OA 10-6-89

IN THE SUPREME COURT OF FLORIDA

Case No. 73,696
Fla. Bar No. 283975

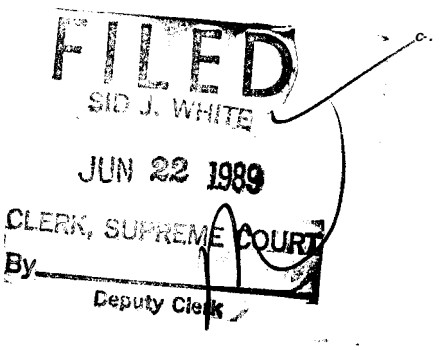
MICHAEL STEIN,

Petitioner,

vs.

PATRICIA CLARK FOSTER, et. al.

Respondent.



PETITIONER'S INITIAL BRIEF ON THE MERITS

LAW OFFICES OF
MELVYN B. FRUMKES & ***ASSOCIATES, P.A.***

LAW OFFICES OF
GREENE AND GREENE, P.A.
Attorneys for Petitioner
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 372-3737

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

INTRODUCTION

The Petitioner, MICHAEL STEIN, was the Appellee in the District Court of Appeal of Florida, Third District. The Respondent, PATRICIA CLARK FOSTER, was the Appellant.

The parties shall be referred to herein as either "Michael Stein" and "Patricia Clark Foster" or as the "Petitioner" and "Respondent".

References to the Appendix submitted with the Petitioner's Brief on Jurisdiction shall be indicated by the abbreviation, "Jur.App.". References to the Appendix attached hereto shall be indicated by the abbreviation, "App."

STATEMENT OF THE CASE AND FACTS

Michael Stein, is the natural father of -------, a minor child born ------, 1987. Patricia Clark Foster, is the natural mother. The child was conceived through artificial insemination under the terms of a "Surrogate Parenting Agreement" entered into between Michael Stein and Patricia Clark Foster in January, 1986. (Jur.App.1-24).

When Patricia Clark Foster became pregnant in late 1986, Michael Stein filed a "Petition for Declaratory Relief" seeking an adjudication of his paternity of the then unborn child carried by Patricia Clark Foster. (Jur.App. 25-26).

Patricia Clark Foster responded with a "Verified Answer" in which she admitted that Michael Stein was the father of the unborn child she was carrying. Patricia Clark Foster's husband, Brent Foster, joined in the "Verified Answer" acknowledging that Michael Stein was the father of the child. (Jur.App. 27-28).

The paternity case was filed in Dade County, Florida, and assigned to the Honorable Edward N. Moore, Circuit Judge. At the time, however, the Honorable Gerald T. Wetherington, Chief Judge, had entered a series of "Administrative Orders" authorizing County Judges to hear and determine certain cases within the Family Division of the Circuit Court. On December 19, 1986, therefore, County Judge Edward Swanko, as Acting Circuit Judge, entered an "Agreed Order Regarding Paternity" declaring Michael Stein the

father of the child then carried by Patricia Clark Foster. (Jur.App. 29-30).[1]

The relevant order in effect at the time was Administrative Order 86-149 (Jur.App. 31-32) which read, in pertinent part:

> [The Honorable A. Leo Adderly, Harvey Baxter, Robert M. Deehl, Charles D. Edelstein, Marvin H. Gillman, Harvey L. Goldstein, Bernard R. Jaffe, Thomas G. O'Connell, James S. Rainwater, Leah A. Simms, Edward H. Swanko, Philip Cook, Stanley M. Goldstein, Murrary Z. Klein, Murray Meyerson, Jeffrey Rosinek and Alexander S. Gordon are hereby assigned] to temporarily serve as Acting and Temporary Judges of the FAMILY CIVIL DEPARTMENT of the Circuit Court, to hear, try, conduct, determine and dispose of those cases assigned to them by the Associate Administrative Judge of the Family Division of the Circuit Court, effective through December 1, 1986 and inclusive of December 31, 1986, and thereafter to dispose of all those matters considered by them during said period.

