

NO. 05 J 502304
06 J 500208
04 J 503703
05 J 504763-5
05 J 503450
04 J 502356
04 J 500023-5
05 J 504660-2
05 J 504132-4
01 J 500400
03 J 502589
00 J 501708-9

JEFFERSON CIRCUIT COURT
FAMILY DIVISION NINE

CERTIFIED COPY OF RECORD
OF JEFFERSON FAMILY COURT
BY David L. Nicholson
DAVID L. NICHOLSON, CLERK
BY D.C.

IN THE INTEREST OF MINOR CHILDREN

ORDER

This matter came before the Court on October 11, 2006, for a hearing on the motions of the Guardians Ad Litem ("GALs") and Court Appointed Counsel ("CAC") for the above cases for attorney's fees and to hold the Finance and Administration Cabinet ("FAC") in contempt for failure to pay attorney's fees as court ordered. These matters were consolidated for the purpose of the hearing. Contempt Orders shall be entered in the individual cases. The moving parties, Hon. Christopher M. Harrell, Hon. Joseph S. Elder II, Hon. Dana R. Kolter, Hon. John H. Helmers, Jr., Hon. Catherine Wallace, and Hon. Elizabeth Bricking, appeared. The Finance and Administration Cabinet appeared by counsel, Hon. M. Stephen Pitt and Hon. Rania M. Basha.

The statute that controls the appointment and compensation of GALs and CAC in dependency, abuse and neglect cases, KRS 620.100, was enacted on July 1, 1987. Since its enactment over nineteen years ago, the fee caps set in KRS 620.100 have not been amended for reasonableness or for cost-of-living adjustments. The statutes requiring annual reviews and

permanent custody were not enacted until 1994 and 1996 respectively. Permanency reviews are required by KRS 610.125 and Cabinet for Health and Family Services policy. In addition, they are required by federal law to obtain funding. See 42 U.S.C. 671. The legislature could not have anticipated in 1987 the post-dispositional work which would be required by appointed attorneys in dependency, abuse and neglect cases in 2007.

In September 1998, a performance audit was done on guardian ad litem practices in the Commonwealth of Kentucky. As a result of that audit, a commission was formed to make recommendations on guardian ad litem practices. The commission included distinguished professionals in this area of law. The commission's recommendations were published on October 25, 1999. The commission found that the current maximum fee set in KRS 620.100 and CR 17.03 were insufficient and should be amended by the General Assembly. The commission recommendations clearly reflect that the maximum fee set in KRS 620.100 cover the entire length of the case, including reviews subsequent to the disposition and/or termination of parental rights and permanent custody motions. The fee structure recommended by the commission was never enacted by the General Assembly.

The importance of the work done by GALs and CAC cannot be overstated. Kentucky courts were a national leader in providing attorneys for children and parents in dependency, abuse and neglect cases. Parent's interests in their children are fundamental liberty interests protected by the Fourteenth Amendment. There are very few judicial acts that have as profound effect as the actions made involving the parent-child relationship. There is little doubt in this Court's mind that many quality attorneys will no longer seek appointment as GALs or CAC if the legislature does not act to amend KRS 620.100. Additionally, attorneys should not be required to fulfill appointments which create undue financial hardships in violation of their due process rights. See SCR 3.130(6.2) and

SCR 3.130(1.16). Kentucky Rule of Professional Conduct 1.16 implicitly requires an attorney to not accept representation unless they feel they can see it through its completion. Under the FAC's new policy strictly enforcing the \$500 and \$250 maximums, the GALs and CAC are expected carry out appointments for unknown amounts of time, perhaps as long as eighteen (18) years. Complex dependency, abuse and neglect cases can continue for years until permanency is achieved. It is fair to assume that attorneys have relied on the past policy to accept appointments and therefore should not necessarily be bound by professional ethics to complete such appointments. See case history attached to this opinion.

Pursuant to KRS 620.100, GALs and CAC **must** be appointed by the court when the court determines, as a result of the temporary removal hearing, that further proceedings are required. FAC is charged with payment of the fees to GALs and CAC. The statute states

“The fee to be fixed by the court shall not exceed five hundred dollars (\$500); however, if the action has final disposition in the District Court, the fee shall not exceed two hundred fifty dollars (\$250).”

The issue before the court is what stages of the litigation are included in the maximum fee found in KRS 620.100. Also relevant is Civil Rule 17.03, which provides that guardians ad litem shall be appointed to defend infants or persons of unsound mind. Pursuant to CR 17.03(5), the court shall permit the GAL a reasonable fee for services, however fees allowed to GALs and CAC in dependency, abuse or neglect cases, shall not exceed the amounts specified in KRS 620.100.

