

MINUTES OF THE HOUSE COMMITTEE ON CORRECTIONS AND JUVENILE JUSTICE.

The meeting was called to order by Chairperson Ward Loyd at 1:30 p.m. on January 30, 2003, in Room 526-S of the Capitol.

All members were present except:

Ranking Minority Member Jim Ward - excused
Representative Lana Gordon - excused

Committee staff present:

Jill Wolters - Office of Revisor
Mitch Rice - Office of Revisor
Jerry Ann Donaldson - Legislative Research Department
Bev Renner - Committee Secretary

Conferees appearing before the committee:

Secretary Janet Schalansky—KS Department of Social and Rehabilitation Services
Randy Hearrel—KS Judicial Council
Professor Sheila Reynolds, Washburn Law School
Trista Beadles Curzydlo—Legislative Steering Committee, KS Bar Association (written testimony)

HB 2016: Training and powers and duties of juvenile correctional officers.

Chairperson Loyd advised that a subcommittee would be appointed to resolve the issues that are involved in law enforcement officer's powers and authority to refine the bill draft to be more in keeping with the request from Juvenile Justice Authority. Representative Horst will Chair with Representatives Kassebaum, Carter, Ward and Betts making up the membership.

HB 2035: Children in need of care; right to counsel.

Chairperson Loyd welcomed Secretary Janet Schalansky, SRS to provide a briefing on Children In Need Of Care. Secretary Schalansky explained the definition of such a child as set forth in K.S.A. 38-1502 (Attachment 1). In FY 2002, the department accepted 60% of the total reports alleging a child to be in need of care. If the allegation is that the child has been abused or neglected, an assessment of the child's immediate safety must take place on the same day or within 72 hours. The remaining third of screened-in reports involve children who have been referred because of "objectionable" behavior; i.e. truants, runaways or youth not under adequate parental care and control. Agency policy requires an assessment of the reported concern be started within twenty working days. Normally, these children are older. Efforts are made to give support to the family from various agencies or service groups to meet the assessed needs. If this effort fails or it is deemed necessary to remove the child from the home, a referral is made for Family Preservation services from a private, licensed agency under contract with SRS. If the child's safety is involved, the county or district attorney may file a petition alleging the child to be in need of care and a guardian *ad litem* is appointed by the court to represent the child and independently investigate the facts upon which the petition is based. If foster care is considered appropriate, SRS staff provides guidance, technical assistance and monitors for compliance with contracted services. The plan is usually reintegration with the parent, but if this is not possible, the goal may be adoption, permanent guardianship or another permanent living arrangement.

Chairperson Loyd opened the hearing on HB 2035. Randy Hearrel introduced Professor Sheila Reynolds from Washburn Law School as a proponent (Attachment 2). This bill seeks to amend current statute K.S.A. 38-1505 in three respects:

- 1) The first is to better define the role of the guardian *ad litem* (GaL) in representing children in need of care. The statute has historically been interpreted and intended to provide that the appointed attorney does not represent the child, but rather the best interests of the child; yet some attorneys treat this responsibility as a traditional attorney-client relationship with a duty of protecting the confidences shared and considering only the wishes of the child.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON CORRECTIONS AND JUVENILE JUSTICE at on January 30, 2003, in Room 526-S of the Capitol.

Even if the attorney feels that the child's wishes may not be what is best for the child, the GaL is duty-bound to present those wishes for consideration of the court. The role of the GaL should be clarified with specific language so that the best interests of the child are served, and the judge is given full and complete information, including the wishes of the child, even if the wishes are inconsistent with what otherwise might be considered the best interests of the child.

- 2) The second matter in amending the statute is to require the GaL to inform the court when there is disagreement with the child's position, so that the child's wishes can be weighed in the judge's decision. The proposed change would allow either the GaL or the child to ask for a second attorney to represent the child in a traditional attorney-client relationship.
- 3) The third thing the bill seeks to do is give the judge the discretion to appoint an attorney to actually represent the child in appropriate cases. Traditionally, this is needed in cases where older children might benefit from the empowerment of having their own lawyer and from having their own position advocated.

The committee was advised that the Supreme Court Administrative Order No. 100 represented a change so as to conform with the understanding as expressed in the statutory language that the GaL is an officer of the court, representing the best interests of the child, as opposed to representing the child and thus the desires or wishes of the child. Committee discussion then centered upon preference that the guardian's position in **HB 2035** should be clarified so as to recognize the appropriate role of the GaL.

Randy Hearrel discussed and summarized the existing ambiguity, indicating the conflict is resolved with **HB 2035**.

