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# Appeal -- Acceptance of the Benefits of a Divorce Decree

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Although black letter law still allows private hospitals to select with impunity the applicants they will admit, "changing social conditions lead constantly to the recognition of new duties. No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists."<sup>87</sup>

ELLIOTT HARRIS

## APPEAL—ACCEPTANCE OF THE BENEFITS OF A DIVORCE DECREE

Appellant was granted a divorce from the appellee in 1951. The divorce decree provided alimony for the appellant in the amount of 500 dollars per month. In 1964, the circuit court, in a post-decretal order, reduced the alimony award to 400 dollars per month. After accepting two payments, the appellant appealed from the modified order. The appellee moved to dismiss the appeal, *held*, dismissed: one who has accepted the benefits of a divorce decree is estopped from subsequently appealing from the benefits. *Fort v. Fort*, 167 So.2d 315 (Fla. 1st Dist. 1964).<sup>1</sup>

The majority of case law, dealing with the availability of appeal to one who has accepted the benefits of a judgment,<sup>2</sup> holds that the dissatisfied winning party is estopped from taking the appeal from the specific benefits accepted.<sup>3</sup> Courts have founded their use of estoppel on various theories, all of which reach the same end result—dismissal of the appeal. Some of the more prevalent theories are that: an appellant cannot take two inconsistent positions, both accepting the award and appealing therefrom;<sup>4</sup> an appellant consents to a release of errors when

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37. PROSSER, TORTS § 53, at 334 (3d ed. 1964).

1. The majority was of the opinion that the appellant should have complied with the provisions of FLA. R. APP. P. 3.8 (1962 Revision) in order to avoid dismissal of her appeal. This rule provides that a wife may petition the trial court for a subsistence allowance pending appeal.

2. *E.g.*, *Shannon Copper Co. v. Potter*, 14 Ariz. 481, 131 Pac. 157 (1913); *Morton v. Superior Ct.*, 65 Cal. 496, 4 Pac. 489 (1884); *Stallings v. Shell Petroleum Corp.*, 54 Ga. App. 359, 188 S.E. 50 (1936); *Holt v. Rees*, 46 Ill. 181 (1867); *Knapp v. Brown*, 45 N.Y. 207 (1871). See generally, Annot., 169 A.L.R. 986 (1941).

3. *San Bernardino County v. Riverside County*, 135 Cal. 618, 67 Pac. 1047 (1902). The appellee must file a motion to dismiss in the appellate court when attacking the right to the appeal. See also *Cohen v. Cohen*, 102 Cal. App. 2d 624, 228 P.2d 54 (1951); *Bass v. Ring*, 210 Minn. 598, 299 N.W. 679 (1941); *Sherman v. Sherman*, 89 Ore. 130, 173 Pac. 572 (1918); *Wallace v. Wallace*, 371 S.W.2d 918 (Tex. 1963).

4. "[T]he right to proceed on a judgment and enjoy its fruits, and the right to attack it on appeal, are totally inconsistent positions, so that the party's election to pursue the one course must be taken as an abandonment of the other." *Knebel v. Knebel*, 189 S.W.2d 464, 466 (Mo. Ct. App. 1945).

he accepts the award;<sup>5</sup> or by accepting the benefits of the judgment<sup>6</sup> an appellant waives his right to appeal.<sup>7</sup>

In an attempt to avoid the obvious harshness of this position, some courts have taken a directly opposite view, while others have sought to avoid the harshness through an exception. The minority view bluntly permits an appeal after the return of the benefit.<sup>8</sup> The exception which was developed is said to be applicable where the appellant's right to the benefits of the judgment cannot be disturbed by a new trial.<sup>9</sup> In such cases the acceptance of the judgment will not bar an appeal.<sup>10</sup> This exception found early favor in a number of jurisdictions.<sup>11</sup>

5. *Bass v. Ring*, *supra* note 3.

6. In *Dickenson v. Kallusch*, 91 Cal. App. 141, 266 Pac. 816 (1928), acceptance of a money award in an action to set aside a deed precluded an appeal on the validity of the deed; *Moffett v. Moffett*, 142 Kan. 9, 45 P.2d 579 (1935) (removing furniture in a divorce decree); *Mickens v. Lawrence Paper Mfg. Co.*, 130 Kan. 149, 285 Pac. 624 (1930) (acceptance by attorney of a fee decreed by the court precluded an appeal for higher fee); *Hartley v. Hartley*, 305 Ky. 350, 203 S.W.2d 770 (1947) (an agreement to forego attorney fees in the event of divorce); *McKee v. Goodrich*, 84 Neb. 479, 121 N.W. 577 (1909) (obtaining execution on an award of court costs); *Becker v. Becker*, 299 S.W. 528 (Tex. Ct. App. 1927) (acceptance of offer of settlement in open court); *Potter v. Potter*, 46 Wash. 2d 526, 282 P.2d 1052 (1955) (acceptance of an alimony payment); *Chesapeake & O. Ry. Co. v. Lane*, 113 W. Va. 51, 166 S.E. 698 (1932) (acceptance of land in condemnation proceeding).