Following the birth of the child in March, 1987, Patricia Clark Foster executed a "Consent for Adoption", consenting to the adoption of the child by Hyat Stein, the wife of Michael Stein. (Jur.App. 35). Michael Stein also executed a "Consent for Adoption", agreeing to the step-parent adoption of the child by his wife. (Jur.App. 36). Simultaneously, Michael Stein filed a "Petition for [Step-Parent] Adoption", attaching thereto the "Agreed Order Regarding Paternity", which established him as the father of the child, and the "Consents

---

[1] Following the entry of the "Agreed Order Regarding Paternity" by Judge Swanko, an additional order determining Michael Stein's paternity of the child was entered in the State of Michigan in January, 1987. This order, entitled "Consent Order Determining Paternity", was entered upon the motion of Patricia Clark Foster. (Jur.App. 33-34)

for Adoption" executed by Patricia Clark Foster and himself. (Jur.App. 37-38).

In May, 1987, the Honorable Edward Swanko, as Acting Circuit Judge, entered a "Final Judgment of Adoption" authorizing the step-parent adoption of the child by Hyat Stein. (Jur.App. 39).

The Administrative Orders then in effect, authorizing Judge Swanko to serve as an Acting Circuit Judge and permitting County Judges to hear uncontested adoption cases, were Administrative Orders 87-59 and 87-9. (Jur.App. 40-41; App. 42-43). The first re-appointed Judge Swanko to serve as Acting Circuit Judge for the month of May, 1987 and the second provided, in pertinent part:

> WHEREAS, experience has shown that uncontested dissolutions of marriage, uncontested adoptions and change of name cases should be scheduled for final hearing by the Clerk of the Court at designated outlying court locations for the convenience of the Bar and the general public, the following procedures and provisions are placed in effect:
>
> 1. The Clerk of the Court is hereby authorized and directed to continue using the established documented system for scheduling final hearings on uncontested dissolutions of marriage, uncontested adoptions and change of name cases at outlying court locations in this Circuit.
>
> 2. The Associate Administrative Judge of the Family Civil Department of the Family Division will determine when the above-named Family Civil type cases will be heard at each of the following locations, and advise the Clerk of the Court of when as well as the number of cases to be scheduled each hour . . .

3. These matters will be heard by County Court Judges, as Acting Circuit Judges of the Eleventh Judicial Circuit of Florida under appropriate administrative order of the Chief Judge of this Circuit.

One and a half years after the entry of the "Agreed Order Regarding Paternity" and eleven months after the entry of the "Final Judgment of Adoption", Patricia Clark Foster filed a "Verified Motion for Relief from Judgment" seeking an order setting aside both judgments. (Jur.App. 44-52). She alleged, in pertinent part:

1. That although the "Consent for Adoption" executed by her reflects that she signed the consent before a notary and two witnesses, she did not do so.

2. That despite the filing of her "Verified Answer" acknowledging paternity and her sworn "Consent to Adoption", she had never been served with process in connection with the proceedings for paternity or adoption;

3. That the child was never within the territorial jurisdiction of the State of Florida at time of the adoption and was not born at the time of the paternity adjudication;

4. That she was not represented by independent counsel in the proceedings; and

5. That Judge Edward Swanko did not have jurisdiction to enter either the paternity judgment or the adoption judgment as an Acting Circuit Judge under the terms of the Administrative Orders in effect at the time.

With reference to this latter point, Patricia Clark Foster contended that the language of the Administrative Orders stating

that certain County Judges (including Judge Swanko) were "designated and assigned" to hear "those cases assigned to them by the Associate Administrative Judge of the Family Division of the Circuit Court" required a still further order specifically assigning a particular case to a particular judge and that no such further or "second" order existed.

A hearing was held before the trial court as scheduled and noticed by Patrica Clark Foster. At the hearing Patricia Clark Foster presented no evidence with respect to any of the allegations contained in her "Verified Motion for Relief from Judgment". Instead, she relied solely upon her legal argument that Judge Swanko, as Acting Circuit Judge, had no jurisdiction to enter either the paternity judgment or the adoption judgment. She presented no evidence as to the policy and procedure employed in the Eleventh Judicial Circuit in 1986 and 1987 with respect to the assignment of cases to the Acting Circuit Judges but, rather, argued only that a "further order" of some type was required by implication from the language of the Administrative Orders. (Appendix to Answer Brief of Appellee, District Court of Appeal, page 13).

In June, 1988, the lower court denied Patricia Clark Foster's request to set aside the two judgments. She thereafter sought review in the District Court of Appeal of Florida, Third District.

