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Discovery of Financial Worth in a Divorce Proceeding

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DISCOVERY OF FINANCIAL WORTH IN A DIVORCE PROCEEDING

The plaintiff husband filed a complaint[1] for divorce[2] against the defendant wife. Subsequently, the wife served notice[3] of the taking of a deposition to inquire extensively into the husband's financial worth. Admitting that he was ready, willing and able to answer any reasonable order for costs, fees or other allowances, the husband by motion sought a protective order[4] to prohibit the wife from inquiring into any matter relating to his financial worth, income, capital assets or income tax. The Circuit Court granted the protective order and the Third District Court of Appeal affirmed.[5] On appeal to the Supreme Court of Florida, *held*, decision quashed and case remanded: A husband in a divorce proceeding is not immunized from all inquiry concerning his financial worth in spite of his admission of being willing and able to pay. *Orlowitz v. Orlowitz*, 199 So.2d 97 (Fla. 1967).

Although courts in all jurisdictions have allowed some type of alimony payment for the divorced or separated wife,[6] they have not displayed the same degree of uniformity in deciding whether to grant pre-trial discovery of the financial assets and worth of the husband.

Michigan,[7] Missouri,[8] Texas[9] and Utah[10] generally allow pre-trial discovery, while Arizona,[11] Colorado,[12] Minnesota[13] and South Dakota[14]

1. FLA. STAT. § 65.01 (1965).
2. FLA. STAT. § 65.04 (1965).
3. FLA. R. CIV. P. 1.310(a).
4. FLA. R. CIV. P. 1.310(b).
5. Orlowitz v. Orlowitz, 187 So.2d 670 (Fla. 3d Dist. 1966).
6. Except in the case of an adulterous wife where the courts have been consistent in following the common-law rule which denies any alimony. *See* J. MADDEN, HANDBOOK ON THE LAW OF DOMESTIC RELATIONS 319-335 (1931). Florida follows the common law rule. FLA. STAT. § 65.08 (1965). *See* Turnbull, *Alimony and Property Settlement in Florida*, 11 U. FLA. L. REV. 312 (1958); J. CARSON, FLORIDA LAW OF THE FAMILY, MARRIAGE, AND DIVORCE 409, 662 n.1 (1950).
7. Tomilson v. Tomilson, 338 Mich. 274, 281, 61 N.W.2d 102, 105 (1956) where the court stated:
> The proper support of the wife in her accustomed station in life, commensurate with the husband's ability, and especially that of his children who may be dependents, is the first concern of the court. To this end the financial status of the husband is material and relevant to the subject matter of divorce.
8. Gragson v. Gragson, 290 S.W.2d 420 (Mo. Ct. App. 1956).
9. Lucas v. Lucas, 365 S.W.2d 372 (Tex. Civ. App. 1962).
10. Vrontikis v. Vrontikis, 11 Utah 2d 305, 358 P.2d 632 (1961).
11. Van Ness v. Superior Court, 69 Ariz. 362, 213 P.2d 899 (1950) (discovery allowed only as to community property).
12. Kane v. Kane, 154 Colo. 440, 391 P.2d 361 (1964) (husband's right to divorce must first be determined before discovery of wife's assets allowed).
13. Bakersville v. Bakersville, 246 Minn. 496, 75 N.W.2d 762 (1956) (right to divorce must first be established).
14. Peterson v. Peterson, 70 S.D. 385, 17 N.W.2d 920 (1945) (income tax papers are protected).

will deny discovery depending upon the circumstances. Kentucky, by statute,[15] will protect one spouse from a discovery motion by the other.[16]

In New York the rule was established early[17] that pre-trial discovery of a husband in a divorce action will ordinarily be denied if the right to support is contested and undetermined. The first cases used an analogy to the common law action of account render or account as it is more generally known. The first issue to be decided in that action is whether there is a duty to account. Thereafter, the court appoints auditors who report the account between the parties.[18] Applying the same procedure to a suit for divorce or separation, the New York courts reasoned that since alimony was incidental to the cause of action itself, then logically it could not be delved into until the right to a divorce or separation was first established. Until this occurred, pre-trial discovery of a subject which was not yet an issue would be denied as lacking the relevancy and materiality necessary to support a discovery motion.[19]

The New York courts soon invented distinctions to allow examination of financial assets.[20] Discovery was granted when the only contested issue was the amount of alimony[21] or where the right to a divorce was estab-

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15. KY. REV. STAT. 421.210(1) (1964).

