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IN THE SUPREME COURT OF FLORIDA

LAWRENCE FERNANDEZ, JR.,	**	
	**	
Petitioner,	**	
	**	CASE NO. 83,392
vs.	**	
	**	DISTRICT COURT OF APPEAL,
SUSAN E. FERNANDEZ, GEORGE	**	2ND DISTRICT NO. 93-00802
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.	**	

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY NOTE

For purposes of this brief, the parties will be referred to in the following fashion:

a. Petitioner, Lawrence Fernandez, Jr., husband in the Circuit Court dissolution action, will be referred to as "Petitioner" and/or "Husband."

b. Respondents, the heirs, estate of and personal representative of the estate of Susan E. Fernandez, will be collectively referred to as "Respondents" and/or "the heirs of Susan E. Fernandez."

c. Susan E. Fernandez, the deceased wife of Lawrence Fernandez, Jr., will be referred to as "Susan E. Fernandez" and/or "Wife."

STATEMENT OF THE CASE
AND STATEMENT OF THE FACTS

The prior history of the case and the facts are well stated in the parties previous briefs and do not require further attention.

SUMMARY OF ARGUMENT

I.

A PARTY SEEKING A DISSOLUTION OF MARRIAGE MUST PROVE HIS OR HER RESIDENCY AND THAT THE MARRIAGE IS IRRETRIEVABLY BROKEN.

The only potential proof of residency was the verified petition of Susan E. Fernandez, the answer and verified counter-petition of the Petitioner, and the father of Susan E. Fernandez who testified as to residency at the first final hearing. The only potential proof of the marriage being irretrievably broken was contained in the parties' verified pleadings. Neither party testified at the final hearing or even appeared. Such proof is insufficient.

II.

EVEN IF THE FINAL JUDGMENT OF DISSOLUTION WAS PROPER, THE TRIAL COURT LOST JURISDICTION OVER THIS MATTER AFTER THE DEATH OF SUSAN E. FERNANDEZ.

The property and financial issues in this case were not litigated and decided by the trial court prior to the death of Susan E. Fernandez. After the death of Susan E. Fernandez, the trial court continued to apply dissolution law to the property and financial issues. The trial court allowed the estate of Susan E. Fernandez to continue to prosecute the dissolution action. After the death of Susan E. Fernandez, probate law should have been applied to the property and financial issues.

III.

THE SECOND DISTRICT COURT OF APPEAL INCORRECTLY REVERSED AND REMANDED WITH INSTRUCTIONS TO REINSTATE THE FINAL JUDGMENT SINCE PETITIONER DID NOT COMPLETE HIS TESTIMONY OR EVIDENCE AT THE HEARING ON HIS MOTION FOR RELIEF FROM JUDGMENT.

Petitioner did not waive his right to present evidence on the other matters raised in his motion for relief from judgment. Petitioner was not required to cross-appeal those issues to the Second District Court of Appeal since they were not ruled upon by the trial court.

ARGUMENT

I.

A PARTY SEEKING A DISSOLUTION OF MARRIAGE MUST PROVE HIS OR HER RESIDENCY AND THAT THE MARRIAGE IS IRRETRIEVABLY BROKEN.

The first issue in this case is simple. Did Susan E. Fernandez prove that she was a resident and that her marriage was irretrievably broken? Everyone agrees that the only potential proof of residency was the verified petition of Susan E. Fernandez, the answer and verified counter-petition of the Petitioner, and the father of Susan E. Fernandez who testified as to residency at the first final hearing. Was this enough to prove residency? If so, was it enough to prove that the marriage was irretrievably broken?

Both questions are jurisdictional in nature. Because they are jurisdictional in nature, they cannot be established by an admission in the pleadings, stipulation, agreement, or waiver. Wise v. Wise, 310 So.2d 431 (Fla. 3rd DCA 1975) and Hadley v. Hadley, 140 So.2d 326 (Fla. 3rd DCA 1962). Other facts may be established by admissions in the pleadings, but not those which go to subject matter jurisdiction.

We must assume that the testimony of the father of Susan E. Fernandez established her presence in the State of Florida. Clearly, he could not testify as to her intention to remain. The verified petition of Susan E. Fernandez was not received into evidence. The Respondents argue that it did not have to be received into evidence since her residency was admitted to by the Petitioner. This is simply incorrect due to the jurisdictional

nature of residency and the caselaw stating that it cannot be proven by the pleadings. Wise, supra. Beaucamp v. Beaucamp, 508 So.2d 419 (Fla. 2nd DCA 1987) held "that the standard of evidence to establish residency--and therefore subject matter jurisdiction in a dissolution suit--is "clear and positive", which we view as akin to "clear and convincing" rather than merely a preponderance. In Beaucamp, the Second District Court reiterated that residency is the presence or the state coupled with intent. The proof in this case is wholly insufficient on that issue.