In December, 1988, the District Court of Appeal reversed the lower court and vacated both the order adjudicating Michael Stein as the father of the child and the order of adoption of the then nearly two-year-old child. The District Court determined that both judgments were "void":

> **[T]he county judge who executed the order and judgment was never appropriately assigned to the cause as an acting circuit judge. Since only the circuit court, acting through a duly qualified circuit judge, has jurisdiction in paternity and adoption proceedings, the order and judgment were entered without jurisdiction over the subject matter and are totally void. (App.** 53-54).[2]

Michael Stein sought review in this Court on the basis of the conflict between the decision of the District Court herein and the decision of this Court in ***Card v. State,*** 496 So.2d 1169 (Fla. 1986). This Court has accepted jurisdiction of this case.

---

2 The District Court also commented, in a footnote, that it found "disturbing" the "fact" that none of the parties hereto has "so much as set foot in Florida". There was and is nothing in the record to support such a statement and, in reality, the facts were otherwise. The Petitioner sought, on rehearing, to correct this erroneous statement but the District Court declined to revise its opinion. (Jur.App. 55-57; Jur.App. 58). This statement, beyond its lack of record support, is also irrelevant. At the time in question there was no residency requirement with respect to adoption within the state of Florida. $63.185, Florida Statutes (1987), requiring residence with the state of Florida in order to adopt a child in Florida did not become effective until October 1, 1987, five months after the entry of the Final Judgment of Adoption herein.

SUMMARY OF THE ARGUMENT

This is a case in which the District Court of Appeal declared "void" and vacated an "Order Regarding Paternity" and a "Final Judgment of Adoption" upon the grounds that the County Judge, who entered the order and judgment as an Acting Circuit Judge, was not "appropriately assigned" to the case. The Petitioner submits:

1. That the record establishes, on its face, that the County Judge was properly assigned pursuant to the practice, policy and procedure employed by the court at the time;

2. That even if it were to be determined that the record does not establish the propriety of the assignment, the Respondent never established its impropriety. There was never an evidentiary hearing at the trial level regarding the practices and procedures utilized with respect to the assignment of County Judges to serve as Acting Circuit Judges and, therefore, the District Court's finding that the instant case was never "appropriately assigned" was improperly made in the absence of any evidentiary basis.

3. Even assuming the County Judge herein was not "appropriately assigned", there is no question but that he was acting under color of authority and was serving as an Acting Circuit Judge under a lawfully entered Administrative Order. Therefore, his actions were those of a ***de facto*** judge and the orders and judgments of a ***de facto*** judge are valid and not "void." The opinion of the District Court of Appeal herein holding to the contrary is against the manifest weight of authority nationally and is directly opposed to the established law of this Court and of this State.

I.

THE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT THE COUNTY JUDGE WHO EXECUTED THE ORDER AND JUDGMENT HEREIN WAS NOT "APPROPRIATELY ASSIGNED".

The essence of the District Court of Appeal decision herein is the determination that the "county judge who executed the order [of paternity] and judgment [of adoption] was never appropriately assigned to the cause as an acting circuit judge". (Jur.App. 53-54) Based upon this determination, the District Court of Appeal concluded that the order and judgment were "totally void". (Jur.App. 53-54)

The District Court's opinion, however, raises the question of upon what evidence did the District Court conclude that the county judge was "not appropriately assigned?"

The initial Administrative Order which authorized certain county judges to serve as acting circuit judges read, in pertinent part, that the county judges were appointed:

> [T]o temporarily serve as Acting and Temporary Judges of the FAMILY CIVIL DEPARTMENT of the Circuit Court, to hear, try, conduct, determine and dispose of those cases assigned to them by the Associate Administrative Judges of the Family Division of the Circuit Court . . . (Jur.App. 31-32)

It was the Respondent's contention, in the District Court of Appeal, that the language of this Administrative Order implies that a further order of assignment by the Associate Administrative

Judge for each individual case was required in order for the county judge to act. [3]

The Respondent took this position in the appellate court and the District Court of Appeal agreed despite the fact that there was never an evidentiary hearing at the trial level to determine what procedures were in effect in the Dade County Circuit Court at the time in question. The District Court of Appeal simply accepted the Respondent's argument that the necessity of a separate assignment to the county judge for each individual case was implicit in the language of the initial Administrative Order. There is, however, absolutely nothing in this record to establish that such further, individual orders were ever required or were the practice or procedure in the Dade County Circuit Court.

The Petitioner submits that the District Court's finding that this case was "never appropriately assigned" raises two additional separate issues:

1. Did the District Court err in so finding where the record before the District Court of Appeal established, on its face, that no individual, case-by-case assignment procedure was in effect at the time that this case was heard by the County Judge as Acting Circuit Judge?