16. In Wiglesworth v. Wright, 269 S.W.2d 263, 265 (Ky. App. 1954) the court observed of KY. REV. STAT. 421.210(1) that:

> It may be seen that this amendment opened wide the range of testimony permitted in husband and wife cases, but in order to avoid what the ancient cases called "implacable dissension" between the spouses, a strict reservation was made that neither could be compelled to testify for or against the other.

For a critical analysis of this statute, see Smith, *Discovery in Divorce Proceedings*, 4 J. FAM. L. 132 (1964).

17. *See* Schultz v. Schultz, 258 App. Div. 971, 16 N.Y.S.2d 967 (1940); Van Valkenburgh v. Van Valkenburgh, 149 App. Div. 482, 133 N.Y.S. 942 (1912); Haff v. Haff, 132 App. Div. 338, 116 N.Y.S. 1100 (1909); Whittaker v. Whittaker, 126 Misc. 640, 215 N.Y.S. 154 (Sup. Ct. 1925); Reynolds v. Reynolds, 81 Misc. 362, 142 N.Y.S. 1 (Sup. Ct. 1913); Danziger v. Danziger, 68 Misc. 452, 124 N.Y.S. 177 (Sup. Ct. 1910).

18. *See generally* B. J. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 144 (3d ed. 1923). At p. 146, the author states:

> The action of account render differs from the other common law actions in the mode of procedure. Though it is commenced like them, the judgment is first rendered upon the liability to account, quad computet, which is an interlocutory judgment only. The court thereupon appoints auditors or arbitrators, whose business it is to take and report the account between the parties, with the balance due, and upon their report the final judgment is rendered.

19. In Van Valkenburgh v. Van Valkenburgh, 149 App. Div. 482, 483, 133 N.Y.S. 942, 943 (1912), the court observed:

> The question of defendant's financial condition in reference to any award of alimony does not become an issue until plaintiff has succeeded in establishing her right to the judgment which she seeks. Should she fail in her action, or should the defendant recover judgment in his favor upon his counterclaim wherein he asks for relief, the information sought by the examination would be immaterial, unnecessary, and useless.

The accounting analogy was subsequently criticized in Haft v. Haft, 137 N.Y.S.2d 21 (Sup. Ct. 1954).

20. Altman v. Altman, 160 Misc. 600, 289 N.Y.S. 937 (Sup. Ct. 1936) (rule does apply in actions for separation); Linnekin v. Linnekin, 96 Misc. 56, 159 N.Y.S. 767 (Sup. Ct. 1916).

21. Campbell v. Campbell, 7 App. Div. 2d 1011, 184 N.Y.S.2d 479 (1959); Plohn v.

lished.[22] One Judicial Department adopted a "special circumstances rule" which allows discovery if extraordinary conditions are set out.[23] Other Departments have allowed examination of financial worth where both the right to a divorce or separation and the amount of alimony are determined at one hearing instead of the two proceedings usually required.[24]

Generally, however, pre-trial discovery motions in New York are denied wives[25] on the basis of public policy.[26] Common experience has shown that pre-trial discovery may be costly, time-consuming and unproductive.[27] Furthermore, the process of examination may worsen an already bad situation. It may end any hope of reconciliation and, in some instances, be used as a weapon to bring collateral pressure on the husband in business or social activities.[28]

Plohn, 281 App. Div. 1056, 121 N.Y.S.2d 336 (1953); Rose v. Rose, 3 Misc. 2d 753, 117 N.Y.S.2d 32 (Sup. Ct. 1952) (limited examination allowed); Selkowitz v. Selkowitz, 195 Misc. 979, 80 N.Y.S.2d 688 (Sup. Ct. 1948); Miller v. Miller, 188 Misc. 644, 69 N.Y.S.2d 210 (Sup. Ct. 1947); Levi v. Levi, 182 Misc. 445, 44 N.Y.S.2d 346 (Sup. Ct. 1943) (husband consents to the entry of a decree).

