

**CHILD AND FAMILY WELFARE REVISIONS**

2005 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: LaVar Christensen**

Senate Sponsor: Curtis S. Bramble

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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 prior to an adjudication of unfitness, government action in relation to parents and their children may not exceed the least restrictive means or alternatives available to accomplish a compelling state interest;
- ▶ 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 based on findings that establish the necessity for the appointment; and
- ▶ makes technical changes.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

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

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

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

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

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

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

(1) (a) Under both the United States Constitution and the constitution of this state, a parent possesses a fundamental liberty interest in the care, custody, and management of the parent's children. A fundamentally fair process must be provided to parents if the state moves to challenge or interfere with parental rights. A governmental entity must support any actions or allegations made in opposition to the rights and desires of a parent regarding the parent's children by sufficient evidence to satisfy a parent's constitutional entitlement to heightened protection against government interference with the parent's fundamental rights and liberty interests.

(b) The fundamental liberty interest of a parent concerning the care, custody, and management of the parent's children is recognized, protected, and does not cease to exist simply because a parent may fail to be a model parent or because the parent's child is placed in the temporary custody of the state. At all times, a parent retains a vital interest in preventing the irretrievable destruction of family life. Prior to an adjudication of unfitness, government action in relation to parents and their children may not exceed the least restrictive means or alternatives available to accomplish a compelling state interest. Until the state proves parental unfitness, the child and the child's parents share a vital interest in preventing erroneous termination of their natural relationship and the state cannot presume that a child and the child's parents are adversaries.

~~[(1) (a)] (c) [Courts have recognized a general presumption that it]~~ It is in the best interest and welfare of a child to be raised under the care and supervision of [his] the child's natural parents. A child's need for a normal family life in a permanent home, and for positive,

nurturing family relationships will usually best be met by ~~[his]~~ the child's natural parents. Additionally, the integrity of the family unit, and the right of parents to conceive and raise their children have found protection in the due process clause of the Fourteenth Amendment to the United States Constitution. The right of a fit, competent parent to raise ~~[his]~~ the parent's child without undue government interference is a fundamental liberty interest that has long been protected by the laws and Constitution of this state and of the United States.

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

(e) Subsections (2) through (7) shall be interpreted and applied consistent with this Subsection (1).

(2) It is also the public policy of this state that children have the right to protection from abuse and neglect, and that the state retains a compelling interest in investigating, prosecuting, and punishing abuse and neglect, as defined in this chapter, and in Title 78, Chapter 3a, Juvenile Court Act of 1996. Therefore, ~~[as a counterweight to parental rights,]~~ the state, as *parens patriae*, has an interest in and responsibility to protect children whose parents abuse them or do not adequately provide for their welfare. There ~~[are]~~ may be circumstances where a parent's conduct or condition is a substantial departure from the norm and the parent is unable or unwilling to render safe and proper parental care and protection. Under those circumstances, the state may take action for the welfare and protection of the parent's children ~~[is the consideration of paramount importance]~~.

(3) When the division intervenes on behalf of an abused, neglected, or dependent child, it shall take into account the child's need for protection from immediate harm. Throughout its involvement, the division shall utilize the least intrusive and least restrictive means available to protect a child, in an effort to ensure that children are brought up in stable, permanent families, rather than in temporary foster placements under the supervision of the state.

(4) When circumstances within the family pose a threat to the child's immediate safety or welfare, the ~~[state's interest in the child's welfare is paramount to the rights of a parent. The]~~

division may obtain custody of the child for a planned period and place [~~him~~] the child in a safe environment, in accordance with the requirements of Title 78, Chapter 3a, Part 3, Abuse, Neglect, and Dependency Proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) (a) The court may appoint an attorney guardian ad litem to represent the best interest of a minor involved in any case before the court and shall consider [~~only~~] the best interest of a

minor, consistent with the provisions of Section 62A-4a-201, in determining whether to appoint a guardian ad litem.

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

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

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

- (a) represent the best interest of the minor in all proceedings;
- (b) be trained in applicable statutory, regulatory, and case law, and in accordance with the United States Department of Justice National Court Appointed Special Advocate Association guidelines, prior to representing any minor before the court;
- (c) conduct or supervise an independent investigation in order to obtain first-hand, a clear understanding of the situation and needs of the child;
- (d)
  - (i) personally meet with the minor;
  - (ii) personally interview the minor if the minor is old enough to communicate;
  - (iii) determine the minor's goals and concerns regarding placement; and
  - (iv) personally assess or supervise an assessment of the appropriateness and safety of the minor's environment in each placement;
- (e) file written motions, responses, or objections at all stages of a proceeding when necessary to protect the best interest of a minor;
- (f) personally or through a trained volunteer, paralegal, or other trained staff, attend all administrative and foster care citizen review board hearings pertaining to the minor's case;
- (g) participate in all appeals unless excused by order of the court;
- (h) be familiar with local experts who can provide consultation and testimony regarding the reasonableness and appropriateness of efforts made by the Division of Child and Family

Services to maintain a minor in the minor's home or to reunify a minor with the minor's parent;

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

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

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

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

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

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

(d) When possible and appropriate, the court may use a volunteer who is a peer of the minor appearing before the court, in order to provide assistance to that minor, under the supervision of an attorney guardian ad litem or the attorney's trained volunteer, paralegal, or other trained staff.

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

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

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

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

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

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

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

(9) An attorney guardian ad litem shall be provided access to all Division of Child and



Family Services records regarding the minor at issue and the minor's family.

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

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

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

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

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

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

- (i) the development, policy, and management of the statewide guardian ad litem program;
- (ii) the training and evaluation of attorney guardians ad litem and volunteers; and
- (iii) the number of children served by the Office of the Guardian Ad Litem.