

The background features abstract blue geometric shapes, including triangles and polygons, in various shades of blue, some overlapping and some semi-transparent, set against a white background.

# **Guardianship of a Minor: RCW 11.130 Article 2**

Presented by:

Celeste Miller, Statewide Kinship  
Care Legal Aid Coordinator

**KING COUNTY BAR**

[celestem@kcba.org](mailto:celestem@kcba.org)

# Topics for Today

- ▶ Background on the statute
- ▶ Who can file?
- ▶ Who must be served?
- ▶ Who might get a court appointed attorney?
- ▶ Basis for establishing a guardianship.
- ▶ Basis for terminating or modifying a guardianship.
  - ▶ How does this differ from the standard to terminate a nonparent custody order?
- ▶ Emergency guardianship under this statute.
  - ▶ Petition, motion, ex parte motion
- ▶ How the new Minor Guardianship intersects with dependency court.
  - ▶ Prior to the filing of a dependency case.
  - ▶ To dismiss a dependency.
  - ▶ As a permanent plan.
  - ▶ Compared to 13.36 guardianship.

The Uniform Guardianship Act was passed in 2019.

The trailer bill with specific amendments, many to Article 2, was passed in 2020.

January 1, 2021

RCW 11.130 became effective with respect to minor guardianships

RCW 26.10 was repealed\*

# What does the UGA say about effectiveness of 26.10 orders?

- ▶ (1) This chapter does not affect the validity of any court order issued under chapter 26.10 RCW prior to January 1, 2021. Orders issued under chapter 26.10 RCW prior to January 1, 2021, remain in effect and do not need to be reissued in a new order under this chapter.
- ▶ (2) All orders issued under chapter 26.10 RCW prior to the effective date of chapter 437, Laws of 2019 remain operative after the effective date of chapter 437, Laws of 2019. After the effective date of chapter 437, Laws of 2019, if an order issued under chapter 26.10 RCW is modified, the modification is subject to the requirements of this chapter.

# Three Types of Minor Guardianship

“Regular” Minor Guardianship - (*Main focus today*)

Emergency Minor Guardianship

Standby Minor Guardianship

# Who Can File?

- Someone who wants to be the guardian of the minor
- The child
- Someone concerned about the child/children, but who wants someone else to be the guardian

# What do the notice requirements look like under the guardianship law?

Notice Requirements Fall into Two Categories.

Personal service

Notice - Reasonably determined to give actual notice



# Tier 1: Personal Service

- ▶ The child if 12 or over - but see important exception\*\*\*\*
- ▶ Each parent of the child, or nearest adult in kinship if there are no parents.
- ▶ Any guardian or person with nonparent custody under RCW 26.10.
- ▶ Any other person the court decides should get personal service

## Tier 2: Notice Reasonably Determined to Provide Actual Notice

- Any person with primary care and custody who is not the parent, legal guardian, or nonparent custodian.
- Any adults who had primary care and custody of the child for more than 60 days in the last two years, if known.
- Any adults who had primary care and custody of the child for two years or more, in the last five years, if known.
- Any person nominated as guardian by the minor, if the minor is 12 years of age or older.
- Any guardian proposed by a parent of the child.
- All grandparents and adult siblings of the child, if known.
- Any conservator for the child from another state or jurisdiction.
- Any other person the court determines

# Information Going to Minors 12 and Older

- ❑ Statute gives children 12 and over the right to receive all the case information
- ❑ Statute has a separate “reasons” document - where all the facts about why the guardianship is needed are contained
- ❑ Petitioners can ask the court to waive serving the “reasons” on the child 12 and up (if the child doesn’t have an attorney), as well as other future filings
- ❑ Child can ask the court to see the information anyway - RCW 11.130.195(1)(a)(i)

# Rights of the Minor

- ✓ RCW 11.130.200 (3) - a minor “may retain an attorney to represent the minor in the proceeding”
  
- ✓ May qualify for a court appointed attorney if :
  - (a) Requested by the minor and the minor is twelve years of age or older;
  - (b) Recommended by a guardian ad litem; or
  - (c) The court determines the minor needs representation
  
- ✓ May have a court visitor appointed in the proceeding to obtain their views
  
- ✓ Right to be present and participate in the court hearing

# Minor's Court Appointed Attorney Shall:

- ▶ (a) Make a reasonable effort to ascertain the minor's wishes;
  - ▶ (b) Advocate for the minor's wishes to the extent reasonably ascertainable;  
and
  - ▶ (c) If the minor's wishes are not reasonably ascertainable, advocate for the minor's legal rights.
- ▶ RCW 11.130.200(2)

# Counsel for Parents

## RCW 11.130.200

- Parents may retain counsel
  
- Parents have right to court appointed counsel in certain instances
  - (a) The parent has appeared in the proceeding;
  - (b) The parent is indigent; and
  - (c) Any of the following is true:
    - (i) The parent objects to appointment of a guardian for the minor; or
    - (ii) The court determines that counsel is needed to ensure that consent to appointment of a guardian is informed; or
    - (iii) The court otherwise determines the parent needs representation.
  
