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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER:

ON REVIEW FROM THE DISTRICT COURT OF THE STATE OF FLORIDA, FOURTH DISTRICT

CASE NUMBER: 89-2385

IN RE: The Estate of
Adele M. Laflin,

deceased.

First Fidelity Bank, N.A., New Jersey

Petitioner,

vs.

District Court of Appeal, Fourth District, ~~et al~~,

Respondents.

PETITION FOR WRIT OF MANDAMUS/BRIEF ON JURISDICTION

First Fidelity Bank, N.A., New Jersey ("Petitioner"), by and through its undersigned attorneys and pursuant to Florida Rules of Appellate Procedure §§9.030(a)(3) and 9.030(a)(2)(iv), files this Petition for Writ of Mandamus/Brief on Jurisdiction seeking review of orders of the District Court of 'Appeal, Fourth District, rendered December 12, 1989, and January 3, 1990. The District Court's orders dismissed for lack of jurisdiction Petitioner's timely filed Petition for Writ of Common Law Certiorari after determining that the order sought to be reviewed

was a final order subject to direct appellate review. The Court cited Lampkin - Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978), as authority for its decision. The pertinent portions of Lampkin - Asam were expressly receded from by this Court in Johnson v. Citizens State Bank, 537 So.2d 96 (Fla. 1989).

STATEMENT OF THE CASE AND OF THE FACTS

By order ("Order") dated August 16, 1989, the trial court found Petitioner, a national banking institution with its principal place of business in New Jersey, incompetent to serve as trustee of a testamentary trust established by a will probated in Florida. (App. 11). By a Petition for Writ of Common Law Certiorari filed with the District Court September 12, 1989, Petitioner sought review of the trial court's Order. (App. 3, 116). Respondent below, the estate's personal representative, argued that the Order constituted a final order subject to direct appellate review. (App. 73). Since no notice of appeal had been filed with the clerk of the trial court, Respondent argued that the district court lacked jurisdiction over the action. (App. 76).

By 'order rendered December 12, 1989, the District Court dismissed the action for lack of jurisdiction. (App. 2). Petitioner filed an Emergency Motion for Clarification; Certification of Conflict or Question of Great Public Importance; or Vacating of Order and Retention of Jurisdiction on December

19, 1989. (App. 98). By order rendered January 3, 1990, the District Court denied the motion "on the authority of Lampkin - Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978)." (App. 1, 112).

JURIBDICTION

(a) Mandamus

This Court has jurisdiction to issue writs of mandamus to state officers. Fla. Const. Art. V, §3(b)(8); Fla. R. App. P. 9.030(a)(3). A writ of mandamus compels the performance of a mandatory duty where no other adequate remedy exists. City of Coral Gables v. Dodaro, 397 So.2d 977 (Fla. 3d D.C.A. 1981). A writ of mandamus is the proper vehicle to compel a lower court to exercise its non-discretionary jurisdiction. Sky Lake Gardens Recreation, Inc. v. District Court of Appeal, Third District, 511 So.2d 293 (Fla. 1987); State ex rel. Globe & Rutgers Fire Insurance Company v. Cornelius, 100 Fla. 292, 129 So. 752 (1930); New Hampshire Insurance Company v. Calhoun, 341 So.2d 777 (Fla. 2d D.C.A. 1976), aff'd, 354 So.2d 882 (Fla. 1978).

The District Court's jurisdiction to review the Order, if properly invoked, was non-discretionary. Fla. R. App. P. 9.030(b)(1)(A): "district courts of appeal shall review, by appeal...final orders of trial courts..." (emphasis supplied); Holloway v. State, 342 So.2d 966 (Fla. 1977) ("shall" is mandatory). Absent issuance of a writ of mandamus by this Court, Petitioner has no means available to compel the District Court to exercise its non-discretionary jurisdiction and treat the

Petition for Writ of Common Law Certiorari as a notice of appeal. Hess v. Metropolitan Dade County, 467 So.2d 297 (Fla. 1985) (availability of alternate relief does not preclude court of appeal from exercising its discretion to address the merits of a mandamus petition that involves only questions of law).

This case is substantially similar to Sky Lake Gardens Recreation, Inc. v. District Court of Appeal, Third District, 511 So.2d 293 (Fla. 1987). There, the Third District dismissed as untimely an appeal of a final judgment, under a misapprehension of the definition of "rendition". The appellant petitioned this Court for a writ of mandamus compelling the Third District to hear the appeal. After finding that the appeal was timely, this Court concluded that:

> ...the district court has a ministerial duty to consider and decide the appeal. We presume that the district court of appeal will perform its duty and reinstate the appeal and we therefore withhold the formal issuance of the writ of mandamus.

Id. at 294.

