

0/a 10-6-89

IN THE SUPREME COURT OF FLORIDA

MICHAEL STEIN,

Petitioner,

vs.

PATRICIA CLARK FOSTER, et. al.

Respondent.

Case No. 73,696
Fla. Bar No. 283975

FILED

SID J. WHITE

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CLERK, SUPREME COURT

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PETITIONER'S REPLY BRIEF ON THE MERITS

**LAW OFFICES OF
MELVYN B. FRUMKES & ASSOCIATES, P.A.**

**LAW OFFICES OF
GREENE AND GREENE, P.A.**

Attorneys for Petitioner
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 372-3737

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I.

**THE DISTRICT COURT OF APPEAL ERRED
IN DETERMINING THAT THE COUNTY JUDGE WHO
EXECUTED THE ORDER AND JUDGMENT HEREIN WAS NOT
“APPROPRIATELY ASSIGNED”.**

The first issue in this case is whether the District Court of Appeal erred in finding that the county judge who acted herein was “not appropriately assigned” based on the record that was before the District Court.

The Respondent, in her “Statement of the Case and Facts”, sets forth numerous alleged “facts” which were never established below but, rather, were mere allegations made by the Respondent in a motion which was never heard by the trial court in an evidentiary hearing.’ Indeed, one of the key issues in this case is that there was never any form of evidentiary hearing at the trial court level and, as such, the District Court erred in making its “factua finding” that the county judge was “not appropriately assigned”?

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The record before this Court establishes that the only hearing in this case took but a few minutes and was limited to argument of counsel. No witnesses testified and no evidence of any type was introduced.

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The Respondent’s Brief is replete with references to “facts” which, in truth, are merely the statements she made in her untried motion. The following are the most egregious misstatements:

A. The Respondent alleges, as a “fact” in her brief, “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”. (Respondent’s Brief, at 2). The “Consent for Adoption” executed by Patricia Foster bears a notary seal and the signature of two witnesses. Foster alleged in her “Motion for Relief from Judgment” that she did not sign the document in the presence of a notary or witnesses but no court has ever so found because no evidentiary hearing uppn Foster’s said motion has ever been had. It is certainly not a “fact”.

B. The Respondent alleges, as a “fact” in her Brief, that she “was never served with process in connection with this proceeding” (Respondent’s Brief, at 2). Nowhere in her Brief, however, does she disclose that she voluntarily

This case involves the entry of two orders by a county judge as an "acting circuit judge". The first order was an "Agreed Order Regarding Paternity" and the second was a "Final Judgment of Adoption". It is necessary to separately address the circumstances surrounding the entry of the two orders.

A. The "Agreed Order Regarding Paternity"

At the time of the entry of the "Agreed Order Regarding Paternity", the county judge was acting under Administrative Order 86-149, through which he and other county judges were appointed as "acting circuit judges" to hear such matters as were "assigned to them by the Associate Administrative Judge of the Family Division of the Circuit Court" The Administrative Order did not specify or limit in any way the types of cases which could be heard by the "acting circuit judges" other than that they be in the "family division".

Despite the foregoing, the Respondent contends herein, as she did at the District Court level, that the "Agreed Order Regarding Paternity" is "void" because there was no Administrative Order

appeared in the proceedings, filing a "Verified Answer" to the petition thus waiving any necessity for service of process upon her.

C. The Respondent alleges, as a "fact" in her Brief, that the child "was never within the territorial jurisdiction of the Florida Court". (Respondent's Brief, at 2). There is absolutely no record support for this statement which is, as are most of the Respondent's other "facts", merely a repetition of the allegations of her "Motion for Relief from Judgment".

D. The Respondent states that at the hearing upon her "Motion for Relief from Judgment" that "no opportunity to present testimony and evidence was given to the Fosters". (Respondent's Brief, at 5). What the Respondent does not disclose to this Court is that she scheduled and noticed the hearing upon her "Motion for Relief from Judgment". She was the moving party who selected the amount of time for the hearing and who did not present, at the hearing she scheduled and noticed, any witnesses or evidence.

authorizing the county judge, as acting circuit judge, to hear a declaratory action concerning paternity. This argument, however, is prima facie false in light of the wording of Administrative Order 86-149 which authorized the county judge, as acting circuit judge, to hear any family cases assigned by the Associate Administrative Judge. The "Petition for Declaratory Relief" filed by the Petitioner shows, on its face, that it was filed in the "Family Division" of the Circuit Court of Dade County, Florida. As such, under Administrative Order 86-149 which was in effect at the time, the case was properly before the county judge as "acting circuit judge".

