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.

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

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# PETITIONER'S BRIEF ON THE MERITS WITH APPENDIX

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## REFERENCES

The Petitioner, JAMES D. SIEGEL, shall be refereed to as "Husband" in this brief.

The Respondent, VICTORIA B. SIEGEL, shall be refereed to as "Wife" in this brief.

References to the Record on Appeal in the District Court shall be designated by (R.___).

Reference to the Petitioner's Appendix shall be designated by (A.___).

## STATEMENT OF THE CASE AND FACTS

This case has evolved out of a contested dissolution of marriage action and child custody litigation between the Husband, who resides in New York and the Wife who resides in the state of Florida. On November 20, 1986 Mr. and Mrs. Siegel moved from Maitland, Florida to the original home state of the Husband, New York. They placed their Florida home with a realtor to be sold. They took all their belongings and set up their residence in Poughkeepsie, New York. Upon arriving in Poughkeepsie Mr. and Mrs. Siegel immediately executed a lease to occupy premises located at 44 Kerr Road, Poughkeepsie, New York. The Husband took a job with the family business in Poughkeepsie. Also, there was an agreement that the Husband's father and brother, who are in the construction business, would build a one family home for them.

On March 19, 1987 the Husband, returned home from work to find the Wife, and his daughter missing, together with a small amount of clothing and the family car. (R. 171-175).

On April 6, 1987 the Husband filed a divorce action in the state of New York and the Wife was personally served while in the state of New York. (R. 166-168).

The Wife retained New York counsel and filed motions to dismiss which were denied.(R. 176-177, 210-212). She subsequently answered the divorce, and personally appeared in court. (R. 215-224).

After answering and appearing in the New York court, the Wife returned to Florida where she filed a Petition for Dissolution of Marriage dated April 15, 1987. (R. 154-158). On April 27, 1987 a Summons and Petition for Dissolution of Marriage was served on the Husband in Poughkeepsie, New York. The Husband retained a Florida attorney and said attorney filed a MOTION TO DISMISS FOR LACK OF JURISDICTION setting forth the fact that the Petitioner had not resided in Florida for six months prior to filing the Petition. (R. 190-192). In light of the above motion the Wife's Florida counsel filed a MOTION TO AMEND PETITION dropping the divorce action but filed an action for the Court to determine child residence, custody, visitation rights and support obligations. (R. 199-201). This was done even though the Wife had previously appeared personally before the New York Family Court and had agreed to visitation matters ordered by that court. (R. 215-224).

The Wife, who after she resided in the state of Florida for the requisite SIX (6) months, on September 24, 1987, filed a MOTION TO AMEND AMENDED PETITION with an accompanying SECOND AMENDED PETITION seeking to add a count for dissolution. (R. 227-233, 240-243).

On October 14, 1987 another hearing was conducted before Judge Johnston in Seminole County whereby he granted the Wife's motion allowing her to add a count for dissolution. (R. 238). The Husband's motions for dismissal, stay and re-hearing were all

denied. (R 236-237, 239). Florida assumed jurisdiction over both the dissolution and child custody issues although the New York courts already had asserted jurisdiction.

The New York Supreme Court held that it had proper jurisdiction over the dissolution proceedings on August 25, 1987. (R. 210-212). This was approximately TWO (2) months before the Florida court ruled it had jurisdiction amongst numerous motions stating that jurisdiction did not exist. (R. 236-237).

On July 27, 1988, the Circuit Court held that the Florida courts had jurisdiction over the divorce and child custody proceedings in spite of the New York order holding otherwise. The Order stated that the Court was unpersuaded by the New York order. (R. 456-457).

Over objections by the Husband's Florida counsel, the Circuit Court on September 2, 1988 entered a Final Judgment concerning the child custody and divorce. (R. 712-718). Although the New York Courts had ruled on child custody matters, due to the time stalling tactics of the Wife's New York counsel, the New York Supreme Court entered a decision after that of Florida concerning the dissolution.

