

Guardianship:  
The-Not-as-Permanent Permanency  
Option  
Attorney Kim Zion

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**Chapter 48 vs. Chapter 54**

Differences	Chapter 48	Chapter 54
CHIPS/JIPS finding	✔	
Child must live with guardian	✔	
Subsidized payments	✔	
Temporary guardianship		✔
If objection, <u>Barstad</u> standard		✔
Procedure for parent to request termination	✔	?

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**What Does Permanent Guardianship  
Get You Under Either Chapter**

**1. Rights and duties of guardians:**

- To provide and make decisions about food, clothing, shelter, dental care, medical care, education, and supervision for the child
- To decide about driver’s license, marriage, military enlistment
- To allow the parents reasonable visitation

**2. Rights and duties retained by parents:**

- Parental rights including reasonable visitation

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**CHAPTER 48  
GUARDIANSHIPS  
(S. 48.977)**

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**Requirements for Appointing a  
Ch. 48 Guardian**

- Child is on a CHIPS order or a 938.13(4) JIPS order AND placed outside his/her home or agency is recommending the placement with the proposed guardian
- person nominated as the guardian of the child is a person with whom the child has been placed or in whose home placement of the child is recommended and that it is likely that the child will continue to be placed with that person for an extended period of time or until the child attains the age of 18 years
- That, if appointed, it is likely that the person would be willing and able to serve as the child's guardian for an extended period of time or until the child attains the age of 18 years
- That it is not in the best interests of the child that a petition to terminate parental rights be filed with respect to the child

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**Requirements for Appointing a  
Ch. 48 Guardian, continued**

- Child's parents are neglecting, refusing or unable to carry out the duties of a guardian
- Agency has made reasonable efforts to make it possible for the child to return to his or her home (unless not required per 48.355(2d)(b)(1))
- Reunification is unlikely or contrary to the best interests of the child
- Further reunification efforts are unlikely to be made or are contrary to the best interests of the child

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### Statutory Procedures Provided For:

- Who May File a Petition
- Contents of the Petition (JC-1605)
- Who, When, and How Everyone Must be Served
  - WICWA cases: notice to the parents, Indian custodian (if any), and Tribe must be provided by registered mail with return receipt requested at least 10 days prior to the first hearing
- Contents of the Court Report filed by the Agency

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### Plea Hearing

- Must occur within 30 days of the filing of the petition
  - At the hearing, the non-petitioning parties and the child, if he or she is 12 years of age or over or is otherwise competent to do so, shall state whether they wish to contest the petition.
  - **If Uncontested:**
    - Determine that the plea is **made voluntarily**
    - Determine that the party understands the nature of the **facts alleged in the petition, the potential disposition and the legal consequences**
    - Establish whether any promises or threats were made to elicit the plea
    - Alert all unrepresented parties to the possibility that an attorney may discover grounds to contest the petition that would not be apparent to those parties.
    - **Determine** that there is a factual basis for the plea
- Court can proceed to Disposition unless an adjournment requested, then no more than 30 days**
- **If Contested**, set a date for a fact-finding hearing not more than 30 days after the plea hearing

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### Fact-Finding Hearing

- If the Petition is Contested:
- Any party may present evidence relevant to the issue of whether the conditions for guardianship are met
  - The standard is clear and convincing evidence
  - Rules of Evidence apply [48.299(4)(a)]
  - If BOP is met, proceed to Disposition – unless an adjournment is requested, then allow no more than 30 days

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### Dispositional Hearing

- Any party may present evidence, including expert testimony, relevant to the disposition
- Rules of Evidence do not apply
  - But evidence must have reasonable probative value
  - Hearsay is admissible if circumstantial guarantees of trustworthiness
- Within 10 days after the dispositional hearing the Court shall:
  - Dismiss the petition if the court determines that appointment of the person as the child's guardian is not in the best interests of the child
  - Appoint the child's guardian, if the court determines that such an appointment is in the best interests of the child

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### Dispositional Factors

#### The Best Interest of the Child is the Prevailing Factor

- Whether the proposed guardian(s) would be a suitable guardian of the child
- The willingness and ability of the person to serve as the child's guardian for an extended period of time or until the child attains the age of 18 years
- The wishes of the child
- If the child is an Indian child, the order of placement preference unless the court finds good cause for departing from that order

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### Subsidized Guardianships

