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Divorce: Vacation and Modification of Final Decrees in Florida

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social knowledge and experience for their interpretation and application. A realization of the lack of their own training and experience in child welfare and sociology has led many judges to question the soundness of having custody determined by the courts. Undoubtedly, welfare agencies with trained personnel are far better qualified to determine the best interests of the child, but such agencies are no more capable of determining legalistic problems involved in custody awards than are the courts in determining welfare problems. A combination of the two agencies suggests a solution. This idea is not novel in Florida law. In an adoption proceeding the problem of determining the fitness of the adopter and the welfare of the child to be placed under custody is determined by a licensed child-placing agency or by the state welfare society, and such agency is deemed to be a party to the cause.[109]

The reference of the problem of determination of the best interest of the child or children in custody proceedings in a law court would probably require legislative action. Indeed, legislative action, and perhaps a constitutional amendment, is necessary to a final solution to the problems involved in custody proceedings.[110] However, as a temporary expedient, there appears to be no reason why courts of equity cannot refer the problem of determination of the welfare of the child to a special master,[111] who does not have to be a member of the bar but may be a member of the state welfare society or other agency especially qualified in child-welfare work.

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DIVORCE: VACATION AND MODIFICATION OF FINAL DECREES IN FLORIDA

To present the procedural and substantive aspects of a suit in Florida for the vacation or modification of a final decree of divorce is the purpose of this note. The note does not purport to cover either the vacation or modification in Florida of a divorce decree rendered by a sister state,

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[109]FLA. STAT. 1941, §72.15 (Supp. 1947).

[110]Lemkin, *Orphans of Living Parents: A Comparative Legal and Sociological View*, 10 LAW AND CONTEMP. PROB. 834-854 (1944).

[111]FLA. STAT. 1941, §63.57.

or the vacation or modification in a sister state of a Florida divorce decree. The only modifications dealt with are those in reference to the provisions of the decree as to alimony, support, or maintenance of the wife.[1]

I. Vacation of Decrees

Procedure. Since 1942, it is clear that an attack upon a divorce decree that has become final must be initiated by a bill of complaint.[2] Prior to that time the commencement of the suit could have been by bill of complaint, petition, motion, or rule to show cause.[3] The kind of bill required is immaterial, because of the liberal provisions of the Florida Chancery Act abolishing technical distinctions in pleadings in equity;[4] and therefore it may be an original bill, a bill of review, or an original bill in the nature of a bill of review.[5]

Even before 1942 due process of law required that notice of the proceedings must be given, as well as an opportunity to be heard and have made of record any pleadings or evidence that might be made the predicate for appellate review.[6]

Analagous to the rule applied in suits seeking a decree of divorce,[7] a bill attempting to vacate or modify a final decree of divorce does not prove itself. The grounds for vacating or modifying the divorce decree must be both alleged and proved, even though the opposing party does not file an answer.[8] The burden of proof in such a suit is, as would be

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[1]For a discussion of the law applicable to modifications of the provisions of a final divorce decree in reference to the custody of children see Note 1 U. of Fla. L. Rev. 360 (1948).

[2]Sauer v. Sauer, 154 Fla. 827, 19 So.2d 247 (1944); Gross v. Gross, 154 Fla. 649, 18 So.2d 538 (1944); State *ex rel.* Lorenz v. Lorenz, 149 Fla. 625, 6 So.2d 620 (1942).

[3]Kurtz v. Kurtz, 112 Fla. 619, 150 So. 785 (1933); Bryant v. Bryant, 101 Fla 179, 133 So. 635 (1931); *cf.* Sawyer v. Gustason, 96 Fla. 6, 118 So. 57 (1928).

[4]Fla. Stat. 1941, §63.21.

[5]State *ex rel.* Lorenz v. Lorenz, 149 Fla. 625, 6 So.2d 620 (1942). Mathein v. Mathein, 131 Fla. 623, 179 So. 663 (1938), held that a motion praying that a final decree of divorce be vacated and set aside was considered as a bill in the nature of a bill of review.

[6]Kurtz v. Kurtz, 112 Fla. 619, 150 So. 785 (1933); Bryant v. Bryant, 101 Fla. 179, 133 So. 635 (1931).

[7]State v. Wolfe, 63 Fla. 290, 58 So. 841 (1912); Hancock v. Hancock, 55 Fla. 680, 45 So. 1020 (1908); Underwood v. Underwood, 12 Fla. 434 (1869).

