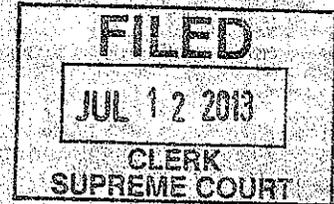


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-000196-DE
(2012-CA-000655)



FONDA MORGAN

APPELLANT

VS.

CAMPBELL CIRCUIT COURT
ACTION NO. 2003-CI-00281

DANIEL GETTER
and
A.G., Child

APPELLEES

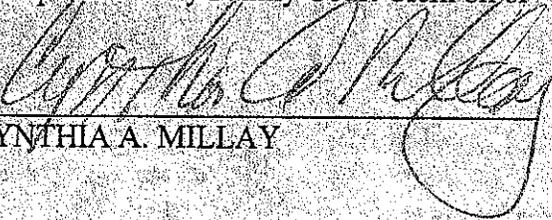
BRIEF FOR THE APPELLANT FONDA MORGAN

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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 prepaid, on the 11th day of July, 2013: Hon. Samuel Givens, Jr, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 406011-9229; Hon. Judge Richard A. Woeste, Campbell Family Court, Division 3, 330 York Street, Newport, KY 41071; Hon. Blaine J. Edmonds, III, Edmonds Law, PLLC, 157 Barnwood Drive, Suite 205, Edgewood, Kentucky 41017; Hon. Richard Kongoly-Thege & Honorable Joshua B. Crabtree, GALs, Children's Law Center, Inc., 1002 Russell Street, Covington, Kentucky 41011. The undersigned does also certify that the record on appeal has been returned to the Campbell County Family Court Clerk on or before this date.


CYNTHIA A. MILLAY

INTRODUCTION

In this case, Appellant Fonda Morgan (Appellant Morgan) appeals the decision of the Campbell County Family Court Order entered on December 19, 2011 which modified the custody of the parties' minor child as well the Kentucky Court of Appeals Order Affirming entered on February 22, 2013. Appellant Morgan is asking this Court to reconcile the existing patchwork of statutes and rules and to define the role and responsibilities of Guardians ad litem (GALs) in circuit court custody actions in order to protect her due process rights as well as the rights of other litigants and to ensure the fundamental fairness of her child custody proceeding and other child custody proceedings.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant Morgan requests an oral argument. There currently exists a detrimental lack of clarity as to the role of a GAL in child custody proceedings due to the various existing statutes and rules that touch on the issue. Because defining the role of the GAL in child custody proceedings is one of first impression for this Court, oral argument is necessary to explore all of the issues before the Court.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION.....i

STAEMENT CONCERNING ORAL ARGUMENTii

STATEMENT OF POINTS AND AUTHORITIES.....iii

STATEMENT OF THE CASE.....1

ARGUMENT.....4

**I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT
REQUIRED THE GAL TO SERVE IN TWO CONFLICTING ROLES AND
THEREBY DENIED APPELLANT HER RIGHT OF DUE PROCESS.....4**

FCRPP Rule 6.....4, 6

Commonwealth of Kentucky v. Love, 334 S.W.3d 92 (Ky. 2011) 4

KRE 103(a).....4

KRS 403.290.....7

KRS 403.300.....8

KRE 706.....9

Troxel v. Granville, 530 U.S. 57 (2000) 9

Santosky v. Kramer, 455 U.S. 745 (1982) 9

Vitek v. Jones, 445 U.S. 480 (1980)10

Lassiter v. Dept. of Social Services of Durham County, N.C., 452 U.S. 18 (1981).....10

KRE 611(b).....10

Commonwealth v. Maddox, 955 S.W.2d 718 (Ky. 1997)10

Moore v. Commonwealth, 771 S.W.2d 34 (Ky. 1988) 10

Baker v. Kammerer, 187 S.W.2d 292 (Ky. 2006).....10

Robert G. Lawson, The Kentucky Evidence Law Handboook, §3.20(3), at 239
(4th Ed. 2003)10

