01A3-6-85

IN THE SUPREME COURT OF FLORIDA

IN RE: The interest of M.P., a child, STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner,

vs.

LAKE COUNTY, etc., et al.,

Respondent. /

Case No. 65,596

5th District Court of Appeal
Case Nos. 83-584,83-779

ANSWER BRIEF OF RESPONDENT, STEPHEN G. BIRR

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PRELIMINARY STATEMENT

Stephen G. Birr, Esquire, (Guardian Ad Litem) will be referred to in this Brief as "Respondent Birr" or "Birr". The Petitioner, State of Florida, Department of Health and Rehabilitative Services shall be referred to as "Petitioner" or "H.R.S.". Respondent Lake County, Florida shall be referred to as "Lake County".

The issues advanced by the Petitioner have been substantially rephrased herein to reflect Respondent Birr's position.

STATEMENT OF THE CASE AND FACTS

Respondent Birr hereby agrees with the statement of facts and procedures filed by Petitioner in its Initial Brief, except that Birr would add as follows:

(1) Birr concurs with Petitioner that as Guardian Ad Litem he participated vigorously and effectively in the interest of the children he was appointed to represent and in that regard he moved for a temporary restraining order against the Petitioner; he filed a twelve page Report of Guardian Ad Litem detailing facts and his involvement in one case and he filed a thirteen page Report of Guardian Ad Litem detailing the facts and his involvement in the other case.

(2) At the trial court hearings on March 7, 1983 and April 26, 1983 which awarded compensation to the Guardian Ad Litem (Birr) the only issue raised was who should pay, Petitioner or Respondent Lake County. There was no discussion or argument regarding whether or not Birr was entitled to be paid for his services and no discussion or argument regarding the propriety of Petitioner being ordered to pay within thirty (30) days of the trial court's Order.

ARGUMENT

ISSUE I

THE LOWER TRIBUNAL PROPERLY AWARDED FEES AND COSTS TO THE GUARDIAN AD LITEM IN THE CHILD ABUSE AND NEGLECT PROCEEDINGS, AND PROPERLY ORDERED H.R.S. TO PAY SAME.

Petitioner argues that the Fifth District Court of Appeal opinion In re: The Interest of M.P., 453 So. 2d 90 (Fla. 5th DCA 1984) conflicts with the opinion of the Supreme Court in Interest of D.B. and D.S., 385 So. 2d 83 (Fla. 1980) both on the issue of whether an attorney acting as a guardian ad litem is entitled to payments of fees, and on the issue of who should pay the fees and costs of the attorney serving as guardian as litem.

Respondent Birr disagrees for the reasons hereinafter mentioned.

In both cases Birr was appointed as guardian ad litem. The Order appointing him in Mark's case, dated May 24, 1982 said in pertinent part:

> 2. The guardian ad litem is cautioned to keep adequate records of work done and services performed on behalf of the minor child in order that in due course the court may consider the question of a reasonable fee for the guardian ad litem to be paid in accordance with the applicable law. (emphasis added)

The Order does not state upon whose motion the appointment was requested. It does state, though, that:

> It having been suggested to the court that the appointment of a guardian ad litem for the child in this case might be appropriate, and it further appearing to the court that

> the appointment of a guardian ad litem to represent the child in this case is mandated by Section 827.07(16) Florida Statutes, (1981).

The Order Appointing Guardian Ad Litem was certified for mailing to all attorneys of record in this case, including but not limited to Robert Q. Williams (attorney for H.R.S.) and James A. Sawyer, Jr., H.R.S. sub-legal counsel, on May 25, 1982. No objection was made to this Order by any party. (App. 1,2)

Further, H.R.S. on page 17 of its brief states that all attorneys were charged with knowledge of Interest of D.B. and D.S. that guardians ad litem were not entitled to compensation, however H.R.S. itself never objected to the Order of court that Birr would be paid a fee.

The Order appointing Birr in Michael's case dated July 16, 1982 specifically states that it was based upon the ore tenus motion by counsel for the Petitioner. (App. 3,5,4)

The Fifth District Court of Appeal in Interest of M.P. stated as follows:

> Appellant never objected below to the appointment of the guardian, which order required the keeping of records to support a compensation order, and never objected to the order requiring thirty-day payment. We cannot fault the trial judge for not ruling on these matters in a way appellant prefers where appellant never made its preferences known.

Interest of M.P. at page 91

It is well established that an Appellant is estopped or will not be permitted to take advantage of error for the commission of which he participated in or contributed to. 5 Corpus Juris Secundum, Appeal and Error, Section 1051, page 857-861; see The Public Health Trust of Dade County, Florida v O'Neal, 348 So. 2d 377 (Fla. 3rd DCA 1977).

