
IN THE SUPREME COURT OF MISSOURI

KAREN M. BROWN

Respondent

vs.

ANTHONY T. BROWN

Appellant

Appeal No. SC93238

Appeal from the Circuit Court of St. Charles County

Hon. Ted House, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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POINTS RELIED ON

I. CHRISTINE MILLER HENDRIX HAS NO STANDING TO ASSERT THE RIGHTS OF THE MINOR CHILDREN TO SUPPORT HER CLAIM FOR FEES.

Silcox v. Silcox, 6 S.W.3d 899 (Mo. 1999)(*En Banc*)

II. CHRISTINE MILLER HENDRIX DID NOT PRESERVE ANY OF HER CONSTITUTIONAL CHALLENGES TO THE DECISION RENDERED BY THE COURT OF APPEALS.

State ex rel. Willoch v. Oehler, 154 S.W.2d 781 (Mo.1941)

III. THE COURT OF APPEALS UNANIMOUSLY AND CORRECTLY HELD THAT THERE IS NO AUTHORITY, STATUTORY OR OTHERWISE, FOR AN ATTORNEY APPOINTED AS GUARDIAN AD LITEM IN A CUSTODY PROCEEDING IN CIRCUIT COURT TO PARTICIPATE IN AN APPEAL FROM A DECISION OF THAT COURT

IV. IF THIS HONORABLE COURT WERE TO AGREE WITH THE CONCURRING OPINION OF JUDGE MOONEY THAT, AS A MATTER OF POLICY, PARTICIPATION OF GUARDIANS AD LITEM IN APPELLATE COURTS IS DESIRABLE, SUCH PARTICIPATION, AND THE SELECTION OF SUCH A GUARDIAN, SHOULD BE AUTHORIZED BY A COURT, EITHER TRIAL OR APPELLATE.

ARGUMENT

I. CHRISTINE MILLER HENDRIX HAS NO STANDING TO ASSERT THE RIGHTS OF THE MINOR CHILDREN TO SUPPORT HER CLAIM FOR FEES.

Christine Miller Hendrix asserts that the Eastern District’s rejection of her claim for fees for writing a brief in an appeal of a custody ruling violates the rights of the children of Anthony and Karen Brown “to open access to the courts under Missouri Constitution Article I Section 14.” Hendrix Sub. Br. 26. To the contrary, her success or failure in this appeal has nothing to do with the children’s “access to the courts.” The appeal regarding custody of the children in which she wrote a brief is over and done with. This appeal only involves the question of whether the trial court had authority to order their parents to pay her for writing a brief in that appeal. It can have no effect on the welfare of those children—other than to diminish the assets of their parents which are available for their support. Christine Miller Hendrix has no standing to assert any rights of the minor children, under Article I, Section 14, of the Missouri Constitution, in support of her own pecuniary interests. Silcox v. Silcox, 6 S.W.3d 899, 903 (Mo. 1999)(*En Banc*).

In the same vein, Christine Miller Hendrix invokes “the child’s federal and state due process rights are implicated in that her rights to protection are terminate

without notice or an opportunity to be heard”¹ Hendrix Sub. Br. 26. In her Motion for Rehearing/Application for Transfer, she told the Eastern District that their opinion “violates the Brown children’s Due Process and Equal Protections rights under Article 1 Section 10 and Section 18 of the Missouri Constitution and the Fifth Amendment of the Federal Constitution as applied to Missouri under the Fourteenth Amendment.” Motion for Rehearing 1-2. Again, the “rights” of these children have already been resolved, and Christine Miller Hendrix has no standing to assert such “rights” in support of her efforts to get paid. Silcox v. Silcox, *supra*.

In yet another attempt to wrap her claim for fees in constitutional garb, Christine Miller Hendrix asserts that “Appellant’s application^[2] would result in

¹ In the remainder of this sentence, Christine Miller Hendrix displays the type of negative and hubristic attitude towards the parents which impedes her function as a guardian ad litem: “the litigant parents cannot be trusted, as a general rule, to make decisions regarding the child’s best interests in the litigation process.”

