

Senate Bill 230

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes procedure for appointing guardian ad litem for parent in juvenile dependency proceedings.

A BILL FOR AN ACT

1
2 Relating to guardians ad litem in juvenile dependency proceedings; creating new provisions; and
3 amending ORS 419B.010, 419B.819, 419B.839, 419B.875 and 419B.881.

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

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

7 **SECTION 2. (1) In a proceeding under this chapter, including a proceeding for the ter-**
8 **mination of parental rights, the court, on its own motion or the motion of a party in the**
9 **proceeding, may conduct a hearing to determine whether a guardian ad litem should be ap-**
10 **pointed for a parent involved in the proceeding. A party may make a motion under this**
11 **subsection in writing or orally.**

12 **(2) The court shall grant a motion made under subsection (1) of this section and conduct**
13 **the hearing requested if an affidavit accompanying the motion or the oral representations**
14 **of the party making the motion set forth facts that establish that it is more probable than**
15 **not that the parent, due to mental or physical disability, lacks substantial capacity to either**
16 **understand the nature and consequences of the proceedings or give direction and assistance**
17 **to the parent's attorney on decisions the parent must make.**

18 **(3) The court may grant a motion made under subsection (1) of this section and conduct**
19 **the hearing requested or may conduct a hearing on its own motion if the court has a rea-**
20 **sonable belief that the parent, due to mental or physical disability, lacks substantial capacity**
21 **to either understand the nature and consequences of the proceedings or give direction and**
22 **assistance to the parent's attorney on decisions the parent must make.**

23 **(4) A court may not appoint a guardian ad litem under this section unless the court**
24 **conducts a hearing. At the hearing, the court may receive testimony, reports and other ev-**
25 **idence without regard to whether the evidence is admissible under ORS 40.010 to 40.210 and**
26 **40.310 to 40.585 if the evidence is relevant to the determinations and findings required under**
27 **this section. As used in this subsection, "relevant evidence" has the meaning given that term**
28 **in ORS 40.150.**

29 **(5) The court may not appoint a guardian ad litem for a parent unless the court finds by**
30 **a preponderance of the evidence that the parent, due to mental or physical disability, lacks**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 substantial capacity to either understand the nature and consequences of the proceedings
 2 or give direction and assistance to the parent’s attorney on decisions the parent must make.

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

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

- 8 (a) Must be a licensed mental health professional or attorney;
- 9 (b) Must be familiar with legal standards relating to competence;
- 10 (c) Must have skills and experience in representing persons with mental and physical
 11 disabilities; and
- 12 (d) May not be a member of the parent’s family.

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

15 (3) The guardian ad litem shall:

- 16 (a) Consult with the parent, if the parent is able, and with the parent’s attorney.
- 17 (b) Make legal decisions that the parent would ordinarily make concerning the case and
 18 decisions concerning the adoption of a child of the parent including release or surrender,
 19 certificates of irrevocability and consent to adoption under ORS 109.312 or 418.270 and
 20 agreements under ORS 109.305.

21 (c) Control the litigation and provide direction to the parent’s attorney on the decisions
 22 that would ordinarily be made by the parent.

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

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

29 (5) When a guardian ad litem has been appointed under section 2 of this 2005 Act, the
 30 parent’s attorney shall monitor the performance of the guardian ad litem to ensure that the
 31 guardian ad litem adequately asserts the parent’s interests. The parent’s attorney shall in-
 32 quire at every critical stage in the proceeding as to whether the parent’s competence has
 33 changed and, if appropriate, shall request removal of the guardian ad litem.

34 (6)(a) A parent for whom a guardian ad litem has been appointed under section 2 of this
 35 2005 Act has a privilege to refuse to disclose and to prevent any other person from disclosing
 36 confidential communications made for the purpose of facilitating the rendition of professional
 37 services to the parent:

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

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

41 (b) The privilege created by this subsection:

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

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

45 **SECTION 4.** (1) The appointment of a guardian ad litem under section 2 of this 2005 Act

1 **continues until:**

2 (a) **The court terminates the appointment;**

3 (b) **The case is dismissed; or**

4 (c) **The parent’s parental rights are terminated, unless the court continues the appoint-**
 5 **ment.**

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

8 (a) **Shall remove the guardian ad litem if the court determines that the parent no longer**
 9 **lacks substantial capacity to either understand the nature and consequences of the pro-**
 10 **ceedings or give direction and assistance to the parent’s attorney on decisions the parent**
 11 **must make; or**

12 (b) **May remove the guardian ad litem on other grounds as the court determines appro-**
 13 **priate.**

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

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

18 419B.819. (1) A court may make an order establishing permanent guardianship under ORS
 19 419B.365 or terminating parental rights under ORS 419B.500, 419B.502, 419B.504, 419B.506 or
 20 419B.508 only after service of summons and a true copy of the petition on the parent, as provided
 21 in ORS 419B.812, 419B.823, 419B.824, 419B.827, 419B.830 and 419B.833.

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

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

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

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

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

32 (4) A summons under this section must contain:

33 (a) A statement that the rights of the parent are proposed to be terminated or, if the petition
 34 seeks to establish a permanent guardianship, that a permanent guardianship is proposed to be es-
 35 tablished.

