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

APPELLANT, FONDA MORGAN'S REPLY TO BRIEF OF GUARDIAN AD LITEM

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing brief were served upon the following named individuals by first-class mail, postage prepaid, on the 28th day of August, 2013: Hon. Samuel Givens, Jr, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 406011-9229; Hon. Richard A. Woeste, Campbell County Family Court, Division 3, 330 York Street, Newport, KY 41071; Hon. Blaine J. Edmonds, III, Attorney for Appellee, 157 Barnwood Drive, Suite 201, Edgewood, KY 41017; Hon. Richard A. Konkoly-Thege & Hon. Joshua B. Crabtree, Guardians ad Litem for the minor child, Children's Law Center, 1002 Russell Street, Covington, KY 41011. The undersigned does also certify that the record on appeal was returned to the Campbell County Family Court Clerk on or before this date.

CYNTHIA A. MILLAY

PURPOSE OF THE REPLY BRIEF

The purpose of this reply brief is to address only those matters presented in the Brief of the Guardian Ad Litem that Appellant Morgan believes deserve further comment or citation of additional authorities beyond those presented in the previously filed Brief for the Appellant Fonda Morgan.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant Morgan once again requests an oral argument as she believes that oral arguments would be helpful to a proper determination of this case.

ARGUMENT

I. APPELLANT REASSERTS THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PLACED THE GUARDIAN AD LITEM IN CONFLICTING ROLES AND THEREBY DENIED APPELLANT HER DUE PROCESS RIGHTS

The trial court erroneously created two conflicting roles within the Guardian ad Litem (GAL). First when it appointed the GAL as an adviser to the court by stating in its order entered on August 15, 2011 that **"a Guardian ad Litem is necessary to help the Court decide the case properly..."** (RA, pp 47-48) and thereafter allowed the GAL to file his opinion-based report in the court file. The trial court later created the second conflicting role when at trial on November 21, 2011 the court denied Appellant Morgan the right to cross examine the GAL as to the basis of his opinion based report, stating that the GAL was the "child's **legal representative and attorney**" and he therefore would not allow Appellant Morgan to cross-examine the GAL (emphasis added) (VR 11/21/11; 9:33:40, VR 12:00:40). The trial court's error was further exacerbated when the trial court failed to strike said report from the court record when so moved by Appellant Morgan and instead specifically relied on said GAL's opinion in the court's Conclusions of Law.

While Appellee A.G. concedes that Family Court Rules of Procedure and Practice (FCRPP) 6 outline the appointment of a GAL in circuit court custody actions, she continues to mistakenly argue the merits of KRS 387.305 in defining the role of the GAL in such a case. For the reasons previously argued in Appellant Morgan's initial brief to this Court, KRS 387.305 does not apply to GALs appointed in circuit court custody actions and does not define the role of a GAL in circuit court custody actions.

Appellee A.G. also relies heavily on the definition of guardian ad litem from Black's Law Dictionary (7th Edition 1999). However it should be noted that Black's Law Dictionary (6th Edition 1990) defines guardian ad litem differently as "as special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward, or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs." It should also be noted that the most current edition is Black's Law Dictionary (9th Edition 2009) defines guardian ad litem as:

> A guardian, usu. a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party. — Abbr. GAL. — Also termed *special advocate*; *special guardian*; *law guardian*. Cf. next friend; *attorney ad litem* under attorney.
> "[I]t is necessary to determine whether the lawyer has been appointed as a guardian *ad litem* (GAL) charged with representing the child's best interests, or as an advocate, serving as counsel to the child .... From the distinction between guardian and advocate flow a series of important consequences, including such matters as whether the attorney may file motions and examine witnesses, whether the attorney may file a report with the court, and whether the attorney may testify. Moreover, in most jurisdictions a GAL has an absolute quasi-judicial immunity for lawsuits for negligence .... Although a non-lawyer cannot serve as counsel to the child, such an individual might be a GAL or 'special advocate' in some states. Courts have struggled to clarify these roles, and define how children's representatives may participate in different types of proceedings." Homer H. Clark Jr. & Ann Laquer Estin, *Domestic Relations: Cases and Problems* 1078 (6th ed. 2000).