An appeal was taken followed to the Fifth District Court of Appeal concerning the jurisdiction of the Florida courts over the child custody matters as well as the divorce. The Husband argued that the Florida Court should not have jurisdiction over the divorce action due to the dictates of the Full Faith and Credit provisions of the U.S. Constitution as well as the fact

that a prior divorce action was pending in the state of New York.

The Fifth District Court of Appeal decided that the Florida Circuit Court did not have jurisdiction over the child custody matters. (See Appendix 1-4 for a copy of that decision). However the District Court also held that there was no impediment to the Florida court proceeding in a dissolution action when the petitioner meets the Florida residency requirements, notwithstanding the pendency of prior divorce proceedings in another state. (See Appendix Exhibit A).

Both parties filed motions for rehearing or clarification which were both denied by the Fifth District. While the Husband agrees that the Florida courts did not have jurisdiction over the child custody matters, he still asserts that it was improper for the Florida court to assert jurisdiction over the divorce proceedings when prior proceedings were instituted and were being litigated in the state of New York month before those in Florida.

## SUMMARY OF ARGUMENT

The Doctrine of Comity has long been used to maintain balance and harmony between the courts of the several different jurisdictions that exist in our federal system of government. The United Stated Supreme Court as well as this court have determined what a court with subsequent concurrent jurisdiction is to do to avoid the perils that exist when two courts exercise jurisdiction over the same subject matters and parties.

The United States Supreme Court in dealing with the issue of and problems that exist with federal and state courts exercising concurrent jurisdiction has held that courts already cognizant of prior identical litigation pending before the court of a sister jurisdiction should defer action on those identical causes until the courts of the other sovereignty has ruled on those issues. This is to avoid the problems that would exist if both courts issued different conflicting orders and to enhance the harmony between the different courts in our republic.

Likewise this Court has held that in those cases involving conflicting concurrent jurisdiction in different circuits of this state, that the circuit that first obtains and perfects service over the parties has exclusive jurisdiction to hear all matters concerning that litigation. This Court has reasoned that one court alone should go forward with the litigation so as to avoid unseemly conflict within the state. This same rational should be used and extended with those situations involving concurrent

jurisdiction between courts of sister states. To do otherwise would be to foster the type of disharmony and vexatious litigation that the United States Supreme Court and this Court have attempted to avoid. It is clear from the record that the Wife was personally served in the state of New York and therefore service perfected over subject matter and parties in the divorce issue on or about April 6, **1987**. It is further clear that the Husband was initially served with the Florida pleadings on or about April **27, 1987**. (R. **154-158)**. Additionally the record reflects that the Wife was not able to initiate divorce actions in this state until September **24, 1987**. five months after New York was exercising jurisdiction over the divorce issue. Additionally the record reveals that the Wife was actively litigating the. divorce issue in the state of New York with her counsel from that state. (R. **176-177, 210-212)**. Therefore to avoid the very forum shopping and the conflicting orders that this Court as well as the U.S. Supreme Court have attempted to do away with by applying the doctrine of comity has been effectivly eliminated by the Fifth District Court of Appeal.

Several other District Courts and other authorities have held that it is an abuse of discretion for a trial court not to stay divorce actions when it is aware that simultaneous divorce proceedings are pending before a sister court with concurrent jurisdiction. Therefore the Fifth District Court of Appeal directly conflicts with decisions from other jurisdictions.

