

Thank you for the opportunity to offer testimony regarding House Bill No. 2381 and its proposed changes to the role/responsibility of advocates for children in child in need of care (CINC) proceedings. The undersigned are all either parent attorneys or guardians ad litem in the Eighteenth Judicial District (Sedgwick County). This testimony is submitted in each individual's capacity as a private citizen, and should not be construed as a position taken as a part of anyone's role or involvement with any other organizations, committees, or affiliations.

In a nutshell, it appears that the intent of the bill is to give children in the CINC system an appointed attorney to "serve as counsel" and represent the interests of the child (Proposed Legislation, 6:21-30), rather than the current provisions of the Revised Code for Care of Children, which provide for the appointment of a guardian ad litem (GAL) to represent the best interests of the minor children. Also under the current code, the Court also has the option to appoint an attorney to represent the wishes of a minor child, should the wishes of the minor child and guardian ad litem differ (K.S.A. § 38-2205(a)).

The existing GAL provisions in statute already provide for appropriate powers, duties, and abilities to advocate for children effectively. It is unclear what the change to an attorney to represent the child accomplishes which is better for the child than the existing guardian ad litem arrangement.

Although the potential benefits of such legislation are unclear, there are a number of adverse consequences which are probable, if not likely, should HB 2381 become Kansas law. HB 2381 should not become Kansas law because (1) it would decrease the quality of information sharing in CINC proceedings; (2) it would create significant ethical dilemmas for attorneys appointed for children; (3) it would frustrate the goal of obtaining permanency for children in a timely fashion; and (4) it would create significant logistics challenges.

HB 2381 would decrease the quality of information sharing in CINC proceedings.

(a) Privileged Communications

In a traditional attorney-client relationship, attorneys are ethically bound to keep confidential communications privileged (See Kansas Rules of Professional Conduct Rule 1.6 Confidentiality). Under Kansas Supreme Court Rule 110A, the current rule for GALs, the GAL is not similarly bound.

At the outset, a GAL should advise the child that he or she is acting for them and their best interest, and is bound to advise the court of the child's wishes. This could include disclosing things which would be privileged under an attorney-client relationship. For example, the child might disclose that he or she is a witness to parental drug abuse, or may be having contact with parents which is unauthorized or not approved by the court – two situations which could potentially pose an imminent safety risk to the child. A GAL could share that information with the court, but a child's attorney could not. Similarly, a child could disclose potential feelings of self-harm, or a desire to do something against his or her best interest (leave placement, move in with a significant

other) – those conversations would be privileged, and thus become information not available to the court.

(b) Case Events Adverse to Minor Child

Under the proposed legislation, the attorney must take direction from the child, meaning that the child has the ability to direct the attorney. Proponents would suggest that this creates a greater communication of the child's wishes to the court. However, there are a number of situations in which the directives of the child client might be things which objectively are contrary to his or her best interest. For example, the child's position could be: (1) I don't want to attend therapy, (2) I don't want to attend drug treatment, or (3) I want you to increase my visits with parents who are currently using methamphetamine and send me home. Under the child attorney system, those wishes which are contrary to the best interest of the child would be the only information received by the court.

Under the current GAL system, the GAL can have the same communication and convey the child's desires to the Court just as a child's attorney would be bound to do. As an added benefit, a GAL has an additional duty to act in the best interests of the child, and can communicate regarding best interests, even if that information might be contrary to the child's direction. That best interest perspective is critical to a court's decision-making. If GALs were substituted to for a child's attorney, the benefit of an objective party observer is and substituted with another adversarial viewpoint is added to the process.

(c) Flexibility

Each child is unique in his or her needs and abilities. While children may share the same age as peers, that does not mean their capabilities are identical given their experiences, education, and maturity. What criteria should be used to assess whether or not a child is capable? If a "capable" child can articulate a rationale to support a negative decision, is the child's attorney duty bound to advocate for that position, no matter how ill advised?

Contrastingly, the GAL standard of best interests is much more flexible. The child's wishes, even if ill advised, can always be conveyed. But, the GAL has the added benefit of also offering an additional narrative of what might be in the child's best interest. This multi-faceted presentation is ultimately best for informing the court of all perspectives, and protecting the child.

HB 2381 would create several ethical dilemmas for attorneys who serve as children's counsel.

(a) Independent and Experienced Judgment

If a child directed his attorney to keep him informed of everything, the attorney would be bound to ensure the child attended all proceedings, and was informed of all court reports and information concerning the case. While in many cases this is appropriate or reasonable, especially in the case of older youth, there are certainly times where this may not be appropriate. For example, it may not be best for a child to hear that their parents continue to test positive for illegal

substances, the parents have expressed a desire that they do not wish to have the child return to their home, placement has voiced concerns re: the child or is wishing to disrupt on the child.

Under the current model, a GAL has some discretion in determine what information should be shared with the child per his or her best interests. Further, GAL can request that the court speak with the child in private. It is unclear whether the court could ethically continue to do this if the child had specific counsel appointed.