[8]Shore v. Shore, 138 Fla. 586, 190 So. 48 (1939); Ahearn v. Ahearn, 124 Fla. 524,

expected, upon the person seeking to set aside the decree.[9] A solemn decree of a court of competent jurisdiction will not be vacated except upon clear and convincing proof of the matters *in pais* that are offered as grounds for the maintenance of the suit.[10] That is to say, a slight preponderance of the evidence would be insufficient to enable the plaintiff to prevail in this type of a proceeding. This requirement is especially apparent in those instances in which a deceased person is charged with the misconduct constituting the basis for setting the decree aside.[11]

When both parties to the divorce decree are still living, the court cannot vacate the decree unless both have been made parties to the suit.[12] When one of the parties to the divorce decree has died intestate and property rights would be affected by the vacation of the decree, then the heirs of the intestate must be made parties.[13] It follows *a fortiori* that, if the deceased dies testate, then the devisees and legatees have to be made parties to the suit if property rights are affected thereby.

An attack upon a final decree of divorce, regular upon its face, must be made before the court that rendered the original decree, since the orderly administration of justice will best be served by giving the court that was allegedly imposed upon the opportunity to correct its own decree.[14] When the decree is void upon its face, it is a mere *brutum fulmen*,[15] and no reason is apparent why the proceeding to vacate cannot be instituted in any court of competent jurisdiction.

Grounds. As a general proposition, a court of chancery has the same power to declare null and void invalid decrees of divorce that it has in other types of invalid decrees.[16] In general, decrees are invalid if

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168 So. 807 (1936); Cone v. Cone, 102 Fla. 793, 136 So. 466 (1931).

[9]Masilotti v. Masilotti, 158 Fla. 663, 29 So.2d 872 (1947); Gross v. Gross, 154 Fla. 649, 18 So.2d 538 (1944); Kearley v. Hunter, 154 Fla. 81, 16 So.2d 728 (1944); Miller v. Miller, 149 Fla. 722, 7 So.2d 9 (1942).

[10]Dye v. Dolbeck, 114 Fla. 866, 154 So. 847 (1934).

[11]Barnes v. Willis, 65 Fla. 363, 61 So. 828 (1913).

[12]Bannon v. Kendall, 117 Fla. 475, 158 So. 99 (1934).

[13]Barnes v. Willis, 65 Fla. 363, 61 So. 828 (1913); Rawlins v. Rawlins, 18 Fla 345 (1881).

[14]State *ex rel.* Willys v. Chillingworth, 124 Fla. 274, 168 So. 249 (1936).

[15]Kroier v. Kroier, 95 Fla. 865, 116 So. 753 (1928); Malone v. Meres, 91 Fla 709, 109 So. 677 (1926); Einstein v. Davidson, 35 Fla. 342, 17 So. 563 (1895).

[16]Shrader v. Shrader, 36 Fla. 502, 18 So. 672 (1895).

obtained through fraud, collusion, deceit, or mistake.[17]

Proceeding to the specific bases upon which the bill to vacate the final decree of divorce may be maintained, it is not surprising that the most frequent ground in this state is a failure to acquire jurisdiction of the parties in the suit for divorce.[18] Considering first the question of jurisdiction of the plaintiff, the Florida law, by statute,[19] requires that the plaintiff must have resided in the State of Florida for ninety days prior to the filing of the bill of complaint; and a failure to comply therewith will be cause for vacating the decree of divorce.[20]

Most litigation is involved, however, with the problem of whether or not jurisdiction over the person of the defendant has been obtained. Since the decision in the first *Williams v. North Carolina* case,[21] it is definite that a state may allow a divorce on the basis of substituted service upon the defendant; Florida has a statute specifically authorizing this.[22] Failure to comply strictly with the statutory requirements as to substituted service will be grounds for vacating a decree obtained on the basis of such defective service, and this is especially applicable to suits for divorce.[23]

A divorce decree rendered on the basis of wilfully false or perjured testimony is vulnerable to a suit to set it aside.[24]

In the event that a divorce decree is granted to one spouse and is predicated upon his or her testimony given after the other spouse has been judicially declared insane, it will be vacated.[25]

A valid ground for vacation arises when, before the final decree of

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[17]KOOMAN, FLORIDA CHANCERY PLEADING AND PRACTICE §162 (1939).

