

HOUSE BILL REPORT

ESSB 6257

As Passed House - Amended:

February 29, 1996

Title: An act relating to guardians and guardians ad litem for minors and incapacitated persons.

Brief Description: Improving guardian and guardian ad litem systems to protect minors and incapacitated persons.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Franklin, Hargrove, Goings, Long, Sheldon, Fairley, Wojahn, Prentice, Thibaudeau, Fraser and Heavey).

Brief History:

Committee Activity:

Law & Justice: 2/20/96, 2/23/96 [DPA].

Floor Activity:

Passed House - Amended: 2/29/96, 96-0.

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended. Signed by 14 members: Representatives Sheahan, Chairman; Delvin, Vice Chairman; Hickel, Vice Chairman; Costa, Assistant Ranking Minority Member; Carrell; Chappell; Cody; Lambert; McMahan; Morris; Robertson; Smith; Sterk and Veloria.

Minority Report: Without recommendation. Signed by 1 member: Representative Dellwo, Ranking Minority Member.

Staff: Pat Shelledy (786-7149).

Background:

A guardian ad litem may be appointed in three types of actions: guardianships, dependencies, and family law cases such as divorces.

Guardianships Under Chapter 11.88 RCW:

Some people cannot manage their financial affairs or provide for their basic needs without the help of a guardian. Those "incapacitated" people may be elderly, disabled, or children. To establish a guardianship, a person must file a petition with the court, stating the reason why the appointment of a guardian is sought, the petitioner's interest in the appointment, and why another alternative to guardianship is not appropriate. Alternatives to guardianships may include powers of attorney or trusts.

Upon filing the petition, the court appoints a "guardian ad litem" (GAL) to represent the best interests of the alleged incapacitated person (AIP). The GAL assumes duties upon appointment. The GAL position is temporary and expires when the case is dismissed or the guardianship is established. The GAL does not act as the AIP's attorney and may recommend that a guardianship be established over the AIP's objection. The AIP may also be represented by an attorney who advocates for the AIP's wishes.

The AIP may object to establishing the guardianship. If so, the AIP has a right to a jury trial and to attend the hearing on the petition. The burden of proof to establish a guardianship is clear, cogent, and convincing evidence, which is a civil standard comparable to the beyond a reasonable doubt standard in criminal cases. If the AIP is represented by counsel before the petition for guardianship is filed, that person must petition to be appointed to represent the AIP in the guardianship action. However, no requirement exists to give the AIP's attorney notice of the petition, even if the petitioner knows the attorney that represents the AIP. If the AIP is not represented by counsel, the court may appoint an attorney. The GAL may recommend certain attorneys.

The GAL may or may not be an attorney, but should have requisite training and expertise to address competently the issues presented in the particular case and be free of a conflict of interest. The superior courts in each county must have a registry containing the names of people qualified to act as guardians ad litem. The court must choose a GAL listed on the registry except in exceptional circumstances. To be on the registry, the person must present a written background statement describing the person's knowledge, training, and experience in a variety of areas, such as the needs of impaired elderly people. The person must also complete a training program adopted by the superior court or complete a model training program developed by the Department of Social and Health Services.

The GAL's written background statement is made part of the record in each case. The GAL's duties include advising the AIP of his or her rights, obtaining appropriate evaluations of the AIP, meeting with the person who may be appointed to act as a guardian, investigating the case, and making a recommendation to the court within 10 days of the hearing on the petition. The GAL may ask for an extension or reduction of the deadline for good cause. The GAL has authority to choose which health care

professionals will examine the AIP and report to the court. The GAL may also make emergency medical decisions on behalf of the court, and move the court to allow the GAL to seize assets, enjoin anyone from disposing of assets of the AIP's estate, or enjoin a person from making other decisions pursuant to a power of attorney or a trust.

The court determines the GAL's fee. Those fees are charged to the AIP unless the court finds that charging the AIP would impose a substantial hardship on the person, in which case the county pays for the GAL. If the guardianship is not established, the court may charge the fee to the petitioner or split the fee between the AIP and petitioner. If the court finds the petition is frivolous or brought in bad faith, the petitioner must pay the GAL's fee. In most cases, the GAL charges an hourly fee. Consequently, the more paperwork, reports, motions, and hearings that are required of the GAL and attorneys during the pendency of the guardianship action, the higher the costs to the AIP.

Guardians Ad Litem Under Dependency and Domestic Relations Cases (Chapter 13.34 RCW and Title 26):

The guardian ad litem represents the best interests of the child that is the subject of the dependency or the child of divorced or divorcing parents. GALs must be appointed in dependency cases but not family law cases. Some GALs are paid for their services and may be independent lawyers or other professionals. Other GALs are volunteers that work through a guardian ad litem program or are court-appointed special advocates (CASA) that work through the CASA program. The CASA volunteers are trained through the program. Nineteen CASA programs are operated in 20 counties. Other programs are being developed in four other counties. When a judicial district has a CASA program, the program is appointed rather than a particular GAL. The program then assigns a particular GAL, pending appointment by the court; or, in the event of illness or removal, the program acts as the GAL.

