BEST PRACTICE METHODS AND ESSENTIAL ELEMENTS FOR THE CHILD'S GUARDIAN AD LITEM

Adapted from:

A BEST PRACTICE MODEL FOR DEPENDENCY, ABUSE AND NEGLECT CASES

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In Kentucky, it is presupposed that a guardian *ad litem* shall act in the capacity of an attorney; his or her obligation is to stand in the child's interests and defense demand; although not having the powers of a regular guardian, he or she fully represents the child and is endowed with similar powers for purposes of the litigation at hand; he or she is, therefore, both a fiduciary and lawyer of the child, and in a special sense the representative of the court to protect the minor. Black v. Wiedeman, Ky, 254 S.W.2d 344 at 346 (1953). It is the duty of a guardian *ad litem* (GAL) to make good litigation decisions on behalf of children. To perform this function effectively a GAL can be obliged to do several tasks.

The Basics

Children are not *sui juris*. This means that they are under what the law calls a "disability" and are not persons who act in their own right and are able to make binding contracts or otherwise act in their own behalf. A child involved as a party in dependency, abuse or neglect litigation is involved in a case governed by the Rules of Civil Procedure. KRS 610.080 (2). Under those rules when a guardian *ad litem* is appointed for a youngster, he or she is to defend the case for the child. CR 17.03 (2). Because the child is not *sui juris,* the GAL acts on the child's behalf for purposes of the lawsuit.

The COMMENTARY to the appropriate Kentucky Rule of Professional Conduct (Rule 1.14) teaches that a lawyer should ordinarily look to the legal representative of a child for decisions on that child's behalf. A guardian *ad litem* is both that legal representative of the child and the lawyer for the minor. Hence he or she can, as is required by KRS 387.305 (5), advocates for the child's best interest (rather than simply parroting the child's wishes).

GAL Chores-A Chronological View

TEMPORARY REMOVAL HEARING

1. Because ordinarily the Rules of Civil Procedure require that the guardian *ad litem* make the defense for a child, a GAL should be present at the temporary removal hearing (TRH) even if KRS Chapter 620 does not require it.

2. Check to see if "reasonable efforts" have been made to prevent the removal.

3. Often the GAL will have had no chance to speak to the child that he or she represents. Make an appointment to talk to that youngster before, at or right after the emergency custody hearing.

4. It is frequently overlooked that when a case does NOT start with a temporary removal hearing, there should be such a hearing within ten days of the filing of the petition. If the situation at home turns out to be worse than the Cabinet for Families and Children (CFC) initially thought, consider asking for a hearing concerning removal under KRS 620.080(1)(b).

5. Consider calling the parent (or parents) as a witness during the hearing. This can provide probative evidence and discovery. In addition, obtaining the parent's testimony on the record can facilitate a settlement of the case. A settlement helps prevent the delay during litigation that is unfriendly to children.

6. Consider asking for the appointment of a Court Appointed Special Advocate (CASA). KRS 620.500 *et seq*.

7. If the facts alleged or the relief requested in the petition are insufficient is some way, consider asking that the petition be amended. This could save a motion for a continuance later on the basis of surprise.

8. If appropriate, ask that the Court order the parents to sign a release of information so that the GAL can have access to professionals who are familiar with the child's situation and records concerning the child, including the mental health professional who has worked with the child.

BETWEEN THE EMERGENCY REMOVAL HEARING AND THE ADJUDICATION HEARING

1. If you have not already done so, OPEN A FILE at your office just as you would in any other case.

2. KEEP NOTES ABOUT THE CASE and continue to supplement them as the case evolves. To the extent possible GALs should FOLLOW CASES.

Attorneys appointed to the first case should be appointed on subsequent cases involving the same children. Even the first case of dependency, abuse, or neglect can involve complex facts, histories and issues. Without notes to consult, especially in a case, which comes back to court after extended intervals, memory may not be sufficient to allow for effective advocacy.

