In Re: Interest of M.P. a Child

IN THE SUPREME COURT OF THE STATE OF FLORIDA

O/a 3-6-85

CASE NO. 65,596

DCA-5 Nos. 83-584
83-779

STATE OF FLORIDA,
DEPARTMENT OF HEALTH &
REHABILITATIVE SERVICES,

Petitioner,

vs.

LAKE COUNTY, a political
subdivision of the State of
Florida, and STEPHEN G. BIRR,

Respondents.

_____/

FILED
SID J. WHITE
FEB 6 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

ANSWER BRIEF OF AMICUS CURIAE, METROPOLITAN DADE COUNTY

Respectfully submitted by:

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PRELIMINARY NOTE

The Petitioner, the State of Florida's Department of Health and Rehabilitative Services, will be referred to as HRS or Petitioner. The Respondent, Lake County, Florida, will be referred to as Lake County and the Respondent, Stephen G. Birr, will be referred to as Respondent Birr or Mr. Birr. Amicus Curiae, Metropolitan Dade County, will be referred to as Metropolitan Dade County. The term "the County" shall be used to refer to any county affected by the resolution of the issues presented in this case.

STATEMENT OF FACTS AND PROCEDURES

Metropolitan Dade County concurs with the Statement of Facts and Procedures set forth by HRS, Lake County and Mr. Birr.

II. ISSUES PRESENTED

A. DID THE LOWER TRIBUNAL CORRECTLY REQUIRE THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES TO PAY FEES AND COSTS TO THE GUARDIAN AD LITEM REPRESENTING THE CHILDREN IN THESE ABUSE AND NEGLECT PROCEEDINGS?

B. DID THE LOWER TRIBUNAL ERR IN AWARDING FEES TO THE GUARDIAN AD LITEM IN THESE CHILD ABUSE AND NEGLECT PROCEEDINGS?

C. DID THE LOWER TRIBUNAL ERR IN ORDERING HRS TO PAY THE GUARDIAN AD LITEM'S FEES AND COSTS WITHIN THIRTY DAYS?

III. SUMMARY OF ARGUMENT

The Florida Supreme Court in In the Interest of D.B. and D.S., 385 So.2d 83, 91 (Fla. 1980), divided the right to counsel for a child into three categories for dependency proceedings:

(1) Delinquency proceedings where the constitution mandates appointment of counsel;

(2) Proceedings under Florida Statutes Section 827.07 (16) where the state statutes mandate appointment of counsel as guardian ad litem; and

(3) Proceedings where counsel is not mandated but desirable.

This Honorable Court held that the County is only resonsible for paying for counsel in category (1), where the appointment is mandated in delinquency proceedings by the constitution. D.B. and D.S., supra, at 87, 93. As to category (3), the Court held that counsel's services are part of his pro bono obligation to represent the poor. D.B. and D.S., supra, at 92.

The instant case falls within category (2), an appointment pursuant to Florida Statutes Section 827.07 (16) (1981). By restricting County liability solely to category (1), i.e., constitutional appointments, this Honorable Court precluded counties from paying for fees under Chapter 827. However, this Honorable Court did not state what non-County entity, if any, should pay for

counsel appointed pursuant to Chapter 827 of the Florida Statutes.

All District Courts of Appeal considering the issue of liability for fees under Section 827.07 (16) have held that HRS and not the County is responsible for paying for said fees. Their persuasive rationale is that the state has chosen to obligate its judges to appoint guardians ad litem under Section 827.07 (16). The state has also mandated that HRS has the prime responsibility for the care, treatment and ameliorative services provided to the child. Therefore, HRS should pay for guardians' services under Chapter 827.

As the Briefs of Petitioner and Respondent, Lake County, emphasize, a persuasive argument can be made that counsel appointed under Chapter 827 serves pursuant to his pro bono obligation to represent the poor. Nothing in Chapter 827 specifically states that any entity must pay for guardians appointed under Section 827.07 (16). Indeed, on can argue Chapter 827 does not even mandate that an attorney be appointed as guardian in all instances. This Honoroble Court did exclude the County from liability for any appointments of counsel not required by the constitution. However, this Honorable Court has not ruled that such guardians must be paid under Chapter 827. Conceivably, although the District Courts have held otherwise, Chapter 827 mandates appointment of a guardian or attorney but does not require payment of that individual.

