COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-000196-DGE
(2012-CA-000655)

FONDA MORGAN — APPELLANT

VS. — CAMPBELL CIRCUIT COURT
ACTION NO. 03-CI-00281

DANIEL GETTER
and
A.G. Child — APPELLEE

BRIEF OF THE GUARDIAN AD LITEM

Submitted by:
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of this brief were served upon the following named individuals by first-class mail, postage pre-paid, on the 9th day of August, 2013: Hon. Judge Richard A. Woeste, Campbell Family Court, Division 3, 330 York Street, Newport, KY 41071; Hon. Blaine J. Edmonds III, 157 Barnwood Drive, Suite 201, Edgewood, KY 41017; Hon. Cynthia A. Millay, Legal Aid of the Bluegrass, 104 East Seventh Covington, KY 41011. The undersigned does also certify that the record on appeal has been returned to the Campbell Circuit Court Clerk on or before this date.

Joshua B. Crabtree

STATEMENT CONCERNING ORAL ARGUMENT

Appellee A.G. requests oral argument. The case law and statutes that pertain to the role of the GAL, when read together to give them harmonious effect, make clear that some aspects of the GAL's role are undisputed. Oral argument is necessary to properly frame the issue before the Court.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On August 15, 2011, the Campbell County Family Court appointed counsel with the Children's Law Center as Guardian *ad Litem* ("GAL") to represent A.G. and "help the [c]ourt decide the case properly." (RA, p. 47). The GAL was granted "immediate access to the child, [and] all privileged or confidential information regarding such child." *Id.* The GAL filed its Report of the Guardian *ad Litem* ("GAL Report") on October 14, 2011. (RA, p. 54). The GAL Report, which functions as a pretrial memorandum providing the court with the GAL's position, (GAL Brief at p. 6), was based on A.G.'s particular circumstances. In considering A.G's particular circumstances, the GAL weighed several factors, including: a review of the court file; interviews with A.G., Appellant Morgan and Appellee Getter; information gathered visiting Appellant Morgan's home; and A.G.'s expressed wishes regarding the disposition of the case. (RA, p. 54). Taking the foregoing factors into account, the GAL argued that A.G. be allowed to reside primarily with Appellee Getter. (RA, p. 60).

At trial, prior to the court hearing testimony, Appellant Morgan expressed her intention to call the GAL as a witness and question him about the GAL Report. The trial court judge stated that he would not allow it because the GAL was the child's attorney. (Video Record on Appeal Date 11/21/11; 9:28:18 [hereinafter VR]). Appellant Morgan stated that she intended to object, arguing that she should be able to cross-examine the GAL because he filed a report with the family court. *Id.* At that time, the judge did not rule on any objection, instead stating that the court could deal with the issue after the other witnesses were called. *Id.* After hearing from both parties and the child, however,

the Appellant failed to call the GAL as a witness, and so the court never ruled on a specific objection by the Appellant. *See generally* VR 11/21/11; 9:28:18- 12:49:22.

In its order, the Campbell County Family Court stated that it "considered many factors in determining whether the child should be permitted to [re]locate." (RA, p. 82). The court heard testimony from all three interested parties, namely Appellant Morgan, Appellee Getter and A.G., and formulated its findings of fact and conclusions of law based upon the evidence as it applied to the child's best interests. (RA, pp. 79-84). The court ordered that A.G. be "permitted to relocate to Florida to reside with [Appellee Getter] because such appears to be in the best interests of the child." (RA, p. 83). The court did not simply adopt the GAL's opinion as its own. As its first conclusion of law, the trial court simply recognized that "[t]he *Guardian ad Litem* interviewed and/or met with parties and the minor child... [and] is of the opinion that the child would be successful regardless of where she resides and should be given the opportunity to live with her father." (RA, p. 82).

The Court of Appeals Opinion Affirming found in favor of Appellee Getter, stating that although "[w]e are persuaded that Kentucky courts and the practicing bar need more clarity in this area of law... any error – if any there were – was harmless and that reversal is not warranted." *Morgan v. Getter*, No. 2012-CA-000655-ME, WL 645717 (Ky. App. Feb. 22, 2013). The court stated that there was a lack of clarity in the GAL statute as to whether the GAL is acting as an advocate for a client or as an expert counselor to the court, meriting "the scrutiny of the General Assembly and/or the Supreme Court to define the proper role of a GAL in child custody issues." (*Id.* at p. 6).

The issue presented is the role of the representation of a child in custody cases. In dispute is whether the GAL is acting in the capacity of an advocate for the child, an expert investigator or evaluator for the court, or in some hybrid role that is unique to child custody cases.

