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Domestic Relations -- Florida Jurisdictional Requirements for Divorce

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CASES NOTED

DOMESTIC RELATIONS — FLORIDA JURISDICTIONAL REQUIREMENTS FOR DIVORCE

Defendant moved from Maryland to Florida, intending to establish Florida as his family's permanent home. By agreement, his wife was to join him at a later date. Plaintiff joined her husband and they resided together for a short period of time. Subsequently, the wife filed a complaint for divorce which was dismissed for lack of jurisdiction. On appeal, *held*, affirmed: a wife who is not physically present within the borders of the state for the statutory period of time[1] cannot acquire residence through her husband's previously established domicile. *Brown v. Brown*, 123 So.2d 382 (Fla. App. 1960).

Florida has consistently held the statutory residence period in divorce cases to be a jurisdictional requirement.[2] Its courts have no authority to grant a divorce unless residence is both alleged[3] and proven by the plaintiff.[4] It is also well established that whether the plaintiff is a resident of the state is a mixed question of law and fact to be determined by the chancellor.[5]

A problem arises in the court's interpretation of the term "must have resided" as used in the Florida statute.[6] The Supreme Court of Florida has held that the term *residence*, when used in divorce statutes, is used in the sense of a legal residence or place of *domicile* or permanent abode

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1. FLA. STAT. § 65.02 (1959). "In order to obtain a divorce the complainant *must have resided* six months in the state before the filing of the bill of complaint. . . ." (Emphasis added.)

2. Kutner v. Kutner, 159 Fla. 870, 33 So.2d 42 (1947); Mills v. Mills, 153 Fla. 746, 15 So.2d 763 (1943); Phillips v. Phillips, 146 Fla. 311, 1 So.2d 186 (1941); Curley v. Curley, 144 Fla. 728, 198 So. 584 (1940); Wade v. Wade, 93 Fla. 1004, 113 So. 374 (1927); Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (1907); Donnelly v. Donnelly, 39 Fla. 229, 22 So. 648 (1897); Gredler v. Gredler, 36 Fla. 372, 18 So. 762 (1895).

3. Curley v. Curley, 144 Fla. 728, 198 So. 584 (1940); Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694 (1929); Wade v. Wade, 93 Fla. 1004, 113 So. 374 (1927); Prall v. Prall, 58 Fla. 496, 50 So. 867 (1909); Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (1907); Gredler v. Gredler, 36 Fla. 372, 18 So. 762 (1895).

4. Mills v. Mills, 153 Fla. 746, 15 So.2d 763 (1943); Curley v. Curley, 144 Fla. 728, 198 So. 584 (1940); Wade v. Wade, 93 Fla. 1004, 113 So. 374 (1927); Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (1907).

5. Fowler v. Fowler, 156 Fla. 316, 22 So.2d 817 (1945); Kiplinger v. Kiplinger, 147 Fla. 243, 2 So.2d 870 (1941); MacQueen v. MacQueen, 131 Fla. 448, 179 So. 725 (1938).

6. FLA. STAT. § 65.02 (1959).

as distinguished from a mere temporary residence.[7] Thus, the court has used the term *residence* to mean a *domicile* for a specified period of time.[8] In order for one to establish a domicile it is necessary for two factors to concur: (1) physical presence within the state, and (2) the intention to reside indefinitely therein.[9] It is also necessary for one to have legal capacity in order to perfect the establishment of a new domicile.[10] It is generally recognized, in the absence of a judicial decree of separation, that the domicile of the husband is also the domicile of the wife.[11] This is based upon the view that the husband is the head of the family, with the legal obligation of support, and the right to choose the family domicile.[12] Therefore, a married woman cannot claim a separate legal residence for the purpose of commencing an action for divorce when the parties are living together.[13] However, if the wife separates from the husband for just cause[14] she may establish a residence of her own.[15]

The majority of jurisdictions have not permitted a wife to file suit for divorce in the state of the husband's domicile when her only claim to

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7. Fowler v. Fowler, 156 Fla. 316, 22 So.2d 817 (1945); Curley v. Curley, 144 Fla. 728, 198 So. 584 (1940); Evans v. Evans, 141 Fla. 860, 194 So. 215 (1940); Bowmall v. Bowmall, 127 Fla. 747, 174 So. 14 (1937); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933). The court stated that the terms "residence" and "domicile" are synonymous in many cases, but "'[R]esidence' as used in . . . [the constructive service statute] should not be construed to be synonymous with 'domicile' in all cases. . . ." Minick v. Minick, *supra* at 483, 149 So. at 489; Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694 (1929); Wade v. Wade, 93 Fla. 1004, 113 So. 374 (1927); Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (1926); Warren v. Warren, 73 Fla. 764, 75 So. 35 (1917).

