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Family Law

Bertha Claire Lee

Dee L. Altfater

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BERTHA CLAIRE LEE* AND DEE L. ALTFATER**

The authors survey the recent Florida cases and legislation in the field of domestic relations. Areas of emphasis include dissolution of marriage, alimony, custody and child support. After discussing the recent developments, the authors analyze the standard of review applied by the various district courts.

* LL.B., University of Miami School of Law, 1958; B.A., Vanderbilt University, 1934; former Editor-in-Chief, *University of Miami Law Review* (1957-58). Partner in the firm of Frates, Floyd, Pearson, Stewart, Richman & Greer, Miami, Florida.

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I. INTRODUCTION

Family law litigation and legislation has continued to increase. Much of the litigation is centered on disputes arising out of the parties' financial situation with questions of alimony, property rights, child support and attorney's fees being the primary sources of contention. The trend toward equal treatment of spouses can also be seen in the opinions applying the criteria for exclusive possession of the marital home to both spouses equally. The trend initiated by the judiciary toward an equal sharing of community resources between the husband and wife at the time of the divorce has been codified. Similarly, relative fault, as a factor in awarding alimony, has also been codified. Furthermore, the special equities doctrine developed in the real property decisions has been expressly extended to personal property.

II. DISSOLUTION OF MARRIAGE

A. *Jurisdiction*

In *Palmer v. Palmer*,[1] the wife filed a petition for dissolution of marriage and requested alimony, child support, attorney's fees and costs. Her husband, an Army officer resident in Florida but stationed in Germany, was served by publication pursuant to section 49.021 of the Florida Statutes (1975). Reversing the lower court, the District Court of Appeal, First District, held that the court could assert only in rem jurisdiction over the defendant when service of process was by publication. Consequently, the court dismissed the wife's claims for child support, alimony, attorney's fees and costs on the basis of lack of in personam jurisdiction over the husband. The court pointed out that personal jurisdiction over the husband could have been asserted under sections 48.193(e) and 48.194 of the Florida Statutes (1975) but that the wife had selected service by publication.

Also of note, the District Court of Appeal, Third District, held that an unappealed judgment of dissolution may not be subsequently challenged for lack of jurisdiction on the ground that the wife had not fulfilled the residency requirement.[2] Unless appealed,

1. 353 So. 2d 1271, 1272 (Fla. 1st DCA 1978).
2. O'Connor v. O'Connor, 357 So. 2d 763 (Fla. 3d DCA 1978) (per curiam).

a final judgment will preclude litigation of that issue, absent allegations of fraud upon the court or lack of knowledge of the claimed issue at the time of entry of the judgment.

B. *Venue*

The District Court of Appeal, First District, held that venue, in a suit to domesticate a foreign divorce decree, lies in the county where the respondent resides rather than where child support and alimony payments were to be made.[3] Following the District Court of Appeal, Fourth District,[4] the First District held that section 47.011 of the Florida Statutes controlled.[5]

C. *Procedure*

On a petition for rehearing, the District Court of Appeal, Second District, held that a wife's answer to a petition for dissolution which requested custody of the children, permanent alimony and child support, constituted a counterclaim for purposes of preventing a voluntary dismissal by the husband pursuant to Florida Rule of Civil Procedure 1.420(a)(1).[6]

One count of a postjudgment petition to set aside a final judgment of divorce alleging fraud upon the court was held not to be an independent action for relief from a final judgment.[7] Consequently, the lower court's dismissal of the count was affirmed because the petition was not filed within the one-year limitation period provided in Florida Rule of Civil Procedure 1.540(b).[8] In an alternative holding, the court stated that undue influence, duress and fraudulent concealment of assets do not constitute a fraud upon the court.[9] Although it did not state what actions would constitute fraud upon the court, the court cited *Alexander v. First National Bank*,[10] which listed certain acts, *e.g.*, misrepresentations which would mislead the court as to its jurisdiction over the defendant or the subject matter, misrepresentations as to the identity of the defendant, or misrepre-

3. McIntire v. McIntire, 352 So. 2d 142, 143 (Fla. 1st DCA 1977).

4. Ruscoe v. Ruscoe, 327 So. 2d 93 (Fla. 4th DCA 1976).

5. FLA. STAT. § 47.011 (1975).

6. McFarley v. McFarley, 353 So. 2d 1250 (Fla. 2d DCA 1978).

7. August v. August, 350 So. 2d 794 (Fla. 3d DCA 1977).

8. The limitation on an independent action would be four years from the discovery of the fraud. *See* Tullo v. Horner, 296 So. 2d 502, 503 (Fla. 3d DCA 1974) ("In cases of fraud . . . the statute ordinarily begins to run with the discovery of the fraud."); FLA. STAT. § 95.11(3)(j) (Supp. 1978)(legal or equitable actions founded on fraud).

9. 350 So. 2d at 794.

10. 275 So. 2d 272, 274 (Fla. 4th DCA 1973).

sentations which prevented the parties from effectively litigating the case.

With respect to an independent action for relief from a judgment, the Second District has held that Rule 1.540(b) of the Florida Rules of Civil Procedure requires a showing of fraud upon the court for relief to be granted. In *Erhardt v. Erhardt*,[11] the trial court had relieved the husband of the obligations imposed by a two year old decree, including $17,000 in arrearages, on the basis of Rule 1.540(b). The trial court had found that the wife had misrepresented the husband's salary but that no fraud had occurred. Reversing, the Second District stated that a finding of fraud upon the court was required.

In *Christiansen v. Christiansen*,[12] it was held error for the trial court to deny without a hearing a wife's motion for temporary relief pending the final hearing. The District Court of Appeal, Fourth District, noted that the relief sought was temporary alimony, attorney's fees and suit money allegedly necessary to enable her "to carry on the litigation and sustain herself until the final hearing."[13]

A trial court was found to have abused its discretion by refusing to allow the wife to testify regarding alimony because of her failure to comply fully with Rule 1.611(a) of the Florida Rules of Civil Procedure,[14] as well as by denying her requests for a continuance so that she might comply.[15] A partially completed statement had been filed two months before the final hearing and, upon disclosure of the defects, the wife filed numerous motions for continuances which were denied. The District Court of Appeal, Second District, held that where the failure to comply technically with the rule was neither willful nor prejudicial to the husband, the refusal to allow compliance was an abuse of discretion.[16]

Although a statutory exception to the patient-psychiatrist privilege exists when the "patient introduces his mental condition as an element of his claim or defense,"[17] the mere denial by the wife in her answer to her husband's allegations as to her mental condition

11. 362 So. 2d 70, 71 (Fla. 2d DCA 1978) (per curiam).

12. 354 So. 2d 1254 (Fla. 4th DCA 1978).

13. *Id.* at 1255.

14. Hagin v. Hagin, 353 So. 2d 949 (Fla. 3d DCA), *cert. denied*, 357 So. 2d 185 (Fla. 1978). Rule 1.611(a) requires the party seeking temporary alimony to file and serve on the opposing party an affidavit specifying the party's financial circumstances. The opposing party is then required to draw up an affidavit of his financial circumstances and serve it at or before the hearing.

15. 353 So. 2d at 952.

16. *Id.*

17. FLA. STAT. § 90.242(3)(b) (1977) (repealed 1976 Fla. Laws ch. 76-237, § 2; effective July 1, 1979, 1978 Fla. Laws ch. 78-379, § 1).

does not constitute a waiver of the privilege.[18] Moreover, despite the denial of plaintiff's request to allow the psychiatrist's report into evidence, the trial judge had obtained copies of the report over the objections of plaintiff's counsel. Stating that it was aware of "no law nor rule of evidence which permits a trial judge in a dissolution proceeding, in the absence of agreement of the parties, to consider matters not in evidence and not available to the attorneys,"[19] the court remanded for a *de novo* hearing.[20]

Haight v. Haight[21] demonstrates the importance of submitting sufficiently specific pleadings. The trial court, at the final hearing, found that the wife was entitled to lump sum and periodic alimony although her answer and counterpetition did not contain a specific prayer for such relief. The husband's counsel objected and the wife moved to amend her pleadings to conform to the evidence pursuant to Rule 1.190(b) of the Florida Rules of Civil Procedure. The District Court of Appeal, Second District, held that the trial court had not abused its discretion in allowing the amendment. Nevertheless, the case was remanded to give the husband an opportunity to explore the wife's financial resources because he might have been misled by the procedural posture of the case.

D. *Restrictions on Remarriage*

A somewhat unusual divorce decree forbade the parties to remarry for four years. The District Court of Appeal, First District, held that divorce from bed and board was abolished by section 61.031 of the Florida Statutes (1975) and that, consequently, the court was without authority to restrict the parties' right of remarriage.[22] The court modified the decree by deleting the provision.

III. ALIMONY

A. *Reservation of Jurisdiction*

The reservation of jurisdiction by courts for the purpose of subsequent modification of alimony awards has been raised by several recent cases. The District Courts of Appeal for the Third[23] and

18. Mohammad v. Mohammad, 358 So. 2d 610, 612-13 (Fla. 1st DCA 1978).
19. *Id.* at 612.
20. *Id.* at 613-14.
21. 350 So. 2d 1155 (Fla. 2d DCA 1978).
22. Hilderbran v. Hilderbran, 357 So. 2d 788, 789 (Fla. 1st DCA 1978).
23. Lockwood v. Lockwood, 354 So. 2d 1267 (Fla. 3d DCA 1978); Mumm v. Mumm, 353 So. 2d 134 (Fla. 3d DCA 1977). *See also* Wood v. Wood, 359 So. 2d 23 (Fla. 3d DCA 1978) (no abuse of discretion where jurisdiction was retained).

