pursuant to CR 76.12(8)(c)

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

FONDA MORGAN — MOVANT/APPELLANT

VS.

APPEAL FROM
CAMPBELL CIRCUIT COURT
ACTION NO. 2003-CI-00281

DANIEL GETTER
and
A.G., Child — RESPONDENTS/APPELLEES

AMICUS CURIAE BRIEF ON BEHALF OF THE
KENTUCKY CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

CERTIFICATE OF SERVICE

It is hereby certified that true copies of this brief were served upon the following named individuals by first-class mail, postage prepaid, on the 26th day of July, 2013: Hon. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; Hon. Judge Richard A. Woeste, Campbell Family Court, Division 3, 330 York Street, Newport, KY 41071; Hon. Cynthia A. Millay, Attorney for Movant/Appellant, Fonda Morgan, Legal Aid of the Bluegrass, 104 East Seventh Street, Covington, Kentucky 41011; Hon. Blaine J. Edmonds, III, Edmonds Law, PLLC, 157 Barnwood Drive, Suite 205, Edgewood, Kentucky 41017; Hon. Richard Kongoly-Thege & Hon. Joshua B. Crabtree, GALs, Children's Law Center, Inc., 1002 Russell Street, Covington, Kentucky 41011.

Bonnie M. Brown

BONNIE M. BROWN
ATTORNEY FOR *AMICUS CURIAE*, KYAAML
Bailey Office Park, Suite 201
4205 Springhurst Boulevard
Louisville, Kentucky 40241-6160
Telephone: (502) 412-9190 Ext. 226

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION AND PURPOSE

The purpose of this *Amicus Curiae* brief on behalf of the Kentucky Chapter of the American Academy of Matrimonial Lawyers[1] (KYAAML) is to urge this Court to address the proper role of Guardians *Ad Litem* in Kentucky in accordance with the standards contained in the publication, Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings, American Academy of Matrimonial Lawyers, 150 North Michigan Avenue, Suite 2040, Chicago, Illinois 60601, (312) 263-6477, (2011), (Hereafter, "Standards").

ARGUMENT

I. IT IS APPROPRIATE FOR THIS COURT TO SET FORTH PARAMETERS FOR THE ROLE AND RESPONSIBILITY OF A GUARDIAN *AD LITEM* APPOINTED UNDER CHAPTER 403.

The role of a Guardian *Ad Litem* in contested custody and timesharing litigation has not been squarely addressed by the legislature or the Appellate Courts. There are no parameters setting forth the responsibilities for the attorney appointed in this capacity if the Order of appointment is silent. The KYAMML strongly urges this Court to rectify this void in the law by adopting the Standards and incorporating same into the case law of Kentucky to define the role for a Guardian *Ad Litem* appointed under KRS 403.

---

[1]This brief represents the views of the Kentucky Chapter of the American Academy of Matrimonial Lawyers. It does not necessarily reflect the views of the American Academy of Matrimonial Lawyers. This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this motion or reviewed it before its submission. The Kentucky Chapter of the American Academy of Matrimonial Lawyers does not represent a party in this matter, is receiving no compensation for acting as *amicus*, and has done so pro *bono publico*.

The American Academy of Matrimonial Lawyers (AAML) Standards and Commentary are premised upon the following definitions describing critically distinct roles for children's representation. Standards, p. 9:

> 1. *"Counsel for the child"*: A licensed member of the relevant state Bar assigned by the Court to represent a minor who is the subject of the proceedings. The principal purpose of assigning such counsel is, to the maximum extent feasible in accordance with the applicable Rules of Professional Conduct, to further the traditional role of counsel and seek the litigation's objectives as established by the client. Counsel for the child is presumptively the client's agent and the client is the principal.
>
> 2. *"Court-Appointed Professionals Other than Counsel for the Child"*: Any person, whether or not licensed to practice law, who is appointed in a contested custody or visitation case for the purpose of assisting the court in deciding the case.

