University of Miami Law Review

Volume 26 | Number 3 Article 3

5-1-1972

Family Law

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FAMILY LAW*

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* The materials surveyed herein extend from 225 So.2d through 249 So.2d 416 and the legislation enacted by the 1970 and 1971 regular and special sessions of the Florida Legislature.

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I. INTRODUCTION

The adoption of the new Dissolution of Marriage Act[1] is without doubt the most dramatic change in Florida's family law since it became a state. This law, which became effective on July 1, 1971, has been labeled in the press as the "no-fault divorce law." In reality, it is a combination of "no-fault" and "divorce by consent" concepts. Under the new law, a marriage will be "dissolved" when the court finds that the marriage is "irretrievably broken." This phrase may have been borrowed from the English Divorce Reform Act of 1969[2] which provides that a divorce may be granted if it is proven that the marriage "has broken down irretrievably."[3] While the English act defines this concept of irretrievable breakdown,[4] such a definition is noticeably lacking in the Florida act.

1. Fla. Laws 1971, ch. 71-241, *repealing* FLA. STAT. §§ 61.041, 61.042, 61.051, 61.15 (1969), *creating* FLA. STAT. §§ 61.043, 61.044, 61.052.

2. The Divorce Reform Act 1969.

3. *Id.* § 1.

4. *Id.* § 2. Proof of breakdown

(1) The court hearing a petition for divorce shall hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say—

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

Id.

It is also interesting to compare the Florida criterion with that of the current law of the Soviet Union which provides for the dissolution of marriage "if it is established by a court of law that the further joint life of the partners and the preservation of their family have become impossible."[5] Even more closely related to the Florida approach is the standard used in California:[6]

> A court may decree a dissolution of the marriage . . . on either of the following grounds, which shall be pleaded generally:
>
> (1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.
>
> (2) Incurable insanity.

Comparing the Florida and California legislation, it is apparent that Florida has borrowed heavily from the terminology in the California statute. Therefore, California decisions under its act should have precedent value in Florida.

In the area of financial responsibility and child custody, the Florida act attempts to place husbands and wives on a plane of equality because *either* spouse may now be required to pay alimony, child support, attorney's fees and court costs to the other. In addition, alimony to either spouse may now be awarded for a limited period designed to allow the recipient spouse to "rehabilitate" himself or herself, rather than the former perpetual dole concept. Finally, in determining the custody of minor children, the courts are now commanded to give equal consideration to both parents rather than the former policy of preferring the mother simply because she was the mother.

The new act is a combination of the old and the new since it tracks the existing statutes in some areas and completely supersedes them in others. As a result of this approach, it is suggested that many of the dreams of the draftsmen will be unfulfilled because courts will use preact cases to construe the act. In addition, the act does not purport to be all embracing and much of Florida family law will remain case oriented.

The Dissolution of Marriage Act will be discussed under the appropriate sections of this article. Minor statutory changes made by the act will be indicated. Those sections of the act which make dramatic changes in existing law will be quoted verbatim.

II. Marriage and Annulment

A. *Multiple Marriages*

One of the strongest presumptions known to Florida law is that when two women claim to be the widow of a deceased man, the second

5. Basic Principles of Legislation in the U.S.S.R. and Union Republics on Marriage and the Family, Article 14, Appendix to Stove, *The New Fundamental Principles of Soviet Family Law and Their Social Background*, 18 Int'l & Comp. L.Q. 392, 415 (1969).

6. Ch. 1608, § 4506, [1969] Cal. Laws Reg. Sess. Section 4507 attempts to define "irreconcilable differences": "Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."

marriage is presumed valid, and the burden of rebutting this presumption rests upon the first wife, even though she must prove a negative. It is not necessary for the first wife to show the absence of grounds for divorce in order to overcome the presumption of validity of the second marriage. However, the presence of grounds for divorce should be given great consideration in weighing the evidence used to overcome the presumption. As a result, when a ground for divorce did exist between the first wife and the husband and the evidence showed that the husband stated he was not married; that his first wife had been absent from the marital home for more than ten years and had never communicated with him; that he was a seaman employed in states other than Florida and that the first wife failed to introduce certificates from the departments of vital statistics of these foreign states showing that no divorce had been entered, this evidence would be sufficient to justify the trial court in holding that the presumption of the validity of the second marriage had not been rebutted.[7]

B. *Common Law Marriages*

The District Court of Appeal, Third District, has held that when a couple divorce and continue to live together agreeing that the divorce means nothing to them this does not indicate the formation of a common law marriage, but merely constitutes an attempt to disregard the legal effect of a divorce. Further, if the parties attempt to keep the fact of their divorce a secret, any cohabitation subsequent to the divorce can not ripen into a common law marriage without a new agreement to become husband and wife.[8]

A typical law school examination question was presented in the case of *Dandy v. Dandy*.[9] A woman received an interlocutory divorce decree in California and subsequently married a man in Florida before her California decree became final. While the woman knew of the interlocutory decree, the Florida "husband" did not. Subsequently, the "husband" learned that at the time of his ceremonial marriage his "wife" had not received a final divorce from her prior husband. The parties continued to cohabit after the interlocutory decree became final, and the "husband" agreed that he would remarry her at a later date. Fortunately, or unfortunately, he never did. The "wife" claimed that a common law marriage had come into existence. The court held that the original "marriage" was void on the grounds that it was bigamous. In addition, in order to prove a common law marriage, the wife would have to show that there was a *present*, as opposed to a future, agreement to be husband and wife. The "wife" was able to demonstrate only that her "husband" had promised to marry her in the future; she, therefore, was unable to prove a common law marriage.

7. *In re* Estate of Yohn, 238 So.2d 290 (Fla. 1970).
8. Williams v. Dade County, 237 So.2d 776 (Fla. 3d Dist. 1970).
9. 234 So.2d 728 (Fla. 1st Dist. 1970).

In order to establish a common law marriage it is insufficient to prove merely that the parties lived together and represented to their landlord and to members of their respective families that they were married; it is also necessary to prove that there was a written or oral agreement between the parties to be husband and wife.[10]

III. Dissolution of Marriage

A. *The Dissolution of Marriage Act*

In conformity with prior law governing divorces, proceedings for the dissolution of marriage under the new Dissolution of Marriage Act are in Chancery.[11] The person filing the petition for dissolution must have resided for six months in Florida before filing of the petition.[12] The dissolution of marriage is to be *a vinculo* and not from bed and board.[13] Proceedings for dissolution may be brought against persons residing out of the state,[14] and no final judgment of dissolution of marriage may be entered until at least twenty days have elapsed from the date of the filing of the original petition except upon a showing that injustice would result from this delay.[15]

Since the new act operates on the "no-fault" concept, Florida Statutes sections 61.041 (grounds for divorce), and 61.042 (incurable insanity as ground for divorce) have been repealed.[16] In addition, sections 61.051 (which illegitimacized children born of a bigamous marriage) and 61.15 (which provided for attorney's fees for wives in enforcing alimony and support awards) have also been repealed.[17]

A "proceeding" for dissolution of marriage or a proceeding for support of the wife and children in the event of the husband's failure to support must be commenced by the filing in the circuit court of a petition entitled "In re the marriage of —, husband, and —, wife." A copy of this petition is then served upon the other party in the same manner as other civil process.