Fourth Districts[24] have found error in the trial courts' failure to retain jurisdiction subsequent to a decision denying or terminating an award of alimony to the wife where there is a possibility of changed circumstances in the future.

The consequences of failure to retain jurisdiction, at least in the Fourth District, seem to turn on whether there was an award of alimony in the original final judgment. In *Boswell v. Boswell,*[25] an order modifying alimony and adjudicating property rights was reversed because the trial court had failed to reserve jurisdiction. There had been no alimony award in the original final judgment. Conversely, in *Kelly v. Kelly,*[26] the court held that the trial court did have jurisdiction to modify a prior alimony award even though jurisdiction had not been reserved. The court in *Kelly* premised its decision on its reading of section 61.14(1) of the Florida Statutes (1977).

It was held in *Brisco v. Brisco*[27] that the court has no jurisdiction to modify arrearages that had vested under a domesticated foreign decree prior to the husband's petition for modification. Upon granting the modification, however, the court has the discretion to make the modification effective either as of the date of the petition or after that date but prior to the date of the order.

B. *Criteria for an Award of Alimony*

The amendment of section 61.08(2) of the Florida Statutes (1977)[28] codifies, with one significant addition, the criteria generally applied by case law in determining a proper award of alimony.[29] The requirement that the court consider, *inter alia,* "[t]he contribution of each party to the marriage, including but not limited to services rendered in homemaking, child care, education and career building of the other party,"[30] approaches a community property concept. This new section, however, could be rendered nugatory by a judge's reliance on section 61.08(1), which allows consideration of the adultery by a spouse, and the last sentence of section 61.08(2) which allows "[t]he court [to] consider any other factor necessary to do

24. Parry v. Parry, 353 So. 2d 610 (Fla. 4th DCA 1977).

25. 352 So. 2d 91 (Fla. 4th DCA 1977).

26. 361 So. 2d 428 (Fla. 4th DCA 1978).

27. 355 So. 2d 506 (Fla. 2d DCA 1978).

28. 1978 Fla. Laws ch. 78-339, § 1 (codified at FLA. STAT. § 61.08(2) (Supp. 1978)).

29. This addition appears to express legislative approval of the reasoning of Brown v. Brown, 300 So. 2d 719 (Fla. 1st DCA 1974).

30. FLA. STAT. § 61.08(2)(f) (Supp. 1978).

equity and justice between the parties."[31] Indeed, *Linda v. Linda*[32] expresses concern over the judicial undermining of the "no-fault" concept in divorce but places the blame on the legislature because of its inclusion of the above quoted sentence in section 61.08(2). In *Linda,* the court held that the "question of whether or not the wife actually committed adultery would be proper . . . where she is claiming alimony,"[33] but that the wife was not required to divulge the name of her lover. The court then reiterated the view that any evidence or impropriety should be limited to gross misconduct.[34]

Relying heavily on two Fourth District cases,[35] the District Court of Appeal, First District, held that relative fault was a factor, although not necessarily a determinative one, to be considered in awarding alimony.[36] By so holding, the court rejected the holdings of the District Court of Appeal, Third District,[37] insofar as they stand for the proposition that only the adultery of the spouse seeking alimony should be considered. Thus, the First District has adopted the broader view that the conduct of both parties relates to and is indicative of the relative equities necessary to do justice.

The issue of relative fault was indirectly raised in *McCloskey v. McCloskey,*[38] where the wife was denied the right to depose her husband on the question of his extramarital affairs. The court referred to a previous case[39] in which it had held that evidence of adultery is admissible when the amount of alimony is at issue.[40] The court noted, however, the husband's net worth of $18 million, stating: "[T]he husband is as rich as Croesus and a veritable harem would have no effect on his ability to pay."[41]

Even before the amendment of section 61.08(2), courts were moving toward a more equitable division of property. In *Ruse v. Ruse,*[42] a lump sum award of $4,000 to the wife was upheld, even though the wife was earning $12,000 per year and the husband only

31. *Id.*

32. 352 So. 2d 1208, 1209 (Fla. 4th DCA 1977), *cert. denied,* 360 So. 2d 1249 (Fla. 1978).

33. *Id.*

34. *Id.* (citing McAllister v. McAllister, 345 So. 2d 352 (Fla. 4th DCA 1977), *cert. denied,* 357 So. 2d 186 (Fla. 1978)).

35. McAllister v. McAllister, 345 So. 2d 352 (Fla. 4th DCA 1977), *cert. denied,* 357 So. 2d 186 (Fla. 1978); Oliver v. Oliver, 385 So. 2d 638 (Fla. 4th DCA 1973).

36. Williamson v. Williamson, 353 So. 2d 880 (Fla. 1st DCA 1977).

37. Claughton v. Claughton, 344 So. 2d 944 (Fla. 3d DCA 1977); Escobar v. Escobar, 300 So. 2d 702 (Fla. 3d DCA 1974).

38. 359 So. 2d 494 (Fla. 4th DCA 1978).

39. Pro v. Pro, 300 So. 2d 288 (Fla. 4th DCA 1974).

40. 359 So. 2d at 496.

41. *Id.*

42. 351 So. 2d 81 (Fla. 1st DCA 1977), *cert. denied,* 357 So. 2d 187 (Fla. 1978).

$5,000. The District Court of Appeal, First District, relied on *Brown v. Brown,*[43] a case that endorses community property concepts while declining to engraft "upon the jurisprudence of this state the law of community property."[44]

In *Jones v. Jones,*[45] the parties had been married for twenty-three years and both had been continuously employed. The husband was earning $1,650 per month while the wife earned $433. The trial court's denial of alimony to the wife was reversed on the ground that the husband earned four times as much as his wife. The requirement of equalizing the parties' income in a dissolution decree is another step toward a judicially sanctioned community property concept in Florida.

In *Lutgert v. Lutgert,*[46] the District Court of Appeal, Second District, noted that although the recently enacted statute[47] was not applicable to the case, its decision would be proper under that statute. In *Lutgert,* the parties had maintained an opulent lifestyle during their ten-year marriage. Although the husband's financial statements reflected his net worth as $3.9 million, the evidence tended to support the conclusion that he was worth over $25 million. In order for the fifty year old wife, who had not worked for thirty years, to maintain a standard of living reasonably commensurate with her previous one, the Second District found that the lower court had abused its discretion in awarding her $4,000 per month rehabilitative alimony for two years in addition to $75,000 lump sum alimony in lieu of permanent alimony. The Second District awarded the wife $6,500 per month permanent alimony, believing such action to be necessary in order "to terminate this lengthy and costly litigation."[48]

Any award of alimony is improper without an evidentiary hearing. The District Court of Appeal, Second District, in *Darby v. Darby,*[49] reversed an award of $21 per week alimony to the wife, when no alimony had been mentioned at the hearing and where the parties had stipulated that the home belonged to the wife and neither the husband nor the wife had appeared in court.

It was held to be error to place the burden on the wife to prove complete and permanent dependence on her husband in order to

43. 300 So. 2d 719 (Fla. 1st DCA 1974).
44. *Id.* at 726.
45. 357 So. 2d 439 (Fla. 2d DCA 1978).
46. 362 So. 2d 58 (Fla. 2d DCA 1978).
47. FLA. STAT. § 61.08(2) (Supp. 1978).
48. 362 So. 2d at 63.
49. 356 So. 2d 898 (Fla. 2d DCA 1978).

entitle her to permanent alimony.[50] The court stated that such a showing by the wife "is a factor to be considered; but it is not an essential element which must be proved [for] . . . an award of permanent alimony."[51] The court held that after thirty-two years of marriage, during which the wife devoted herself full-time to raising four children, an award of permanent alimony was proper. In the event of a petition for modification, it would be the husband's burden to show significantly changed circumstances.

In the absence of an express agreement, the husband's estate is not bound to continue alimony payments after his death. The District Court of Appeal, Fourth District, in *Pan American Bank v. O'Malley,*[52] held that a separation agreement providing: "Husband agrees to pay unto Wife as and for permanent alimony the sum of . . . ($850.00) per month . . . until Wife becomes remarried or deceased"[53] was not sufficiently specific to compel this result.

The District Court of Appeal, First District, has twice held that a husband could not be required to maintain a life insurance policy on his life with the wife as beneficiary.[54] On a proper showing, however, it may be that a court could impose such a requirement. In *Watterson v. Watterson,*[55] the court stated: "There is nothing in *this* record which justifies an award of alimony after death."[56] Concurring, Chief Judge McCord stated that when alimony after death is not justified, it would be error to require the husband to maintain a life insurance policy on his life for the benefit of his wife.[57]

In authorizing an award of permanent alimony, the likelihood of the wife's rehabilitation is another factor which the courts will consider. In a twenty-one-year marriage with three minor children, the trial court awarded, in addition to child support, $600 per month rehabilitative alimony to be reviewed in six years.[58] The District Court of Appeal, Third District, reversed and amended the final judgment to provide for permanent alimony. The court analyzed the following facts in arriving at its decision that "it was an abuse of discretion to deny permanent alimony and make the alimony reha-

50. Garrison v. Garrison, 351 So. 2d 1104 (Fla. 4th DCA 1977).

51. *Id.* at 1105.

