OA 9-5-90

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

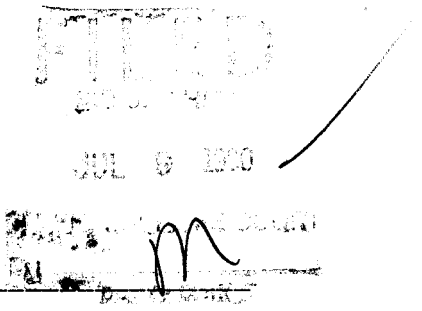
JAMES D. SIEGEL,

Petitioner,

vs. Case No. 74-813

VICTORIA B. **SIEGEL,**

Respondent.



DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

RESPONDENTS ANSWER BRIEF

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REFERENCES

The Petitioner, James D. Siegel, shall be referred to as "Husband" in this Brief.

The Respondent, Victoria B. Siegel, shall be referred to as "Wife" in this Brief.

References to the Record on Appeal shall be by the designation (R____). References to the Transcript shall be by the designation (T____). References to Respondent's Appendix shall be by the designation (A____).

Reference to the Uniform Child Custody Jurisdiction Act will be referred to as UCCJA.

STATEMENT OF FACTS AND CASE

The entire facts in this case have been set forth in detail in the Husband's main brief filed in the Supreme Court on May 14, 1990, and the Wife herein would incorporate in her statement of facts in the instant case a statement of facts which has been set forth in detail in case number 74,834.

The Wife herein can accept portions of the statement of facts set forth by the Husband; however, some statements that have been made are not supported by the record or are incomplete.

The Siegel family did leave the State of Florida **suddenly** on or about November 20, 1986. (T 45) The reason for their leaving was based upon death threats made against Mr. Siegel as a result of some illicit drug activities between Mr. Siegel and those who were seeking to take his life. (T 44) There was never any testimony that Mrs. Siegel specifically intended to permanently give **up** her residency in the State of Florida and reside in New York. From the time the Wife returned to the State of Florida on March 19, 1987, she has continually maintained this state as her permanent residence. (T 47) The Husband did institute a divorce action on April 6, 1987, by alleging that the Wife was a resident of New York at the time of service of the summons upon her. (A 1) After the Husband had obtained an **ex** *parte* "punitive custody order" from a family court judge in New York he came to the State of Florida, seized the minor child and illegally removed the minor child from the State of Florida, taking her back to the State of New York. (T 50)

The Wife, in an attempt to obtain some contact with the daughter, went to New York, and while there attempting to get contact rights with her daughter through the Family Court, was served with divorce papers filed by the husband. (A **3)** The Wife had retained a New York counsel and filed a motion to dismiss. After those were perfunctorily disposed by the New York Judge, she did file an

answer in the divorce action but specifically reserved the issue of jurisdiction [i.e. her residency at the time of service] as an affirmative defense in the divorce action. (A 6) The statutes of the State of New York do not permit the institution of a divorce action unless there is residence in the state for a period of one year, **unless both parties are a resident of the state at the time of the institution of the action** along with other exceptions. N.Y.DOM.REL.LAW, §230 (Consol. 1988) The New York courts were never called upon to take evidence on the residency of the Wife in that the Florida divorce was granted prior to the New York case coming on for a final evidentiary hearing. (R 712-718) However, in the record, the husband has conceded she was visiting the State of New York at the time of her being served with the papers in New York. (R 208) After the Wife was served with those papers, she did return to Florida and filed her Petition for Dissolution of Marriage on April 15, 1987. (R 154-159A)

The Husband, numerous times stated that the Wife appeared personally in the various courts in New York. (R **208,** 244, 387) At no time does the record ever reflect that the Wife ever abandoned her position that New York did not have jurisdiction except the times when she was coerced into accepting a stipulation settlement in order to have an opportunity to see her child. (R 671) This matter was litigated extensively in the State of Florida, evidence being taken from both sides, and the trial court in Florida determined that the stipulations that were extracted from the Wife in the State of New York were coerced and not voluntary. (R 478)

At one point in the statement of facts the Husband's attorney accuses the New York counsel of time-talling tactics in New York. There **is** no reference to the record with regard to the statement and it is not only improper but inaccurate. Husband's statement that the Florida Court assumes jurisdiction although the New York courts had already asserted jurisdiction belies the record that the New York

court never did reach the factual issue of whether or not the Wife was a resident of the state of New York at the time she was served with process. (A 8)

SUMMARY OF ARGUMENT

The Husband, James D. Siegel, urges that this Court should exercise its discretionary jurisdiction to review the Fifth District Court of Appeal's opinion because the opinion conflicts with other case law decisions in Florida. The cases to which the Husband cites do not pose a direct conflict with the Fifth District Court of Appeal's affirmation of the trial court's decision to accept and maintain jurisdiction over the divorce proceedings in this state. The Martinez case to which the Husband cites involved concurrent jurisdiction between two circuit courts in Florida. That case does not apply because it does not take into consideration issues such as personal and subject matter jurisdiction, the residency requirement required in dissolution proceedings and the principle of comity. Bedingfield and Gillis do not apply to the case before this Court and pose no direct conflict because the facts in those cases significantly differ from the facts of the instant case, and those factual differences create a major reason for reaching a different conclusion. Both of these cases acknowledge that the issue of accepting and maintaining jurisdiction and the principle of comity are within the sound discretion of the trial court.

The Wife in this case did not, as Mrs. Bedingfield had, file an initial divorce proceeding in New York thereby accepting and acceding to the jurisdiction of the foreign state and then travel to Florida and file a divorce proceeding in this state. Additionally, the child in the Bedingfield case was not being held hostage by the foreign state, forcing the mother of the child to accept the foreign state's jurisdiction in order for the mother to have any contact with the child. The Wife, in this case, was served with divorce when she was forced to come to New York to

get a judicial order to see her child for one hour. **(T** 51) Upon returning to New York about two months later the Judge required the Wife to drop her Florida divorce proceeding in order to see her child for seven hours that day. (T 51, **A 18)**

In his brief, the Husband argues that the Fifth District's decision to accept and maintain jurisdiction over the divorce proceedings when proceedings were pending in New York encourages unnecessary and repetitious litigation in separate states. The policy of discouraging unnecessary and repetitious litigation must be weighed against the constitutional mandate of allowing Florida citizens access to the judicial system to seek legal redress where a sister state improperly invokes jurisdiction over a Florida resident. The latter mandate must prevail, and Florida residents must be allowed to continue to seek and obtain dissolutions in their residential state. In the case before this court, the Wife, Victoria B. Siegel, is a resident of Florida. If Florida did not accept and maintain jurisdiction over the dissolution proceedings, the Wife would be foreclosed from seeking a divorce, as Florida was the only forum available to her. Also, the parties in this case had real property, their marital residence, located in Florida, the overwhelming majority of their married life was maintained in Florida, and all of the major witnesses were located in Florida. The trial court exercised its sound jurisdiction in deciding the dissolution of marriage issue.

