

March 2021

The Doctrine of Recrimination in Florida

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Recommended Citation

J. Allen Smith, *The Doctrine of Recrimination in Florida*, 1 Fla. L. Rev. 62 (2021).

Available at: <https://scholarship.law.ufl.edu/flr/vol1/iss1/4>

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NOTES

THE DOCTRINE OF RECRIMINATION IN FLORIDA

To the question of what to do when both parties to a divorce suit are guilty of statutory grounds for divorce, the Florida decisions suggest three possible answers. The purpose of this discussion is to present what the law has been, what it appears to be now, and how the Florida solutions compare with the broad outline of those formulated in other jurisdictions.

I. FLORIDA LAW: PAST AND PRESENT

The Doctrine of Recrimination. The Florida Court has defined and approved recrimination as a doctrine which denies relief to either party in a suit for divorce when both parties are guilty of statutory grounds.¹ This view is followed in most American jurisdictions.² The reason given for the doctrine, in Florida at least, is that he who comes into equity must come with clean hands;³ and in one case,⁴ though the

¹See *Macfadden v. Macfadden*, 157 Fla. 477, 479, 26 So.2d 502, 503 (1946); *McMillan v. McMillan*, 120 Fla. 209, 214, 162 So. 524, 526 (1935): "The general rule is that to constitute a defense by recrimination the misconduct that defendant charges complainant with must be such that if proven will afford defendant a ground for divorce."

²*Martin v. Martin*, 327 Ill. App. 552, 64 N. E.2d 379 (1946); *Hove v. Hove*, 219 Minn. 590, 18 N. W.2d 580 (1945); *Veler v. Veler*, 571 Ohio App. 155, 12 N. E.2d 783 (1935); See *Reddington v. Reddington*, 317 Mass. 760, 59 N. E.2d 775, 777 (1945) (A thorough discussion is given with authorities. The court found that the factual situation did not necessitate the application of the doctrine but said: "The fact that a marriage has proved so unsuccessful that both spouses have broken their vows by giving cause for divorce, has the effect of riveting the legal bond and making it indissoluble except by death."); 1 NELSON, *DIVORCE AND ANNULMENT* §10.01 (2d ed. 1945); KEEZER, *LAW OF MARRIAGE AND DIVORCE*, §522 (3d ed. 1946).

³*Stewart v. Stewart*, 29 So.2d 247 (Fla. 1947); *Sahler v. Sahler*, 154 Fla. 206, 17 So.2d 105 (1944); *McMillan v. McMillan*, 120 Fla. 209, 162 So. 524 (1935). In *Macfadden v. Macfadden*, 157 Fla. 477, 26 So.2d 502 (1946) the court expressed divorce as resting on an innocent-guilty spouse relationship. As to these reasons and others, including the concept of mutual covenants, and for a general criticism of the doctrine, see Note, 28 COL. L. REV. 83 (1928); Feinsinger and Young, *Recrimination and Related Doctrines in the Wisconsin Law of Divorce as Administered in Dane County*, 6 WIS. L. REV. 195 (1931).

⁴*Devlin v. Devlin*, 157 Fla. 17, 24 So.2d 704 (1946) (The doctrine of clean hands

term recrimination was not used, the Court denied the plaintiff husband a divorce, since he had been living in adultery. In most Florida cases, however, the Court has found that the plaintiff was either innocent of the recriminatory charge⁵ or that the chancellor had made inadequate findings as to the guilt and innocence of the parties.⁶

In requiring the defense to be definitely asserted and fully pleaded in all cases where adultery is not the basis of the recrimination,⁷ the Court has shown a tendency to avoid a strict application of the doctrine. This tendency may be seen further in the case where a wife, upon obtaining a decree from her husband, remarried before the time for filing of an appeal had expired.⁸ The decree on appeal was reversed for lack of jurisdiction. Upon satisfying the jurisdictional requirement, the wife brought another suit for divorce, which was granted and sustained on appeal, the Court finding her not guilty of legal adultery and commenting on the fact that she left her second husband when she learned that the first husband was appealing the original decree.⁹

In Florida the one specific legislative enunciation on the matter makes the denial of divorce mandatory only when both spouses are guilty of adultery;¹⁰ but divorce, a matter of statute law,¹¹ has been placed in the courts of equity,¹² where, it may be argued, equitable principles

was given as the basis for the decision).

⁵*Macfadden v. Macfadden*, 157 Fla. 477, 26 So.2d 502 (1946); *McMillan v. McMillan*, 120 Fla. 209, 162 So. 524 (1935); *Welch v. Welch*, 112 Fla. 590, 152 So. 173 (1933).