52. 353 So. 2d 856 (Fla. 4th DCA 1978); *cf.* Ford v. First Nat'l Bank, 260 So. 2d 876 (Fla. 2d DCA 1972) (absent agreement of parties, alimony may not be awarded beyond husband's death), *cert. discharged,* 283 So. 2d 342 (Fla. 1973).

53. *Id.* at 857.

54. Patrick v. Patrick, 358 So. 2d 1184 (Fla. 1st DCA 1978); Watterson v. Watterson, 353 So. 2d 1185 (Fla. 1st DCA 1977).

55. 353 So. 2d 1185, 1189 (Fla. 1st DCA 1977).

56. *Id.* at 1189 (emphasis added).

57. *Id.* at 1190 (McCord, C.J., concurring in part and dissenting in part).

58. Gratton v. Gratton, 358 So. 2d 262 (Fla. 3d DCA 1978) (per curiam).

bilitative in character:"[59] (1) the length of the marriage; (2) the presence of minor children; (3) the wife's chronic physical ailments; and (4) the wife's lack of adequate earning capacity to approximate the living standard she enjoyed during the marriage.[60] The District Court of Appeal, Second District, under similar facts—a twenty-five-year marriage and a high standard of living—held that the trial court had abused its discretion in awarding $550 per month for three years as rehabilitative alimony.[61]

In the District Court of Appeal, First District, an award of permanent alimony was also justified where the wife was being treated for a heart condition and was advised to cease working.[62] The court noted, however, that the award was still subject to modification in the event of significantly changed circumstances. The First District, however, reversed the award of permanent alimony where the parties had been married for five years, where there were no children and where the wife was soon to be reemployed.[63] Thus, it seems that the length of the marriage, the presence of minor children, the parties' standard of living during the marriage, and the wife's earning potential are the critical factors.

C. *Rehabilitative Alimony*

When the District Court of Appeal, First District, required the payment of rehabilitative rather than permanent alimony to a twenty-nine year old wife with two small children who had previously worked, the wife filed a petition for rehearing.[64] In the ensuing discussion, the court stated "that just as permanent does not necessarily mean forever . . . neither does rehabilitative necessarily mean temporary."[65] The court observed that if the trial judge were to determine that the wife's responsibilities as a mother would prevent her from rehabilitating herself, it was in his discretion to award rehabilitative alimony for an extensive period of time.[66]

In a much clearer case of abuse of discretion, however, the First District reversed the trial court's award of rehabilitative alimony at the rate of $1,200 per month for a period of one year.[67] The facts

59. *Id.* at 265.
60. *Id.* at 264.
61. Douglas v. Douglas, 361 So. 2d 212 (Fla. 2d DCA 1978).
62. Catches v. Catches, 354 So. 2d 133 (Fla. 1st DCA 1978) (per curiam).
63. LaFountain v. LaFountain, 359 So. 2d 898 (Fla. 1st DCA 1978).
64. Manning v. Manning, 353 So. 2d 103 (Fla. 1st DCA 1977) (per curiam).
65. *Id.* at 105.
66. *Id.*
67. Smithwick v. Smithwick, 353 So. 2d 572 (Fla. 1st DCA 1977).

indicated that the wife had helped her husband through medical school and had borne three children; the husband had earned $236,890 in his first year of practice. Upon reversal, it was ordered that the alimony should not be reduced until the youngest child reached majority, plus a reasonable time thereafter for rehabilitation.[68]

Where the parties have a more modest standard of living, a court may use rehabilitative alimony to equalize the disparity in their earnings. For example, in *Zaugg v. Zaugg*,[69] the husband earned $28,000 per year while the wife earned $8,000. The court modified a lump sum award of $5,200 at $100 per week to rehabilitative alimony at $100 per week for three years. Similarly, in *Losco v. Losco*,[70] the court increased the time period during which the $37.50 per week rehabilitative alimony would be received from one year to two, where the husband and wife each had assets worth $20,000. The court increased the rehabilitative alimony because the wife would have to spend a substantial sum to train herself for the job market.

Nevertheless, a wife may be entitled to rehabilitative alimony even if the husband does not have any funds. In such a situation and where in addition there was a strong likelihood that the husband's financial circumstances would improve, the District Court of Appeal, Third District, remanded a case to the trial court with instructions to reserve jurisdiction for a reasonable time in order to be able to modify the award if the husband's financial circumstances changed.[71]

D. *Lump Sum Alimony*

The circumstances which will justify the award of lump sum alimony have been the subject of some confusion in the past, as well as the present. A recent, well-reasoned opinion, however, has delineated the boundaries for such an award. In *Canakaris v. Canakaris*,[72] the court stated: "Lump sum alimony is justified only where it serves a reasonable purpose, such as rehabilitation, or where the marriage's duration or the parties' financial position would make such an award advantageous to both."[73]

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68. *Id.* at 573.

69. 357 So. 2d 201 (Fla. 3d DCA 1978).

70. 354 So. 2d 385 (Fla. 1st DCA 1977).

71. Lockwood v. Lockwood, 354 So. 2d 1267 (Fla. 3d DCA 1978).

72. 356 So. 2d 858 (Fla. 1st DCA 1978).

73. *Id.* at 859. The dissent, however, felt that the majority was unnecessarily harsh in denying the wife the marital home as lump sum alimony in view of the 33 year duration of the marriage, the fact that the wife had quit college to help establish her husband's medical career, and that the husband's net worth was over $3.5 million. *Id.* at 861.

An example of the continued confusion over the concept of lump sum alimony is the recent case of *Seale v. Seale.*[74] In *Seale*, the court, in a supplemental judgment, awarded what it labeled "lump sum alimony" to a wife who had remarried after the conclusion of the dissolution portion of her bifurcated trial, but before the court had resolved the issues of alimony, property division and child custody. An examination of the facts reveals that the former husband had recently become totally disabled and had no source of income. The trial court, having awarded the two minor children to the wife, stated that "the needs of the wife to care for her children are apparent and the only ability which the husband has to provide for those needs is by conveying to the wife as lump sum alimony the real estate owned by the husband in his sole name."[75] Thus, it is clear that this court had, in substance, provided child support in the guise of lump sum alimony.

Similarly, in *Claughton v. Claughton,*[76] the wife had also remarried subsequent to the dissolution of her marriage but prior to the judicial determination of either alimony or child support. The husband stopped paying temporary support upon his wife's remarriage, and she sued for contempt. Claiming that he was under no obligation to pay alimony, the husband moved for summary judgment. The trial court denied the motion, impliedly holding that an award of alimony is proper after remarriage. The District Court of Appeal, Third District, was compelled to distinguish *Seale.* The court pointed out that while the *Seale* decision apparently creates precedent for the proposition that a wife's rights to lump sum alimony payments vest immediately upon the dissolution of her marriage and are unaffected by her subsequent remarriage, such a holding is inconsistent with prior case law. The court then held that where a wife remarries prior to any award of alimony, whether lump sum or periodic; her rights to alimony have not vested and are barred by her subsequent remarriage.[77]

An award of lump sum alimony more in keeping with the guidelines stated in *Canakaris* was made in *Ferriss v. Ferriss.*[78] In that case a wife who had worked throughout her thirty-year marriage was awarded the husband's one-half interest in the marital home as lump sum alimony.[79] The court found that while the wife had

74. 350 So. 2d 96 (Fla. 1st DCA 1977).
75. *Id.* at 97.
76. 361 So. 2d 752 (Fla. 3d DCA 1978).
77. *Id.* at 756.
78. 356 So. 2d 895 (Fla. 1st DCA 1978).
79. *Id.* at 896. Conversely, where a husband was awarded possession of a house purchased

worked during the marriage and had given her husband special care during a long illness, the husband had made imprudent investments with their joint funds which had left him financially unable to assume periodic alimony payments sufficient to compensate fairly the wife. Conversely, in *Storer v. Storer,*[80] where the husband was quite wealthy and the wife had already received $2,261,000 in alimony and $200,000 in attorney's fees, the court held that there was no showing of the wife's special need for the marital home. Similarly, in *Bucci v. Bucci,*[81] the award of the marital home to the wife was reversed. The reversal by the District Court of Appeal, Third District, was due to the following factors: (1) the trial court had equally divided approximately $235,000 of jointly held assets; (2) the couple's two children were grown and no longer in need of support; and (3) the wife had received $750 per month as permanent periodic alimony. In view of these findings, the court concluded that an award of the marital home to the wife as lump sum alimony served no "reasonable purpose such as rehabilitation or the protection of the children."[82]

Despite the caveat stated in *Canakaris* that "the requirement that lump sum alimony be based upon special equities must not be confused with an award in a dissolution of marriage action to a spouse who has acquired a special equity in property accumulated during the marriage,"[83] courts continue to fall into the trap created by this identical language. In *Meridith v. Meridith,*[84] even though the husband's entire net income was only $179.35 per week and his only asset was a $15,500 undivided half interest in the marital home, the court affirmed an award of forty percent of his income to his wife for child support and deprived him of his only asset as lump sum alimony. A strongly worded dissent accused the majority of confusing "special equities" in property with "special equities" to be considered when awarding lump sum alimony.[85] In a similar vein, in *Birs v. Birs,*[86] the wife was awarded the husband's interest in the marital home as lump sum alimony.The District Court of Appeal, Fourth District, found that the wife had made no showing of need

during the parties' brief marriage, the District Court of Appeal, Fourth District, affirmed an award of $13,000 to the wife, which sum represented the amount she had contributed toward the purchase of the house. Kast v. Kast, 351 So. 2d 1060 (Fla. 4th DCA 1977).