It is a well established fact that once a court assumes

jurisdiction, that jurisdiction does not dissolve just because other identical proceedings are pending before a court in a sister state. However it is and has been held an abuse of discretion for a court of subsequent jurisdiction not to stay the dissolution proceedings before it if the issues and parties before the court of subsequent jurisdiction are identical to the action pending in a foreign court so that a determination of the matters in the foreign court would constitute a bar to further litigation in this state. As stated above, the record is clear that divorce issues concerning the same parties and subject matter were pending in New York, five months before the action in Florida. (R.154-158). Additionally, if the New York Supreme Court had been able to completely exercise its jurisdiction, then under the full, faith and credit clause, Florida would not have been able to rule on the matter. Therefore it was an abuse of discretion for the trial court not to stay the Florida proceedings until the New York Supreme Court could have fully exercised its jurisdiction in many of the other districts in Florida. However, in the Fifth District a vindictive spouse may move into the district and have no impediment to institute proceedings in this state while stalling action in the courts of a sister state and push through a divorce, while the other spouse who is properly litigating in the sister state is without a remedy to prohibit such behavior. This would be to allow the vexatious and harassing litigation that the doctrine of comity is designed to prevent.

However, there is case law that realizes that there are certain situations where to stay subsequent proceeding in Florida would work to such a hardship that to deny a stay would not be an abuse of discretion. Examples of such hardships is when there is undue delay in obtaining a just result in the courts of a sister state. In those situations it is not an abuse of discretion for the Florida courts not to stay proceedings subsequently filed in this state. No such hardship was proven in the case at bar. In denying the Husband's Motion to Stay Proceedings, the Circuit Court held that it was not persuaded by the New York court's order for continuing jurisdiction over the matter. (R. 456-457). Therefore the Wife did not show a hardship as to why the stay should not be granted.

The Fifth District Court of Appeal incorrectly based its decision on cases that either supported our view that the circuit court should have stayed the proceedings or involved special circumstances that did not exist in the case at bar, or were clearly incorrect in their holding. While there are cases that sporadically deny the right or power to stay a later filed domestic suit based upon the rational that the pendency of a foreign suit is not a bar or ground for abatement of a domestic suit and between the same parties, the soundness of that decision should be questioned.

While the Fifth District Court was correct in holding that jurisdiction existed in the circuit court over the divorce, it was in direct conflict with this Court as well as decisions of

other District Courts within the state when it held that there was not impediment in requiring the circuit court to stay the divorce matter before it. The better rational that would prevent the vexatious and harassing litigation as well as the problems that conflicting orders create, is for this Court to reverse the Fifth District Court of Appeal in this matter and hold that it is an abuse of discretion for a court in this state not to stay a subsequently filed divorce action, unless there are some overriding concerns that would prohibit the sister court from adjudicating the matter fairly and efficiently.

To hold otherwise would be to encourage the forum shopping and vexatious and harassing litigation that an aggrieved spouse may institute in the Fifth District.

## I.

## THE TRIAL COURT IMPROPERLY ASSUMED JURISDICTION OVER THE DIVORCE WHEN A PRIOR DIVORCE ACTION WAS INSTITUTED AND PERFECTED IN THE STATE OF NEW YORK AND THE FIFTH DISTRICT COURT DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AS WELL AS NUMEROUS DISTRICT COURTS.

The Eighteenth Circuit Court in and for Seminole County, Florida, accepted jurisdiction in the dissolution matter and refused to stay its proceedings comcerning the divorce actions over the objections of the Husband and his Florida counsel. (R.456-457). The court refused to stay the proceedings although a prior dissolution action had been filed in the state of New York and service perfected some five months before the action was instituted in Florida.(R 166-168, 238).

### A. The Florida Court As A Matter of Comity Should Have Staved Its Jurisdiction In Favor of The Prior Pending New York Dissolution Action.

It was improper for the Circuit Court to accept jurisdiction when a prior dissolution action was pending in the sister state Of New York. Furthermore, the Fifth District Court of Appeal was incorrect in holding that there was no impediment to the Florida court proceeding in the dissolution action although a prior dissolution action was pending in a sister state. Not only does this cause a duplication of judicial effort, it increases the possibility of conflicting results. It has long been recognized

that one court should defer jurisdiction when the court of another sovereign with concurrent powers has already instituted proceedings.

