

SUBJECT: Court-ordered representation in DPRS and private child custody suits

COMMITTEE: Juvenile Justice and Family Issues — committee substitute recommended

VOTE: 7 ayes — Dutton, Goodman, Baxter, Castro, Hodge, J. Moreno, Morrison
0 nays
2 absent — Dunnam, Reyna

WITNESSES: For — Debra Lehrmana, Ad Hoc Ad Litem Committee; Judge Tom Stansbury, Texas Family Law Foundation
Against — E. Cumberland; Roy Getting, Texas Fathers Alliance
On — John J. Sampson

BACKGROUND: Family Code, Chapter 107, is divided into four subchapters that govern appointments of guardians *ad litem* (GAL), attorneys *ad litem* (AAL), and volunteer advocates. These appointments are made in two types of cases — suits filed by a governmental entity, which is the Texas Department of Protective and Regulatory Services (DPRS), Child Protective Services division, and private custody suits.

Subchapter A governs the appointment of GALs, as well as their powers and duties. It provides that in a suit filed by a governmental entity seeking to terminate the parent-child relationship or to be named conservator of the child, the court must appoint a GAL to represent the best interests of the child. It also provides that the court may appoint a GAL in any other suit. A GAL may be an attorney, a volunteer advocate, or another adult with the competence, training, and expertise to represent the best interests of the child.

Subchapter B governs the appointment of AALs, their powers and duties, as well as their fees. It provides that the court must appoint an AAL to represent the interests of the child in any case where a governmental entity is seeking termination of the parent-child relationship or to be named conservator of the child, or in any other case where it is necessary to protect the interests of the

child. In cases seeking termination of the parent-child relationship, the court also must appoint an AAL to represent the interests of an indigent parent who opposes termination, or certain parents whose identity or location is not known. An AAL is entitled to reasonable fees and expenses in the amount set by the court to be paid by the parents of the child unless the parents are indigent, in which case an AAL must be paid from the general funds of the county.

Subchapter C provides that, in a suit filed by a governmental entity, the court may appoint a person who has received the court's approved training and who has been certified by the court to appear at court hearings as a volunteer advocate on behalf of the child.

DIGEST:

CSHB 1815 would reorganize Family Code, ch. 107, to add a definitions section and to specify the different rules that apply to appointees depending on the type of suit for which an appointment was being made.

Definitions, powers, and duties of amicus attorney, AAL, and GAL

Amicus attorney. The bill would create a new type of appointment known as an amicus attorney. Such an attorney would be appointed in a private custody suit to provide legal services necessary to assist the court in protecting a child's best interests, rather than to provide legal services to the child. Amicus attorneys would advocate the best interests of the child and would not be bound by the child's expressed objectives. The amicus attorney would have to seek the child's expressed objectives in a developmentally appropriate manner and make these objectives known to the court, explain the role of the amicus attorney to the child, and inform the child that the amicus attorney could use information provided by the child in assisting the court.

CSHB 1815 would require amicus attorneys and AALs to interview the child in a developmentally appropriate manner (if the child was four years of age or older), and to interview any person who had significant knowledge of the child's history and condition, and the parties to the suit. It also would require AALs to investigate the facts of the case, obtain and review copies of relevant records relating to the child, participate in the litigation to the same extent as an attorney for a party, take any action consistent with the child's interests that would be necessary to expedite the proceedings, and encourage

settlement and the use of alternative forms of dispute resolution. The bill would require the AAL or amicus attorney to be trained in child advocacy or have equivalent experience.

Attorney *ad litem*. This bill would specify that an AAL would provide legal services to a person, including a child, and would owe that person the duties of undivided loyalty, confidentiality, and competent representation. In addition, an AAL would be required to seek to elicit in a developmentally appropriate manner the child's objectives, advise the child, provide guidance to the child, and represent the child's expressed objectives if the AAL determined that the child was competent to understand the nature of the attorney-client relationship and had formed that relationship with the AAL.

