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SUPREME COURT
CASE NO. 2013-SC-000196-DE
2012-CA-000655

FONDA MORGAN

APPELLANT

V.

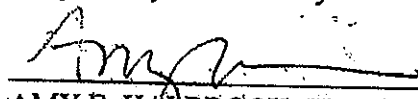
CAMPBELL CIRCUIT COURT
ACTION NO. 2003-CI-00281

DANIEL GETTER and
A.G., A MINOR CHILD

APPELLEE

**BRIEF OF LAW PROFESSORS AMY HALBROOK, JOHN BICKERS,
JAMIE ABRAMS, AND ANIBAL LEBRON AS AMICI CURIAE**

Respectfully submitted by:



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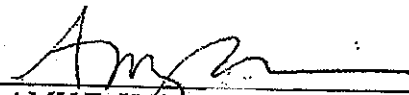
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CERTIFICATION

I, Amy E. Halbrook, hereby certify that on this twenty fifth day of July, 2013, ten (10) originals of this *Brief of Law Professors Amy Halbrook, John Bickers, Jamie Abrams and Anibal Lebron as Amici Curiae* were served via U.S. Mail upon Hon. Susan Stokley Clary, Clerk of the Supreme Court, Room 235, 700 Capital Ave., Frankfort, KY 40601, with one (1) copy served by U.S. Mail upon: Cynthia A. Millay, Legal Aid of the Bluegrass, 104 East Seventh Street, Covington, KY 41011; Blaine J. Edmonds III, 157 Barnwood Drive, Suite 201, Edgewood, Kentucky 41017; Richard Konkoly-Thege, Children's Law Center, Inc., 1002 Russell Street, Covington, KY 41011; Hon. Richard A. Woeste, Campbell Family Court, 330 York Street, Newport, KY 41071; and Hon. Samuel P. Givens Jr., Clerk of the Kentucky Court of Appeals, 360 Democratic Drive, Frankfort, KY 40601.



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PURPOSE AND INTEREST OF *AMICI CURIAE*

The attorneys submitting this brief, Amy Halbrook (Assistant Professor and Director of the NKU Chase Children's Law Center Clinic, Chase College of Law), John Bickers (Professor of Law, Chase College of Law), Jamie Abrams (Assistant Professor of Law, University of Louisville, Louis D. Brandeis School of Law), and Anibal Lebron (Visiting Professor of Law, University of Louisville, Louis D. Brandeis School of Law) are clinical law professors, doctrinal law professors and scholars who have a particular interest in family law, children's law and/or professional responsibility. *Amici* know from combined experience the importance of role clarity when it comes to the representation of children.

Amici submit this brief in support of the Kentucky Court of Appeals decision issued on February 22, 2013 concerning the proper role of a Guardian *ad Litem* (GAL) in child custody proceedings. *Morgan v. Getter*, No. 2012-CA-000655-ME, WL 645717 (Ky. App. Feb. 22, 2013). In that decision, the Court of Appeals noted that the lack of role clarity in Kentucky creates potential ethical conflicts for GALs, attorneys who may be expected to serve as both legal advocates and professional advisors to the Court. *Id.* at 6. The Court of Appeals urged the General Assembly and/or the Supreme Court to promulgate rules defining the proper role of GALs in child custody proceedings, a result that the practicing bar and legal academics alike are seeking.

As *amici curiae*, the Law Professors assert that (1) the current role of the GAL in Kentucky custody proceedings is to act as an attorney subject to standard professional responsibility obligations; and (2) the role of counsel for children in Kentucky custody proceedings should be modified/clarified to align with national standards.

STATEMENT OF THE CASE

This case involves an appeal from an order modifying the custody and primary residency of sixteen-year-old A.G. *Morgan v. Getter*, No. 2012-CA-000655-ME, WL 645717, at 2 (Ky. App. Feb. 22, 2013). The trial court did not allow the GAL to testify as a witness, but considered the GAL's written report (as well as testimony consistent with the contents of the report brought in by the GAL) in making its custody determination. *Id.*

Appellant, the non-custodial parent, appealed the trial court's decision, arguing that her due process rights were violated when the trial court refused to allow cross-examination of the GAL but relied on the GAL report, and contended that the GAL was a professional consultant or advisor to the court who may be called to testify pursuant to the Kentucky statute. *Id.* at 3. The trial court and the Court of Appeals disagreed, finding that the GAL serves in an attorney role and the GAL is, thus, not subject to cross-examination. *Id.* at 5.