<u>In Re Hoffman</u> , 766 N.E.2d 484 (Oh. 2002)	11
<u>Kelley v. Kelley</u> , 175 P.3d 400 (Ok. 2007)	11
KRS 387.305.....	12, 13
SCR 3.130-1.6.....	14
SCR 3.130-3.7.....	15
SCR 3.130-2.3.....	16
II. THE KENTUCKY SUPREME COURT HAS THE UNIQUE OPPORTUNITY TO CLARIFY AND DEFINE THE ROLES AND RESPONSIBILITIES OF A GAL APPOINTED FOR A MINOR IN A CIRCUIT COURT CUSTODY ACTION.....	17
<u>ABA Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases</u>	17, 18
Ohio Sup. R. 48.....	18
750 Ill. Comp. Stat. Ann. 5/506 (West)	18
S.C. Code Ann. § 63-3-8301.....	18
Fla. Stat. Ann. § 61.401 (West)	19
Fla. Stat. Ann. § 61.403 (West)	19
<u>Leinenbach v. Leinenbach</u> , 634 So.2d 252 (Fla. 2d DCA 1994)	19
<u>Clayman v. Clayman</u> , 536 So.2d 358 (Fla. 3d DCA 1988)	19
<u>In Re Gregory</u> , 313 So.2d 735 (Fla. 1975).....	19
Tex. Fam. Code Ann. § 107.001 (West 2003)	19
Tex. Fam. Code Ann. § 107.002 (West 2005)	19
III. THE FACTS OF THIS CASE MEET THE EXCEPTION TO THE MOOTNESS DOCTRINE BECAUSE THE ISSUE BEFORE THE COURT IS ONE THAT IS CAPABLE OF REPETITION, YET EVADING REVIEW.....	21
<u>Com. Ex rel. Lockett v. Helm</u> , 464 S.W.2d 260 (Ky. App. 1971)	21

<u>Commonwealth by Breckinridge v. Woods</u> , 342 S.W.2d 534 (Ky. App. 1961)	21
<u>Mason v. Commonwealth</u> , 283 S.W.2d 845 (Ky. App. 1955)	21
<u>Lexington Herald-Leader Co., Inc. v. Meigs</u> , 660 S.W.2d 658 (Ky. 1983)	21
<u>Commonwealth of Kentucky v. Hughes</u> , 873 S.W.2d 828 (Ky. 1994)	21
CONCLUSION	22
APPENDIX	24

STATEMENT OF THE CASE

Appellee Daniel Getter (Appellee Getter), and Appellant Morgan, were married and had two (2) children born of their marriage, namely A.G., b. 8-2-1995 and D.G., b. 1993. The parties separated in January 1999 (Record on Appeal, page 2, [hereafter (RA, p. 2)]) and the parties were divorced on October 1, 2003 by a Decree of Dissolution (RA, p. 27) in Campbell County, Kentucky. The decree provided that Appellant Morgan had sole custody of the children and Appellee Getter was granted supervised visitation (RA, p. 17). In 2011 D.G. reached the age of majority. On July 21, 2011 Appellee Getter filed an Emergency Ex-Parte Motion (RA, p. 29) and moved for custody of the parties' minor child, A.G. in Campbell Family Court.

By the agreement of the parties, the trial court appointed a Guardian Ad Litem (GAL) for A.G. on August 15, 2011. The GAL Appointment Order found that "it appear[s] **a GAL is necessary to help the trial court decide the case properly**, because of the following factors or allegations: child custody/ parenting time (emphasis added)" (RA, p. 47). The trial court's GAL Appointment Order then granted the GAL authority to contact the minor child, the parties' attorneys, and the litigants, and gave the GAL immediate access to all privileged or confidential information. The Appointment Order did not specify the GAL's role and responsibilities. Thereafter the GAL conducted an investigation and filed a report with the Court on October 14, 2011 (RA, p. 54). In said report, the GAL gave his opinion to the trial court and made a recommendation that A.G. should be allowed to relocate to Florida with Appellee Getter (RA, p. 60).

On November 21, 2011, at the beginning of the parties' custody hearing, the trial court inquired as to the witnesses that each party expected to call at trial. (Video Record on Appeal date 11/21/11, time 09:28:10 [hereafter (VR 11/21/11; 09:28:10)]. At this time, Appellant Morgan informed the court that she intended to call the GAL as a witness to question him about his report. The trial court was unconvinced of Appellant Morgan's right to do so, commenting that the GAL is "like [the child's] representative" (VR 11/21/11; 09:28:18). Appellant Morgan responded that the GAL had filed a written report to the court where he gave his opinion. Appellant Morgan then argued that she should have an opportunity to question the GAL as to the basis of his opinion. The trial court refused to allow Appellant Morgan to examine the GAL and said Morgan could examine other persons as to the contents of the GAL's report (VR 11/21/11; 09:29:14). Appellant Morgan then objected to the admission of the GAL report and asked that it be stricken from the court file (VR 11/21/11; 09:29:25). The trial court failed to strike the GAL report.