Issuance of a writ of mandamus rests within the exercise of sound judicial discretion. The instant action is particularly appropriate for mandamus. It is important for the public and the probate Bar that the merits of the underlying action be reached. Attorneys frequently draft wills for clients who have moved to Florida from outside the state naming as testamentary trustee a foreign bank or trust company with which the client has had a long standing relationship. In other cases, a non-resident moves

to Florida and later dies domiciled here, leaving a will naming a testamentary trustee located in the decedent's original state of residence. There is no Florida case law addressing the validity of such appointments under the current statutes. The trial court's Order would hold such foreign trustees incompetent to serve, even if the trust is to be administered completely outside the state. The public and the probate Bar will be served by the thorough review of the substantive merits of the Order.

(b) Discretionary Review

Petitioner believes that a writ of mandamus is proper in this action. In an abundance of caution, though, Petitioner has also sought review based on conflict. In its January 3, 1990, order, the District Court denied Petitioner's Emergency Motion "on the authority of Lampkin - Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978)." In Lampkin - Asam an appellant mistakenly filed a notice of appeal in the appellate, not the trial, court.[1/] The appellant sought to invoke Florida Rule of Appellate Procedure 9.040(b) to require the appellate court to transfer the notice to the trial court, to be effective as of the original filing date. This Court held that Florida Rule of Appellate Procedure 9.040(b) was intended to require transfer of pleadings which seek to invoke the jurisdiction of the wrong court, not which seek to invoke the jurisdiction of the right court in the wrong way.

1/ From the Lampkin - Asam opinion it is unclear whether the notice was timely filed even in the appellate court. Id.. at 470.

The Court had the opportunity to reconsider its decision in Johnson v. Citizens State Bank, 537 So.2d 96 (Fla. 1989). In Johnson, a losing party mistakenly filed a notice of appeal in the trial court seeking to invoke the appellate jurisdiction of the district court where review was properly by petition for writ of certiorari filed directly with the district court. This Court held that the notice had to be transferred to the district court and treated as a timely petition for writ of certiorari:

> There is no question that an appellate court has jurisdiction to review a cause even though a form of appellate relief is mischaracterized. Thus district courts have considered as petitions for writs of certiorari, erroneously titled notices of appeal...District Courts have also considered as notices of appeal, erroneously titled petitions for writ of certiorari.
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> Id. at 97-98 (citations omitted, footnote consolidated).

This Court went on in Johnson to expressly overrule the pertinent portions of Lampkin - Asam:

> We note that the district courts below relied upon Lampkin - Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978), which in turn relied upon Southeast First National Bank of Miami v. Herin, 357 So.2d 716 (Fla. 1978). To the extent of conflict with our decision today, we recede from Lampkin - Asam and Southeast First National Bank of Miami.,
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> Id. at 98.

Under Johnson, a pleading seeking to invoke the jurisdiction of the correct appellate court which is filed with an incorrect

court must be transferred to the correct court. Lampkin - Asam has been overturned on this point.

A district court of appeal per curiam decision which cites as controlling authority a district court decision that is either pending review in or has been reversed by the Supreme Court constitutes prima facie express conflict and allows this Court to exercise jurisdiction. Jollie V. State, 405 So.2d 418 (Fla. 1981). "Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it." Id. at 420. Obviously, this Court technically may not "reverse" one of its own decisions. By receding from the pertinent parts of the cited decision, though, the Court has generated the same legal effect as a reversal would have. The District Court has impermissibly applied principles and relied on a case expressly declared invalid by this Court to resolve a proceeding, creating an express and direct conflict between the lower court's ruling and the public records of this Court. A similar situation was presented to the Court in Romine V. Metropolitan Dade County, 385 So.2d 1368 (Fla. 1980). There, in a per curiam affirmance of a summary judgment the district court expressly relied on a case later disapproved by this Court. The Court accepted jurisdiction and remanded ,the case for reconsideration.

The District Court's misapplication of Lampkin - Asam as limited by Johnson to this case creates a "real and embarrassing conflict of opinion and authority." Pinkerton - Hays Lumber

Company, Inc. v. Pope, 127 So.2d 441, 443 (Fla. 1961). For the equitable reasons discussed in the immediately preceding section, this Court should exercise its discretionary jurisdiction to consider the conflict presented, allowing the District Court to reach the merits of the underlying action.

NATURE OF RELIEF SOUGHT

Petitioner seeks issuance of a writ of mandamus to the District Court compelling it to exercise its non-discretionary jurisdiction to review the Order or, alternatively, that this Court exercise its discretionary jurisdiction to resolve a conflict between the decision below and previous decisions of this Court.

ARGUMENT

The Florida Constitution, the Florida Rules of Appellate Procedure, and a substantial body of case law require that a timely petition for writ of certiorari be treated as a notice of appeal. Florida Constitution Art. V, §2(a)(1968) provides that:

> (t)he supreme court shall adopt rules for practice and procedure in all the courts including...the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought...

