

HOUSE BILL REPORT

SHB 1285

As Reported by House Committee On: Judiciary

Title: An act relating to representation of children in dependency matters.

Brief Description: Modifying provisions regarding the representation of children in dependency matters.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Goodman, Freeman, Pettigrew, Jinkins, Walsh, Kirby, Orwall, Roberts, Appleton, Seaquist, Ryu, Stanford, Clibborn, Maxwell, Tarleton, Morrell, Pollet and Ormsby).

Brief History:

Committee Activity:

Judiciary: 2/6/13, 2/12/13 [DPS], 1/23/14, 1/30/14 [DP2S].

Appropriations Subcommittee on General Government: 2/23/13 [DPS(JUDI)]

Brief Summary of Second Substitute Bill

- Requires the appointment of counsel for a child in a dependency within 72 hours of granting a petition to terminate the parent and child relationship and provides that the state will pay one-half of the costs if certain standards are met.
- Authorizes the appointment of one attorney to a group of siblings, unless there is a conflict of interest or such appointment is inconsistent with rules of professional responsibility.
- Provides that legal services provided by an attorney appointed to a child following termination do not include representation in any appellate proceedings related to the termination.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass. Signed by 11 members: Representatives Jinkins, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; Nealey, Assistant Ranking Minority Member; Goodman, Kirby, Klippert, Muri, Orwall, Roberts and Walkinshaw.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Do not pass. Signed by 1 member: Representative Shea.

Staff: Cece Clynch (786-7195).

Background:

The Department of Social and Health Services (DSHS) or any person may file a petition in court to determine if a child should be a dependent of the state due to abuse, neglect, abandonment, or because there is no parent or custodian capable of caring for the child. If the court determines the child is dependent, the court conducts periodic reviews and makes determinations about the child's placement and the parent's progress in correcting parental deficiencies. The court, under certain circumstances, may order the filing of a petition for the termination of parental rights. If a child has been in out-of-home placement for 15 of the most recent 22 months, the court must order the DSHS to file a petition for termination, absent a good-cause exception.

The court must appoint a guardian ad litem (GAL) for a child in a dependency unless the court finds the appointment unnecessary. It is discretionary with the court whether to appoint an attorney to represent a child in a dependency. If an attorney is appointed by the court, the county pays the cost.

The DSHS and the child's GAL must notify a child who is age 12 or older of the child's right to request an attorney and must ask the child whether he or she wants an attorney. If the child requests an attorney and is age 12 or older, or if the GAL or the court determines that the child needs to be independently represented, the court may appoint an attorney to represent the child's position. There are ongoing requirements with respect to notification of the right to request an attorney:

- The DSHS and the GAL must so notify the child every year and upon the filing of any motion affecting the child's placement, services, or familial relationships.
- The DSHS must note in the child's service and safety plan, and the GAL must note in his or her report to the court, the child's position regarding appointment of an attorney.
- The GAL must provide the court with the GAL's recommendation regarding whether appointment of an attorney is in the child's best interests.
- The court must also ask a child who is age 12 or older whether he or she has been informed by the DSHS and the GAL regarding the child's right to request an attorney.
- The court must make an additional inquiry at the first regularly scheduled hearing after the child's fifteenth birthday.

In the case of *In re Dependency of M.S.R., 174 Wn 2d 1, 271 P. 3d 234 (2012)* (MSR), the Washington Supreme Court held that "children of parents subject to dependency and termination proceedings have due process rights that must be protected and, in some cases, must be protected by appointment of counsel, but that the right to appointment of counsel is not universal." The court found this "constitutionally adequate to protect the right of counsel for such children."

Summary of Second Substitute Bill:

Mandatory Appointment of Counsel.

The court *must* appoint an attorney for a child in a dependency within 72 hours of granting a petition to terminate the parent and child relationship. In so doing, the court may appoint one attorney to represent a group of siblings unless there is a conflict of interest or it would be inconsistent with rules of professional conduct. Legal services provided by an attorney appointed at termination do not include representation of the child in any appellate proceedings related to the termination of parental rights.

