OA 10-6-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,696

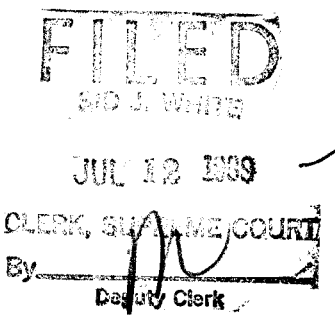
MICHAEL STEIN,

Petitioner,

VS.

PATRICIA (CLARK) FOSTER and BRENT FOSTER

Respondents.



RESPONDENTS' BRIEF ON THE MERITS

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TABLE OF CITATIONS

OTHER AUTHORITIES

STATEHENT OF THE CASE AND FACTS

The petitioner[1/] filed his Notice to Invoke Discretionary Jurisdiction directed to a decision of the District Court of Appeal of Florida, Third District, and on May 26, 1989, this Court entered its Order Accepting Jurisdiction and Setting Oral Argument. As provided in the Florida Appellate Rules, this brief addresses the merits of the controversy. Petitioner 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 below provides in part:

> ...only the circuit court, acting through a duly qualified circuit judge, has jurisdiction in paternity and adoption proceedings, Art. V., Sec. 5(b), Fla. Const., the order and judgment were entered without jurisdiction over the subject matter and are totally void. ...[T]he appellant's motion under Florida Rule of Civil Procedure 1.540(b)(4) for relief from the order and judgment as void should have been granted. (Citations and footnotes omitted.)

Patricia (Clark) Foster signed a Surrogate Parenting Agreement ("Agreement"), believing that she was represented by

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1/ Respondent Patricia (Clark) Foster is the natural mother of the child. Respondent Brent Foster is the natural mother's husband. The Petitioner, Michael Stein, is the purported natural father. Hayat Stein, Michael Stein's wife is the adoptive mother. 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: "PAM" - Petitioner's Appendix to Brief on the Merits; and "R" - Record on Appeal.

an independent counsel [R: Vol III 24-35]. Herbert A. Brail, Esq. signed an Acknowledgment of Independent Counsel indicating that he represented Foster [R: Vol III 431. On December 19, 1986 Petitioner, Michael Stein, filed a "Petition for Declaratory Relief Relevant to Adoption and for Supplemental Relief" which attached a "Consent for Adoption" allegedly signed by Patricia Foster [R: Vol I 1-21. Although it appears that Patricia Foster's signature was affixed to the consent, the acknowledgment is false as Foster never signed any document in the presence of a notary or two witnesses [R: Vol I 37-38].

At the time the action was filed in Dade County, Florida all parties were Michigan residents and the Respondents were never served with process in connection with this proceeding [R: Vol I 381. At that time the child, who is the subject of this paternity and adoption action, was not even born [R: Vol I 381.

The child was born on 1987 in Michigan. The infant was never within the territorial jurisdiction of the Florida Courts. The Court did not appoint a guardian ad litem to act for the child [R: Vol. I 381.

This cause was assigned to Circuit Judge Edward N. Moore, Division 16. Nevertheless, the matter was heard by County Court Judge Edward Swanko, who was an acting circuit court judge in certain limited instances pursuant to various administrative orders. None of the administrative orders authorized a county court judge to hear and determine a

declaratory action concerning paternity as in the instant case [R: Vol I 3-26, Vol II 11. Nevertheless, on December 19, 1986, County Court Judge Swanko entered an "Agreed Order Regarding Paternity" [R: Vol I 27-28].

Only Administrative Order 87-59 authorized county court judges to hear "uncontested adoptions". Pursuant to Administrative Order 87-59, Judge Edward Swanko and others were assigned to temporarily serve as:

> Acting and temporary Judges of the FAMILY CIVIL DEPARTMENT of the FAMILY DIVISION of the Circuit Court, to hear, try, conduct, determine and dispose of these cases assigned to them by the Associate Administrative Judge of the FAMILY DIVISION of the Circuit Court, effective May 1, 1987 through and inclusive to May 31, 1987 and thereafter dispose of all those matters considered by them during said period. [R: Vol I 41

Although there is no order from the Associate Administrative Judge of the Family Division appointing County Court Judge Swanko to hear the adoption below, Judge Swanko entered a "Final Judgment of Adoption" on May 29, 1987 [R: Vol I 331.