On December 19, 2011, the trial court entered an Order that permitted the child to relocate to Florida to reside with Appellee Getter and designated Appellee Getter as primary residential custodian (RA, pp.79-84). The trial court specifically relied on the GAL's report in its Order granting Appellee Getter primary residential custody of A.G. In said Order, the trial court stated as its first Conclusion of Law that "1. [The GAL] 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."

Because the Order did not set forth a specific parenting schedule, Appellant Morgan filed a Motion to Alter, Amend or Vacate on December 29, 2011, asking for a

specific parenting time schedule. The parties thereafter resolved said Motion by an Agreed Order with a specific visitation schedule that was entered on March 12, 2012 (RA, pp. 134-137).

On April 3, 2012 Appellant Morgan filed her Notice of Appeal to the Kentucky Court of Appeals. Thereafter the parties submitted their required briefs timely. The GAL filed a Motion to Intervene on July 23, 2012, Appellant Morgan filed her Response to the GAL's Motion to Intervene on August 2, 2012 objecting to the GAL being permitted to intervene. The Court of Appeals granted the GAL's Motion to Intervene on August 31, 2012. Thereafter the GAL and Appellant Morgan filed their respective briefs timely.

The Court of Appeals heard oral argument on January 15, 2013. Thereafter the Court of Appeals entered its Opinion Affirming on February 22, 2013. The Court of Appeals recognized that lack of coherence by the various relevant statutes created a conflict in the role of the GAL, as to whether the GAL was acting as advocate for the client or expert counselor to the court. The Court of Appeals stated that "[w]e believe the potential for prejudice and inherent conflict created by lack of clarity in the statute merits (indeed necessitates) the scrutiny of the General Assembly and/of the Supreme Court to define the proper role of a GAL in child custody issues." Appellant Morgan then moved this Supreme Court of Kentucky for Discretionary Review of the case. The Order Granting Discretionary Review was entered on June 12, 2013 and the briefing schedule was expedited.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REQUIRED THE GAL TO SERVE IN TWO CONFLICTING ROLES AND THEREBY DENIED APPELLANT HER RIGHT OF DUE PROCESS.

This case is before this Honorable Court as a case of first impression of a unique issue which turns on the construction and meaning of Family Court Rules of Procedure and Practice 6 (FCRPP 6) which allows for the appointment of a GAL in a Circuit Court custody dispute, but does not define the role and responsibility of the GAL in such a case and does not reconcile it with the other rules and statute that effect the GAL's role. This Court's resolution or clarification of the roles and responsibilities of the GAL in this case affect not only the parties to this appeal but will also provide guidance to all the Kentucky Family Courts and Circuit Courts as to the role of the GAL appointed for the child in Circuit Court custody cases. The interpretation of FCRPP 6 is a question of law and as such *de novo* review applies. Commonwealth of Kentucky v. Love, 334 S.W.3d 92 (KY. 2011)

The issue was properly preserved for review pursuant to Kentucky Rules of Evidence (KRE) 103(a) which provides in part that:

Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and (1) Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

Appellant Morgan satisfied the requirements of this test. First, Appellant Morgan had a due process right to cross-examine witnesses or evidence brought against her, in this case being the report and recommendation of the GAL. When the trial court denied

her the right to examine the GAL as to the basis of his report, the trial court impinged Appellant Morgan's right to fully and fairly litigate the issue of custody.

Appellant Morgan's counsel timely objected to the trial court's denial of her request to examine the GAL concerning the basis of his report (VR 11/21/11; 09:29:17). The specific foundation for Appellant Morgan's objection was that the GAL's report contained matters of opinion and, given that the report had been entered into the court's record, Appellant Morgan should be afforded the opportunity to examine the GAL as to his report. In refusing to allow said examination of the GAL, the trial court noted its belief that the GAL was the child's "representative" and to call him as a witness would be inappropriate (VR 11/21/11; 09:29:03). The trial court said that Appellant Morgan could examine other persons regarding the GAL's report. However, this other testimony would not have provided the court with the basis for the GAL's opinion. Only the GAL's testimony would have provided the basis for his opinion. The trial court did not explain its decision further, and Appellant Morgan's counsel moved to strike the GAL's report from the file. When the trial court failed to strike the report and then relied specifically on said report in its decision, it committed reversible error.

The trial court's decision to appoint the GAL in an investigatory role, to give the GAL sweeping authority to talk to all parties and the child and have access to have access to the child's confidential information, to allow the GAL to file his opinion based report with the court, then refuse to allow Appellant Morgan to examine the GAL as to the report and finally to specifically rely upon said report in its decision, created two conflicting and irreconcilable roles in the GAL. The two conflicting roles again advancing the question of, was the GAL appointed to act as an investigator and advisor to

the court pursuant to KRS 403.290 and KRS 403.300 **OR** was the GAL appointed as an attorney for the child **OR** was the GAL acting in some other capacity contemplated by FCRPP 6.