The defenses of condonation, collusion, recrimination and laches are similarly abolished as defenses to "divorce and legal separation."[18] This is a beautiful work of drafting—defenses to "divorce" are abolished, and then the same act abolishes "divorce." This is a kind of legal double negative.

Under the act "[n]o judgment of dissolution of marriage shall be

10. *In re* Estate of Yohn, 229 So.2d 612 (Fla. 1st Dist. 1969).
11. Fla. Laws 1971, ch. 71-241, § 2, *amending* Fla. Stat. § 61.011 (1969).
12. Fla. Laws 1971, ch. 71-241, § 3, *amending* Fla. Stat. § 61.021 (1969).
13. Fla. Laws 1971, ch. 71-241, § 4, *amending* Fla. Stat. § 61.031 (1969).
14. Fla. Laws 1971, ch. 71-241, § 8, *amending* Fla. Stat. § 61.061 (1969).
15. Fla. Laws 1971, ch. 71-241, § 20, *amending* Fla. Stat. § 61.19 (1969).
16. Fla. Laws 1971, ch. 71-241, § 22.
17. Fla. Laws 1971, ch. 71-241, § 22.
18. Fla. Laws 1971, ch. 71-241, § 6, *adding* Fla. Stat. § 61.044.

granted unless one of the following acts appears, which shall be pleaded generally:"[19]

> (a) The marriage is irretrievably broken:
> (b) Mental incompetence of one of the parties, provided, however, that no dissolution shall be allowed unless the party alleged to be incompetent shall have been adjudged incompetent according to the provisions of section 394.22, Florida Statutes, for a preceding period of at least three (3) years. Notice of the proceeding for dissolution shall be served upon one (1) of the nearest blood relatives or guardian of such incompetent person, and such relative or guardian shall be entitled to appear and to be heard upon the issues. If the incompetent party has a general guardian or a guardian of his person other than the party bringing the proceeding, the petition and summons shall be served upon the incompetent party and such guardian, and the guardian shall defend and protect the interests of the incompetent party. If the incompetent party has no general guardian or guardian of his person, the court shall appoint a guardian ad litem to defend and protect the interests of the incompetent party; provided, however, in all dissolution of marriages granted on the basis of incompetency the court may require the petitioner to pay alimony pursuant to the provisions of section 61.08, Florida Statutes.

At the hearing for dissolution of marriage, the evidence need not be corroborated except to establish the fact of required residence. If the ground for dissolution is that the marriage is "irretrievably broken," the court shall dispose of the petition as follows:[20]

> (a) If there are no minor children of the marriage and if the respondent does not, by answer to the petition for dissolution deny that the marriage is irretrievably broken, the court shall enter a judgment of dissolution of the marriage if the court finds that the marriage is irretrievably broken.
> (b) Where there are minor children of the marriage or where the respondent denies by answer to the petition for dissolution that the marriage is irretrievably broken, the court may:
> 1. Order either or both parties to consult with a marriage counselor, a psychologist or psychiatrist, a minister, priest, or rabbi, or any other person deemed qualified by the court and acceptable to the party or parties ordered to seek consultation; or
> 2. Continue the proceedings for a reasonable length of time not to exceed three (3) months, to enable the parties themselves to effect a reconciliation; or
> 3. Take such other action as may be in the best interest of the parties and the minor children of the marriage.
> If, at any time, the court finds that the marriage is irretriev-

19. Fla. Laws 1971, ch. 71-241, § 7, *adding* FLA. STAT. § 61.052.
20. Fla. Laws 1971, ch. 71-241, § 7, *adding* FLA. STAT. §§ 61.052(2)-(4).

> ably broken, the court shall enter a judgment of dissolution of the marriage. If the court finds that the marriage is not irretrievably broken, it shall deny the petition for dissolution of marriage.
>
> (3) During any period of continuance the court may make appropriate orders, for the support and alimony of the parties, the custody, support, maintenance and education of the minor children of the marriage, attorney's fees, and for the preservation of the property of the parties.
>
> (4) A judgment of dissolution of marriage shall result in each spouse having the status of being single and unmarried. No judgment of dissolution of marriage renders the children of such marriage illegitimate.

It is submitted that the above quoted portion of the new act is an incredibly sloppy sample of legislative drafting and would appear to fall within the "void for vagueness" test. For example:

1. What does "irretrievably broken" mean? It is a cardinal rule in bill drafting that new terms should be defined in the same act that introduces them.
2. How long must the parties consult with a marriage counselor, priest, minister, rabbi, etc.? What is the trial court judge to do in this regard? If the judge is "in favor of dissolution," a half-hour conference may be enough. However, if the judge is opposed to the dissolution concept, he may order months of consultation.
3. What *is* a "marriage counselor?" In Florida, any quack or confidence man may call himself (or herself) a marriage counselor.
4. A judge opposing dissolution may continue the proceedings for a period of up to three months. His colleague down the hall, however, may find instantly that the marriage is "irretrievably broken" and dissolve it.

It would appear that under subsection (a) of the above, the law is coming very close to "consent divorce." For example, it would seem that in the event of a childless marriage and the failure of the respondent to deny, either in his answer or in the event of a default, that the marriage is irretrievably broken, it would appear that the trial court is almost bound to grant a judgment of dissolution upon the simple statement of the petitioner that "I cannot stand to live with the respondent." The petitioner's "I cannot stand" testimony need not be corroborated, and the trial court judge would seem to have little, if any, discretion but to grant the dissolution. Even if an answer is filed and the defendant denies that the marriage is irretrievably broken, how can the defendant contest the allegation?

B. *Jurisdiction*

A sheriff's return of personal service of process is presumed to be correct, but this presumption is rebuttable. Therefore, if a former wife

testifies that she had never lived with her sister upon whom service had been made but had lived with her mother at an address different from the one mentioned in the summons and that she was unaware of the divorce proceedings until years after the divorce decree was entered, she has rebutted the presumption of correctness of the sheriff's return. Thus, she may attack the final decree upon the grounds that the court never had jurisdiction over her even though her attack is made after the death of her former husband.[21]

Sections 49.011, 49.021 and 49.041 of the Florida Statutes (1969) require constructive service of process only at the defendant's last known *residence*. As a result, a wife may sign a memorandum with her husband that she may find the husband's *address* at any time from the named attorney of her husband and then ignore this memorandum and send the notice to appear to her husband's last known *residence* and secure a divorce from him without his knowledge and it will be error for the trial court to set aside the divorce on the ground that it was obtained by fraud.[22] The author has no quarrel with the abstract proposition that the words "residence" and "address" are not synonymous, but the application of the proposition to these facts seems to be a little strained.

C. *Grounds and Defenses*

Inasmuch as the Dissolution of Marriage Act has repealed the defense of condonation to divorce,[23] a discussion of cases dealing with adultery and its condonation might appear to be irrelevant. However, under the new Act the trial court judge in awarding alimony may consider the adultery of a spouse and the circumstances thereof in determining whether alimony should be awarded.[24] Likewise, in determining a proper award of alimony he may also consider "any factor necessary to do equity and justice between the parties."[25] Under the latter provision, it would appear that the conduct, whether adultery, cruelty, desertion, etc., of a spouse may have a bearing in determining the amount of any alimony award. Upon this basis, it is submitted that some of the pre-act cases will have continued relevancy, if only in regard to financial considerations.