ARGUMENT

This case is now moot because A.G. is 18 years old. Regardless, the decision of the Court of Appeals should be affirmed. There was an actual controversy when the Court of Appeals issued its affirming opinion and the court below correctly applied the law. In Kentucky, a GAL must be an attorney, and is therefore bound to follow the Kentucky Rules of Professional Conduct ("KRPC"). The KRPC include the rules related to competence, diligence, confidentiality, attorney-client privilege, and representation of clients with diminished capacity. Additionally, the GAL does not serve in conflicting roles. The GAL is not an investigator or witness, subject to examination by the parties, but rather is counsel for the child. The GAL is by definition a guardian, and is duty bound to represent the child. As a matter of statutory interpretation and long standing Kentucky case law, the role of the GAL is, and should continue to be, that of an attorney for the child, subject to the Rules of Professional Conduct regarding clients with diminished capacity. The trial court correctly applied the law; it acted properly when it did not allow the Appellant to cross-examine the GAL because the GAL is an attorney for the child. The concerns raised by the Court of Appeals are important, however, and should be taken up by this Court in its rule-making capacity.

In the alternative, this appeal should be remanded to the trial court with instructions to dismiss because the issue is not ripe for review, and does not fall under this Court's subject matter jurisdiction. The Appellant did not properly preserve her objection for appeal because it was never ruled upon at the trial court level.

I. THE ISSUE IS MOOT OR, IN THE ALTERNATIVE, IS NOT RIPE FOR REVIEW.

A. The Facts of this Case Establish that it is Moot.

When this case was heard before the Kentucky Court of Appeals, the issue was in controversy because it was a child custody determination and A.G. was, at that time, a child. Article III of the United States Constitution allows only actual controversies to be adjudicated. *Associated Indus. of Kentucky v. Com.*, 912 S.W.2d 947, 951 (Ky. 1995) (citing *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). Thus, the Court of Appeals decision should be affirmed because there was a justiciable controversy at the time the opinion was issued. At this time, though, the issue is moot.

This case was rendered moot on August 2, 2013, when the minor child turned eighteen years of age. As this matter involves a custody determination, jurisdiction over the child ends when the child reaches the age of majority. For the purposes of custody determinations, "'child' means an individual who has not attained eighteen (18) years of age." KRS 403.800(2). Further, a "'child custody determination'" is a determination "with respect to a child." KRS 403.800(3). Thus, because A.G. is no longer a child, the family court's jurisdiction terminates. Additionally, this appeal will not serve to grant meaningful relief to either party since A.G. is an adult and capable of making her own decisions as to where she will live. "[A]n appellate court is required to dismiss an appeal when a change in circumstance renders that court unable to grant meaningful relief to either party." *Med. Vision Grp., P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008) (citing *Brown v. Baumer*, 301 Ky. 315, 321, 191 S.W.2d 235, 238 (Ky.1945)).

Furthermore, this case does not fulfill the requirements to meet the exception to the mootness doctrine, as it is not capable of repetition, yet evading review. In *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992), this Court explained the "capable of repetition, yet evading review" test:

> [W]hether to apply the exception to the rule that a case will be dismissed when the issues are moot which we have recognized when the issues are "capable of repetition, yet evading review," involves more than just an important public question that is difficult to review. Our courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy. The decision whether to apply the exception to the mootness doctrine basically involves two questions: whether (1) the "challenged action is too short in duration to be fully litigated prior to its cessation or expiration and [2] there is a reasonable expectation that the same complaining party would be subject to the same action again."

(citing *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir.1988)).

Appellant correctly states that this specific custody determination was too short in duration to be fully litigated prior to its cessation or expiration, and therefore meets the first prong of the test. However, this action fails to meet the second prong of the test, as there is no reasonable expectation that the same complaining party will be subject to the same action again. While Appellant does propose an unlikely hypothetical scenario wherein Appellant "could have more minor children and be subject to the same type of litigation involving a GAL," this clearly does not meet the reasonable expectation requirement of the second prong. To interpret the requirement in this fashion would render it all but meaningless, as most litigants in any type of case could conjure up a hypothetical scenario in which they might be subject to the same action in a myriad of possible futures.

Finally, even if the issue is hypothetically "capable of repetition," for the Appellant specifically, the issue is not likely to evade review because GALs are

frequently appointed in child custody cases, and similar objections could be raised by the future litigants of such cases. So, because the issue is not likely capable of repetition and because it will likely not evade review in the future, the facts establish that the case is moot.

B. The Appellant Failed to Preserve Her Alleged Objection to the Admission of the GAL Report and the Appellant's Inability to Cross-Examine the GAL, and, as a Result, the Issue is Not Ripe for Review.