80. 353 So. 2d 152 (Fla. 3d DCA 1977).

81. 350 So. 2d 786 (Fla. 3d DCA 1977).

82. *Id.* at 789.

83. 356 So. 2d at 859-60.

84. 352 So. 2d 72 (Fla. 4th DCA 1977) (per curiam).

85. *Id.* at 72, 73 (Downey, J., dissenting).

86. 354 So. 2d 428 (Fla. 4th DCA 1978).

sufficient to support such an award and remanded the case so that the trial court might specify whether or not it had meant to find that the wife had some special equity in the home as a result of her contribution to the husband of certain stocks.[87]

An illustration of the distinction between the two special equities may be found in *Storer v. Storer.*[88] The court in *Storer* stated that since the property in question had been previously owned by the husband rather than acquired during the marriage, the only special equities to be considered were whether the wife had made such a showing of special need for the house that it would constitute an appropriate award of lump sum alimony.

In a series of cases, the courts have held that it is error to award lump sum alimony where it is not pled nor the need proven.[89] In cases where the need for an award of lump sum alimony is proven, those awards may be modified by the court in fairness to the husband. For example, in *Spotts v. Spotts,*[90] where both husband and wife contributed earnings to the marriage, a lump sum award of $25,000 was reduced to $7,000 because the court recognized that the husband had many debts to repay and the wife was able to work. A similar adjustment in *Keller v. Keller*[91] allowed the money paid by the husband as temporary alimony pending appeal to be credited toward the award of lump sum alimony.

E. *Enforcement of the Award*

The incomplete wording of section 61.12 of the Florida Statutes (1977) has been remedied by both the courts and the legislature. In *Clemons v. Morris,*[92] it was made clear that even though section 61.12(1) refers only to orders of the court, it applies to judgments for alimony or child support as well. Additionally, the legislature recently amended section 61.12(2) to allow the enforcement of periodic alimony payments in addition to enforcement of periodic child support payments through the use of a continuing writ of garnishment.[93]

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87. *Id.* at 429.

88. 353 So. 2d 152, 158 (Fla. 3d DCA 1977).

89. *See* Dobbins v. Dobbins, 359 So. 2d 48 (Fla. 1st DCA 1978); Foxx v. Foxx, 357 So. 2d 754 (Fla. 1st DCA 1978); Fuchs v. Fuchs, 356 So. 2d 1355 (Fla. 1st DCA 1978); Andrews v. Andrews, 356 So. 2d 1333 (Fla. 3d DCA 1978). The dissent in *Dobbins,* however, claimed that FLA. STAT. § 61.08 (1977) does not require that the wife categorize the type of alimony sought. 359 So. 2d at 49 (Booth, J., dissenting).

90. 355 So. 2d 228 (Fla. 1st DCA 1978).

91. 356 So. 2d 854 (Fla. 3d DCA 1978).

92. 350 So. 2d 519 (Fla. 4th DCA 1977).

93. 1978 Fla. Laws ch. 76-63, § 1 (codified at FLA. STAT. § 61.12(2)(Supp. 1978).

In a case involving garnishment under section 61.12 of the Florida Statutes (1975), the wife attempted to garnish her former husband's wages to enforce alimony payments under two different judgments.[94] The first judgment was based on an *excontractu* action at law to enforce a separation agreement which had not been incorporated into the couple's Pennsylvania divorce decree. Because this was not a judgment based on an action to enforce a decree or order of the court in a proceeding for dissolution, alimony or child support, the court held that the husband stands "as any other judgment debtor; as the head of a household his wages cannot be garnished by a judgment creditor."[95] The second judgment, however, was a Florida decree adopting and enforcing the separation agreement for support of the wife and children which the court found to be collectible by garnishment pursuant to section 61.12(2).

In a similar case involving the enforcement of a foreign judgment, *Kellenbenz v. Kellenbenz*,[96] the District Court of Appeal, Third District, held that a judgment domesticating a foreign decree of divorce was a final judgment. Thus, the domesticated judgment was enforceable notwithstanding the court's reservation of jurisdiction to consider memoranda of law on whether it had power of contempt over the husband's actions prior to the Florida domestication of the Canadian judgment.

In *Kelly v. Kelly*,[97] the husband ceased paying alimony when his former wife remarried in Texas. When the wife's Texas marriage was annulled, she petitioned to have the former husband held in contempt for failure to pay alimony. The wife pled that under Texas law an annulled marriage is void *ab initio* and that alimony payments should be reinstated. Under Florida law, the marriage would have been rendered voidable and would not have required the resumption of alimony payments.[98] The court held, however, that since the former husband had failed to assign as error the wife's inadequate pleading of the foreign law, he was bound by the court's order requiring him to make future alimony payments.

A split of authority with respect to the specificity of a court's decree for a judgment of arrearages has developed between the District Courts of Appeal, Second and Fourth Districts. The Fourth District, in *Mulligan v. Mulligan*,[99] held that there was no legal

94. Busot v. Busot, 354 So. 2d 1255 (Fla. 2d DCA 1978).
95. *Id.* at 1257.
96. 360 So. 2d 60 (Fla. 3d DCA 1978).
97. 350 So. 2d 11 (Fla. 4th DCA 1977).
98. *Id.* at 12.
99. 351 So. 2d 361 (Fla. 4th DCA 1977).

requirement that the trial court make specific findings regarding what portions of an $85,000 judgment were due as past support, alimony, educational expenses and medical expenses. On the other hand, in *Thomas v. Thomas,*[100] the Second District held that the trial court had erred by failing to allocate the arrearages to the above mentioned categories and remanded to the trial court for corrections.

In the absence of evidence of a husband's intent to be uncooperative or to conceal assets, it was error to provide in a final judgment that the alimony obligation of the husband should be secured by a lien against certain real property.[101] The case was remanded so that the trial court could reserve jurisdiction to make a lump sum award in the event of the husband's death because the original alimony had been designated as a charge against the husband's estate.

F. *Modification*

The District Court of Appeal, First District, has affirmed an order terminating a husband's permanent alimony obligations because of his former "wife's improved financial circumstances . . . irrespective of any change in husband's financial abilities."[102] Unfortunately, the opinion does not elaborate on what these improved financial circumstances were. In *Rothenberg v. Rothenberg,*[103] however, the District Court of Appeal, Third District, held that the wife's improvement in her financial position (she was then earning $9,000 per year) was insufficient to warrant modification of the decree. In *Rothenberg*, the court rejected the husband's argument that the trial court had committed error by its continuance of alimony in the face of what the husband argued was a clear showing that the wife was self-supporting. The court held that there was no error of law because the master had found that she was not self-supporting.

The District Court of Appeal, Second District, requires that a substantial change in circumstances be unforeseeable to warrant modification of alimony. In *Ashburn v. Ashburn,*[104] it was held that the wife's receipt of the proceeds from the sale of the marital home did not constitute a substantial change in circumstances because the sale had been ordered by the final judgment dissolving the marriage. Similarly, in *Coe v. Coe,*[105] the wife's return to work when

100. 352 So. 2d 564 (Fla. 2d DCA 1977).
101. Davis v. Davis, 358 So. 2d 126 (Fla. 1st DCA 1978).
102. Moreland v. Moreland, 358 So. 2d 907, 908 (Fla. 1st DCA 1978).
103. 358 So. 2d 222 (Fla. 3d DCA 1978).
104. 350 So. 2d 1158 (Fla. 2d DCA 1977) (per curiam).
105. 352 So. 2d 559 (Fla. 2d DCA 1977) (per curiam).

their child began school was not a "substantial change in circumstances," since it was a "readily foreseeable eventuality."[106]

After being divorced for fourteen years, the wife sought modification of alimony from $600 per month to $2,000 per month. The District Court of Appeal, Third District, affirmed the trial court's granting of the husband's motion to quash a notice to produce certain financial documents at his deposition, holding that since the husband had responded to the wife's petition by admitting that he was financially able to pay the increase, the only question properly before the court was whether the wife was entitled to the increase.[107]

Whether an award of certain property incident to a divorce proceeding may be subsequently modified turns on whether the award was in the nature of alimony or a true property settlement agreement. In *Hyotlaine v. Hyotlaine,*[108] the wife contended that the entire agreement between her and her husband was a property settlement agreement and thus not subject to modification. The holding that the periodic payments were indeed alimony was based, in part, on the provision in the agreement that "all payments provided by this paragraph shall be taxable to the wife and deductible by the husband."[109] The court pointed out that such tax treatment would be available only if the payments were alimony.[110] The court, however, also found that the husband's agreement to hold $200,000 worth of collateral in escrow was an integral part of the contract between the parties and not modifiable under section 61.14 of the Florida Statutes (1975).

Moreover, the District Court of Appeal, Second District, requires that an award of money, to be considered a property settlement rather than alimony, must appear to be so from the record. In *Goerlich v. Goerlich,*[111] the court reversed the trial court which had found that an oral agreement, read into the record and included in the final judgment, was a property settlement and not subject to modification.[112]

The husband must specifically petition for cancellation of alimony rather than simply seek a reduction to zero because cancella-

106. *Id.* at 560.

107. Alterman v. Alterman, 361 So. 2d 773 (Fla. 3d DCA 1978).

108. 356 So. 2d 1319 (Fla. 4th DCA 1978).

