

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-829

D.H. and L.H., minor children, by and through their next friends and permanent guardians, RICHARD HARKINS and SUELLEN HARKINS,

DCA Case No.: 2D15-304; 2D15-677

Lower Case No.: 10-16698-CI-21

Petitioners/Appellants,

vs.

ADEPT COMMUNITY SERVICES, INC.
and B.E.A.R.R., INC.,

Respondents/Appellees.

**FLORIDA’S CHILDREN FIRST’S MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT/PETITIONER**

Florida’s Children First hereby moves to appear as amicus curiae in this case under Rule 9.370 of the Florida Rules of Appellate Procedure and for leave to file the proposed amicus curiae brief attached as Exhibit A in support of Petitioners, D.H. and L.H., minor children, by and through their next friends and permanent guardians, RICHARD HARKINS and SUELLEN HARKINS.

STATEMENT OF IDENTITY

Florida’s Children First, Inc. (“FCF”) is Florida’s preeminent legal advocacy organization dedicated to the legal rights of children in the state’s care and custody. Its mission is to advance children’s legal rights consistent with their medical, educational, and social needs. FCF seeks to achieve significant improvements in all systems affecting children’s lives, with a special emphasis on the child welfare system. Its work consists of advocating for legislative change, monitoring executive branch actions, training and providing technical assistance

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to lawyers representing children, increasing public awareness of children's issues, filing amicus briefs, and, where necessary, litigating. First among the goals of the organization is to secure legal representation for children in the dependency system. Inextricably linked with that goal is making sure that the children's parents also have access to competent and effective counsel.

HOW FCF CAN ASSIST THE COURT

FCF offers unique perspective and expertise on the issues. While the issue before the Court deals with the right to sue on behalf of a child by a Guardian ad Litem (GAL), or by the grandparents as "next friend," it is important for the Court to understand how the Guardian Ad Litem Program (GALP) works in dependency proceedings, the role of GALs and relative caregivers as temporary custodians, and the ramifications of the Second District's decision on children who suffer harm or injuries while in the dependency system and on the GALP's ability to recruit and assist volunteer GALs. FCF is a recognized leader and expert in the field of children's rights. Central to FCF's mission and purpose is the protection of rights currently under consideration by this Court.

Every appellate court in Florida, including this Court, has previously accepted FCF's amicus curiae submissions.

ISSUES TO BE ADDRESSED

The Petitioners' Initial Brief presents issues to this Court as to: whether the infant minors' claims accrued at a time when there was no adult with authority to sue on their behalf and no adult who knew or should have known of their injury; whether the children's grandparents can be considered "next friend" with authority to sue prior to the time the grandparents were appointed permanent guardian with plenary powers; whether the delayed discovery doctrine should be extended to the facts of this case; and, whether the statute of limitations was tolled pursuant to section 95.051, Florida Statutes until the grandparents were appointed permanent guardians of the twins with plenary powers including the power to file suit.

FCF's brief will not reargue these points, but will focus on what it believes to be a fundamental misunderstanding of the role of GALs and relative temporary custodians in child dependency proceedings under chapter 39, Florida Statutes, and how this misunderstanding caused the court to misapply section 95.11(1)(h) to include GALs and temporary caregivers as persons who capable of bringing personal injury actions on behalf of the children, and thus allowing the statute of

limitations to run against the children when such a GAL or relative temporary custodian has been appointed by the dependency court. This mistake, if not corrected, could permanently damage the ability of the GALP to recruit the volunteer GALs and Department of Children & Families the relative caregivers on which they so heavily rely since it would burden them with the legal or moral duty to pursue litigation on behalf of the child or risk loss of the child's legal rights and burden the GALP with additional duties of training its staff and more than 10,000 volunteers as to this newly imposed duty. Moreover, the constitutional right of access to courts by children is affected by the Second District's ruling without regard to the right and ability of a legal representative to file suit on their behalf.