3. TALK TO THE CHILD preferably away from the hall outside the courtroom. Your law office, perhaps augmented with some toys, may be the best place to talk to the youngster, but the home of the child or school may also be appropriate. If a child is so young that he or she can have no meaningful understanding of proceedings, it is good idea for the GAL to see the child in some social setting where the individual nature of the youngster can be observed. If a preschool child is developmentally delayed, ask the family service worker about the "First Steps" program for that youngster.

4. Be sure that any mental health professional that has been working with the child gets the opportunity to provide information. A GAL may want some expert support for his or her task. Do not overlook that mental health professional as a source.

5. Do not allow parents or others to manipulate what the child says to the guardian *ad litem*. Let it be known that the GAL is making the litigation decisions. Parents who know this may be less determined in efforts to control what a child says. Children should not be responsible for litigation results and the GAL should make it clear to the child that her or she does not have that burden.

6. Sexual abuse cases present a special area of concern. Often the child who has made the pertinent disclosure will not be able to testify about what happened or the child may recant. When it appears that a child will be too shy or afraid to testify, consider whether a professional (doctor, psychologist, etc.) may be regarded as the child's "treating physician" thus able to testify about what the child has said. See Edwards v. Commonwealth, Ky., 833 S.W.2d 842 (1992).

7. If there is to be expert testimony at a hearing involving allegations of sexual abuse, that expert should be warned about commenting on the credibility of what the child has said. If such testimony is admitted over an objection at the hearing, that can provide an important issue for appeal. The law is not inclined to countenance expertise about credibility. See Hall v. Commonwealth, Ky., 862 S.W.2d 321 (1993).

8. The lawyer for the parents may want the child to be physically or psychologically examined. Authority pertinent to such motions would include CR 35.01, Turner v. Commonwealth, Ky., 767 S.W.2d 557 (1989) and Mack v. Commonwealth, Ky., 860 S.W.2d 275 (1993). Be prepared to argue that if there is to be such relief granted to a parent, it will suffice if a second physician merely reviews the findings of the first doctor and gives an opinion of the second

physician is that a new examination would not be of help then that may save the child of the unpleasantness of submitting to being looked at a second time. See Crawford v. Commonwealth, Ky., 824 S.W.2d 847 at 850 (19920.

9. Remember that even a child below school age can be competent to testify. If there is any question about competency, consider asking that there be a hearing before the adjudication hearing date to address the issue. A child may be competent to testify about some things and not others; argue that a youngster should be allowed to testify about those matters that are within his or her competence. With very young children, after a determination that the child is competent to testify, it is within the discretion of the court to decide whether it is appropriate to administer a formal oath. Gaines v. Commonwealth, Ky., 728 S.W.2d 525 at 526 (1987).

10. If a child will not be able to testify in a sexual abuse case when confronted with one or both of his or her parents, consider filing a motion to exclude that parent pursuant to KRS 421.350. If no closed circuit TV monitor is available for use in your county, make a motion asking the judge to request assistance from the Administrative Office of the Courts: (502) 573-2350.

11. If the child is going to testify at the adjudication, be sure that the youngster is prepared for what may be an unpleasant event. The prosecutor will probably want to talk to the child about testifying and more preparation than that may be traumatic or merely fruitless. However, the GAL should ensure that the job will be properly done. See to it that the child visits the courtroom before the date of the hearing.

12. Prepare the case for trial on behalf of the child. Investigate the case in an appropriate manner and if it appears that some witnesses with pertinent information will not be available, subpoena them.

13. Avoid *ex parte* communications at all stages of litigation. Judges are not, except as authorized by law, to initiate or consider *ex parte* or other communications concerning a pending or impending proceeding (Code of Judicial Conduct, CANNON 3, Adjudicative Responsibilities, section 4; see the Appendix to this document for the new version of the rule). The common informality of the juvenile session of district courts should not be abused by the guardian *ad litem*.

14. Consider whether the case or aspects of it can be resolved through an AGREED ORDER and be ready to do the necessary legal drafting. An agreed order amending the petition may make it easier to obtain an admission of dependency, abuse or neglect and expedite a child-friendly resolution to the case.

