

RENDERED: OCTOBER 29, 2021; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2019-CA-0313-ME

G.F.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LIBBY G. MESSER, JUDGE  
ACTION NO. 18-J-00900-002

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND  
FAMILY SERVICES, DEPARTMENT  
FOR COMMUNITY BASED  
SERVICES; E.A.F.; K.S.; K.S.; AND  
M.F.

APPELLEES

AND

NO. 2019-CA-0314-ME

G.F.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LIBBY G. MESSER, JUDGE  
ACTION NO. 18-J-00901-002

COMMONWEALTH OF KENTUCKY  
CABINET FOR HEALTH AND  
FAMILY SERVICES, DEPARTMENT  
FOR COMMUNITY BASED  
SERVICES; K.S.; K.S.; L.J.F.; AND  
M.F.

APPELLEES

AND

NO. 2019-CA-0315-ME

G.F.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LIBBY G. MESSER, JUDGE  
ACTION NO. 18-J-00902-002

COMMONWEALTH OF KENTUCKY  
CABINET FOR HEALTH AND  
FAMILY SERVICES, DEPARTMENT  
FOR COMMUNITY BASED  
SERVICES; F.G.F.; K.S.; K.S.; AND  
M.F.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GOODWINE, MAZE, AND McNEILL, JUDGES.

McNEILL, JUDGE: Appellant, G.F., is the biological mother of three minor children, E.A.F., L.J.F., and F.G.F.<sup>1</sup> As a result of an investigation beginning in 2018 by the Cabinet for Health and Family Services, Department for Community Based Services (hereafter “the Cabinet”), the Fayette Family Court ultimately issued three separate orders that were entered on February 7, 2019, finding each of the Children to have been neglected or abused. As a result, the Children were placed in the custody of their grandparents. G.F. raises the following arguments on appeal:<sup>2</sup> 1) the trial court abused its discretion by denying her motion to strike the reports issued by the guardian *ad litem* (hereafter “GAL”); and 2) that the court committed structural error by undertaking its own investigation into other matters outside of the cases before it. For the following reasons, we disagree.

### **I. STANDARD OF REVIEW**

Our standard of review in cases involving dependency, neglect and abuse (hereafter “DNA”), is as follows:

A family court’s findings of fact in a DNA action shall not be set aside unless clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. If the family court’s findings of fact were supported by substantial evidence, and it applied the correct law, its

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<sup>1</sup> Pursuant to Court policy, the children will be referenced by initials only. All three children will hereby be collectively referred to as “the Children.”

<sup>2</sup> The above-styled appeals were consolidated by order entered December 16, 2019.

decision will not be disturbed absent an abuse of discretion. An abuse of discretion occurs when the family court's decision is unreasonable or unfair.

*M.C. v. Cabinet for Health & Fam. Servs.*, 614 S.W.3d 915, 921 (Ky. 2021)

(internal quotation marks and citations omitted). Similarly, we review a trial court's evidentiary rulings for an abuse of discretion. *Anderson v.*

*Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

## **II. ANALYSIS**

It is undisputed that a GAL was appointed to represent the interests of the Children. G.F. asserts that although the GAL's reports were emailed to the parties and the trial court, they were not filed in the record until after the disposition of this case.<sup>3</sup> In support of her argument that the trial court erroneously considered the GAL's reports, G.F. primarily relies upon *Morgan v. Getter*, 441 S.W.3d 94, 114 (Ky. 2014). Therein, the Court discussed the unique and distinct roles performed by a GAL attorney, who represents a party or person with a vested interest in the litigation, versus a friend of the court, who serves as an agent of the court. *Id.* at 113-14. Ultimately, the Court in *Morgan* concluded that "[t]he GAL should *not* file reports, testify, make recommendations, or otherwise put his own or her own credibility at issue." *Id.* at 114. However, unlike the present case which

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<sup>3</sup> Two GAL reports were eventually filed while this case was pending on appeal. The first report was entered issued on November 25, 2018 and the second was issued on February 4, 2019. The reports contain much of the same content.

concerns a DNA action, *Morgan* arose from a civil custody determination pursuant to a decree dissolving the parties' marriage. Nevertheless, G.F. argues, *inter alia*, that custody is also an issue in the present case and therefore *Morgan*'s reasoning should be applied here. However, we have previously addressed the differences between DNA and custody cases:

The purpose of the dependency, neglect, and abuse statutes is to provide for the health, safety, and overall well being of the child. KRS<sup>[4]</sup> 620.010. It is not to determine custody rights which belong to the parents.

