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Notice Requirements in Modification of Alimony Proceedings

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INTRODUCTION

A frequent problem for many Florida practitioners is the question of the modification of Florida chancery decrees relating to, or providing for, the continuation or reduction of alimony payments by husbands. However, it is the intention of these writers to limit this discussion to the question of the notice required to be given by an applicant for modification to the respondent, where such respondent has removed himself from this state or is not and never was a resident of it.

The general provisions for the procedure in the modification of alimony appear in the Florida Statutes,[1] and bear repetition and study here:

> Whenever any husband and wife heretofore, or hereafter, shall have entered any agreement providing for the payments for, or in lieu of, separate support, maintenance or alimony, whether in connection with any action for divorce or separate maintenance, or with any voluntary property settlement, or whenever any husband has pursuant to the decree of any court of competent jurisdiction been required to make to his wife any such payments, and the circumstances of the parties or the financial ability of the husband shall have been changed since the execution of such agreement, or the rendition of such decree, either party may apply to the circuit court of the circuit in which the parties, or either of them, shall have resided at the date of the execution of such agreement, or shall reside at the date of such application, or in which such agreement shall have been executed, or in which such decree shall have been rendered, for an order and judgment decreasing or increasing the amount of such separate support, maintenance or alimony, and the court, after giving both parties an opportunity to be

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1. § 65.15 (1951).

> heard, and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the husband, decreasing or increasing or confirming the amount of separate support, maintenance or alimony provided for in such agreement, or in such decree....

Eliminating any reference here to the enforcement provisions of the statute, which follow the foregoing, the statute then continues, significantly:

> This section is declaratory of existing public policy and laws of this State, which is hereby affirmed and confirmed in conformance with the provisions hereof, and it shall be the duty of the Judges of the Circuit Courts of this State *to construe liberally* the provisions hereof in order to effect the objects and purposes hereof and the public policy of the State as hereby declared. (Emphasis supplied).

The problem can be stated succinctly in the following hypothetical situation. Husband, H, and wife, W, both formerly New York residents, execute a property settlement and separation agreement, providing for the payment of permanent alimony in the sum of thirty-five dollars per week to W. She establishes a Florida residence and sues for divorce. H appears through a Florida attorney and eventually a final decree is entered granting W her divorce and approving the agreement. Some time later W leaves Florida for another domicile. Years pass. While H has become wealthy W has grown old and sickly. She returns to Florida for a short visit and upon arrival files a petition before the same court which entered the final decree years before, setting forth the grounds of her plea for an increase. But H is and always has been a New York resident. True, he appeared generally in the original proceeding. Now, however, she cannot serve him with personal process in Florida, and he is not likely to make another voluntary general appearance. As a result, she resorts to a statutory "Notice by Publication," variously known as "Order for Publication" and a "Notice to Defend," under the provisions of the Florida Statutes,[2] which provide for the use of substituted service by publication. The clerk of the court, at her request, mails a carbon copy of the petition and notice to H, receiving back a return receipt.

Has "due process" been satisfied? After all, W is trying to obtain an *increase* in the payments due her under an order which is probably entitled "Final Decree of Divorce." Is this not tantamount to an initial suit for new monies, and therefore contrary to the doctrine of *Pennoyer v. Neff*?[3]

2. c. 48 (1951).
3. 95 U.S. 714 (1878).

This question, and the reverse situation, where the husband requests a reduction of alimony under similar circumstances, has caused not a little concern and confusion, and has further caused the Supreme Court of Florida to tacitly reverse itself in recent years.

PROCEDURAL PROBLEMS

Ancillary Proceedings, notice. In 1942, the Supreme Court of Florida decided, in *Cohn v. Cohn*,[4] what is apparently the controlling opinion on the subject in this State; that a proceeding for modification was an "ancillary proceeding," that is, ancillary to the original case for divorce or separate maintenance. The impression was given that an applicant for modification could always come before the same circuit court which rendered the final decree, and by pleading the requisites outlined in the statute, and sending the respondent the simplest sort of notice of hearing, such as by mail, that such circuit court would then assume (or re-assume) jurisdiction of the matter, and the litigation could proceed on the merits.

