

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

THE FLORIDA BAR
RE: ADVISORY OPINION
HRS NONLAWYER COUNSELOR

MAR 23 1989

CLERK, SUPREME COURT

CASE NO. 70-Deputy Clerk

RESPONSE OF DEPARTMENT
OF HRS TO REPORT AND
RECOMMENDATIONS OF UPL
AD HOC COMMITTEE

LINDA K. HARRIS
DEPUTY GENERAL COUNSEL
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES
1323 Winewood Boulevard
Tallahassee, FL 32399-0700
(904) 488-2381

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SUMMARY OF RESPONSE

The department supports the ad hoc committee's recommendations for:

- 1.) Better training for judges and HRS counselors;
- 2.) Tightening of dependency judicial process;
- 3.) Certification of HRS legal intern programs in cooperation with Florida's law schools.

The department supports the spirit of the committee's recommendation that HRS attorneys should be involved at all stages of dependency proceedings in order to provide oversight and assistance to lay staff in drafting, screening of cases, and the legal course of proceedings. However, parents now have no constitutional right to counsel in uncontested proceedings, and to require actual courtroom presence of an attorney for the state in all instances would upset the balance of fairness.

Detention proceedings are now required to be non-adversarial under the juvenile rules, and no attorney for the state is required at arraignment hearings. A dependency adjudicatory proceeding is uncontested if the parents consent to dependency or admit the allegations of the dependency petition. If parents are willing and able to enter into a performance agreement with the department, that process is also uncontested. Many pre- and post-adjudicatory motions and other proceedings are routine and favorable or otherwise agreeable to the parents. The majority of judicial review hearings are uncontested.

Actual HRS attorney courtroom presence in uncontested proceedings should not be required, nor should HRS attorneys be substantively involved in negotiations of performance agreements. However, HRS attorney oversight, assistance and advice would alleviate many of the current problems, and such involvement is supported by the department provided the Legislature would agree to fund additional needed positions.

The department also agrees with the committee's recommendation that HRS staff attorneys rather than the State Attorney should handle all dependency cases, so that a uniform statewide system of legal representation could be established. Unfortunately, the department cannot expect the additional \$6,000,000.00 of funding for that issue this year. The department would preserve that recommendation as a goal for the future and submits that the alternative proposal for HRS attorney-paralegal teams in each circuit could achieve much the same results for the present.

HRS counselors are currently authorized by statute and juvenile court rules to draft and file detention petitions, injunctions, dependency petitions, predisposition reports, performance agreements, permanent placement plans, judicial review petitions and reports, and other post-adjudicatory motions. Assuming adequate legal training, and legal and supervisory review, HRS counselors' authority to prepare such documents should be affirmed by this Court under its jurisdiction to authorize the practice of law in this state.

There is no assurance the Legislature would fund any additional attorneys for HRS. If HRS counselors are subject to criminal prosecution for unrepresented court appearance, and no additional lawyers are funded, HRS counselors will not be able to appear in court.

Counselor nonappearance would be felt most sharply in loss of federal funding for foster care and adoption assistance because federally-mandated case reviews, now required under Florida law to be judicial rather than administrative reviews, could not take place.

Total cost to implement all ad hoc committee recommendations as to HRS staff attorney representation in contested and uncontested cases would be \$11,089,300.00. Cost to implement representation in uncontested cases alone would be \$4,476,439.00.

HRS suggests that a reasonable alternative to vastly increased attorney representation for the state, which would address the concerns of all parties, would be for the Court to authorize HRS workers to continue drafting and filing specified documents, under attorney and paralegal supervision, and to appear without actual in-court attorney representation in uncontested court proceedings. HRS would seek legislative funding for 21 attorneys, 42 paralegals, clerical and technological support, to be used exclusively to supplement State Attorney review and drafting of court documents, to assist counselors in screening cases, to provide legal advice on strategy, and for court appearances in particularly difficult cases. Cost would be \$3,458,037.00.