⁶*Sahler v. Sahler*, 154 Fla. 206, 17 So.2d 105 (1944) (The wife appealed from a decree, which the Supreme Court reversed. The husband had died in the meantime. The Court discussed the necessity of an innocent party and the doctrine of recrimination, and insisted that definite findings be made as to the innocent spouse). That the chancellor should stipulate that one party is innocent, *see Macfadden v. Macfadden*, 157 Fla. 477, 479, 26 So.2d 502, 503 (1946).

⁷*Welch v. Welch*, 112 Fla. 590, 152 So. 173 (1933).

⁸*Chisholm v. Chisholm*, 105 Fla. 402, 141 So. 302 (1932).

⁹There is authority, however, that even innocent behavior of this kind by a complainant, if considered by the court a mistake of law, would not be excused and would thus be a recriminatory defense, *Williams v. North Carolina*, 325 U. S. 226 (1944); *Dunn v. Dunn*, 156 Miss. 132, 125 So. 562 (1930); *Simonds v. Simonds*, 103 Mass. 572 (1870); *Leith v. Leith*, 39 N. H. 20 (1859).

¹⁰FLA. STAT. 1941, §65.04, "If it shall appear to the court . . . that both parties have been guilty of adultery, no divorce shall be decreed."

¹¹*McGowin v. McGowin*, 122 Fla. 394, 165 So. 274 (1936); *Chisholm v. Chisholm*, 98 Fla. 1196, 125 So. 694 (1929).

¹²FLA. STAT. 1941, §65.01, "Suits for divorce shall in all cases be by bill in equity."

should apply. As will be shown, however, some jurisdictions have abolished, in part or in whole, the defense of recrimination.

Divorces to Both Spouses. Although it may have been assumed that the doctrine of recrimination was settled law in Florida,¹³ at least two decisions have given relief to both parties in the form of awarding separate divorces to each spouse. In neither instance did the Court discuss recrimination, nor apparently consider it. In one case¹⁴ the husband obtained the decree on the ground of adultery, and the wife obtained a decree on the ground of extreme cruelty. Alimony was denied the wife,¹⁵ but the question of the support and custody of the child was left for further determination by the trial court. In the second case¹⁶ the husband was awarded a divorce on the grounds of adultery and extreme cruelty, and the wife was awarded a divorce on the ground of extreme cruelty. Washington appears to be the only other state which grants divorces to both parties,¹⁷ though there is a dictum in a Kansas decision which suggests that a statute in that state makes it possible to achieve a similar result.¹⁸ The scant authority for this type of relief results, doubtless, from the absence of legislative expression concerning it¹⁹ and from the impossibility of reconciling double divorces with the majority doctrine of recrimination.

Relief to One Spouse Though Both are Guilty. The Florida Supreme Court in its most recent treatment of the subject, *Stewart v.*

¹³See *Stewart v. Stewart*, 29 So.2d 247, 249 (Fla. 1947) (dissenting opinion); Recent Case, 2 MIAMI L. REV. 114 (1947).

¹⁴*Simmons v. Simmons*, 112 Fla. 325, 165 So. 45 (1936).

¹⁵FLA. STAT. 1941, §65.08, "No alimony shall be granted to an adulterous wife."

¹⁶*Malby v. Malby*, 142 Fla. 656, 195 So. 601 (1940).

¹⁷*Schirmer v. Schirmer*, 84 Wash. 1, 145 Pac. 981 (1915) (Two justices dissented, favoring the application of the recriminatory doctrine.); *McDonall v. McDonall*, 95 Wash. 53, 164 Pac. 204 (1917). *Flagg v. Flagg*, 192 Wash. 679, 74 P. 2d 189, 191 (1937) (the court said, "We are of the opinion that both parties have been guilty of cruelty within the meaning of the statute . . . and that both are therefore entitled to divorce." *Accord*, *Eliason v. Eliason*, 10 Wash.2d 719, 118 P.2d 170 (1941); *Flint v. Flint*, 15 Wash.2d 443, 131 P.2d 426 (1942).

¹⁸As will be shown, Kansas permits divorce to one spouse though both are at fault; as to granting both spouses divorces, the Supreme Court in *Lassen v. Lassen*, 134 Kan. 436, 7 P.2d 120 (1932) quoted the trial judge as saying, "A divorce might be granted to either if both were asking, or it might be denied to both."

¹⁹2 VERNIER, AMERICAN FAMILY LAWS §78 (1931) and Supp. (1938), lists a number of statutory variations as to recrimination but none which precludes the defense in express language.