22. Scheffer v. Scheffer, 183 Misc. 344, 48 N.Y.S.2d 839 (Sup. Ct. 1944).

23. Kennedy v. Kennedy, 40 Misc. 2d 672, 243 N.Y.S.2d 737 (Sup. Ct. 1963) (special circumstances not shown); Becker v. Becker, 37 Misc. 2d 1, 234 N.Y.S.2d 611 (Sup. Ct. 1962) (wife alleged no knowledge of husband's income from various businesses).

24. In Berlin v. Berlin, 17 Misc. 2d 210, 212, 187 N.Y.S.2d 553, 555 (Sup. Ct. 1959), the court stated:

> Precedents in this state are not in agreement. However, two of the Judicial Departments which in the past have denied such pre-trial examination follow a standard practice of having the separated issues of support heard before a referee after the trial on the events. This practice allows a full exploration of the husband's financial ability at the referee's hearing. This is not the procedure in the 6th and 5th Districts. In both, the events of the action and the question of support are usually determined at the trial. Where all the issues are determined in a single trial, the wife may not be in a position to present sufficient proof for the Court to properly determine a reasonable amount unless she is permitted to examine the husband before trial.

See also Jasne v. Jasne, 10 Misc. 2d 59, 174 N.Y.S.2d 822 (Sup. Ct. 1952).

25. A husband, however, may inquire into the wife's financial assets since they will substantially affect the amount of alimony. *Compare* Phillips v. Phillips, 1 App. Div. 2d 393, 150 N.Y.S.2d 646 (1956) *with* McLaughlin v. McLaughlin, 207 Misc. 700, 142 N.Y.S.2d 407 (Sup. Ct. 1955).

26. Augustin v. Augustin, 277 App. Div. 777, 97 N.Y.S.2d 430 (1950); Swanton v. Swanton, 13 App. Div. 2d 989, 216 N.Y.S.2d 507 (Sup. Ct. 1961); La Mura v. La Mura, 22 App. Div. 2d 658, 253 N.Y.S.2d 304 (1964); Tavalin v. Tavalin, 13 Misc. 2d 909, 179 N.Y.S.2d 137 (Sup. Ct. 1958); Stitt v. Stitt, 2 Misc. 2d 655, 153 N.Y.S.2d 1007 (Sup. Ct. 1955); *But see* Epstein v. Epstein, 21 App. Div. 2d 799, 250 N.Y.S.2d 764 (1964); Kirshner v. Kirshner, 7 App. Div. 2d 202, 182 N.Y.S.2d 286 (1959); Kasden v. Kasden, 49 Misc. 2d 743, 268 N.Y.S.2d 571 (Sup. Ct. 1966); Vlassopulos v. Vlassopulos, 10 Misc. 2d 79, 172 N.Y.S.2d 87 (Sup. Ct. 1954).

27 *Compare* Hunter v. Hunter, 10 App. Div. 2d 291, 198 N.Y.S.2d 1008 (1960) *with* Kasden v. Kasden, 49 Misc. 2d 743, 268 N.Y.S.2d 571 (Sup. Ct. 1966).

28. The reasons stated by the courts in denying such examinations may, in one lawyer's opinion, be sufficient rationale in support of full and fair discovery. Glieberman points out in *Discovery Tactics in a Divorce Case*, 11 PRAC. LAW. 69 (May, 1965) that:

> Until a divorce proceeding ceases to be an adversary contest, the need for discovery and deposition will be as vital, as necessary, and perhaps more useful in divorce litigation than in all other branches of law. No cause of action is more consumed with such white-hot emotion, such venom, such controversy, such deliberate, calculated, and intentional concealment of fault and finances on the part of litigants. Each litigant relishes the thought of learning all and revealing nothing, of pinning the other down and making him yell "stop". . . .

