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IN THE FLORIDA SUPREME COURT

LAWRENCE FERNANDEZ, JR.,

Petitioner,

vs. CASE NO: 83,392

SUSAN E. FERNANDEZ, GEORGE MURPHY, MICHAEL A. MURPHY, DAVID MURPHY, ANN NASH, LAURIE SOMESON, JANE BOURKARD, ESTATE OF SUSAN E. FERNANDEZ, deceased, and E. RICHARD BOURKARD, JR., Personal Representative of the ESTATE OF SUSAN E. FERNANDEZ,

Respondents.
_____/

RESPONDENTS ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE

References herein to the Record on Appeal will be by an "R" followed by the page numbers referred to, all in parenthesis.

On November 20, 1991, Susan E. Fernandez (hereinafter referred to as "Susan") filed a verified Petition for Dissolution of Marriage and Other Relief (R1-4). One of the allegations contained in the Petition was that:

> The petitioner has been a resident of Florida for more than six (6) months before the filing of this petition.

On December 27, 1991, Petitioner in these discretionary jurisdiction proceedings, Lawrence Fernandez, Jr. (hereinafter referred to as "Lawrence") filed his Answer to Petition for Dissolution of Marriage and Other Relief and Counter-petition for Dissolution of Marriage, Partition and Other Relief (R9-18). In the Answer portion of this pleading, Lawrence admitted the aforequoted allegation from Susan's Petition for Dissolution of Marriage and Other Relief. Also, in this Answer portion, Lawrence admitted the allegation in Susan's Petition wherein she alleged that the parties' marriage was irretrievably broken.

On January 21, 1992, Susan filed a Motion to Bifurcate (R28-29), and Notice of Hearing (R27) pertaining thereto, copies of which were served on that date upon Lawrence's attorney by facsimile and by mail. Pursuant to said Notice of Hearing (R27), a hearing was conducted on January 23, 1992 upon, among other things, said Motion to Bifurcate (R28-29) and same was granted as per Order Upon Pending Motions (R30-31). Subsequent to said hearing but nevertheless on January 23, 1992, a second hearing was conducted upon the "requests to dissolve the parties' marriage

contained in both the Petition and Counter-Petition for Dissolution of Marriage filed in this cause" which hearing culminated in the entry of a Final Judgement of Dissolution of Marriage (R32-22) on January 23, 1992.

Neither Susan nor the other Respondents in this discretionary jurisdiction proceeding, to wit, George Murphy, Michael A. Murphy, David Murphy, Ann Nash, Laurie Someson, Jane Bourkard, Estate of Susan E. Fernandez, deceased, and E. Richard Bourkard, Jr., Personal Representative of the Estate of Susan E. Fernandez (hereinafter collectively referred to as "Respondents") have any disagreement with the second and third paragraphs of the Statement of the Case section of the Petitioner's Initial Brief On The Merits filed in this cause.

STATEMENT OF THE FACTS

Susan's verified Petition for Dissolution of Marriage and Other Relief (R1-4) alleged, among other things, that she had been a Florida resident for the six (6) months preceding the filing of the Petition. This allegation was admitted in Lawrence's Answer (R9-18) to the Petition. Thereafter, on January 21, 1992, Susan filed her Motion to Bifurcate (R28-29)in which she alleged the admission by Lawrence of matters necessary to dissolve the parties marriage, to wit, her residency and the irretrievably broken nature of their marriage and further alleged that she was dying and did not want to die married to Lawrence because she wanted to avoid him succeeding to her interest in their entireties property by reason of her death. The Motion to Bifurcate (R28-29) requested that the court proceed to dissolve the parties' marriage and reserve jurisdiction on all other issues raised by the Petition (R1-4) and

Counter-Petition (R9-18) filed in the case. As per Order Upon Pending Motions (R30-31), by stipulation, the Motion to Bifurcate (R28-29) was granted. Immediately after the granting of the Motion to Bifurcate, a hearing was conducted upon the question of dissolving the parties marriage. The only evidence presented at the hearing was the testimony of Susan's father (R172-202) who corroborated the residency allegation contained in her verified Petition for Dissolution of Marriage and Other Relief (R1-4). This latter hearing resulted in the entry, on January 23, 1992, of a Final Judgment of Dissolution of Marriage (R32-33) by which the parties marriage was dissolved and by which the Court reserved jurisdiction over all other issues raised by the pleadings.

Two (2) days later, on January 25, 1992, Susan died.