POINT I.

THE DECISION OF THE TRIAL COURT, AFFIRMED BY THE FIFTH DISTRICT COURT OF APPEAL, TO EXERCISE ITS JURISDICTION OVER THE DISSOLUTION OF MARRIAGE PROCEEDINGS DOES NOT CONFLICT WITH DECISIONS OF THE FLORIDA SUPREME COURT OR WITH OTHER DECISIONS OF THE DISTRICT COURTS OF APPEAL

In Point I of his Brief, the Husband, James D. Siegel, argues that this Court should reverse the decision of the Fifth District Court of Appeal to accept and maintain jurisdiction over the dissolution of marriage proceedings because it conflicts with this Court's decision in Martinez v. Martinez, 15 So.2d **842** (Fla. 1943). It requires a distortion of this case to render it applicable to the body of cases decided in the area of interstate jurisdictional issues. The Martinez case decided by the Supreme Court, opinion written by Justice Thomas, doesn't give **us** a lot of help. The wife did file first. It's a case between two circuit courts in the State of Florida, first being filed in Polk County and the second a couple weeks later, in Pinellas County. Pinellas County perfected service before Polk County and the issue presented to this Court was which of the two counties should proceed with the case. There was no disputing the fact that two courts in this state couldn't be trying the same identical divorce action. Public policy dictated that one forum be chosen over the other. In the Martinez case the court basically decided that perfection of service over a party will determine the priority question as to who would have the right to proceed where there are concurrent and conflicting venues.

Martinez dealt with venue between two circuit courts in this state. Concurrent jurisdiction, called venue, between circuit courts in the same state involve different principles of law than concurrent jurisdiction between two

states. In the instant case, there are not only priority of jurisdiction issues, but there are also other issues which impact the jurisdiction issue, such as the residency requirement, personal and subject matter jurisdiction, the doctrine of res judicata, and comity. Intrastate court conflicts rest squarely in the same judicial system, all subject to review by appellate courts within the same state.

For any number of sound philosophical reasons, the law that applies to venue issues cannot be used to surplant the fundamental federalism issues that have guided courts in this country for over 200 years. Therefore, the Martinez decision cannot be applied to force a "conflict" with prior precedence in this state. That decision is good law and can remain good law alongside the Siegel decision for many years to come. Mabie v. Garden Street Management Corp. 397 So.2d 920 (Fla. 1981), another case relied upon by the Husband, is a brief decision again involving a intrastate venue issue that tracks the Martinez decision and renders little help in this interstate jurisdictional area.

In Point IB of his Brief, the Husband, James D. Siegel, argues that the Fifth District Court of Appeal's decision to accept and maintain jurisdiction over the dissolution of marriage proceedings directly conflicts with Bedingfield v. Bedingfield, 417 So.2d 1047 (Fla. 4th DCA 1982) and Gillis v. Gillis, 391 So.2d 772 (Fla. 3d DCA 1980). There is no conflict with either.

The wife, in Bedingfield, had previously filed for a divorce in Georgia, had obtained an order of temporary custody with visitation to the husband, and then she fled the state, taking the children with her. [Bedingfield at 1048] Later, in a Florida enforcement proceeding instituted by the husband, the wife filed a counterpetition for dissolution of marriage. The Fourth District Court of Appeal in Bedingfield held that the wife's counterpetition for dissolution should have been stayed under the principles of priority because of her pending divorce in Georgia.

The primary issu in the Bedingfield case wa whether Fl rida properly exercised its jurisdiction under the Uniform Child Custody Jurisdiction Act. Issues under the UCCJA are governed by state and federal statutes and do not embrace years of evolving case law on the interstate jurisdictional "conflicts" issues. This case and the uniform act is discussed in great detail in the Wife's main brief filed in the companion case in this Court. Additionally the facts in the Bedingfield case are so extreme as to mandate the decision entered by the 4th District. This court does not need to adjust the decision in Bedingfield in order to affirm the divorce jurisdictional decision in Siegel.

The instant case factually differs from Bedingfield in that the Husband filed the initial proceedings in New York, [under a cloud of assumed subject matter and personal jurisdiction] whereas the Wife filed the proceedings in Florida. The Wife in this case did not, as Mrs. Bedingfield had, file an initial divorce proceeding in New York, thereby accepting and acceding **to** the jurisdiction of the foreign state and then travel to Florida and file a divorce proceeding in this state. Additionally, the child in the Bedingfield case was not being held hostage by the foreign state, forcing the mother of the child to accept the foreign state's jurisdiction in order for the mother to have any contact with the child. Mrs. Bedingfield was the parent who was attempting to conceal the children from the father, as she fled one state with the children and hid them until some time later when the father located them in Florida. The Wife, in this case, was served with a notice of divorce when she was forced to come to New York to get a judicial order to see her child for one hour. (A **3**) Upon returning to New York about two months later the Judge required her to drop her Florida divorce proceeding in order to see her child for 7 hours that day. **(A 8)**

About five months later, having no contact with her daughter [personal or telephonic] she was coerced into agreeing to giving the Husband custody over the

child in order to get to see her child during Christmas, 1987, but then only if she dropped her Florida divorce proceedings. **(A** 10)

The court in Bedingfield did acknowledge, that a sister state has the inherent right to exercise its discretion to recognize, or not to recognize, the right of the foreign state to proceed. The opinion went on to state that the "principle of priority" is inapplicable between sovereign jurisdictions as a matter of duty. Rather, a court of one state may, as a matter of comity and **in its discretion,** stay proceedings pending before it on the grounds that a case involving the same subject matter and parties is pending in a court of another state. [Bedingfield at 10501 This leads to the conclusion that the facts in this case are so extreme as to mandate the exercising of the trial courts discretion against granting comity to the New York courts exercising jurisdiction.

In his Brief, James D. Siegel argues that the Fifth District Court of Appeal's decision in the instant case conflicts with Gillis v. Gillis, supra. Like Mrs. Bedingfield, Mrs. Gillis instituted divorce proceedings in England. She obtained in that proceeding a final judgment of divorce. Still pending in England was her request for child support. Mrs. Gillis then traveled to the United States and ultimately instituted proceedings in Florida seeking child support. The husband moved to dismiss based on the fact that England had jurisdiction. Then the wife moved to abate the matter until the English Court decided the matter. The court did abate the matter for four months and then the wife moved again for a hearing and the court went ahead and denied the husband's Motion to Dismiss and ordered the husband to proceed with the case and decided that Florida had jurisdiction. The Third District stated that the husband didn't have to respond as England clearly had prior jurisdiction on the issue and that the Florida Court should have gone ahead and continued the stay to avoid duplication. Since proceedings were pending in England on the same issue, the Third District Court of Appeal held that

Florida should have exercised its sound discretion and stayed the Florida proceedings pending determination of the same question in England.

