

Regular Session, 2011

SENATE BILL NO. 32

BY SENATOR BROOME (On Recommendation of the Louisiana State Law Institute)

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

CHILDREN. Provides relative to guardianship of children in need of care.

AN ACT

To amend and reenact Children's Code Articles 116(12.1), 675(B)(3), 681, 1511, 1515(B) and 1516(B), and to enact Children's Code Articles 718, 719, 720, 721, 722, 723, 724 and 1514(D), relative to guardianship; to define guardianship; to provide for dispositional alternatives; to provide for the purpose of guardianship; to provide for the guardian's rights and responsibilities; to provide for a home study report; to provide for certain procedures; to provide for a motion, hearing, and order for guardianship; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Children's Code Articles 116(12.1), 675(B)(3), 681, 1511, 1515(B) and 1516(B) are hereby amended and reenacted, and Children's Code Articles 718, 719, 720, 721, 722, 723, 724 and 1514(D) are hereby enacted, to read as follows:

Art. 116. Definitions

Except where the context clearly indicates otherwise, these definitions apply for the following terms used throughout this Code.

* * *

(12.1)(a) ~~Legal~~ "Guardianship" means the **judicial placement of a child**

under the duty and authority **of a guardian** to make ~~important~~ decisions in matters having a permanent effect on the life and development of the child **as set forth in Article 719** ~~and the responsibility for the child's general welfare until he reaches the age of majority, subject to any residual rights possessed by the child's parents. It shall include but not necessarily be limited to:~~

~~(i) The authority to consent to marriage, to enlistment in the armed forces of the United States, to represent the minor in legal actions, to make other decisions of substantial legal significance concerning the minor.~~

~~(ii) The authority and duty of reasonable visitation, except to the extent that such right of visitation has been limited by court order.~~

~~(iii) The rights and responsibilities of legal custody.~~

~~(b) The term "legal guardian" means to the caretaker in such a relationship.~~

* * *

Comment - 2011

In this revision "guardian" is defined more broadly. See Ch.C. Art. 719. If guardianship is granted, most parental rights and responsibilities are allocated to the guardian. The child has been declared abused or neglected and since that adjudication, continuing case review has confirmed that parental abandonment or dereliction persists, thus precluding the safe return of the child to the parent's custody or control. The modifier "legal" is omitted as redundant although "legal guardian" is the term used by federal statutes. See, for example, the "Fostering Connections to Success and Increasing Adoptions Act of 2008", Public Law 110-351, 42 U.S.C. 671 et al.

* * *

Art. 675. Case plan purpose; content

* * *

B. The case plan shall include at least the following:

* * *

(3) Documentation of the efforts the agency is making to safely return the

1 child home or to finalize the child's placement in an alternative safe and permanent
2 home in accordance with the child's permanent plan. For children whose permanent
3 plan is adoption or placement in another permanent home, this documentation shall
4 include child-specific recruitment efforts, such as the use of state, regional, and
5 national adoption exchanges, including electronic exchange systems to facilitate
6 orderly and timely instate and interstate placements. **For children whose**
7 **permanent plan is guardianship, the documentation shall include the facts and**
8 **circumstances supporting guardianship, including the reasons that the plan is**
9 **in the best interest of the child and that reunification with a parent and**
10 **adoption are not appropriate permanent plans. The documentation shall also**
11 **address the suitability and commitment of the proposed guardian to offer a**
12 **wholesome, stable home for the child throughout the child's minority.**

13 * * *

14 Comment - 2011

15 According to Ch.C. Art. 603(15), guardianship is a "permanent placement",
16 ending at the age of majority. See Ch.C. Art. 723(D). The juvenile court is required
17 to conduct a case review hearing at least every six months during the child's minority
18 until a permanent placement of the child has been achieved. "Wholesome" and
19 "stable" are used elsewhere in C.C. Art. 133 and Ch.C. Art. 702(C).

20 * * *

21 Art. 681. Dispositional alternatives

22 A. In a case in which a child has been adjudicated to be in need of care, the
23 child's health and safety shall be the paramount concern, and the court may:

24 (1) Place the child in the custody of a parent or such other suitable person on
25 such terms and conditions as deemed in the best interest of the child including but
26 not limited to the issuance of a protective order pursuant to Article 618.