109. *Id.* at 1321.

110. *Id.*; *see* I.R.C. §§ 71, 215.

111. 358 So. 2d 895 (Fla. 2d DCA 1978) (per curiam).

112. Alimony was to be paid at $500 per month for two years, $400 per month for three years, and $200 per month for four years. These amounts were clearly set aside "as and for alimony" and no mention of the agreed monetary property settlement was made. *Id.* at 896.

tion divests the court of jurisdiction while a reduction does not.[113]

The First District has held that a successor judge (to the deceased trial judge) may not, upon the same facts, review, modify or reverse the final orders of his predecessor, absent fraud or mistake.[114]

IV. PROPERTY

A. *Subject Matter Jurisdiction*

The wife in *Rothenheber v. Jessup*[115] sought to enforce the provisions of a property settlement agreement authorized by the court in which her former husband had agreed to make house payments until it was completely paid for.[116] The District Court of Appeal, Second District, held that since the lower court had no authority to modify the property settlement agreement, the husband was not discharged from his obligation when the wife sold the house to a third party. Similarly, where the wife made no claim of special equity in the house owned as tenants by the entirety, the court had no jurisdiction to enter an order divesting the husband of his one-half interest.[117] Absent a contrary showing, the husband and wife, by statute, became tenants in common.[118]

B. *Partition*

It is well-settled that a court may not apportion either real or personal property where there is no evidentiary support therefor. Thus, in *Beard v. Beard,*[119] it was error for the trial court to award the wife all personalty in the home in the absence of an agreement between the parties or an appropriate pleading for such relief.[120]

In *Jacobs v. Jacobs,*[121] husband and wife had partitioned jointly owned timberland, the wife having chosen the piece of property she preferred. The District Court of Appeal, First District, reversed the award to the wife of one-half of the $25,000 proceeds from the sale

113. Jennings v. Jennings, 353 So. 2d 921 (Fla. 4th DCA 1978).

114. McBride v. McBride, 352 So. 2d 1254, 1256 (Fla. 1st DCA 1977).

115. 360 So. 2d 798 (Fla. 2d DCA 1978).

116. *Id.* at 800.

117. DiMartino v. DiMartino, 360 So. 2d 1133 (Fla. 3d DCA 1978).

118. FLA. STAT. § 689.15 (1977).

119. 356 So. 2d 1313 (Fla. 2d DCA 1978).

120. Where the pleadings comply with the requirements of FLA. STAT. § 64.041 (1977), however, the court has no discretion; if the allegations are properly pled and proven, the court must grant partition. *In re* Marriage of Jones, 357 So. 2d 439 (Fla. 2d DCA 1978); Zaugg v. Zaugg, 357 So. 2d 201 (Fla. 3d DCA 1978) (per curiam).

121. 358 So. 2d 74 (Fla. 1st DCA 1978).

of timber harvested off the land, holding that she was entitled only to that portion of the proceeds (here, one-tenth) attributable to timber cut from her portion of the property.

C. *Special Equities Doctrine*

A "special equity" in real property is created by an unrebutted showing that all of the consideration paid for property held as tenants by the entirety was supplied by one spouse from a source clearly unrelated to the marital relationship. The doctrine, enunciated in *Ball v. Ball,*[122] has been expressly extended to personal property by the District Court of Appeal, First District, in *Merrill v. Merrill.*[123] In *Merrill,* it was held that the wife's relinquishment of a pension paid to her as the widow of her former husband was not the kind of contribution intended by *Ball* to rebut the husband's showing that his acquisition of the property came from funds totally independent of the parties' seven-month marriage. Several District Court of Appeal decisions, however, have recognized its application, albeit without citing *Ball* as authority for their holdings. Thus, where the wife neither pled nor proved a special equity in a jointly owned automobile, the Fourth District held that the car was owned by the parties as tenants in common.[124] The First District reversed the trial court's award to the husband of his wife's one-half interest in their yacht on the ground that the husband had failed to plead the existence of a special equity for himself in the yacht.[125] In *Dozier v. Dozier,*[126] the Third District, reversing the award of all personalty to the wife, remanded the case for presentation of testimony regarding the ownership of the parties' personal property, including the presence of any special equity in the wife.

Several decisions have followed *Ball* in finding a special equity in real property. The husband, upon showing that he had made the downpayment on certain real property with funds he had inherited separately from his mother and had continued to make all subsequent payments, was held to have established a special equity so that the jointly owned property was awarded solely to him.[127] The wife's brief testimony as to her understanding of the husband's donative intent was insufficient to rebut the husband's entitlement to

122. 335 So. 2d 5, 7 (Fla. 1976).
123. 357 So. 2d 792, 793 (Fla. 1st DCA 1978).
124. Stetson v. Stetson, 356 So. 2d 53 (Fla. 4th DCA 1978).
125. Garmon v. Garmon, 357 So. 2d 487 (Fla. 1st DCA 1978).
126. 356 So. 2d 63 (Fla. 3d DCA 1978).
127. Bickerstaff v. Bickerstaff, 358 So. 2d 590 (Fla. 1st DCA 1978).

the property. Similarly, in *Tyrrell v. Tyrrell*,[128] the wife failed to show a special equity in certain real and personal property merely by virtue of having been a "mother and homemaker." The District Court of Appeal, First District, however, has found that a wife had a special equity in property held in the husband's name where the property was acquired with funds from a joint bank account to which both had contributed.[129] Similarly, where a wife had furnished all funds for two condominiums acquired as tenants by the entirety during the parties' brief marriage, she was awarded a one-hundred percent special equity in the property.[130] The District Court of Appeal, Fourth District, on the other hand, reversed an award of a special equity in the house to a wife where the only testimony submitted was that the house was a gift from the wife's mother to both her and her husband.[131] The court stated that even though there was a default by the husband, "a plaintiff in a marriage dissolution case must prove the allegations of the complaint and the entitlement to various property awards."[132] The Fourth District has also reversed a trial court's award to the wife of the husband's interest in the house where the parties earned approximately the same salary and the wife had made no showing of a special equity.[133]

D. *Awarding Possession*

In Florida, the award of exclusive possession of the marital home must be based on either: (1) the presence of minor children; (2) a special equity; (3) an award of lump sum alimony; or (4) other special circumstances. After enumerating these factors in *Kelly v. Kelly*,[134] the District Court of Appeal, Fourth District, held that a trial judge is not required to modify an unappealed judgment simply because none of these factors was present at the time the judgment was granted or at the time modification was sought.[135] It is error, however, for the trial judge to grant exclusive possession if all these factors are absent, and, if appealed, such a ruling will be reversed.[136] Currently, these criteria are being applied equally to both spouses.

128. 359 So. 2d 62, 64 (Fla. 1st DCA 1978).

129. Knoblock v. Knoblock, 351 So. 2d 387 (Fla. 1st DCA 1977).

130. Malkemes v. Malkemes, 357 So. 2d 223 (Fla. 2d DCA 1978); *cf.* Easterling v. Easterling, 358 So. 2d 1114 (Fla. 4th DCA 1978) (reversing award to wife of one-half interest in mobile home purchased prior to marriage).

131. Manley v. Manley, 360 So. 2d 489 (Fla. 4th DCA 1978).

132. *Id.* at 490.

133. Chayka v. Chayka, 361 So. 2d 430 (Fla. 4th DCA 1978).

134. 361 So. 2d 428 (Fla. 4th DCA 1978).

135. *Id.* at 429.

136. Segal v. Segal, 353 So. 2d 894 (Fla. 3d DCA 1977).

The District Court of Appeal, First District, has reversed a lower court by holding that a husband, who had been granted custody of the parties' minor son, was entitled to the exclusive possession of the house until the child's majority or the husband's remarriage.[137]

E. *Presumptions*

It is well-settled that when property is acquired with the husband's funds and title is taken in both names, a tenancy by the entirety is created and the presumption arises that a gift to the wife of an undivided half interest is intended.[138] The District Court of Appeal, Second District, has held that a husband's testimony to the effect that he paid for the property is insufficient to rebut this presumption.[139] Apparently relying on this presumption, the wife in *Josephs v. Josephs*[140] argued that since most of the money earned by the husband and wife was channeled through a joint checking account, she should receive one-half of the assets purchased with funds from that account. Implicitly finding the presumption to have been rebutted, the District Court of Appeal, Third District, held that the trial court, as trier of fact, was not compelled to find a constructive trust for the wife's benefit in the property purchased with funds from the joint account.[141]

In *Rutledge v. Rutledge,*[142] a case of first impression, the District Court of Appeal, Second District, has held that the existence of a final judgment gives rise to a rebuttable presumption that it remains in full force and unsatisfied. The wife had sued the estate of her deceased former husband for failure to construct and furnish a house as had been provided in the final judgment. Counsel for the estate argued that the Dead Man's Statute[143] rendered inadmissible the wife's testimony as to failure of performance. The court stated that the mere introduction of the final judgment into evidence raised the presumption of nonpayment. Analogizing to Rule 1.110(d) of the Florida Rules of Civil Procedure, which characterizes payment as an affirmative defense, the court reasoned that the

137. Bailey v. Bailey, 361 So. 2d 204 (Fla. 1st DCA 1978).

138. Strauss v. Strauss, 148 Fla. 23, 3 So. 2d 727 (1941).

139. Hagin v. Hagin, 353 So. 2d 949 (Fla. 2d DCA 1978).

140. 357 So. 2d 206 (Fla. 3d DCA 1978).