If the role of the GAL is to act as investigator and advisor to the court, as it appears by the trial court's Order Appointing the GAL and its reliance on said report, then the GAL should be subject to examination pursuant to KRS 403.290 and or 403.300 if he files an opinion based report with the court. If the role of the GAL is to act as an attorney representing the child as if the child were a party to the action, then the GAL should be precluded from submitting an opinion based report and recommendation to the court and then he would not be subject to examination.

This question is one of first impression because no Kentucky statute, rule, or case law has clearly set forth what the role of the GAL is in a circuit court custody proceeding. While there is no authority directly on point outlining or defining the role of the GAL in a Circuit Court custody action, FCRPP 6 gives a significant indication of the role of the GAL in such a case.

FCRPP 6 states that:

- (1) If disputes regarding custody, shared parenting, visitation, or support are properly before the court, 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 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.

From FCRPP 6 it is clear that by the inclusion of categories f. and g., the rule intends that the preceding categories a. through e. which include the "Appointment of guardian *ad litem*", are all considered actions that can be ordered by the court or professionals that can be appointed by the court when the appointing court deems the orders and opinions or advice of the appointed professional(s) to be appropriate.

The trial court's GAL Appointment Order, which stated in part that "it appear[s] a **GAL is necessary to help the trial court decide the case properly**"(emphasis added) (R.A. pp 47), likewise clearly intended that the GAL was to act as an advisor to the court and not as an attorney providing legal representation to the child. The trial court's intention that the GAL act as an advisor to the trial court was further cemented when it specifically relied on the GAL's report as its first Conclusion of Law stating that "1. [The GAL] 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."

Because the role of the GAL in a circuit court custody case is one of a professional advisor or investigator for the court, then KRS 403.290 and or 403.300 also apply and as such the GAL herein should have been compelled to testify at trial.

KRS 403.290 states that:

(1) The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

(2) The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request. **Counsel may examine as a witness any professional personnel consulted by the court.** (Emphasis added)

and

KRS 403.300 states that:

(1) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, 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.

(2) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (3) are fulfilled, the investigator's report may be received in evidence at the hearing.

(3) The clerk shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2), and the names and addresses of all persons whom the investigator has consulted. **Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination.** A party may not waive his right of cross-examination prior to the hearing. (Emphasis added)

KRS 403.290 and 403.300 offer further guidance because they are on their face specific as to what is expected of a person appointed by the court as a professional advisor or as an investigator in a custody case. Both statutes require that the report(s) of said persons be provided in writing to the court and to all parties, which the GAL did in the case herein. Second, the rules require that the person making the report be subject to

examination as a witness, which the trial court herein refused to allow Appellant Morgan the opportunity.

Additionally, by appointing the GAL for the purpose enumerated in the GAL Appointment Order the trial court essentially made the GAL an expert witness. Therefore, [KRE] 706 should also have applied.

Kentucky Rules of Evidence [KRE] 706 states in part:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may require the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection... The witness shall be subject to cross-examination by each party, including a party calling the witness.

When the trial court denied Appellant Morgan the ability to examine the GAL as to the basis of his opinion and thereafter refused to strike the report from the court record, it denied Appellant Morgan her fundamental due process right to a fair trial. In Troxel v. Granville, 530 U.S. 57 (2000), the U.S. Supreme Court held that “the interest of parents in the care, custody, and control of their children –is perhaps the oldest of the fundamental liberty interests recognized by the Court.” The Court in Troxel went on to say that “[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” The U. S. Supreme Court in Santosky v. Kramer, 455 U.S. 745 (1982) recognized that natural parents have a fundamental liberty interest in the care, custody, and management of their child. Santosky also held that “[w]hen the State moves to destroy weakened family bonds, it must provide the parents with fundamentally fair procedures.”

Although the U. S. Supreme Court held that cross-examination is not a right universally applicable to civil proceedings, Vitek v. Jones, 445 U.S. 480, 494-96 (1980), the Court also said that due process entitles parties to “fundamental fairness;” a term that is defined by looking at several interests that are particular to that specific situation. Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18, 24-25 (1981).