The file was sealed on June 18, 1987. As early as July 16, 1987 Dale L. Bernstein, Esq. filed a Notice of Appearance on behalf of Patricia Foster and on July 22, 1987 filed a motion to inspect the file alleging that the natural mother had reasonable cause to believe that there had been fraud, undue influence, duress and illegal acts on the part of the Petitioner. On Septemer 28, 1987 the Court entered an order

denying Foster's "Motion to Inspect the File". She filed another "Verified Motion to Inspect the Pile" on October 7, 1987. That motion was denied on November 25, 1987. A second "Verified Motion to Inspect the File" was filed on December 7, 1987. That motion was denied by Order dated February 8, 1988 [R: Vol I 46-47]. All of these Orders were entered by County Judge Swanko.

On April 15, 1988, Patricia (Clark) Foster and Brent Foster filed a "Verified Respondents' Motion for Relief from Judgment and Memorandum of Law" pursuant to Fla. R. Civ. P. 1.540(b)(3)(4) [R: Vol I 37-45]. They urged that the "Agreed Order Regarding Paternity" and the "Final Judgment of Adoption" were void because Judge Swanko lacked jurisdiction to enter those orders. In addition, the "Consent for Adoption", allegedly signed by Patricia Foster, the natural mother, was not in fact signed in the presence of the notary or the witnesses. The Respondents were Michigan residents who were not served with process and the child, at the time the Petition was filed, was not yet born. None of the parties were Florida residents and the infant was never within the territorial jurisdiction of the court. The Fosters also stated that Herbert A. Brail, who was supposedly their "independent" counsel, was in fact an attorney in the law firm of Noel P. Keane, the attorney representing the natural father. In a letter dated August 29, 1986 from the law offices of Noel P. Keane to Patricia Foster, Herbert A. Brail was listed as an

attorney in the law firm. That same letter stated that Mr. Jasinski would be representing Patricia Foster's interests. Incredulously, Robert M. Jasinski, appeared on behalf of Hayat Stein in this action and filed the Petition for Adoption on behalf of Hayat Stein.

To ensure that any order on the "Verified Respondents' Motion for Relief from Judgment" would not suffer from the same infirmities as the orders on paternity and adoption, Respondents filed a "Motion to Determine Trial Judge" [R: Vol I 34-35]. This Motion was set for hearing before Hon. John Gale, in his capacity as Administrative Judge of the Dade County Circuit Court. Petitioner's counsel agreed to an Order appointing Judge Edward Swanko as an acting circuit court judge solely to hear the "Verified Motion" [R: Vol I 361. At the hearing on the "Verified Respondents' Motion for Relief from Judgment", Judge Swanko heard brief argument and summarily denied the Motion. No opportunity to present testimony and evidence was given to the Fosters [R: Vol II 71.

Patricia Foster sought review in the District Court of Appeal, Third District. That Court reversed the lower court's order finding that the county court judge had never been appropriately assigned to the cause as an acting circuit court judge. The order and judgment were entered without subject matter jurisdiction since only the circuit court, acting through a duly qualified circuit court judge, has jurisdiction

in paternity or adoption proceedings.

The District Court of Appeal, Third District, noted the disturbing fact that all of the parties herein are Michigan residents who never set foot in Florida. The Court also found that the Motion for Relief from Judgment was also properly based on allegations of extrinsic fraud relating to the subsequential representation by the same counsel[2/] of, first, the surrogate mother and then the adoptive parent [PAM: 31. These proceedings ensued in the Supreme Court of Florida.

SUMMARY OF ARGUMENT

Only the circuit court has jurisdiction over declaratory actions. None of the administrative orders authorized and appointed County Court Judge Swanko to hear such actions. He lacked subject matter jurisdiction to enter the "Agreed Order Regarding Paternity". Similarly, none of the administrative orders in effect appointed County Court Judge Swanko to enter the "Final Judgment of Adoption". The clear language of the administrative orders reflect that they are not self-executing. See, Klosenberg v. Klosenberg, 419 So.2d 421 (Fla. 3d DCA 1982).

The county court judge cannot be considered a de facto circuit court judge since he lacked subject matter jurisdiction, the Respondents directly challenged his

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2/ Mr. Jasinski, the lawyer selected by Noel P. Keane for Patricia Foster.

jurisdiction in a timely fashion and never acquiesced to his actions. Orders entered without subject matter jurisdiction are void. Treasure, Inc. v. State Beverage Dept., 238 So.2d 580, 586 (Fla. 1970); Caudell v. Leventis, 43 So.2d 853 (Fla. 1950); Corak Construction Corp. v. Scott, 184 So.2d 460 (Fla. 3d DCA 1966).