In conclusion, this Honorable Court has ruled that the County is not responsible for paying for statutorily mandated counsel under Florida Statutes Section 827.07 (16). The remaining issues are whether or not the District Courts of Appeal are correct that HRS is liable for such fees or whether an attorney's services as guardian are part of his pro bono obligation to represent the poor. In addition, if HRS is held liable, this Honorable Court must decide whether or not the Order requiring payment within 30 days is correct and whether or not HRS is procedurally precluded from raising this issue on appeal. Metropolitan Dade County adopts Lake County's position on these issues. Metropolitan Dade County agrees with Lake County that the Fifth District correctly applied Simpson v. Merrill, 234 So.2d 350 (Fla. 1970), in holding HRS liable despite the non-existence of any specific appropriation for attorneys appointed pursuant to Chapter 827. The resolution of the issue of the propriety of requiring payment within thirty days does not affect the resolution of the question of whether HRS is liable for Mr. Birr's fees or whether Reponsdent Birr's services are pro bono.

IV. ARGUMENT

A. CASE LAW, STATUTES, LOGIC AND PUBLIC POLICY DICTATE HRS, RATHER THAN THE COUNTY, IS RESPONSIBLE FOR PAYMENT OF AN ATTORNEY APPOINTED PURSUANT TO FLORIDA STATUTES SECTION 827.07(16) (1981).

Petitioner, HRS, cites no authority for holding Lake County responsible for these fees beyond Florida Statutes Section 43.28 (1981). However, the Florida Supreme Court and District Courts of Appeal have held that, under Florida Statutes Section 43.28, counties are precluded from paying for guardian ad litem's attorney fees in dependency proceedings, including those involving abuse or neglect.

This Honorable Court in D.B. and D.S. held that counties, rather than the state, must compensate only constitutionally appointed counsel. The Florida Supreme Court distinguished the constitutional right to counsel for a child in a delinquency matter as opposed to the lack of such rights in a dependency proceeding:

> To accurately characterize the proceeding involved, it should be recognized that juvenile dependency proceedings and juvenile delinquency proceedings have distinct and separate purposes. Dependency proceedings exist to protect and care for the child that has been neglected, abused, or abandoned. Delinquency proceedings, on the other hand, exist to remove children from the adult criminal justice system and punish them in a manner more suitable and appropriate for children. We reject the contention that in re Gault, which the Davis court found

> applicable, requires the appointment of counsel in a juvenile dependency proceeding. The holding in Gault, in our opinion, only requires the appointment of counsel for an indigent child in delinquency proceedings which might result in detention as a punishment. Further, there are numerous types of juvenile dependency proceedings, but all concern the care, not the punishment of the child. Some provide very temporary types of relief and custody, while other dependency proceedings permanently terminate the custody and care of a child. See Section 39, Fla. Stat.(1979); Bell, Dependency Law in Florida, 53 Fla. Bar J. 652 (1979). In the Interest of D.B. and D.S., supra, at 90 (Emphasis added).

Having found no constitutional basis for appointment of counsel for the child in dependency matters, including those proceedings involving abuse or neglect, the Florida Supreme Court sought to reconcile two prevalent views of other jurisdictions regarding compensation of court appointed counsel. One view is that the common law obligation of the profession to represent the poor without compensation should continue to prevail in court appointed cases. See, e.g., Tyler v. Lark, 472 F.2d 1077 (8th Cir. 1973); Dolan v. United States, 351 F.2d 671 (5th Cir. 1965); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), cert. denied, 282 U.S. 978, 86 S. Ct. 550, 15 L. Ed. 2d 469 (1966); Sparks v. Parker, 368 So.2d 528 (Ala. 1979); State v. Kenner, 224 Kan. 100, 577 P.2d 1182 (1978); State v. Doucet, 352 So.2d 222 (La. 1977); Jackson v. State, 413 P.2d 488 (Alaska 1966); Weiner v. Fulton County, 113 Ga.App. 343, 148 S.E.2d 143 (1966);