A Guardian *Ad Litem* is an attorney appointed as the child's attorney. However, in this particular case, as recognized by the Court of Appeals (Opinion, p. 6), the role of the Guardian *Ad Litem* has been made murky. The lower Court chose to seek the advice and assistance of a professional for other reasons—to talk to the child, to review the homes of the parents, to verify various allegations and to make recommendations, etc. These reasons are not justification for appointment of counsel for the child. The Court has the power to appoint other experts and professionals for assistance, but these persons should not carry the label "counsel" or "attorney". Under FCRPP 3(4)(a), such experts are required to file a written Report and are subject to subpoena and examination at Trial.

By confusing the title of the advisor the Court sought to appoint with that of an attorney to represent the child, due process was violated. The Standards squarely analyze and address this issue as follows:

3. STANDARDS RELATING TO THE APPOINTMENT OF PROFESSIONALS OTHER THAN COUNSEL FOR CHILDREN:

3.1 Unless appointed as counsel for the child, no one should function as an attorney for the child. No court-appointed person should acquire party status.

> *Commentary*: (AAML) do(es) not wish to join the chorus of either the ABA or NCCUSL, and encourage the use of such court-appointed professionals labeled as children's representatives. On the other hand, we recognize that courts are likely to consider appointing someone other than counsel for the child. We wish to clarify what the appropriate role of such a court-appointed professional should be.
>
> Courts may choose to appoint someone to investigate and report information to the court. When they do so, these professionals should be called "court-appointed advisor." Courts may choose to appoint someone in an expert capacity to provide the court with an opinion about some contested matter. When they do so, these professionals should be called "experts." Courts may choose to appoint someone to protect children from the harms associated with the contested litigation. When they do so, these professionals should be called "protectors." There may be other reasons courts may choose to add a professional to the case.
>
> Language matters, however. We believe that assigning any of these tasks to someone who is called counsel is unnecessary, needlessly confusing, and misleading. Whatever these professionals are called, and whether or not they happen to be members of the bar, these professionals should never be mistaken for being counsel for the child or serving in any kind of attorney role. Nor should such a professional ever acquire party status. (Emphasis added. Citations omitted.)

Standards, pp. 26 – 27.

3.2 No one appointed pursuant to this Standard shall make a recommendation on the outcome of the proceeding or on a factual claim about a contested fact or issue except under oath subject to cross examination by all parties.

> *Commentary*: Courts frequently appoint a third party, such as a court-appointed advisor or an expert (sometimes called "court appointed special advocates," "guardians *ad litem*," "best interests attorneys," "court appointed advisors," or "investigators") for the purpose of making a recommendation concerning the best interests of the child. We believe this practice is fraught with danger and should be avoided. Experts should be permitted to testify to facts and opinions pertinent to the case, but should not be authorized to make recommendations regarding how cases are to be decided by the court. All others (that is, persons who do

not qualify as "expert" within the meaning of the controlling rules of evidence) should never be permitted to offer opinion testimony or any other form of opinion.

We do not think that children are better off when an adult - other than the judge - whom they do not know is assigned the task of determining their best interests and seeking to secure a result consistent with the adult's perception of them. Prohibiting all court-assigned professionals from making recommendations regarding the child's best interests avoids the serious danger of abdication of judicial responsibility. By prohibiting everyone from advocating an outcome, the democratic process by which duly elected or appointed judges become the true arbiters of controversies brought to courts is reaffirmed. Moreover, in making a decision, a judge is subject to relevant evidentiary rules and to appellate process.

An outright prohibition against advisors recommending an outcome can best be explained by placing all cases into two categories: easy and hard cases. In the first category, it is clear what outcome is best for children. In easy cases, it may be assumed that virtually all court-appointed professionals would recommend the same outcome. In these cases, the risk of arbitrary behavior is at its lowest when these professionals are appointed. Since a principal concern in these Standards is the avoidance of arbitrary behavior, it would appear that permitting court-appointed professionals from recommending the result they perceive would further the child's best interests in easy cases is consistent with this principle. The need for court-appointed professionals in easy cases to opine on the child's best interests, however, is at its lowest since the court almost always will find the "correct" result on its own.

