

Legal Guardianship of Juveniles As A Permanency Alternatives In Nebraska: Some Legal Considerations

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Introduction and Summary

At the outset of most Juvenile Code cases, a primary objective is to assure that reasonable efforts are made to reunite the family. Neb. Rev. Stat. §43-246 (1), (5). If reasonable efforts cannot achieve reunification, then the court has the duty to seek permanency for the juvenile. §43-246 (6) and §43-1312 (3). Foster care, by nature and definition, is intended to be temporary, and children cannot and should not be suspended indefinitely in foster care. *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000). If the family cannot be preserved or reunified, adoption is the preferred permanency alternative, that being the most permanent. The next preferred permanency alternative for wards of the Department of Health and Human Services is legal guardianship. 390 NAC 6-001.

In the event guardianship is in the best interests of the juvenile state ward, there are two alternative venues available to accomplish that: (1) the existing Juvenile Code case, or (2) a separate Probate Code guardianship proceeding after dismissal of the juvenile case. The Department recommends the former, and not

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the latter. A juvenile court guardianship can maintain any prior restrictions on parental rights to custody and visitation.

Jurisdiction continues until age of majority, providing a safety net and forum for special needs or circumstances that may arise. If difficulties arise within the guardianship, a review hearing can be set and the court can take appropriate action as warranted including re-committing the juvenile to HHS if necessary.

The authority for the juvenile court guardianship resides initially in the court's authority to place a juvenile in the custody of an individual or family under Neb. Rev. Stat. §43-284 (3) and (5). Orders of custody to individuals convey powers of guardianship unless otherwise ordered by the court. Neb. Rev. Stat. §43-285 (1). See also, §43-294. Because the latter statute may be seen as limited to situations of custody after termination of parental rights, it is recommended that the juvenile court specifically order the guardian's powers, limitations and duties. Such a detailed order could take the form of the usual "Letters of Guardianship" contemplated in the Probate Code guardianship of minors provisions. It also would document the guardian's authority for purposes of medical treatment, school enrollment, etc. Moreover, the juvenile court has specific authority to conduct a guardianship proceeding under §43-247 (10).

Another alternative approach within the existing juvenile case can also be considered and, depending upon the view of the court with Juvenile Code jurisdiction, it is an option that could be pursued. This approach would involve the establishment of a Probate Code-based guardianship done within the existing Juvenile Code case. Concurrent guardianship jurisdiction is given to the juvenile court pursuant to Neb. Rev. Stat. §43-247 (10). One can argue that this provision would include the

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establishment of a legal guardianship as a permanency alternative pursuant to Probate Code guardianship of minors provisions, Neb. Rev. Stat. §§30-2605, et seq., while operating under the Juvenile Code for all other aspects of the case. This approach would have both the Juvenile Code and Probate Code provisions being applied in an essentially simultaneous fashion in the case.

Dual custody in the Department and another is not permitted, *Jeremy T.*, *infra*. The court should therefore discharge the Department as custodian **before** appointing the new custodian and guardian.

Once the court places custody in an individual, with attendant guardianship powers, regular six month dispositional reviews are no longer required because permanency has been achieved, and there is no longer a “foster placement.”

The guardian is nonetheless required to file a report with the court once every six months under Neb. Rev. Stat. §43-285 (3). The court has the discretion to conduct further reviews, by hearing or on paper.

A guardianship can be subsidized upon appropriate application and qualification prior to the formal establishment of the guardianship. Subsidy can be applied to state ward guardianships established exclusively under the Juvenile Code or under the Probate Code.

If the guardianship is established in a Probate Code proceeding rather than in juvenile court under the Juvenile Code, *In re the Guardianship of Rebecca B.*, 260 Neb. 922 (2000) would require that the juvenile court case first be dismissed. Any juvenile court-imposed limitations on parental rights of custody or visitation short of actual termination would disappear with the dismissal, as would any authority to re-involve HHS. In the event of a disruption or termination of a Probate Code guardianship, a new Juvenile Code case could be filed pursuant to Neb. Rev. Stat. §43-247 (9). This is a new jurisdictional subdivision added in 2001 via LB 23.

Rationale And Supporting Authorities

I. A Probate Guardianship Has Inherent Risks If Parental Rights Have Not Been Terminated.

§30-2608 provides:

The father and mother are the natural guardians of their minor children and are duly entitled to their custody . . .

. . . The court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by prior or current circumstances or prior court order. . . .