CONSENT

FCF has conferred with counsel for Appellant/Petitioner and Appellee/Respondent and Appellant/Petitioner has consented to the filing of this amicus curiae brief. Appellee/Respondent has not consented and is believed to have objections to FCF's motion on the basis that it overstates FCF's role in child advocacy and relies on non-record data. As for the first objection, FCF would merely point out that a computerized legal database search would show that FCF's amicus curiae briefs have been accepted in 27 recent cases in Florida's appellate courts, both in cases involving child welfare and in cases involving dependency court rules, including, in this Court, *J.B. v. Florida Department of Children and Families*, 170 So. 3d 780, 794-95 (Fla. 2015), *O.I.C.L. v. Department of Children & Families*, 205 So. 3d 575, 578 (Fla. 2016), and *In re: Amendments to the Fla. Rules of Juvenile Procedure*, 191 So. 3d 257 (Fla. 2016), just to name a few.

As to the second objection, FCF does not utilize non-record material, but government data to show potential impact of the district court's decision. This is consistent with the role of an amicus curiae. A good amicus brief helps the court understand the broader effects of resolving an open question of law, especially "when the interest of the amici is differentiated from that of the litigants, or where amici want to introduce subtle variations . . . or even novel arguments that might result in a successful outcome but are too risky for the principal litigant to embrace." Walbolt, Sylvia and Lang, Joseph, "*Amicus Briefs: Friend or Foe of Florida Courts?*," 32 STETSON L. REV. 269, 274 (Winter 2003).

Ideally, the amicus comes forward with "special" or "unique" perspective that aids the court in understanding the consequences of its decision. *Id.* at 278 (quoting interview with Justice Pariente). FCF's brief follows this approach.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by email and by Florida E-Portal Service to: KEVIN M. DAVIS, ESQ., (kdavis@defensecounsel.com, grivera@defensecounsel.com), Attorney for Defendant, B.E.A.R.R. Inc. and J. ROBERT MCCORMACK, ESQ., (bob.mccormack@ogletreedeakins.com, christine.skalla@ogletreedeakins.com), Attorney for Defendant, Adept Community Services, Inc., Howard M. Talenfeld, Esq. howard@justiceforkids.us, Richard A. Filson, Esq., eservice@filsonlaw.com; Nicole R. Coniglio, Esq. nicole@justiceforkids. Counsel for Plaintiffs/Appellants on this 26th day of October, 2017.

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STATEMENT OF INTEREST

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Every appellate court in Florida, including this Court, has previously accepted FCF's amicus curiae submissions.

FCF's brief will not reargue points raised in Petitioners' Initial Brief, although it generally agrees with them, but will focus on what it believes to be a fundamental misunderstanding of the role of GALs and relative temporary custodians in child dependency proceedings under chapter 39, Florida Statutes, and how this misunderstanding caused the court to misapply section 95.11(1)(h), Florida Statutes (2005), to include GALs and temporary caregivers as persons who capable of bringing personal injury actions on behalf of the children, and thus allowing the statute of limitations to run against the children when such a GAL or relative temporary custodian has been appointed by the dependency court. This mistake, if not corrected, could permanently damage the ability of the GALP to recruit the volunteer GALs and Department of Children & Families (DCF) the relative caregivers on which they so heavily rely since it would burden them with the legal or moral duty to pursue litigation on behalf of the child or risk loss of the child's legal rights and burden the GALP with additional duties of training its staff and more than 10,000 volunteers as to this newly imposed duty. Moreover, the constitutional right of access to courts by children is affected by the Second District's ruling without regard to the right and ability of a legal representative to file suit on their behalf.

SUMMARY OF ARGUMENT

The opinion of the Second District Court of Appeal should be quashed. It is harmful to children, especially those served by the state's child welfare system. If affirmed, all of the children who are appointed a GAL or placed with a relative could lose their access to civil courts despite the fact that neither the GAL nor relative caregivers have an affirmative duty to ascertain the need for and initiate injury litigation. The opinion misapplies section 95.11(1)(h), Florida Statutes, by in its holding that that dependency court GALs and dependency court-appointed relative temporary custodians are capable of bringing personal injury actions, thus allowing the statute of limitations to run against these children.