2. In the alternative, did the District Court err in so finding in the absence of any type of evidentiary hearing at the trial level

---

[3] The Respondent, in her initial Brief in the District Court of Appeal, argued, "there is no order from the Associate Administrative Judge of the Family Division appointing Judge Swanko to hear this 'uncontested adoption'". (Initial Brief of Patricia Clark Foster at page 2, emphasis supplied).

concerning the practice and procedure of the Dade County Court with respect to the assignment of cases to County Judges as Acting Circuit Judges?

Addressing the first point, the limited record before the District Court of Appeal established, directly contrary to the Respondent's position, that the practice and procedure of the Dade County Circuit Court did not call for separate assignments per individual case acted upon by the county judges. The two portions of the record which make this patently clear are Administrative Order number 87-9 (Jur.App. 42) and a "Memorandum" dated February 3, 1988, addressed to "County Court Judges" from the Associate Administrative Judge, Family Division. (App. 1) [4]

Administrative Order 87-9, reads, in pertinent part:

> WHEREAS, experience has shown that uncontested dissolution of marriage, uncontested adoptions and change of name cases should be scheduled for final hearing by the Clerk of the Court at designated outlying court locations for the convenience of the Bar and the general public, the following procedures and provisions are placed in effect:
>
> 1. The Clerk of the Court is hereby authorized and directed to continue using the established documented system for scheduling final hearings on uncontested dissolutions of marriage, uncontested adoptions and change of name cases at outlying court locations of this Circuit.

---

[4] This "Memorandum" was a part of the record before the District Court of Appeal, having been attached as an Exhibit to the Motion for Rehearing filed on behalf of Michael Stein.

> 2. The Associate Administrative Judge of the Family Civil Department of the Family Division will determine when the above-named Family Civil type cases will be heard at each of the following locations, and advise the Clerk of the Court of when as well as the number of cases to be scheduled each hour . . .
>
> 3. These matters will be heard by County Court Judges, as Acting Circuit Judges of the Eleventh Judicial Circuit of Florida under appropriate administrative order of the Chief Judge of this Circuit.

The "Memorandum" to County Judges from the Associate Administrative Judge, reads:

> Pursuant to the directives of Administrative Order 87-9 of 20 March 1987, this is to confirm your authority to hear and sign Final Judgments in following cases:
>
> 1) Uncontested Dissolutions of Marriage
> 2) Uncontested Adoptions
> 3) Change of Name
>
> It would be appreciated if your Judicial Assistant could make a list on a weekly basis of all cases in which you have signed a Final Judgment, showing the Docket Number, including the Circuit Court Division, and date the Order was signed. If you could forward the list to me, I will advise the individual Judges, so their case management reports can be maintained on a current basis. (App. 1).

From just these two portions of the record it can be determined that:

1. The Clerk of the Court was responsible for scheduling hearings before the County Judges who were authorized to serve as Acting Circuit Judges;

2. There was an "established, documented system" for the Clerk to do so; and,

3. The Associate Administrative Judge assigned such cases to the County Judges as a class and not on an individual basis.

Yet, despite the record evidence that no separate, individual case-by-case assignment of cases was ever required, the District Court nevertheless determined that this case was not "appropriately assigned." There was simply no evidence whatsoever from which the District Court of Appeal could have so concluded. Instead, the limited record before the District Court supports the only conclusion possible - the assignment was proper.

Addressing the second point, the Petitioner further submits the District Court of Appeal erred in determining that this case was "never appropriately assigned" absent an evidentiary hearing at the trial level to establish the manner and methodology utilized by the Dade County Circuit Court with respect to the assignment of cases to County Judges as Acting Circuit Judges. Here, the District Court of Appeal simply accepted, in its entirety and without record support, the Respondent's argument that the initial Administrative Order authorizing County Judges to serve as Acting Circuit Judges impliedly required some type of specific, individual, case-by-case assignment. The Respondent's argument was just that - an argument. There was never any evidence, testimony or proof of any kind that her argument was even remotely correct. At the very least, before an appellate court vacates and declares "void" an adoption judgment involving the welfare and best interest of a two

year old child, something more than argument and allegations should be required?

---

5 Indeed, the proper administration of justice should require a presumption, in the absence of direct evidence to the contrary, that a judicial assignment was properly made. In states where "special judges" are regularly and ordinarily appointed, such a presumption is a matter of law. See, *e.g.*, *Shanholt v.* State, 448 N.E.2d 308 (Ind. Ct. App. 1983).