15. If the child was taken from home at the emergency removal hearing, attend the 5 day conference conducted by the CFC. Monitor reasonable efforts and take advantage of a good opportunity to learn about the facts of the case.

16. At the 5 day conference, if some improvements will make it best for the child to return home, be sure that the treatment plan (more properly called "case plan") does not set the parents up to fail. A bad treatment plan, one that piles on a lot of nice time consuming, but not strictly necessary tasks as a prerequisite to the return of the kids to their home, is to be avoided.

17. The 5 day conference will produce a treatment plan that may, as a practical matter, evolve into the family treatment plan thereafter. An otherwise appropriate treatment plan may present special problems for the families of the poor. A parent going to work for the first time may be set up to fail if that work experience is made more difficult if the children are returned home too soon.

BETWEEN THE ADJUDICATION HEARING AND THE DISPOSITIONAL HEARING

1. If the child testifies be vigilant and object if the child is being treated unfairly because age appropriate language is not being used. (Learn about age appropriate language if this subject is new to you).

2. If the child is going to testify, remember that he or she may need some breaks if the testimony is to be prolonged.

3. Remember that "dependency" applies to childcare or supervision that "is not due to an intentional act" of the custodian of the youngster. When such an "intentional conduct" does exist, argue that a finding of dependency is not proper but rather that "abuse" or "neglect" is the appropriate finding.

4. If the child has been removed and the case will go to the dispositional stage, determine if the CFC made "reasonable efforts."

5. If a continuance is necessary and there cannot be a disposition within forty-five days, be prepared to argue that the court should grant an extension of time. Written findings establishing the need for an extension and a finding the extension is in the child's best interest are needed. KRS 620.090 (5)

6. As guardian *ad litem* you speak for the child. The child does not legally speak for himself or herself. However, the child may not want the dispositional result that you are seeking. For example, the continuing use of crack cocaine in the home may not prevent the child from wanting to reside there. It is good for youngsters to know that the judge heard what they wanted. Calling the child as a WITNESS is a good practice when the GAL and the youngster hope for different dispositional outcomes. Let the child know that he or she will get to talk to the judge. Prepare the youngster for that opportunity and see to it that the child will be available when the disposition hearing is held.

7. In contested disposition cases, do not forget that the impact of live witnesses, especially expert witnesses, may be much more valuable than any report. The mental health provider who has been working with the child can be a very useful witness. The attorney for the parent may surprise you with witnesses who oppose what you believe to be in the best interest of the child and she or he may object to the admissibility of pertinent portions of the report of the CFC or the CASA. See to it that the needed witnesses will be available at the disposition hearing.

8. Beware of the SLOW pace of interstate home evaluations if an out of state family placement is what is best for the child. The youngster may be placed at a CFC placement for six months or more waiting to go to live with people that you think will provide the best home for the child. The CFC may have to obtain such an evaluation before recommending an out of state placement but the GAL does not. Obtain a criminal records check on out of state potential custodians and those living in the home with them. Ask the CFC to check to see if the home state of the potential has information in its form of Kentucky's CAN registry about those persons, which is adverse to them as potential caregivers. If common sense dictates out of state placement for the child, be prepared to call some witnesses to testify and recommend the out of state placement to the court without the formality of interstate home evaluation (you may find that the CFC gladly says nothing in opposition).

THE DISPOSITIONAL HEARING

1. Do not forget to raise the issue of child support when appropriate. It is usually wise to ask to have payments made through the local domestic relations office. If paternity has not been established, the court may direct that the child's mother file a paternity suit.

2. Long after disposition you may want to ask for a "show cause" hearing if parents are not obeying court orders. Ask that the orders be specific enough to defeat any future claim that a parent did not understand or that dilatory parental conduct added up to a kind of compliance.