The Gillis case is inapplicable to the case before this Court. The Wife, Victoria B. Siegel, did not institute divorce proceedings, travel to Florida, and institute proceedings in this state. Rather, the husband instituted proceedings in New York. The Wife, who was a Florida resident, instituted divorce proceedings here. Where the Wife had been the one who instituted the suit in England and then subsequently instituted in Florida, it is difficult to equate the factors in that case with those which are present in the instant case. The Wife, Victoria B. Siegel, agrees that when the same party goes from jurisdiction to jurisdiction invoking a court's jurisdiction, hoping to eventually get a favorable decision such actions violate so many equitable principles that to permit such behavior would do a grave injustice to the basic precepts of anglosaxon jurisprudence. If the Wife, Victoria B. Siegel, had been guilty of that type of inequitable conduct she would not be litigating these issues in the Florida judicial system.

Baron v Baron. 454 So.2d **86** (Fla. 4th DCA **1984)** has been cited by the Husband in support of his position that where the jurisdiction is challenged in a foreign state and the person loses then that foreign state's decision becomes res judicata and precludes a collateral attack on the judgment in a sister state. In that case, the New Hampshire suit was filed some three days prior to the Florida suit being filed and there was a special appearance in New Hampshire to challenge the jurisdiction. The Florida Court did not stay its proceeding, but did allow the New Hampshire Court to proceed with all the child custody issues and retain the divorce issues to itself. The New Hampshire court was able to get the final judgment first and then they brought the judgment to Florida and plead full faith and credit on all the issues. The Florida trial judge had refused to give full faith and credit to the judgment because the wife was not a resident of New Hampshire

and the husband was not personally served with process. The Fourth District Court of Appeal reversed that based upon a finding that the New Hampshire Court had reached judgment first and that judgment is valid. Where the issue of jurisdiction was raised and ruled on by the New Hampshire Court, that decision is res judicata and entitled to full faith and credit, thereby precluding a collateral attack in the sister state.

This decision did omit discussing many Florida decisions that would have come to a different conclusion including decisions that distinguish between factual versus legal findings by the foreign state. The only way to incorporate this decision into the existing case law in this area is to note that Judge Hurley did point out that there was **nothing on the face of the record disclosing the invalidity of the New Hampshire decree.** Therefore, one could assume that if there were on the face of the record matters that disclosed the invalidity of the order, the decree entered by the foreign state could be considered void by the Florida Courts and a trial court would have the right to then question jurisdiction even though it had been previously litigated in the foreign state. The Fourth District did not discuss the case of Rhoades v. Bohn, 114 So.2d 493 (Fla 1st DCA 1959) at all, even though the Rhoades case was decided some **23** years prior to that time. The Rhoades court had established the rule in Florida that only where there was an evidentiary basis for the foreign state's finding of jurisdiction was the Florida trial judge bound by the principle of full faith and credit.

In Schwartz v. DeLoach, 453 So.d 454 (Fla. 2d DCA 1984), the Plaintiff filed an action in the state court and it was removed to the Federal Court by the Defendant, and then the Plaintiff, three months later in same circuit, filed a second action in the state court. The state court refused to stay this second action covering the same matters that were plead in the first case and on appeal the district court ruled that the second case really needed to be stayed until the first

case was decided. The plaintiff chose the forum, something happens that they do not like and the same plaintiff attempts to go to another forum to litigate the same matters. Cases of this fact pattern do not appear to be much help in deciding the issues in this case. Likewise, the case of Darr v. Burford, **339** US 200, **94** L. Ed. **761,** decided in **1949,** is of tenuous help. It involves an attempt by a prisoner to bring a habeas corpus action in the Federal district court before applying for certiorari to the United States Supreme Court from a state judgment denying him habeas corpus. In this exhaustion of remedies question the court noted in its opinion the doctrine of comity, acknowledging that one court should defer action on cases properly within its jurisdiction until the court with concurrent power has an opportunity to pass upon the matter. Because of this doctrine, the court found that a district court had the power to refuse a discretionary writ of habeas corpus as a matter of comity until state remedies were exhausted, including applying for certiorari to the United States Supreme Court. The dictum in this case **is** of little value when the body of case law surrounding Williams v. State of North Carolina, **325 US 226, 89** L Ed **1577** is examined. These cases recognize the right of sister states to reexamine the jurisdictional underpinning of a foreign state's exercise of jurisdiction before the sister state is required to give full faith and credit under the Constitution of the United States.

POINT II

A FLORIDA TRIAL COURT MUST EXERCISE JURISDICTION OVER A DIVORCE INSTITUTED BY A FLORIDA RESIDENT, WHEN A FOREIGN JURISDICTION IMPROPERLY ATTEMPTS TO EXERCISE JURISDICTION OVER **A** FLORIDA RESIDENT.

A. THE PRINCIPLE OF COMITY REQUIRES A TRIAL COURT TO TAKE EVIDENCE TO DETERMINE THE RIGHT OF A FOREIGN JURISDICTION OVER A FLORIDA RESIDENT, AND TO INVOKE THAT PRINCIPLE ONLY WHERE IT FINDS THAT THE FOREIGN COURT HAS JURISDICTION, ITS JUDGMENT WAS NOT FRAUDULENTLY PROCURED, AND ITS EXERCISE DOES NOT VIOLATE A PUBLIC POLICY OF THIS STATE OR IMPOSE A UNREASONABLE BURDEN UPON A FLORIDA RESIDENT

The Husband has continuously raised the issue, that the courts of the State of Florida, or for that matter, any sister state courts, would not have the right to make an independent determination as to the State of New York's jurisdiction in matters of divorce jurisdiction. The problem between sister states looking at other states' jurisdiction has been a long standing part of our federalism. The Supreme Court of the United States was called upon to rule in this area many times. The case of Williams v. The State of North Carolina supra, permitted this court to analyze the problem of divorce jurisdiction in depth.

Without discussing the facts of that case the court laid to rest the right of a sister state to review the jurisdiction of another sister state, in divorce cases.

> The fact that the Nevada Court found that they [the parties] were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada Court found that it had power to award a divorce decree cannot, we have seen, **foreclose reexamination by another State.** Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the

> other States which the full faith and credit clause certainly did not confer. (emp. added)

They concluded by saying that

> [N]orth Carolina was not required to yield her state policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, **that they did not acquire domicile in Nevada** and that the Nevada court was therefore without power to liberate the petitioner from the amenability of laws of North Carolina governing domestic relations. (emp. added)

The United States Supreme Court, as early as 1925, recognized that when sister states jointly litigate the same issues, neither state need be deterred by the actions of the other state. However, whenever judgment was rendered in one of those states, it would be subject to the principles of res judicata under the full faith and credit clause.