Petitioner argues that the award of fees to counsel appointed to serve as guardian ad litem is contrary to the Supreme Court's holding in In the Interest of D.B. and D.S., 385 So. 2d 83 (Fla. 1980). However, the instant case is clearly distinguishable from In the Interest of D.B. and D.S., supra.

In the Interest of D.B. and D.S. involved an appeal by the state from orders directing it to pay attorney's fees for representation of both indigent children and parents in all juvenile dependency proceedings. Neither of the proceedings in the case was a child abuse or neglect proceeding brought pursuant to Section 827.07, Florida Statutes (1979). The Supreme Court held that there was no constitutional right to counsel for a subject child in a juvenile dependency proceeding. Interest of D.B. and D.S. at p. 91.

This Court in D.B. and D.S. stated:

> ...the principal issues are what legal representation is constitutionally required, and in what manner attorneys should be compensated when appointed to represent indigent parties in dependency matters. (emphasis added)

385 So. 2d at p. 89.

The Court in D.B. and D.S. despite the clear language of Section 827.07(16), Florida Statutes (1979) that "a guardian ad litem shall be appointed by the court to represent the child in any child abuse or neglect judicial proceeding", has held that the guardian ad litem is only required in criminal proceedings pursuant to Chapter 827. The Court recognized that the appointment of counsel as guardian ad litem for the child "is left to the traditional discretion of the trial court and should be made only when warranted under Florida R. Juv. P. 8.300". Janiewski, "The Role of the Lawyer in Dependency Cases", Florida Juvenile Law and Practice, Section 9.14, Pp. 225,226, The Florida Bar (1981).

At the time of the D.B. and D.S. opinion, May 16, 1980, Florida R. Juv. P. 8.300 had not been amended to make mandatory the appointment of a guardian ad litem in child abuse or child neglect proceedings which amendment became effective September 1, 1982. In re: Amendment to Fla. Rules of Juvenile Procedure, 418 So. 2d 1004 (Fla. 1982).

Furthermore, it is evident that this Court's language:

> When appointment of counsel is desirable but not constitutionally required, the Judge should use all available legal aid services, and when these services are unavailable, he should request private counsel to provide the necessary services. Under these circumstances, no compensation is available, and the services are a part of the lawyer's historical, professional responsibility to represent the poor. (emphasis added)

Interest of D.B. and D.S. at p. 92 does not apply to the instant case.

The Court's reference to "desirable" is a reference to the instance when appointment of counsel as guardian ad litem is left to the traditional discretion of the trial court (pursuant to Fla. R. Juv. P. 8.300 prior to its amendment in 1982) and to be distinguished from the situation in the instant case where the appointment of a guardian ad litem is mandatory both under the Statute 827.07(16) and Fla. R. Juv. P. 8.300(b) as amended September 1, 1982.

Therefore at the time of the D.B. and D.S. opinion, since appointment of a guardian ad litem was totally discretionary with the court pursuant to Fla.R. Juv. P. 8.300 and since Section 827.07(16), Florida Statutes (1979) (now transferred to Section 415.508 in the 1983 Legislature) appeared in the same chapter as did the sections regarding criminal child abuse and neglect proceedings (i.e. Sections 827.03, aggravated child abuse; 827.04, child abuse; 827.05, negligent treatment of children; and 827.06, persistent non-support), and since Chapter 39, Florida Statutes (1979), the Florida Juvenile Justice Act, contained no language regarding appointment or reimbursement of guardians ad litem, the Court opined that the guardian ad litem was only required in criminal proceedings pursuant to Chapter 827.

Not only did the 1983 Legislature transfer Section 827.07(16) (now Section 415.508) to Chapter 415, but so also was Section 415.509(1)(a) (formally 827.07(11)) which provides that H.R.S. has the "prime responsibility for strengthening and improving

child abuse and neglect prevention and treatment efforts" and shall "provide ongoing protective, treatment, and ameliorative services to, and on behalf of, children in need of protection to safeguard and insure their well being, and, whenever possible, to preserve and stabilize family life."

It is this chapter (415) and particularly Section 415.501, Florida Statutes (1983) which require H.R.S. to develop a plan for the prevention of abuse and neglect of children and that the plan be used as a basis for funding. See Section 415.501(1), Florida Statutes (1983).

It is noteworthy that Section 415.508 which requires the appointment of a guardian ad litem to represent the child in any child abuse or neglect judicial proceedings and to remiburse the individual providing guardian ad litem services immediately precedes Section 415.509 which places the prime responsibility on H.R.S. to provide protective, treatment and ameliorative services to the child.

