O/G 1-6-88

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IN THE SUPREME COURT OF FLORIDA

ANA SILVIA GOEDMAKERS, **

Petitioner, ** CASE NO. 70,407

vs. **

HARRY GOEDMAKERS, **

Respondent. **

_____/

RESPONDENT'S BRIEF
ON THE MERITS

Petition for Discretionary Review
From The District Court Of Appeal
Of Florida, Third District.

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EXPLANATORY NOTE

We refer to petitioner as the wife and to respondent as the husband. We designate references to the wife's appendix as "A" and to the husband's appendix, filed herewith, as "AA".

We refer to the record on appeal from the District Court of Appeal as "R".

RE-STATEMENT OF THE CASE AND OF THE FACTS

To the extent that the wife reargues that the decision of the Third District directly conflicts with the First District's opinions in Crawford v. Crawford, 415 So.2d 870 (1982) and Carroll v. Carroll, 322 So.2d 53 (1975), aff'd., 341 So.2d 771 (Fla. 1977); and the decisions in Kalman v. Kalman, 393 So. 2d 641 (Fla. 4th DCA 1981), Feldman v. Feldman, 390 So.2d 1231 (Fla. 3d DCA 1980), Rosselle v. Rosselle, 366 So.2d 1197 (Fla. 3d DCA 1979), St. Anne Airways, Inc. v. Webb, 142 So.2d 142 (Fla. 3d DCA 1962), Freidus v. Freidus, 89 So.2d 604 (Fla. 1956), and Couture v. Couture, 307 So.2d 194 (Fla. 3d DCA 1975), we disagree.

For the reasons set forth in our brief on jurisdiction, which we shall, in less detail, reiterate in part in this brief, we believe as a matter of law and as a matter of fact that there is no conflict between the decision of the Third District in this case and the decisions cited by the wife.

The origin of this appeal dates back more that one year to October 14, 1986, when the wife filed her notice of appeal of non-final order to the Third District Court of Appeal (R-1), following the entry, on October 19, 1986, by the Honorable Edward N. Moore, Circuit Judge of the Eleventh Judicial Circuit, of an order denying, without prejudice, the

wife's motion to abate/dismiss the husband's dissolution action, for improper venue (R-22; AA-1).

After being separated from his wife for one year, the husband filed his petition for dissolution of marriage on August 15, 1986 (A-3). In the belief that the matter would be amicably resolved, the husband's petition for dissolution was in simple format, praying for a judgment of dissolution and for such other and further relief as may be meet and proper. As the wife's brief points out, the petition does not mention anything about the parties' property.

The wife filed her venue motion in defense of the petition for dissolution on September 11, 1986 together with a supporting affidavit (R-5; A-5-18). The husband filed his affidavit in opposition on October 8, 1986 (R-19; AA-2-4).

In his affidavit, the husband alleged, inter alia, that the parties are and have been, since March, 1981, the "owners and operators" of Best Blueprint & Supply Company, Inc., a Florida corporation, in Miami, Dade county, Florida, that he [and another] run the day-to-day business affairs of that corporation and the husband is a director and holds two offices. One-half of the corporate stock is titled in the wife's name. He further alleged that in the event this cause could not be amicably resolved, he would seek a division of the corporation's assets or its dissolution as well as the imposition of a special equity in his favor in the corporate

stock issued in his wife's name (R-19; AA-2-4). The husband described the parties' additional substantial business and property connections with Dade County, Florida. That is, that their property affairs are conducted in and their property records are maintained in Dade County; that all of their corporations have been formed in Miami; that their financial records are provided to the parties in Dade County; and that all these activities have been so conducted for the last six to nine years with the aid of professionals located in Dade County, whom the parties had engaged (R-19; AA-2-4).

Following what had been the parties' pattern for the previous six to nine years, the husband retained Miami counsel to represent him in this dissolution proceeding and requested that the action be filed in Dade County, because the assets of the Miami business, all of the parties' individual and joint personal financial planning and corporate records, and the professionals who handle those matters for the parties and will most certainly be witnesses in this cause, are located in Dade County (R-19; AA-2-4).