B. The "Final Judgment of Adoption"

The county judge entered the "Final Judgment of Adoption" in May, 1987. At the time he did so, a new series of Administrative Orders had been entered: Administrative Orders 87-9 and 87-59. Administrative Order 87-59 was identical in language to Administrative Order 86-149 other than its effective dates. It provided that the acting circuit judges were authorized to hear family division cases "as assigned to them by the Associate Administrative Judge of the Family Division of the Circuit Court". As with Administrative Order 86-149, it did not limit or specify the types of cases which could be heard or assigned to the acting circuit judges other than that they be "family" cases.

Administrative Order 87-9, however, specifically granted authority to the acting circuit judges to hear "uncontested dissolutions of marriage, uncontested adoptions and change of name cases" as scheduled by the Clerk of the Court.

With respect to the “Final Judgment of Adoption”, then, the Respondent alters her argument. Because Administrative Order 87-9 specifically mentions “uncontested adoptions”, she cannot argue, as she attempts to do with respect to the “Agreed Order Regarding Paternity” that the acting circuit judge had “no authority” to hear the matter. Instead, with respect to the “Final Judgment of Adoption” she changes her argument to allege that “Administrative Order 87-9 requires an order from the Associate Administrative Judge of the Family Division to hear an uncontested adoption”. (Respondent’s Brief, at 8-9, emphasis supplied).

The question presented here is: where in the language of any of the Administrative Orders is there any requirement that an “order” be entered to assign a case to an acting circuit judge? The Administrative Orders only speak of “assignment” - they do not speak to the manner in which such “assignment” was to be made; they do not speak of “orders”.

Here, the Respondent makes a gigantic leap of assumption. First, she assumes that the requirement of an “assignment” by the Associate Administrative Judge is tantamount to the entry of an “order” and second she assumes that such an “order” must be entered in every individual case to be heard by the acting circuit judges. Having made these assumptions, she then contends that the “Final Judgment of Adoption” herein is “void” because no such “orders” exist as to this particular case.

The error committed by the District Court of Appeal in this case is that the Court accepted these assumptions as fact. The District Court of Appeal, upon nothing more than the Respondent’s

assumptions phrased as argument, found, as a matter of fact, that the acting circuit judge in this case was not “appropriately assigned”. The District Court erred in making such a “finding of fact” in two respects.

First, the record before the District Court established that the Respondent’s “assumptions” were erroneous. The Administrative Orders do not mention, much less require, the entry of “orders” of assignment, nor do they mention or require the entry of “orders” in each individual case before the case may be heard by an acting circuit judge. In fact, Administrative Order 87-9 refers to the assignment of classes of cases (including uncontested adoptions) to the acting circuit judges by the Associate Administrative Judge.³ Thus, the District Court of Appeal erred in accepting the Respondent’s argument that some type of individual “order” was necessary when the record before the District Court established, on its face, that no individual, case-by-case assignment procedure was in effect.

Second, the District Court erred in its “finding of fact” that this case was not “appropriately assigned” because there never was any type of evidentiary hearing at the trial court level concerning the practice and procedure of the Dade County Court with respect to the assignment of acting circuit judges to hear certain types of

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Administrative Order 87-9 states, in pertinent part, “[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” (Emphasis supplied).

cases. It is one thing for the Respondent to assume that certain requirements existed. It is quite another thing for the District Court of Appeal to raise those assumptions to the level of fact.

II.

ASSUMING THAT THE COUNTY JUDGE HEREIN WAS NOT "APPROPRIATELY ASSIGNED", THE DISTRICT COURT OF APPEAL NEVERTHELESS ERRED IN DETERMINING THE ORDER AND JUDGMENT EXECUTED BY THE COUNTY JUDGE TO BE "VOID".