Florida courts have taken a different approach in solving the problem. The landmark decision of *Jacobs v. Jacobs*,[29] until tacitly overruled in the instant case,[30] denied examination of a husband when he admitted that he was financially able and willing to pay any alimony the court might decree. Relying upon the construction of the old Equity Rule 49,[31] the Supreme Court said that the two elements to be proved for alimony are the wife's necessity and the husband's ability to pay.[32] Since the husband was willing and able to pay, there was no longer an issue as to his financial ability. Where there was no issue, the court reasoned, there could be no discovery.[33]

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29. 50 So.2d 169 (Fla. 1951).

30. Orlowitz v. Orlowitz, 199 So.2d 97, 98 (Fla. 1967), where the court points out:

> We think the case of Jacobs v. Jacobs, Fla. 1951, 50 So.2d 169 is distinguishable on its facts and also because it applied old Equity Rules 48 and 49, while the instant case involved the more liberal existing rule of civil procedure. Rule 1.280(b) F.R.C.P. In any event, we think the pronouncements in Parker v. Parker, supra, are more likely to produce a better result and decrees based on facts in the record than the procedure followed in the Jacobs case.

31. Equity Rule 49, which was abolished upon the adoption of the 1954 Florida Rules of Civil Procedure, provided:

> On the motion of any party, after reasonable notice, the court may order any other party or parties to produce books, records, and papers containing or believed to contain evidence pertinent to the cause of action or defense of the movant which are in the possession or control of the party or parties named in the motion and order, either for inspection before or use at trial, at such time or times and under such reasonable terms and conditions as may be prescribed by the court in its order on such motion.

In Hollywood Beach Hotel and Golf Club, Inc. v. Gilliland, 140 Fla. 24, 28, 191 So. 30, 32 (Fla. 1939) the court construed the rule:

> The sole purpose of the rule is to procure evidence pertinent to the issues. It is not designed to afford a litigant an avenue to pry into his adversary's business or go on a fishing expedition to uncover business methods, confidential relations, or other facts pertaining to the business . . . .
>
> This rule does not provide a means to secure information on which to predicate a cause of action. It is limited to securing evidence to prove the issues made and since the issues are not determined, it does seem that the motion for the production of books and records was premature as no issue had been matured in the chancery cause and no judgment had been secured at common law, and being so, there may be no occasion to produce the evidence.

32. The landmark case of Haddon v. Haddon, 36 Fla. 413, 18 So. 779 (Fla. 1895) demonstrated that two things must appear before a court is justified in making any allowance to the wife in a divorce proceeding:

> (1) A necessity must appear on the part of the wife, from her want of means, or of sufficient means to maintain herself during litigation, and with which to employ counsel, and
>
> (2) It must also appear that the husband has the pecuniary ability to supply that necessity. If it appears in such a case that the applicant wife has abundant means or property of her own, that is under her control and at her disposal, out of which to maintain herself and to employ counsel, then the necessity for the allowance is wanting, and it should be denied.

See also, Gaer v. Gaer, 168 So.2d 789 (Fla. 3d Dist. 1964); Slimer v. Slimer, 112 So.2d 581 (Fla. 2d Dist. 1959); Astor v. Astor, 89 So.2d 645 (Fla. 1956); Arendall v. Arendall, 61 Fla. 496, 54 So. 957 (1911).