> Where both are in personam, the second action or proceeding "does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever **a** judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

Our Supreme Court has been called upon to discuss these issue in a number of different situations. For example, in Herron v. Passailaigue, 110 So **539,** (Fla. 1926), Justice Terrell opined as follows.

> No principle of law is better settled than this: The right of every state under the Constitution of United States, to regulate the matter of marriage and divorce within its own borders and to

> defend it against encroachment, and to fix and declare the matrimonial status of its own citizens, and the full faith and credit provisions of the Constitution is not to be construed so as to defeat this right, nor is the provision applicable at all save to judgments rendered with jurisdiction which is the power to adjudge, and jurisdiction may be collaterally inquired into.

In the case of Gilman v. Morgan, 29 So.2d 372. (Fla. 1947), Justice Adams opined that the Florida trial court had the right to ascertain whether the Iowa court had jurisdiction of the subject matter so as to entitle its orders to full faith and credit.

> It becomes necessary for **us** to determine whether the Iowa judgment is entitled to full faith and credit, under Article IV, Section 1, Constitution of the United States. If the Iowa Court did not have jurisdiction of the subject matter it's judgment is not entitled to the full faith and credit and, as to that question, we have the power to ascertain. Williams et al v. State of North Carolina, 324 **U.S.** 226, 65 **S.** Ct., 1092, 89 L. Ed. 1577, 157 **A.L.R.** 1366; Esenwein v. Pennsylvania ex rel. Esenwein, 325 US 279, 65 S. Ct. 1118, **89** L.Ed. 1608, 157 A.L.R. 1396 and 31 Am. Jur. page 162, Sec. 553 et seq.

In that case, Justice Adams reversed the trial judge who had awarded custody of a child based upon the judgment in Iowa. He based his reversal upon the single finding that the question of the best interest of the children was not litigated **in a truly adversarial manner** and that the issuance of a custody order as a penalty could not establish its jurisdiction. He concluded by finding that "jurisdiction must be conferred by law" implying that it could not be conferred by the conduct of the parties, i.e. stipulations, or the whim of the foreign trial judge.

Justice Roberts, in Lanigan v. Lanigan, **78** So.2d 92 (Fla. 1955) made it clear that one cannot prevail in the State of Florida by contending that this State is required to give full faith and credit to a divorce decree of a sister state which is void for want of jurisdiction or by reason of fraudulent procurement.

> Nor can it be successfully contended that this state is required to give full faith and credit to divorce decrees of a sister state

> which are void for want of jurisdiction or by reason of fraudulent procurement.

Three years earlier, Justice Roberts in Haas v. Haas, 59 So.2d **640** (Fla. 1952) had confirmed the right of a party in Florida to provide equitable defenses against the enforcement of foreign divorce judgments. In the Haas case, the parties were residents of New York at the time when a proceeding for separation was instituted by the wife and during the process the husband left the State of New York. It went on to judgment uncontested in **1948.** Then the wife came to Florida in **1949** and asked the Florida Court to adopt and enforce the **1948** judgment. Thereafter, the wife went back to New York and asked the New York to reduce the alimony arrearage to judgment and the Respondent didn't receive notice of such proceeding until two days after the judgment was entered by the New York Court. The husband attempted to set aside the judgment in New York and the New Court, after hearing and considering an affidavit filed in support and opposition entered its order denying the Husbands motion to set aside the judgment unless he posted a $27,000 surety bond in the State of New York. The husband didn't appeal the Order. The wife came to Florida and instituted suit in Florida in order to enforce the $27,000 New York Judgment. The husband set up equitable defenses alleging that the judgement was void because of lack of due process and notice, and other grounds. Justice Roberts determined that those equitable defenses were recognizable as proper defenses in enforcing a foreign judgment and that the husband could litigate those defenses here in Florida.

> [W]e are not here concerned with what subsequent efforts might be made to enforce the judgment, in the State of New York.

The First District Court in the case of Rhoades v. Bohn, supra, faced a question that had some parallels to the one in the instant case. Judge Wigginton, for the court, pointed out the facts. The parties were married in Wisconsin. The

Final Decree of Divorce was entered in 1951. The wife was apparently granted custody of the minor child in the first divorce. The husband remarried and shortly after their remarriage, there was an agreement between the husband and wife that the child should come and live with the father. There was an amended decree entered in Wisconsin at that time. The husband moved a year later moved from Wisconsin to Florida and the wife was aware of the move but did not petition the Wisconsin Court for any change until 1957. The husband filed a motion to dismiss for jurisdictional grounds challenging the Wisconsin court's jurisdiction over him personally and the subject matter and the court heard those matters and denied it. Thereafter the attorney withdrew and declined proceeding further in the case. Thereafter, the Wisconsin court entered an amended decree awarding custody of the child to the mother. The mother then came to Florida and instituted proceedings in Duval County in which she attempted to get that decree accorded full faith and credit. The Florida trial judge dismissed the petition, holding that Florida was not bound to give full faith and credit to the decree because the child was not physically present in Wisconsin and that the best interest of the child was not litigated in a truly adversarial manner. Justice Wigginton in discussing the existing Florida Law and in particularly, the former Haas decision, stated as follows:

> We interpret the Haas decision to mean that only when the issue of the foreign court's jurisdiction turns on **a disputed question of fact and upon hearing the issue** is resolved in favor of the courts jurisdiction that such determination become res judicata and cannot be litigated a second time in another state. . . **The Wisconsin Court's decision in favor of its jurisdiction turned solely on an issue of law.** That ruling did not therefore become res judicata, and the defendant was at liberty to raise the question again in the Florida courts in this proceeding. (Emp Added)

The Rhoades case is also known for reversing the Dorman Rule which was a rule that said Florida would not have jurisdiction unless the child was present within its jurisdictional limits

In Gillen v. United Services Automobile Ass., **300** So.2d **3** (Fla. 1974) the Supreme Court, reversed a trial and district court holding that the Florida court were bound to give comity to the law of a foreign state where such a construction would bring about an inequitable result. This case did not involve conflicting courts, but did give a good discussion of the comity principle. Justice Adkins stated:

> [G]enerally speaking, since the purpose of comity is the fostering of amiable and respectful relations among individual states, a prerequisite for its institution should be a significant interest of the foreign state in the issue to be adjudicated. . . .While it is generally undesirable to unduly criticize the decisions of a sister state, it becomes necessary to evaluate one court's position on an issue and the reasons behind it in order to accurately assess the respective states' interests. . . . Public policy requires this Court to assert Florida's paramont interest in protecting its own from inequitable insurance arrangements.

The public policy and protection of our citizens rule for declining to grant a sister state's laws or judicial orders, comity was repronounced in the case of Beverly Beach Properties. Inc. v. Nelson, *68* So.2d 604 (Fla. 1953) They cited to the earlier Herron case to support its language. Of similar import is the case of Anderson Contracting Company. Inc. v. Zurich Insurance Company, 448 S2d 37 (Fla. 1st DCA 1984) where the court confirmed that comity does not require Florida to allow foreign law to surplant its public policy, recognizing that comity is for convenience and expediency.