In earlier years, in the *Norton* case, the same court had held that service by publication in a modification action was insufficient.[5] In this latter holding, it should be noted that the final decree originally entered between the parties did not specifically retain jurisdiction as to the question of alimony. However, the statute on modification does not require such retention of jurisdiction, and is probably intended to take care of those cases where such retention is not present.[6] Nor, for that matter, does such statute provide for the manner or method of service on or notice to the respondent.

Where a final decree specifically retains jurisdiction as to alimony, either party thereunder can probably re-enter the same original proceeding as well as the same court, without the necessity of filing a new action.[7]

An understanding of the facts in each of the pertinent cases on the subject is essential to an understanding of the application of the legal principles involved. In the *Norton* case, the respondent had filed a motion to dismiss, under the Rules of Chancery then in force,[8] which the court held to be a general appearance that cured an otherwise defective service. Although not essential to the decision in that case, Justice Trammel added as dictum:

> Petitioner... may only proceed with the cause after service of process on the respondent, or after the voluntary appearance of respondent.[9]

4. 151 Fla. 589, 10 So.2d 77 (1942).
5. Norton v. Norton, 131 Fla. 219, 179 So. 414 (1938).
6. *Cf.* Haynes v. Haynes, 40 So.2d 123 (Fla. 1949); Van Loon v. Van Loon, 132 Fla. 535, 182 So. 208 (1938).
7. *Cf.* Gaffny v. Gaffny, 129 Fla. 172, 176 So. 68 (1937) (where such jurisdiction was retained); McSherry v. McSherry, 113 Md. 395, 77 Atl. 653 (1910).
8. FLA. STAT. § 63.33 (1951).
9. Norton v. Norton, 131 Fla. 219, 227, 179 So. 414, 418 (1938).

in referring to "service of process", the court clearly was not including in its dictum a substituted service.

The *Cohn* case then appeared to reverse the dictum of the *Norton* case. Mrs. Cohn had acquired a final decree of divorce in Florida, with alimony provisions, in a case where her husband had made a written appearance. She later acquired a New York domicile, which in her husband's case had never been relinquished. Subsequently, as an acknowledged New York resident, Mr. Cohn applied for a reduction of the alimony provisions in the same Florida circuit court where the original decree was entered. The alimony provisions in such decree were in the form of confirmation of an agreement of the parties relating thereto, and incorporated therein. Mr. Cohn published a "Notice by Publication" addressed to his wife, of the pendency of the "new" action, giving her a set time within which to appear and contest or have a default entered against her. Mrs. Cohn then filed a special appearance for the sole purpose of moving to quash the attempted substituted service. She may have been mailed a copy of the proceedings by the clerk of the court, but this fact was not mentioned in the report of the case. The Supreme Court of Florida, in affirming the circuit court's denial of the said motion, held the husband's action, although it had all the accoutrements of a new suit, to be an *ancillary proceeding,* and added some phraseology that is of great interest:

> *A binding res* being within the jurisdiction of the Court, service of notice by publication is authorized... the non-resident defendant having appeared, though specially, has notice of the application made under the statute in force when the alimony decree was rendered at her suit in which the husband appeared. (Emphasis supplied).[10]

The court tried only half-heartedly to avoid an open break with the *Norton* dictum. But were they not going farther than the facts warranted, and holding, in effect, that substituted service was always authorized in modification proceedings, regardless of whether brought by husband or wife? True, Justice Whitfield made the distinction between the *Cohn* case and the *Norton* case by stating, in the former:

> The respondent (in the *Norton* case) appeared in the cause and the Court did not have occasion to decide that *in such cases as this seeking a reduction of alimony decreed and agreed,* service of process on the respondent must be personal and not by publication when the respondent is a non-resident of Florida. (Emphasis supplied).[11]

Justice Whitfield, in referring to "such cases as this seeking a reduction of alimony decreed and agreed," was plainly referring only to the *Cohn* case, because in the *Norton* case, Mrs. Norton was the applicant and was

10. Cohn v. Cohn, 151 Fla. 549, 557, 10 So.2d 77, 81 (1942).
11. *Ibid.*

seeking an increase. Was the Justice therefore limiting his decision to application for reduction, steering clear of *Pennoyer v. Neff* and leaving that for a future court decision?

