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SFA



BILL ANALYSIS

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Senate Bills 954, 955, and 956 (as enrolled)
Senate Bill 1032 (as enrolled)
Sponsor: Senator William Van Regenmorter (S.B. 954-956)
Senator George A. McManus, Jr. (S.B. 1032)
Senate Committee: Families, Mental Health and Human Services
House Committee: Human Services and Children

PUBLIC ACTS 480-482 of 1998
PUBLIC ACT 483 of 1998

Date Completed: 2-2-99

CONTENT

Senate Bills 954, 955, 956, and 1032 amended the juvenile code, the Revised Probate Code, the Child Custody Act, and the Child Protection Law, respectively, to provide for the appointment of a lawyer-guardian ad litem to represent the best interests of a child in certain proceedings; prescribe the powers and duties of a lawyer-guardian ad litem; and permit the appointment of legal counsel for a child if a lawyer-guardian ad litem and the child disagree as to the child's best interests. Senate Bills 954-956 also permit a court to assess the costs and fees of a lawyer-guardian ad litem against a party or against money allocated from marriage license fees for family counseling services.

Under the bills, "lawyer-guardian ad litem" means an attorney appointed under various sections of the Acts amended. The bills specify that a lawyer-guardian ad litem represents the child, and has the powers and duties as set forth in Senate Bill 954.

All of the bills will take effect on March 1, 1999.

Senate Bill 954

Powers and Duties

The bill states that the following provisions also apply to a lawyer-guardian ad litem appointed under sections of the Revised Probate Code, the Child Custody Act, and the Child Protection Law amended by Senate Bills 955, 956, and 1032, respectively.

Senate Bill 954 provides that a lawyer-guardian ad litem's duty is to the child, not the court. The lawyer-guardian ad litem's powers and duties include at least all of those described below, including the obligations of the attorney-client

privilege.

The lawyer-guardian ad litem must serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child. The lawyer-guardian ad litem must determine the facts of the case by conducting an independent investigation, including interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information.

Before each proceeding or hearing, the lawyer-guardian ad litem must meet with and observe the child, assess his or her needs and wishes with regard to the representation and the issues in the case, review the agency case file, and, consistent with the rules of professional responsibility, consult with the child's parents, foster care providers, and caseworkers. The lawyer must explain his or her role to the child, taking into account the child's ability to understand the proceedings.

The lawyer-guardian ad litem must file all necessary pleadings and papers, independently call witnesses on the child's behalf, attend all hearings, and substitute representation for the child only with court approval.

The lawyer-guardian ad litem must make a determination regarding the child's best interests and advocate for those best interests according to the lawyer's understanding of them, regardless of whether his or her determination reflects the child's wishes. The bill specifies that the child's wishes are relevant to the lawyer's determination of the child's best interests, and the lawyer must weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-

guardian ad litem must inform the court as to the child's wishes and preferences.

The lawyer-guardian ad litem must monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer must inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

Consistent with the rules of professional responsibility, the lawyer-guardian ad litem must identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.

The lawyer-guardian ad litem also must request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer determines that the child's interests as identified by the child are inconsistent with the lawyer's determination of the child's best interests, the lawyer must communicate the child's position to the court. If the court considers the appointment appropriate concerning the child's age and maturity and the nature of the inconsistency between the child's and the lawyer's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this provision will serve in addition to the child's lawyer-guardian ad litem.

The court or another party to the case may not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case, and the lawyer's file of the case is not subject to discovery.

Appointment

Section 17c of the juvenile code provides for the court to appoint an attorney to represent a child in various proceedings under the code. The bill requires the court to appoint a lawyer-guardian ad litem (rather than an attorney) in a proceeding under Section 2(b) (which provides for the family court's jurisdiction in abuse and neglect cases) or Section 2(c) (which provides for the family court's jurisdiction in divorce cases). As currently provided regarding an attorney, the child cannot waive the assistance of the lawyer-guardian ad litem.

The bill provides that, if appointed to represent a child in a proceeding under Section 2(b) or (c), "attorney" means an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan Rules of Professional Conduct. The bill specifies that an attorney defined under this provision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client. For the purpose of a notice required under these sections, "attorney" includes a child's lawyer-guardian ad litem.

Like an attorney appointed under Section 17c, a lawyer-guardian ad litem must serve until discharged by the court. As currently provided, if the child's case is under Section 2(b), the court may not discharge the lawyer-guardian ad litem as long as the child is subject to the jurisdiction, control, or supervision of the court, or of the Michigan's Children's Institute or other agency, unless the court discharges the lawyer-guardian ad litem for good cause shown on the record. If the child remains subject to the jurisdiction, control, or supervision of the court, or of the Michigan Children's Institute, the court must immediately appoint another lawyer-guardian ad litem to represent the child.