So while Appellee A.G.'s use of the Black's Law Dictionary's definition of guardian ad litem is a good starting place, it is clear that the definition continues to evolve time and currently indicates a clear difference between the role of a guardian ad litem and an attorney ad litem.

Appellee A.G.'s citation to Black v. Wiedeman, 254 S.W.2d 344 (Ky. App. 1952) is not controlling herein. Said cite is taken from the Civil Code of Practice which was

abolished in 1953. The Code cited to was amended and transferred to KRS 387.305 and, as addressed above and in Appellant Morgan's initial brief, KRS 387.305 does not apply to a GAL appointed in a circuit court custody case.

Appellee A.G.'s survey of the local court rules throughout Kentucky illustrates that the various venues throughout Kentucky are also not in agreement as to the role of the GAL in circuit court custody actions. While most of the local rules quoted and addressed by Appellee A.G. agree that the role of the GAL is that of an attorney to represent the best interests of the child, most of those quoted also fail to address whether the GAL can file an opinion based report or be cross examined as to their opinion. Appellee A.G. cites to the following venues, Allen, Simpson, Boone, Gallatin, Lincoln, Pulaski, Rockcastle, and Franklin which all have local rules that most closely adhere to the provisions of FCRPP 6. All of these venues allow for the "Appointment of a Guardian Ad Litem to represent the best interest of the child(ren)". However, all of said venues also include a provision for the "Appointment of independent counsel to represent the child(ren)" KY RASF Rule 3, KY RGF Rule 602, KY RLFC Rule 602, and KY RFFC Rule 602. This provision regarding independent counsel is not included in FCRPP 6. The deliberate inclusion of this provision in these local rules illustrates that the role of a GAL and the role of independent counsel for children are separate and distinct roles in these venues.

Although Appellee A.G.'s reasoning regarding the role of the GAL in a custody case may be flawed, if we accept the premise of Appellee A.G.'s argument that a GAL in such a case is an attorney appointed to represent the best interests of a child, their argument still fails to address the trial court's error in its use of the GAL in the other role

as advisor to the court. If the trial court had simply appointed the GAL in the role of attorney representing the child's best interest, then the attorney would have been subject to the Supreme Court Rules of Professional Conduct and would not have been subject to cross examination except possibly pursuant the exceptions under SCR 3.130-1.6 , SCR 3.130-3.7, and SCR 3.130-2.3. However, in its appointing order entered August 15, 2011, the trial court made it clear that it required the GAL to act as an advisor to the court. Because FCRPP 6 is unclear as to the GAL's role in circuit court custody actions, Appellant Morgan contends that the trial court had the option of appointing a GAL for the child to act in his capacity as an attorney representing the child's best interests only OR as an advisor to the court to make an investigation of the parties and the child and to report back to the court with recommendations regarding custody pursuant to KRS 403.290 and 403.300 but not to act in both roles. When the conflicting roles of the GAL became apparent at the start of the trial on November 21, 2011, the trial court had the option of requiring the GAL to testify pursuant to Appellant Morgan's request and subject to the requirements of KRS 403.290 and or 403.300 as previously argued OR to strike the opinion based report of the GAL from the court's record as moved by Appellant Morgan. When the trial court failed to do either of these things, the court denied Appellant her due process rights and committed reversible error.

II. APPELLANT MORGAN PROPERLY PRESERVED THE ISSUE BEFORE THE COURT AT TRIAL OR IN THE ALTERNATIVE THIS COURT MAY HEAR THE ISSUE ON APPEAL DUE TO THE PALPABLE ERROR OF THE TRIAL COURT AND THE ISSUE IS RIPE FOR REVIEW

Appellee A.G. incorrectly details the relevant facts of the case in her brief regarding this issue. The correct relevant facts are that at the start of the trial on November 21, 2011 the Judge asked who the parties intended to call as witnesses. Appellant Morgan stated that she intended to call the GAL as a witness since he had filed a report with the court wherein he gave his opinion and she wanted to question him as to his opinion. The Judge ruled that he would not allow Appellant Morgan to call the GAL as a witness. Appellant Morgan then objected to the GAL's report being part of the court file and moved that the report be stricken from the file. The Judge stated that he would hear the testimony and address that issue at the end of the hearing. After a three and a half (3 ½) hour hearing the matter of Appellant Morgan's objection and motion regarding the GAL report was not revisited. Thereafter the Judge specifically relied upon said report in his Conclusions of Law entered on December 19, 2011.

