

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 1st Meeting of the 2019 Interim

June 7, 2019

Call to Order and Roll Call

The 1st meeting of the Interim Joint Committee on Judiciary was held on Friday, June 7, 2019, at 10:00 AM, in Room 171 of the Capitol Annex. Representative Jason Petrie, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Representative Jason Petrie, Co-Chair; Senator Whitney Westerfield, Co-Chair (via video conference); Senators Danny Carroll, Alice Forgy Kerr, John Schickel, Wil Schroder, Dan "Malano" Seum, Robert Stivers II, Robin L. Webb, Stephen West, and Phillip Wheeler; Representatives Charles Booker, Kevin D. Bratcher, McKenzie Cantrell, Daniel Elliott, Joseph M. Fischer, Nima Kulkarni, Stan Lee, Derek Lewis, Savannah Maddox, C. Ed Massey, Chad McCoy, Reginald Meeks, Jason Nemes, Brandon Reed, and Maria Sorolis.

Guests: Chief Justice John D. Minton, Jr, Justice Debra H. Lambert, Judge Marcus Vanover, Judge William Leach, Judge J. Foster Cotthoff, Virginia Erxleben, Andrea Bruns, Gerald W. Hoppmann, Tammy Bullock, Judge Lucinda Masterton, Commissioner W. Bryan Hubbard, Jim Musser, and Stacy Tapke.

LRC Staff: Katie Comstock, Alice Lyon, Chandani Kemper, Dale Hardy, and Yvonne Beghtol.

Guardians Ad Litem and Court-Appointed Counsel: Overview of Appointment, Duties, and Training

Chief Justice John D. Minton, Jr. provided historical background on the appointment of Guardians Ad Litem (GAL) and Court-Appointed Counsel (CAC). He introduced Justice Debra H. Lambert and highlighted her role on the Supreme Court as the chair of Family Court Rules. She has begun the process of drafting court rules pertaining to GALs and CACs.

After taking office in January, Justice Lambert reached out to Executive Director Gerald Hoppmann and Director Tammy Bullock of the Finance and Administration Cabinet to get a better understanding of the cabinet's audit of the selection, billing, and payment of GALs and CACs. In addition, Justice Michelle M. Keller and others from the Administrative Office of the Courts (AOC) exchanged ideas on how to collect additional

data to improve the GAL and CAC process. Court rules will be used as the structure for these changes and will be discussed at a public hearing on June 12 at the Kentucky Bar Association's Annual Convention. The Supreme Court will consider and vote on the adoption of the proposed rules in the fall. Justice Lambert is working with the Cabinet for Health and Family Services to assist in implementing the Family First Prevention Services Act, and to provide assistance in the funding and training of GALs, CACs, and judges.

Judge Marcus Vanover noted that judges had concerns about 2019 SB 205, including the creation of a centralized agency that would have overseen the appointment of GALs on a state-wide basis, which would have created a conflict of interest between those that represent children and those that represent parents. In addition, judges are concerned with coverage. For example, an Emergency Custody Order (ECO) case has to be heard within 72 hours. An ECO may be signed one night and have to be heard at 9:00 the next morning. Getting notice to counsel in a regional office and having them available by the next morning is a concern. Judges are concerned about the potential removal of a GAL or CAC not performing his or her duties.

Judge Vanover testified about the appointment and duties of GALs and CACs. GALs are appointed to represent legally incapable persons, while CACs represent juvenile respondents in public offenses and status offenses, indigent criminal defendants, indigent adults in child welfare cases, and adult respondents in guardianship proceedings. In dependency, neglect, and abuse (DNA) cases, the court must appoint a GAL for a child, separate counsel for a parent who exercises custodial control if indigent, counsel for any person claiming to be a de facto custodian if indigent, and may appoint separate counsel for a non-parent exercising custodial control if indigent.

Judge Vanover noted that he was not sure if the Finance and Administration Cabinet's audit took into account the number of third party petitions filed and wanted to bring to light the volume of these petitions. In response to Chairman Petrie, Judge Vanover stated that he sees about 3 to 5 third party petitions versus what is filed by the cabinet. He believes this is true across the state. For example, blended and large families may require several attorneys to be appointed.