27 (2) Place the child in the custody of a private or public institution or agency.

28 (3) Commit a child found to be mentally ill to a public or private mental
29 institution or institution for the mentally ill.

(4) Grant guardianship of the child to ~~any individual~~ **a nonparent**.

(5) Make such other disposition or combination of the above dispositions as the court deems to be in the best interest of the child.

B. A child in need of care shall not be committed to the Department of Public Safety and Corrections, nor shall such department accept a child in need of care.

Comment - 2011

The substance and procedure for guardianships is governed by Chapter 19 of this Title.

* * *

Art. 718. Purpose of guardianship

A. The purpose of guardianship is to provide a permanent placement for children when neither reunification with a parent nor adoption has been found to be in their best interest; to encourage stability and permanence in the lives of children who have been adjudicated to be in need of care and have been removed from the custody of their parent; and to increase the opportunities for the prompt permanent placement of children, especially with relatives, without ongoing supervision by the department.

B. The Chapter is intended to ensure that the fundamental needs of children are met while ensuring that the constitutional rights of all parties are recognized and enforced.

Comments - 2011

(a) Guardianship is a common law concept that is similar but not identical to the civilian concept of tutorship. In 2004, the legislature approved a proposal to add guardianship ("Legal guardianship" as it is known under federal law) as a defined term in the Children's Code (Ch.C. Art. 116 (12.1) and to authorize the juvenile court to appoint a guardian as a permanent plan for child. (Ch.C. Art.702(C)(3)). Under federal statutes, when a child is removed from his parents' care and control, the state is obligated to submit a "permanent plan" within twelve

1 months after the child enters foster care. The Adoption and Safe Families Act of
2 1997, P.L. 105-90, 42 U.S.C. 601 et seq. The options are return the child to his
3 parents; to terminate the parental rights and try to place the child for adoption; to
4 place the child in guardianship; to place the child in the legal custody of a relative;
5 or as a last resort alternative, to place the child in the least restrictive most family-
6 like alternative permanent living arrangement (which can be long-term foster care.)
7 Adoption and Safe Families Act of 1999, P.L. 105-89, 42 U.S.C. 601 et seq.; Ch.C.
8 Art. 601(15). Guardianship often becomes the only viable alternative after the other
9 two preferred options (reunification or adoption) prove to be beyond reach. Ch.C.
10 Art. 702(C).

11 (b) In 2008, Congress enacted "Fostering Connections to Success and
12 Increasing Adoptions Act," P.L. 110-351, 42 U.S.C. 671 et al. It calls for the
13 expansion of the practice of appointing relatives as "guardians" for children who are
14 stranded in the foster care system. The statute provides incentives for states to
15 encourage these guardianships and provides federal funds for Title IV-E Social
16 Security Act subsidies to support relatives in assuming such responsibilities. The
17 authorization of subsidies will increase the use of guardianship as a permanent plan
18 for abused and neglected children.

19 (c) The 2009 State Plan submitted by the Department of Children and Family
20 Services commits the Department to this goal of increased guardianships and
21 clarifying the law and policy necessary for effective implementation. The Plan was
22 approved and funded by the federal government.

23 (d) Clarification of guardianship is important because judges are concerned
24 about exactly what the option entails, and caseworkers must be able to explain to
25 potential guardians their rights and obligations toward the child.

26 (e) The source of this article is the permanent guardianship statute of the
27 District of Columbia, D.C. Code Ann. S 16-2381, although the text has been
28 substantially revised.

29 **Art. 719. Guardian's rights and responsibilities**

A. Unless the court specifies otherwise, a guardian shall exercise the rights and responsibilities of legal custody and shall have the authority to consent to the child's marriage, to consent to his enlistment in the armed forces of the United States, and to make other decisions concerning the child, except the right to consent to the child's adoption.

B. Guardianship does not subject the guardian to responsibility under Civil Code Articles 2317 or 2318 for damage occasioned by the child.

C. The rights and responsibilities of administering the property of the child are governed by the law of tutorship.

Comments - 2011

(a) The common law concept of guardianship encompasses both a guardianship of the person and a guardianship of property. These new additions to the Children's Code recognize only a version of guardianship of the child's person. Even then, guardianship is a status that is authorized only for a court exercising juvenile jurisdiction in a child in need of care case.