The Appellant failed to preserve her alleged objection, and so the issue is not ripe for review. "[T]he ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues." *Associated Indus. of Kentucky v. Com.*, 912 S.W.2d 947, 951 (Ky. 1995) (citing *United States v. Fruehauf*, 365 U.S. 146, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961)). Unripe claims are not justiciable and the court has no subject matter jurisdiction over them. *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007) (citing *Golden & Walters, PLLC*, 173 S.W.3d at 270; Ky. Const. § 112(5)).

The issue before the Court derives directly from the Appellant's intention to object to the admission of the GAL Report; but, Appellant never objected, nor was the intended objection ruled upon by the trial court. Error may not be predicated on a ruling that admits or excludes evidence unless a timely objection is made. KRE 103. Further, objections as to the competency of evidence are waived if the objections are not ruled on by the trial court. *Williams v. Williams*, 554 S.W.2d 880, 882 (Ky. Ct. App. 1977). At trial, there was a preliminary discussion between the trial judge and the Appellant regarding Appellant's ability to cross-examine the GAL. VR 11/21/11; 9:28:30. The trial court indicated that it would not allow the Appellant to cross-examine the GAL. *Id.* If the Appellant objected the court would rule on the matter after the other witnesses had been called. VR 11/21/11; 9:29:36. The trial court indicated that it would rule when Appellant

called the GAL. *Id.* Once the other witnesses had been called however, Appellant did not attempt to call the GAL or raise her objection as to the report. Thus, the trial judge was unable to make a ruling because Appellant did not object and so failed to preserve the issue for appeal. In light of Appellant's failure to preserve the issue, this matter is not ripe for review by this Court and does not fall under this Court's subject matter jurisdiction.

II. THE TRIAL COURT PROPERLY DISALLOWED APPELLANT TO CROSS-EXAMINE THE GAL

A. The GAL is an Attorney for the Child

GAL, in its ordinary meaning, is defined as "a guardian, usu. [sic] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." Black's Law Dictionary 713 (7th Ed. 1999). The role of the GAL in Kentucky is further defined in rules, statutes, and case law, and a reading using accepted canons of statutory construction, reveals that the GAL's role is, first and foremost, to act in his or her capacity as an attorney to represent the interests of the child to whom he or she is assigned. *See* FRCPP 6(2); KRS 387.305; *Black v. Wiedeman*, 254 S.W.2d 344 (Ky. 1952).

The appointment of a GAL in custody cases is specifically provided for in Rule 6 of the Kentucky Family Rules of Practice and Procedure. This rule applies to all cases in which there are disputes regarding custody, shared parenting, visitation or support. FRCPP 6. It states:

> (2) A parent or custodian may move for, or the court may order, one or more of the following, which may be apportioned at the expense of the parents or custodians:
> (a) A custody evaluation;
> (b) Psychological evaluation(s) of a parent or parents or custodians, or child(ren);
> (c) Family counseling;

(d) Mediation;
(e) Appointment of a **guardian *ad litem*;**
(f) Appointment of such other professional(s) for opinions or advice which the court deems appropriate; or,
(g) Such other action deemed appropriate by the court.

FRCPP 6(2)(e) (emphasis added). While this provision does not specifically define "guardian *ad litem*," or the duties expected of the GAL, it does explicitly provide for various professionals' appointments. Appellant suggests that FRCPP 6(2) creates ambiguity by including the term GAL amongst other professionals who act in the capacity of objective observers, appointed by and owing their primary loyalty to the court rather than the child. However, as with statutes, courts interpret the civil rules in accordance with their plain language. *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290 (Ky. 2010).[1] In this case, the appellate court properly followed this Court's principles of interpreting the civil rules by looking to the ordinary meaning of the term "guardian *ad litem*." The Court of Appeals referred to Black's Law Dictionary, which defines GAL as "'a guardian, usu. [sic] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party'."(App. Op. at p. 4). This straightforward definition highlights two important aspects of the role of the GAL: 1) that the GAL is usually a lawyer (and in Kentucky, pursuant to KRS 387.305, the GAL is always a lawyer); and 2) that the GAL is appointed by the court to appear in a lawsuit on behalf of the child. Thus, well-established principles of rule interpretation resolve any ambiguity in the FRCPP's use of the term "guardian *ad litem"* because the term GAL has a plain and ordinary meaning.

[1] The Kentucky Family Rules of Practice and Procedure "constitute a separate section of the civil rules..." FRCPP 1.