The Florida Supreme Court has re-affirmed[26] the rule laid down in *Stockham v. Stockham*[27] that a plaintiff in a divorce action should not be permitted to prosecute the action further if he refuses to answer questions dealing with his alleged adultery upon the basis of the fifth amendment privilege against self-incrimination. The court disapproved of the third

21. Black v. Black, 227 So.2d 53 (Fla. 1st Dist. 1969).
22. Roxby v. Roxby, 235 So.2d 58 (Fla. 2d Dist. 1970).
23. Fla. Laws 1971, ch. 71-241, § 6, *adding* FLA. STAT. § 61.044.
24. Fla. Laws 1971, ch. 71-241, § 10, *amending* FLA. STAT. § 61.08 (1969).
25. Fla. Laws 1971, ch. 71-241, § 10.
26. Minor v. Minor, 240 So.2d 301 (Fla. 1970), *aff'g* Minor v. Minor, 232 So.2d 746 (Fla. 2d Dist. 1970). *Followed in* Simonet v. Simonet, 241 So.2d 720 (Fla. 4th Dist. 1970).
27. 168 So.2d 320 (Fla. 1964).

district's contrary opinion in *Simkins v. Simkins*.[28] In a case decided prior to the Supreme Court's decision in *Stockham*, the District Court of Appeal, Fourth District, held that when a plaintiff-husband refuses to testify upon a deposition as to his alleged adultery on the basis of his privilege against self-incrimination, the trial court could strike his complaint but could not commit the husband to jail upon the grounds of contempt because of his refusal.[29]

It is reversible error for the trial court judge to refuse to compel an adult son of the spouses to testify concerning his father's association with another woman. The fact that the son will be placed in an awkward position and that the actions of the wife's attorney may be in poor taste is not sufficient reason for the trial court judge's refusal to compel the son to testify.[30]

The defense of condonation of adultery received a rather narrow delineation in *Chandler v. Chandler*.[31] The wife admitted to her husband that she had committed adultery with a man, but she gave a fictitious name to her paramour. The parties continued to quarrel about her conduct but they resumed marital relations. Apparently the wife then admitted that she had adulterous relations with two additional men and the parties separated. The husband sued for divorce and the wife asserted condonation as a defense. The court held that full knowledge of adultery is an essential element of condonation, and the husband's resumption of cohabitation with her would not be a condonation of the first adultery because of the fictitious name given by the wife. Further, he did not condone the adultery with the other two men because he did not have knowledge of their existence. The court also noted that the continued bickering on the part of the husband concerning the wife's adulterous activities indicated an absence of forgiveness. Finally, the court held that, in order for the resumption of marital relations to be considered as a condonation of adultery without proof of actual forgiveness, the husband must not only have knowledge of the adulterous acts but must have sufficient evidence to prove that adultery was committed. Since the husband did not know the names of the paramours he would not have sufficient proof of adultery. It would appear that if an adulterous wife is candid about her sexual activities, a resumption of marital relations will constitute condonation, but if she is less than candid it will not. It is questionable whether there should be a distinction between acts of adultery based upon the identity of the male.

D. *Invalidity*

A classical law school examination factual pattern was presented in *Dixson v. Dennard*.[32] A man asked a woman to marry him, but she

28. 219 So.2d 724 (Fla. 3d Dist. 1969).

29. Cotton v. Cotton, 239 So.2d 865 (Fla. 4th Dist. 1970), *citing* Malloy v. Hogan, 378 U.S. 1 (1964).

30. Spencer v. Spencer, 242 So.2d 786 (Fla. 4th Dist. 1971).

31. 230 So.2d 723 (Fla. 2d Dist. 1970).

32. 243 So.2d 472 (Fla. 1st Dist. 1971).

informed him that she already had a husband. The man then persuaded the woman to divorce her husband and marry him. The man furnished funds for the divorce and secured the services of a lawyer for his future wife. The divorce was obtained, the new marriage was entered into and a son was born of this union. Upon the death of this man, his minor grandchildren (the result of a previous marriage) brought suit to invalidate the second marriage of their grandfather upon the ground that the constructive service of process which was used in the divorce suit of their alleged "step-grandmother" against her former husband was improper. Therefore, the grandchildren contended, she was still married to another at the time of her marriage to their grandfather. A decree of invalidity would, of course, have resulted in the bastardization of the minor child born of the union of the grandfather with the new wife. The court held that the grandfather would have been estopped to attack the validity of his marriage on these grounds because he engineered the allegedly invalid divorce resulting in a change of position by his new wife, the birth of a son and the enjoyment of the marriage by the grandfather. Since the minor grandchildren were claiming as heirs of the grandfather, they were also subject to the same estoppel defense.

E. *Procedure*

A wife has the right to discharge her counsel at any time, with or without cause, and to retain new counsel to represent her as plaintiff in a divorce action. Therefore, it is an abuse of discretion for the trial court judge to refuse to grant a continuance upon a motion of newly retained counsel in the absence of a showing that the wife was trying to frustrate the orderly conclusion of the case by her actions.[33]

In an unusual application of the attorney-client privilege, the District Court of Appeal, Fourth District, held that in a divorce action it is improper to allow a psychiatrist to testify over the objections of the client as to the mental condition of a patient, when his testimony was based upon two tape-recorded telephone conversations between the client and her attorney which were furnished to the psychiatrist by the attorney without his client's consent.[34]

Rule 1.540(b) of the Florida Rules of Civil Procedure authorizes a trial court judge to grant relief from final judgments, orders, and decrees when there has been some "mistake, inadvertence, surprise or excusable neglect." In light of this rule, the District Court of Appeal, First District, has held that a trial court judge may vacate a final judgment and then redate it so that an appeal could be taken when the earlier divorce judgment had been entered without the knowledge of the husband. It should be noted that the husband's motion to vacate was filed after the thirty day appeal period had expired, and that if the trial court

33. Tsavaris v. Tsavaris, 244 So.2d 450 (Fla. 2d Dist. 1971).

34. Schetter v. Schetter, 239 So.2d 51 (Fla. 4th Dist. 1970).

had not redated the judgment, he would not have had an opportunity to appeal.[35]

In another case, the District Court of Appeal, Third District, held that when a defendant-husband's cause of action against his father-in-law is totally unrelated to a divorce action brought by the wife against the husband, it is error for the trial court to permit the impleading of the father-in-law under rule 1.180 of the Florida Rules of Civil Procedure.[36]

It would not be an abuse of discretion for the trial court to grant a continuance to the husband upon the condition that the husband would agree to stay further proceedings in a foreign action that he had brought against the wife, and to deny the continuance when the husband refused to agree to the imposed condition.[37]

A final written decree of divorce, in regard to the winning party and the disposition of property, must conform to the judge's orally pronounced "decree" at the close of the final hearing. If the decree fails to conform, the case should be remanded for the entry of a decree which does conform.[38]

IV. ALIMONY

A. *Alimony Pendente Lite*

Section 61.071 of the Florida Statutes (1969) was slightly amended by the new Dissolution of Marriage Act:[39]

> 61.071 Alimony pendente lite.—In every proceeding for dissolution of the marriage, a party may claim alimony and suit money in the petition or by motion, and if the petition is well founded, the court shall allow a reasonable sum therefor. If a party in any proceeding for dissolution of marriage claims alimony or suit money in his answer or by motion, and the answer or motion is well founded, the court shall allow a reasonable sum therefor.

