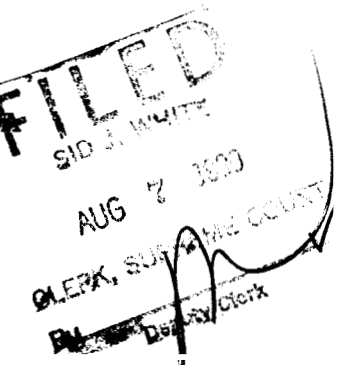
O.A. 9-5-90

IN THE SUPREME COURT
OF THE STATE OF FLORIDA



JAMES D. SIEGEL,

Petitioner,

vs.

VICTORIA B. SIEGEL,

Respondent.

CASE NO. 74-813

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

PETITIONER'S REPLY BRIEF ON THE MERITS WITH APPENDIX

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REFERENCES

The Petitioner, JAMES D. SIEGEL, shall be referred to as "Husband" in this Brief.

The Respondent, VICTORIA D. 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.__). Reference to the Petitioner's Brief on the Merits shall be by the designation (AB__). References to the Respondent's Answer Brief shall be by the designation (AA__). References to the Petitioner's Reply Appendix shall be by the designation (C__). References to the Repsondent's Answer Appendix shall be by the designation (D__).

References to the Uniform Child Custody Jurisdiction Act shall be by the designation UCCJA.

STATEMENT OF THE FACTS AND CASE

This Reply Brief is being written in response to an Answer Brief filed by the Wife on July 6, 1990. The facts and history of the case have already been stated in the Petitioner's Initial Brief and therefore are incorporated into this brief. (See AB 1-4). Each point in this Reply Brief will correlate and rebut the Points raised in the Respondent's Brief. The issue of this appeal is the appropriateness of the Florida Circuit Court assuming jurisdiction over the **DIVORCE AND EQUITABLE DISTRIBUTION OF MARITAL ASSETS** and is filed under case number **74-813.**

This Reply Brief will focus on the irrelevancies of the Respondent's Answer Brief as well as highlight some of the confusing and misconstrued facts raised in that answer.

As stated before, the issue of this appeal filed under case number **74-813,** is concerning the inappropriate assumption of jurisdiction over the divorce issue only. A separate appeal which is before this Court and is filed under case number **74-834,** concerns the lack of jurisdiction of the Florida Court's over the parties minor child in accordance with the UCCJA.

It should be noted that this appeal contains references to the New York Court System which is structured different than that in Florida. In New York, jurisdiction over a divorce and or equitable distribution of martial property, is vested in the New York Supreme Court. However, the New York court system does have a specialized court with jurisdiction over issues concerning

children including child custody and or support matters. This court is call the New York Family Court. It should be noted that these two courts work independently from the other.

This Court has held that an appellant court should not re-weigh the facts. Walter v. Walter, 464 So.2d 538 (Fla. 1985). However, the Respondent cites many misleading facts and makes arguments concerning issues that are not before this Court in this appeal. As stated previously, there is another appeal that has been joined with the case at bar for reasons of oral argument concerning the impropriety of the Florida Circuit Court's assertion of jurisdiction over the couples's minor child. It is filed under case number 74-834. Contained within the answer brief are references to the UCCJA as well as arguments that are made concerning child custody that us not the subject of this appeal and are therefore irrelevant and should be disregarded. (See AA 23).

Throughout the Answer Brief, the Wife continuously asserts facts which describe the Petitioner as a drug dealer who was threatened with his life to leave the state. However a close examination of the source of this information reveals that the majority of this evidence is from the Wife and her interpretation of the marriage and the couples relationship. (T45). This was not a simple uncontested divorce. It was a highly contested and unfortunate bitter situation. During the hearing by which this information was transmitted by the Wife, the Husband, was not present due to the fact that he did not believe that the Florida

Courts should be exercising jurisdiction over the divorce since a prior proceeding was pending in the courts of New York. The Husband did not want to create the same legal problems that the Wife has created by appearing and litigating the divorce in two different states. Therefore any testimony concerning why the Husband moved to the state of New York, based only on the testimony of the Wife, without the benefit of cross examination, is highly prejudicial and should not be taken into consideration. Walter v. Walter, 464 So.2d at 539.

