IN THE SUPREME COURT OF THE STATE OF MISSOURI

ANTHONY BROWN,	)	
Appellant	)	**Appeal No. SC93238**
	)	
v.	)	
	)	
KAREN BROWN, et al	)	
Respondents.	)	

SUBSTITUTE BRIEF OF RESPONDENT GUARDIAN AD LITEM

On appeal from the Circuit Court of St. Charles County

Respectfully submitted,

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I. The trial court did not err in ordering Father to pay a portion of the Respondent's fees incurred for work on appeal in that:

a) Chapter 507 of the Missouri Code, applicable to all civil cases, contains sufficient language empowering a trial court to award fees for a guardian ad litem after entry of a final judgment;

b) The Respondent was not appointed pursuant to Mo. Rev. Stat. Sec. 452.423 but was appointed under Missouri's Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) under Mo. Rev. Stat. Sec. 452.785 and there is no language of limitation under the uniform act implying that a guardian ad litem's protective powers are terminated upon entry of a final judgment;

c) Applying Mo. Rev. Stat. Sec. 452.423 to bar a guardian ad litem's participation in an appeal creates a conflict with Mo. Rev. Stat. Sec. 1.092 in that one of Missouri's initial statutes provides that all laws shall be construed to protect the best interests of Missouri's children;

d) Barring the children from having a legal advocate on appeal would result in an unconstitutional application of Mo. Rev. Stat. Sec. 452.423 which violates the Brown children's due process rights and equal protection rights as afforded to them under Missouri's Constitution under Article I Sections 2 and 10 and Section 18 and the Fifth Amendment of the Federal Constitution, as applied to Missouri under the Fourteenth Amendment in that children born outside of a marriage are deemed necessary and indispensable parties under Missouri's Uniform Parentage Act set forth in Mo. Rev. Stat.

Sec. 210.830 which would afford the children an absolute right to representation on appeal as a party had they been born outside of a marriage. There is no legitimate or rationale reason or basis for affording children born outside of marriage with different rights to representation on appeal than the Brown children. Said application would also violate the mandate of Mo. Const. Article I, Section 14 guaranteeing every Missouri citizen open access to the Courts;

e) Respondent's personal Due Process Rights and access to the open courts under the provisions set forth *supra* are further implicated under Appellant's analysis in that the Respondent GAL participated in the appeal and Father filed no objection with the Court of Appeals challenging the GAL's actions and therefore acquiesced to her spending time and resources on the appeal and the GAL was not afforded notice of Father's position that she lacked any authority to file a brief until Father's first pleading raising the issue – his opening brief on this transferred appeal; and

e) Under the 2011 Judgment affirmed on appeal, Mother was granted sole legal custody and Mother has not filed any Notice of Appeal challenging the order to pay the guardian ad litem fees on appeal, despite being ordered to pay more in fees than Appellant Father. Father further lacks standing to challenge any portion of the GAL payment order applied to Respondent Mother in that he does not have authority to represent Mother on appeal.

Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503, 512 (1991)

Strahler v. St. Luke's Hospital, 706 S.W.2d 7 (Mo. 1986)

Mo. Rev. Stat. Sec. 1.092

Mo. Rev. Stat. Sec. 452.785

II. The trial court did not err in ordering Father to pay Respondent GAL fees due to evidentiary insufficiency in that Father did not order a transcript of any hearing on the motion for GAL fees on appeal or failed to secure the record he required to preserve his objections on appeal. Separately, the Respondent did produce evidence of her billing as attached to her second motion for fees and the trial court's determination as to whether the Respondent's fees were reasonable and necessary are subject to deference to the fact finder.

Basham v. Williams, 239 S.W.3d 717 (Mo. Ct. App. 2007)

Clark v. Clark, 101 S.W.3d 323 (Mo. Ct. App. 2003)

S.I.E. v. J.M., 199 S.W.3d 808 (Mo. Ct. App. 2006)

St. Paul Ins. Co. v. Carlyle, 428 S.W.2d 753 (Mo. Ct. App. 1968)

SUMMARY OF THE CASE

Unfortunately, this case involves a family in emotional turmoil and the protection of the best interests of the remaining minor children. Respondent Christine Miller-Hendrix has been the Guardian ad Litem for the Brown children since 2007. Despite pending motions to modify, the first Missouri Judgment for this family was entered by the Circuit Court of St. Charles County on January 24, 2011 after a five (5) day trial. Father filed an appeal with the Eastern District of Missouri. Respondent Christine Miller-Hendrix participated in the appeal and appeared at oral argument, without objection from Appellant Father. Her views as the GAL were distinct from either parent's views.

The Court of Appeals affirmed the Judgment and the GAL filed her motion for fees related to her participation and appearance on the appeal. The trial court granted her attorney fees motion and was awarded the previously paid funds in trust and an additional $2500 from Father and $ 1228 against Mother and Father appealed this Judgment. (LF 34-35). The Eastern District held, in a case of first impression, that Missouri GALs have no authority to act on a case once a Judgment is final – even when a case is on appeal.

On Father's second Point Relied On, Father alleges evidentiary insufficiency as to the GAL's work. As a result of these issues, a summary of the 2011 Judgment which started the first appeal is also provided.in the Statement of Facts.