In Florida temporary alimony is not awarded as a matter of right. Rather, it may be granted only upon a "well founded" complaint. It is error, therefore, for the court to award temporary alimony if the order is silent as to the complaint being well founded and the trial court judge has refused to consider the wife's alleged adultery prior to the making of the award.[40]

In a rather ambiguous opinion, the Supreme Court of Florida has apparently held that a Florida court may not award temporary alimony to a plaintiff-wife when the husband asserts the defense that he has se-

35. Woldarsky v. Woldarsky, 243 So.2d 629 (Fla. 1st Dist. 1971).
36. Dick v. Dick, 238 So.2d 469 (Fla. 3d Dist. 1970).
37. Huxford v. Huxford, 231 So.2d 868 (Fla. 1st Dist. 1970).
38. Westberry v. Westberry, 226 So.2d 405 (Fla. 2d Dist. 1969).
39. Fla. Laws 1971, ch. 71-241, § 9, *amending* FLA. STAT. § 61.071 (1969).
40. Gilbert v. Gilbert, 241 So.2d 713 (Fla. 1st Dist. 1970).

cured a divorce in a foreign state and the Florida court has not determined whether the foreign divorce decree is valid.[41] The author is forced to agree with dissenting Justice Ervin that, inasmuch as the wife asked for alimony, the trial court had the power to award it even if the foreign decree were valid under the divisible divorce theory articulated in *Pawley v. Pawley*.[42]

A wife's affidavit, when considered with the pleadings in a divorce case, may establish a prima facie right to be heard for the award of temporary alimony and attorney's fees even though she is absent from the state at the time of the hearing. It is, therefore, reversible error for the court to summarily deny the motion for the award.[43] Likewise, it is reversible error for a trial court judge to entirely set aside a judgment providing for alimony and child support payments pending further testimony in the case without awarding alimony and child support pendente lite when the evidence shows the husband has continued to receive a salary.[44] It would also appear to be reversible error for the trial court, upon an application for temporary alimony and attorney's fees, to order that the wife should be denied *final* alimony, court costs and attorney's fees.[45] Lastly, unless supersedeas of an alimony judgment is effectuated, the trial court may enforce the payment of alimony pending the appeal by the use of the contempt process.[46]

B. *Permanent Alimony*

Section 61.08 of the Florida Statutes (1969) was completely changed by the Dissolution of Marriage Act. The new section provides that:

> (1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded to such spouse.
>
> (2) In determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties.[47]

The above language evidently leaves the question of alimony solely within the discretion of the individual trial court judge. Hopefully, the courts will utilize the concept that alimony should terminate after the

41. Newton v. Newton, 245 So.2d 45 (Fla. 1971).
42. 46 So.2d 464 (Fla. 1950).
43. Valentine v. Valentine, 244 So.2d 503 (Fla. 4th Dist. 1970).
44. Edwards v. Edwards, 243 So.2d 12 (Fla. 2d Dist. 1971).
45. Jordan v. Jordan, 243 So.2d 607 (Fla. 3d Dist. 1971).
46. Helin v. Helin, 235 So.2d 533 (Fla. 3d Dist. 1970).
47. Fla. Laws 1971, ch. 71-241, § 10, *amending* FLA. STAT. § 61.08 (1969).

rehabilitation of the other spouse, whether by improved health, education, training, etc. It is doubtful that many courts will award alimony to husbands except in the most extreme cases dealing with sick or disabled men.

It is reversible error when the final decree of divorce fails to make any mention of alimony and any finding of the equities between the parties.[48] However, when a trial court fails to reserve jurisdiction to award alimony in the future upon a change in circumstances, the appellate court may amend the divorce judgment to provide for the reservation of jurisdiction; it need not remand the case to the trial court to enter an amended judgment.[49]

It has been held that a trial court may not increase the amount of alimony or child support payments when the parties have stipulated as to these amounts during the progress of the action and the stipulation is not the result of fraud, deceit, coercion, trickery or overreaching.[50]

The Supreme Court of Florida has held that former section 61.08 of the Florida Statutes which forbade the granting of alimony to an adulterous wife was not a denial of equal protection or of due process and was, therefore, constitutional under the Federal and state constitutions.[51]

It would appear that trial court judges should give consideration to the income tax consequences involved in allocating alimony and child support awards. For example, the District Court of Appeal, Third District, has held that it is error to award $400 per month for child support for a two-year-old child and $100 per month alimony to the wife in the absence of any evidence justifying this allocation. The court remanded the case to the trial court for reconsideration including the tax consequences to the parties if the alimony award were increased and the child support amounts were decreased.[52]

An award of alimony must be based upon a showing of the wife's needs and the husband's ability to pay. Therefore, if the wife merely demonstrates her needs, without evidencing the husband's financial ability to pay, the trial court may properly deny her alimony. The trial court should, however, retain jurisdiction over the case in order to modify the judgment upon a subsequent showing that the husband's financial ability has improved.[53]

C. *Lump Sum Alimony*

It is reversible error to award lump sum alimony to a relatively wealthy wife on the ground that she suffered financial losses occasioned

48. Reed v. Reed, 226 So.2d 114 (Fla. 1st Dist. 1969).
49. Reed v. Reed, 244 So.2d 449 (Fla. 1st Dist. 1971).
50. Costa v. Costa, 245 So.2d 123 (Fla. 2d Dist. 1971).
51. Pacheco v. Pacheco, 246 So.2d 778 (Fla. 1971).
52. Drucker v. Drucker, 239 So.2d 117 (Fla. 3d Dist. 1970).
53. Carmody v. Carmody, 230 So.2d 40 (Fla. 1st Dist. 1970).

by the conduct of her husband, a man of meager means.[54] In *McGarry v. McGarry*,[55] a case decided under pre-Dissolution Act principles, it was held that a trial court judge may award lump sum alimony payable in installments. However, he may not award "pure" alimony and provide that it shall be terminated at a fixed time in the future. The trial court judge should reserve jurisdiction to extend the period for payment if the circumstances should later justify it. Although it is not entirely certain, it would appear that the new Dissolution of Marriage Act, providing for the awarding of alimony to rehabilitate a spouse, may reverse the holding of this case.[56]

It is not erroneous for a trial court to award lump sum alimony when the wife has prayed for it, the husband has raised no objection and the wife, on appeal, alleges that it is an abuse of discretion. However, a judgment of this nature should provide that the trial court retains jurisdiction to modify the award by providing for periodic alimony if it should become necessary in the future.[57] On the other hand, it is error to award alimony in a lump sum to the wife when the evidence discloses that the husband is unable to make one lump sum payment or even begin to pay the lump sum award in weekly payments until seven months after the date of the judgment.[58]