The Second District's opinion makes illusory children's constitutional rights of access to courts by making the exercise of that right dependent on the willingness and financial ability of a third party to hire counsel and become mired in difficult and costly litigation on behalf of the minor during a dependency case. Moreover, if affirmed, the decision will impair the ability of the GALP to recruit and retain volunteer GALs and it will impair the ability of DCF to place children with relatives.

ARGUMENT OF AMICUS CURIAE

- I. **The Second District erred as a matter of law in concluding that the appointment of a Guardian ad Litem as provided in Chapter 39, Florida Statutes (2005) or the possibility that the grandparents could have sued as “next friend” created a legal representative on behalf of the children under section 95.051(1)(h) so that the statute of limitations was not tolled.**

The opinion of the Second District Court of Appeal represents a fundamental misunderstanding of the role of GALs and relative temporary custodians in child dependency proceedings under chapter 39, Florida Statutes. It also misapplies section 95.11(1)(h) to include them as persons who are capable of bringing personal injury actions on behalf of the child, thus allowing the statute of limitations to run against the child when such a GAL or relative temporary custodian has been appointed by the dependency court. This mistake, if not corrected, could permanently damage the ability of the GALP to recruit the volunteer GALs, and the ability of DCF and its contractors to recruit relative caregivers on which they so heavily rely since it would burden them with the legal or moral duty to pursue litigation on behalf of the child or risk loss of the child’s legal rights. The roles of GALs and relative caregivers are discussed in turn below.

Guardians ad Litem and the Guardian ad Litem Program

The GALP is a state-funded executive agency advocating for the best interests of Florida’s abused, abandoned and neglected children in the dependency

system primarily through volunteer GALs. The reliance on volunteers is part of its vision statement: “To the fullest extent possible, [the GALP’s] vision will be realized through volunteer [GALs].” Statewide Guardian ad litem Program Webpage, *About Us*, <http://guardianadlitem.org/about-us>, last visited 10/23/17. Only 137 of the GALPs 10,458 volunteer GALs are attorneys, and the remaining lay GALs are responsible for 25,456 children with the support of 170 GAL attorneys. <http://guardianadlitem.org/wp-content/uploads/2014/08/GAL-Representation-Report-September-2017.pdf>; <http://guardianadlitem.org/wp-content/uploads/2017/07/Narrative-Salary-Adjustment-for-Guardian-ad-Litem-Staff.pdf>, last visited 10/25/17.

The GALP’s 2017 Annual Report gives the following additional information on the number and roles of GALs in Florida:

there are more than *10,000 volunteers* and 740 staff representing the needs of thousands of dependent children. *In the last 35 years, more than 30,000 volunteers, have represented more than 250,000 children.* The Florida GAL Program has the highest number of GAL volunteers nationwide! GAL volunteers ensure that during what is certainly the most difficult time in a child’s life, that child has a consistent advocate who listens to them, makes sure the court hears their voice and advocates for their needs. The GAL volunteer’s perspective is unique because the GAL volunteer advocates for one child or a sibling group, and typically represents only one or two children, rather than managing a caseload. The child is not a case or a number. While case workers and placements may change, a GAL volunteer is a constant in the child’s life. *The GAL volunteer advocates from the perspective that every child should be treated as if he or she were the only child in the foster care system.*

Available at <http://guardianadlitem.org/wp-content/uploads/2014/08/GAL-Annual-Report-2017-web.pdf>, last visited 10/23/17. (Emphasis added).

The 2017 GALP Annual Report further describes the role of volunteer GALs, stating the independent perspective of a GAL provides an opportunity for judges to hear what is best for each child before decisions that forever affect the child's life. *Id.* "Some examples of issues a GAL might work on include ensuring a child . . . stays in the same school, advocating for increased visitation between children and their parents or siblings, and identifying age-specific services for children. The GAL monitors the child and all participants in the case to promote and prevent children from languishing in the foster care system." *Id.* The role of the GAL does not include independent litigation, nor is there a single instance of the GALP pursuing injury litigation on behalf of a child.