Scott v. State, 216 Tenn. 375, 392 S.W.2d 681 (1965); See also, Comment, Indigents' Right to Appointed Counsel in Civil Litigation, 66 GEO. L. J. 113, 138 (1977). However, some courts and legal scholars argue that not compensating court appointed counsel constitutes an unfair "taking" violating the due process clause and an unfair burden to the legal profession. See, State v. McKenney, 20 Wash. App. 797, 582 P.2d 573 (1978); Kovarik v. County of Banner, 224 N.W.2d 761 (1975); Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972); State v. Green, 470 S.W. 2d 571 (Mo. 1971); Bedford v. Salt Lake County, 22 Utah 2d 12, 447 P.2d 193 (1968); Hunter, Slave Labor in the Courts -- A Suggested Solution, 74 CASE AND COM. 3 (July-August 1969); Comment, The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression, 60 KY. L. J. 710 (1972); See also, Conference on Legal Manpower Needs of Criminal Law, Report, 41 F.R.D. 389, 415-16 (1966); See generally, Note, The Indigent's "Right" to Counsel in Civil Case, 43 FORD. L. REV. 989 (1975); Annot., 21 A.L.R. 3d 819 (1968, 1979 Supp.).

To reconcile these views, this Honorable Court established a compromise view; counsel should be reimbursed for only those cases where appointment is constitutionally required:

> It is our view that the government has an obligation to provide legal representation when such appointment is required by the constitution, but lawyers should not be totally relieved of their professional obligation to provide legal services to the poor. In the Interest of D.B. and D.S., supra, at 92.

Thus, when counsel is appointed pursuant to a constitutional mandate, the County is obligated to provide such services to individuals and there is a concomitent obligation to pay for those mandatory services. If the due process clause does not dictate the appointment of counsel, as in the instant case, the County is under no concomitent obligation to pay for such services.

In the Interest of D.B. and D.S. establishes in this state that the County, pursuant to due process requirements, must pay fees for court-appointed counsel in delinquency proceedings but not for counsel for children appointed pursuant only to Florida Statutes Section 827.07(16). The Florida Supreme Court reviewed the constitutional law on appointment and compensation of counsel and established a logical rule incorporating the right to counsel under the due process clause and the County obligation to pay for legal services. As shown above, there is no County responsibility for paying for Mr. Birr's services in the instant case, because his appointment was not compelled by the due process clause. Respondent Birr was appointed pursuant to Florida Statutes Section 827.07 (16)(1981), a statutory but not a constitutional mandate.

The D.B. Court also found that, unless constitutionally appointed, counsel are not "personnel necessary" under Florida Statutes Section 43.28. See, D.B., supra, at 93. Section 43.28 provides:

> The counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the State, personnel necessary to operate the circuit and county courts.

The Fifth District in In the Interest of M.P., 453 So.2d 85, 90 (Fla. 5th DCA 1984), found the language "unless provided by the State" significant. In excluding Lake County from liability for attorneys appointed pursuant to Section 827.07(16), the Fifth District found that the state, having prime responsibility for the provisions of Chapter 827, should provide the personnel necessary for representing indigent children in dependency proceedings. M.P., supra, at 90.

Florida Statutes Section 43.28 can not, according to this Honorable Court in D.B. and D.S., and its progeny, be the basis for holding Lake County liable for Respondent Birr's fees. Mr. Birr was not appointed pursuant to the constitution. No authority for County liability is derived from Chapter 827 of the Florida Statutes (1981), because that Chapter obligates HRS to ensure the welfare of the child. As Respondent, Lake County, incitefully points out, Chapter 827 obligates the courts, not the counties, to appoint counsel for the children. The courts are state, not county, entities. Petitioner claims