The Wife also states that it was never her intention to change her residence to New York. (AA 1). While the Respondent never testified that she intended to change her residence to the state of New York, her actions prove otherwise. As stated in the Petitioner's Initial Brief on the Merits, the Wife testified that the couple had purchased a home in the state of New York, and placed the Florida residence on the market. Additionally the couple has moved all monies out of Florida checking accounts as well as well as both couples obtaining employment in New York and moving all personal belonging to that state. (C. 37). Additionally, the Wife, through her actions in Circuit Court, prove that she intended to re-establish her residency in New York. The Wife originally file for divorce in this state on or about April 15, 1987. (R.154-158). However, after the Husband's Florida counsel filed a MOTION TO DISMISS FOR LACK OF JURISDICTION stating that the Wife had not resided in the state for the requisite SIX (6) MONTHS prior to filing for divorce, the

Wife, instead of noticing the matter for a hearing, amended her Petition by dropping the divorce action. (R. **190-192, 199-201).** If the Wife had not intended to change her residence to the state of New York, why did she amend her complaint dropping the divorce action in April of **1987** and did not petition for divorce until September 1987? (R. **227-233,240-243).**

The Wife further misstates the facts by stating that the courts in the state of New York issued a "punitive custody order" and asserts other facts that appear to indicate that the Wife was being denied visitation with the minor child. (**AA. 1).** Not only is this improper to state that the order was punitive, the issue concerning child custody is not before the Court on this appeal. The record clearly reveals that the Wife was before the New York Court in an evidentiary hearing concerning the temporary custody of the minor child. Not only was the Wife allowed to testify and represented by counsel, the New York Family Court allowed the Wife a supervised visitation arrangement although the record reflected that the Wife had a prior alcohol problem which caused black-outs and fled the state with the minor child without warning. As stated before the above mentioned evidence and misstated facts do not have any relevancy concerning the exercise of jurisdiction over the divorce and should not be considered in this appeal.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL WAS IMPROPER IN HOLDING THAT THERE WAS NO IMPEDIMENT TO THE FLORIDA COURT EXERCISING JURISDICTION OVER THE DIVORCE ALTHOUGH A PRIOR ACTION HAD BEEN FILED IN NEW YORK.

The Wife asserts that it would be improper for the courts in this state to be required to stay its proceedings when concurrent jurisdiction exists with a sister state although the action was first instituted in that sister state. The Wife argues that to do so would discriminate against a Florida resident or go against a public policy of this state. Additionally the Wife states that under the long established doctrine of comity, the courts in this state do not have to extend the principals of this doctrine if this court determines that the foreign court lacked jurisdiction.

1. The Petitioner Does Not Advocate The Abrogation Of These Long Held Policies Concerning the Doctrine of Comity.

The Wife, in her answer brief, states that the cases of Martinez v. Martinez, 15 So.2d 842 (Fla. 1943) and Mabie v. Garden Street Manasement Corp, 397 So.2d 920 (Fla. 1981) did not apply to the issue at hand. (AA. 5-6). This is due to the fact that those decisions dealt with actions between circuit courts within the state and therefore do not conflict with the Fifth District's Decision at bar. (AA. 5-6). However, the Respondent misinterprets the reason that the Petitioner placed the cases in his initial brief. The Petitioner relies on the above mentioned

case law for the proposition that in order to insure efficient and economical adjudication of the rights between parties, this Court has held that one court alone should go forward with the litigation. Martinez, 15 So.2d at 845. Additionally this Court has defined which court should exercise jurisdiction in a case where two sister courts have and are exerting jurisdiction. When two actions are pending between the same parties in different circuits, jurisdiction lies in the circuit where the service of process is first perfected. Mabie v. Garden Street Corporation, 397 So.2d at 397. The rational for this Court's ruling in the above mentioned cases should be extended to the case at bar. While it is undisputed that the factual basis are different in that the above mentioned cases which concern concurrent jurisdiction between circuit courts of this state and not sister courts of different states, there is no reason why the same rational cannot be applied.

