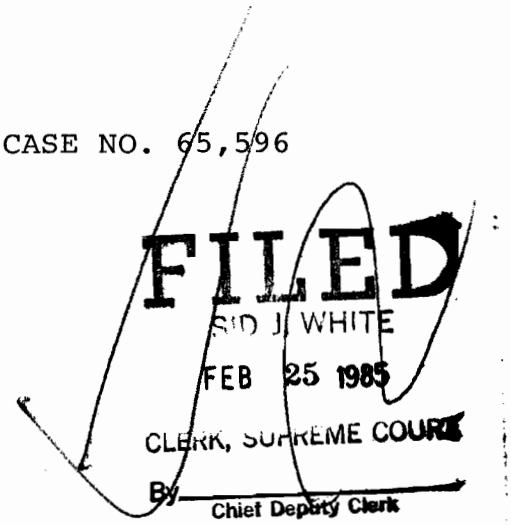
IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES, Petitioner, vs. LAKE COUNTY, etc., et al., Respondents.	:	CASE NO. 65,596



REPLY BRIEF OF PETITIONER STATE OF FLORIDA
DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

SUMMARY OF ARGUMENT

ISSUE I

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

This issue presents a primary issue regarding reimbursement of costs and a fallback position regarding payment of attorney's fees. In Issue II, HRS argues that the guardian ad litem is not entitled to payment of fees by anyone.

The issue of who should pay the sums due the guardian ad litem is separate and distinct from the issue of whether the guardian ad litem is entitled to payment of fees, and these issues should not be confused.

On the issue of who should make payment, this court has invoked the "personnel necessary" analysis of Fla. Stat. 43.28 (1979) to hold that when a case cannot proceed without an appointment by the court, the person appointed is personnel necessary to operate the court, and payments due that person are to be made by the county. Interest of D. B. and D. S., 385 So 2d 83 (Fla. 1980).

In D. B. and D. S. the court had before it only situations where the necessity arose by constitutional requirement. However, the allocation of responsibility for payment (as distinct to entitlement to payment) turned on no constitutional consideration, but instead on the necessity vel non of the appointment. Nothing

in this court's analysis precludes the "necessity" from arising by statutory rather than constitutional requirement. Respondent Birr, appointed pursuant to the mandate of Fla. Stat. 827.07(16) is such a personnel necessary, and the reimbursement of his costs (and fees, if entitled) should be made by the county and not by HRS.

No statute directs or even authorizes HRS to reimburse these sums. Fla. Stat. 827.07(11)(1979) assigns HRS "prime responsibility" for certain broad responsibilities regarding abused or neglected children, but these responsibilities do not include the provision of guardian ad litem services. Fla. Stat. 827.07 (16) assigns the guardian ad litem responsibility directly to the court, and not to HRS. Therefore, the order directing HRS to pay the sums due the guardian ad litem is erroneous.

ISSUE II

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

The statute mandating appointments of guardians ad litem in child abuse and neglect cases, Fla. Stat. 827.07(16)(1981), does not authorize payment of a fee to the guardian ad litem, and does not require that the guardian ad litem be an attorney.

This court held in D. B. and D. S. that when the appointed guardian ad litem is an attorney, no compensation is available, and that representation is part of the attorney's historical

professional responsibility to represent the poor.

The Respondent County agrees that the guardian ad litem is not entitled to payment of fees; the Amicus has adopted an equivocal position.

ISSUE III

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

Petitioner will rely on the argument presented in its initial brief.

ISSUE I

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

The trial court ordered HRS to reimburse the costs of the guardian ad litem, and also pay the guardian ad litem's fees. Both these awards are now under review. However, the issues are separable. On the guardian ad litem's entitlement to reimbursement of costs and expenses, HRS does not deny this entitlement, but does deny that HRS is the party liable to make this reimbursement. Regarding payment of the guardian ad litem's fees, however, the primary HRS position is that no one should pay these fees, because the guardian ad litem is not entitled to receive compensation. This issue is specifically argued as Issue II. Only if this court were to depart from its prior holding and find the guardian ad litem entitled to payment of fees would it become necessary to resolve the issue of what branch of government should make that payment. As a fallback position, HRS in that case would rely on the same analysis and argument as presented on costs and expenses, to say that HRS should not make payment of these guardian ad litem fees.

This court, in The Interest of D. B. and D. S., 385 So 2d 83 (1980) analyzed the respective obligations of the state and the county for payment of attorney's fees in such cases, and found that

§43.28, Fla. Stat. (1979) required these sums to be borne by the county rather than this state. This court's analysis, primarily on page 93 of the published opinion, focused on the term "personnel necessary" and ruled it a county obligation to compensate personnel necessary. In that case, the court found certain personnel to be necessary because their presence was required by the Constitution of the United States.

Both Respondents and the Amicus would have this court limit its analysis of Fla. Stat. 43.28 (1979) to those situations where the necessity is of constitutional origin.

Neither the statute itself nor this court's construction of it warrants such a limitation. The plain words of the statute contain no reference to the Constitution, either of the United States or of Florida.