The United States Supreme Court has dealt with the issues of concurrent jurisdiction between the federal courts and courts located in the different states. The United States Supreme Court has sought a means by which it would not disrupt the delicate balance that exists in our dual system of government. Noting that their exists the possibility of conflicting and unharmonious court decisions, the Supreme Court has stated a court that is cognizant of prior pending litigation concerning the same issues and parties should defer action on causes properly within its jurisdiction until the courts of another sovereign with concurrent powers have had an opportunity to pass upon the matter. Darr v. Burford, 70 S. Ct. 587, (1949). This Court has also recognized the wisdom of one court deferring jurisdiction to a court with concurrent jurisdiction.

This court has reviewed the problems that exist when different Circuit Courts within the state have concurrent jurisdiction and has basically invoked the doctrine of comity to settle such issues. This court has held that in case of conflict between circuit courts with concurrent jurisdiction, the one that assumes jurisdiction acquires control to the exclusion of the other. Martinez v. Martinez, 15 So.2d 842 (Fla. 1943). This case involved a divorce action that had been filed in two separate circuit within the state. Both Circuits had

jurisdiction and both were issuing conflicting orders. This Court reasoned that one court alone should go forward with the litigation so as to avoid unseemly conflict of orders issued from time to time and to insure an expeditious and economical adjudication of the rights between parties. Martinez, 15 So.2d at 845. This court ha5 further defined which court should exercise jurisdiction when both are doing so.

When two actions between the same parties are pending in different circuits, jurisdiction lies in the circuit where service of process is first perfected. Mabie v. Garden Street Management Corporation, 397 So.2d 397 (Fla. 1981). This court reasoned that in these types of situations it is the better rule of law that the date of service should govern the jurisdictional conflict presented when two courts have concurrent jurisdiction .

Although this Court has set down a rule of law on which court assumes jurisdiction when two circuit courts have concurrent jurisdiction, the same rational should be followed in instances of concurrent jurisdiction with courts of sister states. The same possibility of conflicting orders and allowing duplicative and harassing litigation exists when the courts of sister states both exercise jurisdiction concurrently as do when two circuit courts within the state do so . To allow the Florida Court to proceed with its dissolution action although the state Of New York had been exercising jurisdiction over the divorce some five months prior to that of Florida, would be to encourage vexatious and harassing litigation and to effectuate the type of

inefficient system and problems that exist when parties have conflicting orders. The rational that the court which first acquires jurisdiction retains jurisdiction should especially be applied to divorce matters where there is normally a high level of animosity between parties which would lead to a higher than normal chance of causing harassing litigation. In the case of bar, it was therefore incorrect for the Circuit Court to have exercised jurisdiction when the courts in the state of New York had perfected jurisdiction. The Wife was served with divorce papers on or about the 6th day of April, **1987** while the husband was served with papers concerning the Florida divorce on or about the 27th day of April, **1987**. Thus, extending the logic as laid out by this court, it was improper for the Circuit Court not to stay the proceedings. By refusing to do so , the Circuit Court caused a situation where two courts were issuing conflicting decisions.

Under the principals of comity, a court of a sovereign state is not without power to stay proceedings before it if prior proceedings are pending in a foreign forum. The power to stay is not to be exercised as a matter of right of the litigant but rests in the sound discretion of the court. However it is generally recognized in a domestic action that if all of the relief sought could have been obtained in the previously commenced and pending foreign action, and the issues and the parties in the two suits are identical so that a judgment which would be recovered in the foreign action would be a bar to the

recovery of a judgment in the domestic suit, and there are no special circumstances, the subsequently filed domestic action is vexatious, and the court's refusal to stay it until the determination of the foreign litigation is an abuse of discretion. Annot., 19 A.L.R.2d 306.