STATEMENT OF FACTS

Appellant Father and Respondent Mother were divorced in State of Texas on February 15, 2007. [1] (SLF 1-35). During the parties' divorce in Texas, Respondent Mother moved to Missouri however Texas retained control over the mediated dissolution matter. (SLF 3). Respondent Mother was granted the exclusive right to designate the children's primary residence regardless of location. (SLF 9).

The parties were designated as "Joint Managing Conservators" of the then minor 6 children – with rights which the Circuit Court of St. Charles County found to be similar to Missouri's legal custody laws. (SLF 5, 7-11, 37). Each parent's rights as a "managing conservator" were delineated in the Texas decree. (SLF 7-8). The Texas decree also set forth each parent's managing conservatorship duties, punishable as a misdemeanor if required notifications are not provided. (SLF 8-9). Separate from the "managing conservatorship" orders, the parties were awarded joint "possession" with terms similar to Missouri's physical custody laws. (SLF 11-19, 37).

Texas law varies from Missouri law on issues of child support as well. The Texas decree provided that child support terminates at the age of 18 or a child graduating high school, whichever shall occur last. (SLF 20-21, 38). The Texas decree also provided that

[1] The original legal file submitted in ED96426 will be referenced as (LF). The parties have also filed a stipulated supplemental legal file which will be referenced as (SLF). There are paginated "blank" pages in the Texas decree as received by the Circuit Clerk of St. Charles County.

child support was an obligation of Father's estate and did not terminate upon Father's death. (SLF 24). Additionally, should Mother die, Father's child support obligation continued for the children's benefit. (SLF 24).

The Texas decree contained some language pertinent to this appeal. Both parties were awarded:

- "the independent right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children." (SLF 9, 11); and
- "except when a guardian of the children's estate or a guardian or attorney ad litem has been appointed for the children, the independent right to act as an agent of the children in relation to the children's estates if the children's action is required by a state, the United States, or a foreign government…" (SLF 9, 11);

The Circuit Court of St. Charles County first appointed Respondent, Christine Miller Hendrix as the guardian ad litem (GAL) for this family August 27, 2007. (LF 3, 10). Ms. Miller Hendrix entered her appearance as the guardian ad litem (GAL) on September 7, 2007. (LF 11). During the litigation phases of this case, the GAL was awarded fees from both parties and allowed to disburse funds held in her trust account. (LF 13, 14). The 2007 motion to modify was deemed "never fully adjudicated." (SLF 38).

On January 24, 2011 the Circuit Court of St. Charles County issued its Judgment as to pending motions for contempt and modification and a family access motion (SLF

36-72) with an incorporated parenting plan. (SLF 73-83). Respondent GAL represented the children at this five (5) day trial and the GAL filed a proposed Parenting Plan. (SLF 36).

Missouri Court Jurisdiction

The 2011 Judgment set out the procedural history of the dissolution matter. The Court found that the Texas "Agreed Final Decree of Divorce" was registered in the Eleventh Judicial Circuit on February 14, 2007 as Case No. 0711-FC00455. (SLF 38). The terms of the Texas Decree remained unchanged as of the date of trial (SLF 38, 59). While there was a previous motion to modify, the Court found the previous motion to modify was "never fully adjudicated." (SLF 38) while noting that the judgment was addressing Father's Motion to filed on June 25, 2009 (SLF 59).

Father's Family Access Motion

The 2011 Judgment addressed Father's motion to modify custody and child support, his motion for contempt, and a separately filed family access motion. The Court found "[t]here is no question that Father has a right to seek the relief that he requests in his motions. But it appears that he would rather prevail in the lawsuit against his ex-wife than have a relationship with his children." (SLF 66-67).

Father's family access motion was meritorious and the Court found that Mother interfered in visitation with the minor children to the following degree: Jonathan 223 days, Joseph 243 days, Haven 62 days, Hannah 62 days, Ellie 62 days and Emma 34 days. (SLF 42-43). By the time of trial, Jonathan was 18, emancipated and became a parent at age 16 and that "the days lost are irretrievable…." (SLF 42, 63). The Court

concluded that forcing Joseph to spend compensatory time with Father would be harmful to Joseph. (SLF 42). Father was awarded compensatory time with the children under his Family Access Motion, as follows: Haven – 62 days; Hannah – 62 days; Ellie – 62 days; and Emma – 34 days. (SLF 70). The Court also fined Mother $500 for missed time with Jonathan and Joseph and ordered Mother to pay $2500 in Father's attorney fees. (SLF 70).