The Third District was called upon in 1974 to discuss a similar matter in Ratner v. Hensley, **303** So.2d 41, (Fla. 3rd DCA 1974) In clarifying this state's responsibility to comply with full faith and credit, the court stated that the courts

of this state are bound to give full faith and credit to a judgment of a sister state but the rule is subject to the principle that the courts of this state are not required to recognize the judgment of another state where the judgment was rendered by the court without jurisdiction or where it was obtained by extrinsic fraud. It went on to point out that questions of foreign state's jurisdiction may be raised in this state in any action to enforce that state's orders. Thereafter, the court discussed, at length, the effect of a constructive service statute in the State of South Carolina. The opinion recited the results of a jurisdictional evidentiary hearing in South Carolina on whether the defendants were doing business as another entity in that state. The district court reversed the trial court's granting of a summary judgment to the plaintiff [the holder of the South Carolina judgment] because the record did not show that the question of jurisdiction over the defendant, individually, was litigated in South Carolina. This case recognizes that the Florida trial judge must review the factual basis of the decisions of a foreign state's jurisdiction to be sure that a full evidentiary hearing was afforded the Florida resident before it will enforce any foreign order,

Finally, the Wife points to the case of Mirras v. Mirras, 202 So.2d **887** (Fla. 2nd **DCA 1967)** which, like the instant case, involved a jurisdictional battle between New York and Florida over **a** divorce and a minor child. In November, **1964,** the husband filed his action in New York. The wife filed in July, **1965,** in Florida. The husband sought to abate the action, pending New York's decision, based on the principle of comity. The trial judge denied that and moved the case on to final evidentiary hearing. Florida entered its final judgment in September, **1966.** The district court upheld the final judgment of divorce, in spite of the prior filing and prior interlocutory decree entered in New York. When they discussed the custody part of the order, they carefully laid out their understanding of the doctrine of comity as it affects divorce cases in this state.

> [E]ven though a decree touching custody of minors of the foreign court having jurisdiction is entitled to great weight under the doctrine of comity, that tenet is discretionary with the court and depends, for its consideration, upon **the foreign court having had jurisdiction and having properly litigated the matter before it.** (Emp. added)

The district court then refused to recognize the New York order because, not only did it find it to be without jurisdiction but also found that even if it had jurisdiction the New York court did not consider relevant facts (evidence of the Wife's qualification for custody of the child) nor did the the New York court litigate in a truly adversarial manner.

> The decree of the Supreme Court of New York regarding custody of the minor child involved is entitled, then, to no weight in this case inasmuch as the decree was issued without jurisdiction. The Florida court, in exercising sound discretion, could likewise have given it no weight under the doctrine of comity, in any eventuality, because of the absence of relevant facts bearing upon the best interest and welfare of the child before the New York court at the time of its decree. Nor was any evidence considered with reference to the appellee's [Wife's] qualifications for custody of the child. . . .The question of the best interest of the child not having been litigated in a truly adversary manner in the foreign state, its decree would not be recognized or given effect by the Florida court.

The court concluded it opinion by affirming the trial judge's finding of no abuse of discretion and no rulings inconsistent with the law.

> On appeal, the Appellate Court must not only view the evidence in the light most persuasive to the position of the appellee or the party who prevailed in the lower court but he, as the prevailing party, is entitled to the benefit of all reasonable inferences that can be drawn from the evidence viewed in the light most propitious to him The Appellate Court is limited to a review of the law and ***so*** long as there is sufficient evidence to sustain a finding of fact, must not substitute its judgment for the judgment of the trial court in this regard..

The Fifth District, in upholding the trial courts' right to decide the divorce matter while not discussing the cases set forth above, did place in its opinion three cases. The facts of Gratz v Gratz, 188 ***So.*** 580 (Fla. 1939) were the wife first filed for divorce in Florida and then the husband filed in New York. New York issued its judgment first. The husband filed his judgment in Florida and requested full faith and credit and a dismissal of the Wife's petition. There is no discussion in the opinion as to whether the issues of the divorce were litigated in an adversarial manner in New York or went by default. Additionally, the husband's complaint about the wife's jurisdiction was grounded upon the erroneous principle that a wife could not establish a separate domicile from the husband. The Florida Supreme Court basically stated the state that first acquires jurisdiction doesn't have to stop its proceeding just because another state has entered a judgment first. This case seems to struggle over another unresolved issue: whether the court that obtains a judgment first has the right to have its judgment estabilished and enforced under the full faith and credit clause where that court **properly had jurisdiction.** The Gratz case says, no, to upholding the principle that the judgment which is acquired first must be given full faith and credit. It appears like the court was persuaded by the fact that the uncontested default divorce in New York did not truly litigate the issues of this case, and therefore is not entitled to enforcement in Florida.

The Fifth District also supported its decision upon the case of Cruickshank v. Cruickshank, 420 So.2d 914 (Fla. 1st DCA 1982). In Cruickshank, the first action was filed by the wife in Illinois in July of 1981, The husband was personally served and he answered the suit. Then the husband moved to Florida and filed in Okaloosa County in August of 1981. The wife appeared and contested subject matter jurisdiction by claiming that the husband had not met the residency requirements of Florida, that Florida was not a convenient forum, and that the parties were already litigating in Illinois. The trial judge and the district court

found that the husband had met the residency requirements and that the discretion exercised by the trial judge was not abuse when he denied the forum non conveniens motion. The court was influenced by the Husband's contention that **Florida was the only forum available to him to obtain a divorce.** Then the district court summarily affirmed the trial judge's denial of the motion based upon the principle of comity [priority] citing the Gratz case.

Even though the First District did not spend much time on this last issue, the opinion does support the decision of the Fifth District in the instant case, and does follow the prior law as set forth above in this brief.

Also, the Fifth District relied upon a decision in 1980, Markofsky v. Markofsky, 384 So.2d 38 (Fla. 3rd DCA 1980). A Canadian proceeding for divorce was filed first. The opinion does not disclose whether this was filed by the husband or the wife, but one could assume that the husband had filed first in Canada. A second divorce proceeding was filed in Florida by the wife. Apparently the wife, having established a proper residency for herself and her children, instituted this second proceeding in Florida and the wife was not required to abate or dismiss its action either **as** a matter of jurisdiction or as a matter of comity. Although not discussed in any kind of depth the court was persuaded that the wife was a Florida resident for a considerable period of time and **could only proceed with a divorce case in this state.** The opinion does not disclose that the Wife contested the Canadian Courts jurisdiction over her. The court cited the case of Schrey v. Schrey, 354 So.2d 405 (Fla. 4th DCA 1978) as authority for its position.