Eleven (11) months later, on December 17, 1992, after the following parties were added to the case, to wit, George Murphy, Michael A. Murphy, David Murphy, Ann Nash, Laurie Someson, Jane Bourkard, Estate of Susan E. Fernandez, deceased, and E. Richard Bourkard, Jr., Personal Representative of the Estate of Susan E. Fernandez, these being Susan's estate, heirs and the personal representative of the estate, a Stipulated Final Judgment (R64-72) was entered by which the assets of Susan E. Fernandez, deceased, and Lawrence were disposed of by stipulation and agreement of all of the then parties to the case. Thereafter, on December 28, 1992, Lawrence filed a Motion for Relief from Judgment Pursuant to Rule 1.540 and Rule 1.530 of Rules of Civil Procedure (R73-80) in which he contended, among other things, that the trial court lacked jurisdiction to dissolve the parties marriage because Susan had not testified before the Court as to her Florida residency for the six

(6) months preceding the filing of her Petition for Dissolution of Marriage and Other Relief (R1-4). Said Motion for Relief from Final Judgment Pursuant to Rule 1.540 and Rule 1.530 of Rules of Civil Procedure (R73-80) was granted as per Order Granting Motion for Relief from Final Judgment (R81-82) entered on February 10, 1993.

SUMMARY OF THE ARGUMENT

ISSUE I

The trial court had subject matter jurisdiction to dissolve the marriage of Susan and Lawrence because Susan's requisite Florida residency was established because her allegation of same as contained in her verified Petition for Dissolution of Marriage and Other Relief was admitted by Lawrence in his Answer to Petition for Dissolution of Marriage and Other Relief and Counter Petition for Dissolution of Marriage, Partition and Other Relief and because said residency was corroborated.

ISSUE II

When facts are established by pleadings, that is, allegation in the pleading of one party admitted in a pleading of the other party, the pleadings need not be admitted into evidence in order to establish the fact.

ISSUE III

The fact of an irretrievable break in a marriage can be established by an allegation of same in one party's pleading and the admission of the allegation in a pleading of the other party without the necessity of further evidence to prove the fact.

ISSUE IV

The Circuit Court which granted the dissolution of the

marriage of Susan and Lawrence two (2) days before her death continued to have jurisdiction to dispose of their property for two (2) reasons, to wit: Chapter 26.012(2)(b) Fla. Stat. and the joinder of Susan's personal representative, heirs and estate.

ISSUE V

By failing to cross appeal from the Order Granting Motion for Relief from Judgment and by participating in proceedings which culminated in Stipulated Final Judgment, Lawrence waived any failure by the trial court to receive evidence upon the questions of Susan's competency on January 23, 1992 or whether Lawrence personally was on notice of the hearing of that date.

ARGUMENT UPON ISSUE I

In the first Argument of Respondent's Initial Brief on the Merits, Respondent attacks, among other things, the lack of live testimony by Susan regarding her Florida residency during the six (6) months preceding the filing of her verified Petition for Dissolution of Marriage and Other Relief. Though never succinctly enunciated in this first Argument, the issue of whether or not Susan's live testimony was required devolves into a question of whether or not the trial court had subject matter jurisdiction to enter the Final Judgment of Dissolution of Marriage by which the marriage of Susan and Lawrence was terminated. See Order Granting Motion for Relief from Judgment (R81-82). On the subject of whether or not the trial court possessed the necessary subject matter jurisdiction, Respondents argue as follows.

Chapter 61.021 Fla. Stat. requires that one seeking a dissolution of marriage in Florida have been a Florida resident for six (6) months immediately preceding the filing of a petition for

dissolution of marriage. The fulfillment of this residency requirement is necessary for a Florida court to have subject matter jurisdiction in a dissolution of marriage case. Gilbert v. Gilbert, 187 So.2d 40 (Fla. 3d DCA 1966). As per Chapter 61.052(2) Fla. Stat., petitions for dissolution of marriage which allege that the marriage is irretrievably broken must be disposed of based on evidence, none of which need be corroborated except for the residency requirement of Chapter 61.021 Fla. Stat. Based on these precepts, an issue is whether the admitted verified allegation of Susan's requisite Florida residency constitutes sufficient evidence of the requisite residency so as to provide the trial court with subject matter jurisdiction upon such residency being corroborated. The answer is in the affirmative.

Civil cases are governed by Florida's Rules of Civil Procedure. Rule 1.010 Fla.R.Civ.P. A dissolution of marriage cases is a civil case. According to Rule 1.110(b) Fla.R.Civ.P., a pleading which sets forth a claim for relief must contain, among other things,

> ...a short and plain statement of the grounds upon which the court's jurisdiction depends...

As per Rule 1.110(d) Fla.R.Civ.P.,

> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading.

As per Rule 1.100(a) Fla.R.Civ.P., an answer to a petition, such as a petition for dissolution of marriage, is required. The effect of these cited rules is as follows:

> The parties are bound by their pleadings. Admissions in the pleadings are accepted as facts without the necessity of further proof.

Carvell v. Kinsey, 87 So.2d 577, 579 (Fla. 1956). City of Deland v. Miller, 608 So.2d 121 (Fla. 5th DCA 1992).

In reply to Count II, defendants admit, as alleged in the complaint, that at the time of her death Mamie Holland owned and occupied the property in question as her homestead....During the trial, no testimony was offered either by plaintiff or defendants with respect to the homestead character of the property involved in the suit at the time of Mamie Holland's death. It is undisputed, however, that at the conclusion of the trial, the fact had been affirmatively established by the allegations contained in Count II of the Complaint, and defendants' answer thereto that the property in question was in fact the homestead of Mamie Holland at the time of her death. No evidence to prove this fact was necessary in that it was affirmatively admitted by the pleadings filed in the cause. Freeman v. Holland, 122 So.2d 791 (Fla. 1st DCA 1960).

