Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

The Intersection of Probate Court and Family Court: Guardianship and Conservatorship

Presenters:

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CHOOSING FIDUCIARIES IN GUARDIANSHIPS AND CONSERVATORSHIPS

Mark M. Williams

I. INTRODUCTION

In general, a guardian has control over the "person" while a conservator has control over the person's property. Either one deprives the protected person of substantial rights and should be obtained only if a real need exists. Alternatives to guardianship and conservatorship should be considered prior to petitioning for a full guardianship and/or conservatorship. Note: Other states use different terms or reverse the meanings. If you have a client with a guardianship or conservatorship from another state, you will need to check the definitions of guardian and conservator in that state.

II. POWER OF ATTORNEY

1. A Power of Attorney is one alternative to a conservatorship.

2. A person who understands the nature and significance of his actions can grant legal authority over his financial affairs to another person by giving that person a power of attorney. The person granting the authority is called the principal. The person receiving the authority is called the agent or attorney-in-fact.

3. The agent has the right to sign the principal's name in order to conduct business or transactions of the principal as allowed by the power of attorney. The agent should sign as follows: Joe Principal by Susan Agent, as attorney-in-fact, or as "POA" is also acceptable.

4. A person who does not have the mental ability to understand the nature and significance of the creation of a Power of Attorney cannot create a valid Power of Attorney.

5. The agent has a fiduciary duty to act in the best interest of the principal.

6. The form for a Power of Attorney is not controlled by statute. There are several types of pre-printed forms that are available. A Power of Attorney can also be prepared by an attorney to fit the specific needs of the person.

7. The procedure to grant a Power of Attorney is simple. The person simply signs the Power of Attorney document. ORS 127.005(1). Although signing before a notary public is not legally required, most banks, institutes and county recorder's offices will not accept the document if it is not notarized.

8. The Power of Attorney does not need to be recorded in the county recorder's

office unless it is used to transfer real property.

9. Unless the document specifies otherwise, it is a Durable Power of Attorney. ORS 127.005(1). This means that the Power of Attorney remains valid even after the principal becomes incapacitated.

10. All Powers of Attorney automatically end when the agent has notice that the principal is deceased.

11. When drafting a Power of Attorney, the following factors should be considered:

a. Should the power be a general power of attorney or should it be for a limited purpose.

b. Should the agency be valid immediately or should it be a "springing" Power of Attorney. A springing Power of Attorney states that the document is only effective if the principal becomes disabled. "Disabled" should be defined in the document.

c. Should gifting powers be included. A Power of Attorney does not give the agent authority to give the assets of the principal away unless the document specifically provides for it. Gifting, however, may be important for tax reasons or for planning to obtain government benefits such as Medicaid. It is essential that the principal authorize these gifting provisions in the document. It is good practice to place limitations on the gifting, if possible.

d. Should one person be named or should there be co-agents. If there are co-agents, an authority to delegate may be included.

e. Should the authority to sign tax returns be included.

12. A Power of Attorney can be revoked at any time by the principal provided the principal understands what he or she is doing. A revocation is not required to be in writing, but from a practical standpoint, it should be. Once revoked, notice of the revocation should be given to the agent and anyone else who has dealt with the agent, such as banks and brokerage firms.

13. A Power of Attorney cannot be used to cash or endorse a federal check, such as Social Security.

III. ADVANCE DIRECTIVES FOR HEALTHCARE. ORS 127.505 et seq.

1. An advance directive has a statutory form which allows for the designation of a health care representative and delineation of treatment wishes in end of life scenarios. The health care representative had broad authority to make placement and medical treatment decisions for the incapacitated principal.

2. The appointment of a guardian does NOT supercede the authority of the health care representative absent specific revocation of the authority of the health care representative by the court.

3. Where there is a validly executed Advance Directive pursuant to ORS 127.510, there should be no need for a court to impose a guardianship.

IV. PROTECTIVE PROCEEDINGS

A protective proceeding means any proceeding under ORS 125. Types of protective proceedings include guardianships, conservatorships, limited guardianships, limited conservatorships, and temporary guardianships and conservatorships. ORS 125 refers to the proposed protected person in a protective proceeding as Respondent.

