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IN THE SUPREME COURT OF FLORIDA
Case No. 73,696

[Third District Court Case No. 88-1451]

MICHAEL STEIN,

Petitioner,

vs.

PATRICIA CLARK FOSTER and
BRENT FOSTER, her husband

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION ON JURISDICTION

(Conflict Certiorari)

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STATEMENT OF THE CASE AND FACTS

Petitioner, MICHAEL STEIN[1/] seeks review of the Third District Court of Appeal's decision in *Foster v. Stein*, 534 So.2d 1218 (Fla. 3d DCA 1988). The opinion[2/] reflects the following:

A Dade County, county court judge (designated as an "acting circuit judge" for certain limited matters by administrative orders) entered an Agreed Order Regarding Paternity and a Final Judgement of Adoption concerning a dispute arising from a surrogate parenting agreement. Pursuant to the pertinent administrative orders of the Chief Judge of the 11th Judicial Circuit, the county court judge who executed the order and judgment was never appropriately assigned to the cause as an acting circuit court judge [PA 53-54].

1/ The Petitioner, MICHAEL STEIN is the purported natural father who filed an action seeking declaratory relief and a determination of paternity. Hyatt Stein, MICHAEL STEIN's wife is the adoptive mother. Respondent, PATRICIA CLARK FOSTER is the natural mother of the child. Respondent, BRENT FOSTER is the natural mother's husband. The parties will be referred to interchangeably by Supreme Court standings, descriptively or by proper names wherever clarity is best served. All emphasis is supplied unless otherwise indicated. The following symbols will be used: "PA" - Petitioner's Appendix.

2/ In his jurisdictional brief and in his statement of the facts Petitioner improperly refers to "facts" which are not before this Court as they are not stated in the opinion of the District Court of Appeal, Third District. Conflict" must appear within the four corners of the majority decision". *Reeves v. State*, 485 So.2d 829, 830 (Fla. 1986).

Respondents filed a Verified Motion for Relief from Judgment in which they argued that the paternity order and judgment of adoption were void because the county court judge lacked subject matter jurisdiction; the "surrogate mother, the "natural" father, his wife, the adoptive mother and the child were and are Michigan residents who had no contact with this State; and that order and the judgment should be set aside because of extrinsic fraud in that Respondents' "independent" counsel first represented them and later represented the adoptive parents [PA 53-54].

The county court judge was subsequently properly assigned by order to hear solely the Verified Motion for Relief from Judgment. He denied the motion. The District Court of Appeal reversed, holding that only the circuit court has subject matter jurisdiction in paternity and adoption proceedings. The Third District held that since the county court judge was not properly assigned pursuant to the Administrative Orders, he was not a qualified circuit court judge. The county court judge's order and judgment were entered without subject matter jurisdiction and were void [PA 53-54].

SUMMARY OF ARGUMENT

The decision below does not conflict with Card v. State, 497 So.2d 1169 (Fla. 1986), where a circuit court judge, whose jurisdiction is uniform thoughout the State, tried a case without

objection. Unlike Card, in the instant case the county court judge never had jurisdiction over adoption and paternity proceedings and lack of subject matter jurisdiction could not be waived. Moreover, subject matter jurisdiction cannot be conferred by consent.

There is no conflict with State v. Wiseheart, 158 Fla. 267, 28 So.2d 589 (1946), where the Petitioner never questioned the validity of the acts of the judge and the constitutional impediment to the judge's title had long since lapsed.

Although Petitioner suggests otherwise, public policy cannot generate conflict. This decision merely applies a long established rule that judges must have subject matter jurisdiction.

ARGUHENT

THE DECISION SOUGHT TO BE REVIEWED DOES NOT EXPRESSLY AND DIRECTLY CONFLICT ON THE SAME QUESTION OF LAW WITH THE DECISIONS CITED BY PETITIONER.

A. NO BASIS FOR REVIEW

Respondents submit that there is no express and direct conflict with the decisions cited by Petitioner on the same question of law, as required by Art. V., Sec. 3(b)3, Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv). Therefore, the review sought should be denied.

Conflict exists when two decisions are "wholly irreconcilable" or where decisions collide so as "create an

inconsistency or conflict". Williams v. Dugan, 153 So.2d 726 (Fla. 1963); Kinkaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963). "Conflict must be such that if the latter decision and the earlier were rendered by the same Court, the former would have the effect of overuling the latter." Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).

