

# Guardianships

ORS 419B.365 – 419B.371

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## 1. Types of guardianship

### A. Durable: ORS 419B.336 (most common)

Provides for juvenile guardianship on behalf of children in dependency cases when the child cannot safely return home within reasonable time, and the court has determined one of the circumstances provided in ORS 419B.498(2) is applicable. At any time, the parent(s) may request the court to vacate a durable guardianship order.

### B. Permanent: ORS 419B.365

Permanent guardianship is less common. The grounds for granting a permanent guardianship are the same as those for termination of parental rights. Once ordered, the parent(s) may not petition the court to vacate a permanent guardianship order. ORS 419B.368(7).

### C. Community: ORS 419B.371

Community guardianship provides a durable guardianship to a child-care agency licensed under ORS 418.205 to 418.310, provided that certain requirements are met.

### D. Note about guardianship assistance

The guardian will cease to receive payments when the child turns 18. In limited circumstances, assistance may continue after the child turns 18 provided the guardian requests continued assistance at least 30 days prior to the child’s 18th birthday. See [OAR 413-070-0918](#)

## 2. Establishing a durable guardianship: ORS 419B.366

### A. Who can file the motion?

- A party; *or*
- A person granted rights of limited participation for the purpose of filing a guardianship motion. ORS 419B.366(1)

### B. Evidence and standard of proof

The court may receive testimony and reports or other materials relating to the child's mental, physical and social history and prognosis without regard to their competency and relevancy under the rules of evidence. ORS 419B.366(4).

- For non-Indian children, the facts supporting any finding must be established by a preponderance of the evidence. ORS 419B.366(2)
- If the Indian Child Welfare Act (ICWA) applies, the facts supporting any finding must be established by clear and convincing evidence. 419B.366(3).

### C. Required findings

#### I. Grounds for durable guardianship (ORS 419B.366(5)):

If the court has approved a plan of guardianship under ORS 419B.476, the court may grant the motion if the court finds, after a hearing, that:

- The child cannot safely return to a parent within a reasonable time;
- Adoption is not an appropriate plan for the child;
- The proposed guardian is suitable to meet the child's needs and is willing to accept the duties and authority of a guardian; and
- Guardianship is in the child's best interests. In determining this, the court shall consider the child's wishes.
- If the ICWA applies, the court must find, based on evidence that includes testimony from a Qualified Expert Witness, that continued custody by the parents or Indian Custodian would result in serious emotional or physical harm to the child. ORS 419B.366(3); 25 U.S.C. §1912(e).

#### II. Grounds for durable community guardianship: ORS 419B.371(2)

The court may appoint a community guardian when, in addition to the requirements of ORS 419B.366 (durable guardianship):

- The child is 16 years of age or older;
- The child has spent three or more years in substitute care;
- The proposed community guardian has provided care or services to the child under ORS 418.205 to 418.310 in the 12 months immediately preceding the filing of the motion;
- Except for Another Planned Permanent Living Arrangement (APPLA), there is no other appropriate permanency plan under ORS 419B.476(5);
- The guardianship would provide planning and guidance for the child's transition to successful adulthood, including addressing crisis intervention, housing, physical and

mental health, education, employment, community connections and supportive relationships;

- The child has access to court-appointed counsel; and
- The child gives *informed consent* to the community guardianship.
  - Informed consent: The court, the Department of Human Services (DHS), or the proposed community guardian must provide information in writing to the child about the consequences of establishing a community guardianship, including any loss of benefits that may be available under another permanency plan, and the child must provide written consent to this information; and
- The child must provide written acknowledgement that he or she cannot be placed in substitute care in the legal custody of DHS after reaching age 18.

### III. Home study

ORS 419B.369 requires that when the child is in DHS custody before guardianship is established, DHS must conduct a study of the proposed guardian’s home, report on whether the potential guardian is suitable and whether the placement is in the child’s best interests. If the child is not in DHS custody, the court may (but is not required to) order the proposed guardian to obtain a study at the proposed guardian’s expense. ORS 419B.369(2).