Some have preferred to dismiss the juvenile court case to avoid the jurisdictional problem, and then to proceed to appoint the guardian in a separately filed Probate Code case. There are two principal difficulties with this procedure: (1) Unless there is a final order terminating parental rights, prior juvenile court suspension of parental rights disappears upon dismissal of the juvenile case, and the Probate Code does not then permit appointment of a guardian. (2) Once the juvenile case is dismissed, the parent with rights intact may well be able to successfully demand custody of the juvenile. Additionally, that procedure may run afoul of the Nebraska Supreme Court’s holding in the case of *In re the Guardianship of Rebecca B.*, 260 Neb. 922 (2000), which is discussed in more detail below.

In 2001 the Juvenile Code was amended by LB 23 to add a new subdivision (9) to §43-247 that allows the court to assume jurisdiction over “Any juvenile who was a ward of the juvenile court at the inception of his or her guardianship and whose guardianship has been disrupted or terminated; . . .”. This legislation was not proposed by HHS. It appears that it was intended to provide a safety net of sorts for juveniles who are under Probate Code guardianships that are disrupted or terminated. However, in order to re-establish juvenile court jurisdiction in such a case, a new Juvenile Code petition must be filed by the county attorney in the county where the juvenile is located.

II. The Juvenile Court has Dispositional Authority to Commit a Juvenile to an Individual.

Neb. Rev. Stat. §43-284:

When any juvenile is adjudged to be under subdivision (3) or (4) of section 43-247, the court may . . . make any order committing the juvenile to (3) the care of some reputable citizen of good moral character, . . . (5) the care of a suitable family, . . .

Thus, it is clear that the juvenile court can make a direct commitment of a juvenile to the care and custody of foster parents who are willing to become legal guardians as part of a permanency plan.

III. The Custodian Acquires Guardianship Powers Over the Juvenile, as a Matter of Law.

Neb. Rev. Stat. §43-285 (1):

When the court awards a juvenile to the care of . . . an individual . . . the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the . . . individual to whose care he or she is committed.

Guardianship has been defined by the Juvenile Code as well as by the Probate Code and a body of case law.

Neb. Rev. Stat. §43-285 (1) provides that such guardianship shall not include any estate of the juvenile. Accordingly, in cases where a child has assets, a separate Probate Code conservatorship proceeding may need to be considered.

Although located under the heading "Termination of parental rights," the substantive language of Neb. Rev. Stat. §43-294 arguably applies to all custodians designated by the court:

The custodian . . . shall have charge of the juvenile and the right to make decisions affecting the person of the juvenile, including medical, dental, or psychiatric treatment except that consent to a juvenile marrying or joining the armed forces of the United States may be given by a custodian, other than the Department of Health and Human Services, with approval of the juvenile court . . . without further court authority. The authority of a custodian appointed by a juvenile court shall terminate when the individual under legal custody reaches nineteen years of age, is legally adopted, or the authority is terminated by order of the juvenile court. . . . Any . . . individual receiving the care or custody of any such juvenile shall be subject to visitation or inspection by the Department of Health and Human Services, or any probation officer of such court or any person appointed by the court for such purpose. [Such inspector] and the court may at any time require from such association or person a report or reports containing such information or statements as the judge shall deem proper or necessary to be fully advised as to the care, maintenance, and moral and physical training of the juvenile, as well as the standing and ability of such . . . individual to care for such juvenile. The custodian so appointed by the court shall have standing as a party in that case to file any pleading or motion, to be heard by the court with regard to such filings, and to be

granted any review or relief requested in such filings consistent with Chapter 43, article 2.

Since the juvenile court has concurrent jurisdiction with the county (probate) court concerning guardianship of any juvenile adjudicated under a subdivision of §43-247, it may be argued that powers and duties of guardians as provided in the Probate Code and Court Rules also may apply, and may even supplement implied guardianship powers under the mentioned sections to the extent they are not inconsistent with the Juvenile Code. Neb. Rev. Stat. §43-247.

All ambiguities can be avoided by a clear and complete order, as discussed below.

While adoption remains the primary permanency alternative of choice, legal guardianship can and should be considered in cases where circumstances dictate that adoption is not feasible.

IV. An Order of Formal Guardianship Provides Authoritative Evidence of Guardianship Powers, Limitations and Duties.

Documentation is often necessary to verify legal status and authority in our society. Likewise, persons who deal with the custodian of a child, such as medical personnel, may demand clear documentary proof of authority for their own protection. Implied guardian powers are uncertain, but there is no question that the juvenile court can specifically fashion a guardianship order in the best interests of the juvenile. Such an order could incorporate all or part of the language of Neb. Rev. Stat. §43-294 and any restrictions or means of informal supervision it deems appropriate. Although it would seem unnecessary, the court could further certify the powers by letters of guardianship.

