THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

John D. McLeod, Judge, Administrative Law Court
Case No. 2010AL1100591

S. Phillip Lenski, Judge, Administrative Law Court
Case No. 2012ALJ-11-0495-AP

ORIGINAL

Karen A. Forman — Appellant,

versus

South Carolina Department of Labor, Licensing and Regulation, State Board of Social Work Examiners, — Respondents.

INITIAL BRIEF OF APPELLANT

Thomas F. McDow
Erin K. Urquhart
Law Office of Thomas F. McDow
Attorneys for Appellant
514 Oakland Avenue, Second Floor
Post Office Box 891
Rock Hill SC 29731-6891
Telephone 803-327-4141

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STATEMENT OF ISSUES ON APPEAL

I Does the quasi-judicial immunity afforded to guardians *ad litem* in *Fleming v. Asbill* apply to professional disciplinary proceedings?

II Does the State Board of Social Work Examiners have subject matter jurisdiction to make findings of fact that a guardian *ad litem* appointed by the family court "failed to perform GAL responsibilities as required under the private GAL statute of S. C. Code Ann. § 63-3-830(A)(2)(a-f)" or that she "failed to investigate or investigate fully all relevant documentation and failed to support her conclusions with a detailed report?"

III Even if the Board had authority to find facts relating to Ms. Forman's performance as a guardian *ad litem* in family court, are its findings of fact correct?

IV Does the Board have the jurisdiction or authority to prevent the family court from exercising its discretion in appointing a guardian *ad litem* or preventing the family court's appointee from serving as a guardian?

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STATEMENT OF THE CASE

In August 2009, the South Carolina Department of Labor, Licensing and Regulation's State Board of Social Work Examiners ("the Board") served Appellant Karen A. Forman with a Notice of Charges and Notice of Hearing.[1] On September 14, 2009, Appellant moved for dismissal of for the charges.[2] This request for dismissal was denied via email on September 15, 2009.[3] The Board held a two-day administrative hearing on June 28-29, 2010. Appellant again requested dismissal on the grounds of lack of jurisdiction and again the Board denied the motion.[4] The Board issued its Order sanctioning Appellant on July 13, 2010.[5] The Board found Appellant violated S.C. Code Ann. § 40-63-110(B)(9) by violating the Social Work Principle of Ethics found at S.C. Code Regs. 110-20(8).[6] The Board ordered that Appellant not work as a guardian *ad litem*, and also prohibited Appellant from all independent social work practice.[7] Appellant filed her Notice of Appeal with the

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[1]ROA, Notice of Charges dated August 17, 2009, pages [9-13].

[2]ROA, Motion to Dismiss to the Social Work Board (undated), page [14].

[3]ROA, Email from Social Work Board attorney Jamie Saxon dated September 15, 2009, page [1].

[4]ROA, Transcript of Record June 28, 2010, pages [37-38].

[5]ROA, Order, Board of Social Work Examiners dated July 13, 2010, pages [2-5].

[6]ROA, Order, Board of Social Work Examiners dated July 13, 2010, page [4].

[7]ROA, Order, Board of Social Work Examiners dated July 13, 2010, page [5].

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administrative law court on August 4, 2010.[8] Appellant also filed a motion with the administrative law court to stay the enforcement of the Board's Order and to expedite the appeal.[9] The administrative law court granted this motion in part, allowing Appellant to continue to perform guardian *ad litem* work and expediting the appeal.[10] The administrative law court affirmed in part, reversed in part, and remanded to the Board for the reconsideration of sanctions.[11] The Appellant filed a Notice of Appeal with the South Carolina Court of Appeals September 26, 2012,[12] a Motion to Confirm Automatic Stay or Alternatively for Supersedeas with the South Carolina Court of Appeals October 8, 2012,[13] and a Motion to Certify Appeal to the Supreme Court on October 15, 2012.[14] On November 14, 2012, the South Carolina Court of Appeals denied the motion to confirm the automatic stay or alternatively for supersedeas, dismissed the appeal, and transferred the case to the

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[8]ROA, Notice of Appeal dated August 4, 2010, page [2].

[9]ROA, Motion to Expedite and for a Stay of the Boards's Order dated August 4, 2010, pages [27-29].

[10]ROA, Order Granting in Part Appellant's Motion to Expedite and for a Stay of the Board's Order dated August 26, 2010, pages [6-7].

[11]ROA, Order of Administrative Law Court dated July 12, 2011, pages [1-13].

[12]ROA, Notice of Appeal dated September 26, 2014, pages [1-2].

[13]ROA, Motion to Confirm Automatic Stay or Alternatively for Supersedeas with the South Carolina Court of Appeals October 8, 2012, pages [1-3].

[14] Motion to Certify Appeal to the Supreme Court on October 15, 2012, pages [1-5].

administrative law court.[15] The administrative law court issued a Notice of Assignment on November 27, 2012. The South Carolina Supreme Court denied the appellant's motion to certify December 6, 2012.

Appellant sought a hearing on remand and that hearing was held September 17, 2012 by the Board. By Order on Remand dated September 19, 2012, the Board reimposed it original sanctions.[16] Appellant filed her notice of Appeal with the administrative law court on November 14, 2012. The administrative law court's order dated January 9, 2014, affirmed the reimposition of the original sanctions.[17] This appeal followed.

