

PPIC Kinship/Guardianship Subcommittee Task Force on Minor Guardianships in Probate Court

FINDINGS AND RECOMMENDATIONS

MISSION/PURPOSE

The Permanency Planning Implementation Committee formed a committee to look at issues surrounding minor guardianships created in probate court where Vermont's child protection agency (DCF) is not involved. Probate judges have identified minor guardianships as an area of probate court jurisdiction and practice in need of some reform. In Vermont, minor children can be placed in the custody of a person other than a parent in a civil proceeding in probate court called a minor guardianship. Often these minor guardianships are used when a parent is ill, deceased, or otherwise incapable of serving as the parent. In a few cases, the parent is giving guardianship to another following a period of child neglect or abuse. These are not a large part of the minor guardianship caseload in probate court, but when these cases arise, they present serious issues. In these cases there is considerable overlap in the issues presented in minor guardianship proceedings in probate court and in CHINS proceedings in family court and yet there are different rules, risk assessments and processes in each. The Task Force on Minor Guardianships in Probate Court agreed to look at how minor guardianships work, the risk to children in guardianship placement, and how to address the issue of safety and permanence for children in these proceedings.

TASK FORCE MEMBERS

The Task Force was co-chaired by Probate Judge George Belcher and Juvenile Defender Kathryn Piper. Other members of the Task Force include Judi Daly and Brian Southworth from Casey Family Services; Lynn Granger and Betty Holton, both of whom are grandparents with custody of their grandchildren and founders of the Relatives as Parents Program; Probate Judges Tobias Balivet and Susan Fowler; and Dianne Dexter and Linda Coble from the Vermont Department for Children and Families (DCF).

OVERVIEW

Minor guardianships are clearly the best solution for families where parents are temporarily unable to care for their children due to illness or absence such as a period of service in the armed forces overseas. Probate court proceedings have the advantage of informality, speed and a non-threatening, user-friendly ambience. They allow extended families to solve family problems on their own without the cost and the heavy hand of state intervention. Task Force members support the need to keep probate proceedings casual and non-threatening for parents and family members. We all recognized the need for the safety valve provided by minor guardianships in cases that do not rise to the level of a CHINS filing. However, we also see that

probate court proceedings are ill-equipped to address serious child protection issues.

In cases of substantiated or suspected child abuse or neglect, risk of harm to the child, chronic and serious parental substance abuse or mental illness, domestic violence and severe inter-generational family dysfunction, the probate courts lack the resources to address the underlying problems that led to the creation of the guardianship. In the current probate system there are limits upon the ability of the court to assess the suitability of the proposed guardian/kin, to determine when a termination of the guardianship is in the child's best interests and to provide permanence for a child.

Very often the probate court is not fully informed as to why the parties are seeking to create the guardianship. For example, grandparents who have finally been able to persuade a substance-abusing parent to transfer guardianship of the child may not be willing to rock the boat by informing the probate judge of their concerns for the safety of the child. They may fear that the parent will no longer agree to the guardianship.

If a minor guardianship involves issues of a dysfunctional parent who cannot be with the child for safety reasons, there will likely exist issues concerning social services for the child and the parent. In a minor guardianship proceeding reunification with the parent is an issue which can arise at any time at the request of the parent. Thus, a plan for reunification, if there is to be one, is part of most minor guardianships. The probate courts lack the statutory authority, social services and in-depth information to make a meaningful plan with the family to address the problems that led to the creation of the guardianship. Even if a plan of services is put in place, there is no case manager to monitor progress and compliance with the plan.

Probate judges feel they do not have the resources to assess the background of the proposed guardian in many cases. The yearly reviews held by the probate court do not address the reasons why the guardianship was created, rehabilitation of the parent or permanency needs of the child. There is no one to coordinate services to the family. Guardians may perceive themselves to be at the mercy of the parents who can threaten to seek a termination of the guardianship any time the guardian takes protective action on behalf of the child that displeases the parent. In cases where a child has been abused, there is frequently no effective way the probate court can guarantee the child is going to be safe and the perpetrator will have no access to the child.