It should be noted that it is not a precondition to custody or guardianship that the juvenile court terminate or further suspend parental rights, other than what already occurred at the prior removal from custody. *In re Interest of Amber G.*

et al., 250 Neb. 973 (1996). The father in that case argued that the proposed guardianship in the juvenile case was tantamount to a *de facto* termination of his parental rights. The Supreme Court rejected that argument, citing *Stanley v. Illinois*, 405 U.S. 645, 648, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972): "[L]egal custody is not parenthood or adoption. A person appointed guardian . . . is subject to removal at any time . . .". *Amber G.*, *supra* at 985. In that case, the Nebraska Supreme Court approved a plan of permanent guardianship in the foster parents under the best interests standard, without termination of the father's parental rights. It noted: The juvenile court's exclusive jurisdiction in this matter does not deny the father the right to attempt to seek custody in the future. The father retains the right to petition the court for restoration of custody and full parental rights in the event of a change in the circumstances which at this time justify permanent guardianship and support a finding of the father's unfitness.

Amber G., *supra* at 986.

V. The Juvenile Court has Exclusive Jurisdiction Over the Guardianship of an Adjudicated Juvenile.

Formal guardianship in juvenile proceedings is envisioned within statute and case law. Neb. Rev. Stat. § 43-247 provides,

The juvenile court shall have exclusive original jurisdiction . . . as to any juvenile defined in subdivision (3) of this section . . .

The juvenile court in each county as herein provided shall have jurisdiction of:

- (10) The adoption or guardianship proceedings for a child over which the juvenile court already has jurisdiction under another provision of the Nebraska Juvenile Code; . . .

In re Interest of Rebecca B. et al., 260 Neb. 922 (2000), held that the juvenile court has exclusive original jurisdiction in a guardianship proceeding respecting a juvenile adjudicated under Neb. Rev. Stat. §43-247 (3), and it is subject to the provisions of the Juvenile Code and not §

30-2608 under the Probate Code.

VI. Guardianship Proceedings in Juvenile Court Differ From Those in Probate Court.

A. The Standards Of a Guardianship Proceeding in Juvenile Court

1. Reasonable Efforts:

Rebecca B., supra, addressed the conflicting standards between juvenile and probate guardianship proceedings:

The “fitness” standard applied under §30-2608 was analogous to a juvenile court finding that it would be contrary to a juvenile’s welfare to return home. . . . The second requirement under the juvenile code, however, potentially causes a conflict with concurrent county court jurisdiction. A juvenile court must also make an additional finding that reasonable efforts at reunification have been made.

Id. at 936. The court determined that to apply the §30-2608 standard would permit the court to evade the juvenile code requirement of reasonable efforts. The court concluded that “. . . once there has been an adjudication under a juvenile proceeding, in either a separate juvenile court or a county court sitting as a juvenile court, guardianship proceedings must be brought in a juvenile proceeding and not under §30-2608.” (Emphasis added.) *Id.* at 937.

2. Best Interests of the Juvenile:

The Nebraska Court of Appeals has also addressed the different standards of a guardianship proceeding in juvenile court in *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676 (2000). In that case, foster parents were appointed co-guardians, initially in a Probate Code proceeding, which was later terminated, and then under the Juvenile Code in the juvenile court case. In that case the Appellate Court permitted the juvenile court-appointed guardians to remove the juve-

niles to Texas, over the father’s objection, whose parental rights remained intact. The court held that the parental rights doctrine was inapplicable to a juvenile court proceeding, where the best interests of the juveniles were served by remaining with the guardians and to move with them.

B. The Guardianship Procedure in Juvenile Court is Governed by the Juvenile Code.

The procedure described in Neb. Rev. Stat. §30-2611 is also different from that in juvenile court. The same reasoning in *Rebecca B. supra*, applies: the juvenile court procedure controls. Neither would the venue provision of §30-2609 apply.

Foster care, by definition, is intended to be a temporary transitional phase in the life of the juvenile.

C. The Essential Form and Substance of Guardianship Documentation Could be Adapted from That Used in Probate Court.

Eric O., supra at 693, noted that the relationship of the former foster parents with the juveniles was “legally formalized as a guardianship.” *Rebecca B., supra*, also recognized formal guardianship proceedings in juvenile court. The commonly recognized forms for guardianship proceedings exist in the probate guardianship forms published by the Nebraska Bar Association. They can easily be adapted by the juvenile court to the juvenile’s particular circumstances. The forms are readily recognized throughout the state, serving the purpose of formalization when adapted and entered as an order or orders by the court.