In its decision, the Court of Appeals recognized the conflict – is the GAL acting as an advocate for the child or as an expert counselor to the court? – and noted that the Kentucky statutes create potential ethical conflicts for GALs, who, without role clarity, may be asked to serve simultaneously as both legal advocates and professional advisors to the court.

The Supreme Court is asked to review the issue of the proper role of the GAL in child custody proceedings.

ARGUMENT

Ambiguity as to the role of attorneys representing children is a great source of conflict in child custody proceedings. The Court of Appeals in this matter highlighted a lack of coherence in Kentucky law that creates confusion and potential conflicts of interest. The lack of a defined role for GALs in child custody proceedings raises the issue of whether a Kentucky GAL serves as an attorney-advocate for the child client or a professional consultant to the court.

Amici contend that the current role of the GAL in Kentucky custody proceedings is an attorney's role, despite the fact that courts, attorneys and parties may be confused by the title "GAL," and assume the appointment requires the GAL to serve as an investigator for the court. Moreover, *amici* argue that the role of counsel for children in Kentucky custody proceedings should be modified/clarified to align with national standards, making it clear that children's attorneys should serve in the traditional attorney role to the greatest extent possible.

I. THE CURRENT ROLE OF THE GAL IN KENTUCKY IS AN ATTORNEY'S ROLE SUBJECT TO STANDARDS OF PROFESSIONAL RESPONSIBILITY OBLIGATIONS

Appellant Morgan argues that the trial court violated her due process rights when it denied her request to cross-examine the GAL and then, when the request to cross-examine was denied, failed to strike the GAL's report. *Morgan v. Getter*, No. 2012-CA-000655-ME, WL 645717, at 2 (Ky. App. Feb. 22, 2013). Appellant argues that the GAL was appointed as a professional consultant or investigator, tasked with providing advice to the court and, as such, should have been subject to examination. *Id.*

Appellant's arguments reflect a common misunderstanding, namely that the

purpose of the GAL is to investigate, write reports, or otherwise make recommendations to the court, rather than to serve as an advocate representing the child. This is not the case based on current Kentucky rules.

The Kentucky Family Court Rules of Practice and Procedure specifically provide for the appointment of a GAL -- as differentiated from an evaluator, counselor, or other professional advisor -- in custody cases. FCRPP 6(1). The GAL must be a "practicing attorney" who must "attend properly to the preparation of the case" and "advocate for the client's best interest in the proceeding." KRS 387.305. The GAL's duties include subpoenaing and calling witnesses at trial. KRS 387.305(3). The statute clearly contemplates the GAL serving in an attorney-advocate role.

As a practicing attorney, the GAL is subject to the Rules of Professional Conduct. *See* SCR 3.130(1.1) – 3.130(8.4). As such, even though the client is a child, the GAL is required to, "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." SCR 3.130(1.14). Duties owed to the client include competent, client-directed representation (to the extent that the client is competent to direct the attorney), diligence, confidentiality and loyalty. *See* SCR 3.130(1.1); (1.2); (1.3); (1.7). Like other attorneys, GALs may not act as both an advocate and a witness in a trial except when "(1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services; or (3) Disqualification of the lawyer would work substantial hardship on the client." SCR 3.130(3.7).

In terms of testimony, had the trial court allowed Appellant to cross-examine the GAL, it would have put the GAL in the position of having to refuse to testify or be potentially required to violate his duty of confidentiality. Such testimony was properly

prohibited. As practicing attorneys, GALs should not be required to violate client confidentiality or risk becoming adversaries to clients by exposing information contrary to their clients' position.

If the GAL had been explicitly and exclusively participating in the role of a professional consultant or investigator, as allowed under FCRPP 6(2) and KRS 403.300(1), Appellant Morgan's due process argument would have merit. However, because the GAL was an attorney tasked with calling witnesses and bringing in evidence at trial to support a legal position -- and because the GAL's witnesses were subject to cross-examination by the parties -- Appellant's due process rights were satisfied.

