

WISCONSIN COURT OF APPEALS  
DISTRICT II

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IN RE THE MARRIAGE OF:

ELIZABETH MARY VOLKMANN,

Appeal No. 2009AP1601

Petitioner-Respondent,

v.

JACOB FREDRICK VOLKMANN,

Respondent-Appellant.

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**MEMORANDUM IN SUPPORT OF WITHDRAWAL,  
AUTHORING, AND RECOMMENDATION  
OF PUBLICATION OF OPINION**

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### **Interests of Legal Action of Wisconsin, Inc.**

Prior to filing the present Motion, Legal Action of Wisconsin, Inc. (Legal Action) has not been involved in this case and is not a party to this action. Legal Action is a non-profit law firm which provides free advice and representation to low-income clients in civil matters. Legal Action exists to provide creative and effective legal representation in order to achieve justice for low-income people and others to whom it would otherwise be denied.

Legal Action was founded in 1967 and has six offices in Oshkosh, Green Bay, Milwaukee, Madison, Racine, and La Crosse serving clients in thirty-nine counties throughout the southern half of Wisconsin. Legal Action provides free advice and representation to low-income clients in the areas of family, housing, public benefits, employment, education, and consumer law. This focus has provided Legal Action and its' attorneys with significant experience in representing low-income litigants.

In the arena of family law, one of Legal Action's priorities is handling cases which concern the payment and collection of guardian ad litem fees and court fees. Legal Action has been counsel in multiple cases involving such fees including *Zablocki v. Redbail*, 434 U.S. 374 (1978) establishing the right to marry and prohibiting the State from requiring payment of child support arrearages prior to obtaining a marriage licence; and *Olmsted v. Circuit Court*, 2000 WI App 261, 240 Wis. 2d 197, 622 N.W.2d 29 (Wis. App. 2000) regarding the waiver of guardian ad litem fees. Given this experience and given Legal Action's priorities, Legal Action has an strong interest in having this court withdraw, author, and recommend for publication the *per curiam* opinion in this case.

## Argument

Legal Action respectfully requests the court withdraw, author, and recommend for publication the *per curium* opinion in this case pursuant to Wis. Stat. § 809.23(4)(c). There are two basis for this court to withdraw, author and publish the opinion in this case: 1) pursuant to Wis. Stat. § 809.23(1)(a)5, a published opinion will decide an issue of substantial and continuing public interest regarding the payment of guardian ad litem fees; and 2) pursuant to Wis. Stat. § 809.23(1)(a)1, a published opinion will clarify an existing rule of law regarding the appointment of guardians ad litem. Legal Action agrees with the court's opinion on this issue and with the court's remand to the circuit court, however, Legal Action takes no position on what should – or should not – be the ultimate outcome of the case upon remand to the circuit court.



**1. A published opinion will decide an issue of substantial and continuing public interest.**

The court's decision in this case held a guardian ad litem's appointment in a family law case cannot be conditional on the payment of a deposit or fee. Slip opinion at ¶ 5. In reaching this decision, this court looked to the circuit court's order which appointed the GAL:

Appointment of the *guardian ad litem* shall be deferred and the *guardian ad litem* shall defer commencement of any duties pending payment by both parties of the required deposit as provided above. Payment of the deposits as ordered above shall require strict compliance and any breach with regard to same will, absent further Court Order, result in the services of the guardian ad litem being terminated. *Id.* at ¶ 2.

Although not specifically addressed by either party in their briefs or this court, a basis for this order is found in Fond du Lac County's local rules at 3.10(2):

Upon appointment of a guardian ad litem in any action affecting the family, each party to the action, unless otherwise ordered by the Court, shall make a prepayment toward the guardian ad litem fees in the amount ordered by the Court. **Failure of either party to pay guardian ad litem fees during the pendency of any action may result in** the imposition of sanctions by the Court, **dismissal of the guardian ad litem appointment** or delay in scheduling matters for contested hearings or trial. (Emphasis added) <sup>1</sup>

It would appear that as a result of this court's decision in this case, this local

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<sup>1</sup> Online at: [www.wisbar.org/AM/Template.cfm?Section=Fond\\_du\\_Lac\\_County](http://www.wisbar.org/AM/Template.cfm?Section=Fond_du_Lac_County). Last viewed on May 17, 2010.

rule would not be enforceable as it makes the involvement of a GAL conditional upon the payment of fees.

Fond du Lac County is not unique in taking this approach to GAL appointments. Many counties throughout the state have local circuit court rules which make the appointment and involvement of a GAL conditional upon a parties payment of a fee or deposit. A survey of local court rules find at least eighteen counties with conditional GAL local rules. These local rules are found in counties large (Brown, Fond du Lac, Marathon, Waukesha, Winnebago) and small (Jackson, Rusk, Washburn). They are found in counties located in every judicial administrative district except for the 1<sup>st</sup> and 2<sup>nd</sup> districts. Accordingly, publication of this decision will have a statewide impact on the appointment of guardians ad litem in family court cases.