Judge Vanover said that indigency standards defined in KRS 31.100 and KRS 31.120 are often vague when put into practice, making it hard to determine who is indigent. He stated that judges would like to "give more teeth" to the Affidavit of Indigency, to track if people are truly needy in qualifying for the appointment. For example, if the form is not completed, the person would not qualify for counsel. However, there are times when a parent is not available to complete the affidavit, for reasons such as being incarcerated in another county, being in a treatment center, or being medically incapacitated. Therefore, some leeway may be needed to have counsel available to protect a person's rights up front, but allow them time to have their client complete the affidavit.

The proposed amendments to the Family Court Rules of Procedure and Practice include the following improvements to the GAL and CAC appointment process: (1) prohibit selective appointments, except in rare circumstances; (2) prohibit “closed lists” of appointed attorneys; and (3) allow courts to remove attorneys who do not meet the standards of representation. In response to President Stivers, Judge Vanover stated that the local circuits would be the ones to enforce the new rules.

The proposed rules also seek to address GAL and CAC payment concerns. The proposed rules require courts to review income prior to appointing attorneys for adults, require parties seeking attorneys to complete and submit the affidavit of indigency, and prohibit multiple invoicing for the same case. The review stage helps monitor the parents, as well as the Cabinet for Health and Family Services and the attorneys. However, submitting the forms up front does not allow attorneys to account for the majority of the time they actually spend on a case.

The proposed rules require mandatory education. The proposed rules require all attorneys to: (1) complete AOC’s GAL and CAC training prior to appointment; (2) complete advanced multi-disciplinary training every two years; and (3) provide a certificate to their judge as evidence of completion.

Judge Vanover highlighted other issues the proposed rules seek to address. In particular, Kentucky has a D on the First Star report card that grades each state on their court-appointed counsel. The proposed rules would raise the score dramatically.

Judge Foster Cotthoff addressed other CAC issues. Under KRS 387.305, CACs appointed for disabled adults are paid \$40.00 an hour for out-of-court work and \$60 an hour for in-court work, which is paid through the respondent’s estate or by county government. In KRS Chapter 202A and 202B, proceedings dealing with involuntary hospitalization cases, a trial commissioner at Western State Hospital hears the petitions. If a jury trial is requested, the Department of Public Advocacy usually represents the respondents.

Judge William Leach addressed KRS 26A.140, dealing with accommodating the special needs of children. One issue not addressed in the statute is the means for paying the GALs. Under KRS 387.025, parties in DNA cases can ask to be appointed as a guardian over a child. Often times the guardian spends any money coming to the child before paying the attorney. Having the courts clarify who is responsible for payment to the GAL would help. Some small counties do not have a Family Court and have many indigent families. Due to the set fee of \$250 per case in those counties, and the number of court appearances that may be required, it is difficult to find an attorney to be the GAL in those counties. Incarcerated individuals are also assigned GALs and getting the paperwork completed by the defendant in order to pay the GAL can be difficult.

In response to Representative Elliott, Justice Lambert advised that, while she is not familiar with what every state pays GALs and CACs, Kentucky pays \$500 while Alabama pays up to \$5,000. The low pay raises concerns that representation may be at a lower level.

Guardians Ad Litem and Court-Appointed Counsel: Court Appointed Special Advocate's (CASA's) Role

Andrea Bruns, State Director of Kentucky CASA Network, introduced herself and Virginia Erxleben, Executive Director of the CASA Program of Christian County. Ms. Erxleben stated that Court Appointed Special Advocates (CASAs) are trained community volunteers who advocate for the best interests of children involved in the court system through no fault of their own. CASA volunteers are appointed by a judge and make recommendations in court reports. Last year, over 1,100 CASA volunteers advocated for over 3,500 children.

In addition to court observation and the shadowing of social workers, CASA staff and volunteers complete a required 30 hour pre-service training curriculum developed by the National CASA Association. Advocate supervisors and volunteer coordinators support, supervise, recruit, and train CASA volunteers.