D. Initiation of the Guardianship Proceeding in Juvenile Court.

The usual way of initiation of a guardianship proceeding in an existing Juvenile Code case would be for the matter to be brought before the court at a scheduled dispositional review hearing. If it is

deemed desirable to bring this issue before the court prior to a regularly scheduled dispositional review hearing, then a “Motion for Further Dispositional Review” or “Motion to Establish Guardianship Through Alternative Disposition” could be filed with specific allegations that further efforts at reunification are futile and should not be further required, if not previously so found and ordered, that legal guardianship is the permanency alternative of choice and would be in the best interests of the child and that the court should approve such permanency plan and grant alternative disposition pursuant to Neb. Rev. Stat. §43-284 (3) or (5), thus creating the desired guardianship.

Even when there is a regularly scheduled dispositional review hearing set, due process concerns may dictate that a separate special motion be filed specifying that guardianship is being sought as a permanency alternative. This would seem to be the best and safest practice.

If the approach is to seek a Probate Code guardianship within the existing juvenile case, a “Motion for Establishment of Guardianship” could be filed wherein the Probate Code guardianship of minors provisions (§§30-2605, et seq.) could be cited and relied upon for jurisdiction pursuant to the concurrent guardianship jurisdiction provided at Neb. Rev. Stat. §43-247 (10). This would be the simultaneous Juvenile Code/Probate Code approach discussed above in the Introduction and Summary.

Given our understanding of certain aspects of the Justice computer system utilized by our state courts and/or practices of the various court clerks, it is probably advisable to avoid using the term “petition” in the actual captioned title of any document prepared for the purpose of establishing a legal guardianship as a permanency alternative over a juvenile in juvenile court. To use the term “petition” may well cause the case to be docketed as a new separate case and given a Probate Code (PR) number rather than being filed within the existing juvenile case along with the assigned Juvenile Code (JV) number. This can create unintended legal consequences that are best avoided in the first instance.

VII. The Department Must be Discharged from Custody Prior to Placement of the Juvenile in the Custody of Another.

Dual custody with the Department is not permitted. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). For that reason it is necessary that the court discharged the Department as custodian before placing the juvenile in the custody of another and appointing the guardian. After such discharge, there does not appear to be any authority under the Juvenile Code to require other continuing involvement of the Department. However, in the event of problems within the guardianship, the court could quickly re-involve the Department with a temporary order of custody in order to safeguard the best interests of the child or children involved.

VIII. No Review Hearings are Required After a Juvenile Court Guardianship, Except Guardian Reports Must be Filed Every Six Months.

The court in *Eric O.*, *supra*, admonished against suspending juveniles in foster care; and it noted in its resolution of that case: “. . . the relationship between [the guardians] and the children is now essentially that of natural parent and child, which has been legally formalized as a guardianship.” *Id.* At 693. A juvenile court guardianship is not a foster placement, it is permanency achieved when accomplished as the final implementation of a permanency plan as approved by the court

Foster care, by definition, is intended to be a temporary transitional phase in the life of the juvenile. When it is determined by the court that family preservation or reunification are not viable alternatives, then a permanency plan must be approved and implemented by the court. Neb. Rev. Stat. §§43-283.01 (4), (5) and 43-1312. As pointed out above, legal guardianship is a recognized permanency alternative. When permanency has been achieved in a case there is no need for the frequent reviews that are mandated by law for juveniles in the temporary situation of foster care. Further regular formal reviews would serve no purpose and could threaten the child's sense of perma-

nency and security. The guardian is nonetheless required to file a report with the court once every six months under Neb. Rev. Stat. §43-285 (3).



IX. A Juvenile Court Guardianship Provides the Safety Net of Continuing Jurisdiction and a Forum to Address Changed and Special Circumstances.

A guardianship proceeding in the juvenile court under the Juvenile Code has other advantages of continuing jurisdiction. If there is a disruption of the placement, or if special needs arise, the court is immediately available to address the situation. The department is readily available under the Juvenile Code upon order of the court or upon emergency protective custody by law enforcement to step in and assume temporary custody should the circumstances so dictate. Such is not the case under the Probate Code. Additionally, the juvenile has a forum in which to have requests for relief addressed. A parent with other rights intact retains a forum in which to seek restoration of custody and full parental rights in the event of a change in circumstances, as noted in *Amber G.*, *supra*.

The court could schedule further proceedings on its own motion, or upon the motion of an interested person and the court must always find what is in the juvenile's best interests with the health and safety of the juvenile being the paramount concern. Neb. Rev. Stat. §43-246 (5).

