

**CHILD AND FAMILY WELFARE REVISIONS**

2005 GENERAL SESSION

STATE OF UTAH

**Sponsor: LaVar Christensen**

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**LONG TITLE**

**General Description:**

This bill amends provisions of the Utah Human Services Code and the Judicial Code relating to child welfare and the rights of parents.

**Highlighted Provisions:**

This bill:

- ▶ describes the rights of parents and the obligations of the state with regard to children and the protection of children;
- ▶ provides that government action in relation to parents and their children is subject to strict scrutiny and must be justified by a compelling state interest;
- ▶ provides that all portions of the Utah Code relating to child protection be interpreted and applied consistent with certain parental rights and government obligations described in this bill;
  - ▶ requires that the state juvenile court:
    - act in the best interests of a minor in all cases; and
    - preserve and strengthen family ties;
  - ▶ provides that the appointment of an attorney guardian ad litem for a minor shall be:
    - made in a hearing after the minor's parents are given notice and an opportunity to be heard regarding the appointment; and
    - based on findings that establish the necessity for the appointment;
  - ▶ provides that, in deciding whether to appoint an attorney guardian ad litem for a minor, the court may not presume that a parent and the parent's child are



28 adversaries, or that their interests are in conflict;

29       ▶ provides that the appointment of an attorney guardian ad litem may be terminated at  
30 any stage of a child protection proceeding upon motion of the court or any party to  
31 the proceeding; and

32       ▶ makes technical changes.

33 **Monies Appropriated in this Bill:**

34       None

35 **Other Special Clauses:**

36       None

37 **Utah Code Sections Affected:**

38 AMENDS:

39       **62A-4a-201**, as last amended by Chapter 274, Laws of Utah 2000

40       **78-3a-102**, as last amended by Chapter 329, Laws of Utah 1997

41       **78-3a-912**, as last amended by Chapter 356, Laws of Utah 2004



43 *Be it enacted by the Legislature of the state of Utah:*

44       Section 1. Section **62A-4a-201** is amended to read:

45       **62A-4a-201. Rights of parents -- Children's rights -- Interest and responsibility of**  
46 **state.**

47       (1) (a) Under both the United States Constitution and the constitution of this state, a  
48 parent possesses a fundamental liberty interest in the care, custody, and management of the  
49 parent's children. A fundamentally fair process must be provided to parents if the state moves  
50 to challenge or interfere with parental rights. A governmental entity must support any actions  
51 or allegations made in opposition to the rights and desires of a parent regarding the parent's  
52 children by sufficient evidence to satisfy a parent's constitutional entitlement to heightened  
53 protection against government interference with the parent's fundamental rights and liberty  
54 interests. The required standard of proof shall eliminate to the fullest extent possible the  
55 likelihood of an erroneous judgement in an adjudication involving parents, children, and  
56 private family life.

57       (b) The fundamental liberty interest of a parent concerning the care, custody, and  
58 management of the parent's children is recognized, protected, and does not cease to exist

59 simply because a parent may fail to be a model parent or because the parent's child is placed in  
60 the temporary custody of the state. At all times, a parent retains a vital interest in preventing  
61 the irretrievable destruction of family life. Government action in relation to parents and their  
62 children is subject to strict scrutiny and may not exceed the least restrictive means or  
63 alternatives available to accomplish a compelling state interest.

64 ~~[(1)(a)]~~ (c) ~~[Courts have recognized a general presumption that it]~~ It is in the best  
65 interest and welfare of a child to be raised under the care and supervision of his natural parents.  
66 A child's need for a normal family life in a permanent home, and for positive, nurturing family  
67 relationships will usually best be met by his natural parents. Additionally, the integrity of the  
68 family unit, and the right of parents to conceive and raise their children have found protection  
69 in the due process clause of the Fourteenth Amendment to the United States Constitution. The  
70 right of a fit, competent parent to raise his child without undue government interference is a  
71 fundamental liberty interest that has long been protected by the laws and Constitution of this  
72 state and of the United States.

73 ~~[(b)]~~ (d) It is the public policy of this state that parents retain the fundamental right and  
74 duty to exercise primary control over the care, supervision, upbringing, and education of their  
75 children ~~[who are in their custody].~~

76 (e) Subsections (2) through (7) and all portions of the Utah Code that relate to child  
77 protection shall be interpreted and applied consistent with Subsection (1).

78 (2) It is also the public policy of this state that children have the right to protection  
79 from abuse and neglect, and that the state retains a compelling interest in investigating,  
80 prosecuting, and punishing abuse and neglect, as defined in this chapter, and in Title 78,  
81 Chapter 3a, Juvenile Courts. Therefore, ~~[as a counterweight to parental rights,]~~ the state, as  
82 parens patriae, has an interest in and responsibility to protect children whose parents abuse  
83 them or do not adequately provide for their welfare. There ~~[are]~~ may be circumstances where a  
84 parent's conduct or condition is a substantial departure from the norm and the parent is unable  
85 or unwilling to render safe and proper parental care and protection. Under those circumstances,  
86 the state may take action for the welfare and protection of the parent's children ~~[is the~~  
87 consideration of paramount importance].