Even if the Appellant is correct, however, and this provision does create ambiguity, her argument still fails when we also review the statutes on point. Appellant argues that the appointment of the GAL in this case is unclear because she claims there is uncertainty as to whether the GAL is an investigator under KRS 403.290 and 403.300 or whether the GAL is an attorney for the child, or some other role contemplated by FRCPP 6. Because GAL has a plain and ordinary meaning in FRCPP 6, that meaning ought to be resolved in terms of the statutes on point. When construing a statute, courts must give effect to the intent of the General Assembly. *Petitioner F v. Brown*, 306 S.W.3d 80 (Ky. 2010). Legislative intent is determined by looking first to the language of the statute, and giving words their plain and ordinary meaning. *Id.* When a statute is ambiguous, the new enactment is to be construed in connection and in harmony with the existing laws as a part of a general and uniform system of jurisprudence. *Brown v. Hoblitzell*, 307 S.W.2d 739, 744 (Ky. 1956). Apparent conflicts or repugnancies between statutes on the same general subject enacted at different times should be reconciled in the light of the existing statutes and Constitution. *Id.* Thus, if there is an ambiguity as to the role of a GAL within the statutes, the appropriate next step is to look to statutes "on the same general subject."

The most appropriate provision touching on "the same general subject" as the definition and role of the GAL can be found in KRS 387.305, "Appointment of guardian ad litem; qualifications; duties; fees", which specifically outlines the function of the GAL. While Appellant argues that the statute "is obviously intended by its title... to be for minor defendants in civil cases involving the administration of a trust or estate or in a case filed under the Kentucky Unified Juvenile Code," (Appellant's Brief p. 13), the

statute is both relevant and persuasive as a matter of statutory interpretation. The statute provides that:

> (2) A guardian ad litem **must be a regular, practicing attorney of the court** and may be appointed by the court, whether a guardian, curator, or conservator appear for the defendant or not. The guardian ad litem may be appointed upon the motion of the plaintiff or of any friend of the defendant; but neither the plaintiff nor his attorney shall be appointed, nor be permitted to suggest the name of the proposed guardian ad litem; and the court may change the guardian so appointed whenever the interest of the infant may appear to require such change.
>
> (3) It shall be the duty of the guardian ad litem **to attend properly to the preparation of the case**; and in an ordinary action he may cause as many witnesses to be subpoenaed as he may think proper, subject to the control of the court; and in an equitable action he may take depositions, not, however, exceeding three (3), without leave of the court...
>
> (5) Whether appointed pursuant to this statute or pursuant to a provision of the Kentucky Unified Juvenile Code, the duties of a guardian ad litem shall be to advocate for the client's best interest in the proceeding through which the guardian ad litem was appointed. Without an appointment, the guardian ad litem shall have no obligation to initiate action or to defend the client in other proceedings.

K.R.S. 387.305 (emphasis added). This statute is clearly in agreement with the plain language definition of a guardian *ad litem*. The GAL must be a "practicing attorney," must "attend properly to the preparation of the case," and must "advocate for the client's best interest in the proceeding through which the guardian ad litem was appointed." *Id.*

Even if it remains unclear as to the specific role of the GAL in relation to the child, there can be no doubt as to the GAL's relationship to the court. This is because KRS 387.305 specifies that the GAL must be a practicing attorney. Because the statute specifically states that a GAL must be a practicing attorney, it follows that the GAL must perform his duties as an attorney.

Every practicing attorney in Kentucky is bound by the Kentucky Rules of Professional Conduct. SCR 3.130(1.14), "Client with diminished capacity," states that

"the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." *Id.* If any doubt exists as to the applicability of the KRPC to the specific relationship between a GAL and a child client in a child custody case, one need only look to the comments section of SCR 3.130(1.14), which states:

> ...a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings **concerning their custody.** So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

SCR 3.130(1.14) (Comment 1). (emphasis added). The Supreme Court, when promulgating these rules and comments, clearly understood that the KRPC would apply to the GAL when representing a child client in a custody dispute, and went to the trouble of outlining the specific problem of weighing the wishes of the child in such disputes.

The comments to SCR 3.130(1.14) make clear that information obtained regarding the representation of the client is protected by SCR 3.130(1.6), "Confidentiality of Information." For this reason, a GAL should not be subject to cross-examination any more so than the attorney for either parent should be subject to cross-examination. Rule 3.130(1.6) specifies that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by" certain limited exceptions. The exceptions are:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to secure legal advice about the lawyer's compliance with these Rules;

> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including a disciplinary proceeding, concerning the lawyer's representation of the client; or
> (4) to comply with other law or a court order.

SCR 3.130(1.6). Clearly, the relationship between the GAL and the child does not fall under any of the exceptions in (b)(1)-(3). Also, there is no law or court order requiring that the GAL reveal information relating to the representation of a client as described in (b)(4).