The statutory definition and duties of a GAL in sections 39.807 and 39.820, Florida Statutes (2005)¹ limit the GAL to representing the child in the matter before the dependency court. Section 39.822(4), Florida Statutes (2005) states GAL's role is to "review all disposition recommendations and changes in placements, and . . . be present at all critical stages of the dependency proceeding or submit a written report of recommendations to the court."

¹ The 2005 statutes were in effect on the dates the GAL was involved here.

Other provisions of Florida Statutes use the term “Guardian Ad Litem” to vest responsibility in adults charged with looking out for specific interests of children in a specific legal proceeding. The mere use of the term “Guardian Ad Litem” does not mean those individuals have the capacity or authority to bring independent civil suits on behalf of children.

For example, section 61.401, Florida Statutes, provides for appointment of a GAL in dissolution of marriage proceedings where necessary to determine the best interests of children born of the marriage. Like a Chapter 39 GAL, GALs appointed under Chapter 61 are directed by statute in the performance of their duties. See section 61.403. And like Chapter 39 GALs, Chapter 61 GALs are not empowered to initiate lawsuits on behalf of the children to whom they are appointed.

Section 914.17(1), Florida Statutes, mandates the appointment of a “guardian ad litem or other advocate” in any criminal proceeding in which a child is a victim or witness of abuse. Such a GAL’s duties are to explain the proceedings to the child in understandable terms and to be a friend of the court. *Id.*

None of these types of GALs serve to represent the interests of the child in injury litigation, and several recent court decisions recognize the distinct differences in the various types of GALs. *S.C. v. Guardian Ad Litem*, 845 So. 2d 953, 957-58 (Fla. 4th DCA. 2003).

The distinction between dependency court GALs, serving under the GALP, versus other court-appointed GALs was discussed in *Statewide Guardian Ad Litem Office v. Office of the State Atty. Twentieth Judicial Circuit*, 55 So. 3d 747, 750 (Fla. 2d DCA 2011), in which judges in criminal proceedings sought to appoint the GALP in cases where a child witness or victim needed a GAL under section 914.17(1). While “no one disputed that the court had authority to appoint guardians from its own program to represent any child that needed a guardian ad litem,” the GALP is an office in the executive branch, and the circuit court cannot compel the GALP to serve in such cases. *Id.* To rule otherwise would allow the judiciary branch to “interfere with legislative discretion in determining the funds required of an executive branch agency [or] with the agency's executive discretion in spending appropriated funds.” *Id.* Since the GALP has no funding to serve in criminal cases, the appellate court urged the circuit court to find other resources to fulfill the mandate of section 914.17, noting that a guardian ad litem program had previously existed under the auspices of the circuit court, and was funded by the county, and under this arrangement, the GAL served as an arm of the judiciary rather than of the executive branch.

In contrast, only section 744.3025, Florida Statutes, concerning monetary claims of minors, allows the court to appoint a GAL to represent the minor in lawsuits, and a guardian or GAL is required in cases involving claims of a minor in

amounts greater than \$15,000. Only GALs under 744.3025 have fiduciary lawyer – client privilege. Moreover, guardians appointed pursuant to chapter 744 are subject to claims of breach of fiduciary duty, *e.g.*, *Reed v. Long*, 111 So. 3d 237, 238 (Fla. 4th DCA 2013), but GALs appointed under chapters 39 and 61 have immunity from suit. See sections 39.822(1), 61.405, and 90.5021, Florida Statutes.

Judge Villanti touched briefly upon the limited powers of a dependency GAL in his specially concurring opinion when he stated “more is required to avoid the tolling statute than simply the existence of an entity called a ‘guardian ad litem.’” *D.H.*, 217 So. 3d at 1085 (Villanti, J, concurring). “The guardian ad litem in this case was appointed by the dependency court to represent the best interests of the twins in the dependency case [and] did not have plenary powers over the twins for any other matter.” *Id.* Further, he stated, the dependency GAL lacked legal authority necessary to bring a civil action. He concurred in the result because this issue, although preserved in the trial court, was not raised on appeal.