If he was thus limiting his opinion, was the "binding res," of such a continuing nature that the court does not lose the jurisdiction not specifically reserved under its own decree? Such res can only be the marital union itself, including the parties thereto and all the facets of its institution and disolution.

The Florida cases are silent on the specific subject of notice until the *Pasquier* case,[12] in 1951. At that time, the Supreme Court affirmed a decision of the Dade County Circuit Court, without opinion, in denying certiorari to a respondent husband under circumstances almost identical to those of the *Norton* case. Mrs. Pasquier, an acknowledged New York resident, applied for an increase in alimony. The original decree had been rendered by the same circuit court where the new application was filed, and in the original proceeding a decree affirmed and approved the provisions of an agreement between the parties. The husband made a general appearance in the original proceeding. Many years passed, when she filed her petition alleging that she was poor and ailing while her husband had, on the contrary, acquired large wealth. A "Notice by Publication" was issued, and a copy mailed the husband by registered mail. He appeared specially and filed a motion to quash, largely in the same form as in the *Cohn* case. His counsel argued that *Pennoyer v. Neff*, controlled, as this was an action "on a money demand."[13] The logic of this argument, and its attempt to distinguish the case from the *Cohn* case, lay in the fact that here an attempt to *increase* rather than to *decrease* alimony was asked. But *Cohn v. Cohn* was successfully quoted again, to the effect that there was here "not an original suit for alimony but... an application by ancillary proceedings under (Chapter 65.15) the act of 1935."[14]

Thus it may be seen how an evolutionary process of thinking evolved on this subject in the Supreme Court of Florida. But the unfortunate absence of a written opinion in the *Pasquier* case leaves the issues partially unresolved in that forum.

Since it is partially unresolved, it becomes necessary to question how the present court would hold on a case on all fours with the *Pasquier* case. In connection therewith, the further question arises as to whether the word "modify" in the statute is inclusive of both reduction and increase of alimony. *Words and Phrases*[15] attempts to define the elusive term, as does *Ballantine's Law Dictionary*,[16] the latter citing a case[17] that terms it "the

12. Parczewski v. Parczewski (Pasquier), 51 So.2d 195 (Fla. 1950) (Decision rendered by Hon. Marshall C. Wiseheart, Circuit Judge, Dade County, Florida, in which one of the authors was counsel for the petitioning wife).
13. Brief for Appellants, p. 2.
14. Cohn v. Cohn, 151 Fla. 549, 556, 10 So.2d 77, 81 (1942).
15. 27 WORDS AND PHRASES 425.
16. BALLANTINE'S LAW DICTIONARY 827 (2d ed. 1948).
17. State v. Tucker, 36 Or. 291, 61 Pac. 894 (1900).

power to change or vary in some particulars an already created or legally existing thing." It has been defined also as "to alter, to change incidental or subordinate features; enlarge, extend, limit, reduce."[18] More pointedly, an Iowa court has held that "the statutory power of the Industrial Commission to modify an arbitration award is the power to change the award, thus to increase as well as reduce it."[19] Finally, the California courts have held that under the code of that state, providing that the court may award alimony to the wife where the divorce is granted for offense of the husband, and may from time to time modify its orders in such respect, the word "modify" includes both the increase and decrease of such alimony award.[20]

It will be noted that none of the foregoing citations involves the issue of notice to a respondent in an ancillary proceeding for modification. In none of these cases was such an issue litigated.