that this Honorable Court in D.B. and D.S. held Dade County responsible for fees of counsel for the child. Yet, as the Court explained at page 93 of its decision, the government was held responsible for the children's attorneys' fees in the case at bar, only because counsel for the children had expended certain resources with the expectation of payment. The Court explicated that from the date of its decision, May 16, 1980, all courts were directed to follow its dictates that counsel for the children in dependency cases can not be compensated from County funds.[1] D.B. and D.S., supra, at 95. Respondent Birr, who was appointed in 1982, could be under no delusions that he would be paid by Lake County. Any detrimental reliance he may have had would be an expectation he would be paid by HRS, because decisions of the Second District Court of Appeal had held that a guardian ad litem under Chapter 827 is entitled

[1] Petitioner is incorrect when its Brief states that D.B. and D.S. exempted the Eleventh Circuit from its dictates. D.B. and D.S. held that all judges should follow its ruling on right to counsel except juvenile and family judges of the Eleventh Circuit who were under direct and valid orders of Davis v. Page, 442 F. Supp. 258 (S.D. Fla. 1977). The Davis court decided that the state must provide counsel for indigent parents and children in dependency matters. Davis was not a ruling on who, if anyone, should pay for court-appointed attorneys' fees. Thus, all Eleventh judges must follow the dictates of D.B. and D.S. that preclude the County from paying for a court-appointed attorney for the child in a dependency case. Only those judges who were under a direct order from Davis had to appoint counsel for those who D.B. and D.S. found have no constitutional right to an attorney. See, D.B. and D.S., at 95.

to attorneys' fees from HRS. In the Interest A.E., a Child, State of Florida, Department of Health and Rehabilitative Services v. Lee County, 409 So.2d 1071 (Fla.2d DCA 1981); In the Interest of R.W., a Child, State of Florida, Department of Health and Rehabilitative Services v. Lee County, 409 So.2d 1069 (Fla. 2d DCA 1981), rev. denied, 418 So.2d 1279 (Fla. 1982).

Aside from the lack of statutory and constitutional authority, public policy and equity dictate that Lake County should not be responsible for Respondent Birr's fees. Counties have no connection with these proceedings. The proceedings involve the state, HRS, the parents and the child. Counties have no control over the manner and length of such proceedings. HRS, as a party throughout these proceedings, is in a much better position than the County to assess the reasonableness and necessity of counsel's fees as guardian ad litem. To hold a party liable for proceedings over which it has no control or knowledge is unfair and illogical.

The statutes, case law, common sense and good public policy preclude Lake County from paying for Resondent Birr's fees. Respondent's inexplicable conclusion that counties are responsible for such payment is thus unjustified.

Petitioner, HRS, is the proper source for payment of guardian ad litem fees under Florida Statutes Section 827.07 (16) (1981). Petitioner ignores or fails to distinguish reasoning in cases holding HRS responsible for payment of guardians ad litem.

Mr. Birr was appointed and has moved for attorney's fees pursuant to Florida Statutes Section 827.07 (16) (1981), which reads:

> GUARDIAN AD LITEM. - A guardian ad litem shall be appointed by the court to represent the child in any child abuse or neglect judicial proceeding. Any person participating in a judicial proceeding resulting from such appointment shall be presumed prima facie to be acting in good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed. In those cases in which the parent or parents of the child are financially able, the parent or parents of the child shall reimburse the court, in part or in whole, for the cost of provision of guardian ad litem services. Reimbursement to the individual providing guardian ad litem services shall not be contingent upon successful collection by the court from the parent or parents.

Petitioner's Brief attacks the rationale of cases holding HRS liable. Yet, an examination of those cases reveals solid grounds for holding HRS liable.

