IN THE SUPREME COURT
STATE OF FLORIDA

BOBBIE SUE WISHART, and
CHARLES F. WISHART,

Appellees, Cross-Appellants,
and Petitioners,

v.

LESLIE M. BATES (BOGGS),
Appellant, Cross-Appellee,
Respondent.

v.

RANDALL A BATES,

Cross-Appellee, Respondent.

CASE NO. 71,370

DCA CASE NO. 86-2408

JURISDICTIONAL BRIEF

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished this 2nd day of November 1987 to **LESLIE M. BATES (BOGGS)**; Post Office Box 4; Seffner, Florida 33584; and to **RANDALL A. BATES**; 410 West Bloomingdale; Brandon, Florida 33511-7402.

Delivery by HAND [*] MAIL [x]

Bobbie Sue Wishart
BOBBIE SUE WISHART

Charles F. Wishart
CHARLES F. WISHART, Esquire

* Hand delivery to RANDY.
x Mail delivery to LESLIE.

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JURISDICTIONAL BRIEF

CITATIONS:

Cites will be to the pages of Petitioner's Appendix as A: pg. p ¶ pp. line l.

APPENDIX:

To facilitate citations to the opinion of the Second District Court of Appeal dated August 7, 1987 both the required conformed copy (A: pgs. 23 to 28) and a transcribed copy with numbered paragraphs are provided (A: pgs. 29 to 31).

PARTIES:

Charles F. and Bobbie Sue Wishart, shall hereinafter be referred to as CHARLES, BOBBIE, WISHART or the WISHARTS as grammar dictates, appear pro se.

Leslie Michelle Bates [Boggs], and Randall Aaron Bates, parents of Tiffany Michelle Bates shall hereinafter be referred to as LESLIE, RANDY and TIFFANY.

STATEMENT OF THE NECESSARY FACTS FOR INVOKING JURISDICTION:

The following relevant facts may be deduced from the Appendix which includes the opinion of the Second District Court of Appeal dated August 7, 1987 (A: pgs. 29 to 31), reh. den. September 23, 1987 (A: pg. 32) and mandate forwarded October 9, 1987 (A: pg. 33) and which refers directly or indirectly to the other orders, judgements or opinions.

The WISHARTS are paternal step-grandfather and grandmother of TIFFANY. (A: pg. 29 ¶ I, pg. 30 ¶¶ II, V, and VI, and pg. 31 ¶ X), were joined in LESLIE'S dissolution and custody suit as necessary parties pursuant to §§ 61.1306 and 61.131 Florida Statutes (1983) (A: pg. 29 ¶ I) from which we may deduce that WISHARTS standing was due to "...physical custody of...(TIFFANY)...." (A: pg. 29 ¶ I lines 6 to 8)and not grandparents.

Their petition for custody, they have custody of TIFFANY and wish to retain it, and it was the "... denial of their petition for custody of...TIFFANY..." which the WISHARTS appealed, (Cf. (A: pg. 12 ¶ 1 lines 1 and 2) and after the filing of the suit BOB-

BIE was awarded temporary residency of TIFFANY (A: pg. 1 ¶ 1; pg. 30 ¶ II; and pg. 30 ¶ IV lines 6 and 7) from which it is manifest that the WISHARTS maintaied their "petition for custody" to the present (Cf. A: pg. 30 ¶ V lines 4 to 5)

An examination of the actual order shows that BOBBIE was awarded "...temporary primary residency..." (A: pg. 1 ¶ 1 line 1) and that there was a medical problem for which BOBBIE was given specific authority and responsibility to deal with (A: pg. 2 ¶¶ 5 and 6).

That finding repudiates LESLIE'S fitness. (A: pg. 31 ¶ VIII lines 5 to 6)

On February 26, 1985 (nunc pro tunc December 4, 1986) the WISHARTS lost their custody of TIFFANY (A: pg. 30 ¶ III lines 1 to 3), and note, the Second District Court of Appeal failed to report BOBBIE'S given visitation in the Final Judgement (A: pg. 8 ¶ 13).

WISHART appealed (A: pg. 30 ¶ III line 4 and Cf. A: pg. 30 ¶ IV) and on April 2, 1986 the Second District Court of Appeal reversed and remanded finding:

> The court having reviewed the record finds that...(the WISHARTS) should have been afforded an opportunity to be heard and present evidence at the custody hearing.
>
> We therefore reverse and remand for further proceedings consistent herewith. ((A: pgs. 15 and 30 ¶ IV lines 1 to 4)

The opinion was rendered when LESLIE'S motion for rehearing was denied on May 1, 1986 (A: pg. 13) and the mandate forwarded on October 9, 1986. (A: pgs. 14 and 15)