In addition to Appellant's argument being contrary to the Kentucky Rules of Professional Conduct, Appellant's interpretation of the law runs counter to every mention of GALs in Kentucky statutes and case law, as well as the common practice of the local courts of Kentucky. The GAL is not a new concept in Kentucky; indeed, the law in other areas requiring the services of a GAL is well-established. The mere fact that there is an absence of a specific statute regarding the GAL in the very particular context of a child custody dispute should not hinder this Court from looking to the law in other areas requiring the services of a GAL to decipher the regular use and purpose of a GAL in Kentucky.

In *Van Wey v. Van Wey*, 656 S.W.2d 731 (Ky. 1983), for example, this Court highlighted the importance of protecting the interests of children who are the subject of legal action, though not technically a party to the action:

> [T]his is not just a two-sided law suit. The third party, with an interest in the outcome at least as great as the first two, is Baby Boy Van Wey. He is represented in this litigation by a *Guardian Ad Litem*, appointed by the court to protect his interests and his interests alone.

Id. at 733. Though *Van Wey v. Van Wey* dealt with adoption and the termination of parental rights, the case nonetheless highlights that Kentucky courts recognize the need for a child's interests to be represented, especially where the subject matter of the dispute is the child. Indeed, Kentucky courts have long sought to protect children in litigation by ensuring that the GAL acts as an attorney for the child rather than in some other capacity. *Sparks v. Boggs*, 839 S.W.2d 581, 583 (Ky. Ct. App. 1992) ("...next friend promulgates the child's interests by suing and the guardian ad litem defends the minor's interest in a lawsuit."); *Black v. Wiedeman*, 254 S.W.2d 344, 345 (Ky. 1952) (explaining that the GAL should act in his or her capacity as a practicing attorney during proceedings to which he or she has been appointed to a minor child. The GAL is to stand in the minor's place to determine the best interests along with the minor's rights. The GAL is also endowed with the powers of a regular guardian for the purpose of litigation, and is therefore "both a fiduciary and a lawyer of the infant.").

KRCP 17.03 also sheds light on the purpose of the GAL. This rule provides that although actions involving children should normally be brought or defended by the parents, a next friend or guardian ad litem should be appointed to bring or defend the lawsuit when the parents are "unable or unwilling to act or is a plaintiff." KRCP 17.03. Rule 17.03(3) further states that "[n]o judgment shall be rendered against an unmarried infant or person of unsound mind until the party's guardian or committee or the guardian ad litem **shall have made defense**..." (Emphasis added). Of course, Rule 17.03 seems to refer specifically to cases in which the child might be a party plaintiff or defendant. But the need to protect children whose parents are "unable or unwilling to act" on their behalf is certainly present in contested custody disputes. In these often adversarial proceedings,

counsel for each parent is bound by the duty of loyalty to advocate for the *parents*, and not for the child, and parents' interests may often diverge from the interests of the children. A child custody dispute is exactly the kind of case in which the parent might be "unable or unwilling" to act on behalf of the child.

Finally, a survey of the local court rules throughout Kentucky demonstrates that a majority of trial courts have interpreted the role of the GAL to be that of an attorney/advocate for the child. "A trial court may not adopt a practice which contradicts any substantive rule of law or any rule of practice and procedure promulgated by the Supreme Court." *Drury v. Drury*, 32 S.W.3d 521, 524 (Ky. Ct. App. 2000). Further, "local rules must be consistent with statutes enacted by the General Assembly." *Id.* The local rules of Allen, Simpson, Boone, Gallatin, Lincoln, Pulaski, Rockcastle, and Franklin counties all state that the Guardian Ad Litem is appointed to "represent the best interest of the children."[2] Importantly, these rules are almost identical to FRCPP 6, except that they provide for the specific function of the GAL:

> B. At such time that it is determined that custody and/or parenting arrangement is in dispute, and the parties are unable to resolve the conflict, a party may seek, or the Court, sua sponte, may order appropriate action to address the custody and/or parenting arrangement. Such appropriate action may consist of one or more of the following:
>
> > 1. Custody evaluation;
> > 2. Psychological evaluation(s) of a party or parties, and/or child(ren);
> > 3. Family counseling;
> > 4. Mediation/evaluation where the parties are assisted in reaching their own resolution of conflict; however, if this process fails, the Court may order a custody evaluation, which is to be reported to the Court and the parties.
> > 5. Appointment of a Guardian Ad Litem **to represent the best interest of the child(ren);**

[2] KY R ALLEN FAM CT Rule 3; KY R BOONE GALLATIN FAM CT Rule 602; KY R LINCOLN FAM CT Rule 602; KY R FRANKLIN FAM CT Rule 602

> 6. Appointment of independent counsel to represent the child(ren);
> 7. The appointment of other suitable professionals for opinions or advice which the Court deems appropriate;
> 8. Such other action deemed appropriate by the Court. In requesting one of the alternatives presented above, counsel for a party shall provide, in detail, the reason(s) supporting the request.