However, it was not necessary to raise this issue on appeal when all parties, both in the trial court and in their appellate briefs, agreed that the cause of action of a minor child accrues when an adult with authority to sue on the minor’s behalf knew or should have known of the minor’s injury and its connection to the defendant’s negligence, and it was undisputed that the GAL did not know. As such, the mere existence of the GAL as a basis for tolling the statute of limitations

was not a determinative issue that had to be raised on appeal. Unfortunately, the Second District, rather than confine itself to the briefs of the parties and the points specifically argued, resolved the case on a collateral issue, when it could have remanded that issue to the trial court for initial resolution. At the very least, it could have given the parties the opportunity to file supplemental briefing if it deemed this to be the determinative issue on appeal, particularly since it involves the fundamental rights of the minor children.

Grandparents as Temporary Caregivers

The grandparents of the minor children were merely temporary caregivers from May 2006 until April 2007, when they were appointed as permanent custodians and granted the rights of parents. They were given limited rights “to authorize any necessary and emergency medical treatment and ordinary medical, dental, psychiatric, and psychological care for the children.” R. 1268, 1343. The order appointing them as temporary caregivers expressly did not confer on the grandparents the power to bring a civil action for damages on behalf of the children. Therefore, the children lacked a representative sufficient allow the running of the statute of limitations until April 2007, and their filing of the lawsuit on November 17, 2010, less than four (4) years after they were appointed as permanent guardians should have been deemed timely.

To deny the children's cause of action on the basis that the grandparents could have sued the state agencies while acting as temporary custodians on the basis that they could be "next friends" as litigants on behalf of the children is unprecedented and impractical. First, this scenario would apply equally to any person familiar with the children, be it a pediatrician, Sunday School teacher, or neighbor – dozens of people could have been next friends for these children. The fact that many people have the capacity to serve as next friend does not mean that anyone of them were obligated to step up as a next friend.

It is true that as court-ordered temporary custodians, the grandparents here had greater responsibility to the children than other potential next friends. They were given the responsibility to provide care for children under the supervision of the state and its subcontractors. It would be unfair to then also impose a duty to initiate litigation on them as this scenario could require the concerned temporary custodian to file suit against the very agency that has discretion to make a persuasive recommendation to the dependency court regarding the children's permanent placement. It is easy to see how such an adverse position against the agency would harm the grandparents' likelihood of obtaining permanent custody, as they believed, and the agency later determined, was in the children's best interests.

The fact that these temporary custodians were the children's grandparents does not change the equation. Under Florida law, grandparents have no special rights, duties or authority to step into the parents' shoes to initiate litigation on behalf of their grandchildren. Moreover, an affirmance of the Second District's decision will place a great burden on the shoulders of all relatives considering taking children into their homes. Relatives currently house 45% (over 10,000) of all children in the child welfare system who have been removed from home. Child Welfare Dashboard available at <http://www.dcf.state.fl.us/programs/childwelfare/dashboard>, last visited 10/24/17. Adding the burden of litigation might well impair the willingness of relatives to step forward.

The practical consequences of the Second District's ruling are broad and far-reaching. On any given day, there are 23,000 children in the child welfare system placed out of home state care. *Id.* Over the course of the year, nearly 40,000 children will spend the night in out of home care. *Id.* A significant number of those children are maltreated while in state shelters, group homes or foster care – Florida's rate of maltreatment while in care is a rate 10.43 per 100,000 bed days – far above the federal target of 8.5 or below. *Id.* If the lower court is affirmed, any relative who took in a child who was injured in a previous placement would be obligated to initiate litigation, possibly before the conclusion of the underlying case. This cannot be what the Legislature intended.

The ruling of the Second District will create undue barriers to the ability of injured children to bring claims that arise while in such care by assuming a dependency court GAL or temporary caregiver represents the child regarding injuries occurring during care. Such injuries may result from maltreatment in care or from other types of personal injury and a guardian or guardian ad litem must be appointed under Chapter 744 for the purposes of a specific claim, and only the service of such a guardian is relevant to section 95.11(1)(h) as a person capable of bringing personal injury actions on behalf of the child, and thus allowing the statute of limitations to run against the child. To place this burden on a GAL or relative temporary custodian appointed by the dependency court will permanently damage the ability of the GALP to recruit the volunteer GALs and the agency to recruit relative caregivers on which they rely, and place new burdens on the GALP.

