SUPREME COURT OF FLORIDA

EUGENE F. GAINES,

Petitioner/Appellant,

vs.

LYNN SAYNE, as personal representative of the estate of CHLODEL H. GAINES, deceased.

Respondent/Appellee.

SUPREME COURT CASE NO.: 95,134

DCA CASE NO: 97-00491

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION
FROM DECISION OF SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF ON JURISDICTION OF PETITIONER/APPELLANT,

EUGENE F. GAINES

JOHN B. GIBBONS, ESQUIRE
FLORIDA BAR NUMBER 242901
GIBBONS, MELENDI, GIBBONS
& GARCIA, P.A.
408 East Madison Street
Tampa, Florida 33602
Telephone: (813) 228-0853

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

The Petitioner herein, EUGENE F. GAINES, was the Petitioner for dissolution of marriage in the trial court and the Appellant in the Second District Court of Appeal, below. In this brief, the Petitioner will be referred to as the "Husband." The Respondent herein, LYNN SAYNE, as personal representative of the estate of Chlodel H. Gaines, deceased, was the Appellee in the appeal proceedings below, having been substituted as a party after the death of Chlodel H. Gaines on February 25, 1997. The Respondent will be referred to herein either as the "Wife," or the "Wife's Estate."

References to the Appendix filed herewith shall be made by the symbol "A", followed by the applicable page number. For purposes of this jurisdictional brief, the Husband shall rely solely on the Appendix to establish the jurisdiction of this Court. Accordingly, there will be no references to the record below.

STATEMENT OF THE CASE AND OF THE FACTS

The opinion of the Second District Court of Appeal rendered below on February 19, 1999, contains a fairly extensive recitation of the facts and the procedural context in which the issues in this case arose. While not conceding that the record below supports the findings of the Second District as set forth in its opinion, the Husband would accept these findings below for purposes of this jurisdictional brief. For purposes of clarity on the jurisdictional question, however, the Husband will hereafter highlight the facts and procedural steps occurring below which are material to establish this Court's jurisdiction under the Constitution of the State of Florida and Rule 9.030(a)(2)(A)(iv), Fla.R.App.Pro.

The subject case arises out of a dissolution of marriage proceeding filed by the Husband in January of 1996. After the final hearing was held, the trial court entered final judgment in October 1996, dissolving the marriage and further ruling on the alimony and equitable distribution issues. Both the Husband and Wife timely filed motions for rehearing requesting reconsideration on financial aspects of the final judgment.

On January 6, 1997, the trial court denied the Husband's motion for rehearing, but granted the Wife's motion with hearing on the merits to be held at a later date. On January 29, 1997, counsel for the Husband filed a Notice of Appeal to the Second

District. Because the rehearing motion was still pending, this appeal was procedurally premature, and in August 1997, the Second District relinquished jurisdiction back to the trial court to resolve the pending rehearing motion.

In the meantime, on February 25, 1997, the Wife died. Subsequently, the trial court, on September 15, 1997, over objection of the Husband's counsel, ruled on the motion for rehearing and granted the Wife additional equitable distribution. The cause then was transferred back to the Second District for appeal purposes.

On appeal, the Husband contended, *inter alia,* that the Wife's death prior to the trial court resolving the timely filed rehearing motion rendered the original judgment void because the death of the Wife occurred prior to the judgment being final. The contention was essentially that the death of one party in a dissolution proceeding prior to the judgment being final deprives the trial court of jurisdiction to make the judgment final, and the marriage is terminated by death rather than by judgment of the court. For this contention, the Husband relied on the decision of the Third District Court of Appeal in *Johnson v. Feeney*, 507 So.2d 722 (Fla. 3d DCA 1987).

