



Legal Protection for Children In Long-Term Foster Care

Testimony before the House Juvenile Justice and Family Issues Committee in opposition to HB 596

by Brandon Logan, J.D., CWLS

My name is Brandon Logan, and I am the director of the [Center for Families and Children at the Texas Public Policy Foundation](#), a non-profit, non-partisan think tank based here in Austin. Prior to my current position, I was an attorney ad litem for children under the care of the Texas Department of Family and Protective Services (DFPS) for over a dozen years. I have represented hundreds of children throughout Texas. I am also certified as a Child Welfare Law Specialist by the [National Association of Counsel for Children](#).

I am here to testify in opposition to HB 596, because all children in the managing conservatorship of the state need effective, independent legal representation.

Current Law

In a suit filed by the Department of Family and Protective Services (DFPS) seeking termination of the parent-child relationship or appointment of DFPS as conservator of the child, [Section 107.016, Texas Family Code](#), provides 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. Section 107.016 has been interpreted as permitting the discharge of the guardian ad litem or attorney ad litem when DFPS has been named the child's permanent managing conservator ([M.D. v. Abbott, 171](#)).

Federal Lawsuit

In December 2015, a federal judge declared that "rape, abuse, psychotropic medication, and instability are the norm" in the Texas foster care system and that the state has been deliberately indifferent to that fact for decades ([M.D. v. Abbott, 255](#)). The judge noted that children in the permanent conservatorship of the state are at an increased risk of harm because most "do not have an attorney ad litem to set hearings and file pleadings with a court, or notify a court when the child needs assistance" ([M.D. v. Abbott, 7](#)).

Children's Right to Counsel

Children in dependency cases have a procedural due process right to effective legal representation ([Pitchal 2005](#)). Furthermore, children in the permanent managing conservatorship enjoy substantive due process rights including the right to be free from an unreasonable risk of harm caused by the state ([M.D. v. Abbott, 255](#)).

Texas currently violates the right of children in its care to be free from unreasonable risk of harm ([M.D. v. Abbott, 255](#)). Without effective legal representation, children are unable to access the courts and are left at the mercy of the agency that has been found consciously indifferent to the risk it is causing them.

Guardians Ad Litem

HB 596 contemplates the continuation of the appointment of an attorney ad litem *or* guardian ad litem. The two roles serve fundamentally different goals and are not interchangeable. Children in the permanent managing conservatorship of the state

need an attorney. Guardians ad litem are essentially fact witnesses in suits brought by DFPS ([Tex. Fam. Code §107.002\(e\), \(f\)](#)). They may not call or question witnesses ([Tex. Fam. Code §107.002\(c\)\(4\)](#)).

Attorneys ad litem are obligated to advise the child and to represent the child's expressed objectives of representation ([Tex. Fam. Code §107.004\(a\)](#)). Unlike guardians ad litem, attorneys have the power to seek court review and redress, to issue subpoenas for witnesses and evidence, and to secure the attendance of the child at hearings and trial ([Tex. Fam. Code §107.003\(a\)\(3\)](#)).

Attorneys are bound by standard legal procedures and best practices, including the Texas Family Code, the American Bar Association's standards of practice for attorneys who represent children in abuse and neglect cases, the suggested amendments to those standards adopted by the National Association of Counsel for Children, and the American Bar Association's standards of practice for attorneys who represent children in custody cases ([Tex. Fam. Code §107.004\(a\)\(3\)](#)). Finally, unlike guardians ad litem, attorneys for children are subject to discipline for failure to perform their duties ([Tex. Fam. Code §107.0045](#)).

Costs of Representation

Although there is an increased initial cost in providing attorneys for children in the state's long-term conservatorship, children with effective legal representation achieve permanency more quickly ([Zinn 2008, 9](#)). Expedited permanency means reduced court costs, less money spent on foster care, and fewer services needed for the child ([Zinn 2008, 22](#)). This long-term savings indicates that providing abused and neglected children with effective legal representation throughout the case not only leads to better outcomes for children but also might be economically advantageous for the state ([Zinn 2008, 22](#)).

Conclusion

HB 596 fails to satisfy foster children's fundamental right to counsel after DFPS is named their permanent managing conservator. The bill seems to permit the appointment of a guardian ad litem in place of an attorney. As compared to children in the temporary managing conservatorship, children in the permanent managing conservatorship of the state are at increased risk of harm with fewer procedural protections. The increased costs of providing legal representation should be balanced against both the cost savings from effective representation and the improved outcomes for children in achieving permanency, accessing services, and avoiding harm in care.

I look forward to your comments and questions. ★

About the Texas Public Policy Foundation

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The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