² It is unclear exactly what Christine Miller Hendrix is referring to as “Appellant’s application.” If this is synonymous with appellant’s position, it should be noted that appellant’s position is identical to that unanimously adopted

violation of a child’s federal and state equal protection rights in that illegitimate children are deemed a suspect class under federal law and Missouri law provides that children are necessary and indispensable parties to all lawsuits involving their custody or support so their GAL’s are guaranteed to be able to represent their best interests in the appellate process and children born during a marriage should be afforded the same protections and rights to access the courts as other children - and oftentimes their own siblings.” *Ibid.* Apparently, the “Missouri law” which Christine Miller Hendrix refers to as providing “that illegitimate children . . . are necessary and indispensable parties to all lawsuits involving their custody or support” is MO. REV. STAT. § 210.830, which applies “to any action commenced under sections 210.817 to 210.852.” Those sections provide procedures for paternity suits. Section 210.840.3 provides that a “judgment or order . . . may contain . . . provision[s] . . . concerning” support and/or custody. (Emphasis added.). Section 210.830 provides that: A guardian ad litem shall be appointed for the child only if child abuse or neglect is alleged, or if the child is named as a defendant, or if the court determines that the interests of the child and his next friend are in conflict.” (Emphasis added.). The statute says nothing about GAL participation in any appellate process. Since, in the instant matter, the

by the Missouri Court of Appeals for the Eastern District.

“appellate process” is already over as far as the interests of the children are concerned, there is no issue of equal protection on which Christine Miller Hendrix can rely to require the parents to pay her fees. Again, she has no standing to assert any equal protection rights the Brown children might have had while the appeal regarding their custody was pending. Silcox v. Silcox, *supra*.

II. CHRISTINE MILLER HENDRIX DID NOT PRESERVE ANY OF HER CONSTITUTIONAL CHALLENGES TO THE DECISION RENDERED BY THE COURT OF APPEALS.

Christine Miller Hendrix represents to this Court that she has a right to be paid for writing a brief in father’s appeal of the custody decision under the Fifth (“due process”) and Fourteenth (“equal protection”) Amendments to the United States Constitution, and Article I, §§ 2 (“equal rights”), 10 (“due process”), 14 (“open courts”), and 18³ of the Missouri Constitution. Christine Miller Hendrix did not raise her reliance on any of these constitutional provisions in either of the courts below until she filed her motion for rehearing and application for transfer in the Eastern District, and thus has waived her right to rely on any of them.⁴ State ex

³ This article applies only to criminal cases.

⁴ Christine Miller Hendrix claims that Father has no “standing” to challenge her claim for fees and is “equitabl[y] estopped” from doing so because “[t]he first

rel. Willoch v. Oehler, 154 S.W.2d 781 (Mo. 1941).

pleading raising the issue of lack of authority to order GAL fees was Father's opening brief in this appeal." Hendrix Sub. Br. 31-32. Christine Miller Hendrix's memory is very short, for Father filed petitions for extraordinary writs both in this Court (SC92259) and the Eastern District (ED97728) raising this very issue. Father further raised this issue in the court of appeals in response to a Motion to Dismiss Appeal filed by Christine Miller Hendrix.

Christine Miller Hendrix also faults Father for not "order[ing] a transcript of the hearing" which resulted in the judgment here appealed from. Hendrix Sub. Br. 32. As she noted later in her brief, this was "a non-evidentiary hearing on the motion for a payout order," and the hearing was not on the record. *Id.* at 35.

Again, Christine Miller Hendrix did not challenge Father's right to appeal the judgment ordering him to pay fees to her for writing a brief on appeal and arguing same in the Eastern District. To the contrary, she told both the Eastern District and this Honorable Court in seeking transfer that resolving the issue of guardian ad litem participation in appeals was of great interest and importance. Now she says that this Court should hold that Father had no right to appeal her judgment, which, if so, would deter resolution of the very issues she previously claimed to be so important.

III. THE COURT OF APPEALS UNANIMOUSLY AND CORRECTLY HELD THAT THERE IS NO AUTHORITY, STATUTORY OR OTHERWISE, FOR AN ATTORNEY APPOINTED AS GUARDIAN AD LITEM IN A CUSTODY PROCEEDING IN CIRCUIT COURT TO PARTICIPATE IN AN APPEAL FROM A DECISION OF THAT COURT.

The Court of Appeals found that Christine Miller “Hendrix was appointed guardian ad litem for the minor children under Section 452.423 in connection with post-dissolution child custody proceedings between Father and Mother.” Opinion 2 (footnote omitted); *see* Opinion 4-7, 9. Christine Miller Hendrix claims that the Court of Appeals is wrong, and that she was appointed under MO. REV. STAT. § 452.785⁵. Hendrix Sub. Br. 29-30. She cites neither case law, nor statutory language, to support her naked assertion that the Court of Appeals was mistaken. *Ibid.*

Christine Miller Hendrix faults appellant (and, by implication, the Court of Appeals) for “fail[ing] to address Chapter 507.” Hendrix Br. 30. Chapter 507 deals with guardian ad litem appointments in suits filed by or against infants, and

⁵ Christine Miller Hendrix was appointed as guardian ad litem in Cause No. 0911-FC01389 on May 22, 2009. Section 452.785 was not enacted until July 10, 2009.

has nothing to do with the tenure of GALs in child custody cases.