Jurisdiction cannot be envoked because the Supreme Court disagrees with the District Court of Appeal's decision or because the Supreme Court would have made a different factual determination if it had been trier of fact. Mansini v. State, 312 So.2d 732 (Fla. 1975). Conflict "...must appear within the four corners of the majority decision..." Reeves v. State, 485 So.2d 829, 830 (Fla. 1986). Conflict must also be express and direct, not inherent or implied. Department of Health v. Nat. Adoption Counseling, 498 So.2d 888 (Fla. 1986).

B. THE DECISION IS IN COMPLETE HARMONY WITH CARD V. STATE, 497 So.2d 1169 (Fla. 1986)

In Card v. State, 497 So.2d 1169 (Fla. 1986), a defendant was charged with crimes in the 14th Judicial Circuit. Pursuant to the defendant's motion for change of venue, the case was transferred to the 1st Judicial Circuit. The trial was conducted in the 1st Judicial Circuit by Circuit Court Judge Turner of the 14th Judicial Circuit. The Chief Justice of the Florida Supreme Court never appointed Circuit Court Judge Turner to hear the case in the 1st Judicial Circuit. The Supreme Court agreed that Circuit Court Judge

Turner was not authorized to preside over the cause in the 1st Judicial Circuit. However, the Court held that the lack of an official assignment of a visiting <u>circuit court judge</u> to another circuit did not necessarily deprive the other court of subject matter jurisdiction stating:

> A technical flaw in assignment does not strip a Circuit Court of subject matter jurisdicition over a cause which is expressly conferred by law. <u>Id</u>. at 1173.

Unlike <u>Card</u>, the judge who entered the judgment and order at issue here was a county court judge. County court judges are not authorized to hear actions for declaratory relief pursuant to Chap. 86, <u>Fla. Stat.</u>, (1988). Those actions are to be brought in the circuit court. Jurisdiction is determined by statute and the <u>Fla. Const</u>. Reference to the applicable administrative orders determines the authority of a county court judge who is assigned as an acting circuit court judge. Pursuant to the applicable adminstrative orders, the county court judge was not properly assigned as an acting circuit court judge to consider either a paternity or an adoption case. A judge's authority is limited to those powers fixed by law. <u>See</u>, Art. V, Sec. 5(b), <u>Fla. Const.</u>

Here, the failure to comply with administrative orders of the 11th Judicial Circuit in assignment is not mere technical flaw, as in <u>Card</u>, where a circuit Court judge sat in another circuit. Here a county court judge heard a matter which could <u>only</u> be heard by a circuit court judge. In this case, unlike <u>Card</u>, the county court

judge lacked subject matter jurisdiction over the cause. The lack of the official assignment in Card, was a mere technicality because jurisdiction of the circuit court is uniform throughout the state. In Card, there was subject matter jurisdiction.

A county court judge does not have the power to hear a declaratory action. Therefore, any action taken by a county court judge, who is not properly assigned to sit as a circuit court judge, is taken without authority and therefore void. In Caudell v. Leventis, 43 So.2d 853, 855 (Fla. 1950) the Supreme Court stated:

> Inasmuch as judicial power to enter an order or judgment extends only to subjects over which the Court or judge has jurisdiction, and a final order or judgment entered in a judicial proceeding as to a subject not within the judicial power of the court or judge is nullity, see Seaboard Airline Railway v. Maxey, 64 Fla. 487, 60 So. 353 [1912]...

In Corak Construction Corp. v. Scott, 184 So.2d 460 (Fla. 3d DCA 1966) the District Court of Appeal, Third District, reversed a judgment entered by the Civil Court of Record which granted recission, since jurisdiction for recission was reposed in equity. In Falkner v. Amerifirst Federal Savings & Loan Association, 489 So.2d 758 (Fla. 3d DCA 1986) the court reversed an order denying relief from a judgment which was entered without service of process. The judgment was void. In the instant case, the county court judge did not have subject matter jurisdiction and the paternity order and judgment of adoption he entered were void.

The decision of the District Court of Appeal is in harmony

with Card, because in Card, the defendant failed to object when Circuit Court Judge Turner presided over his case. Since Judge Turner was a circuit court judge and the circuit court had subject matter jurisdiction, his actions were merely voidable as those taken by a de facto judge. Failure to timely object constituted a waiver. There was subject matter jurisdiction.

