)(b)

[2/2]

5. I. Termination:

- ☐ Termination Request by Parent
48.476(10)(b)
- ☐ Filed by parent and Parent must show:
 - ❖ ...Substantial change in circumstances...
 - ❖ ... Parent fit, willing & able....
 - ❖ ..Best Interests... of child..
- ☐ Burden is on parent..
- ☐ Clear & convincing evidence.

