

Enrolled
Senate Bill 230

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CHAPTER

AN ACT

Relating to guardians ad litem in juvenile dependency proceedings; creating new provisions; amending ORS 419B.010, 419B.819, 419B.839, 419B.875 and 419B.881; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2, 3 and 4 of this 2005 Act are added to and made a part of ORS chapter 419B.

SECTION 2. (1) In a proceeding under this chapter, including a proceeding for the termination of parental rights, the court, on its own motion or on the written or oral motion of a party in the proceeding, may appoint a guardian ad litem for a parent involved in the proceeding as provided in this section.

(2) The court shall conduct a hearing to determine whether to appoint a guardian ad litem in a proceeding under this chapter if:

(a) A party moves for the appointment and the affidavit or oral representations submitted in support of the motion state facts that, if proved at a hearing under this section, would establish that it is more probable than not that:

(A) Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; and

(B) The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment; or

(b) The court has a reasonable belief that:

(A) Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; and

(B) The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment.

(3)(a) A court may not appoint a guardian ad litem under this section unless the court conducts a hearing. At the hearing, the court may receive testimony, reports and other evidence without regard to whether the evidence is admissible under ORS 40.010 to 40.210 and 40.310 to 40.585 if the evidence is:

(A) Relevant to the findings required under this section; and
(B) Of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.

(b) For purposes of this subsection, evidence is relevant if it is “relevant evidence” as defined in ORS 40.150.

(4) A court may not appoint a guardian ad litem for a parent unless the court finds by a preponderance of the evidence presented at the hearing that:

(a) Due to the parent’s mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent’s attorney on decisions the parent must make in the proceeding; and

(b) The appointment of a guardian ad litem is necessary to protect the parent’s rights in the proceeding during the period of the parent’s disability or impairment.

(5) The fact that a guardian ad litem has been appointed under this section may not be used as evidence of mental or emotional illness in any juvenile court proceeding, any civil commitment proceeding or any other civil proceeding.

SECTION 3. (1) A person appointed as a guardian ad litem under section 2 of this 2005 Act:

(a) Must be a licensed mental health professional or attorney;
(b) Must be familiar with legal standards relating to competence;
(c) Must have skills and experience in representing persons with mental and physical disabilities or impairments; and

(d) May not be a member of the parent’s family.

(2) The guardian ad litem is not a party in the proceeding but is a representative of the parent.

(3) The guardian ad litem shall:

(a) Consult with the parent, if the parent is able, and with the parent’s attorney and make any other inquiries as are appropriate to assist the guardian ad litem in making decisions in the juvenile court proceeding.

(b) Make legal decisions that the parent would ordinarily make concerning the juvenile court proceeding including, but not limited to, whether to:

(A) Admit or deny the allegations of any petition;

(B) Agree to or contest jurisdiction, wardship, temporary commitment, guardianship or permanent commitment;

(C) Accept or decline a conditional postponement; or

(D) Agree to or contest specific services or placement.

(c) Make decisions concerning the adoption of a child of the parent including release or surrender, certificates of irrevocability and consent to adoption under ORS 109.312 or 418.270 and agreements under ORS 109.305.

(d) Control the litigation and provide direction to the parent’s attorney on the decisions that would ordinarily be made by the parent in the proceeding.

(e) Inform the court if the parent no longer needs a guardian ad litem.

(4) In making decisions under subsection (3) of this section, the guardian ad litem shall make the decisions consistent with what the guardian ad litem believes the parent would decide if the parent did not lack substantial capacity to either understand the nature and consequences of the proceeding or give direction or assistance to the parent’s attorney on decisions the parent must make in the proceeding.

(5) The parent’s attorney shall follow directions provided by the guardian ad litem on decisions that are ordinarily made by the parent in the proceeding. The parent’s attorney shall inquire at every critical stage in the proceeding as to whether the parent’s competence has changed and, if appropriate, shall request removal of the guardian ad litem.

(6)(a) A parent for whom a guardian ad litem has been appointed under section 2 of this 2005 Act has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the parent:

(A) Between the guardian ad litem and the parent's attorney or a representative of the attorney; or

(B) Between the guardian ad litem and the parent.