The Schrey case, again, is a very brief opinion but does gives this court some guidance in this matter. It is a case involving a parenting issue. There **is** no discussion of UCCJA. The court found that Florida did have jurisdiction even though the Pennsylvania proceeding had been filed first. There was no prayer for

custody in Pennsylvania. The Florida proceeding was filed second. The Florida trial judge had declined to exercise jurisdiction based upon the comity principle of priority The district court reversed and stated that Florida should have exercised jurisdiction. Again, a district court is deciding that Florida **as** the second state filing should proceed, but there is no discussion of whether or not Pennsylvania was exercising any jurisdiction over the issues of this divorce.

Therefore, there are four districts that have ruled that the comity principle of priority does not have to be followed in this state. The First, Third, Fourth, and Fifth, all basing their decisions fundementally upon the Gratz decision.

B. THE FLORIDA COURT CORRECTLY FOUND THAT NEW YORK HAD NOT EXERCISED ITS JURISDICTION IN THE HUSBAND'S NEW **YORK** DIVORCE ACTION.

The following facts are important in determining the State of New **York's** jurisdiction over the Wife in the divorce proceeding.

November 20, 1986, some five years and eight months after the parties had been married and residing in Florida, they suddenly relocated to New **York** when the husband was threatened with death by some drug dealing associates.

March 19, 1987, some four months after arriving New York, the Wife left the Husband relocated back to Florida with the minor child.

March 28, 1987, the Husband removes the minor daughter from the Wife's home and returns with her to New York.

April 2, 1987, the Wife executed a Petition for Dissolution of Marriage in the State of Florida.

April 6, 1987, while the Wife was in New York, solely for the purpose of attempting to obtain a court order to see her daughter, she was served with a summons for divorce. (In New York the action for divorce is a mere notice and does not contain the petition for divorce but under New York law this is

recognized as the date when action is commenced.) This was some four and one-half months after the parties had first relocated in New York.

April 15, 1987, the Wife instituted suit for divorce in the State of Florida by filing the same in the Circuit Court, 18th Judicial Circuit, Seminole County.

April 22, 1987, the Wife filed a motion to dismiss through her New York counsel for lack of jurisdiction. Simultaneous therewith the Wife filed an affidavit and her attorney filed affirmation.

April 27, 1987, husband was served by long arm statute in New York with the Wife's Petition for Divorce. (A 47)

May 20, 1987, the Husband's Florida counsel filed a motion to dismiss for lack of jurisdiction and a motion to stay the proceeding in the Florida Court.

August 19, 1987, the trial judge in Florida conducted an extensive evidentiary hearing on the issue of jurisdiction at which all parties appeared and testified. At the conclusion of that hearing the Court entered an oral order that was subsequently reduced to writing wherein the court found:

1) that the Wife was not a resident in the State of New York when she was served with papers on April 6, 1987, affirmatively finding that she had established residency in the State of Florida on March 19, 1987, and her return to New York was to appear at the hearing;

2) that the service of process on the Wife was ineffective in New York;

3). that the child had substantial contacts in the State of Florida, more than any other state setting forth those contacts;

4). that both actions that were filed in the State of New York were not in substantial compliance with the UCCJA, and

5) that the earliest date that the State of New York could have jurisdiction over the minor child under the UCCJA would have been April 26, which would have been eleven days after the commencement to the Florida action.

The Court concluded by denying the motion for stay and motion to dismiss, affirmatively finding that the State of Florida had jurisdiction.

August 22, 1987, the Wife amended her pleading to a $61.09 Petition.

August 25, 1987, the Supreme Court of New York (Trial Court) entered an order denying the Wife's motion to dismiss finding:

1) the Wife was personally served in the State of New York and

2) the residency of the Wife is a substantive element to be proved in the matrimonial action.

The court did not set an evidentiary hearing on this matter.

March 14, 1988, the Wife filed an answer to the divorce petition and set up six affirmative defenses, the first of which was that there was no jurisdiction over her person, the fifth was that there was no jurisdiction over the subject matter, and the sixth was the divorce action could not properly be maintained under **$230** DRL. (Domestic Relations Law).

Jurisdiction over actions for divorce in the State of New York is governed by statute. Domestic Relations Law **$230** succinctly sets forth the residency requirements for the institution of an action for divorce. There are five such provisions, four of which carry with it specific time requirements. The first, second and third provisions require a one year residency in the State of New York before the action can be instituted. The fifth ground requires two years of residency. **The fourth ground permits an action to be instituted where both parties are residents of the State of New York at the time of the commencement of the action and that the cause of action occurred in the state.**

The New York court has still not heard the divorce petition largely due to the inability of the husband to establish that the Wife was a resident of the State of New York on April 6, 1987, the date she was actually served. If it is

determined that the husband could not properly institute a cause of action for divorce in the state of New York because of the Wife's non-residency, then it would require a new action filed after November 21, 1987, in order to meet the statutory residency requirement of **DRL** §230. Up to the present time, the husband has not instituted a new action for divorce in New York under the residency requirements under the third provision of the statute. The Wife pursued her petition for dissolution of marriage through to final judgment which was entered on September 8, 1988, and supplemented thereafter on December 9, 1988.

The New York Trial Judge predicated his decision denying the Wife's motion to dismiss upon a 1976 case of Lacks v Lacks, **359** NE 2nd 384. In that case, the Court of Appeals of New York was called upon to set aside a final judgment for divorce that was entered in 1970. The Wife had opposed the divorce and fought it through the appellate process. Four years after the final judgment had been entered and two years after all of her appeals had been exhausted, she filed a collateral attack alleging that the Husband was not a resident of the State of New York for one full year prior to the commencement of the original action. Faced with the unpleasant task of opening up a final divorce decree that had been entered some four years before, they decided that a divorce judgment granted in absence of the residency requirement as provided for under **$230;** (even if erroneously determined as a matter of law or fact) is not subject to a "vacatur". This is apparently a procedure similar to our Fla.R.Civ.P. Rule 1.540 (B), Relief from Judgment or Decree.

The issue was decided by the New York Court without the taking of any evidence, based upon affirmation and affidavit, and basically decided as a matter of law upon the Lacks case which held that the residency requirements under **$230** only go to the substance of the divorce action and not to the jurisdiction of

the Court to hear the matter, and therefore would have to be proved as an element of the divorce cause of action.

For the sake of argument, this construction of subject matter jurisdiction places many citizens of this state and every other state in the union at peril if a wayward spouse were to try to delay an expected divorce filing in his or her present state of residence. For example, if the husband and wife in this case had gone to New York for a vacation or any reason, and shortly after arriving the husband suspecting that the wife was going to file for divorce in their home state immediately serves the wife with a notice of divorce under New York law. He alleges that the wife is a resident of New **York** and she committed acts that would be grounds for dissolution of the marriage. The husband then declares that he is going to remain in New York and make that his residence. The wife upon returning to the state where the parties had resided institutes a second divorce proceeding. Even though the parties had lived for twenty years in this state, the case would be stayed based upon the Husband's position in this case.