Circuit courts do have broad discretion in establishing local rules under Wis. Stat. § 753.35. The Wisconsin Supreme Court has held local rules can **supplement** state statutes but local rules may not **supercede** state statutes. *Hefty v. Stickhouser*, 2008 WI 96, ¶ 59, 312 Wis.2d 530, 752 N.W.2d 820 (Wis. 2008). Legal Action has been able to identify eighteen local court rules which

could arguably be interpreted as superceding the statutory requirement at Wis. Stat. § 767.407(1)(a)2 for a GAL to be appointed in family law cases in which the custody or placement of a minor child is contested. If the court's decision in this case was published, it could impact the following local rules which arguably make the appointment or involvement of a GAL conditioned upon the payment of a deposit or fees: <sup>2</sup>

Ashland County local rule 503.01:

If upon the request of either party, the court determines that a Guardian Ad Litem (GAL) should be appointed, unless otherwise ordered by the court both parties will share equally the fee of the guardian ad litem and **may be required to pay all or part of said fee in advance.**

Brown County local rule 800(c):

**Prior to commencing any work on a file** the guardian ad litem shall be required to verify that the required deposit(s) have been made.

Chippewa County local rule 503.02:

**Before an appointed guardian ad litem commences work**, a retainer of not less than \$1,000 shall be paid to the Guardian Ad Litem. **The Guardian ad Litem may not commence work until the retainer is paid**, unless the court orders otherwise.

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<sup>2</sup> All local circuit court rules cited are available online at: [www.wisbar.org/AM/Template.cfm?Section=Circuit\\_court\\_rules2](http://www.wisbar.org/AM/Template.cfm?Section=Circuit_court_rules2). Last viewed May 17, 2010.

Clark County local rules 803-A(3) & 803-B(3):

If custody/placement remains at issue following mediation, the parties shall each make an initial deposit towards the guardian ad litem fee. Each party shall pay 50% of the initial deposit to the Clerk of Court's Office within 30 days of the conclusion of mediation. Petitioner's attorney shall prepare an order appointing the guardian ad litem. **Upon receipt of the initial deposit amount, the court shall appoint a guardian ad litem to represent the interests of the children.**

Dunn County local rule 508.02:

**Before the appointment of, or investigation by a guardian ad litem,** a deposit/retainer in an amount established by the Court may be required to be paid to the Clerk of Court for Dunn County. **The G.A.L. may not commence work until the deposit/retainer is paid,** unless the court orders otherwise.

Green County local rule 403.1:

Upon appointment of a guardian ad litem in any action affecting the family, **each party to the action, unless otherwise ordered by the court, shall make a prepayment** in the amount ordered by the court directly to the appointed guardian ad litem, upon acceptance of the appointment, for deposit in his or her trust account, subject to further order of the court.

Jackson County local rule 16:

In order that the guardian ad litem appointed in all child custody cases are compensated for their services, the party contesting the existing custody arrangement shall deposit with the Clerk of Court the sum of one thousand two hundred dollars (\$1,200) **before a guardian ad litem will be appointed.**

Juneau County local rule:

Guardian Ad Litem fees will be increased to \$400.00 per person Commencing APRIL 1, 2002. These fees will be payable to the CLERK OF CIRCUIT COURT upon the appointment of a Guardian Ad Litem. **Any fees not timely paid may result in a delay.**

Lincoln County local rule:

In any action in which it is necessary for the Court to appoint a guardian ad litem, **each party shall first be required to make to the Clerk of Court for Lincoln County the following payments for the appointment and continued service of the guardian ad litem:**

**\$400.00 in advance of the guardian ad litem's appointment;**

\$ 50.00 per month payable no later than the 15<sup>th</sup> day of each month, commencing with the next month. ...

A party's failure to pay any of the amounts required shall subject that party to potential sanctions for contempt of Court.

**Until both parties have either paid the \$400.00 advance or the Court has approved an affidavit of indigency and waiver of fees:**

**No guardian ad litem shall be appointed, and**

No final hearing or trial shall be scheduled by the Court.

Marathon County local rule 5.30(1):

(1) **Preconditions of Appointment:** Unless otherwise ordered upon motion, all requests for the appointment of a guardian ad litem shall be accompanied by the each of the following:

- (a) The certification of impasse required by Rule 5.20
- (b) A deposit of \$800 to secure payment of the guardian ad litem's fees.

Unless otherwise ordered, the deposit shall be equally shared by the parties.