II.

ASSUMING THAT THE COUNTY JUDGE HEREIN WAS NOT "APPROPRIATELY ASSIGNED," THE DISTRICT COURT OF APPEAL NEVERTHELESS ERRED IN DETERMINING THE ORDER AND JUDGMENT EXECUTED BY THE COUNTY JUDGE TO BE "VOID".

In order to address the legal issues raised in the instant case it is necessary to briefly review the facts.

In December, 1986, Michael Stein filed a "Petition for Declaratory Relief" seeking an adjudication of his paternity of then unborn child carried by Patricia Clark Foster. This paternity case was filed in the Dade County Circuit Court and was assigned to the Honorable Edward Moore, a Dade County Circuit Judae.

Thereafter, the Honorable Gerald T. Wetherington, Chief Judge, entered an Administrative Order authorizing certain County Judges to serve as Acting Circuit Judges with respect to cases arising in the "Family Civil Department". County Judge Edward Swanko was one of the judges appointed to serve as an Acting Circuit Judge during the period of time from December 1, 1986 to December 31, 1986.

Following the filing of Michael Stein's paternity action, Patricia Clark Foster filed a "Verified Answer" in which she acknowledged that Michael Stein was the father of the child she was carrying.

Thereafter, on December 19, 1986, during the period of time in which he was serving as an Acting Circuit Judge, Judge Swanko entered an "Agreed Order Regarding Paternity". Judge Swanko entered this "Agreed Order" as an Acting Circuit Judge and not as a County Judge.

Thereafter, following the birth of the child, Patrica Clark Foster executed a "Consent for Adoption", consenting to the adoption of the child by Hyat Stein, the wife of Michael Stein. Michael Stein also executed a "Consent for Adoption", and a "Petition for Step-Parent Adoption" of the child by Michael Stein's wife, Hyat, was filed.

During this same period of time, Judge Swanko was again appointed by Administrative Order to serve as an Acting Circuit Judge and a further Administrative Order was entered authorizing such Acting Circuit Judges to hear "uncontested adoptions". Again in his capacity as Acting Circuit Judge and not as a County Judge, Judge Swanko entered a "Final Judgment of Adoption".

The foregoing recitation of the facts establishes that this is not a case involving any question of subject matter jurisdiction.[6] Both of the actions - the paternity action and the adoption action - were filed in the Circuit Court and, when acted upon by Judge Swanko, were acted upon in his capacity as an Acting Circuit Judge and not in his capacity as a County Judge. Thus, this case is solely one involving the technical question of whether Judge Swanko was properly appointed to serve as an Acting Circuit Judge when he executed the "Agreed Order Regarding Paternity" and the "Final

---

6 The District Court of Appeal erroneously concluded that because the County Judge was "inappropriately assigned" the order and judgment were entered "without jurisdiction over the subject matter". In ***Card v. State,*** **496** So.2d **11**69 (Fla. 1986), this Court held, "A technical flaw in assignment does not strip **a** circuit court of subject matter jurisdiction over a cause which is expressly conferred by law". Here, as aforesaid, both the paternity and adoption actions were filed in the circuit court and the County Judge entered the order and judgment as an Acting Circuit Court Judge, not as a County Judge.

Judgment of Adoption". As such, this case raises the issue of the status of a ***de facto*** judge and the status of orders and judgments entered by a ***de facto*** judge.

The concept of ***de facto*** judges is an ancient one. It is also one which is recognized in nearly every jurisdiction of the United States. A ***de facto*** judge, according to this Court in ***Card v.*** **State, 497** So.2d **1169** (Fla. 1986), is:

> **[A] judge who functions under color of authority but whose authority is defective in some procedural form.** (Id. at **1173).**

Here, Judge Swanko was certainly functioning under color of authority on both occasions at issue in this case. He had been appointed to serve as an Acting Circuit Judge during the period of time in which he entered the "Agreed Order Regarding Paternity" and during the period of time in which he entered the "Final Judgment of Adoption". His appointment as Acting Circuit Judge was for the purpose of hearing "family civil department" cases which include, by definition, paternity and adoption matters.

The sole question here, then, is whether there was a defect in the procedural assignment of the two cases - the paternity matter and the adoption matter - to Judge Swanko as Acting Circuit Judge. That question brings this case squarely within the ***de facto*** judge doctrine.