Once a judge appoints a CASA volunteer to a case, the volunteer has regular visits with the child, researches the case, reviews documents, interviews relevant people, and makes recommendations during each court proceeding in regard to the child's well-being and placement. CASA volunteers work closely with social workers and GALs, putting in an average of 10 hours a month and often times more. A case with heavy court activity may require 30 hours or more. A CASA volunteer acts as a mentor, a guide, and a connector of important services that a child may require. CASA volunteers may also report personal needs, and may assist a child in the decision and paperwork required to recommit with the Cabinet for Health and Family Services, apply for tuition, or financial assistance in getting an apartment. CASA volunteers teach them how to balance a checkbook, manage their time, and adjust to living on their own. CASA is a piece of the system working to ensure permanency for these children to have a safe and permanent home where they can thrive.

The KCN Network of Programs works to secure funding to increase the number of active volunteers to serve more children in the Commonwealth. Unfortunately, the March 2019 U.S. Children's Bureau Report ranked Kentucky as number one in child malnutrition and child abuse rates. An increase in funding will be requested in the 2020 Budget Year. Support from legislators for the CASA Program is appreciated. In Kentucky, all CASA Programs are 501 (c) (3) organizations. The budgetary needs are largely for personnel and training costs.

Ms. Bruns said that not every county has a CASA Program, but they are moving in that direction. CASA is in about 56 counties and hopes to be in 80 counties by the end of

2021. In regards to 2019 SB 205, Ms. Bruns wanted to clarify that, in Kentucky, “volunteers” are CASAs and not GALs.

Guardians Ad Litem and Court-Appointed Counsel: GAL and CAC Payments

Mr. Hoppmann, Executive Director of Office of Policy and Audit with the Finance and Administration Cabinet, stated that their presentation would review the billing and payment process for GALs and CACs, provide an update on the FINGAL-1 Form, and highlight the fee disparity issues relating to attorneys who provide GAL and CAC services in counties where there are no Family Courts.

Ms. Bullock, Division Director of Administrative Services with the Finance and Administration Cabinet, advised that the FINGAL-1 form was created for attorneys to submit to the cabinet for payment. Payments are processed in eMars, a statewide accounting system. However, the cabinet’s audit highlighted the need for tracking more information relating to GAL and CAC payments. After working with the AOC, the FINGAL-1 Form will be updated by July 1, 2019, to track new information such as whether the payment was for a GAL for a child, a CAC for a parent, a CAC for family who is not a parent, or a CAC for a person who is not family. Additional coding will identify payments made to the District Court or Family Court. To date, the cabinet has spent approximately \$16,000,000 in CAC and GAL this fiscal year.

Mr. Hoppmann advised that the new tracking of expenditures will begin in July 2019, giving them at least 6 months of data by the next legislative session. In regards to fee disparity, attorneys appointed to provide GAL and CAC services related to DNA cases in District Courts receive \$250, whereas attorneys providing the same services in Family Courts receive \$500. Twenty-five District Courts in Kentucky have found KRS 620.100 unconstitutional because the law “discriminates against court-appointed counsel in judicial districts without a Family Court.” The cabinet is seeking a legislative solution for consistency moving forward.

Child Support Enforcement and Guidelines: An Overview of the Child Support Guidelines Review Commission

Judge Lucinda Masterton advised that updating the child support guidelines is a frustrating process. Judge Masterton has been the Chair of the Child Support Guidelines Review Commission since 2010. Before the guidelines, every judge was different and the results were inconsistent. The Family Support Act of 1988 required more consistency, with evidence-based guidelines, and a presumption of the amount of child support that would be awarded under the guidelines. The consequences for not adhering to the guidelines is loss of federal funding.

The child support guidelines were established in 1990, pursuant to the federal law, based on evidence from the Department of Agriculture’s report in 1987 on how much it took to raise children at different income levels in an intact family. In 1994, the guidelines

changed to extend the schedule to include families with monthly incomes between \$10,000 and \$15,000, to set a minimum obligation of \$60, and to make adjustments for maintenance of children. However, the basic schedule did not change. In 2000, a split custody arrangement calculation was added to KRS 403.212. In 2006, HB 356 was proposed to update the guidelines, but did not pass out of the House. In 2007 and 2008, no legislation to change the guidelines was proposed. In 2008, the commission commissioned a \$50,000 study from the University of Kentucky on how to best update the guidelines. The study recommended that the guidelines be updated with an estimation method to keep up with changing price levels, and to begin future research into the cost of raising a child. In 2009, no legislation was proposed. In 2010, the commission recommended legislation to introduce new amounts in the child support guidelines and to include shared parenting adjustments. The bill died in the House. In 2011, 2013, and 2014, similar legislation was introduced and died in either the House or Senate. In 2015 and 2018, the shared parenting adjustment was dropped, but the legislation still did not pass. In 2016, a bill updating the guidelines was passed but was vetoed.