Hard cases, by contrast, are difficult precisely because deciding what is best for the child is difficult. In such cases, permitting court-appointed professionals to give their opinion of what outcome best serves the child invites arbitrariness. These cases are precisely the ones in which it is most likely that different court-appointed professionals will recommend different outcomes. Not only is it likely that different court-appointed professionals will recommend different results in close cases, but the danger is compounded because it is to be expected that judges will be grateful to have the professional's opinion to help decide the case. For these reasons, we prefer that court-appointed professionals be prohibited from making recommendations regarding the outcome of contested cases.

Nonetheless, we have concluded that adding this Standard is important because of the widespread practice of allowing (and expecting) court-

> appointed professionals to make recommendations. This Standard requires that whenever a court-appointed professional makes a factual claim about a contested issue, the professional should do so under oath and be subject to cross examination. Basic principles of due process require that no contested claims about a matter before a court be considered by the judge without providing all parties the opportunity to test the accuracy of the claim. In the event the court accepts a written report, the report must be made under oath and may not be considered by the court without affording all parties the opportunity to cross-examine its maker, unless otherwise agreed by the parties.

Standards, pp. 27-29.

Thus, the filing of the Guardian *Ad Litem* Report without the Guardian *Ad Litem* being subject to cross examination was contrary to the AAML Standard for Court Appointed Professionals Other than Counsel for Children. Further, the appointment also violated the Standard for Counsel for Child. Containing a recommendation (opinion) also violated the clear requirements of FCRPP 3(4)(a).

II. THE ORDER OF APPOINTMENT AND ROLE UNDERTAKEN BY THE GUARDIAN *AD LITEM* IN THIS CASE WAS INADEQUATE UNDER THE STANDARDS.

FCRPP 6(2)(e) granted the lower Court power to appoint a Guardian *Ad Litem* for A.G. To the extent that the Guardian *Ad Litem* acted as A.G.'s attorney, it is consistent with the Standards. It was appropriate to provide advocacy for the sixteen year old in a relocation case. As expressed in the Opinion of the Court of Appeals, page 9, it appears A.G. was mature and of the capacity to direct her own representation. Therefore, the appointment itself was appropriate. The Standards refer to the following criteria, at page 15:

2. STANDARDS RELATING TO COUNSEL FOR CHILDREN

2.1 Court-appointed counsel must decide, on a case-by-case basis, whether their child clients possess the capacity to direct their representation. In the event that the court seeks to appoint counsel for children who lack the capacity to direct their representation, the lawyer should strive to refuse the appointment.

2.2 Unless controlling law expressly provides otherwise, counsel's role in representing a child client is the same as when representing an adult client. Clients who have sufficient capacity, regardless of age, have the right to establish the goals of representation and counsel is obliged to seek to attain those goals. In no case shall counsel for the child advocate for any objectives other than those established by the client.

2.3 Counsel for a child should be treated by all parties and the court as a counsel of record.

2.4 All counsel for children should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement when appropriate in order to reduce trauma that can be caused by the litigation.

Had the Guardian *Ad Litem* appropriately acted only as counsel for A.G. and advocated her wishes at trial only through presentation of evidence and examination of witnesses, this matter would not currently be before this Court. However, the Guardian *Ad Litem* was appointed and treated as an advisory expert. A written Report was issued, admitted into the record and no examination was allowed to elaborate or challenge the report. The Report of the Guardian *Ad Litem* is hearsay. No sworn testimony was taken to establish the credibility of the author or the information submitted. The appointment and role of the Guardian *Ad Litem* in this matter was inconsistent with the Standards and created the issue herein. It was an inherent conflict for a single attorney to represent the child in the litigation and simultaneously perform an advisory or investigative role for the Court. The Order of appointment created this due process

concern, which was compounded by the procedure at the Trial in which Movant was not permitted to cross examine.

