House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

CIVIL IMMUNITY FOR GUARDIANS AD LITEM

House Bill 5043 with committee amendments
First Analysis (1-18-96)

Sponsor: Rep. Kirk Profit
Committee: Judiciary and Civil Rights

THE APPARENT PROBLEM:

In general, the governmental liability act (Public Act 170 of 1964) gives governmental agencies (and their officers, employees, and volunteers) immunity from tort liability when the agency (officer, employee, volunteer) is engaged in the exercise or discharge of a governmental function (or acting on behalf of the agency within the scope of their authority). Judges, legislators, and the highest executive officials of all levels of government have similar immunity whenever they act within the scope of their judicial, legislative, or executive authority.

A 1986 amendment (Public Act 175) to the act gave immunity to certain governmental individuals -- agency officers, employees, and volunteers, judges, legislators, and the highest executive officials of all levels of government -- rather than just governmental agencies, apparently in large part in reaction to a January 1985 Supreme Court decision (Ross v Consumers Power Co.) regarding governmental immunity.

Reportedly, most people assumed that since guardians ad litem (who are appointed by circuit and probate judges to investigate and make recommendations to the court regarding the best interests of a minor or other legally incapacitated person) are officers of the court, they shared in the kind of governmental immunity provided for judges under Public Act 170 of 1964. However, an April 1995 court of appeals decision (Bullock v. Huster, 209 Mich app 551) ruled that guardians ad litem are not protected from lawsuits under the current governmental immunity act. Legislation has been proposed that would extend civil immunity to guardians ad litem under that act.

THE CONTENT OF THE BILL:

The bill would amend the governmental liability act (MCL 691.1407) to give guardians ad litem immunity from civil liability for injuries to persons or damages to property whenever they were acting within the scope of their authority as guardians ad litem. The bill's provisions would apply to lawsuits filed before, on, or after the bill took effect, which would be May 1, 1996.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal implications. (1-16-96)

ARGUMENTS:

For:

It is preposterous that people serving at the direction of the court, and in a role that helps so many people, don't have the protection of quasi-judicial immunity. Attorneys appointed as guardians ad litem (GALs) have believed, until recently, that they would be protected by the court that appointed them, but this belief has been shaken by a recent court of appeals decision. Although GALs act as officers of the court, the recent appeals court ruling apparently has both judges and potential GALs worried that without the kind of immunity granted to judges, fewer people will be willing to accept appointments as guardians ad litem. Currently, GALs often are appointed to represent the best interests of the child(ren) in the more acrimonious custody disputes (for example, those in which one or the other divorcing partner alleges physical or sexual abuse of the child by the other). If GALs are not given immunity, the potential -- indeed, the likelihood -- exists that the GAL will be sued by the disgruntled "losing" party to the custody dispute. In addition, reportedly some insurance companies are telling attorneys that if they are sued while acting as a guardian ad litem their malpractice policies will not cover them (because the attorney isn't acting as an attorney advocate but as an officer of the court). Understandably, both the court of appeals ruling (which is being appealed to the Michigan supreme court) and the insurance companies' reported behavior serve as disincentives for attorneys to accept appointment as guardians ad litem. Even if a lawsuit ultimately is dismissed as frivolous, the attorney still

would have to invest time and money in responding to it. (And while the attorney could ask for his or her attorney fees in such suits, very often the person suing won't be collectible, even if the court awards fees.) Since, further, the compensation paid to GALs reportedly is considerably less than what can be made by a successful attorney in private practice (in fact, according to one report, sometimes GALs go unpaid), the financial rewards of the work would not, to many attorneys, be worth the risk. The bill is necessary to assure that there will be a sufficient pool of attorneys willing to take on the work of guardians ad litem -- and to restore the immunity of GALs to what it was presumed to be prior to the 1995 court of appeals decision.

Against:

Although the Bullock decision is the first time that the court of appeals has ruled on a lawsuit against a guardian ad litem, this particular lawsuit reportedly isn't the first of its kind. And should attorneys who incompetently carry out their duties as GALs be exempt from negligence lawsuits? Who needs competent representation more than a child in an acrimonious custody dispute? Also, although judges (and legislators and elected executive officials) currently enjoy immunity from gross negligence, lower level government employees (agency officers, employees, and volunteers) do not. Should GALs be exempted from gross negligence, or just from simple negligence? In addition, regardless of whether or not GALs should be included under the governmental immunity law, people have argued that the legislature ought to specify in more detail just what the GAL's role and duties are. There needs to be more uniformity and guidance in how GALs handle cases and how they conduct their investigations.

POSITIONS:

The Michigan Probate Judges Association supports the bill. (1-17-96)

A representative of the Michigan Protection and Advocacy Service testified in support of the bill. (1-17-96)

The State Bar of Michigan has no position on the bill. (1-18-96)

The Michigan Trial Lawyers Association opposes the bill. (1-18-96)

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.