SUPREME COURT OF FLORIDA

Case No. 85,384
District Court of Appeal
First District No. 94-1047
Circuit Court No. 93-12860

NANCY GALE GARRETT,

Petitioner,

vs.

LARRY ALLEN GARRETT,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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EXPLANATORY STATEMENT

The Petitioner will be referred to as petitioner, the wife, or Mrs. Garrett. The Respondent will be referred to as respondent, the husband, or Mr. Garrett. The Appendix will be referred to by the abbreviation "App-". The Petitioner's Initial Brief will be referred to by the abbreviation "IB-". All underlining was added by the scrivener unless otherwise indicated.

SUMMARY OF ARGUMENT

The question certified by the First District to this court is specifically:

> WHEN MAY A RESIDENT RESPONDENT'S PRIOR RESIDENCE IN FLORIDA BE SUFFICIENT TO CREATE PERSONAL JURISDICTION IN AN ACTION CONCERNING ALIMONY, CHILD SUPPORT OR DIVISION OF PROPERTY?

In this case, the question addresses the only statutory jurisdictional basis potentially applicable to the facts, pursuant to Section 48.193(e), Fla. Stat., turning on the determination of whether or not "the defendant resided in this State preceding the commencement of the action".

In substance, the petitioner's only position responsive to this question is the assertion that any prior residence, no matter how remote, should establish jurisdiction, (IB 7-8), although petitioner seemingly acknowledges that such a proposition runs afoul of due process. (IB 14-16).

By far the bulk of petitioner's Initial Brief is unresponsive to the certified question, attempting instead to relitigate issues finally determined by the court below, namely the relevance of the respondent's historical contacts in the State of Florida, those prior to the parties' abandonment of Florida as their state of residence in 1986, six years before the wife's return to Florida and the commencement of her divorce action, and those further contacts of respondent with Florida for purposes of visitation with the parties' minor child, after the wife departed Texas, and the

divorce action she had initiated in her then state of residence, and reestablished her individual residence in Florida.

While the court below, in certifying the question to be considered, indicated that "it is unclear what amount of time may pass between the respondent's residence in the state and the filing of the action where jurisdiction is claimed", (IB/App. 52) petitioner's argument does not address that question but rather seeks to have this court reconsider matters finally determined below, matters not properly before this court.

In addressing the issue of the statutory meaning of "residence preceding the commencement" of a dissolution action, Florida case law has interpreted into the statute the necessity of demonstrating the logical proximity of the prior residence to the commencement of the action, considering the totality of the circumstances. No Florida case, however, has held that where both parties abandon Florida as their state of residence, and take up residence in another state, one party alone is thereafter permitted to return to the State of Florida and obtain personal jurisdiction over the other as though the prior Florida residence had never changed. Should this court interpret Section 48.193(e), Fla. Stat., so as to have *im personam* jurisdiction reach respondent in this case, it would not only encourage forum shopping by prior residents who, when facing, divorce return to Florida to obtain a tactical advantage over their non-resident spouses, it would impermissibly violate due process.

While determining a finite time limit when considering the

period from a non-resident's prior residence in Florida to the commencement of a divorce by the Florida resident spouse may not effect an overall just result, this court's embracing of the "proximity" requirement, mandating that a logical nexus exist between the time of the prior residence in Florida of a non-resident respondent and the commencement of a Florida divorce action by petitioner would allow great latitude for the courts to do equity, without violating due process.

In this specific case judicial economy would have been advanced had petitioner concluded her divorce action in the State of Texas, hers and her husband's then state of residence.

ARGUMENT

ISSUE I: WHEN IS THE RESPONDENT'S PRIOR RESIDENCE IN FLORIDA SUFFICIENT TO CREATE PERSONAL JURISDICTION IN AN ACTION CONCERNING ALIMONY, CHILD SUPPORT, OR DIVISION OF PROPERTY?

