

January 4, 2018

Representative Maxine Grad,  
Chair  
Vermont House Judiciary Committee

Dear Ms. Grad,

Happy New Year!

I am writing to you regarding the proposed amendments to the minor guardianship act. As you may know, I was on the Minor Guardianship Legislative Study Committee (attached see our 2012 report) and an active participant in the legislative process which culminated in the adoption of what is now known as Guardians of Minors, 14 V.S.A. §2621 et. sec.

After almost two years studying the decades old law, the group together proposed a very well balanced and carefully crafted law, that your committee and the full Legislature adopted. I am afraid that H-307 will undo the balance we created. Under the current law there is a clear distinction between consensual and nonconsensual guardianships. H-307 muddles the distinction and is most likely unconstitutional. Please consider the following thoughts about each of the proposed amendments:

**§2627 Non Consensual Guardianships:** The proposed language of inserting that the guardianship be in the best interests of the child to the language of 2622(2)(B) child in need of guardianship removes the intentional use of the same language in non-consensual guardianships and a Child in Need of Care or Supervision, 33 V.S.A. §5102(3). Constitutionally you cannot add the best interests of the child determination in a non-consensual dispute unless there is a finding that the parents have abandoned, abused, neglected the child or the child is without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being. This is not a situation like a parental rights and responsibilities dispute between parents where the parental rights are equal. When a third party wants guardianship and the parents do not agree, the findings should be the same as when the state brings an action. Bringing in the best interests of the child in this context muddles the constitutional protections of parents as so well-articulated by the Vermont Supreme Court in *In re K.M.M.* (2010-145) 2011 VT 30.

**§2632 Termination:** The proposed amendments will completely undo the careful distinction made between consensual and non-consensual guardianships. Under the current law the parents can establish a guardianship voluntarily under circumstances articulated under §2622(2) which include any circumstance that the parents and proposed guardian has agreed to. This was done to ensure that the family could agree to establish the guardianship without acrimony. Under this arrangement the parents would also be able to terminate the guardianship by requesting so with the court, unless the guardian files a request with the court within limited time frames to continue the guardianship, and the guardian proves by clear and convincing evidence that the child is in need of guardianship.

The proposed amendment not only changes the burden to the parent but requires the parents to show by clear and convincing evidence that they are "suitable". As stated above, not only does this completely change the difference between consensual and non-consensual guardianships, it brings back "suitable" language which the drafters of the current law so carefully avoided, AND worse, "suitable" is not defined. What is suitable to one person is not suitable to another. The law under *In re. K.M.M.* cannot put the burden on a parent to show that they should be allowed to parent unless there is a finding that the parent has abused or neglected their child or the child is without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being. We have 20 years of language by the Supreme Court trying to work through what suitable and unsuitable meant, and it created massive confusion. This is one of the many things that the current guardianship language avoided for good reasons.

**§2635 BEST INTERESTS OF CHILD:** As stated above, adding the "best interests of the child" language in this context creates an unconstitutional requirement on parents in a third-party custody situation. Furthermore, the language is undefined. The language tends to bring in middle class values versus socio economic conditions of the poor and cannot withstand constitutional scrutiny.

It is my understanding that Representative Buckholz was inspired to propose the language changes through one experience with one case in which she represents the guardians. We cannot change the law based on one case when so many other people over four years carefully balanced multiple considerations to make the current law.

Thank you so much for taking the above into consideration to reject H-307 and not bring it to the House Floor for a vote.

Sincerely



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