

Permanent Guardianship

By Ashley Moore

On May 25, 2005, the Tennessee Legislature passed the Permanent Guardianship statute (T.C.A. §§ 37-1-801-807), authorizing the juvenile courts to appoint “a permanent guardian[] [for a child] at a permanency planning hearing or at any other hearing in which a permanent legal disposition of the child can be made, including a child protection proceeding or a delinquency proceeding.”⁵⁵ This statute provides relative caregivers with another legal option aside from legal custody or adoption.⁵⁶ This memorandum will outline the permanent guardianship statute, and its benefits for relative caregivers, provide a brief history behind the statute’s enactment, and address the possibility of the Kinship Summit generating a Position Statement in support of this statute and the goals for which it was enacted.

I. Criteria for Permanent Guardianship and Guardianship

Requirements (Found in T.C.A. § 37-1-802)

a. General overview

The court may appoint any adult, including a relative, foster parent, or any other adult with a significant relationship with the child, as permanent guardian. If the child is in state custody, the court shall seek the opinion of the Department of Children’s Services (DCS) as to the proposed guardianship and the appointment of a specific permanent guardian. Permanent guardianship, however, is not limited to children in state custody, but provides a unique opportunity for a non-parent custodian to gain legal recognition as guardian of a

minor child. Thus, relatives (and non-relatives) who have informally taken physical custody of a child, or have established legal custody or guardianship through a court, with or without intervention from DCS, may seek appointment as that child's permanent guardian.

b. General requirements for permanent guardianship

In order to establish a permanent guardianship, a Tennessee court with juvenile jurisdiction must first determine whether the statutory requirements for a permanent guardianship order have been met. Those requirements are as follows: (1) the child must have been adjudicated dependent and neglected, unruly, or delinquent;⁵⁷ (2) the child must have lived with the proposed permanent guardian for at least six (6) months; (3) permanent guardianship must be in the child's best interests; (4) reunification of the parent and child is not in the child's best interests; and (5) the proposed permanent guardian meets the necessary requirements, which are described below.

c. Requirements for guardianship consideration

Once a court has ruled that permanent guardianship is possible, it must then determine whether the proposed permanent guardian is qualified. That individual must meet the following criteria before he or she can be certified by the court as a child's permanent guardian: (1) emotional, mental, physical, and financial suitability; (2) ability to provide the child with a safe, permanent home; (3) an expressed commitment to raise the child for the duration of the child's minority (until age 18, or 19 if the child has been adjudicated delinquent)⁵⁸; (4) express demonstration of a clear understanding of financial implications of

becoming a permanent guardian, including potential loss of benefits or assistance;⁵⁹ and (5) a willingness to comply with any terms of a court order to provide the child's parent with visitation, contact, or information.⁶⁰

II. Best Interests Considerations Regarding the Child (Found in T.C.A. 37-1-802)

In determining whether it is in the child's best interests that the court designate a permanent guardian, the court shall consider each of the following factors: (1) the child's need for continuity of care and caregivers, and for timely integration into a stable and permanent home, taking into account the child's developmental stage and needs; (2) the physical, mental, and emotional health of all individuals involved with the child, but most importantly, the child's needs; (3) the quality of the child's relationships with all family members and caregivers, including the proposed guardian; and (4) the reasonable preferences of the child, if the child is twelve (12) years or older. The court may hear the preferences of younger children, but should generally give more weight to those of older children. Outside of these listed factors, the court may also look to any other evidence that it finds relevant.

III. Parental Rights and Responsibilities Under a Permanent Guardianship

a. T.C.A. 37-1-803

Parents may enter into a permanent guardianship arrangement voluntarily and shall demonstrate an understanding of the implications and obligations of such consent. It must be emphasized that the creation of a permanent

guardianship arrangement does not terminate the parent and child relationship. Further, the parent and child continue to hold the following rights: (1) the child's right to inherit from his or her parents; (2) the parents' right to visitation, as defined by the court (see below); (3) the parents' right to consent to adoption; and (4) the parents' obligation to provide financial, medical, and other support for the child.

The permanent guardianship order shall specify the frequency and nature of visitation or contact, or the sharing of information between the parents and the child. The order regarding visitation, contact, and the sharing of information shall be based upon the best interests of the child. The order may restrict or prohibit visitation, contact and the sharing of information, and may incorporate an agreement reached among the parties. Until a hearing can be held, the court may temporarily suspend visitation, upon a showing by affidavit of immediate harm to the child, on an ex parte basis for a maximum of thirty (30) days. A modification of an order of visitation or contact shall be based upon a finding, by a preponderance of the evidence, that there has been a substantial change in the material circumstances, and that the proposed modification is in the best interest of the child.

b. T.C.A. 37-1-807

With regard to a parent's financial obligations, the order may specify that the parent pay a reasonable sum that will cover in whole or in part the support or medical treatment of the child. Further, the permanent guardian shall not be precluded from receiving (1) child support money paid to the child's parent under

the terms of any statutory benefit or insurance system or any private contract, settlement, agreement, court order, devise, trust, conservatorship, or custodianship, (2) money or (3) property of the child.

IV. Rights and Responsibilities of the Permanent Guardian (Found in T.C.A. § 37-1-804)

According to the law, a qualified individual who seeks appointment as a permanent guardian has a number of specific rights and responsibilities to ensure the proper care and welfare of the child placed in the guardian's custody: (1) protect, nurture, discipline, and educate the child; (2) provide food, clothing, shelter, education and health care (including medical, dental, and mental health) for the child; (3) consent to health care without liability related to the giving of consent for injury to the child resulting from a third party's negligence unless a parent would have been liable under the circumstances (however, the guardian is not liable to third parties by reason of his or her relationship with the child for acts of the child); (4) authorize a release of health care and education information; (5) authorize a release of information when the consent of a parent is required by law, regulation, or policy; (6) consent to the child's social and school activities; (7) consent to military enlistment or marriage; (8) obtain representation for the child in legal actions; (9) determine the nature and extent of the child's contact with other persons; (10) make decisions regarding travel; and (11) manage the child's income and assets.

V. Modification or Termination of the Permanent Guardianship (Found in T.C.A. § 37-1-806)

Modification or termination of the permanent guardianship may be requested by the permanent guardian, the child, if sixteen (16) years of age or older, the parent, the state, or the court on its own initiative. Modification of an order for visitation or contact, as well any other modification, shall be based on a finding, by a preponderance of the evidence, that there has been **a substantial change of material circumstances**, and that **the proposed modification is in the best interests of the child**. Modification or termination of the permanent guardianship order can also be based upon a determination that one or more of the findings upon which the guardianship was based no longer exists. In determining whether there has been a substantial change in circumstances, the court may consider whether the child's parent is currently able and willing to care for the child, or whether the permanent guardian is unable to continue to care for the child.

⁵⁵ T.C.A. § 37-1-801 (2005).

⁵⁶ See Tomesha Faxio's Memorandum, previously submitted at an earlier Kinship Summit advisory meeting, for a more detailed examination of other available kinship placement alternatives.

⁵⁷ This determination can be made in a prior court action, or at the same time as the permanent guardianship is being considered.

⁵⁸ T.C.A. § 37-1-805.

⁵⁹ The effect of the permanent guardianship on other benefits would depend on the particular circumstances of the child and the caregiver.

⁶⁰ A permanent guardianship order does not terminate parental rights. See Section III of this memo for further information.