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FILED
SID J. WHITE

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAN 30 1987

SARA CALDWELL,
Petitioner,

CLERK, SUPREME COURT
CASE NUMBER 86-2024
Deputy Clerk *pl*

vs.

ESTATE OF JERRY L. MCDOWELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND/OR MANDAMUS

COMES NOW Petitioner, SARA CALDWELL, as attorney and petitioner for [REDACTED], and [REDACTED] [REDACTED] minors, and petitions this Honorable Court for issuance of a writ of certiorari and/or mandamus. As grounds therefor, Petitioner would show as follows:

I. JURISDICTION

The jurisdiction of this Court is invoked pursuant to Article V, Section 3, Fla. Const. (1968). This petition is filed pursuant to Fla.R.App.P. 9.030 (a) (3) and 9.100(c).

II. FACTS

The Petitioner, SARA CALDWELL, was appointed attorney for the minor children of the decedent, Jerry L. McDowell. (A-1) Mr. McDowell killed the mother of the children and then committed suicide in the front yard of the family residence. There ensued a custody battle which is, as yet, still unresolved. Although a temporary custodian was appointed, no guardian has been appointed for the children, and the State of Florida HRS and guardian ad litem programs have been relieved of any responsibility for representing the children. (A-2) The attorney for the children filed a petition for appointment of guardian ad litem on the 25th day of September, 1986. (A-3) The custodians for the children joined the petition. (A-7) The petition for appointment of guardian ad litem was denied on the 16th day of October, 1986. (A-8) The attorney for the children filed her Appeal of the order denying the petition for appointment of a guardian ad litem on the 18th day of November, 1986. (A-9) On the 4th day of

December, 1986, the lower court entered its order pursuant to Fla.R.App.P.9.430. (A-10). On the 11th day of December, 1986, the trial court's order adjudicating the indigency was filed with the Appellate Court. On the 31st day of December, 1986, the Appellate court dismissed the appeal on the on the basis of lack of certified order of indigency or a filing fee. (A-11) The instant petition has been filed in a timely manner to seek review of that Order.

III. RELIEF SOUGHT

Petitioner prays this Honorable Court issue a writ of certiorari and/or mandamus directed to the Fifth District Court of Appeals of the State of Florida. As will be more fully argued in the Argument portion of the instant petition, the district court departed from the essential requirements of law by dismissing the Appellant's appeal for lack of a certified copy of a lower court Order of Insolvency. In that Petitioner has no other adequate remedy, certiorari and/or mandamus is proper.

IV. ARGUMENT

Petitioner asserts that the appellate court departed from the essential requirements of law in dismissing the appellant's appeal for lack of a filing fee or a certified copy of an Order of Indigency.

While the departure from the essential requirements of law necessary to invoke jurisdiction must amount to more than judicial error, Matthews v. Metropolitan Life Insurance Co., 89 So. 2d 641 (Fla. 1966); Chicken 'N'Things v. Murray, 329 So.2d 302 (Fla. 1976); McGuire v. Nelson, 388 So.2d 42 (Fla. 5th DCA 1980); City of Winter Park v. Jones, 392 So.2d 568 (Fla. 5th DCA 1981), the action of the appellate court in dismissing the appeal on grounds of lack of a certified copy of an order adjudicating indigency or a filing fee when the certified order had indeed been timely received by the court constitutes such a departure from the essential requirements of law.

Fla. R. App. P. 9.430 provides that a party may proceed

without prepayment of fees upon the lower court's order of indigency. The order of the lower court, styled Sara Caldwell as appellant for [REDACTED] and [REDACTED] [REDACTED] ordered that the cost of this appeal be borne by Volusia County, Florida, based on a finding that the minors were indigent. (A-10). Petitioner asserts that the appellate court erroneously dismissed the appeal by failing to accept the trial court's order of indigency, and that this Honorable Court should reinstate the appeal on the basis that the acceptance of the lower court's order of indigency was a ministerial duty involving no discretion. State ex rel. Curley v. McGeachy, 6 So.2d 823 (Fla.1942).

In appealing on behalf of the minor children, the undersigned appeared not in the strict sense as a party to the suit, but as an officer of the court. Garner v. I.E. Shilling Co. 174 So. 837 (Fla. 1937). It is the financial status of the parties, not that of their attorney, that determines whether or not the filing fee must be prepaid. In petitioning for a guardian ad litem for the minor children, the undersigned was acting as an officer of the court appointed to represent the interests of the children. To hold that the appeal for a petition for appointment of a guardian ad litem for minors adjudicated to be indigent must be dismissed because their court appointed representative has not personally paid a filing fee nor has been declared to be indigent is not within the discretion of the appellate court.

This Honorable Court should direct that the appeal be reinstated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Writ of Certiorari and/or Mandamus has been furnished by U.S. Mail to J. Dana Fogle, Esquire, 109 West Rich Avenue, DeLand, Florida 32720; Ed I. Matz, Esquire, P.O. Box 5337, Daytona Beach, Florida 32018; George Gleason, Esquire, Glendale Federal Bldg., Suite 406, Pompano Beach, Florida and Garrett Briggs, Esquire, 121 Broadway, Daytona Beach, Florida 31018.

DATED this 30th day of January, 1987.



Sara Caldwell