Written testimony was submitted by Trista Curzydlo on behalf of the Kansas Bar Association (Attachment 3).

Chairperson Loyd closed the hearing on HB 2035.

The meeting was adjourned at 3:21 p.m. The next meeting is scheduled for February 3, 2003.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE GUEST LIST

DATE Jan. 30, 2003

| NAME | REPRESENTING |
|------------------|----------------------------|
| Dick Kelsey | King's Camp Inc |
| Mary Beth Kedd | Juvenile Justice Authority |
| Sheila Reynolds | Kansas Judicial Council |
| Trista Curzydlo | KS Bar Assn. |
| Teresa Schwab | KCSL |
| Ramona Doerksew | KCSL |
| Crystal Galliano | Partnership for Children |
| Marianne Deack | |
| Janet Schalsky | |
| Shelby May | KS DD Council |
| TK Shivel | KS Legal Services |
| Therese Banzeit | Ks. Catholic Conference |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |

Kansas Department of

Social and Rehabilitation Services

Janet Schalansky, Secretary

Corrections and Juvenile Justice - 526-S
January 30, 2003

Briefing on Child in Need of Care

Integrated Service Delivery
Janet Schalansky, Secretary
(785)296-3271

For additional information contact:
Office of Planning and Policy Coordination
Marianne Deagle, Director

Docking State Office Building
915 SW Harrison, 6th Floor North
Topeka, Kansas 66612-1570
phone: 785.296.3271
fax: 785.296.4685
www.srskansas.org

House Corr : J.J.
1-30-03
Attachment 1

can not be addressed with less intrusive services, a referral is made for Family Preservation services from a private, licensed agency under contract with the department.

If the child is in immediate danger, law enforcement or the court may place the child in police protective custody or SRS custody. Law enforcement officers may take a child into custody when there are reasonable grounds to believe the child would be harmed if left in the same circumstances. The court must find that leaving the child in the home would be contrary to the welfare of the child and an emergency exists, or reasonable efforts have failed to remove the danger. Protective custody allows for immediate separation of the child from the family and is limited to 72 hours exclusive of weekends and holidays.

When reasonable efforts have failed to maintain the child safely with the family or are not appropriate, the county or district attorney may file a petition alleging the child to be in need of care.

Parents and grandparents receive notice of the petition. Grandparents were recently made parties to all child in need of care actions and are legally equivalent to parents once a petition is filed. However, while grandparents may be represented, only parents who can not afford an attorney have the right to have an attorney provided. A guardian ad litem is appointed by the court to represent the child and independently investigate the facts upon which the petition is based.

If all parties agree, orders of informal supervision, which serves as diversion to a child in need of care designation can be implemented. If an agreement is not possible, after a hearing or parental stipulation the court may determine there is clear and convincing evidence that the child is in need of care. When the court places the child in SRS custody for out of home placement, the family is referred to the foster care contractor responsible for foster care and reunification services in the community.

The court balances the rights of parties with the best interests of the child and insures adequate progress is made to implement a permanency plan which is designed to provide the child a safe, permanent family. The family and foster care contract staff work together to implement the plan and achieve the goal. SRS staff provide guidance, technical assistance and monitor for compliance with requirements of the foster care contract.

The permanency plan goal is usually reintegration with the parent, but when this is not appropriate the goal may be adoption, permanent guardianship or another planned permanent living arrangement. Statewide during FY 2002, over two-thirds (67.4%) of all children served by the foster care contractor had a permanency goal of reunification. Independent living is incorporated in the case plan for all children 14 and older.

Attachment A
Child in Need of Care Definitions

KSA 38-1502. Definitions. As used in this code, unless the context otherwise indicates:

(a) "Child in need of care" means a person less than 18 years of age who:

(1) Is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian;

(2) is without the care or control necessary for the child's physical, mental or emotional health;

(3) has been physically, mentally or emotionally abused or neglected or sexually abused;

(4) has been placed for care or adoption in violation of law;

(5) has been abandoned or does not have a known living parent;

(6) is not attending school as required by K.S.A. 72-977 or 72-1111, and amendments thereto;

(7) except in the case of a violation of K.S.A. 41-727, subsection (j) of K.S.A. 74-8810 or subsection (m) or (n) of K.S.A. 79-3321, and amendments thereto, or, except as provided in subsection (a)(12) of K.S.A. 21-4204a and amendments thereto, does an act which, when committed by a person under 18 years of age, is prohibited by state law, city ordinance or county resolution but which is not prohibited when done by an adult;

(8) while less than 10 years of age, commits any act which if done by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-3105 and amendments thereto;

(9) is willfully and voluntarily absent from the child's home without the consent of the child's parent or other custodian;

(10) is willfully and voluntarily absent at least a second time from a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee;

(11) has been residing in the same residence with a sibling or another person under 18 years of age, who has been physically, mentally or emotionally abused or neglected, or sexually abused;
or

(12) while less than 10 years of age commits the offense defined in K.S.A. 21-4204a and amendments thereto.