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

RE: ADVISORY OPINION
HRS NONLAWYER COUNSELOR

CASE NO. 70,615

DEPARTMENT'S RESPONSE TO REPORT AND
RECOMMENDATIONS OF UPL AD HOC COMMITTEE

This Court has requested the department to respond fully to the recommendations of the UPL ad hoc committee, not limited to matters of cost. The department accordingly responds as follows:

I. Training and Judicial Process

The committee's report has many excellent suggestions for overall improvement of the juvenile dependency system which go to the heart of the current problems. Chief among these is the committee's recommendation that new juvenile judges be trained in substantive and procedural dependency law prior to assuming judicial assignment to the juvenile division (see pages 10, 15 of ad hoc committee report).

The HRS Districts are resigned to a period of frustration and apprehension when a new and untrained juvenile judge comes on the bench. Many new judges flounder about because they simply do not know basic dependency law. A typical reaction is to require presence of an HRS lawyer in proceedings that would be routine for an experienced juvenile judge. A "judge school" teaching the elements of Chapters 39 and 415, and the Juvenile

Rules, would help a great deal to make the new judge feel confident to handle these cases.

Better legal training for HRS counselors and supervisors is also critical to efficient functioning of the system. In the past, such training has been sporadic and left mainly to the District Legal Counsels who have had neither the time nor the expertise to organize and provide consistent training. That past practice is changing due to the commitment of the department to provide specialized in-service legal training at regional Professional Development Centers. The first of these legal training programs are scheduled for March and April (see Attachment I).

The committee's recommendation for certification of HRS legal intern programs in cooperation with Florida's law schools is also right on target, and the department would ask this Court to approve such certification regardless of the outcome of this proceeding.

HRS also commends the committee for its excellent recommendations for improvement of dependency court process. The Rules of Juvenile Procedure do need to be updated, especially in regard to termination of rights proceedings. Better control of dependency dockets by juvenile judges as related to coordination of associated criminal cases, would significantly decrease current delays. Experience in the Districts has shown that many of the delays in initial dependency adjudications occur as a direct result of a related pending criminal case. The dependency adjudication is continued by the SAO or defense counsel, often

for many months, until the criminal case is concluded. Priority handling of the criminal case, with limited grants of continuance in both the criminal and related dependency action would alleviate this problem.

The department respectfully submits that 1.) better training for judges and HRS counselors; and 2.) tightening of dependency judicial process, will substantially resolve the problem of delay, the major harm found by the committee.

II. Legal Representation for the Department of HRS in Uncontested Dependency Proceedings

A. Department's Position.

The department's only problem with the committee's recommendations centers upon the need for HRS attorney blanket court involvement in uncontested dependency proceedings. HRS agrees that it should, and already has attorney representation in contested cases, either from the State Attorney or HRS staff attorneys, and that is not an issue here. HRS further agrees with the committee that HRS attorney oversight in drafting, screening of cases, and legal strategy, from start to finish of a case, would improve the current system by providing consistency, encouraging settlement and reducing delays caused by worker error. The department's proposal for HRS attorney-paralegal teams in each judicial circuit would substantially accomplish this without adding large numbers of additional staff.

Parents currently have no constitutional right to counsel in uncontested cases, see Attachment II, Sections 5. and 7., and to require such in-court representation for the state

would upset the balance of fairness. There are fundamental differences between contested and uncontested proceedings. Blanket in-court involvement of HRS attorneys would add nothing of substance to most of the uncontested proceedings, and could inject a coercive element not now present.

The question before this Court is:

Are HRS counselors committing the unauthorized practice of law when they prepare and file documents, and present the case, request relief and testify in uncontested dependency court cases.