### IV. Type of hearing required.

ORS 419B.366 does not explicitly require a specific type of hearing or that the hearing be conducted in a specific manner; rather, a party contesting the guardianship must be given the opportunity to be heard at a “meaningful time and in a meaningful manner.” *Dept. of Human Services v. K.H.*, [256 Or App 242 \(2013\)](#)

## 3. Establishing a permanent guardianship

### A. Who can file the petition? ORS 419B.365(1)

- A party; *or*
- A person granted rights of limited participation for the purpose of filing a guardianship petition. ORS 419B.365(1)

### B. Standard of proof

The facts supporting any finding must be established by *clear and convincing evidence*. ORS 419B.365(3).

If the ICWA applies, the facts supporting any finding must be established *beyond a reasonable doubt*. ORS 419B.365(4).

### C. Required findings

Grounds for permanent guardianship: Same as grounds for termination of parental rights. ORS 419B.365(2). The court shall grant a permanent guardianship if it finds that:

- The grounds cited in the petition are true, and
- It is in the best interest of the child that the parent never have physical custody of the child but that other parental rights and duties should not be terminated.

- If the ICWA applies, the court must find, based on evidence that includes testimony from a Qualified Expert Witness, that continued custody by the parents or Indian Custodian would result in serious emotional or physical harm to the child. ORS 419B.365(4); 25 U.S.C. §1912(e).

#### **4. Order establishing guardianship, letters of guardianship and annual reports.**

##### **A. Letters of guardianship**

Upon granting a motion or petition for guardianship, the court shall issue letters of guardianship in substantially the same form as provided in ORS 419B.367. The purpose is to provide the guardian with documentation to use as necessary to demonstrate his/her authority to fulfill the duties of a guardian.

##### **B. Annual guardian’s report**

In the order appointing the guardian, the court shall require the guardian to file an annual report and summary sheet with the court (due within 30 days after each anniversary of the appointment). ORS 419B.367(2). A model annual report and summary sheet are available on the [JCIP Model Forms webpage](#).

##### **C. Discretionary orders: ORS 419B.367(2)**

In the order, the court *may*:

- Specify the frequency and nature of visitation or contact between the child and relatives, including siblings;
- Enter an order for child support pursuant to ORS 419B.400 that complies with ORS 25.275; and
- Make any other order to provide for the child’s continuing safety and well-being.

##### **D. Duties; authority; limited liability of guardian: ORS 419B.373 and 419B.376.**

The guardian has legal custody of the child and has the duties and authority of legal custodian and guardian under ORS 419B.373 and 419B.376. ORS 419B.367(5).

##### **I. Duties and authorities**

The guardian’s duties and authorities generally include (but are not limited to):

- Having physical custody and control of the child;
- Supplying food, clothing, shelter and other necessities for the child;
- Providing care, education, and discipline for the child;
- Authorizing medical care, surgery, dental, mental and other remedial care and treatment for the child;
- Making reports and requiring such information as the court requires;
- Applying for Social Security, public and medical assistance for the child;
- Consenting to military enlistment, marriage, adoption, and other decisions of substantial legal significance for the child.

## II. Limited liability

The guardian is not liable to third persons for acts of the child solely by reason of being appointed guardian. ORS 419B.367(5).

## E. Court review of the annual report

Upon receipt of the annual report, the court shall review and maintain it. ORS 419B.367(4)(a). The report is filed in the supplemental confidential file, while the summary sheet with the name of the submitting person and date of submission is stored in the record of the case. ORS 419B.367(3); ORS 419A.255(1) and (2).

### I. Court review options: ORS 419B.367(4)

The court may (if timely received) or must (if report not received in a timely manner):

- Conduct a court review of the case;
- Appoint a court visitor to file a report with the court (subject to availability of funds); or
- Direct the local citizen review board (CRB) to conduct a review. (Note: Before referral, confirm with the local field manager that a program for review of guardianship cases exists in your county.)

### II. CRB review: ORS 419A.109

If the court refers the case for CRB review:

- The court, in its request, must provide the names and addresses of the parties.
- The review must take place within 45 days (or as soon as practicable) after receiving the court's request.
- CRB must send notice of review to all parties.
- CRB must forward its findings and recommendations to the court and all parties.
- Upon receipt of CRB findings and recommendations, the court shall (ORS 419A.120):
  - Review the findings and recommendations of the CRB within 10 days of receipt;
  - If the court finds it appropriate, the court may schedule a review hearing on its own motion;
  - Notify the CRB if the court modifies, alters, or takes other action as a result of the CRB's recommendations;
  - Cause the findings and recommendations to become part of the juvenile court file.