Stewart,²⁰ stated that though both parties are guilty of marital offenses, the chancellor may in his discretion award a divorce to the spouse with whom he finds the equities. The brief opinion does not give the factual situation in enough detail to ascertain the statutory ground of which the defendant was guilty, or of what offense by way of recrimination was proved against the plaintiff.²¹ In holding, however, that recrimination is not an absolute bar but one dependent upon public policy, public welfare, and the exigencies of the case, the Court does not thereby award to every spouse who can show grounds for divorce a right to a decree; but the Court recognizes merely that the doctrine of clean hands upon which recrimination has been said to rest is not itself an absolute doctrine.²² The opinion establishes no standard to make uniform the weighing of the equities. No statutory ground is labelled less or more heinous than another. Whether, in addition to comparing the statutory faults, the chancellors may consider other behavior on the part of the spouses remains undisclosed, though such language as “misbehavior” and “misconduct” used in the majority opinion suggests that the total behavior

²⁰*Stewart v. Stewart*, 29 So.2d 247 (Fla. 1947).

²¹In this case the husband was awarded a divorce by the chancellor. The wife, seeking separate maintenance, appealed. The Court at first hearing, in a per curiam opinion, found evidence of adultery by the husband and reversed the decree. This was, of course, the application of the doctrine of recrimination. On rehearing the Court, although recognizing that recrimination was probably proved by both parties, upheld the decree in favor of the husband as the equities were with him. The Court stated that the parties charged “misconduct, misbehavior, desertion and general abandonment of the marriage obligations.” Of these terms, only desertion is a statutory ground for divorce. It is not probable that both spouses were guilty of desertion, for in Florida that ground does not contemplate mutual abandonment. KOOMAN, *FLORIDA CHANCERY PLEADING AND PRACTICE* c. 24, §226, p. 519 (1939), “The essence of the wrong of desertion . . . consists of the refusal of a husband or wife to live with the other, when that other spouse wants the deserting spouse to live with him or her.” The Brief for Appellant states on page 26: “On October 25, 1945, the lower court entered its Final Decree finding, among other things, that the Appellant had been guilty of extreme cruelty toward the Appellee . . .” As to the recriminatory defense, the concurring opinion states that there was no definite proof of legal adultery, but the majority opinion does not state of what statutory grounds the plaintiff was guilty. Unless both parties were guilty of statutory grounds there is no place for the doctrine of recrimination at all. The opinion leads reasonably, however, to the conclusion that both parties were guilty or could have been found guilty of statutory grounds.

²²That the clean hands doctrine is subservient to public policy see 3 POMEROY, *EQUITY JURISPRUDENCE* §941 (5th ed. 1941).

pattern of the two guilty spouses is to be examined in determining who is less to blame. What is clear, however, is that the several chancellors, who have undoubtedly differing social concepts, may at their discretion grant or refuse divorce when the guilt of both parties is shown, and that only in exceptional circumstances will the Supreme Court go behind the findings of the chancellors.²³

II. OTHER JURISDICTIONS: RELIEF TO ONE SPOUSE WHEN BOTH ARE GUILTY

A minority of jurisdictions permits divorce though both spouses are at fault. (a) Several states, for example, have statutes which make separation for a specified period of time a ground for divorce, and some courts in construing these statutes preclude recrimination as a defense, considering relative guilt only as to property settlements and the custody of children.²⁴ (b) Three states have expressly authorized by statute the granting of divorces despite the guilt of the complaining party. One of these states insists that one spouse be less guilty than the other;²⁵ but the other two states allow decrees when the parties are equally guilty,²⁶ thus permitting, in one instance, a divorce to a wife, of whom there was evidence of adultery, from a husband, who had been sentenced for the

²³See *Snider v. Snider*, 155 Fla. 788, 791, 21 So.2d 546, 548 (1945); *Coslick v. Coslick*, 133 Fla. 698, 702, 182 So. 835, 836 (1938); *Phifer v. Phifer*, 124 Fla. 223, 226, 168 So. 9, 10, (1936); *Stoneburg v. Stoneburg*, 120 Fla. 188, 189, 162 So. 334 (1935); *Currie v. Currie*, 120 Fla. 28, 32, 162 So. 152, 153 (1935); *Trigo v. Trigo*, 90 Fla. 60, 62, 105 So. 123 (1925).

