

IN THE SUPREME COURT OF FLORIDA

District Court Case No. 88-1451
Supreme Court Case No. 73,696

MICHAEL STEIN,

Petitioner,

VS.

PATRICIA CLARK FOSTER, et. al.

Respondent.

FILED

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PETITIONER'S BRIEF ON JURISDICTION

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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 as "Michael Stein" and "Patricia Clark Foster". References to the Appendix shall be indicated by the abbreviation, "App."

STATEMENT OF THE CASE AND FACTS

MICHAEL STEIN, is the natural father of [REDACTED] a minor child born [REDACTED] 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. (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. (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. (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. (App. 29-30).¹

The relevant order in effect at the time was Administrative Order 86-149 (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, Murray 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. (Emphasis supplied).

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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. (App. 33-34)

Following the birth of the child in ██████████ 1987, Patricia Clark Foster executed a "Consent for Adoption", consenting to the adoption of the child by Hyat Stein, the wife of Michael Stein. (App. 35). Michael Stein also executed a "Consent for Adoption", agreeing to the step-parent adoption of the child by his wife. (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 for Adoption" executed by Patricia Clark Foster and himself. (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. (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. (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:

■ 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. (Administrative Order 87-9, emphasis supplied.)

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. (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 Patricia 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.

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 now nearly two-year-old child. The District Court determined that both judgments were "void":²

[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).

The Petitioner, Michael Stein, seeks discretionary review by this Court of this decision.

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The District Court also commented, in a footnote, that it found "disturbing" the "fact" that none of the parties hereto had "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 are otherwise. The Petitioner sought, on rehearing, to correct this erroneous statement but the District Court declined to revise its opinion. (App. 55-57; App. 58).

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal, Third District, herein expressly and directly conflicts with this Court's decision in Card v. State, 497 So.2d 1169 (Fla. 1986), in that, in Card, this Court held that an improperly assigned judge acts "under color of authority" and that the acts of such a "de facto judge" are valid and not void. Here, the District Court of Appeal held that the County Judge who entered the two judgments in issue was "inappropriately assigned" and, therefore, the two judgments were "totally void".

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN CARD V. STATE 497 So.2d 1169 (FLA. 1986)

Card v. State, 497 So.2d 1169 (Fla. 1986), was, like this case, a decision addressing the effect of a technical flaw in a judicial assignment? Unlike this case, however, this Court held, in Card, that an improperly assigned judge acts under "color of authority" and

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The Petitioner does not agree that there was a defect in the assignment of this case to County Judge Swanko as Acting Circuit Judge. The minimum burden borne by the Respondent was to prove, at an evidentiary hearing, her allegations. Here, however, the Respondent presented no testimony or evidence at the hearing she scheduled upon her "Motion for Relief from Judgment". Thus, even assuming that the judgments herein would be "void" if the County Judge was not properly assigned, the Respondent never established the alleged lack of proper assignment. The Administrative Orders in effect at the time establish, on their face, that an assignment procedure was in effect. The District Court of Appeal, however, simply assumed that the Respondent's allegation of a lack of assignment was true and, based thereon, declared both of the judgments "void". In a sensitive and significant case involving the future and best interest of a two-year-old child, more than mere allegations should be required before judgments are declared "void".

judgments or orders entered by such a judge are not void. Here the District Court of Appeal held precisely to the contrary, determining that because this case was "not appropriately assigned", the two judgments entered by the Acting Circuit Judge were "totally void".

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 Okaloosa 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 required by Article V, section 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", defined as:

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

This Court went on to hold that, "the official acts of a de facto judge are valid". (Id. at 1173).

Here, there is no question but that County Judge Swanko had been appointed to serve as an Acting Circuit Judge during the time periods in issue. There is also no question concerning the authority of the Chief Judge of the Eleventh Judicial Circuit to enter

Administrative Orders temporarily appointing County Judges to serve as Acting Circuit Judges. County Judge Swanko, then, was an Acting Circuit Judge when he entered the two judgments which Patricia Clark Foster sought to set aside. The defect, if any, alleged to have occurred was with respect to Judge Swanko's authority to hear the two specific cases - the uncontested paternity case and the uncontested adoption case - absent a specific order of referral of those two cases. The defect, if any, was identical to that in Card and yet the decision of the District Court of Appeal is diametrically opposed to that in Card.⁴

The District Court's opinion further conflicts with earlier decisions of this Court holding that the acts of a "de facto judge" are valid and not void. For example, in State ex. rel. Hawthorne v. Wiseheart, 158 Fla. 267, 28 So.2d 589 (1946), this Court employed the concept of de facto judge 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.

In this case, upon nothing more than an unsubstantiated allegation that something beyond the Administrative Orders in

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In this case the District Court held that the "inappropriate assignment" of Judge Swanko resulted in the two judgments having been entered "without jurisdiction over the subject matter". In Card, this Court held that, "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, both the paternity and adoption actions were filed in the Circuit Court and Judge Swanko entered the two judgments in the two cases as an Acting Circuit Judge.

effect at the time was required to permit Judge Swanko to hear the two uncontested proceedings, the District Court of Appeal held that the Judge's actions were "totally void" and set aside two judgments entered by Judge Swanko as an Acting Circuit Judge.⁵

The ramifications of this case to the law of this State, the child herein and of countless persons within this State who hold judgments of dissolution of marriage or adoption are obvious. Not only has the District Court of Appeal rendered an opinion in conflict with the prior case law of this Court and the various district courts of appeal which have addressed this issue, but, perhaps more importantly, at risk are the literally thousands of judgments entered by Acting Circuit Judges and at jeopardy is a two-year-old child who has lived his entire life with his natural father and adoptive mother. The Petitioner respectfully requests that this Court exercise its discretionary jurisdiction to review this case.

CONCLUSION

Upon the argument and authority contained herein, the Petitioner requests this Court to exercise its discretionary jurisdiction to review this case.

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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 of the two judgments. At the time in question, there was no residency requirement associated with adoption cases, (See, Section 63.185, 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 19879); lack of independent counsel does not provide grounds for relief from judgment (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, Section 63.182, Florida Statutes (1987).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Amended Petitioner's Brief on Jurisdiction was served by mail this 27th day of February, 1989 (original brief served on February 8, 1989), upon counsel for the Respondent, Ira. M. Elegant, Buchbinder & Elegant, P.A., Commonwealth Building, Fourth Floor, 46 Southwest First Street, Miami, Florida, 33130.

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