This Honorable Supreme Court has exclusive jurisdiction to authorize the practice of law in the Florida courts. Art. V., Section 15, Fla. Const. "Implicit in the power to define the practice of law, regulate those who may so practice and prohibit the unauthorized practice of law is the ability to authorize the practice of law by lay representatives. The unauthorized practice of law and the practice of law by non-lawyers are not synonymous." The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980). See Section 454.23, Fla. Stat. (1977) ("Any person not licensed or otherwise authorized by the Supreme Court of Florida..." who practices law is guilty of a first degree misdemeanor) (emphasis supplied).

The department respectfully requests this Court to authorize HRS counselors to prepare and file specific documents, and to present the case, request relief and testify in the uncontested court proceedings described below and in Attachment II, provided the department is able to establish reasonable HRS attorney oversight, and to reasonably assure that counselors are

adequately qualified through legal training and supervision, so that the public is protected from "incompetent, unethical, or irresponsible representation." Moses, supra at 417.

B. Contested v. Uncontested Dependency Proceedings.

In order to fully appreciate the basic differences between contested and uncontested dependency proceedings, it is necessary to examine each stage of the proceedings, as established by statute, court rule, and actual practice. Cases may be contested at certain stages and uncontested at others. It is the department's position that significant HRS attorney involvement (either State Attorney or departmental attorney) is not necessary during uncontested stages of a case.

Detailed discussion of each stage of the proceedings is attached to this Response as Attachment II. In summary, the department concurs with the overall thrust of the ad hoc committee's recommendations that HRS attorney involvement would be beneficial at all stages of dependency proceedings to screen cases for legal sufficiency, review and draft pleadings, and to provide legal advice to counselors on the appropriate legal course the case should take at each stage of the proceedings.

However, such attorney oversight need not entail actual courtroom presence in every instance. For example, dependency detention (shelter) hearings are required to be non-adversarial under the juvenile rules, and no attorney for the state is currently required either at detention hearings or at arraignments. Attorney oversight, however, could assure that the case is on the proper legal track. Chapter 39 and the juvenile

rules allow parents to consent to dependency or admit the allegations of the dependency petition. Such consensual proceedings are by definition uncontested and non-adversarial, and actual courtroom presence of an HRS attorney should not be required.

Likewise, if parents are willing and able to enter into a performance agreement with the department, such a process is also uncontested, as are many routine pre- and post-adjudicatory motions and other proceedings favorable or otherwise agreeable to the parents. The majority of judicial review hearings are uncontested.

Assuming adequate attorney oversight, review of documents and legal advice to counselors, actual HRS attorney courtroom presence should not be required in any of these uncontested proceedings.

At present, HRS counselors are authorized by statute and juvenile court rules to draft and file dependency detention (shelter) petitions, injunctions, dependency petitions, predisposition reports, performance agreements, permanent placement plans, judicial review petitions and reports, and other post-adjudicatory motions. So long as the department has provided reasonable attorney advice and review, as certified by the counselor on the document, HRS counselors' authority to draft and file such documents should be affirmed by this Court pursuant to its exclusive authority to authorize the practice of law in this State.

C. State Attorney v. HRS Staff Attorney Representation.

The ad hoc committee recommends that HRS be made responsible for furnishing counsel in dependency cases rather than being represented by the State Attorney, so that a uniform statewide system of legal representation could be achieved (pages 24-25 of ad hoc committee report).

HRS concurs wholeheartedly with this recommendation. Unfortunately, it would cost over \$6,000,000.00 to implement such a changeover, and the department simply could not take that issue on with the Legislature this year. What the department would hope is that its less costly alternative would basically achieve the same result by providing HRS attorney input, if not actual courtroom presence, at all stages. The department supports the committee's recommendation as a goal worthy of pursuit in the future.

The department would also note that some State Attorneys are less than committed to performing their statutory duty. It would be helpful if this Court would encourage all participants in the dependency process, including Judges, SAOs and HRS staff, to comply with their ethical responsibilities and to see this time as a golden opportunity to work together to improve the dependency system.

