IN THE SUPREME COURT OF FLORIDA

KYE S. HOFFMAN,

Petitioner,

CASE NO. 66,718

vs.

GLENN A. HOFFMAN,

Respondent

_____/

PETITIONER'S BRIEF ON THE MERITS

Walter A. Steigleman
DEWRELL, BLUE & BRANNON
Post Office Box 1510
Fort Walton Beach, FL 32549
(904) 244-9136

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PRELIMINARY STATEMENT

References in this brief are made to the Appendix (A.____). For purposes of clarity and brevity, Petitioner Kye S. Hoffman is referred to as the "ex-wife" or "wife", and Respondent Glenn A. Hoffman is referred to as the "ex-husband" or "husband".

STATEMENT OF THE CASE AND FACTS

Glenn and Kye Hoffman were divorced in 1974. At the time the present controversy arose, the ex-wife had custody of the only child of the marriage, and the ex-husband had an obligation to pay child support. In an order rendered January 13, 1984,[1] the trial court modified the child support obligation and found the husband in willful contempt for failure to make child support payments. The husband appealed this order to the First District Court of Appeal.

During the course of the appeal, the wife moved to dismiss on the ground that the notice of appeal had been filed on February 14, 1984, which was the thirty-second day following rendition of the order. A copy of the notice of appeal, as it appears in the records of the First District Court, is appended to this brief (A. 3).

The husband responded that the notice of appeal should be considered timely filed because on February 13[2] the husband's attorney had delivered the notice to the Shalimar, Florida,

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[1]Although circuit judge Erwin Fleet apparently signed the order in question on January 12, 1984, it was not "rendered" until the following day. The parties agree on this point. See Fla.R.App.P. 9.020(g).

[2]Although this was the thirty-first day following rendition of the order on appeal and therefore fell outside the thirty-day time limit set by Fla.R.App.P. 9.110(b), February 13 was a Monday; therefore a notice filed on or before that day would be timely. See Fla.R.App.P. 9.420(e).

branch office of the Clerk of Circuit Court for Okaloosa County.[3] As is the customary practice of the clerk, the notice of appeal was carried by the clerk's twice-daily courier service to the Courthouse in Crestview, the county seat, where it was "stamped in" as being filed February 14, 1984.

The wife then filed a Suggestion, informing the appeals court that the Clerk of Circuit Court for Okaloosa County had a long-established policy that although documents are accepted at the Shalimar Annex as a convenience to residents in the southern portion of the county, those documents are not considered officially filed until the clerk's courier deposits them with the deputy clerks in the County Courthouse in Crestview. The wife noted that the husband's argument called into question that policy.

The First District Court of Appeal entered an order which contained a preliminary finding that Florida law does not seem to prohibit the filing of notices of appeal at branch offices of the clerk, when these offices have been properly established in accordance with law. The Court concluded, however, that the motion to dismiss could not be resolved without

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[3]The Clerk's branch office is located in a building complex commonly referred to as the "Shalimar Annex", which also houses several judges' offices, courtrooms, and branch offices of the tax collector, county commissioners, supervisor of elections, property appraiser, state attorney and public defender.

fact-finding to determine whether the Shalimar branch office of the clerk had been established in accordance with law, and whether the notice was presented for filing there on or before February 13, 1984. The court appointed the original trial judge, Erwin Fleet, as a special commissioner to take evidence on these issues and to report back to the appellate court.

Judge Fleet conducted a hearing and on November 14, 1984, he issued a "Commissioner's Report" (A. 9) containing the following findings of fact (which are not disputed in this appeal):

1. In 1972, the Board of County Commissioners adopted resolutions authorizing and providing for the construction of the Shalimar Annex in accordance with certain building plans and specifications. Although the Board did not specifically establish a branch office of the clerk, some of the plans depicted office space for the clerk in addition to office space for other branches of county government such as the tax collector, property appraiser and supervisor of elections.

2. Since 1976, when the Annex was opened, the Clerk of Circuit Court for Okaloosa County has continuously maintained and staffed offices there, providing services such as accepting documents for recording and pleadings for filing, issuing process and defaults.

3. It has been the policy and practice of the clerk that pleadings and other documents are not considered filed until

they are carried by courier to Crestview and stamped in at the Courthouse.

