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IN THE SUPREME COURT OF FLORIDA

LAWTON CHILES, etc., et al.,

Petitioners,

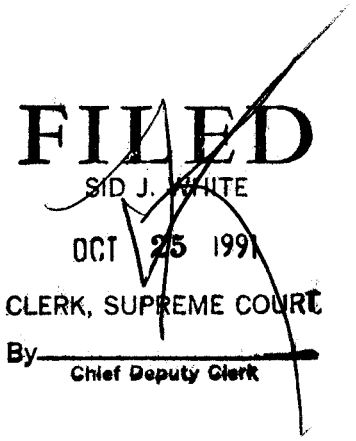
vs.

CHILDREN A, B, C, D, E and F, etc.,

Respondents.

_____/

CASE NO. 78,792



AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA GUARDIAN AD LITEM PROGRAM

Appeal from the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida Case No. 91-46672 CA (13)

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STATEMENT OF THE CASE AND FACTS

The instant action was commenced by MICHAEL ROSSMAN, as next friend and Guardian Ad Litem to Children A, B, C, D, E and F (the "Children"), seeking declaratory and injunctive relief against Defendants/Petitioners LAWTON CHILES, JIM SMITH, ROBERT BUTTERWORTH, GERALD LEWIS, TOM GALLAGHER, and BETTY CASTOR, in their capacities as Governor and members of the Cabinet and Administration Commission, respectively. The Children have been adjudicated dependent, and are in custody of the State of Florida. The Children instituted the instant action upon Governor Chiles' announcement that he and the Administration Commission intended to reduce the budget of Florida's Judicial System by some $8,400,000.00. The Children contended that such a severe budget cut would adversely impact their access to the courts, and would eliminate the Guardian Ad Litem Program upon which they so heavily rely. The Children challenged Governor Chiles' purported right to cut the judicial budget under Fla. Stat. § 216.221, arguing that the statute amounts to an unconstitutional delegation of power by the Florida Legislature to the executive branch.

On October 18, 1991, the trial court granted the Children's request for declaratory relief. The Court expressly declared § 216.221 unconstitutional, agreeing with the Children that it amounted to an impermissible delegation of legislative power to the executive branch. Petitioners then sought review in this Court pursuant to Fla.R.App.P. 9.030(a)(2)(B)(i).

Amicus Curiae, State of Florida Guardian Ad Litem Program (hereinafter "Amicus"), is a statewide program administered by the court system which trains and co-ordinates lay and attorney guardians in dependency, family law, probate, and criminal proceedings. Amicus submits the instant brief to this Court because of the dire effect Petitioners' intended actions will have on all those children whom Amicus serves. Amicus urges this Court to affirm the judgment of the trial court, and hold Fla. Stat. § 216.221 unconstitutional for the reasons expressed more fully herein.

SUMMARY OF THE ARGUMENT

If the Court sustains Petitioner's proposed action, not only will there be an infringement on the legislature's authority, there will be an usurpation of this Court's rule-making authority.

The importance of Guardians Ad Litem to this state can not be overstated. Our Courts have recognized their importance in case opinions, and our legislature has expanded their role and responsibilities over the years.

Within our complicated legal system, the child is a quiet and lost soul. The Judge whose docket is overflowing and the attorneys who view the issues through the perspective of their individual clients are inherently incapable of providing the representation for the child.

Query what will happen without this voice? The horrors have been expounded with children dying, the economic resources of a family dissipated, a child's mind being so warped by abuse, neglect or parental alienation, that he or she becomes a resident of our future prison system, welfare system or a casualty of our ineffective foster care system. Our Constitution guarantees more, our children deserve more.

ARGUMENT

I. PETITIONERS' ACTION UNCONSTITUTIONALLY INFRINGES ON THE AUTHORITY OF THE JUDICIAL BRANCH.

That Florida's government is based upon a tripartite system of checks and balances requires no citation of authority. Florida's Constitution grants to the executive, legislative, and judicial branches various spheres of power within which they must operate. Indeed, the instant case presents a crystalline example of the judicial branch being asked to check and balance the respective powers of the executive and legislative branches. Amicus recognizes that a substantial portion of Petitioners' and Respondents' briefs will exhaustively explore this issue. Amicus considers itself obligated, however, to submit to this Court various considerations of the children it serves, so that this Court may take into account the situation of this otherwise voiceless class of Florida citizens.