36 (b) A statement that, if the parent fails to appear at the time and place specified in the summons
 37 or in an order under ORS 419B.820 or, if the summons requires the filing of a written answer, fails
 38 to file the answer within the time provided, the court may, without further notice and in the parent’s
 39 absence, terminate the parent’s rights or grant the guardianship petition, either on the date specified
 40 in the summons or order or on a future date, and may take any other action that is authorized by
 41 law.

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

44 _____

45

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

7 _____
 8
 9 (d) A statement that the parent has the responsibility to maintain contact with the parent's at-
 10 torney and to keep the attorney advised of the parent's whereabouts.

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

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

16 (b) May schedule other hearings related to the petition and order the parent to appear per-
 17 sonally.

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

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

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

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

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

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

32 419B.839. (1) Summons in proceedings to establish jurisdiction under ORS 419B.100 must be
 33 served on:

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

36 (b) The legal guardian of the child;

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

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

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

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

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

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

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

7 419B.010. (1) Any public or private official having reasonable cause to believe that any child
8 with whom the official comes in contact has suffered abuse or that any person with whom the offi-
9 cial comes in contact has abused a child shall immediately report or cause a report to be made in
10 the manner required in ORS 419B.015. Nothing contained in ORS 40.225 to 40.295 [*shall affect*] **or**
11 **section 3 (6) of this 2005 Act affects** the duty to report imposed by this section, except that a
12 psychiatrist, psychologist, member of the clergy, [*or*] attorney [*shall not be*] **or guardian ad litem**
13 **appointed under section 2 of this 2005 Act is not** required to report such information communi-
14 cated by a person if the communication is privileged under ORS 40.225 to 40.295 **or section 3 (6)**
15 **of this 2005 Act.** An attorney is not required to make a report under this section by reason of in-
16 formation communicated to the attorney in the course of representing a client[,] if disclosure of the
17 information would be detrimental to the client.

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

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

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

27 419B.875. (1)(a) Parties to proceedings in the juvenile court under ORS 419B.100 and[, *except as*
28 *provided in paragraph (h) of this subsection, under ORS*] 419B.500 are:

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

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

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

34 [(d)] (D) The state;

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

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

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

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

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

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

44 **(b) An intervenor who is granted intervention under ORS 419B.116 is a party to a pro-**
45 **ceeding under ORS 419B.100. An intervenor under this paragraph is not a party to a pro-**

1 **ceeding under ORS 419B.500.**

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

6 [(3)] (2) The rights of the parties include, but are not limited to:

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

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

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

12 (d) The right of appeal; and

13 (e) The right to request a hearing.

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

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

19 [(5)] (4) If a foster parent, preadoptive parent or relative is currently providing care for a child
 20 or ward, the Department of Human Services shall give the foster parent, preadoptive parent or re-
 21 lative notice of a hearing concerning the child or ward and the court shall give the person an op-
 22 portunity to be heard. Except when allowed to intervene, the foster parent, preadoptive parent or
 23 relative providing care for the child or ward is not considered a party to the juvenile court pro-
 24 ceeding solely because of notice and an opportunity to be heard.

25 [(6)] (5) When a legal grandparent of a child or ward requests in writing and provides a mailing
 26 address, the Department of Human Services shall give the legal grandparent notice of a hearing
 27 concerning the child or ward and the court shall give the legal grandparent an opportunity to be
 28 heard. Except when allowed to intervene, a legal grandparent is not considered a party to the ju-
 29 venile court proceeding solely because of notice and an opportunity to be heard.

30 [(7)] (6) Interpreters for parties and persons granted rights of limited participation shall be ap-
 31 pointed in the manner specified by ORS 45.275 and 45.285.

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

33 419B.881. (1) In all proceedings brought under ORS 419B.100 or 419B.500, each party, including
 34 the state, shall disclose to each other party **and to a guardian ad litem appointed under section**
 35 **2 of this 2005 Act** the following information and material within the possession or under the control
 36 of the party:

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

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

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

45 (d) Any books, papers, documents or photographs that the party intends to offer in evidence at

1 the hearing, or that were obtained from or belong to any other party.

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

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

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

7 (C) Ten days before a termination trial, except for information received or discovered less than
8 10 days prior to the trial.

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

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

14 (4) The following material and information need not be disclosed:

15 (a) Attorney work product; and

16 (b) Transcripts, recordings or memoranda of testimony of witnesses before the grand jury, except
17 transcripts or recordings of testimony of a party to the current juvenile court proceeding.

18 (5) Upon a showing of good cause, the court may at any time order that specified disclosure be
19 denied, restricted or deferred or make such other order as is appropriate.

20 (6) Upon request of a party, the court may permit a showing of good cause for denial or regu-
21 lation of disclosure by the parties or the contents of subpoenaed materials, or portion of the show-
22 ing, to be made in camera. A record shall be made of the proceeding.

23 (7) If the court enters an order following an in camera showing, the entire record of the showing
24 shall be sealed and preserved in the records of the court, to be made available to the appellate court
25 in the event of an appeal. The trial court may, after disposition, unseal the record.

26 (8) When some parts of certain material are subject to disclosure and other parts are not, as
27 much of the material as is subject to disclosure shall be disclosed.

28 (9) Upon being notified of any breach of a duty to disclose material or information, the court
29 may:

30 (a) Order the violating party to permit inspection of the material;

31 (b) Grant a continuance;

32 (c) Refuse to permit the witness to testify;

33 (d) Refuse to receive in evidence the material that was not disclosed; or

34 (e) Enter such other order as the court considers appropriate.

35