(b) The privilege created by this subsection:

(A) May be claimed by the parent or the guardian ad litem. The guardian ad litem may claim the privilege only on behalf of the parent.

(B) Is subject to ORS 40.280, 40.285 and 40.290.

SECTION 4. (1) The appointment of a guardian ad litem under section 2 of this 2005 Act continues until:

(a) The court terminates the appointment;

(b) The juvenile court proceeding is dismissed; or

(c) The parent's parental rights are terminated, unless the court continues the appointment.

(2) A party to the proceeding or the attorney for the parent for whom a guardian ad litem has been appointed may request removal of the guardian ad litem. The court:

(a) Shall remove the guardian ad litem if the court determines that the parent no longer lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; or

(b) May remove the guardian ad litem on other grounds as the court determines appropriate.

(3) The Public Defense Services Commission shall compensate a guardian ad litem for duties the guardian ad litem performs in the proceeding from funds appropriated to the commission.

SECTION 5. ORS 419B.819 is amended to read:

419B.819. (1) A court may make an order establishing permanent guardianship under ORS 419B.365 or terminating parental rights under ORS 419B.500, 419B.502, 419B.504, 419B.506 or 419B.508 only after service of summons and a true copy of the petition on the parent, as provided in ORS 419B.812, 419B.823, 419B.824, 419B.827, 419B.830 and 419B.833.

(2) A summons under this section must require one of the following:

(a) That the parent appear personally before the court at the time and place specified in the summons for a hearing on the allegations of the petition;

(b) That the parent appear personally before the court at the time and place specified in the summons to admit or deny the allegations of the petition; or

(c) That the parent file a written answer to the petition within 30 days from the date on which the parent is served with the summons.

(3) If the court does not direct the type of response to be required by the summons under subsection (2) of this section, the summons shall require the parent to respond in the manner authorized by subsection (2)(c) of this section.

(4) A summons under this section must contain:

(a) A statement that the rights of the parent are proposed to be terminated or, if the petition seeks to establish a permanent guardianship, that a permanent guardianship is proposed to be established.

(b) A statement that, if the parent fails to appear at the time and place specified in the summons or in an order under ORS 419B.820 or, if the summons requires the filing of a written answer, fails to file the answer within the time provided, the court may, without further notice and in the parent's absence, terminate the parent's rights or grant the guardianship petition, either on the date speci-

fied in the summons or order or on a future date, and may take any other action that is authorized by law.

(c) A notice that the parent has the right to be represented by an attorney. The notice must be in substantially the following form:

You have a right to be represented by an attorney. If you wish to be represented by an attorney, please retain one as soon as possible to represent you in this proceeding. If you cannot afford to hire an attorney and you meet the state's financial guidelines, you are entitled to have an attorney appointed for you at state expense. To request appointment of an attorney to represent you at state expense, you must contact the juvenile court immediately. Phone _____ for further information.

(d) A statement that the parent has the responsibility to maintain contact with the parent's attorney and to keep the attorney advised of the parent's whereabouts.

(5) If the summons requires the parent to appear before the court to admit or deny the allegations of the petition or requires the parent to file a written answer to the petition, the summons must advise the parent that, if the parent contests the petition, the court:

(a) Will schedule a hearing on the allegations of the petition and order the parent to appear personally; and

(b) May schedule other hearings related to the petition and order the parent to appear personally.

(6) At a hearing, when the parent is required to appear personally, or in the parent's written answer to the petition, the parent shall inform the court and the petitioner of the parent's current residence address, mailing address and telephone number.

(7) If a parent fails to appear for any hearing related to the petition, or fails to file a written answer, as directed by summons or court order under this section or ORS 419B.820, the court, without further notice and in the parent's absence, may:

(a) Terminate the parent's rights or, if the petition seeks to establish a permanent guardianship, grant the guardianship petition either on the date specified in the summons or order or on a future date; and

(b) Take any other action that is authorized by law.

(8) If a guardian ad litem has been appointed for a parent under section 2 of this 2005 Act, a copy of the summons served on the parent under this section must be provided to the guardian ad litem.