The decision of the District Court of Appeal, Third District, should also be approved because it is clear that Respondents did not have the advice of an independant counsel. The attorney who signed the "Acknowledgement of Independant Counsel" was an attorney in the office of Petitioner's attorney. Another attorney, who was supposedly acting on Respondents' behalf, later represented the adoptive mother, Mrs. Stein, herein. The "Verified Respondents' Motion for Relief from Judgment" was properly based on a flagrant case of extrinsic fraud. DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984).

Finally, since: (a) all of the parties are Michigan residents; (b) the child was born in Michigan; (c) the Agreement was entered into in Michigan; and the parties selected Michigan law in the Agreement, Florida has no state interest in applying its laws which conflict with Michigan laws. The "Final Judgment of Adoption" is unconstitutional because the lower court improperly applied Florida law. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

ARGUMENT I

THE COUNTY COURT JUDGE LACKED JURISDICTION TO ENTER AN ORDER IN AN ACTION FOR DECLARATORY RELIEF AND THE "FINAL JUDGMENT OF ADOPTION" PURSUANT TO THE ADMINISTRATIVE ORDERS.

Pursuant to Ch. **86,** Fla. Stat., actions for declaratory relief are to be brought in circuit court. County court judges are not authorized to hear actions for declaratory relief. None of the administrative orders below authorized a county court judge to hear **a** declaratory action [R: Vol I **3-26,** Vol II **11.** County Court Judge Swanko was without subject matter jurisdiction to enter the 'Agreed Order Regarding Paternity".

Absent an appropriate adminstrative order contemplated by Administrative Order **87-9,** a county court judge could not have entered the "Final Judgment of Adoption". None of the administrative orders in force during the pertinent periods authorized county court judges, and specifically County Court Judge Swanko, to consider the instant action for adoption absent an order appointing him. There was no such order.

Administrative Order **87-9** which granted authority to hear uncontested dissolutions of marriage, uncontested adoptions and change of name cases, provided as follows:

> These matters will be heard by County Court Judges, as acting Circuit Court Judges of the Eleventh Judicial Circuit of Florida under appropriate administrative order of the Chief Judge of this Circuit. [R: Vol II 11

Administrative Order **87-9** is not self executing. Similarily Administrative Order **87-59** requires an order from the Associate

Administrative Judge of the Family Division to hear an uncontested adoption [R: Vol I 3-41. The record is devoid of such an order.

Relying on Administrative Order 87-9 and a memorandum dated February 3, 1988[3/], Petitioner now argues that County Court Judge Swanko was properly assigned to the case. It is clear, however, that Administrative Order 87-9 could not give County Court Judge Swanko authority to hear paternity cases. That Order is limited to uncontested dissolutions of marriage, uncontested adoptions and change of name cases. Therefore, County Court Judge Swanko did not have subject matter jurisdiction to enter the "Agreed Order regarding Paternity".

The memorandum relied upon by Petitioner is nothing more than a red herring. First, the memorandum is dated over two (2) years after County Court Judge Swanko entered the "Agreed Order Regarding Paternity" and is dated over eight months later than the "Final Judgment of Adoption" [PAM: 1].

Secondly, Administrative Order 87-9 granted authority to hear uncontested dissolutions of marriage, uncontested adoptions and change of name cases only where there had been "an appropriate administrative order of the Chief Judge of the Circuit" [R: Vol II 1-21. There was none here. Petitioner

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[3/] Injected into these proceedings for the first time as an exhibit to the Steins' Motion for Rehearing filed in the Third District below.

incorrectly seeks to elevate a mere memorandum to the status of an order of the Chief Judge of the Eleventh Judicial Circuit. Administrative Order **87-59** authorized a county court judge to hear uncontested adoptions and enter a final judgment of adoption in cases "assigned to them by the Associate Administrative Judge of the Family Division of the Circuit Court" **[R:** Vol I **4].** There is no order from the Associate Administrative Judge of the Family Division appointing County Court Judge Swanko to hear the uncontested adoption **[R:** Vol I **46-47].** Notwithstanding that, County Court Judge Swanko entered a "Final Judgment of Adoption" on May **29, 1987 [R:** Vol **I 331.**