88 (3) When the division intervenes on behalf of an abused, neglected, or dependent child,  
89 it shall take into account the child's need for protection from immediate harm. Throughout its

90 involvement, the division shall utilize the least intrusive and least restrictive means available to  
91 protect a child, in an effort to ensure that children are brought up in stable, permanent families,  
92 rather than in temporary foster placements under the supervision of the state.

93 (4) When circumstances within the family pose a threat to the child's immediate safety  
94 or welfare, the [~~state's interest in the child's welfare is paramount to the rights of a parent. The~~]   
95 division may obtain custody of the child for a planned period and place him in a safe  
96 environment, in accordance with the requirements of Title 78, Chapter 3a, Part 3, Abuse,  
97 Neglect, and Dependency Proceedings.

98 (5) In determining and making "reasonable efforts" with regard to a child, pursuant to  
99 the provisions of Section 62A-4a-203 [~~and keeping with the presumptions described in~~  
100 ~~Subsection (1)~~], both the division's and the court's paramount concern shall be the child's  
101 health, safety, and welfare. The desires of a parent for the parent's child shall be given full and  
102 serious consideration by the division and the court.

103 (6) In cases where actual sexual abuse, abandonment, or serious physical abuse or  
104 neglect are [~~involved~~] established, the state has no duty to make "reasonable efforts" or to, in  
105 any other way, attempt to maintain a child in his home, provide reunification services, or to  
106 attempt to rehabilitate the offending parent or parents. This Subsection (6) does not exempt the  
107 division from providing court-ordered services.

108 (7) (a) It is the division's obligation, under federal law, to achieve permanency for  
109 children who are abused, neglected, or dependent. If the use or continuation of "reasonable  
110 efforts," as described in Subsections (5) and (6), is determined to be inconsistent with the  
111 permanency plan for a child, then measures shall be taken, in a timely manner, to place the  
112 child in accordance with the permanency plan, and to complete whatever steps are necessary to  
113 finalize the permanent placement of the child.

114 (b) If, because of his conduct or condition, a parent is determined to be unfit or  
115 incompetent based on the grounds for termination of parental rights described in Title 78,  
116 Chapter 3a, Part 4, Termination of Parental Rights Act, the welfare and best interest of the  
117 child is of paramount importance, and shall govern in determining whether that parent's rights  
118 should be terminated.

119 Section 2. Section **78-3a-102** is amended to read:

120 **78-3a-102. Establishment of juvenile court -- Organization and status of court --**

121 **Purpose.**

122 (1) There is established for the state a juvenile court.

123 (2) The juvenile court is a court of record. It shall have a seal, and its judges, clerks,  
124 and referees have the power to administer oaths and affirmations.

125 (3) The juvenile court is of equal status with the district courts of the state.

126 (4) The juvenile court is established as a forum for the resolution of all matters  
127 properly brought before it, consistent with applicable constitutional and statutory requirements  
128 of due process.

129 (5) The purpose of the court under this chapter is to:

130 (a) promote public safety and individual accountability by the imposition of  
131 appropriate sanctions on persons who have committed acts in violation of law;

132 (b) order appropriate measures to promote guidance and control, preferably in the  
133 minor's own home, as an aid in the prevention of future unlawful conduct and the development  
134 of responsible citizenship;

135 (c) where appropriate, order rehabilitation, reeducation, and treatment for persons who  
136 have committed acts bringing them within the court's jurisdiction;

137 (d) adjudicate matters that relate to minors who are beyond parental or adult control  
138 and to establish appropriate authority over these minors by means of placement and control  
139 orders;

140 (e) adjudicate matters that relate to abused, neglected, and dependent minors and to  
141 provide care and protection for these minors by placement, protection, and custody orders;

142 (f) remove a minor from parental custody only where the minor's safety or welfare, or  
143 the public safety, may not otherwise be adequately safeguarded; and

144 (g) consistent with the ends of justice, [~~strive to~~] act in the best interests of the  
145 [~~minor's~~] minor in all cases and [~~attempt to~~] preserve and strengthen family ties [~~where~~  
146 ~~possible~~].

147 Section 3. Section **78-3a-912** is amended to read:

148 **78-3a-912. Appointment of attorney guardian ad litem -- Right of refusal --**  
149 **Duties and responsibilities -- Training -- Trained staff and court-appointed special**  
150 **advocate volunteers -- Costs -- Immunity -- Annual report.**

151 (1) (a) The court may appoint an attorney guardian ad litem to represent the best

152 interest of a minor involved in any case before the court and shall consider ~~[only]~~ the best  
153 interest of a minor, consistent with the provisions of Section 62A-4a-201, in determining  
154 whether to appoint a guardian ad litem.

