



**Date:** February 17, 2021  
**To:** House Committee on Human Services  
**Re:** House Bill 2104  
**From:** The Office of Public Defense Services

Dear Chair Williams, Vice Chair Leif, and members of the House Committee on Human Services:

The Office of Public Defense Services (OPDS) seeks to provide you with background and context within which [House Bill \(HB\) 2104](#) arises and to relay issues our appellate experts have raised with the bill, as presently drafted. Our submitted testimony includes: (1) background on an Oregon Supreme Court case that led to HB 2104; (2) an overview of the differences between permanent and general guardianships in existing law; (3) a brief description of the changes proposed in HB 2104 by section; and (4) a summary of the agency's concerns regarding the implications of these proposed changes.

## **1. Background:**

### ***Dept. of Human Services v. J.C., 365 Or 223 (2019)***

HB 2104, in relevant part, grants juvenile court continuing wardship jurisdiction upon establishment of permanent or durable guardianship regardless of whether original bases for wardship jurisdiction continue to exist. HB 2104 responds to [Dept. of Human Services v. J.C., 365 Or 223 \(2019\)](#), in which the Oregon Supreme Court held that ORS 419B.368 (the statute providing for modification or vacation of guardianship) does not prevent a challenge to the court's jurisdiction (the reasons why the court is involved) when the child at issue is subject to a general guardianship under ORS 419B.366. The court explained that the "general rule" for the duration of general guardianships is that "they continue so long as the juvenile court's jurisdiction" over the child (ward) continues.<sup>1</sup>

The court also explained that a "general" (or temporary) guardianship under ORS 419B.366 may end in two ways: (1) the court's vacating the guardianship under ORS 419B.368 (in which case, jurisdiction and wardship would continue); or (2) by dismissing jurisdiction and terminating the wardship if there is no longer a basis for jurisdiction over the child.<sup>2</sup>

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<sup>1</sup> *Id.* at 231.

<sup>2</sup> *Id.* at 231-232.

A necessary predicate to vacating a guardianship under ORS 419B.368 is a determination that doing so is in the child's best interests. No such determination is necessary on a motion to dismiss jurisdiction and terminate the wardship. Longstanding case law holds that the juvenile court may not continue its wardship over a child when it no longer has jurisdiction because the facts that gave rise to juvenile court jurisdiction no longer exist.<sup>3</sup>

## **2. Permanent vs. General Guardianships**

There are two types of guardianships under the juvenile dependency code: (1) a permanent guardianship under ORS 419B.365; and (2) a "general" guardianship under ORS 419B.366.

### ***Permanent Guardianship***

ORS 419B.365, a permanent guardianship, provides procedural protections for parents and children before a permanent guardianship may be established, including proof by clear and convincing evidence<sup>4</sup> that there are grounds for terminating parental rights and that it is in the child's best interests that the parent never again have physical custody but that other parental rights and duties should not be terminated. A parent may not move to vacate a permanent guardianship, per ORS 419B.368(7).

### ***General Guardianship***

ORS 419B.366, a general guardianship, does not have similar protections – it requires only proof by a preponderance of evidence<sup>5</sup> that the child cannot safely return home within a reasonable time, that adoption is not an appropriate plan, that the proposed guardian is willing and able to be the guardian, and that the guardianship is in the child's best interests. A parent may move to vacate a general guardianship, per ORS 419B.368(1).

### ***How Permanent and General Guardianships Interact Currently***

Should a child be placed in a general guardianship under ORS 419B.366, a parent may ask the juvenile court to end the guardianship, either by vacating the guardianship or by dismissing the case entirely (that is, dismissing jurisdiction and

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<sup>3</sup> See e.g., *State v. A.L.M.*, 232 Or App 13,16, 220 P3d 449 (2009) ("It is axiomatic that a juvenile court may not continue a wardship if the jurisdictional facts on which it is based have ceased to exist.") (internal quotation marks omitted).

<sup>4</sup> "Clear and convincing evidence" is evidence that proves a fact is substantially more likely than not.

<sup>5</sup> A "preponderance of evidence" is evidence that proves a fact more probable than not.

terminating the wardship). However, should the Department of Human Services (DHS) or the child wish to have a guardianship that the parent cannot ask the court to end, they may seek to establish a permanent guardianship under ORS 419B.365. The key difference is that the permanent guardianship requires a higher threshold of factual proof to establish due to its impacts on parents' rights.