Even counsel for Petitioner recognized the necessity for an order appointing County Court Judge Swanko in the instant case by agreeing to the entry of the "Agreed Order Appointing Acting Circuit Court Judge" dated May **2, 1988** which allowed County Court Judge Swanko to hear the "Verified Respondents' Motion for Relief from Judgment" [R: Vol I **361.** The Third District noted that County Court Judge Swanko was properly appointed to hear only that Motion [PAM: **31.**

To adopt Petitioner's argument that **a** specific assignment is not required for a County Court Judge to hear an uncontested adoption would render the language in Administrative Order **87-9** and Administrative Order **87-59** meaningless. Such construction is not favored. See, Wilensky v. Field, **267 So.2d** 1 (Fla. **1972);** Peoples Gas System, Inc. **v.**

City Gas Company, 147 So.2d 334 (Fla. 3d DCA 1962).

Based upon a memorandum which was not properly a part of the record in the Third District Court of Appeal and is not properly a part of the record before this Court[4], Petitioner now argues for the first time that an evidentuary hearing was required to determine whether an order was necessary to assign County Court Judge Swanko to hear this matter. Such an evidentiary hearing is unnecessary and superfluous in view of the clear language of the administrative orders which contemplate an order appointing a county court judge as an acting circuit court judge.

ARGUMENT II

A COUNTY COURT JUDGE WHO HAS NO SUBJECT MATTER JURISDICTION OVER A DECLARATORY ACTION AND WHO WAS NOT PROPERLY APPOINTED AS AN ACTING CIRCUIT COURT JUDGE CANNOT BE CONSIDERED A DE FACTO CIRCUIT COURT JUDGE AND THE ORDERS ENTERED BY THE COUNTY COURT JUDGE ARE VOID.

The cases relied upon by Petitioner are all distinguishable because in those, the de facto judges had subject matter jurisdiction. In this case, the District Court of Appeal, Third District, found as follows:

> Since only the circuit court, acting through a duly qualified circuit judge, has jurisdiction in paternity and adoption proceedings, Art. V., Sec. 5(b) Fla. Const., the order and judgement were entered without jurisdiction of the subject matter and are totally void. [PAM: 2-31

4/ "Respondents' Verified Motion to Strike and for Sanctions" filed on June 22, 1989 remains pending before the Court.

Petitioner relies upon Card v. State, 497 So.2d. 1169 (Fla. 1986), where a defendant was charged with crimes in the Fourteenth Judicial Circuit. The case was transferred to the First Judicial Circuit where the trial was conducted by Circuit Court Judge Turner of the Fourteenth Judicial Circuit. The Chief Justice of the Florida Supreme Court had never appointed Circuit Court Judge Turner to hear the case in the First Judicial Circuit. Although the Supreme Court agreed that the circuit judge was not authorized to preside over that cause in the First Judicial Circuit, the Court held that the lack of an official assignment of a visiting circuit court judge 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 jurisdiction over a cause which expressly conferred by law. Id. at 1173.

The lack of an official assignment in Card, supra, was a mere technicality because the jurisdiction of the circuit court is uniform throughout the State. In Card, supra, there was subject matter jurisdiction.

Similarly, Mendenhall v. State, 71 Fla. 552, 72 So. 202, 203-204 (1916), the appellant questioned a circuit court judge's right to preside in a county in which he did not reside. The Court stated:

> This plea likewise goes to the right of Judge Reaves to exercise the duties of an office admitted to exist, that is the

> judgeship of the Sixth judicial circuit, of which Pinellas county is a part.
>
> There is no contention that Judge Reaves is not a de facto officer, clothed with the state's commission and exercising under legislative authority an office recognized by the Constitution.

In Mendenhall, supra, the plea challenged the officer, rather than the office. There was never a contention that subject matter jurisdiction did not exist. Unlike Mendenhall, supra, in the instant case, Respondents directly challenged the subject matter jurisdiction of a county court judge to enter orders which only a circuit court judge could enter.

Petitioner gains no solace from State v. Byington, 168 So.2d 164, 175 (Fla. 1st DCA 1964), where the Court determined that prohibition would not lie to challenge a county court judge from continuing to act becausehe had attainedthe age of seventy and had automatically become retired under the Constitution. The Court stated:

> It [prohibition] is available to prevent the exercise of jurisdiction where none exists and where the court exceeds its power. It is apparent here 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 iure judge to a de facto judge, which in no way impairs his jurisdiction.