In his Initial Brief, the Petitioner brought to the attention of this Court the fact that the doctrine of "de facto judge", a doctrine accepted by this Court and every other jurisdiction in the United States, make valid the actions of the acting circuit judge herein even if he was "inappropriately assigned".

The Respondent has chosen to respond to the "de facto judge" doctrine by insisting that this case involves "subject matter jurisdiction" and, therefore, is distinguishable from the line of authority in this State that dates back to the early 1900's. This case, however, does not involve "subject matter jurisdiction".

Subject matter jurisdiction is the power of a particular court to hear a particular class of cases. The two classes of cases involved herein are paternity (via a declaratory action) and adoption. The Respondent seeks to raise "subject matter jurisdiction" by arguing that "here a county judge heard a matter which could only be heard by a circuit court judge". (Respondent's Brief, at 17). What the Respondent ignores, however, is the fact that the two cases (paternity and adoption) were not filed in the county court; they were not heard in the county court and they were not heard by a

county judge. Here, both the paternity case and the adoption case were commenced in the circuit court. The two cases were heard by a judge serving as an acting circuit judge under the authority of Administrative Orders entered by the Chief Judge of the Circuit Court. There is, then, quite simply, no issue of “subject matter jurisdiction“ in this case. As was stated over fifty years ago in **Quigley v. Cremin**, 113 So. 892, 94 Fla. 104 (1927):

The test of jurisdiction is whether the tribunal had the power to enter upon the inquiry in question, and not whether its method was regular, its findings right, or its conclusions in accordance with law. (Id. at 894)

There being no question of “subject matter jurisdiction” here, it becomes patently clear that the doctrine of “de facto judge” must apply. Indeed, the Respondent was unable to bring to this Court’s attention a single case in which a judgment was declared “void” based upon a defect in the assignment of the judge to the cause.

The Respondent relies upon **Caudell v. Leventis**, 43 So.2d 853 (Fla. 1950); **Corak Construction Corp. v. ;Scott**, 184 So.2d 460 (Fla. 3rd DCA 1966); **Falkner v. Amerifirst Savings & Loan Association**, 489 So.2d 758 (Fla. 3rd DCA 1986); **Treasure, Inc. v. State Beverage Dept.**, 238 So.2d 580 (Fla. 1970); **Klossenberg v. Rainwater**, 410 So.2d 1009 (Fla. 3rd DCA 1982); and **Klossenberg v. Klossenberg**, 419 So.2d 421 (Fla. 3rd DCA 1982). None of these cases support her position.

In **Caudell v. Leventis**, a case had been filed in the Circuit Court of Dade County, Florida which did not involve an amount exceeding \$5,000, the then jurisdictionally necessary “amount in

controversy". The circuit court judge transferred the case to the lower court, an action which he could not take because the subject matter jurisdiction of the circuit court had never been properly invoked. Thus, the order transferring the case was found to be "a nullity".

Here, as aforesaid, there is no issue of "subject matter jurisdiction". The two cases in question - the paternity case and the adoption case - were filed in the circuit court. The circuit court, through the power of the chief judge of the circuit court, authorized a county judge to hear the two cases as an "acting circuit judge". No one has questioned the authority of the chief judge to do so and, hence, the only question is whether the county judge, as acting circuit judge, was properly designated. As such, the question turns upon the act of assignment which is precisely the type of question controlled by the "de facto judge" doctrine.

In ***Corak Construction Corp. v. Scott***, the error complained of was the fact that a court of law heard a case reserved for the courts of equity. As with ***Caudell v. Lewentis, Corak Construction*** has nothing whatsoever to do with the instant case, which was filed, commenced and concluded in the proper court.

In ***Falkner v. Amerifirst Savings & Loan Association***, the third case cited by the Respondent as purportedly supporting her position, the issue was personal jurisdiction. In the ***Falkner*** case, a motion and notice of hearing was mailed to an incorrect address and was not received until after the entry of an order upon the said motion. The court held that "a judgment entered without due service

of process is void". Clearly, the *Falkner* case has nothing whatsoever to do with the instant case.

The decision in *Treasure, Inc. v. State Beverage Department*, also cited by the Respondent, actually supports the position of the Petitioner herein.