Statutory GALs in dependency, family, and criminal cases are a recent phenomenon and their existence as it relates to statutes of limitation has not been developed in Florida law. However, under the common law, the existence of a general guardian or a potential “next friend” was not be deemed to allow the statute of limitations to run against a minor’s claim; indeed, such a result would have been contrary to public policy:

Although an infant may sue by *prochien amie* [next friend] it is not a consequence that he must do so necessarily to save the statute [of limitations]. The right to sue and the privilege of availing himself of the

statute are not incompatible. The law gives both. Besides, to say, that inasmuch as the infant could at any time sue, and not having sued therefore the statute cannot avail him, independent of depriving him of a positive right, it strikes us as a doctrine replete with the rankest injustice to a class of persons, whose interests the courts will go far to protect. Look at the results to grow out of such a doctrine. Suppose the guardian through negligence or dishonesty will not sue, or as in this case, could not sue, then, after the lapse of five years the debt would be barred according to this view. Such a doctrine we cannot countenance.

Lanier v. Chappell, 2 Fla. 621, 631 (1849). “Even a guardian ad litem cannot by any prejudicial act bind an infant.” *Simpson v. Gonzalez*, 15 Fla. 9, 37 (1874). *See also Berger v. Jackson*, 23 So. 2d 265, 269 (Fla. 1945) (“[a] cause of action cannot be said to have accrued, within the meaning of that statute, until an action can be instituted thereon. There must be some person capable of suing or being sued upon the claim in order for the statute to begin to run”); *S.A.P. v. Dep’t of Health & Rehab. Servs.*, 704 So. 2d 583, 585-86 (Fla. 1st DCA 1997) (“the statute could not begin to run against the minor child until a parent, guardian, or next friend knew or reasonably should have known of facts which supported the child’s cause of action”); *Drake v. Island Community Church, Inc.*, 462 So. 2d 1142, 1144 (Fla. 3d DCA 1984) (holding that minor’s negligence claim does not accrue until an adult capable of bringing action knows of invasion of the minor’s legal rights); *Doe v. Nur-Islam Academy, Inc.*, 217 So. 3d 85 (Fla. 4th DCA 2017) (cause of action for child abuse did not accrue until the victim reached the age of majority, unless the victim’s parents know of the abuse and are able to sue); *Doe*

v. Dorsey, 683 So. 2d 614, 616 (Fla. 5th DCA 1996), abrogated on other grounds by *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002) (ruling the statute of limitations would “start[] running when plaintiff turned eighteen.”).

CONCLUSION

If allowed to stand, the Second District’s opinion will eviscerate the right of Florida’s children to recover for injuries suffered when they were not under the custody of their parents. The State gives children dependency GALs to help them get the services and supports they need in the child welfare system – not to take away their ability to get additional support from litigation. Placing a minor’s legal rights in the hands of a third party – such as, a GAL who has limited interest and authority and no legal fiduciary duty, or a relative who has no legal interest—effectively eliminates the right of access to courts. And placing this new burden on GALs and the GALP without state funding for additional staffing and training interferes with its fundamental mission and with legislative funding discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by email and by Florida E-Portal Service to: KEVIN M. DAVIS, ESQ., (kdavis@defensecounsel.com, grivera@defensecounsel.com), Attorney for Defendant, B.E.A.R.R. Inc. and J. ROBERT MCCORMACK, ESQ., (bob.mccormack@ogletreedeakins.com, christine.skalla@ogletreedeakins.com), Attorney for Defendant, Adept Community Services, Inc., Howard M. Talenfeld, Esq. howard@justiceforkids.us, Richard A. Filson, Esq., eservice@filsonlaw.com; Nicole R. Coniglio, Esq. nicole@justiceforkids. Counsel for Plaintiffs/Appellants on this 26th day of October, 2017.

s/Susan W. Fox

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is type in Times New Roman 14-point font, which complies with the font requirements as set forth in Florida Rule of Appellate Procedure 9.100.

s/Susan W. Fox