In rejecting this contention, the Second District below relied on the decision of the Fifth District Court of Appeal in *Reopelle v. Reopelle,* 587 So.2d 508 (Fla. 5th DCA 1991), which reached a contrary decision on similar facts. However, the Second District,

in its opinion below, expressly noted the conflict between the instant opinion based on the *Reopelle* decision and the holding of the Third District in *Johnson*:

> The decision in *Reopelle v. Reopelle*, 587 So.2d 508 (Fla. 5th DCA 1991), attempts to distinguish the Third District's decision in *Johnson v. Feeney*, 507 So.2d 722 (Fla. 3d DCA 1987). We doubt the two cases can be reconciled. Our case is different from *Johnson* in that the pending motion in *Johnson* was filed by the survivor and not the decedent. Nevertheless, to the extent that *Johnson* seems to hold that the death of one of the parties to a marriage dissolution action after the entry of a final judgment, but before the trial court rules on a timely motion for rehearing, always divests the trial court of jurisdiction and renders the divorce judgment void, we expressly conflict with that holding. (emphasis supplied).

(A-6 n.4).

On March 17, 1999, the Husband timely filed his Notice to Invoke the Discretionary Jurisdiction of the Court.

ARGUMENT

I. THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN *JOHNSON V. FEENEY,* 507 So.2d 722 (Fla. 3d DCA 1987) ON THE SAME QUESTION OF LAW, AND THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION UNDER RULE 9.030(A)(2)(A)(iv), FLORIDA RULES OF APPELLATE PROCEDURE.

The question of law faced by the Second District below, and upon which conflict jurisdiction is based in this Court, revolves around the important issue of when does a dissolution of marriage decree become final. When one party to a divorce action dies prior to entry of any written final judgment of dissolution of marriage, the law in Florida is well settled.

The courts of Florida have long held that since a dissolution proceeding is a purely personal action it cannot survive the death of either party. *See, Price v. Price,* 114 Fla. 233, 153 So. 904 (1934). Accordingly, Florida courts have consistently followed the rule that a final decree of dissolution cannot be entered *nunc pro tunc* where one of the parties dies prior to rendition of the written decree. *Sahler v. Sahler,* 17 So.2d 105 (Fla. 1944); *Jarvis v. Tucker,* 414 So.2d 1164 (Fla. 3d DCA 1982) dismissed 419 So.2d 1198 (Fla. 1982). This rule is followed in Florida even if the trial court orally announces its ruling at the final hearing so long as the death occurs prior to rendition of a written decree. *McKendree v. McKendree,*139 So.2d 173 (Fla. 1st DCA 1962).

However, the law in Florida becomes a confusing quagmire when death occurs, as in the subject case, after a final decree has been entered, but during the time when a timely filed motion for rehearing is pending. The Third District Court of Appeal faced this exact question of law in *Johnson v. Feeney*, 507 So.2d 722 (Fla. 3d DCA 1987). In that case, the Wife had died after entry of the final judgment of marriage dissolution, but prior to the trial court ruling on a timely filed motion for rehearing. The *Johnson* court held that in those circumstances the final judgment of dissolution was void and that the death terminated the marriage and divested the trial court of jurisdiction to make the dissolution decree final. The basis for the *Johnson* decision was that the dissolution decree was not final while the rehearing motion remained pending, and until the decree is, in fact, final, the marriage is terminated by death rather than the trial court's decree. *Id.* at 723.

In the instant decision of the Second District Court of Appeal below, the court rejected the *Johnson v. Feeney* decision, and relied instead on a contrary decision of the Fifth District in *Reopelle v. Reopelle*, 587 So.2d 508(Fla. 5th DCA 1991). In *Reopelle*, on similar facts, the Fifth District held that a husband's death prior to the disposition of a rehearing motion does not invalidate the previously entered final judgment dissolving the marriage when the rehearing is directed only to property or other

collateral issues and does not attack the granting of the dissolution itself. In reaching this decision, the *Reopelle* court sought to distinguish *Johnson v. Feeney* by noting that the decision of the Third District failed to specify whether the rehearing motion pending in that case attacked the dissolution itself or merely sought reconsideration of collateral property issues. *Reopelle v. Reopelle, supra* at 512 n.1.

Although the Second District Court of Appeal in its opinion below adopted the *Reopelle* decision, it recognized that the *Reopelle* court's attempt to distinguish *Johnson* is strained, at best, when it commented that "We doubt the two cases can be reconciled." (A-6 n.4). The Second District then went on to state the conflict of the current decision with *Johnson v. Feeney* as follows:

> Nevertheless, to the extent that *Johnson* seems to hold that the death of one of the parties to a marriage dissolution action after the entry of a final judgment, but before the trial court rules on a timely motion for rehearing, always divests the trial court of jurisdiction and renders the divorce judgment void, we expressly conflict with that holding. (emphasis supplied).

