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Opinion No. 07-154

Guardian *Ad Litem* Fees

QUESTION

Is it lawful for a Tennessee judge to attach guardian *ad litem* fees to a parent's child support obligation?

OPINION

While the question posed raises no constitutional issues, it would be inappropriate to attach guardian *ad litem* fees to a parent's child support obligation because such fees are not child support. A judge, however, may assess guardian *ad litem* fees as discretionary costs.

ANALYSIS

Under Tennessee law, courts conducting proceedings under Part 1 of Title 37 of the Code may appoint guardians *ad litem* for children who are parties in the litigation:

> The court at any stage of a proceeding under this part, on application of a party or on its own motion, shall appoint a guardian ad litem for a child who is a party to the proceeding if such child has no parent, guardian or custodian appearing on such child's behalf or such parent's, guardian's or custodian's interests conflict with the child's or in any other case in which the interests of the child require a guardian. The court, in any proceeding under this part resulting from a report of harm or an investigation report under §§ 37-1-401 -- 37-1-411, shall appoint a guardian ad litem for the child who was the subject of the report. A party to the proceeding or the party's employee or representative shall not be appointed.

Tenn. Code Ann. § 37-1-149(a)(1).

Child support actions are governed solely by statute and by administrative rules. In cases arising upon a dissolution of marriage, Tennessee law requires that the divorce court set child support for the parties' children. Tenn. Code Ann. § 36-5-101(a)(1). Similarly, in parentage cases involving children born out of wedlock, the law also mandates that the juvenile court set child support. Tenn. Code Ann. § 36-2-311(a)(11)(A). In both situations, the court must set child support in accordance with the Child Support Guidelines ("Guidelines"):

> In making the court's determination concerning the amount of support of any minor child or children of the parties, the court shall apply, as a rebuttable presumption, the child support guidelines, as provided in this subsection (e).

Tenn. Code Ann. § 36-5-101(e)(1)(A). The Department of Human Services ("Department"), in turn, has statutory rulemaking authority to promulgate the Guidelines. Tenn. Code Ann. § 71-1-132(a)(1). The Guidelines "have the force and effect of a legislative mandate." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). Neither these statutes nor the Guidelines provide that guardian *ad litem* fees may be "attached" to a parent's child support obligation.

The Tennessee Rules of Civil Procedure, however, do allow a court to assess guardian *ad litem* fees as discretionary costs. Rule 54.04(2) provides, in relevant part, as follows:

> Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. *Discretionary costs allowable are*: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, *and guardian ad litem fees*[.]

Tenn. R. Civ. P. 54.04(2) (emphasis added).

In light of these authorities, we conclude that, while the question posed raises no constitutional issues, it would be inappropriate to attach guardian *ad litem* fees to a person's child support obligation because such fees are not child support. A parent's child support obligation must be established by applying, "as a rebuttable presumption," the Guidelines. Tenn. Code Ann. § 36-5-101(e)(1)(A). Neither the statutes authorizing reliance on the Guidelines to set child support nor the Guidelines themselves provide that guardian *ad litem* fees may be "attached" to a parent's child support obligation. In fact, attaching guardian *ad litem* fees to a parent's child support obligation would improperly transform the fees into child support, subjecting them to the prohibition against retroactive modification under Tenn. Code Ann. § 36-5-101(f)(1). A judge, however, may assess

guardian *ad litem* fees as discretionary costs under Tenn. R. Civ. P. 54.04(2).[1] Rule 54 thus should govern the assessment of guardian *ad litem* fees to a party in the litigation.[2]

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[1]Rule 54.04(1) provides, however, that "costs against the state, its officers or its agencies shall be imposed only to the extent permitted by law." Tenn. R. Civ. P. 54.04(1). Tennessee law states that guardian *ad litem* fees may be charged to the counties or, in cases involving indigents, to the Administrative Office of the Courts. Tenn. Code Ann. § 37-1-150(a)(3). In cases in which the Department is prosecuting the child support matter, the court cannot assess guardian *ad litem* fees against the Department. *Matter of Harris*, 849 S.W.2d 334, 336 (Tenn. 1993). Any such assessment would violate the State's sovereign immunity. *Id.*

[2]This is true even if the proceeding in question has been filed in juvenile court. While the Rules of Juvenile Procedure do not provide for assessment of discretionary costs, a juvenile court "[w]here no specific procedure is prescribed by these rules . . . may proceed in any lawful manner." Tenn. R. Juv. P. 1(d). The Supreme Court has approved reliance on the Rules of Civil Procedure by a juvenile court when the Rules of Juvenile Procedure do not cover a certain situation. *Gonzalez v. State Dept. of Children's Servs.*, 136 S.W.3d 613, 617 (Tenn. 2005) (holding that the question of whether a party has standing to intervene in a termination of parental rights proceeding in juvenile court should be analyzed under Tenn. R. Civ. P. 24).