The Kentucky Rules of Evidence, state that “A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” KRE 611(b). When the GAL filed his report with the trial court, cross-examination of the GAL as to the basis of his report became a significant and relevant issue of the case. The fact that the trial court specifically stated in its Order appointing the GAL that the GAL “is necessary to help the court decide” and then the trial court then relied on the GAL report in its conclusions of law, indicates the significance and relevance of the report. Although the trial court judge does have discretion, “The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge.” Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997)(quoting Moore v. Commonwealth, 771 S.W.2d 34, 38 (Ky. 1988)), the Supreme Court of Kentucky has previously noted that “KRE 611(b) addresses the subject of ‘scope of cross examination’ but undoubtedly contemplates that litigants will be given an opportunity to subject evidence to the cleansing and clarifying process of cross examination.” Baker v. Kammerer, 187, S.W.2d 292, 295 (Ky. 2006)(citing Robert G. Lawson, The Kentucky Evidence Law Handbook §3.20(3), at 239 (4th Ed. 2003). Appellant Morgan’s ability to clarify the information contained in the GAL report came from her due process right to

cross-examine the GAL as to the basis of his opinion which she could not have clarified by any other means. Appellant Morgan had a fundamental interest in maintaining custody of her child, and the fact that the trial court relied specifically on the GAL report in deciding to modify custody of said child demonstrates the necessity of Appellant Morgan to have the opportunity to examine such an important witness against her.

While there is no specific case law on point in Kentucky regarding the examination of GAL's in custody actions, other nearby states have addressed the issue of a parent's due process right to cross-examine the GAL in a custody case. In Ohio, the Supreme Court of Ohio allowed a mother in a permanent custody case to cross-examine the GAL about the written report of the GAL, after the report was entered into evidence. The Court based its decision upon the idea that the parent should have the right to cross-examine the GAL, since the trial court relied on the report, in order to ensure the accuracy of the statements made and information provided to the court. In re Hoffman, 776 N.E.2d 485, 489 (Ohio 2002). In Oklahoma, a GAL refused to be cross-examined, stating that she was an attorney advocating for the cause, however, the court decided that cross-examination of a witness is a right of trial and that once the report of the GAL is submitted to the court, the parent has a right to cross-examine about the report. Kelley v. Kelley, 175 P. 3d 400, 406 (Okla. 2007). The Kelley Court concluded that denying the parent the right to cross-examine the GAL was an "unconstitutional restraint on the parent's fundamental rights to the care, custody, companionship and management of his or her child."

The GAL in the case herein submitted his report with recommendations as to custody to the court prior to trial. Appellant Morgan, like the parents in In Re Hoffman

and Kelley, thereafter had a fundamental due process right to cross-examine the GAL as to his report. The trial court denied Appellant Morgan of this fundamental due process right.

The GAL in their past briefs and in their reply to Appellant Morgan's Motion for Discretionary Review, have relied almost exclusively on KRS 387.305 to establish what they believe is the role of the GAL in a circuit court custody case and to deny Appellant Morgan her due process right to examine the GAL as to his report. However, KRS 387.305 does not apply to the case herein.

Notably KRS 387.305 is found in Title XXXIII. **Administration of Trusts and Estates of Persons Under Disability**; Chapter 387. Guardians; Conservators; Curators of Convicts, and appears as follows; (emphasis added)

387.305 Appointment of guardian ad litem; qualifications; duties; fees
Currentness

- (1) No appointment of a guardian ad litem shall be made until the defendant is summoned, or until a person is summoned for him, as is authorized by law; nor until an affidavit of the plaintiff, or of his attorney, be filed in court, or with the clerk, showing that the defendant has no guardian, curator, nor conservator, residing in this state, known to the affiant.
- (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.
- (4) The court shall allow to the guardian ad litem a reasonable fee for his services, to be paid by the plaintiff and taxed in the costs. The affidavit of such guardian, or of another person, or other competent evidence, is admissible to prove the services rendered, but not to prove their value. The court must decide concerning such value, without reference to the opinions of parties or other witnesses.

(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. (emphasis added)

This statute is obviously intended by its title heading and paragraph (5) to be for the appointment of a GAL 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. The case at bar is neither as it is a circuit court custody action. Since there is no controlling authority on the issue, we must interpret the statute by the plain language on its face. KRS 387.305 on its face was never intended to be used to appoint a GAL for a minor child in a circuit court custody action.

Additionally, KRS 387.305 is also unmistakably intended to apply to the appointment of a GAL for a minor child when the minor child is a real party in interest to the action. The minor child herein was not a real party in interest to the circuit court custody action of the parents. There is no statute, rule, regulation, or case authority that requires, holds, or allows that a minor child in a circuit court divorce or custody action is a real party in interest to said action, absent a motion on behalf of the child for joinder, interpleader, or to intervene. To hold that children of the parties in a circuit court divorce or a circuit court custody proceeding are now to be considered real parties in interest, would create a tremendous burden upon the court system with unimaginable and far reaching consequences to an already over-burdened area of law.