D. Cost Estimate and Analysis

This section must be prefaced by statement of the obvious. There is no assurance the Legislature would fund any additional attorney representation for the department. If this Court finds that HRS counselors are committing the unauthorized

practice of law, so that HRS counselors will be subject to criminal prosecution if they appear in court unrepresented, and no additional attorneys are authorized by the Legislature, then HRS counselors will not be able to appear in court. The department could not compel these counselors to incriminate themselves.

Aside from the chilling effect on case workers' child protective activities, the impact of nonappearance by HRS counselors would be felt most sharply by the state in regard to judicial reviews, because federal law requires a state plan to include 6-month reviews of children in foster care in order for the state to retain eligibility for federal foster care and adoption assistance payments. 42 U.S.C. Sections 671(a)(16), (b); 42 U.S.C. 675(5), (6). At present, Chapter 39, Part V, Florida Statutes, comprises Florida's state plan. Section 39.453, Fla. Stat., requires judicial, not administrative review.

The department estimates that a minimum of 44 additional attorneys and 22 paralegals would be required just to handle uncontested proceedings, based on the 1987-88 statistics on cases judicially handled (Tables I, II and III attached). Cost, including 33 secretaries, 99 computers, 11 printers and 11 FAX machines would total \$4,476,439.00 for a 12-month period (Table IV).

If HRS were required to also take over the contested cases now being handled by the State Attorneys, 66 more attorneys, including paralegals, clerical and technological support, would be needed. For this grand total of 110 new

attorneys, and support, new total funding of \$11,089,300.00 would be needed to fully implement the committee's recommendations.

HRS suggests, provided the Legislature would agree to fund, that a reasonable compromise, which would address the concerns of all parties as to inadequately drafted pleadings and lack of consistent legal guidance in case development and handling, would be for this Court to authorize HRS counselors to draft, file and proceed unrepresented in the uncontested proceedings outlined in Attachment II. and above, and for HRS to seek funding to supplement current staff with teams compromised of 1 attorney, 2 certified paralegals, 1 secretary, and technological support, per judicial circuit (except the 11th circuit, which would receive 2 attorneys and 4 paralegals due to its large volume and special problems). The attorneys and paralegals would exclusively review and draft court documents, advise staff at all stages of proceedings, and, on rare occasions, appear in court or by telephone, as necessary to assist the court in especially complex proceedings. Cost for 21 attorneys, 42 paralegals, and clerical and technological support, would be \$3,458,037.00, for a 12-month fiscal period.

The department respectfully submits that this additional staff, combined with the ongoing legal training which has been instituted by the department, certification of legal intern programs, as well as the judicial training and judicial process controls recommended by the committee and supported by the department, comports with the spirit and substance of the committee's chief concerns, and would greatly improve the current

system without unduly burdening an already tight state budget.

The Honorable Seymour Gelber, Administrative Judge of the 11th Circuit Juvenile Division, has kindly consented to allow the department to quote him here. Judge Gelber states:

The system needs lawyers at the early stages to see that documents are properly prepared. Lawyers and paralegals could do the job. Judge Charles Edelstein's original consultant's report, which recommended using some lawyers, with paralegal assistance, supports this approach and could be used.

Lawyers in court for every instance would not help, but would only result in more lawyering. Many of the cases can be completely disposed of with lawyer involvement at the front end, and Dade County has instituted such a pilot fast-track system, also created by Judge Edelstein, which other circuits would do well to study.

Lawyers rank low in terms of needs. Citing HRS counselors for practicing law is not the answer. We need to respond in a logical, reasonable fashion.

The department respectfully submits that a logical and reasonable response would be: 1.) for this Court to authorize HRS counselors to draft and file documents as specified above, and to proceed without actual attorney court presence in uncontested cases, and; 2.) for HRS to seek legislative funding of the additional 21 legal and 42 paralegal positions outlined above.