The Florida Supreme Court found that "when counsel is constitutionally required, the county, rather than the state, must compensate appointed counsel . . ." D.B. and D.S., supra, at 87. (emphasis added). The D.B. Court thus did not directly deal with the instant situation in which counsel was appointed pursuant to a statutory mandate. By implication, the Supreme Court precluded payment from the County for statutorily rather than constitutionally appointed counsel. D.B. restricts payment from the County to those situations where counsel is appointed pursuant to a constitutional mandate and holds that appointment of counsel as guardians is never constitutionally required, even in situations of abuse or neglect. See, D.B and D.S., supra, at 87, 93. D. B., supra, at 92, also excludes payment from any source "where appointment is "desirable" but not "constitutionally required." However, the Court never confronts the issue of whether an entity other than the County should pay for counsel appointed pursuant to Florida Statutes Section 827.07(16). The language in D.B. and D.S. indicating that the County, rather than the state, shall pay solely for constitutionally required counsel leaves the door open for state, as opposed to County, liability in other situations.

In a detailed decision, the Fifth District held that HRS should pay for guardian ad litem fees under Florida Statutes Section 827.07(16). In The Interest of M.P., supra. Recognizing that payment from the state is not justifiable except by contract or statute, the M.P. Court held counsel must be reimbursed because of the last sentence of Florida Statutes Section 827.07(16):

> Reimbursement to the individual providing guardian ad litem services shall not be contingent upon successful collection by the court from the parent or parents.

Finding that the appointment was a legislative requirement, the Fifth District emphasized that "the prime responsibility for carrying out this requirement has been placed on the Department of Health and Rehabilitative Services . . . " M.P., supra, at 87. In reaching its conclusion, the Fifth District emphasized two subsections of 827.07(11)(a). Subsection (11)(a)(1) provides that HRS "shall have prime responsibility for strengthening and improving child abuse and neglect prevention and treatment efforts." HRS must under subsection (a)(4) "[p]rovide ongoing protective, treatment, and ameliorative services to, and on behalf of, children in need of protecting to safeguard and ensure their well-being and, whenever possible, to preserve and stabilize family life." HRS, having the prime responsibility for protective and treatment services for the child, is the source for

payment of guardians ad litem when the parents are insolvent.

The Fifth District also analogized the instant situation to the payment of costs and attorney's fees awarded to a prevailing party under Florida Statutes Section 57.041. Citing Simpson v. Merrill, 234 So.2d 350 (Fla. 1970), and A.Z. v. State, 404 So. 2d 386 (Fla. 5th DCA 1981), the M.P. court found that there is no exemption for the state or its agencies from the statutory rule that taxes attorneys' fees and costs in favor of prevailing parties. Simpson recognized that such costs may be imposed upon the state even if they are not anticipated by a "'specifically itemized appropriation'". M.P., supra, at 91.

Similarly, as M.P. found, HRS should bear the burden of representing children of indigent parents, because it is primarily responsible for the child's welfare. It would be illogical to create statutes that provide for reimbursement of the guardian and hold HRS responsible for the child and at the same time block any payment from HRS to the child's attorney. As noted in Simpson, the failure of the state to create a special appropriation for such payments is irrelevant to the issue of the state's responsibility.

The M.P. Court based its opinion in part on In the Interest of R.W., State of Florida, Department of Health & Rehabilitative Services v. Lee County, 409 So.2d 1069 (Fla. 2d DCA 1981). The Second District held that HRS could be held liable for attorney's fees under Florida Statutes Section 827.07(16), even though the state had enunciated no specific appropriation for payment.

The R.W. court found HRS liable because Section 827.07(11) places the prime responsibility for the child in dependency proceedings upon HRS. R.W., supra, at 1071.

The Second District in In the Interest of A.E., a child, State of Florida, Department of Health & Rehabilitative Services v. Lee County, 409 So. 2d 1071 (Fla. 2d DCA 1981), reaffirmed its holding in R.W. The A.E. court noted that it had affirmed without opinion the award of guardian ad litem fees from HRS in In Re A.E, 392 So. 2d 75 (Fla. 2d DCA 1980). Affirming a judgment of contempt against HRS for failing to pay guardian ad litem fees, the A.E. court cited R.W., supra, to justify imposing liability against HRS. The First and Third District Courts of Appeal have recently followed the decisions of its sister courts in holding HRS liable the guardians' fees under Chapter 827. State of Florida, Department of Health and Rehabilitative Services v. Metropolitan Dade County and The Interest of V.G., a child, _____So.2d_____(Fla. 3d DCA) (Case No. 84-1364, Opinion filed December 11, 1984) 9 FLW 2584;

Department of Health and Rehabilitative Services v. In The Interest of A.H., A.H. & R.H., Children, ____ So.2d ____ (Fla. 1st DCA 1984) (Case No. AW-141, Opinion filed November 15, 1984) 9 FLW 2396.