141. *Id.* at 207.

142. 357 So. 2d 466 (Fla. 2d DCA 1978).

143. FLA. STAT. § 90.05 (1975) (repealed by 1976 Fla. Laws ch. 76-237, § 2, as amended by 1977 *id.* ch. 77-77, § 1 and 1978 *id.* ch. 78-361, § 22, effective as of 1978 *id.* ch. 78-379, § 1).

burden of proof then shifted to the defendant. In the instant case, the court held that the defendant failed to sustain this burden.[144]

F. *Conveyances*

The husband was required to satisfy a second mortgage encumbering the marital home, even though no consideration was given for the note and mortgage and it was not executed according to law. Affirming the lower court, the District Court of Appeal, Third District, pointed out that since the chancellor did not have the mortgagee as a party she could not cancel the debt, but she could do equity by making the husband solely responsible for it.[145]

Where the wife had been granted exclusive possession of the marital home while her mother lived there, it was held that on resale, the wife should receive the benefit of the husband's increased equity resulting from mortgage payments that the wife had made.[146]

In *Gibson v. Sampson,*[147] the wife had executed on her judgment for alimony arrearages and purchased the house herself at a sheriff's sale after advertising the notice of sale in an obscure weekly newspaper. The District Court of Appeal, Fourth District, reinstated the husband's complaint seeking to set aside the sheriff's sale, holding that the husband's allegation that his wife had promised to notify him personally raised the issue of a confidential relationship as cotenants between the former husband and wife.

V. ATTORNEY'S FEES

In *Dresser v. Dresser,*[148] The District Court of Appeal, First District, receded from the harsh practice, approved in an earlier decision,[149] of denying an appellee's motion for attorney's fees for an appeal where there was a failure to allege need or appellant's ability to pay. Instead, when the trial court has awarded fee money to the movant, the appellate court will assume that the parties' financial needs are essentially the same as at the time of the final judgment, provisionally grant the motion for allowance of fee money and remand to the trial court the questions of the amount of a reasonable fee and what part, if any, should be paid by the other party.[150]

144. 357 So. 2d at 467-68.
145. Hechler v. Hechler, 351 So. 2d 1122 (Fla. 3d DCA 1977).
146. Parry v. Parry, 353 So. 2d 610 (Fla. 4th DCA 1977).
147. 353 So. 2d 609, 610 (Fla. 4th DCA 1977).
148. 350 So. 2d 1152, 1154 (Fla. 1st DCA 1977).
149. Burns v. Snedaker, 348 So. 2d 597 (Fla. 1st DCA 1977).
150. 350 So. 2d at 1154.

The award of attorney's fees to a wife was reversed in *Bucci v. Bucci*[151] because the record reflected that the wife had approximately the same financial resources as her husband. The court said that the wife had failed to establish that "the requesting party was unable to pay the fee, and that the opposing party was able to pay."[152] Similarly, where the record reflected that the wife had a more favorable financial condition than the husband, an award to the wife of $2,500 attorney's fees was reversed.[153]

Absent an agreement by the parties, attorney's fees may not be decided on the basis of affidavits; the trial court must hold a hearing to determine a reasonable fee as well as the wife's need and the husband's ability to pay.[154] Furthermore, the amount of attorney's fees cannot be ascertained without expert testimony directed to the issue.[155] Consequently, in *Ruszala v. Ruszala,*[156] the trial court abused its discretion in striking expert testimony presented on the issue of reasonable attorney's fees, which had resulted in the wife being arbitrarily penalized.

VI. ANTENUPTIAL AND POSTNUPTIAL AGREEMENTS

A. *Antenuptial Agreements*

The District Court of Appeal, Fourth District, held that an antenuptial agreement providing that the husband would support the wife for the duration of the marriage did not operate as a bar to the seventy-seven year-old wife's claim for alimony from her eighty-one year-old husband after fourteen years of marriage.[157] Since the trial court had not allowed the presentation of any evidence relating to alimony, the case was remanded for a full hearing on issues of alimony and ownership of the parties' personal property.

The District Court of Appeal, First District, has found error in a trial court's refusal to admit into evidence an antenuptial contract executed in Iran.[158] The lower court refused to consider the antenuptial contract ostensibly because it was "entered into under the laws of another country."[159] The First District remanded with in-

151. 350 So. 2d 786 (Fla. 3d DCA 1977).

152. *Id.* at 790. *See also* Rosell v. Rosell, 362 So. 2d 86 (Fla. 3d DCA 1978); Canakaris v. Canakaris, 356 So. 2d 858, 860-61 (Fla. 1st DCA 1978).

153. Winston v. Winston, 362 So. 2d 149 (Fla. 3d DCA 1978).

154. Neale v. Neale, 359 So. 2d 880 (Fla. 4th DCA 1978).

155. Segal v. Segal, 353 So. 2d 894 (Fla. 3d DCA 1977).

156. 360 So. 2d 1288 (Fla. 3d DCA 1977).

157. Seltsman v. Seltsman, 352 So. 2d 136 (Fla. 4th DCA 1977).

158. Mohammad v. Mohammad, 358 So. 2d 610 (Fla. 1st DCA 1978).

159. *Id.* at 611.

structions to consider the anteneuptial agreement in light of the circumstances existing at the time of its execution and at the time of the dissolution proceedings.

B. *Postnuptial Agreements*

An agreement between a seventy-two year old husband and his thirty-four year old wife made six months before the husband filed for dissolution was held void for duress and coercion, where the wife had agreed to "release" to the husband $135,000 worth of bonds, and the husband had agreed to transfer the title to the marital home from his name to both names and to give his wife $115,000 worth of bonds, 1,823 shares of various stocks, and cash.[160]

VII. CUSTODY OF CHILDREN

A. *Jurisdiction*

The strong public policy of Florida to provide for the well-being of children within its borders was recently illustrated in *Schrey v. Schrey*.[161] The wife, a Pennsylvania resident, had originally filed for divorce in Pennsylvania while her husband was in Florida, but had not requested custody in that action. Subsequently, the husband, who along with the children was a Florida resident, filed in Florida for divorce and custody. The wife moved for dismissal for lack of personal and subject matter jurisdiction premised on the ground that she had previously filed the Pennsylvania action. The lower court granted the motion based on a finding that it lacked subject matter jurisdiction. The District Court of Appeal, Fourth District, reversed the trial court as to the custody action, stating: "Each state is charged with the duty to regulate the custody of infants within its borders."[162]

The Florida courts' subject matter jurisdiction has been legislatively expanded to allow a discretionary award of visitation rights to grandparents.[163]

B. *Visitation Privileges*

In keeping with the statutory requirement that the court award visitation rights "in accordance with the best interests of the child,"[164] the appellate court affirmed the lower court's denial of the

160. Sniffen v. Sniffen, 352 So. 2d 113 (Fla. 4th DCA 1977).
161. 354 So. 2d 405 (Fla. 4th DCA 1978).
162. *Id.* at 406.
163. 1978 Fla. Laws ch. 78-5, § 2 (codified at FLA. STAT. § 68.08 (Supp. 1978)).
164. FLA. STAT. § 61.13(2)(b) (Supp. 1978).

husband's right to visit his adopted daughter, the natural child of the wife, because the evidence showed that the child was afraid of the husband.[165] A provision subjecting a husband's visitation rights with the parties' minor child to the condition that no other person be in his home while the child was present was stricken from the final judgment as too restrictive.[166]

The 1978 Florida Legislature has overruled prior case law[167] by amending section 61.13(2)(b) of the Florida Statutes to provide that under certain circumstances grandparents may be awarded visitation rights for minor children, although they are not granted standing as full participants in dissolution proceedings.[168]

C. *Modification*

Appellate review of child castody decisions is extremely limited "[b]ecause the custody issue primarily involves the evaluation of human relationships, [and] the judgment of the trial court in resolving that issue must be afforded even greater respect than a judgment involving issues which are capable of resolution based on purely objective considerations."[169] The appellate court will not defer to the trial court, however, where a party has been denied an opportunity to be heard. In *Murphy v. Murphy*,[170] the mother's petition for change of custody was granted after the father removed the child from Broward County to Fort Walton Beach. The District Court of Appeal, Fourth District, held that the lower court had no authority to change custody unless there had been an emergency involving the child's welfare because the father was not given a

165. Hechler v. Hechler, 351 So. 2d 1122 (Fla. 3d DCA 1977).

166. Patrick v. Patrick, 358 So. 2d 1184 (Fla. 1st DCA 1978).

167. Tamargo v. Tamargo, 348 So. 2d 1163 (Fla. 2d DCA 1977).

168. 1978 Fla. Laws ch. 78-5, § 1 (codified at FLA. STAT. § 61.13(2)(b) (Supp. 1978)). The amended section reads as follows:

> (b) The court shall award custody and visitation rights of minor children of the parties as a part of proceeding for dissolution of marriage in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction Act. Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody. *The court may award the grandparents visitation rights of minor children if it is deemed by the court to be in the child's best interest. Nothing in this section shall be construed to require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor shall such grandparents have legal standing as "contentants" as defined in s. 61.1306, Florida Statutes. No court shall order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation for the grandparents.*

Id. (emphasis in original, indicating amended portion).

