

DECISION-MAKING AUTHORITY FOR DEPENDENT CHILDREN WHO ARE NOT IN THE CUSTODY OF DHS

The Oregon Child Advocacy Project

Professor Leslie J. Harris and Child Advocacy Fellows Jordan Bates and Gloria Trainor
March 2008

Summary

If a juvenile court does not commit a dependent child to the Department of Human Services, it may allow the parents to retain legal custody or it may grant legal custody to a private individual or a public or private child-caring agency. The court determines who has specific responsibility to make decisions for the child by its allocation of “legal custody” and “guardianship,” by orders entered pursuant to its “protective supervision” authority, and by reviewing cases and revising case plans at regular reviews and permanency hearings.

Decision-making for Children Whose Parents’ Rights Have Not Been Terminated¹

When the juvenile court finds a child to be a dependent and thus within its jurisdiction under ORS 419B.100,² the court makes the child a “ward of the court,” signifying the court’s continuing authority over the child until the court dismisses the petition, transfers jurisdiction to another court, or orders that wardship terminate, or the child is adopted or becomes 21. ORS 419B.328. Under this authority, the court determines who will provide for the child on a day-to-day basis by determining who has legal custody of the child. In a great many cases the court awards legal custody to the Department of Human Services under ORS 419B.337. This memo does not deal with this situation; instead, it addresses authority over the child when the court leaves the child in the legal custody of the parents or grants custody to another person³ or to a child care

¹ This memo does not cover medical neglect and related issues.

² The juvenile court has exclusive original jurisdiction of a child under 18:

- (a) Who is beyond the control of the person's parents, guardian or other person having custody of the person;
- (b) Whose behavior is such as to endanger the welfare of the person or of others;
- (c) Whose condition or circumstances are such as to endanger the welfare of the person or of others;
- (d) Who is dependent for care and support on a public or private child-caring agency that needs the services of the court in planning for the best interest of the person;
- (e) Whose parents or any other person or persons having custody of the person have:
 - (A) Abandoned the person;
 - (B) Failed to provide the person with the care or education required by law;
 - (C) Subjected the person to cruelty, depravity or unexplained physical injury; or
 - (D) Failed to provide the person with the care, guidance and protection necessary for the physical, mental or emotional well-being of the person;
- (f) Who has run away from the home of the person;
- (g) Who has filed a petition for emancipation pursuant to ORS 419B.550 to 419B.558; or
- (h) Who is subject to an order entered under ORS 419C.411 (7)(a).

³ A child’s relatives and people who have established a “caregiver relationship” with the child under ORS 419B.116 are the preferred placements for a child in substitute care. ORS 419B.192(1).

center or youth care center, as authorized by ORS 419B.331. Besides determining legal custody, the court also has authority to place the child under protective supervision and to determine the child's guardian; by combining these three kinds of orders, the juvenile court allocates responsibility over the child.

The most basic concept is "legal custody," which is defined in ORS 419B.373. The legal custodian has the duty and responsibility:

- “1) To have physical custody and control of the ward.
- 2) To supply the ward with food, clothing, shelter and incidental necessities.
- 3) To provide the ward with care, education and discipline.
- 4) To authorize ordinary medical, dental, psychiatric, psychological, hygienic or other remedial care and treatment for the ward, and, in an emergency where the ward's safety appears urgently to require it, to authorize surgery or other extraordinary care.
- 5) To make such reports and to supply such information to the court as the court may from time to time require.
- 6) To apply for any Social Security benefits or public assistance to which the ward is otherwise entitled and to use the benefits or assistance to pay for the care of the ward.”

ORS 419B.373. No appellate cases have interpreted this statute.

The juvenile court can limit and shape the authority of the legal custodian (whether the parent, another adult, or a child-caring entity) by placing the child under the court's protective supervision under ORS § 419B.331. The protective supervision authority permits the court to “specify particular requirements to be observed during the protective supervision consistent with recognized juvenile court practice, including but not limited to restrictions on visitation by the ward's parents, restrictions on the ward's associates, occupation and activities, restrictions on and requirements to be observed by the person having the ward's legal custody, and requirements for visitation by and consultation with a juvenile counselor or other suitable counselor.” *Id.* The Oregon appellate courts have not specifically construed this statute, although the Court of Appeals held that a similar provision regarding probation conditions for delinquents requires that “any additional requirement must be of the same kind as those specifically set out in the statute.” *State ex rel. Juvenile Dept. of Multnomah County v. Gallagher*, 79 Or.App. 39, 717 P.2d 1242 (1986).