SECTION 6. ORS 419B.839 is amended to read:

419B.839. (1) Summons in proceedings to establish jurisdiction under ORS 419B.100 must be served on:

(a) The legal parents of the child without regard to who has legal or physical custody of the child;

(b) The legal guardian of the child;

(c) A putative father of the child if he has provided or offered to provide for the physical, emotional, custodial or financial needs of the child in the previous six months or was prevented from doing so by the mother of the child;

(d) The person who has physical custody of the child, if the child is not in the physical custody of a parent; and

(e) The child, if the child is 12 years of age or older.

(2) If it appears to the court that the welfare of the child or of the public requires that the child immediately be taken into custody, the court may indorse an order on the summons directing the officer serving it to take the child into custody.

(3) Summons may be issued requiring the appearance of any person whose presence the court deems necessary.

(4) If a guardian ad litem has been appointed for a parent under section 2 of this 2005 Act, a copy of a summons served on the parent under this section must be provided to the guardian ad litem.

SECTION 7. ORS 419B.010 is amended to read:

419B.010. (1) Any public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child shall immediately report or cause a report to be made in the manner required in ORS 419B.015. Nothing contained in ORS 40.225 to 40.295 *[shall affect]* **or section 3 (6) of this 2005 Act affects** the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy, *[or]* attorney *[shall not be]* **or guardian ad litem appointed under section 2 of this 2005 Act is not** required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295 **or section 3 (6) of this 2005 Act**. An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client*[,]* if disclosure of the information would be detrimental to the client.

(2) Notwithstanding subsection (1) of this section, a report need not be made under this section if the public or private official acquires information relating to abuse by reason of a report made under this section, or by reason of a proceeding arising out of a report made under this section, and the public or private official reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services.

(3) A person who violates subsection (1) of this section commits a Class A violation. Prosecution under this subsection shall be commenced at any time within 18 months after commission of the offense.

SECTION 8. ORS 419B.875 is amended to read:

419B.875. (1)(a) Parties to proceedings in the juvenile court under ORS 419B.100 and*[,] except as provided in paragraph (h) of this subsection, under ORS* 419B.500 are:

[(a)] (A) The child or ward;

[(b)] (B) The legal parents or guardian of the child or ward;

[(c)] (C) A putative father of the child or ward if he has provided or offered to provide for the physical, emotional, custodial or financial needs of the child or ward in the previous six months or was prevented from doing so by the mother of the child or ward;

[(d)] (D) The state;

[(e)] (E) The juvenile department;

[(f)] (F) A court appointed special advocate, if appointed;

[(g)] (G) The Department of Human Services or other child-caring agency if the agency has temporary custody of the child or ward; **and**

[(h) An intervenor who is granted intervention under ORS 419B.116. An intervenor under this paragraph is not a party to a proceeding under ORS 419B.500;]

[(i) A guardian ad litem appointed under subsection (2) of this section; and]

[(j)] (H) The tribe in cases subject to the Indian Child Welfare Act if the tribe has intervened pursuant to the Indian Child Welfare Act.

(b) An intervenor who is granted intervention under ORS 419B.116 is a party to a proceeding under ORS 419B.100. An intervenor under this paragraph is not a party to a proceeding under ORS 419B.500.

[(2) When a court determines that a parent or guardian, due to mental or physical disability, cannot adequately act in the parent's or guardian's interests or give direction to the parent's or guardian's counsel on decisions the parent or guardian must make, the court shall appoint some suitable person to act as guardian ad litem for the parent or guardian.]

[(3)] (2) The rights of the parties include, but are not limited to:

(a) The right to notice of the proceeding and copies of the petitions, answers, motions and other papers;

(b) The right to appear with counsel and, except for intervenors under subsection [(1)(h)] (1)(b) of this section, to have counsel appointed as otherwise provided by law;

(c) The right to call witnesses, cross-examine witnesses and participate in hearings;

(d) The right of appeal; and

(e) The right to request a hearing.

[(4)(a)] (3)(a) A person granted rights of limited participation under ORS 419B.116 is not a party to a proceeding under ORS 419B.100 or 419B.500 but has only those rights specified in the order granting rights of limited participation.