The Respondent states that the rational behind the above mentioned cases cannot be extended to the situation at bar due to the fact that other issues impact the jurisdictional issue such as residency requirements, personal and subject matter jurisdiction, and comity. (AA.6). However, the Petitioner is not asserting that the above mentioned concerns be eliminated and a strict application or a race to the courthouse should determine which state exercises jurisdiction over a divorce.

The Petitioner believes that in order to promote an orderly administration of justice and to avoid the conflicting results

that exists when two sister courts with concurrent jurisdiction both exercise that jurisdiction, a test needs to be established that would establish to determine if Florida should stay a subsequently filed dissolution action. Instead this Court should develop a system based on the principals of comity for the courts in this state to follow when two sister courts have and are concurrently exercising jurisdiction over a divorce. If a prior dissolution action is pending in a sister state that has properly assumed jurisdiction, the state which first perfected jurisdiction should be allowed to continue while the second state stays its proceedings. At first glance it would appear that this would unduly limit the ability of a court to exercise its equitable powers in the event a citizen of this state is treated unfairly. However, under the doctrine of comity, the power to stay is not exercised a matter of right but rests in the sound discretion of the court. It is generally recognized that if all of the relief sought could have been obtained in the previously commenced and pending foreign divorce action, and the issues and the parties in the two suits are identical and there are no special circumstances, such as undue delay in administration of justice, violation of public policy or lack of jurisdiction, 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.

Therefore, the Petitioner is not seeking to have a strict "race to the courthouse" theory adopted as the Respondent states would happen, however a system as outlined in the Bedingfield v.

Bedinsfield, 417 So.2d 1046 (Fla. 4th DCA 1982), whereby under the Rule of Priority, the state that first assumes jurisdiction should hear all matters relating to that jurisdiction. As stated under that decision, this obligation is not a matter of duty but is discretionary. If a litigant in Florida could prove that he or she is being unduly oppressed in the sister state, like forcing one to submit to a court which cannot determine a case for a lengthy period, that a sister court does not have sufficient jurisdiction, or that a public policy of the state is being violated, these factors would be sufficient to override the rule of priority. However, when these factors are not proven by competent evidence, the refusal to stay an action that has been previously filed in a sister state should be an abuse of discretion. Bedinsfield 417 So.2d at 1050. By following the rational as laid out by Bedinsfield case, the Court can discourage a duplication of proceedings and keep a disgruntled spouse from coming to this state abuse its systems to avoid a legitimately filed divorce in a sister state. Noting the acrimonious nature of divorces and family law matters in general, it should be 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). However in the Fifth District Court of Appeal, a disgruntled and vindictive spouse may flee to this district and institute identical proceedings. By doing so that spouse could institute a race as to which state could finish first.

Additionally, an aggrieved spouse could litigate in both states, instituting stalling tactics in the first state whereby the second state could secure a judgment first.

To establish and adopt a system as laid out in the Bedinsfield case, would be to enhance the harmony between the courts of the fifty states as intended by the U.S. Constitution. No more will a disgruntled spouse be able to flee to this state and avoid a properly instituted action in a sister state without showing some degree of hardship or violation of public policy.