- Court may appoint counsel - 11.130.200 (7)

## Basis of Appointment of Guardian

- ❑ In the child's best interests to have a guardian,  
and one of these:
  - ❑ Both parents agree
  - ❑ Parents rights are terminated or
- ❑ No parent of the child is **willing or able** to exercise parenting functions as defined in RCW 26.09.004

Clear and convincing evidence

# Parenting Functions 26.09.004

## ▶ Include:

- ▶ Maintaining a loving, stable relationship with the child
- ▶ Attending to daily needs of the child
- ▶ Attending to adequate education of the child
- ▶ Assisting the child in developing and maintaining interpersonal relationships
- ▶ Exercising appropriate judgment regarding the child's welfare...
- ▶ Providing financial support of the child



# Duties and Powers of a Guardian

Duties: (1) A guardian for a minor is a fiduciary. **Except as otherwise limited by the court**, a guardian for a minor has the duties and responsibilities of a parent regarding the minor's support, care, education, health, safety, and welfare. A guardian shall act in the minor's best interest and exercise reasonable care, diligence, and prudence

Powers: **Except as otherwise limited by court order**, a guardian of a minor has the powers a parent otherwise would have regarding the minor's support, care, education, health, safety, and welfare

# Full Guardianship vs. Limited Guardianship

- ▶ If parents retain no rights - “full guardianship”
- ▶ Parents rights of visitation or decision-making - “limited guardianship”.... This will be most cases - in the interests of maintaining or encouraging parents’ involvement in minor’s life
- ▶ Minor - court may find that a teen should have some decision-making authority to develop self-reliance - also limited guardianship

# Aspects of Guardianship

- ❖ Guardian(s) will be issued **Letters of Office** - showing their authority and noting limitations (limited guardianship...such as parents visitation rights and health and education decision making retained by parents)
- ❖ Guardians will need to take a **lay guardian training** for minor guardianship (required by statute, but can be waived by court)
- ❖ The court may order **periodic reporting** (not mandatory)

# Basis for Terminating or Modifying the Guardianship

When the court finds that the basis for appointing a guardian no longer exists, **unless the court finds**

- 1) ending the guardianship would be harmful to the minor **and**
- 2) the minor's interest in continuing the guardianship outweighs the parent's interest in getting their rights to make decisions about the minor back

▶ Note: There is also no adequate cause requirement.

# Difference in Termination Standards Between Minor Guardianship and Nonparent Custody

- ▶ Going forward, terminating a nonparent custody order will follow the same requirements as terminating a guardianship.
- ▶ Previously, terminating a nonparent custody order required the parent to show a substantial change of circumstances for themselves, the child, or the nonparent custodian.
- ▶ Best interests of the child was **not** a factor in terminating a nonparent custody order - if a parent proved themselves to be fit, it was presumed that it was in the child's best interest to be with their parent.
  - ▶ Considering the best interests of the child and requiring the parent to show a change of circumstances only for the nonparent custodian or the child was found to be unconstitutional in Washington in 2019.
    - ▶ *In Re Custody of: S.M. and A.M.*, 78208-8-1, (Div. 1, Jul. 1, 2019)

## The Nonparent Custody Case Law - Minor Guardianship's Basis for Termination Could Face Similar Constitutionality Arguments

▶ “Since RCW 26.10.190 clearly contemplates that **a parent may seek to modify a nonparental custody order**, due process requires that he or she be given a meaningful opportunity to do so. The factual basis for a nonparental custody order is a finding that the parent is unfit or a detriment to the child. A parent has no meaningful opportunity to regain custody of his or her child if that parent is precluded from showing there is no longer a factual basis for the order. We conclude that **RCW 26.10.190**, which applies the requirements of RCW 26.09.260(1) to modification of nonparental custody proceedings, **violates due process** in so far as it limits the change in circumstances to that of the child or the nonmoving party. Consistent with this conclusion, **we also hold unconstitutional** the requirement of RCW 26.10.190 that the modification be in the best interests of the child. The law presumes that a fit parent will act in the best interest of his or her child. *Troxel*, 530 U.S. at 68-69. Thus, just as *Shields* held that it is unconstitutional for a court to infringe on the parent-child relationship by making an initial custody determination based on a best interests analysis, it is similarly unconstitutional for a court to deny a modification on that basis. It may, however, provide grounds to impose conditions on the transition process by which the parent shall regain custody.”

▶ *In Re Custody of: S.M. and A.M.*, 78208-8-1, (Div. 1, Jul. 1, 2019)

# Emergency Guardianships

Up to 60 days with one extension... however, can also be extended during pendency of “regular” guardianship case.

If a full minor guardianship case is pending, or filed after an emergency guardianship has been filed, the cases shall be linked or consolidated. RCW 11.130.225(8)

Ex parte or with notice, however if without notice, specified parties must receive notice within 48 hours of appointment

Note: This is the only way to attain temporary custody of a child - there are no temporary custody orders or temporary parenting plans while a full/limited guardianship is pending.