4. This policy is widely known among the members of the bar in Okaloosa County, and it is not unusual for an attorney who wishes to be assured of same-day filing to drive to Crestview in order to file the documents and pleadings.

The Commissioner's Report also contained two findings of law and fact:

1. By adopting the abovementioned resolutions which referred to the Annex construction plans, the Board of County Commissioners satisfied any and all requirements of Article VIII, Section 1(k) of the Florida Constitution pertaining to the establishment of branch offices for the conduct of county business.

2. By operating the Annex office, the Clerk effectively and lawfully established an official branch there in accordance with Section 28.07, Florida Statutes.

The Commissioner's Report concluded with the recommendation that the appellate court should find that the husband had officially filed his notice of appeal when he presented it at the Shalimar Annex on February 13, 1984.

On February 12, 1985, the First District Court of Appeal entered its order denying the motion to dismiss, finding that the notice of appeal was timely filed upon its presentment at the

Shalimar Annex (A. 1). The court certified this holding to be in direct conflict with the holding of the Fifth District in Perego v. Robinson, 377 So.2d 834 (Fla. 5th DCA 1979).

The petitioner/wife then sought discretionary review in the Florida Supreme Court.

SUMMARY OF ARGUMENT

The order on appeal, in which the First District held that notices of appeal must be considered "filed" (as opposed to being merely "accepted" for subsequent filing at the county seat) at the time they are presented for filing at a branch office of the clerk, expressly conflicts with the holding in Perego v. Robinson, et al, in which the Fifth District stated that a notice of appeal cannot be considered filed until it is logged in at the county seat. Petitioner respectfully suggests that neither approach may be entirely correct. Instead, it is possible that a notice of appeal may be considered filed at the time it is presented at a branch office of the clerk, but only under the proper circumstances. The order of the First District should be reversed because the proper circumstances are not present in this case.

If it is constitutionally permissible for a notice of appeal to be considered filed at the time it is presented at a location other than at the courthouse in the county seat, this can only occur if: 1) the filing location is a branch office of the clerk that has been established in accordance with law, and 2) the clerk operates the branch office for the purpose of, among other things, filing pleadings (and not simply accepting them for transmittal to, and subsequent filing at, the county seat). Here, it is doubtful that the branch office in question was established in accordance with law, and it is undisputed that the clerk did not consider pleadings to be filed at the branch office

and that, instead, the clerk had a widely-known policy and practice of merely accepting pleadings for transmittal to the county seat, where they would be officially filed. Therefore, the notice of appeal in this case, which was presented at the branch office, should not be considered to have been filed until it was actually filed at the courthouse pursuant to the customary practice of the clerk.

Because the notice of appeal was filed outside the time limits established by the Florida Rules of Appellate Procedure, the First District lacked jurisdiction of this appeal, and the motion to dismiss should have been granted. Accordingly the order on appeal should be reversed.

ARGUMENT

I. WHETHER, FOR PURPOSES OF THE APPELLATE RULES, PLEADINGS MAY BE CONSIDERED FILED AT THE TIME THEY ARE PRESENTED AT A BRANCH OFFICE OF THE CLERK

A. Whether the Shalimar Branch Office Was Established in Accordance With Law

Arguably the county commission resolution (A. 12) which referred to Shalimar Annex construction plans which, in turn, contained a designation for space for a clerk's office, impliedly authorized the establishment of a branch office of the Clerk of Circuit Court for Okaloosa County. However, this may be constitutionally insufficient.

The Florida Constitution requires that the establishment of branch offices for the conduct of county business be accomplished by county commission resolution. Article VIII, § 1(k) provides in pertinent part: "Branch offices for the conduct of county business may be established elsewhere [from the county seat] in the county by resolution of the governing body of the county in the manner prescribed by law." The requirement of a resolution is clearly indicated by the plain language of the provision itself and in its enactment history. Originally, the Constitutional Revision Commission recommended language that branch offices could be established as provided by law. The language adopted, however, contains the additional requirement of

a resolution (see commentary by Dean D'Alemberte accompanying text of Article VIII, § 1(k), in Florida Statutes Annotated).[1]

Although Section 28.07, Florida Statutes, authorizes the clerk to establish branch offices, the petitioner knows of no court opinion that discusses the statute's interplay with the constitutional requirement of a county commission resolution. In the absence of such precedent, it appears that the statute permits the clerk to establish a branch office once he is authorized to do so by the county commission. Before it was amended in 1957, Section 28.07 flatly stated that the clerk must keep his office at the county seat. The present language brought the statute into harmony with the constitution and made clear that there are no legislative impediments to implementing the constitutional provision.