7. Waiver has also been referred to as an estoppel. *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002 (1950).

8. In an early Alabama decision, the appellant sued out a writ of execution upon his judgment, while an appeal was pending. The appellate court held that the appeal would be allowed if the money was returned to the defendant. *Hall v. Krabrouski*, 9 Ala. 278 (1846). Thereafter the Alabama courts relied on the holding in the *Hall* case and permitted an appeal only after the appellee had been put into *status quo*. See *Shannon v. Mower*, 186 Ala. 472, 65 So. 338 (1914); *Whetstone v. McQueen*, 137 Ala. 301, 34 So. 229 (1903); *Phillips v. Toweles*, 73 Ala. 406 (1882); *Shingler v. Martin*, 54 Ala. 354 (1875); *Murphy Heir's v. Murphy Heir's*, 45 Ala. 123 (1871); *Bradford v. Bush*, 10 Ala. 274 (1846). Restoration of the *status quo* was allowed only if the benefit had been accepted after an appeal had been filed. If acceptance of the benefit was prior to appeal, the general rule applied and the appeal was dismissed.

9. The exception to the general rule is well stated in the *dictum* of an early Idaho case. Upon reason and principle . . . the test should be this: If the party has collected his judgment, and, in seeking to gain more by the prosecution of an appeal . . . the appeal is from such an order of judgment as that he could in no event recover a less favorable judgment, and that he incurs no hazard of ever receiving less than the judgment already collected by him, we see no objection to the prosecution of his appeals. *Bechtel v. Evans*, 10 Idaho 147, 150, 77 Pac. 212, 213 (1904).  
*Accord*, *McKain v. Mullen*, 65 W. Va. 558, 64 S.E. 829 (1909); see Annot. 29 L.R.A. n.s. 30 (1911).

10. The situation is best illustrated by those cases applying community property law. In community property states a wife is legally entitled to 50 per cent of the property in a divorce and an appeal from such an award will not be dismissed, even though the proceeds have been accepted. See *Cohen v. Cohen* and *Marshall v. Marshall*, *infra* note 31. In the instant case the appellant's right to alimony was not challenged, the only issue confronting the appellate court was a reduction, and not a relitigation of the complete award (which had been granted thirteen years earlier). Therefore, the appellant was not placing in issue any right to the benefit of the decree but rather placing in issue the *amount* of the award (here a 100 dollar reduction). The only amount which could be re-litigated was the amount of the reduction and the appellant had an absolute right to the unreduced amount based on the 1951 award, notwithstanding any hearing by the appellate court.

11. *Bechtel v. Evans*, *supra* note 9; *Tyler v. Shea*, 4 N.D. 377, 61 N.W. 468 (1894);

In the more specific area of divorce decrees, as with damages generally, the acceptance of the benefits of a decree has generally been held to be a consent to a release of errors<sup>12</sup> and a waiver of the right of appeal.<sup>13</sup> Courts have considered the acceptance of any benefits conferred under the terms of a divorce decree a bar to an appeal.<sup>14</sup> For example, the acceptance of attorney's fees,<sup>15</sup> living expenses,<sup>16</sup> issuance of a writ of possession,<sup>17</sup> and alimony<sup>18</sup> have been deemed benefits sufficiently *unseverable*<sup>19</sup> to preclude an appeal by the recipient. An appeal may be taken, however, where the benefits accepted are considered to be severable from that portion of the decree which is placed in issue on appeal.<sup>20</sup>

Florida adheres to the general rule which bars an appeal if the appellant has accepted the benefits of the decree,<sup>21</sup> and the Florida Supreme Court applies the "acceptance of the benefits" doctrine<sup>22</sup> to divorce cases.<sup>23</sup> In the instant case the court reasoned that even though

Higbie v. Westlake, 14 N.Y. 281 (1856); McMullen v. Fort Pierce Fin. & Constr. Co., 108 Fla. 492, 146 So. 567 (1933) (dictum).

12. Kissin v. Kissin, 29 Ill. App. 2d 126, 172 N.E.2d 635 (1961).

13. *Supra* note 6.

14. 4 AM. JUR. 2d § 259 (1962).