Community Services
Mental Health Services
Developmental Disabilities Provider
Substance Abuse Treatment Provider
Family Resource Centers
Domestic Violence Programs

Law Enforcement
Medical & Dental Providers

Guardians Ad Litem
District & County Attorneys

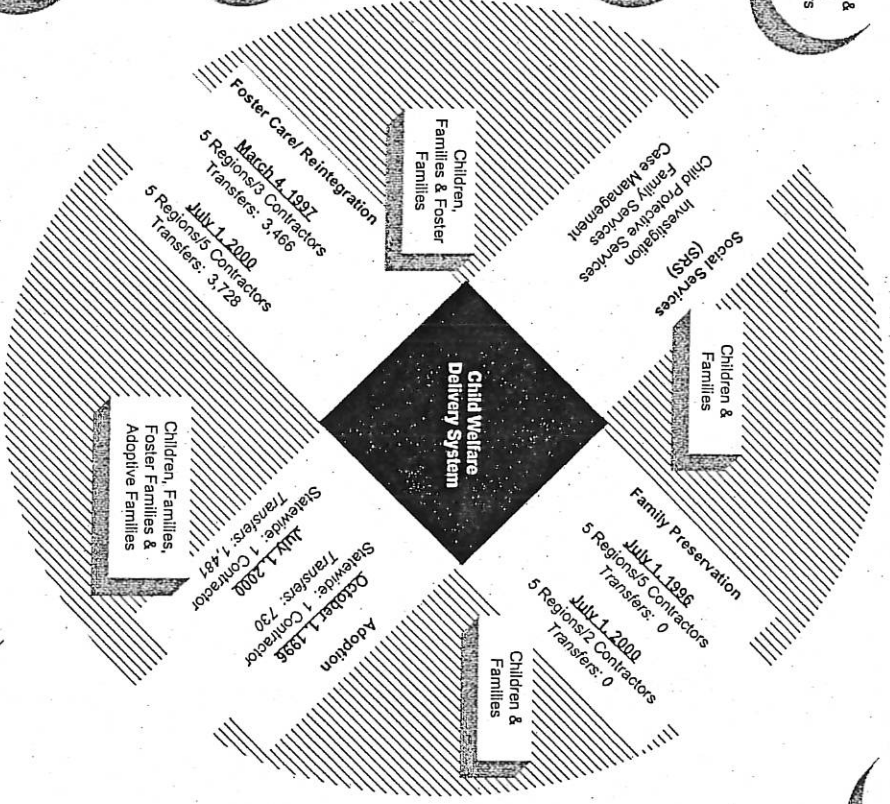
Tribal Communities Social Services
Extended Families (Kin)

Education System
Employment Services

Faith-Based Organizations

Kansas Child Welfare

October 16, 2001



Kansas Bureau of Investigation (KBI)

KS Dept. Of Health & Environment

Legislature

Subcontracting Service Providers

ACLU/Children's Rights, Inc.

Legislative Post Audit (LPA)

Child Care & Early Childhood Development

Child Advocates

Foster Parents

Prevention Centers & Programs

Extension Services

Courts

Court Service Officers (CSO) Citizens Review Board

Behavioral Sciences Regulatory Board

Juvenile Justice Authority (JJA)

Courts

Child Welfare Circle Chart.vsd - cjc

JUDICIAL COUNCIL TESTIMONY ON HOUSE BILL 2035

Professor Sheila Reynolds, Washburn Law School

The First Problem

There is ambiguity in KSA §38-1505(a), which provides that courts must appoint an attorney for a child alleged to be in need of care, to serve as the child's guardian *ad litem* (GAL). The statute at one point states:

The guardian ad litem shall make an independent investigation of the facts upon which the petition is based and shall appear for and **represent the child**.

Most attorneys believe that the statute means the GAL must represent not the child, but the best interests of the child, as determined by the GAL. The Kansas Supreme Court interprets the statute this way in its Guidelines for Guardians Ad Litem, which state that the GAL must determine the best interests of the child, present all relevant facts to the court, and make recommendations to the court, which may vary from what the child desires.