The Husband filed a dissolution action in the couples homestate of New York on or about April 6, 1987. The Wife was served with process in that state on the same day. (R. 166-168). The Wife subsequently answered the divorce and personally appeared in court (R. 215-224). The Wife originally filed a Petition for Dissolution of Marriage in Florida was not able to file a divorce until September of 1987, some five months after the New York court had been exercising jurisdiction over the divorce. The issues before both of the courts was the dissolution of the marriage and the distribution of the martial assets. If Florida action had been stayed as requested, then the New York Supreme Court would have been able to enter a final judgement and thus would have been a bar to the litigation in the state of Florida. Baron v. Baron, 454 So.2d 86 (Fla. 4th DCA 1984).

Therefore it was an abuse of discretion for the Florida Court not to stay its dissolution proceedings before it. The New York action concerning the dissolution was filed approximately five months before that of Florida, the parties were seeking the same relief in the courts of both states and a Final Judgment of divorce in New York would have acted as a bar to the litigation in the state of Florida and therefore it was an abuse of

discretion for the Circuit Court not to stay the dissolution action and for the Fifth District to allow this simultaneous dissolution action to proceed.

**B. It Was *An* Abuse of Discretion for the Circuit Court not To Stay the Florida Proceedings Concerning The Dissolution Action and the Fifth District's Decision Conflicts With Decisions From Other Districts.**

A hearing was conducted on October 14, 1987, before Judge Johnson in Seminole County concerning the Wife's Motion amending her petition to add a count for dissolution. At that hearing, the Husband's Motion to Stay the Florida proceedings due to the fact that a divorce action was pending before the New York Supreme Court, was denied. (R. 236-239). Not only was this an abuse of judicial discretion, the Fifth District by allowing the dissolution action to proceed forward under these circumstances, directly conflict with decisions from sister districts. The Fourth District Court in the Beddingfield decision directly conflicts with the Fifth District in the case at bar.

The Fourth District Court of Appeal has held that in those cases where concurrent jurisdiction exists, that under the Rule of Priority, the state that first assumes jurisdiction should hear all matters relating to that jurisdiction. Bedinsfield vs. Bedingfield, 417 So.2d 1046 (Fla. 4th DCA 1982). Although the Rule of Priority is not applicable between sovereign jurisdictions as a matter of duty and is discretionary, the failure to stay proceedings when identical proceedings are pending in another jurisdiction is an abuse of discretion. The

principal of priority is based on wisdom and justice and is to prevent oppression and harassment, unnecessary litigation and multiplicity of law suits. Bedinsfield 417 So.2d at 1050. The Fifth District's decision expressly and directly conflicts with this decision from the Fourth District.

Like the current situation, Bedinsfield involved a situation where the Wife participated in dissolution litigation in the state of Georgia and then fled to Florida where she instituted identical proceedings. The Fourth District held that the trial court should have stayed dissolution proceedings because identical proceeding had been instituted in Georgia prior to those in Florida. As in Bedingfield, the Husband, Mr. James Siegel instituted dissolution proceeding in the state of New York on or about April 6, 1987. (R-169-170). Additionally as in Bedingfield, the Wife, Ms. Siegel, hired New York counsel and appeared in the New York court system moving to dismiss the proceeding which were denied.(R 215-224). The Wife subsequently instituted dissolution proceedings in Florida on September 24, 1987. Therefore, under the Bedinsfield decision, it was an abuse Of discretion not to order a stay in the Florida proceedings. However under the dictates of the Fifth District's decision, no impediment exists as to the Florida court in proceeding forward. Not only does the Fifth District's decision expressly conflict with the Fourth District's decision concerning concurrent jurisdiction, it also expressly conflicts with other decisions.

