

February 26, 2024

To the Members of the House Committee on the Judiciary:

My name is Grant Brazill. I currently work as a parent's attorney and guardian ad litem in the Eighteenth Judicial District (Sedgwick County). I also currently serve as a member of the Kansas Supreme Court Task Force on Permanency Planning.

I have worked within the child in need of care (CINC) system since September 2016 as a parent's attorney, and as guardian ad litem since May 2023. During that time, I have worked with hundreds of families from the inception of a CINC case through permanency by either reintegration or adoption. As guardian ad litem, I have had the opportunity to speak with youth and work under the current best interest model. My time both as a parent attorney and guardian ad litem has also made me acutely aware the strengths and shortcomings of the present system; and, while it is not my job, nor the job of the judiciary nor the Supreme Court Task Force to opine as to what the law *should* be, I wish to be a resource and provide information which can assist the legislature in making its decision.

Under the current version of the Revised Code for Care of Children, every child who comes into care is appointed a guardian ad litem, whose job it is to "make an independent investigation of the facts upon which the petition is based and shall appear for and represent the best interests of the child."¹ Also under the current system, the district court has discretion to appoint an attorney to represent the wishes of the child, if the wishes of the child are so divergent from what the guardian ad litem believes is in his or her best interest. The Code also requires that, if such a divergence exists, no matter how insignificant, "the guardian ad litem shall inform the court of the disagreement."² In a CINC case, the judge must make decisions which the judge finds are in the child's best interests, and judges rely on the child's guardian ad litem to independently investigate and make recommendations so the judge can then make decisions based on the child's best interests.

HB 2381, if passed, would result in a significant change to child in need of care proceedings across the state. Rather than directing the appointment of a guardian ad litem who represents the best interest of the child, the new legislation would require the court to "appoint an attorney to serve as counsel and represent a child who is the subject of proceedings under this code. The attorney shall consult with the child to direct such child's representation."³ The difference between the two roles can be summarized simply. As the guardian ad litem, an attorney's job is to advance the best interest of the child by sharing the child's wishes and his or her own opinion regarding best interest. In contrast, the child's attorney role is to communicate only that information which advances the desires of the child in hopes of delivering a favorable ruling or "win" for the client.

¹ K.S.A. § 38-2205(a).

² *Id.*

³ HB 2381 6:23-25

While the goal of HB 2381 is to empower youth, the current system allows for children to have a voice in the process without potential adverse consequences. For example, under a model in which the child is another active party to the adversarial process, a child could be thrust into a discussion where he or she may need to be adopt a position directly adverse to his or her biological parent. Having to take such a position could be damaging for a child who have already suffered traumas, but also still in many cases deeply loves their parents and wishes to return home. Under the current model, the guardian ad litem can express the child’s wishes, but also provide “cover” for a child who may not desire to take a directly adverse position to his or her parent. Children also have the ability under the current system to advocate on their own behalf, should they choose, by submitting a Youth Court Report.⁴

The guardian ad litem model addresses concerns for children who are infants, preverbal, or are otherwise unable to participate in discussions regarding their wishes (such clients are referred to as having “diminished capacity” under ethical rules). The National Association of Counsel for Children, in their *Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings*, recognizes the challenges of such representation. In situations where a client has diminished capacity, NACC recommends the substituted judgment approach, which is “guided by the attorney’s understanding of what the client would request if able to verbalize their goals.”⁵ To determine substituted judgment, the attorney should obtain “firsthand observations of the client, conduct an independent investigation, and seek information from collateral sources.”⁶ HB 2381 seems to follow the substituted judgment model for these children (“[i]f the child is unable to direct representation, the attorney shall determine what the child would decide if the child were capable of making an adequately considered decision and represent the child in accordance with that determination”)⁷. While the guardian ad litem model follows a best interest standard rather than substituted judgment, both models rely on the attorney formulating a position after conducting an investigation. The language of Kansas Supreme Court Rule 110A closely mirrors the language behind the NACC recommendation; the current rule requires a GAL to “conduct an independent investigation” utilizing many collateral sources, third parties, and “contact with the child [is] mandatory.”⁸ Ultimately, the current guardian ad litem (best interest) model already captures the essence of the NACC’s regarding the importance of an independent investigation. The nature and quality of information received by a court is likely to change by switching to a traditional attorney-client model for children. Attorneys acting as guardians ad litem have different ethical obligations in carrying out client representation. A guardian ad litem makes recommendations as to the child’s best interests, and in doing so is not bound by the traditional rules of client confidentiality that are found in the Kansas Rules of Professional Conduct. In

