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,

v.

CASE NO. 65,596

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

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

STEPHEN G. BIRR,

Respondents.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF FACTS AND PROCEDURE

Proceedings in the trial court began with the commencement of two actions by the Department of Health & Rehabilitative Services for permanent commitment of two siblings. These proceedings were not commenced simultaneously and were not consolidated in the lower tribunal. In each case Appellee Stephen G. Birr, an attorney, was appointed by the trial court to serve as guardian ad litem for the children. In each case the Order of Appointment directed Appellee Birr to keep accurate records of work done and service performed so the court could later consider the question of a reasonable fee for the guardian ad litem to be paid in accordance with applicable law. The Department of HRS did not object to these orders.

At the trial level the actions for permanent commitment proceeded through final judgment, and in each case following final judgment Appellee Birr filed a Motion for Attorney's Fees and Costs, which were granted by the trial judge. In each the trial judge ordered the Department of HRS to pay these fees. Each such order was appealed and in the District Court of Appeal the cases were consolidated, resulting in the decision and opinion of the lower tribunal.

ISSUE

THE OPINION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT ON THE ISSUE OF WHETHER ATTORNEY'S 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.

This Court, In The Interest of D. B. and D. S., 385 So 2d 83 (Fla. 1980) wrote a lengthy and thoughtful opinion dealing with the issues of entitlement to representation by appointive counsel of parents and children involved in dependency proceedings brought under Chapter 39, Florida Statutes, and the entitlement of those appointed attorneys to compensation for their representation. The contestants in the appellate proceedings were the State of Florida and Dade County, Florida (and others). In that case the trial judge had awarded fees to five court appointed attorneys, and had ordered the State of Florida to pay those fees; the State appealed, asserting that if counsel were entitled to compensation, it was the obligation of Dade County, the venue of the actions, to pay these attorneys' fees.

With respect to counsel for the children involved, this Court held that there is no constitutional right to counsel for the child, and that by statute counsel as guardian ad litem must be appointed in any child abuse and neglect proceedings under §827.07(16), Florida Statutes (1979), 385 So 2d 91.

With respect to payment of attorney's fees, this Court examined and approved the "Rush formula", State v. Rush, 46 N.J. 399, 217 A 2d 441 (1966), for use in computing payment for constitutionally required appointed counsel, 385 So 2d 92. With respect to attorneys serving as counsel for the child or parents not constitutionally entitled, this Court said:

> 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 part of the lawyers historical professional responsibility to represent the poor.
>
> 385 So 2d 92

The Court continued immediately with the following:

> To the extent the government must provide fees for appointed counsel, such payment must be made by the county under section 43.28 Florida Statutes (1979).

The Court explained this holding on the basis that such counsel as must be paid by the government were personnel necessary to operate the circuit and county courts.

The Court then proceeded to examine the two trial court cases, of D. B. (appointed counsel representing mother, father and child) and D. S. (appointed counsel representing mother and child). This Court ruled that some of those appointments were neither constitutionally required nor appropriate, some appropriate but not required, and some required, 385 So 2d at 93.

At the beginning of its conclusion, this Court observed:

> The instant trial court orders require the state to pay five separate attorneys, in addition to payment of counsel necessary to represent the state.

The Court concluded its opinion in In the Interest of D. B. and D. S. with the following final paragraph:

> This cause is remanded to the trial court to reconsider the attorneys fees in accordance with the formula expressed in this opinion and to enter the appropriate orders directing the county pay such fees when they are established. (emphasis added)
>
> 385 So 2d 95

The opinion of this Court was unanimous.

Notwithstanding the clarity and certainty of this Court's opinion in In The Interest of D. B. and D. S., the Fifth District Court of Appeal has undertaken to re-evaluate both the issues of entitlement to compensation for attorneys appointed to represent the child, and of the branch of government charged with paying the fees awarded such attorneys. In conducting its analysis, the opinion of the Fifth District Court of Appeal materially and substantially misrepresents the actions and holding of this Court. Most flagrantly, the District Court in ordering HRS to pay the fees for the guardian ad litem, said:

> The Supreme Court also clearly found that counsel for the child in dependency proceedings is not constitutionally required, but may be appropriate under certain circumstances. However, the court did not specifically indicate who should pay for the child's attorney's fees in that event.

> Nevertheless, the Court affirmed the award of fees to D. B.'s guardian ad litem (although remanding for application of the Rush fee formula), and the order affirmed required the state to pay the fees.
>
> (emphasis by the District Court of Appeal)
>
> 9 FLW 1314

As noted above, in In The Interest of D. B. and D. S. the Court did not affirm the order directing the state to pay the fees, but instead reversed that order with directions that the county pay them.