While FCRPP 6 may allow a GAL to provide an opinion and advice to the court, nothing in the Kentucky rules require the GAL to do so. Instead, the rules speak to the GAL as an attorney who attends properly to the case and who calls witnesses. *See* KRS 387.305. If a GAL submits a report to the court, it serves the same purpose as a pre-trial memorandum, which provides the parties and the court with a statement of the legal position the attorney intends to advocate at trial based on the facts gathered through diligent investigation on behalf of the client. *See* FCRPP 7(1)(disclosure of witnesses, the subject of their testimony, and a list of exhibits are required by the parties in child custody matters.) It should not be admitted as evidence because, if the GAL is effective at trial, the report becomes cumulative.

The Court of Appeals in this matter noted that the potential for prejudice and lack of clarity in the Kentucky statutes necessitates the scrutiny of the legislature or the Supreme Court to define the proper role of the GAL in child custody cases. *Morgan v. Getter*, No. 2012-CA-000655-ME, WL 645717, at 6 (Ky. App. Feb. 22, 2013). *Amici*

argue that, while clarity is imperative to ensure the rights of the children and parties, until there is legislative action or a Supreme Court Rule defining the role of the GAL/attorney for the child in Kentucky, the Kentucky Rules of Professional Conduct require GALs to serve as attorneys with standard professional responsibility obligations. Consistent with those obligations, the GAL should advocate for the client's best interests, should not be called to testify, and the GAL's report should not be admitted as evidence.

II. THE ROLE OF COUNSEL FOR CHILDREN IN CHILD CUSTODY MATTERS SHOULD BE MODIFIED/CLARIFIED TO ALIGN WITH NATIONAL STANDARDS

Confusion about the role of attorneys representing children is not unique to Kentucky. *See, e.g.*, Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 Fam. L. Q. 63, 75 (2008) (“[M]any states routinely appoint lawyers as guardians ad litem without careful delineation between the roles.”) Scholars and practitioners have raised concerns about this issue for the past twenty years. *See, e.g.*, Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1301 (1996); Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham, 6 Nev. L. J. 592 (2006); American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases, 37 Fam. L. Q. 131 (Summer 2003)(hereinafter “ABA Standards”); American Academy of Matrimonial Lawyers Standards for Attorneys for Children in Custody or Visitations Proceedings with Commentary, 22 J. Am. Acad. Matrimonial Law, 227 (2009)(hereinafter “AAML Standards”); National Conference of Commissioners on Uniform State Laws Uniform

Representation of Children in Abuse, Neglect and Custody Proceedings Act, 42 Fam. L. Q. 1 (Spring 2008)(withdrawn from consideration by the ABA House of Delegates) (hereinafter “NCCUSL Act”).

Two distinct approaches (with considerable variations) are available in child custody proceedings. The first is the appointment of a GAL, an advocate who is ethically bound to advance the child’s best interests in the case. See Linda D. Elrod, *Client-Directed Lawyers for Children: It is the “Right” Thing to Do*, 27 Pace L. Rev. 869, 907-08 (2007). In the past twenty years, scholars and practitioners have moved toward a consensus that it is improper for counsel for the child to play the role of a neutral-reporter GAL. See, e.g., ABA Standards III.B., 37 Fam. L. Q. 131, at 134 (recommending that attorneys for the child not make recommendations, file a report, or testify in court.) Rather, counsel for the child should act as attorneys and should present information to the court as any other attorney would do: by bringing in admissible evidence at trial and making traditional evidence-based legal arguments. ABA Standards II.B.cmt. at 134. Attorneys should not be allowed to present opinions to the court about the outcome of the custody proceeding through testimony or reports to the court, which frequently contain hearsay and may require the attorney to violate ethical duties. See Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 Fam. L. Q. 105, 116-18 (2003).