In his amended complaint, Slack alleged that he was on defendant's property as a licensee. In its answer, defendant admitted this allegation.... In addition, it is obvious that the district court's opinion conflicts with the well settled rule that 'parties litigant are bound by the allegations of their pleadings and that admissions contained in the pleadings as between the parties themselves are accepted as facts without the necessity of supporting evidence.' *Carvell v. Kinsey, 87 So.2d 577 (Fla. 1956)*, and like cases. Hart Properties, Inc. v. Slack, 150 So.2d 236 (Fla. 1963).

Admissions made in the complaint and answer, upon which issue is finally joined are accepted as facts without the necessity of supporting evidence. The litigants are bound by these admissions. Vann v. Hobbs, 197 So.2d 43 (Fla. 2d DCA 1967).

The parties to an action are bound by the allegations in their pleadings and any admissions made in the pleadings are accepted as facts without the necessity of any supporting evidence. United States of American vs. Century Federal S & L Association of Ormond, 418 So.2d 1195 (Fla. 5th DCA 1982).

The upshot of the preceding is that, so long as the verified allegation of Susan's residency as contained in her Petition for Dissolution of Marriage and Other Relief was admitted by Lawrence in his Answer and corroborated as required by Chapter 61.052(2) Fla. Stat., the Court's subject matter jurisdiction over this dissolution of marriage case was established. Respondents note no exception to the aforequoted sentence from Rule 1.110(d) Fla.R.Civ.P. when the averment admitted happens to be the "short and plain statement of the grounds upon which the Court's jurisdiction depends." Surely, had Florida's Supreme Court intended that subject matter jurisdiction could not be established by a defendant's or respondent's admission of facts necessary to establish such jurisdiction as pled in a complaint or petition, it would have engrafted such an exception upon Rule 1.110(d) Fla.R.Civ.P. when it promulgated same. Thus, the fact of Susan's requisite residency necessary to the trial court's subject matter jurisdiction was established by Lawrence's admission of same in his Answer and it was this admission which, except for the corroboration requirement (satisfied in this case) peculiar to dissolution of marriage cases, obviated the need for any additional, further proof on this point, including Susan's testimony.

Despite the preceding, Lawrence relies upon certain cases and other arguments in an effort to sustain the view that proof of Susan's residency was insufficient to establish the trial court's subject matter jurisdiction to dissolve the parties' marriage. Respondents will now address these cases and other arguments.

One case relied on by Lawrence is Wise v. Wise, 310 So.2d 431

(Fla. 1st DCA 1975). In Wise, the petition for dissolution of marriage alleged that the petitioner had been a Florida resident for more than six months preceding the filing of the petition. In his answer to this petition, the respondent admitted the residency allegation. At final hearing, the petitioner testified to her requisite residency. However, at the final hearing, no corroboration of the petitioner's residency was presented. On appeal, the final judgment dissolving the marriage was overturned because the trial court lacked (subject matter) jurisdiction to grant the dissolution. The defect noted in Wise was the failure to corroborate residency as required by Chapter 61.052(2) F.S. This is evident from the appellate court's view that

> An admission of residence by an adverse party's responsive pleading cannot substitute for proof *(Chisholm v. Chisholm, supra)*. Evidence of the residence requirements of Section 61.021, F.S., must be corroborated.

This quoted language must mean that the admission in the responsive pleading will not substitute for corroboration of residency since the only lack of proof cited by the appellate court was the lack of corroboration. In other words, though the petitioner testified to his residency, what put off the Wise court was not the petitioner's testimony but the lack of corroboration of it. As a result, Wise is inapplicable to the case at hand where the issue does not involve corroboration but the quality of the proof of the corroborated fact.

The other case relied upon by the Lawrence, and the case which placed (conflict) jurisdiction of this cause in Florida's Supreme Court is Gillman v. Gillmam, 413 So.2d 412 (Fla. 4th DCA 1982). In Gillman, the petitioner in a dissolution of marriage case did not

testify as to her residency. Her residency was testified to by her sister.

> Because this evidence (the sister's testimony) was not corroborated as required by Chapter 61.052(2), F.S., the trial court was without jurisdiction to enter the judgment of dissolution.....We hold that Section 61.052(2), F.S. (1971), requires that the individual invoking the jurisdiction of the court must testify as to his or her actual presence in the state and the intention to make Florida his or her residence at that time, and that such testimony must be corroborated by other testimony or objective evidence. Gillman v. Gillman, supra.

