

STATE OF NEW YORK
COURT OF APPEALS

ARLENE M. CARELLA

Petitioner-Respondent

- against -

NOTICE OF MOTION

CHARLES E. COLLINS, III,

Respondent-Appellant

SIRS:

TAKE NOTICE that upon the annexed affidavit of Charles E. Collins, III sworn to on the 17th day of June, 1994 and upon all prior documentation in this appeal proceeding herein, the Respondent-Appellant Charles E. Collins, III will move this Court on Tuesday, July 5, 1994 at 10:00 A.M. at a term to be held at the New York State Court of Appeals, Eagle Street, Albany, New York for an Order that counsel be appointed for me during this appeal (Appellate Court Docket No. 68873) pursuant to Family Court Act § 1120 and that I be granted permission to appeal to the Court of Appeals as I face imprisonment without the benefit of my constitutional and statutory rights including my right to a public trial as guaranteed under the 5th Amendment to the United States Constitution and under the Uniform Rules for New York State Trial Court, Section 205.4.

Dated: June 17, 1994

Charles E. Collins, III
108 Brunswick Road
Troy, New York 12180
(518) 274-1418

TO: Nicholas D. Morsillo (Z 029 072 028)
723 State Street
Schenectady, New York 12307

Solicitor General (Z 029 072 030)
Department of Law
Albany, New York 12224

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AFFIDAVIT

CHARLES E. COLLINS, III,

Respondent-Appellant

STATE OF NEW YORK)
COUNTY OF RENSSELAER) SS.:

CHARLES E. COLLINS, III, being duly sworn, deposes and says:

1. That I am the Respondent-Appellant in the above captioned matter and make this Affidavit in support of my Notice of Motion dated June 17, 1994 which requests that this Court grant permission to appeal the Appellate Court's Memorandum and Order, Case No. 68873, dated May 12, 1994 (attached), and that I be assigned counsel pursuant to Family Court Act § 1120.

2. I hereby certify that I had assigned counsel pursuant to Family Court Act § 262 at the time of Judge Austin Order that is the subject of this appeal and continue to have assigned counsel in the Family Court. (documents attached)

3. That I face imprisonment in a closed court proceeding over my objection in violation of my 5th Amendment right to a public trial as stated In Re Roshan, 671 F.2d 690 and in violation of my right to a public trial under the Uniform Rules for the New York State Trial Courts, Part 205, Family Court § 205.4.

4. That this appeal was transferred to the Appellate Court from the New York

State Court of Appeals pursuant to the order of Hon. Richard D. Simons dated November 24, 1992.

5. That the Appellate Court heard oral arguments on February 16, 1994.

6. That the Appellate Court is holding that Judge Austin's Order of September 24, 1992 is a nonfinal order and thus not appealable.

7. That I have argued that I am being denied my constitutional rights to a public trial and a jury trial as well as the constitutionality of several state statutes.

8. The Court of Appeals in Sirlin Plumbing Co. v. Maple Hill Homes, Inc., 20 N.Y.2d 401, (1967) held that:

[1] The motion to dismiss the appeal should be denied. The determination of the Appellate Division, insofar as it dismissed the defendant's counter claim, "impliedly severed it from the action, which is still pending undetermined, and to that extent is final." * * *

[2] It is the same theory of implied severance that a determination dismissing one of several causes of action in a complaint is to that extent held final, although the other causes of action have yet not yet been determined. * * *

9. Maliades v. Maliades, 1962, 17, A.D.2d 994, 234 N.Y.S.2d 274 at 275:

[1,2] Following the established practice under the Civil Practice Act, it is our opinion that an order of disposition is one which affects a substantial right of the person aggrieved; such an order is appealable as of right. The order here is such an order. The motion for leave to appeal is therefore denied as unnecessary.

10. Judge Austin's Order is a denial of my constitutional rights which must be considered as "substantial rights". The denial of my right to a public trial is a denial of a substantial right as is the denial of my right to a jury trial as I face a potential sentence that exceeds six months in jail or a \$5,000.00 fine or both.

11. That I have the right to appeal to the Court of Appeals pursuant to N.Y.S.

Const., Art. VI, § 3 subd. b, par. [2] and CPRL 5601(b) as the issue of the constitutionality of State statutes as they relate to either the State Constitution and/or the United States Constitution are involved. I also have the right to appeal under CPLR § 5601 (d) as this is based upon a non-final order of the Appellate Division and is an appeal of a final judgment entered in the court of original instance.

12. That this Family Court proceeding is a contempt proceeding under Article 4 of the Family Court Act in which I face a penalty that exceeds six months in jail or a \$5,000.00 or both.

13. That failure to pay support has been held to be a crime under County Law § 722(a) pursuant to Linda G. v. Theodore G., 345 N.Y.S. 2d 361 (Fam. Ct.); is a crime under Penal Law § 260.05 and under Family Court Act § 454 as a term of imprisonment may be imposed (see, Penal Law Article 10):

Penal Law § 260.05 Non-payment of a child:

A person is guilty of non-support of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than sixteen years old, he fails or refuses without lawful excuse to provide support for such child when he is able to do so, or becomes unable to do so, when, though employable, he voluntarily terminates his employment, voluntarily reduces his earning capacity or fails to diligently seek employment.

Non-support of a child is a class A misdemeanor.

13. People v. Johnson, 20 N.Y.2d 220, 282 N.Y.S.2d 481 (Ct. of Appeals) states:

Order of Family Court which denies transfer of family offense proceeding to criminal court is subject to review and will be reversed if retention of case constitutes abuse of discretion. Const. art. 6, § 13, subd b.

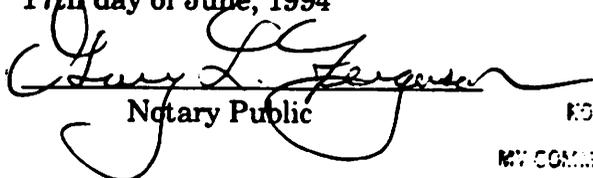
14. Judge Austin has denied my request that the contempt proceeding be transferred to the Supreme Court pursuant to Article 6, § 19(e) and his retention of the proceeding is an abuse of discretion as he lacks subject matter jurisdiction pursuant to the

State Constitution Article 6, § 13 which has not been contradicted by either Judge Austin or Mr Morsillo.

WHEREFORE, Charles E. Collins, III, the respondent-appellant, respectfully requests this Court appoint counsel to help in any further papers I may have to file with this Court and that the Court hear my appeal concerning my constitutional and statutory right to a public trial.


Charles E. Collins, III

Sworn to before me this
17th day of June, 1994


Notary Public

GARY L. FERGUSON
4730107
NOTARY PUBLIC STATE OF NEW YORK
RESIDING IN ALBANY COUNTY
MY COMMISSION EXPIRES 12/31/96

CERTIFICATION AND AFFIRMATION OF SERVICE

I, Charles E. Collins, III certify and affirm that on the 17th day of June, 1994, I mailed the original Notice of Motion dated June 17, 1994 with Affidavit dated June 17, 1994 and true copies thereof to Donald M. Sheraw - Clerk, New York State Court of Appeals, Eagle Street, Albany, New York 12207 and to all counsel listed below.

Duly Affirmed: Troy, New York
June 17, 1994


Charles E. Collins, III
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