

**Recommendations of the
Commission on *Guardians ad litem***



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Introduction

At the request of the Finance and Administration Cabinet, the Auditor of Public Accounts studied guardian *ad litem*¹ (GAL) practice in Kentucky. In 1998, results of the performance audit were released. The auditor's report recommended 15 changes to improve the legal representation of children in dependency, neglect or abuse (DNA) cases in the Commonwealth. Many of the recommendations suggested action by the Judicial Branch. To determine whether any of the 15 suggestions should be implemented, Chief Justice Joseph E. Lambert created the 24-member Commission on Guardians *ad litem*.

Chaired by Justice William S. Cooper of the Kentucky Supreme Court, the Commission began its work in May, 1999. At five monthly meetings, Commission members heard testimony from various groups involved in DNA cases in Kentucky. These groups included attorneys serving as guardians *ad litem* in both rural and urban areas, the judiciary, advocacy groups, law schools and state agencies. The Commission also considered the various approaches taken by at least a dozen other states that are tackling similar challenges in improving the legal representation of children. In June, several Commission members attended and evaluated a full day pilot training session for attorneys serving as GALs in Laurel and Knox Counties.

The scope of the Commission was limited to GALs representing children in DNA cases. While GALs are appointed in other cases, those situations are not addressed by this report. Specific topics considered by the Commission include:

- < reasonableness of fees paid to GALs
- < documentation required to justify payment of the fee earned by a GAL
- < appropriate agency to shoulder financial responsibility for payment of GALs
- < qualifications and training required for attorneys who serve as GALs
- < appropriate agency to ensure GALs are qualified and adequately trained
- < creation of an office to administer the GAL program
- < need for written court rules specifying the duties of GALs
- < revision of forms and the mandated use of statewide forms
- < need for statutory revision to specify the responsibilities of the Executive and Judicial Branches for oversight, monitoring and payment of GALs
- < rural and urban needs
- < unified data collection



¹ Appointment of a GAL for a child is mandated by KRS 620.100 when further proceedings are required following a temporary removal hearing. KRS 387.305(2) requires that a GAL "be a regular, practicing attorney of the court."

Recommendation

The adequacy of GAL representation in the Commonwealth has been a topic of study and conversation for some time by many individuals and groups. As the discussions continue and multiply, the number of children in out-of-home care in Kentucky grows at an alarming rate. To move these children toward permanency, Kentuckians must recognize the immediate need for knowledgeable and energetic GALs. To achieve the goal of a well-trained pool of attorneys who are willing and able to serve as GALs, it is imperative that Kentucky devote adequate funding to this important work as well as enact statutory amendments and adopt court rules. To this end, the Commission urges all three branches of government to work toward funding and implementing the following recommendations:

I. Responsibilities of the GAL

A recurring theme heard and expressed by Commission members and witnesses was the lack of a clear understanding of what is expected of a guardian *ad litem*. To correct this deficiency, the Commission recommends the following responsibilities of GALs be statutorily enacted by the 2000 General Assembly. It is further urged that a Supreme Court Rule incorporating similar language be adopted.



- A. A GAL should determine the facts of the case by interviewing the child, Cabinet for Families and Children (CFC) family services worker, family members, therapist and others as necessary and by reviewing reports and other information. When interviewing a child is impractical (due to age or other circumstances), inspection of the home or place of care and/or an interview with the foster parent or caretaker is an adequate substitute. If these events do not occur, perhaps due to hostility toward the GAL or other safety concerns, the GAL should document the reason the action did not occur;
- B. A GAL should meet with and observe the child, assess the child's needs and wishes with regard to the representation and issues in the case, and explain the proceedings to the child according to the child's ability to understand;
- C. A GAL should appear at all hearings concerning the child;
- D. A GAL should make recommendations for specific and clear orders for evaluation, services, and treatment for the child and the child's family;