It is not clear that a branch office of the clerk properly may be created by implication. Because the establishment of a branch office is significant enough to merit a constitutional provision that requires an enabling resolution, it would seem that such a resolution should be expressly made. On several

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[1] The constitutional policy for constraining county officials in setting up branch offices outside the county seat was described in Mack v. Carter, 183 So. 478, 479 (Fla. 1938) (invalidating a state law that had permitted certain civil cases to be heard by the Circuit Court in St. Petersburg, which is not a county seat): "If the thing here sought to be accomplished can be done in the manner attempted, then there is no end to which the purpose of a county seat may be flustered and every community in the County may be made the County seat for some purpose. If such things are to be done, they should be brought about as the fundamental law provides."

occasions, this Court has stated that county commissions have only such powers as are granted to them by statute or by the constitution, and that "where there is doubt as to the existence of authority, it should not be assumed." See e.g., Gessner v. Del-Air Corp., 17 So.2d 522, 523 (Fla. 1944), and authorities cited therein. The attorney general, addressing the question of filing documents at clerks' branch offices for recording, has stated: "Branch offices constitutionally or statutorily authorized for some purposes but not for others must be operated only in the manner and for those purposes provided by law for those branches." Op.Fl.Atty.Gen. No. 079-70 (July 30, 1979). This strongly suggests that an enabling act creating a branch office must be explicit and specific.

B. The conflict with Perego v. Robinson

Preliminarily, Petitioner respectfully suggests that the above-stated question on appeal may not be squarely before the Court, and that the district court should be reversed without answering this question. The narrower and more precise question presented here is whether the notice of appeal herein should be considered filed at the time it was presented at the Shalimar branch office of the clerk under the circumstances of this case. This question should be answered in the negative and the district court's order should be reversed accordingly. (See discussion under Part II of this brief.)

On the merits, the order on appeal, which held in effect that pleadings must be considered filed at the time they are presented at a properly established branch office of the clerk, directly conflicts with Perego v. Robinson, et al, 377 So. 2d 834 (Fla. 5th DCA 1979), cert denied, 388 So.2d 1116 (Fla. 1980), in which the Fifth District, noting that the office of the clerk in Volusia County is located at the county seat in Deland, broadly held: "No documents are filed or recorded elsewhere, nor can they be," even though the clerk had a branch office located in Daytona Beach. Perego at 835. The Perego opinion has also been regarded with disfavor by the Second District in Sanchez v. Swanson, ____So.2d____ (Fla. 2nd DCA 1984) [9 FLW 2518].

If the Perego opinion is incorrect, it is only because of the broad language quoted above. The Perego opinion blurred the distinction between the filing and the recording of a document for purposes of Article VIII, § 1(k) (which states that documents shall not be considered recorded until they reach the county seat). The Perego court did not discuss that although Fla.R.App.P. 9.040(g) requires the clerk to record notices of appeal the operative date for deciding the timeliness of the notice is the date of filing, not recording. See, Magnant, et al v. Peacock, et al, 24 So.2d 314 (Fla. 1945)

In 1934, this Court held that a notice of appeal given to a deputy clerk is not considered to be "filed" until it is taken to the place assigned for its official storage. In Re: Switzer's Estate, 156 So. 1, (Fla. 1934) contained this statement:

> Until a paper is received at the proper place to be there put on file as part of the records of an office in which it is required by law to be not only filed but also kept, the filing is not complete, although the responsible officer may have personally received at some unofficial place the actual physical custody of the document proposed to be filed. 156 So. at 2 (emphasis by the Court; citations omitted).