X. Department Subsidy of the Guardianship is Available Upon Prior Agreement.

Subsidy of a guardianship involving a state ward is provided for at Neb. Rev. Stat. §43-284.02. The department regulations provide that “The agreement for subsidy will be completed and approved before the order establishing guardianship is issued.” (Emphasis added.) 390 NAC 6-005.05. This applies to Probate Code guardianships for wards as well as those established under the Juvenile Code.

XI. Responsibility for Assets and/or Income of the Ward.

In some cases the juvenile ward will own assets and/or have monthly income, usually federal SSI or SSA survivor's benefits or possibly parental child support payments. Assets may come from the settlement of a lawsuit on behalf of the juvenile, savings they had accrued, insurance proceeds or other sources. Since the Juvenile Code specifically prohibits an appointed guardian from having any “. . . guardianship of any estate of the juvenile”, there can be a problem arise if the juvenile has any significant assets or an “estate”. Neb. Rev. Stat. §43-285 (1). Although HHS is specifically excepted from this provision pursuant to Neb. Rev. Stat. §43-907, all other guardians appointed by the court pursuant to the Juvenile Code cannot exercise control over the assets or estate of their wards.

Whether this prohibition extends to monthly income is not entirely clear. Generally, the Social Security Administration is willing to make the custodian of a beneficiary child (SSI or SSA benefits) the payee of such benefits. Additionally, these benefits are supposed to be used for the monthly care and support of the juvenile beneficiary according to federal requirements. The ability to set things up this way, when there are no other significant assets on hand, should be explored before the establishment of the guardianship in the juvenile case. In cases where significant assets are owned by the ward and guardianship is to be pursued as an alternative disposition under §43-284 (3) or (5) of the Juvenile Code, if there is not already a conservatorship established, steps should probably be taken to establish a separate conserva-

torship for the juvenile pursuant to the applicable Probate Code provisions, Neb. Rev. Stat. §§30-2630, et seq. This kind of proceeding should not represent a jurisdictional problem vis-à-vis the Juvenile Code case since these types of cases can coexist without apparent conflict. Thus, it would seem possible and probably advisable to establish any necessary conservatorship prior to the establishment of the guardianship. The establishment of a conservatorship as a prerequisite to the establishment of a guardianship, may be paid for by HHS as a part of the subsidy of the overall guardianship proceeding if there are not sufficient assets in the juvenile's estate to allow payment. Again, this should be determined and necessary arrangements made **prior** to filing anything in court.

Another possible approach, depending upon the view of the court with Juvenile Code jurisdiction, is that the guardianship could be established in the juvenile case but under the Probate Code guardianship of minors provisions. Neb. Rev. Stat. §§30-2605, et seq., while exercising the concurrent jurisdiction contemplated at Neb. Rev. Stat. §43-247(10). That would allow the appointed guardian to exercise some control over assets owned by the ward to the extent allowed by the governing Probate Code guardianship of minors statutes. We believe that some courts might entertain such a proceeding while others would not, so it would be imperative that the position of the court of jurisdiction be determined prior to the filing of motions or pleadings.

Conclusion

When a permanency plan of guardianship for a state ward is approved by the Juvenile Court, the proposed guardianship should generally be created within the existing juvenile court case as an alternative disposition pursuant to Neb. Rev. Stat. §43-284 (3) or (5). The court should enter a very detailed order relieving HHS of all custody and committing the juvenile(s) to the proposed guardians. Ideally the order should detail the fact that the custodians so appointed are the legal guardians of the juvenile(s) and specify the powers, authority, limitations and reporting requirements of the guardian(s) so appointed.

Another acceptable alternative without significant risk to the juvenile ward is to establish a Probate Code guardianship within the existing juvenile case. This is the simultaneous Juvenile Code/Probate Code approach discussed above.

It should be remembered that if a subsidy is to be paid to the guardian(s), that arrangement **must** be set up **prior** to the establishment of the guardianship.

There should be no dispositional review hearings or permanency hearings necessary under the law once the guardianship is established but the court could schedule such review hearings as it deems appropriate within its discretion. Only semi-annual reports are legally required from the guardian(s) under the Juvenile Code. The guardian ad litem could be left in place and could generally oversee the guardianship and report to the court as the court may require, but HHS should have no ongoing role.

There appears to be no authority in the Juvenile Code for the court to require ongoing HHS involvement once the department is relieved of custody and the guardianship is established.



While adoption remains the primary permanency alternative of choice, legal guardianship can and should be considered in cases where circumstances dictate that adoption is not feasible. The pursuit and establishment of a legal guardianship in those cases can provide the needed sense of permanency and belonging that each ward deserves. 