[18]Gov. David Sholtz signed c. 16975 of Florida Laws 1935, which reduced to ninety days the residence requirement in order to institute a suit for divorce, with these words: "Florida is a transient state, extending to the people of the United States an invitation to come here as visitors and remain as residents. If this Bill brings additional residents *or visitors* to Florida, it will be in line with that invitation." (Italics supplied).

[19]FLA. STAT. 1941, §65.02.

[20]De Sosa v. De Sosa, 104 Fla. 219, 139 So. 581 (1932); Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694 (1929).

[21]Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 (1942).

[22]FLA. STAT. 1941, §65.06.

[23]De Sosa v. De Sosa, 104 Fla. 219, 139 So. 581 (1932); Shrader v. Shrader, 36 Fla. 502, 18 So. 672 (1895).

[24]North v. Ringling, 149 Fla. 752, 7 So.2d 476 (1942); Parramore v. Parramore, 61 Fla. 701, 55 So. 795 (1911).

[25]Lorenz v. Lorenz, 157 Fla. 402, 26 So.2d 54 (1946).

divorce is recorded, the parties become reconciled and the complainant dies.[26]

The portion of a decree of divorce obtained through duress will be set aside;[27] and *a fortiori* an entire decree so obtained will be vacated.

There are two distinct aspects to the question of collusion as a ground for setting aside a divorce decree. In the first place, before the court which rendered the decree has lost jurisdiction of the cause, a divorce decree procured by collusion may be vacated, even by the court *ex mero motu*.[28] Secondly, however, when the court has lost jurisdiction of the cause, the decree will not be set aside on the basis of collusion if parties are in *pari delicto*.[29] And this is true regardless of the relative degree of fault of the parties to the collusion, provided that the person seeking the vacation was to any appreciable degree a participant in the collusion and seeks the vacation in order to obtain a personal advantage.[30]

Defenses. The fact that divorce is involved, as distinguished from some other subject of equitable cognizance, will not alone raise an equity sufficient to maintain a bill to vacate a final decree, when met by equitable defenses good as against bills of this character generally, such as laches, inequitable conduct, and waiver.[31]

Any defenses that could have been included in the answer to the original bill of complaint for a divorce would be, on a hearing on their merits and the introduction of evidence to support them, res judicata and consequently insufficient to support a suit to vacate the divorce decree.[32]

When there are no property rights involved and the custody or maintenance of children is not affected, and one of the parties to the divorce decree is deceased, then the court will not propound a nullity by vacating the decree in order merely to satisfy the personal feelings of the complainant.[33] Equitable estoppels are complete bars to this

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[26]Hardesty v. Hardesty, 31 So.2d 60 (Fla. 1947).

[27]Miller v. Miller, 134 Fla. 725, 184 So. 672 (1938).

[28]*See* Hall v. Hall, 93 Fla. 709, 725, 112 So. 622, 628 (1927).

[29]Hall v. Hall, 93 Fla. 709, 112 So. 622 (1927).

[30]*Ibid.*

[31]Mabson v. Mabson, 104 Fla. 162, 140 So. 801 (1932).

[32]Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545 (1945); Rice v. Rice, 148 Fla. 620, 4 So.2d 850 (1941).

[33]North v. Ringling, 149 Fla. 752, 7 So.2d 476 (1942); *accord,* Price v. Price, 114 Fla. 233, 153 So. 904 (1934); *see* Darsey v. Darsey, 124 Fla. 125, 133, 167 So. 810, 813 (1936).

kind of a bill. For example, when the party seeking to set the decree aside has willingly acquiesced in the divorce proceedings and the rendition of the final decree, and has waited eleven years to contest the validity thereof, he is estopped to do so.[34]

The right to contest the validity of a final divorce decree is also lost in those instances in which the complainant has actual notice of the pendency of the divorce proceedings, even though not through service of process technically proper, and thereafter intentionally refrains from answering and wrongfully seeks to invoke the aid of a foreign court, the reason being that such conduct amounts to a waiver of the defects in the attempted service of process.[35]

When the party challenging the decree waits until two years and three months after the entry of the final decree, during which time both parties remarry and one dies, laches will bar the suit.[36] On the other hand, the fact that two years have elapsed since the rendition of the divorce decree does not constitute laches when the suit to vacate is brought within four months after learning of the existence of the original decree.[37]

In the event that the person seeking vacation has by duress forced the other party to procure the decree, he will not be allowed to maintain the suit, by virtue of the familiar axiom that he who comes into equity must come with clean hands.[38]

II. Modification of Decrees

Procedure. There is a broad statutory provision in Florida authorizing modification of a final decree of divorce as regards the provisions pertaining to separate support, alimony, maintenance, or a voluntary property agreement incorporated in the decree.[39] It seems obvious that, contrary to the rule generally regarded as obtaining prior to the passage of the above statute in 1935,[40] there is now no necessity for an express retention

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[34]Barnes v. Willis, 65 Fla. 363, 61 So. 828 (1913).