This appeal is from the order of the Board dated July 13, 2010, the order of the administrative law court dated July 12, 2011, the Board's Order on Remand dated September 19, 2012, and the Order of the administrative law court dated January 9, 2014. The appellant seeks a dismissal of the proceeding for lack of subject matter jurisdiction and a reversal of sanctions.

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[15]ROA Order dated November 14, 2012, South Carolina Court of Appeals, pages [1-2].

[16]ROA, Order on Remand, Board of Social Work Examiners dated September 19, 2012, pages [1-4].

[17]ROA, Order of the administrative law court dated January 9, 2014, pages [1-10].

FACTS

Appellant Karen A. Forman has been a licensed social worker for over fifteen years.[18] She has a Masters Degree in Social Work[19] and for many years was licensed by the State of South Carolina as a Masters Social Worker ("LMSW").[20] More recently, she became licensed as an Independent Social Worker-Clinical Practice (LISWCP).[21] Each of these license designations bas its own extensive education and testing requirements, as prescribed by statute.[22] The charges that the Board brought against her in 2009 covered a time period during which she had her LMSW license.[23] However, it is undisputed that the charges dealt with actions taken by Appellant exclusively while she was working as a private, family court-appointed guardian *ad litem*.[24] At the time of the trial, and since 2003, Appellant bas been appointed as a private guardian *ad litem* in approximately one hundred fifty cases,[25] and this has been her primary way she earns her living.[26]

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[18]ROA, Transcript of Record June 28, 2010, page [357], lines 20-21.

[19]ROA, Order of the administrative law court dated July 12, 2011, page [2].

[20]ROA, Order of the administrative law court dated July 12, 2011, page [2].

[21]ROA, Order of the administrative law court dated July 12, 2011, page [2].

[22] S.C. Code Ann. §§ 40-63-230 & 240.

[23]ROA, Order, Board of Social Work Examiners dated July 13, 2010. page [2].

[24]ROA, Notice of Charges, pages [9-12].

[25]ROA, Transcript of Record June 28, 2010, page [301], lines 9-24.

[26]ROA, Transcript of Record June 28, 2010, page [358], lines 6-9.

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In the instant case, the charges filed against Appellant by the Board resulted from complaints from "members of the public"[27] and involved two separate family court cases in which Appellant was appointed as a private, lay guardian *ad litem* and where the main issues involved modification of visitation, not initial custody[28]. During this time, Appellant used letterhead which identified her as "Karen A. Forman MSW, LMSW."[29]

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Evans Case

Mr. Evans filed a modification case, initially regarding custody, but ultimately for visitation schedule and restriction changes.[30] The order of appointment authorized Ms. Forman to investigate Mr. Evans' alleged alcohol abuse and efforts at sobriety.[31] In a preliminary report, she listed concerns about Mr. Evans' drinking but did not recommend denial of visitation.[32] Mr. Evans filed a motion to relieve the Appellant as guardian *ad litem,*[33] but it was never heard. The parties settled all

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[27]ROA, Notice of Charges, pages [9].

[28]ROA, Transcript of Record June 28, 2010, page [13], lines 6-9, and page [110], lines 6-11.

[29]ROA, Transcript of Record June 28, 2010, page [186], lines 10-12.

[30]ROA, Transcript of Record June 28, 2010, page [334], line 25 through page [335], lines 1-3; and page [110], lines 6-11.

[31]ROA, Transcript of Record June 28, 2010 page [336], lines 22-25.

[32]ROA, Transcript of Record June 28, 2010 page [337], lines 19-24 and Guardian *ad litem* Report, pages [712-718].

[33]ROA, Complainant's Exhibit #14, Motion to Relieve Guardian *ad litem* dated October 20, 2006, page [727].

issues prior to the beginning of trial,[34] including payment of the Appellant's guardian fees. In his complaint about Appellant's service as guardian, Mr. Evans alleged she was unethical and unprofessional, was overly scrutinizing,[35] was hostile,[36] and failed to visit the parents' homes.[37] The Appellant did not observe the children, who lived out of state. She was notified of their presence in South Carolina only one week prior, and she was scheduled to be out of state. Mr. Evans' attorney admitted that the appropriateness of the parents' homes was not in dispute. The Board's charges against Appellant regarding *Evans v. Evans* centered upon Appellant's alleged failure to investigate and to interview all parties including the minor children.[38] The charges also indicate that Appellant should not have represented herself as a LMSW in her correspondence because for a time, her license was on probation.[39] Finally, there was an allegation that Appellant should have withdrawn from the Evans case because of a conflict (This alleged conflict surrounded a potential claim that Evan's attorney's partner considered bringing

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[34]ROA , Transcript of Record June 28, 2010, page [205], line 8.

[35]ROA, Transcript of Record June 28, 2010, page [111], lines 20-22.

[36]ROA, Transcript of Record June 28, 2010, page [130], lines 10-11.

[37]ROA, Transcript of Record June 28, 2010 page [114], lines 16-24.

[38]ROA, Notice of Charges dated August 17, 2009, pages [9-10].