The problems with Gillman are multiple. First and foremost is the appellate court's failure to advise whether or not the respondent had admitted or denied the petitioner's requisite Florida residency. Without this critical piece of information, evaluating the meaning of Gillman becomes difficult and applying it to the case at hand impossible. For example, would the Gillman court really have required residency testimony solely from the petitioner in the face of an admission by respondent of petitioner's residency? Unfortunately, such will always remain unknown. Secondly, the Gillman language about the one invoking the court's jurisdiction "must testify" is dicta and obviously an overstatement because, if taken literally, it would preclude those petitioners unable to testify either in person or by deposition due to illness or disability from ever securing dissolutions of their marriages. Is this the result intended by the Gillman court? Obviously not since there are so many ways, other than a petitioner's testimony, by which residency can be established. One way would be proof from nonparty witnesses that a petitioner had always resided in Florida, had always held a Florida drivers

license, and had always voted in Florida. Surely, a reasonable inference from such evidence is that the petitioner possessed the requisite residency. Respondents would suggest that proof that a petitioner, so ill or disabled as to be unable to testify, was a Florida Supreme Court Justice whose term was one half complete would be sufficient upon corroboration to establish the requisite residency in view of the residency requirements for the position. And, of course, a third way to establish the requisite residency is as discussed above via an admission of same in a pleading, such as an answer, filed by a respondent, which, when combined with corroboration, should result in subject matter jurisdiction for the trial court. In this regard, note must be taken of Form 1.943(a) Fla.R.Civ.P., a form Petition for Dissolution of Marriage promulgated and approved by Florida's Supreme Court. In the Form, the approved residency allegation, which is almost identical to that contained in wife's Petition for Dissolution of Marriage and Other Relief (1-4), reads as follows:

> Petitioner has been a resident of Florida for more than 6 months next before filing the petition.

With such an approved allegation, it is difficult to imagine the Florida Supreme Court not concluding that its admission in an answer establishes the requisite residency and subject matter jurisdiction, when corroborated, in view of its promulgation of the following from Rule 1.110(e) Fla.R.Civ.P., to wit:

> Averments in a pleading to which a responsive pleading is required, other than those as to amount of damages, are admitted when not denied in the responsive pleading.

and

> .....the well settled rule that "parties litigant are bound by the allegations of their pleadings and that admissions contained in the pleadings as between the parties themselves are accepted as facts without the necessity of supporting evidence." Hart Properties, Inc.v. Slack, 159 So.2d 236 (Fla. 1963).

As stated above, the defect alleged by Petitioner in the trial court's subject matter jurisdiction was Susan's failure to testify that she had been a Florida resident for the six (6) month period required by Chapter 61.021 Fla. Stat. However, when such residency is verified, uncontested, and corroborated, Respondents have asserted herein that this lack of testimony does not vitiate nor constitute a defect in the trial court's subject matter jurisdiction. In further support of this position, Respondents cannot help but take note of Florida's simplified dissolution (of marriage) procedure as set for in Rule 1.611(c) Fla.R.Civ.P.. According to this Rule, the parties to a dissolution of marriage case may file a petition for simplified dissolution if they certify under oath the truth of certain facts, including those set forth in Form 1.943(b) Fla.R.Civ.P. Upon the filing of such a petition, same is to be submitted and considered by the Court and:

> The parties shall appear before the Court in every case and, if the Court so directs testify. The Court, after examination of the petition and the personal appearance of the parties, shall enter a judgment granting the dissolution if the requirements of this subdivision have been satisfied and there has been compliance with the waiting period required by statute. Rule 1.611(c)(2)

Though Rule 1.611(c) Fla.R.Civ.P. makes no reference to the corroboration of residency required by Chapter 61.052(2) F.S., such is the subject of Rule 1.611(d) Florida Rules Civil procedure which permits such corroboration of one of the parties' residency by

affidavit when residency is an uncontested issue. From this outline of Rule 1.611(c) and (d) Fla.R.Civ.P., it is clear that in a simplified dissolution of marriage case, subject matter jurisdiction can exist:

a. when a residency allegation is verified;

b. when a residency allegation is uncontested, and

c. without the necessity of a party's testimony concerning his or her residency.

That this is correct is evident from the following. First, Form 1.943(b) Fla.R.Civ.P., as promulgated by Florida's Supreme Court, depicts a joint petition for simplified dissolution of a husband and wife which alleges that either or both were Florida residents for the requisite six (6) month period. As per this form, its allegations are made "UNDER PENALTY OF PERJURY, WE CERTIFY THE FOREGOING FACTS ARE TRUE" and sworn to. Secondly, the joint nature of such a petition clearly renders the residency issue uncontested since both the husband and wife are alleging the necessary residency. Finally, since the Rule only requires that the parties testify "<u>if</u> the Court so directs" (emphasis added), it was clearly contemplated by Florida's Supreme Court when it promulgated Rule 1.611(c)(2) Fla.R.Civ.P. that a party's testimony, including testimony about residency, was not required or mandatory when all pleading and procedural requirements of the Rule were met.

