

Guardianships: Wyoming Law Nuts and Bolts

Guardianship as a possible pathway to permanency for children in the custody of the Wyoming Department of Family Services

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What is a guardianship?

- Guardianship is a legal proceeding – appropriate documents must be filed with the court, and an Order entered by the judge
- Guardianship gives the Guardian power and duty to act, typically as a parent would
- Guardianship also gives Guardian power to determine appropriate residence of the child or incompetent person

Guardianship is NOT:

- a parent simply giving a child to another person
- a parent signing a document that says “I give you guardianship of my child” without going through the legal process
- Guardianship is different from a guardian *ad litem* who is often an attorney and typically appointed to represent the best interests of the child

Two Types of Guardianship

1. Temporary Guardianship

- The goal for DFS is permanency, so the agency typically won't use temporary guardianships
- Limited to maximum of 1 year, unless extended for good cause
- Two types of temporary guardianship:
 - For educational, medical and dental care purposes - Wyo. Stat. Ann. §§ 3-2-301 *et seq.*
 - For general purposes - Wyo. Stat. Ann. § 3-2-106

Two Types of Guardianship

2. Permanent Guardianship

- No maximum time period
- Types: Voluntary and Involuntary
 - Voluntary guardianships are when ward (age 14 or older) petitions for appointment of guardian.
Wyo. Stat. Ann. § 3-2-105

Situations that are appropriate for permanent guardianship for a child in custody of DFS

- Before considering guardianship, policy requires DFS to:
 - exhaust reunification efforts,
 - rule out reunification with parents, and
 - rule out adoption as a permanency option

DFS Social Services Division Policy 3.3

Situations that are appropriate for permanent guardianship for a child in custody of DFS

- Before filing guardianship, the ward must have resided with the proposed guardians for a minimum of 6 months
- Prospective guardian and the child must have strong attachment
- Children age 14 and older must participate in guardianship arrangement and Family Service Plan

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Situations that are appropriate for permanent guardianship for a child in custody of DFS

- Before guardianship is finalized, DFS is required to:
 - Determine guardian is an appropriate placement, including application, home study, background check, etc.
 - Typically, they are already certified foster homes

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Subsidized Guardianships

- This only applies if the child is in the custody of DFS, and guardianship is the permanency goal
- DFS may negotiate a subsidy if finances are the only barrier to guardianship
 - DFS subsidies are **not** provided by statute, and are not guaranteed
- Negotiable subsidy amount range found in Rate Memo
- Rate cannot exceed foster care maintenance payment
- Subsidy remains in effect as long as terms of subsidy agreement are met
 - Annual reviews are required
- Subsidy agreements are contingent upon availability of state funds
 - Wyoming does not receive federal money for these subsidies

Where to file a guardianship action

- Venue: County where proposed ward resides or is present - Wyo. Stat. Ann. § 3-1-103
 - It is DFS's position that the ward resides in the county where the juvenile court action originated, and the court retains jurisdiction.
 - This matters when proposed guardians are in another state or county.
- The proposed guardians consent to the personal jurisdiction of the court where the guardianship action is filed. Wyo. Stat. Ann. § 3-1-102

Where to file a guardianship action

- Court:
 - District court. Wyo. Stat. Ann. §§ 3-1-101(a)(ii), 3-2-101
 - For Child Protection Cases:
 - May also be filed in Juvenile Court action. Wyo. Stat. Ann. § 14-3-403(c)
- Transfer:
 - The District Court may transfer jurisdiction of guardianship petition to the Juvenile Court if the proposed ward is under the prior and continuing jurisdiction of Juvenile Court.

Wyo. Stat. Ann. § 3-2-101(b)

Transferring to Juvenile Court

- Problematic:
 - If the Juvenile Court dismisses the juvenile case, guardianship must then be filed as a separate action.
 - Guardianship statutes do not provide for court-appointed counsel for parents, but juvenile actions do
 - Which statutes govern if guardianship is transferred?
 - Who then pays for the attorney?
 - Appointment of GALS – different standards
 - CPS actions require appointment of a GAL.
 - Delinquency and CHINS actions require the appointment of a GAL if the child has no one to appear on his behalf, or if the parents' interests are adverse to the best interests of the child.
 - Guardianship statutes require the judge to appoint a GAL or make such other order as it deems proper for the protection of the minor. Wyo. R. Civ. P. 17(c).
 - Which statutes govern if guardianship is transferred?