*S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky. App. 2010). Furthermore, G.F. cites no authority extending the holding in *Morgan* to DNA cases. In fact, *Morgan* noted the following:

We emphasize that this case concerns a KRS Chapter 403 custody proceeding and the new FCRPP<sup>[5]</sup> 6. GALs are appointed in many other contexts – CR<sup>[6]</sup> 17.04, for example, provides for the appointment of a GAL for adult prisoners and, of course GALs are very involved in dependency, neglect, abuse, and termination cases. Practice in those other contexts is not before us here.

441 S.W.3d at 97 n.1.

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<sup>4</sup> Kentucky Revised Statute.

<sup>5</sup> Family Court Rules of Procedure and Practice.

<sup>6</sup> Kentucky Rules of Civil Procedure.

Therefore, we agree with the trial court that the holding in *Morgan* does not apply to the present case.<sup>7</sup> Furthermore, any alleged error that may have possibly occurred here was harmless. As the trial court stated during a January 18, 2019 hearing on the matter, the GAL reports had not been filed in the record and had not been relied upon by the court for its ultimate disposition. Therefore, any concerns raised by G.F. concerning the GAL reports containing potentially inadmissible hearsay, not being subjected to cross-examination, *etc.*, are not at issue here. In fact, the GAL reports were filed by G.F.’s counsel on December 20, 2019, long after the court had issued its orders granting the Children’s grandparents custody and after the notices of appeal had been filed.<sup>8</sup> Therefore, we cannot say that the trial court abused its discretion.

As previously stated, G.F. also argues that the trial court committed structural error by undertaking its own investigation into other matters outside of the cases before it. G.F. specifically argues that at the January 18, 2019 hearing/case management conference, the court stated that it had reviewed G.F.’s criminal case record in “CourtNet” and also took

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<sup>7</sup> KRS 620.100 also provides that in DNA cases, “[t]he court shall appoint counsel for the child[.]”

<sup>8</sup> The notice of filing and the accompanying GAL reports were filed on December 20, 2019, pursuant to an order of a panel of the Court of Appeals.

“judicial notice” of other cases involving the minor children. In support of this unpreserved claim, G.F. cites *Marchese v. Aebersold*:

So strong is our commitment to the restrictive interpretation of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned that we have expressly rejected CourtNet, the Kentucky Court of Justice’s online database of criminal convictions from Kentucky courts, as a valid source for taking judicial notice of a Kentucky criminal conviction. Instead, a true copy of the authenticated official court record is required.

530 S.W.3d 441, 447 (Ky. 2017) (internal quotation marks and citations omitted).

The issue in *Marchese* was the trial court’s erroneous consideration of the respondent’s Virginia assault conviction, which the court gleaned from an unknown source and significantly instructed the court’s decision to issue a domestic violence order against the respondent. On appeal, the Kentucky Supreme Court held that the trial court committed structural error, vacated the court’s order, and remanded the case to the trial court for additional proceedings. *Id.* at 449.

Unlike *Marchese*, G.F. has failed to cite to anything in the record indicating that the trial court’s ultimate decision was influenced by the pending case information referenced on CourtNet. To the contrary, the audio record of the status conference indicates that the court was concerned that G.F. had an order pending in her criminal case requiring that she have “no contact” with one of the Children who was the victim in that criminal case. Nothing from the record indicates that the

court's concern here was improper or that any prejudice resulted. There was certainly no structural error requiring reversal.

### **III. CONCLUSION**

For the foregoing reasons, we hereby affirm the order of the Fayette Circuit Court.