(b) Persons moving for or granted rights of limited participation are not entitled to appointed counsel but may appear with retained counsel.

[(5)] (4) If a foster parent, preadoptive parent or relative is currently providing care for a child or ward, the Department of Human Services shall give the foster parent, preadoptive parent or relative notice of a hearing concerning the child or ward and the court shall give the person an opportunity to be heard. Except when allowed to intervene, the foster parent, preadoptive parent or relative providing care for the child or ward is not considered a party to the juvenile court proceeding solely because of notice and an opportunity to be heard.

[(6)] (5) When a legal grandparent of a child or ward requests in writing and provides a mailing address, the Department of Human Services shall give the legal grandparent notice of a hearing concerning the child or ward and the court shall give the legal grandparent an opportunity to be heard. Except when allowed to intervene, a legal grandparent is not considered a party to the juvenile court proceeding solely because of notice and an opportunity to be heard.

[(7)] (6) Interpreters for parties and persons granted rights of limited participation shall be appointed in the manner specified by ORS 45.275 and 45.285.

SECTION 9. ORS 419B.881 is amended to read:

419B.881. (1) In all proceedings brought under ORS 419B.100 or 419B.500, each party, including the state, shall disclose to each other party **and to a guardian ad litem appointed under section 2 of this 2005 Act** the following information and material within the possession or under the control of the party:

(a) The names and addresses of all persons the party intends to call as witnesses at any stage of the hearing, together with any relevant written or recorded statements or memoranda of any oral statements of such persons;

(b) Any written or recorded statements or memoranda of any oral statements made either by the parent or by the child to any other party or agent for any other party;

(c) Any reports or statements of experts who will be called as witnesses, including the results of any physical or mental examinations and of comparisons or experiments that the party intends to offer in evidence at the hearing; and

(d) Any books, papers, documents or photographs that the party intends to offer in evidence at the hearing, or that were obtained from or belong to any other party.

(2)(a) Disclosure shall be made as soon as practicable following the filing of a petition and no later than:

(A) Thirty days after a petition alleging jurisdiction has been filed.

(B) Three days before any review hearing, except for information received or discovered less than three days prior to the hearing.

(C) Ten days before a termination trial, except for information received or discovered less than 10 days prior to the trial.

(b) The court may supervise the exercise of discovery to the extent necessary to insure that it proceeds properly and expeditiously.

(3) The obligation to disclose is an ongoing obligation and if a party finds, either before or during the hearing, additional material or information that is subject to disclosure, the information or material shall be promptly disclosed.

- (4) The following material and information need not be disclosed:
 - (a) Attorney work product; and
 - (b) Transcripts, recordings or memoranda of testimony of witnesses before the grand jury, except transcripts or recordings of testimony of a party to the current juvenile court proceeding.
- (5) Upon a showing of good cause, the court may at any time order that specified disclosure be denied, restricted or deferred or make such other order as is appropriate.
- (6) Upon request of a party, the court may permit a showing of good cause for denial or regulation of disclosure by the parties or the contents of subpoenaed materials, or portion of the showing, to be made in camera. A record shall be made of the proceeding.
- (7) If the court enters an order following an in camera showing, the entire record of the showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal. The trial court may, after disposition, unseal the record.
- (8) When some parts of certain material are subject to disclosure and other parts are not, as much of the material as is subject to disclosure shall be disclosed.
- (9) Upon being notified of any breach of a duty to disclose material or information, the court may:
 - (a) Order the violating party to permit inspection of the material;
 - (b) Grant a continuance;
 - (c) Refuse to permit the witness to testify;
 - (d) Refuse to receive in evidence the material that was not disclosed; or
 - (e) Enter such other order as the court considers appropriate.

SECTION 10. This 2005 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2005 Act takes effect on its passage.

Passed by Senate March 24, 2005

Received by Governor:

Repassed by Senate June 21, 2005

.....M.,....., 2005

Approved:

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Secretary of Senate

.....M.,....., 2005

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President of Senate

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Governor

Passed by House June 17, 2005

Filed in Office of Secretary of State:

.....M.,....., 2005

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Speaker of House

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Secretary of State