While the GAL correctly cites that KRS 387.305 requires that; “(2) A guardian ad litem must be a regular, practicing attorney of the court ... and (3) [i]t shall be the duty of the guardian ad litem to attend properly to the preparation of the case...”; it is irrelevant to

the case herein as KRS 387.305 does not apply to this case for the reasons set forth above.

FCRPP 6 is the controlling law for the appointment of GALs in circuit court custody cases and as such the GAL's role is intended to be an investigator or advisor to the court and not an attorney representing the child. Therefore, a GAL appointed under FCRPP 6 has a duty to advise the minor in question of his role as an advisor to the court and not an attorney representing the child and the GAL would then not be subject to SCR 3.130-1.6 or SCR 3.130-3.7. However, if a GAL appointed pursuant to FCRPP 6 is held to the standard of an attorney representing a child and SCR 3.130-1.6 and SCR 3.130-3.7 would apply, the GAL still should have been required to testify pursuant to the exceptions in SCR 3.130-1.6 and SCR 3.130-3.7 as well as the provisions of SCR 3.130-2.3.

SCR 3.130-1.6 states that:

- (a) 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 paragraph (b).** (emphasis added)
- (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.** (emphasis added)

In a circuit court custody case like the one at bar the GAL/lawyer had a duty to inform the minor of his role and that the disclosure of certain information regarding the minor was impliedly authorized to carry out the GAL's duties. Additionally, the

disclosure by the GAL was permitted under the exception in SCR 3.130-1.6(4) because said disclosure would comply with KRS 403.290 and 403.300 after the GAL filed his report with the court, as well as the intent of FCRPP 6.

SCR 3.130-3.7 states that:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

The duty of a lawyer pursuant to SCR 3.130-3.7 is the responsibility of the lawyer in question. If SCR 3.130-3.7 applies to the GAL in the case herein, then it is the lawyer's responsibility to make sure his actions do not cause him to violate this rule. The lawyer/GAL in question knowingly entered his testimony into the record when he filed his report with the court. He should not now be allowed to use his actions as a shield to preclude himself from being called as a witness. Whether the lawyer/GAL breached his duty to his client under SCR 3.130-3.7 is not a matter that should have been policed sua sponte by the trial court during the trial. The lawyer/GAL in this case should have known that if he filed an opinion based recommendation with the court that he would be subject to examination as to the basis of his opinion and he should have taken steps to ensure that he did not violate the rule, such as having another attorney from his office act as the attorney in court so the appointed GAL could testify, pursuant to SCR 3.130-3.7(b). Additionally, the exceptions pursuant to SCR 3.130-3.7 (1) and (3) would also

apply to the case herein. First, the GAL's testimony requested by Appellant Morgan was the uncontested issue of the basis of the GAL's opinion and recommendation which could not be ascertained by any other means. Second, if another attorney from his office was not available to act as the attorney so that the GAL could participate as a witness, the trial court could have found that disqualifying the GAL as a lawyer pursuant to SCR 3.130-3.7(3) "...would work a substantial hardship on the client." Because the GAL in this case was a necessary witness for Appellant Morgan, the trial court should have allowed the testimony under this exception.

Finally, SCR 3.130-2.3 states that;

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6. (emphasis added)

As the GAL herein was appointed as an advisor or evaluator of the trial court pursuant to FRCPP 6 and to the trial court's Order appointing the GAL, SCR 3.130-2.3(c) would also apply as an exception to SCR 3.130-1.6.

Upon review of the relevant statutes and rules above, it is clear that the trial court committed reversible error when it denied Appellant Morgan her due process right to examine the GAL as to the basis of his report.

II. THE KENTUCKY SUPREME COURT HAS THE UNIQUE OPPURTUNITY TO CLARIFY AND DEFINE THE ROLES AND RESPONSIBILITIES OF A GAL APPOINTED FOR A MINOR IN A CIRCUIT COURT CUSTODY ACTION.

The Family Court Rules of Procedure and Practice established by this esteemed Court are a great advance in family law in Kentucky, however, as Justice Noble said, as recently as the 2013 KBA Convention, these Rules are a work in progress. This Court now has the opportunity to further advance Kentucky in the area of family law by clearly defining the roles and responsibilities of a GAL appointed for a minor in a circuit court custody action pursuant to FCRPP 6 and to reconcile said rule with the various other relevant rules and statutes to ensure due process and fundamental fairness.