However, because of the words bolded above, some lawyers believe that KSA §38-1505 means that the GAL must represent the child in a traditional attorney-client relationship, with a duty of protecting the confidences of the child-client and of advocating the decisions made by the child-client. The ethical regulations for attorneys do not permit an attorney to play both roles at the same time. If the attorney represents the child, the attorney must protect the confidences of the child and is forbidden to report confidential relevant facts to the court. If the attorney represents the child, the attorney must advocate for the wishes of the child, even though the attorney has formed an opinion that the child's wishes are not best for the child and that the judge should in fact make a decision different from what the child wants.

Solution. Serving as a GAL for a child in need of care is a difficult endeavor which can best be done if expectations are clear. If the legislature intends that the appointed lawyer serve as a GAL, the statute should be amended to remove the ambiguity by adding the phrases "**represent the best interests of the child**" in subsections a and d. There is no cost in clarifying the role of the attorney. The interests of children are better served by providing the judges who must decide how to protect them with the best information and ideas available.

The Second Problem

If the GAL disagrees with the child's position, the GAL should be required to inform the court of what the child's position is, so the child's wishes can be factored into the judge's decision. Although many GAL's do that, there is not a requirement in the law to do so. Subsection a adds that requirement.

There are occasional cases, involving a more mature child, where the child may benefit from having an attorney who can protect confidences and who can advocate solely for what the child wants. Having an attorney may empower the child and should result in better advocacy for the child's position. The proposed amendment would allow either the GAL or the child to ask the judge to appoint a second attorney to represent the child in a traditional attorney-client relationship. The Judicial Council supports giving the court discretion to grant the request, if the court is convinced there is good cause to appoint another attorney in addition to the GAL.

House Corr's
J.J.
1-30-03
Attachment 2

IN THE SUPREME COURT OF THE STATE OF KANSAS

ADMINISTRATIVE ORDER NO. 100

RE: GUIDELINES FOR GUARDIANS AD LITEM

The Supreme Court guidelines are recommended for the representation of children by guardians *ad litem* in cases pursuant to the Kansas Code for the Care of Children, K.S.A. 38-1501 *et seq.*; the Parentage Act, K.S.A. 38-1110 *et seq.*; and Domestic Relations, K.S.A. 60-1601 *et seq.* unless departure is authorized by the presiding judge or designee for good cause shown. The appointing judge or designee should:

- 1) issue an Order appointing the guardian *ad litem* on a form substantially as attached, and
- 2) insure compliance with this Administrative Order.

A guardian *ad litem* should:

1) Conduct an independent investigation consisting of the review of all relevant documents and records including those of social service agencies, police, courts, physicians (including mental health), and schools. Interviews either in person or by telephone with the child, parents, social workers, relatives, school personnel, court appointed special advocates (CASAs), caregivers, and others having knowledge of the facts are recommended. Continuing investigation and ongoing contact with the child are mandatory.

2) Determine the best interests of the child by considering such factors as the child's age and sense of time; level of maturity; culture and ethnicity; degree of attachment to family members, including siblings; as well as continuity, consistency, permanency and the child's sense of belonging and identity.

3) File appropriate pleadings on behalf of the child. Appear for and represent the child at all hearings. All relevant facts should be presented to the court, including the child's position. If the child disagrees with the guardian *ad litem*'s recommendations, the guardian *ad litem* must inform the court of the disagreement. The court may, on good cause shown, appoint an attorney to represent the child's expressed wishes. If the court appoints an attorney, that individual serves in addition to the guardian *ad litem*. The attorney must allow the child and the guardian *ad litem* to communicate with one another but may require such communications to occur in the attorney's presence.

4) Provide reports at every hearing, such reports being written or oral at the discretion of the judge.

5) Explain the court proceedings and the role of the guardian ad litem in terms the child can understand.

6) Make recommendations for specific appropriate services for the child and the child's family.

7) Monitor implementation of service plans and court orders.

8) Participate in prerequisite education prior to appointment as a guardian *ad litem* which consists of not less than six (6) hours including one (1) hour of professional responsibility, and participate in annual continuing education consisting of not less than six (6) hours. Areas of education should include, but are not limited to, dynamics of abuse and neglect; roles and responsibilities; cultural awareness; communication and communication with children skills and information gathering and investigatory techniques; advocacy skills; child development; mental health issues; permanence and the law; community resources; professional responsibility; special education law; substance abuse issues; school law; and the code for the care of children. Such hours of continuing education, if approved by the Continuing Legal Education Commission, shall apply to the continuing legal education requirements of Supreme Court Rule 802 and the minimum total hours annually required by that rule are not modified by these guidelines. The appointing judge or designee shall have the authority to approve the prerequisite education and continuing education not otherwise approved by the Continuing Legal Education Commission. Guardians ad litem shall be responsible for maintaining a record of their own participation in prerequisite and continuing education programs. Upon the request of the appointing judge or designee, the guardian ad litem shall be required to provide evidence of compliance with this order. Such prerequisite education may be waived by the appointing Judge or designee upon showing of a need for emergency temporary appointment. The educational requirements shall be completed within six (6) months of appointment. These educational requirements shall not be effective for a period of six (6) months from the date this order is adopted by the Supreme Court.

