

BILL ANALYSIS

Senate Research Center

H.B. 1815
By: Goodman (Harris)
Jurisprudence
5/12/2003
Engrossed

DIGEST AND PURPOSE

Currently the possibility of multiple appointments of individuals to a case, or alternatively appointment of either a lawyer or a layperson with the same title of guardian ad litem, has caused confusion for lawyers and judges. H.B. 1815 provides definitions of the three roles of amicus ad litem, attorney ad litem, and guardian ad litem, and certain terminology used in the appointments, and describes the powers and duties of both an attorney ad litem and the newly-created role denominated amicus attorney.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subchapters A, B, and C, Chapter 107, Family Code, as follows:

SUBCHAPTER A. New heading: COURT-ORDERED REPRESENTATION IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

Sec. 107.001. DEFINITIONS. Defines “amicus attorney,” “attorney ad litem,” “developmentally appropriate,” “dual role,” and “guardian ad litem.” Deletes text regarding the appointment of a guardian ad litem.

Sec. 107.002. New heading: POWERS AND DUTIES OF GUARDIAN AD LITEM FOR CHILD. (a) Provides that a guardian ad litem appointed for a child under this chapter, rather than subchapter, is not a party to the suit but may perform certain acts.

(b) Requires a guardian ad litem appointed for a child under this chapter, rather than subchapter, to perform certain acts.

(c) Provides that a guardian ad litem appointed for the child under this chapter, rather than subchapter, is not a party to the suit but is entitled to certain information and rights.

(d) Authorizes the court to compel the guardian ad litem to attend a trial or hearing and to testify as necessary for the proper disposition of the suit. Deletes text regarding an attorney being prohibited from testifying.

(e) Requires the court, unless the guardian ad litem is an attorney who has been appointed in the dual role and subject to the Texas Rules of Evidence, to ensure in a hearing or in a trial on the merits that a guardian ad litem has an opportunity to testify or submit a report regarding certain guardian ad litem recommendations. Deletes text regarding certain attorney ad litem and guardian ad litem requirements.

(f) Authorizes a party, in a nonjury trial, to call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian’s report without the

guardian ad litem being listed as a witness by a party. Requires the court, if the guardian ad litem is not called as a witness, to permit the guardian ad litem to testify in the narrative. Deletes text regarding an attorney and the determination of a conflict of interest.

(g) Requires the guardian ad litem, in a contested case, to provide copies of the guardian ad litem's report, if any, to the attorneys for the parties as directed by the court, but not later than the earlier of a certain date.

(h) Provides that disclosure to the jury of the contents of a guardian ad litem's report to the court is subject to the Texas Rules of Evidence.

Sec. 107.003. POWERS AND DUTIES OF ATTORNEY AD LITEM FOR CHILD AND AMICUS ATTORNEY. Requires an attorney ad litem appointed to represent a child or an amicus attorney appointed to assist the court to perform certain acts, to be trained in child advocacy or have experience determined by the court to be equivalent to that training, and to be entitled to certain information and rights. Deletes text regarding immunity.

Sec. 107.004. ADDITIONAL DUTIES OF ATTORNEY AD LITEM FOR CHILD. Requires the attorney ad litem appointed for a child, except as otherwise provided by this chapter, to perform certain acts.

Sec. 107.005. ADDITIONAL DUTIES OF AMICUS ATTORNEY. (a) Requires an amicus attorney, subject to any specific limitation in the order of appointment, to advocate the best interests of the child after reviewing the facts and circumstances of the case. Provides that notwithstanding Subsection (b), in determining the best interests of the child, an amicus attorney is not bound by the child's expressed objectives of representation.

(b) Requires an amicus attorney to perform certain acts.

(c) Prohibits an amicus attorney from disclosing confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the best interests of the child.

Sec. 107.006. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD.

(a) Requires the court, except as provided by Subsection (c), in conjunction with an appointment under this chapter, other than an appointment of an attorney ad litem for an adult or a parent, to issue an order authorizing the attorney ad litem, guardian ad litem for the child, or amicus attorney to have immediate access to the child and any otherwise privileged or confidential information relating to the child.

(b) Requires the custodian of any relevant records relating to the child, including records regarding social services, drug and alcohol treatment, or medical or mental health evaluation or treatment of the child, law enforcement records, school records, records of a probate or court proceeding, and records of a trust or account for which the child is a beneficiary, without requiring a further order or release, to provide access to a person authorized to access the records under Subsection (a).

(c) Authorizes a mental health record of a child at least 12 years of age that is privileged or confidential under other law to be released to a person appointed under Subsection (a) only in accordance with the other law. Deletes text regarding a guardian ad litem, an attorney ad litem pool, and qualifications.

Sec. 107.007. ATTORNEY WORK PRODUCT AND TESTIMONY. (a) Prohibits an attorney ad litem, an attorney serving in the dual role, or an amicus attorney from

performing certain acts.