Probably because of considerations of public policy, many courts have long held that where questions of custody and support of children are involved the court has jurisdiction to hear the application as part of the original proceeding.[21]

The authors of an *American Law Reports* comment have speculated at length upon the comparison of notice requirements in child support cases and in alimony cases.[22] Part of this speculation is very much in point here, and is quoted accordingly:

> Perhaps the doctrine of these cases may, technically at least, be applied by analogy to the modification of a decree as to the amount of installments of alimony payable thereunder, since in each instance the original decree is essentially of a provisional or interlocutory nature, subject to change as the circumstances may require, and in each instance the proceedings for modification... are merely ancillary... and in each case it may be argued that the jurisdiction acquired in the divorce proceedings over the complaining party furnishes the scintilla of jurisdiction necessary for the modification of the decree, without further personal notice to him within the territorial jurisdiction of the Court.[23]

A case very similar to the *Cohn* case arose in the State of Arkansas.[24]

18. Smith v. Ray, 149 Ohio St. 394, 79 N.E. 2d 116 (1948). We find, however, that "the court's statutory power to modify alimony allowances includes the right finally to terminate alimony payments previously ordered." Gebhardt v. Gebhardt, 69 Cal. App.2d 723, 160 P.2d 177 (1945).

19. Jarman v. Collins-Holt Lumber and Coal Co., 226 Iowa 1247, 286 N.W. 526 (1939).

20. Soule v. Soule, 4 Cal. App. 97, 87 Pac. 205 (1906).

21. Cowles v. Cowles, 80 N.H. 530, 120 Atl. 76 (1923) (The court said: "Since jurisdiction is determined by the state of facts existing at the time of filing a petition and when once attached is not defeated by subsequent acts of the parties nor by their removal out of the jurisdiction, on a petition to modify a decree for support of children the... court had jurisdiction to hear the application as part of the original proceeding.").

22. 70 A.L.R. 526.

23. *Id.* at 527.

24. Schley v. Dodge, 206 Ark. 1151, 178 S.W. 2d 851 (1941) (commented on favorably in 2 NELSON ON DIVORCE 469 2d ed. 1945).

In that instance, both parties to the original divorce-alimony action in Arkansas had become non-residents of Arkansas. The wife filed an application for a writ of prohibition against the Arkansas Chancellor's proceeding further on the husband's petition to modify alimony payments. She admitted actual notice of the petition, but entered a special appearance, since she could not be served within the jurisdictional limits. An Arkansas statute quoted in the case provides that the court, upon application of either party, may make such alterations from time to time as to the allowance of alimony and maintenance, as may be proper. The court there noted that its statutes did not prescribe the method of service, though the respondent had complained that her ex-husband had not taken the proper steps for constructive service on her. The court said:

> The notice need only be such as is reasonable calculated to give the opposite party knowledge of the proceeding an opportunity to be heard.[25]

Analogy to the instant problem may be drawn to the procedure of most states in allowing for enforcement of an alimony decree against a non-resident husband, where he was a party to the original proceedings. The past due payments accrue to a point where the wife seeks to reduce them to judgment. New York, for example, directs the wife to serve him with copies of the Order to Show Cause "by such notice ... as the court may direct."[26] In one case, the New York wife moved to collect nine thousand three hundred seventy dollars ($9,370.00) from her errant husband, then resident in Vermont.[27] The wife cited a former case with good effect, which stated:

> Due process does not require that personal service shall be made upon a party where the proceeding is only a continuation of litigation which is already within the jurisdiction of the court.[28]

The same court held that a final judgment does not terminate a matrimonial action where there is a provision for alimony, the court's jurisdiction remains unimpaired and the defendant remains subject to its mandates.

The case of *Schley v. Dodge*[29] has been commented upon favorably in *Nelson on Divorce*.[30] The author of that volume stated:

> If (as is the case in most States) the proceeding to modify is merely incidental to the original suit, and there is no specific provision as to the manner of service of such an application on a nonresident over whom the Court had personal jurisdiction at the time of making the award, it would appear that the Court could properly direct service of notice of such application by any method

25. Commented on favorably in Divorce, 27 C.J.S. 1094.
26. N.Y. CIV. PRAC. ACT § 1171-b.
27. Cukor v. Cukor, 114 Vt. 456, 49 A.2d 206 (1946).
28. *Id.* at 209.
29. 206 Ark.1151, 178 S.W.2d 851 (1941).
30. 2 NELSON ON DIVORCE 469 (2d ed. 1945).