In this situation, the appointment of a guardian ad litem is a legislative requirement under Chapter 827, Florida Statues (1979) and the prime responsibility for carrying out this requirement has been placed on H.R.S. Because H.R.S. has the prime responsibility for carrying out the provisions of Chapter 827 (now Chapter 415) the court in Interest of R.W.,409 So. 2d 1069, 1071 (2nd DCA 1982) concluded that H.R.S. should pay the costs incurred in carrying out that responsibility. H.R.S.

after having failed in that appealate process petitioned for review but the petition was apparently without merit as it was denied at 418 So. 2d 1279 (1981).

Additionally, the court in Interest of R.W., supra, considered an award of fees (though not specifying whether the term "fees" applied only to simple costs, or reimbursement for general services, or attorney's fees, or all the foregoing) to a guardian ad litem, as required by Section 827.07(16) (now Section 415.508(2), Florida Statutes (1983) to be "clearly akin to an award of costs and attorney's fees provided by Statutes to be awarded to a prevailing party". See Interest of M.P. at p.87. "See also A.Z. v State, 404 So. 2d 386 (Fla. 5th DCA 1981) recognizing that certain costs are available in a juvenile proceeding, after appeal in the discretion of the lower court." Interest of M.P., at p. 87.

Furthermore, compensation for the services of the guardian ad litem seems contemplated by the phrase in Section 827.07(16) (now 415.508(b), Florida Statutes (1983)) "shall reimburse the court, in part or in whole, for the cost of provision of guardian ad litem services." Interest of M.P., at p. 89.

The intent of Section 415.508(b) when read together with Fla. R. Juv. P. 8.300(c) which indicates in part "...when the guardian ad litem shall be an attorney or other responsible adult" clearly is to compensate an attorney acting as the guardian ad litem. Section 415.508, Florida Statutes (1983)

recognizes that there is a cost of providing the guardian ad litem's services and that the individual providing same shall be reimbursed.

Section 415.508 does not prohibit attorneys from being compensated for their time when providing guardian ad litem services. The Second DCA in Interest of R.W., supra, did not state that an attorney acting as a guardian ad litem would not be compensated for his time. The Supreme Court of New Jersey in State v Rush, cited in In the Interest of D.B. and D.S., supra, indicated that attorneys should be compensated for their time as follows:

> The rate should reimburse assigned counsel for his overhead and yield something towards his own support. (emphasis added)

217 A.2d 441,448 (N.J. 1966)

Further, it is noteworthy that the Supreme Court in Interest of D.B. and D.S., supra, indicated that an attorney and not merely any "responsible adult" shall be appointed and said:

> By statute counsel as guardian ad litem must be appointed in any child abuse judicial proceeding under Section 827.07(16) Florida Statutes (1979). (emphasis added)

385 So. 2d at p. 91.

To date, four of the five District Courts of Appeal have held that H.R.S. has the responsibility of reimbursement of the guardian ad litem. They are as follows: The Second DCA

in Interest of R.W., supra; the Fifth DCA in Interest of M.P., supra; the First DCA in Interest of A.H., A.H. and R.H., 9 FLW 2396 (Fla.1st DCA, November 23, 1984), which cited both Interest of M.P. and Interest of R.W.; and the Third DCA in Interest of V.G., 9 FLW 2584 (Fla. 3rd DCA, December 21, 1984), which followed the First, Second and Fifth District Courts of Appeal in holding that H.R.S. has the responsibility for the payment of fees assessed pursuant to Section 827.07(16), Florida Statutes (1981) to an attorney appointed as a guardian ad litem in child abuse and neglect cases instituted under Chapter 39, Florida Statutes (1981).

H.R.S. submits that the guardian ad litem in this case constituted "personnel necessary to operate" the court pursuant to Section 43.28. However, it is clear from a reading of D.B. and D.S. that the"personnel necessary" theory is restricted to cases where appointment of counsel is constitutionally required. In those cases this Court in D.B. and D.S. held that Section 43.28, Florida Statutes (1979) requires the county to pay such fees. Appointment of a guardian ad litem in a child abuse case is not a constitutional requirement nor is it the type of appointment necessary to the operation of the court as contemplated by Section 43.28 but is necessary to the effectuation and the implementation of Section 827.07 (transferred in 1983 to 415.501) which is legislation which not only obviously bears the hand of the petitioner's author-

ship but which specifically states that H.R.S. has primary responsibility for carrying out the provisions of the chapter. See Section 415.509, Florida Statutes (1983).