If Appellant Morgan failed to otherwise properly preserve the issue for review, this Court may still review the issue under CR 61.02 which states that:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In Fraley v. Rice-Fraley, 313 S.W.3d 635, 641 (Ky. App. 2010) the court outlined the test under CR 61.02 as to whether palpable error occurred "is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken *by the court.*" (citing Childers Oil Co. v. Adkins, 256 S.W.3d 19, 27 (Ky. 2008) (emphasis added).

In the case herein (1) Appellant Morgan was denied her substantial right to due process, (2) which resulted in the manifest injustice of Appellant Morgan losing primary

custody of her child, and (3) this palpable error was the result of the action taken by the trail court because the trial court refused to allow Appellant Morgan to cross-examine the GAL, failed to strike the GAL report from the record, and then relied upon said report to Appellant Morgan's detriment.

Appellee A.G.'s ripeness argument fails because as she points out "the 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 (Ky.1995) (citing United States v. Fruehauf, 365 U.S. 146, 81 S. Ct. 547, 5 L.Ed.2d 476 (1961)) and the issue before this Court is not hypothetical. Additionally, Appellee A.G. agrees that [w]hen 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." Because the ripeness of an issue implies that an unripe issue is premature for the court to rule on, then it stands to reason that once an issue becomes ripe it cannot then become unripe. While Article 3 of the United States Constitution addresses both issues of ripeness and mootness, the issue here is a question of mootness and not ripeness. Appellant Morgan's mootness argument is set forth below.

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 previously stated in Appellant Morgan's Brief, 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. Luckett v. Helm,

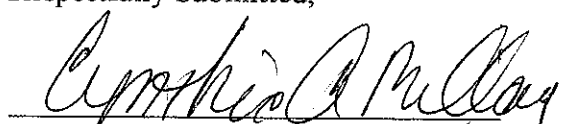
464 S.W.2d 260, 261 (Ky. App. 1971)(citing Commonwealth by Breckinridge v. Woods, 342 S.W.2d 534 (Ky. App. 1961); Mason v. Commonwealth, 283 S.W.2d 845 (Ky. App. 1955)), Lexington Herald-Leader Co., Inc. v. Meigs, 660 S.W.2d 658, 661 (Ky. 1983). Appellee A.G. correctly cites the two prong mootness doctrine test in her brief and concedes that Appellant Morgan meets the first prong of the test. Appellee A.G. mistakenly contends that Appellant Morgan does not meet the second prong of the test. Appellant Morgan meets the second prong of the test because she has a reasonable expectation that she would be subject to the same action again if she had legal custody of any other minor child. The probability of whether Appellant Morgan is likely to have legal custody of another minor child is unknown under the facts before the court and is irrelevant to the question.

CONCLUSION

In conclusion, FCRPP 6 controls the appointment of the GAL in circuit court custody cases. Whether the role of a GAL in such a case is to act as an advisor to the court or to represent the best interests of the child; one person cannot perform both roles in the same case due to the likely conflict. If the GAL role is to act as an advisor and provide their written opinion to the court then they should be subject to cross-examination. If the GAL role is to act as an attorney representing the best interests of the child then they should not be permitted to provide their written opinion to the court and would therefore not be subject to cross-examination. The issue before the Court is ripe and was properly preserved or is reviewable by this Court due to the palpable error of the trial court. Finally, while the issue may be moot due to the child reaching the age of

majority, the Court can continue to hear the case and render a decision because the facts of the case meet the two prong test of the mootness doctrine. Therefore the trial court and the Court of Appeals decisions should be reversed and the role of the GAL under FCRPP 6 should be defined accordingly.

Respectfully Submitted,



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