

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED

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DEPUTY CLERK OF COURT

Deputy Clerk

pl

SARA CALDWELL,

Petitioner,

v.

CASE NO. 69-968

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT,

Respondent.

_____ /

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the respondent, the DISTRICT COURT OF APPEAL, FIFTH DISTRICT, by and through the senior staff attorney, and responds to the petition for writ of certiorari and/or mandamus as ordered by this court on February 18, 1987. The respondent would set forth the following statement of the case and facts, and argument.

STATEMENT OF THE CASE AND FACTS

1. Petitioner, Sara Caldwell, filed her pro se notice of appeal to the Fifth District Court of Appeal with the clerk of the lower court on November 13, 1986, seeking review of a final order denying her petition for appointment of guardian ad litem rendered October 16, 1986 (Res.App. 1). This appeal, assigned Fifth District Court of Appeal Case No. 86-2024, was received by respondent without the required statutory filing fee.

2. Petitioner, Sara Caldwell, filed her pro se amended notice of appeal to the Fifth District Court of Appeal with the clerk of the lower court on November 17, 1987, seeking review of a final order denying her petition for appointment of guardian ad litem rendered October 16, 1987 (Res.App. 2). The patent distinction between petitioner's notice of appeal and petitioner's amended notice of appeal was that the latter contained a certificate of service as required by Florida Rule of Appellate Procedure 9.420(b) & (c)(2).

3. On November 21, 1986, an order was issued by respondent directing the petitioner to remit the statutory filing fee of \$100.00 within twenty days or risk dismissal of her appeal (Res.App. 3).

4. On December 9, 1986, the lower court entered an order declaring [REDACTED] and [REDACTED], minors, to be insolvent for purposes of appeal. This order of insolvency was forwarded to and received by respondent on December 11, 1987 (Res.App. 4); however, records of the respondent failed to reflect any appeal taken directly by [REDACTED] or [REDACTED] [REDACTED] (It is noted that the caption of the lower court order of insolvency indicated that one Sara Caldwell was an appellant for [REDACTED] and [REDACTED] However, records of the respondent also failed to reflect any appeal taken in behalf of [REDACTED] or [REDACTED]).

5. On December 31, 1986, an order was issued pursuant to Florida Rule of Appellate Procedure 9.410 dismissing petitioner's appeal for failure to comply with the November 21, 1986, order to remit the statutory filing fee (Res.App. 5).

ARGUMENT

A notice of appeal must be accompanied by an appellate court filing fee, or an order of insolvency rendered by the lower court. See §35.22(3), Fla.Stat. (1985); Fla.R.App.P. 9.110(b) and 9.430. Petitioner was the appellant as stated by her notice and amended notice of appeal. The order of insolvency filed with the Fifth District Court of Appeal did not find petitioner to be insolvent, but found three minors to be insolvent. The notices of appeal received by the Fifth District Court of Appeal did not indicate that petitioner was filing an appeal on behalf of the minors. Instead, the notices of appeal indicated that petitioner was the aggrieved party. Nothing was ever filed by petitioner in the Fifth District Court of Appeal explaining the facts as alleged in her petition to the Supreme Court, even after the

court's show cause order was issued on November 21, 1986. Even after petitioner's appeal was dismissed, no motion for reinstatement was filed, explaining that petitioner was appointed as the minors' attorney and intended to appeal as an officer of the court on behalf of the minors.

The order of insolvency that was filed in the Fifth District Court of Appeal designated both petitioner and the minors as appellants. However, the order of insolvency did not meet the requirements of Florida Rule of Appellate Procedure 9.430, because it did not find petitioner, who was the appellant in appellate case no. 86-2024, to be insolvent. Therefore, the appeal was dismissed for failure to pay the statutory filing fee.


Petitioner finds fault with the Fifth District Court of Appeal for dismissing her appeal, when she was the one who filed the inaccurate notice and amended notice of appeal designating herself as the aggrieved party. The Fifth District Court of Appeal's refusal to find that the order of insolvency filed by petitioner satisfied the requirements of Florida Rule of Appellate Procedure 9.430 was not a breach or dereliction of a ministerial duty as the court was not obligated under the circumstances to accept it in lieu of the filing fee. Nor did the dismissal of petitioner's appeal constitute a departure from the essential requirements of law. The Fifth District Court of Appeal did not commit any error, petitioner committed the error which led to the dismissal of her appeal. Based on the record before the appellate court, the Fifth District Court of Appeal had the discretionary authority to sanction petitioner by dismissing her appeal for failure to pay the filing fee. See Fla.R.App.P. 9.410; Williams v. State, 324 So.2d 74,77 (Fla. 1975); Weintraub v. Alter, 482 So.2d 454,456 (Fla. 3d DCA 1986).

CONCLUSION

Petitioner's own error cannot justify the issuance of a writ of certiorari. Furthermore, mandamus is not available as a remedy to review a discretionary act. Accordingly, the petition should be denied.

Respectfully submitted,

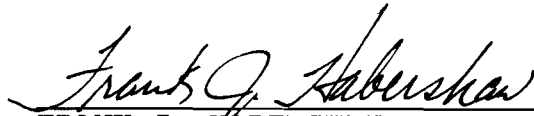
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of certiorari and/or mandamus has been furnished by mail to: Sara Caldwell, Esquire, P.O. Box 2023, Daytona Beach, Florida, 32015, on this 3rd day of March, 1987.



FRANK J. HABERSHAW
CLERK OF COURT
FOR THE COURT