## 5. Review, modification and vacation of guardianship order

### A. Court Review

#### I. Generally

The court *may* review a guardianship order on its own motion or on the motion of a party. ORS 419B.368(1)

## II. Community guardianships

The court *must* review ORS 419B.371 (community) guardianships at least 60 days before the child reaches the age of 18. At the hearing, the court shall inform the child that after turning 18, he/she may not be placed in substitute care in the legal custody of DHS. ORS 419B.368(8).

### B. Modification

The court may modify a guardianship order on its own motion or on the motion of a party if, after a hearing, the court determines the modification would be in the child’s best interest. ORS 419B.368(2)

- “Best interest” includes (but is not limited to) consideration of:
  - The child’s emotional and developmental needs;
  - The child’s need to maintain existing attachments and relationships and to form new ones;
  - The child’s health and safety; and
  - The child’s wishes. ORS 419B.368(5)

### C. Vacation

The court may vacate a guardianship order on its own motion or on the motion of a party. ORS 419B.368 (1).

#### I. Permanent guardianship

A parent is prohibited from moving to vacate a (permanent) guardianship under ORS 419B.365 for the purpose of returning the child to the parent(s). ORS 419B.368(7).

#### II. Service required

A party filing a motion to vacate a guardianship shall complete service as required by ORS 419B.851 and serve the motion upon DHS. ORS 419B.368(6).

#### III. Required findings to return child to parent (without a motion to terminate wardship). ORS 419B.368(3)

- It is in the child’s best interest to vacate the guardianship (see “best interest” considerations listed under modification above);
- The conditions and circumstances necessitating the guardianship have been ameliorated; and
- The parent is presently able and willing to adequately care for the child.

#### IV. Required findings to return child to parent when motion to terminate wardship is filed

If a parent files a motion to terminate the wardship, the court conducts the two part inquiry in *Dept. of Human Services v. T.L.*, [279 Or App 673 \(2016\)](#); *Dept. of Human Services v. J.C.*, [365 Or 223 \(2019\)](#):

- Do the original bases for jurisdiction continue to pose a current threat of serious loss or injury?
- If so, is the risk likely to be realized?

- When the plan is no longer reunification, a parent making a motion to dismiss based on lack of jurisdiction has the burden of proof if requested by the proponents of jurisdiction.

#### V. Required finding when guardian is unable or unwilling to serve. ORS 419B.368(4)

The court may vacate a guardianship order after determining that the guardian is no longer willing or able to fulfill the duties of a guardian.

##### *a. Hearing required*

If the court vacates the guardianship order under these circumstances, the court is required to:

- Conduct a hearing within 14 days, make writing findings required in ORS 419B.185(1)(a), (d), and (e), and make any other order directing disposition of the child that the court is authorized to make under ORS 419B; *and*
- Hold a permanency hearing pursuant to ORS 419B.476 within 90 days of the order vacating guardianship. ORS 419B.368(4)

## **6. Duration of guardianship**

Unless vacated, a guardianship continues as long as the ward is subject to the court's jurisdiction as provided in ORS 419B.328. ORS 419B.365(5) (permanent guardianship);

419B.366(6)(durable guardianship) . Jurisdiction over the ward continues until:

- The court dismisses the petition concerning the ward;
- The court transfers jurisdiction over the ward;
- The court enters an order terminating the wardship;
- A judgment of adoption of the ward is entered by a court of competent jurisdiction; or
- The ward becomes 21 years of age. ORS 419B.328(2)

### **A. Guardianship assistance**

Although the guardianship may continue beyond age 18, the guardian will cease to receive guardianship assistance payments when the child turns 18. In limited circumstances, assistance may continue after the child turns 18 provided the guardian requests continued assistance at least 30 days prior to the child's 18<sup>th</sup> birthday. See [OAR 413-070-0918](#)