Under the principle of priority the state of New York would have the jurisdiction to proceed with the divorce proceeding at least through the final trial, and any attempt by the wife to dismiss the New York case would be met with a denial based upon the Lacks decision. If it was established at the trial that the wife was not a resident when she was served with the New York summons for divorce, then the divorce petition would be dismissed. At this juncture, maybe two or more years later, the wife could finally attempt to revive her action for divorce. All that time any proceeding for divorce in the sister state would have been stayed with the wife having to go to the expense of litigating the matter in two states and suffering many other anomalies as a result of the delay in justice.

The position of the trial judge in New York does not comport with logical sense. It puts New York in a position of being able to control the pace of the

litigation, even though ultimately the issue of the right of New York to proceed would be denied. A more logical procedure in this matter would have been for the State of New York to immediately take evidence on the issue of whether or not the Wife was in fact a resident at the time and if that evidence established that she was not a resident to dismiss or terminate the action as opposed to requiring that matter to be heard at the final hearing of the cause. In this case such an action on the part of either of the judge in New York would have determined that the Wife was not a resident and that the jurisdiction - or whatever New York chooses to call it - would have to be dismissed. With that dismissal in May or June of 1987, the Florida trial judge would then have been able to have proceeded to determine all of the issues in the divorce petition.

C. THE POLICY BEHIND THE EXISTING LAW OF FLORIDA REGARDING APPLICATION OF THE DOCTRINES OF COMITY, PRIORITY, AND FULL FAITH AND CREDIT IS SOUND AND SHOULD BE APPLIED TO THE FACTS IN THE INSTANT CASE.

The doctoring of judicial comity is not a rule of law but is one of practical convenience and expediency based upon the theory that it is a beneficial exercise in interstate harmony. The doctrine is not a rule of law, but one of practice, convenience and expediency.

The courts of the State of Florida have acknowledged and recognized the doctrine and have followed it when it did not overrule established principles in Florida. For example, it would not be used to override the State of Florida's established public policies. It can be departed from for the purpose of protecting citizens of this state or enforcing some paramount rule of public policy, or where the enforcement of a sister state's law would be in conflict with laws of the State of Florida and would give non-residents an advantage over residents. All of this language adopted by the courts over the years have given the trial judge the right

to exercise discretion in regard to giving way to the jurisdiction of a sister state in the area of principle of priority, that is, the court which first asserts jurisdiction has jurisdiction. The doctrine of comity, along with its exceptions, has been permitted to be applied by the trial judges of this state.

The issues presented in this review, when reduced to its basic core, go to the requirements placed upon a trial court faced with a principle of priority question. It has been argued by the Husband in this case, and suggested by some other cases in this jurisdiction, that the trial judge must grant a stay of the Florida case immediately upon being satisfied that there is a pending case in a sister state. Other cases suggest the trial judge in the above situation is required to set down a plenary evidentiary hearing to determine whether the sister state has, in fact, proper jurisdiction under applicable state and federal law, and only upon such factual findings would the court then either grant or deny the requested stay. There may even be a mid-ground position which holds that a trial court in the State of Florida can either grant the stay immediately without the taking of any testimony or holding any hearing, or may, in its discretion, hold a hearing to make the determination. That decision will be reviewed only based upon an abuse of discretion.

The facts in the instant case reveal clearly that the trial court judge did not automatically stay the Florida proceedings upon being notified that a prior proceeding for dissolution of marriage was pending in the State of New York. Therefore, if the rule in Florida is that a trial court judge is required to automatically issue that stay, then the trial court judge misapplied the rule and the Fifth District Court of Appeals erred in affirming that decision.

On the other hand, if trial court judges in the State of Florida have either the responsibility or discretion to conduct plenary evidentiary hearings, then the trial court judge in the instant case did not err by holding such a hearing. The record

in the case below reveals that the Husband filed his motion to dismiss for lack of jurisdiction and motion to stay on May 20, 1987. The matter came up for hearing on August 6, 1987, at which time the judge entered an order continuing the hearing until August 19, 1987, in order to take evidence on the jurisdiction of the State of Florida. Additionally, the court indicated in its order that pursuant to the authority of F. S. 61.1314 that he would contact the appropriate judges in New York where the other proceeding was pending. On August 19, 1987, the matter came on for a plenary evidentiary hearing. At this hearing the Wife appeared personally and by counsel and testified, and the Husband appeared by Florida counsel. The court, on request of Husbands Florida counsel, permitted the Husband and the Husband's New York counsel to appear by phone during the hearing. Testimony was taken from both of the parties. Argument was made by both New York and Florida counsel.

The court orally entered its order setting forth four findings and instructed Wife's counsel to prepare an order based upon those findings. The findings are set forth in the transcript of the proceedings and in the order that was ultimately entered on October 13, 1987. Based upon the testimony of the Husband and the Wife, the court determined:

First, that the Wife was not a resident of New York when she was served with papers in New York on April 6, 1987, and further determined that the unrebutted evidence was that the Wife was a resident of Florida and returned to New York on the April 6, 1987, only to appear at a hearing.

Second, that service of process on the Wife was ineffective under DRL §230.

Third, that the child had more substantial contacts with the State of Florida and neither of the two actions in the State of New York were commenced in substantial compliance with the UCCJA.

And, finally, that the earliest date the New York Court court could be deemed to have jurisdiction under the UCCJA would be April **26, 1987,** or eleven days after the commencement of the Florida action. At the time that the Florida judge entered its ruling on August **19, 1987,** the trial judge in New York had not ruled upon jurisdiction then resting in New York. The Order denying the Wife's motion to dismiss the New York action because of lack of jurisdiction over her was not signed by the judge until August **25, 1987,** some six days later. The Husband filed a motion for rehearing setting forth the alleged stipulation of the Wife to the New York jurisdiction and the order by the trial court judge denying the Wife's motion to dismiss. That matter came on for hearing on October **15, 1987,** and after extensive argument by counsel, the court denied the motion for rehearing and the Husband took a non-final appeal to the Fifth District Court of Appeal.

On March **23, 1988,** the Husband's attorney filed a motion for summary disposition of the non-final appeal based upon an alleged stipulation of the parties in front of the family court judge in November, **1987.** Based upon that motion, the Fifth District Court of Appeal treated the motion as notice of voluntary dismissal and went ahead and dismissed the appeal. Subsequently, a second Florida trial judge determined that the alleged stipulation in New York was invalid because it was obtained through coercion and duress and was not voluntary.

