IN THE SUPREME COURT OF FLORIDA

CASE NO.: 96,853

BONNIE BARNETT,	)
	)
Petitioner,	)
	)
vs.	)
	)
HARRY BARNETT, etc.,	)
	)
Respondent.	)
_____	)

Discretionary Proceedings to Review a Decision by the
Fourth District Court of Appeal, State of Florida
Case No.: 98-0798

REPLY BRIEF OF PETITIONER ON THE MERITS

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CERTIFICATE OF TYPE SIZE

Counsel for Petitioner certifies that the following type size and style is being utilized in this brief:

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PREFACE

This brief is submitted on behalf of the Petitioner, BONNIE BARNETT, in response to the answer brief of Respondent, HARRY BARNETT, as Personal Representative of the Estate of Elliott Barnett, deceased. In this brief, as in the initial brief, the Petitioner will be referred to as Mrs. Barnett or the Wife; Elliott Barnett will be referred to as Mr. Barnett or as the Husband; and the Respondent, Harry Barnett, as Personal Representative of the Estate of Elliott Barnett, deceased, will be referred to as the Estate. The same abbreviations will be used.

Any emphasis appearing in quoted material is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Several of the statements in the Estate's statement of the case and facts require comment. The Estate refers at page two of its brief to "the multiple continuances at the Wife's request,..." Then at page three, the Estate declares:

> Equitable considerations were raised concerning the fact that the Husband had been trying to get divorced for over two years and had noticed the case for trial over a year and a half ago, but the case had been continued repeatedly at the Wife's insistence.

The Estate fails to acknowledge that these continuances were required as a result of the Husband's failure to file his 1995 individual tax return (R.3/487, 555-556; R.4/575-578,

612, 627-632, 680). The trial court had previously held that the case would not be tried until the Husband produced a copy of his filed 1995 tax return (R.2/297). Moreover, these so-called equitable considerations were "raised" by counsel for the Husband, and not by the court.

At page six of the answer brief, footnote 1, the Estate takes issue with the Wife's statement that the Fourth District was incorrect in stating that the Husband died on February 2, 1998, after the partial final judgment was filed with the clerk at 3:53 p.m. Both parties are in agreement that the record does not contain information as to the time of the Husband's death, and thus the appellate court's statement as to when Mr. Barnett died had no factual basis. Should this Court determine that the judgment's finality is determined by the time of filing the judgment with the clerk (although that is not the position taken by either party), then the time of death will have to be ascertained and that fact included in the record.

ARGUMENT

POINT I

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE BARNETT AND JOHNSON DECISIONS BY HOLDING THAT A JUDGMENT OF DISSOLUTION OF MARRIAGE DOES NOT BECOME EFFECTIVE TO DISSOLVE THE MARRIAGE UNTIL 10 DAYS AFTER ITS ENTRY OR, IF A TIMELY MOTION FOR REHEARING IS FILED, UNTIL THAT MOTION HAS BEEN DETERMINED; SO THAT THE DEATH OF EITHER PARTY PRIOR TO THAT DATE WOULD RENDER ANY SUBSEQUENT DISSOLUTION JUDGMENT VOID.

The Estate relies heavily upon this Court's decision in Berkenfield v. Jacobs, 83 So. 2d 265 (Fla. 1955). As the Wife pointed out in her initial brief, however, Berkenfield supports her position rather than that of the Estate. This Court made it clear in Berkenfield that the final decree becomes effective when the judicial labor in the case is at an end. Berkenfield, 83 So. 2d at 268. In that case, the Court concluded that the judicial labor had ended when the chancellor signed the decree, because there were no issues remaining unresolved, no occasion for process or any further proceeding, and no challenge to the termination of the marriage. The present case is markedly different, because the partial final judgment of dissolution was entered over the Wife's protest.

The Estate attempts to avoid the distinction between the present case and Berkenfield by arguing that the Wife's challenge to the dissolution in the present case

was "directed at the distribution of property, not at any deficiency in the basis for the divorce (answer brief, p.12)." That argument cannot withstand scrutiny for two reasons. First, it is inaccurate since the only ruling that the trial court had made at the time Mr. Barnett passed away was its decision to bifurcate the proceedings and to dissolve the marriage. No property issues had been determined at all. The motion for rehearing challenged only the propriety of entering the partial final judgment of dissolution itself (R.5/906-907).

Second, and perhaps more important, is that by making that argument at all, the Estate has illustrated the unworkability of having two separate dates for finality. Neither divorce litigants nor their counsel, nor the trial judge for that matter, should be subjected to the uncertainty of not knowing whether a marriage is effectively dissolved without consulting other documents (i.e., the prior pleadings, any motion for rehearing, or perhaps even an appellate brief) to determine the substantive basis for challenging the dissolution decree. For example, in Reopelle v. Reopelle, 587 So. 2d 508, 511-512 (Fla. 5th DCA 1991), the Fifth District Court of Appeal found it significant that a motion for rehearing after the death of one of the parties dealt only with property issues and not the dissolution itself. The court thus held that the rehearing did not affect the finality of the dissolution. The Reopelle court acknowledged that its decision was contrary to Johnson v. Feeney, 507 So. 2d 722 (Fla. 3rd DCA), rev. denied, 518 So. 2d

1274 (Fla. 1987), but noted that Johnson had failed to specify whether the motion for rehearing in that case attacked the dissolution itself or merely sought reconsideration of collateral property issues. Reopelle, 587 So. 2d at 512, *fn*. 1.