[39]ROA, Notice of Charges dated August 17, 2009, page [10].

against the appellant. The alleged conflict was never raised by Evans to the family court and no civil case was ever filed.).[40]

The administrative law court found "Appellant made recommendations to the court in her affidavit without interviewing the Father's alcohol treatment provider, without interviewing the children, and without interviewing all parties."[41]

Higuera Case

Katherine Knagenhjelm Higuera, sometimes referred to as Ms. K, was involved in a family court case where the parties were in dispute about the visitation schedule for the child. The family court appointed the Appellant to replace the initial guardian.[42] During the pendency of the case, the visiting parent was deployed to Iraq for sixteen months.[43] Ms. K alleged that her husband's visitation should be restricted due to his criminal history and her allegations that he put inappropriate things in the internet and sent the child pornographic photos. Ms. K submitted the evidence of this to the police, but no criminal charges were brought.[44] The Appellant summarily reviewed the same evidence and did not find a safety concern for the

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[40]ROA, Notice of Charges dated August 17, 2009, page [10].

[41]ROA, Order of the administrative law court dated July 12, 2011, page [3].

[42]ROA, Transcript of Record June 28, 2010, page [58], lines 4-6, and Complainant's Exhibit #24, Order Appointing Guardian *ad litem* dated November 23, 2004, pages [777-780].

[43]ROA, Respondent's Exhibit #2, Time Line, page [835].

[44]ROA, Transcript of Record June 28, 2010, page [66], lines 2-25.

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son.[45] The Appellant performed a home study on the father when he returned from Iraq[46] and *suggested* the attorneys phase in visitation. Ms. K rejected that recommendation, interpreting it to mean Appellant was recommending unsupervised visitation.[47] A meeting between the Appellant and Ms. K was scheduled but never held. Appellant testified that Ms. K did not respond to her attempts to communicate,[48] and therefore she was not granted access to the child to observe.[49] The parties ultimately settled all issues,[50] including payment of Appellant's guardian fee. Ms. K's complaint about the Appellant referred to her as unethical and unprofessional.[51]

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[45]ROA, Transcript of Record June 28, 2010, page [317], lines 16-23.

[46]ROA, Transcript of Record June 28, 2010, page [312], lines 8-11.

[47]ROA, Transcript of Record June 28, 2010, page [24], lines 10-12.

[48]ROA, Transcript of Record June 28, 2010, page [312], lines 1-3, and page [313], lines 9-10.

[49]ROA, Transcript of Record June 29, 2010, page [15], lines 7-8.

[50]ROA, Transcript of Record June 28, 2010, page [73], lines 21-24.

[51]ROA, Transcript of Record June 28, 2010, page [12], lines 4-6.

STANDARD OF REVIEW

The standard of review for a court reviewing the decision of the ALC is set forth in the Administrative Procedures Act. S.C. Code Ann. § 1–23–610 (Supp.2009). "The review of the administrative law judge's order must be confined to the record." § 1–23–610(B). Under section 1–23–610(B), our court may affirm or remand the case for further proceedings. Additionally, this court may reverse or modify the decision of the ALC if its findings, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1–23–610(B). The decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. *Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct.App.2008). "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." Id. at 605, 670 S.E.2d at 676.[52]

"In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Sloan v. South Carolina Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466–67, 636 S.E.2d 598, 605–06 (2006) (stating the appellate court is free to decide the question based on its consideration of law, public policy, and the court's sense of justice). Notwithstanding, this court will accord the most respectful consideration to the interpretation of a statute by the agency charged with its administration.

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[52]*Sierra Club v. S. Carolina Dep't of Health & Envtl. Control*, 387 S.C. 424, 430-31, 693 S.E.2d 13, 16 (Ct. App. 2010).

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Bursey v. South Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, 186–87, 631 S.E.2d 899, 905 (2006).[53]

The Board of Social Work Examiners is ***not*** an agency charged with administration of the private Guardian *ad litem* statute. Thus, the Board's findings are entitled to no deference or respectful consideration.

Determining whether a statement of the administrative law court is a findings of fact or a conclusion of law is similar to *The Serenity Prayer*: "God, grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference." The key is knowing the difference. A finding that a person did or did not do a particular specific objective act is a finding of fact. A finding that a person violated a statute or a regulation is a conclusion of law. A vague subjective finding such as "The Respondent failed to investigate or investigate fully" is a conclusion of law because is requires a reference to, and interpretation of, the legal standard of the private Guardian *ad litem* statutes.

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[53]*Hardee v. McDowell*, 372 S.C. 413, 417, 642 S.E.2d 632, 634 (Ct. App. 2007) aff'd as modified, 381 S.C. 445, 673 S.E.2d 813 (2009).

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ARGUMENT

I

Does the quasi-judicial immunity afforded to guardians *ad litem* in *Fleming v. Asbill*[54] apply to professional disciplinary proceedings?

It is a violation of the Constitution of South Carolina for any non-judicial body, and in particular the South Carolina Department of Labor, Licensing and Regulation, to restrict the practice of a purely judicial function. The Social Work Board was unguided in its interference with the family court. It made findings of fact and imposed sanctions haphazardly, without any grant of authority or guidelines, either statutory or precedent. The result was an erroneous and unconstitutional deprivation of rights.

