

**Department of Legislative Services**

Maryland General Assembly

2002 Session

**FISCAL NOTE**

House Bill 1405

(Delegate Pitkin)

Judiciary

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**Family Law - Guardian Ad Litem - Custody or Visitation Proceedings**

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This bill authorizes a court to appoint a guardian ad litem in contested custody or visitation proceedings to represent the best interest of the child, and establishes the qualifications and duties of a guardian ad litem.

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**Fiscal Summary**

**State Effect:** Potential minimal increase in general fund expenditures for the Administrative Office of the Courts (AOC) to pay guardian ad litem fees for indigent parents.

**Local Effect:** Potential minimal increase in expenditures for payment of guardian ad litem fees for indigent parents.

**Small Business Effect:** Potential minimal. Psychologists, social workers, and attorneys could receive additional revenues from providing guardian ad litem services to courts.

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**Analysis**

**Bill Summary:** In a contested custody or visitation proceeding, the court is authorized to appoint a guardian ad litem for a child if the court cannot determine what is in the best interest of the child based solely on the evidence and testimony during the proceeding. The court must inform the appointed guardian ad litem what issues to investigate, how many hours to spend investigating the case, and the date a final report must be submitted to the court.

A guardian ad litem may be an attorney, a social worker, or a psychologist and must have a Maryland professional license. The guardian ad litem must have experience in one or more of the following areas: child abuse and neglect, child development, sexual abuse, substance abuse, or domestic violence. The guardian ad litem must attend at least six hours of professional development training annually. The training must include the latest information on the best practices in child abuse cases, at-risk children, and the correlation between domestic violence and child abuse.

The guardian ad litem must interview the child, social workers, family members, and other relevant persons, and review reports and other information. The guardian ad litem must also meet with and observe the child, assess the child's needs, and explain the proceedings to the child so that he or she can understand them. A written report must be submitted with the outcome of the investigation and a recommendation of appropriate treatment or services for the child or child's family.

**Current Law:** In an action where custody, visitation rights, or the amount of a support for a minor child is contested, the court is authorized to appoint counsel to represent the minor child. The counsel may not represent any party to the action. The court may impose the counsel fees against one or both parents.

The Maryland Rules of Professional Conduct provide that when a client's status as a minor impairs the client's ability to make adequately considered decisions with regard to the representation, the lawyer must, as much as possible, maintain a normal client-lawyer relationship. A lawyer is authorized to seek the appointment of a guardian or take other protective action for a minor client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

**Background:** Outside of the court's authority to appoint an attorney to act on behalf of the child, there is little statutory reference to the role of guardians ad litem in proceedings involving children. According to the AOC, guardians ad litem are generally not appointed by Maryland courts.

There is some guidance at common law about the appointment of children's attorneys. The Court of Appeals ruled in *Nagle v. Hooks*, 296 Md. 123 (1983) that when an issue arises in a custody case as to disclosure of privileged communications for a minor child who is too young to assert or waive the privilege, the court must appoint a guardian to assert or waive the privilege on behalf of the best interest of the child. Due to conflict of interest, the parents may not, either separately or together, assert or waive their child's privilege of disclosure in a contested custody proceeding. Even in custody proceedings where the court does not believe that a child's attorney is necessary, if the issue of disclosure of a child's privileged (generally medical) information is raised, the court will

appoint an attorney/guardian, often called a *Nagle v. Hooks attorney*, to assert or waive the disclosure privilege on behalf of the child.

In the case *Levitt v. Levitt*, 79 Md. App. 394 (1989,) the Court of Special Appeals ruled that where the chancellor did not have sufficient facts to resolve the issues affecting the child in a custody dispute, an attorney was necessary to represent the child, who had interests separate and distinct from the parents. An attorney could have provided additional information to the court so that an informed custody decision could have been made. Such information could have included a professional evaluation of the child or a home or school visit by an unbiased professional. In the case *John O. v. Jane O.* 90 Md. App. 406 (1991), the Court of Special Appeals said that it was permissible for an attorney to advocate views that are different than the child's expressed position, if the attorney is acting in what he or she reasonably believes to be the child's best interest. However, the child's views must be given due consideration by counsel. In *Leary v. Leary*, 97 Md. App. 26 (1993), the Court of Special Appeals stated that the trial judge who calls for attorney representation for a child in a child custody case must provide specific guidance to that attorney about the range of duties expected.

In 1990, the Family Law Section of the Maryland State Bar Association issued guidelines about the role of guardians ad litem. The guidelines were issued to all the circuit court administrative judges, and judges may use them, although they are not obligated to do so. The guidelines state that if it appears that the parents are not adequately serving the child's interests in a contested proceeding, a guardian ad litem should be appointed.

A guardian ad litem may advocate a position that differs from the child's wishes because the guardian ad litem is representing the child's best interest, which may be distinct from what the child desires. A guardian ad litem should interview the child, if possible, and talk with others who have had significant contact. It is acceptable for the guardian ad litem to participate in settlement discussions with the parties' attorneys, since the guardian ad litem can encourage agreements that will benefit the child. A guardian ad litem may independently take steps to promote the child's interest, including requesting a court-ordered family evaluation, attending counseling sessions with the child, or requesting an injunction, if necessary. The guidelines state that a guardian ad litem has all the duties and functions of an attorney for any party, including presentation of evidence, and the calling and cross-examination of witnesses. The court may request a written report from a guardian ad litem and, at the close of evidence, is expected to present final recommendations regarding custody and visitation to the court.

**State Expenditures:** The bill is silent about the fees of a guardian ad litem and who would pay those fees. Assuming, however, that guardians ad litem would be hired in the same way that other court-appointed personnel in family cases are hired, the AOC states

that the adult parties would generally be expected to pay the guardian ad litem fees. Those fees may range from \$100 to \$150 per hour. The average involvement in a case for a guardian ad litem is ten hours.

The courts may waive or reduce family service fees if the income of the parties falls below guidelines established by the Maryland Legal Services Corporation. The AOC grants waivers for payment of children's attorneys, mediation services, investigations, and visitation services, among other things, for indigent parties. General fund expenditures by the AOC could increase as a result of the bill to the extent that guardians ad litem are appointed in cases in which the parents are indigent. Any such impact would be moderated if a guardian ad litem were appointed instead of a children's attorney. However, there could be cases where both a child's attorney and a guardian ad litem are appointed. Any increase in expenditures cannot be estimated at this time, but is expected to be minimal.

For context, the AOC advises that for fiscal 2002, \$164,000 is budgeted in 12 of 24 jurisdictions to pay children's attorneys' fees for indigent parties in contested custody and visitation cases. For 15 of 24 jurisdictions, \$139,000 is budgeted for custody investigations of indigent parents. Custody investigations may be ordered instead of a children's attorney in less serious custody cases. It is possible for a judge to require both a custody investigation and a children's attorney, however. A guardian ad litem could request additional family services, such as counseling or co-parenting classes. The AOC would pay some or all of those fees for indigent parents.

**Local Expenditures:** While custody/visitation services are provided at the local level, the Family Services Program in the AOC defrays a significant portion of the cost of these services to local jurisdictions by providing grants for family services. Some jurisdictions provide some of the funding for family services. They could be minimally impacted by the waiver of guardian ad litem fees for indigent families under this bill.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Department of Human Resources, Judiciary (Administrative Office of the Courts), Department of Legislative Services

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Analysis by: Karen D. Morgan

Direct Inquiries to:  
John Rixey, Coordinating Analyst  
(410) 946-5510  
(301) 970-5510