Who makes other decisions regarding the child in this situation depends on who has “guardianship” as that term is defined in ORS 419B.376. The duties and responsibilities of the guardian include:

- “1) To authorize surgery for the ward, but this authority does not prevent the person having legal custody of the ward from acting under ORS 419B.373 (4).
- 2) To authorize the ward to enlist in the Armed Forces of the United States.
- 3) To consent to the ward's marriage.
- 4) [When the child's parents' rights have been terminated], to consent to the adoption of the ward.
- 5) To make other decisions concerning the ward of substantial legal significance.

(6) To make such reports and to supply such information to the court as the court may from time to time require.”

ORS 419B.376. The juvenile court may grant the child’s legal custodian guardianship “if it appears necessary to do so in the interests of the ward.” ORS 419B.370(2). If the court does not explicitly grant guardianship to the legal custodian, it retains these powers itself. ORS 419B.370(3).

A guardian under the juvenile code does not have authority to manage the child’s property; if this authority is required, a conservatorship proceeding must be instituted under the provisions of ORS Chapter 125. ORS. 419B.479.

If the juvenile court grants legal custody or guardianship to an entity (rather than an individual), it retains supervisory responsibilities and authority over the child which are facilitated by the obligation of the entity to file reports with the court of citizen review board as soon as it places the child and every six months thereafter. ORS 419B.440; 419B.446. The court (or CRB) may hold a hearing after receiving such a report “to review the child or ward’s condition and circumstances and to determine if the court should continue jurisdiction and wardship or order modifications in the care, placement and supervision of the child or ward.” ORS 419B.449(1). It must hold a hearing at the request of the child or the child’s attorney, the parents, or the agency. ORS 419B.449(1)(b). The purpose of the hearing is to determine whether plans to move the child into a permanent placement have been made and are being implemented and to make needed changes. In addition, if the child is in the care of an agency,⁴ the court must hold a permanency hearing within 12 months of the court assuming jurisdiction over the child and every 12 months thereafter so long as the child remains in substitute care. ORS 419B.470. At the hearing the court may order the agency “to modify the care, placement and supervision of the ward.” ORS 419B.470(4)(g). It must also determine the permanent plan for the child. ORS 419B.470(5).

Legal Custody and Guardianship When the Parents’ Rights have been Terminated

After a child’s parents’ rights have been terminated, the juvenile court ordinarily places the child in the legal custody and guardianship of DHS, which has responsibility and authority to arrange for the child’s adoption or other permanent placement. ORS 419B.527 (1)(a). However, the juvenile court has other alternatives, including placing the child in the legal custody and guardianship of another public or private agency authorized to place children for adoption or making “any order directing disposition of the ward that it is empowered to make under this chapter.” ORS 419B.527(1). As discussed above, this includes authority to grant legal custody to a private individual.

⁴ The statute actually refers to a child in “substitute care.” “Substitute care” is defined in ORS 419A.004(28) as “an out-of-home placement directly supervised by the department or other agency, including placement in a foster family home, group home or other child caring institution or facility. “Substitute care” does not include care in:

- (a) A detention facility, forestry camp or youth correction facility;
- (b) A family home that the court has approved as a ward’s permanent placement, when a private child caring agency has been appointed guardian of the ward and when the ward’s care is entirely privately financed; or
- (c) In-home placement subject to conditions or limitations.”

ORS 419B.460 provides that if a child has been surrendered for adoption and the agency has not physically placed the child for adoption or initiated adoption proceedings within six months of receiving the child, the agency must file a petition alleging that the child comes within the jurisdiction of the court, which will trigger the rules discussed above.

If the court does not grant guardianship to an individual or agency, it retains guardianship under ORS 419B and therefore has authority, i.a., to consent to the child's adoption. ORS 419B.370(3), 419B.376.