In order to invoke Florida's Long Arm Statute, § 48.193, Fla. Stat., the petitioner in this cause was first required to allege, in her Petition For Dissolution Of Marriage, a sufficient factual basis to prima facie demonstrate Florida's personal jurisdiction over the non-resident respondent. **International Harvester Co. v. Mann, 460 So.2d 580 (Fla. 1st DCA 1984); Holton v. Prosperity Bank of St. Augustine, 602 So.2d 659 (Fla. 5th DCA 1992); Kaufman v. Machinery Wholesalers Corp., 574 So.2d 1225 (Fla. 3d DCA 1991).**

Her Petition For Dissolution Of Marriage alleged the following facts, in that regard:

> The parties were married on November 23, 1974 in Jacksonville, Florida. The parties' daughter, AMY REBECCA GARRETT, was born in Jacksonville, Florida in 1978, and the parties lived continuously in Jacksonville from the time they were married until June of 1986. The Husband was born and raised in Jacksonville and his extended family continues to live here. While the parties lived in Jacksonville from 1974 through 1986, they did own real estate together in Jacksonville. The Husband periodically comes to Jacksonville to visit the children and he has business trips in Florida. (Appendix 36).

The wife also filed with her Petition For Dissolution Of Marriage an Affidavit (Appendix 34-35) in compliance with the Uniform Child Custody Jurisdiction Act, providing the following

additional facts:

1. That from June of 1986 through July of 1991, the husband and wife and their minor child lived in Arlington, Texas, thereafter the parties separated and the child remained in Texas with the wife until August 15, 1992.

(2) From August 15, 1992 until November 15, 1993 the minor child returned to Jacksonville, Florida, the wife having initiated a Petition For Dissolution Of Marriage in the state of Texas.

(3) Although the Texas divorce court had entered a temporary support order, the wife dismissed the Texas divorce action fifteen months after moving to Florida and two days before executing the Child Custody Affidavit.

As is applicable to this case, § 48.193(1)(e) Fla. Stat. provides:

> (1) Any person, whether or not a citizen or resident of this state, . . . submits himself . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> * * *
>
> (e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, <u>if the defendant resided in this state preceding the commencement of the action</u>, whether cohabiting during that time or not. This paragraph does not change the residence requirement for filing an action for dissolution of marriage. (Emphasis Added)

While the language of § 48.193(1)(e) appears to give Florida jurisdiction over any person who had previously resided in the state of Florida, decisions throughout Florida have determined that the proximity of the party's prior residence in Florida to the initiation of the dissolution of marriage action is also required. **Bofonchik v. Smith, 622 So.2d 1355 (Fla. 1st DCA 1993); Birmbaum v. Birmbaum, 615 So.2d 241 (Fla. 3d DCA 1993).**

The logic of requiring that a divorce defendant's residency in Florida must proximately precede the commencement of the divorce action was, as early as 1986, construed to be a part of the statute in the case of **Shammay v. Shammay, 492 So.2d 284 (Fla. 3d DCA 1986).**

In **Shammay** the Third District found that the parties' residence in Florida five and one-half years before the wife returned to Florida and initiated her divorce action was insufficient to invoke personal jurisdiction of the husband in Florida. Interestingly, in a factual setting parallel to the instant case, the **Shammay** court reasoned that "[the husband] and his wife were entirely free to change their residence, as indeed there conduct indicates they had." Id. at 286.

The **Shammay** court also found support from the earlier First District decision in **Soule v. Rosasco-Soule, 386 So.2d 862 (Fla. 1st DCA 1980)**, wherein the First District ruled that the mere fact that defendant resided in Florida sometime prior to the commencement of this action is not sufficient to invoke jurisdiction under Florida's Long Arm Statute Id. at 863,; and

Shammay, supra at 286.