Florida courts should exercise sound discretion and stayed

Florida proceedings when an English court had assume jurisdiction prior to that of Florida. This is to avoid a duplication of proceedings in both courts and the failure to do so is an abuse of discretion warranting a reversal of all Florida decisions regarding the joint issues and causing an entry of a stay. Gillis v. Gillis, 391 So.2d 772 (Fla. 3rd DCA 1980). The Gillis case dealt with a British couple who had filed for divorce and child support proceedings in the United Kingdom. After the divorce was entered but before the court could make a ruling regarding child support, the husband fled to the state of Florida. The wife immediately filed a petition seeking child support in Florida whereupon the husband moved to have the Florida proceedings dismissed due to the fact that the English court had prior jurisdiction. The wife subsequently moved to abate the proceedings in Florida pending and outcome of the action in England.

The Third District Court in reversing the trial courts decision not to stay the Florida proceedings held that while the courts in this state did have jurisdiction, it was an abuse of discretion not to stay the Florida proceedings. This was to discourage and avoid a duplication of proceedings concerning the child support issues. Gillis, 391 So.2d at 773. Although the matter at bar concerns the filing of divorce actions and not child support actions, it was an abuse of discretion for the Florida Circuit Court not to stay the proceedings in this state when the New York courts had perfected its jurisdiction over the

divorce issue and had been exercising that jurisdiction some FIVE MONTHS prior to that of Florida. (R. 169-179, 236-239). Likewise, the Fifth District Court not only directly conflicted with other circuits when it allowed the courts of this state to proceed forward with the divorce proceedings, it set a dangerous precedent.

A distraught husband or wife may now come to any of the circuit courts located within the Fifth District and file a petition for divorce although a prior action had been filed in a sister state and not be in fear of having that action stayed. This behavior can only encourage that type of forum shopping and harassing, vexatious litigation that the circuit courts through the use of the doctrine of comity, have tried to avoid. To allow such behavior is to run the risk of numerous conflicting decisions between the courts of the fifty states which could lead to a total breakdown of harmony that is so important to our federal system. The Second District Court of Appeal has extended and expanded the concept of when a court should stay an action when a federal court has concurrent and prior jurisdiction over the state court.

When a previously filed federal action is pending between the same parties on the same issues, a subsequently filed state action should ordinarily be stayed until a determination of the federal action and failure to do so constitutes an abuse of discretion. Schwartz v. DeLoach, 453 So.2d 454 (Fla. 2d DCA 1984). The Second District Court held that once a federal or

state court's jurisdiction has attached, that jurisdiction cannot be taken away or arrested, however the common practice is for the second court to stay its proceedings until the prior jurisdiction has tired and determined the cause before it and this should be the usual practice in the interest of state-federal comity. Schwartz, 453 So2d at 455, citing with approval; Wade v. Clower, 94 Fla. 817, 114 So. 548 (Fla. 1927). The denial of a stay could be justified upon a showing of the prospects for undue delay in the disposition of a prior action. Schwartz, 453 So2d. at 455. It was therefore improper for the Circuit Court not to grant a stay and to allow the divorce to continue. The record reflects that the New York Supreme Court assumed and acquired jurisdiction over the divorce on or about April 6, 1987, some five months before the courts in Florida. (R. 169-179, 236-239). Nowhere in the record did the Florida court hold that it was denying the stay due to the fact that there was undue delay in the divorce courts in the state of New York and therefore the denial of the stay was an abuse of discretion. Schwartz, 453 So2d. at 456. Although the Schwartz case dealt with federal-state harmony, the same principals should apply to courts of a sister state since the concerns are the same, to avoid harassing, vexatious and duplicative litigation and to foster the harmony between the courts in our federal system. Martinez, 15 So.2d at 844-845. To allow otherwise would be to disturb the delicate and important balance that the doctrine of comity has fostered between the dual court systems in our republic.

## POINT II.

### THE FIFTH DISTRICT COURT OF APPEAL BASED ITS DECISION ON CASES THAT WERE NOT APPLICABLE OR DO NOT HOLD UP TO THE WISDOM OF THE DOCTRINE OF COMITY.