Even if the Second District Court was correct in its opinion that residency was proven by the verified petition and corroborated by Susan E. Fernandez's father, there is still insufficient proof that the marriage was irretrievably broken. The only potential proof on that issue was the verified petition of Susan E. Fernandez. Again, that petition was not placed into evidence at the final hearing. The Respondents' reliance on City of Deland v. Miller, 608 So.2d 121 (Fla. 5th DCA 1992) is misplaced. The question of whether the marriage is irretrievably broken goes to subject matter jurisdiction and therefore cannot be established by admission or stipulation. "Irretrievably broken" had to be proven by the evidence adduced at the final hearing.

Harrison v. Harrison, 314 So.2d 812 (Fla. 3rd DCA 1975) stands for the proposition that a trial court's finding that a marriage is irretrievably broken is clothed with a presumption of correctness. However, Harrison dealt with a case where both the husband and wife testified. The trial court weighed the competing testimony of the

parties and made a finding of fact. In Harrison, both parties appeared at the final hearing and testified. Here, neither party appeared and/or testified at the final hearing. There was no finding of fact in this case because there was no evidence presented.

Respondents also cite the case of Reopelle v. Reopelle, 587 So.2d 508 (Fla. 5th DCA 1991). They boldly assert that Reopelle stands for the proposition that a finding of "irretrievably broken" can be based upon an allegation of "irretrievably broken" in a petition for dissolution and an admission in an answer. That is not what Reopelle actually holds. Reopelle only stands for the proposition that a finding of "irretrievably broken" need not be specifically stated in a final judgment. Reopelle does note that an admission in the pleadings is insufficient to prove "irretrievably broken". The requirement of proof at the final hearing on the issue of irretrievably broken is not a creation of caselaw but of the dissolution statute itself. There is no common law action for divorce in Florida. Dissolution is a creature of, and therefore governed by, statutory law. Wood v. Beard, 107 So.2d 198 (Fla. 2nd DCA 1958). A marriage relationship is exclusively personal and may only be dissolved by the voluntary consent and the comprehending exercise of the will of one of the parties to the marriage. Wood, Id. at 199. Wood holds that a dissolution action requires the participation of the parties. Wood goes on to acknowledge the public policy that a marriage relationship should not be dissolved lightly and that many marital separations are temporary.

Finally, on the issue of "irretrievably broken", the Respondents quote from the case of McClelland v. McClelland, 318 So.2d 160 (Fla. 1st DCA 1975). Respondents' reliance on McClelland is also misplaced. McClelland stands for the notion that an admission in the pleadings of "irretrievably broken" will not substitute for proof. Such a finding is a judicial act to be based upon the evidence. The First District noted that "the Court must therefore be permitted to learn from the parties the depth of the breach and, inevitably, its cause." That is exactly what was not done in this case.

The Respondents are asking this Court to adopt a rule whereby contested divorces can be granted in this state based upon affidavits. The State of Florida has no business divorcing people that do not appear before the trial court to prove their residency and to prove that their marriage is irretrievably broken. Even a simplified dissolution requires the parties to appear before the trial judge. Respondents have cited no case to this court which has held that the party seeking a dissolution does not have to appear and testify.

In Gillman v. Gillman, 413 So.2d 412 (Fla. 4th DCA 1982), the Fourth District Court stated that:

> "We hold that Section 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." Id. at 414.

In Wise v. Wise, supra, the First District Court stated that

"An admission of residence by an adverse party's responsive pleading cannot substitute for proof."

Respondents spent almost ten (10) pages of their brief arguing that Gillman and Wise do not mean what they say. Respondents can argue until they are blue in their faces, but the plain language of Gillman and Wise is clear.

Respondents state that the testimonial requirement of Gillman is dicta. Dicta is defined as opinions which do not embody the determination of the court. In Gillman, the testimonial requirement is preceded by the statement of "we hold that". Clearly, it is not dicta.

Respondents continue to argue that the admission of residency in the Husband's answer is sufficient to prove it. This argument is disingenuous. The questions of residency and whether the marriage was irretrievably broken go to whether the trial court had subject matter jurisdiction. Subject matter jurisdiction cannot be conferred on a court by admission, waiver, stipulation or agreement. The lack of subject matter jurisdiction can be raised at any time. State of Florida, Department of Health and Rehabilitative Services v. Schreiber, 561 So.2d 1236 (Fla. 4th DCA 1990).

The only proof of the parties' marriage being irretrievably broken is contained within the pleadings. Such proof is insufficient as a matter of law. Without some other proof, the trial court was without subject matter jurisdiction and could not enter a final judgment dissolving the marriage.

II.

EVEN IF THE FINAL JUDGMENT OF DISSOLUTION WAS PROPER, THE TRIAL COURT LOST JURISDICTION OVER THIS MATTER AFTER THE DEATH OF SUSAN E. FERNANDEZ.

In their argument on this issue, the Respondents have confused the issue to a greater extent than the Second District Court of Appeal did in its opinion in the instant case.

Generally, the death of a party to a dissolution of marriage action before a final judgment is entered terminates the marriage relationship by operation of law and divests the trial court of jurisdiction. Sahler v. Sahler, 17 So.2d 105 (Fla. 1944). Again, divorce is a personal action.