[35]Mabson v. Mabson, 104 Fla. 162, 140 So. 801 (1932).

[36]Kearley v. Hunter, 154 Fla. 81, 16 So.2d 728 (1944).

[37]Parramore v. Parramore, 61 Fla. 701, 55 So. 795 (1911).

[38]Hennessy v. Hudson, 100 Fla. 967, 131 So. 315 (1930).

[39]Fla. Stat. 1941, §65.15.

[40]*See* Kennard v. Kennard, 131 Fla. 473, 477, 179 So. 660, 662 (1938); Norton v. Norton, 131 Fla. 219, 227, 179 So. 414, 417 (1938); Mooty v. Mooty, 131 Fla. 151, 160, 179 So. 155, 159 (1938). *But see* State *ex rel.* Willard v. Harrison, 133 Fla. 169, 175, 183 So. 464, 466 (1937).

of jurisdiction in the divorce decree to enable the court to grant such modification.[41] The statute expressly provides that either party to the divorce decree can apply to the court for a modification thereof;[42] this has been held to exclude action by the court *sua sponte*.[43]

The venue for proceedings under this statute is specifically set out therein and consists of the judicial circuit: (a) in which the parties, or either of them, shall reside at the date of the application for the modification, or (b) in which the decree shall have been rendered.[44] In the event that a voluntary agreement as to a property settlement has been incorporated in the decree of divorce, then the venue of the proceeding to modify that portion of the decree can be, in addition to either of the above two locations, in the judicial circuit: (c) in which the parties, or either of them, shall have resided at the date of the execution of the agreement, or (d) in which the agreement was executed.[45] It must appear affirmatively from the allegations of the petition for modification that there has been a compliance with one of the above four provisions.[46] Although a property settlement incorporated in a final decree has been executed in a sister state, modification can still be sought in the circuit in which the divorce decree was rendered.[47]

Since the statute, as previously stated, contains a provision that a proceeding thereunder may be instituted in a judicial circuit different from that in which the divorce decree was rendered, it is apparent that such a modification proceeding was never intended to constitute a step in the original divorce proceedings; and accordingly service of process on, or a voluntary appearance by, the defendant is necessary; this proceeding is a statutory analogy to a bill of review.[48] The Florida Court has specifically held that service of process by publication is proper when personal service cannot be procured.[49]

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[41]Norton v. Norton, 131 Fla. 219, 179 So. 414 (1938); Van Loon v. Van Loon 132 Fla. 535, 182 So. 205 (1938); *see* Gaffny v. Gaffny, 129 Fla. 172, 175, 176 So 68, 69 (1937); Hennessy v. Hudson, 100 Fla. 967, 131 So. 315 (1930).

[42]FLA. STAT. 1941, §65.15.

[43]Hagen v. Viney, 124 Fla. 747, 169 So. 391 (1936)

[44]FLA. STAT. 1941, §65.15.

[45]*Ibid.*

[46]Norton v. Norton, 131 Fla. 219, 179 So. 414 (1938).

[47]*Ibid.*

[48]*Ibid.*

[49]FLA. STAT. 1941, §48.01(4), (10); Cohn v Cohn, 151 Fla 547, 10 So 2d (1942), in which the court said that the proceeding was one quasi in rem and t

It is not error to dismiss a petition seeking a modification under this statute without leave to amend, since the court is always open to entertain a further proceeding when the conditions of the statute are met.[50]

Grounds. The grounds set out in the statute for procuring a modification are a change in the circumstances of the parties or in the financial ability of the husband since the rendition of the decree.[51] It is clear that the decree is res judicata as to all conditions that existed as of the date of the decree, and that the court can regard only that which has happened since the decree was rendered in order to determine whether or not a modification should be made.[52] A slight change of conditions, however, will not warrant alteration of the final decree.[53]

The following will illustrate what has been deemed changes of circumstances sufficient or insufficient to authorize modification of the divorce decree. On the basis that it should not be within the power of the ex-husband to reduce his obligations to his former wife voluntarily, the remarriage of the husband is not a ground for modifying the final decree of divorce.[54] This principle is true even though the ex-husband acquires children as a result of the remarriage.[55] On the other hand, the remarriage of the ex-wife will, generally speaking, relieve the husband from the obligation to pay alimony;[56] but this is not so when a property settlement has been made releasing all claims, including alimony, of one spouse against the other, and when the only change in circumstances is the remarriage of the ex-wife.[57] The ex-husband is not entitled to

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a binding res was within the jurisdiction. It is difficult to perceive just what the res is. However, the decision is correct on the basis that the statute retains jurisdiction over the parties to the original decree, even though the decree does not expressly so provide.