As a threshold matter, Amicus observes that to sustain Petitioners' proposed action would infringe not only upon the Legislature's authority, but would also amount to an unconstitutional usurpation of this Court's rule-making authority. The Florida Constitution explicitly grants this Court the authority to adopt rules of practice and procedure. Art. V, s. 2(a), Fla. Const. Pursuant to its rule-making authority, this Court has mandated the appointment of guardians ad litem in various situations. See, e.g., Fla.R.Civ.P. 1.210(b); Fla.R.Juv.P. 8.590(b). As evidenced by the Children's Complaint,

to permit Petitioners to implement their proposed budget cuts will effectively eliminate the Guardian Ad Litem program throughout Florida. Thus, as a practical matter, Petitioners will have rendered this Court's rules mandating the appointment of guardians ad litem a nullity. Plainly, a statute purporting to create or modify a rule of this Court is constitutionally infirm. Markert v. Johnston, 367 So. 2d 1003 (Fla. 1978). If the Florida Constitution grants this Court the sole authority to determine rules of practice and procedure, then the executive branch is, as a matter of constitutional law, barred from taking actions effectively avoiding those rules. Because the budget cuts at issue will render Fla.R.Civ.P. 1.210(b) and Fla.R.Juv.P. 8.590(b) hollow rules the courts cannot implement, this Court should affirm the judgment of the trial court and hold Fla. Stat. § 216.221 unconstitutional.

II. AFFIRMANCE OF THE TRIAL COURT ORDER WILL PROTECT AND PROMOTE THE PUBLIC POLICY AND THE RIGHTS OF THE CHILDREN OF THE STATE OF FLORIDA.

Setting aside the esoteric vagaries of the "separation of powers" doctrine, deeply rooted public policy and the legal rights of children in Florida dictate that this Court affirm the ruling of the trial court. To permit Petitioners to take actions that will indisputably eliminate guardians ad litem flies in the face of the overall legislative and judicial schemes of this state. This Court has mandated the appointment of guardians ad litem "for an infant or incompetent person not otherwise represented in an action . . . ." Fla.R.Civ.P. 1.210(b). It has

also mandated that a guardian ad litem be appointed "to represent the child in any child abuse or neglect proceedings . . . ." Fla.R.Juv.P. 8.590(b). Likewise, the Florida Legislature has decreed that "[a] guardian ad litem shall be appointed by the Court to represent the child in any child abuse or neglect judicial proceeding, whether civil or criminal." Fla. Stat. § 415.508(1). Further, in the context of dissolutions of marriage, the Legislature has recently enacted a statutory scheme for the appointment of guardians ad litem, affording them certain powers, rights and protections. See Fla. Stat. § 61.401; § 61.402; § 61.403; § 61.404 (1990). Similarly, the 1974 Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5107 (1988) requires that states receiving certain federal assistance for child protective services assure that every child involved in a civil child protective proceeding has a court-appointed guardian ad litem.[1] In short, whether under the auspices of the legislative or judicial branch, the Government of the State of Florida and the Federal Government have continually recognized and reaffirmed the importance of guardians ad litem to Florida's children. Petitioners' proposed actions ignore the acknowledged need for guardians ad litem, given their foreknowledge that the budget cuts will eviscerate Amicus' program with dire consequences to the children it can otherwise serve.

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[1]For an overview of the rights of children to be represented in court proceedings, see Davidson, The Child's Right to be Heard and Represented in Judicial Proceedings, 18 Pepperdine Law Review 255 (1991).

Florida courts have long recognized the utility of guardians ad litem. For example, in Esdale v. Esdale, 487 So. 2d, 1219 (Fla. 4th DCA 1986), the District Court of Appeal affirmed an award of physical custody of a six year old boy to the divorced husband. In so doing, the court "applaud[ed] the trial court's decision to retain the services of a guardian ad litem to report to the court for a period of six months after the date of the final judgment now appealed." Id. In making this observation, the Esdale court acknowledged that its paramount concern was the best interests of the child. Id. It is the concurring opinion in Esdale, however, which poignantly focuses on the plight of the children Amicus seeks to serve:

> A lawyer confidently strides into the courthouse. To the client, it is like being wheeled in to the operating room for the removal of cancer. Fear, gut-wrenching uncertainty and ignorance control the client's emotions, as he or she realizes that his or her future or that of a child, is being controlled by two lawyers and a stranger wearing a black robe instead of a surgical mask . . . . Even adult children of the parties are grievously traumatized by their parents' acrimonious dissolutions. What chance do minor children have to escape the fall-out when they are the subject matter?