The fact that a court retains jurisdiction over the entire divorce case does not give it the power to award permanent or lump sum alimony after the entry of the divorce judgment.[59]

A judge may award the husband's undivided one-half interest in homestead property to the wife as lump sum alimony; however, the final judgment should reserve jurisdiction over the case to award alimony to the wife if there should be a change of circumstances.[60]

D. *Enforcement of the Award*

Section 61.11 of the Florida Statutes (1969) was amended by the Dissolution of Marriage Act to provide that when either party receives alimony, he or she is free from the control of the other in the manner of spending the money. In addition, a writ of ne exeat or the injunctive process may be used against the party paying the alimony, whether it be the husband or the wife.[61]

Section 88.291 of the Florida Statutes (1969), commonly referred to as the Uniform Reciprocal Enforcement of Support Law, provides that any proceedings under the law shall not confer jurisdiction over the parties in any other proceedings. As a result, when a wife brings an ac-

54. Black v. Black, 247 So.2d 775 (Fla. 3d Dist. 1971).
55. 247 So.2d 13 (Fla. 2d Dist. 1971).
56. *See* Fla. Laws 1971, ch. 71-241, § 10, *amending* FLA. STAT. § 61.08 (1969).
57. Arthur v. Arthur, 243 So.2d 8 (Fla. 2d Dist. 1971).
58. Chester v. Chester, 241 So.2d 190 (Fla. 3d Dist. 1970).
59. Comcowich v. Comcowich, 237 So.2d 66 (Fla. 3d Dist. 1970).
60. Barfield v. Barfield, 226 So.2d 132 (Fla. 3d Dist. 1969).
61. Fla. Laws 1971, ch. 71-241, § 13, *amending* FLA. STAT. § 61.11 (1969).

tion in Florida to enforce the payment of arrearages due under a support order of New Jersey, it is reversible error for the trial court to enter a counterclaim for divorce filed by the husband.[62]

The case of *Bendl v. Bendl*[63] presents an intertwining of the law governing homesteads, estates by the entirety and claims for accrued alimony. Charles and his first wife owned property as an estate by the entirety. They were divorced (becoming tenants in common) and Charles married a second wife who lived with him on the property. In 1963 the first wife secured a judgment against Charles for accrued alimony but the recorded judgment was never satisfied. Subsequently, pursuant to the 1968 Florida Constitution, Charles and his second wife executed a deed conveying Charles' one-half of the property to themselves as an estate by the entirety. Later, Charles died and the first wife sought to enforce the judgment against the second wife's one-half interest and to partition the property between the two women. The court held that the property did not pass to the second wife as homestead property. Rather, it vested by operation of law in the surviving spouse. Between the divorce from the first wife and the marriage of the second, Charles occupied the property as a homestead and the judgment could not constitute a lien against the property while it had this status. The court held that, due to the particular facts in the case, the homestead status was lost at the time of Charles' death. Therefore, the entire estate of Charles vested in the second wife and would not be subject to the lien of the judgment. Hence, partition would be justified with each wife receiving one-half of the real estate.

The sentencing of a husband to jail for contempt for his failure to pay an award of alimony and attorney's fees does not constitute an unconstitutional imprisonment for debt. It is not the failure to pay the award but the disobedience of the court's command which furnishes grounds for the imprisonment.[64]

The District Court of Appeal, First District, has held that when the wife has a civil cause of action for non-support she should not utilize the process of criminal prosecution in lieu of the civil, and a judgment of acquittal should be entered upon the defendant's motion in the criminal trial court.[65] It is submitted that the court has butchered the law by its poor analysis of the problem; what the wife "should" do has no bearing on what the law "is."

E. *Modification of Alimony and Support*

Section 61.14 of the Florida Statutes (1969) was amended by the Dissolution of Marriage Act to be consistent with the concept that either party may be ordered to pay alimony.[66] A new subsection, (4), was added:

62. Simpson v. Simpson, 247 So.2d 792 (Fla. 3d Dist. 1971).
63. 246 So.2d 574 (Fla. 3d Dist. 1971).
64. DeFrances v. Knowles, 244 So.2d 168 (Fla. 2d Dist. 1971).
65. Russ v. State, 242 So.2d 148 (Fla. 1st Dist. 1970).
66. Fla. Laws 1971, ch. 71-241, § 16, *amending* FLA. STAT. § 61.14 (1969).

> (4) If a party applies for a reduction of alimony or child support and the circumstances justify the reduction, the court may make the reduction of alimony or child support regardless of whether or not the party applying for it has fully paid the accrued obligations to the other party at the time of the application or at the time of the order of modification.

The above statutory change has been long overdue. Under the former rule, a husband who was behind in his payments could not apply for a modification of future payments unless he either paid the unpaid amounts or proved that he was unable to do so through no fault of his own. If unable to prove this latter point, he could be denied any relief.[67]

It is erroneous for the trial court to order the former husband to pay increased child support and alimony for a retroactive period which precedes the date of the filing of the petition for modification.[68]

Alimony and child support payments as provided for in a property settlement agreement may be modified subsequently upon a showing of a change of conditions.[69]

A trial court may not modify the court-ordered alimony provisions in a final divorce decree subsequent to the death of the former wife.[70]

A court may modify an award of alimony by increasing the amount for a limited time in order to pay for unanticipated education expenses even though the wife admits that there has not been a substantial change in her ordinary expenses aside from the educational ones.[71]

Under former section 61.14 of the Florida Statutes (1969), the alimony provisions of a final divorce decree could be modified in the event of a subsequent change in the husband's financial ability or in the event of subsequent changes in the wife's needs. The statute did not require that there be both a change in the husband's financial ability and the wife's needs.[72] The amended version of section 61.14 provides for modification in the event that "the circumstances or the financial ability of either party has changed . . . ."[73] As a result, it would appear that the amended statute is entirely in accord with the prior interpretation of the statute.

It is within the discretion of a trial court judge to grant a petition for modification of alimony based upon subsequent unusual medical expenses which were not contemplated at the time of the final divorce decree.[74]

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67. *See, e.g.*, Blanton v. Blanton, 154 Fla. 750, 18 So.2d 902 (1944); Selige v. Selige, 138 Fla. 783, 190 So. 251 (1939); Ohmes v. Ohmes, 200 So.2d 849 (Fla. 2d Dist. 1967); English v. English, 117 So.2d 559 (Fla. 3d Dist. 1960).

68. Ramona v. Ramona, 244 So.2d 547 (Fla. 3d Dist. 1971).

69. *See, e.g.*, Ohmes v. Ohmes, 200 So.2d 849 (Fla. 3d Dist. 1967); English v. English, 117 So.2d 559 (Fla. 3d Dist. 1960); Blanton v. Blanton, 154 Fla. 750, 18 So.2d 902 (1944); Selige v. Selige, 138 Fla. 783, 190 So. 251 (1939).