3. Check to see if "reasonable efforts" were made.

AFTER THE DISPOSITIONAL HEARING AND BEFORE THE REVIEW HEARING

1. If there is an appeal, remember that by statute if it appears by affidavit or sworn testimony that the child would be in imminent danger if left with or returned to his parents, guardian, or other person party to the appeal then the circuit court may remove the child to a suitable place. KRS 620.155

2. When the disposition has resulted in the child being committed to CFC, if

the child has not already been returned, attend the six-month case review conducted by the CFC. If this request has not already been made, consider filing a motion to compel the parent or the CFC to comply with existing court orders.

3. Remember that "reasonable efforts" is not merely about reunification of families. See the clarification of "reasonable efforts" in Section 101 of the Federal Adoption and Safe Families Act of 1997 [P.L.105-89]. You should do your "reasonable efforts" duty when the CFC has determined to pursue termination of parental rights. When reunification amounts to goals not consistent with the permanency plan for the child, "reasonable efforts" should be made to place the child IN A TIMELY MANNER in accordance with the permanency plan and to complete whatever steps are necessary to finalize the placement of the child. If the CFC is lackadaisical in pursuing TPR then do not wait one year from removal for the KRS 610.125 hearing. The court has jurisdiction to make reviews under KRS 610.010 (11).

If appropriate, make a motion to challenge "reasonable efforts." Call witnesses, perhaps the child's mental health worker or a foster care review board member, who can tell what CFC delay is doing to the child. Because a finding of no reasonable efforts can result in the cut off of federal money to the Cabinet for placement of the child, the valid challenge to compliance with "reasonable efforts" should get TPR started.

If the child has been in foster care under the responsibility of CFC for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition, CFC does not have to continue with "reasonable efforts." See KRS 635.090 for the grounds for termination.

REVIEW PURSUANT TO KRS 610.125

1. Locate and talk to your client before the hearing. The child may have changed placements several times since you last had contact with him or her. The youngster may be frustrated by the slow pace of events and want to have some influence on the process.

2. Remember that if the commitment to CFC is ended by an order of the juvenile session of the district court the effect of that order will be destroy the present ability of CFC to pursue termination of parental rights litigation in the circuit court. Check on the foster care review board reports that are in the record for evidence about how things have gone in foster care.

3. If twelve months have passed and the child is still in foster care and common sense indicates that CFC in not expediting the case, a GAL should not be reticent, no matter what his or her former opinions were, to entertain second thoughts about the wisdom of committing the child to the CFC. Good intentions do not guarantee good results for a child. If a child is still in foster care and is

approaching the age of eighteen then consideration should be given to what will happen to the youngster on his or her eighteenth birthday. The GAL may want to explore the possibility that the child's commitment be extended beyond age eighteen. If the GAL recommends an independent living program the result may be that the child ends up with some important living skills at whatever age the child leaves the custody of the CFC. If the child will inevitably go back to the bad home from which he or she was removed on his or her eighteenth birthday then the GAL should consider recommending a return to the family before age eighteen, with appropriate services provided. The youngster who is going to go back home should have the best opportunity to have a stable platform from which to step off into adulthood.

4. Again if a child is in foster care limbo, TPR is needed, and the CFC is not doing a good job the remember that "reasonable efforts" should be made by CFC to place the child IN A TIMELY MANNER in accordance with the permanency plan and to complete whatever steps are necessary to finalize the placement of the child. Oppose a finding of reasonable efforts by the CFC; perhaps the real or threatened cut off of Federal money will spur the CFC to do a better job of fighting for the permanency for the child.

WHENEVER APPROPRIATE

1. PERMANENT RELATIVE PLACEMENT is available in district court. Children who are in foster care need permanency as much as those who are in institutional limbo. A district judge who has seen a dysfunctional family on a number of occasions may be in a better position to render prompt justice than his or her circuit court colleague who has never had contact with the child's family situation. Remind yourself to consider moving for permanent relative placement pursuant to KRS 620.027. That statute brings KRS Chapter 403 (best interest) standards into consideration and changes to KRS 403.270 brought about by 1998 legislation known as Senate Bill 205 makes it easier for a "de facto custodian" to win custody. Once such a custody award is made there will be no danger that a lackadaisical parent will belatedly complete a treatment plan and be entitled to destroy a child's new home on family reunification rationale.