155 (b) The appointment of an attorney guardian ad litem under Subsection (1)(a), shall be  
156 made in a hearing where the parents of the minor are given notice to be present and an  
157 opportunity to express the parents' preferences and concerns relating to the appointment of an  
158 attorney guardian ad litem.

159 (c) (i) In deciding whether to appoint an attorney guardian ad litem, the court may not  
160 presume that a parent and the parent's child are adversaries or that their interests are in conflict.

161 (ii) In all cases where an attorney guardian ad litem is appointed, the court shall make a  
162 finding that establishes the necessity of the appointment.

163 (2) ~~[An]~~ If appointed, an attorney guardian ad litem shall represent the best interest of  
164 each minor who may become the subject of a petition alleging abuse, neglect, or dependency,  
165 from the date the minor is removed from the minor's home by the division, or the date the  
166 petition is filed, whichever occurs earlier.

167 (3) The Office of the Guardian Ad Litem Director, through an attorney guardian ad  
168 litem, shall:

169 (a) represent the best interest of the minor in all proceedings;

170 (b) be trained in applicable statutory, regulatory, and case law, and in accordance with  
171 the United States Department of Justice National Court Appointed Special Advocate  
172 Association guidelines, prior to representing any minor before the court;

173 (c) conduct or supervise an independent investigation in order to obtain first-hand, a  
174 clear understanding of the situation and needs of the child;

175 (d) (i) personally meet with the minor;

176 (ii) personally interview the minor if the minor is old enough to communicate;

177 (iii) determine the minor's goals and concerns regarding placement; and

178 (iv) personally assess or supervise an assessment of the appropriateness and safety of  
179 the minor's environment in each placement;

180 (e) file written motions, responses, or objections at all stages of a proceeding when  
181 necessary to protect the best interest of a minor;

182 (f) personally or through a trained volunteer, paralegal, or other trained staff, attend all

183 administrative and foster care citizen review board hearings pertaining to the minor's case;  
184 (g) participate in all appeals unless excused by order of the court;  
185 (h) be familiar with local experts who can provide consultation and testimony  
186 regarding the reasonableness and appropriateness of efforts made by the Division of Child and  
187 Family Services to maintain a minor in the minor's home or to reunify a minor with the minor's  
188 parent;

189 (i) to the extent possible, and unless it would be detrimental to the minor, personally or  
190 through a trained volunteer, paralegal, or other trained staff, keep the minor advised of the  
191 status of the minor's case, all court and administrative proceedings, discussions, and proposals  
192 made by other parties, court action, and psychiatric, medical, or other treatment or diagnostic  
193 services that are to be provided to the minor;

194 (j) review proposed orders for, and as requested by the court, prepare proposed orders  
195 with clear and specific directions regarding services, treatment, and evaluation, assessment, and  
196 protection of the minor and the minor's family; and

197 (k) personally or through a trained volunteer, paralegal, or other trained staff, monitor  
198 implementation of a minor's treatment plan and any dispositional orders to determine whether  
199 services ordered by the court are actually provided, are provided in a timely manner, and  
200 attempt to assess whether they are accomplishing their intended goal.

201 (4) (a) An attorney guardian ad litem may use trained volunteers, in accordance with  
202 Title 67, Chapter 20, Volunteer Government Workers Act, trained paralegals, and other trained  
203 staff to assist in investigation and preparation of information regarding the cases of individual  
204 minors before the court. An attorney guardian ad litem may not, however, delegate the  
205 attorney's responsibilities described in Subsection (3).

206 (b) All volunteers, paralegals, and staff utilized pursuant to this section shall be trained  
207 in and follow, at a minimum, the guidelines established by the United States Department of  
208 Justice Court Appointed Special Advocate Association.

209 (c) The court may use volunteers trained in accordance with the requirements of  
210 Subsection (4)(b) to assist in investigation and preparation of information regarding the cases  
211 of individual minors within the jurisdiction.

212 (d) When possible and appropriate, the court may use a volunteer who is a peer of the  
213 minor appearing before the court, in order to provide assistance to that minor, under the

214 supervision of an attorney guardian ad litem or the attorney's trained volunteer, paralegal, or  
215 other trained staff.

216 (5) (a) The attorney guardian ad litem shall continue to represent the best interest of the  
217 minor until released from duties by the court.

218 (b) The appointment of the attorney guardian ad litem may be terminated at any stage  
219 of the proceeding upon motion of:

220 (i) the court; or

221 (ii) any party to the proceeding, as approved by the court.