In the recent case of **Bofonchik v. Smith 622 So.2d 1355 (Fla. 1st DCA 1993)**, the First District followed **Shammay** in finding, among various factors considered, that the husband's residence in Florida between 1984 and 1986 was insufficient to confer personal jurisdiction. Id. at 1357. In following the reasoning of **Shammay**, the **Bofonchik** court distinguished its factual basis from the Third District's decision in **Durand v. Durand, 569 So.2d 838 (Fla. 3d DCA 1990)**, review denied **583 So.2d 1034 (Fla. 1991)**, wherein that court found Florida had personal jurisdiction of the husband, although he had departed the state of Florida several years before the initiation of the divorce action, because the wife and children at all times continued to reside in Miami in a home jointly owned by the husband and wife. Id. at 838-839.

Seemingly inconsistent findings in **Shammay** and its progeny, as opposed to **Durand** can be reconciled, however. Utilizing the "totality of circumstances" test applied by the Third District in **Shammay**, and adopted by the First District in **Bofonchik**, to determine whether the non-resident husband's prior residence in Florida was proximate in time to the commencement of the Florida divorce action, allows the trial court to find personal jurisdiction where a logical factual relationship between the two events is found to exist. Thus, as in **Durand**, where the wife and children never left the Florida marital residence, the "substantial family unit" in effect remaining in Florida, even the passage of substantial time should not terminate the Florida residents' right

to personal jurisdiction over the former resident respondent. Because of the logical nexus between the non-resident's prior residence in Florida and the commencement of the divorce action, the husband in **Durand** having never himself initiated a divorce action in the state of his residence outside Florida, and the wife having herself never taken action to terminate the logical nexus between the husband's ties to and residence in Florida and the date of commencement of the divorce action, personal jurisdiction over the non-resident followed.

In contrast, when the married parties both depart Florida, and establish residence elsewhere, as is the situation in the instant case, and in **Shammay**, **Bofonchik** and **Rosasco-Soule**, the logical nexus between the prior residence and the commencement of divorce action is lost, absent the marriage being reestablished by both parties in Florida thereafter.

Here the parties were married in Florida in 1974 (Appendix 36) and lived together as husband and wife until they moved, as husband and wife, to Texas, and established their residency in that state, logically ending the proximity of each party's prior residence in Florida for any future divorce action, absent a subsequent reestablishment of the marriage in Florida. (Appendix 34).

Five years later, in 1991, while still a Texas resident, the wife filed her divorce action in that state (Appendix 34). Thus, in November 1993, more than seven years after the parties jointly abandoned Florida as their state of residence, (and just two days after the wife dismissed her Texas divorce action) when the wife

filed her instant action for dissolution of marriage, the marriage having not been reestablished in Florida by the parties after changing their residence from Florida in 1986, no proximity existed to relate the respondent's prior residence to the commencement of the wife's 1993 divorce action.

The petitioner's alternative positions, like her strained analogy of the issue of concern in the instant case to actions for paternity, permitted pursuant to Section 48.193(1)(h), Fla. Stat., based on the child having been conceived in Florida is wholly without merit (IB 14). While petitioner's reliance on the equal protection guarantees under the Fourteenth Amendment, in asserting that married "mothers and legitimate children should be treated on the same basis as unmarried mothers and illegitimate children", (IB 14) the wholly inapposite argument simply ignores the rights of all Florida resident mothers to pursue issues of child custody and support under the provisions of Section 61.132, Fla. Stat., an alternative the First District alluded to in its initial opinion finding the requirements for obtaining personal jurisdiction over the respondent had not been met (IB/App. 42).

CONCLUSION

This court should adopt the "proximity" requirement, based upon the totality of circumstances, as enunciated in **Shammay** and **Bofonchik**, as it applies to determining whether personal jurisdiction over a non-resident may be had because of the non-resident's prior residence in Florida.

The court should also find that the voluntary change of residence of the marital unit from Florida eliminates all prior residences to that point in time from consideration in evaluating whether personal jurisdiction may be had, pursuant to Section 48.193(e), Fla. Stat., based upon a non-resident defendant having "resided in this state preceding the commencement of the action".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Nancy N. Nowlis, Esquire, 1200 Riverplace Blvd., Suite 630, Jacksonville, Florida 32202, by mail, this 9th day of May, 1995.

Attorney

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