A. PRESUMPTION OF CAPACITY. A lawyer should presume that an adult client has the necessary mental competency to make legal choices, then critically assess whether this is true. There are no automatic tests. Even a client that has had a guardian appointed is not presumed to be incompetent. See ORS 125.300(2); *First Christian Church v. McReynolds*, 194 Or 68, 73-74 (1952). Oregon case law presumes a person to be competent. Van v. Van, 12 Or App 14 (1973).

B. "SLIDING SCALE" OF COMPETENCY. Competency should be viewed as a flexible concept, which is subject to many factors. Therefore, determining the competency of a client may be a complex issue. For example, a clinical diagnosis of Alzheimer's disease or other form of dementia-causing condition suggests diminished capacity, but a lawyer should not assume that a person is not competent to participate in or consent to a transaction because of that diagnosis. The lawyer must view competency in terms of the client's ability to perform a specific task. A person may be competent for certain tasks but lack capacity for others.

C. ATTORNEY INVESTIGATION.

1. Reasonable investigation required. When a client suggests a need for a guardianship for another person, the attorney for the petitioner must establish that a) the needs exists (and that the court will likely recognize that need); and b) that the proposed guardian is appropriate for the role. This is usually done based on information provided by

the petitioner and without contact with the proposed protected person. The attorney is required to make a reasonable investigation before filing a petition and must believe the petition is well founded in law and fact. ORCP 17; Whitaker v. Bank of Newport, 101 Or App 327, 333, 795 P2d 1170 (1990), aff'd, 313 Or 450 (1992).

2. Incapacity. The need exists when the proposed protected person is "incapacitated," that is, suffering from an impairment which affects the person's ability to receive and evaluate information or to communicate decisions to such an extent that the person presently lacks the capacity to meet the essential requirement for physical health or safety. "Meeting the essential requirements for physical health or safety means those actions necessary to provide the health car, food , shelter, clothing, personal hygiene and other without which serious physical injury or illness is likely to occur. ORS 125.005(5).

3. Medical support. In order to get an order from the court, it is simplest if medical evidence be offered. A letter from the treating or primary care physician of the proposed protected person stating that there a medical condition warranting the imposition of the guardianship may be obtained under some circumstances, but not available in others.

4. Other evidence. Important information may be provided by social workers, caregivers and other persons with the ability to observe the functioning of the proposed protected person. Depending on the credentials of these individuals (R.N., LCSW, MSW, Ph.D.), their evidence may be sufficient to support a petition. You may need to rely solely on the observations of friends and neighbors. Opportunity to observe, and length and nature of relationship are important factors to describe.

5. Alternatives to Guardianship. Always consider lesser measures than a full-blown guardianship/conservatorship to achieve the purpose of protection. Intervention and support from a local area agency on aging may be adequate to meet their needs. Powers of Attorney, Advance Directives for health care and living trust may exist or be creatable. Make certain these avenues have been explored. If so, they may provide additional evidence to support the petition.

V. FIDUCIARY PREFERENCES

A. Due process. Oregon differs from all other states in its due process requirements. Extremely state-specific. Oregon’s practices are shocking to practitioners around the country, and even in neighboring California and Washington.

B. Preference statute ORS 125.200. The court shall appoint the most suitable person who is willing to serve as fiduciary after giving consideration to

1. the specific circumstances of the respondent,
2. any stated desire of the respondent,
3. the relationship by blood or marriage of the person nominated to be fiduciary to the respondent,
4. any preference expressed by a parent;
5. the estate of the respondent;
6. and any impact on ease of administration that may result from appointment.

C. Disqualified to serve: ORS 125.205

1. incapacitated (needs their own guardian)
2. financially incapable (needs their own conservator)
3. a minor
4. a health care provider (i.e., long term care facility operator).

D. Judicial discretion is paramount, and almost insurmountable.

E. "PROFESSIONAL FIDUCIARIES" Surprisingly ORS 125.240 No licensing requirements used to be required for professionals: If you were appointed by the court for 3 or more persons unrelated to the fiduciary, you were deemed a "professional" fiduciary with little additional information required. As of 2013, it is now required that the professional fiduciary, or an individual responsible for making decisions for clients or for managing client assets for the professional fiduciary, is certified by the Center for Guardianship Certification or its successor organization as a National Certified Guardian or a National Master Guardian.