Dr. David Clark – custody evaluator

Dr. David Clark, Ph.D. was the court appointed custody evaluator whom Father introduced as his expert witness for a nearly full day of testimony. (SLF 51). The Court's findings regarding Dr. Clark's testimony and recommendations were comprehensive. The Court entered the following findings:

- Dr. David Clark was appointed by the Court on December 15, 2009 to provide a custody evaluation and each party was ordered to schedule appointments and make payments by certain dates. (SLF 51). "Mother informed Dr. Clark that she did not intend to return the required paperwork nor pay him as described in the Court Order and she had not made any appointments to commence the evaluation. It was only after a Motion for Sanctions was filed by Father's counsel that Mother proceeded to make the required appointments and participate in the evaluation process." (SLF 51). Mother was previously ordered to pay $3500 of Dr. Clark's fee and, as of trial, had paid $2000. (SLF 51). Father had paid $15,340 as of trial and Father later chose Dr. Clark as his expert witness and Dr. Clark testified for "virtually the entire day" under Father's subpoena. (SLF 51)

- Dr. Clark's assessment concluded Father was a "generally psychologically normal individual with no significant psychopathology. He does appear to be somewhat rigid and he may have difficulty being flexible in responding to his children's interest and desires. [Dr.] Clark states that Father has come to demonize Mother and to blame her for virtually all of the problems that this family has experienced. [Dr.] Clark concludes that Father's theory that Mother is the major source of the problems does not fit well with the facts. [Dr.] Clark concludes that the Father's requests that Mother's contact with the children be supervised or cut off or that Mother needs to enter some sort of batterer's program show just how off-base his opinions about Mother are. [Dr.] Clark concludes that Father's belief that Mother might present some realistic threat of harm to the children or to him is a grossly inaccurate perception of Mother." (SLF 53);
- Dr. Clark concluded "that Mother appears to have some mild to moderate problem with emotional and behavioral regulation." (SLF 53-54); Dr. Clark expressed concern that the children's needs for regular school attendance and regular dental care are not being adequately met in Mother's care. (SLF 54) Dr. Clark believed a change in custody for the girls would "cause more harm than benefit." (SLF 54);
- Dr. Clark believed that Joseph "is seriously dysfunction and declining in his current environment." (SLF 54). While transferring Joseph's custody to Father bears the possibility of Joseph running away, "Dr. Clark testified a transfer of custody to Father is the least detrimental alternative for Joe." (SLF 54). The Court rejected this

recommendation and found Dr. Clark's testimony in support of this recommendation to not be credible. (SLF 64-65)

- Dr. Clark concluded that the boys are alienated due to their age during the divorce and their witnessing their Mother's emotionalist and distress of the divorce and this witnessing caused the children to "side with" Mother and "defend" her against Father. (SLF 55). Mother testified that she plays "whatever emotional cards I have to make the children do what I need them to." (SLF 55).
- Dr. Clark was concerned about the children's educational truancy and Mother first tried to blame Father but she ultimately stated "They're just kids. It doesn't real matter" and Dr. Clark found this attitude unacceptable from a high school physics teacher. (SLF 56, 60).

Respondent Christine Miller-Hendrix as Guardian ad Litem

The Court noted that the Respondent was originally appointed for the six children when Mother filed her motion to modify in 2007. (SLF 57). When Father filed his Family Access Motion, Motion for Contempt and motion to modify, the Respondent was re-appointed as the Guardian ad Litem. (SLF 57). The Respondent charged 67.4 hours of time at the previous GAL rate of $165 per hour for a total payment due to the GAL of $11,121. (SLF 57). At the time of trial, Father had paid $3,900 and Mother had paid $2,600. (SLF 57). The GAL provided the Court with a report and recommendation which concurred with most of Dr. Clark's findings except for recommending transfer of custody of Joseph. (SLF 57).

In the 2011 Judgment, the Respondent was awarded a fee of $11,121 and Mother was ordered to pay an additional $1,385.30 and Father was ordered to pay an additional amount of $3,234.70 for GAL fees. (SLF 69-70).

The Court's custody findings

The trial court addressed each of the custody factors under Mo. Rev. Stat. Sec. 452.375. (SLF 61-73). The Court stated "This Court is far more interested in protecting these wonderful and amazingly resilient children than in accommodating the wishes of their selfish parents." (SLF 61). The parents were found to have caused "substantial emotional harm to their children." (SLF 62). The Court found each parent's behavior problematic – Father's routine involvement of police civil stand-by for each visitation period may have contributed to "Joseph's panic reaction of fleeing from the police at a speed in excess of 90 miles per hour and wrecking his mother's car when Office Ochs attempted to stop him for speeding." (SLF 62-63). Joseph is now the "man of the house" with Jonathan away with his baby much of the time and the trial court rejected all arguments for Joseph to reside with Father. (SLF 64-65).

The trial court modified the Texas decree by awarding Mother sole legal custody of the five unemancipated children. (SLF 68). The parties retained joint physical custody. (SLF 68).

Father's Notice of Appeal on 2011 Judgment

Pursuant to Eastern District Court Rules, Father filed a civil case information form listing the issues he expected to raise on appeal. (SLF 84-87). Many of the issues deal with the Court's custody Judgment and issue number 9 addressed the trial court's

"acceptance" of the "Guardian ad Litem's physical and legal custody recommendations…" and argued that the trial court failed to recognize that the Respondent GAL actively participated in the litigation and failed to take an active stance in investigating the children's welfare and represent the total interests of the children. (SLF 87). Father also argued against the assessment of GAL fees. (SLF 87). Father listed the GAL on the Civil Case Information Form. (SLF 84).