15. Kerr v. Kerr, 74 S.D. 454, 54 N.W.2d 357 (1952).

16. A wife accepted costs and temporary living expenses and appealed from an order denying her attorney fees. The appellate court dismissed the appeal on the ground that the appellant would not be allowed to take two inconsistent positions. Crum v. Crum, 137 Mont. 439, 352 P.2d 988 (1960).

17. Gaulding v. Gaulding, 256 S.W.2d 684 (Tex. Civ. App. 1953).

18. Brackin v. Brackin, 167 So.2d 604 (Fla. 1st Dist. 1964).

19. The unseverability criterion has been extended to divorce cases when the appellant remarried before appealing from the divorce decree. Swisher v. Swisher, 42 Ohio App. 53, 181 N.E. 917 (Ct. App. 1932); if severable, remarriage will not constitute grounds for dismissing an appeal, Pope v. Pope, 268 Ala. 513, 109 So.2d 521 (1959).

20. If "the different portions of a judgment are severable, a party by voluntarily accepting the fruits of one portion . . . does not necessarily estop himself to attack other and severable portions thereof upon appeal." Preluzsky v. Pacific Co-op. Cafeteria Co., 195 Cal. 290, 293, 232 Pac. 970, 971 (1925); In Cunningham v. Cunningham, 60 Nev. 191, 105 P.2d 398 (1940), a divorced wife was allowed to appeal from the trial court's denial of attorney's fees although she had accepted property under the decree; In Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953) (a wife was allowed to appeal a property settlement, even though she had lived in a jointly owned residence, since the two were severable and she did not indicate voluntary and absolute acquiescence); Hundley v. Hundley, 291 S.W.2d 544 (Ky. 1956) (A wife's appeal was not barred because she had accepted a jointly owned dwelling as part of the divorce decree. The court stated, "[T]he right of appeal is favored in law and will not be held to have been waived except on clear and decisive grounds." *Id.* at 546).

21. In McMullen v. Fort Pierce Fin. & Constr. Co., *supra* note 11, it was held that the voluntary acceptance of the award pending appeal was a release of errors and an estoppel. In dictum the court recognized the existence of an exception to the general rule.

There is authority for the proposition that, where there is no controversy as to the amount awarded by the judgment, and the plaintiff is entitled to that much in any event, the acceptance by the plaintiff of such uncontroverted sum so awarded him by the judgment is not a bar to an appeal, for such amount was concededly due him. *Id.* at 497, 146 So. at 569.

22. *Supra* note 6.

23. The supreme court extended the doctrine expressed in McMullen v. Fort Pierce Fin. & Const. Co. *supra* note 11, to divorce decrees in a *per curiam* decision, Brooks v.

the action was for a reduction in alimony payments,<sup>24</sup> acceptance of reduced payments by the appellant<sup>25</sup> amounted to an acceptance of benefits under the modified divorce decree.<sup>26</sup> The court indicated that the issue concerning appeals from divorce decrees was well-settled in Florida<sup>27</sup> to the effect that acceptance of the benefits of a divorce decree is considered tantamount to waiver of the rights to appeal.<sup>28</sup> The court thus concluded that the appellant was estopped from appealing. Any financial assistance required by the wife pending appeal must be requested under the provisions of Florida Rule of Appellate Procedure 3.8(b).<sup>29</sup>

In his dissent, Justice Sturges pointed out that the rights of the appellant were continuing in nature from the original divorce decree, and thus were subject only to the power of the court to modify the award.<sup>30</sup> He further argued:

that since the order appealed [from] operated to reduce the wife's income and conferred no special rights upon her, she did not benefit by accepting the reduced amount. . . . [S]he did not receive something of which she had theretofore been deprived or to which she was not entitled to in any event.<sup>31</sup>

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Brooks, 100 So.2d 145 (Fla. 1958). Justice Drew concurred specially stating that, "one may not accept the fruits of a decree and at the same time appeal from it" *Ibid*.

24. The only controversy that existed concerned the amount of the alimony. It was conceded that the appellant was entitled to alimony, as provided by the original decree.

25. A Florida appellate court was confronted with an analogous case in *Hartley v. Hartley*, 134 So.2d 281 (Fla. 2d Dist. 1961). The appellee, husband, filed for a reduction in alimony payments because of a change of condition. The appellant moved to vacate the judgment on the grounds that she received no notice of hearing until after the hearing was held. The appellee filed a motion to dismiss on the grounds that the appellant accepted the amount awarded by the hearing. The amount was composed of back alimony. The decree terminated all alimony, when the back alimony was accepted. The appellate court reversed on the basis that no controversy existed as to the amount accepted, and the appellant was entitled to the award in any event. Therefore, the acceptance of the uncontroverted sum was not a bar to an appeal. The court applied the exception to the general rule.

26. *Supra* note 23.