The Respondent argues that the Bedinsfield and Gillis cases should not be applied to the case at hand since the Wife in those two cases did not file in Two different state court systems as the current Respondent. Although the factual basis are not exact, they are similar. The Fourth District Court of Appeal in Bedinsfield and the Third District Court of Appeal in the Gillis case, were faced with a prior and concurrent jurisdiction of a sister state. Both courts wisely held that it would be an abuse of the trial court's discretion not to stay a proceeding when a prior matter had been filed previously in a sister state concerning the same issues. Bedinsfield, 417 So.2d at 1050; Gillis, 391 So.2d at 772. As in Bedinsfield and Gillis, the Circuit Court was faced with concurrent jurisdiction over a divorce that had been filed in New York some FIVE MONTHS prior to that of Florida. Therefore as in Bedinsfield and Gillis , without a showing of undue hardship, violation of public policy or lack of jurisdiction, it was an abuse of discretion not to

stay the Florida subsequently filed action and all matters concerning the exercise of jurisdiction over the divorce should be reversed.

2. The Florida Circuit Court Never Determined If Improper Jurisdiction Existed Or If to Stay The Florida Action Would Render An Undue Hardship To The Wife Or Violate A Public Policy of This State.

The Wife asserts that the Florida Court had correctly found that the New York court had not exercised its jurisdiction in the Husband's New York divorce action and therefore under the doctrine of comity, the Florida court was correct in not staying its jurisdiction over the divorce. (AA. **22-27).** However a close examination of the record reveals that the Florida judge never took any evidence concerning the jurisdiction of the New York Supreme Court over the divorce. Additionally the Florida trial court never determined that to stay the proceedings, the Wife would suffer an undue hardship or some public policy would be violated.

In support of the Wife's position, the Respondent cites that she filed for a divorce in Florida on April 15, **1987.** Additionally the Wife asserts that the Florida judge held an evidentiary hearing on New York jurisdiction over the divorce on August **19, 1987.** (AA. **23).** However, **a** close examination of the record reveals that the Florida Circuit Court in that hearing was dealing with the issues concerning child custody, not the exercise of jurisdiction over the dissolution matter which is the issue in this appeal.

The record clearly reveals that the Wife withdrew her count

for divorce in Florida before the August, **1987** hearing. **(R.199-201)**. Additionally the record reveals that the Wife could not and did not amend her petition to include a count for dissolution until September **24, 1987**. (R. **227-233, 240-243)**. Therefore the earliest date by which the Florida Circuit Court would have had jurisdiction over the divorce was ONE **(1)** MONTH after the evidentiary hearing at which the Wife asserts took place concerning the dissolution matter. Therefore at the time of the August, **1987** hearing, the dissolution of the marriage matter was not an issue and the Court could not hear evidence nor make any ruling arising out of any issues associated with the divorce.

The transcripts of that hearing are contained in the Appendix of this brief. A quick review of those transcripts reveal that the attorney for the Wife also asserted that the hearing was not for the purposes of any divorce between the parties, but was concerning the jurisdiction of the Florida courts over the minor child. On page **36** (C. **36)** of those transcripts, the attorney for the wife states:

> "...This would be true if we were dealing with raising our jurisdiction question regarding the filing of the divorce. We certainly have not chose to do that..."

Therefore the Florida courts never had an evidentiary hearing concerning the jurisdiction of the New York courts over the divorce nor of any hardships that the Wife would suffer by the court entering a stay of its proceedings. The record is void of any findings on behalf of the Wife asserting that she would be unduly burdened (although she was actively contesting and

litigating the divorce in the state of New York) or that to stay the Florida proceeding in compliance with judicial harmony would violate a public policy of this state. The record only reveals one time that the Florida courts ruled on the jurisdiction of the New York Supreme Court. The Florida Circuit Court, improperly acting in an appellate capacity for the New York trial court, denied the Husband's Motion to Stay, stating that it was not persuaded by the New York court's order for continuing jurisdiction over the divorce. (R. **456-457).**

3. The Florida Circuit Court Should Have Stayed the Proceeding Before It Concerning the Divorce And To Do Otherwise Is An Abuse of Discretion.

