IN THE SUPREME COURT OF THE STATE OF FLORIDA



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| STATE OF FLORIDA, DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES,<br><br>Petitioner,<br><br>vs.<br><br>LAKE COUNTY, etc., et al.,<br><br>Respondants. | CASE NO. 65,596<br><br>DCA-5 NOS. 83-584, 83-779 |

# INITIAL BRIEF OF PETITIONER STATE OF FLORIDA DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES

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## PRELIMINARY NOTE

The letter "A" in the Statement of Facts will refer to the Appendix to Petitioner's brief on the merits.

The parties to this proceeding will be referred to as follows: Petitioner, Department of Health and Rehabilitative Services... the agency; Respondent, Lake County, Florida... the county; Respondent, Stephen G. Birr, the guardian ad litem.

This brief makes many references to Florida Statute 827.07(1979). Section 827.07 was transferred by the revisers in 1983 to Sections 415.502 through and including 415.513, Florida Statutes (1983). The Legislature adopted Florida Statutes (1983) in Chapter 83.61, Laws of Florida (1983).

## STATEMENT OF FACTS AND PROCEDURES

In the trial court, two separate dependency and permanent commitment actions were brought, regarding two brothers, M. T. P. (Mark), and M. T. P. (Michael). Mark was born January 27, 1981, and was later diagnosed a battered child, and was adjudicated dependent, and permanent commitment proceedings were commenced (App. - 7). During the pendency of those proceedings, Michael was born to the same parents, and was also adjudicated dependent (App. - 7). Because of the psychological status of the parents, it was determined that Michael was also at substantial risk, (App. - 6) and permanent commitment proceedings were also begun on Michael.

During the course of these proceedings, a guardian ad litem was appointed to represent the interest of the two children. In each case, the court appointed Stephen G. Birr, Esquire, as the guardian ad litem.

In Mark's case, following extensive litigation the Petition for Permanent Commitment was dismissed with prejudice as moot, as the child was adopted by the foster parents (App. - 1, 2). In Michael's case the Petition for Permanent Commitment was granted, and Michael has been permanently committed to HRS for subsequent adoption.

In each case, the guardian ad litem participated vigorously and effectively in the interest of the children he was appointed to represent.

Following the final judgments, the court entered two orders awarding attorney's fees to the guardian ad litem, and directing the Department of Health and Rehabilitative Services to pay these fees to the guardian ad litem within thirty (30) days. In Mark's case, the court on March 24, 1983, ordered the Department to pay attorney's fees in the amount of Twenty-Seven Hundred Dollars (2,700.00), and costs in the amount of One Hundred Fifteen Dollars, Seventy Cents (115.70), to Mr. Birr (App. - 4,5). In Michael's case, on May 2, 1983, the court ordered the Department to pay as fees to Mr. Birr the sum of Twenty-Five Hundred Dollars (2,500.00), and costs in the amount of Seventy-Eight Dollars, Eighty Cents (78.80) (App. - 12, 13). Both orders provided that the fees and costs were to be paid within thirty (30) days. The Petitioner Department of HRS appealed those portions of the orders awarding attorney's fees which direct that these fees and costs of the guardian ad litem be paid, be paid by HRS, and be paid by HRS within thirty (30) days. The Fifth DCA affirmed.

## ISSUE I

THE LOWER TRIBUNAL ERRONEOUSLY REQUIRED THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES TO PAY FEES AND COSTS OF THE GUARDIAN AD LITEM REPRESENTING THE CHILDREN IN THESE ABUSE AND NEGLECT PROCEEDINGS.

The lower tribunal affirmed the trial court's order that the Department of Health and Rehabilitative Services (the agency) must pay the fees and costs of the attorney appointed as guardian ad litem in the child abuse proceedings in the trial court. The lower tribunal's decision conflicts with the prior opinion of this court in the Interest of D. B. and D. S., 385 So 2d 83 (Fla. 1980), both on the issue of whether such an attorney is entitled to payment of fees, and on the issue of who, if anyone, should pay the fees and costs of the attorney serving as guardian ad litem.

In Issue II the agency will argue that the attorney serving as guardian ad litem is not entitled to receive payment of fees from anyone. However, the agency does not contest the entitlement of the guardian to reimbursement of costs, and a resolution of Issue II favorable to the agency will not completely dispose of the question of who should make these payments to the guardian ad litem. In this issue, the agency will refer to the aggregate of fees and costs simply as fees, and will argue that the county, not the agency, should be required to make such payments as are due to the guardian ad litem.