Alternatively, a public body or agency may become obligated upon an implied contract to pay the reasonable value of the benefits received in the same manner as it would be liable if it had entered into a specific contract for such services. Universal Construction Company v Ft. Lauderdale, Florida, 68 So. 2d 366 (Fla. 1953). Furthermore, the same theories are applicable to administrative agencies. Logan v Board of Public Instruction, 118 Fla. 184, 158 So. 720 (Fla. 1935). Inasmuch as the Petitioner is statutorily charged with the primary responsibilities for the implementation and the effectuation of Florida Statute 415, et al., and that pursuant to certain provisions of that chapter the appointment of a guardian ad litem is necessary to its implementation, then it is the Petitioner which has received the benefit of the services provided by the guardian ad litem and it is the Petitioner who should be required to provide compensation for such services.

Petitioner contends that because of the court's ruling in D.B. and D.S. reliance was not justified by Birr that he would be compensated for his services. However, it is clear that D.B. and D.S. did not rule on the issue before the court in the instant case, whereas at the time of Birr's appointment as

guardian ad litem on May 24, 1982 (App. 1,2) and July 16, 1982 (App. 3-5) Interest of R.W. had been decided December 18, 1981 (rehearing denied January 15, 1982). Again, Petitioner never objected to the Order of court appointing Birr and instructing him to keep time records so that he would be paid a fee according to applicable law. (App. 1,2)

Further, Petitioner fully cognizant of the previous court Order appointing Birr and the language regarding compensation to him, made an ore tenus motion to the court for the appointment of a guardian ad litem in the subsequent case (App. 3-5)

If the D.B. and D.S. decision so clearly applies to the instant case forbidding compensation to Birr, as H.R.S. alleges, H.R.S. certainly had a duty to inform the trial court of its error in instructing Birr to keep time records so that he would be paid a fee at the conclusion of the proceedings. If H.R.S. had knowledge superior to that of the trial court and the attorneys in the instant case it should have made such knowledge known instead of waiting nearly eleven months when it filed its notice of appeal to object (date of Order Appointing Guardian Ad Litem, May 24, 1982 to Notice of Appeal, April 20, 1983).

H.R.S. attempts to pass off its failure to inform the court of the D.B. and D.S. decision which it claims all "litigants in the juvenile division are charged with knowledge of" by its weak excuse on page 20 of its Brief that since it approved

the trial judge's thirty day provision in the Order awarding fees and costs "then the agency's opposition to that Order should be construed to cover the Order in its entirety" is totally devoid of merit.

The only time that H.R.S. ever objected was after the trial court had already entered the Order of payment of fees and costs to Birr, and that objection was to nothing more than to the thirty day provision.

The law is clear that any objections must be timely made and specific or there is a waiver of the right to appeal and review of that issue. H.R.S. is estopped from taking advantage of any error for the commission of which it participated. 5 Corpus Juris Secundum, Appeal and Error, Section 1051, page 857-861; see The Public Health Trust of Dade County, Florida v O'Neal, supra.

In the instant case the trial court's findings stated in both Orders awarding attorney's fees were that: In the Interest of R.W., supra, contained in a similar factual situation as the instant case; in In the Interest of R.W., supra, appeared to be in the present state of the law in Florida; the appointment of the guardian ad litem was justified under the circumstances of the case in order to safeguard the interests of the child; the guardian ad litem represented the interest of the child with the understanding that he would be paid for his services; and the guardian ad litem's fees (in one case $2,700.00 and

the other $2,500.00) and his costs (in one case $115.70 and the other $78.80) were reasonable and necessary. (App.6-11)

Findings of fact by the trial court are presumed to be correct and are entitled to the same weight as a jury verdict. Marsh v Marsh, 419 So. 2d 629 (Fla. 1982).

It is presumed that the courts know and act in conformity with the law. Kashkan v Pearce, 400 So. 2d 541 (Fla. 4th DCA 1981) rehearing denied. Petition For Review denied 408 So. 2d 1095 (Fla. 1981).

Moreover, this Court can order payment to Birr on the basis of the doctrine of inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. Rose v Palm Beach County, 361 So. 2d 135(Fla. 1982).