As early as **1916** the courts of this State recognized that the acts of a ***de facto*** judge - one who acts under color of authority - are valid.

In ***Mendenhall v. State,*** 71 Fla. 552, 72 So. 202 (1918), the appellant attempted to argue that the judge who had heard the case below "was not then and never had been the legal and proper judge of the Sixth Judicial Circuit of the State of Florida for Pinellas County" and had "no authority to preside over the Pinellas County Court".[7] The Court held:

> **There is no contention that [the judge] is not a *de facto* officer, clothed with the State's commission and exercising under legislative authority an office recognized by the constitution. No effective challenge of the *de jure* character of that office has been offered, and short of that the [appellant] may not be heard.**

Following ***Mendenhall*** is a long line of authority within this State regarding the validity of actions taken by *de facto* judges. In ***State ex. rel. Hawthorne v. Wiseheart,*** 158 Fla. 267, 28 So.2d 589 (1948), the concept of ***de*** *facto* judge was employed to validate the acts of a judge who was appointed in violation of a constitutional provision that prohibited a member of the legislature from being appointed to any civil office that was created during the time for which he was elected.

Thereafter, in ***State v. Byington,*** 168 So.2d 164 (Fla. lst **DCA** 1964), a writ of prohibition was sought to prevent a county judge from continuing to act in a certain case because he had attained the age of 70 and the Florida Constitution required that "all justices and

---

7 The basis of the appellant's argument was that the judge resided in Manatee County, not Pinellas County and that the Florida Constitution required circuit judges to reside in the circuit in which they were judges.

judges shall automatically retire at age 70". It was further argued that all of the acts performed by the judge after his 70th birthday were invalid. The First District Court of Appeal held:

> It is apparent that even if the respondent as a county judge does fall within the automatic retirement provision of the Florida Constitution, such does not ipso facto impair the jurisdiction of his office or the validity of his exercise thereof. Affording relator's position its greatest possible effect, the respondent's status is changed only from that of a ***de jure*** judge to a de ***facto*** judge, which in no way impairs his jurisdiction. The official acts of a *de facto* judge are as valid as if he is an officer ***de jure.*** (Id. at 175)

In ***McGhee v. City of Frostproof,*** 289 So.2d 751 (Fla. 2nd DCA 1974), the Second District Court of Appeal was called upon to review an order of the lower court dismissing a certiorari petition filed in the lower court. The petitioner in ***McGhee*** had, at the city court level, moved to disqualify the city judge because she was also the city attorney. The city judge denied the motion and the petitioner sought certiorari review in the circuit court asserting that it was illegal for the judge in question to hold two offices. The circuit court judge dismissed the certiorari petition, finding that certiorari could not be used to question a person's qualifications for office. The District Court of Appeal determined that certiorari was the proper remedy to determine if the city judge's refusal to disqualify herself was a departure from the essential requirements of law. In so holding, the District Court of Appeal also stated:

> As to prohibition, such writ only lies to prohibit a judicial or quasi-judicial officer from acting

> **in excess of his jurisdiction. This isn't the case here since, even if the allegations in the petition are true, the city judge would merely be a *de facto* judge rather than a *de jure* judge; and such fact would neither impair the jurisdiction of her office nor the validity of the exercise thereof.** (Id. at 752, emphasis supplied).

Turning, then, to the most recent decision regarding *de facto* judges, this Court's decision in ***Card v. State,*** 496 So.2d 1169 (Fla. 1986), it is clear that the holding therein follows this established line of precedent.

In ***Card,*** the defendant was charged with crimes which occurred in Bay County, Florida, located within the Fourteenth Judicial Circuit. Upon the defendant's motion for change of venue, the case was transferred to Okalossa County, within the First Judicial Circuit. The trial was conducted in the First Judicial Circuit by Judge Turner, a judge of the Fourteenth Judicial Circuit. However, the Chief Justice of the Florida Supreme Court had never appointed Judge Turner to hear the case in the First Judicial Circuit as was required by Article V, §2(b) of the Florida Constitution.

On petition for writ of habeas corpus, the defendant argued that Judge Turner lacked authority to conduct a trial in the First Judicial Circuit absent an order of temporary assignment. This Court agreed but held that Judge Turner had nevertheless acted as a *de facto* judge and that "the official acts of a *de facto* judge are valid." (Id. at 1173).

The principle that the official acts of a *de facto* judge are valid is an almost universal rule and the policy reasons for the adoption of *de facto* judge principle are uniform from state to state.