An alternate approach to a GAL appointment is for the court to appoint an attorney to represent the child. The ABA Standards delineate two different attorney positions: the child’s attorney and the best interests attorney. ABA Standards II.B. at

133. The Standards make it clear that a child's attorney should never perform both functions. *Id.* Both are attorneys, not witnesses or arms of the court. *Id.*

Under the ABA Standards, children's lawyers are generally required to advocate for the result sought by the client, so long as the client -- in the lawyer's judgment -- is capable of making adequate decisions. ABA Standards IV.C. at 143. The child's attorney functions as legal counsel with the same duties, including confidentiality, as they would to an adult client, so long as the child is "competent" to give instructions. *Id.* The child's attorney must make a good faith effort to determine the child's wishes, even with preverbal children, and has "a duty not to overbear the will of the client." ABA Standards IV.B.cmt. 142-143; ABA Standards IV.C.2.cmt. at 144-145. When the child is mature enough to formulate a position, the attorney must work to advance the client's lawful objectives. ABA Standards IV.C. at 143.

Where the child is too young to express a preference or position, or is unwilling to do so, attorneys may represent the client's best interests or substitute judgment for the client. ABA Standards IV.C.2.cmt. at 144-145. The best interests attorney provides independent legal services to the child in order to protect the client's best interests, without being bound by the client's wishes. ABA Standards V.F. at 150. In short, while a child's attorney is client-directed, a best interests attorney may determine that a child's preferences or position is not in their best interests and could choose to ignore the client's directive. In the past twenty years, scholars and practitioners have moved toward a consensus that best interests representation creates ethical conflicts for attorneys and impinges on the rights of child clients to direct the litigation. *See* Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or*

No Lawyer at All?, 53 Ariz. L. Rev. 381, 382 (2011); Elrod, *Client-Directed Lawyers for Children*, at 910-12 (2007).

As Kentucky considers the role of counsel for children in child custody proceedings, *amici* argue that the GAL role should be modified/clarified to align with national standards. Specifically, the role should be explicitly defined as an attorney role, making it clear that the attorney is not an investigator or court-appointed expert, and is not subject to cross examination.

Consistent with standards promulgated by the ABA, AAML and NCCUSL, attorneys in Kentucky child custody matters should not make recommendations, file reports, or testify in court. ABA Standards II.B. at 133; AAML Standards 3.2 at 248; NCCUSL Act §17 at 55. Instead, they should make traditional evidence-based legal arguments consistent with attorney practices. ABA Standards III.B.cmt. at 134. The attorney for the child should call their own experts and cross-examine witnesses in order to ensure due process rights while allowing the child's attorney to adhere to the Rules of Professional Conduct. ABA Standards III.G. at 138.

It is the position of *amici* that, in the vast majority of cases -- cases where the child is mature enough to express a preference as to the outcome of the case -- attorneys should be appointed in the traditional client-directed attorney role, and the attorney should not be allowed to substitute judgment for the client's. Consistent with attorney practices, the attorney for the child should interview and counsel the client, setting expectations and trying to find a balance between what is in the child's best interests and the child's wishes. In cases where the attorney does not agree with the child's desired outcome, the attorney has the obligation to counsel the client; if, after counseling, the

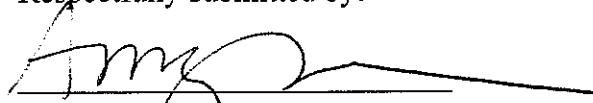
child's position remains the same, the attorney should follow the child's direction. *See* ABA Standards IV.C.2.cmt. at 144-145. The Court and the parties should not be overly concerned that, by requiring the attorney to act on the child's direction, it would somehow overemphasize the importance of the child's position; the requirement would simply provide the client a clear voice in the litigation, but the child's wishes would remain only one of the best interests factors.

Amici believe that, in a small number of cases -- those where the attorney believes that the child is not mature enough to set the goals of the representation competently -- the attorney must talk to the child and try to ascertain his or her wishes. After consultation, if the lawyer decides not to advocate for what the child wants because the lawyer believes it is not in the child's best interests, the lawyer should not advocate against what the client wants. To do so would undermine the attorney-client relationship and raise ethical concerns.

CONCLUSION

Wherefore, *amici curiae* Amy Halbrook, John Bickers, Jamie Abrams, and Anibal Lebron respectfully request that this Court take action to clarify the proper role of the GAL/child's attorney in child custody cases. *Amici* believe that the most effective way to do so would be for the Court to promulgate a Supreme Court Rule or for the Court to request that the legislature define the role explicitly.

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