The decision of the lower tribunal, ordering the agency

to make these payments, is clearly at odds with D. B. and D. S., supra. Like the instant case, D. B. and D. S. originated as a contest between a county (Dade) and the state over who should pay the fees for certain attorneys appointed to represent parents and children before the juvenile court, 385 So 2d at 86, 87. The opening lines of Justice Overton's opinion are:

> This appeal by the State of Florida is from circuit court orders directing the state to pay attorney's fees for representation of both indigent children and parents in all juvenile dependency proceedings. The orders by the circuit court held that the state must provide this legal representation as a fundamental constitutional right under the due process clause of the Florida Constitution and the United States Constitution. This finding was based on the decision of the United States District Court for the Southern District of Florida in Davis v. Page, 442 F.Supp. 258 (S.D.Fla.1977).
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> 385 So 2d at 87

The opinion of this court quoted at some length from the trial judge's opinion, including the trial judge's extension of Davis v. Page that the Federal and Florida Constitutions:

> Require the Court to appoint counsel to serve as guardians ad litem for children in dependency proceedings when the Court finds such an appointment is necessary in order to protect the intersts (sic) of the child...
>
> 385 So 2d at 89

This court rejected the extension by the trial court. This court said:

> Finally, we find there is no constitutional right to counsel for the subject child in a juvenile dependency proceeding. By statute, counsel as guardian ad litem must be appointed in any child abuse judicial proceeding under section 827.07(16), Florida Statutes (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 Florida Rule of Juvenile Procedure 8.300.
>
> 385 So 2d at 91

It is noteworthy that in its opinion, written in 1980, this court expressly recognized that appointment of guardians ad litem were made mandatory by statute in child abuse judicial proceedings.

Having disposed of the issue of constitutional entitlement, this court also addressed the issue of what branch of government should pay fees for appointed counsel.

> 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). This statutory provision was not considered by the trial court or the parties in this action. 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." [Emphasis added.] This section was enacted to aid in the implementation of a new judicial article and was adopted immediately following the amendment of article V in 1972. In our opinion, when appointment of counsel is constitutionally required to represent an indigent, the case cannot proceed without such an appointment; consequently, such counsel is "personnel necessary" to operate the court. In such

> an instance, the trial court may require the county to pay appropriate attorney's fees for such representation absent any other statutory provision. We note that the counties are required by statute to pay such fees in criminal matters. §§27.53(2), 925.035(6), Fla. Stat. (1979).
>
> 385 So 2d at 92, 93

The court reviewed the facts of the two cases before it, and found that the appointment of the guardian ad litem for the child, D. B., while not constitutionally required, was an appropriate appointment under the facts of the case, and that the appointment of the guardian ad litem for the child, D. S., was neither constitutionally required nor appropriate under the circumstances. However, the court recognized that these attorneys performed their representation at the trial court's direction with the understanding that they would be paid for their services, and that they therefore should be paid (even though the court earlier in the opinion had ruled that the guardians ad litem were not entitled to payment).

The court concluded its opinion by directing the Florida judiciary (except the Eleventh Circuit) to follow the dictates of D. B. and D. S., and resolved the specific issues before it, i.e., whether the state or the county should pay the fees, as follows:

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

The opinion of this court was unanimous.

In the present case there is no issue regarding right to counsel of parents of dependent children. The issue focuses squarely on the representation of the child by an attorney appointed as guardian ad litem. As noted above, in D. B. and D. S., this court recognized a distinction between a constitutional right to counsel for the child, which right it found totally absent, and a statutory right existing under §827.07(16) Florida Statutes (1979). The lower tribunal, as well as its sister court in The Interest of R. W., 409 So 2d 1069 (2nd DCA, 1982) have focused on the fact that guardians ad litem are not constitutionally required in an attempt to distinguish this court's prior opinion. This attempt must be rejected. This court's requirement that fees for appointed counsel be paid by the county was not based on any constitutional consideration. The assignment of liabilities for fees was based on §43.28, Florida Statutes (1979), because such attorneys were "personnel necessary". 385 So 2d at 92, 93. In the case of the attorneys appointed to represent parents in D. B. and D. S., this necessity arose by constitutional requirement, but in the cases of the guardians ad litem it clearly did not. This court ordered the county and not the state to pay fees to the guardian ad litem as well as the attorneys for the parents.

