

IN THE SUPREME COURT OF FLORIDA

IN RE: The Interest of  
M.P., A Child.

STATE OF FLORIDA,  
DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES,

Petitioner,

vs.

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

STEPHEN G. BIRR,

Respondents

CASE NO. 65,596

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

RESPONDENT LAKE COUNTY'S BRIEF ON JURISDICTION

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**FILED**

SID J. WHITE

AUG 13 1984 ✓

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

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## PREFACE

The Petitioner, State of Florida, Department of Health and Rehabilitative Services, will be referred to herein as the "Department". The Respondent, Lake County, will be referred to herein as the "Respondent". The Respondent, Stephen G. Birr, will be referred to herein as the "Guardian Ad Litem".

STATEMENT OF THE FACTS AND OF THE CASE

The Respondent concurs in the Statement of Facts and Procedure set forth by the Petitioner with the following additions.

The actions commenced in the Trial Court by the Department of Health and Rehabilitative Services were child abuse or neglect proceedings brought pursuant to Chapter 827, Florida Statutes (1981), Abuse of Children or Disabled or Aged Persons and Chapter 39, Part III, Florida Statutes, Proceedings Relating to Juveniles, Dependency Cases.

The District Court of Appeal affirmed the Trial Court's Order granting the Guardian Ad Litem's Motion for attorney's fees and costs to be paid by the Department of Health and Rehabilitative Services. The District Court of Appeals also remanded the case for a recalculation of the amount of the fees.

## ARGUMENT

The Department attempts to invoke the discretionary jurisdiction of this court on the basis that the decision rendered by the District Court of Appeal on June 14, 1984 in this matter conflicts with In The Interest of D.B. & D.S., 385 So.2d 83 (Fla. 1980). Discretionary conflict jurisdiction for this court is limited to decisions of districts courts of appeal that "...expressly and directly conflict with a decision of another district court of appeal or the Supreme Court on the same question of law." Art. V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv).

The standard for the Supreme Court's appellate conflict jurisdiction is whether an inconsistency has been created among the precedents. Kincaid v. World Insurance Company, 157 So.2d 517, 518 (Fla. 1963). The Supreme Court has granted review of cases in direct conflict when two decisions have been wholly irreconcilable. Williams v. Duggan, 153 So.2d 726 (Fla. 1963).

....[J]urisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced the decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of appeal on the same point, thereby generating confusion and instability among the precedents. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962)

In a nine page opinion, the Fifth District Court of Appeal herein expressly distinguished In The Interest of D.B. and D.S., applying much of the same reasoning used by the Second District Court of Appeal In The Interest of R.W., 409 So.2d 1069 (Fla. 2nd DCA 1981). In both R.W. and the case herein, Guardians Ad Litem had been appointed to represent children in child abuse cases pursuant to Section 827.07(16), Florida Statutes (1981). In their opinions, both district courts have recognized that the appointment of Guardians Ad Litem in child abuse cases is not constitutionally required but legislatively mandated.

There is no indication in the opinion of D.B. and D.S. that those dependency proceedings were child abuse and neglect proceedings requiring the application of Section 827.07(16). In D.B. and D.S., the Supreme Court addressed:

1. What legal representation is constitutionally required.
2. In what manner attorneys should be compensated when appointed to represent indigent parties in dependency matters.

In The Interest of D.B. and D.S. supra at 89.

The Supreme Court ruled that constitutionally required counsel must be compensated by the County pursuant to Section 43.28, Florida Statutes (1979). The Supreme Court also discussed the payment of fees to counsel when appointment in dependency matters was desirable although not constitutionally required. In that event, private counsel is required to provide the necessary services with no compensation. D.B. and D.S. supra at 92.

The Supreme Court, however, did not in D.B. and D.S. expressly consider a third situation, that in this case, where counsel, though not constitutionally required, was statutorily mandated. The Supreme Court in D.B. and D.S. did recognize the existence of Section 827.07(16) though failing to discuss the payment of counsel fees pursuant to that statute. D.B. supra at 91.

Further, the Supreme Court relied on Section 43.28, Florida Statutes (1979) to determine that the County rather than the State must provide fees for constitutionally required counsel. That section provides:

Court facilities - the County shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the State, personnel necessary to operate the Circuit and County courts. (emphasis provided).

As the district court explained, the situation herein is distinguished from that in D.B. and D.S. by Sections 827.07(16) and 827.07(11), Florida Statutes (1979). Both the Fifth and the Second District Courts of Appeal have interpreted these provisions to mean that the Department has the prime responsibility in carrying out the provisions of Chapter 827, including payment of costs incurred. In The Interest of R.W., supra at 1071 and In The Interest of M.R., FLW 1312. These statutes thus combine to create the situation contemplated in Section 43.28 of "unless provided by the State."

The determination by the District Court of Appeal in this case is, therefore, in harmony with the decision of the Supreme Court in D.B. and D.S. No inconsistency of precedent is created

as the two decisions are reconcilable. In effect, the case herein determines compensation to Guardians Ad Litem in an area not explicitly considered by the Supreme Court in D.B. and D.S. The two cases together establish three prongs for consideration of payment to Guardians Ad Litem:

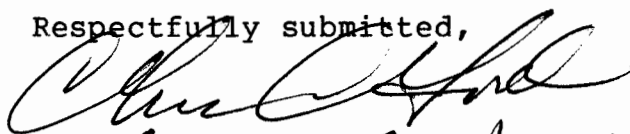
1. Constitutionally required counsel,
2. Statutorilly mandated counsel,
3. Situations where counsel is neither constitutionally mandated nor statutorilly required, but desirable.

The opinion of the lower tribunal does not expressly nor directly conflict with a decision of this court on the issue of whether attorneys' fees for Guardians Ad Litem are to be paid by the State or by the County, nor on the entitlement of attorneys serving as Guardians Ad Litem to receive payment for their services. Wherefore, Respondent requests that the Department's petition to invoke discretionary jurisdiction be denied.

CONCLUSION

The opinion of the lower tribunal does not expressly nor directly conflict with the decision of this court In The Interest of D.B. and D.S. on the issue of whether attorneys fees for Guardians Ad Litem are to be paid by the State or by the County nor on the entitlement of attorneys serving as Guardians Ad Litem to receive payment for their services. Therefore, this court does not have conflict jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv). Wherefore, the Respondent requests that the court deny Petitioner jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of Respondent's Brief on Jurisdiction has been furnished to STEPHEN G. BIRR, ESQ., 122 St. Clair-Abrams Avenue, Tavares, Florida 32778 and to JAMES A. SAWYER, JR., District III Legal Counsel, 1000 Northeast 16th Avenue, Gainesville, Florida 32609 by U.S. Mail this 9<sup>th</sup> day of August, 1984.

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