By order of the Court, this 7 day of march, 2002.

ORDER APPOINTING GUARDIAN AD LITEM

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS
_____ JUDICIAL DISTRICT

In the Interest of

Case No. _____

ORDER APPOINTING GUARDIAN AD LITEM

NOW on this _____ day of _____, _____, it is ordered that
_____, a duly qualified practicing attorney in _____
County, Kansas, is hereby appointed as guardian *ad litem* for the above-named minor.

1. The guardian *ad litem* shall be served with copies of all pleadings and other papers filed herein. The guardian *ad litem* shall comply with all the guidelines of Kansas Supreme Court Administrative Order No. _____.

2. Upon presentation of a certified copy of this Order to any agency, organization, person or office, including the Clerk of this Court, any school personnel, any drug or alcohol treatment provider, any police department or other law enforcement agency, any pediatrician, psychologist, psychiatrist, hospital, mental health treatment facility or other medical or mental health care provider or any social worker or social welfare agency, the aforementioned shall be permitted to communicate orally or in writing with the guardian *ad litem* about any records or treatment relating to the minor child and/or the minor child's parents, and the aforementioned shall permit the guardian *ad litem* to inspect and copy any such records. The guardian *ad litem* shall maintain any information received from any such source as confidential and shall not disclose the same except in reports to the Court or as otherwise permitted by the Code for Care of Children.

3. The guardian *ad litem* is hereby vested by the Court with all powers, privileges and responsibilities necessary for the full and effective performance of the duties and obligations to the minor child as set forth in this Order.

Judge



**KANSAS BAR
ASSOCIATION**

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
www.ksbar.org

TO: MEMBERS OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE
COMMITTEE

FROM: TRISTA BEADLES CURZYDLO, KBA LOBBYIST

RE: HOUSE BILL 2035

Members of the Committee:

I am writing to you to convey the Legislative Steering Committee of the Kansas Bar Association's position on House Bill 2035. The KBA Board of Governors is scheduled to conduct a meeting to discuss House Bill 2035 and adopt a position. House Bill 2035 contains many of the provisions found in Senate Bill 399 proposed last year. The KBA Board of Governors opposed Senate Bill 399 for several reasons including that the Kansas Supreme Court issued a Rule that does exactly what Senate Bill 399 proposed to accomplish. After a discussion amongst our Legislative Steering Committee concerning House Bill 2035 we remain opposed to this proposal.

House Bill 2035 proposes to amend K.S.A. 38-1505 to allow a guardian ad litem or the child at issue to request the appointment of a second attorney to serve as the attorney for the child. When a guardian ad litem is appointed for a child, the guardian ad litem is appointed to represent "the best interests of the child." Obviously, occasions may arise where the wishes of the child are incongruent with the best interests of the child. Many guardian ad litem find this to be an awkward situation, which seems to provide the impetus for this bill.

However, there is a very good reason for the current law. Children are children, and obviously, they don't always know what is best for them. Guardian ad litem are appointed to represent the best interests of the child so that someone is truly looking out for "the best interests of the child." If the guardian ad litem simply represented whatever the child wanted, the best interests of the child would frequently not be served. As a general rule, should not the representation of children be governed by this approach? Guardian ad litem are savvy enough to identify any unusual cases where additional help is required, and can then ask for it.

We don't believe this legislation is necessary or timely for a couple of reasons. Firstly, there are not many occasions where a guardian ad litem isn't recommending what is best for the child, and the child agrees. Our Legislative Committee, which includes individuals involved in the Guardian ad litem system, feels the bill is unnecessary. What is accomplished by appointing a lawyer to represent an eight-year-old who doesn't want to go to school? We believe that the existence of this proposed language in statute may cause a significant increase in the number of cases where a child will request a second attorney for reasons similar to the example I have noted above. This bill is going to result in the expenditure of more judicial resources. The cost of compensating attorneys or guardian ad litem is born by an underfunded juvenile system and many financially strapped counties. The money demand is not justified.

For the reasons stated above, we believe House Bill 2035 is ill advised and ask you to reject the bill. Thank you!

House Corr: JJ
1-30-03
Attachment 3