Such is not the case here, where a county court judge lacked subject matter jurisdiction. In McGee v. City of

Frostproof, 289 So.2d 751 (Fla. 2d DCA 1974) cited by Petitioner, the Court determined that certiorari was the proper procedure to review the actions of a city judge who failed to recuse herself. In discussing other appellate remedies, the Court noted that prohibition would not lie to prohibit a presiding city judge who was also the city attorney from presiding over a matter because that would neither impair the jurisdiction of her office nor the validity of the exercise thereof. In McGee, supra, the judge held two offices, one of which was the office of the city judge. There was no contention that the city judge did not have jurisdiction over the subject matter of the offense. In State v. Wiseheart, 158 Fla. 267, 28 So.2d 589 (Fla. 1946), the State of Florida through quo warranto proceedings challenged the title of a member of legislature who was improperly appointed as a circuit court judge during his term in the legislature. The appointment was prohibited by the Constitution only during the period for which one was elected to the legislature. The challenge was brought two years after the judge's legislative term had expired. The appointment, on its face, was regular and confirmed. The Supreme Court held that:

> Since the technical disqualification had long since been relieved his status as a de facto or a de jure officer was not material.

In Wiseheart, supra, the Petitioner's position was that the judge's acts were valid even though he challenged the judge's

title to his office. In contrast, the issue here is whether the 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 decisions from other states cited by Petitioner are inapposite. In O'Neill v. O'Neill, 420 So.2d 261, 263 (Ala. Ct. App. 1982); Shanholt v. State of Indiana, 448 NE.2d 308, 312 (Ct. App. Ind. 1983); Survance v. State, 465 NE.2d 1076, 1081 (Ind. 1984); Koss v. City of Cedar Rapids, 271 NW.2d 730, 736 (Iowa 1978); Brinkerhoff-Faris Trust and Savings Co. v. Gaskill, 201 SW.2d 274, 275 (Mo. 1947); and State v. Pillo, 104 A.2d 50, 53 (N.J. 1954), the parties failed to object or acquiesced to the officer's acts. Such is not the case here. In Raper v. State, 317 So.2d 709 (Miss. 1975), although the city clerk found no record of the appointment of a police justice pro tem, there was an order reflecting that the justice had been appointed, sworn and recorded. There is no such appointment here.

In McLeod v. Court of Probate, 223 SE.2d 166 (S.C. 1976), the attorney general, not the affected parties, sought to determine the constitutionality of various statutes conferring authority upon judicial officers. Although the statutes were unconstitutional, the officers were de facto officers and not subject to collateral attack. Similarly, in quo warranto proceedings to determine conflicting claims to an

office improperly filled by a judge who was over the age of retirement, the court found that the judge nonetheless was certified by the Board of Elections, sworn and served as a district court judge and his resignation caused a vacancy to be filled by the Governor. Duncan v. Beach, 242 SE.2d 796 (N.C. 1978). There was no question of subject matter jurisdiction made by a litigant. In State v. Mavhew, 207 NW.2d 330 (N.D. 1973), both the defendant and the State agreed that a county justice appointed by the Board of County Commissioners was a de facto county justice and all parties agreed that the district court erred in setting aside the preliminary investigation of the justice. Respondents herein have never agreed that County Court Judge Swanko had any authority to enter the orders in question. In Devine v. Scully, 487 N.Y.S. 2d 615 (A.D. 2 Dept. 1985), the court merely held that the issue of the propriety of a judge's appointment could not be reviewed collaterally in habeas corpus proceedings after the trial.

County court judges are not authorized to hear actions for declaratory relief pursuant to Chapter 86, Fla. Stat., (1988). Those actions are to be brought solely in the circuit court. Jurisdiction is determined by Statute and the Florida Constitution. Reference to the applicable administrative order determines the authority of a county court judge who is assigned as an acting circuit court judge. Pursuant to the applicable administrative orders, Hon. Edward Swanko, a County Court Judge, was not assigned as an active circuit court judge

to consider either a paternity or an adoption case.

The failure to comply with administrative orders in assignment is not a mere technical flaw. Here, a county court judge heard a matter which could only be heard by a circuit court judge.