Since the opinion of the lower tribunal is directly contrary to In Re D. B. and D. S. on the issue of whether the state or the county should pay these attorneys fees (when payable), there is express and direct conflict in the decisional law of this state.

In addition, the Supreme Court and the lower tribunal are in conflict on the entitlement of the attorney for the child to payment in the first instance. As noted above, the Supreme Court in In The Interest of D. B. and D. S., held that the attorney for the child was not entitled to compensation. On the contrary, the lower tribunal has held that the attorney appointed to represent the child in trial court proceedings is entitled to compensation. The lower tribunal places great reliance on the provisions of §827.07(11), Florida Statutes (1981), which assignes to the Department of HRS "prime responsibility" for various activities conducted in the area of child abuse and neglect. The lower tribunal

fails to note that this statutory section had its identical form in 1979, and in 1980 when the Supreme Court decided Interest of D. B. and D. S.

The lower tribunal also attaches great significance to the mandatory language in F.S. 827.07(16)(1981), that "a guardian ad litem shall be appointed by the court to represent the child in any child abuse or neglect judicial proceeding..." Again, the lower tribunal overlooks the fact that this statute had precisely the same language in 1979, and in 1980 when the Supreme Court's opinion was issued. Finally, the lower tribunal relies on an equitable argument that the order appointing the guardian ad litem provided for "a reasonable fee for the guardian ad litem to be paid in accordance with the applicable law" (9 FLW 1313), thereby creating an expectation of payment. However, since 1980 the expectation relied upon is unreasonable, since the applicable law was stated by this Court in its opinion in In The Interest D. B. and D. S., and stated with unmistakable clarity "When appointment of counsel is desirable but not constitutionally required... no compensation is available, and the services are part of the lawyers historical professional responsibility to represent the poor." (385 So 2d 92) Thus, there was no reasonable expectation of payment, and in any event no reasonable expectation that payment would be made by the State, and thus no reasonable basis for HRS to object to the entry of this order which could not foreseeably affect its interests.

Inexplicably, the lower tribunal further stated:

> ... furthermore, since the opinion in Interest of D. B., the appointment of a guardian ad litem in any child abuse or neglect proceedings has become mandatory by statute, rather than 'desirable'. Thus, in the instant case, there is authority for the award of attorneys fees,...
>
> 9 FLW 1984

This statement is factually incorrect. The appointment of a guardian ad litem in any child abuse or neglect proceeding was "mandatory by statute" in 1980 when this Court's opinion was written, F.S. 827.07(16)(1979). The statutory language "a guardian ad litem shall be appointed by the court to represent the child in any child abuse or neglect judicial proceeding" was in place as law, as was the phrase "reimbursement to the individual providing guardian ad litem services shall not be contingent upon a successful collection by the court from the parent or parents". Thus the lower tribunal has reinterpreted the same statutory language interpreted by this Court, to reach the opposite conclusions, creating express and direct conflict in the decisional law of this state.

CONCLUSION

This case presents no issue of constitutional entitlement to counsel. Instead, assuming statutory entitlement to representation by a guardian ad litem, this case presents issues as to whether an attorney acting as a guardian ad litem in a child abuse and neglect proceeding is entitled to compensation, and if so, by whom such compensation is to be paid.

In The Interest of D. B. and D. S. announced the decision of this Court, relying on its construction of various statutes, that if such an attorney were to be paid he should be paid by the county rather than the state, and that in fact an attorney so acting was not entitled to payment of fees at all.

Reinterpreting those same statutory provisions, the lower tribunal has concluded that such an attorney is entitled to compensation, and that such compensation is to be paid by the state rather than the county.

The conflict in the decisional law of this state could hardly be more express and direct. This Court has jurisdiction, and this jurisdiction should be invoked to resolve the conflict and end the uncertainty presently existing between the affected state agency and the several county governments who are uncertain as to whether the opinion of this Court or of the lower tribunal should be followed.

Respectfully submitted,

STATE OF FLORIDA, DEPARTMENT OF
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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of Petitioner's Brief on Jurisdiction has been furnished to STEPHEN G. BIRR, ESQ., 122 St. Clair-Abrams Avenue, Tavares, Florida 32778 and to MARY M. McDANIEL, ESQ., 101 East Maud Street, Tavares, Florida 32778 by U. S. Mail delivery this 20th day of July, 1984.

STATE OF FLORIDA, DEPARTMENT OF
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