(b) Paragraph B is a reflection of a decision that in order to encourage persons to become guardians for children, the liability accorded to tutors under Civil Code Art. 2318 should not be applied to guardianship. A guardian would be liable for his lack of adequate supervision or other negligence but is not otherwise subject to strict liability. See C.C. Art. 2315. States are split on this issue; however, nine states (Alaska, Delaware, Iowa, New Hampshire, North Carolina, North Dakota, South Dakota and Tennessee) have explicitly either eliminated or severely limited a guardian's liability. Thirteen other states limit tort liability to the parents of a child, thus by implication, alleviating guardians from liability.

(c) Paragraph C contemplates that what would be known in common law jurisdictions as a guardianship of property continues to lie within the jurisdiction of district courts in tutorship actions. In order to avoid possible conflict with tutorship as well as the lack of expertise of the juvenile courts concerning financial oversight, the guardian is required to be appointed tutor before managing the property of the

child. See C.C. Art. 246 et seq.

Art. 720. Motion for guardianship

A. After a child has been adjudicated to be in need of care, a motion for guardianship may be filed by the department, parent or counsel for the child.

B. The motion shall include the following:

(1) The name and gender of the child, and the date and place of his birth.

(2) A description of the child's mental and physical health.

(3) The current placement of the child and when it began.

(4) The proposed guardian's name, address, and relationship, if any, to the child.

(5) The name and address of the parents of the child.

(6) A plain and concise statement of the facts on which the motion for guardianship is sought and why neither adoption nor reunification with a parent is in the best interest of the child.

C. If any of the information required by Paragraph B is unknown, the motion shall state that fact. In addition, if the location of either parent is unknown, the motion shall disclose efforts to locate him.

D. Unless not yet completed, the home study of the proposed guardian's home, as required by Article 721, shall be attached to the motion. If not attached, it shall be submitted to the court as soon as it is completed.

Comments – 2011

(a) In addition to those enumerated in Paragraph A, another individual could seek to intervene in accordance with Article 707 for the purpose of being named guardian or to object to the proceedings.

(b) By administrative Rule LAC 67:V., Chapter 41, Louisiana has adopted a State Plan that qualifies for the federally funded subsidy authorized by the "Fostering Connection to Success and Increasing Adoptions Act of 2008", P.L. 110-351, 42 U.S.C. 671 et al. For subsidy, the child must be living with the proposed

guardian for at least six months and the placement must have been certified as a foster home. A qualifying agreement must be finalized before the date of any guardianship judgment.

(c) Guardianships that do not qualify for subsidy are permitted.

Art. 721. Home study report

The department shall submit to the court a confidential report of its investigation and evaluation of the proposed guardian's home. The report shall include the following:

(1) The moral and financial fitness of the proposed guardian.

(2) The conditions of the proposed guardian's home with respect to health, adjustment, and other advantages or disadvantages for the child.

(3) The physical and mental condition of the child and his reaction to the proposed guardianship.

(4) The proposed guardian's plan for the child if the guardian becomes incapable of providing care.

Comments - 2011

(a) The source of this article is Ch.C. Art. 1229(A). As a precaution for the child's safety, a home study of a prospective guardian is just as important as it is for an adoptive home. No new investigation is required. In most cases, because the department has long sought a permanent plan for the child, it has already conducted such an inquiry into the fitness of the guardian and his home. In adoptions, there is no authorization for the department to delegate this investigation to any private agency.

(b) Subparagraph (4) reflects best practices in case planning for the child.

Article 722. Grounds; hearing; order

A. The mover shall have the burden of proof to show the following by clear and convincing evidence:

(1) The child has been adjudicated to be in need of care.

(2) Neither adoption nor reunification with a parent is in the best interest

1 of the child.

2 (3) The child has resided for at least six months with the proposed
3 guardian, unless the court waives the residence requirement for good cause.

4 (4) The proposed guardian is able to provide a safe, stable, and
5 wholesome home for the child for the duration of the child's minority.

