



Not So Fast: Setting Aside a Divorce Judgment Procured by “Fraud”

By Christopher R. Bruce

Anyone who has dabbled in a practice close to matrimonial law has or will inevitably face the following question in an interview with a potential client: “My former spouse tricked me, can I set aside my divorce decree?” Often, this question will be followed by an explanation of how the potential client’s former spouse engaged in a perceived litany of fraudulent acts. Unfortunately, in most cases it is not appropriate to set aside a final judgment of dissolution of marriage- even when an actual fraud has occurred.

Below is a basic outline of the law applicable to setting aside divorce judgments. Although this law is written for family law practitioners, the concepts explained herein are largely applicable to other litigation in Florida’s state courts.

Ground Rules

The Florida Rules of Civil and Family Procedure authorize a vacating a divorce judgment in limited circumstances. Within one year, a divorce judgment can be set aside due to several categories of mostly clerical mistakes, newly discovered evidence that could not have been discovered by due diligence, and fraud. After one year, it is generally “too late” to bring an action to set aside a divorce judgment, with the exception that Rule 12.540 states “there shall be no time limit for motions based on fraudulent financial affidavits in marital or paternity cases.”

Remember when evaluating a potential case for setting aside a divorce judgment that an appeal generally does not toll the time to bring an action to vacate a judgment under Rule 12.540. Furthermore, great care must be put into drafting a Rule 12.540 motion as any amendments to the motion after the one year deadline do not “relate back” to the original filing of the motion. This is because a Rule 12.540 motion is a “motion” and not a “pleading” to which the Rule 12.190 “relation back” provisions apply. Finally, it is improper to bring a 12.540 motion on identical grounds previously asserted in a Rule 12.530 petition for rehearing. *Sloan v. Sloan*, 393 So.2d 642 (Fla. 4th DCA 1981).

Basic Pleading Requirements

In *Flemenbaum v. Flemenbaum*, 636 So. 2d 579 (Fla. 4th DCA 1994), the Fourth District Court of Appeal established a two prong test for what must be alleged to establish a basis for setting aside a divorce judgment. The “*Flemenbaum Test*” states a party seeking to set aside a divorce judgment based on fraud must (1) specify the fraud that occurred and (2) explain why the fraud requires the final judgment to be set aside. *Id.* at 580.

Practice Tip: A trial court lacks jurisdiction to grant a motion to set aside a divorce judgment when the *Flemenbaum Test* is not satisfied. Under *Flemenbaum*, a deficient motion to set aside a judgment can be denied without an evidentiary hearing. A motion to dismiss citing *Flemenbaum* can quash a motion to vacate a judgment in its tracks.

Step 1: Pleading Fraud

Pleadings in an action to set aside a divorce judgment based on fraud must allege: (a) there was a misrepresentation of a material fact; (b) the defendant knew the falsity of the misrepresentation; (c) the defendant made the misrepresentation intending that the plaintiff would rely on it in doing an act

desired by the defendant; and (d) the plaintiff’s reliance caused damage. *Myers v. Myers*, 652 So. 2d 1214, 1215 (Fla. 5th DCA 1995). Merely pleading a former spouse omitted assets from a financial affidavit is not analogous to establishing the fraud requisite to setting aside a divorce judgment. See *Romero v. Romero*, 959 So. 2d 333, 338 (Fla. 3d DCA 2007). The pleadings must explain how the omission of an asset from a financial affidavit was fraudulent. See *id.*

Step 2: Pleading Why the Fraud Matters

Surprisingly, under *Flemenbaum* and prevailing jurisprudence, a showing of fraud does not automatically require a divorce judgment to be vacated. Instead, there must be a showing of why the fraud requires the judgment to be set aside. This is because, in some circumstances, fraud can be remedied without setting aside a judgment. As an example, the law provides divorced spouses are automatically tenants in common to any asset left unaddressed by a divorce judgment. See *Demorizi v. Demorizi*, 851 So. 2d 243 (Fla. 3d DCA 2003). Other cases hold that even egregious fraud does not require a judgment to be vacated when a party did not establish their entitlement to relief at trial. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.*, 20 So. 3d 952, 957 (Fla. 4th DCA 2009).

Conclusion

Although vacating a divorce judgment is difficult, it can be done when the practitioner is mindful of the technical rules of engagement that apply to this area of the law. These rules and the client’s specific set of circumstances should be thoroughly reviewed before any significant resources are dedicated to pursuing a Rule 12.540 proceeding.

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