- E. A GAL should file all necessary pleadings and papers, and maintain a complete file with notes rather than relying upon court files;
- F. During the term of the appointment, a GAL should monitor the implementation of court orders and determine whether service(s) ordered by the court for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. If a GAL believes services are not being provided in a timely manner, or if he/she believes the family has failed to take advantage of these services, or if the GAL believes the services are not accomplishing their purpose, he/she should file a motion for appropriate relief. The GAL should assess whether the Cabinet for Families and Children (CFC) is making reasonable efforts as defined in state and federal law and should challenge the adequacy of those efforts when appropriate;
- G. Representation by the GAL continues so long as the appointing authority retains jurisdiction over the child;
- H. Consistent with the Rules of Professional Responsibility, a GAL should identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter;
- I. A GAL should consult, as necessary and consistent with existing rules of confidentiality, with other persons knowledgeable about the child and the child's family to identify the child's interests, current and future placements that would be best for the child, and necessary services for the child;
- J. A GAL should submit, as ordered, an oral or written report to the court;
- K. A GAL should advocate the child's best interests, but advise the court when the child disagrees with the attorney's assessment of the case.

II. Administration



To increase accountability of attorneys who serve as GALs and to organize training which is specific to attorneys practicing DNA cases, the Commission recommends creation of an office to coordinate GAL representation throughout the Commonwealth. Responsibility for training GALs should rest with the Kentucky Bar Association (KBA).

- A. The Administrative Office of the Courts (AOC) should create an Order of Appointment in DNA Cases which will provide the GAL access to

necessary records and reports and outline the responsibilities of the GAL. The order should also require the CFC to inform the court and the GAL of any disruption in the disposition of the child. Use of this standard order should be mandatory.

- B. A technology committee [composed of representatives from CFC, the AOC, the KBA, the Finance and Administration Cabinet (FAC) and the Chief Information Officer] should be established to oversee the sharing of electronic data to satisfy existing as well as future state and federal reporting requirements.
- C. A coordinator and one staff person, attached to the AOC, should be responsible for organizing training at district bar meetings in conjunction with the KBA; coordinating additional training of GALs with other agencies and CLE sponsors; recruiting GALs from the private bar; compiling and providing training material for GALs (including the *Best Practice Model for DNA Cases* developed by the Community Action Group); directing complaints about GAL practice to the KBA; coordinating and maintaining a list and an internet webpage of qualified GALs; serving as a resource person for GALs; and acting as a liaison with Court Appointed Special Advocates (CASA), Citizen Foster Care Review Board (CFCRB) volunteers as well as the CFC, the courts, Children's Advocacy Centers and others.
- D. The GAL should be added to the distribution list on the CFCRB review form to allow the GAL to receive a copy of each review on the child.
- E. A procedure should be created whereby the GAL is clearly identified in the court file.

III. Training

The lack of training for GALs is another concern. It is believed all attorneys serving as GALs in DNA cases will benefit from basic training. For this reason, the Commission recommends adoption of a Supreme Court Rule implementing mandatory continuing legal education (CLE) for GALs.



- A. A GAL must be a practicing member, in good standing, of the KBA.
- B. To be included on the list of certified/qualified GALs and to be eligible to serve as a GAL in a DNA case, an attorney should be required to complete an initial training of 7.5 hours of KBA-approved CLE in the following areas:
- 1.) Roles, responsibilities and duties of guardian *ad litem* representation;
 - 2.) Laws governing child abuse, neglect, dependency, foster care review, and termination of parental rights;
 - 3.) Role of social service agencies in handling dependency, abuse or neglect petitions;
 - 4.) Characteristics of abusive and neglectful families and of children who are victims; physical and medical aspects of child abuse and neglect;
 - 5.) Communication with children, especially when children are witnesses, and the use of closed circuit television;
 - 6.) Factors or conditions which indicate risk to a child's health or safety;
 - 7.) Domestic violence as it affects children and families;
 - 8.) Determining what is the best interest of the child;
 - 9.) The roles and functions of CASA and CFCRB;
 - 10.) Overview of district, circuit and family court;
 - 11.) Developmental needs of children;
 - 12.) Substance abuse issues; and
 - 13.) Cultural awareness.
- C. Each year, one track of district bar meetings should be devoted to GAL training.
- D. To remain eligible to be appointed a GAL in a DNA case, an attorney should be required to complete two (2) hours of GAL training every year after receiving initial training.
- E. Four (4) years after implementation of mandatory initial training for GALs, no attorney should be permitted to serve as a GAL unless he/she has completed the initial training.
- F. Certification of attendance at CLE for GALs should be submitted to the KBA. To provide flexibility in fulfilling the annual training requirement, a one-year carryover of two (2) credit hours should be permitted.
- G. During the four-year window while initial training is occurring, courts are encouraged to appoint attorneys as GALs who are adequately qualified to represent children.