GAL's motion for fees now on appeal

The Respondent filed two motions to secure fees on appeal related to the 2011 Judgment. Her first motion was filed on September 26, 2011 after receiving a copy of the civil case information sheet. (SLF 88-90). On October 19, 2011 Father was ordered to provide the GAL with a copy of the transcript and the record on appeal by the Circuit Court and each parent was ordered to deposit $2500 into the GAL's trust account within 45 days. (SLF 91).

On February 21, 2012 the GAL filed her second motion for GAL fees for services related to the appeal. (SLF 91). Neither party paid the GAL fees previously ordered as of said date, and the GAL amended her estimated expenditures for the appeal to be $4,698.00 at the court rate of $180 per hour and a copy of counsel's bill was attached to the motion. (SLF 91-104).

After a non-evidentiary hearing on the motion for a payout order, the Court issued its amended Judgment ordering Appellant to now pay $1228 for GAL fees and Respondent Mother to pay $2500 to the GAL. (SLF 106-107). Appellant did not request

an evidentiary hearing and the Judgment entered on that date does not state it was entered over Father's objection. It bears Father's attorney's signature – David Howard.

Respondent Mother has not filed a Notice of Appeal challenging the GAL's legal representation of the children and she was awarded sole legal custody of the children in the 2011 Judgment. (SLF 68-69).

The continuance of the civil case

While the 2011 Judgment was on appeal, litigation between these parents has continued and the Court appointed Respondent as the GAL on August 18, 2011 for case number 0711-FC00455-03 after Father filed a request for a temporary restraining order. (LF 16). On the same date, Appellant disqualified Respondent in the -03 case. (LF 17). A new GAL was appointed for the Brown children. The -03 case was concluded on September 6, 2011, per case.net. Father filed a Notice of Appeal on that case and the Eastern District dismissed Father's appeal on June 1, 2012 for failure to perfect the appeal in cause number ED97776.

On June 6, 2012, Father filed a motion to prevent Mother's relocation and a motion to modify in cause number 0711-FC00455-04. A review of case.net shows that Mother filed a motion for a change of venue to Barry County, Missouri and her motion was granted on March 14, 2013. The parties continued to litigate the change of venue issue and the change of venue order was vacated on April 8, 2013. However, on April 17, 2013, the Circuit Court of St. Charles County rescinded the order granting the change of venue after learning that the Circuit Court of Barry County had been filed and accepted and issued a cause number of 13BR-DR00074. The parties are continuing to

argue the change of venue issue and the matter is set for hearing in Barry County on August 19, 2013.

ARGUMENT

I. [Trial court had jurisdiction to award GAL fees relating to work on appeal]

I. The trial court did not err in ordering Father to pay a portion of the Respondent's fees incurred for work on appeal in that:

a) Chapter 507 of the Missouri Code, applicable to all civil cases, contains sufficient language empowering a trial court to award fees for a guardian ad litem after entry of a final judgment;

b) The Respondent was not appointed pursuant to Mo. Rev. Stat. Sec. 452.423 but was appointed under Missouri's Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) under Mo. Rev. Stat. Sec. 452.785 and there is no language of limitation under the uniform act implying that a guardian ad litem's protective powers are terminated upon entry of a final judgment;

c) Applying Mo. Rev. Stat. Sec. 452.423 to bar a guardian ad litem's participation in an appeal creates a conflict with Mo. Rev. Stat. Sec. 1.092 in that one of Missouri's initial statutes provides that all laws shall be construed to protect the best interests of Missouri's children;

d) Barring the children from having a legal advocate on appeal would result in an unconstitutional application of Mo. Rev. Stat. Sec. 452.423 which violates the Brown children's due process rights and equal protection rights as afforded to them under Missouri's Constitution under Article I Sections 2 and 10 and Section 18 and the Fifth Amendment of the Federal Constitution, as applied to Missouri under the Fourteenth

Amendment in that children born outside of a marriage are deemed necessary and indispensable parties under Missouri's Uniform Parentage Act set forth in Mo. Rev. Stat. Sec. 210.830 which would afford the children an absolute right to representation on appeal as a party had they been born outside of a marriage. There is no legitimate or rationale reason or basis for affording children born outside of marriage with different rights to representation on appeal than the Brown children. Said application would also violate the mandate of Mo. Const. Article I, Section 14 guaranteeing every Missouri citizen open access to the Courts;

e) Respondent's personal Due Process Rights and access to the open courts under the provisions set forth *supra* are further implicated under Appellant's analysis in that the Respondent GAL participated in the appeal and Father filed no objection with the Court of Appeals challenging the GAL's actions and therefore acquiesced to her spending time and resources on the appeal and the GAL was not afforded notice of Father's position that she lacked any authority to file a brief until Father's first pleading raising the issue – his opening brief on this transferred appeal; and

e) Under the 2011 Judgment affirmed on appeal, Mother was granted sole legal custody and Mother has not filed any Notice of Appeal challenging the order to pay the guardian ad litem fees on appeal, despite being ordered to pay more in fees than Appellant Father. Father further lacks standing to challenge any portion of the GAL payment order applied to Respondent Mother in that he does not have authority to represent Mother on appeal.