The department would further ask this Court to approve certification of HRS legal intern programs in cooperation with Florida's law schools.

The department would finally request this Court to rule immediately so that funding may be sought this Legislative Session, April-May, 1989.

WHEREFORE, the department so requests.

CONCLUSION

This case arose out of the concerns of one juvenile judge with the presentation of uncontested cases by HRS counselors. Its conclusion must necessarily involve significant policy considerations by this Court which include:

1. Whether individual HRS counselors should face criminal sanctions for unauthorized practice of law because the Legislature has not adequately funded attorney representation.
2. Whether attorneys should now be required in uncontested cases when they have not before been required for either parents or the state, thus making adversarial a previously non-adversarial system.
3. Whether scarce resources should go toward attorneys instead of higher pay for workers, training, and substantive programs.

The department respectfully submits that this Court should answer "no" to these questions. Lack of attorneys is not the cause of harm in Florida's juvenile dependency system. There are, as the Committee's Report establishes, a myriad of causes which did not arise overnight and will not be resolved so soon. There are no easy answers, no simple cures. But there are steps that can be taken, by the Courts, HRS, the Legislature, and all concerned parties, to improve the system.

HRS will seek funding for additional lawyers and paralegals. This Court can authorize limited legal practice by counselors. All parties can make a concerted effort to raise the consciousness of legislators as to the needs of Florida's dependent children.

The challenges are great. The opportunity is now.

Respectfully submitted,



LINDA K. HARRIS

Deputy General Counsel

Department of Health and

Rehabilitative Services

1323 Winewood Boulevard

Building One, Suite 407

Tallahassee, FL 32399-0700

(904) 488-2381

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response of Department of HRS to Report and Recommendations of UPL Ad Hoc Committee has been furnished by U.S. Mail, this 23rd day of March, 1989, to:

Christina A. Zawisza
Legal Services of Greater
Miami, Inc.
Suite 300
225 N.E. 34th Street
Miami, FL 33137

Robert M. Sondak
Paul, Landy, Beiley, and
Harper, P.A.
200 Southeast First Street
Miami, FL 33131

James A. Sawyer, Jr.
District VII Legal Counsel
Department of Health &
Rehabilitative Services
400 West Robinson Street
Suite 911
Orlando, FL 32801

Pete Dunbar
General Counsel
Office of the Governor
The Capitol
Tallahassee, FL 32301

Daniel P. Dawson, Chairman
Juvenile Rules Committee
Office of State Attorney
Juvenile Division
2000 East Michigan Street
Orlando, FL 32806

Mary Ellen Batemen
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

Honorable Chester B. Chance
Chief Judge
Eighth Judicial Circuit
201 E. University Avenue
Gainesville, FL 32601

Honorable Carolyn K. Fulmer
Circuit Judge
Tenth Judicial Circuit
P.O. Box 9000, Drawer J112
Bartow, FL 33830

Samuel M. Streit
HRS Children, Youth &
Families Program
1317 Winewood Boulevard
Tallahassee, FL 32399-0700

Henry George "Skip" White
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

James G. Smart
Assistant State Attorney
Juvenile Division
Eleventh Judicial Circuit
3300 N.W. 27th Avenue
Miami, FL 33142

F. Thomas Weber, M.D.
Medical Director
Child Protection Team
5700 S.W. 34th Street
Suite 1310
Gainesville, FL 32608

Carolyn S. Raepple
and William D. Preston
P.O. Box 6526
Tallahassee, FL 32301

Jane H. Shaeffer
State Director
Guardian Ad Litem Program
Supreme Court Building
Tallahassee, FL 32301

Wayna Harris
CYF Human Services Program
HRS District 6
4000 West Buffalo Avenue
Tampa, FL 33614

Stephen S. Zaricki
Children's Home Society of
Florida
P.O. Box 10097
Jacksonville, FL 32247-0097


Linda K. Harris