Stability and predictability of such an important issue as when a parties' marriage has legally ended would be served only by adoption of a bright line rule which would be easily applied in all cases. The most logical rule is that a marriage is legally ended either ten days after the judgment is signed or, if a motion for rehearing is timely served, upon the court's ruling on that motion. It should not be necessary to consult the parties' prior pleadings to determine if there was any challenge to the dissolution itself, nor to inspect any subsequent motion for rehearing to determine the basis therefor, in order to determine when the parties' marriage was effectively ended.

It must also be pointed out that during the ten-day period after any decree has been rendered, it is subject to being changed or set aside on any number of grounds. It is for that reason that the court observed in Fugazy Travel Bureau, Inc. v. State by Dickinson, 188 So. 2d 842, 844 (Fla. 4th DCA 1966) that the effect of the ten-day rehearing rule

> ...is to put the world on notice that at any time within ten days after entry of a decree by a court of equity in Florida the court may, on petition for rehearing or on its own initiative, order a rehearing or enter a new or amended decree. Any person that acts in reliance upon such a decree within that time does so at his own peril.

Id. at 844.

A rule declaring that a marriage is dissolved only after ten days has passed would accommodate those concerns, and would also be in harmony with this Court's decision in Berkenfield that it is the end of judicial labor that determines when a decree should be considered effective. Notably, the Estate has advanced no cogent reason in its answer brief as to why such a rule should not be applied in all cases.

Finally, the Estate argues that the present case is factually analogous to Fernandez v. Fernandez, 648 So. 2d 712 (Fla. 1995). The Estate wholly fails to mention that in Fernandez, the parties stipulated to the bifurcation procedure, and thus that was not an issue either before the district court of appeal or this Court. Fernandez, 648 So. 2d at 713. Moreover, the judgment of dissolution in Fernandez became final without being appealed, and it does not appear that the wife's death in Fernandez during the ten-day rehearing period was ever raised in the husband's motion to vacate. Id. at 713.

The better rule, by far, is to require the judicial labor at the trial court be at an end before a dissolution of marriage be considered final and effective for all purposes. The issue of when the State of Florida recognizes that a marriage is effectively dissolved is a critical one because it affects a party's right to remarry and the party's income tax filing status, as well as other important matters. The need for predictability

and consistency, as well as the avoidance of confusion, all militate in favor of a rule which all can understand, namely the familiar ten-day rule. The Wife respectfully urges this Court to clarify the law in this regard and to make it clear that judicial decrees purporting to dissolve a marriage will also be governed by that rule. This Court should accordingly resolve the conflict of decisions in the present case in favor of Johnson v. Feeney, and should quash the Fourth District's decision in the present case with the directions that the partial final judgment of dissolution be set aside as a void decree.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN DISSOLVING THE PARTIES' MARRIAGE AND DIVESTING THE WIFE OF HER SURVIVORSHIP RIGHTS BASED ON THE HUSBAND'S DYING WISH, IN THE ABSENCE OF EVIDENCE THAT BIFURCATING THE PROCEEDINGS WAS CLEARLY NECESSARY FOR THE BEST INTERESTS OF THE PARTIES.

It appears that the parties agree that Mr. Barnett was seriously ill and that this was the sole basis for his seeking bifurcation; that no testimony or other evidence was presented to the trial court as to the consequences of bifurcation as to the Wife, the Husband, or their creditors; and that the trial court's only expressed reason for granting the motion to bifurcate was a sentimental one, i.e., the court's wish to accommodate the desire of a man who was faced with death (T.2/27; R.5/912-913).

It is also undisputed that the trial court initially insisted upon being given evidence as to the specifics regarding the parties' assets, because it recognized that its decision would depend to some extent on whether the assets would be taken by creditors in the event of dissolution, or whether there was sufficient equity so that Mr. Barnett's heirs could inherit (T.1/11, 13). It is also true that from that point onward, the court heard nothing but general discussion by the attorneys and an accountant, all of whom were uncertain about the facts (T.1/19-21). There was serious disagreement between the attorneys as to the value of various assets and liabilities and as to the effect of bifurcation (T.1/9-10, 14, 16, 17-18; T.2/4-5, 8-10, 13-15). Ultimately, the court

decided to disregard the financial considerations and decided to grant Mr. Barnett's "dying wish (T.2/27-28)."

The question thus is whether, given this Court's pronouncement that bifurcation should be used "only when it is clearly necessary for the best interests of the parties", Claughton v. Claughton, 393 So. 2d 1061, 1062 (Fla. 1981), a trial court has the discretion to grant a motion for bifurcation based on absolutely no evidence as to what is in the best interests of the parties. The Fourth District's answer to this question was apparently that the approaching demise of the requesting party was sufficient in and of itself to justify bifurcation, irrespective of any other factors. The Fourth District referred to no case law to support its statement, nor did it explain its departure from its previously expressed rulings disapproving of bifurcation unless clearly necessary for the best interests of the parties. We submit that the trial court's granting of the motion for bifurcation, in light of the moving party's total failure to present any evidence whatever to support it, was a clear abuse of discretion and that the Fourth District's approval thereof must be quashed.