Thus, the trial court was presented with unrebutted evidence which established the existence and location of property [1/] in litigation in Dade County, Florida as well as

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1/ Wife incorrectly and somewhat misleadingly tells the Court that corporate stock (personalty) "travels" with the person and that an in personam decree ordering a party to transfer stock is effective. Of course. But, the husband's unrefuted affidavit makes clear that the non-migratory assets of the corporation located in Dade County is the "property" which is the subject of the litigation.

other evidence, although not required, establishing the propriety of the choice of Dade County as the forum for this action.

In its decision, the Third District pointed out that the "disclosure and division of the property located in Dade County will [undoubtedly] be the focus of the trial", and concluded that "there is statutory support" for the husband's choice of venue and that the wife "has not demonstrated that the court, for any other reason, should have ordered the case tried in [nearby] Broward County", citing the applicable Florida venue statute, § 47.011, Fla. Stat. (1985); Groome v. Abrams 448 So.2d 82 (Fla. 4th DCA 1984); and Thames v. Thames, 449 So.2d 401 (Fla. 2d DCA 1984) (R-24; A-1-2).

The wife's petitions for rehearing and rehearing en banc were denied by the District Court on April 8, 1987 (R.26), and the wife filed her notice to invoke discretionary jurisdiction on April 17, 1987.

SUMMARY OF ARGUMENT

1. The choice of venue belongs to the husband as petitioner in the trial court.

2. The husband is not required to establish the propriety of his choice of venue. He need not plead nor prove that his venue selection is proper. Rather, the burden of proof to show that venue is improper is on the wife and the wife failed to sustain her burden of proof.

3. Venue of this cause is proper in Dade County, under the Florida general venue statute, § 47.011 Fla. Stat. (1985), in that Dade County is the situs of property in litigation.

4. The Crawford and Carroll decisions do not conflict with the decision of the Third District, as those cases address themselves solely to the issue of where a cause of action for dissolution of marriage accrues, only one of the three equally weighted venue bases under § 47.011, Fla. Stat. (1985). Unlike the instant case, there was no property in litigation in Crawford and Carroll.

5. The Crawford and Carroll decisions do not, and cannot be construed to, rewrite the general venue statute by excising from the statute the "property in litigation" basis for venue. If the legislature had intended for there to be an exception to the general venue statute in dissolution actions it would have expressly provided one. It did not,

and the decisions of the First District in Crawford and Carroll do not and cannot create one.

6. Contrary to the wife's assertions, Dade County is a convenient forum for this action. The husband's affidavit establishes that the witnesses having knowledge of the details concerning the parties' property and their insurance policies, pension plans, corporate and personal financial matters, and their estates, are located in Dade County, as are the property records, files, corporate minute books, insurance policies, etc. Thus, the cost of litigation will be greatly reduced by maintaining the action in Dade County.

7. The wife (and husband), having voluntarily chosen over an extended period to locate their property and to conduct their business affairs and supervise their property rights in Dade County, should not be permitted to forum shop simply because more than one year earlier they resided together in Broward County.

8. In dissolution of marriage actions today the focal point has become the division of the property, not the breakup of the marriage.

9. The assets of a closely held corporation owned and operated by the parties can be divided and distributed and the corporation dissolved as well in a dissolution of marriage action between the parties where the corporation is made a party. Furthermore, the conflicting claims of the

individual parties to the assets as well as the stock of the corporation, render the assets and stock "property in litigation".

ARGUMENT

THE WIFE FAILED TO MEET HER BURDEN OF PROVING THAT THE VENUE SELECTED BY THE HUSBAND IS IMPROPER.

The Third District, agreed with the trial court that the wife failed to meet her burden of establishing that the husband's choice of venue is improper and thus found that the trial court did not abuse its "broad discretion" in denying the wife's motion to abate/dismiss for improper venue, citing Groome v. Abrams, 448 So.2d 82 (Fla. 4th DCA 1984) (R-24; A-1-2).

