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.

BRIEF OF RESPONDENTS AS TO JURISDICTION

SIMSON UNTERBERGER, ESQ.
Suite 707, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Respondents

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STATEMENT OF THE CASE

References to the Appendix which accompany this Brief of Respondent's As To Jurisdiction will be by an "A" 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 (A1-4). 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 (A5-14). In the Answer portion of this pleading, Lawrence admitted the aforequoted allegation from Susan's Petition for Dissolution of Marriage and Other Relief.

On January 21, 1992, Susan filed a Motion to Bifurcate (A15-16), and Notice of Hearing (A17) 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 (A17), a hearing was conducted on January 23, 1992 upon, among other things, said Motion to Bifurcate (A15-16) and same was granted as per Order Upon Pending Motions (A18-19). 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 (A20-21) 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 Brief of Petitioner As To Jurisdiction filed in this cause.

STATEMENT OF THE FACTS

Susan's Verified Petition for Dissolution of Marriage and Other Relief 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 to Petition. Thereafter, on January 21, 1992, Susan filed her Motion to Bifurcate 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 requested that the court proceed to dissolve the parties marriage and reserve jurisdiction on all other issues raised by the Petition and Counter-petition filed in the case. As per Order Upon Pending Motions, by stipulation, the Motion to Bifurcate 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 who corroborated the residency allegation contained in her verified Petition for Dissolution of Marriage and Other Relief. This latter hearing resulted in the entry, on January 23, 1992, of a Final Judgment of Dissolution of Marriage 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, a Stipulated Final Judgment (A22-30) 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 in which he contended that the

Trial Court lacked jurisdiction to dissolve the parties marriage because Susan did not testify before the Court as to her Florida residency for the six (6) months proceeding the filing of her Petition for Dissolution of Marriage and Other Relief. Said Motion for Relief from Final Judgment Pursuant to Rule 1.540 and Rule 1.530 of Rules of Civil Procedure was granted as per Order Granting Motion for Relief from Final Judgment (A31-32) entered on February 10, 1993.

SUMMARY OF ARGUMENT

Florida's Supreme Court should decline to exercise its discretionary conflict jurisdiction, as per Rule 9.030(a)(2)(a)(iv) Fla.R.App.P., in this case because:

a. The facts of the case at hand, insofar as they pertain to Susan's requisite Florida residency for dissolution of marriage purposes, are distinguishable and not analytically the same as those cases for which conflict jurisdiction is claimed by Petitioner, and,

b. The issue of whether or not a fact, to wit, Susan's residency, essential to trial court jurisdiction was sufficiently proven is disposed of on the authority and basis of Rule 1.110(e) Fla.R.C.P. a matter not addressed in any of the cases, including the one at hand, as to which conflict is claimed.

ARGUMENT

In this case, Lawrence seeks to invoke the Florida Supreme Court's discretionary jurisdiction on the theory that the opinion of Florida's Second District Court of Appeal in this case expressly

and directly conflicts with opinions rendered by other of Florida's District Courts of Appeal. Rule 9.030(a)(2)(a)(iv) Fla.R.App.P. Specifically, on one issue, Lawrence claims that the Second District Court of Appeal's opinion expressly and directly conflicts with Gillman v. Gillman, 413 So.2d 412 (Fla. 4th DCA 1982), and, on another issue, with Jaris v. Tucker, 414 So.2d 1164 (Fla. 3d DCA 1982). Respondent will deal with each of these alleged conflicts separately.

I.

In its opinion in this case, Florida's Second District Court of Appeal stated that:

> We recognize that by not requiring the party seeking to invoke the Court's jurisdiction to testify in all circumstances we are in conflict with Gillman v. Gillman, 413 So.2d 412 (Fla. 4th DCA 1982). We do not, however, believe that the law requires such testimony in every case.

It is this language on which Lawrence claims that the Second District Court of Appeal's opinion expressly and directly conflicts with the Fourth District Court of Appeal's opinion in Gillman v. Gillman. Respondents' position, despite what the Second District Court of Appeal has said, is that there is no conflict between its opinion in this case and Gillman v. Gillman. Respondents support this position as follows:

The facts in Gillman v. Gillman are as follows. At a Final Hearing to dissolve the marriage of the parties, the wife, the petitioner, did not testify. The only evidence pertaining to her Florida residency was the testimony of her sister. No evidence to

corroborate her residency was presented. It its opinion, concluding that the trial Court lacked jurisdiction to dissolve the parties marriage, Florida's Fourth District Court of Appeal said:

> To obtain a dissolution of marriage, the party filing the proceeding must reside in Florida for six (6) months before filing the petition. Sec. 61.021, Fla. Stat. (1971). Evidence as to Florida residence must be corroborated. Sec. 61.052(2), Fla. Stat. (1971). Appellee did not testify to her Florida residence. The only evidence adduced was the testimony of appellee's sister. Because this evidence of residence was not corroborated as required by Section 61.052(2), Florida Statutes (1971), the Trial Court was without jurisdiction to enter the Judgment of Dissolution.
>
> We hold that Sections 61.052(2), Florida Statutes (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 the time, and that such testimony must be corroborated by other testimony or objective evidence.