Id. at 1221 (Glickstein, J., concurring).

Judge Glickstein had an earlier opportunity to impress upon the public the importance of guardians ad litem in French v. French, 452 So. 2d 647 (Fla. 4th DCA 1984). Dissenting from the court's resolution of the visitation issues in a dissolution proceeding, Judge Glickstein opined "that the appropriate

alternative is to relinquish jurisdiction to the trial court with direction to appoint a trained guardian ad litem to represent these children and to report to the court with an appropriate recommendation upon the issue of visitation." Id. at 651 (Glickstein, Jr., concurring and dissenting). He recognized that "[k]nowledgeable, caring child advocates throughout the country are making the rest of us aware of the necessity for sensitive treatment of children who are forced, involuntarily into issues of custody or visitation." Id. In a remark peculiarly applicable to the instant case, he observed that

> Florida is taking its rightful place among the states of the union who can be relied upon for leadership and who serve as role models in the battle of 'awareness' of and response to children's needs.

Id. at 652-53. It is precisely this role of leadership, cited with understandable pride in French, that Petitioners propose to abdicate through their proposed unconstitutionally budget cuts. In a state which, both legislatively and judicially, attaches such importance to "the best interests of the child," the executive branch should be prohibited as a matter of public policy from destroying the foremost bastion of protection for its children.

Some appellate courts have even held that the failure to appoint counsel for a child can be an abuse of discretion requiring reversal of the trial court's decision. See e.g., G.S. v. T.S., 23 Conn. App. 509, 582 A.2d 467 (1990) (custody award reversed for failure to appoint counsel for the child), cited in

Davidson, The Child's Right to be Heard and Represented in Judicial Proceedings, supra at p. 270.

Obviously, if trial courts are unable to find guardians ad litem to appoint because of the lack of funding, a serious risk exists that the lack of guardians in the case could lead to reversals on appeal, resulting in further burdens on the court system, as well as delays and added expenses to the parties and children involved in the proceedings.[2]

Under the recently enacted Fla. Stat. § 61.403 (1990), a guardian ad litem is entitled to participate in all hearings and proceedings in a dissolution action, and is entitled to reasonable notice before any action affecting the child is taken. Fla. Stat. § 61.403(5), (6). Had the statute been in effect

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[2]The State, of course, cannot use lack of funding as a basis to deny someone their basic rights. See, e.g., Alberti v. Sheriff of Harris County, Texas, 406 F. Supp. 649 (D.C. Tex. 1975) (lack of adequate economic resources does not excuse, nor does it lessen, the obligations of state and local governments to provide jail facilities which are constitutionally adequate); Gates v. Colier, 407 F. Supp. 1117 (D.C. Miss. 1975) (constitutional treatment of human beings confined to penal institutions is not dependent upon the willingness or the financial ability of the state to provide decent penitentiaries).

As the Second District Court of Appeals notes in its Order on Prosecution of Criminal Appeals by the Tenth Judicial Court Public Defender, 1989 WL 142259 (Fla. App 2 Dist): The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.

See also Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

earlier, the tragic circumstances present in Katz v. Katz, 505 So. 2d 25 (Fla. 4th DCA 1987) might have been avoided. The Katz court affirmed the trial court's decision without discussion, and devoted its opinion instead to discussing the fact that the parties' trial and appellate attorneys' fees and accounting fees would exceed fifty percent of the parties' assets. Id. at 26. The Katz court admonished both the bar and judiciary to be mindful of unnecessary expense in dissolution proceedings. It observed that reasonable parties would likely not undertake a contested dissolution if they knew that such a vast percentage of their assets would be unavailable to them or their children because of the adversary process. See Id. The court's admonition of the parties and their counsel included this disturbing forecast:

> Without responsible direction, not only will the parties -- who are represented -- have their assets dissipated without good cause, but also their innocent, unrepresented children will see their opportunity for higher education vanish in a nightmarish plethora of motions, transcripts and time sheets.

Id.