The Fifth District ruled that there was no impediment to the Florida court proceeding in a dissolution action when the petitioner meets the Florida residence requirements, notwithstanding the pendency of prior divorce proceedings in another state. (A. 1) The Fifth District supported this decision with the following cases: Gratz v. Gratz, 137 Fla. 709, 188 So. 580 (1939); Cruiskshank v. Cruiskshank, 420 So2d. 914 (Fla. 1st DCA 1982); Markofsky v. Markofsky, 384 So2d 38 (Fla. 3d DCA 1980). It was improper for the District Court to base its decision on these cases since those cases either do not stand for the proposition that the Florida courts should not adhere to the long held and followed doctrine of comity or the law as set out in those decisions are based on factual situations so different than the case at bar that to adhere to the rational as laid out in them would be to set a dangerous precedent.

The Fifth District supported its view that a prior pending divorce action would be no bar to a subsequently filed action in this state in the case of Gratz v. Gratz, 137 Fla. 709, 188 So. 580 (1939). However a close reading of that case reveals that it does not support the position that there is no bar to a court taking action in a divorce action when prior litigation has been

filed in the court of another state.

Gratz, involved a case where a wife had left her husband and went to reside in this state. After meeting the requisite jurisdictional requirements the wife filed for divorce. The Husband subsequently filed in his home state and came to Florida and moved to have her divorce proceedings dismissed on the proposition that a wife could not have a residence separate from that of her husband. This Court held that it would be irrational and absurd to hold that the court which first acquired jurisdiction should arrest its proceedings because the court of another government having concurrent jurisdiction over the same subject matter and parties had subsequently attempted to take a jurisdiction. Gratz , 188 So. at 581. Therefore this court in Gratz, has held that the courts in Florida should have jurisdiction over the divorce since it had prior jurisdiction over the subject matter and parties. Likewise, in the case at bar, the courts of the state of New York had acquired jurisdiction over the parties and divorce some five months prior to that of Florida. (R.169-179, 236-239). Therefore, following this court's rational as laid out in Gratz, while the court in Florida may have had concurrent jurisdiction over the divorce, it should have stayed its proceedings in favor of the proceedings that were already pending in the state of New York.

The Fourth District Court of Appeal in the case of Baron v. Baron, 454 So.2d 86 (Fla. 4th DCA 1984), held that the Florida courts erred as a matter of comity by refusing to decline

jurisdiction in deference and concurrent jurisdiction of a court in a sister state concerning a divorce action. In support of its position, the Fourth District cited the Gratz, decision. Baron, 454 So2d. at 87. Therefore it was incorrect for the Fifth District to hold that there was no bar to the Florida Circuit Court when it exercised jurisdiction when our sister court in the state of New York had assumed jurisdiction over the subject matter and parties five months prior to that of Florida. The Fifth District Court was further incorrect to apply the case law as laid out in the cases of Cruiskshank v. Cruiskshank, and Markofskv v. Markofskv, , since the factual situations in those cases are not applicable in the case at bar.

The First District Court of Appeal in the case of Cruiskshank v. Cruiskshank, 420 So2d. 914 (Fla. 1st DCA 1982); held that the Appellant had not shown that the trial court abused its discretion when it refused to dismiss the Florida proceedings although identical ones were pending in the state of Illinois. The Appellant/Wife in that case had argued that the court abused its discretion on the theory of forum non conveniens. The appellant court held that since the courts in Florida were the only ones available to the husband, the doctrine of forum non conveniens was not applicable in this case and therefore the trial court did not abused its discretion in refusing to dismiss the proceedings. This case clearly does not apply in the case at hand.