In the instant case, Respondent filed a timely Verified Motion for Relief from Judgment based upon the lack of subject matter jurisdiction. The paternity order and judgment of adoption were not merely voidable, but void, because the county court judge did not have subject matter jurisdiction. There was no waiver. Subject matter jurisdiction could not be conferred by consent.

C. THERE IS NO CONFLICT WITH STATE V. WISEHEART, 158 Fla. 267, 28 So.2d 589 (1946).

The State of Florida through quo warranto proceedings challenged the title of a legislator who was improperly appointed as a circuit court judge during his term in the legislature in State v. Wiseheart, 158 Fla. 267, 28 So.2d 589 (1946). On its face, the Constitution prohibited the appointment only during the period for which one was elected to the legislature. The challenge was brought two (2) years after the judge's legislative term had expired. Since the appointment on its face was regular and confirmed, the Supreme Court held as follows:

> ...Wiseheart's technical disqualification was

> relieved long before the assualt was made on his title, and whether his status at the present is that of a *de facto* or a *de jure* officer is not material to this suit. 28 So.2d at 593

The Supreme Court also noted that if the judge's title had been challenged during the period he was serving in the legislature, the judge would "no doubt" have been declared ineligible and ousted.

State v. Wiseheart, supra is in harmony with the decision of the Third District below. In *Wiseheart*, the petitioner never raised the question of whether the judge's official acts were void. In fact, his position was that the judge's acts were valid even though he challenged the judge's title to his office. In contrast, the issue squarely before the Third District in the instant case was whether an order and judgment which could only be entered by a circuit court judge were void since they were entered by a county court judge who lacked subject matter jurisdiction. The Supreme Court in *Wiseheart, supra*, was not called upon to determine the issue decided by the District Court of Apeal below.

D. THE "PUBLIC POLICY" ARGUMENT

Petitioner's "public policy argument" is without merit since public policy cannot generate conflict. *Carlin v. City of Miami Beach*, 113 So.2d 551, 553 (Fla. 1959). The decision does not announce a rule of law which is in disharmony with the cited cases, but rather applies an established rule of law concerning subject matter jurisdiction to the particular facts of the instant case. Although the decision is certainly of importance to the litigants,

its importance is primarily limited to the litigants themselves and does not extend beyond them.

Petitioner's arguments regarding the perils confronting persons with judgments of dissolution of marriage and adoption are without merit. Judgments entered by acting circuit court judges who are properly appointed are not at risk. Chap. 86, Fla. Stat. (1988) clearly reflects that only a circuit court judge has jurisdiction to hear actions for declaratory relief. Petitioner asks this Court to circumvent Chap. 86, Fla. Stat. (1988) by expanding the jurisdiction of a county court judge who was not properly appointed to act as circuit court judge. This only the legislature can do. Litigants who follow the procedure mandated by local administrative orders are no more at risk after this decision than before the Third District ruled below. If the appropriate procedures set forth in the administrative orders had been followed below there would be no question as to the county court judge's jurisdiction to enter the final judgment and order.

CONCLUSION

The decision sought to be reviewed does not contain any statement of law capable of causing confusion or disharmony in the law of the State. It merely confirms the rule that only the circuit court has jurisdiction in paternity and adoption proceedings and that orders entered without jurisdiction over the subject matter are

void. The Third District's decision is not the kind of decision which the Constitution contemplates as being reviewable, and thus, review should be denied.

Respectfully submitted,

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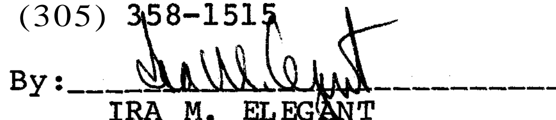

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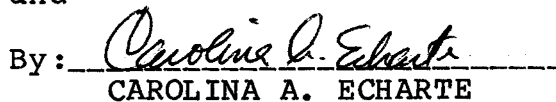
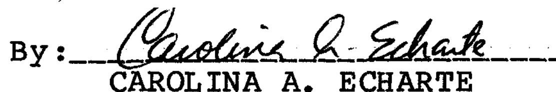


By:____________________
CAROLINA A. ECHARTE

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been furnished, by mail, to: GREENE AND GREENE, P.A., Suite 601, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132, this 24th day of March, 1989.



By:____________________
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