The "Final Judgement" was on it's face void ab initio (A: pg. 4 ¶ f and pg. 5 ¶ 5), and must be reversed as the Second District Court of Appeal did, LESLIE gained nothing, WISHART lost nothing, for the violation of Rule 1.440, F. R. Civ. P. (1985), the case law of Leeds v. C. C. Chemical Corp., 280 So.2d 718 at 719 (Fla. 3d DCA 1973), Ellis v. Ellis, 242 So.2d 745 (Fla. 4th DCA 1971), State v. Battle, 302 So.2d 782, 783 (Fla. 3d DCA 1974) and Johnson v. McKinnon, 54 Fla. 221, 45 So. 23 (Fla. 1907) requires the reversal since the matter was not ready for pretrial let alone trial for it reads:

> f. The Court finds that the Wife's Motion to Strike the grandfathers' Amended Answer should be denied and instead, treated as a denial

of the allegations contained in the Affirmative Defenses filed by the WISHARTS. (A: pg. 4 ¶ f)

5. That the Wife's Motion to Strike the grandparent's Amended Answer be and the same is hereby denied and instead, it is treated as a denial of the allegations contained in the Affirmative Defenses filed by the Wisharts. A: pg. 5 ¶ 5 line 1 to pg. 6 line 2)

WISHART, assured the Final Judgement (A: pgs. 3 to 11) was void ab-initio did indeed file a Motion to Enforce Mandate and as an alternative pleading at trial level connected with the visitation awarded them by said Final Judgement but disobeyed by LESLIE and rarely enforced by the trial courts.

Both the Second District Court of Appeal (A: pg. 30 ¶ v lines 7 to 11) and the trial judge (A: pg. 17 ¶ 6) seem to agree that the reversal of the Final Judgement "...did not 'completely reverse the final judgement..." and therefore they admit that the final judgement was reversed in part and therefore WISHART prevailed as contemplated by Rule 9.400(a), F. R. App. P. for The Second District Court of Appeal defines what WISHART gained by saying:

By returning the matter to the trial court in the prior appeal...(w)e merely granted the...(WISHARTS) an opportunity to be heard at a custody hearing. (A: pg. 31 ¶ VII lines 11 to 13)

...(W)e did not reverse the trial court's prior custody judgement. We merely granted the appellees an opportunity for a hearing in which to present evidence as to the child's best interest with regard to her custody. (A: pg. 31 ¶ X line 5 to 8; Cf. pg. 17 ¶ 6 and pg. 18 ¶ 14)

It should be noted that the "we" speaking in the present opinion under appeal (A: pg. 31 ¶ XII) is not the same as the panel which reversed the final judgement nor did they have the record on appeal when they made their "findings of fact", and in any case the opinion speaks for itself as to the reversal question. (A: pg. 12)

JURISDICTION:

The WISHARTS invoke the discretionary jurisdiction of the Supreme Court based upon Rule 9.030(a)(2)(A)(iii) and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure and address the question of Attorney's as constitutional officers first.

QUESTION I:

> ARE ATTORNEY'S, WHO HAVE HISTORICALLY BEEN OFFICER'S OF THE COURT, SUBJECT TO THE COURTS' INHERENT POWER'S TO DISCIPLINE AND COMPEL, NOW ELEVATED TO THE STATUS OF CONSTITUTIONAL OFFICERS BY OPERATION OF ARTICLE V, §§ 3 AND 15, OF THE FLORIDA CONSTITUTION?

The case of Ex Parte Wall, 107 U.S. 552, 556 (1882) sets forth the inherent power of the Court over it's attorney's as officers of the Court when it summarily disbarred one J. B. Wall, a citizen of Tampa, Florida who lead a lynch mob to break into a prison, draw out and hang a prisoner in front of the Tampa Court House during the lunch hour.

The United States Supreme Court in support of the District Court's action said:

> We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defense.

The Supreme Court is also a Constitutional Court, and it's Judges are Constitutional Officers pursuant to Article V, § 3, of the Florida Constitution.

Simularly, they are given exclusive jurisdiction by Articles V, § 15 of the Florida Constitution over attorneys (Cf.Title XXXII, Chapter 454, Attorneys at Law).

Various cases dealt with who is not a constitutional officer but these cases dealt with officials who were not specifically mentioned in the Constitution, but Attorney's most certainly are, and we may conclude that Attorney's are constitutional officers since they are officers of a Constitutional Court as this court held in the Petition of the Florida State Bar Ass'n et al, 40 So.2d 902, 907 (Fla. 1949) that:

> Attorney's are not State or County Officers, but they are officers of the Court and as such constitute an important part of the judicial system.

May we then ask what circumstance or advantage to the attorney's, the Courts, or the society at large may allow attorney's the right to invoke the discretionary jurisdiction of the Supreme Court when attorneys as a class of constitutional officers are expressly and directly affected?