An easy rule for this court to adopt to avoid any possible jurisdictional conflicts would be to insist that a trial court stay proceedings any time another sister state has chosen to exercise jurisdiction in a case. This rule could be strictly adopte requiring it in all situations without taking any evidence, or it could be adopted informally so that even after evidence was taken trial courts would know that, unless they had some extraordinary circumstances, they should stay the proceedings. This, of course, would establish one primary purpose of both the principle of priority and the UCCJA, and that is to insure that only one forum was

litigating an issue at a time. Such a bright line rule would have its benefits. The first one to the court house would win its choice of forum. The adoption of such a rule whether formally or informally would seem to obliterate certain prior public policies of the State of Florida.

For example, the public policy of following prior legal precedence in Florida i.e. courts have the right to review the jurisdictional underpinning of a sister state's orders where there is a determination by a Florida Court that jurisdiction doesn't rest in the sister state, Florida does not have to abide by that policy in order to give up jurisdiction. A second policy is that our State should afford protection to its citizens in the area of domestic relations instead of turning the citizens of this state over to another state for determination of domestic relations matters. Additionally, there is the public policy of this State to protect its children from the over-zealous exercise of judicial power of a sister state. Finally, a policy of requiring sister states who enter into compacts with our State to fairly and uniformly apply the rules of the compact and to avoid rules which create a special disadvantage to citizens of our State.

Particularly troubling to the Wife in the instant case is the refusal of the New **York** trial court to hold a plenary evidentiary hearing to determine whether or not there was any evidence that would find that she was a resident of the State of New York at the time that she was served there on April **6,** 1987. The Wife had filed her motion raising the jurisdictional questions as early as April **22,** 1987, some four months prior to the Florida Court ever having to deal with the issue.

The point **is** simple. If the State of New York had determined the issue of personal jurisdiction over the Wife or subject matter jurisdiction over the divorce, whether it be a substantive matter to be decided as an element of the cause of action or whether it be jurisdictional, that matter could have been determined as a matter of fact instead of as a matter of law. It is obvious under existing law that

the state of Florida would not have been on solid ground to redetermine that factual issue.

What is the significance of this? The Wife finds herself in the untenable position of having the Supreme Court of this state determine:

1. that the State of Florida should have: stayed her pending dissolution matter until the State of New York determined whether it had subject matter jurisdiction,

2. thereby vacating the final judgment of divorce entered by the state of Florida,

3. thereby staying the Florida proceeding,

4. thereby allowing the State of New York to proceed to determine the factual issue of the Wife's residence.

Based upon all of the evidence presently available, it is virtually undisputed that the Wife was not a resident of the state of New York so the Husband will be unable to prevail upon his divorce petition in the state of New York.

Nevertheless, the Wife will be forced to wait until the New York trial judge makes that determination, a matter of months or years, then upon the determination being made, the Wife will have the opportunity to move to vacate the stay and proceed with the divorce proceeding again in the State of Florida.

The policy against protracted, duplicitous, and vexatious litigation would certainly be lost in this scenario. One would need to ask why the Wife, or the parties for that matter, would have to bear the this burden. This then raises this point; where the foreign state has been reluctant or refuses to take evidence on its own jurisdiction prior to a final hearing, should the State of Florida nevertheless insist that its trial judges stay their proceedings in Florida to await the processes of the foreign state?

Since the Wife left the State of New York with her child in an attempt to remove herself from a very sick and trying marriage, she has attempted to follow all of the rules, except in those rare instances where, in order for her to have access to her child, it was necessary for her to make agreements with a sitting New York judge, to abandon legal positions and drop her proceeding in this State which she had every right to hold.

The evidence is simply overwhelming that the Husband, on the other hand, has attempted to make his own rules, going into court in New York and obtaining a punitive custody order without disclosing any jurisdictional facts to the court and then taking that order to the State of Florida and seizing the minor child without utilizing the rights that were available to him **in** the Florida Courts. He then held the child hostage in the State of New York while he attempted, on at least three separate occasions, through the use of a New York Family Court Judge to extract agreements from the Wife to abandon legal positions which she rightfully could hold. Then a trial court judge deferred decision on a plenary matter which deals with the entire essence of whether or not the State of New York has the right to proceed with the divorce case until almost three years after the original pleadings were filed. The Husband continuously denied the Wife any contact at all with the child for almost a year and then only allowed contact by phone until it was agreed by the attorneys and the courts that the Wife, for the purposes of child contact, would not assert Florida jurisdiction over the child until the matters were ultimately decided by the courts.

What is important in this case is that this conduct be denounced as unacceptable. Several attempts were made by Florida trial judges to speak with the judges who were hearing the matters in the State of New York, and those contacts were met with parochial possessiveness as opposed to a sense of

cooperation; i.e. how can we basically work this problem out so that the parties can receive substantial justice in this country?

At the present time the New York courts have at least recognized that they may not have the right to proceed and go forward on the divorce question so a decision by this court that the divorce was properly granted will at least lay to rest that matter.

On the issue of the child, a much more complex scenario has been created. The child is substantially a hostage between the jurisdiction of these two states and only so long as the parties have reached a preliminary tentative agreement can the child experience her birthright of having frequent and continuing contact with both her natural parents.

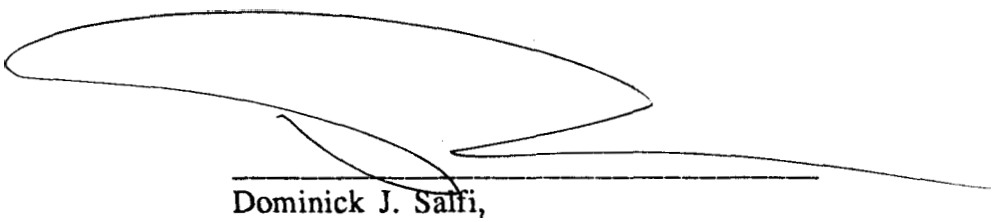
At the present time, neither the Congress of the United States nor the Federal Court system has availed itself of an easy way to resolve these kind of interstate jurisdictional conflicts. But cases such as these can highlight the problem and serve to quicken the time when a remedy will be fashioned so that children of the United States will not be subjected to the inequities that Lindsay Siegel has been forced to endure in this case.

CONCLUSION

The Fifth District Court of Appeal's opinion affirming the trial court's decision to accept and maintain jurisdiction over the dissolution proceedings does not conflict with existing state law in Florida, and should be upheld as the proper procedure to follow when a foreign jurisdiction is asserting jurisdiction over a Florida resident. The findings of fact by the trial court are supported by the evidence and should not be disturbed on appeal. The judgment of the trial judge and the decision of the Fifth District Court of Appeals on the issue of Florida's jurisdiction over the dissolution of marriage should be affirmed.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer Brief, together with Appendix, has been furnished by mail this 6th day of July 1990 to Robert H. Hosch, Jr., Esquire, Butler, McDonald and Moon, 1218 East Robinson Street, Orlando, Florida 32801.



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