6 B. If the child is twelve years of age or older, the court shall solicit and
7 consider his wishes in the matter.

8 C. The court shall hold a hearing before approving a guardianship and
9 shall, at the conclusion of the hearing, enter a written order that includes the
10 findings upon which the order is based.

11 Comment - 2011

12 In most cases, the child will have lived with the proposed guardian for some
13 period before the hearing. Similarly, as a "permanent placement" the child will
14 typically remain in the guardian's care throughout the child's minority. Subparagraph
15 B is patterned on the similar requirement in an adoption. See for example, Ch.C.
16 Art. 1208(C).

17 Art. 723. Order of guardianship

18 A. The court may grant the motion and appoint a guardian for the child
19 if the court finds by clear and convincing evidence that the requirements of
20 Article 722 have been met and that the proposed guardianship is in the best
21 interest of the child.

22 B. The guardianship order shall address the frequency and nature of
23 visitation or contact between the child and his parent, as necessary to ensure the
24 health, safety, and best interest of the child.

25 C. The guardianship order may require the parent to contribute to the
26 support of the child to the extent the court finds the parent is able pursuant to
27 Article 685.

28 D. The order continues until the child reaches the age of eighteen years,
29 unless earlier modified or terminated by the court in accordance with Article

724.

Comment - 2011

The court's authority to limit frequency of visitation includes the authority to forbid contact with the parent altogether. If there is proof by clear and convincing evidence that parental contact would cause substantial harm to the child, contact can be constitutionally eliminated. *Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982). In accordance with Ch.C. Art. 307, the juvenile court has exclusive original jurisdiction in child in need of care proceedings and continuing jurisdiction over any custody determination rendered. Ch.C. Art. 309. Paragraph D reflects the general jurisdictional policy of Ch.C. Art. 313.

Art. 724. Motion for Modification of guardianship; termination of guardianship**A. The court shall retain jurisdiction to enforce, modify, or terminate a guardianship order until the child reaches the age of eighteen years.****B. The department, counsel for the child, the guardian, a parent permitted to intervene under Article 707, or the court on its own motion may seek to enforce, modify or terminate a guardianship order.****C. A guardianship order may be enforced in accordance with the contempt provisions of Chapter 2 of Title XV of this Code.****D. A guardianship order may be modified or terminated if the court finds by clear and convincing evidence that there has been a substantial and material change in the circumstances of the guardian or child because of either of the following:****(1) The guardian no longer wishes to serve or can no longer serve as guardian of the child.****(2) Continuation of the guardianship is so deleterious to the child as to justify a modification or termination of the relationship or the harm likely to be caused from a change in the guardianship is substantially outweighed by the advantages to the child of the modification.**

1 **E. The court shall hold a hearing before modifying or terminating a**
2 **guardianship and shall, at the conclusion of the hearing, enter a written order**
3 **that includes the findings upon which the order is based.**

4 Comments - 2011

5 (a) This article is suggested by the Georgia statute, GA.CODE S 15-11-356;
6 however, several features have been added. Enforcement of a guardianship
7 judgment, if necessary, could be achieved through ordinary contempt provisions,
8 pursuant to Chapter 2 of Title XV of this Code.

9 (b) Paragraph B reflects a policy decision of limiting those who can move for
10 a reconsideration of a guardianship judgment. This Paragraph is intended to
11 preclude a parent from having this right of action unless the parent first is able to
12 demonstrate good cause that intervention is warranted. Paragraph B does not
13 broaden the grounds for modification that are set forth in Paragraph D.

14 (c) Paragraph D reflects the policy that the most important feature of a
15 guardianship was its permanence during the child's minority; therefore, the standard
16 for modification or termination ought to be quite stringent, except where the
17 guardian seeks termination or modification. Thus, the material change must occur
18 in the circumstances of the guardian or child. Improvement of a parent's capabilities,
19 for example, would not satisfy the threshold requirement that some deterioration in
20 the quality of the guardian's care must be demonstrated. The Louisiana custody
21 modification standard announced in *Bergeron v. Bergeron*, 492 So.2d 1193 (La.
22 1986) is used here in Subparagraph D(2).