Guardian *ad litem*. CSHB 1815 would define a GAL as a person appointed to represent the best interests of a child, including a volunteer advocate, a professional other than an attorney, an AAL appointed to serve in the dual role, or any adult with the necessary competence, training, and expertise to represent the best interests of the child. The bill would expand the duties of a GAL to include seeking to elicit in a developmentally appropriate manner the child's expressed objectives of representation, considering the child's expressed objectives of representation without being bound by those objectives, encouraging settlement and the use of alternative forms of dispute resolution, and performing any other specific task directed by the court. It would specify that the GAL could not provide legal services unless the GAL was a licensed attorney appointed in the dual role as GAL and AAL.

Dual Role. The bill would define dual role as the role of an attorney appointed to act both as GAL and AAL in a suit filed by a governmental entity.

Neither an attorney serving in the dual role, nor an AAL, or an amicus attorney could be compelled to produce attorney work product, to disclose the source of any information, submit a report into evidence, or testify in court except as authorized by the Texas Disciplinary Rules of Professional Conduct.

An AAL or attorney serving in the dual role, who decided that the child could not express meaningfully his or her objectives, could present a position to the court that the attorney determined would serve the best interests of the child.

The AAL or attorney in the dual role could reach that conclusion based on the child's lack of maturity, the child's insistence on objectives that would seriously injure the child, or the child's inability to make reasonable judgments and engage in meaningful communication. The AAL or attorney in the dual role in that case would be required to consult with the GAL and present the child's objectives to the court based on the GAL's opinion regarding the child's best interest.

CSHB 1815 would give GALs, AALs, and amicus attorneys immunity from liability for civil damages arising from their recommendations or opinions in that capacity, unless they acted with conscious indifference or reckless disregard to the safety of another, in bad faith or with malice, or with gross negligence.

Appointments in DPRS suits. CSHB 1815 would require the court to appoint a GAL in a suit by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for a child. The court could not appoint a GAL if it already had appointed an attorney in the dual role unless the court appointed another person to serve as GAL and restricted the role of the attorney to that of AAL. A court could appoint an attorney to serve as GAL and not in the dual role only if the attorney specifically was appointed to serve only in the role of GAL. An attorney appointed solely as a GAL could not take any action restricted to a licensed attorney.

This bill would require the court to appoint an AAL in a suit by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for a child. The court could meet the requirement to appoint an AAL and GAL in a governmental case by appointing an attorney in the dual role. The court could at any time restrict the attorney to acting as an AAL for the child and appoint another person to serve as GAL, and an attorney appointed to serve in the dual role could request the court to appoint another person to serve as GAL. Unless the court appointed a separate person to serve as GAL, an appointment of an attorney to serve as AAL would constitute a dual role appointment, regardless of the terminology used in the appointing order.

The bill would establish that an attorney appointed to serve as an AAL or in the dual role would be entitled to reasonable fees set by the court to be paid by the parents of the child unless the parents were indigent, in which case the fees would be paid from the general funds of the county.

CSHB 1815 would specify that the court could not appoint an amicus attorney in a suit filed by a governmental entity.

Appointments in private custody suits. The court would have the discretion to appoint an amicus attorney, an AAL, or a GAL in a suit not brought by a governmental entity in which the best interests of a child were at issue. In making this decision, the court would have to consider the parties' ability to pay reasonable fees to the appointee and balance the child's interests against the cost to the parties, and could make the appointment only if it was deemed necessary for the determination of the child's best interests. An appointment would be prohibited without reasonable compensation for the services rendered.

CSHB 1815 would specify that an amicus attorney, an AAL for the child, as well as a professional appointed as a GAL, other than a volunteer advocate, would be entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit. When making the appointment, the court would order a reasonable cost deposit to be made and, before the final hearing, order an additional amount to be paid to the credit of a trust account for the use and benefit of the AAL, GAL, or amicus attorney.

The court could not appoint an attorney in the dual role in private custody disputes.

Appointment of volunteer advocates. The bill would specify that, in a suit filed by a governmental entity, the court could appoint a charitable organization composed of volunteer advocates whose charter mandated the provision of services to abused and neglected children, or an individual who had received court-approved training regarding abused and neglected children and who had been certified by the court to appear at court hearings as a GAL or volunteer advocate for the child.