The state must pay one-half of the costs of attorneys appointed to children upon termination of the parent and child relationship if the legal services are provided in accordance with standards of practice, training, and caseload limits developed and recommended by the Statewide Children's Representation Workgroup (Workgroup) pursuant to House Bill 2735 (2012).

Counties are encouraged to set caseload limits as low as possible and to account for the individual needs of the children in care. Specific provision is made for determining compliance with caseload standards and state reimbursement in cases where one attorney represents a sibling group. In such cases, the first child is counted as one case, and each child thereafter is counted as one-half case.

The Office of Civil Legal Aid (OCLA) is responsible for implementation and administration of state moneys appropriated for appointment of attorneys. The OCLA may enter into contracts with the counties to disburse state funds. Prior to distributing the funds, the OCLA must verify that the attorneys are providing representation in accordance with the standards of practice and training developed and recommended by the Workgroup, as well as the caseload limits as modified with respect to attorneys appointed to represent siblings.

Discretionary Appointment of Counsel.

The court *may* appoint an attorney to represent the child's position at any point in a dependency action on its own initiative, or upon the request of a parent, the child, a GAL, a caregiver, or the DSHS. This is not limited to situations in which the child is age 12 or older.

If the court has not already appointed an attorney for a child or the child is not represented by a privately retained attorney: a child's caregiver or other individual may refer the child to an attorney for purposes of filing a motion to request appointment of an attorney at public expense; or a child or another individual may retain an attorney for the child for such purposes.

References to "counsel" are changed to "attorney."

Second Substitute Bill Compared to Substitute Bill:

The intent section is replaced with a new intent section:

- Recognizing that many children languish in foster care following termination of the parent and child relationship and that providing attorneys for these children is fundamental to protecting the child's legal rights and to accelerate permanency.

- Providing that nothing in the act is to be construed against the parent's fundamental liberty interest prior to termination of the parent and child relationship.

The second substitute bill continues to require appointment of an attorney for a child in a dependency proceeding within 72 hours of granting a petition to terminate the parent and child relationship, but also specifically:

- allows a court to appoint one attorney to a group of siblings, unless there is a conflict of interest or inconsistent with the rules of professional conduct;
- provides that legal services provided by an attorney appointed pursuant to this section do not include representation of the child in any appellate proceedings regarding the termination of the parent and child relationship;
- provides that the state will pay one-half of attorney costs if the services are provided in accordance with the standards of practice and caseload limits developed and recommended by the Workgroup, as modified by specific caseload provisions set forth in the second substitute relative to situations in which an attorney represents more than one sibling; and
- tasks the OCLA with implementation and administration, and disbursement of state funds.

The second substitute bill allows a caregiver or other individual, if an attorney has not already been appointed or the child is not already represented by an attorney, to refer the child to an attorney for purposes of filing a motion to request appointment and allows a child or any individual in similar circumstances to retain an attorney for purposes of filing such a motion.

A provision relative to an evaluation and report back to the Legislature is removed.

Changes that lowered the age at which a child must be notified of his or her right to request an attorney from 12 to 7 years are also removed.

An effective date of July 1, 2014, is included in the second substitute bill.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect on July 1, 2014.

Staff Summary of Public Testimony:

(In support) This topic is familiar to the Judiciary Committee, which is a forum for consideration of issues of justice in society. Vulnerable youth and foster children have been left without representation in the dependency process. There has been a step-by-step effort over the years to bolster this and it is time to take the next step. Everyone else in the process does have an attorney, including the DSHS and the parents. Research shows that providing an attorney for a foster child shortens the case, saves money for the state and the locals, and