One would hope that the present case manifests the arbitrary violations of law and the rules as would initiate review of the matter by certioari, and particularly since the matters brought by WISHART are substantive, yet the Second District Court of Appeal has attempted to slander CHARLES by hanging the Dubowitz v. Century Village East, Inc., 381 So.2d 252, 253 (Fla. 4th DCA 1979) "award" about CHARLES neck, as it were, although the orders of the Second District Court of Appeal would show some success by CHARLES with his motion pleading as for example Appendix, pgs. 19 and 20.

The situation is not however unique to the WISHARTS, save perhaps for the WISHARTS determination to protect TIFFANY as they had from her birth.

By good fortune, the latest issue of The Florida Bar Journal, Vol. LXI No. 10 November 1987, pages 11 to 16 contains an article entitled "Family Law Judicial System: Indictment from within" which would show WISHART is quite objective in a bad system.

The WISHARTS concur that there is a systemic breakdown, and that the system should be indicted, for they have been victims of the system, along with the other parties for over four years, and it is not their abuse of motions practice that is at issue, but the failure of the courts, and also the Florida Bar to confront and correct the matter rather than to allow families to be torn asunder with no recourse.

Rather, the substantive law must be examined, the irretrievably broken question answered, moral judgement reinstated in the social systems as well as in the Courts so as to provide a yardstick for the fitness question, liars must be expelled from Chancery Court under the clean hands doctrine, and in agreement with the article, better training in the principles of Chancery must be provided, along with better reconciliation mechanisms to restore troubled marriages.

The Courts destroyed RANDY and LESLIE'S marriage because of it's hostile position toward marriage in general fomented by it's refusal or inability to address the

irretrievably broken and fitness questions in a rationale manner. The court has given up trying to fix the problem and has become hostile to anyone who opposes its fatalism.

In the Petition of the Florida State Bar Ass'n et al 40 So.2d 902 (Fla. 1949) This Court recognized the inherent powers of the court and said as to them:

> Inherent power should be exercised with sound discretion. It should never be exercised arbitrarily or in a despotic manner, neither should it be the product of pressure, passion or prejudice.

Black's Law Dictionary, 4th Edition, pg. 1689 defines Tyranny as:

> TYRANNY. Arbitrary or despotic government;...

WISHART would suggest that they have suffered long and hard under a system of Courts that have not looked after TIFFANY who should be the focal point of this case.

What we find is a concerted collaboration between the trial and appellate judges to remove the WISHARTS' care, custody, and control over TIFFANY.

For example, The trial judges, know that the Final Judgement was reversed because it was not at issue.

WISHART had objected to the matter being put to trial, walked through the unlawful trial and then appealed and reversed the final judgement.

WISHARTS appeal was on that issue, but the court abstracted the lack of jurisdiction to try the case, which made the final judgement void ab-initio, by finding the WISHARTS "...should have been afforded an opportunity to be heard and present evidence at the evidentiary hearing.", or in other words they did not get due process of law, which also requires a reversal.

There is a clear conflict between the Second District Court of Appeal's opinion, and the Supreme Court's opinion in the case of Johnson et al. v. McKinnon 54 Fla. 221, 45 So. 23 (Fla. 1907) where it held:

> Jurisdiction is simply power. Any power possessed by the judicial tribunal, either affirmative or negative, is jurisdiction. (Pg. 25)

> Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes or procedure and in the extent and character of its judgements. It must act judicially in all things, and cannot then transcend the power conferred by the law. (Pg. 26)

Having found a rule was violated the court went on to say:

> We must hold, therefore, that this decree was absolutely void, not simply erroneous, irregular, or voidable, and that it was subject to collateral attack herein. It was not erroneously made in the exercise of jurisdiction. It was rendered without power, without authority, without jurisdiction. (Pg. 26)

One facit of a void order, it is void forever, and leaves the parties in the same position they were in before the trial. (46 Am. Jur 2d Judgements; D. Effect of Invalidity; § 49. Void Judgements; in general the whole section and specifically pg. 349, n. 17)

The courts know this law, but they refuse to consider the record, which the current panel did not even have but which their predecessors reviewed in making their findings reviewed. (A: pg. 12 ¶ 2 line 1).

The present panel distorted the due process language to infer that WISHART never had a hearing on the custody issue and that a hearing is all they are entitled to.

But that position is easily impeached.

From their own opinion, so cleverly devised to cut off the WISHARTS' visitation, we note that LESLIE was "...found to be a fit parent." (A: pg. 31 ¶ VIII lines and 6)

But, The fitness issue is related not to dissolution of marriage but to custody so there must have been a custody trial along with the dissolution of marriage trial in which the WISHARTS were forced to participate for LESLIE to have a finding that she is fit, for she certainly did not obtain that finding when BOBBIE was awarded her primary residency. (A: pg. 1 ¶ 1; pg. 2 ¶¶ and 6)

There was a trial, and it was reversed and remanded because the trial court had no jurisdiction to try the matter, and the final judgement was void ab-initio.