GOODWINE, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART AND IN RESULT AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN PART AND IN RESULT: While I agree with much of the reasoning and the result of the majority Opinion, I respectfully disagree with the majority's conclusions about the role of a guardian *ad litem* (GAL) in a proceeding involving dependency, neglect, and abuse (DNA). I find significant concerns about allowing a GAL to conduct investigations and to submit recommendations and a report in such cases. Nevertheless, I agree with the majority that any error by the trial court in allowing this process was harmless under the facts presented in this case. Therefore, I concur in result only on this issue. I fully agree with the majority's reasoning and conclusions on the remaining issues.

As the majority correctly notes, the GAL issue is dependent upon the applicability of the holding in *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014). In *Morgan*, our Supreme Court emphasized three factors regarding the role of a GAL

in a domestic custody dispute. First, the Court pointed out that the GAL serves as an attorney for the child, representing the interests of the child as opposed to those of the party parents. *Id.* at 110. Second, the Court distinguished between the roles of a representative appointed as counsel for the child and an agent appointed by the trial court. *Id.* at 111. In particular, the Court noted again that a GAL advocates for the child's best interests, while a friend of the court (FOC) conducts investigations and makes recommendations on behalf of the court. *Id.* The Court cautioned against blurring the distinctions between these functions. *Id.* at 111-12.

And third, the Supreme Court emphasized that a GAL's role as counsel for the child prohibits the GAL from being called as witness or subject to cross-examination. *Id.* at 112-13. The Court pointed out that the GAL's lack of amenability to cross-examination raises serious due process issues for a parent whose custody rights are at issue. *Id.* at 113-14. Based on all of these considerations, the Court concluded that the GAL's obligations to represent the best interests of the child are inherently at odds with conducting investigations and making recommendations to the court regarding custody. *Id.* at 116-18. Consequently, the Supreme Court held that a GAL is precluded from functioning as a hybrid FOC. *Id.* at 118-19.

I agree with the majority that the holding of *Morgan* was expressly limited to permanent custody adjudications under KRS Chapter 403. 441 S.W.3d

at 97 n.1. However, I find no meaningful distinction between the role of a GAL in a permanent custody proceeding under KRS Chapter 403 and in DNA proceedings under KRS Chapter 620. Apart from long-standing custom, the Cabinet points to no statutory or case law authorizing a GAL to engage in such duties in a DNA proceeding. Indeed, this Court has applied the *Morgan* GAL rule to a situation involving simultaneous custody/DNA proceedings. *See S.E.A. v. R.J.G.*, 470 S.W.3d 739, 742 (Ky. App. 2015). Furthermore, I must note that the current Family Court Rules of Procedure and Practice (FCRPP) do not authorize a GAL in custody matters to file reports, testify, or make recommendations regarding custody. *See* Commentary to FCRPP 6. Likewise, none of the provisions of the FCRPP relating to DNA actions authorize a GAL to submit reports.

The trial court and the GAL contend that *Morgan* is distinguishable because the current case does not involve a permanent custody order. However, a disposition order in a DNA case is a final and appealable order. *J.E. v. Cabinet for Health & Fam. Servs.*, 553 S.W.3d 850, 851 (Ky. App. 2018) (citing KRS 620.155). I would also point out that an adjudication of dependency, neglect, or abuse has significant impacts on proceedings later in the case. Therefore, G.F. has properly raised the due process considerations in this appeal.

As a result, even if the GAL's role in a DNA case is different from a permanent custody proceeding, the Supreme Court's concerns about the parent's

due process rights are still applicable. Until our Supreme Court decides to clarify its holding in *Morgan*, I would hold that a GAL in a DNA proceeding cannot fulfill a dual role as an advocate for the child and as an investigator for the court. This conclusion would preclude the procedure applied by the trial court in the current case.

Notwithstanding these concerns, however, I agree with the majority that any error in this regard was clearly harmless. As noted, the GAL reports were not filed at the time the trial court made its findings of neglect and abuse. The trial court expressly stated that it did not rely on the GAL reports in making its determination. We have no reason to question the veracity of that statement. Furthermore, G.F. previously stipulated to neglect as to the three children. And finally, G.F. was subject to continuing no-contact orders in the criminal matter. Under the circumstances, there is no substantial likelihood of unfair prejudice to G.F. Thus, under the facts presented in this case, I would find no reversible error.

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