(b) Provides that Subsection (a) does not apply to the duty of an attorney to report child abuse or neglect under Section 261.101.

Sec. 107.008. **SUBSTITUTED JUDGMENT OF ATTORNEY FOR CHILD.** (a) Authorizes an attorney ad litem appointed to represent a child or an attorney appointed in the dual role to determine that the child cannot meaningfully formulate the child's objectives of representation in a case because the child lacks sufficient maturity to understand and form an attorney-client relationship with the attorney, despite appropriate legal counseling, continues to express objectives of representation that would be seriously injurious to the child, or for any other reason is incapable of making reasonable judgments and engaging in meaningful communication.

(b) Authorizes an attorney ad litem or an attorney appointed in the dual role who determines that the child cannot meaningfully formulate the child's expressed objectives of representation under Subsection (a), except as provided by Subsection (c), to present to the court a position that the attorney determines will serve the best interests of the child.

(c) Requires an attorney ad litem or attorney appointed in the dual role who determines that the child cannot meaningfully formulate the child's expressed objectives of representation under Subsection (a) to, if a guardian ad litem has been appointed for the child, perform certain acts.

Sec. 107.009. **IMMUNITY.** (a) Provides that a guardian ad litem, an attorney ad litem, or an amicus attorney appointed under this chapter is not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian ad litem, attorney ad litem, or amicus attorney.

(b) Provides that Subsection (a) does not apply to certain actions taken or to certain recommendations or opinions given.

Sec. 107.010. **DISCRETIONARY APPOINTMENT OF ATTORNEY AD LITEM FOR INCAPACITATED PERSON.** Authorizes the court to appoint an attorney to serve as an attorney ad litem for a person entitled to service of citation in a suit if the court finds that the person is incapacitated. Requires the attorney ad litem to follow the person's expressed objectives of representation and, if appropriate, refer the proceeding to the proper court for guardianship proceedings.

SUBCHAPTER B. New heading: APPOINTMENTS IN CERTAIN SUITS

PART 1. APPOINTMENTS IN SUITS BY GOVERNMENTAL ENTITY

Sec. 107.011. New heading: **MANDATORY APPOINTMENT OF GUARDIAN AD LITEM.** (a) Requires the court, except as otherwise provided by this subchapter, in a suit filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for a child, to appoint a guardian ad litem to represent the best interests of the child immediately after the filing of the petition but before the full adversary hearing. Deletes text regarding requiring an associate judge to make certain appointments.

(b) Authorizes the appointment of certain persons as a guardian ad litem for a child.

(c) Prohibits the court from appointing a guardian ad litem in a suit filed by a governmental entity if an attorney is appointed in the dual role unless the court appoints another person to serve as guardian ad litem for the child and restricts the role of the attorney to acting as an attorney ad litem for the child.

(d) Authorizes the court to appoint an attorney to serve as guardian ad litem for a child without appointing the attorney to serve in the dual role only if the attorney is specifically appointed to serve only in the role of guardian ad litem. Authorizes an attorney appointed solely as a guardian ad litem to take only those actions that may be taken by a nonattorney guardian ad litem and prohibits such attorney from performing legal services in the case or taking any action that is restricted to a licensed attorney, including engaging in discovery other than as a witness, making opening and closing statements, or examining witnesses.

Sec. 107.012. MANDATORY APPOINTMENT OF ATTORNEY AD LITEM FOR CHILD. Makes no changes to this section.

Sec. 107.0125. APPOINTMENT OF ATTORNEY IN DUAL ROLE. (a) Authorizes the court to appoint an attorney to serve in the dual role, in order to comply with the mandatory appointment of a guardian ad litem under Section 107.011 and the mandatory appointment of an attorney ad litem under Section 107.012.

(b) Authorizes the court, if the court appoints an attorney to serve in the dual role under this section, to at any time during the pendency of the suit appoint another person to serve as guardian ad litem for the child and restrict the attorney to acting as an attorney ad litem for the child.

(c) Authorizes an attorney appointed to serve in the dual role to request the court to appoint another person to serve as guardian ad litem for the child. Requires the attorney, if the court grants the attorney's request, to serve only as the attorney ad litem for the child.

(d) Provides that unless the court appoints another person as guardian ad litem in a suit filed by a governmental entity, an appointment of an attorney to serve as an attorney ad litem in a suit filed by a governmental entity is an appointment to serve in the dual role regardless of the terminology used in the appointing order.

Sec. 107.013. MANDATORY APPOINTMENT OF ATTORNEY AD LITEM FOR PARENT. (a) Requires the court, in a suit filed by a governmental entity in which termination of the parent-child relationship is requested, to appoint an attorney ad litem to represent the interests of certain persons.