[50]Phillippi v. Phillippi, 148 Fla. 393, 4 So.2d 465 (1941).

[51]FLA. STAT. 1941, §65.15.

[52]Slade v. Slade, 153 Fla. 125, 13 So.2d 917 (1943).

[53]Slade v. Slade, 153 Fla. 125, 13 So.2d 917 (1943); *see* State *ex rel.* Willard v. Harrison, 133 Fla. 169, 175, 183 So. 464, 467 (1937).

[54]Webber v. Webber, 156 Fla. 396, 23 So.2d 388 (1945); De Bowes v. De Bowes, 152 Fla. 423, 12 So.2d 118 (1943); Phillippi v. Phillippi, 148 Fla. 393, 4 So.2d 465 (1941).

[55]Phillippi v. Phillippi, 148 Fla. 393, 4 So.2d 465 (1941).

[56]Carlton v. Carlton, 87 Fla. 460, 100 So. 745 (1924); *see* State *ex rel.* Willard v. Harrison, 133 Fla. 169, 180, 183 So. 464, 468 (1937).

[57]Vance v. Vance, 143 Fla. 513, 197 So. 128 (1940).

a reduction of alimony on the basis of the extravagance of the ex-wife.[58] A mere contemplated change in the financial ability of the husband is not a sufficient ground for granting modification of the divorce decree.[59]

General Considerations. A condition precedent to the commencement of a proceeding under this statute is that the petitioner must have complied with the original decree as to the payment of all past-due installments and of the wife's allowance for attorneys' fees in the original suit.[60] This condition, which is based on the "clean hands" doctrine, will not be required, however, when the petitioner shows his inability to pay presently the amount in arrears.[61]

It is clear that a voluntary property settlement ratified by a final decree of divorce may be modified under the provisions of this statute;[62] however, to accomplish this a very strong case is required.[63] The foregoing is true even though the final decree merely accepted and ratified the property settlement and did not itself order any payments to be made.[64] When the property-settlement agreement set out in the divorce decree provides for certain changes in the amount of payments to the wife as the husband's earnings vary, then the wife is estopped to claim more than the provisions of the agreement permit.[65]

There are two phases to the problem of the retrospective application of this statute. First, there can be no modification as to the past-due and unpaid installments, for the reason that they are vested property rights of which the party cannot be deprived except by due process of law.[66] Mr. Justice Brown, concurring specially in the *Van Loon* case, expresses the belief, however, that the court might, for strong equitable

[58]Phillippi v. Phillippi, 148 Fla. 393, 4 So.2d 465 (1941).

[59]De Bowes v. De Bowes, 152 Fla. 423, 12 So.2d 118 (1943) (the husband had been placed in Class 1A in the draft); Fleischer v. Fleischer, 149 Fla. 621, 6 So.2d 836 (1942).

[60]Selige v. Selige, 138 Fla. 783, 190 So. 251 (1939).

[61]Blanton v. Blanton, 154 Fla. 750, 18 So.2d 902 (1944).

[62]Lee v. Lee, 157 Fla. 439, 26 So.2d 177 (1946); Webber v. Webber, 156 Fla. 396, 23 So.2d 388 (1945); Vance v. Vance, 143 Fla. 513, 197 So. 128 (1940); Dix v. Dix, 140 Fla. 91, 191 So. 205 (1939); Norton v. Norton, 131 Fla. 219, 179 So. 414 (1938).

[63]Webber v. Webber, 156 Fla. 396, 23 So.2d 388 (1945); Vance v. Vance, 143 Fla. 513, 197 So. 128 (1940).

[64]Norton v. Norton, 131 Fla. 219, 179 So. 414 (1938).

[65]Lee v. Lee, 157 Fla. 439, 26 So.2d 177 (1946).

[66]Andruss v. Andruss, 144 Fla. 641, 198 So. 213 (1940); Van Loon v. Van Loon.