The Petitioner did not base his argument on the doctrine of

forum non conveniens. Additionally, the Respondent, Wife, was not limited to the courts of this state and was actively litigating the dissolution matter in the state of New York with hired New York counsel. (R.176-177, 210-212). Therefore this case should not be applied to the case at bar. Petitioner/Husband recognizes that the law of comity is not an absolute bar to a court and that there will be situations when a court of subsequent, concurrent jurisdiction should not stay its proceedings in favor of a prior executed jurisdiction. Schwartz, **453** So2d. at **455**. However, as stated above, the wife did not show such a hardship and was actively litigating the matter in the state of New York while she was proceeding forward in her duplicative actions in this state. Therefore, it was an abuse of the circuit court judge's discretion not to stay the Florida actions concerning the dissolution action. Likewise it was improper for the Fifth District to hold that there was no bar for Florida courts to allow the duplicative proceedings in this state based on the above cited case law. By not finding an underlying reason why the Respondent/Wife was handicapped in her New York proceeding, the Fifth District Court has basically allowed a distraught spouse a carte blanche approval of the type of action that the doctrine of comity is designed to prevent. In the Fifth District, any distraught spouse may harass and or flee to this state to forum shop and obtain a better result than what they were obtaining in the state of prior jurisdiction. Additionally, to allow such behavior is to promote a breakdown in the efficient

administration of justice that exists between the courts of this nation.

The Fifth District also incorrectly based its decision concerning the jurisdiction over the divorce on Markofsky v. Markofsky, 384 So2d 38 (Fla. 3d DCA 1980). That case held that the trial court was not required to dismiss the marriage dissolution action as a matter of comity in deference to a prior Canadian divorce proceedings involving the parties since the parties had been Florida residents for some time. Markofsky, 384 So2d. at 39. However the Third District Court of Appeal did not go into detail concerning the facts of the case and cited the case of Schrev v. Schrev, 354 So2d 405 (Fla. 4th DCA 1978), in support of its proposition.

In Schrev, the a father had filed an action for divorce and child custody in Florida. Subsequently the Wife moved to dismiss the Florida proceedings since there were prior proceedings pending in Pennsylvania. The Circuit Court granted the motion to dismiss whereby the Fourth District Court reversed concerning the jurisdiction over the child stating," Each state is charged with the duty to regulate the custody of infants within its borders". Schrey, 354 So2d at 406. Since the appeal at hand does not concern the jurisdiction of the Florida court over the child, it would be improper for the Fifth to base its decision on the Markofsky decision. As stated previously, the Petitioner/Husband agrees that there may exist a situation where it would not be an abuse of discretion for a court in this state

not stay its proceedings when a sister state has assume jurisdiction over a divorce action. However, the case at bar is not such a case. Unlike the facts in Markofsky, the case at bar did not deal with parties that both had been residing in the state of Florida. The Petitioner and Respondent had moved to the state of New York with the intent to make it their domicile and residence. Also, the Wife in the case at bar was actively litigating the dissolution action in the state of New York and has never proven why it would be improper or a hardship for the courts in Florida not to stay its proceedings. (R **176-177,** 210-212, 215-224). Therefore it was improper of the Fifth District Court to hold that there was no bar to prohibit the Circuit Court from denying a stay until the New York courts had concluded the actions concerning the divorce. Although there are sporadic cases which apparently deny the right or power to stay a later filed suit on account of the pendency in another jurisdiction of an earlier suit, based upon the rational that the pendency of a foreign suit is not bar or ground for abatement of a domestic suit by and between the same parties and on the same cause of action, the soundness of the decision in such cases may well be questioned. Annot., 19 A.L.R.2d **306.**

## CONCLUSION

Based on the argument above, it was incorrect for the Fifth District Court of Appeal to rule that there was no impediment to the Florida court proceeding on the dissolution action notwithstanding the pendency of a prior dissolution action in New

York that the decision conflicts with other decisions of this Court and other numerous District Courts of Appeal and should therefore be **REVERSED.**

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been delivered by U.S. Mail this 14th day of May, 1990 to: Dominick Salfi, Esquire, 238 N. Westmonte Avenue, Suite 103, Altamonte Springs, Florida 32714.

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