> reasonably calculated to provide notice, and if it appears that the party in question had actual notice, he or she will be bound.[31]

Some courts have gone so far as to allow notice, in certain ancillary proceedings, on the attorney for the husband in the original proceeding, in the absence of an affirmative showing that the attorney was unauthorized to represent the husband further.[32] However, no court has gone so far as to say that where there was no provision in the original decree of divorce for alimony, although the husband was personally served, the wife may then proceed to obtain an alimony decree in a "modification" proceeding.[33]

CONCLUSION

The question of due process under the federal and state constitutions is implicit throughout this discussion. Although most of the cases in point have taken this for granted, some courts have gone more fully into the subject. One has held:

> ... the notice required to be given a defendant under the due process clause of the Federal constitution, is referable only to the commencement of an action or suit, and to an opportunity to be heard on any material question which shall arise during the prosecution of the action or suit.[34]

Let us grant, for the sake of argument, returning to Mrs. Pasquier, that the Florida modification statute does contemplate the hypothetical situation originally proposed, and answers the same in the affirmative as to the wife's right to apply for an increase in alimony and serve notice of such proceeding on her nonresident husband by means other than personal service of process. Will the courts of the state in which the husband is resident recognize and enforce the increased amounts contained in the ancillary decree, as they would the original alimony decree if he should fail or refuse to make a general appearance in the Florida proceeding? The New York Court was never called on in either the *Cohn* case or the *Pasquier* case, to squarely decide that issue. At least, research of the reports of that state reveal no such action there.

31. *Ibid.*

32. State *ex rel.* Groves v. First Judicial District Court of Ormsby County, 61 Nev. 269, 125 P.2d 723 (1942). "It has been declared to be the prevailing rule that courts will not concern themselves so much with the manner of giving notice, as with the reasonableness under the circumstances of the particular case." *Cf.* Buehler v. Buehler, 329 Ill. App. 239, 67 N.E.2d 708 (1946).

33. 168 A.L.R. 232, the following statement is interesting: "The question whether a court which upon personal service of process upon the defendant-husband has rendered a divorce decree without providing for alimony, may subsequently render a decree of alimony, against him without personal service of process, is analogous to the question...but it does not frequently arise, since it is generally settled that in the absence of a statute to the contrary or a reservation in a divorce decree, a decree which does not provide for alimony precludes the wife from subsequently recovering alimony with or without personal service." McSherry v. McSherry, 113 Md. 395, 77 Atl. 653 (1910).

34. Reale v. Judges of Superior Court, 265 Mass. 135, 163 N.E. 893, 897 (1928).

However, if the hypothetical wife were denied the right to apply for an increase in alimony under the statute, where she could no longer obtain personal service of process on her husband in Florida, would this not have the effect of closing the only door open to her for accomplishment of this purpose? A. L. Sainer, in his work, *The Substantive Law of New York*, states:

> It would seem that the Supreme Court (of New York) has no power to increase the award of alimony made by a decree of a sister state.[35]

Thus it would also seem that the element of public policy and the sharp blade of logic are working a gradual transformation of theory from the unbending viewpoint of the *Norton* case to the relative liberality of the *Pasquier* holding. It should not be long before the Supreme Court of Florida is presented the issue squarely once again, and is called upon to write its opinion on the subject and give its full and final views on the question. Meanwhile, it would seem a fair risk for Florida counselors to bring modification actions under circumstances similar to that of the *Cohn* and *Pasquier* disputes, with the pious hope that after a motion to quash is denied the respondent will make a general appearance for purposes of contest and never be able thereafter to harp back to the question of lack of jurisdiction.

35. SAINER, SUBSTANTIVE LAW OF NEW YORK 231, citing Moen v. Thompson, 186 Misc. 647, 61 N.Y.S.2d 257 (Sup. Ct. 1946).