- ✓ Appointment of an emergency guardian is likely to prevent substantial harm to the minor's health, safety, or welfare
- ✓ No other person appears to have authority, ability, and the willingness to act in the circumstances



# Some Other Differences

- ❑ Reasons served on 12 and up - no exception
- ❑ Parents no rights to court appointed counsel

# Another Option Under the Statute - Standby Guardianship

- ✓ Parents can nominate someone to be a guardian in the future
- ✓ Parent or guardian nominee can petition
- ✓ Can become effective on an event in the future (within 2 years)

# Native American Children

ICWA processes apply, as they do in dependencies

# How Minor Guardianships Intersect with Dependency Court

- ▶ Prior to the filing of a dependency case.
- ▶ To dismiss a dependency.
- ▶ As a permanent plan.

# Prior to Filing a Dependency

- ▶ Kinship caregivers are sometimes advised by CPS to file for minor guardianship of their relative child, so that a dependency case can be avoided.
- ▶ Filing for a minor guardianship is very difficult at this point for kinship caregivers.
  - ▶ The few legal clinics that helped with nonparent custody cases are still catching up on the new law.
  - ▶ Private attorneys are still hesitant to take minor guardianship cases.
  - ▶ Most kinship caregivers are moderate to low income, and have to represent themselves.
  - ▶ Family Law Facilitators are allowed to help with minor guardianship but do not uniformly do so across the state.

# Establishing an 11.130 Guardianship in Order to Dismiss a Dependency Case

- ▶ Concurrent Jurisdiction - RCW 13.34.155
- ▶ This was amended to replace “nonparent custody” with “minor guardianship”
- ▶ The court may hear the minor guardianship petition as necessary to facilitate a permanent plan, part of dependency disposition or dependency review
- ▶ Parents, guardians, or legal custodians of the child must agree to establish a guardianship in this situation, but the court may decide contested issues implementing the guardianship.
- ▶ If the petitioner for guardianship is not a party to the dependency proceeding they must agree to the entry of the guardianship on the record.
- ▶ Once a guardianship is established, dependency is dismissed and department no longer supervises.

# Permanency Plan Option

- ▶ An 11.130 Guardianship replaced nonparent custody as one option for a permanent plan. RCW 13.34.136(2)(a)
- ▶ Guardianship means an 11.130 minor guardianship or a 13.36 guardianship. RCW 13.34.136(7).

# Recent Legislative Changes Affecting Youth in Kinship Care through DCYF

- ▶ **HB 1747 Supporting Relative Placements - Changes effective June 9, 2022**
  - ▶ New good cause exception to filing a TPR petition = if the Department hasn't yet met with the kinship caregiver to discuss guardianship as an alternative to adoption, or if the court has determined that guardianship is an appropriate permanent plan. RCW 13.34.145(5)(vii)
  - ▶ If child has been in foster care or a relative placement for more than six months prior to the permanency planning meeting, the court **shall** instruct the Department to discuss guardianship with the relative and the parents as a potential permanent option and alternative to TPR and adoption. Children in relative placements also **cannot** be moved out of that placement without the court finding that a change in circumstances necessitates the move. RCW 13.34.145(7)(b).
  - ▶ In TPR case, court **must consider** whether DCYF discussed guardianship with relatives before determining that a parent's rights are in the way of a child's stability. RCW 13.34.180(1)(f).



# Recent Legislative Changes Affecting Youth in Kinship Care through DCYF

- ▶ **SB 5124 - Supporting Guardianships and VPAs with Non-Relative Kin - changes effective July 23,2023**
  - ▶ Changed eligibility for guardianship subsidies to include non-relative kin. RCW 13.36.090(1)
  - ▶ Increased eligibility for guardianship subsidies (GAP) - a child is eligible for state GAP even if they don't meet the requirements for federal IV-E GAP. RCW 13.36.090(3)
  - ▶ Created priority for relatives/suitable person placement over licensed foster care in VPAs. RCW 74.13.031(8)
  - ▶ Changed eligibility for GAP for 19-21 year old dependents to include those who are placed with non-relative kin. RCW 74.13.031(14)

# Differences Between 11.130 and 13.36 Guardianships

- ▶ Major differences:
  - ▶ Service and notice requirements are more burdensome in 11.130
  - ▶ DCYF will assist more with 13.36 guardianships, as any party to the dependency case can file the petition for 13.36 guardianship. Whereas 11.130 requires concurrent jurisdiction and often the relative caregiver is the petitioner.
    - ▶ Question - “a person interested in the welfare of a minor” is allowed to file an 11.130 minor guardianship petition, could that be an AAG on behalf of the Department?
  - ▶ Child must be appointed an attorney or GAL in 13.36, not required in 11.130
  - ▶ The termination standards are different - 13.36 is very similar to the standard in nonparent custody that was found to be unconstitutional!
  - ▶ **IMPORTANT: previously, only 13.36 guardianships allowed GAP payments, but now in both types of guardianship, the child could be eligible for GAP.**
- ▶ **SEE Handout for a more detailed comparison between the two types of minor guardianship.**

Questions?