KY R FRANKLIN FAM CT Rule 602 (emphasis added). *Cf.* FCRPP 6 ((e) appointment of a guardian ad litem;). Calloway, Marshall, Clark, Madison, Harrison, Nicholas, Pendleton, and Robertson counties also provide that the GAL is appointed; to "represent the child(ren)," or to "advocate [the] client's positions and best interest."[3] Finally, in some circuits there are specific standards outlined which govern the role of the GAL and the relationship of the GAL to the court. Rule 23 of the Kenton Family Court Rules, "Guardian ad litem rules of practice," provides as follows:

> ...A GAL shall act in the capacity of attorney for a child. A GAL stands in the child's place to determine what the child's best interests and defense demand. Although a GAL does not have the powers of a regular guardian under KRS 387.010 et. seq., a GAL fully represents the child and is endowed with similar powers for purposes of the litigation at hand. Therefore, the GAL is both a fiduciary and lawyer for the child, and in a sense, the representative of the child.
>
> Statements made by the GAL for a child to the Kenton Family Court, whether during a hearing or in a motion or memorandum or otherwise, are presumptively acts of speaking legally on behalf of the child or advocacy or both; they are neither evidence nor an implicit claim of expertise of any kind. A GAL for a child shall not be called as a witness during litigation in which that lawyer is representing a child...

KY R KENTON FAM CT Rule 23. The Daviess county local rules contain similar guidelines:

> The GAL acts as an attorney and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify. The GAL should rely primarily on opening statements, presentation of

[3] KY R CALLOWAY FAM CT Rule 4.03; KY R CLARK MADISON FAM CT Rule 4.04; KY R HARRISON FAM CT Rule 10

> evidence and closing arguments to present the salient information the GAL feels the court needs to make its decisions.

KY R DAVIESS DIST CT App. B.

The foregoing rules, statutes, and case law provide ample evidence to support a finding by this Court that the role of the GAL is that of an attorney for the child and not an investigator or evaluator for the court. Further, a GAL, as a practicing attorney, is bound by the Kentucky Rules of Professional Conduct. The Appellant has provided no direct support for her interpretation of the law apart from a highly tenuous connection she breathes into various unrelated statutes.

B. The GAL Does Not Serve in Conflicting Roles.

Appellant mistakenly argues that the GAL served in two conflicting roles and thereby denied Appellant her right to due process. Appellant relies on two statutes to support her erroneous assertion. First, Appellant cites to KRS 403.290, which provides for the court to "seek the advice" of "professional personnel" who may be called to testify. KRS 403.290(2). Second, Appellant cites to KRS 403.300, which states that in custody proceedings, "the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by the friend of the court or such other agency as the court may select." KRS 403.300(1). Further, each statute corresponds to a provision of FRCPP 6. When a court "seeks the advice" of a professional under KRS 403.290, there is a clear relationship to the provision that the court may order "a custody evaluation" or the "appointment of such other professional(s) for opinions or advice which the court deems appropriate." FRCPP 6(2)(a), (f). When a court orders an investigation and report under KRS 403.300, this is likely "such other action deemed appropriate by the court" in certain cases. FRCPP

6(2)(g). In this case, the court did not appoint an investigator, the court appointed a GAL.

It is no accident that Appellant has not been able to provide any support for her interpretation of these statutes, as her reliance on these provisions is misplaced. KRS 403.290 and 403.300 make no mention of GALs and do not apply to GALs; rather, the statutes anticipate that the court may require the help of an expert when making its custody determination. The statute is meant to apply to such professionals as psychologists and social workers, who have specialized training and can make helpful, objective observations based on the established principles in their field of expertise regarding the well-being of the child. *See Chalupa v. Chalupa*, 830 S.W.2d 391 (Ky. Ct. App. 1992) ("KRS 403.290(2), *which allows a court to order psychological tests of a child*, as well as the parents, in order to assist in making a custody determination is permissive, not mandatory, and the professional's conclusions are merely expert testimony, or evidence to be considered by the courts and not dictates.") (emphasis added).

Equally mistaken is Appellant's statement that "by appointing the GAL for the purpose enumerated in the GAL Appointment order the trial court essentially made the GAL an expert witness." (Appellant's Brief p. 9). While KRE 706 does authorize the appointment of expert witnesses, the court did not exercise this option. Appellant quotes the Appointment Order, which states that "a GAL is necessary to help the trial court decide the case properly." (RA. p. 47). The trial court did not intend the GAL to serve as an expert witness. VR 11/21/11; 9:28:18. The trial court clearly did not view the GAL as an expert witness, any more so than it did Appellant's attorney. The trial judge could not

have been more clear when he stated that the GAL was "like [the child's] representative;" VR 11/21/11; 9:28:18 that the GAL was "representing a party" VR 11/21/11; 9:33:40 and that he was "just like any other attorney...speak[ing] in pleadings and reports." VR 11/21/11; 12:00:53.