ARGUMENT

ISSUE II

THE LOWER TRIBUNAL PROPERLY ORDERED H.R.S. TO PAY FEES AND COSTS OF THE GUARDIAN AD LITEM WITHIN THIRY DAYS OF THE ORDER

Petitioner contends that the payment of the guardian ad litem fees might disrupt H.R.S.'s functioning because the funds might not be available. Petitioner never objected to the Order of the trial court appointing the guardian ad litem wherein it instructed him to keep records of his time for later compensation. (App. 1,2) Nearly eleven (11) months elapsed (May 24, 1982 - April 30, 1983) since the date of the Order Appointing Guardian Ad Litem to the time Petitioner filed its Notice of Appeal. Petitioner did not object to the trial court's thirty day order to pay the fees, or raise the issue of lack of availability of funds at either the first hearing on the guardian ad litem fees, March 7, 1983, or at the second hearing on the guardian ad litem fees April 26, 1983. Petitioner had an opportunity to correct the alleged error of the trial court ordering payments to guardian ad litem within thirty days by objecting to that Order at the time of the second hearing on fees. Petitioner had an opportunity to correct the Order of the court requiring the guardian ad litem to keep records of his time for later compensation, but failed to do so. Assuming arguendo that the trial court erred, Petitioner failed to give the trial court an opportunity to correct itself. Danford v

City of Rockledge, 387 So. 2d 968 (Fla. 5th DCA 1980); Dubowitz v Century Village, East, Inc.,385 So. 2d 1116 (Fla. 4th DCA 1980) rehearing denied July 29, 1980.

Petitioner admits that Chief Justice Ervin's suggestion in Simpson v Merrill, supra, was only that, a suggestion, and is not mandatory.

Petitioner contends that In the Interest of R.W., supra, the Second District Court of Appeal has approved of Chief Justice Ervin's concurring opinion in Simpson v Merrill, supra. However, the Second District Court of Appeal in Interest of R.W., supra, had before it the sole issue of whether H.R.S. can be required to pay guardian ad litem fees absent a specific legislative appropriation. It said:

> We feel that the constitutional limitation does not require every expenditure for which the state might be obligated to pay to be specifically itemized in appropriation to the various departments of state government.

In the Interest of R.W. at page 1070.

The Second District Court of Appeal in In the Interest of R.W.,supra, cited with approval Chief Justice Ervin's language in Simpson v Merrill, supra, that where judgments are rendered against the state in order to pay the judgments, it may be necessary for the agency to transfer funds within its appropriated budget when said transfers would not jeopardize the normal duties of such agencies. It is submitted that the payment of the fees and costs in the case at bar would not seriously

jeopardize the normal duties of Petitioner.

There was no issue in the instant case as to whether or not the funds were available from Petitioner. Chief Justice Ervin only suggested a procedure for determining availability and that is not a mandatory procedure. However, the Supreme Court in an earlier opinion did not view the questions of whether or not the funds were available as being an issue and held there to be a presumption that the officer or agency of the state against whom costs were assessed to have the ability to pay same without the necessity of a protracted and costly mandamus - appropriations - claims bill procedure, as suggested by the Petitioner in the instant case. Miami Retreat Foundation, et al., v Ervin, Attorney General, et al., 66 So. 2d 667 (Fla. 1953) affirmed at 77 So. 2d 787 (Fla. 1955).

The Fifth District Court of Appeal in Interest of M.P. indicated as follows:

> Thus, we find no reversable error in this case in the thirty day requirement and suggest H.R.S. by now has, or should have, resolved the budgetary problem, if there was one, with the legislature. We can invision no further problem either because the legislature and H.R.S. must now be aware they must pay for guardians ad litem in cases as this.

453 So. 2d at p. 91.

CONCLUSION

The lower court's decision ordering payment of fees and costs should be upheld. This Court can affirm payment on any of the following rationale:

(1) The appellate court decisions of the Second DCA in Interest of R.W.; the Fifth DCA in Interest of M.P., The First DCA in Interest of A.H.,A.H., and R.H.; and the Third DCA in Interest of V.G.

(2) The language of Section 415.508(b), Florida Statutes (1983) requiring reimbursement for the guardians ad litem services.

(3) The D.B. and D.S. opinion requiring payment based on reliance by the guardian ad litem.

(4) The implied contract theory whereby H.R.S. has benefited from the guardians ad litem services.

(5) The doctrice of inherent judicial power as stated by this Court in Rose v Palm Beach County, 361 So. 2d 135 (Fla. 1982).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Answer Brief of Respondent, Stephen G. Birr, Esquire, has been furnished by U.S. Mail delivery to James Sawyer, Jr., District III Legal Counsel, 1000 Northeast 16th Avenue, Gainesville, FL 32601; Mary McDaniel, Ford, Minkoff & McDaniel, 101 E. Maud Street, Tavares, FL 32778; and to Robert A. Ginsburg, Dade County Attorney and Eric Gressman, Assistant County Attorney, Public Health Trust Division, Jackson Memorial Hospital, Suite C, West Wing 108, 1611 N.W. 12th Avenue, Miami, FL 33130 this 15 day of January, 1985.

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