70. Van Boven v. First Nat'l Bank, 240 So.2d 329 (Fla. 4th Dist. 1970).

71. Livenston v. Livenston, 233 So.2d 841 (Fla. 3d Dist. 1970).

72. Rogers v. Rogers, 229 So.2d 618 (Fla. 2d Dist. 1969), *clarifying* Knight v. Knight, 205 So.2d 353 (Fla. 2d Dist. 1967).

73. Fla. Laws 1971, ch. 71-241, § 16, *amending* FLA. STAT. § 61.14 (1969).

74. Cuneo v. Cuneo, 229 So.2d 266 (Fla. 4th Dist. 1969).

V. Property Rights

A. *Jurisdiction*

A court does not have power to retain jurisdiction after the final judgment in order to subsequently enter a postjudgment order determining the property rights of the parties. A court may not reserve jurisdiction in its final judgment to settle property rights at some time in the future.[75]

B. *Dower in Personal Property*

During the lifetime of the spouses, a wife's right of dower in real and personal property of her husband is inchoate, and a husband may defeat the inchoate dower right in *personal* property by disposing of the property during his lifetime by sale or gift. Therefore, there is no basis in law or equity for an equity court to enjoin a husband from disposing of his personal property and to award the wife a judgment for the present value of the inchoate dower upon an annuity basis.[76]

C. *Estates by the Entirety*

It is error for the trial court to recognize that the spouses are tenants by the entirety in certain property and then to fail to adjudicate the wife's claim to a special equity in this property.[77] It is also reversible error to award exclusive possession of jointly held real estate to the husband. The parties become tenants in common in accordance with Florida Statute section 689.15 (1969).[78]

An interesting facet of the estate in common concept arose in *Coggan v. Coggan*.[79] A husband and wife held title to a professional office building as an estate by the entirety; upon their divorce they became tenants in common. The husband, a physician, continued to use the property after the divorce as his office and consistently denied any co-tenancy in the building. The wife brought suit for partition and asked for an accounting of one-half of the use value of the building from the date of the divorce. The trial court and the District Court of Appeal, Second District, held that since the ex-husband from the time of the divorce denied that the ex-wife had any interest in the property, this was the equivalent of an ouster of the wife. Therefore, because of the ouster, the husband was liable for one-half of the rental value of the property. However, the Supreme Court of Florida reversed the second district's decision and held that the husband was not liable for one-half of the rental unless he actually or constructively ousted his former wife or, in some manner,

75. Sistrunk v. Sistrunk, 235 So.2d 53 (Fla. 4th Dist. 1970). *Accord*, Penton v. Penton, 246 So.2d 623 (Fla. 3d Dist. 1971).

76. Libberton v. Libberton, 240 So.2d 336 (Fla. 4th Dist. 1970).

77. Henderson v. Henderson, 226 So.2d 699 (Fla. 4th Dist. 1969).

78. Watson v. Watson, 246 So.2d 131 (Fla. 4th Dist. 1971).

79. 230 So.2d 34 (Fla. 2d Dist. 1969).

impressed upon her the fact that he was claiming exclusive possession hostile to her.[80]

When a divorce judgment has been entered and the appeal period has expired, the trial court has no jurisdiction to attempt to divest the wife of her one-half undivided interest as a tenant in common to property which was held during the marriage as an estate by the entirety. Any order of the court permitting the husband to sell the property is effective solely over the husband's one-half interest, and any purchaser from the husband succeeds only to this limited interest.[81]

A husband who uses fraud and deceit in the sale of real property held as an estate by the entirety may subject his wife to liability to the purchasers on the ground that he acted as her agent in the sale of her "interest" in the property.[82]

When a husband creates an estate by the entirety in land with his wife and the parties are subsequently divorced, they become tenants in common unless the husband is able to rebut the presumption that he had made a gift to his wife by clear and convincing evidence.[83] On the other hand, when it is shown that the wife's separate funds have been used to purchase property taken in the joint names of the spouses and the husband has contributed nothing towards the purchase, there is no presumption of a gift. Rather, the presumption is that the husband holds as a trustee under a resulting trust with the wife as beneficiary, or that she has a special equity in the property. However, when the wife furnishes all of the cash towards the purchase price of corporate stock and the spouses sign a purchase-money promissory note for the balance, the wife is entitled to sole title to that aliquot portion of the stock purchased with her separate funds. As to the remaining stock, the parties are tenants in common.[84]

It would appear that the trial court may order the division of jointly held properties in a divorce action when the complaint prays for this relief and the defendant did not object to this procedure during the final hearing.[85]

D. *Use of the Marital Home*

It is reversible error for the trial court to order the husband to make the monthly mortgage payments on the family home and also to order that, in the event of the sale of the home, the monthly mortgage payments are to be returned to the husband. The effect of such an order would relieve the husband of half of his obligation to provide a place for his wife and children to live.[86] On the other hand, a trial court may grant

80. Coggan v. Coggan, 239 So.2d 17 (Fla. 1970).
81. Thomas v. Greene, 226 So.2d 143 (Fla. 1st Dist. 1969).
82. DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3d Dist. 1970).
83. Horne v. Horne, 247 So.2d 99 (Fla. 3d Dist. 1971).
84. Hegel v. Hegel, 248 So.2d 212 (Fla. 3d Dist. 1971).
85. *See* Butcher v. Butcher, 239 So.2d 855 (Fla. 2d Dist. 1970).
86. Centrella v. Centrella, 229 So.2d 882 (Fla. 3d Dist. 1969).

the use of the marital home, formerly held as an estate by the entirety, to the wife and children without requiring the husband to make the monthly mortgage payments. If the wife should make the payments, it would appear that she is entitled to credit for one-half of the total payments upon a subsequent sale of the property.[87]

In *Mintz v. Ellison*,[88] a final decree of divorce provided that the former home of a couple was to be used by the wife and their two minor children until a certain date and then it was to be sold and the proceeds divided in a certain manner. Subsequently, the former wife vacated the premises and brought suit to compel the former husband to pay the mortgage payments due after she vacated the premises. The trial court modified the final judgment and granted this relief to the wife. The District Court of Appeal, Third District, reversed on the basis that the trial court lacked jurisdiction to modify the final judgment in this manner.

A court may order a husband (during the pendency of a divorce case) to vacate the marital home if public decency, safety of the parties or welfare of the children requires this action. However, in the absence of the foregoing, it is erroneous to order an innocent husband to leave the marital home on the basis that his wife "harbors deep-seated antagonism to the defendant which is intensified by the continued presence of the defendant in the home."[89]

A former husband cannot create an enforceable lien on his undivided one-half interest in homestead property (which is occupied by his former wife and the couple's children) by giving his attorney (who was aware of the status of the property) promissory notes secured by a mortgage.[90]

E. *Estoppel*

A classic case of estoppel was illustrated in *Edelstein v. Peninsular Lumber Supply Co.*[91] A husband and wife were involved in divorce proceedings when a suit for foreclosure of mortgage was brought against them. Prior to the foreclosure suit, the husband had conveyed his interest in the property to his wife as part of the divorce settlement. Service of process in the foreclosure action was made on the husband in his own behalf and service was made on the wife by leaving a copy of the summons with the husband. The husband never informed the wife of the summons (the mortgagee did not know of the husband's failure to inform his wife of the summons), but she did have knowledge of the foreclosure proceedings which were continued for two months in order to give her an opportunity to pay the amount owing. The wife was unable to secure the needed funds and the property was subsequently foreclosed and sold to a corporation controlled by the wife's former husband. The