The Wife states that the Florida Trial Court would have abused his discretion by failing to conduct a plenary evidentiary hearing concerning the divorce jurisdiction of the New York Court and not have stayed the Florida hearings. (AA ***28).*** As stated above, the Florida trial judge never had or held an evidentiary hearing concerning the jurisdiction of the New York Court over the divorce nor did it find to allow such would create an undue hardship upon the Wife or violate a public policy of the state. The August **17, 1987** hearing did not concern the divorce jurisdiction since the wife at that time had not petitioner for a divorce at that time. The hearing was held concerning the jurisdiction over the child and not the divorce. ***(C.*** 36). Therefore, it was an abuse of discretion for the Florida Circuit Court not to grant a stay concerning the jurisdiction over the divorce. The proper procedure would have been to stay the

Florida proceeding and allow the New York courts to continue with the litigation in that state. The Wife's remedy would be to appeal those orders that she found violated New York law concerning jurisdiction over a divorce. By staying the action, the Florida court could have added to the economical and efficient administration of justice in this country.

4. The New York Supreme Court Held That It Had Appropriate Jurisdiction over the Divorce.

The New York Supreme Court denied the Wife's Motion t Dismiss the divorce action for lack of jurisdiction and held that it had appropriate jurisdiction to continue on August **25, 1987.** This was approximately ONE **(1)** MONTH before the Wife had amended her petition in Florida for a count for divorce. (R. **210-212,227-233, 240-243).** The Wife asserts in her answer brief that the New York court was incorrect in ruling in this manner based on New York law. (AA. **24-27).** Additionally, the Wife also asserts that it is of great concern that the New York court did not hold an evidentiary hearing concerning jurisdiction over the divorce. However the Wife fails to state why her New York counsel, who was present at these New York hearings, did not either demand such a hearing nor did he provide evidence as to the insufficiently of that jurisdiction. Furthermore if the Wife did not agree with the New York courts ruling concerning its jurisdiction over the divorce her proper remedy would be to seek review in an appellate court in New York.

"Where a defendant makes a special appearance to challenge the

> jurisdiction of a court, and the court overrules the objection and determines that it does have jurisdiction, that decision is res judicata and precludes collateral attack on the judgment, even though the ruling may have been erroneous on the facts or law. An aggrieved defendant must seek reversal in an appellant court of the state involved or, if he is unsuccessful there, in the Supreme Court of the United States. However, he cannot late attack the judgement on jurisdictional grounds of he does not avail himself of those remedies, or if the judgment is affirmed, or if the United States declines to consider the case."

Baron v. Baron, 454 So.2d 86 (Fla. 4th DCA 1984). The principals as set out in the Baron were designed to prevent the uncertainties that would occur if the court of one state could relitigate what had been settled in the courts of another state and potentially arrive at a conflicting result. Dusesoi v. Dusesoi, 498 So.2d 1348 (Fla. 2d DCA 1986). Therefore it is improper for the Florida Circuit Court to rule on the hearing that took place in New York concerning the jurisdiction over the divorce in that state. The record reflects that the Wife made a special appearance to contest the New York jurisdiction. (R. 176-177, 210-212). Additionally the Wife later answered the divorce and personally appeared in court. (R. 215-224). Therefore the proper procedure would be for the Wife to appeal the matter in the state of New York as the Husband has done in Florida.

CONCLUSION

The Fifth District Court of Appeals decision stating that there is not impediment to the institution of a dissolution action as long as the Petitioner has met the Florida resident requirements fosters forum shopping as well as vexatious litigation. Wherefore the Petitioner respectfully requests that this Court **REVERSE** the decision **of** the Fifth District Court of Appeal concerning the exercise of jurisdiction over the divorce and that this Honorable Court establish a procedure so that all of the Circuit Courts in this state would have a test to determine that a subsequently filed dissolution action should be stayed unless the Petitioner can establish that to allow a stay would create an undue burden or violate a public policy of this state or that jurisdiction does not exist in the sister state.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been delivered by U.S. Mail this 6th day of August, **1990** to: Dominick Salfi, Esquire, **238** N. Westmonte Avenue, Suite **103,** Altamonte Springs, Florida 32714.

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