CASA programs that provide services on child abuse and neglect cases are required to maintain background information for each GAL volunteer. The information is updated annually and is made available to the court.

Serving as GALS and Acting as Attorneys:

An attorney who specializes in guardianship cases may serve as a GAL in one case and an attorney for the petitioner or AIP in another. Such an attorney may also be serving as a judge pro tempore or commissioner pro tempore for the judicial district.

Summary of Bill:

Guardianships Under Chapter 11.88 RCW:

Alternatives to Guardianships:

A petition for a guardianship must contain a description of any alternate arrangements in existence, such as trusts or powers of attorney, and must state why a guardianship is necessary if these arrangements already exist.

The guardian ad litem (GAL) is required to investigate whether alternate arrangements have been made or could be created, such as trusts or a durable power of attorney, that would be adequate alternatives to a guardianship. The GAL's report to the court must describe those arrangements and must contain recommendations to the court whether those arrangements should be used in lieu of a guardianship or should be discontinued, and, if so, why they are contrary to the alleged incapacitated person's (AIP) best interests.

If alternate arrangements are in effect when the petition for guardianship is filed, those arrangements remain in effect pending resolution of the petition with two exceptions:

- (1) the court grants an injunction staying use of those arrangements after the petitioner, another person, or a GAL moves for emergency temporary relief to protect the AIP from abuse, neglect, abandonment, or exploitation, or to address any other emergency needs of the AIP; or
- (2) the court finds by clear, cogent, and convincing evidence, following notice and a hearing at which all parties must attend, that an injunction should be issued staying use of those alternate arrangements pending the guardianship.

Rights of the AIP:

Rights of the AIP are clarified or expanded. The AIP has a right to

- (1) request that the date set for the hearing on the petition for guardianship be delayed for good cause shown;
- (2) counsel of his or her choice;
- (3) testify and present evidence at the hearing; and
- (4) select the health professional who will conduct the examination of the AIP and prepare the report to the court, or object to the GAL's selection. If the AIP objects to the GAL's recommendation, the GAL must use the professional selected by the AIP or move the court for approval to select a different provider following a hearing on the issue.

Guardian Ad Litem's Certification, Training, Selection, and Removal:

Training and Qualifications:

The Administrator for the Courts must conduct a study to determine whether guardians ad litem should be certified before they can be appointed. The study must be presented to the Legislature by December 1, 1996.

The Department of Social and Health Services must update the model training program for GALs biennially. The superior courts must use the model state training program for GALs instead of or in addition to the superior court's training program. A GAL must complete the model state training program to be eligible for the registry.

Background and Information:

When a guardian ad litem is appointed, the guardian ad litem must give to the court and parties the following information:

- (1) background and qualifications;
- (2) hourly rate; and
- (3) whether the GAL has served as a GAL, an attorney, or a guardian in any case involving the attorneys in the present case.

The background statement must include information about the GAL's level of formal education; training related to a guardian's duties; the number of years of experience as a GAL; the number of appointments as a guardian ad litem and the county or counties of those appointments; the GAL's criminal history; and the number of times the GAL has been removed from cases for failing to perform duties. The background information must be updated annually.

Selection of GALs:

Selection from the registry must be made by a rotation system. The court must select the GAL by systematic rotation, except in extraordinary circumstances such as particular expertise. If the court does not select a person who is next on the list, the court must enter a written order explaining its reasons.

Once the court has selected the GAL, the GAL must submit the required information about the GAL to the court and parties within five days of appointment. Any party may move for substitution of the GAL within three days of receipt of the information based on a showing that the GAL lacks requisite expertise, charges a higher hourly rate than what is reasonable, or has a conflict of interest. The bill does not explicitly state what are the GAL's powers pending the parties' review of the GAL's background and a hearing on a motion for substitution. The bill does not require the party that moves for substitution to make the motion prior to an action made by the GAL that may be adverse to the moving party's interest.

Review of the GAL's Report:

The GAL must file his or her report at least 15 days before the hearing. If the GAL needs additional time to finalize the report, the GAL must petition the court for a delay of the hearing or, with consent of the parties, extend the time to file the report. If the hearing does not occur within 60 days of filing the petition, then the GAL must file an interim report upon the two-month anniversary of filing the petition and on or before the same day of each following month until the hearing. The report must summarize the GAL's activities, as well as fees and costs incurred.

The parties may file responses to the report at any time up to two days before the hearing. If the GAL does not file the report on time, the court must delay the hearing to allow the court and parties at least 15 days to review the report. The GAL must appear in person at the hearing unless all parties waive in writing the GAL's presence.