Separation of Powers

Separation of powers is a fundamental principal of American democracy. Correspondingly, South Carolina's government consists of three equal branches: the executive branch, the legislative branch and the judicial branch. "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."[55] Because each branch has its own duties and responsibilities, the branches need not come into conflict. Blurring these duties and

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[54]*Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (1997).

[55]S.C. Const. Art. I, §8.

responsibilities creates conflict and confusion as is discussed more fully in Argument III. In addition to the branches' checks and balances, the separation of powers allows for specialized knowledge regarding a particular branch's province.

This case involves two distinct government entities. The first being the State Board of Social Work Examiners, which falls within the executive branch with its members appointed by the governor[56] with the advice and consent of the senate[57] with the secretary of state[58] monitoring the Board.[59] The second is the family court system, which belongs to the judicial branch.[60] Guardians *ad litem* are appointed by a family court judge in the exercise of his or her absolute discretion[61] and thus fall within the judicial branch. Where the executive assumes judicial functions, the result is an improper exercise of power lacking subject matter jurisdiction by the executive branch.

Fleming v. Asbill

The administrative law court found "This case was a professional disciplinary proceeding not a civil action. As such, Appellant is not entitled to quasi judicial

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[56]S. C. Code Ann. Section 1-1-110.

[57]S. C. Code Ann. Section 40-63-10(A).

[58]S. C. Code Ann. Section 1-1-110.

[59]S. C. Code Ann. Section 1-5-40(95).

[60]S. C. Code Ann. Section 14-1-70(6).

[61]S. C. Code Ann. Sections 63-3-530(37) and 63-3-810.

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immunity as provided in *Fleming v. Asbill*."[62] The essence of the administrative law court's holding is that *Fleming* grants guardians absolute common law immunity in civil actions for gross negligence, with only monetary damages at issue, but does not protect guardians in professional disciplinary proceedings where the guardian's ability to earn a livelihood is at stake. It is not surprising that the administrative law court cites no case supporting this proposition, as no precedent appears to exist. A WestLaw search for "professional disciplinary proceeding" in South Carolina appellate cases yields twenty-four cases but a search of those cases for "immunity" does not yield a single case. The administrative law court not only limits the application of *Fleming* inappropriately, its conclusions are wrong.

Fleming does not mention professional disciplinary proceedings; it provides applicable guidelines stating the public policy consideration for the protection and independence of guardians. In *Fleming*, the Supreme Court answered two certified questions from the United States District Court, of which only the second is relevant here: "Is a private person, who is court-appointed to serve as a guardian *ad litem* in a private custody proceeding, afforded common law immunity for acts performed within the scope of her appointment as guardian *ad litem*? If so, what is the nature and scope of the common law immunity?"[63] The type of proceeding is

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[62]*Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (1997).

[63]*Fleming v. Asbill*, 326 S.C. 49, 52, 483 S.E.2d 751, 753 (1997).

irrelevant. What is important is the Court's reasoning for its affirmative answer affirming common law immunity for guardians:

> Both persuasive authority and the policy reasons set forth above convince us to hold today that private persons appointed as guardians *ad litem* in private custody proceedings are afforded immunity for acts performed within the scope of their appointment. Because one of the guardian's roles is to act as a representative of the court, and because this role can only be fulfilled if the guardian is not exposed to a **constant threat of lawsuits from disgruntled parties**, a finding of quasi-judicial immunity is necessary. Such a grant of immunity is crucial in order for guardians to properly discharge their duties. The immunity to which guardians ad litem are entitled is an absolute quasi-judicial immunity.[64] (Emphasis added).

In *Fleming*, the Court addresses the remedies available for rogue guardians. In addition to cross-examination and safeguards provided in *Shainwald*,[65] the Court refers to "the appointing court's oversight," "move the court for termination," "court's prerogative," and "judicial review." Notably absent is any authority for the executive branch of the government to sanction a private guardian *ad litem* acting on behalf of the judicial branch.

The instant case involving threats from "disgruntled parties" illustrates the reasons for the holding in *Fleming*. Here Ms. K complained to The Board, the resident judge, Victim's Advocacy, the Department of Social Services, Guardian *ad litem* services for Dorchester county, Child Protective Services, and various

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[64] *Fleming v. Asbill*, 326 S.C. 49, 57, 483 S.E.2d 751, 755-56 (1997).

[65] *Shainwald v. Shainwald*, 302 S.C. 453, 395 S.E.2d 441 (Ct. App. 1990).

politicians.[66] Mr. Evans complained that the Appellant failed to investigate and at the same time felt overly scrutinized as to his drinking habits.[67]

In the administrative law court, the State argued, "There are several significant differences between a civil action and an administrative disciplinary proceeding."[68] The arguments the State gives are "red herrings." It suggest that the administrative disciplinary proceeding does not rise to the level of a civil action but then revokes Appellant's livelihood, an action much stronger than awarding a civil judgement. The difference is that a civil case can take your money but a disciplinary hearing can take your livelihood.