See Florida Rule of Appellate Procedure 9.040(b), (c) (pleading filed in inappropriate court or seeking improper remedy to the transferred and treated as if proper remedy sought); Pridgen v. Board of County Commissioners of Orange County, 389 So.2d 259

(Fla. 5th D.C.A. 1980), pet. ~~for rev. den~~ 397 So.2d 777 (Fla. 1981) (rule that cause shall be treated as if proper remedy had been sought is mandatory). Indeed, the Advisory Committee Notes to Florida Rule of Appellate Procedure 9.040 state specifically that the:

> ...rule is intended to supersede..,Engel v. City of North Miami, 115 So.2d 1 (Fla. 1959), where a petition for a writ of certiorari was dismissed because review should have been by appeal. **Under this rule, a petition for writ of certiorari should be treated as a notice of appeal, if timely.**[2]

As the Florida Supreme Court stated in Johnson v. Citizens State Bank, 537 So.2d 96 (Fla. 1989), the district courts have routinely considered erroneously titled petitions for writ of certiorari as notices of appeal. ~~See~~, e.g., Pearce v. Parsons, 414 So.2d 296 (Fla. 2d D.C.A. 1982) (petition for writ of certiorari treated as notice of appeal under Fla. R. App. 9.040(c)); DeLuca v. Harriman, 402 So.2d 1205 (Fla. 2d D.C.A. 1981), footnote 2, pet. for rev. den. 412 So.2d 465 (Fla. 1982)(same); Conner v. Mid Florida Growers, Inc., 541 So.2d 1252 (Fla. 2d D.C.A. 1989) (court proceeded as if appellate review had been requested where pleading improperly styled as petition for writ of certiorari); see, also, Stieglitz v. City Commission,

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[2] Engel v. City of North Miami, supra, and its ascendant cases were decided under a statute, applicable only to the Florida Supreme Court, which expressly permitted notices of appeal to be treated as petitions for writ of certiorari, but not the reverse. See Bartow Growers Processing Corporation v. Florida Growers Cooperative, 71 So.2d 165 (Fla. 1954). Prior to amendment of the appellate rules, courts felt confined to a strict reading of the statute.

City of South Miami, 537 So.2d 98 (Fla. 1989), and Jones v. Office of the Sheriff, 541 So.2d 1149 (Fla. 1989), where the Florida Supreme Court answered certified questions of Third and First District Courts, respectively, and required the district courts to treat a notice of appeal timely filed in the trial court but not filed in the district court within 30 days as a petition for writ of certiorari. Thus it is clear that this Court does not consider an appellate court without jurisdiction to consider an action where the pleading invoking the court's jurisdiction is timely filed with the wrong court.

SIMILAR CASES
PENDING BEFORE THE COURT

In Skinner v. Skinner, 541 So.2d 176 (Fla. 4th D.C.A. 1989), the Fourth District Court certified the following question to this Court as one of great public importance:

> DOES A DISTRICT COURT OF APPEAL HAVE JURISDICTION TO CONSIDER A PETITION FOR CERTIORARI FILED THEREIN TO REVIEW A NON-FINAL ORDER WHICH IS REVIEWABLE BY APPEAL BUT WHERE NO NOTICE OF APPEAL WAS FILED IN THE TRIAL COURT?

There is no material difference between the issue as phrased by the Fourth District in Skinner and the issue presented here.3/ Oral argument in Skinner is scheduled for February 6, 1990. (App. 104C).

3/ Petitioner respectfully submits that under the holding of Jolie v. State, 405 So.2d 418 (Fla. 1981), the District Court should have cited Skinner and withheld issuing a mandate pending its disposition.

CONCLUSION

The Fourth District, relying on a single case the pertinent portions of which have been overruled, has denied it has jurisdiction to treat a timely filed Petition for Writ of Common Law Certiorari as a notice of appeal. Its decision flies in the face of previous decisions of this Court and the Second District. The underlying action presents an issue of great public importance and should be resolved. Petitioner respectfully requests that this Court exercise its discretionary jurisdiction and issue a writ of mandamus compelling the District Court to exercise its non-discretionary jurisdiction or that, alternatively, it accept discretionary jurisdiction to review the District Court's orders based on express and direct conflict.

ALLEY, MAASS, ROGERS & LINDSAY, P.A.

By: Elizabeth T. Maass
Elizabeth T. Maass
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407/659-1770

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Abraham Mora, Esquire, Blank, Rome, Comisky & McCauley, 1401 Forum Way, Suite 700, West Palm Beach, Florida 33401; and by U.S. Mail to Joyce M. Boyer, Midlantic National Bank and Trust Co./Florida, N.A., 777 East Atlantic Avenue, Suite 200A, Delray Beach, Florida 33444; and The Honorable Vaughn J. Rudnick, Palm Beach County Courthouse, 300 North Dixie Highway, Room 308, West Palm Beach, Florida 33401; this 10th day of January, 1990.

Elizabeth T. Maass