A. Standard of Review

Appellant's application of Mo. Rev. Stat. Sec. 452.423 would create a constitutional "as applied" challenge on the grounds that it deprives the Brown children of legal representation without due process of law and denies them equal protection. Under *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), a statute, as applied, is subject to strict constitutional scrutiny and be upheld if narrowly tailored to serve a compelling state interest.

This Court, in *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (1991) addressed the standard of review for equal protection claims. This Court held that a statute that neither creates suspect classifications nor impinges on fundamental rights will withstand constitutional challenge if there is a rational relationship to a legitimate state purpose. *Id.* However, one does not reach the rationale relationship prong if the Court finds that the statute creates a *suspect* classification. A *suspect* classification includes classes based on illegitimacy. *Id.* at 512. In this case, Respondent's as applied Equal Protection challenge is premised on the creation of a dual standard for illegitimate versus legitimate children in that children born outside of the marriage are guaranteed representation throughout the entire process, including appeal, by virtue of being parties to their parents' lawsuit under Mo. Rev. Stat. Sec. 210.830.

This Court held that "In terms of equal protection, the presumption of constitutional validity vanishes when the purpose of the legislation is to create classes upon criteria that are inherently suspect or impinges upon a fundamental right…In such a case, the challenged state legislation is subjected to 'searching judicial scrutiny.' *Id.* at

512. Missouri's equal protection rights are set forth in Missouri Constitution Article 1 Section 18. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides "heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Missouri's Constitution affords litigants due process rights under Article 1 Section 2 and 10. The fundamental rights infringed upon are the Brown children's rights to open access to Missouri Courts, as afforded in Article 1 Section 14 of the Missouri Constitution.

B. Facts applicable to point

1. Texas Judgment

Appellant Father and Respondent Mother were divorced in State of Texas on February 15, 2007. (SLF 1-35). The parties were designated as "Joint Managing Conservators" of the then minor 6 children – with rights which the Circuit Court of St. Charles County found to be similar to Missouri's legal custody laws. (SLF 5, 7-11, 37). Each parent's rights as a "managing conservator" were delineated in the Texas decree. (SLF 7-8). The Texas decree also set forth each parent's managing conservatorship duties, punishable as a misdemeanor if required notifications are not provided. (SLF 8-9).

The Texas decree contained some language pertinent to this appeal. Both parties were awarded:

- "the independent right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children." (SLF 9, 11); and
- "except when a guardian of the children's estate or a guardian or attorney ad litem has been appointed for the children, the independent right to act as an agent of the children in relation to the children's estates if the children's action is required by a state, the United States, or a foreign government…" (SLF 9, 11).

2. Sole Legal Custody awarded to Mother in 2011

The trial court modified the Texas decree by awarding Mother sole legal custody of the five unemancipated children. (SLF 68). The parties retained joint physical custody. (SLF 68).

3. Father's Notice of Appeal on 2011 Judgment

Pursuant to Eastern District Court Rules, Father filed a civil case information form listing the issues he expected to raise on appeal. (SLF 84-87). Many of the issues deal with the Court's custody Judgment and issue number 9 addressed the trial court's "acceptance" of the "Guardian ad Litem's physical and legal custody recommendations…" and argued that the trial court failed to recognize that the Respondent GAL actively participated in the litigation and failed to take an active stance in investigating the children's welfare and represent the total interests of the children. (SLF 87). Father also argued against the assessment of GAL fees. (SLF 87). Father listed the GAL on the Civil Case Information Form. (SLF 84).

4. GAL's motion for fees now on appeal

The Respondent filed two motions to secure fees on appeal related to the 2011 Judgment. Her first motion was filed on September 26, 2011 after receiving a copy of the civil case information sheet. (SLF 88-90). On October 19, 2011 Father was ordered to provide the GAL with a copy of the transcript and the record on appeal by the Circuit Court and each parent was ordered to deposit $2500 into the GAL's trust account within 45 days. (SLF 91).

On February 21, 2012 the GAL filed her second motion for GAL fees for services related to the appeal. (SLF 91). Neither party paid the GAL fees previously ordered as of said date, and the GAL amended her estimated expenditures for the appeal to be $4,698.00 at the court rate of $180 per hour and a copy of counsel's bill was attached to the motion. (SLF 91-104).

After a non-evidentiary hearing on the motion for a payout order, the Court issued its amended Judgment ordering Appellant to now pay $1228 for GAL fees and Respondent Mother to pay $2500 to the GAL. (SLF 106-107). Appellant did not request an evidentiary hearing and the Judgment entered on that date does not state it was entered over Father's objection. It bears Father's attorney's signature – David Howard.

Respondent Mother has not filed a Notice of Appeal challenging the GAL's legal representation of the children and she was awarded sole legal custody of the children in the 2011 Judgment. (SLF 68-69).

C. Legal Analysis

1. Constitutional implications

Terminating a child's right to protection in the judicial systems of Missouri upon entry of a final judgment at the Circuit Court level would serve to violate a child's rights to open access to the courts under Missouri Constitution Article 1 Section 14. Separately, the child's federal and state due process rights are implicated in that her rights to protection are terminated without notice or an opportunity to be heard and the litigant parents cannot be trusted, as a general rule, to make decisions regarding the child's best interests in the litigation process. Finally, Appellant's application would result in 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 continue 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.