In the case at bar, the guardian ad litem was a "personnel necessary". As it did in 1979, Florida Statute 827.07(16) continues to mandate the appointment of a guardian ad litem in all child

abuse or neglect judicial proceedings. This statute provides as follows:

> (16) 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 parents 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.
>
> Florida Statutes (1979)
>
> (Emphasis added.)

This statute was recodified by the revisers in 1983 to Florida Statute 415.508, and was broken into two numbered subsections. The wording of the statute has not changed since 1979.

There can be no doubt that the proceedings in the trial court were child abuse or neglect proceedings. Both actions in the juvenile court were proceedings for permanent commitment for subsequent adoption, based on alleged neglect following the death of a sibling from child abuse attributable to the parents. Section 827.07 itself does not provide for any form of judicial action. Instead, in §827.07(10)(e) the agency is directed, where appropriate, to take the subject child into protective custody or commence proceedings as provided in Chapter 39, The Florida Juvenile

Justice Act. (Section 827.07(10) (1979) has been recodified by the revisers to Florida Statute 415.505 (1983).) Thus "child abuse or neglect judicial proceedings" in which guardians ad litem must be appointed by the court are those judicial proceedings under Chapter 39, Florida Statutes brought in the interest of children alleged to be abused or neglected.

The obligation imposed by §827.07(10) (1979) to appoint a guardian ad litem in a child abuse or neglect proceeding is explicitly placed on the court. The statute further provides that it is the court which is to be reimbursed by the parents, and it is the court which is to collect the payment of the parents. The appointment of a guardian ad litem in such a case is a mandatory duty of the court; if the proceeding is an abuse or neglect proceeding, there is no discretion to be exercised.

Under these circumstances, the appointed guardian ad litem is a "personnel necessary" within the meaning of §43.28, Florida Statutes (1979).

Both the lower tribunal and the Second DCA in Interest of R. W., 409 So 2d 1069 (Fla. 2nd DCA 1981) relied heavily on §827.07(11) to assign the agency rather than the county responsibility for guardian ad litem fees. This section provides:

> (a) The department shall:
> 1. Have prime responsibility for strengthening and improving child abuse and neglect prevention and treatment efforts.
> 2. Seek and encourage the development of improved or additional programs and activities, the assumption of prevention and treatment responsibilities by additional

> agencies and organizations, and the coordination of existing programs and activities.
> 3. To the fullest extent possible, cooperate with and seek cooperation of all public and private agencies, including health, education, social services, and law enforcement agencies, and courts, organizations, or programs providing or concerned with human identification, or treatment of child abuse or neglect.
> 4. Provide ongoing protective, treatment, and ameliorative services to, and on behalf of, children in need of protection to safeguard and ensure their well-being and, whenever possible, to preserve and stabilize family life.
> (b) All state, county and local agencies have a duty to give such cooperation, assistance, and information to the department as will enable it to fulfill its responsibilities under this section.

Because the agency has "prime responsibility" for strengthening and improving child abuse and neglect prevention and treatment efforts, both the lower tribunal and the Second DCA concluded that the agency should pay the guardian ad litem fees. The lower tribunal stated flatly that HRS has the primary responsibility in providing guardian ad litem services in child abuse cases. 453 So 2d at 90. This statute, however, provides absolutely no authority for such an assignment of responsibility to HRS, and §827.07(16) plainly assigns it to the court. In Florida Statute 827.07(16) (1979) it is the court that is mandated to appoint guardians ad litem in child abuse and neglect cases, it is the court that is mandated when possible to collect reimbursement from the parents, and it is the court that is authorized to make reimbursement to the guardian ad

litem. Pursuant to §43.28, Florida Statutes (1979), the county, acting as fiscal agent for the circuit court, should make and receive these payments.

Thus, assuming the guardian ad litem is entitled to receive payment, the very statutes relied upon by the lower tribunal to impose the obligation of payment on the agency actually support the prior decision of this court that such payment must be made by the county.

It is noteworthy that the Legislature has never appropriated funds to the agency for payment of guardian ad litem fees or expenses, although the Legislature has funded the creation of a lay Guardian ad Litem Program under the auspices of the Florida Supreme Court (cf line item 855, Chapter 81-201, Laws of Florida (1981) and line item 846A, Chapter 82-215, Laws of Florida (1982)).