Respondent also argued in the administrative law court, "In the instant case, the Appellant's argument that this disciplinary proceeding was retaliation by disgruntled litigants is without merit since this disciplinary proceeding against her Social Work license was brought by the Board."[69] This claim is misleading. While the case was brought by the Board, it was brought as a direct result of the claims of two disgruntled litigants. The Statement of Facts in this same brief directly links the service of the Notice of Charges to the complaints of the public.[70]

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[66]ROA, Transcript of Record June 28, 2010, page [45], lines 5-22, and Complainant's Exhibit #7, Ms. K's letter to Resident Judge dated June 7, 2006, page [690].

[67]ROA, Transcript of Record June 28, 2010, page [111], lines 16-22.

[68]ROA, Brief of Respondent dated November 17, 2010, page [13].

[69]ROA, Brief of Respondent dated November17, 2010, page [13].

[70]ROA, Brief of Respondent, dated November 17, 2010, page [2].

The State cited *Deatherage v. State Examining Board of Psychology.*[71] [72] Deatherage's testimony as an expert witness was inextricably linked to work performed under the license granted by the State Examining Board of Psychology. By revoking his license the State Examining Board of Psychology was, in fact, protecting the public, by preventing Deatherage from being a psychologist. The appropriate comparison would be if Appellant's work in the family court had been contingent on having a license from the Social Work Board. However, in the instant case, Appellant's social work license had no bearing on her qualifications as a guardian *ad litem*.

The rationale and holding of the Supreme Court of South Carolina in *Fleming v. Asbill* protects the independence of Karen Forman and similarly situated guardians from the complaints of "disgruntled litigants" in the United States District Court, the trial courts of South Carolina, and the boards and agencies of the executive department.

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[71] *Deatherage v. State Examining Board of Psychology*, 134 Wash. 2d 131,139, 948 P.2d 828 (Wash.1997).

[72] ROA, Brief of Respondent dated November 17, 2010, page [13].

II

Does the State Board of Social Work Examiners have subject matter jurisdiction to make findings of fact that a guardian *ad litem* appointed by the family court "failed to perform GAL responsibilities as required under the private GAL statute of S. C. Code Ann. § 63-3-830(A)(2)(a-f)" or that she "failed to investigate or investigate fully all relevant documentation and failed to support her conclusions with a detailed report?"

Exclusive Jurisdiction over Guardians

> Who's robbing this train, anyway? "The train robbers were robbing the passengers and threatening to rape the women. An altruistic passenger cries, 'Spare the women!' An elderly lady turns on him, exclaiming 'Who's robbing this train, anyway?'"
> *A Dictionary of Catch Phrases* by Eric Partridge (Routledge: 2003), page 534.

The family court has both exclusive jurisdiction to appoint guardians *ad litem* in actions pertaining to custody or visitation,[73] as well as absolute discretion in determining who will be appointed as a guardian *ad litem* in each case."[74] The State Board of Social Work Examiners has no jurisdiction or authority to infringe on the family court's "absolute discretion in determin[ing] who will be appointed a guardian *ad litem*." An order of the State Board of Social Work Examiners prohibiting a person from working as a guardian *ad litem* is an unconstitutional usurpation of the family court's "absolute discretion."

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[73]S. C. Code Ann. §63-3-530(37).

[74]S. C. Code Ann. §63-3-810(B).

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III

Even if the Board had authority to find facts relating the Ms. Forman's performance as a guardian ad litem in family court, are its findings of fact correct?

Some of the Board's findings of fact may be true in a narrow, strict sense. They are also incomplete and out-of-context. Additionally, the Board's interpretation of the guardian *ad litem* statute suggests confusion between the common usage of particular terms and their usage as professional terms of art. The South Carolina Legislature understood the inherent discretion required in the investigation of family court litigants and provided for it in the guardian *ad litem* statute.[75] The Board failed to recognize this necessary quality of guardian work. The State's own expert witness in guardian work, Jania Sommers, testified, "There is a lot of variation in practice."[76]

The Private Guardian *ad litem* statute forbid Ms. Forman making "a recommendation regarding which party should be awarded custody," absent a specific request from the Family Court for reasons stated on the record.[77] Ms. Forman did not make a recommendation in *Higuera,* she expressed a feeling in a

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[75]S. C. Code Ann. §63-3-810 *et seq*.

[76]ROA, Transcript of Record June 28, 2010, page [295], lines 23-24.

[77]S. C. Code Ann. Section 63-3-830(A)(6).

letter to Ms. K.[78] The Board, probably never having heard of *Patel v. Patel*,[79] lacked the Legislature's sensitivity to the reasons for the Guardian *ad litem* statute or the judiciary's construction and enforcement of the statute. The Board misunderstood and failed to appreciate both the context of these facts and the legislative intent behind a guardian's formal recommendation to the court, as discussed at S.C. Code Ann. §63-3-830(6).