The bill deletes provisions requiring an appointed attorney to observe and, depending upon the child's age and capability, interview the child; to review the agency case file and consult with the foster parents and the caseworker, if the child is placed in foster care, before representing the child in each subsequent proceeding or hearing; and to be present at all hearings concerning the child and not substitute counsel unless the court approves.

The bill also provides that, to assist the court in determining a child's best interests, the court may appoint a guardian ad litem, who need not be an attorney, for a child involved in a proceeding under the juvenile code.

Assessment of Costs

Under the code, if an attorney is appointed for a party, the court may enter an order assessing attorney costs against the party or the person responsible for that party's support. Under the bill, if an attorney or a lawyer-guardian ad litem is appointed, after a determination of ability to pay, the court may enter an order assessing attorney costs against the party or the person responsible for the party's support, or against the money

allocated from marriage license fees for family counseling services under Public Act 3 of 1887. (Under that Act, a party applying for a marriage license must pay a fee of \$20, of which \$15 must be allocated to the circuit court for family counseling services.)

Information from Lawyer-Guardian Ad Litem

The code provides that, in an abuse or neglect proceeding, the court must consider specific information, including any oral or written information concerning the child from his or her parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, or guardian ad litem. Under the bill, the court also must consider information offered by the child's lawyer-guardian ad litem or attorney.

Senate Bill 955

The Revised Probate Code contains provisions for the appointment and removal of a guardian for a minor. The Code permits the court to appoint an attorney to represent the minor if, at any time in the proceeding, the court determines that the minor's interests are or may be inadequately represented. Under the bill, the court may appoint a lawyer-guardian ad litem if the court determines that the minor's interests are inadequately represented.

The bill states that a lawyer-guardian ad litem represents the child and has the powers and duties in relation to that representation as set forth in Senate Bill 954, in addition to any other powers and duties.

In a proceeding in which a lawyer-guardian ad litem represents a child, he or she may file a written report and recommendation. The court may read the report and recommendation, but may not admit the report and recommendation into evidence unless all parties stipulate the admission. The parties may use the report and recommendation for purposes of a settlement conference.

After a determination of ability to pay, the court may assess all or part of the costs and reasonable fees of a lawyer-guardian ad litem against one or more of the parties involved in the proceedings or against the money allocated from marriage license fees for family counseling services. A lawyer-guardian ad litem may not be paid a fee unless the court first receives and approves the fee.

The bill also provides that, to assist the court in determining a child's best interests, the court may appoint a guardian ad litem for a child involved in a

guardianship proceeding.

In addition, the Code provides for the removal of a guardian appointed for a ward, and permits the court to appoint an attorney to represent the minor if the court determines, at any time in the proceeding, that the ward's interests are or may be inadequately represented. Under the bill, the court must appoint a lawyer-guardian ad litem under those circumstances.

Senate Bill 956

Under the Child Custody Act, in all actions involving dispute of a minor child's custody, the court must declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time. The bill provides that if the court determines that the best interests of the child are inadequately represented, at any time in the proceeding, the court may appoint a lawyer-guardian ad litem to represent the child's best interests.

The bill contains the same provisions concerning a lawyer-guardian ad litem's report and recommendation, and the assessment of costs, as included in Senate Bill 955.

The Act describes certain actions that the court may take in a child custody dispute, such as using the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and considering their recommendations for the resolution of the disputes. Under Senate Bill 956, the court also may use a guardian ad litem for this purpose. The bill deletes a current provision allowing the court to appoint a guardian ad litem or counsel for the child and assess the costs and reasonable fees against one or more parties involved.

Senate Bill 1032

In each case filed under the Child Protection Law in which judicial proceedings are necessary, the court must appoint legal counsel to represent the child. The bill, instead, requires the appointment of a lawyer-guardian ad litem.

The Law provides that the legal counsel, in general, is charged with the representation of the child's best interests and, to that end, must make further investigations as necessary to ascertain the facts, interview witnesses, examine witnesses in both the adjudicatory and dispositional hearings, make recommendations to the court, and participate in the proceedings to represent the child

competently. The bill deletes those provisions.

The bill specifies that a lawyer-guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in Senate Bill 954.

MCL 712A.13a et al. (S.B. 954)
700.3 et al. (S.B. 955)
722.22 & 722.24 (S.B. 956)
722.622 et al. (S.B. 1032)

Legislative Analyst: S. Lowe

FISCAL IMPACT

The bills will have an indeterminate impact on State and local units of government. The number of cases that will require the appointment of a second attorney under the bills is not determinable. Local county courts currently pay attorney costs in these cases. Reimbursement for attorneys is controlled by the local units and reimbursement rates vary. Ingham County reports that costs for appointment of attorneys for children average \$250,000 annually in Ingham County.

Provisions of Senate Bill 955 may contain mandated costs on local units of government pursuant to Article IX, Section 29 of the State Constitution of 1963.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.