F. Guardianship/Conservatorship Association of Oregon. Self-regulating, self-interested group. Responsible for the excellent strides toward raising the level of professionalism in fiduciaries. See www.gcaoregon.org

VI. ETHICAL DUTIES OF REPRESENTATION OF INCAPACITATED CLIENTS.

A. RPC 1.14. Oregon and ABA ethical rules and guidelines provide limited guidance for the lawyer in determining the competency of a client. The Oregon Rules of Professional Conduct provide:

A lawyer may seek the appointment of a guardian or take other protective action which is least restrictive with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest, whether because of minority, mental disability, or for some other reason.

The conservative view is that the disciplinary rule permits the attorney to "take other protective action" by referral of the case to another attorney, but not by filing a petition with the client as a respondent. It does not allow the attorney to act against the expressed wishes of the client by doing what the attorney believes is best for the client. This approach allows the attorney to continue representing the client in the ensuing protective proceeding and allow a court or other independent reviewer to make the ultimate determination of the client's status, rather than actually usurping the client's decision-making role.

B. MAINTAIN NORMAL CLIENT RELATIONSHIP. When a client's ability to make adequately considered decisions in connection with the representation is impaired, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interest of the client. If the lawyer reasonably believes the client to be impaired, and no guardian or conservator has been appointed, the lawyer, with respect to a question within the scope of his or her representation, should pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to exercise rational judgment on the question, even if the client expresses no wishes to give *contrary* instructions.

C. REMEMBER WHO IS THE DECISION-MAKER. The attorney-client relationship is one of agent and principal. The attorney acts as agent for the client, *subject to the client's control*. Therefore, the client's autonomy and control of decision-making constitute the core of the relationship.

D. "SUBSTITUTED JUDGMENT" OF THE CLIENT. The lawyer needs to determine what the client's decision would have been if the client were able to make the decision. In making a substitute judgment on a client's behalf, the lawyer must carefully consider the client's circumstances, problems, needs, character, and values to the extent the lawyer can determine them. If the client, when able to decide, had expressed views relevant to the decision in question, the lawyer should follow them, unless there is reason to believe that changed circumstances would change the client's views.

E. "BEST INTERESTS" OF THE CLIENT. This approach is more paternalistic and asks the lawyer to determine the best interest of the client based on the lawyer's own determination after weighing all of the circumstances. Given the traditional requirements that lawyers follow the decisions of clients, this permits the attorney to be in the anomalous position of disregarding the client's expressed wishes in favor or a determination that will arguably better serve the client.

VI. PITHY PARTING THOUGHTS.

A. BEWARE THE POISONED WELL

B. THERE ARE ALWAYS TWO SIDES TO A STORY.

C. "HE NEEDS AN AGGRESSIVE ADVOCATE…" (like he needs a hole in the head; like a fish needs a bicycle…).

D. LOOK BEFORE YOU LEAP. Almost no situation benefits from proceeding without diligent investigation.

FILED: January 29, 2003

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Guardianship of
Katharine Elizabeth Goodwin.

HARRIET BURK,

Appellant,

v.

CHRISTOPHER HALL,
DANA HALL,
and KATHARINE ELIZABETH GOODWIN,

Respondents.

00C-13904; A112154

Appeal from Circuit Court, Marion County.
Claudia M. Burton, Judge pro tempore.
Argued and submitted November 13, 2002.
W. Brad Coleman argued the cause and filed the briefs for appellant.
Tahra Sinks argued the cause and filed the brief for respondents Christopher Hall and Dana Hall.
Dennis Sarriugarte argued the cause and filed the brief for respondent Katharine Elizabeth Goodwin.
Before Landau, Presiding Judge, and Armstrong and Brewer, Judges.
BREWER, J.

Reversed.

BREWER, J.

Harriet Burk appeals from an order appointing Christopher and Dana Hall as the permanent legal co-guardians of Burk's minor daughter, Katharine Goodwin. Burk asserts that the trial court erred in determining that Katharine was "in need of a guardian" under ORS 125.305(1)(a), and she also asserts that the order violated her constitutional rights as a fit parent to have custodial authority over her child. Because we conclude that the Halls were not entitled to appointment as co-guardians, we reverse.