23 * * *

24 Art. 1511. Definitions

25 As used in this Chapter:

26 ~~(1) "Guardianship of the person of a child" means the duty and authority to~~
27 ~~make important decisions in matters having a permanent effect on the life and~~
28 ~~development of the minor and to be concerned about his general welfare. It shall~~
29 ~~include but shall not necessarily be limited to either number or kind to:~~

(a) ~~The authority to consent to marriage, to enlistment in the armed forces of the United States, or to major medical, psychiatric, and surgical treatment, to represent the minor in legal actions, to make other decisions of substantial legal significance concerning the minor.~~

(b) ~~The authority and duty of reasonable visitation, except to the extent that such right of visitation has been limited by court order.~~

(c) ~~The rights and responsibilities of legal custody, including the right to have physical custody of the child and to exercise the rights and duty to protect, train, and discipline him and to provide him with food, shelter, education, and ordinary medical care, all subject to any residual rights possessed by the child's parents.~~

(2) (1) "Legal custody" means a legal status created by court order that vests in a custodian the right to have physical custody of the child and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and ordinary medical care, all subject to ~~the powers, rights, and duties and responsibilities of the guardian of the person of the child and subject to any residual~~ parental rights and responsibilities.

(3) (2) "Physical custody" means the duty and authority to provide care for a child in the home of the custodian.

(4) (3) "Voluntary transfer of custody" is a parent's knowing and voluntary relinquishment of legal custody ~~or guardianship~~ to an agency, institution, or individual, subject to residual parental rights retained by the parent and under such terms and conditions that enable the child to receive adequate care and treatment.

* * *

Art. 1514. Petition for voluntary transfer

* * *

D. If a guardian has been appointed, a petition for voluntary transfer cannot be filed. If a change in guardianship is desired, a motion to modify the guardianship may be filed in accordance with Article 724.

Comment – 2011

The decision to limit the court's authority to render a guardianship judgment to child in need of care proceedings necessitates this change. A parent may no longer create a guardianship by contract. See Ch.C. Art. 722.

Art. 1515. Petition; contents; form

* * *

B. The form for the petition shall be as follows:

"PETITION FOR VOLUNTARY TRANSFER OF CUSTODY

The petition of _____ (all legal custodians of the child unless otherwise indicated in Paragraph III of the petition), domiciled in the parish of _____, respectfully represent(s):

* * *

V.

That petitioner(s) desire to transfer physical custody OR legal custody ~~OR guardianship~~ of the person of the children (indicate one) for the period of time _____(specify intended duration) in accordance with the following terms and conditions _____

(may include provisions for support and/or visitation).

* * *

Art. 1516. Affidavit of acceptance; contents; form

* * *

B. The form for the Affidavit of Acceptance shall be as follows:

"AFFIDAVIT OF ACCEPTANCE

* * *

That affiant does knowingly and voluntarily accept physical custody OR legal custody ~~OR guardianship~~ of the person of the children (indicate one) of _____, _____, _____ (name(s) of child(ren)) for the period of time _____ (specify intended period) in accordance with the following terms and conditions:

The original instrument and the following digest, which constitutes no part of the legislative instrument, were prepared by Jerry G. Jones.

DIGEST

Present law in Children's Code provides definition of "legal guardianship" but does not provide rules governing such legal guardianship.

Proposed law deletes definition and eliminates concept of legal guardianship.

Proposed law defines "guardianship" as the judicial placement of a child under the duty and authority of a guardian to make decisions in matters having a permanent effect on the life and development of the child as set forth in the proposed law.

Proposed law sets forth requirements of guardianship, including design to provide a permanent placement for children in need of care, case plan for children whose permanent plan is guardianship, purpose of guardianship, rights and responsibilities of the guardian, and home study report.

Proposed law sets forth procedures and requirements for motion, hearing, and order for guardianship, and for modification and termination of guardianship. Provides that if a guardian has been appointed, a petition for voluntary transfer cannot be filed and a change in guardianship is through motion to modify the guardianship.

Proposed law provides that in the performance of his duties the guardian will be liable for his own negligence but will not be vicariously liable for his ward.

(Amends Ch. C. Arts. 116(12.1), 675(B)(3), 681, 1511, 1515(B), and 1516(B); adds Ch. C. Arts. 718, 719, 720, 721, 722, 723, 724 and 1514(D))