On May 22, 2009, in Anthony Thomas Brown v. Karen Marie Brown, Cause No. 0911-FC01389, Judge Thornhill of the St. Charles County Circuit Court signed an order which read, in pertinent part, “Christine Miller Hendrix is reappointed^[6] as GAL for the minor children.” LF 56 in ED96426. There is no later order appointing her as Guardian ad Litem on appeal, either by a circuit or appellate judge. It follows that Christine Miller Hendrix can prevail in the instant matter only if appointment in a child custody proceeding at the circuit level inherently and automatically carries with it both the right and duty to continue to act as guardian ad litem in any appeal from the proceeding in which she originally was appointed. If this Court were to so hold, such ruling will have a global impact on all GALs in child custody proceedings, imposing on them the duty of participating in all appeals of such proceedings.⁷

⁶ Christine Miller Hendrix was originally appointed in an earlier incarnation of the proceedings, Cause No. 0711-FC00455-01, which had been dismissed by the court.

⁷ *Query* whether such a holding would also authorize a trial-court appointed GAL “to initiate an appeal of any disposition that he or she determines to be adverse to the best interests of the child.” *See* Opinion 5; MO. REV. STAT. §

The Court of Appeals opinion thoroughly analyzed the operative statute and case law: “we have found no statute or judicial decision authorizing Hendrix’s participation in the appeal filed by Father from the trial court’s disposition of child custody issues, or authorizing the trial court to order the parties to pay Hendrix’s fee relating to such participation.” Opinion 9. Christine Miller Hendrix has cited no such statute or judicial decision. Further, she has utterly failed to refute the Eastern District’s finding that “[t]he lack of authorization in Section 452.423, in contrast to the express grant of authority provided in Sections 453.025 and 211.462, is strongly indicative of the legislature’s intent to disallow a guardian to appeal the disposition of child custody matters.” Opinion 9.

IV. IF THIS HONORABLE COURT WERE TO AGREE WITH THE CONCURRING OPINION OF JUDGE MOONEY THAT, AS A MATTER OF POLICY, PARTICIPATION OF GUARDIANS AD LITEM IN APPELLATE COURTS IS DESIRABLE, SUCH PARTICIPATION, AND THE SELECTION OF SUCH A GUARDIAN, SHOULD BE AUTHORIZED BY A COURT, EITHER TRIAL OR APPELLATE.

Judge Mooney opined that “[t]he appellate court . . . profits greatly from the participation of a guardian ad litem *whose sole focus is the best interests*

211.462.3(1); and MO. REV. STAT. § 453.025.4(2).

of the child.” Concurring Opinion 1. That language does not describe the participation of Christine Miller Hendrix in the appeal for which she seeks to be paid by Father and Mother.

In the Statement filed by Father’s then-attorney with the Notice of Appeal, she alleged that “the Court’s failure to recognize the Guardian’s failure to actively participate in the litigation and take an active stance in investigating the children’s welfare and represent the total interests of the children was abuse of discretion.”

L.F. 87. In her Motion to Secure Costs on Appeal, Christine Miller Hendrix alleged:

“3. . . . Respondent [Father] filed a Notice of Appeal setting forth ten (10) issues on appeal, . . . two (2) of which specifically addressed the Guardian ad Litem.

“4. The two (2) appointment [*sic*] specifically addressing issues involving the Guardian ad Litem are as follows:

“(5) ‘The Trial Court’s inappropriate assignment of payment of fees for the expert custody evaluator and the guardian ad litem was contrary to the evidence presented, the relevant law and general

public policy,’^[8] and

“(9) ‘The Court’s acceptance of the Guardian ad Litem’s physical and legal^[9] custody recommendations was contrary to the children’s best interests and the Court’s failure to recognize the Guardian’s failure to actively participate in the litigation and take an active stance in investigating the children’s welfare and represent the total interests of the children was an abuse of discretion ^[10].’

“5. Due to the above allegations raised as issues on appeal, . . . the Guardian ad Litem feels compelled to file a responsive brief in the Court of Appeals . . . and allegations involving the Guardian ad Litem, issues (5) and (9), will require significant amounts of time to fully research and

⁸ Christine Miller Hendrix inappropriately characterizes this as an argument “against the assessment of GAL fees.” Hendrix Sub. Br. 17, 24.