Katharine resided with Burk until January 12, 2000, when, at age 13, she ran away from home. During the next four months, Katharine stayed at a runaway shelter, at the home of her school principal, and with the parents of a friend. On May 5, 2000, the Halls filed a petition in Marion County Circuit Court seeking appointment as co-guardians of Katharine. Dana Hall is Katharine's half-sister, and Christopher Hall is Dana's spouse. The petition alleged that a guardianship was necessary because Burk had physically abused Katharine and had not been adequately meeting her needs. The petition also alleged that, since January 18, 2000, Katharine had been staying with friends and at the shelter.

In May 2000, the trial court entered an *ex parte* order appointing the Halls as Katharine's temporary co-guardians. On May 24, the court held an evidentiary hearing to determine whether the temporary guardianship should be extended. Burk participated at the hearing, objected to the petition, and presented

evidence. Nevertheless, the court extended the guardianship and authorized the Halls to move Katharine to New Jersey to reside with them. On August 14, 2000, the trial court held a further hearing to determine whether or not to appoint the Halls as permanent co-guardians. Once again, Burk participated in the hearing, presented evidence, and objected to the appointment. On October 3, 2000, the court entered an order granting permanent co-guardianship of Katharine to the Halls. Burk appeals from that order.

At trial and on appeal, the parties have shared two sets of assumptions that have guided their arguments. First, they have assumed that this action is governed solely by ORS 125.305(1) and other general guardianship statutes found in ORS chapter 125.[(1)] Second, they agree that, because this case involves a dispute between a legal parent and opposing contestants concerning the care, custody, and control of a minor child, the governing statutes must be construed in light of the United States Supreme Court's decision in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). *See* *Wilson and Wilson*, 184 Or App 212, 217-19, 55 P3d 1106 (2002) (discussing *Troxel*); *Harrington v. Daum*, 172 Or App 188, 197-98, 18 P3d 456 (2001) (same).

In litigating the case based on the foregoing assumptions, the parties have paid only passing attention to another statute, ORS 109.119.[(2)] That statute provides, in part:

"(1) Any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, *guardianship* or wardship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.

"(2)(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.

"* * * * *

"(3)(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, *guardianship*, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

"(b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order.

"* * * * *

"(8) As used in this section:

"(a) *'Child-parent relationship' means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with*

necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

"* * * * *

"(e) 'Ongoing personal relationship' means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality."

(Emphasis added.)

In their brief on appeal, the Halls argue that the constitutional standards adopted in cases construing ORS 109.119 for the purpose of resolving disputes between legal parents and third parties should apply by analogy to this case. That assertion appears to flow from the assumption of both parties that ORS 125.305, not ORS 109.119, is the controlling statute. In her reply brief, Burk asserts:

"[The Halls] attempt to apply some of the standards of ORS 109.119 to this case, however it is questionable whether or not [that] statute does in fact, apply. ORS 109.119, first requires that the persons seeking custody, must have a 'child-parent relationship' (ORS 109.119(3)(a), 1999 version)[.] It is clear in this case that [the Halls] did not have such a relationship at the time the Court's order was entered."

The quoted argument was not preserved in the trial court. However, if ORS 109.119 applies to this action, the parties may not prevent the court from noticing and invoking that statute merely because they have failed to assert its applicability. *Miller v. Water Wonderland Improvement District*, 326 Or 306, 309 n 3, 951 P2d 720 (1998); *State v. Smith*, 184 Or App 118, 122, 55 P3d 553 (2002).

If ORS 109.119 applies to this action, it is readily apparent that the Halls were not entitled to be appointed as Katharine's co-guardians. Only a person with a "child-parent relationship" with the would-be protected person can bring an action to establish a guardianship under ORS 109.119. *See* ORS 109.119(3)(a). Subsection (8)(a), in turn, restricts child-parent relationships to those in which the petitioner either had physical custody of, resided in the same household with, or provided day-to-day resources for the child "within the six months preceding the filing of an action under this section." It is undisputed that Katharine was not in the Halls' physical custody, did not reside with them, and did not receive relevant day-to-day resources from them before this action was filed. Although the Halls may or may not have had an "ongoing personal relationship" with Katharine within the meaning of subsection (8)(b) before they filed this action, that status would have entitled them only to bring an action for "visitation or contact rights," not for guardianship. *See* ORS 109.119(3)(b). Therefore, if ORS 109.119 applies to this action, the Halls were not entitled to appointment, and the trial court's order must be reversed.