Who can petition for guardianship?

- Any person. Wyo. Stat. Ann. § 3-2-101.
 - However, the filer must state his interest in the petition.
- The Attorney General's office, representing DFS as the legal custodian of the child, files guardianships when guardianship is the permanency plan
 - *See* DFS Social Services Division Policy 3.3.1 for procedure

Who can be appointed as guardian?

- Non-binding preference in the following order:
 - Ward's parent(s)
 - Person named as guardian in will of ward's custodial parent
 - Person requested by a ward who has reached 14 years of age
 - Any other person whose appointment would be in the ward's best interest

Wyo. Stat. Ann. § 3-2-107(d)

Who can be appointed as guardian?

- For a child in DFS custody:
 - Guardian must be over 21 years old
 - unless age requirement waived by DFS District Manager

DFS Social Services Division Policy 3.3

Preparing the Petition

Wyo. Stat. Ann. § 3-2-101(a)

- Petition shall state:
 - Proposed Ward's: name, age, address
 - Status of ward as a minor, incompetent person or mentally incompetent person
 - Reasons for the petition
 - Name and address of proposed guardian
 - Proposed guardian's qualification as a fit and proper person to serve as guardian
 - Residence or presence of the proposed ward in the county
 - Facts showing that the best interest of the proposed ward requires appointment of a guardian
 - Best interest analysis should include showing of unfitness of parent. See *In re MEO*, 2006 WY 87 (Wyo. 2006) and *In re SRB-M*, 2009 WY 22 (Wyo. 2009).

Preparing the Petition

Wyo. Stat. Ann. § 3-2-101(a)

- Petition shall state...continued:
 - Name and address of person/facility that currently has care, custody or control of the proposed ward
 - The interest of the petitioner
 - Also state:
 - Whether the ward has been served with petition.
- Wyo. Stat. Ann. § 3-2-105(b)

Child Custody Pleadings

Wyo. Stat. Ann. § 20-5-309

- Guardianship is a “child custody proceeding.” Wyo. Stat. Ann. § 20-5-202(a)(iv)
- In all child custody proceedings, first pleading or an attached affidavit shall include:
 - Child’s current address
 - Places child has lived for last 5 years
 - Name and current address of anyone with whom the child lived during those 5 years
 - Whether the petitioner:
 - Has participated in any other proceeding concerning custody of the child
 - If so, identify the court, case number, and date of custody order (if any)
 - Knows of any other proceeding that may affect current guardianship petition, including proceedings related to: domestic violence, protective orders, termination of parental rights actions or adoption actions
 - If so, identify the court, case number, and nature of proceeding
 - Knows name and address of any person that is not a party to the current guardianship action that has physical custody of, or claims right of custody or visitation with, the child
 - If so, list name and address of all persons

Who receives notice?

- Notice shall be given in accordance with WY Rules of Civil Procedure. Wyo. Stat. Ann. § 3-2-102(d)
 - This means formal service of process, unless consent includes a waiver of service
- Notice is a matter of due process and fundamental fairness.
 - *In re MEO*, 2006 WY 87 (Wyo. 2006).
 - Guardianships have been overturned on appeal if notice provisions are not strictly followed

Who receives notice?

- Service must be made on the following who have not consented:
 - Proposed ward
 - Statue doesn't make any exceptions based upon age
 - Proposed ward's custodian
 - Proposed guardian
 - Proposed ward's parents
 - Do not forget about absent/unknown fathers!

Wyo. Stat. Ann. § 3-2-102

Who receives notice?

- What if I can't find the parents?
 - Guardianship actions do NOT qualify for service by publication. Wyo. R. Civ. P. 4(e)
 - If the proposed ward's parents are not known, or cannot be discovered with due diligence, court may find good cause to waive service.

Wyo. Stat. Ann. § 3-2-102(b)(ii)

After filing petition

- When all parties have consented, request a hearing and submit proposed Order to the Judge
 - Some judges will appoint guardian without hearing if all parties consent
 - Have guardians appear prepared to answer questions about their duties – especially report obligations
- For contested guardianships:
 - After petition is filed, Wyoming Rules of Civil Procedure and Wyoming Rules of Evidence apply.
 - The petitioner, the proposed ward or the ward's custodian may demand a jury trial.