⁴ Youth Court Report form available at <https://www.kansasjudicialcouncil.org/sites/default/files/KS%20Youth%20Court%20Report%202024.final%20%282-2024%29.pdf>

⁵ National Association of Counsel for Children, *Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings*, 2022, available online at <https://naccchildlaw.org/wp-content/uploads/2024/01/NACC-Recommendations-Final.pdf> at p. 5.

⁶ *Id.*

⁷ HB 2381 6:25-29

⁸ Kansas Supreme Court Rule 110A(c)(1).

contrast, an attorney has an absolute duty of confidentiality⁹. That attorney may only disclose information to the Court that the client authorizes the attorney to disclose. Even if the lawyer knows the judge would want to know the information, the ethical rules do not allow the attorney to disclose information without the child's permission. For example, under the current law, if a child tells his or her guardian ad litem that he or she is using illegal drugs, the guardian ad litem will inform the court so that the child can be assessed for drug treatment. If the child was represented by an attorney instead of guardian ad litem, that attorney would not be able to provide that information to anyone unless the child agreed to the disclosure.

In situations such as this where the child advances a position that raises safety concerns, the NACC recommends that “the attorney should engage in robust client counseling and communication and seek to understand the reasoning behind the client's request.” The NACC goes on to recommend that if, after counseling the client, he or she persists with the undesirable position, the attorney may need to take “reasonably necessary protective action” in accordance with the Rules of Professional Conduct 1.14, “*including seeking the appointment of a guardian ad litem.*”¹⁰ In sum, by changing the representation model, there is a risk that courts will lose out on information which could keep children safer; and, in cases where there is a significant safety concern, the guardian ad litem model is already the recommended solution.

HB 2381 has the potential to impose significant strain on resources. Under the current law, judges appoint one guardian ad litem for each family. In cases with siblings, a judge may appoint an additional guardian ad litem if a circumstance arises where siblings best interests are in conflict; however, those situations are rare. Under the new model of representation, if the judge appoints an attorney for the child, there are many situations which could arise in which the attorney's ethical obligation to one child would not allow that attorney to represent more than one sibling in any family. There is already a statewide shortage of attorneys practicing in CINC court. If a judge must appoint an attorney for each sibling, many counties will not have enough local attorneys to represent parents and siblings. For example, the Eighteenth Judicial District is, as one of the highest volume jurisdictions, one of the most resourced and staffed jurisdictions in the state. In total, there are approximately twenty (20) attorneys who serve as either parent's counsel or guardians ad litem on cases involving approximately 1,400 children. If conflicts arose between sibling sets on even a fraction of the cases in Sedgwick County, the potential resource strain could prove debilitating. Such complications would compound exponentially if, in addition to child attorneys, judges wanting an opinion regarding the child's best interest appointed a guardian ad litem in addition to the child's attorney.

I am happy to stand for any questions you may have, and thank you for your consideration and interest in Kansas youth.

⁹ See Kansas Rules of Professional Conduct 1.6.

¹⁰ National Association of Counsel for Children, *Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings*, 2022, available online at <https://naccchildlaw.org/wp-content/uploads/2024/01/NACC-Recommendations-Final.pdf> at p. 22.