A county court judge does not have the power to hear a declaratory action. 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:

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

The District Court of Appeal, Third District, reversed a judgment entered by the civil court of record, which granted rescission since jurisdiction for rescission was reposed in equity. Corak Construction Corp. v. Scott. 184 So.2d 460 (Fla. 3d DCA 1966). In Falkner v. Amerifirst Federal Savinus & Loan Association, 489 So.2d 758 (Fla. 3d DCA 1986), the Court reversed an order denying relief from judgment which was entered without service of process since the judgment was void.

In Treasure, Inc. v. State Beverage Dept., 238 So.2d 580 (Fla. 1970), the Supreme Court of Florida considered whether, under the Florida Constitution, a substitute official appointed as beverage director must be formally commissioned and take an oath before he has jurisdiction to act. The Governor wrote a letter to a juvenile judge appointing him as substitute beverage director to hear the cause. Prior to the hearing, the petitioner filed a suggestion of lack of jurisdiction and authority, stating that the letter of appointment was insufficient to confer jurisdiction. The Court acknowledged that until title to an office was adjudicated insufficient, the acts of a de facto officer were valid as to third persons and the public, and that the officer's authority could not be collaterally attacked or inquired into by affected third parties. The rule was based upon the public policy that the public cannot be burdened with investigating the regularity of the appointment of one purporting to hold a particular office. However, the Court stated, as follows:

> But when a party to be affected by an official's act or decision holds actual knowledge that such official may not in fact legally occupy the office, and when the party makes a timely and direct attack on the authority and jurisdiction of the person attempting to exercise the powers of the office, there is no reliance by an innocent party and no reason to apply the rule. [Emphasis in original] Id. at 585

The order was void since the order suspending the beverage license and imposing a fine was entered by a purported

substitute beverage director who did not take an oath of office and did not receive a valid commission. The Court stated:

> We cannot disregard or ignore the plain and simple requirements of the Constitution. The Substitute Beverage Director was completely without authority or jurisdiction to hear and dispose of the case against Treasure, ~~Inc.~~ His order purporting to dispose of the cause is void and without effect. Id. at 586

Here, the Constitution confers subject matter jurisdiction over paternity and adoption actions upon the circuit courts. Moreover, the "Agreed Order Determining Paternity" and the "Final Judgment of Adoption" were entered without notice being given to the Respondents [R: Vol I 38]. The Respondents acted immediately to review the sealed file to determine what had occurred [R: Vol I 46-47]. The "Verified Respondents' Motion for Relief from Judgment" directly attacked the jurisdiction of the county court judge to enter the orders [R: Vol I 37-45]. To accept Petitioner's arguments herein is to ignore the constitutional mandate which reposes power only in the circuit court to hear these matters. There is no reason to apply the rule of a de facto officer, where here, the party affected by the official's act holds actual knowledge that the official does not legally occupy the office.

In Klosenberg v. Rainwater, 410 So.2d 1009 (Fla. 3d DCA 1982), a factually similar case, the District Court of Appeal, Third District, found that administrative orders of the chief judge which assigned the respondent county court judge to

preside over specified circuit court proceedings, did not include the particular case sub judice. Consequently, the Respondent lacked subject matter jurisdiction to consider that cause. In Klosenberg v. Klosenberg, 419 So.2d 421 (Fla. 3d DCA 1982) the Court found that an order of contempt was void because the County Court Judge had not been "specifically designated to act as a Circuit Judge in this domestic proceeding".

Similarly, County Court Judge Swanko was not appointed to act as a circuit judge in this proceeding. He lacked subject matter jurisidiction to enter the "Final Judgment of Adoption". Since only the circuit court has jurisdiction over declaratory actions, County Court Judge Swanko did not have subject matter jurisdiction to enter the "Agreed Order Regarding Paternity". Without subject matter jurisdiction, the orders are clearly void.

ARGUMENT III

EVEN IF THE COUNTY COURT JUDGE WAS A DE FACTO JUDGE, THE "VERIFIED RESPONDENTS' MOTION FOR RELIEF FROM JUDGMENT" SHOULD HAVE BEEN GRANTED BECAUSE THE SAME COUNSEL FIRST REPRESENTED THE SURROGATE MOTHER AND THEN THE ADOPTIVE PARENT AND PETITIONER MISREPRESENTED THAT THE RESPONDENTS HAD APPEARED VOLUNTARILY AND CONSENTED TO THE RELIEF SOUGHT, THEREBY CONSTITUTING EXTRINSIC FRAUD.