(A-6 n.4).

A review of the *Johnson v. Feeney* decision shows that the Third District did hold exactly what the Second District stated that the *Johnson* opinion "seems to hold", namely, that the death of a party to a marriage dissolution action before the trial court

rules on a timely rehearing motion always divests the trial court of jurisdiction and renders the previously entered divorce judgment void. The Second District Court below does point out one factual difference between the *Johnson* case and the subject cause; that the rehearing motion in *Johnson* had been filed by the survivor, whereas in the subject case the motion had been filed by the decedent. This, however, is a distinction without a difference. Nowhere in the *Johnson v. Feeney* decision does the Third District impart any significance to the identity of the party who actually filed the motion for rehearing. Accordingly, since the Second District below has expressly noted the conflict between its decision in the subject case and the *Johnson v. Feeney* decision of the Third District, and since that conflict on the same question of law clearly appears from a review of both opinions, this Court has the authority to exercise its discretionary jurisdiction under Rule 9.030(a)(2)(A)(iv), Fla. R. App. Pro.

Given the high incidence of divorce is our society, the question of finality of dissolution decrees is of exceptional importance. Simply a review of several decisions cited by the Second District in its opinion below show the state of confusion. In both *Reopelle* and in *Baggett v. Baggett* 309 So.2d 223 (Fla. 2d DCA 1975) one of the parties had remarried before the dissolution judgment was final in any traditional sense. This factor and the

accompanying desire not to brand one party or the new spouse as a bigamist may have, in fact, led to conflicting decisions.

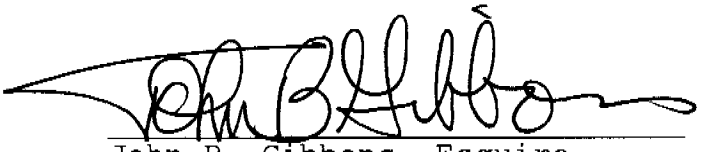
In addition, the Second District and the Fifth District have now adopted concepts of finality for dissolution proceedings which are at odds with those which apply to all other civil actions, and which directly conflict with the rule on the same question of law adopted in the Third District. Further, the finality rule adopted in the Second and the Fifth Districts turns on the question of the contents of the rehearing motion actually filed with no resolution of the question of the proper result if the rehearing motion is broadly drafted where the exact nature of the rehearing challenge is unclear.

The conflict between the District Courts of Appeal on this finality question needs to be resolved and definite finality rules adopted by this Court. This will eliminate the confusion which exists presently as to when a dissolution decree is actually final, and the parties to a divorce proceeding can know when their marriage has actually been dissolved.

CONCLUSION

For the foregoing reasons and legal authorities, the Husband respectfully submits that he has established that the opinion of the Second District Court of Appeal in the subject case expressly and directly conflicts with the decision of the Third District Court of Appeal in *Johnson v. Feeney, supra*, on the same question of law and that this Court has discretionary jurisdiction under Rule 9.030(a)(2)(A)(iv), Fla.R.App.Pro. The Husband further submits that the subject cause is appropriate for the exercise of this Court's jurisdiction, and prays that review be granted and this cause heard on its merits.

Respectfully submitted,

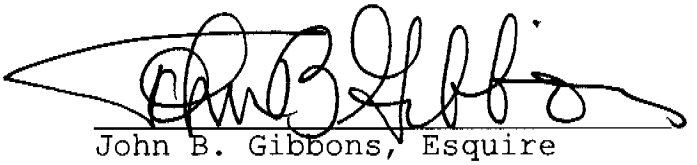


John B. Gibbons, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction of Petitioner/Appellant, Eugene F. Gaines, has been furnished by U.S. Mail to Theodore J. Rechel, Esquire, 1905 W. Busch Boulevard, Tampa, Florida 33602, this 29th day of March, 1999.

I ALSO CERTIFY that the font size and style used in this brief is 12 point Courier New.



John B. Gibbons, Esquire