In this case, the final judgment of dissolution, if it was entered properly, was entered before the death of Susan E. Fernandez. However, both parties agree in their briefs that no property or financial issues were litigated, submitted to the trial court for resolution, and/or decided on by the trial court before the death of Susan E. Fernandez. The question is, can the trial court decide property and financial issues in a dissolution case after the death of a party.

The problem with what occurred in the case at hand is that the Respondents, the heirs of Susan E. Fernandez, continued to litigate her divorce case for her after her death. A review of the pleadings and of the stipulated second final judgment reveals that probate law was not applied by the trial court, but instead, dissolution law, and in fact, concepts of fault were applied. The death of a party ends a dissolution action. Simpson v. Simpson,

473 So.2d 299 (Fla. 3rd DCA 1985) held that a separate probate action was required and that the dissolution action should be dismissed. Becker v. King, 307 So.2d 855 (Fla. 4th DCA 1975) is the case relied upon by the Second District Court for support of its ruling that the trial court had jurisdiction to continue with the dissolution case after the death of Susan E. Fernandez. In Becker, the property and financial issues were tried and ruled upon before the husband's death. Becker only stands for the proposition that a court does not lose jurisdiction to enter a judgment after a party's death on matters previously tried, decided, and orally relied upon before that party's death.

Under the scenario proposed by the Respondents, divorce can now be granted in Florida based upon affidavits and with neither party appearing before the court. If those parties are divorced, but die before their property and financial issues have been litigated, their estates may continue the dissolution litigation. In this case, the estate of Susan E. Fernandez continued to litigate with the Petitioner before the trial court for almost one (1) year after her death. In reality, that litigation continues today. It is inconceivable that the legislature of the State of Florida intended for a dissolution action to be continued by the heirs of a deceased litigant. The statute does not provide for it.

If the final judgment of dissolution was properly entered in this case, Petitioner and Susan E. Fernandez became tenants in common of all jointly owned assets upon the entry of such final judgment. A review of the second final judgment dealing with

property issues reveals that the assets of Susan E. Fernandez were not divided pursuant to Florida's probate law, but that her heirs continued to carry forward the divorce case. Simply put, the trial court did not have subject matter jurisdiction to apply dissolution law to the Petitioner after the death of Susan E. Fernandez. The fact that the second final judgment was stipulated to does not create such jurisdiction.

III.

THE SECOND DISTRICT COURT OF APPEAL INCORRECTLY REVERSED AND REMANDED WITH INSTRUCTIONS TO REINSTATE THE FINAL JUDGMENT SINCE PETITIONER DID NOT COMPLETE HIS TESTIMONY OR EVIDENCE AT THE HEARING ON HIS MOTION FOR RELIEF FROM JUDGMENT.

The trial court in the instant case ruled that residency had not been proven and therefore it was without jurisdiction to dissolve the marriage. Once it reached that conclusion, the trial court ceased further inquiry into this case. It could not inquire further because it did not have jurisdiction. Respondents appealed the trial court's ruling to the Second District Court of Appeal. Petitioner could not cross-appeal as Respondents' suggest because the trial court had not ruled on the remaining portions of Petitioner's motion for relief from judgment. In Petitioner's brief to the Second District Court of Appeal, Petitioner clearly advised the Second District Court of Appeal that he had not completed presenting his evidence on his motion for relief from judgment. Since there was no ruling by the trial court on this issue to appeal from, there can be no waiver by not cross-appealing.

The Respondents next argue that the Petitioner is precluded from raising this issue because it was not raised before the trial court until Petitioner filed his motion for relief from judgment. Stated another way, Respondents contend that Larry Fernandez should have known better than his attorney, his wife's attorney, and the trial judge that his wife should have testified at the final hearing, that her death stopped the proceedings from going forward, and that it was wrong to apply divorce law following her death. Respondents want to hold Larry Fernandez, a lay person, to a higher standard than they would hold themselves, their attorneys, and the trial court. In reality, this case was poorly handled by the attorneys at the trial level until the motion for relief from judgment was filed. There was inadequate notice on the motion to bifurcate. The first final hearing was not properly handled. If Susan E. Fernandez was competent, but just unable to come to court, her testimony could have been presented via the telephone or deposition. After the death of Susan E. Fernandez, the attorneys continued to litigate a dissolution case with an estate as one of the parties. Respondents now argue that Petitioner somehow waived these matters which they created. Respondents, however, cite no cases in support of this proposition.

CONCLUSION

The questions of residency and irretrievably broken are issues of subject matter jurisdiction. Subject matter jurisdiction cannot be created by stipulation, admission or agreement. Florida's

dissolution law requires residency and irretrievably broken to be proven at the final hearing. Those matters were not proven in this case. For the reasons stated in Petitioner's initial brief on the merits and in this reply brief, the decision of the Second District Court of Appeal should be reversed and the order of the trial court granting the motion for relief from judgment reinstated.

Respectfully submitted,

HARRY M. HOBBS, P.A.

By: _____
Robert S. Hobbs, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished by United States Mail to SIMSON UNTERBERGER, ESQUIRE, One Mack Center, Suite 707, 501 East Kennedy Boulevard, Tampa, Florida 33602-4933 this 17th day of August, 1994.

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