The ABA Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (2003) gives some guidance in this area and separately defines the roles of “child’s attorney” vs. “best interest attorney” and states in part as follows:

II

A. Scope

These Standards apply to the appointment and performance of lawyers serving as advocates for children or their interests in any case where temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation are adjudicated, including but not limited to divorce, parentage, domestic violence, contested adoptions, and contested private guardianship cases. Lawyers representing children in abuse and neglect cases should follow the ABA Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996).

B. Definitions

1. “Child’s Attorney”: 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 an adult client.
2. “Best Interests Attorney”: 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.

III.

B. Lawyers Roles

A lawyer appointed as a Child's Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.

The ABA is not alone in its belief in the necessity for separately defining the roles of the child's attorney and the GAL. Multiple other state jurisdictions have addressed this issue. Jurisdictions such as Ohio, Illinois, South Carolina, Florida, and Texas have all separated the role of GAL as different from that of the child's attorney and have defined the roles and responsibilities of each.

In Ohio, Ohio Sup. R. 48 states that in each appointment of a GAL, the court must state whether the appointment is for GAL only OR for a GAL and the attorney for the child. Rule 48 goes on to state the responsibilities of the GAL are based on what the court stated in the appointment. When speaking of a report made by the GAL, Rule 48 states that the GAL shall be available to testify.

Illinois has three (3) capacities in which an attorney can be appointed for a child. The three capacities are (1) attorney, (2) GAL, and (3) child representative. The statute sets out the responsibilities for each. The statute also notably states that the GAL shall submit a report to the court with recommendations and may be called as a witness and cross-examined regarding the aforementioned report. 750 Ill. Comp. Stat. Ann. 5/506 (West).

In South Carolina the Family Court Rules list the responsibilities and duties of the GAL. South Carolina, in listing these responsibilities, included representing the best interest of the child, presenting a written report, and being subject to cross-examination on the facts and conclusions of the written report. S.C. Code Ann. § 63-3-830.

Florida requires that the permitted separate roles of GAL and attorney for the child cannot be performed by the same person. Fla. Stat. Ann. § 61.401 (West). Florida also grants the GAL broad investigative powers and permits the GAL to submit reports to the court. Fla. Stat. Ann. § 61.403 (West). Florida has held with regard to a GAL report “...that it is a fundamental right in this country to confront one's accuser and to examine evidence the trial court relies upon to reach a decision. The parent in a change of custody case must be allowed an opportunity to rebut the conclusions of the report and to cross-examine the preparer.” Leinenbach v. Leinenbach, 634 So.2d 252, 253 (Fla. 2d DCA 1994); Clayman v. Clayman, 536 So.2d 358 (Fla. 3d DCA 1988) (citing In re Gregory, 313 So.2d 735 (Fla.1975)).

Texas defines multiple roles that attorneys and non attorneys can be appointed to for a child. The Texas statute has defined the two (2) roles that attorneys for the child can be appointed to and allows an attorney to serve in dual roles. Tex. Fam. Code Ann. § 107.001 (West 2003). Texas also permits the GAL to submit a report to the court and requires that he be subject to examination as to his report regarding to the best interests of the child and the basis for his recommendations. Tex. Fam. Code Ann. § 107.002 (West 2005).

Although the ways states approach the issue of the role of the GAL in a custody cases vary, a significant number of jurisdictions define the roles and responsibilities in an attempt to clarify the exact duties of the GAL in a custody case. Regardless of whether the states allow for the dual role of best interest GAL and attorney for the child to be performed by one person or not, many states faced with the issue have separately defined the roles of child’s attorney, GAL only, and a mix between GAL and child’s attorney and

most of the jurisdictions listed above require the examination of the GAL or some other form of redress if the GAL submits a written recommendation or report to the court.

Thus, most of the jurisdictions above recognize that the due process right of the parties to examine the GAL as to his report and recommendations is paramount.

After reviewing FCRPP 6 and the other relevant Kentucky statutes, rules, and case law outlined above, as well as the ABA recommendations and the comparison of how several other states have addressed the issue of the role of a GAL in a custody action, the issue before this Court is to clearly define the role of the GAL in a circuit court custody action and to determine whether a GAL can file a report in such an action and if he does file a report, must the GAL be subject to examination regarding the report. The most simple answer would be to hold that a GAL appointed under FCRPP 6 is an advisor to the trial court and if the GAL filed a report with the trial court then he would be subject to examination as to the contents of his report OR in the alternative that the GAL is appointed as an attorney for the child and such a GAL would not be permitted to file any kind of report or advisory opinion to the court and therefore would not be subject to examination. A third hybrid alternative would be to allow for the appointment of two different attorneys for the child to act in each of the above outlined roles when such appointments are warranted by the facts of a particular case. While Appellant Morgan recognizes that the changes demanded by this appeal with regard to the role of the GAL in custody cases may not be easy, they have become a necessity of the family courts and circuit courts of Kentucky, the attorneys who practice in them, and the parties who rely on them.