The record clearly shows that the attorney who signed the acknowledgement of independent counsel was in fact an attorney in the office of the attorney representing the

adoptive parent, Mrs. Stein. [R: Vol III 43, 491. Even more egregious is the fact that an attorney who represented the surrogate mother, Patricia Foster, later represented the adoptive parent, Mrs. Hayat Stein, in the same case [R. Vol III 49, Vol I 29-32].

Extrinsic fraud arises where there is conduct which is collateral to the issues tried, but which prevents a party from exhibiting fully his case such as "where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat'. DeClaire v. Yohanan, 453 So.2d 375, 377 (Fla. 1984).

At the time the action was filed the Petitioner was never served with process in connection with this proceeding. The "Agreed Order Regarding Paternity" was entered without notice to the surrogate mother. Subsequent to the "Agreed Order Regarding Paternity", Hayat Stein, through her attorney, Robert M. Jasinski (previously Patricia Foster's attorney) filed a "Petition for Adoption of the Infant" [R: Vol I 29-32]. Attached to the Petition was "Consent for Adoption" which had a false acknowledgment. Patricia (Clark) Foster never signed the document in the presence of the notary or the two witnesses [R: Vol I 37-38]. Clearly the attorney who was supposedly Foster's independent counsel was now conniving at her defeat.

Even if County Court Judge Swanko was a de facto judge the "Motion for Relief from Judgment" should have been granted to correct the surreptitious entry of an order where Mrs.

Foster had no notice; there was no valid consent; and Mrs. Foster had no independent counsel, but rather, a lawyer who was really Mrs. Stein's attorney.

ARGUMENT IV

THE DECISION OF THE DISTRICT COURT OF APPEAL SHOULD BE APPROVED BECAUSE THE ENTRY OF THE "FINAL JUDGMENT OF ADOPTION" CONTRAVENES FOSTER'S FOURTHEENTH AMENDMENT RIGHTS OF DUE PROCESS, WHERE THE LOWER COURT APPLIED FLORIDA LAW INSTEAD OF MICHIGAN LAW, EVEN THOUGH ALL OF THE PERTINENT ACTS OCCURED IN MICHIGAN.

Florida and Michigan law conflict in many pertinent aspects. Michigan Adoption Code Sec. 710.46 (1)(a), (b), (c) requires the Court to conduct a full investigation considering the best interest of the adoptee, the adoptee's family background and the reason for the adopteels placement away from his or her parent. Sec. 63.122(5), Fla. Stat. does not require an investigation when the Petitioner is a stepparent. Michigan Adoption Code Sec. 710.26(f) requires an agent of the Court to file a report of the investigation before the hearing on the petition of the Court. Sec. 63.112(3), Fla. Stat. does not require a report when the placement is a stepparent adoption.

Most importantly, under Michigan law, consent of a parent who does not have legal custody must be executed before a judge or a referee of the probate court. If the consent is executed before a judge or referree, a verbatim record of testimony relating to the execution of the consent shall be

made. Michigan Adoption Code 710.44(1). Michigan law further provides:

> If a parent's consent to adoption is required under Sec. 43[710.43] ..., the consent shall not be executed until after such investigation as the Court deems proper and until after the judge, referee ... has fully explained to the parent ... the legal rights of the parents ... and the fact that the parent ... by virtue of the consent voluntarily relinquishes permanently his or her rights to the child. Michigan Adoption Code 710.44(5).

In stark contrast[5/] is the Florida law which allows the consent to be executed in the presence of the Court or by affidavit in the presence of two witnesses and to be acknowledged before a notary public. Sec. 63.082(1)(c)(4) Fla. Stat.

Where there is a conflict of law, a state must have significant contacts creating a state interest in order to apply its laws. In Allstate Insurance Company v. Hague, 449

5/ Michigan Adoption Code and the Florida Adoption Act also conflict in other respects. Compare Michigan Adoption Code 710.513 with Sec. 63.082(5), Fla. Stat.; Michigan Adoption Code 710.64(1) and Sec. 63.085(1)(b), Fla. Stat.; Michigan Adoption Code 710.41(1), (4) with Sec. 63.212(1), (b), Fla. Stat.; Michigan Adoption Code 710.52 with Sec. 63.122(1), Fla. Stat.; Michigan Adoption Code 710.56(1) with Sec. 63.182, Fla. Stat.; Michigan Adoption Code 710.43(8) with Sec. 63.062(1), (a), Fla. Stat.; Michigan Adoption Code 710.64(1) with Sec. 63.082(5), Fla. Stat.; Michigan Adoption Code 710.65(1) with Sec. 63.182, Fla. Stat.; Michigan Adoption Code 710.27 (1)(7), 710.68(1), (8) with Sec. 63.162(4), (a), (b), (c), Fla. Stat.