8. Brown v. Brown, 123 So.2d 382, 384 (Fla. App. 1960). *Accord*, see cases collected in note 7 *supra*.

9. Bloomfield v. City of St. Petersburg Beach, 82 So.2d 364 (Fla. 1955); Frank v. Frank, 75 So.2d 282 (Fla. 1954); Kiplinger v. Kiplinger, 147 Fla. 243, 2 So.2d 870 (1941); Phillips v. Phillips, 146 Fla. 311, 1 So.2d 186 (1941); Wade v. Wade, 93 Fla. 1004, 113 So. 374 (1927); Warren v. Warren, 73 Fla. 764, 75 So. 35 (1917); Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (1907); Smith v. Croom, 7 Fla. 81 (1857).

10. Miller v. Nelson, 160 Fla. 410, 35 So.2d 288 (1948).

11. Merritt v. Merritt, 55 So.2d 735 (Fla. 1951); McIntyre v. McIntyre, 53 So.2d 824 (Fla. 1951); Curley v. Curley, 144 Fla. 728, 198 So. 584 (1940); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933); Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (1926).

12. Frank v. Frank, 75 So.2d 282 (Fla. 1954); Pawley v. Pawley, 46 So.2d 464 (Fla.), *cert. denied*, 340 U.S. 866 (1950); Walker v. Walker, 64 Fla. 536, 59 So. 898 (1912).

13. Frank v. Frank, 75 So.2d 282 (Fla. 1954); Bowmall v. Bowmall, 127 Fla. 747, 174 So. 14 (1937); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933); Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (1926).

14. Generally, a wife may acquire a separate domicile from that of her husband when he has been guilty of some misconduct or dereliction of his marital duties which would give rise to a cause of action for divorce. Frank v. Frank, 75 So.2d 282 (Fla. 1954); Gratz v. Gratz, 137 Fla. 709, 188 So. 580 (1939) (cruelty); Chisholm v. Chisholm, 105 Fla. 402, 141 So. 302 (1932) (abandonment of the wife by the husband). See generally, 17 AM. JUR. *Divorce and Separation* § 292 (1957).

15. Frank v. Frank, 75 So.2d 282 (Fla. 1954); Merritt v. Merritt, 55 So.2d 735 (Fla. 1951); McIntyre v. McIntyre, 53 So.2d 824 (Fla. 1951); Curley v. Curley, 144 Fla. 728, 198 So. 584 (1940); Gratz v. Gratz, 137 Fla. 709, 188 So. 580 (1939); Edmundson v. Edmundson, 133 Fla. 703, 182 So. 824 (1938); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933); Chisholm v. Chisholm, 105 Fla. 402, 141 So. 302 (1932); Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (1926); Walker v. Walker, 64 Fla. 536, 59 So. 898 (1912).

domicile or residence is based upon the maxim that the domicile of the husband is that of the wife.[16] Some states refuse to adhere to the strict common law rule and allow the wife to establish a separate domicile. These courts reason that modern statutes have abolished the disabilities of married women, and by doing away with the unity fiction have nullified the identity of the domicile of the spouses.[17] A few jurisdictions have eliminated the problem by enacting statutes allowing the wife to acquire a residence in the state for the purpose of bringing a suit for divorce, independent of the desire of her husband.[18] Other courts have held that a wife can acquire a separate domicile while living apart with the consent of her husband.[19]

The court, in the instant case, was faced with several conflicting concepts: (1) that the domicile of the husband is that of the wife,[20] (2) the equation of the terms domicile and residence,[21] and (3) the Florida Supreme Court's statement that one must have "actual residence" to satisfy the jurisdictional requirements in an action for divorce.[22] The court relied upon the interpretations of these terms as used in other areas of the law,[23] and concluded that the terms are "technically distinct" for purposes of divorce.[24] The court reasoned that the wife became a domiciliary of the state when her husband arrived in Florida with the intent to reside indefinitely therein.[25] But, as the court distinguished the terms domicile and residence for purposes of divorce jurisdiction,[26] the wife could not acquire her husband's residence unless she physically resided with him for the statutory period of time. This result was based upon the court's determination that residence requires an actual physical presence within the state.[27]