The case at hand involving the dissolution of Susan and Lawrence's marriage differs factually from Gillman v. Gillman. In the case at hand, apparently unlike Gillman v. Gillman, there was a verified allegation in Susan's Petition which properly alleged her requisite Florida residency. Additionally, in the case at hand, apparently unlike Gillman v. Gillman, there was the Respondent's (Lawrence's) admission of the truth and correctness of this allegation contained in his Answer. And, finally, in the case at hand, unlike Gillman v. Gillman, there was corroboration of Susan's Florida residency by the live testimony of her father. When the facts of two (2) cases, which are claimed to expressly and directly conflict for the purpose of invoking the Florida Supreme

Court's discretionary jurisdiction are distinguishable and not analytically the same, as is the situation at hand, no conflict should be found and discretionary jurisdiction should be denied. Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

As an aside to the foregoing, though the Second District Court of Appeal did not note any conflict between its opinion and Wise v. Wise, 310 So.2d 431 (Fla. 1st DCA 1975), Lawrence claims that such a conflict exists. The facts in Wise v. Wise are as follows, to wit,

a. In an Answer filed in a dissolution of marriage case, the respondent admitted petitioner's allegation regarding petitioner's Florida residency.

b. At the final hearing, no testimony corroborative of petitioner's residency was adduced.

In concluding that jurisdiction to dissolve the Wise's marriage did not exist, the Wise v. Wise court stated that:

> An admission of residence by an adverse parties' responsive pleading cannot substitute for proof (Chisholm v. Chisholm, supra). Evidence of the residence requirements of Section 61.021, Florida Statutes, must be corroborated.

The facts in the case at hand, involving Susan and Lawrence, differ from those in Wise v. Wise. The most significant difference is that, unlike Wise v. Wise, in Susan and Lawrence's case, Susan's requisite Florida residency was corroborated and further proven, by the testimony of her father. Accordingly, the factual situations between Susan and Lawrence's case and Wise v. Wise are easily distinguishable and differ analytically. Accordingly, conflict

discretionary jurisdiction should be declined. Department of Revenue v. Johnson, supra.

II.

The Florida Supreme Court's authority to review in conflict situations is via its discretionary jurisdiction. Art. V, Section 4 of the Fla. Const. and Rule 9.030(a)(2)(a)(iv), Fla.R.App.P. Since the authority is discretionary, it would seem that it need not be exercised in every case in which conflict exists. In the case at hand, Respondents suggest that Florida's Supreme Court decline to exercise jurisdiction in this cause because the question raised regarding the trial court's jurisdiction to dissolve the marriage of Susan and Lawrence seems so easily resolvable on grounds unrelated to the conflict. Respondents allude to Rule 1.110(e) Florida Rules Civil Procedure which states that:

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

In the case at hand, as previously noted, in his Answer to Susan's verified Petition for Dissolution of Marriage, Lawrence admitted her allegation regarding her requisite Florida residency.

Lawrence's gripe in this appeal is that, although her residency was duly corroborated as required by Chapter 61.052(2) Florida Statutes, because Susan did not testify regarding her residency, same was not proven sufficiently to lodge jurisdiction in the trial court to dissolve their marriage. Respondents' response is what about the effect of Lawrence's aforesaid admission in light of Rule 1.110(e) Fla.R.C.P. and those cases which announce

that evidence need not be presented to prove an admitted fact? United States of America v. Century Federal S & L Association of Ormond, 418 So.2d 1195 (Fla. 5th DCA 1982), Van v. Hobbs, 197 So.2d 43 (Fla. 2d DCA 1967), Hart Properties, Inc. v. Slack, 159 So. 2d 236 (Fla. 1963), and, Freeman v. Holland, 122 So.2d 791 (Fla. 1st DCA 1960). The issue of the effect of Rule 1.110(e) Fla.R.C.P. while raised in the Second District Court of Appeal, was not addressed by it in its opinion rendered in this cause.

III.

In his Brief of Petitioner As To Jurisdiction, Lawrence claims that the Second District Court of Appeal's opinion expressly and directly conflicts with that rendered in Jaris v. Tucker, 414 So.2d 1164 (Fla. 3d DCA 1982). Accordingly, Lawrence claims that Florida's Supreme Court has discretionary jurisdiction to review this case. However, there simply is no such conflict. In Jaris v. Tucker, a Final Judgment of Dissolution of Marriage was entered after the death of one of the spouses. In its opinion in that case, Florida's Third District Court of Appeal stated that:

> a court is not empowered to render a nunc pro tunc judgment of dissolution after the death of one of the parties.

In the case of the dissolution of Lawrence and Susan's marriage, the Final Judgment of Dissolution of Marriage by which same was dissolved was in fact entered on January 23, 1992 and filed on January 24, 1992. Susan did not die until January 25, 1992. Thus, unlike Jaris v. Tucker, the judgment of dissolution of marriage in the case at hand was entered before the death of either spouse.

Accordingly, by reason of this factual difference, there is no conflict between the Second District Court of Appeal's opinion in the case at hand and Jaris v. Tucker.

CONCLUSION

For the reasons stated in this Brief of Respondents' As To Jurisdiction, the Florida Supreme Court should decline to exercise its discretionary jurisdiction in this cause.

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

SIMSON UNTERBERGER, ESQ.
Suite 707, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Florida Bar No. 158800
Attorney for Respondents