The cases involved in this action are post-dispositional proceedings, actions for permanent custody pursuant to KRS 620.027, annual reviews pursuant to KRS 610.125 and motions for visitation following disposition. The attorneys received \$500 from FAC for fees incurred from the initiation of the Petition through the adjudication and disposition of the Petition. The GALs and CAC seek reimbursement for fees incurred after the disposition of the Petition. **There has been no**

motion by any of the attorneys for fees in excess of \$500 incurred through the dispositional hearing. The GALs and CAC argue that the maximum fee set in KRS 620.100 is for fees incurred through the adjudication and disposition of the Petition initiating the action as defined in KRS 620.140, not the conclusion of all proceedings involving the subject family of the Petition. The Finance and Administration Cabinet's position is that the maximum fee in KRS 620.100 prevent the payment of fees in excess of \$500 for GAL or CAC services in any case from its inception at the Petition through the entire life of the case.

FAC has admitted that the maximum fee in KRS 620.100 provides for woefully insufficient compensation for GALs and CAC, especially in cases that involve complex issues. However, the Court does not have the authority to order the Commonwealth to pay a fee in excess of that granted by the legislature. *M.S.M. v. Dep't for Human Resources*, 663 S.W.2d 752 (Ky.App.1983). The Kentucky Court of Appeals in *Commonwealth v. Coleman*, 699 S.W.2d 755 (Ky.App.1985), addressed the issue of whether additional fees could be ordered for an appeal in a termination of parental rights case. The court denied the motion for additional GAL fees, finding that the court could not exceed the authority granted to it by the legislature to assess a fee against the Commonwealth. *Id* at 756. Moreover, the court held that absent a statute explicitly providing for additional fees for appeal, the maximum fee in the statute is the limit an appointed attorney can receive for services. *Id*. Here, the legislature has provided for appointment and compensation of GALs and CAC in KRS 620.100, and the statute does not make a distinction between adjudication, disposition, or permanency planning. Kentucky case law is clear that statutes must be interpreted in accordance with their plain language. *Seaboard Oil Co. v. Commonwealth*, 237 S.W. 48, 49 (1922). Courts may not ignore the plain meaning of statute because that interpretation results in bad policy. See *ITT Comercial Fin. Co. v. Madisonville Recapping Co.*, 793 S.W.2d 849, 852

(Ky.App.1990) (citing *Bd. of Educ. of Nelson County v. Lawrence*, 375 S.W.2d 830(Ky.1963)).

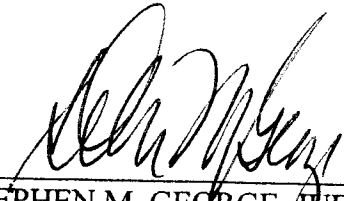
Therefore, no matter how unreasonable the maximum fee, the Court cannot order fees in excess of that which was specifically appropriated by the legislature in KRS 620.100.

For years FAC has paid fees in excess of \$500 for motions and permanency reviews after the disposition when the Judge in the case found they were necessary. On December 21, 2005, FAC sent a letter to be posted for the GALs and CAC attempting to clarify FAC's interpretation of the statutes governing the payment of fees. The letter stated that the maximum fee provided for in KRS 620.100 was interpreted to cover the entire representation, regardless of whether the same attorney was reappointed to represent the same client in the same case.

On June 1, 2006, the FAC sent a follow-up letter, once again to be posted for the GALs and CAC, stating that after July 1, 2006, the FAC would no longer process fee orders in excess of the maximum set by statute. FAC acknowledged that it had paid fees in excess of the statutory maximum set in the statute in the past, however, due to the exclusion of any funding for the GAL/CAC program in the 2007-2008 budget, FAC would now strictly adhere to the maximum fee. A memo was to be posted which stated in part: "Each GAL/CAC will receive only the statutory maximum for each case, regardless of re-appointments, length of time between disposition and permanency review, representation in a mediation, representation in an appeal, etc." FAC is not bound by its previous policy of paying in excess to the statutory maximum, so long as its current interpretation is correct. See *Delta Air Lines, Inc. v. Commonwealth of Ky., Revenue Cabinet*, 689 S.W.2d 14 (Ky.1985). Additionally, a government agency cannot alter the meaning of a statute by its historical interpretation of that statute. *GTE v. Revenue Cabinet*, 889 S.W.2d 788, 792 (Ky.1994).

It is therefore ordered that the GALs and CAC motions for fees in excess of the statutory limit imposed in KRS 620.100 are denied. This is a final and appealable order. There is no just

cause for delay in its entry.


STEPHEN M. GEORGE, JUDGE
JEFFERSON CIRCUIT COURT
FAMILY DIVISION NINE

Date: _____

1/11/07

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ENTERED IN COURT
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JAN 11 2007

BY 
DEPUTY CLERK