While conceding that the burden is on the wife to prove that venue is improper the wife nevertheless shifts the burden to the husband to have established the propriety of his choice of venue in his petition for dissolution of marriage.

But, that is not the law. The husband "is not required to plead facts in support of his selection of the venue for his suit". Groome, supra, at 83.

In Inverness Coca-Cola Bottling Company v. McDaniel, the Court held:

> It is of the very nature of venue that the plaintiff [petitioner] selects it initially but that he need not plead or prove that his selection has been proper. The burden of pleading and proving that venue is improper is upon the defendant [respondent]. (emphasis and brackets added).

78 So.2d 100, 102 (Fla. 1955).

And, the wife has the burden of "clearly proving" that the husband's choice of venue is improper. Groome, supra, at 83. This, she failed to do.

Under the general venue statute §47.011, Fla. Stat. (1985), venue is proper in any one of the following counties: where the defendant resides, where the cause of action accrued, or where the property in litigation is located. If a party is sued in any one of these places he may not complain that the venue selected is improper. Board of Public Instruction v. First Nat. Bank, 111 Fla. 4, 143 So. 738, 741 (1932); aff'd. on rehearing, 149 So. 213 (1933).

The husband's proof established the existence of "property in litigation" in Dade County, his choice of forum (R-19; AA-2-4). The wife's proof does not refute this specifically enumerated venue basis, other than generally alleging that the husband's petition for dissolution does not reflect, on its face, any property in litigation (A-17). But, the husband is not required to plead or prove proper venue in his petition; and such a conclusory statement as that made by the wife in her affidavit is insufficient to establish that venue is improper. See, Lake Worth Premium Finance Co., Inc. v. Singletary, 493 So.2d 1130, 1131 (Fla. 4th DCA 1986).

Furthermore, the election of venue is the prerogative of the husband, as petitioner, not the wife. Itel-Pas, Inc. v. Jones, 389 So.2d 1085, 1086 (Fla. 3d DCA 1980); Florida Forms, Inc. v. Barkett Computer Serv., Inc., 311 So.2d 730, 731 (Fla. 4th DCA 1975).

It is the husband's "statutory right" to choose a forum, and his election controls, unless venue will not lie in that place. Houchins v. Florida East Coast Ry. Co., 388 So.2d 1034, 1035 (Fla. 4th DCA 1980).

The wife does admit, at page 11 of her brief, that "initially" the choice of venue is the husband's but she ignores the principle of law that where venue is proper in more than one county, as it is in this case, the choice of county belongs to the petitioner/husband, not to the respondent/wife. Houchins, supra, at 1289.

The Third District properly affirmed the trial court's denial of the wife's motion because she failed to meet her burden of establishing that the husband's choice of venue is improper.

As an aside, we note that the trial court denied the wife's motion "without prejudice" (R-22; AA-1), thereby leaving open the opportunity for the wife to raise the issue of venue in the future. The wife, having failed to meet her burden of proof at the first hearing, should not be heard to complain first to the District Court and now to this Court particularly where the trial court's order preserves her right to renew her motion.

DADE COUNTY IS A PROPER VENUE FOR THIS ACTION

In his affidavit, the husband alleged that the parties are the owners of a company doing business in Dade County in which the wife owns, in her own name, the parties' stock in the corporation (50% of the stock) (R-19; AA-2-4). The husband further alleged that he will seek a division of that property, meaning the assets of the company, or its dissolution and the imposition of a special equity in his favor in the stock of that corporation held by the wife (R-19; AA-2-4). The wife has not yet filed a responsive pleading in the dissolution action, other than her motion to abate/dismiss for improper venue. Therefore, we cannot say for certain what property claims she will assert. However, in her initial brief to the Third District, the wife intimated that she will assert a claim of "equitable division and distribution of marital property" in the form of a claim against the stock of that corporation (AA-5-6).