In Alabama, in a case involving the issue of whether a district court judge had authority to hear a circuit court case, it was held:

> Even if the judge's blanket authority or authorization to try certain type cases in the circuit court was faulty, he was a de facto judge and his acts as such were valid and unimpeachable. *O'Neill* v. *O'Neill*, 420 So.2d 261 (Ala. Ct. App. 1982)

In California, in a case where it was alleged that the judge presiding over the case had effectively resigned his judgeship by virtue of having accepted an executive appointment, it was held:

> One who claims to be a public officer while in possession of an office, ostensibly exercising its functions lawfully and with the acquiescence of the public, is a *de facto* officer. His lawful acts, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.
>
> The reason for the doctrine is that it is necessary to the supremacy and execution of the laws and that private challenge of the authority of officers in fact would produce inconsistency, confusion and insecurity of rights and of titles to property. *Ensher, Alexander & Barsoom, Inc. v. Ensher,* 238 Cal. App. 2d 250, 47 Cal. Rptr. 688 (1st Dist. 1965)

In ***Raper v. State,*** 317 So.2d 709 (Miss. 1979), the Supreme Court of Mississippi was called upon to determine the validity of a search warrant issued by a "police justice pro tem" as to whom no order of appointment could be located. The "police justice pro tem" issued the search warrant on November 6, 1972, one day before his

resignation. The only order of appointment regarding the "police justice pro tem" was one dated several months after his resignation purporting to be a *nunc pro tunc* order. However, notwithstanding the absence of an order of appointment during the term in which he had served, the "police justice pro tern" had been administered the oath of office, had served in the capacity of "police justice pro tem", and had received a salary for his services.

The Mississippi court first addressed the question of whether the "police justice pro tem" was a *de facto* officer and held:

> An officer de *facto* is one who exercises the powers and discharges the functions of an office, being then in possession of the same under color of authority, but without actual right thereto.

Having concluded that the "police justice pro tern" was a ***de*** *facto* officer, the Court went on to ask, "being at least a *de facto* officer, were the acts of [the police justice] void?" The Mississippi Supreme Court then answered this question as follows:

> There can be but one answer to the question, and that is, the judgment was not void. In all the adjudications we have been able to find, there is not a dissenting voice as to the absolute correctness of this answer. As to the public generally, and as to third persons, the judgment of a special de *facto* judge stands exactly in the attitude of a judgment rendered by a judge *de jure*, and this proposition rests upon considerations affecting the orderly administration of justice, and the welfare of society at large.

There is no question but that these same public policy considerations apply to this case. Here, upon nothing more than innuendo and an unsubstantiated argument, the actions of an

administratively appointed judicial officer acting under color of authority were deemed "void" and a judgment of adoption, perhaps the most sensitive and significant judgment that can be entered by a court, was vacated nearly two years after its entry. Here, the legislative mandate to the courts to "protect and promote the well-being of persons being adopted"[8] was ignored for the sake of an "error" which, if it existed at all, was, at best, a mere technicality? As a result, at risk here, if the opinion of the District Court of Appeal is allowed to stand, are the literally countless numbers of judgments of dissolution of marriage, paternity and adoption entered by Acting Circuit Judges throughout this state.

Turning to the facts of the instant case, it was never contended that the Dade County Circuit Court did not have jurisdiction over the subject matter of either the paternity or the adoption matter herein. The jurisdiction of the Dade County Circuit Court over the person of the Respondent was never contested. It is clear in the record that the Dade County Circuit Court had

---

8

963.022, Florida Statutes (1987)

9

It is significant that none of the allegations contained in Patricia Clark Foster's "Motion for Relief from Judgment" would have been sufficient to set aside either the paternity order or the adoption judgment had the District Court not determined that the order and judgment were "void". **At** the time in question, there was no residency requirement associated with adoption cases, *(See,* 963.185, Florida Statutes (1987); service of process is not required where a party voluntarily submits to the jurisdiction **of** the court by, as here, filing a "Verified Answer" in the paternity action and a "Consent for Adoption" in the adoption case, *(See, e.g., Kirshner **v.** Shernow,* 367 So.2d 713 (Fla. 3rd DCA 1979); lack of independent counsel does not provide grounds for relief from judgment particularly where, as here, no specific fraud was alleged, *(See, e.g., Bubenik **v.** Bubenik,* 393 So.2d 943 (Fla. 3rd DCA 1980); and any alleged "defect" in the consent for adoption or objection thereto is waived after the expiration of thirty days from the entry of a judgment of adoption. *(See,* 963.182, Florida Statutes (1987).

jurisdiction of the subject matter and of the person of the Respondent and had power to proceed to judgment. The alleged "defect" was not one affecting the jurisdiction of the court but, rather, the right and authority of the presiding judge to act as such. The presiding judge, however, was acting under color of authority by virtue of the Administrative Order authorizing him to serve as an Acting Circuit Judge. If then, there was any "defect" at all, the "defect" was in the technical assignment of the particular, individual case to the Acting Circuit Judge.