Based on the foregoing, the question now must be asked. From the perspective of subject matter jurisdiction, what is the difference between a simplified dissolution of marriage case properly pled and proceeded upon and the case involving Susan and Lawrence? In both, the requisite residency requirement is alleged,

verified, admitted, and uncontested. In the simplified dissolution of marriage case, a party's testimony concerning residency is not required. In the case at hand, Susan's testimony concerning her residency was not presented. In both cases, the residency allegation must be corroborated. In the simplified dissolution case, corroboration can be either by affidavit or testimony. In the case at hand, it was by the testimony of Susan's father. If a Court has subject matter jurisdiction in a simplified dissolution case properly pled and proceeded upon when no party testified concerning residency, then why would subject matter jurisdiction not have resided in the trial court in the case at hand considering the parallels just noted between the case at hand and a simplified dissolution of marriage case? It is these obvious parallels which demonstrate that the trial court in the case at hand clearly had subject matter jurisdiction to the extent that same was dependent upon Susan's requisite Florida residency and despite the lack of Susan's testimony regarding residency.

In his Initial Brief on the Merits, Lawrence anticipatorily criticizes the analogy which Respondents draw between what occurred in the case at hand insofar as establishing subject matter jurisdiction is concerned and Rule 1.611(c) and (d) Fla. R.C.P. by which, in a simplified dissolution case, subject matter jurisdiction can be bestowed on the trial court without the actual residency testimony of the one(s) invoking the trial court's jurisdiction. The criticism by Lawrence is that the procedural safeguards which the Rule provides in simplified dissolution cases somehow compensate for the lack of testimony of requisite Florida residency and that no like safeguard exists in the case at hand.

Putting aside the fact that, by such a criticism, Lawrence admits that subject matter jurisdiction can be established by means other than the testimony of the one invoking the trial court's subject matter jurisdiction, the reality is that the procedural safeguard at work in the case at hand was Rule 1.110(e) Fla.R.Civ.P. After all, if Lawrence believed that Susan had not resided in Florida for the requisite time period or if he just wanted to contest her averment about her residency for the heck of it, all he had to do was deny the averment. Instead, he admitted it. In his Initial Brief on the Merits, Lawrence claims that Susan's verified Petition insofar as it alleges her requisite residency is not subject to cross examination. Nothing could better prove Respondent's position regarding procedural safeguards. Respondents agree that cross examination is perhaps justice's most important safeguard against factual distortions. But, in the case at hand, on the subject of Susans's residency, any need to cross examine as to same was rendered unnecessary because Lawrence admitted Susan's requisite residency. Thus, for husband to suggest that somehow Florida's interest in assuring that only those who have resided here for at least six (6) months can secure a divorce in Florida's courts has been compromised because he could not cross examine as to the residency allegation, a fact which he admitted, is ludicrous. And, just as ludicrous is Lawrence's suggestion that Florida's interest in divorces is somehow compromised by his admission of Susan's allegations as to her Florida residency. The reality is that Florida's interests and surely those of Lawrence were just as protected in the case at hand by Rule 1.110(e) Fla.R.Civ.P. and its evidentiary effect as are Florida's interests

and those of parties to simplified dissolutions by Rule 1.611(c) and (d) Fla.R.Civ.P.

ARGUMENT UPON ISSUE II

In his first Argument, Lawrence observes that Susan's verified Petition for Dissolution of Marriage and Other Relief was not received in evidence. This observation is apparently made by Lawrence to point out that, even if the allegation contained in said Petition regarding Susan's requisite residency could serve as evidence of such residency because admitted in Lawrence's Answer, same nevertheless cannot occur because of the failure to admit the Petition into evidence. The law on this point is well settled and it is as follows:

> The parties are bound by their pleadings. Admissions in the pleadings are accepted as facts without the necessity of further proof. *Carvell v. Kinsey, 87 So.2d 577, 579 (Fla. 1956)*. Moreover, these uncontested facts do not have to be introduced into evidence at trial. *Lutsch v. Smith, 397 So.2d 337, 340 (Fla. 1st DCA 1981)*. City of Deland v. Miller, 608 So.2d 121 (Fla. 5th DCA 1992).

Accordingly, without any further evidence and without the introduction of pleadings in which allegations are made and in which such allegations are admitted, uncontested/admitted allegations do not have to be introduced into evidence at trial. Thus, the fact that Susan's Petition for Dissolution of Dissolution of Marriage and Other Relief and Lawrence's Answer thereto were not admitted into evidence is of absolutely no import in the case at hand.

ARGUMENT UPON ISSUE III

In his first Argument, Lawrence claims that the lack of testimony as to the irretrievable break in the marriage of he and

Susan is somehow fatal to the Final Judgment of Dissolution of Marriage by which their marriage was dissolved. With this suggestion, Susan vigorously disagrees.

In this case, Susan's verified Petition for Dissolution of Marriage and Other Relief alleged, among other things, that her marriage to Lawrence was irretrievably broken. In his Answer to Susan's Petition, Lawrence admitted this allegation, that is, that the marriage was irretrievably broken, and, in Count I of his Counterpetition for Dissolution of Marriage, Partition and Other Relief, Lawrence alleged that "the marriage of the parties is irretrievably broken". In her Answer to this Counterpetition, Susan admitted this quoted allegation made by Lawrence. With these admissions in hand and without belaboring the point, Susan asserts that the irretrievably broken nature of the marriage was clearly established to the trial court and relies upon the same argument involving Rule 1.110 Fla.R.Civ.P. as she made earlier in this Brief regarding the sufficiency of admissions in the pleadings as evidence of residency.