Had a guardian ad litem been available in Katz, the children to which the court referred would not have been unrepresented. The guardian would have been free to make written or oral recommendations to the court, and could communicate the children's wishes to the court as well. Fla. Stat. § 61.403(5). In short, the guardian ad litem would have all power necessary to advance the children's best interests. Fla. Stat. § 61.403. A

trained and caring child advocate, as Judge Glickstein described in French, is uninterested in advancing the litigious ends of a divorcing party. Thus, the guardian ad litem, somewhat removed from the heat of battle yet fully able to participate therein, could advise the court of the rapid dissipation of assets and its potential adverse affects on the minor children. While Katz does not discuss the existence of guardians ad litem, the court's admonition of the parties and their counsel further highlights the need for Amicus' services.

The foregoing discussion makes readily apparent that the purpose of guardians ad litem is to safeguard the best interests of Florida's children. See Fla. Stat. § 61.403. In so doing, guardians ad litem are able to advance Florida's public policy of ensuring children a continuing relationship with both parents after the parents separate. See Fla. Stat. § 61.13(1)(b)1. Both common sense and judicial precedent show that children are at great emotional risk when there exists a high degree of conflict between their parents. Cf. Schutz vs. Schutz, 16 FLW S380 (Fla. 1991); Hunter v. Hunter, 540 So. 2d 235 (Fla. 3rd DCA 1989). In such situations, a guardian ad litem trained in dissolution matters is critical to preserve the child's well being. See Tessler v. Tessler, 539 So. 2d 522, 523 (Fla. 4th DCA 1989) (Glickstein, J., concurring). The guardian ad litem can, in such situations, request that the court order physical or psychiatric examinations of the children, the parents, or other interested parties to the action. Fla. Stat. § 61.403(3). Such

examinations may avert emotional harm to the children, and may alleviate that harm which has already been done. This court should uphold the public policy articulated in Fla. Stat. § 61.13(1)(b)1 by affirming the judgment of the trial court, because such a ruling will enable Amicus to continue providing the services both the legislature and judiciary have authorized and mandated.

In a letter from Chief Justice Shaw attached to Respondents' Complaint, the Chief Justice advised the Governor that the budget cuts Respondents have attempted to implement under Fla. Stat. § 216.221 "would require the elimination of a number of court programs and services that address the critical needs of some of Florida's most vulnerable citizens." See Complaint, Exhibit A, p. 2.

The Reports of the Florida Supreme Court Gender Bias Study Commission (March 1990) authorized by this Honorable Court and the legislatively created Commission on Family Courts (March 1, 1991) both identify the glaring needs of this voiceless population.[3] Similarly, this Court, in its Order of May 25, 1989, in Case No. 70,615, The Florida Bar, Re: Advisory Opinion, HRS Nonlawyer Counselor noted that the Juvenile Rules Committee

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[3]For example, the Commission on Family Courts specifically determined, at page 28, that "child advocates are a necessary ingredient in family divisions." This Court, in fact, in its Order of September 12, 1991, regarding that report found, at page 5, that "it is essential that the family divisions receive proper resources to fulfill their responsibilities, including . . . guardians ad litem to represent dependent children and children in contested custody cases."

of The Florida Bar had addressed legitimate concerns within the juvenile system by recommending "that the scope of the Guardian ad Litem Program be expanded."

The Attorney General has already determined that the statutory authority pursuant to which Respondents have attempted to act is an unconstitutional delegation of legislative power to the executive branch. As discussed above, Petitioners' proposed actions also unconstitutionally infringe on this court's rule-making authority. Finally, the public policy concerns surrounding one of Florida's most valuable resources, its children, serve to further vitiate the actions Petitioners propose. Accordingly, this court should declare Fla. Stat. § 216.221 unconstitutional, and affirm the judgment of the trial court.

CONCLUSION

For the foregoing reasons, Amicus Curiae, State of Florida, Guardian ad Litem Program, respectfully requests that this court affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal express U.S. Mail this 24th day of October, 1991, to: Karen A. Gievers, P.A., Attorneys for Appellees, 750 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; Peter Antonacci, Deputy Attorney General, Robert Butterworth, Attorney General, and Charles Finkel, Assistant Attorney General, all as attorneys for Defendant/Appellants Chiles, Butterworth, Lewis, Gallagher and Crawford; and to Syd McKenzie, General Counsel for Commissioner Betty Castor, General Counsel Commissioner of Education, and Phyllis Slater, General Counsel for Secretary Smith, all at The Capitol, Tallahassee, Florida.

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