In *Treasure, Inc.*, the Governor had attempted to appoint a substitute Beverage Director to hold a hearing regarding the suspension of a beverage license held by Treasure, Inc. The appointment letter, however, was deficient in form, an issue which Treasure, Inc. raised immediately, prior to the hearing held by the substitute official. This Court held:

Florida follows the general rule that (1) acts of a de facto officer are valid as to third persons and the public until title to such office is adjudicated insufficient, and (2) Such officer's authority may not be collaterally attacked or inquired into by affected third parties.

*

But when a party to be affected by an official's act or decision holds actual knowledge that such official might 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 supplied).

Here, the Respondent made no such "timely and direct attack" upon the authority of the acting circuit judge. Rather, she proceeded upon a "Motion for Relief from Judgment" filed one and a half years after the entry of the "Agreed Order on Paternity" and eleven months after the entry of the "Final Judgment of Adoption". Significantly,

by her own admission before this Court, she also proceeded before the acting circuit judge - upon a series of motions to inspect the court file, in July, September and October of 1987 - after she was aware of the alleged defect in his authority. (Respondent's Brief, at 4-5).

The Respondent's failure to raise her objections to the authority of the acting circuit judge in a timely manner is, as this Court has held, critical. In **Card v. State**, 497 So.2d 1169 (Fla. 1986), this Court, in discussing a decision from the state of Oklahoma, noted:

[The Oklahoma court] held that a district judge assigned as a special judge in a county outside of his regular district became a de facto judge of that court when he continued to hold court after expiration of his formal assignment. As a de facto judge, the court concluded, a trial in which he presided was not void and the failure to object at trial was deemed critical. (Id. at 1174).

Having so noted, this Court went on to hold:

The requirement that an objection to the authority of a de facto judge be timely made is not unique to our jurisdiction and is based upon sound principles of public policy.

* * *

[N]either the common law nor our statutes favor the policy of a defendant in waiting until the last stage of the cause and attacking such defects by a motion in arrest of judgment, the granting of which would have the effect of unraveling the whole proceeding. (Id. at 1174).

The last two cases cited by the Respondent in support of her position herein are ***Kloosenberg v. Rainwater***, 410 So.2d 1009 (Fla. 3rd DCA 1982) and ***Kloosenberg v. Kloosenberg***, 419 So.2d 421 (Fla. 3rd DCA 1982). The Respondent claims that the former is "factually similar" to the instant case despite the fact that the said decision contains no underlying factual statements. In reality, neither ***Kloosenberg*** opinion has any relevance to this case because each was based upon the fact that the type of case involved had not been assigned to the county judge who acted in the cause. Here, at the time of the entry of the "Agreed Order Regarding Paternity", the acting circuit judge was authorized to hear and determine "those cases" assigned by the Associate Administrative Judge of the Family Division. There was no limitation upon the type of case which could be heard and determined by the acting circuit judge. At the time of the entry of the "Final Judgment of Adoption", the acting circuit judge was fully authorized by Administrative Order to hear and determine "uncontested adoptions".

As is manifestly apparent, the Respondent has not cited a single authority which deems "void" the acts of a "de facto judge". The Respondent has not done so and she cannot do so because there is no such authority. To the contrary, all of the authorities hold that the actions of a de facto officer are valid; in the words of the Mississippi Supreme Court, "there is no a dissenting voice as to the absolute correctness of this answer".⁴

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Raper v. State, 317 So.2d 709 (Miss. 1979).

Here, the Respondent alleged that there was a defect in the assignment of the acting circuit judge to this particular case. The alleged “defect” was the absence of a specific order appointing the acting circuit judge to hear either the paternity action or the adoption action. Assuming such a specific order was necessary, the alleged “defect” was not one affecting the jurisdiction of the court but, rather, the right and authority of the presiding judge to act as such. Such a “defect” goes to the technical assignment of the particular case to the particular judge and, therefore, the “de facto judge” doctrine is controlling. The decision of the District Court of Appeal herein, holding that the order and judgment entered by the acting circuit judge were “void” because of an “improper assignment” is directly contrary to the established law of this State. Its decision must be quashed.

III.

A “MOTION FOR RELIEF FROM JUDGMENT” CANNOT BE “GRANTED” AT THE DISTRICT COURT OR SUPREME COURT LEVEL AND CERTAINLY CANNOT BE “GRANTED” IN THE ABSENCE OF ANY EVIDENTIARY HEARING AT THE TRIAL COURT LEVEL.