27. *Brooks v. Brooks*, *supra* note 23; *Brackin v. Brackin*, 167 So.2d 604 (Fla. 1st Dist. 1964); *Claus v. Claus*, 163 So.2d 26 (Fla. 1st Dist. 1964); *Carter v. Carter*, 141 So.2d 591 (Fla. 1st Dist. 1962); *Hadley v. Hadley*, 140 So.2d 325 (Fla. 3d Dist. 1961). For a recent non-divorce case in Florida, see *Rayle v. Merrill*, 141 So.2d 288 (Fla. 1st Dist. 1962).

28. *Supra* note 23.

29. FLA. APP. R. 3.8(b) (1962) states;

If an appeal is taken from an order or decree awarding separate maintenance, support or alimony, the lower court may in its discretion upon proper notice and hearing, order the payment of separate maintenance, support or alimony pending such appeal in such amounts and under such terms and conditions as may be just and equitable. . . . The acceptance of the benefits thereof shall be without prejudice to the rights of the beneficiary to raise as issues on the appeal the correctness of any of the terms or provisions of the original order or decree appealed.

Prior to adoption of FLA. APP. R. 3.8(b) the trial court did not have jurisdiction to allow temporary alimony. Temporary alimony was granted upon request made to the appellate court, 10 FLA. JUR. *Divorce* § 150 (1956). The change was intended to aid the wife in obtaining a subsistence allowance.

30. *Fort v. Fort*, 167 So.2d 315 at 319.

31. *Id.* at 319. Justice Sturges would recognize the exception to the general rule.

It is apparent that the rationale of the majority precludes the availability of the recognized exception to the general rule,<sup>32</sup> inasmuch as the appellant's rights will be determined solely by Florida Rule of Appellate Procedure 3.8. Rule 3.8 and that exception (which allows appeal by a party to a divorce judgment even after acceptance of the award, when the appeal cannot alter the original award) are simply not interchangeable.<sup>33</sup> The purpose of the exception is legally unconnected with the problem of subsistence while awaiting appeal. In contrast, Rule 3.8 streamlined proceedings for the appellant by allowing the chancellor to grant subsistence to the wife immediately, rather than requiring a petition to the appellate court.<sup>34</sup> In this manner the burden of self-support and child care would be softened for the ex-wife by the promptness in providing support for her.

It must be noted, however, than when a court applies Rule 3.8 in the manner of the instant case, a new burden is placed upon the ex-wife. This burden is one which presumes her to be legally aware of the possible legal ramifications of any and all financial arrangements with her ex-husband. The wife ultimately may suffer extensive financial losses, *i.e.* loss of larger alimony, by unwittingly accepting money not provided by the court pending appeal.<sup>35</sup> In such circumstances it appears inconsistent to then preclude her appeal by the application of a rule designed initially to assist her financially. This is readily demonstrated by the illustration of the instant case, in which there was no issue as to the right to an award in the subsequent hearing, but only as to a reduction of the prior award.

Florida courts should either recognize the exception to the general rule (which allows appeals after the court award has been accepted in situations analogous to the instant case) or amend Florida Appellate Rule 3.8 so as not to preclude a wife's appeal in a divorce decree. Rather, the court chose to ignore the exception to the general rule in deference to rigid legal formalism.

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32. *Cohen v. Cohen*, 102 Cal. App. 2d 642, 228 P.2d 5 (1951); *Harrold v. Harrold*, 100 Cal. App. 2d 601, 224 P.2d 66 (1950); *Marshall v. Marshall*, 364 P.2d 891 (Okla. 1961); *Meyer v. Meyer*, 76 S.D. 268, 77 N.W.2d 559 (1956); *Bohl v. Bohl*, 72 S.D. 257, 32 N.W.2d 690 (1948); *Wallace v. Wallace*, 371 S.W.2d 918 (Tex. Civ. App. 1963); *Nixon v. Nixon*, 348 S.W.2d 438 (Tex. Civ. App. 1961).

33. The exception allows the appellant to take what has been awarded him and this award cannot be diminished by a new trial, *supra* notes 27, 28. FLA. APP. R. 3.8(b) (1962 revision) provides for a subsistence allowance during appeal, which may completely alter the award by the trial court.

34. *Fort v. Fort*, *supra* note 24, at 321.

35. This was clearly shown in *Brackin v. Brackin*, 167 So.2d 604 (Fla. 1st Dist. 1964). The divorced wife accepted a lump sum settlement on the advice of an Alabama attorney, after her Florida attorney had withdrawn from the case. The Alabama attorney advised her that he was not aware of any Florida law which would prejudice her if she accepted the award. The appellate court dismissed her appeal on the basis that she had accepted the benefits of the judgment.