In the present case the guardian ad litem is a "personnel necessary", and this necessity is of statutory, and not constitutional, origin. Fla. Stat. 827.07(16)(1981), identical to the statute in effect in 1979, makes mandatory the appointment of a guardian ad litem in child abuse and neglect proceedings. In its main brief, HRS has argued that these permanent commitment proceedings arising out of child abuse and neglect, are "child abuse and neglect proceedings". That argument will not be repeated here, although it is noteworthy that on a collateral matter regarding the interplay between Chapter 39 and Fla. Stat. 827.07, the Third District Court of Appeal, referring to Fla. Stat. 827.07(8)(1981), said:

> Contrary to the natural mother's contention, we think this statute by its express language applies to Chapter 39 child neglect proceedings, as the statute is made applicable to 'any judicial proceeding relating to child abuse or neglect.' §827.07(8), Fla. Stat.
>
> Interest of E.H. v State, Department of HRS, 443 So 2d 1083 (Fla. 3rd DCA, 1984)

The law of privileged communication of Fla. Stat. 827.07(8) (1981) was held applicable to a Chapter 39 dependency case as an abuse and neglect proceeding, illustrating that Fla. Stat. 827.07 (1981) is applicable in dependency cases.

Thus, the guardian ad litem is required by statute in these cases, and is a personnel necessary. While the source of the necessity is indeed relevant on the issue of the guardian ad litem's entitlement to compensation, it is totally irrelevant as to which branch of government should bear the guardian ad litem's costs and expenses (and fees, if any).

Fla. Stat. 827.07(16) (1981) does not require the appointment of an attorney as guardian ad litem, and the absence of the word "attorney" from this statute appears to be studied and deliberate. Respondent Birr in his brief points out correctly that this court did refer to guardians ad litem as "counsel" in Interest of D. B. and D. S., 385 So 2d at 91. This passing reference was probably motivated by the fact that all guardians ad litem then before the court were in fact attorneys. This passing reference is mere dicta. This court's subsequent involvement in the Guardian ad Litem Program, and the subsequent promulgation of Fla. R. Juv. P. 8.300

clearly demonstrate that no such authoritative construction of Fla. Stat. 827.07(16) was intended. This statute, as construed by this court, allows lay guardians ad litem.

Respondents and Amicus also argue that the statutory language of 827.07 authorizes payment of fees to guardians ad litem, and authorizes HRS to pay these fees. This position cannot withstand a reading of the statutes themselves.

In support of HRS liability for fees and costs, Respondents and Amicus have cited this court to no statute not enacted and effective when this court's opinion in The Interest of D. B. and D. S. issued.

To find HRS liability for these expenses, the Respondents rely on Fla. Stat. 827.07(11) (1981). This section, quoted in full on pages 9 and 10 of Petitioner's main brief, assigns HRS "prime responsbility for strengthening and improving child abuse and neglect prevention and treatment efforts", and goes on for some paragraphs to delineate the nature of these prevention and treatment efforts. Significantly, in sub-paragraph (a)2 HRS is to seek and encourage... the assumption of prevention and treatment responsibilities by additional agencies and organizations. The prevention and treatment efforts for which HRS is given prime responsibility by this statute are stated in broad general terms. No reference to guardians ad litem appears in this statute, no specific authorization for expenditure of funds is contained in this statute. HRS liability for the cost of guardian ad litem

services can be found in Fla. Stat. 827.07(11) only by a strained and tortured interpretation which ignores the plain words of the statute.

To find HRS liability for the costs of guardians ad litem also requires ignoring the plain words of Fla. Stat. 827.07(16) (1981), which clearly assigns this responsibility to the court, and not to HRS. By its plain words, Fla. Stat. 827.07(16) (1981) assigns to the court the authority to make reimbursement to the guardian ad litem, the authority to collect reimbursement from the parents for these costs, and the original responsibility for appointing the guardian ad litem in the first instance. This latter responsibility includes the responsibility of deciding whether the guardian ad litem to be appointed is to be a lay person or a lawyer.

Both Fla. Stat. 827.07(11) (1979) and Fla. Stat. 827.07(16) (1979) were in place and effective when this court issued its opinion in The Interest of D. B. and D. S. in 1980. Yet with these statutes in place and effective, this court ordered the respondent county (the present Amicus) to pay all the fees and costs that were awarded.

Since there is no statute authorizing or directing HRS to assume responsibility for payment for guardian ad litem fees or costs, and since Fla. Stat. 827.07(16) (1979) assigns this responsibility to the court, the trial judge and the lower tribunal have erred in ordering HRS to assume these expenses.

ISSUE II

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

Respondent Birr, the guardian ad litem below, who is an attorney, argues in his brief that the guardian ad litem is entitled to payment of fees. Respondent Lake County agrees with HRS that the guardian ad litem is not entitled to payment of fees, while the Amicus has taken an equivocal position.