Missouri's Constitution has ensured that access to the judicial system is a fundamental right with the passage of Missouri Constitution Article 1, Section 14 which guarantees to every Missouri citizen "that the courts of justice shall be open to every person…" In *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7 (Mo. 1986), this Court addressed the issue of legal minority and the Open Court's provision when it found that Missouri's medical malpractice statute of limitations could not be constitutionally applied

to a minor while noting that a litigant's ability to gain access to Missouri's courts has been afforded constitutional level protection. This Court noted that a minor is under a legal disability which affects his or her capacity to institute, individually, a civil lawsuit while noting that Rule 52.02 requires that civil actions by minors be commences and prosecuted only by a duly appoint guardian or by an appointed next friend. *Id.* at 9. *See also* Mo. Rev. Stat. Sec. 1.020(19) (defining "Under legal disability" to include "persons within the age of minority or of unsound mind or imprisoned."). This Court also recognized that Chapter 507 codified the concepts set forth in Rule 52.02. *Id.*

While *Strahler* did not involve two parents who spent more time fighting than parenting, the 1986 words remain prophetic of the sad realities of domestic cases when this Court said "we think it equally unreasonable to expect a minor, whose parents fail to timely vindicate his legal rights, to independently seek out another adult willing to serve as a next friend. Such an expectation would ignore the realities of the family unit and the limitations of youth." *Id.* Should Appellant's position remain the law in Missouri, the Brown children and similarly situated youths, would be forced to rely on their parents to retain legal counsel for them should they need a voice on appeal or should they need the appellate process explained to them. As of 2011, the evidence demonstrated that the oldest child Jonathan was parenting his siblings more than his parents – after becoming a parent himself at 16.

"Our society takes great pride in the fact that the law remains forever at the reason to 'jealously guard' the rights of minors…." *Id.* at 12. Like the statute struck down in *Strahler*, applying any of the Missouri statutes pertaining to guardians ad litem in a

fashion which removes their protectees' rights to representation in the appellate court after being represented in the trial court would unreasonably deny Missouri's children of a set of rights without providing any adequate substitute course of action for them to follow.

By permitting guardians ad litem to continue to have authority to take action post-judgment, the guardians would be empowered to file Notices of Appeal on behalf of their protectees (in the rare case where a guardian felt such an action was necessary to comply with her appointment order). The guardian would be empowered to file briefs in support of the positions in the best interests of the children.

Appellant's proposed application triggers violations of the children's Due Process and Equal Protection rights under Article I Sections 2, 10 and Section 18 the Missouri Constitution and the Fifth Amendment of the Federal Constitution, as applied to Missouri under the Fourteenth Amendment. Currently, children born outside of marriage are necessary and indispensable parties under Missouri's Uniform Parentage Act. *See* Mo. Rev. Stat. Sec. 210.830. If the child is a Petitioner, then the child is represented by a next friend. *Id.* If the child is a Respondent, then the child is represented by a guardian ad litem. *Id.* If there are allegations of abuse or neglect, the child is also represented by a guardian ad litem. *Id.*

Under federal and Missouri law, statutory classifications based on illegitimacy are deemed "suspect classifications" and, if this Court finds that the application burdens a suspect class or imagined on a fundamental rights, it is irrelevant if the statute is

rationally related to serve a legitimate state interest. *Asher v. Lombardi*, 877 S.W.2d 628 (Mo. 1994).

Nevertheless, a child born outside of marriage has an absolute right to representation in the appellate court process – while a child born during the marriage does not under Appellant's reasoning. Nowadays, many families have some children born before the marriage and some children born after the marriage. While due process does not require Missouri to provide an appellate system- since Missouri does afford an appellate system the equal protection system prohibits Missouri from granting appeal to some litigants and arbitrarily or capriciously denying appeal to other litigants. *In re Marriage of Valleroy*, 548 S.W.2d 857 (Mo. 1977)..

This Court's decision would leave siblings with unequal representation where their custody may be equally at issue on appeal should some of the children be born before the marriage and others born during a marriage. Such disparate treatment is arbitrary and capricious and not in the best interests of Missouri's children. The children's rights to Equal Protection are violated in that they are treated differently than children born outside of marriage when they suffer the same legal disability – minority.

2. The authorizing statutes

Much of Appellant's brief is focused on the language in Mo. Rev. Stat. Sec. 452.423. However, Appellant does not address or discuss the other applicable statutes to the guardian ad litem inquiry. Since this matter was originally a Texas judgment, then this case was governed by the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the appointment of the guardian ad litem was under Mo. Rev. Stat. Sec.

452.785 and not under Mo. Rev. Stat. Sec. 452.423. Prior to Missouri's enactment of the UCCJEA, Missouri was governed by the Uniform Child Custody Jurisdiction Act (UCCJA). The now repealed Mo. Rev. Stat. Sec. 452.490 provided nearly identical language for appointing a guardian ad litem in interstate custody cases prior to 2009. While Mo. Rev. Stat. Sec. 452.490 was in effect when the Respondent was first appointed, the statute was superseded in 2009 by Mo. Rev. Stat. Sec. 452.785.