87. Stewart v. Stewart, 231 So.2d 230 (Fla. 3d Dist. 1970).
88. 233 So.2d 156 (Fla. 3d Dist. 1970).
89. Daniel v. Daniel, 236 So.2d 197 (Fla. 1st Dist. 1970).
90. Daniels v. Katz, 237 So.2d 58 (Fla. 3d Dist. 1970).
91. 247 So.2d 721 (Fla. 2d Dist. 1971).

corporation erected a building on the property, and later defaulted on a new mortgage given by it to the same mortgagee. The mortgagee brought foreclosure proceedings against the corporation and the former wife. The lower court held that the former wife, because of her standing by with knowledge of the construction of the building for a period of approximately fifteen months without raising her claim, was estopped from attacking the foreclosure proceedings. It should be noted that the wife was simultaneously raising the alleged fraud in the court which handled the original divorce proceedings as well as in the foreclosure proceedings.

F. *Legislation*

A married woman may now convey her real property, including dower interests in her husband's property, without the joinder of her husband. If anything, married women are "more equal" than married men because, while wives may convey without consent of their husbands, husbands may not convey without consent of their wives.[92]

VI. ATTORNEY'S FEES

A. *Dissolution of Marriage Act*

Florida Statute section 61.16 (1969) was extensively amended by the Dissolution of Marriage Act:[93]

> 61.16 Attorney's fees, suit money and costs.—The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money and the cost to the other party of maintaining or defending any proceedings under this act, including enforcement and modification proceedings. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

This modestly sized amendment of seventy-six words overrules countless cases. An attorney may now enforce an attorney's fee award in his own name, and, hopefully, the courts will hold that he may appeal an allegedly insufficient award in his own name. Now a wife, or husband, may ask for an attorney's fee in a modification proceeding. Previously, fees were awarded only when the wife was enforcing an award or resisting an attempt by the husband to modify it. The most dramatic change, of course, is the fact that a court may now order the wife to pay her husband's attorney's fees.

B. *Rights to an Award*

In a case of apparent first impression, the District Court of Appeal, First District, held that when a wife is in wilful contempt of court as a

92. Fla. Laws 1970, ch. 70-4, *amending* FLA. STAT. §§ 694.04, 708.08, 708.09 (1969), *repealing* FLA. STAT. §§ 693.01, 693.02, 693.03, 693.04, 693.05, 693.13, 693.14, 708.01, 708.02, 708.03, 708.04, 708.06, 708.07, 62.031 (1969) [Conforming to FLA. CONST. art. X, § 5.].

93. Fla. Laws 1971, ch. 71-241, § 17, *amending* FLA. STAT. § 61.16 (1969).

result of removing herself and her children from the state after the commencement of the suit, it is an abuse of discretion for the trial court judge to award attorney's fees to her. The court stated:

> Though fees which have been allowed for a wife's attorney belong to her counsel, the award of the fee is not for the benefit of her counsel, but is for the equitable objective of putting the wife on substantially even terms with her husband.[94]

It would not appear to be an abuse of discretion for the trial court to deny an award of attorney's fees and suit money to the wife when the court finds that she has independent means and that the suit for divorce was a groundless one.[95]

It is a violation of the Code of Ethics for an attorney to testify for his client when he is also acting as attorney for the client in the trial of a case. It follows, therefore, that it is an abuse of discretion for the judge to award legal fees when the attorney also testifies in behalf of his client.[96]

In *Green v. Green*,[97] the lower court had ordered the husband to maintain the home for the benefit of his ex-wife and children. Subsequently, the ex-wife instituted proceedings requesting the court to fix responsibility on the ex-husband with reference to the sale of the family home to satisfy income tax obligations. While the husband was not in default of the original order, the appellate court upheld the award of attorney's fees to the ex-wife on the ground that she was asking the aid of the court to compel him to comply with the judgment regarding the property.

C. *Corrective Orders*

A trial court judge signed a final order dismissing with prejudice the plaintiff's complaint for divorce and dismissing without prejudice the defendant's counterclaim for separate maintenance. The order inadvertently omitted a reservation of jurisdiction over the parties and the matter of attorney's fees and costs for defendant's attorney. However, the judge was allowed to enter a corrective order under rule 1.540 of the Florida Rules of Civil Procedure.[98]

In another case, the trial court awarded attorney's fees to the wife in accordance with the minimum St. Petersburg Bar Association fee for an uncontested divorce. The former husband subsequently failed to pay the "minimum fee." The court, upon motion of the ex-wife and after hearing arguments of the parties, entered a nunc pro tunc order providing that the former husband pay $250.00 in attorney's fees to enable the wife

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94. Keena v. Keena, 245 So.2d 665, 667 (Fla. 1st Dist. 1971).

95. Rine v. Rine, 240 So.2d 655 (Fla. 3d Dist. 1970).

96. Hubbard v. Hubbard, 233 So.2d 150 (Fla. 4th Dist. 1970).

97. 230 So.2d 492 (Fla. 3d Dist. 1970).

98. Fatolitis v. Fatolitis, 247 So.2d 525 (Fla. 2d Dist. 1971).

to secure a rule to show cause to enforce the award. The trial court's order was upheld on appeal.[99]

VII. ANTENUPTIAL AND POST-NUPTIAL PROPERTY SETTLEMENT AGREEMENTS

A. *Antenuptial Agreements*

The Supreme Court of Florida reversed the District Court of Appeal, Third District, decision in *Posner v. Posner*[100] which was criticized by the author in the preceding survey.[101] The supreme court held that the alimony provisions of an antenuptial agreement are binding upon the parties in the event of a subsequent divorce, provided that the husband has made full disclosure of his assets, etc., in accordance with the rules articulated in the case of *Del Vecchio v. Del Vecchio*.[102] The court held, in addition, that the amounts of alimony as provided in the antenuptial agreement are subject to subsequent increase or decrease upon a change of conditions pursuant to former section 61.14 of the Florida Statutes.

B. *Post-Nuptial Agreements*

1. ATTACKS ON VALIDITY

Rule 1.540(b) of the Florida Rules of Civil Procedure limits certain attacks on fraudulently obtained decrees to one year after the entering of the decree. However, it does not preclude a former wife from bringing an action to set aside a decree which approved a separation agreement upon the basis that the former husband lied about his assets more than a year after the decree was entered.[103]

It would appear that the District Court of Appeal, Fourth District, is of the view that when a wife is represented by an attorney and her husband is not represented, the husband is not a fiduciary in his negotiations resulting in a property settlement. He is under no duty "on his own motion, to make any representations to her with respect to his property."[104]

When a husband in a post-nuptial agreement has released his rights in any potential homestead property which might be owned by his wife, whereas in an antenuptial agreement he released only his nonexistent curtesy or intestacy rights in his wife's property, the post-nuptial agree-

99. Peters v. Peters, 243 So.2d 424 (Fla. 2d Dist. 1971).

100. Posner v. Posner, 233 So.2d 381 (Fla. 1970), *reversing* Posner v. Posner, 206 So.2d 416 (Fla. 3d Dist. 1968). For further proceedings, see Posner v. Posner, 237 So.2d 186 (Fla. 3d Dist. 1970); Posner v. Posner, 245 So.2d 139 (Fla. 3d Dist. 1971).