In addition to the foregoing, Susan also takes note of the bearing which the following cases have upon the point here being argued. In Harrison v. Harrison, 314 So.2d 812 (Fla. 3d DCA 1975), it is said that a trial court's finding that a marriage is irretrievably broken is clothed with a presumption of correctness. In the case at hand, the trial court clearly concluded that the marriage of Susan and Lawrence was irretrievably broken since this is the only explanation for the entry of the Final Judgment of Dissolution of Marriage by which their marriage was dissolved. Thus, the Final Judgment of Dissolution of Marriage is presumably

correct. In Reopelle v. Reopelle, 587 So.2d 508 (Fla. 5th DCA 1991), the issue was whether the parties marriage was terminated in the absence of a finding in the judgment that the marriage was irretrievably broken. The wife's position was that such a finding must be contained in a final judgment of dissolution of marriage and cited two (2) cases in support of her view. In its opinion, Florida's 5th DCA stated that:

> Neither of the cases cited stands for the proposition that a written finding that the marriage is irretrievably broken is required in the order dissolving the marriage. Both of these cases hold simply that the court must make a finding that the marriage is irretrievably broken, even if both parties to the dissolution agreed in their petitions that the marriage was in fact irretrievably broken. They do not hold that this finding must be in writing.

Thus, from Reopelle, it is clear that, though a court in a dissolution of marriage case must find (though not necessarily in writing) that the marriage is irretrievably broken, it can do so based upon the allegation of "irretrievably broken" contained in a petition for dissolution of marriage and the admission of the allegation in an answer to a petition for dissolution of marriage. Of similar import is McClelland v. McClelland, 318 So.2d 160 (Fla. 1st DCA 1975) wherein is found the following:

> Although husband and wife may agree in pleadings that the marriage is irretrievably broken, the statute does not require a circuit judge sitting with the historic discretion of a chancellor to find that to be a fact simply because the parties have said so.

Clear from McClelland is the proposition that a trial court can:

a. accept as fact that the marriage of the parties in a dissolution of marriage case is irretrievably broken based upon an

allegation to that effect contained in a petition for dissolution of marriage and an answer admitting the allegation, or,

b. reject same and perhaps require evidence.

Of course, Susan is only concerned with a) above which clearly supports the upholding of the Final Judgment of Dissolution of Marriage in her dissolution of marriage case against Lawrence for in it the trial court clearly accepted as fact that the marriage was irretrievably broken because of:

a. the allegation of "irretrievably broken" contained in Susan's Petition and admitted by Lawrence in his Answer.

b. tThe allegation of "irretrievably broken" contained in Lawrence's Counterpetition and admitted by Susan in her Answer thereto.

The upshot of the preceding is that there is absolutely no defect in these proceedings arising from a trial court's reliance on allegations, admitted in answers, to establish the fact that the marriage of Susan and Lawrence was irretrievably broken. If the law were otherwise, then what good is Rule 1.110(e) Fla.R.Civ.P. since facts admitted in pleadings would still always have to be proven at trial via evidence presented at same on the theory that the facts had changed between the date when pled and trial. If such were or is to be the law, then one must wonder why Florida's Supreme Court ever promulgated Rule 1.110(e) Fla.R.Civ.P. and, of course, via it's opinion in this case, it might as well announce that the rule has been revoked or is no longer of any effect. Naturally, Susan anticipates no such action by Florida's Supreme Court and thus posits that both she and the trial court were eminently correct in relying upon Rule 1.110(e) Fla.R.Civ.P. in

concluding that proof that her marriage to Lawrence was irretrievably broken existed because same had been alleged in pleadings and admitted in responsive pleadings.

ARGUMENT UPON ISSUE IV

In his second Argument, Lawrence claims that the trial court lost jurisdiction after Susan's death to decide matters of division of Susan's and Lawrence's property.

Two cases bear on this claim. In Jaris v. Tucker, 414 So.2d 1164 (Fla. 3d DCA 1982), a final judgment dissolving a marriage and adopting a stipulation by which the parties had agreed to sell their home was entered after the death of the husband. This final judgment was overturned on appeal because the husband's death deprived the trial court of power (jurisdiction) since the marriage had been terminated by death, not by the court. Jaris is obviously inapplicable to and distinguishable from the case at hand since, in the latter, the marriage of Susan and Lawrence was dissolved before Susan died. More relevant to the case at hand is Becker v. King, 307 So.2d 855 (Fla. 4th DCA 1975) in which, prior to the husband's death, a partial final judgment was entered which dissolved the parties marriage and the court announced its decision regarding collateral matters such as property ownership and division. Before orders could be entered memorializing the decision regarding the collateral matters, the husband died. These orders were entered post-mortem though nunc pro tunc to the date of the partial final judgment. The assertion on appeal was that the orders entered after the husband's death were invalid. This assertion was rejected upon the following rational:

Once a court of record has jurisdiction of the

> cause and the parties and all the evidence has been presented, the cause is then ripe for judgment and the court is not thereafter deprived, by the death of a party, of its inherent power to render a decision or judgment and may do so in the interest of justice by a judgment nunc pro tunc as of the time of submission.
>
> A purely divorce suit is sometimes made an exception to this general principal of law permitting rendition and entry of a nunc pro tunc judgment after death because, it is said, the death itself has already terminated the marriage relationship. If so, the reason for this exception does not apply in this case because the marriage was not ended by death but by the written partial final judgment of January 22, 1973, and the matter involved in the appealed judgment relate only to matters collateral to, and made necessary and appropriate for legal decision by, the adjudication of dissolution.