Removal of the Guardian Ad Litem and Sanctions:

The court must develop procedures for periodic review of persons on the registry, and for probation, suspension, or removal of persons on the registry who fail to perform their GAL duties properly.

At any time during which the guardianship petition is pending, upon motion, the court may remove the GAL for failing to perform his or her duties properly. The GAL is entitled to five days' notice of any motion to remove the GAL before the court enters the order.

The court may reduce the GAL's fees for failing to fulfill the GAL's duties.

The court may consider at any hearing whether the GAL or any person who acts as a fiduciary has breached a statutory or fiduciary duty, or is unable to continue with the case.

Guardians Ad Litem Under Dependency and Domestic Relations Cases:

The Office of the Administrator for the Courts must develop a statewide curriculum for persons who act as GALs in dependency or family law cases. The curriculum must be developed by July 1, 1997. All paid GALs must attend the statewide curriculum. Volunteer GALs and court-appointed special advocates (CASAs) may continue to take their programs' training.

The Office of the Administrator for the Courts must study the advisability of mandating the use of court-appointed special advocates statewide.

Paid GALs will be selected by a rotational registry system. In judicial districts with a population over 100,000, three names will be selected. Each party has one preemptory challenge. The court will select the GAL from those remaining on the list. If only one is left on the list, that person becomes the GAL. If all three people are challenged, the next person on the list is the GAL. The appointed GALs may be challenged for lack of necessary expertise, an excessive hourly fee, or a conflict of interest. The party may move the court to replace the GAL under these circumstances within three days of appointment. The rotational system does not apply to CASA programs.

Paid guardians ad litem must provide their background statements to the parties, as well as to the court, as required under current law. The statement must be provided immediately upon appointment.

If the GAL is a member of a volunteer program or is a court-appointed special advocate (CASA), the GAL does not have to provide the background statement to the parties. If a party or an attorney wants the background information, the party or attorney must file a motion, based on good cause, requesting the background information. If the court finds that good cause exists, the court must grant the motion.

When a volunteer program is ordered on the case, the program will pick the GAL. Pending appointment, the program acts as the GAL. If a party reasonably believes that the appointed GAL or CASA member is incompetent, the party may ask the program to review the appointment for good cause shown. The program must review the appointment within five days. If the party is not satisfied with the result, the party may move the court to remove the GAL.

In domestic relations cases, the court may require the GAL to provide periodic reports to the parties regarding the status of the investigation. Paid GALs must provide an accounting of their time and expenses.

Restrictions on Serving as Both a GAL and Commissioner or Judge Pro Tempore:

In judicial districts with a population of more than 600,000, an attorney may not serve as a superior court judge pro tempore or commissioner pro tempore while appointed to or serving on a case as a GAL for compensation in an action for guardianship, dependency, dissolution, or other family law action.

Appropriation: None.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The GAL system is completely out of control. GALs have too much power over the outcome of cases because the judges simply rubber-stamp the GALs' recommendations. Many of them are insufficiently trained, lack proper credentials and experience, are not abiding by their obligation to protect the AIP, but are aligned with a party or an attorney in the case, and engage in strategic maneuvering without judicial oversight or control. The problems exist throughout the system, not just in one county.

Testimony Against: The overall system is working well. The bill attempts to address an isolated problem, but in doing so will negatively impact the entire state. The bill will reduce the pool of competent persons to serve as GALs, raise the cost of guardianships, and delay resolution of cases. The provisions that apply to GALs who are paid for their services do not need to apply to volunteers. The Washington Bar Association has initiated a study of these issues.

Testified: Senator Rosa Franklin, prime sponsor; Representative Gigi Talcott (pro); Dan Sexton, Washington State Association of Plumbers and Pipefitters (pro); Mike Courtney, American Association of Retired Persons and Senior Citizen Lobby (pro); Kelly Gillespie, Mandy Carlson, Cindy Iversen, Judy Smith, Donald Barovic, Pamela McCain-Barovic, and Sharon Carter (pro); Douglas Schafer, attorney (pro); Mary Lockhart, Alliance for the Rights of Children (pro); Frank Winslow, Alzheimer Society of Washington (pro); Dave Marshall, Washington Assembly for Citizens with Disabilities (pro); Lawrence Hutt, Tennis Shoe Brigade (pro); Gus Schwartz, Retired Public Employees Council (pro); Steve Gustaveson, Office of the Attorney General (pro, with amendments); Karen Boxx, Washington State Bar Association, Real Property, Probate and Trust Section (pro, with concerns); Floyd Kinney, Jr., citizen (pro, with concerns); Sharon Paradis, Washington State Association of Guardians ad Litem and CASA and Snohomish County Guardians ad Litem Program (with concerns); Diana Kiesel, attorney (con); and Kathleen Martin (con).