

Child and Family Services Policy Manual: Legal Procedure Guardianship

Guardianship: Definition	<p>A legal guardian is a person who has qualified as a caretaker of a child/youth in the custody of the Department pursuant to court appointment. A legal guardianship is a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the child, custody of the child, and decision-making.</p> <p>A guardianship is a legally created relationship which can only be dissolved by the court. Guardianship is a permanency option for children from whom a permanency team has made the determination that neither reunification with the child's parents nor adoption is in the best interests of the child.</p>
Who may Petition the Court for Guardianship	<p>A petition for the appointment of a guardian may be filed either by the Department or by the child's Guardian Ad Litem. Because a Guardian Ad Litem may petition the court for appointment of a guardian, the petition for appointment of a guardian is distinguished from the other dispositional options in that only the Department can petition the court for Temporary Investigative Authority, Temporary Legal Custody, Planned Permanent Living Arrangement, or Permanent Legal Custody.</p> <p>When the Department petitions for guardianship the Child Protection Specialist must file the affidavit in a timely manner to assure the petition is filed and the hearing scheduled within the timeframes applicable to each individual case.</p> <p>The Child Protection Specialist is strongly encouraged to attach a current picture of the child to all affidavits or reports submitted to the court. The exception to this "strongly encouraged" is if the County Attorney, Deputy County Attorney, CPU Attorney representing the Department or the judge recommends against it.</p>
When a Petition for Guardianship can be Filed	<p>The petition for appointment of a guardian may be filed if the child has been placed in the Temporary or Permanent Legal Custody of the Department. Termination of Parental Rights to the child is not required for the filing of a petition for appointment of a guardian. However, the petition may not be filed prior to a determination by the court that the child has been abused or neglected.</p>

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Department Consent

A petition for appointment of a guardian may be filed prior to the Permanency Hearing upon the determination by a permanency team, with approval of the Regional Administrator, that a guardianship is in the best interests of the child and all the conditions precedent exist.

The petition for appointment of a guardian may also be filed in response to the permanency hearing, if the court finds that reunification of the child with the child's parent is not in the best interests of the child. (See Policy Sections 302-3 and 302-7)
<https://dphhs.mt.gov/portals/85/cfsd/documents/cfsdmanual/302-3.pdf>
<https://dphhs.mt.gov/portals/85/cfsd/documents/cfsdmanual/302-7.pdf>

Conditions Precedent to Appointment of a Guardian

Before the court can appoint a guardian, the Department must have given written consent. The guardianship may be subsidized or nonsubsidized and the Department must consent to both subsidized and nonsubsidized guardianships.

Before the Department can consent to and petition the court for appointment of a guardian for a child in state custody, the court must make a finding of fact for each of the following conditions:

- the child(ren) have been adjudicated a youth in need of care;
- the Department has made reasonable efforts to reunite the parent and child(ren);
- further efforts to reunite the parent and child by the Department would likely be unproductive;
- reunification of the parent and child(ren) would be contrary to the best interests of the child(ren);
- the guardianship is in the best interests of the child;
- the child(ren) have lived with the potential guardian in a family setting and the potential guardian is committed to providing a long-term relationship with the child(ren);
- it is in the best interests of the child(ren) to remain or be placed with the potential guardian;

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- either termination of parental rights to the child(ren) is not in the child's best interests or parental rights to the child(ren) have been terminated, but adoption is not in the child's best interests; and
- if the child(ren) concerning whom the petition for guardianship has been filed is an Indian child(ren), as defined in the Indian Child Welfare Act (See Section 305-1), the child's tribe has received notification from the state of the initiation of the proceedings.

Effect of Decree of Guardianship

The entry of a decree of guardianship terminates the custody of the Department and involvement of the Department with the child, the child's parents, and the guardians except for the provision of a subsidy, if any.

The decree of guardianship awards to the legal guardian the powers and responsibilities of a parent who has not been deprived of custody of the parent's minor child. A guardian has the following powers and duties:

- take reasonable care of the child's personal effects and commence protective proceedings if necessary to protect other property of the child;
- receive money payable for the support of the child from the child's parent, guardian or custodian; and
- facilitate the child's education, social or other activities and authorize medical or other professional care, treatment, or advice; and
- consent to the marriage or adoption of the child.

What if the Guardian wishes to adopt?

Upon finalization of the guardianship, the Department's involvement ceases to exist legally except for the provision of subsidy.

MCA 41-3-444(5) and 72-5-231(3) allows the guardian to pursue and consent to adoption of the child for which it has guardianship. The guardian can pursue the adoption privately without the Department's assistance or intervention by obtaining his/her own counsel. The guardian(s) must have a

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court order showing that parental rights were terminated. If rights were not terminated prior to the guardianship finalization, the guardians can pursue termination on their own through voluntary relinquishment or involuntary termination. The guardian will also need a preplacement evaluation approving him or her to adopt.

If the Department provided a guardianship subsidy and the family wishes to pursue an adoption subsidy, the guardian should contact the Department prior to the finalization of the adoption to determine eligibility for an adoption subsidy.

Revocation of the Guardianship

The court may revoke a guardianship if the court finds, after hearing on a petition for removal of the child's guardian, that continuation of the guardianship is not in the best interests of the child. The petition of revocation of the guardianship may be filed by the legal guardian, the Department, a court appointed Guardian Ad Litem, or the child's parents (if the rights of the parents have not been terminated).

Notice of hearing on the petition must be provided by the moving party to the child's legal guardian, the Department, a court appointed guardian ad litem, the child's parent (if rights of the parent have not been terminated) and other persons directly interested in the welfare of the child.

The petition may include a request for appointment of a successor guardian. After notice and hearing on a petition for removal or permission to resign, the court may appoint a successor guardian or may terminate the guardianship and restore Temporary Legal Custody to the Department.

NOTE: The guardianship discussed in this section is established under Title 41, Child Abuse and Neglect. None of the requirements discussed in this section apply to a guardianship appointed pursuant to Title 72, Chapter 5 (guardianships established under the Probate Code) with the exception of the referenced MCA 72-5-321 which establishes powers and duties of the guardian.

References

Mont. Code Ann. § 41-3-422.
 Mont. Code Ann. § 41-3-442.
 Mont. Code Ann. § 41-3-444.
 Mont. Code Ann. § 41-3-445.

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Mont. Code Ann. § 41-3-607.
Mont. Code Ann. § 72-5-231.
Mont. Code Ann. § 42-2-301
Mont Code Ann. § 42-3-202
Indian Child Welfare Act, 25 U.S.C. 1901 et seq.

Rev. 10/03
Rev. 10/05
Rev. 10/07
Rev. 06/10
Rev. 10/12
Rev. 02/14
Rev. 09/14