To be sure, there are times when the family court may desire an independent, disinterested recommendation from an evaluator, expert, investigator, or friend of the court. This avenue has long been available to the court through specific mechanisms outlined by both Supreme Court Rules and legislation enacted by the General Assembly.[4] These mechanisms, however, serve functions that are distinguishable from the role of the GAL. To hold that the GAL serves the court in the same way as these mechanisms, and is therefore subject to cross-examination, would strip children caught up in custody disputes of the *only* representation provided for them under Kentucky law, and treat them as merely property to be haggled over.

C. Though it May be that the Kentucky Supreme Court, in its Rule-making Capacity, Should Clarify and Define the Role of the GAL Appointed for a Minor in a Family/Circuit Court Custody Action, the Trial Court Applied the Law Correctly in the Decision Below

The Supreme Court of Kentucky has the authority to clarify and define the roles and responsibilities of a GAL appointed for a minor in a family/circuit court custody action, but should only do so prospectively through court rule or by requesting legislative action. There is some measure of ambiguity with regard to the specifics of the role the GAL should perform in custody cases; although, as argued above, there are certain aspects of the GAL's role which cannot be disputed by any interpretation of the available rules and statutes. Specifically, the statutes, case law, and local rules on the subject make

[4] FRCPP 6(2); KRS 403.290; KRS 403.300

clear that the GAL must be an attorney, and is therefore bound by the Rules of Professional Conduct.

Appellant rightfully points out that various states have established different roles for the GAL. Many states, such as Michigan, Minnesota, Montana, and North Dakota, allow the court to appoint a GAL to be an advocate for the best interests of the minor child. M.C.L.A. 722.27.; Mich. Comp. Laws Ann. § 712A.17d (West); M.S.A. § 518.165; *Jacobsen v. Thomas*, 2004 MT 273, 323 Mont. 183, 185, 100 P.3d 106, 107; NDCC, 14-09-06.4. In Illinois, the court may appoint either an attorney for the child, a representative for the child's best interests, or a GAL. Neither the attorney nor the child representative may be called as a witness at trial, but the GAL may be cross-examined regarding his or her report and recommendations. 750 Ill. Comp. Stat. Ann. 5/506 (West). In Florida, the court may appoint a GAL or an attorney/advocate. F.S.A. 61.402. The GAL may be cross-examined regarding his or her report. *Miller v. Miller*, 671 So. 2d 849, 852 (Fla. Dist. Ct. App. 1996). Texas allows for the appointment of an "amicus attorney", an "attorney ad litem" or a GAL, and the GAL may be subject to cross examination. Tex. Fam. Code Ann. § 107.002 (West 2005). In Wisconsin, the court can appoint a GAL to advocate for the best interests of the minor child, and the GAL may not be cross-examined. Wis. Stat. § 767.407(4); *Hollister v. Hollister* (App. 1992) 496 N.W.2d 642, 173 Wis.2d 413.

Recognizing the problem of states establishing different roles under the label of GAL, the ABA promulgated standards for lawyers representing children in custody cases. The *ABA Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases* ("ABA Standards") outlines two types of representation that

could be made available: the "child's attorney" and the "best interests attorney." The ABA Standards define a child's attorney as "[a] lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due to an adult client." *Id.* A "best interests attorney" is defined as "[a] lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives." *Id.* Thus, the primary distinction is between the purpose of the attorney-client relationship rather than the existence of the attorney client relationship. The ABA Standards do not reference GALs, and give the following explanation:

> These standards do not use the term "Guardian Ad Litem." The role of "guardian ad litem" has become too muddled from different usages in different states, with varying connotations. It is a venerable legal concept that has been stretched beyond legal recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator, and advocate.

Due to this confusion, it may be helpful to consider the issue at hand as one less about the role of the GAL, and more about the various mechanisms which need to be in place for a fair adjudication of a child custody case. For example, although there are many differences amongst the various state laws, some overriding commonalities exist. In most jurisdictions, the court can appoint an attorney/advocate for the child in custody cases, whether as a best interests attorney/GAL, a child's attorney, or both. For example, although Illinois, Florida, and Texas all provide that the GAL may be cross-examined, they also allow for the appointment of an advocate that is not subject to cross-examination, and serves to protect the interests of the child rather than to serve as an evaluator for the court.