In 2018, the legislature passed a presumption of joint custody and equal timesharing. However, there was no provision for parenting time adjustment for child support. In 2019, HB 415 was introduced and signed by the Governor, but it did not include updated guideline amounts or a shared parenting adjustment. In the meantime, there is no consensus among judges on what to do with the shared parenting presumption. This is leading to judges having multiple day hearings only to determine child support, others not wanting to deviate from the guidelines at all, others trying to use the split custody calculation, others trying the commission formula, others trying mathematical projections, or still others leaning towards not having any child support at all.

As of December 2016, 45 CFR § 302.56 put funding at risk by not establishing updated child support guidelines. Judge Masterton stated that the guidelines have to be adjusted, case data must be analyzed, the cost in raising a child has to be established, and there has to be consistency.

Child Support Enforcement and Guidelines: Child Support Guidelines

Commissioner Bryan Hubbard with the Cabinet for Health and Family Services' Department for Income Support reached out to the Center for Policy Research for assistance in updating the child support guidelines. Federal law requires three things when developing guideline that comply with the federal law. One federal requirement is to consider economic data on the cost of raising children and to revise the guidelines if appropriate. The second federal requirement is to analyze the state's case file data on the application of and deviation from the existing guidelines, the frequency of low income adjustments as well as the imputation of income, and entry of default orders. Deviations should be kept to a minimum and a method must exist to consider the subsistence needs of the obligated parent. In addition, the federal government requires an analysis of labor market data to inform the development of low-income adjustments which are appropriate

for Kentucky. The third federal requirement is to provide a meaningful opportunity for public input, including feedback from low-income custodial parents and their representatives. The state must also obtain the views and advice of its child support agency. The Center for Policy Research is capable of performing all three of these functions and has agreed to do so. In addition, the Center for Policy Research will conduct all of the required research and data analysis, develop at least three options for the subsistence needs of parents, and alternative updated schedules. This will allow the Child Support Guidelines Review Commission to explore the impact of data variables and assumptions, review parental timesharing adjustment options in comparison to other states, review adjustment options for parents who have children with more than one partner, provide a technical report of its findings with supporting documentation of the updated schedule, and provide recommendations. The Center for Policy Research will also provide up to three onsite presentations on the guideline recommendations and their supporting data. This includes availability to answer technical and subsequent questions. A deadline of the end of September 2019 was given for achieving these tasks, with the objective of having a final report from the Child Support Guidelines Commission, complete with all public feedback, by the end of October.

Child Support Enforcement and Guidelines: Child Support Enforcement

Stacy Tapke, Kenton County Attorney, stated that the county attorneys are in complete and whole agreement that these guidelines must and need to be updated.

Chairman Petrie asked if members had questions for any of the presenters.

Senator Webb stated that indigency standards need to be set and adhered to, and these issues need more committee time to give members a comfort level in passing this legislation.

In response to Representative Meeks, Commissioner Hubbard said that he and his staff would be happy to meet with anyone who is interested in holding a public meeting dealing with these issues.

Representative Bratcher expressed appreciation for all of those involved in this process. Over his years as a legislator, he has received complaints that judges are not following the law. Timelines are one of the biggest issues. A judge in Representative Bratcher's district has been sitting on a case for two years. Chief Justice Minton responded that Representative Bratcher's comment is painful to hear, and if a judge is not doing their job, they need to be held accountable. They are trying to build a system to work on these issues, such as delays. Constant complaints are that the judicial system costs too much, takes too long, and it is never over.

Representative Nemes echoed Representative Bratcher's concern. Family Court is an area that legislators do not know a lot about, which allows for a significant amount of

abuse. Another significant problem are individuals paying for their time in court that is above court filing fees and attorney costs. He stated that money spent on GALs and CASA volunteers is money well spent, and that DPA should be paid more money for their caseloads. Structural change is needed.

Chairman Petrie asked that any member who has an interest in working on the agenda topics to contact him or Katie Comstock.

There being no further business, the meeting was adjourned at 11:50 am.