

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001701-OA

JOHN P. MCCARTY, SECRETARY
FINANCE AND ADMINISTRATION CABINET
COMMONWEALTH OF KENTUCKY

PETITIONER

v. ORIGINAL ACTION
REGARDING POWELL CIRCUIT COURT

LARRY MILLER, JUDGE
POWELL CIRCUIT COURT

RESPONDENT

AND

LYNDON WOODROW PELFREY

REAL PARTY IN INTEREST

* * * * *

OPINION AND ORDER
GRANTING CR 76.36 RELIEF

BEFORE: EMBERTON, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: The Court has considered the petition for writ of prohibition to which no response was filed and, being otherwise sufficiently advised, ORDERS the petition be GRANTED.

Petitioner seeks an order from this Court prohibiting the respondent trial court from enforcing provisions of orders entered May 19, 1999, and June 24, 1999, in the case of Jackie

Rose Pelfrey v. Lyndon Woodrow Pelfrey, Powell Circuit Court Action No. 98-CI-00134, directing Commonwealth of Kentucky, Finance and Administration Cabinet, to pay the sum of \$454.25 to attorney Del W. Miller for his services as guardian ad litem for Lyndon Woodrow Pelfrey. Petitioner contends that it lacks the required legal authority to pay guardian ad litem fees for the representation of an incarcerated person in a divorce action. We agree.

In its order of June 24, 1999, the respondent trial court determined that petitioner was responsible for payment of the guardian ad litem fee on behalf of a prisoner pursuant to Rule of Civil Procedure (CR) 17.04. That Rule provides as follows:

(1) Actions involving adult prisoners confined either within or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense.

(2) Fees allowed to counsel appointed to represent prisoners as respondents in dependency, abuse or neglect cases, or in parental rights termination cases, under the Juvenile Code, shall not exceed the amounts specified in KRS 620.100 or KRS 625.080. Counsel fee awards shall not exceed the statutory maximum, regardless of the number of persons represented in a proceeding by the counsel.

Petitioner recognizes that it is statutorily required to pay fees for guardians ad litem who are appointed pursuant to KRS 620.100 and KRS 625.080. Petitioner also recognizes that CR

17.04 requires that a guardian ad litem be appointed for an inmate when that inmate fails or is unable to defend an action. However, petitioner points out that CR 17.04 does not specifically designate who is responsible for paying the guardian ad litem fee in a case such as this one that is a divorce action.

The Court notes that there is a specific statute which gives courts the authority to assess attorney's fees for a guardian ad litem. That statute is KRS 453.060 and it reads in pertinent part:

(2) A guardian ad litem or warning order attorney shall be allowed by the court a reasonable fee for his services, to be paid by the plaintiff and taxed as costs[.]

This particular statutory provision has been interpreted to assess guardian ad litem fees as costs against the Commonwealth in actions for involuntary termination of parental rights in order to pay for the services involved in the representation of the minor children or an indigent parent. See e.g., Commonwealth of Kentucky, Cabinet for Human Resources v. Coleman, Ky. App., 699 S.W.2d 755 (1985). The basis for such assessment against the Commonwealth is that, in that type of cases, the Commonwealth, being "the most frequent petitioner . . . , is logically included in that class of persons contemplated to be 'plaintiffs' by KRS 453.060(2)." Coleman at 757.

The action below is a divorce action and, therefore, is not the type of case where the Commonwealth is a "plaintiff" as contemplated by KRS 453.060(2). The Court is of the opinion that, under this construction of KRS 453.060(2), petitioner, Commonwealth of Kentucky, Finance and Administration Cabinet, is

not the party who is responsible for the payment of attorney's fees to a guardian ad litem for the representation of an incarcerated respondent in a divorce action.

Based on the foregoing, we conclude that the orders of May 19, 1999, and June 24, 1999, are in error and the respondent trial court is hereby PROHIBITED from enforcing those orders.

ALL CONCUR.

ENTERED: September 10, 1999

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

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