Of course, Respondents recognize one distinction between Becker and the case at hand, to wit: that, unlike Becker, ownership and division of property issues had not been decided prior to Susan's death. However, this is of no moment because, as noted by the Becker court,

> The essence of this appeal is the contention that because the husband died before the two (2) nunc pro tunc final judgments were signed, those judgments are invalid, especially because the court had previously dissolved the marriage and also because the court did not order a substitution of parties and did not give notice to the estate of the decedent before the entry of those judgments.

In the case at hand, like the Becker court would have required based on the immediately preceding quote in a scenario such as that presented by the case at hand, there was a substitution of parties and notice to Susan's estate. If anything is clear from the Stipulated Final Judgment, it is that the following had become parties to the case, to wit: Susan's estate, heirs and personal

representatives. Thus, when it is recognized that the court which entered the Final Judgment of Dissolution of Marriage and the Stipulated Final Judgment is the Circuit Court in and for Hillsborough County, Florida, that Circuit Court's have jurisdiction in proceedings relating to the settlement of estates of decedents and other jurisdiction usually pertaining to probate, Chapter 26.012(2)(b) Florida Statutes, and that, after Susan's death, her estate, heirs and personal representatives became parties in the case, it is undoubted that the Circuit Court which entered the Stipulated Final Judgment had subject matter jurisdiction to do so and personal jurisdiction over the necessary parties. Therefore, Lawrence's contention that somehow the Circuit Court lacked jurisdiction to divide and deal with property, as was done via said Stipulated Final Judgment, should be rejected.

ARGUMENT UPON ISSUE V

In his third Argument, Lawrence complains about what he claims was the trial court's failure to receive evidence upon other questions, to wit:

a. Whether Susan was competent on the day of the hearing, January 23, 1992, which culminated in the entry of the Final Judgment of Dissolution of Marriage.

b. Whether Lawrence personally was on notice of the hearing. raised by his Motion for Relief from Judgment Pursuant to Rule 1.540 and Rule 1.530 of Rules of Civil Procedure.

Specifically, Lawrence attributes these failures to the fact that the trial court ruled in his favor upon the question of its subject matter jurisdiction and thus never reached a and b above. Thus, Lawrence seems to be arguing that, in the event this appeal in

Florida's Supreme Court ends with a ruling affirming the Second District Court of Appeals' view that the trial court had subject matter jurisdiction in Susan and Lawrence's dissolution of marriage case, then the case should nevertheless still be remanded to the lower court for an evidentiary hearing upon a and b above.

There are several reasons why a and b above should not be considered and they are as follows.

First, this case is before Florida's Supreme Court because of a conflict between the opinion of Florida's Second District Court of Appeal in it and Gillman v. Gillman, supra., which conflicting cases do not deal with either of the issues inherent in a and b above. Therefore, since those issues where never raised via a cross-appeal filed by Lawrence when this case was before Florida's Second District Court of Appeal, Respondents would suggest that the ability and/or right to raise them in this case in Florida's Supreme Court has been waived. If the trial court erred in not receiving evidence upon these issues, a point not conceded by Respondents, then this error should have been appealed by Lawrence when he was an appellee in this case while it was in Florida's Second District Court of Appeal. He filed no such cross-appeal. Accordingly, the issue is waived.

Secondly, Lawrence has waived these issues in another way. As noted in other parts of this brief, after Susan's death, her estate, heirs and personal representative were made parties to the case which ultimately ended in the entry of Stipulated Final Judgment on December 17, 1992. The Stipulated Final Judgment states, among other things, that:

THIS CAUSE came on before the Court on

> December 17, 1992 for Final Hearing pursuant to Order Setting Non-Jury Trial (October 20, 1992). Present were: Glenn E. Brown and his client, Lawrence Fernandez, Jr. Also present: J. Scott Taylor and his clients, George Murphey, Michael A. Murphey, David Murphy, Laurie Someson. Mr. Taylor's clients, Ann Nash and Jane Bourkard were not present.
>
> Prior to the commencement of the Final Hearing, Mr. Taylor and Mr. Brown announced to the Court that the parties had settled their differences as to all matters which were pending before the Court. The settlement reached between the parties is as follows:

From this quote from the Stipulated Final Judgment, it is clear that Lawrence was present at and participated in this case subsequent to the entry of the Final Judgment of Dissolution of Marriage and surely he did so on the premise that his marriage to Susan had been dissolved by court action, not her death. Only such a premise accounts for the following from Paragraph A of the Stipulated Final Judgment.