Missouri's enactment of the UCCJEA is part of Missouri's effort to synchronize with federal law. This Uniform Act was drafted by the National Conference of Commissioners on Uniform State Laws to be in compliance with the Parental Kidnapping Prevention Act (PKPA) set forth in 28 USCA Sec. 1738A. The only state which has not adopted the UCCJEA at this time is Massachusetts. See http://www.uniformlaws.org.

Appellant also failed to address Chapter 507 – recognized by this Court in *Strahler* as the codification of the guardian ad litem principles. *Strahler*, 706 S.W.3d at 9. Appellant did not consider or address Mo. Rev. Stat. Sec. 507.182 (authorizing a guardian ad litem to specifically employ counsel to represent a ward without judicial approval and requiring judicial approval only for payout orders); Section 507.184 (describing powers of a guardian ad litem, once appointed); Section 507.186 (describing powers of a guardian ad litem into appeal and how a guardian may be substituted on appeal). Chapter 507 is part of the general civil procedure statutory framework applicable to all civil actions in Missouri and therefore applicable to this case as well. If a guardian ad litem is to be paid for services on appeal, the award should be made by the

trial court and not by the appellate court. *St. Paul Ins. Co. v. Carlyle*, 428 S.W.2d 753 (Mo. Ct. App. 1968).

All of Appellant's arguments ignore Mo. Rev. Stat. Sec. 1.092. The full text of this statute is one sentence and it encapsulates the importance of this case… "The child welfare policy of this state is what is in the best interest of the child." It is so important that it is the 13th statute on the rolls.

On a side note, the Respondent was personally involved in a case where she was the guardian ad litem and believed custody had been settled and, with the consent of the Circuit Court, did not participate in what was to be a non-custody trial. In *Keling v. Keling*, 155 S.W.3d 830 (Mo. Ct. App. 2005) , the Eastern District found that Respondent's non-participation in the dissolution hearing, with the consent of the parties and the Circuit Court, resulted in manifest injustice. The *Keling* case has resulted in Circuit Courts and guardians, and the Respondent in particular, making sure that their protectees' rights are defended until specifically released by the Circuit Court.

3. Standing

Father's point relied on attempts to raise the issue regarding the authority to award fees on behalf of both him and Respondent Mother. Mother has not filed a Notice of Appeal challenging the ruling and Father does not have authority to represent Mother on appeal.

Separately, Father never filed any objection to the Respondent appearing in the appeal in ED96426. Father listed the Respondent as a party in his civil case information form. (SLF 84-87). Respondent filed a motion to compel Father to serve her with a copy

of his transcript and record on appeal in both the Circuit Court and the Eastern District and both Courts orders Father to provide Respondent with copies of the same. Father did not file objections to Respondent's motions for copies of the record with either Court. Respondent filed motions for extensions of time to file her brief and Father did not file any objection stating that the GAL should not be filing a brief in the case. Father's silence was tantamount to acquiescence and detrimental reliance and estoppel analogies seem applicable here. The first pleading raising the issue of lack of authority to order GAL fees was Father's opening brief in this appeal.

The purpose of equitable estoppel is to prevent a party from taking advantage of a situation he has caused. *Bonney v. Environmental Eng., Inc.*, 224 S.W.3d 109, 117 (Mo. Ct. App. 2007). This doctrine has been applied to estop a defendant from setting up the statute of limitations defense where his conduct, though not fraudulent has induced the plaintiff to take some action or acts that mislead a claimant. *Dixon v. Shafton*, 649 S.W.2d 435, 439 (Mo. 1983). Equitable estoppel is a question of fact. *Young v. Tri-State Water Treatment*, 343 S.W.3d 695 (Mo. Ct. App. 2011). However, in this case, Appellant did not order a transcript of the hearing and prepare a record on appeal sufficient to address this issue. Nevertheless, the docket entries and pleadings are the most compelling evidence in this case and they show a Guardian ad Litem who didn't "swoop in" and appear at the last minute but a Guardian ad Litem who was listed as a party on the civil case information sheet, where Father raised issues on appeal pertaining to the Guardian ad Litem's performance, and where the guardian ad litem filed several motions to compel Father to comply with service requirements on appeal.

While the Respondent was doing all of this work, the Respondent was filing motions for fees on appeal (her first motion was an estimate and her second was based on billing) and Father did not file any objections based on lack of statutory authority. Father's action appear, to a casual observer, to be one of caution – wait and see what the Guardian ad Litem says on appeal and if you lose and don't like what she says fight her bill. At a minimum, Father should be estopped from challenging the authority of Respondent to act in this particular matter regardless of the Court's holdings on the substantive constitutional issues.

4. GAL standards

Appellant argues about the intention of this Court when it enacted the Standards for Guardians ad Litem. Appellant focuses much of his argument on the absence of language pertaining to appeals as evidence that this Court never contemplated a Guardian ad Litem participating in an appeal when such an inference is a logical misstep. While Appellant is correct that the standards are focused on the duties of the guardian at the trial level, there is nothing in the standards implying that a guardian should not and may not participate in an appeal. In fact, the first GAL standard provides that "The guardian ad litem shall serve until the matter is concluded or as otherwise ordered by the court." The Eastern District ordered Father to provide the GAL with copies of the transcript and the legal file in the 2011 appeal and threatened to dismiss Father's appeal if he did not timely comply with its order. See ED96426 docket entries for December 2, 2011.