The Florida Legislature recently had an opportunity to express any dissatisfaction with rulings of the courts holding HRS liable for guardian ad litem fees. Instead, the Legislature in its 1984 Regular Session simply put a cap on the fees counsel in a dependency proceeding could receive from any source:

> Section 39.415, Florida Statutes is amended to read
> 39.415 Appointed counsel; compensation. -- If counsel is entitled to receive compensation for representation pursuant to court appointment in a dependency proceeding, compensation shall not exceed $1,000 at the trial level and shall not exceed $2,500 at the appellate level. Chapter 84-311, Section 12, Laws of Florida (1984 Regular Session).

Instead of attempting to nullify previous decisions holding HRS liable, the Legislature failed to change the law holding HRS responsible for guardians' fees. Indeed, the Legislature appears to have purposely left the source of payment of counsel under Section 39.415 unnamed. Thus, the Legislature implicitly expressed its satisfaction with several District Courts of Appeal decisions holding HRS liable for guardian ad litem fees in dependency proceedings involving abuse or neglect.

Equity and public policy are well served by holding HRS liable for these fees. The state as a whole enunciated laws providing for the mandatory appointment of a guardian ad litem. The state and its agency HRS have accepted prime responsibility for the protection of children. In dependency proceedings, judges must appoint attorneys as guardians ad litem to represent children of insolvent parents, even though there is no constitutional right to counsel. The state has also mandated that reimbursement to the guardian ad litem is not contingent upon collection from the parents. Aside from the clear import of the applicable statutes and the welfare of the child, the efficiency and fairness of dependency proceedings are well served by encouraging responsible attorneys to serve as guardians ad litem. The statutory provisions of Chapter 827 are designed to ensure the welfare of the child. It is irresponsible for the state to choose to create a system of representation for children of indigent families, accept overall responsibility for the system and the child in dependency proceedings, and then refuse to fund that representation.[2]

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[2] Respondent Birr cites Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1982), as authority for the Fifth District's decision. See, Respondent Birr's Brief, at 16. Yet, Rose was strictly limited to a directory statute awarding witness fees. Rose is not applicable to a mandatory statute awarding attorney's fees. Rose, supra, at 137 n.5, specifically recognized that the will of the Legislature should prevail in matters involving mandatory statutes awarding attorneys' fees.

B. IF HRS IS NOT RESPONSIBLE FOR GUARDIAN AD LITEM FEES UNDER FLORIDA STATUTES SECTION 827.07(16) (1981), THEN RESPONDENT BIRR'S SERVICES ARE PART OF COUNSEL'S PRO BONO OBLIGATION TO THE POOR.

As stated above, HRS has been held responsible for guardian ad litem fees under Florida Statutes Section 827.07(16). However, should this Court find no statutory authority for holding HRS liable, then Respondent Birr's services become part of his pro bono obligation to represent the poor.

The Florida Supreme Court, in D.B. and D.S., found that when counsel is not constitutionally, required, but desirable, an attorney's services are part of his pro bono obligation to represent the poor. Query whether or not a statutorily mandated counsel should be in the same catagory as a "desirable" attorney for purposes of payment of fees.

As the Fifth District indicated in M.P., supra, at 91, one can argue that there is nothing in Section 827.07 that specifically requires that a guardian ad litem be compensated. Indeed, pro bono services are in the highest tradition of the Florida Bar. A judge has the contempt power to assure that attorneys are available for court appointments.