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16. George v. George, 190 Ky. 706, 228 S.W. 408 (1921); Phelps v. Phelps, 241 Mo. App. 1202, 246 S.W.2d 838 (1952); Hopkins v. Hopkins, 35 N.H. 474 (1857); Schonwald v. Schonwald, 55 N.C. 343 (2 Jones, Eq. 367) (1856); Malgras v. Malgras, 15 Ohio App. 335 (1921); Starr v. Starr, 78 Pa. Super. 579 (1922); White v. White, 18 R.I. 292, 27 Atl. 506 (1893); Tower v. Tower, 120 Vt. 213, 138 A.2d 602 (1958); Dutcher v. Dutcher, 39 Wis. 651 (1876). *Contra*, Kashaw v. Kashaw, 3 Cal. 312 (1853); Thoms v. Thoms, 222 Ill. App. 618 (1921); Ashbaugh v. Ashbaugh, 17 Ill. 476 (1856).

17. Younger v. Gianotti, 176 Tenn. 139, 138 S.W.2d 448 (1940); Commonwealth v. Rutherfoord, 160 Va. 524, 169 S.E. 909 (1933).

18. GA. CODE ANN. § 79-403 (1937); KAN. GEN. STAT. ANN. § 60-1503 (1949). See Pearlstine v. Pearlstine, 148 Ga. 756, 98 S.E. 264 (1919); Johnson v. Johnson, 57 Kan. 343, 46 Pac. 700 (1896).

19. Antonelli v. Antonelli, 16 N.J. Super. 439, 84 A.2d 753 (Super. Ct. 1951); Webb v. Webb, 13 N.J. Misc. 439, 178 Atl. 282 (Ch. 1934); *In re* Crosby's Estate, 85 Misc. 679, 148 N.Y. Supp. 1045 (Surr. Ct. 1914); Younger v. Gianotti, 176 Tenn. 139, 138 S.W.2d 448 (1940).

20. Brown v. Brown, 123 So.2d 382, 384 (Fla. App. 1960).

21. Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (1926).

22. Campbell v. Campbell, 57 So.2d 34 (Fla. 1952).

23. Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933) (constructive service statute); Commonwealth v. Rutherfoord, 160 Va. 524, 169 S.E. 909 (1933) (taxation).

24. Brown v. Brown, 123 So.2d 382, 384 (Fla. App. 1960).

25. *Ibid.*

26. *Ibid.*

27. *Id.* at 385.

There would appear to be an apparent conflict between the result reached in the instant case and the Florida Supreme Court case of *McIntyre v. McIntyre*.[28] In that case, the wife left Florida for more than six months, returning for a few days to file for divorce. She alleged that she was a *bona fide* resident of Florida. The Florida Supreme Court held that the mere removal of the wife to another state, without more, is insufficient to rebut the presumption that the wife's domicile was that of the husband.[29] Therefore, the wife acquired the necessary residence time by virtue of the common law fiction that the domicile of the husband is that of the wife.

After careful review of the facts presented in the *Brown* case, it appears that the jurisdictional requirements should have been sustained by the District Court of Appeal, when viewed in the light of the *McIntyre* decision. In both cases the court held that the wife acquired the domicile of her husband, but, according to *McIntyre* this was sufficient to confer residence upon the wife.[30] It is submitted that the court improperly incorporated into the statute a new jurisdictional requirement for divorce. A complainant wife, whose husband has acquired a domicile in the state, must *now physically reside* six months in the state before the filing of her complaint. Although this would appear to be the better view, the change made by the court properly lay with the state legislature.

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LANDLORD AND TENANT — LANDLORD'S LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR

The lessors voluntarily agreed to repair the roof of certain leased premises. They employed an independent contractor to perform the work. While the repairs were being made, rain came through the roof and damaged plaintiff's furniture and furnishings. The plaintiff sued the lessors for failure to exercise proper control over the contractor. The trial court granted defendants' motion to dismiss. On appeal, *held*, reversed: a lessor who gratuitously assumes to make repairs on leased premises may not absolve himself from liability by employing an independent contractor. *Easton v. Weir*, 125 So.2d 115 (Fla. App. 1961).

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28. 53 So.2d 824 (Fla. 1951).
29. *Ibid.*
30. *Ibid.*