Wyo. Stat. Ann. § 3-2-103

Duties of Guardian

Wyo. Stat. Ann. § 3-2-201

- Guardian shall:
 - Facilitate least restrict and most appropriate residence for the ward
 - Facilitate ward's education, social and other activities
 - Authorize or restrict ward's healthcare and treatment, subject to limitations
 - Take care of ward's personal property
 - Commence protective proceedings if necessary
 - Apply ward's money and property to the current needs of the ward
 - Exercise due care to conserve ward's excess funds
 - Pay conservator annually, if applicable
 - Ask the court to modify guardian's duties, if necessary
 - If ward dies, arrange final disposition of ward's remains, if immediate family is unavailable/unwilling

Powers of Guardian

Wyo. Stat. Ann. § 3-2-201

- Guardian may:
 - Receive money payable from any conservatorship for support of the ward
 - Receive money or property of the ward pursuant to Wyo. Stat. Ann. § 3-3-108 (payment/delivery of property in lieu of conservatorship)
 - Institute proceedings to compel performance of a person's duty to support the ward
 - Consent to marriage or adoption of the ward

Power of Guardian Subject to Court Approval - Wyo. Stat. Ann. § 3-2-202

- Guardian must petition the court for authority to:
 - Commit the ward to a mental health facility
 - Consent to the following treatments:
 - Electroshock therapy
 - Psychosurgery
 - Sterilization
 - Other long-term or permanent contraception
 - Relinquish the ward's minor child for adoption
 - Execute advance medical directives, durable power of attorney for health care

Guardian's Report

Wyo. Stat. Ann. § 3-2-109

- Must be filed with the Court every 6 months
 - If the guardian fails to file the report, the court shall order the guardian to show cause why he shouldn't be held in contempt of court
 - Court may dismiss the guardianship.
 - If dismissed, any guardianship subsidy will cease
- Report must include:
 - Physical condition of the ward
 - Principal residence of the ward
 - Description of treatment, care and activities
 - Description of actions taken on behalf of ward

Fiduciary statutes apply

- Wyo. Stat. Ann. §§ 2-3-101 – 504
 - **Oath of Guardian and Letters Testamentary**
 - Important: Guardianship is not in place until Oath & Letters are filed!
 - Bond – DFS requests that bond not be required
 - Uniform Fiduciaries Act
 - Handling property and investments
 - Trust funds
 - Mortgages, leases and sales
- Wyo. Stat. Ann. §§ 2-3-801 – 834
 - Wyoming Uniform Principal and Income Act

Rights and Powers of the Ward

Wyo. Stat. Ann. §§ 3-1-201 *et seq.*

- In any involuntary guardianship, ward has the right to:
 - Notice of filing of guardianship petition
 - An opportunity for a hearing
 - Be present at any hearing
 - Have a guardian *ad litem* appointed pursuant to Wyo. R. Civ. P. 17(c)
 - Guardianship statute does not require the judge to appoint a GAL
 - Rule 17(c) requires the judge to appoint a GAL or make such other order as it deems proper for the protection of the minor.
 - The least restrictive and most appropriate guardianship suitable to the circumstances
 - These rights may be exercised by the ward, his legal counsel or the guardian *ad litem*.

Dissolution of guardianship

Wyo. Stat. Ann. § 3-3-1101

- Minor ward attains age of majority (and has not been adjudged incompetent)
- Death of ward
- Determination by the court that ward is competent and capable of managing his own affairs, and continuance of guardianship is not in ward's best interest
 - After guardianship has been in place for at least 6 months, the ward may petition to terminate the guardianship
- Determination by the court that the guardian is not acting in the ward's best interest
 - Court shall then appoint a new guardian
- Determination by the court that the guardianship is no longer necessary for any other reason
- If a petition to terminate the guardianship is denied, another petition to terminate the guardianship may not be filed for 6 months
- If a guardianship is attacked by a parent, burden is on the guardian to show guardianship is still necessary

Avoiding the pitfalls of guardianship

- Include all required information in petition
 - Don't forget about Wyo. Stat. Ann. § 20-5-309!
- When Order Appointing Guardian is entered, don't forget about Oath and Letters!
 - Wyo. Stat. Ann. §§ 2-3-101, 103
- Ensure guardians know of the reporting requirements – judges typically ask
 - Best practice: send a “Notice to Guardian” which details their rights and responsibilities
 - If guardian fails to submit report, guardianship—and any subsidy—may be terminated!

DFS Policy:

<http://dfsweb.wyo.gov/social-services/policy/dfs-policy-manual>