33. The court stated:

> In light of the issues made by the pleadings, it is our conclusion that the production of the books, records, receipts, bank statements, etc. referred to in the order dated

Recently, the Fourth District Court of Appeal in *Parker v. Parker*[34] specifically rejected the holding in *Jacobs* and allowed discovery of financial worth. Distinguishing the new Florida Rules of Civil Procedure from the old Equity Rules, the court emphasized the greater scope of discovery provided by the new rules. The present Rule 1.280(b)[35] permits examination regarding *anything* that is relevant and material as long as it seems *reasonably calculated* to lead to the discovery of admissible evidence.[36] Discovery is not limited, as under the old Equity Rules, to pending issues, and one may properly "fish" within the limits prescribed.[37] The court noted in *Parker*, however, that a dependent wife and child in a divorce suit necessarily make the husband's income and assets material and relevant to the pending issues:

> We must say based upon our understanding of the Rules and the philosophy behind them, that we do not look with favor upon the husband's position in not wishing to reveal any of the details of his financial position and his effort to bridle the dependents' discovery right by substituting his secondary and non-verifiable conclusion in lieu of the primary detailed facts. The adversary and the court are entitled to the whole factual picture to the end that an independent complete understanding and evaluation may be had.[38]

August 22, 1950, is not material, relevant or pertinent to the issues and for said reason the order was improper and should be quashed.

Jacobs v. Jacobs, 50 So.2d 169, 173 (Fla. 1951).

34. 182 So.2d 498 (Fla. 4th Dist. 1966). *But cf.* Muskin v. Muskin, 184 So.2d 923 (Fla. 3d Dist. 1966). In Novack v. Novack, 187 So.2d 385 (Fla. 3d Dist. 1966), the court rejected the *Jacobs* decision where the wife claims a special interest in the property.

35. Formerly Rule 1.21(b), FLA. R. CIV. P., 1965 Revision.

36. Rule 1.280(b), FLA. R. CIV. P., provides:

Unless otherwise ordered by the court as provided herein, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the examining party or the claim or defense of any other party, including the existence, location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

37. *See* Author's Comment to Rule 1.280, FLA. R. CIV. P., 30 F.S.A. at 379:

The scope of the examination covers all matters, not privileged, which are relevant to the subject matter of the pending action. The examination is not limited to what is relevant to the issues, nor is it to be limited to what would be admissible as evidence at the trial. Those limitations are proper at the trial but applying them to the taking of depositions would impair the usefulness of the discovery procedure. The objection that the examining party is on a "fishing expedition" is no longer available to preclude him from inquiring into all the facts and circumstances that may have a bearing on either side of the case. The examining party is not restricted to the discovery of facts relevant to his claim or defense. His greater need is to know the facts of the opponent's claim or defense, and the role provides for an examination "whether it related to the claim or defense of the examining party or to the claim or defense of any other party."

See also, F. JAMES, CIVIL PROCEDURE, § 6.2, § 6.8 (1965); Massey and Westen, *Civil Procedure, Seventh Survey of Florida Law*, 20 U. MIAMI L. REV. 654, 655 n.386 (1966).

38. Parker v. Parker, 182 So.2d 498, 500 (Fla. 4th Dist. 1966).

In the instant case, the Supreme Court expressly adopted the reasoning of the court in *Parker*. Not only did the husband admit nothing[39] by stating that he was ready and willing "to answer any reasonable order for costs, fees or other allowances," but by refusing to answer questions relating to financial worth, he also frustrated discovery of facts which would bear on the issues of residency and adultery. The court conceded that there will be instances where disclosure is unwarranted and protection should be granted. Under the facts in the instant case, however, the protective order, by preventing the wife from showing the husband's ability to pay and standard of living, was an abuse of discretion by the trial court.

The writer agrees with the court in both the result obtained and the principle applied. The philosophy behind the Florida Rules of Civil Procedure—to secure the just, speedy, and inexpensive determination of every action[40]—is nowhere better employed than in divorce litigation. The desire of each party to get all and give nothing has been especially noticeable in cases where the husband has hidden his wallet and bankbook behind a protective order, whispered his willingness to pay a reasonable sum, while refusing the wife the opportunity to discover what is, in fact, *reasonable*. Only when the full discovery of all pertinent facts is allowed will the divorce action be noted for justice. Toward that end the Supreme Court has taken a step forward.

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39. In Ortiz v. Ortiz, 194 So.2d 38 (Fla. 3d Dist. 1967), the court noted that a husband's statement that he was ready, willing, and able to pay costs and allowances was not sufficient.

40. Rule 1.010, FLA. R. CIV. P.