To prevent this potential for prejudice (Opinion p. 6) in appointment of Guardians Ad Litem, the Standards state as follows:

> **1. STANDARDS RELATING TO THE APPOINTMENT OF COUNSEL FOR CHILDREN IN CUSTODY OR VISITATION PROCEEDINGS**
>
> **1.1 Courts should not routinely assign counsel for children in custody or visitation proceedings. Appointments should be reserved for those cases in which both parties request the appointment or the court wants the objectives sought by the child to be a prominent basis for the outcome of the case.**
>
> *Commentary:* Except when both parties request such an appointment, representatives for children should be appointed only when courts want an advocate for the child who will strive to achieve the outcome the child wants. In all other cases, children are not necessarily better served by this extra person being added to the case, and the other parties to the action may be adversely affected by the appointment.
>
> To this extent, the AAML is more neutral in its support for using counsel for children than the ABA and NCCUSL. Believing that there are advantages and disadvantages to appointing counsel for children, these Standards do not embrace any presumption in favor of such appointments. Although appointment of counsel for children is discretionary under all these standards, the ABA and NCCUSL place fewer restrictions on the court's ability to make such appointments.
>
> In contrast to the AAML Standards, the ABA Standards and the NCCUSL Act accord courts wide discretion to appoint counsel for children, referencing a long list of factors which may indicate a particular need for such appointments, Indeed, the ABA Standards devote several paragraphs of commentary to the various benefits of appointing counsel for children, but never discuss any reasons to avoid their routine appointment. Although the NCCUSL Act describes the need for courts to consider the financial burden and other disadvantages of appointing counsel for children, it, too, emphasizes the "significant benefit" of appointing them in certain custody cases and fails to discuss in sufficient detail reasons to avoid such appointments.

Academy Standards alone among the three limit the circumstances under which courts may appoint counsel for children. We believe that matrimonial and related custody proceedings should continue to be viewed as private disputes brought to the court for resolution because the parties are unable to resolve the dispute by other means. The mere fact that parents have decided to resolve their dispute through a litigation forum is insufficient reason to require a separate legal representative for children in most cases.

The routine addition of counsel for children may merely duplicate the efforts of counsel already appearing in the case or needlessly delay the proceedings. Moreover, adding a lawyer taxes the resources of the courts and the parties. Adding a lawyer not only increases fees; overall costs may become exponentially greater if the child's representative chooses to retain paid experts whose contributions may, in turn, encourage the parties to retain additional experts. These greater expenses may ultimately be detrimental to the child's interests, since less money may be available during and after the litigation to spend on the child. If the child's counsel is paid by the Court, taxpayers will be subsidizing private parties engaged in a private legal dispute. If counsel for children are unpaid, there would likely be an insufficient number of qualified professionals available to represent children.

A review of the laws in the different jurisdictions in the United States reveals that very few states provide meaningful guidance about any aspect of the use of counsel for children in custody or visitation cases. Relatively few states provide courts with any meaningful guidelines regarding when to make appointments. In the vast majority of jurisdictions, the relevant statute or case law merely recognizes the court's discretion to make an appointment when, for example, 'the court determines that representation of the interest otherwise would be inadequate.'

Under this Standard, counsel for children should be assigned when both parties want the child to be represented. When both parties desire such an appointment, there are few reasons to disallow it. The impact on the parents' privacy and pocketbook are not the exclusive costs associated with the needless complication of legal dispute resolution (judicial resources, as one prominent example, can be severely taxed when cases are not resolved expeditiously). Nevertheless, when both parties are willing to absorb these costs, the appointments should go forward.

When either party opposes the appointment, this Standard permits court to appoint counsel for children only for one purpose: to advocate, after proper counseling by the lawyer, for the outcome desired by the child.

> Given these limitations, courts should appoint counsel only when they believe that the child's wishes need to be forcefully advocated. When courts choose to add a professional to the case for any other reason, the appointed professional should not carry the label "counsel" or "attorney."

Standards, pp. 10 – 12.

The Order entered August 15, 2011, Record on Appeal (Hereafter "R."), 47, appointing the Guardian *Ad Litem*, addressed the issues before the Court as well as the Guardian *Ad Litem's* identity, contact information, fee, time tables, and resources to be made available. The Order did not define the Guardian *Ad Litem's* tasks. That omission permitted the Guardian *Ad Litem* to co-mingle mutually exclusive roles under the Standards leading to due process violations.

III. IT IS APPROPRIATE TO SET FORTH THE STANDARDS FOR THE ROLE AND RESPONSIBILITY OF A GUARDIAN *AD LITEM* UNDER KRS 403, CONSISTENT WITH EXISTING RULES AND STATUTES.