The question, then, is whether this action is subject to the requirements of ORS 109.119. The problem is one of statutory construction, involving both ORS 109.119 and ORS 125.305, which we resolve under the methodology of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). We examine first the text of the statutes in context to determine whether the legislature's intended meaning has been expressed unambiguously. If either statute is ambiguous, then we resort to legislative history and other aids to construction. *Id.* at 611-12. At first blush, it is easy to understand why the parties have not focused on ORS 109.119. After all, ORS chapter 125 establishes what appears to be a comprehensive framework, both substantive and procedural, of statutory law governing guardianship proceedings. However, an examination of the text and context of both statutes reveals that ORS 125.305(1) must be construed in light of the requirements of ORS 109.119.

ORS 125.305(1) makes clear that it does not specify all of the requirements for establishing a guardianship of a minor. Subsection (1)(a) provides that the court may appoint a guardian for a minor who "needs" one, but that power is subject to the preliminary determination, prescribed by the preface to subsection (1), that "conditions for the appointment of a guardian have been established." ORS 125.305(1). Moreover, subsection (1)(c) further restricts the court's authority to the appointment of a guardian who is "both qualified and suitable." ORS 125.305 does not further specify the criteria for establishing the qualifications and suitability of prospective guardians. Thus, it is apparent from the text of the statute that it cannot be interpreted in a vacuum that disregards other statutes, like ORS 109.119, that prescribe qualifications for guardians of children.[(3)]

ORS 109.119, in turn, is quite clear and specific in scope. It provides substantive requirements for actions in which a nonparent seeks custody or guardianship of a minor child over the objection of a legal parent. Nothing contained either in the text or context of that statute suggests that the legislature intended for persons who cannot satisfy those requirements to bypass them by proceeding solely under ORS 125.305(1). It makes no sense to assume that the legislature intended to create such a loophole. To the contrary, it makes sense only to conclude that ORS 109.119 is, within the meaning of ORS 125.305(1), a separate source of "conditions for the appointment of a guardian" and of criteria for determining whether the nominated person "is both qualified and suitable." Accordingly, the two statutes can be harmonized in such a way as to give full effect to both. *See* ORS 174.010.

However, even if we were to determine that the statutes are in conflict, we would conclude that this action is subject to the requirements of ORS 109.119. The courts have held that when "one statute deals with a subject in general terms and another deals with the same subject in a more minute and definite way," the specific statute controls over the general if the two statutes cannot be read together. *State v. Guzek*, 322 Or 245, 268, 906 P2d 272 (1995); *see* ORS 174.020(2). That maxim is applicable at the first level of statutory construction analysis. *Kambury v. DaimlerChrysler Corp.*, 334 Or 367, 374, 50 P3d 1163 (2002). As pertinent here, although ORS 125.305(1) does address guardianships for minors, it does not specifically address the type of contested guardianship proceeding at issue here, where a third party seeks guardianship of a child over the objection of the child's legal parent. That specific circumstance is provided for by ORS 109.119(1) and (3)(a). It follows that ORS 109.119, the more specific statute, would control in the case of a conflict.

In *Kelley v. Gibson*, 184 Or App 343, 349-50, 56 P3d 925 (2002), we held that ORS 125.305 does not apply to guardianships established pursuant to a court's juvenile dependency jurisdiction because ORS 419B.365 provides the only statutory procedure for the establishment of a permanent guardianship for a child within juvenile court jurisdiction. In so holding, we noted but did not reach the issue raised here. We said:

"[I]t is arguable whether ORS 125.305 would apply were this not a dependency case. ORS 109.119 appears to address guardianships with respect to children who have a living legal parent and contains various presumptions and procedures to protect that parent's rights as enunciated by the United States Supreme Court in [*Troxel*]. However, we need not decide that issue here."

Kelley, 184 Or App at 350 n 4 (citations omitted). We now decide that issue. We conclude that guardianship actions involving a child who is not subject to a court's juvenile dependency jurisdiction and whose legal parent objects to the appointment of a guardian are--in addition to the requirements of ORS 125.305--subject to the requirements of ORS 109.119.[(4)] Because the Halls were not entitled to appointment as Katharine's co-guardians under ORS 109.119(3)(a), the trial court did not have the authority to enter the order so appointing them. Accordingly, we reverse.[(5)]

Reversed.