CHINS proceedings in Family Court with DCF services provide the structure and statutory authority to address most of the issues identified above: the requirement of findings of abuse/neglect on the record, identification of the underlying problems and a plan to address them, a way to measure compliance and progress with the plan and an assurance of permanence for the child when reunification is unlikely. CHINS proceedings invoke the resources of DCF and a multitude of service agencies, not to mention the assurance of court-assigned legal representation for all parties. In a CHINS proceeding in Family Court, the State of Vermont, with all its resources, pursues the best interests of the child. In Probate Court, the court only hears what evidence is brought before it as in other civil matters.

PROPOSALS

1) INSURING THE COURT HAS SUFFICIENT INFORMATION AT TIME GUARDIANSHIP IS CREATED

A) INFORMATION REGARDING THE SUITABILITY OF THE PROPOSED GUARDIAN:

DCF has agreed in principle to offer their services to help screen some proposed guardians. The screening the DCF could do for probate courts would be similar to the screening DCF does when licensing foster parents. However, this would not involve doing a home study or sending someone out to the home but rather would include a check of the following registries and records:

Central Registry
Motor Vehicles
NCIC (National Crime Information Center)
Child Benefits/ Support
Domestic Violence
Sex Offender Registry
Child Abuse and Neglect Registry

The Task Force recommends that the screening should also involve anyone over the age of sixteen living in the home of the proposed guardian. The Task Force discussed including a release as part of the petition for guardianship. We also discussed the difficulty of requiring the proposed guardian to obtain the signatures of everyone else who resides in the home. We could avoid that by not having to rely on releases but instead obtaining a change in statute requiring that the petition include the name, DOB and social security number of everyone over 16 residing in the home and giving the probate courts the authority to request a records check by DCF on each person.

B) CHANGES TO PETITION FOR GUARDIANSHIP:

Probate Courts need better documentation of what has been happening in the family prior to the creation of the guardianship and why the petition for guardianship is being filed. The Task Force recommends several changes to the petition for guardianship and requests that these recommendations be passed on to the Probate Rules Committee for further discussion and implementation. We discussed adding questions aimed at soliciting the following information:

*What is the financial plan for the child? Will the parent agree to pay child support or will the guardian be seeking financial benefits through PATH. There is no statutory mechanism for the probate court to order child support.

*What has been happening in the family prior to the filing of the petition and why is the petition for guardianship being filed? Who has the child been living with? Who has been paying the bills? Has a parent been serving jail time or residing in a treatment facility?

*For how long is the guardianship intended to last? Why? What is the plan for the child's return

to the parent/s? What is going to trigger the child's return?

*Has this child been abused or neglected? Has the parent/s or proposed guardian ever been the subject of an investigation by Vermont's SRS or DCF or the child welfare agency of any state?

*Questions designed to solicit information about jurisdictional issues such as the ICWA, UCCJA and regarding paternity and proof of service.

California probate courts include an attachment to the petition for guardianship that asks for personal information such as whether the guardian or person living in the guardian's home is a sex offender, has had a restraining order or protective order filed against them, has been receiving mental health services, is on probation or parole, has been the subject of a child abuse and neglect report or investigation, uses illegal substances or abuses alcohol, etc. This attachment is kept confidential. In order for Vermont probate courts to keep such information similarly confidential, a statutory change may be required. Vermont Law, both statutes and rules, should be amended to provide for the ability of the probate courts to seal from public view minor guardianship files, or portions of them, which might be injurious to the parties if disclosed, or which have come to the probate court from the family court.