Thus, at a minimum, the parties' have each put the stock of the corporation "in litigation", and by virtue of the husband's claim, the corporation's assets [2/] are "property in litigation" as well.

[2/] We agree with the wife that in order for the trial court to order a transfer of the corporation's assets to either or both of the parties, the corporation must be made a

The venue statute, §47.011, Fla. Stat. (1985), expressly provides that venue lies in the county where the property in litigation is located. Therefore, Dade County is clearly a proper venue for this action.

The wife overlooks the fact that the husband's property claim is not limited to the stock of the Dade County corporation. In his affidavit the husband states that he will seek a division of the corporation's assets, or a dissolution of the corporation.

Furthermore, contrary to what the wife would have the Court believe, we are not talking about stock in a corporation that the parties' own as an investment, or a corporation in which the parties have no direct personal involvement, or a "shell corporation" (wife's brief, p. 23), rather we are talking about a "thriving business operated by the husband, in which the wife holds a substantial ownership interest" (opinion of the Third District, R-24; A-1-2). A business owned and operated by the parties for more than five years prior to the filing of the dissolution action (R-19;

(footnote 2 continued)

party to the action. Rosenberg v. North American Biologicals, Inc., 413 So.2d 435 (Fla. 3d DCA 1982); Feldman v. Feldman, 390 So.2d 1231 (Fla. 3d DCA 1980). Venue of the action against the corporation is proper in Dade County, as well. §47.051, Fla. Stat. (1985). The wife cannot refute that the "principal place of business" of Best Blueprint and Supply Company, Inc., is in Miami, Dade County.

AA-2-4). A business which is part and parcel of the parties' marital property. That business and its assets, not to mention the corporation's books and records, are located in Dade County, and by virtue of the husband's claim, are very much "property in litigation" under the venue statute, §47.011, Fla. Stat. (1985) (R-19; AA-2-4).

Those assets can be divided and distributed and the corporation dissolved in this dissolution action, when the corporation is made a party as well, as the husband has expressed his intention to do (R-19; AA-2-4). As we explained earlier, when after a year's separation from his wife, the husband filed his simple petition without enumerating any property claims, he had hoped that the matter would be amicably resolved. By virtue of the pendency of the wife's appeal from the trial court's order denying her venue motion, proceedings in the trial court have been virtually at a standstill since the initiation of the dissolution of marriage proceeding.

PROPERTY IN LITIGATION IS A VALID BASIS FOR VENUE IN A DISSLOUTION OF MARRIAGE ACTION

Relying upon her interpretation of the decisions of the First District in Crawford v. Crawford, 415 So.2d 870 (1982), and Carroll v. Carroll, 322 So.2d 53 (1975), aff'd., 341 So. 2d 771 (Fla. 1977), the wife argues that venue of a proceeding for dissolution of marriage is only proper in the county where the parties last resided together with the intent to remain married.

But, this reasoning ignores the very language of the general venue statute:

> 47.011 Where actions may be begun. Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located ...

If a party is sued in any one of these locations he cannot claim that venue is improper. Board of Public Instruction, supra, 143 So. at 741.

The issue decided in Carroll was whether the cause of action for dissolution of marriage arose in Okaloosa County because the petitioner alleged that the marriage became irretrievably broken there when her husband took away the car keys. 341 So.2d 771, 772 (Fla. 1977).

Faced with the fact that the action had not been filed in the county where the respondent resided, and because there was no property in litigation, the Carroll court was left with only one remaining basis for determining whether

venue was proper in the petitioner's chosen forum; that is, where the cause of action for dissolution of marriage accrued.

The Carroll and Crawford (which follows Carroll) decisions define where a cause of action accrues in a dissolution of marriage action. They are strictly limited by the issues which were presented in those cases. As there was no property in litigation in those cases, they cannot be construed to rule out that statutory basis for venue in marriage dissolution actions.