Additionally, if a child is in a general guardianship, and a parent requests that the juvenile court vacate the guardianship based on changed circumstances, but additional circumstances exist that DHS or the child believe would cause endangerment should the child be returned to the parent, those parties may ask the juvenile court to assert jurisdiction based on the new circumstances.

### ***Jurisdiction vs. Circumstances Giving Rise to Guardianship***

It is important to note that the bases for a juvenile court's establishing jurisdiction over a child, and the circumstances that give rise to a general guardianship are not the same thing. The basis for a general guardianship is often narrower than the basis for a juvenile court establishing jurisdiction over a child. A parent may change the circumstances that led to a general guardianship even while some of the bases for the juvenile court's jurisdiction continue. For example, if the juvenile court established a general guardianship over a child due to the parent's lack of safe housing, the parent may request that the juvenile court vacate the general guardianship when the parent obtained safe housing. Meanwhile, the basis for jurisdiction, which could include any number of other factual bases, could continue to exist, allowing the court to continue its jurisdiction over the child, such as if the parent needed additional services that could be addressed while the child was in the parent's custody.

### **3. Flagged Changes in HB 2104 by Section:**

**Section 2, subsection (3):** This section expands the duration of the court's wardship over a child for cases in which the court has previously established either a general (ORS 419B.366) or permanent (ORS 419B.365) guardianship for the child, *regardless* of whether the court continues to have jurisdiction.

**Section 3, subsection (5):** Except in cases where a child reaches the age of 21, this section purports to provide for ORS 419B.368 as the exclusive means by which the juvenile court may dissolve or otherwise terminate an ORS 419B.365 permanent guardianship.

**Section 4, subsection (6):** Except in cases where a child reaches the age of 21, this section purports to provide for ORS 419B.368 as the exclusive means by which the

juvenile court may dissolve or otherwise terminate an ORS 419B.366 general guardianship.

#### **4. OPDS Technical Feedback on HB 2104's Proposed Policy Changes:**

##### **Summary**

HB 2104 would make it virtually impossible for a parent to end a general guardianship established under ORS 419B.366, even where the parent has ameliorated all of the reasons why the court became involved with the family in the first place (the jurisdictional bases). This change would also provide parents with almost no procedural protections in establishing the general guardianship. Lastly, existing law allows for DHS or the child to seek general guardianship if new circumstances arise or to move for permanent guardianship if they believe that to be in the best interests of the child.

##### **Specific issues:**

- **Due process implications:** The changes put forth in HB 2104 implicate due process as to the general guardianship statute, ORS 419B.366, because they would authorize presumptively permanent governmental deprivation of parental rights based upon a preponderance of evidence standard when the rules of evidence do not apply to the hearing at which the record is developed. This elevates general guardianship virtually to co-equal status with permanent guardianship, even though it does not also require the same corresponding standards of proof, requirement for rules of evidence, and demonstration of parental unfitness sufficient to authorize permanent deprivation. By comparison, there are no due process problems as to the permanent guardianship, because the statute provides that “the grounds for granting a permanent guardianship are the same as those for termination of parental rights,” wherein the state must prove those grounds by clear and convincing evidence at a proceeding to which the rules of evidence apply.
- **Due process and other implications of parties' reliance interest in stare decisis:** Parties (such as parents with children in the foster care system) with existing cases open have already waived challenges and/or stipulated to general guardianships in reliance on the case described, *J.C.* Legislative amendments that undercut those reliance interests may prompt litigation challenges.
- **Jurisdiction issue:** As written, these amendments would require a juvenile court to continue wardship even when it lacks jurisdiction to do so. A party, however,



may raise a challenge to subject matter jurisdiction at any time. The source of the juvenile court's subject matter jurisdiction is currently before the Oregon Supreme Court in three cases:

- *Dept. of Human Services v. C.M.H.*, S067827 (ORS 419B.100)
- *Dept. of Human Services v. J.S.*, S068044 (UCCJEA)
- *Dept. of Human Services v. P.D.*, S068041 (UCCJEA)

The OPDS would be happy to provide more information regarding the issues described in this testimony.

Thank you for your time,

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