²⁴*Tarr v. Tarr*, 207 Ark. 622, 182 S. W.2d 348, 349, (1944); *Young v. Young*, 207 Ark. 36, 178 S. W.2d 994 (1944); see *Larsen v. Larsen*, 207 Ark. 543, 181 S. W.2d 683, 684, (1944); *Herrick v. Herrick*, 55 Nev. 59 25 P.2d 378 (1933); *Jegendorf v. Jegendorf*, 157 P.2d 280 (Wyo. 1945); *Dawson v. Dawson*, 177 P.2d 200 (Wyo. 1947) (The Wyoming statute is somewhat stricter than some others, and the court may deny divorce if the separation was caused by complainant); *Vanderhuff v. Vanderhuff*, 79 App. D. C. 153, 144 F.2d 509 (1944); but in *Martin v. Martin*, 160 F. 2d 20 (1947) divorce was denied on this ground as the separation was not voluntary. *But see Taylor v. Taylor*, 225 N. C. 80, 33 S. E.2d 492, 494 (1945).

²⁵*Herrick v. Herrick*, 55 Nev. 59, 25 P.2d 378 (1933) (Where the ground is one other than separation, the doctrine of recrimination is discretionary; where the ground is separation, the doctrine is precluded.).

²⁶*Lassen v. Lassen*, 134 Kan. 436, 7 P.2d 120 (1932); *Roberts v. Roberts*, 103 Kan. 65, 173 Pac. 537 (1918); *Panther v. Panther*, 147 Okla. 131, 295 Pac. 219 (1931).

commission of a felony.²⁷ (c) A New Mexico statute making incompatibility a cause for divorce has been held inconsistent with the recriminatory defense and permissive of a decree, when the parties are clearly irreconcilable.²⁸ (d) The Federal Court for the District of Columbia, construing the new grounds for divorce enacted by Congress, has abolished recrimination as a defense to all causes, including adultery, single or double.²⁹ (e) Only a few jurisdictions have awarded a divorce to a guilty spouse without the help of statutes. Pennsylvania in giving such relief apparently confines it to the grounds of indignities and barbarous treatment.³⁰ Texas has developed a similar rule.³¹ Even prior to the Arkansas statute making separation a ground for divorce,³²

²⁷*Panther v. Panther*, 147 Okla. 131, 295 Pac. 219 (1931).

²⁸*Pavletich v. Pavletich*, 50 N. M. 224, 174 P.2d 826 (1946) (One judge dissented feeling that the decision of the court made the ground of incompatibility so liberal that spouses seeking divorce would choose it, and that, as a result, other grounds for divorce would, in large part, become meaningless.).

²⁹*Parks v. Parks*, 76 App. D. C. 93, 116 F.2d 556 (1940); *Buford v. Buford*, 156 F.2d 567 (App. D. C. 1946).

³⁰Where one party was guilty of bigamy, the other of adultery, relief was denied, *Bowden v. Bowden*, 161 Pa. Super. 150, 53 A.2d 892 (1947), where the court said, "It has always been the law that if during the period of respondent's misconduct, a libellant has been guilty of acts which in themselves would be grounds for divorce, the law will leave the parties where it found them and a divorce will be refused." But in *Dearth v. Dearth*, 141 Pa. Super. 344, 15 A.2d 37 (1940), the court permitted a divorce where both parties charged cruel and barbarous treatment and indignities to the person, saying; "Assuming that each party has offended against the established proprieties that are expected in the marital relations,—even under such unfortunate conditions there must be some point beyond which human indulgence cannot be expected to submit, and resort to the courts may rightly be had to sever a relationship no longer endurable. We are not called upon to balance such an account of mutual delinquencies but only to determine which party is least open to the charge of causing the situation." That such relief will be given is apparently limited to cases where both parties are guilty of indignities and cruel treatment and not applicable to other grounds, *Dash v. Dash*, 160 Pa. Super. 317, 51 A.2d 426 (1947), where a husband charged desertion and was denied divorce, the court finding that his relations with another woman were "to say the least not platonic." And even where both are guilty of cruel treatment the complaining spouse must show himself less at fault, *Nagin v. Nagin*, 146 Pa. Super. 198, 22 A.2d 78 (1941).

³¹The rule in Texas is that a divorce may be granted if the recrimination on the part of the injured spouse is insignificant with the great provocation on the part of the other. *Marr v. Marr*, 191 S. W.2d 512 (Tex. 1945); *See Jones v. Jones*, 60 Tex. 451 (1883). In *Staples v. Staples*, 136 S. W. 120 (Tex. 1911) divorce was denied where both parties charged cruelty, since there was not enough difference in degree.