C) SHARING OF INFORMATION BY DCF AND CLARIFICATION OF DCF POLICY REGARDING THE USE OF PROBATE GUARDIANSHIPS WHERE THERE HAS BEEN A SUBSTANTIATION OF CHILD ABUSE OR NEGLECT

DCF has informed the Task Force that their agency does not sanction the creation of minor guardianships in probate court in order to avoid the filing of a CHINS proceeding. However, it is not DCF practice to file a CHINS petition in every case where child abuse or neglect has been substantiated. Depending upon the assessment of risk factors and the parents' willingness to work with service providers, DCF will often open a family case, identify risk factors and create a case plan in order to work with a family. If a petition for guardianship is filed in these cases, there needs to be a mechanism by which DCF can place the facts of their investigation and substantiation on the record in the probate proceedings. Where there is DCF involvement and a case plan, there should be a suitably consistent plan in the probate proceedings outlining a time frame and conditions for termination of the guardianship. The probate court can condition the guardianship upon compliance with the plan.

Without this information from DCF, it is difficult for the probate court to assess when it is safe for the child to have the guardianship terminated and the child returned to the parent/s. DCF needs to be listed as an interested party and called back into the case by the probate court to assist with this determination. Unfortunately, there is no clear statutory authority or responsibility as to what kind of information DCF can or should provide to the probate court. Probate court proceedings are not confidential and disclosure of information by DCF may be prohibited by statutory non-disclosure laws unless the DCF worker is subpoenaed and ordered to testify by the probate court. The probate judge can order DCF to disclose information in their records. However, as things stand now, the probate judge may not necessarily be aware of any DCF involvement; the judge might not even know to ask. There needs to be clear DCF protocol on information that should be provided to the probate court.

Reports of suspected abuse and neglect should be made by probate judges to DCF. If probate judges have issues with how DCF is handling a case, they can go to the field services director now. In the past probate judges have asked DCF workers to be present for guardianship proceedings but they don't always come. There need to be protocols around what probate judges have a right to expect of DCF when they suspect abuse or neglect. There needs to be an avenue for the probate court to refer serious cases of child abuse and neglect which occur in the context of minor guardianships to the appropriate agency for appropriate action.

2) REVISING THE ANNUAL REVIEW FORMS-THE MINOR PERSONAL STATUS REPORTS

Statutory changes are needed so that probate courts have the authority to require that annual review forms be submitted in minor guardianships. Right now they are required for adult guardianships but not for minors. Currently, most probate courts are nonetheless requiring the guardian to file a Minor Personal Status Report ever year. The Task Force has made several proposals as to what needs to be included in these reports.

As with the petition for guardianship, the promulgation of these annual review forms is something which can be addressed by the Probate Rules Committee. A draft revision of the Minor Personal Status Report is now being circulated among the probate judges for comments. Many of the changes recommended by the Task Force were adapted from the changes to the Permanency Review Reports recommended by PPIC which guardians appointed in CHINS proceedings are now being required to file before every permanency planning hearing.

3) STATUTORY CHANGES AUTHORIZING PROBATE COURTS TO ESTABLISH PERMANENT GUARDIANSHIPS:

As noted above, the annual reviews have not been addressing the reasons the guardianship was created, the rehabilitation of the parent or permanency needs of the child. However, probate judges have expressed a reluctance to include questions in the report about whether the parties have considered creating a permanent guardianship given that probate courts have no authority to create them. This Task Force recommends that the permanent guardianship statute be revised so that probate courts are given the authority to create a permanent situation for minors, similar to the permanent guardianship statute.

A similar recommendation was made in the "Report of the Legislative Study Committee Concerning the Structure, Organization and Jurisdiction of the Vermont Probate Courts", November 2004. Such a change in the law would require study since the current permanent guardianship law always has DCF as a party and if the guardianship is revoked, the child returns to DCF custody.

4) FUNDING FOR CASE MANAGEMENT AND ASSESSMENTS

Although there are few minor guardianships which involve dysfunctional parents and families, when the children of such families are subject to guardianship orders, there needs to be the

ability to assess the needs of the children and the family. Funding is needed for probate courts to pay for assessments of the suitability of proposed guardians, of the needs of the children, and of the parents who petition to terminate the guardianships.