- Contractual agreement between DCF and Proposed Guardian must be entered into before the guardianship order is granted
- CHIPS Dispositional Order or other 48.977 Guardianship must be dismissed
- Contract must be incorporated into Dispositional Order
- Any Successor Guardian MUST be named in the Contract

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## Subsidized Guardianship

**The child meets all of the following conditions:**

- The child has been residing in the home of the guardian for not less than 6 consecutive months
- The child's situation precludes return of the child to his or her home or adoption as appropriate permanency options for the child
- The child demonstrates a strong attachment to the guardian
- If the child is 14 years of age or over, the child has been consulted with regarding the guardianship arrangement

**The guardian meets all of the following conditions:**

- The guardian is any of the following:
  - A relative of the child
  - A person who has a significant emotional relationship with the child or the child's family and who, prior to the child's placement in out-of-home care, had an existing relationship with the child or the child's family that is similar to a familial relationship
  - a person who has a significant emotional relationship with the child or the child's family and who, during the child's placement in out-of-home care, developed a relationship with the child or the child's family that is similar to a familial relationship
- The guardian has a strong commitment to caring permanently for the child
- The guardian is licensed as the child's foster parent and the guardian and all adults residing in the guardian's home meet the requirements

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## Post-Disposition Matters

- **Revision to Order** with a substantial change in circumstances and that the proposed revision would be in the best interests of the child
- **Termination of Order** on the Request of a Parent if:
  - there has been a substantial change in circumstances
  - the parent is willing and able to carry out the duties of a guardian
  - the proposed termination of guardianship would be in the best interests of the child
- **Removal of Guardian if:**
  - The guardian is or has been neglecting, refusing or unable to discharge the guardian's trust
  - OR the guardian resigns AND the court accepts the resignation

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## CHAPTER 54 GUARDIANSHIPS

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### Requirements for Appointing a Ch. 54 Guardianship

- Clear and convincing evidence that the proposed ward is a minor

Section 54.44(2)

- Federal Indian Child Welfare Act (ICWA) applies to Chapter 54 guardianships
  - Notice, right to counsel, active efforts, placement preferences, serious damage finding, etc.

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### Statutory Procedures Provided For:

- Who May File a Petition: Anyone
- Contents of the Petition (GN-3290)
  - Statement of Acts (GN-3140)
  - UCCJEA Affidavit (GF-150)
- Who, When, and How Everyone Must be Served
  - Affidavit of Service must be executed (GN-3120)

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### Initial Appearance

- Ascertain all parties have been served
- Determine positions of the parties – colloquy conducted with parents who appear and are in agreement
- Parents may be defaulted if they fail to appear
- Guardianship may be granted if all parties agree or parents are in default

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### Contested Hearing

- Must be held within 90 days of filing of petition
- Petitioner and parents may call witnesses, testify
- Guardian ad litem may call witnesses
- Standard is clear and convincing evidence
- Rules of Evidence apply
- Proposed guardian must be present unless good cause to excuse
- Minor ward's appearance can be waived

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### Dispositional Factors

*Barstad v. Frazier*  
118 Wis. 2d 549, 348 N.W.2d 479 (1984)

- The relationship between parent and child is a constitutionally protected right
- If a parent objects to transfer of guardianship, the court must find that parent is unfit, or unable to care for child, or that there are compelling reasons for denying custody to the parent
- Compelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child

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### *Barstad, cont.*

- If the court finds such compelling reasons, it may award custody to a third party if the best interests of the child would be promoted thereby
- High bar for transfer of guardianship if parent is not in agreement

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### Other Dispositional Matters

- Court can appoint a Standby Guardian at any time
- Court can appoint a Successor guardian at any time
- Upon request, review the conduct of the guardian
- Court can terminate the guardianship
  - Reverse *Barstad*?

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### Power of Attorney Delegating Parental Power

Wis. Stats. 48.979

- A non-permanent option to a guardianship.
- Only a parent with legal custody may execute this form.
- Cannot be used for children under juvenile court jurisdiction.
- May be helpful in certain cases where juvenile court jurisdiction no longer needed but parent is not caring for the child.

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### Additional Resources

- Guardianship Judicial Checklists  
(see Checklists tab in your binder)
- Chapter 48 Guardianship E-Learning Activity  
[www.wicciptraining.com](http://www.wicciptraining.com)
- Chapter 48 Model Recordkeeping Procedures  
(includes Ch. 54 vs. Ch. 48 comparison chart)  
<http://courtnet.wicourts.gov/policies/modelrecord.htm>

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**QUESTIONS OR COMMENTS?**

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