³²*See Arkansas cases cited in note 24 supra.*

the Supreme Court of the state had, in one case,³³ awarded relief where both spouses were guilty of statutory offenses. The State of Washington, in addition to awarding double divorces,³⁴ grants decrees to the party less at fault.³⁵ Thus, in those jurisdictions where the recriminatory doctrine has been weakened the courts have usually waited for the legislatures to make the change.³⁶ The changes in some instances permit the courts to use their discretion and in others preclude the doctrine altogether.³⁷

III. CONCLUSION

The decision in the *Stewart* case, though logical, is at best a compromise solution, which in failing to set up a clear standard for use by the chancellors, does not answer the need for more uniform divorce law and procedure. Though a modification of the recriminatory doctrine, the holding under the *Stewart* case can still be subjected to the criticism that, because of the possibility of the recriminatory defense, much cruel bargaining goes on between spouses, in cases where both are guilty, in order that one spouse may obtain an uncontested divorce and that in such cases the courts of necessity pass on important matters without all of the facts.³⁸

³³*Longinotti v. Longinotti*, 169 Ark. 1001, 277 S. W. 41 (1925) (The court granted a husband, guilty of cruelty a divorce from his wife, guilty of adultery, because she was the first and greater offender). *Contra*: *Widders v. Widders*, 207 Ark. 596, 182 S. W.2d 209 (1944) (The court denied divorce, when recrimination was shown).

³⁴See note 17 *supra*.

³⁵*Huff v. Huff*, 168 Wash. 684, 35 P.2d 86 (1934).

³⁶*Blankenship v. Blankenship*, 51 Nev. 356, 276 Pac. 9 (1929) and *Chavez v. Chavez*, 39 N. M. 480, 50 P.2d 264 (1935) are striking examples of the reluctance by the courts to precede the legislatures in this respect. Both cases announced the strict doctrine of recrimination, which has in each jurisdiction been modified by recent statutes.

³⁷The decisions in the District of Columbia are apparently the only ones to discard the doctrine as to every defense; but in several jurisdictions, as already shown, the defense may not be considered as to particular grounds.

³⁸See Feinsinger and Younge, *op. cit. supra* note at 213; *Marriage and Divorce, SURVEY, JOURNAL OF SOCIAL WORK*, June, 1941, 181, 183. Such bargaining is as likely to be true under the law of the *Stewart* case, where the application of the recriminatory doctrine is discretionary and thus unpredictable, as it is under the former rule where the doctrine was absolute.

It is to be regretted that the Court in examining the problem did not either reaffirm the doctrine of recrimination once and for all,³⁹ placing before possible litigants a certain though perhaps harsh standard of behavior as a requisite to obtaining relief in the divorce courts, or on the strength of the two former cases permitting divorce to both spouses⁴⁰ (together with the knowledge that divorce is a matter of statute⁴¹ and that recrimination, being of ecclesiastical rather than common law origin is not binding on the courts)⁴² reject recrimination altogether.⁴³ If the latter view were adopted, a definite standard would emerge: a party proving a ground for divorce could obtain a decree, irrespective of his fault.⁴⁴ The courts then could use judicial discretion, based on the unseemly conduct of *both* spouses as revealed by the entire record, in equitably adjusting property differences and in deciding the all important questions relating to children of a broken marriage.⁴⁵

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³⁹See *Stewart v. Stewart*, 29 So.2d 247 (Fla. 1947) (dissenting opinion).

⁴⁰See notes 14 and 16 *supra*.

⁴¹See note 11 *supra*.

⁴²See *Chisholm v. Chisholm*, 98 Fla. 1196, 1223, 125 So. 694, 703 (1929); *Hatfield v. Hatfield*, 113 W. Va. 135, 167 S. E. 89, 91 (1932).

⁴³See *Chisholm v. Chisholm*, 98 Fla. 1196, 1225, 125 So. 694, 703 (1929) where the power of the legislature over divorce is stated to be supreme, subject only to constitutional limitations. It is quite possible, then, that the legislature could abolish the recriminatory defense. *But see* *Young v. Young*, 207 Ark. 36, 178 S. W.2d 994, 999 (1944) (dissenting opinion) where one judge questioned the constitutionality of putting parties before the court and at the same time limiting the judicial authority to the extent that the principles of equity, such as the clean hands doctrine, could not be applied.

⁴⁴Except in cases of double adultery where divorces are forbidden by statute. See note 10 *supra*.

⁴⁵See *Kennedy v. Kennedy*, 101 Fla. 239, 246, 134 So. 201, 204 (1931).

*The author is grateful for the use of *The Desirability of the Comparative Rectitude Doctrine*, an unpublished research paper by Mrs. Madie B. Wyatt, member of the Florida Bar.