To give even more context, at the time that Ms. Forman was appointed as the guardian *ad litem* in the Higuera case, the father was in the process of re-enlisting in the military and leaving for Iraq.[80] The visitation issue was held in abeyance until his return, which was nearly sixteen months later. The mother testified that the previous guardian, Ms. Groff, had decided not to meet with the son because the father was not pursuing visitation.[81] The mother did not suggest that this was inappropriate. Ms. Forman took the same approach when the father was going to be out of the country for military service. Additionally, the mother took the minor child out of public school and home-schooled the child during the pendency of this case.[82] The standing order in this case required supervised visitation. Ms. Forman came to

[78]ROA , Complainant's Exhibit 2, Letter from Karen Forman to Ms. K. dated June 1, 2006, page [631].

[79]*Patel v. Patel*, 347 S.C. 281, 555 S.E.2d 386 (2001).

[80]ROA, Transcript of Record June 28, 2010, page [306], lines 9-17.

[81]ROA, Transcript of Record June 28, 2010, page [19], lines 17-21.

[82]ROA, Transcript of Record June 28, 2010, page [314], lines 7-12.

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a motion hearing at which a complete settlement was put on the record. All of these facts are uncontested. None of these undisputed facts are included in the Board's findings of fact, yet they are part of the record and relevant to Ms. Forman's actions and sanctions. The findings are analogous to the statement "The man deliberately stuck the child with a needle and made her cry," but omitting the man's status as a doctor who was treating the child.

Ms. Forman made efforts to meet with the mother, to interview the child and to visit the mother's home.[83] The mother was uncooperative with the investigation. School records for the child who was home-schooled by the mother would not have corroborated or disproved any contested facts as this would be an extension of the child's home life with the mother. Additionally Ms. Forman testified that she likes to interview children at school because they are less likely to feel parental pressure to provide particular answers.[84] In this case, the school environment and the home environment were the same. The mother's fitness was not in issue, a fact corroborated by mother's testimony as to why Ms. Forman was appointed as the guardian. "To look after the best interest of my son and to be sure that he would be safe if he did visit with his father."[85] What was in issue was the father's fitness. Ms.

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[83]ROA, Transcript of Record dated June 28, 2010, page [312], lines 1-3; and Complainant's Exhibit #2, Letter from Karen Forman to Ms. Knagenhjelm dated June 1, 2006, page [631].

[84]ROA, Transcript of Record dated June 28, 2010, page [314], lines 14-20.

[85]ROA, Transcript of Record dated June 28, 2010, page [13], lines 3-5.

Forman met with the father twice and visited his house once to determine if it was suitable for visitation with his child. Ms. Forman investigated the case as necessary under the circumstances and allegations.

Ms. Forman talked with the mother's attorney, Kate Schmutz, regarding the mother's allegations of the father's potential criminal activity, to which Ms. Schmutz responded that she was not aware of any actual concern.[86] Detective Thomas Myles Marshall testified that he reviewed the same papers Ms. Forman received and found that there was no criminal conduct represented in those papers.[87] Detective Marshall reported this to both attorneys and to Ms. Forman. The Board found that Ms. Forman did not investigate these reports fully. What she did was to use her statutorily provided discretion to conclude that the professional opinions of Kate Schmutz and Detective Marshall fulfilled her requirement to investigate the mother's allegations of father's criminal activity. Further, she testified that there were more than 2,000 pages of documents and that they were difficult to read.[88] To equate not having reviewed the reports fully as not having competently investigated the allegation of criminal activity is illogical emphasis of 'form over substance' that would serve no useful purpose but to increase guardian fees in visitation cases.

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[86]ROA, Transcript of Record dated June 28, 2010, page [319], lines 5-17.

[87]ROA, Transcript of Record dated June 29, 2010, page [120], lines 3-12.

[88]ROA, Transcript of Record dated June 28, 2010, page [316] line 24 through page [317] line 7.

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The Board found that Ms. Forman did not provide a detailed report supporting her conclusions regarding visitation. It was the mother's testimony that she had "no idea" whether Ms. Forman made a final recommendation to the court.[89] That the Board found that Ms. Forman made "conclusions regarding visitation," illustrates its ignorance regarding the relevant guardian *ad litem* statutes. Ms. Forman wrote a letter to the mother on June 1, 2006, that indicated the father was interested in visitation and that she thought that some visitation was appropriate.[90] The family court had already ruled on the issue of visitation on November 10, 2003, giving the father supervised visitation.[91]

The Board failed to recognize that a guardian's report is only pertinent when the court is ruling on contested issues. A settlement of all issues arises when the parties themselves agree to a solution. In approving a settlement, the judge's role is to ensure that the parties enter into the agreement freely and voluntarily. Even in a contested trial, the guardian may not even make a recommendation in her report or in her testimony unless specifically requested by the trial judge for reasons stated in the record.[92] It is true that Ms. Forman did not provide a detailed report

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[89]ROA, Transcript of Record dated June 28, 2010, page [80], lines 4-18.

[90]ROA , State's Exhibit 2, Letter from Karen Forman to Ms. Knagenhjelm dated June 1, 2006, page [631].

[91]ROA, Complainant's Exhibit #1, Temporary Order dated November 10, 2003, page [624-627].

[92]S. C. Code Ann. §63-3-830(A)(6).

supporting her conclusions regarding visitation because the case did not go to trial. In the same way, a judge would not likely issue a bench warrant for a subpoenaed fact witness where the parties settle on the morning of court. A guardian is appointed to bring facts to the court's attention to help it settle a dispute. Here, there was no longer a dispute. A natural consequence of the parties reaching a full and final settlement with the assistance of their lawyers,[93] is that the need for a final report or a formal recommendation was moot.