Although the Petitioner’s Initial Brief herein raised only the two issues heretofore addressed, the Respondent has addressed two additional issues not properly before this Court and never before argued by the Respondent, either at the trial court or district court level. The first of these two issues, as stated by the Respondent, is: “The Motion for Relief from Judgment should have been granted because the same counsel 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". In other words, the Respondent is asking this Court to grant her "Motion for Relief from Judgment".

This Court cannot "grant" the Respondent's "Motion for Relief from Judgment"; it was never heard in an evidentiary proceeding below. This Court cannot "find" that what the Respondent asserts regarding the "facts" of this case are "true".

The Respondent alleges that an attorney who represented her later represented the adoptive parent but that is all she does. The question of whether that is, in fact, true, has never been heard and has never been determined. It has also never been heard or determined whether, if the same attorney acted in a dual capacity, he had the consent of the parties to do so.

The Respondent alleges that she never executed the "Consent for Adoption" (which bears the signature of a notary and the signatures of two witnesses) but that is all she does. The veracity of her denial has never been heard or determined.

The Respondent alleges that she was never served with process but the question of whether her voluntary appearance in the case waived the necessity for process has never been heard or determined by any court.

This Court does not, and the District Court of Appeal did not, have the authority to "grant" the Respondent's "Motion for Relief from Judgment" based upon her mere allegations. The Respondent's contention that the opinion of the District Court herein should be

affirmed because her motion “should have been granted” is totally without merit.

IV.

THIS COURT CANNOT RULE UPON A “CONSTITUTIONAL^{yy} ISSUE PRESENTED FOR THE FIRST TIME ON APPEAL

The second of the two points raised by the Respondent which is not properly before this Court is stated by the Respondent as, “The Decision of the District Court of Appeal Should be Approved because the Entry of the Final Judgment of Adoption contravenes Foster’s Fourteenth Amendment Rights of Due Process Where the Lower Court Applied Florida Law Instead of Michigan Law, even though All of the Pertinent Acts Occurred in Michigan”.

The foregoing represents the very first time that the Respondent has ever raised a “constitutional” issue in this case.

It is “hornbook law” that a party cannot raise an issue for the first time on appeal. The cases so holding are legion. See, e.g., **Atwood v. Hendrix**, 439 So.2d 973 (Fla. 1st DCA’1983); **Hunter v. Employers Mutual Liability Insurance Company of Wisconsin**, 427 So.2d 199 (Fla. 2nd DCA 1983); **Sparta State Bank v. Pape**, 477 So.2d 3 (Fla. 5th DCA 1985).

It is equally well established that constitutional issues may not be raised for the first time on appeal. See, e.g., **Sanford v. Rubin**, 237 So.2d 135 (Fla. 2nd DCA 1970); **Hegeman-Harris Company, Inc. v. All State Pipe Supply Company**, 400 So.2d 1245 (Fla. 5th DCA 1981).

Should this Court determine that the Respondent's "constitutional" argument is properly before this Court, it is nevertheless an argument devoid of merit.

The Respondent complains of a deprivation of "due process" because the State of Florida applied Florida law to the instant case. The Respondent, however, fails to advise this Court that she voluntarily submitted herself to the jurisdiction and law of the Florida courts and, as such, waived any such "due process" or "conflict of law" argument.

CONCLUSION

Upon the argument and authority contained herein and in the Initial Brief of Petitioner, the Petitioner submits that the opinion of the District Court of Appeal, Third District, herein must be quashed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief on the Merits was served by mail this 31th day of July, 1989, upon counsel for the Respondent, Ira M. Elegant, Buchbinder & Elegant, P.A., Commonwealth Building, Fourth Floor, 46 Southwest

First Street, Miami, Florida, 33130.

**LAW OFFICES OF
MELVYN S. FRUMKES & ASSOCIATES, P.A.**
100 North Biscayne Boulevard
Suite 1607
Miami, Florida 33132

and

**LAW OFFICES OF
GREENE AND GREENE, P.A.**
100 North Biscayne Boulevard
Suite 601
Miami, Florida 33132

BY: 

CYNTHIA L. GREENE