results in earlier permanency. There have been concerns expressed from locals about the cost, but the state will pay one-half of the cost if certain standards are met. This is essentially the same 50-50 split that the state and locals have with respect to judges and interpreters. The pilot program will measure outcomes. Attorneys will not supplant GALs and court appointed special advocates (CASAs) but will work with them. The GALs and CASAs represent the best interest of the child to the court. An attorney represents the legal interest of the child, and provision of an attorney will afford the child someone they can trust and confide in. For instance, the GAL or CASA may believe that it is not in the best interest of the child to be returned home. If that is what the child wants, however, the attorney who represents the legal interest can tell the court that that is what the child wants. The current system varies across the state, with some counties providing attorneys and others not. It is "justice by geography." All sorts of issues arise in dependency proceedings, both before and after termination of parental rights. These issues include sibling visits, provision of medical and mental health services, and placement decisions. When a group of parents is asked whether they would allow their minor child to appear in court without representation, the answer is always no. This is the community standard and these foster children should be afforded the community standard. An attorney provided to a dependent teenager who had just given birth was able to help that teenager keep the baby. Later, when the state tried to exit her at 18 years old, the attorney was able figure out a way for her to stay in care and get her the services she needed. In Tennessee, dependent children are provided lawyers and they are able to do a myriad of things to help the child, such as find the child a job, or enable the child to see his mother. It is crazy that Washington wouldn't do the same. An attorney provided to one girl talked her out of running away, helped her "pick her battles" when she didn't agree with certain decisions, and ultimately helped her find a placement that she wanted. With an attorney, she was not afraid of the court. Under this bill, the lawyer appointed to represent the child after termination would not represent the child in any appeal of the termination. Rather, the attorney would assist with placement decisions and obtaining services for the child. Some counties already provide attorneys to all or certain categories of children in dependencies and these counties are paying the entire cost of those attorneys. Courts can be very scary. It is a "cattle call" experience. People talk in code. It is too much to expect that children can handle this by themselves. Attorneys should be appointed before termination.

(Neutral) The 2013 report from the Ombuds included two options: (1) appointment for all dependent children, similar to other states; or (2) have certain circumstances trigger appointment, and do it consistently throughout the state. Best interests is different than stated interests. As the court said in the MSR case, it is a matter of fundamental fairness.

(With concerns) A CASA volunteer representing four siblings was able to see those children frequently, get to know them and their needs, and make sure they received the services they needed. Ultimately, in that case, the father met the requirements and the termination hearing with respect to his parental rights was cancelled. The CASAs are able to share on a more intimate level than an attorney can. The use of attorneys shouldn't be increased if other things that are needed in the system are not provided for. It would be counterproductive.

(Opposed) The county doesn't oppose appointment. In fact, attorneys are appointed universally in Grays Harbor County at the age of 12. The concern is with county funding. What will happen to other county programs if the county has to pick up the bill for attorneys?

It is a good model, but the costs could be devastating to counties. A CASA does tell the court what the child wants, even if the CASA doesn't agree with the child. The CASA volunteers build rapport, and visit one time per month or more. It would be difficult for an attorney to get to know a child in just a few minutes. It is very important for children to have CASA volunteers who represent them from the time of the shelter care hearing until permanent placement. The CASAs in Chelan and Douglas counties have logged more than 6,000 hours. It is a basic human right of these children to not be in the system. The appellate process is slow, and children can linger in the foster system during this time. Provision of an attorney in the appellate process has support.

Persons Testifying: (In support) Representative Goodman, prime sponsor; Jim Theofelis, Mandy Urwiler, and Wes Robinson, The Mockingbird Society; Jill Malat, Columbia Legal Services; Zapporah Williamson; Maureen Devlin; and Erin Lovell, Washington Defender's Association.

(Neutral) Patrick Dowd, Office of the Family and Children's Ombuds.

(With concerns) April Rivera; and Clyde Lulham, Court Appointed Special Advocates.

(Opposed) Rae Sherk, Grays Harbor County Court Appointed Special Advocates; and Susan Baker, Chelan-Douglas Court Appointed Special Advocates.

Persons Signed In To Testify But Not Testifying: None.