U.S. 302, 308, 312, (1981), the United Supreme Court stated as follows:

> In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts to the State, whose law was applied, with the parties and with occurrence or transaction giving rise to the litigation..... [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

In Allstate, **supra,** the Supreme Court cited **Home** Ins. **Co. v.** Dick, **281** U.S. **397 (1930)** and John Hancock Mut. Life Ins. Co. **v.** Yates, **299** U.S. **178 (1936)** as extreme examples where forum states improperly chose to apply their own laws based solely upon the fact that the parties bringing the suit resided in the forum state. Here, even that contact is absent since all the parties reside in Michigan.

The United States Supreme Court reaffirmed its decision in Allstate, supra, in **Phillips** Petroleum **Company v. Shutts, 472 U.S. 797, 823, (1985),** stating:

> When considering fairness in this context, an important element is the expectation of the parties.

Here, the Agreement contemplates that Michigan law would apply as evidenced by the fact that Petitioner, Brent Foster, signed a document entitled "Refusal of Consent" which advised him that

Michigan law, which was cited therein, would not regard him as the father of the child born to his wife by means of artificial insemination if he refused to consent to such insemination [R: Vol III 44].

The Supreme Court of Florida in Feller v. Equitable Life Assur., Soc, 57 So.2d 581 (1952) applied Florida law which permitted attorneys fees, after finding that the insured was a resident of Florida, the insured paid insurance premiums while a resident of Florida and the insurance company had complied with the laws of Florida. See also, Lacy v. Force V Corporation d/b/a JBF, 403 So.2d 1050 (Fla. 1st DCA 1981); Carrier Insurance Company v. Leroy, 309 So.2d 35 (Fla. 3d DCA 1975); Home Insurance Company v. Denning, 177 So.2d 348 (Fla. 3d DCA 1965); Confederation Life Association v. Ugalde, 151 So.2d 315 (Fla. 3d DCA 1963).

All the parties in this case resided in Michigan and all the occurrences giving rise to the litigation occurred in Michigan, including the birth of the child. Florida has no state interest in determining the parental status of the parties involved. A state "may not abbregate the rights of the parties beyond its borders having no relation to anything done or to be done within them." Phillips Petroleum Company v. Shutts, 472 U.S. at 822.

By applying Florida law, the trial court failed to give full faith and credit to Michigan laws thereby usurping Michigan's soveriegn authority to legislate regarding the

parental rights of its citizens. Absolutely nothing relating to this litigation occured in Florida.

Had the lower court properly applied the law of Michigan, the "Judgment of Adoption" could not have been granted since under Michigan law any consent to an adoption must be executedina hearing before a judge and only after the mother has had her legal rights fully explained to her by the judge and if the judge is satisfied as to the genuiness of the consent. The judgment herein is unconstitutional since it would not have been granted if Michigan law had applied because many statutory requirements for an adoption under Michigan law were not met.

CONCLUSION

It is respectfully submitted that the Order Accepting Jurisdiction should be discharged and the decision below be approved. The decision is entirely correct because:

1. The county court judge never had subject matter jurisdiction.

2. The county court judge cannot be considered a de facto judge since he was without subject matter jurisdiction and the Respondents directly challenged his authority.

3. The "Verified Respondents' Motion for Relief from Judgment" should also have been granted because of the extrinsic fraud perpetrated upon the Respondents.

4. The trial court unconstitutionally applied Florida law, which conflicts with the law of Michigan, since all of the pertinent acts occurred in Michigan.

Respectfully submitted,

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and

By: _____
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been furnished, by mail, to the Law Offices of Melvyn B. Frumkes & Associates, P.A. and Law Offices of Greene and Greene, P.A., Attorneys for Petitioner, 100 North Biscayne Boulevard, Miami, Florida 33132, this 11th day of July, 1989.

By: _____
Ira M. Elegant