1. ORS 125.305(1) provides:

"(1) After determining that conditions for the appointment of a guardian have been established, the court may appoint a guardian as requested if the court determines by clear and convincing evidence that:

"(a) The respondent is a minor in need of a guardian or the respondent is incapacitated;

"(b) The appointment is necessary as a means of providing continuing care and supervision of the respondent; and

"(c) The nominated person is both qualified and suitable, and is willing to serve."

Return to previous location.

2. This action was filed while ORS 109.119 (1999) was in effect. Because subsections (1), (3), and (8) of the 2001 version are, in all pertinent respects, identical to the comparable subsections of the 1999 version, we apply the 2001 version of ORS 109.119.

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3. ORS 125.200 establishes preferences in appointing fiduciaries, including a requirement that the court consider "any preference expressed by a parent of the respondent." In addition, ORS 125.205 and ORS 125.210 establish certain qualifications for fiduciaries. However, none of those statutes in any way limits or impairs the applicability of the additional requirements of ORS 109.119 to this action.

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4. We are not called upon to decide whether ORS 109.119 has any application to guardianship actions where a minor protected person does not have a living legal parent or the minor's legal parent does not object to the appointment as guardian of a person who lacks a child-parent relationship with the minor. Of course, the legislature, in its policy judgment, is free to address that and any other issue of concern that is raised by our decision here.

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5. Because the Halls do not have a child-parent relationship with Katharine for purposes of ORS 109.119, we do not address the statutory presumption in favor of a legal parent in the 2001 version of the statute nor the relationship between the current version of the statute and *Troxel*.

Return to previous location.

ORS 109.119 (2015)

109.119 Rights of person who establishes emotional ties creating child-parent relationship or ongoing personal relationship; presumption regarding legal parent; motion for intervention.

(1) Except as otherwise provided in subsection (9) of this section, any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement or guardianship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.

(2)(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.

(b) In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection.

(c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section.

(3)(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

(b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order.

(4)(a) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award visitation or contact rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The petitioner or intervenor is or recently has been the child's primary caretaker;

(B) Circumstances detrimental to the child exist if relief is denied;

(C) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor;

(D) Granting relief would not substantially interfere with the custodial relationship; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(b) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The legal parent is unwilling or unable to care adequately for the child;

(B) The petitioner or intervenor is or recently has been the child's primary caretaker;

(C) Circumstances detrimental to the child exist if relief is denied;

(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(5) In addition to the other rights granted under this section, a stepparent with a child-parent relationship who is a party in a dissolution proceeding may petition the court having jurisdiction for

custody or visitation under this section or may petition the court for the county in which the child resides for adoption of the child. The stepparent may also file for post-judgment modification of a judgment relating to child custody.

(6)(a) A motion for intervention filed under this section shall comply with ORCP 33 and state the grounds for relief under this section.

(b) Costs for the representation of an intervenor under this section may not be charged against funds appropriated for public defense services.

(7) In a proceeding under this section, the court may:

(a) Cause an investigation, examination or evaluation to be made under ORS 107.425 or may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist the parties in creating and implementing parenting plans under ORS 107.425 (3).

(b) Assess against a party reasonable attorney fees and costs for the benefit of another party.

(8) When a petition or motion to intervene is filed under this section seeking guardianship or custody of a child who is a foreign national, the petitioner or intervenor shall serve a copy of the petition or motion on the consulate for the child's country.

(9) This section does not apply to proceedings under ORS chapter 419B.

(10) As used in this section:

(a) "Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

(b) "Circumstances detrimental to the child" includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child.

(c) "Grandparent" means the legal parent of the child's legal parent.

(d) "Legal parent" means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.

(e) "Ongoing personal relationship" means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality. [1985 c.516 §2; 1987 c.810 §1; 1993 c.372 §1; 1997 c.92 §1; 1997 c.479 §1; 1997 c.873 §20; 1999 c.569 §6; 2001 c.873 §§1,1a,1e; 2003 c.143 §§1,2; 2003 c.231 §§4,5; 2003 c.576 §§138,139]