When the probate court has been asked to terminate a guardianship, if the parent and guardian are in agreement, there is no other voice for the child. Generally no guardian ad litem or attorney for the child is appointed in uncontested proceedings. There is no one appointed who can conduct an independent investigation. A relative/guardian is under a lot of pressure not to take a position adverse to the parent for fear that they will then lose their ability to have contact with and to protect the child in the future. The parent holds the power and the relatives are left feeling powerless to advocate a position or disclose facts to the court that may upset the parent.

Under case law, probate court minor guardianships may be revoked only if the court finds that to be in the best interests of the child. However, the probate court has little access to the information that would allow the judge to make a fair assessment of the child's best interests.

The Task Force endorses the idea of requesting funds from the legislature to fund such assessments while at the same time attempting to obtain grant money for such assessments. Each probate court could choose to contract with a local agency such as Casey Family Services to conduct these assessments.

Case management/social work services are also needed for other reasons in these guardianship proceedings. For instance, the relationship between parent and kin/guardian is often a source of constant friction and rehearing. The Task Force identified the lack of support and resources for kin/guardians as a significant problem. This includes financial resources, buffering and mediating between the parent and kin/guardian, assistance with visitation issues, addressing permanence issues and assistance with adoption where the relative wants to adopt and reunification with the parent is unlikely. "The grandparents walk out of probate court with no one to hold their hands, with no expertise." Frequently, the children have special needs arising out of the trauma they have suffered. The child and guardian could benefit from case management services and therapeutic support and the guardian frequently does not know where to turn for this kind of assistance. As one DCF worker stated: "Without providing support, we are going to end up seeing these families over and over again."

Generally, when guardianships are created, parents are not told what they are expected to do before they can get their children back. The Task Force believes that identifying the problem and having a plan to deal with it from the beginning is very important for families.

The Washington County Probate Court has been utilizing the social work services of Casey Family Services for several years. The Probate Judge only assigns cases in which an assessment would appear to benefit the court or the parties. The cases are usually situations where a non-functional parent has given their child to a relative. After an assessment is done by the caseworker assigned, a plan is proposed by the social worker or the family. In several cases, termination of parental rights and adoption has been suggested. In at least one case, a referral to DCF was made for the filing of a CHINS petition.

5) PROBATE JUDGES SHOULD BE AUTHORIZED TO TRANSFER CASES TO FAMILY COURT WHERE THERE IS CONCURRENT JURISDICTION

Family court judges have more experience and expertise in addressing child protection issues. Therefore, it may make sense to have certain types of guardianship proceedings handled by family court. While probate and family court have concurrent jurisdiction in these cases and the family court has the ability to transfer a case to probate court, the probate court lacks the authority to transfer a case to family court. In cases where the power of the State or the authority of the Family Court is needed, the system should allow transfer of cases from Probate Court to Family Court, assuming that the Family Court judge agrees to accept the transfer.

6) THERE NEEDS TO BETTER COMMUNICATION BETWEEN PROBATE AND FAMILY COURTS

Probate courts are not always getting notice of the creation of permanent guardianships. Some protocol between family and probate courts needs to be developed to ensure that notice is given. Furthermore, not enough information is shared between these courts about proceedings involving the same family. There should be some protocol developed so the court clerks can notify each other of pending proceedings. It makes sense that whenever there is a proceeding in family court involving the same child, the probate court should transfer the guardianship proceeding to family court and the two proceedings should be consolidated.

SUMMARY

While many families use the minor guardianship system without the need for special screening, assessment, or monitoring, the probate system should have the tools to screen, assess, and supervise guardians where the best interests of the minor children require it. The suggestions made in this report for change to the probate rules, statutes and assessment of families are made for the improvement of the system.