In 1980 this court decided D. B. and D. S., an action between a county and the state on the issue of which of them should pay the fees of attorneys appointed in dependency cases. This court ruled on matters of entitlement to counsel, and ruled squarely that the county and not the state should pay the fees of those attorneys entitled to receive payment. Now, some five years later, this court is called upon to reaffirm that decision. In these intervening five years no changes to the federal or state Constitution or to the Laws of Florida have altered the basis for this court's prior decision. This court should reaffirm its

decision in The Interest of D. B. and D. S., and quash that portion of the opinion of the lower tribunal requiring the agency to pay the fees of the guardian ad litem, and order these cases remanded to the trial court for entry of an order directing the county to pay such sums as may be lawfully payable.

## ISSUE II

THE LOWER TRIBUNAL ERRED IN AWARDING FEES TO THE GUARDIAN AD LITEM IN THESE CHILD ABUSE AND NEGLECT PROCEEDINGS.

This court's opinion in The Interest of D. B. and D. S., 385 So 2d 83 (Fla. 1980) held that a guardian ad litem for a child is not entitled to payment.

The court reached this conclusion through a reasoning process of several steps. The issue arose because the trial judge in D. B. and D. S. had extended the holding of Davis v. Page and had ruled that children in dependency cases were constitutionally entitled to representation by counsel. The trial judge in that case does not appear to have considered Florida Statute 827.07(16), but based his ruling directly on the holding of Davis v. Page and the reasoning set forth in his opinion, reproduced in 385 So 2d at 88, 89. This court rejected that holding:

> Finally, we find there is no constitutional right to counsel for the subject child in a juvenile dependency proceeding. By statute, counsel as guardian ad litem must be appointed in any child abuse judicial proceeding under section 827.07(16) Florida Statutes (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 Florida Rule of Juvenile Procedure 8.300.
>
> 385 So 2d at 91.

Thus this court's first premise was that children in dependency proceedings were not constitutionally entitled to

representation by counsel. This court had no issue regarding the effect of §827.07(16) (1979) before it.

This court then discussed the traditional professional representation of the poor, without charge or governmental reimbursement, by American and English lawyers, and noted that the development of constitutional rights to counsel in various cases had intruded into that tradition. This court then said:

> 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...
>
> 385 So 2d at 92

This court then approved the holding of State v. Rush, 46 N.J. 399, 217A 2d 441, 448 (1966), calling for payment of appointed counsel at sixty percent of the fee a client of ordinary means would pay an attorney of modest financial success. This court went on immediately to say:

> 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 these services are part of the lawyer's historical professional responsibility to represent the poor.
>
> 385 So 2d at 92
>
> (Emphasis added.)

Thus, in the discussion of entitlement of appointed

counsel in dependency cases to compensation, this court made a clear and firm distinction between those cases where counsel are appointed to meet constitutional requirements, and cases where counsel are appointed for non-constitutional reasons. The dividing line drawn by this court was that of constitutional requirement.

The lower tribunal has drawn the line differently. Following In The Interest of R. W., 409 So 2d 1069 (Fla. 2nd DCA 1981) in its error, the lower tribunal wrongly assumes that Florida Statute 827.07(16) had, since the opinion in The Interest of D. B. and D. S., made the appointment of a guardian ad litem mandatory in child abuse or neglect proceedings; the lower tribunal makes this statement twice:

> Furthermore, subsequent to the court's opinion in In The Interest of D. B., section 827.07 was amended to make the appointment of a guardian ad litem mandatory, and compensation for the services of the guardian ad litem seems contemplated by the phrase: "Shall reimbuse the court in part or in whole, for the cost of provision of guardian ad litem services."
>
> (Emphasis by the lower tribunal.)
>
> Interest of M. P., 453 So 2d at 89.
>
> ...furthermore, since the opinion in Interest of D. B., the appointment of a guardian ad litem in any child abuse or neglect proceeding has become mandatory by statute, rather than "desirable". Thus, in the instant case, there is authority for the awards of attorney's fees,...
>
> 453 So 2d at 90.

As the above quotations from its opinion show, the lower court relied upon this perceived statutory amendment as creating an authority for payment of fees to the guardian ad litem. (As noted earlier, the court also relied on this statute, and others, to shift responsibility for payment from the county to the agency.)