II. [Appellant failed to preserve issue as to evidentiary sufficiency]

II. The trial court did not err in ordering Father to pay Respondent GAL fees due to evidentiary insufficiency in that Father did not order a transcript of any hearing on the motion for GAL fees on appeal or failed to secure the record he required to preserve his objections on appeal. Separately, the Respondent did produce evidence of her billing as attached to her second motion for fees and the trial court's determination as to whether the Respondent's fees were reasonable and necessary are subject to deference to the fact finder.

A. Standard of Review

A Circuit Court Judgment will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). When assessing whether a judgment is supported by the evidence, the appellate court must "accept as true the evidence and inferences from the evidence that are favorable to the circuit court's decree and disregard all contrary evidence." *Wright v. Buttercase ex rel. Buttercase*, 244 S.W.3d 174, 176 (Mo. Ct. App. 2008).

B. Facts applicable to point

The Respondent filed two motions to secure fees on appeal related to the 2011 Judgment. Her first motion was filed on September 26, 2011 after receiving a copy of the civil case information sheet. (SLF 88-90). On October 19, 2011 Father was ordered to provide the GAL with a copy of the transcript and the record on appeal by the Circuit

Court and each parent was ordered to deposit $2500 into the GAL's trust account within 45 days. (SLF 91).

On February 21, 2012 the GAL filed her second motion for GAL fees for services related to the appeal. (SLF 91). Neither party paid the GAL fees previously ordered as of said date, and the GAL amended her estimated expenditures for the appeal to be $4,698.00 at the court rate of $180 per hour and a copy of counsel's bill was attached to the motion. (SLF 91-104).

After a non-evidentiary hearing on the motion for a payout order, the Court issued its amended Judgment ordering Appellant to now pay $1228 for GAL fees and Respondent Mother to pay $2500 to the GAL. (SLF 106-107). Appellant did not request an evidentiary hearing and the Judgment entered on that date does not state it was entered over Father's objection. It bears Father's attorney's signature – David Howard.

Respondent Mother has not filed a Notice of Appeal challenging the GAL's legal representation of the children and she was awarded sole legal custody of the children in the 2011 Judgment. (SLF 68-69).

C. Legal Analysis

Regardless of the appointing statute, the Respondent was entitled to a reasonable fee for services rendered to the Brown children. *Compare* Mo. Rev. Stat. Sec. 452.423 and Mo. Rev. Stat. Sec. 452.785 and Mo. Rev. Stat. Sec. 507.182. If a guardian ad litem is an attorney and his actions were necessary as a guardian and as an attorney, he is entitled to reasonable fees. *St. Paul Ins. Co. v. Carlyle*, 428 S.W.2d 753 (Mo. Ct. App. 1968). A Circuit Court may consider the circumstances surrounding the appointment of a

guardian ad litem in a child custody proceeding in determining payment of fees to the guardian ad litem. *S.I.E. v. J.M.*, 199 S.W.3d 808 (Mo. Ct. App. 2006). In *Clark v. Clark*, 101 S.W.3d 323 (Mo. Ct. App. 2003), the Eastern District held that a trial court is an expert on guardian ad litem fees and it can set the fees without any evidence in a dissolution proceeding. *See also Lindell v. Coen*, 896 S.W.2d 525 (Mo. Ct. App. 1995).

In *Basham v. Williams*, 239 S.W.3d 717 (Mo. Ct. App. 2007), an award of GAL fees was reversed when the GAL filed the statement but there was no evidence the statement was served on opposing counsel prior to the entry of the Judgment for GAL fees. The Court reversed and remanded for a hearing in that matter. In this case, the GAL's motion for fees resulted in an original order for the parties to pay into her trust account. Neither party was compliant in a timely fashion. Eventually, funds were paid into her trust account and the Respondent sought a payout order. The payout order was set for hearing, after providing counsel ample opportunity to review the Respondent's billing, and a Judgment for fees was entered.

The Judgment does not state over Father's objection or that Father requested an evidentiary hearing and said request was denied. Had an evidentiary hearing been held, the GAL fees would have potentially been even higher to all parties. More importantly, Father's counsel signed the Judgment and the Judgment could just as easily be deemed by consent absent any request for an evidentiary hearing from any party. Father did not file a motion to vacate the judgment under Rule 75.01.

CONCLUSION

Based on the foregoing, the Respondent Guardian ad Litem prays that this Court affirms the Judgment of the Circuit Court of St. Charles County in its entirety.

CERTIFICATE OF SERVICE and COMPLIANCE

This brief contains 8341 words, according to Microsoft Office 2010.

The undersigned further states that on 15th day of July 2013 a true and correct copy of the foregoing brief was electronically served via the Court's efiling system on Alan Kimbrell, counsel for Appellant. An electronic copy of the brief was emailed to Respondent Karen Huffman at her provided e-mail address.

/s/ Benicia Livorsi #45077

Respectfully submitted,

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