(b) Authorizes the court, if both parents of the child are entitled to the appointment of an attorney ad litem under this section and the court finds that the interests of the parents are not in conflict, to appoint an attorney ad litem to represent the interests of both parents. Deletes existing Sections 107.0135 (Appointment of Attorney ad Litem Not Required; Certain Cases) and 107.014 (Powers and Duties of Attorney Ad Litem for Child), Family Code.

Sec. 107.015. New heading: ATTORNEY FEES. (a) Provides that an attorney appointed under this chapter to serve as an attorney ad litem for a child, an attorney in the dual role, or an attorney ad litem for a parent is entitled to reasonable fees and expenses in the amount set by the court to be paid by the parents of the child unless the parents are indigent.

(b) Authorizes the fees and expenses, if the court, but not an associate judge, determines that one or more of the parties are able to defray the fees and expenses of an attorney ad litem or guardian ad litem for the child as determined by the reasonable and customary fees for similar services in the county of jurisdiction, to be ordered paid by one or more of those parties, or the court, not an associate judge, to order one or more of those parties, prior to final hearing, to pay the sums into the registry of the court or into an account authorized by the court for the use and benefit of the payee, rather than attorney ad litem, on order of the court.

(c) Requires an attorney ad litem appointed to represent a child or parent in a suit filed by a governmental entity in which termination of the parent-child relationship is requested, if indigency of the parents is shown, to be paid from the general funds of the county according to the fee schedule that applies to an attorney appointed to represent a child in a suit under Title 3 as provided by Chapter 51.

(d) Requires a person appointed as a guardian ad litem or attorney ad litem to complete and submit to the court a voucher or claim for payment that lists the fees charged and hours worked by the guardian ad litem or attorney ad litem. Provides that information submitted under this section is subject to disclosure under Chapter 552, Government Code.

Sec. 107.016. CONTINUED REPRESENTATION. Authorizes an order appointing the Department of Protective and Regulatory Services as the child's managing conservator, in a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, rather than a suit brought by a governmental entity seeking termination of the parent-child relationship or appointment of the entity as a conservator, to provide for the continuation of the appointment of the guardian ad litem or attorney ad litem for the child for any period set by the court.

Sec. 107.017. APPOINTMENT OF AMICUS ATTORNEY PROHIBITED. Prohibits the court from appointing a person to serve as an amicus attorney in a suit filed by a governmental entity under this chapter.

PART 2. APPOINTMENTS IN SUITS OTHER THAN SUITS BY GOVERNMENTAL ENTITY

Sec. 107.021. DISCRETIONARY APPOINTMENTS. (a) Authorizes the court, in a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity, to appoint certain persons.

(b) Requires the court, in determining whether to make an appointment under this section to give due consideration to the ability of the parties to pay reasonable fees to the appointee and balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment. Authorizes the court to make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child and prohibits it from requiring a person appointed under this section to serve without reasonable compensation for the services rendered by the person.

Sec. 107.022. CERTAIN PROHIBITED APPOINTMENTS. Prohibits the court, in a suit other than a suit filed by a governmental entity, from appointing certain persons.

Sec. 107.023. FEES IN SUITS OTHER THAN SUITS BY GOVERNMENTAL ENTITY. (a) Provides that in a suit other than a suit filed by a governmental entity, in addition to the attorney's fees that may be awarded under Chapter 106, certain persons are entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit.

(b) Requires the court to perform certain acts.

(c) Prohibits a court from awarding costs, fees, or expenses to an amicus attorney, attorney ad litem, or guardian ad litem against the state, a state agency, or a political subdivision of the state under this part.

SUBCHAPTER C. New heading: APPOINTMENT OF VOLUNTEER ADVOCATES

Sec. 107.031. VOLUNTEER ADVOCATES. (a) Authorizes the court, in a suit filed by a governmental entity, to appoint a charitable organization composed of volunteer advocates whose charter mandates the provision of services to allegedly abused and neglected children or an individual, rather than person, who has received the court's approved training regarding abused and neglected children and who has been certified by the court to appear at court hearings as a guardian ad litem for the child or as a volunteer advocate for the child.

(b) Authorizes the court, in a suit other than a suit filed by a governmental entity, to appoint a charitable organization composed of volunteer advocates whose training provides for the provision of services in private custody disputes or a person who has received the court's approved training regarding the subject matter of the suit and who has been certified by the court to appear at court hearings as a guardian ad litem for the child or as a volunteer advocate for the child. Provides that a person appointed under this subsection is not entitled to fees under Section 107.023. Deletes text regarding authorizing the court to make certain appointments; text providing that certain persons are not liable for certain damages; text providing that this section does not prohibit the court from certain acts; and text authorizing a court-certified volunteer advocate to be assigned to act as a surrogate parent if certain criteria exists.

SECTION 2. Makes application of this Act prospective.

SECTION 3. Effective date: September 1, 2003.