Inexplicably, both the lower tribunal and the Second DCA overlooked the fact that no such statutory change had occurred, and that the very section relied upon by them was specifically referenced by this court in its opinion, at 385 So 2d at 91. Thus the supposed statutory change relied upon below was nonexistent, and the lower tribunal's efforts to find statutory authority for the payment of guardian ad litem fees must fail.

Similarly, the lower tribunal's perception of this court's action in The Interest of D. B. and D. S. was erroneous. In the latter case, this court found guardians ad litem were not entitled to payment but (apparently as a matter of grace) allowed adjusted payment to these guardians, under the Rush formula, thereby avoiding retroactive application of its decision. This court expressly observed:

> ...we recognize counsel did in fact represent their designated clients at the trial court's direction with the understanding that they would be paid for their services. Therefore we find that these causes should be remanded and counsel should be compensated in accordance with the Rush fee formula set forth in this opinion.
>
> 385 So 2d at 93

This court remanded the cause for entry of appropriate orders directing the county to pay such fees when they are established.

This court was apparently unwilling to suprise the attorneys who had been appointed as guardians ad litem with the expectation of payment prior to this court's decision that such guardians were not entitled to compensation. However, since the appearance of this court's published opinion in 1980, there has been no basis for any attorney to experience such surprise. The Interest of D. B. and D. S. was a decision of major significance in the field of juvenile law, and its holdings should be presumed familiar to all juvenile judges and attorneys. Neither equity nor grace justifies the departure subsequent to 1980 from this court's holding, as all litigants in the juvenile division are charged with knowledge of the law as announced by this court, and are entitled to rely upon it. In this case there was no reasonable expectation of payment, there was no statutory authority for payment, and there was in fact a prior holding of this court that there was no entitlement to payment. Fees should not have been awarded.

The reaffirmance by this court of its prior decision that guardians ad litem in child abuse and neglect cases are not entitled to compensation will not cause any undue hardship upon the Florida Bar. Florida Statute 827.07(16) (1979) does not require that the appointed guardian ad litem be an attorney. Subsequent to its opinion in D. B. and D. S., this court in 1982

promulgated an amendment to Florida Rule of Juvenile Procedure 8.300, and while this amended rule echoes the requirement of §827.07(16) that a guardian ad litem be appointed in all child abuse and neglect cases, this rule specifically contemplates that the guardian so appointed need not be an attorney. This amendment to Florida Rule of Juvenile Procedure 8.300 was promulgated at about the time this court was implementing the legislatively authorized Guardian ad Litem Program.

Moreover, not all juvenile dependency cases are child abuse and neglect cases. This court has recognized that distinction in D. B. and D. S. and also in Florida Rule of Juvenile Procedure 8.300. Paragraph (1) of this rule is the older, permissive, rule allowing the appointment of guardians ad litem in juvenile delinquency and dependency cases. However, in paragraph (2) of the rule, the court mandates the appointment of a guardian ad litem in child abuse and neglect cases. This distinction in terminology echoes the distinction in the relevant statutes, where §827.07(16) (1979) mandates the appointment of a guardian ad litem in child abuse and neglect cases, while §39.405(6) authorizes the appointment of a guardian ad litem in any dependency case. Dependency is defined by Florida Statute 39.01(9) to include a variety of conditions and situations other than abuse or neglect. However, in abuse and neglect cases the subject child is alleged to have suffered harmful wrong from his parents or custodians, creating a particularly acute conflict between the

child and his natural protectors. It is in these cases only that the Legislature and this court have mandated the appointment of an additional spokesman for the child. While the trial judge may appoint an attorney to this office, he is under no obligation to do so. The uniquely social and non-punitive character of the needs of the child and the dependency proceeding itself may make the child's interest better served by a spokesman whose training is more specifically relevant to the child's best interest.

There is no authority for the lower tribunal's departure from this court's holding that guardians ad litem are not entitled to compensation, and neither is there any reason for this court to modify its prior holding. The decision of the lower tribunal should be reversed.

## ISSUE III

THE LOWER TRIBUNAL ERRED IN ORDERING THE AGENCY TO PAY THE GUARDIAN AD LITEM'S FEES AND COSTS WITHIN THIRTY DAYS.

The lower tribunal not only affirmed the trial judge's order granting fees to the guardian ad litem, and directing these fees be paid by the agency, but also affirmed that portion of the order requiring the agency to pay the required sums within thirty (30) days.