The Board applied the investigative requirements of a fully contested custody case to a more limited visitation modification case, which abruptly settled, and concluded that Ms. Forman failed to perform her duties. However, based on the contested issues in the Higuera case, the father's availability, and the mother's unwillingness to cooperate, Ms. Forman took the appropriate steps to conduct a guardian's investigation.

In the Evans case, the Board found that she failed to interview the children or all parties. It is an undisputed fact that the children lived with their mother in Nevada and came to South Carolina on a "last minute" visit just once during the pendency of the case. Ms. Forman was on a previously scheduled vacation out-of-state during this visit. At the time there was nothing to suggest that this would be her only opportunity to meet the children.[94] Ms. Forman did not meet with the

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[93]ROA, Transcript of Record dated June 28, 2010, page [73], lines 21-24.

[94]ROA, Transcript of Record dated June 28, 2010, page [341], lines 5-23.

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mother because she, too, lived in Nevada. There were already concerns about the cost of Ms. Forman's fees in this case as evidenced by the parties's refusal to consent to raising the court appointed cap of the guardian's fees.[95] No one expected or requested Ms. Forman to fly to Nevada to interview the mother and the children. Neither the mother's home nor fitness were contested issues. When one considers both the geographical distance and the contested issues, Ms. Forman's exercise of discretion that a home visit was not necessary is reasonable.

The Board found that Ms. Forman failed to interview the father's alcohol treatment provider. Ms. Forman did speak with Doug Fotia by phone[96] and attended one counseling session.[97] One of the main responsibilities of the guardian is to bring facts to the court that would not otherwise be presented.[98] The father admitted to the family court that he had an ongoing problems with alcohol.[99] The father's own testimony to the Board confirmed this statement[100] and confirmed that

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[95]ROA, Transcript of Record dated June 28, 2010, page [138], lines 3-10.

[96]ROA, Transcript of Record dated June 28, 2010, page [154] lines 19-21.

[97]ROA, Transcript of Record dated June 28, 2010, page [117], lines 21-25 and page [118] lines 1-4.

[98]S.C. Code Ann. Section 63-3-810(A).

[99]ROA, Joint Exhibit #1, Consent Order dated August 24, 2005, page [856], Joint Exhibit #2, Order for Rule to Show Cause dated April 21, 2006, pages [861-862], and Joint Exhibit #5, Order dated July 22, 2007, pages [873-875].

[100]ROA, Transcript of Record dated June 28, 2010, page [129], lines 2-6.

this was a problem.[101] Ms. Forman prepared and filed a preliminary Guardian's report with findings regarding father's use of alcohol, a report that neither party contested or sought to contradict. Additional investigation would have been "gilding the lily,"[102] a waste of her time and the parties' money.

The Evans case ended with a full settlement of the issues, reached by the parties with the assistance of their lawyers and approved by the family court judge.[103] As with the Higuera case, when the litigants settle the case themselves, there is no requirement for a final report from the guardian. As she thought the case was at an intermediate milestone, her investigation was likewise at an intermediate place. Furthermore, once a settlement of all issues was put on the record, no further investigation or reports was needed, relevant or appropriate.

The fallacy of the Board's findings was not in what Ms. Forman did or did not do; it was the blind interpretation of those actions without consideration of circumstances or context.

The findings of fact of The Board, affirmed by the administrative law court, are subject to reversal upon all six of the examples provided by *Sierra Club v.*

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[101]ROA, Transcript of Record dated June 28, 2010, page [130], lines 15-20.

[102]Originally "To gild refined gold, to paint the lily ... is wasteful and ridiculous excess," from Shakespeare's *King John*, (1585).

[103]ROA, Transcript of Record dated June 28, 2010, page [133], lines 4-12.

S. Carolina Dep't of Health & Envtl. Control:[104] because "its findings, conclusions, or decisions, are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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[104]*Sierra Club v. S. Carolina Dep't of Health & Envtl. Control*, 387 S.C. 424, 430, 693 S.E.2d 13, 16 (Ct. App. 2010)

IV

Does the Board have the jurisdiction or authority prevent the family court from exercising its discretion in appointing a guardian ad litem or preventing the family court's appointee from serving as a guardian?

Do "the responsibilities of a paid private guardian *ad litem* clearly fall within the definition of 'Practice of Independent Social Work-Clinical Practice' under §40-63-20(25)?"[105] The administrative law court held

> Furthermore, contrary to Appellant's argument that Appellant's GAL "services" were not actually within the ambit of social work practice, the responsibilities of a paid private GAL clearly fall within the definition of "Practice of Independent Social Work-Clinical Practice" under § 40-63-20(25). And, Appellant's present license can be restricted under § 40-63-11 O(A) if she is guilty of misconduct as defined in § 40-63-110(B).[106]

S. C. Code Ann. §40-63-20(25) defines "Practice of Social Work--Clinical Practice.[107] This definition provides that "The practice of independent clinical social

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[105]ROA, Order of the administrative law court dated July 2, 2011, page [6].