169. Barnhill v. Barnhill, 353 So. 2d 923, 924 (Fla. 4th DCA 1978).

170. 351 So. 2d 383 (Fla. 4th DCA 1977).

chance to respond to the mother's petition.[171]

Similarly, the appellate court overturned a trial court order transferring custody of the parties' thirteen year old son from his mother to his father when the record failed to reflect substantial competent evidence supporting the transfer.[172] The order was reversed because there had been no showing below of material and substantial change of circumstances and because "the law favors the reasonableness of the original decree" which had awarded custody to the mother.[173] Analogously, in *Collins v. Newton*,[174] where both parties were found to be fit parents, it was reversible error to change custody from the mother to the father when the only change of circumstances was that the son was about to enter high school.

VIII. CHILD SUPPORT

A. *Adult Children*

A corollary of the general rule that the legal duty of a parent to support his child ceases when the child reaches majority is the principle that a parent, absent an agreement, cannot be required to provide a college education for an adult child under the terms of a child support decree.[175] Since children of a harmonious marriage have no right to require their parents to provide them with a college education, it would be inconsistent to argue that a divorced parent has a greater obligation to his children. Furthermore, even if a duty to support the adult child does exist, a dissolution proceeding is not the proper forum; a separate suit must be brought to establish the obligation.[176] Consequently, it was held in *Cyr v. Cyr*[177] that in a dissolution proceeding, a trial court did not have the authority to require the father to pay child support after the children attained the age of eighteen.

If it is claimed that an adult child is "dependent," and thus entitled to support beyond the age of eighteen years, such a determination must be made at the time of the child's eighteenth birthday. In *Watterson v. Watterson*,[178] the District Court of Appeal, First District, reversed the trial court's finding that the husband's

171. *Id.* at 384.
172. Tash v. Oesterle, 356 So. 2d 61 (Fla. 3d DCA 1978).
173. *Id.* at 62.
174. 362 So. 2d 174, 175 (Fla. 2d DCA 1978).
175. Kern v. Kern, 360 So. 2d 482 (Fla. 4th DCA 1978).
176. *Id.* at 485.
177. 354 So. 2d 140 (Fla. 2d DCA 1978).
178. 353 So. 2d 1185 (Fla. 1st DCA 1977).

twenty-one year old son was a "dependent" person requiring support within the meaning of section 743.07(2) of the Florida Statutes (1975). The court held that where the child was over twenty-one years of age at the time of the final judgment and there was no allegation of physical or mental disability, there was no justification for requiring support for the child. The court reached this result despite testimony from a clinical psychologist that the son was "upset over his parents' divorce and was clinically depressed, socially withdrawn and incapable of earning a living and maintaining himself."[179] The support payments ordered by the trial court were reversed.

On different facts, however, the District Court of Appeal, Third District, found that the evidence adduced in an action for dissolution of marriage supported a finding of dependency beyond the adult child's eighteenth birthday.[180] The parties' adopted son suffered from debilitating muscular disorders and a severe personality maladjustment. The court granted monetary support and awarded the use of the marital residence to the wife for so long as the dependency continued.[181]

B. *Modification*

A provision of a final judgment which provided for automatic increases in child support at predetermined future dates was approved in *Spotts v. Spotts*.[182] The court upheld the formula fashioned by the trial court, noting that the automatic increases, which corresponded to the husband's net income, were precise and definite. The court also noted that this formula would save time and money by not requiring the parties to return to court every time the husband's income increased. The husband's right to petition for modification, however, was preserved.[183]

Changed circumstances that will justify a reduction of child support, according to the court in *In re Marriage of Johnson*,[184] must be substantive, material, involuntary and permanent in nature. In reversing the trial court's reduction of support, the District Court of Appeal, First District, held that the husband's remarriage, voluntary job change and his lack of counsel at the hearing were insufficient circumstances to compel a support reduction. On the other

179. *Id.* at 1187.
180. George v. George, 360 So. 2d 1107 (Fla. 3d DCA 1978).
181. *Id.* at 1110.
182. 355 So. 2d 228 (Fla. 1st DCA), *cert. denied*, 361 So. 2d 835 (Fla. 1978).
183. *Id.* at 229.
184. 352 So. 2d 140 (Fla. 1st DCA 1977).

hand, the First District approved the termination of a husband's obligation to support his eighteen year old daughter because "she does not acknowledge nor does she even visit" her father.[185]

Following the principles of review espoused by the Supreme Court of Florida in *Shaw v. Shaw*,[186] the First District found that the trial judge had abused his discretion by awarding a mere $100 per month increase in child support when the former husband had been earning an additional $100,000 anually since the last modification.[187] The case was remanded to the lower court with instructions to grant a more adequate amount of support for the children.

The District Court of Appeal, Second District, reversed the trial court's order awarding $25 per week child support on the basis of lack of sufficient evidence in the record regarding both the husband's ability to pay and the wife's lack of ability to contribute to the support of the child despite the fact that the master had recommended only the reservation of jurisdiction to award child support.[188] The court pointed out that the award was less than what the mother had been receiving under an agreement with her ex-husband whereby they had agreed to share equally the child's expenses. The lower court's order had effectively relieved the husband of any obligation to pay more than $25 per week.

C. *Remedies for Nonsupport*

The District Court of Appeal, Third District, reversed two contempt orders, holding, in both instances,[189] that the trial judge had failed to make the required finding that the husband had a present ability to comply with the order to pay child support and willfully refused to do so, or in the alternative, that the husband previously had the ability to pay, " 'but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order.' "[190]

In *Deter v. Deter*,[191] notwithstanding a finding that the elements of both civil[192] and criminal[193] contempt were present, a con-

185. Tyrrell v. Tyrrell, 359 So. 2d 62, 64 (Fla. 1st DCA 1977).

186. 334 So. 2d 13 (Fla. 1976).

187. Meltzer v. Meltzer, 356 So. 2d 1263 (Fla. 3d DCA 1978).

188. Yontz v. Yorkunas, 358 So. 2d 91 (Fla. 2d DCA 1978).

189. Adams v. Adams, 357 So. 2d 264 (Fla. 3d DCA 1978); Hamra v. Hamra, 350 So. 2d 538 (Fla. 3d DCA 1977).

190. Hamra v. Hamra, 350 So. 2d 538, 539 (Fla. 3d DCA 1977) (quoting Faircloth v. Faircloth, 339 So. 2d 650, 651 (Fla. 1976).

191. 353 So. 2d 614 (Fla. 4th DCA 1977).

192. Husband had failed to pay the wife.

193. There was an alleged assault on the wife.

tempt citation was reversed for failure to comply with the notice requirements of Florida Rule of Criminal Procedure 3.840(a)(1).[194]

When the children have attained majority status, however, the wife's remedy for recovery of child support arrearages is limited to a judgment enforceable by ordinary civil proceedings.[195]

D. *Jurisdiction*

In a case involving the domestication of a New York support judgment, the District Court of Appeal, Fourth District, held, *inter alia,* in a dissolution proceeding where the wife has not been served personally and does not appear, a Florida court cannot terminate or modify a prior support order of a sister state.[196] A judgment granting, denying or modifying child support is a "personal" judgment that may be entered only if the court has in personam jurisdiction over both parties.[197]

A trial court's dismissal for lack of subject matter jurisdiction of a former wife's petition to enforce a judgment incorporating an ex-husband's agreement to pay his son's college expenses was reversed and remanded.[198] While the father's liability was contingent on his ability to pay, the lack of an allegation of such a fact in the petition was not fatal to the court's jurisdiction to decide the issue.

E. *Support for Religious Education*

A trial court may require a husband to pay for his children's religious education as part of child support payments when both parties represented to the court that religious education was important to their children's welfare.[199] The District Court of Appeal, Second District, implied that if the children's need for attending Sunday School and Hebrew School had been disputed, constitutional questions would then have been raised.[200]

IX. ADOPTION

If a child's natural parents are found to be unfit to care for him,

194. The defendant must be given adequate notice of the charges by sworn affidavit. The court said that an allegation of "attacking and injuring petitioner" was not specific enough, in the absence of any reference to time, place or date. 353 So. 2d at 618.

195. Moreland v. Moreland, 358 So. 2d 907 (Fla. 1st DCA 1978) (citing Wilkes v. Revels, 245 So. 2d 896 (Fla. 1st DCA 1970), *cert. denied,* 247 So. 2d 437 (Fla. 1971)).

196. Hunter v. Hunter, 359 So. 2d 500 (Fla. 4th DCA 1978).

197. *See* Kulko v. Superior Court, 436 U.S. 84 (1978).