Comparing these facts to those of the numerous decisions of the various states regarding the establishment of de facto status, one finds that a "defective assignment" is clearly within the type of technical error which gives rise to such de facto status. Among such technical errors which have been held to result in de facto status are:

1. The entry of a circuit court judgment by a district court judge. *O'Neill v. O'Neill*, 420 So.2d 261 (Ala. Ct. App. 1982);

2. The continued action in a cause by a special judge after the authority of the special judge had terminated. *Shanhold v. State*, 448 N.E.2d 308 (Ct. App. Ind. 1983);

3. The appointment of a "judge pro tempore" to act in the presence of the regular judge where, under the established law of the state, a court may not have two judges with power and jurisdiction to act in the same case at the same time. *Survance v. State*, 465 N.E.2d 1076 (Ind. 1984);

4. The appointment of a commissioner by an assistant chief judge who had not been reappointed as assistant chief judge

following the reappointment of the chief judge. *Koss v. City of Cedar Rapids, Iowa*, 271 N.W.2d 730 (Iowa 1978);

5. The appointment of a special judge by a circuit judge where no authority for such appointment existed. *Brinkerhoff-Faris Trust and Savings Company v. Gaskill,* 201 S.W.2d 274 (Mo. 1947);

6. The election of a judge who was not eligible to serve because he had attained the mandatory retirement age. *Duncan v. Beach, et. al.*, 242 S.E.2d 796 (N.C. 1978);

7. The appointment of a judge who was not licensed to practice law in the state. *State v. Mayhew*, 207 N.W.2d 330 (N.Dak. 1973);

8. A county judge presiding over a Superior Court case in the absence of any record evidence of an appointment. *State v. Pillo*, 104 A.2d 50 (N.J. 1954);

9. The appointment of a judge as an Acting Supreme Court judge in the absence of any authority for such appointment. *Devine v. Scully,* 110 A.D.2d 773 (N.Y. 2nd App. Div. 1985);

10. The actions of judicial officers where the legislation conferring authority upon them to act has been declared unconstitutional. *McLeod v. Court of Probate,* 223 S.E.2d 166 (S.C. 1976).

In all of the foregoing cases and in numerous others, the actions of the de facto officers were deemed valid despite the flaws and defects in their appointments, or, in some cases, despite the total lack of authority for their appointment.

Here, the decision of the District Court of Appeal, Third District, holding that the order and judgment entered by the Acting

Circuit Judge were "void" because of an "improper assignment" is directly contrary to all of the established law of this state and of nearly every jurisdiction in the United States. As such, the decision of the District Court of Appeal, Third District, must be quashed.

CONCLUSION

Upon the argument and authority contained herein, the Petitioner submits that the opinion of the District Court of Appeal, Third District, herein must be quashed because:

1. The Court's finding that the County Judge was "never appropriately assigned" is belied by the record and was not predicated upon any factual or evidentiary support;

2. The Court's determination that an "inappropriate assignment" of a County Judge to serve as an Acting Circuit Judge results in "void" adjudications is contrary to the manifest weight of authority of all of the jurisdictions of the United States and is contrary to all of the established law of this Court and this state.

Respectfully submitted,

LAW OFFICES OF
MELVYN B. FRUMKES & ASSOCIATES, P.A.

and

LAW OFFICES OF
GREENE AND GREENE, P.A.
Attorneys for the Petitioner

BY: _____
CYNTHIA L. GREENE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief on the Merits was served by mail this 20th day of June, 1989, upon counsel for the Respondent, Ira M. Elegant, Buchbinder & Elegant, **P.A.,** Commonwealth Building, Fourth Floor, **46** Southwest First Street, Miami, Florida, 33130.

LAW OFFICES OF
GREENE AND GREENE, P.A.

BY: _____
CYNTHIA L. GREENE