In private custody suits, the court could appoint a charitable organization composed of volunteer advocates whose training provided for the provision of services in private custody disputes, or a person who had received court-approved training and who had been certified by the court to appear at court hearings as a GAL or a volunteer advocate. A person appointed for these purposes would not be entitled to fees.

This bill would take effect September 1, 2003, and would apply only to a suit affecting the parent-child relationship filed after that date.

**SUPPORTERS
SAY:**

CSHB 1815 would clarify the roles of attorneys and volunteer advocates appointed by the court to represent children in DPRS and private custody cases. It largely would preserve current law regarding court appointments in DPRS cases but would make substantive changes regarding court appointments in private custody cases. Furthermore, it would reorganize the Family Code to separate the rules for private custody cases from the rules for DPRS cases. These rules currently are lumped together, which can be confusing for judges and attorneys. Finally, the bill would protect children by ensuring that the best interests and expressed wishes of the child were represented.

CSHB 1815 would clarify the roles of lawyers appointed in private custody cases and would help eliminate conflicts of interest. The conflict arises when an attorney is appointed to represent the best interests of the child while remaining subject to the rules of professional conduct, which impose a duty of zealous representation. For example, a GAL's duty to report to the court what he or she believes to be in the best interest of the child would conflict with an attorney's duty to represent and advocate on behalf of the client, if it meant advocating for a child's wish to live with an abusive parent. This bill would help clarify when an appointee would represent the best interests of the child, as opposed to serving as an advocate for the child, by specifying that the GAL could not provide legal services. It also would create a new category of court appointment — the amicus attorney — who would be required to advocate the best interests of the child and would not be bound by the child's expressed objectives.

The training requirements under this bill would prevent the appointment of an unqualified volunteer advocate as a GAL in a private custody case. Court

appointed special advocates (CASAs) are not trained, nor is their organization designed, to handle private custody suits. They are intended specifically to represent children in abuse and neglect cases, and CSHB 1815 would prevent their services from being used otherwise.

The bill would help ensure that court appointees actually received reasonable fees for their advocacy work in private custody cases. The court could consider whether the parents were able to pay in reaching its decision about making the appointment in the first place, and would make an appointment only when necessary to protect the best interest of the child. Currently, many attorneys find themselves providing involuntary *pro bono* services because, unlike in DPRS suits, counties do not pick up the tab for attorney services in private suits when the parents are indigent.

CSHB 1815 would make it clear that in private custody cases, the court could appoint only one AAL, amicus attorney, or GAL, so concerns about having more than one court appointed attorney in the case are misplaced. No court would appoint a lawyer unless it was necessary to ensure the best interests of the child. Furthermore, the court would be prohibited from appointing an amicus attorney in a DPRS case.

If the law already were clear with regard to court appointments in private custody cases, the House Committee on Juvenile Justice and Family Issues would not have conducted an interim study of this issue based on practitioners' and judges' concerns. CSHB 1815, which resulted from an in-depth study during the last interim, would provide much needed clarification with regard to court appointments in private custody suits.

OPPONENTS
SAY:

This bill is unnecessary. Under current American Bar Association rules and the Family Code, it is clear that an AAL is appointed to serve as an advocate for the child, unless the child cannot communicate his or her desires, whereas the GAL looks out for the child's best interests. This bill ultimately would cause more confusion than already exists by creating a new type of attorney advocate position. It would be redundant and costly to allow a court to appoint more than one lawyer in a private custody case, especially when counties are facing budget crises. Finally, this bill could lead to a situation where there was both an AAL and an amicus attorney, which would cause confusion, particularly if they disagreed.

NOTES:

The committee substitute differs from the bill as introduced by requiring the amicus attorney to explain his or her role to the child and allowing the AAL or attorney in the dual role to present a position that the attorney determined would serve the best interests of the child if the child could not meaningfully articulate his or her objectives. The committee substitute also deleted a provision allowing an order for payment of attorney fees to be enforced as child support against the parent.