The Estate attempts to justify the trial court's decision by reiterating its unfair and unfounded assertions that Mrs. Barnett had repeatedly sought continuances in a "blatant attempt to delay the divorce proceedings long enough to acquire all of the marital estate after the Husband's demise" (answer brief, pp.2, 3, 20-21). As noted

earlier in this brief, it was the Husband's repeated failure and refusal to provide his tax returns which required continuance after continuance. Moreover, Mrs. Barnett had received no support from her husband throughout the dissolution proceedings, while the Husband's embezzlement and other activities had drastically diminished the marital estate. That the trial court was aware of these issues is evidenced by the following:

> THE COURT: I know all the law. I'm thinking about – I'm trying to weigh the equities here. The equities, you know, obviously if he passes on and she inherits after two years of litigation, that's not equitable to Mr. Barnett. Mrs. Barnett will allege that it's more than equitable to her because he has engaged in practices which have dissipated the marital estate.
>
> * * * *
>
> So if you weigh the equities there, Mrs. Barnett says, well he's dissipated the marital estate and I should inherit. And Mr. Barnett says we're not married, we're not husband and wife anymore, I should be able to do with what I wish with my estate. There are equities there and I can weigh them, okay.
>
> And then on the other hand Mrs. Barnett says he's got liens on his property that will eat up all his property as soon as we're tenants in common and why give it to the lien holder, why shouldn't I get it. And so there are equities there.
>
> Tell me what else is going on in your minds.
>
> MR. STOLBERG: Well, I think the Court needs to hear the specifics of those equities. I think that the Court ought to consider the status of this case and the ownership of the property. As I understand it, and this is a proffer because –

THE COURT: Definitely.

MR. STOLBERG: – we didn't have all of the data and so forth.

THE COURT: Definitely. Cut through the garbage and let's get to the real stuff.

MR. STOLBERG: I refer to the motion and the motion says that the main asset is a residence in Nantucket held as tenants by the entireties that will pass to the wife.

It is my understanding that there is probably no equity in this in any event and so I don't think that's factually correct. There probably is equity in some art that is owned by these folks. And Mr. Barnett at his, I think, you know I only want to say I think, says it's worth $750,000. Mrs. Barnett is more of a mind that it's perhaps $300,000. The art, as I understand it, is owned by the entireties and will pass to Mrs. Barnett.

I, in the hour and-a-half or two hours that I had to prepare for this case, I reviewed the law on this issue. And I don't know that there is any case that addresses the issue of whether or not a bifurcation should be granted to divest the wife of her survivorship interest in jointly held property or divest the wife of any rights as wife because that's really what happens here.

It appears that Mr. Barnett's creditors exceed those of Mrs. Barnett. There is at least, as far as we know, a 200, an almost $300,000 judgment against him in his name alone for money absconded with from the Ruden Barnett firm. And a bonding company paid off on this, sued him and there's a judgment in his name alone.

THE COURT: All right. Well, now what we need to know is how perilously close is Mr. Barnett to death. And we also need to know what's going to happen to his tenants in common share if the Court bifurcates the divorce and grants him the divorce.

> If it's all going to be eaten up by creditors and nobody's getting – nobody, no heir will take, that's one scenario. If it's not eaten up by creditors and heirs will take, that's another scenario. I need to be more fully informed about this.
>
> MR. STOLBERG: That is essentially my point, Your Honor. We can't –
>
> THE COURT: So I need to be more fully informed. Now, if Mr. Barnett is on death's door and if the creditors can be – if there are not – if there's more assets than the creditors, then that's something that I might want to move on. If there are creditors that are going to eat up these assets and Mr. Barnett's heirs are not going to take, that's another thing.

(T.1/8-11). In the end, however, the trial court ruled without receiving any evidence at all, expressly disregarding the financial consequences of bifurcation, the court chose to grant the motion based solely on her sentiments. Clearly, this was not the kind of informed discretion that this Court envisioned in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). The decision to grant the motion to bifurcate based on no evidence at all as to the consequences thereof was a clear abuse of discretion, and this Court should so declare.

CONCLUSION

For the reasons set forth above and in Mrs. Barnett's initial brief, this Court should set aside the partial final judgment as void because of Mr. Barnett's death prior to the conclusion of judicial labor in the trial court. Alternatively, the judgment should be set aside because of the trial court's abuse of discretion in bifurcating the proceedings under the circumstances of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by mail this 29th day of December, 1999, to: **ROBERT BLAIR GOLDMAN, ESQUIRE**, Shutts & Bowen, LLP, 250 Australian Avenue South, Suite 300, West Palm Beach, Florida 33401, Co-Counsel for Respondent; and **BARBARA J. COMPIANI, ESQUIRE**,

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