The legislature, in enacting § 47.011 of the Florida Statutes did not limit its applicability in actions for dissolution of marriage. The statutory language is "actions", not, all actions other than those for dissolution of marriage. And, there is nothing in Chapter 61 of the Florida Statutes, dealing with dissolution of marriage, which conflicts with or is contradictory to § 47.011 or enacts into law the rationale which the wife urges upon the Court, relying on her interpretation of Carroll and Crawford.

Furthermore, Carroll and Crawford do not abrogate the equally proper basis for venue in dissolution actions of where the property in litigation is located. This is evident from the second district's opinion in Thames v. Thames, 449 So.2d 402 (1984):

> There is no property in litigation in this cause. Appellant's sworn affidavit indicates that he continues to reside in Alachua County, Florida. Thus, the remaining basis for venue is where the cause of action arose. (emphasis supplied).

See also, Auritt v. Auritt, 334 So.2d 68 (Fla. 3rd DCA 1976); Smith v. Smith, 430 So.2d 521 (Fla. 2d DCA 1983).

If property in litigation was no longer a valid "remaining basis" for venue after the decisions in Carroll in Crawford, why would the court in Thames have made a point of mentioning it? Wouldn't that have been superfluous? We believe not, particularly as the focal point of dissolution proceedings today is now the division of the property, not the breakup of the marriage.

Since the Court's decision in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), decided five years prior to the First District's opinion in Carroll, trial courts today are utilizing the principle of equitable distribution to make a division of all of the marital property, regardless of how title is actually held. Division of property in a dissolution case is as much a part of the function of the trial court today as are the traditional concepts of alimony and child support.

Thus, by virtue of the evolution of the law since Canakaris, many dissolution proceedings today are actions involving disputed property. They permit a petitioner such

as the husband here to invoke the provision of § 47.011, Fla. Stat. (1985) which clearly allows an action to be maintained in the county where the property in litigation is located.

And, such application of the law makes good sense. Here, it will drastically reduce the cost of litigation. All the witnesses, the records, and the very hub of the parties' properties are in Dade County. Times have changed as have the needs of the parties to promptly and inexpensively resolve their dissolution problems.

We have not overlooked footnote 1 of the first district's Carroll decision, 322 So.2d 53, at 54, which seems to limit the applicability of the "property in litigation" basis for venue in dissolution proceedings, and from which the wife has quoted a small portion (wife's brief at pp. 12-13). 3/ The footnote is somewhat confusing in that it seems to equate a child with property in litigation.

The Court's affirmance of Carroll is strictly limited to the issue of whether the cause of action arose in

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3/ We here lay out the entire footnote with citations ommitted: "Ms. Carroll makes no attempt to invoke the addtional provision of § 47.011 allowing an action to be maintained in the county 'where the property in litigation is located.' This provision is commonly understood to refer only to actions local in nature, which a marriage dissolution proceeding is not... It has been held, however, that the presence of a child in the forum county is sufficient to sustain venue of an action involving his custody and support, despite objection by a defendant residing in a distant county ..."

Okaloosa County because the petitioner alleged that the marriage became irretrievably broken there when her husband took away the car keys. 341 So.2d 771 at 772 (Fla. 1977). Thus, it cannot be construed as an approval of the dicta in footnote 1. No court has adopted that principle. And, as aforesaid, the case law [4/] indicates that property in litigation is a relevant venue consideration in dissolution cases.

Interestingly, the footnote seems to say that the statutory "property in litigation" can only be real property. But, the legislature in enacting the statute chose to use the term "property", not "real property". It did not distinguish between real and personal property. And, property is defined as:

> That which is peculiar or proper to any person; that which belongs exclusively to one ...
>
> * * * *
>
> ... everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; ... It extends to every species of valuable right and interest, and includes real and personal property ...

Black's Law Dictionary 1382 (4th ed. rev. 1976).

[4/] Thames, supra; Auritt, supra; Smith, supra.

For venue purposes, personal property is property under the statute. See, Goodwin v. Figueroa, 407 So.2d 1055, 1056, n.1 (Fla. 3d DCA 1981).