Under Kentucky law, on the other hand, there is currently no provision which allows for the appointment of an attorney/advocate for a child in custody cases apart from FCRPP 6, which allows for the appointment of a GAL. If the GAL is interpreted to be a mere extension of the court and subject to cross-examination, the child will be left with no possibility of zealous and independent advocacy on his or her behalf. Conversely, there *are* several mechanisms that the court may utilize to obtain an independent evaluation or investigation from a party that may be subjected to cross examination as a witness. These mechanisms are provided for in KRS 403.290 and KRS 403.300, the other professionals listed in FRCPP 6, and the "friend of the court" provision in KRS 403.090.

Based upon the foregoing, this Court has several options moving forward. First, the Court could clarify that the GAL is not an investigator or evaluator, and should not be treated as such. The GAL is an attorney for the child's best interests, and is not subject to cross-examination. Second, Kentucky could define the role as that of a child's attorney, whose responsibility it would be to represent the child to the extent allowable under the Rules of Professional Conduct governing clients with diminished capacity. If the Court chooses this option, it may then decide whether or not to maintain the GAL as an option in custody cases. If the Court retains the GAL position, it should clarify whether the GAL can file a report or be subject to cross-examination. Finally, if this Court retains the GAL position and determines that the GAL may be subject to cross-examination, the Court should not allow this position to be filled by an attorney, due to the risk of ethical conflict this would cause with the Rules of Professional Conduct.

If this Court decides that any such changes would best be accomplished through legislative measures or changes to the Family Court Rules, the best interpretation of the

available case law and statutes must be relied upon. The available case law and statutes lend themselves to the interpretation that the GAL is an attorney for the child who is bound by the Rules of Professional Conduct. Attorneys may be placed in an ethical dilemma if required to serve in a capacity in which they may be called to testify, which would ultimately lower the quality of representation of children in custody cases. The Fordham Conference on Ethical Issues in the Legal Representation concisely articulated the role of lawyers for children when it stated:

> A lawyer appointed or retained to serve a child in a legal proceeding should serve as the child's lawyer. The lawyer should assume the obligations of a lawyer, regardless of how the lawyer's role is labeled, be it as guardian *ad litem*, attorney *ad litem*, law guardian, or other. The lawyer should not serve as the child's guardian *ad litem* or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child.

64 Fordam L. Rev. 1301 (1996).

CONCLUSION

The current role of the GAL in a custody proceeding under a proper reading of Kentucky law is that of an attorney for the child. The attorney is bound by the Rules of Professional Conduct, including the duty of loyalty, the duty of confidentiality, and the rules regarding representing clients with diminished capacity. As such, the GAL should not be subject to cross-examination in Kentucky. There are several mechanisms provided by statute and court rule through which the trial court can appoint an independent investigator or evaluator, and such a professional would be subject to cross-examination.

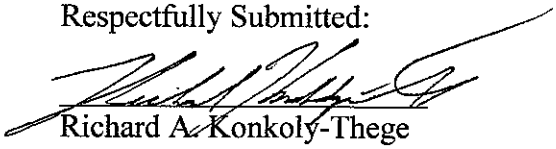
This Court should exercise its rule-making power to clarify the role of the GAL in Kentucky, insuring that the trial courts still have the option to appoint an attorney for the child. Any other interpretation of the role of the GAL would put countless attorneys

currently representing children throughout the Commonwealth in ethical peril. Regardless of any ambiguity in the GAL's role, any Kentucky attorney should err on the side that provides the client - - in this case, the child - - with the greatest protection under the Rules of Professional Conduct.

Should this Court decide not to clarify the role through its rule-making authority so that the GAL is an attorney for the child, any such opinion issued by the Court should be issued and applied prospectively. To do otherwise would place attorneys currently serving as GALs in an ethical dilemma. If not applied prospectively, a ruling that indicates a GAL is not an attorney for the child would jeopardize all current relationships between GALs and their clients in terms of confidentiality and privilege that the Rules of Professional Conduct afford, putting children in a worse position than they would have otherwise been had they gone without any representation at all.

In conclusion, this Court should find that the case is moot because A.G. is now an adult. The Court of Appeals decision should be affirmed, however, because it properly applied the law to the facts of an actual controversy that existed while A.G. was still a child. Alternatively, this Court should remand this case to the trial court with instructions to dismiss because the Appellant failed to properly preserve her objection for appeal and is therefore not reviewable under the Kentucky Rules of Evidence.

Respectfully Submitted:



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APPENDIX

TAB 1.....Kentucky Court of Appeals – Appellant's Brief

TAB 2.....Kentucky Court of Appeals – GAL's Brief

TAB 3.....Fordham Conference on Ethical Issues in the Legal
.....Representation of Children