The Florida Attorney General in 1958 opined that deputy clerks who accept documents at branch offices of the clerk must stamp on them "Received at the branch office of the Clerk of the Circuit Court..." and that the branch office clerks have a duty to deliver such documents to the main clerk's office promptly because "[a]ny delay...might well bring about serious consequences in those situations where the time of filing is of extreme importance." Op.Fl.Atty.Gen. No. 058-17 (January 16, 1958). Although the opinion was directed primarily at the clerk's recording function, with the Attorney General holding that documents are not considered filed for recording until they reach the county seat, the case at bar is also one of "those situations where the time of filing is of extreme importance." Although time is of the essence in filing notices of appeal, this does not require the courts to create -- as the First District has in this case -- law which provides that documents accepted at branch offices of the clerk are deemed filed at that time. Instead, this time problem easily can be solved by the parties filing at the county seat or by preparing their pleadings farther in advance of filing deadlines.

In short, the Perego court said that notices cannot be considered filed at the time of presentment at a branch office. Here, the First District said that notices must be considered at the time of such presentment. Patitioner respectfully suggests the accurate answer is that notices may be considered filed when they are presented at a branch office but that, under the circumstances presented here, the notice of appeal in this case should not be deemed to have been filed until it was presented at the county seat.

II. WHETHER THE CLERK OF CIRCUIT COURT HAS THE DISCRETION TO DETERMINE THAT PLEADINGS DEPOSITED AT THE CLERK'S BRANCH OFFICE ARE NOT DEEMED FILED UNTIL THEY ARE TRANSMITTED TO THE COURTHOUSE AT THE COUNTY SEAT

The essence of the district court's holding in this case is that a pleading must be considered as being filed at the time it is deposited at a branch office of the clerk. Petitioner respectfully suggests that this is error. Assuming, arguendo, that the Shalimar Annex branch office was properly authorized by the county commissioners and properly established by the clerk, this does not indicate that the clerk is required to treat documents as being filed when presented at the branch office.

In this regard, the legislature appears to have given the clerk considerable discretion, within the confines of the constitution, in deciding whether to provide services at locations other than the county seat. Section 28.07 provides:

> The clerk of the circuit court shall keep his office at the county seat of the county; however, in those counties in which the clerk feels such offices to be necessary, he may establish branch offices in other places than the county seat and may provide such offices with a deputy clerk authorized to issue process; provided, that all permanent official books and records shall be kept at the county seat of the county.

The statute does not require that once a branch office is established all functions and services of the clerk must be offered there. For example, the statute specifically gives the clerk discretion to decide whether or not to staff such a branch office with a deputy authorized to issue process; it does not require that a deputy be assigned there.

The petitioner respectfully suggests that the statute does not require the clerk to install a time stamp machine or hire personnel or otherwise to provide for filing of legal documents at the clerk's branch office. Doesn't the clerk have authority under the statute to set up an office solely for the purpose of issuing marriage licenses or issuing process?

This analysis is consistent with the Second District's opinion in Sanchez. There, the court held that a notice was filed at the time it was presented at a branch office, but this was predicated upon a finding that the decision was in accordance with "the clerk's practices in effect at the time" and that when the document was presented at the branch office, the clerk gave her assurance that the notice would be filed that day. The instant case contains converse facts and requires a converse result. Here, the clerk's stated policy and practice is that the branch office merely serves as a conduit for the filing of documents, and it is undisputed that this policy and practice was widely known.

Here, the record indicates that the Clerk of Circuit Court for Okaloosa County has decided to operate and maintain a branch office in the town of Shalimar where, as a public service to residents of the southern portions of the county, clerk personnel will accept documents and transmit them, free of charge, to the county courthouse for filing. This appears to be a permissible practice and it was error for the First District to invalidate this policy by holding that such documents must be considered filed in Shalimar.

CONCLUSION

Because the notice of appeal was not filed within the time permitted under the Florida Rules of Appellate Procedure, the Petitioner requests that this Court reverse the decision of the First District Court of Appeal and order that the appeal be dismissed.

Walter A. Steigleman
DEWRELL, BLUE & BRANNON
P.O. Box 1503
Fort Walton Beach, FL 32549
(904) 244-9136
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to JAMES L. SCHMIDT, Esquire, Attorney for Respondent, P.O. Box 308, Fort Walton Beach, Florida 32549, by regular U.S. Mail, this 3rd day of April, 1985.

Walter A. Steigleman
DEWRELL, BLUE & BRANNON
P. O. Box 1510
Ft. Walton Beach, FL 32549
(904) 244-9136
Attorney for Appellees