

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

AUG 13 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN RE: The Interest of
M. P., a child.

STATE OF FLORIDA,
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Petitioner,

v.

LAKE COUNTY, a political
subdivision of the State of
Florida, and

STEPHEN G. BIRR,

Respondents.

CASE NO. 65,596

DCA-5 NO. 83-584 & 83-779

RESPONDENT STEPHEN G. BIRR'S
BRIEF ON JURISDICTION

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Pro Se

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STATEMENT OF FACTS AND PROCEDURES

Respondent Birr hereby agrees with the Statement of Facts and Procedure filed by the Petitioner in its Brief, except that Respondent Birr would add as follows: That the appointment of Respondent Birr as guardian ad litem and the permanent commitment of cases was made pursuant to Section 827.07(16) Fla.Stat. (1981) pursuant to orders of the Court dated May 26, 1982, and July 16, 1982, respectively.

ARGUMENT

ISSUE

THE OPINION OF THE LOWER TRIBUNAL DOES NOT CONFLICT WITH A DECISION OF THIS COURT ON THE ISSUE OF WHETHER ATTORNEYS' FEES FOR GUARDIANS AD LITEM ARE TO BE PAID BY THE STATE OR BY THE COUNTY, AND ON THE ENTITLEMENT OF ATTORNEYS SERVING AS GUARDIANS AD LITEM TO RECEIVE PAYMENT FOR THEIR SERVICES.

The case of In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980), is distinguishable from the case at hand. As this Court is well aware, the principal issues in that case were

. . . what legal representative 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 89.

This Court In the Interest of D.B. and D.S., supra., had before it the situation where the judges of the juvenile and family division of the Eleventh Judicial Circuit were named as defendants in a Federal class action styled Davis V. Page, 442 F.Supp. 258 (S.D. Fla. 1977). The United States District Court entered judgment in favor of the Plaintiff who were Hillary Davis and all indigent parents who had been or may become defendants in child dependency proceedings in the Dade County Circuit Court and who had not been advised of their right to counsel or afforded counsel at the state's expense. The District Court held that the indigent parents had a constitutional right to appointed counsel in dependency proceedings and that the Dade County Circuit Court must comply with the Federal Court Order.

This Court in In the Interest of D.B. and D.S., supra.,

had before it all juvenile dependency proceedings, not child abuse or neglect proceedings pursuant to Chapter 827, Fla.Stat. (1981), as in the case at bar, and did not decide the issues involved in the case at bar.

The Petitioner on page three of its brief refers to when appointment of counsel is desirable, but not constitutionally required. It is clear from the use of the word "desirable" that it is a reference to the instance where the 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), as existed in In the Interest of D.B. and D.S. and to be distinguished from the situation in the case at bar where the appointment of a guardian ad litem is mandatory in a child abuse proceeding pursuant to Section 827.07(16) Fla.Stat. (1981) and pursuant to Fla.R.Juv.P. 8.300(b) (effective September 1, 1982, 418 So.2d 1004 (Fla.1982)). This Court indicated as follows:

By statute, counsel as guardian ad litem must be appointed in any child abuse proceeding under Section 827.07(16) Fla.Stat. (1979). In all other instances, 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 where warranted under Fla.R.Juv.P. 8.300. 385 So.2d at 91.

To further distinguish the case at bar from In the Interest of D.B. and D.S., supra., which is not a mandatory guardian ad litem appointment case pursuant to Section 827.07(16) Fla.Stat. (1981) is the following language from this Court opinion:

. . .there were no factors which would justify the appointment of a guardian ad litem. . .
385 So.2d at 93.

And,

. . .we find . . .that the appointment of a guardian ad litem for D.S. to be neither constitutionally required nor appropriate under the circumstances of these cases. 385 So.2d at 93.

And, further, the following language of this Court, clearly shows that this Court was concerned with the constitutional right to counsel in juvenile dependency cases and not with mandatory appointment and compensation of a guardian ad litem pursuant to Section 827.07(16) Fla.Stat. (1981) (as in the case at bar):

. . .we direct Florida's judiciary to follow the dictates of this opinion as it concerns the right to counsel in juvenile dependency matters . . . 385 So.2d at 95.

On the otherhand, the Second District Court of Appeal in In the Interest of R.W., a child, State of Florida, Department of H.R.S. v. Lee County, 409 So.2d 1069 (Fla. 2nd DCA, 1981) Petition for Review denied, 418 So.2d 1279 (Fla. 1982) clearly addressed and decided the issue of the appointment and compensation of a guardian ad litem pursuant to the Section 827.07(16) Fla.Stat. (1979), wherein it was held that the Department of H.R.S. was required to pay fees to a guardian ad litem pursuant to Section 827.07(16) Fla.Stat. (1979) (this Section is unchanged in Section 827.07(16) Fla.Stat. (1981)).

In In the Interest of R.W., supra., the Department of H.R.S. relied on In the Interest of D.B. and D.S., supra., as support for its position that the appellee, Lee County, and not the appellant, H.R.S., should pay the guardian ad litem fees incurred pursuant to Section 827.07(16). The Court stated as

follows:

We find that reliance misplaced as we interpret that decision to be restricted to cases where appointment of counsel is constitutionally required.

In those instances, the Court held that Section 43.28, Fla.Stat. (1979), requires the county to pay such fees. Appointment of a guardian ad litem in child abuse cases 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. It is the result of a legislative requirement under Chapter 827, Fla.Stat. (1979). Section 827.07(11) places the prime responsibility for carrying out the provisions for that Chapter upon appellant. Appellant, therefore, should pay the costs incurred in carrying out that responsibility. 409 So.2d at 1070 and 1071.

The Petitioner states on page 5 of its brief that this Court in In the Interest of D.B. and D.S., held that the attorney for the child was not entitled to compensation. As noted above, the Court in that case did not address the issue of compensation to the guardian ad litem pursuant to a Section 827.07(16) Fla.Stat. (1981) appointment, but assuming arguendo that it did, the Court clearly compensated the guardians ad litem for the children. In the Interest of D.B. and D.S., at page 93.

The Petitioner contends that because of In the Interest of D.B. and D.S., supra., case, reliance was not justified by the guardian ad litem that he would be paid for his services. However, Interest of D.B. and D.S., supra., is clearly distinguishable from the case at bar, whereas, In the Interest

of R.W., supra., creates justifiable reliance. Interest of R.W. is a later case in time (December 18, 1981) (rehearing denied January 15, 1982) and was decided before the appointment of the Respondent Birr as guardian ad litem on May 24, 1982, and July 16, 1982, respectively.

CONCLUSION

In the Interest of D.B. and D.S. is clearly distinguishable from the case at bar.

The opinion of the lower tribunal does not conflict with the decision of this Court in In the Interest of D.B. and D.S.. This Court does not have jurisdiction.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondent's Brief on Jurisdiction has been furnished to MARY M. McDANIEL, 101 East Maud Street, Tavares, FL 32778, and to JAMES A. SAWYER, JR., District III Legal Counsel, 1000 Northeast 16th Avenue, Gainesville, FL 32609, by U.S. Mail this 10th day of August, 1984.


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