198. Golden v. Golden, 356 So. 2d 1274 (Fla. 3d. DCA 1978).

199. Schatz v. Schatz, 356 So. 2d 892 (Fla. 2d DCA 1978).

200. *Id.* at 894.

it is the trial judge's difficult task to decide to whom custody should be awarded. In *Ex rel. W.H.*,[201] the grandmother, who had previously had temporary custody of the child, successfully sought a reversal of the trial court's award of temporary custody to an unrelated couple who had taken care of the child for a substantial amount of time. Although the evidence showed that the couple had taken good care of the child, the court must award custody, if possible, to a close relative who is "fit, ready, able and willing to be awarded custody."[202] Moreover, the forty-six year old grandmother already had custody of the child's two brothers, and the court felt that siblings should not be separated absent the most compelling of reasons.[202]

When a natural parent is to be deprived of his child through adoption, notice to him is a fundamental prerequisite. It has been held to be error for the trial court to deny the natural father's motion to vacate the final judgment of adoption where the evidence showed that no effort had been made to effect either personal or constructive service of process on him.[204]

Consent by a natural parent is usually a requirement before a child can be adopted. A judicial determination of abandonment by the parent, however, constitutes a deemed waiver of the consent requirement.[205] In *Turner v. Adoption of Turner*,[206] the trial court reluctantly refused to find legal abandonment by the child's natural father, who was serving two consecutive life terms for murdering the child's mother. The lower court relied on a prior decision which had held that "the imprisonment of a natural parent under a lifetime sentence does not, as a matter of law, constitute abandonment of his natural child."[207] The District Court of Appeal, First District, however, noted that the father had neither communicated with his child nor requested to see her since his imprisonment. The court held, therefore, that under these facts abandonment had occurred.[208]

In a subsequent abandonment case decided by the First District, an incarcerated natural father, after receiving notice, failed to appear at the adoption proceeding in person or through counsel. The court affirmed the denial of the natural father's motion to set aside

201. 356 So. 2d 34 (Fla. 1st DCA 1978).
202. *Id.* at 34.
203. *Id.*
204. Canaday v. Gresham, 362 So. 2d 82 (Fla. 3d DCA 1978).
205. FLA. STAT. § 63.072 (1977).
206. 352 So. 2d 957 (Fla. 1st DCA 1977).
207. Harden v. Thomas, 329 So. 2d 389, 391 (Fla. 1st DCA 1976).
208. 352 So. 2d at 960.

the final judgment of adoption on the ground of excusable neglect.[209] A strong dissent argued that the natural father's ignorance of the legal requirement that he must set for hearing or file a petition for a writ of habeas corpus ad testificandum coupled with his request to present evidence at the adoption hearing provided ample basis for the type of excusable neglect contemplated by Rule 1.540(b) of the Florida Rules of Civil Procedure.[210]

Under certain circumstances, the consent of the natural parent is not needed before the child can be adopted. According to *In re Adoption of Mullenix*,[211] a putative father of a child born to an unwed mother was not within any category of section 63.062 of the Florida Statutes (1975)[212] which would have required his consent to the adoption. Furthermore, the court found that the father's argument of denial of equal protection was without merit in that his "interests are readily distinguishable from those of a divorced father, and . . . the State could permissively give [the putative father] less veto authority than it provides to a married father."[213]

A natural mother had petitioned the lower court to regain custody of her two minor children who had been permanently committed to the care of the state. The District Court of Appeal, Third District, construed section 39.11(6) of the Florida Statutes (1977) to prevent her from reopening the original commitment proceeding to regain custody.[214] The court pointed out, however, that she could petition the circuit court, through an independent adoption proceeding, to adopt her children.

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209. Despres v. Pagel, 358 So. 2d 905 (Fla. 1st DCA 1978).

210. *Id.* at 906-07 (Ervin, J. dissenting).

211. 359 So. 2d 65 (Fla. 1st DCA 1978).

212. As a condition precedent to adoption, the statute requires the consent of the father of minor child if:

> 1. The minor was conceived or born while the father was married to the mother.
>
> 2. The minor is his child by adoption.
>
> 3. The minor has been established by court proceeding to be his child.
>
> 4. He has acknowledged in writing, signed in the presence of a competent witness, that he is the father of the minor and has filed such acknowledgment with the vital statistics office of the Department of Health and Rehabilitative Services.
>
> 5. He has provided the child with support in a repetitive, customary manner.

FLA. STAT. § 63.062(1)(b) (1977).

213. 359 So. 2d at 65.

214. Thompson v. Department of Health & Rehab. Servs., 353 So. 2d 197, 198 (Fla. 3d DCA 1977).

X. Legislation Relating to Juveniles

The Supreme Court of Florida held unconstitutional a statute which prohibited billiard parlors from permitting persons under the age of twenty-one to play billiards while exempting bowling alleys with pool tables from the statute.[215] The court found that section 849.06 of the Florida Statutes (1975) violated equal protection, because there was no practical difference between playing billiards in a billiard parlor and playing billiards in a bowling alley sufficient to warrant a special classification for billiard parlor operators.

Reversing two lower courts, the supreme court upheld the constitutionality of section 827.04(2) of the Florida Statutes (1975), which deals with negligent treatment of children.[216] The court held that the statute was not vague, indefinite and overbroad. The court distinguished its decision in an earlier case which had struck down a statute criminalizing negligent treatment of children,[217] pointing out that section 827.04(2) requires scienter or culpable negligence.[218]

XI. Scope of Review

It is very difficult to predict how appellate courts will treat property distributions because the trial judge's determination of matters involving monetary and property allocation is influenced by many factors which are accorded unequal weight. In Florida, there is a striking contrast between the broader scope of review employed by the District Court of Appeal, First District, and the narrower reevaluation of evidence made by the District Court of Appeal, Third District.

A. *District Court of Appeal, First District*

The District Court of Appeal, First District, merely stating that there was no substantial competent evidence in the record, reversed an award of seventy-five dollars per week permanent, periodic alimony to the wife.[219] A similar result was reached in *Canakaris v.*

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215. Rollins v. State, 354 So. 2d 61 (Fla. 1978).

216. State v. Joyce, 361 So. 2d 406 (Fla. 1978).

217. State v. Winters, 346 So. 2d 991 (Fla. 1977).

218. Section 827.04(2) provides:

> (2) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits the physical or mental health of the child to be materially endangered, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 827.04(2) (1975).

219. Bateman v. Bateman, 358 So. 2d 910 (Fla. 1st DCA 1978).

Canakaris.[220] The wife had been awarded assets worth over $330,000 after twenty-five years of marriage to a physician whose net worth was well over $3 million. Despite the fact that she had abandoned her career to marry her husband and scrubbed floors to further his career, that the husband had engaged in adulterous relationships,[221] and that they had an apparent high standard of living, the court held that there was no competent substantial evidence to support an award of $500 per week permanent periodic alimony.

B. *District Court of Appeal, Third District*

Generally, the District Court of Appeal, Third District, has strictly followed the complementary tests of appellate review espoused by the Supreme Court of Florida in *Shaw v. Shaw*[222] and *Herzog v. Herzog*.[223] These cases hold that an appellate court may not reevaluate the evidence[224] and that, absent a lack of substantial evidence in the record, the findings of the trial court should be affirmed.[225] For example, in *Bucci v. Bucci*,[226] the court refused to reverse an award of $750 per month as alimony to the wife in spite of their acknowledgment that the income as given in the parties' federal tax returns would not justify an award of that amount. The district court upheld the lower court because there was evidence in the record from which the lower court could infer that the husband had other resources. The court, however, did not state the amount of these other resources or if the trial judge had any idea of the extent of the alleged resources.[227]

The Third District took its narrowest approach to judicial review in *Burch v. Burch*.[228] The court refused to reverse the trial court's award of forty dollars per week rehabilitative alimony where the husband earned in excess of $26,000 per year, stating that:

> While we might be of the view that the award of rehabilitative alimony was not proper here and that, if proper, the amount awarded was insufficient, we cannot say that the judgment is not supported by "competent evidence" which is the test laid down

220. 356 So. 2d 858 (Fla. 1st DCA 1978).
221. *Id.* at 861 (McCord, C.J., dissenting).
222. 334 So. 2d 13 (Fla. 1976).
223. 346 So. 2d 56 (Fla. 1977).
224. *Shaw*, 334 So. 2d at 16.
225. *Herzog*, 346 So. 2d at 58.
226. 350 So. 2d 786 (Fla. 3d DCA 1977).
227. *Id.* at 788-89.
228. 352 So. 2d 552 (Fla. 3d DCA 1977).

by the Supreme Court in *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976) to overturn the trial court at the appellate level.[229]

Several cases, though, have indicated a slight departure from the strict adherence to the *Shaw* and *Herzog* standards. In *Meltzer v. Meltzer*,[230] the court rejected as too meager an increase of $100 in child support where the ex-husband's income had tripled since the last modification. Despite claims of adherence to the strictures of *Shaw*,[231] the court peppered its opinion with expressions such as "[t]he appellant argues persuasively," "[w]e are convinced," and "[i]t is our view."[232] Similarly, in a seemingly inequitable decision, the Third District reversed an award of $165 per month permanent alimony to the sixty year old wife because the record did not contain competent evidence that substantiated the wife's needs.[233] The lower court, however, had found that the wife was in a state of poor health and that her expenses exceeded her income by approximately $400. In a third case, the Third District modified an award of $300 per month permanent alimony to a thirty-two year old wife of an orthodontist who had been married eleven years.[234] The award was changed to $300 per month rehabilitative alimony for three years. The dissent to the court's denial of rehearing argued that the majority had substituted its judgment for that of the trial court and that absent a showing that the trial judge had acted arbitrarily, the order should be affirmed.[235]

XII. CONCLUSION

The no-fault concept in dissolution of marriage has not diminished the volume of family law litigation; it has merely redefined its focus. The courts, however, having developed the legal standards, are now struggling to define their factual parameters. Consequently, for the foreseeable future, domestic relations case law will continue to revolve around the factual setting.

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229. *Id.* at 553.
230. 356 So. 2d 1263 (Fla. 3d DCA 1978).
231. *Id.* at 1265 n.2.
232. *Id.* at 1265.
233. George v. George, 360 So. 2d 1107 (Fla. 3d DCA 1978).
234. Rosenberg v. Rosenberg, 352 So. 2d 867 (Fla. 3d DCA 1977) (per curiam).
235. *Id.* at 868 (Hubbart, J., dissenting).