III. THE FACTS OF THIS CASE MEET THE EXCEPTION TO THE MOOTNESS DOCTRINE BECAUSE THE ISSUE BEFORE THE COURT IS ONE THAT IS CAPABLE OF REPETITION, YET EVADING REVIEW.

As this Court is probably aware the minor child in this case, A.G., will turn eighteen years of age on the August 2, 2013, thus implicating the mootness doctrine. However, because this case involves an issue of substantial public interest, that is capable of repetition yet evading review, it meets the test for the exception to the mootness doctrine. Com. ex rel. Lockett v. Helm, 464 S.W.2d 260, 261 (Ky. App. 1971)(citing Commonwealth by Breckinridge v. Woods, 342 S.W.2d 534 (Ky. App. 1961); Mason v. Commonwealth, 283 S.W.2d 845 (Ky. App. 1955)), Lexington Herald-Leader Co., Inc. v. Meigs, 660 S.W.2d 658, 661 (Ky. 1983).

A parent's right to the care and custody of their children and the parent's right to due process as stated above have long been held to be fundamental rights. Troxel v. Granville, 530 U.S. 57 (2000). These fundamental rights of parents also clearly make them matters of substantial public interest. Thus, when Appellant Morgan or any other parent, is denied a due process right, which then infringes upon their fundamental right to have the custody, care and control of their child, a matter of substantial public interest is created.

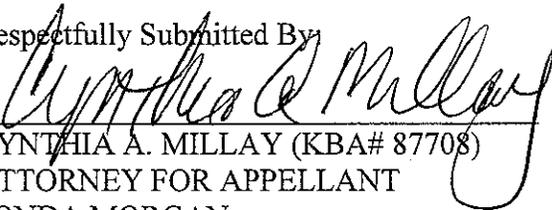
To determine if the substantial public interest is capable of repetition yet evading review, this Court has established a two-prong test: (1) is the "challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) is there a reasonable expectation that the same complaining party would be subject to the same action again." Commonwealth of Kentucky v. Hughes, 873 S.W.2d 828, 830-831 (Ky. 1994).

Appellant Morgan meets the first prong of this test. Due to the nature of our court system, for a case to proceed from the Circuit Court through the Court of Appeals and then through the Supreme Court, the process, even with an expedited schedule, takes several years. When the issue of custody of a minor child begins to be litigated when the child is around sixteen years of age, there will likely not be enough time to fully litigate the matter before the minor child reaches the age of majority, as happened in the case herein. The second prong is also met because while Appellant Morgan does not have any other minor children, it is possible that she could have more minor children and be subject to the same type of litigation involving a GAL. More importantly any parent who is a party to a custody action where the child is of the approximate age of sixteen, has a reasonable expectation that they will be subjected to this same action and result with regard to a GAL for the child. Given Appellant Morgan's argument above, if the role of GAL is not defined, parents like Appellant Morgan will continue to be subjected to this denial of due process. Since Appellant Morgan has met the requirements of the mootness doctrine exception, this Court should continue to hear and rule upon the case herein.

CONCLUSION

For the reasons herein presented, the trial court erred as a matter of law when it failed to allow Appellant Morgan to examine the GAL, when it failed to strike the GAL report from the court record and when it specifically relied on said report in its final order. The trial court and the Court of Appeals decisions should be reversed and the role of the GAL should be defined accordingly.

Respectfully Submitted By


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APPENDIX

- TAB 1.....Kentucky Court of Appeals Order Affirming Entered February 22, 2013**
- TAB 2.....Final Agreed Order Entered March 12, 2012**
- TAB 3.....Order Entered December 19, 2011**
- TAB 4.....Report of the Guardian Ad Litem Entered October, 14, 2011**
- TAB 5.....GAL Appointment Order Entered August 15, 2011**
- TAB 6.....Findings of Fact and Conclusions of Law Entered October 1, 2003**
- TAB 7.....Decree of Dissolution of Marriage Judgment and Order Entered
.....October 1, 2003**
- TAB 8.....Mediation Agreement Entered June 6, 2003**
- TAB 9.....ABA Section of Family Law Standards of Practice for
.....Lawyers Representing children in Custody Cases**