[106]ROA, Order of the administrative law court dated July 2, 2011, page [6].

[107]S. C. Code Ann. §40-63-20(25) "Practice of Independent Social Work--Clinical Practice" means the professional application of social work theory, knowledge, methods, principles, values, and ethics, and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, and direct clinical needs of organizations and communities. The practice of Clinical Social Work requires the application of specialized clinical knowledge and advanced clinical skills in the areas of assessment, diagnosis, and treatment for mental, emotional, and behavioral disorders, and conditions. Treatment methods include the provision of individual, marital, couple, family, and group counseling and psychotherapy. The practice of independent clinical social work includes case management, information and referral, mediation, client education, supervision of employees, consultation, research, advocacy, outcome evaluation, and expert testimony. The practice of Independent Social Work--Clinical

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work includes … mediation, client education….” Contrast this with the requirement that “A guardian *ad litem* must ***NOT*** mediate, attempt to mediate, or act as a mediator in a case to which he has been appointed,” (emphasis added).[108] “Client education” is impossible for a guardian *ad litem* because the guardian does not have a “client” as defined by S. C. Code Ann. Section 40-63-20(9). “‘Client’ means the individual, couple, family, group, organization, or community that seeks or receives social work services.” The administrative law court’s finding that the responsibilities of a guardian fall within this definition emphasizes what can happen when the executive branch usurps subject matter jurisdiction from the judicial branch.

Consider the following hypothetical. John Doe is a licensed social worker and attorney. He is appointed to represent James Roe in a criminal case. As a social worker, John Doe is a required mandatory reporter of child abuse.[109] Interviewing Roe, he learns of child abuse committed by Roe. Relying upon Rule 1.6(a), Rules of Professional Conduct, Rule 407, SCACR, Doe does not report. Could the Board restrict the lawyer-social worker *from practicing law*, for conduct that was required of an ethical lawyer?

Practice may include private practice. A Licensed Independent Social Worker--CP may not practice advanced practice social work independently. The Independent Social Worker--CP may engage in the activities included under the practice of Masters Social Work.

[108]S.C. Code Ann. §63-3-810.

[109]S. C. Code Ann. §63-7-310(A).

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Reciprocal Sanctions

The distinct branches of government may have the authority to issue reciprocal punishment where the appropriate branch has already found the relevant facts. This is illustrated by cases in which lawyers failed to file state income tax returns. The issues regarding the returns were handled by the South Carolina Department of Revenue and the Attorney General's Office. Only after the lawyer waived indictment and entered a plea did the South Carolina Commission on Lawyer Conduct and the judicial branch become involved.[110]

For example, if the family court had found wrong-doing on the part of the Appellant, than the Social Work Board could appropriately apply reciprocal sanctions. In the Higuera case, Ms. K filed a complaint with both the resident judge and guardian ad litem services, both within the judicial branch, and both affirmatively declined to act. Despite this, the Social Work Board trespassed on judicial turf. Had the judicial branch found wrongdoing, then the Board could have imposed a reciprocal sanction.

Finally, in its conclusions in the Order on Remand, the Board finds that it "has jurisdiction in this matter and, upon finding that a licensee has violated any of the provisions of S.C. Code Ann. §40-1-110 or §40-63-110, has the authority to impose sanctions as provided in §40-1-120, including suspension, restriction, or revocation of a license and impose a fine of not more than five thousand dollars for each

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[110] *Matter of Foster*, 324 S.C. 247, 478 S.E.2d 840 (1996).

violation." Note that the code sections they consider relevant do not include the guardian statute or any section related to the family court. Even in its own conclusions, the board did not give itself the authority to restrict her practice of guardian *ad litem* as guardianship is permitted exclusively by the family court and licensure does not apply.

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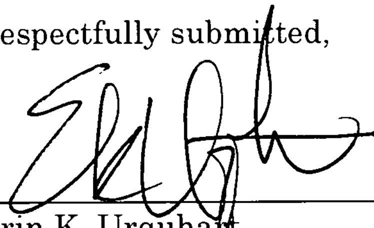
CONCLUSION

Karen Forman asks that the proceedings be dismissed because the Board lacked subject matter jurisdiction and because she had quasi-judicial immunity under *Fleming v. Asbill* and the public policy considerations expressed by the Supreme Court in *Fleming*.

In addition to exceeding its authority, the Board's findings are "cherry-picked," taken out of context, and misleading. The adverse findings should be reversed because they are "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The sanctions should be dismissed because the Board does not have the authority to restrict the family court in the court's selection of guardians *ad litem*.

Respectfully submitted,



Erin K. Urquhart
Thomas F. McDow
Law Office of Thomas F. McDow
Attorneys for Appellant
514 Oakland Avenue, Second Floor
Post Office Box 891
Rock Hill SC 29731-6891
Telephone 803-327-4141

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April 25, 2014

CERTIFICATE OF COUNSEL

The final brief of appellant complies with Rule 211(b), SCACR.

Thomas F. McDow
Attorney for Appellant
514 Oakland Avenue, Second Floor
Post Office Box 891
Rock Hill SC 29731-6891
Telephone 803-327-4141

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