Nothing in the language in Chapter 827 requires that the guardian be an attorney.[3] If an attorney

[3] Although there is nothing in the language of Chapter 827 requiring the appointment of an attorney, D.B. and D.S., supra, at 91, stated that an attorney must be appointed under Florida Statutes Section 827.07(16).

is not required to be appointed under Chapter 827, the Court's appointment of such an attorney is "desirable". Under D.B. and D.S., such an attorney is not entitled to payment.

Prior to the enactment of Chapters 27 and 925 of the Florida Statutes, court-appointed counsel for indigent adults under arrest who had conflicts with the Public Defender's office served without charge, because no authority existed for taxing attorneys' fees against the counties. Respondent Birr is in the same position as those attorneys unless one concurs with the District Courts of Appeal that Chapter 827 of the Florida Statutes requires HRS to assume the burden of the state requirement of court-appointed counsel for indigent children.

The Supreme Court of Florida has excluded the counties from paying for counsel who like Respondent Birr is not constitutionally required. The First, Second, Third and Fifth Districts have required HRS to pay for fees of statutorily appointed counsel under Section 827.07(16). This Honorable Court thus should examine the reasoning of the District Courts to resolve the issue of whether HRS should pay for guardian ad litem fees in dependency proceedings or whether such representation is part of an attorney's pro bono obligation to represent the poor. However, this Honorable Court has already limited the extent of the counties' responsibility for payment of attorneys' fees to counsel appointed pursuant to the constitution.

C. METROPOLITAN DADE COUNTY ADOPTS LAKE COUNTY'S POSITION AS TO THE THIRTY-DAY PERIOD FOR PAYMENT BY HRS.

Metropolitan Dade County concurs[4] with Lake County's position that the Fifth District cited Simpson v. Merrill, 234 So.2d 350 (Fla. 1970), appropriately to hold that there need be no specific appropriation prior to holding HRS liable for a debt.

Moreover, Petitioner, HRS, is incorrect when it states that the problem of availability of funds

> is not present when fees are assessed against the county; in that case the guardian ad litem's fees and costs are charged against an account previously established for payment of appointed counsel. Petitioner's Initial Brief, at 22.

Counties pursuant to D.B. and D.S. have only created accounts and budgets for constitutionally court-appointed counsel in criminal matters as well as court-appointed attorneys for the parents in permanent commitments. Counties have not provided or set aside funds for payment of guardians ad litem. Counties would lack funds to pay guardians, if they were ever held liable under Chapter 827.

[4] Metropolitan Dade County also adopts all of the other excellent arguments made by Lake County in its Brief.

As to whether this Honorable Court should even consider the issue of the 30-day order at all because of the lack of specific objections by HRS, Metropolitan Dade County takes no position. If this Honorable Court holds HRS liable, Metropolitan Dade County takes no position as to whether HRS should be granted more than thirty (30) days to pay. Finally, Metropolitan Dade County takes no position as to whether or not guardians must await specific appropriations before receiving payment from HRS. As Petitioner points out, issues surrounding the order to pay within thirty days are distinct from HRS's liability for counsel's fees. If any entity is liable for Mr. Birrs' fees, HRS is the proper party to seek reimbursement for a guardian's fees under Chapter 827, notwithstanding the lack of specific appropriations.

IV. CONCLUSION

The decision of the Lower Tribunal should be upheld because several persuasive decisions of the District Courts have held HRS liable for guardian ad litem fees under Florida Statutes Section 827.07(16). However, should this Honorable Court in its wisdom decide to reject the reasoning of other cases and find no authority for award of these fees, then the judgment of the Fifth District should be reversed and vacated with instructions that no fees be paid.

Respectfully submitted,

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V. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and copy of the Answer Brief of Amicus Curiae Metropolitan Dade County has been furnished by U.S. Mail delivery to James Sawyer, Jr., Esquire, District III Legal Counsel, 1000 Northeast 16th Avenue, Gainesville, Florida 32601; Mary McDaniel, Esquire, Ford, Minkoff & McDaniel, 101 E. Maud Street, Tavares, Florida 32778; and to Stephen G. Birr, Esquire, 122 St. Clair-Abrams Avenue, Tavares, Florida 32778, this 4th day of February, 1985.

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