Oconto County local rule 1308:

In an original action where custody or physical placement of a child or children is an issue **the parties shall be equally responsible for the payment of any** fees for mediation, custody or physical placement studies or **Guardian ad Litem fees due in advance** and will be presumed to be equally responsible for the total fees, unless otherwise ordered by the court.

Rusk County local rule 503.03:

**503.03 In pro se matters, where a Guardian Ad Litem is necessary, the retainer fee must be paid prior to the Guardian Ad Litem appointment.** The Court will allow 60 days for the party or parties to pay this amount. **Once this amount has been paid, the Guardian ad Litem will be appointed.**

St. Croix County local rule 503.03:

The court will normally require one or both parties to deposit partial **prepayment of the GAL fee in the amount of \$1,000** to the clerk of court upon appointment of a GAL.

Trempealeau County local rule 4.V(B):

**The parties shall deposit the sum of \$2,300.00 with the Clerk of Courts prior to the commencement of the evaluation and appointment of the guardian ad litem.** The deposit consists of \$1,000.00 for the guardian ad litem and \$1,300.00 for the remainder of the team. This fee shall be divided equally by the parties. A party may request a hearing regarding these fees in cases of undue hardship.

Washburn County local rule 503.02:

**Before the appointment of, or investigation by a guardian ad litem,** deposit/ retainer in an amount established by the Court may be required to be paid to the Clerk of Court for Washburn County. **The G.A.L. may not commence work until the deposit/retainer is paid,** unless the court orders otherwise.

Waukesha County local rule 7.2:

Upon notice to the court by FCCS that mediation was unsuccessful and that a legal custody and/or physical placement study is completed, a party may petition the court for the appointment of a GAL. **The parties will be required to deposit the sum of \$1,000** with the Waukesha County clerk of courts office which sum shall temporarily be held in trust by the clerk of courts office as partial payment for the GAL. **The court shall then appoint a GAL** to represent the best interests of the child(ren).

Winnebago County local rule 3.16(B)(2):

**Before or at the time of** the first hearing on any disputed custody or placement matter in which a Guardian ad Litem has been appointed, the court shall order the parties to pay a suitable sum of up to \$750 to the Clerk of courts to be placed in to the trust account for the case, or may be paid to the Guardian ad Litem.

Legal Action agrees with the Jacob's arguments and the court's decision in this case which holds the appointment and involvement of a GAL cannot be conditioned on a parties' payment of fees. Slip decision at ¶ 5. If published, this decision will have a statewide impact on local court rules all over the state of Wisconsin, in counties large and small. Accordingly, this court should withdraw, author, and recommend for publication the *per curiam* opinion.



## 2. A published opinion will clarify a rule of law

In addition to the above-cited rules which appear to run contrary to the court's decision in this case, many counties have no local rules at all on GAL fees.<sup>3</sup> Under current law, there is no case which has decided the issue of whether a GAL appointment can be conditioned on the payment of a deposit or fee. In the *per curiam* decision in this case, the court correctly cited to *State v. Freymiller*, 2007 WI App 6, 298 Wis.2d 333, 727 N.W.2d 334 (Wis. App. 2006), which clearly held a court must appoint a GAL for a minor child whenever the custody or placement of the child is contested. *Freymiller* at ¶ 6. The statutory requirement *Freymiller* and this court correctly cited for the appointment and involvement is at Wis. Stat. § 767.407(1)(a): “The court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists: 1. The court has reason for special concern as to the welfare of a minor child. 2. Except as provided in par. (am), the legal

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<sup>3</sup> Six counties have no local rules at all: Columbia, Door, Florence, Green Lake, Langlade, and Price. Eighteen counties have no local rules which deal specifically with GAL fees: Buffalo, Calumet, Crawford, Douglas, Forest, Grant, Monroe, Oneida, Pepin, Pierce, Racine, Richland, Shawano, Taylor, Vernon, Vilas, Walworth, and Waushara.

custody or physical placement of the child is contested.”

Both *Freymiller* and the Wis. Stat. § 767.407(1)(a) very clearly require the appointment and involvement of a GAL in such cases, however, the statutes and the *Freymiller* do not address the question of whether a GAL’s appointment and involvement can be conditioned on the payment of a deposit or fee. There is no case law on this issue and accordingly, a published decision in this case would therefore clarify this issue for circuit courts. In particular, a published decision would clarify the law for those counties without any local rules on GAL fees.

## Conclusion

This case presents this court with the opportunity to render an opinion on a critical issue facing family law litigants and in particular, low-income family law litigants who may be unable to afford the costs associated with the appointment of a guardian ad litem in a family law case. A published opinion in this case will not only decide an issue of substantial and continuing public interest, but will clarify an existing rule of law. For these reasons, Legal Action respectfully requests this court withdraw, author, and recommend for publication its decision in this matter.

Dated this 18<sup>th</sup> day of May, 2010

LEGAL ACTION OF WISCONSIN, INC.

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