- H. GALs should be encouraged to engage in training relevant to the practice of DNA cases over and above the mandatory training.
- I. Once standards are in place, AOC should provide training to the judiciary on the duties of GALs and items for which payment by FAC is permitted. This training should emphasize the differences between juvenile delinquency cases and DNA cases.
- J. Court Improvement Project should develop a training handbook for GALs.

IV. Funding

Payment of GALs is a function of the Executive Branch. For this reason, it is urged that FAC retain fiscal responsibility for paying GALs. To ensure uniformity of payment, the AOC should develop an appropriate *Request For Payment* form in conjunction with FAC. This form should collect data FAC deems vital to paying the GAL's itemized request for payment and document the services rendered.



Improving the legal representation of children in DNA cases will require an increased commitment of money. In light of the Commission's recommendation that the training of GALs should be mandatory, there must be an incentive for an attorney to attend training and accept appointment as a GAL. Unless the fee structure for GALs is improved, implementing the desired training requirements and responsibilities will fail. Therefore, the Commission offers the following recommendations to the General Assembly:

- A. Change the current statutory funding limits for GAL practice. Currently, a GAL receives a maximum of \$250 for a case which is resolved in district court and a maximum of \$500 when the case is resolved in circuit court. KRS 620.100 and CR 17.03. The Commission suggests statutory enactment of the following fee structure:
 - < up to \$250 for representation of one child or multiple children in the same family unit through disposition in district or family court
 - < up to \$250 for all reviews up to and including the mandatory 12-month dispositional review
 - < up to \$250 for all subsequent reviews between the 12-month dispositional review and the termination of parental rights (TPR) or other permanency solution (maximum of \$250 regardless of number of reviews)
 - < up to \$250 for petition for immediate entitlement (when filed in circuit or family court)
 - < up to \$500 for circuit or family court TPR and/or permanent custody
 - < up to \$250 for reviews after TPR (could be multiple reviews, but still a maximum of only \$250)
 - < up to \$250 per level of appeal

- B. The GAL should submit his/her request for payment to the judge for approval. There should no longer be a court order for payment. When the judge approves the payment, he/she should also certify the GAL has fulfilled all applicable statutory responsibilities.
- C. While a GAL may represent multiple siblings, payment under the recommended fee structure is based upon representation of all children within the same family unit.

V. **Miscellaneous**

- A. The Commission endorses expansion of CASA and CFCRB programs.
- B. The Commission encourages law schools to include specific discussion of GAL responsibilities within the family law curriculum.
- C. The fee schedule proposed by the Commission may create a disparity between the money available for GALs and that available for attorneys representing parents under KRS 620.100(1)(b) and (c). While outside the scope of the Commission's task, there may be a need to amend KRS 625.080.
- D. The GAL should be appointed at the filing of the petition.



CONCLUSION

The Commission has grappled with these issues since May, 1999. While debate has been polite, Commission members have been passionate in seeking ways to improve the legal representation of children in DNA cases. The Commission voted unanimously on many items, such as mandatory training for GALs, but there are other issues for which there was less than total agreement. For example, the Commission is recommending an increase in the fee cap for GALs. Several members consider the suggested increase to be inadequate. Some believe the cap should be eliminated. Others have suggested adoption of an hourly rate for attorneys, perhaps the same rate used for personal service contracts.



The Commission firmly believes specialized training for attorneys serving as GALs is critical. The Commission further realizes that to make training mandatory will require an incentive for attorneys to participate in the training. In many instances, that incentive is money. Unless significant increased funding is paired with the implementation of mandatory GAL training, Kentucky runs the risk of depleting the already small group of attorneys who are willing and able to serve as GALs in DNA cases and jeopardizing future federal funding opportunities.



The Commission has also suggested creation of a GAL coordinator attached to the AOC to organize GAL training and serve as a resource person and liaison for GALs. Since the AOC does not train attorneys, it may be more appropriate for the coordinator to be attached to the KBA.

The Commission's study and analysis of GAL representation in Kentucky did not reveal a perfect solution. However, the time has come for action and we urge all three (3) branches of government to unite and improve the representation of children in dependency, abuse and neglect cases.