⁹ Actually, the trial court’s removal of Father’s right to joint legal custody was not recommended by the GAL.

¹⁰ During Christine Miller Hendrix’s tenure as Guardian ad Litem in the trial court, Father lost 330 days of visitation, and the children amassed 150 days of school absences.

brief.”

L.F. 89-90.¹¹

Thus, Judge House ordered Father and Mother to pay Christine Miller Hendrix for the time she spent defending her own performance as guardian ad litem at the trial level.¹²

Section 452.423.1 grants each party to a custody dispute one

¹¹ Christine Miller Hendrix avers that she filed her first motion to secure fees on appeal “on September 26, 2011 after receiving a copy of the civil case information sheet.” Hendrix Sub. Br. 34. The notice of appeal had been filed on March 3, 2011, six months earlier. L.F. 194-98. Coincidentally (?), the “first motion to secure costs on appeal” was filed shortly after she had been disqualified in the circuit court. L.F. 17.

¹² Christine Miller Hendrix represents to this Court that Mother was “ordered to pay more in fees than Appellant Father.” Hendrix Sub. Br. 7, 21. This is untrue. Both parties were ordered to pay \$2500 on October 19, 2011, which sum Father paid. S.L.F. 91. Father was ordered to pay an additional \$1228.00 on April 10, 2012. S.L.F. 106-107.

disqualification “in each proceeding.”¹³ Treating a guardian ad litem’s appearance in an appellate court as simply an automatic continuation of a trial court appointment, as Christine Miller Hendrix proposes, creates situations rife with conflict of interest, with Father and Mother being powerless to challenge that conflict.

Of course, the primary duties of a guardian in the trial court are to investigate and make recommendations to the trial judge. These functions presumably have already been carried out prior to entry of a final judgment, and the results thereof are of record for the appellate court. In most appeals from child custody decisions, the interests of the minor children are protected by the briefing and arguments of the parties. Requiring the parents to pay for redundant briefing or argument by a guardian ad litem would simply reduce the resources available

¹³ On August 18, 2011, in Case Number 0711-FC00455-03, Judge Ted House appointed Christine Hendrix as Guardian ad Litem. L.F. 16. On that same date, Respondent Anthony Brown’s attorney disqualified Christine Miller Hendrix as Guardian ad Litem. L.F. 17. On September 22, 2011, in Cause No. 0711-FC-00455-02, the above-cited Motion to Secure Costs on Appeal was filed by Christine Miller Hendrix. L.F. 19. An identical motion was filed on September 26, 2011, with a handwritten amendment of the cause number from “02” to “03.”

for the support of those children. However, in due deference to the opinion of Judge Mooney, there may be instances where such additional input may be helpful, or even necessary. Appellant respectfully suggests that, rather than a universal rule requiring all trial court GALs to participate in appeals of the child custody proceedings they were appointed for, such appointments be left to the discretion of either the circuit court, or the court of appeals, with each party to the appeal having the opportunity to disqualify the sitting guardian ad litem, or whoever else may be appointed.

CONCLUSION

Christine Miller Hendrix was not appointed by any court to participate in the appeal for which she seeks to be paid. She has not cited a single statute, judicial decision, or court rule which authorized her to write a brief or argue Father's appeal of the judgment in the Family Access/Child Custody proceeding. The only basis on which this Honorable Court could reverse the court of appeals is to hold that all Guardians ad Litem appointed by circuit judges in child custody matters are automatically thereby appointed to participate in all appeals filed in the cases to which they were appointed. Her johnny-come-lately attempts to piggy-back her own financial interests on supposed constitutional rights of the minor children is not a proper basis for grafting such a rule onto the statute. Any such

change should include judicial determinations on a case-by-case basis of the utility of such an appointment in a particular appeal, with the parties to such appeals having the right to reject the GAL who participated in the proceeding which one of them is appealing.

Respectfully Submitted

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CERTIFICATES

Copies of Appellant's Reply Brief were served on Christine Miller Hendrix, by serving counsel via the e-filing service, and on Karen M. Brown, by mailing same to 18736 Highway C, Cassville, MO 63625, on this 31st day of July, 2013. This Brief contains the information required by Rule 55.03. It complies with the limitations contained in Rule 84.06(b). It contains 3,184 words. It has been formatted on WordPerfectX5 and converted to PDF on Adobe Reader. The electronic mail file containing the brief has been scanned using AVG2012 and found to be virus free.

/s/ Alan Kimbrell /s/