(b) Unanticipated Confidentiality Concerns

Based on the proposed legislation, each child would be entitled to an attorney. While it may theoretically be ethically permissible to represent all of the children in the same family, there are clearly issues of confidentiality at play with an attorney which are not otherwise present with a GAL. Does the attorney need to visit with each child separately? What if one child discloses something that another child is vehemently against disclosing? Or, what if the children have a different version of events? What if one child has never experienced abuse at the hands of parents and is denies that such abuse ever occurred in the home, whereas a sibling may be the victim of abuse from parents which did occur? In sum, the child's attorney role would be full of ethical pitfalls; whereas, the GAL whose client is the best interest of the child has more latitude and flexibility to navigate such situations.

HB 2381 would frustrate the goal of obtaining permanency for children in a timely manner and complicates the CINC decision-making process.

(a) Incomplete Information for Permanency Decisions

Child welfare practitioners are in agreement that obtaining permanency in a timely fashion is in the best interests of children. A GAL is able to make arguments for or against parents based on their relative performance in a case because the role of the GAL is to act in the child's best interests (or to reach permanency in a timely manner). A child's attorney, however, would be ethically bound to oppose findings like reintegration no longer viable if the child so directs, which could ultimately delay permanency.

A GAL can discuss the child's position with the child on such an issue, and assure the child that such wishes will be conveyed to the court, even if that position or desire is immature or inconsistent with what the GAL believes to be best. However, the GAL is also free to comment what might be best. Absent that best interest perspective, the court is operating with less information.

(b) Experience of the Decision-Maker

Further, while children should be empowered in CINC cases to voice their concerns, children should not be the sole decision-maker. Even the most mature and astute teenager still has several years of brain development ahead of him or her. Very few adults can look back on decisions made at the age of sixteen, seventeen or eighteen and, with the benefit of hindsight, agree with all

of those decisions. Children would benefit from a dialogue with an adult familiar with his or her case who can help shape a discussion from multiple perspectives and ask that the child consider all aspects of a problem. Unlike the GAL, who can have such a conversation, a child's attorney would not be similarly empowered.

It is also worth considering that children may not necessarily want to be the decision maker. They certainly do not want to be in a position to hurt their parents. A GAL is an independent adult who is able to stand in the gap for the child on a controversial question and take a position which might damage the parent-child relationship. The GAL can help to alleviate stress and guilt that may be felt by a child if he or she is compelled to take a position on something which might be contrary to the parent's wishes.

A child's attorney has much less discretion in this regard. Child's counsel would be limited to what an inexperienced, often traumatized, child directs him or her to do. Oftentimes, it is the child who is seeking or could benefit from guidance of an adult, not the other way around.

HB 2381 would create significant logistics challenges.

Judges in CINC cases should be empowered with as much information as possible in order to make sound decisions for the safety of Kansas children. The provisions of HB 2381 require courts to appoint a child attorney, but leave the appointment of GAL to the discretion of the court. Absent the input of a GAL, the court would potentially be lacking significant information that cannot be disclosed by a child attorney due to confidentiality obligations (see above). The only way a court could work around that non-disclosure would be to appoint a GAL in conjunction with a child attorney. Such a double-appointment arrangement would likely result in significant confusion: how would each respective attorney meet with the child? Can and should the child be expected to learn and remember which attorney has confidentiality obligations or not? Does "confidentiality" really have meaning if the GAL discloses information shared with both attorneys anyway? Does such a double appointment create an incentive for the child to NOT share with his or her GAL, this again removing the benefit of an objective best interest analysis?

In the Eighteenth Judicial District, there are approximately twenty attorneys who either work as parent's counsel or guardians ad litem. Requiring children's counsel on each case would explode the number of attorneys needed to the extent that even Sedgwick County could not likely fulfill all the required appointments. Such a resource crisis would be even worse in rural districts, where there are already difficulties in finding counsel for parents and guardians ad litem.

In summation, the following are just some of the many issues, perhaps unintended or unanticipated, which could become problems under the proposed legislation:

- (a) less discretion in communications;
- (b) incomplete or inaccurate information to the court;
- (c) confidentiality issues contrary to the Rules of Professional Conduct;

- (d) children lacking experience as decision maker (or no desire to serve as decision maker);
and
- (e) multiple attorneys per case involve multiple children;

Thank you for your careful consideration of this matter, and for your dedication to Kansas children.

Sincerely,

Jaime Blackwell, KS Bar No. 22419
Guardian ad Litem

Linda Priest, KS Bar No. 21588
Parent Attorney

Joseph Favre, KS Bar No. 26225
Parent Attorney

Anna Jumpponen, KS Bar No. 25805
Guardian ad Litem/Parent Attorney

Gerard Scott, KS Bar No. 12206
Parent Attorney

Steven Wagle, KS Bar No. 12913
Parent Attorney

Michael Lazzo, KS Bar No. 13022
Guardian ad Litem/Parent Attorney

Dana Winkler, KS Bar No. 07526
Guardian ad Litem

Marcus Smith, KS Bar No. 20719
Parent Attorney

Judy Fowler, KS Bar No. 11163
Parent Attorney

Jaime Blackwell #22419
Linda Priest #21588
Joseph Favre #26225
Anna Jumpponen #25805
Gerard Scott 12206
Steven Wagle 12913
Michael Lazzo 13022
Dana Winkler #07526
Marcus Smith 20719
Judy Fowler #11163