Furthermore, as the wife recognizes, there can be no doubt that the stock of Best Blueprint and Supply Company, Inc., not to mention the assets of the business, is "property". See, e.g., Hoecker v. Hoecker, 426 So.2d 1191 (Fla. 4th DCA 1983).

We believe that Carroll and Crawford do not create an exception to the venue statute for marriage dissolution actions and should not be permitted to, in effect, rewrite the Florida general venue statute.

DADE COUNTY IS NOT AN INCONVENIENT FORUM

In her brief (p. 12), the wife recognizes that "the intent and primary purpose of venue statutes is to require that litigation be instituted in that forum which will cause the least amount of inconvenience and expense" to her, as the party required to answer and defend the action.

However, without ever actually arguing either before the trial court or this Court, in what way Dade County is an inconvenient or more expensive forum for this action, the wife does a complete about-face and thereafter argues that such considerations should not play a part in maintaining venue of this cause in Dade County (wife's brief pp. 16-17).

The wife does not, and cannot dispute that Dade County is the least expensive and least inconvenient forum for the wife, as well as the husband.

In his affidavit, the husband alleged that all of the parties' corporate and personal financial planning is done for them in Dade County, that all of the parties' corporations were formed in Dade County, and that the parties' corporate and personal financial planning records are located in Dade County.

In addition, the husband alleged that the professionals who maintain the parties' business and personal

financial records, drew their wills, and provide estate planning services, handle their business affairs, insurance policies and pension plans as well as other personal financial planning, are located in Dade County, and that these professionals have been employed by the parties continuously for the past six to nine years (R-19; AA-2-4). This proof is unrefuted by the wife.

Thus, the records which reflect the assets of the parties, and the professionals who have possession of the records, as well as first-hand knowledge of those assets are in Dade County. The wife will undoubtedly seek to discover that information, having alleged (in her motion for attorney's fees and costs) that she is not actively involved in the business which she and her husband own. Surely, it will be more inconvenient and more costly, if the action were transferred to Broward County, for Broward County counsel to have to come to Dade County to examine those records in Dade County, [5/] not to speak of the expense and inconvenience to those busy professionals who would have to travel to Broward County in the event they are called to testify and produce records at a trial.

[5/] The county where these witnesses reside, are employed, and transact business is Dade County. Therefore, the witnesses can only be deposed in Dade County. Fla.R. Civ.P. 1.410(d)(2).

It will surely reduce the cost of litigation for this action to remain in Dade County. A transfer to Broward County will only increase the cost. Perhaps that is the wife's motivation as she probably anticipates that the cost will ultimately be borne by the husband.

The parties have seen fit for the past nine years to center their business and personal financial affairs in Dade County, to seek the advice of professionals in Dade County, to maintain their business and personal financial records in Dade County, and to operate since March, 1981, Best Blueprint and Supply Company, Inc. in Dade County. How can Dade County suddenly have become an inconvenient forum? The parties' course of conduct indicates otherwise.

CONCLUSION

The District Court correctly and harmoniously applied the law to the facts of this case in rendering its decision. That decision should be affirmed.

Respectfully submitted.

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By: _____
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By: _____
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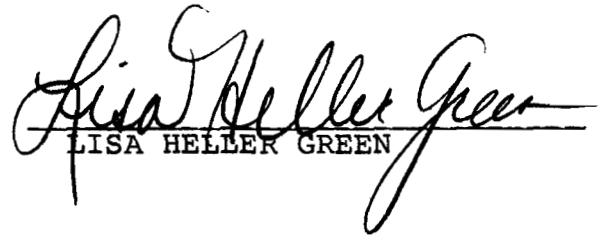
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits was mailed to A. Matthew Miller, Esq., Miller and Schwartz, P.A., 4040 Sheridan Street, Post Office Box 7259, Hollywood, Florida 33081-1259, on this 6th day of November, 1987.



LISA HELLER GREEN