> This is the former marital residence of LAWRENCE FERNANDEZ, JR. and SUSAN E. FERNANDEZ, DECEASED, which is now owned by MR. FERNANDEZ and his FORMER WIFE'S ESTATE as tenants in common.

Thus, it is certain that Lawrence was involved in this case after the dissolution of marriage with knowledge of what was going on and, in this way, he was waiving any complaint that he may have had about Susan's competency at the time of the hearing (January 23, 1992) at which the marriage was dissolved and about this supposed lack of notice to him personally of said hearing.

Thirdly, Lawrence's Motion for Relief From Judgment Pursuant to Rule 1.540 and Rule 1.530 of Rules of Civil Procedure alleges "mistake, inadvertence, surprise or excusable neglect" arising apparently from what he claims was his lack of actual notice of the

January 23, 1992 hearing which culminated in the entry of Final Judgment of Dissolution of Marriage. This quoted language is lifted from Rule 1.540(b) Fla.R.Civ.P. which permits the setting aside of judgments for such reasons. However, when the reason is mistake, inadvertence, surprise or excusable neglect, the motion alleging same must be filed within a reasonable time. Respondent suggests that the Motion for Relief From Judgment Pursuant to Rule 1.540 and Rule 1.530 of Rules of Civil Procedure having been filed on December 28, 1992, some eleven (11) months after the entry on January 23, 1992 of the Final Judgment of Dissolution of Marriage to which it was directed, was not filed within a reasonable time. The eleven (11) months alone is unreasonable. However, the eleven (11) months, when combined with the entry of the Stipulated Final Judgment on December 17, 1992, some eleven (11) days before the filing of Motion for Relief From Judgment Pursuant to Rule 1.540 and Rule 1.530 of Rules of Civil Procedure, clearly renders the time unreasonable because same has created the ludicrous situation in which Lawrence sought to set aside a Final Judgment of Dissolution of Marriage after entry of a subsequent Stipulated Final Judgment which was issued upon the conclusion of a proceeding on December 17, 1992 at which Lawrence was indisputably present with his attorney with various of Respondents and their attorney. Certainly, it is unreasonable to wait until after the occurrence of a proceeding at which the mistake, inadvertence, etc., if any, were obviously known and after further proceedings having occurred despite and in the face of same to seek to go back in time eleven (11) months to seek to set aside a Final Judgment of Dissolution of Marriage upon such bases. After all, if Lawrence had been

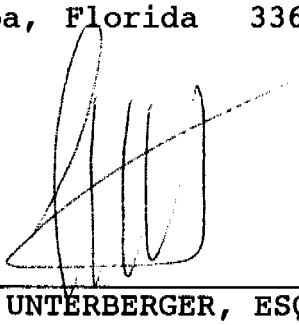
mistaken, surprised, neglectful or been inadvertent, why did he proceed with the process which ended, not with just any Final Judgment, but with one with which he agreed and to which he stipulated. This action by Lawrence renders his Motion for Relief From Judgment Pursuant to Rule 1.540 and Rule 1.530 of Rules of Civil Procedure unreasonably filed time wise.

CONCLUSION

This is a greed case pure and simple. After he had stipulated to a division of property with the estate of the wife from whom he had been divorced two (2) days before her death from cancer, Lawrence then came into court attempting to upset his divorce and thus said stipulated to division of property on the theory that the Final Judgment of Dissolution of Marriage was void for lack of subject matter jurisdiction because Susan's requisite Florida residency had not been proven or voidable on the theory that Susan wasn't competent at the time of the hearing which ended in the Final Judgment of Dissolution of Marriage or that, though his attorney knew what was occurring, he did not. On the matter of subject matter jurisdiction, Lawrence makes his claim despite his admissions in his pleadings that Susan possessed the requisite six (6) month Florida residency and that he possessed the requisite residency. On the other matters, Lawrence makes his claims despite his failure to (cross) appeal when he was the Appellee in this case while it was before Florida's Second District Court of Appeal and in the face of his presence at and obvious participation in subsequent proceedings with his deceased ex-wife's personal representative, estate and heirs which culminated in the entry of a judgment (Stipulated Final Judgment) to which he agreed and to

which he stipulated. Should Lawrence accomplish his goal of over turning his divorce from Susan and also the Stipulated Final Judgment in the face of these actions by him via which everything he now complains of he previously admitted, condoned, affirmed, ratified and/or confirmed would truly represent a mockery of justice. However, for all of the legal reasons set forth herein, Lawrence cannot prevail and the following should be affirmed, to wit: the opinion of Florida's Second District Court of Appeal, the Final Judgment of Dissolution of Marriage and the Stipulated Final Judgment.

I HEREBY CERTIFY, that a true and correct copy of the foregoing have been furnished by United States mail to Robert S. Hobbs, Esq., Post Office Box 18225, Tampa, Florida 33679 this 27th day of July, 1994.



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