KRS 403.090 describes the Friend of the Court as a "protector" rather than "counsel." Primarily relating to collection of support, KRS 403.090(4) allows a Court to appoint a "friend of the Court" to, "make such investigation as will enable the friend of the court to ascertain all facts and circumstances that will affect the rights and interests of the children and will enable the Court to enter just and proper orders and judgment concerning the care, custody, and maintenance of the children. The friend of the court shall make a report to the Trial Judge ... setting forth recommendations as to the care, custody and maintenance of the children. ..." Referenced in KRS 403.300 (1), cross examination is expressly permitted and, thus, consistent with AAML Standards.

Courts may appoint someone to investigate and report information to the court. When they do so, these professionals should be called "court-appointed advisor" or

"friend of the court". These individuals, appointed to provide an opinion about some contested matter, should be called "experts".

As Experts, FCRPP 3(4)(a) requires that the expert submit a written report and be subject to subpoena. The Standards are consistent with this Rule,

> [W]henever a court-appointed professional makes a factual claim about a contested issue, the professional should do so under oath and be subject to cross examination. Basic principles of due process require that no contested claims about a matter before a court be considered by the judge without providing all parties the opportunity to test the accuracy of the claim. In the event the court accepts a written report, the report must be made under oath and may not be considered by the court without affording all parties the opportunity to cross-examine its maker, unless otherwise agreed by the parties.

Standards, pp. 27-29.

The Standards advocated herein are consistent, in substantially all respects, with Kentucky Statutes. A Report that contains opinions or recommendations, as did the Guardian *Ad Litem* Report in this case, must pass muster under KRE 702 or Daubert v. Merrell Dowell Pharmaceuticals, 509 U.S. 579 (1993): Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137 (1999); Goodyear Tire and Rubber Company v. Thompson, 11 S.W.3d 575 (Ky. 2000); Toyota Motor Corporation v. Gregory, 136 S.W.3d 35 (Ky. 2004). This Rule is consistent with the Standards as well.

By admitting the Report of the Guardian *Ad Litem*—containing a recommendation – without supporting testimony, due process was violated, the clear language of FCRPP 3(4)(a) was disregarded, and KRE 702 was ignored. The KYAAML advocates for the Court to rectify the void in statutory and case law authority with

regard to the role of Guardian *Ad Litem* appointment under KRS 403 and to adopt the Standards for Representing Children.

CONCLUSION

FCRPP 6(2)(e) and 3(4)(a) and the role of the Guardian *Ad Litem* in custody and visitation cases cries out for greater definition. KYAAML urges this Court to adopt the AAML's Standards discussed herein to set forth the role and responsibilities for a Guardian *Ad Litem* under KRS 403. Moreover, the KYAAML requests this Court clearly establish that an attorney who submits a recommendation be treated as an expert appointed by the Trial Court—whether or not given the title of Guardian *Ad Litem* —and be prohibited from making recommendations or filing a report in the record without being sworn and subject to cross examination.

Respectfully Submitted,

Bonnie M. Brown

BONNIE M. BROWN
ATTORNEY AT LAW
Bailey Office Park, Suite 201
4205 Springhurst Boulevard
Louisville, Kentucky 40241-6160
Telephone: (502) 412-9190 Ext. 226

PRESIDENT:
VALERIE S. KERSHAW
KERSHAW & BAUMGARDNER, LLP
333 West Vine Street, Suite 1201
Lexington, Kentucky 40507
Telephone: (859) 381-1145

IMMEDIATE PAST PRESIDENT:
MELANIE STRAW-BOONE
PREGLIASCO STRAW-BOONE DOHENY
First Trust Centre, Suite 404 South
200 South Fifth Street
Louisville, Kentucky 40202
Telephone: (502) 568-4700

PRESIDENT-ELECT:
MARTHA A. ROSENBERG
THE ROSENBERG LAW OFFICE
183 North Upper Street
Lexington, Kentucky 40507
Telephone: (859) 233-7972

Counsel for *Amicus Curiae*, Kentucky Chapter of the American Academy of Matrimonial Lawyers