222 (6) (a) The juvenile court is responsible for all costs resulting from the appointment of  
223 an attorney guardian ad litem and the costs of volunteer, paralegal, and other staff appointment  
224 and training, and shall use funds appropriated by the Legislature for the guardian ad litem  
225 program to cover those costs.

226 (b) (i) When the court appoints an attorney guardian ad litem under this section, the  
227 court may assess all or part of the attorney's fees, court costs, and paralegal, staff, and volunteer  
228 expenses against the minor's parents, parent, or legal guardian in a proportion that the court  
229 determines to be just and appropriate.

230 (ii) The court may not assess those fees or costs against a legal guardian, when that  
231 guardian is the state, or against a parent who is found to be impecunious. If a person claims to  
232 be impecunious, the court shall require of that person an affidavit of impecuniosity as provided  
233 in Section 78-7-36 and the court shall follow the procedures and make the determinations as  
234 provided in Section [~~78-7-36~~] 78-7-37.

235 (7) An attorney guardian ad litem appointed under this section, when serving in the  
236 scope of the attorney guardian ad litem's duties as guardian ad litem is considered an employee  
237 of the state for purposes of indemnification under Title 63, Chapter 30, Utah Governmental  
238 Immunity Act.

239 (8) (a) An attorney guardian ad litem shall represent the best interest of a minor. If the  
240 minor's wishes differ from the attorney's determination of the minor's best interest, the attorney  
241 guardian ad litem shall communicate the minor's wishes to the court in addition to presenting  
242 the attorney's determination of the minor's best interest. A difference between the minor's  
243 wishes and the attorney's determination of best interest may not be considered a conflict of  
244 interest for the attorney.

245 (b) The court may appoint one attorney guardian ad litem to represent the best interests  
246 of more than one minor child of a marriage.

247 (9) An attorney guardian ad litem shall be provided access to all Division of Child and  
248 Family Services records regarding the minor at issue and the minor's family.

249 (10) An attorney guardian ad litem shall maintain current and accurate records  
250 regarding the number of times the attorney has had contact with each minor and the actions the  
251 attorney has taken in representation of the minor's best interest.

252 (11) (a) Except as provided in Subsection (11)(b), all records of an attorney guardian  
253 ad litem are confidential and may not be released or made public upon subpoena, search  
254 warrant, discovery proceedings, or otherwise. This subsection supersedes Title 63, Chapter 2,  
255 Government Records Access and Management Act.

256 (b) All records of an attorney guardian ad litem are subject to legislative subpoena,  
257 under Title 36, Chapter 14, Legislative Subpoena Powers, and shall be released to the  
258 Legislature.

259 (c) Records released in accordance with Subsection (11)(b) shall be maintained as  
260 confidential by the Legislature. The Office of the Legislative Auditor General may, however,  
261 include summary data and nonidentifying information in its audits and reports to the  
262 Legislature.

263 (d) Because of the unique role of an attorney guardian ad litem described in Subsection  
264 (8), and the state's role and responsibility to provide a guardian ad litem program and, as *parens*  
265 *patriae*, to protect minors, Subsection (11)(b) constitutes an exception to Rules of Professional  
266 Conduct, Rule 1.6, as provided by Rule 1.6(b)(4). A claim of attorney-client privilege does not  
267 bar access to the records of an attorney guardian ad litem by the Legislature, through legislative  
268 subpoena.

269 (e) The Office of the Guardian Ad Litem shall present an annual report to the Child  
270 Welfare Legislative Oversight Panel detailing:

271 (i) the development, policy, and management of the statewide guardian ad litem  
272 program;

273 (ii) the training and evaluation of attorney guardians ad litem and volunteers; and

274 (iii) the number of children served by the Office of the Guardian Ad Litem.

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**Legislative Review Note**

**as of 2-9-05 11:19 AM**

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

**Office of Legislative Research and General Counsel**

**State Impact**

Provisions of this legislation is estimated to require an appropriation of \$3,416,500 (\$3,321,100 General Fund) in FY 2006. This includes \$41,000 in one time equipment costs. These funds would be appropriated to the Department of Human Services (\$515,700, including 420,300 General Funds), the Office of Attorney General (\$693,800, all General Funds) and the Courts \$2,207,000 (all General Funds). Expenditure of State funds will generate additional federal funding.

	<u>FY 2006</u> <u>Approp.</u>	<u>FY 2007</u> <u>Approp.</u>	<u>FY 2006</u> <u>Revenue</u>	<u>FY 2007</u> <u>Revenue</u>
General Fund	\$3,321,100	\$3,283,400	\$0	\$0
Federal Funds	\$95,400	\$92,100	\$95,400	\$92,100
<b>TOTAL</b>	<b>\$3,416,500</b>	<b>\$3,375,500</b>	<b>\$95,400</b>	<b>\$92,100</b>

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**Individual and Business Impact**

No fiscal impact.

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