Thus the fitness determination was void as well. State ex rel. Coleman et al. v. Williams, 3 So.2d 152 (Fla. 1951)

Yet, the WISHARTS do not have TIFFANY restored to them and have only seen her for a few hours since April 1985 and not at all in the past year.

The WISHARTS have been deliberately set up, they are presently in a trial on these issues but without the opportunity intended by § 61.131, Fla. Stat. (1985) to observe TIFFANY and thus gain fresh evidence and that is not a fair trial.

Which brings us to the next question:

QUESTION II:

> WHEN THERE IS A SYSTEMIC BREAKDOWN IN THE FAMILY LAW OF FLORIDA IN GENERAL, AND IN THE 13TH JUDICIAL CIRCUIT IN PARTICULAR, WHICH HAS SPILLED OVER INTO THE SECOND DISTRICT COURT OF APPEAL, WHICH HAS MADE THE COURTS TO BECOME DEFENSIVE, NO DOUBT TO PROTECT THEIR ADMINISTRATION, SUCH THAT EVEN THE RULES OF PROCEDURE AND LAWS ARE BEING VIOLATED WITHOUT RECOURSE TO THE COURTS, AND THE OPINIONS WRITTEN ARE DESIGNED TO CONCEAL THE TRUE FACTS OF THE CASE, OR ARE DISTORTED FROM THEIR PLAIN MEANING, CAN AN ATTORNEY AS OFFICER OF THE COURT PETITION THE SUPREME COURT AS A MEMBER OF A CLASS OF CONSTITUTIONAL OFFICERS TO PROTECT HIMSELF, HIS CLIENTS AND FORCE THE COURTS TO STOP THEIR TYRANNY AND CORRECT THE SYSTEM NOTWITHSTANDING THE FACT THAT THERE MAY NOT AN ADEQUATE OPINION TO SHOW DIRECT AND EXPRESS CONFLICT?

Surely any citizen and especially an Attorney must be assured that if he holds the courts to follow the law and rules of procedure, he will be supported.

QUESTION III:

> DO THE FOLLOWING CASES SHOW EXPRESS AND DIRECT CONFLICT WITH THE SECOND DISTRICT COURT OF APPEALS DECISION DATED AUGUST 7, 1987?

Rule 1.440, F. R. Civ. P. (1985) as construed in Leeds v. C. C. Chemical Corp., 280 So.2d 718 at 719 (Fla. 3d DCA 1973) and Ellis v. Ellis, 242 So.2d 745 (Fla. 4th DCA 1971) and based upon the express language of the Final Judgement Apendix pg. 4, ¶ f, and pg. 5 ¶ 5 to pg. 6 line 2 and the cases of State ex rel. Coleman et al. v. Williams, 3 So.2d 152 (Fla. 1951), State v. Battle, 302 So.2d 782, 783 (Fla. 3d DCA 1974) and John-

son v. McKinnon, 54 Fla. 221, 45 So. 23 (Fla. 1907) provides express and direct conflicts between the Supreme and other Circuit Courts and the present opinion as it denies the Final Judgement is void, that the WISHARTS never lost their primary residency status over TIFFANY and that they did not prevail as will justify their appellate costs pursuant to Rule 9.400(a), F. R. App. P..

In addition, the reversal of the Appellate Costs on the basis that WISHART did not prevail, is contradicted by the facts since in nothing more, WISHART was able to escape the results of a final judgement and obtain a new hearing. By ruling otherwise, the Second District Court of Appeal opinion provides an express and direct conflict with inter-alia Di Teodoro v. Lazy Dolphin development Company, 432 So.2d 625, 626 (Fla. 3rd DCA 1983), State v. Battle, 302 So.2d 782, 783 (Fla. 3d DCA 1974) and Johnson v. McKinnon, 54 Fla. 221, 45 So. 23 (Fla. 1907).

CONCLUSION

It is no small thing for a person to walk into a trial with temporary primmary residency, wherein the trial is beyond the trial court's jurisdiction to try since the rules of procedure and principles of due process forbid it, to lose physical custody while the void judgement is rendered, to reverse the judgement on the merits that the matter was beyond the authority to have been tried and a violation of due process of law, and then after years of effort find that a void order is enforceable against you so as to prevent the restoration of the primary residency, while the visitation awarded by the final judgement is denied.

Such arbitrary and violent use of the inherent powers of the Court against the WISHARTS who tried to preserve a marriage and are now trying to protect a child who was delivered into their hands by the father for safekeeping and never romoved lawfully warrants an exercise of the discretionary writ of certioari and perhaps, just perhaps use of several other writs as well.