The position taken by this court in The Interest of D. B. and D. S., supra, is unequivocal. Regarding attorneys appointed to serve as guardian ad litem in child abuse and neglect cases, this court first held, at 385 So 2d 91, that the child subject to a juvenile dependency proceeding has no constitutional right to counsel. This court then held:

> 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 lawyer's historical professional responsibility to represent the poor. (emphasis added)
>
> 385 So 2d at 92

Even when the appointed guardian ad litem for the child is a lawyer, this court has held no compensation is available. On the special circumstances of the case, the D. B. and D. S. holding on guardians ad litem was given only prospective application, as

the attorneys appointed as guardians ad litem had accepted appointment with expectation of payment.

The expectation of payment is no longer available as a rationale for payment, as this court's holding is or should be well known, and continued reliance on the "expectation" theory would have the practical affect of nullifying the court's holding.

In its opinion, the lower tribunal has quoted in part from the Order Appointing Guardian ad Litem, at 453 So 2d 89. As quoted, the order requires Birr to keep accurate records of work done and services performed so the court could later consider the question of "a reasonable fee for the Guardian ad Litem to be paid in accordance with the applicable law." (emphasis added) The applicable law was this court's opinion providing that there was no entitlement to payment of fees, and in any event the order gave HRS no reason to object, as such fees should not be assessed against HRS.

There is no basis in statute for the award of a fee to the guardian ad litem at all. Indeed, the lower tribunal admitted in its published opinion that there is nothing in Fla. Stat. 827.07(16) (1981) to indicate that compensation to the guardian ad litem is required, 453 So 2d at 91. In this comment the lower tribunal was correct, as this court so held in D. B. and D. S., that when private counsel are appointed as guardians ad litem, no compensation is avialable, 385 So 2d at 92.

Fla. Stat. 827.07(16) (1981) speaks to reimbursement of the

costs of providing guardian ad litem services; it says nothing of payment of fees. There can be no doubt that the Legislature knows the difference between costs and attorney's fees, and had payment of fees been the legislative intent, it would have so provided, see e.g., Fla. Stat. 827.07(12) (1978 supp.)

The "prime responsibility" argument, based on Fla. Stat. 827.07(11) (1981) likewise fails to provide statutory authority for the payment of a fee to the guardian ad litem. The "prime responsibility" assigned by this section is given in broad general terms, and is obviously goal oriented rather than specific. This statute does not direct HRS to create or operate any specific program, but instead vests the agency with very broad discretion as to what programs should be developed, what responsibilities should be assumed by additional agencies and organizations, and what the specific character of ongoing services on behalf of children should be. Reliance on this statute for the entitlement of fees to the guardian ad litem, to be paid by HRS, proves too much. Such a holding would leave HRS and the courts a blank check to create child abuse and neglect programs by whim, allowing total disregard to the legislative process whereby the Legislature, through its budget, sets priorities for the actions of state agencies.

The other authority cited by the lower tribunal and Respondents as entitling the guardian ad litem to a fee is In The Interest of R. W., 409 So 2d 1069 (Fla. 2nd DCA, 1981). However, the Second DCA's opinion in fact provides no such authority.

Interest of R. W., supra, did not consider the entitlement of the guardian ad litem to fees. As even a casual reading of that opinion will show, the issue of entitlement was not considered by the Second DCA, which instead considered only the issue of whether HRS or the county should pay the fees. As the court said:

> The sole issue raised by appellant is whether it can be required to pay such fees absent a legislative appropriation.
>
> 409 So 2d at 1070

While Interest of R. W., supra, may provide some basis for the lower court's action on the apportionment of responsibility for fees, it provides no support whatever for the lower tribunal's position regarding the guardian's entitlement to receive payment of fees.

The statutes and cases relied upon by the lower tribunal and the Respondent Birr to support a guardian ad litem's entitlement to fees provide not even arguable support for that position. The opinion of the lower tribunal, in this respect, should be quashed.

ISSUE III

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

On this issue Petitioner HRS will rely on the arguments contained in its initial brief.

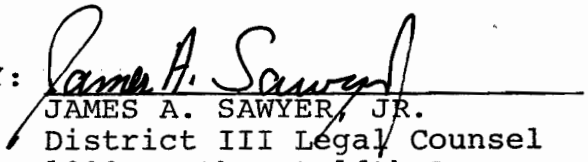
CONCLUSION

The opinion of the lower tribunal, to the extent that it holds the guardian ad litem entitled to payment of fees, and that reimbursement of the fees, or costs, or both of the guardian ad litem should be made by HRS, should be quashed.

These cases should be remanded to the lower tribunal with directions to reverse the award of fees to the guardian ad litem, and to require that the costs of providing guardian ad litem services (including fees, if any entitlement is found) be assessed against Lake County and not against HRS.

Respectfully submitted,

STATE OF FLORIDA, DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES

BY: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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; MARY M. McDANIEL, ESQ., 101 East Maud Street, Tavares, Florida 32778; and to ERIC K. GRESSMAN, ESQ., Assistant County Attorney, Public Health Trust Division, Jackson Memorial Hospital, 1611 Northwest 12th Avenue, Suite C, Room 0108 N.W., Miami, Florida 33136 by U.S. Mail delivery this 21st day of February, 1985.

James A. Sawyer

JAMES A. SAWYER, JR.