The lower tribunal correctly points out that the agency did not object to the orders appointing the guardian ad litem. The agency had no objection to the appointment, and in fact it was the agency that called to the trial judge's attention the provisions of Florida Statute 827.07(16) and Florida Rule of Juvenile Procedure 8.300. In so doing, the agency was attempting both to fully serve the best interest of the child and simultaneously to avoid the introduction of error into the trial level proceedings. This attempt to avoid possible reversible error in the trial procedures cannot be construed as an acceptance for liability for the guardian ad litem's fees or costs.

The lower tribunal also correctly notes that the agency did not specifically object to the trial judge's thirty day provision in the order awarding fees and costs. However, the agency did object at the trial level to the order that the agency pay these fees and costs, and the agency's opposition to that order

should be construed to cover the order in its entirety.

If the order directing the agency to pay is set aside, this provision, of course, loses its significance. If the order stands, the matter is otherwise.

In assigning these obligations to the agency, the lower tribunal relied substantially on In The Interest of R. W., 409 So 2d 1069 (Fla. 2nd DCA 1981). In R. W., the Second DCA had regarded the award of these fees as "closely akin" to an award of costs and attorney's fees awarded to a prevailing party under Florida Statute 57.041 (1969). The Second DCA quoted extensively from Chief Justice Ervin's concurring opinion in Simpson v. Merrill, 234 So 2d 350 (Fla. 1970). In his opinion Chief Justice Ervin addressed the potential problems arising from lack of available appropriated funds to pay for judgments rendered against the state, and the possibility of interference with the agency's proper function if such judgments were paid with transferred funds. As quoted by the Second DCA in R. W., Chief Justice Ervin suggested that a dispute as to availability of funds could be resolved in a separate mandamus action, and that if no funds were in fact available, the losing agency could seek a budgetary item in its next year's budget, or a claim or relief bill could be sought. See 409 So 2d at 1070. The Second DCA's written opinion apparently endorses and adopts this procedure.

Significantly, Simpson v. Merrill and §57.041, Florida Statutes (1969) refer to cost judgments, and not to orders to pay

within a time certain. Under neither the statute nor Simpson v. Merrill is there any authority to convert a simple debt (cost judgment) into a possible contempt by ordering the losing party to pay the sum within a time fixed by the court.

The entire theory invoking §57.041, Florida Statutes (1969) invoked by the Second DCA is a highly dubious device apparently invoked to evade this court's decision in D. B. and D. S. Even if this court's decision may be avoided, the invocation of the cost statute is singularly inappropriate, as that statute authorizes the award of costs against the losing party, and in the proceedings below the agency did not lose.

The procedure suggested by Justice Ervin in Simpson v. Merrill allows the secretary of the agency to make a determination as to availability of funds to pay a cost judgment, and to have this determination judicially reviewed prior to any judicial enforcement of payment. On the other hand, the order to pay within thirty days requires the secretary to determine at his peril that funds are or are not available, and the first judicial review of this determination would be in an action for contempt.

This problem is not present when the 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 the payment of appointed counsel.

The order directing the agency to pay the guardian ad litem's fees and costs within thirty days should be quashed, and

replaced (if at all) with a simple cost judgment.

## CONCLUSION

The lower tribunal's decision affirming the liability of the agency rather than the county for the fees and costs of guardians ad litem in child abuse and neglect cases and affirming the entitlement of the guardian ad litem in these cases to payment of fees is a clear departure from the precedent of this court unjustified by intervening changes in law, and should be reversed, directing the county to reimburse the guardian ad litem's costs.

The order directing the agency to pay these sums within thirty days unreasonably disrupts the agency's administration of appropriated funds, while bypassing previously approved procedures for assessing costs against state agencies, and should be reversed (even if the agency remains liable for payment).

Respectfully submitted,

STATE OF FLORIDA, DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES

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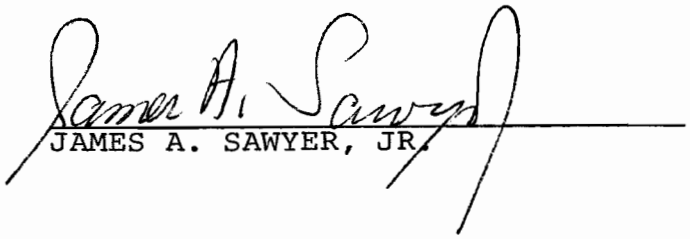
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner State of Florida, Department of Health and Rehabilitative Services 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 22nd day of December, 1984.



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