101. Murray, *Family Law, 1967-1969 Survey of Florida Law*, 24 U. MIAMI L. REV. 296, 313 (1970).

102. 143 So.2d 17 (Fla. 1962).

103. Scales v. Scales, 237 So.2d 50 (Fla. 3d Dist. 1970).

104. Zakoor v. Zakoor, 240 So.2d 193 (Fla. 4th Dist. 1970).

ment was supported by consideration.[105] This case is an illustration of the fundamental contract principle that sufficient consideration may consist of a mere pepper-corn.

2. CONSTRUCTION OF AGREEMENTS

In *Aetna Life Insurance Company v. White*,[106] a husband and wife entered into a property settlement agreement containing a general clause which stated the "intention of the parties that their relations with respect to property and financial matters be fixed by this Agreement." Unfortunately for the husband's estate, the life insurance policy was not expressly referred to in the agreement. In a case of apparent first impression in Florida, the District Court of Appeal, Fourth District, held that the former wife, named prior to the divorce as the named beneficiary, was entitled to the proceeds of a life insurance policy on the life of the deceased former husband. In so holding, the court placed great weight upon the fact that the agreement contained a clause wherein the husband released the wife from all claims, rights, causes of action, etc., which he had against her. However, the agreement was silent as to whether the wife similarly waived all of her claims against the husband.

When the terms of a property settlement agreement, which are made part of a final decree of divorce, provide that the father will be liable for the support of the children after his death, his estate is not entitled to a credit or discharge of this obligation by reason of death benefit payments made to the minor children by the Social Security Administration.[107]

The term "gross income" as used in a property settlement agreement was interpreted by the District Court of Appeal, Fourth District. The property settlement agreement in question provided that the wife was to receive one-third of her husband's yearly "gross income" based upon his gross income of the previous year. At the time of the divorce, the husband owned a business which he later sold. The court held that it was the intention of the parties in their use of the term "gross income" to mean that the wife should receive one-third of the net gain that the husband received from the sale as well as one-third of social security payments paid to him.[108]

3. MODIFICATION

Although a pure property settlement agreement is not subject to modification, a separation agreement, providing for a division of the property and for the care and support of the children and wife, is subject to modification insofar as these continuing liabilities are concerned. This is particularly true when the agreement provides that the court shall

105. First Nat'l Bank v. Morse, 248 So.2d 658 (Fla. 2d Dist. 1971).
106. 242 So.2d 771, 773 (Fla. 4th Dist. 1971).
107. Cohen v. Cohen, 246 So.2d 581 (Fla. 3d Dist. 1971).
108. Johnson v. Johnson, 248 So.2d 195 (Fla. 4th Dist. 1971).

have continuing jurisdiction over alimony and maintenance for the wife.[109]

4. TAXATION

Taxation vis-à-vis alimony was in issue in *Barsumian v. Barsumian*.[110] A separation agreement between a husband and wife provided that the husband was obligated to pay the wife $750 per month as "alimony and support."[111] The wife was obligated to pay the federal income tax on this amount. These payments were to continue "so long as the wife is living and remains unmarried."[112] The agreement, however, failed to mention anything about support payments for the parties' minor child. Payments were made for six years. The husband then brought proceedings to have the court allocate what portion of the $750 was for alimony and what portion was for child support. The husband's obvious intention was that the monthly payment would be reduced when the minor child reached majority. The trial court held that $279 would be considered in the future as child support, and the former wife appealed. The District Court of Appeal, Fourth District, held that the former husband was equitably estopped from asserting that a portion of the payment was for child support after he had maintained for six years that it was alimony and after his former wife had paid taxes on this "alimony" during that period.

The term "net income" as used in a property settlement agreement has been defined to mean "total gross income less the actual expenses in earning said income."[113] As a practical matter, since there is no fixed criteria (compare accounting principles with the Internal Revenue Code) as to the meaning of "actual expenses," what is the value of the court's definition?

VIII. SEPARATE MAINTENANCE

The Dissolution of Marriage Act has completely revamped section 61.09 of the Florida Statutes (1969) and has amended section 61.10:[114]

> 61.09 Nonsupport.—If a person having the ability to contribute to the maintenance of his or her spouse and support of his or her minor children fails to do so, the spouse who is not receiving support or who has custody of the children may petition the court for alimony and for support for minor children without petitioning for dissolution of marriage and the court shall enter such order as it deems just and proper.
>
> 61.10 Rights of parties unconnected with dissolution.—

109. Putnam v. Putnam, 226 So.2d 30 (Fla. 4th Dist. 1969).
110. 235 So.2d 515 (Fla. 4th Dist. 1970).
111. *Id.* at 516.
112. *Id.*
113. Stayman v. Stayman, 232 So.2d 402, 403 (Fla. 3d Dist. 1970).
114. Fla. Laws 1971, ch. 71-241, §§ 11-12.

> Except when relief is afforded by some other pending civil action or proceeding a spouse residing in this state apart from his spouse and minor children, whether or not such separation is through his fault, may obtain an adjudication of his obligation to maintain his spouse and minor children, if any. The court shall adjudicate his financial obligations to such spouse or children, or both and fix the custody and visitation rights of the parties and enforce them. Such an action does not preclude either party from maintaining any other proceeding under this chapter for other or additional relief at any time.

The District Court of Appeal, Fourth District, has held that when a husband brings a suit under section 61.10 of the Florida Statutes (1969) for an adjudication of his financial obligations to his wife and family and to fix custody and visitation rights of the parties, the wife may counterclaim under section 61.09 of the Florida Statutes (1969) for separate maintenance with grounds for divorce. It is reversible error for the trial court to strike the counterclaim upon the grounds of redundancy because the elements of proof necessary to establish a claim under section 61.09 (1969) are distinct from the elements necessary under section 61.10 (1969). In addition, if the counterclaim were stricken, not only would the wife be collaterally estopped from bringing a subsequent action under section 61.09, but it would also leave her no way, other than a divorce action, to be released from the control of her husband. Lastly, section 61.10 does not provide for court costs and attorney's fees for the wife as does section 61.09.[115]

It should be noted that newly adopted section 61.16[116] provides for attorney's fees in actions under amended section 61.10 as well as under section 61.09. Furthermore the "grounds for divorce" concept in former section 61.09 has been eliminated in the new version.[117]

A trial court is justified in refusing to award separate maintenance without divorce (provided for by former section 61.09) to a wife when the evidence shows that the husband has been voluntarily making adequate support payments to her.[118] The result should be the same under the amended version of section 61.09.[119]

IX. Custody and Support of Children

A. *Custody*

1. DISSOLUTION OF MARRIAGE ACT

The Dissolution of Marriage Act extensively amended section 61.13 of the Florida Statutes (1969) with respect to the question of custody:[120]

115. Dover v. Dover, 241 So.2d 740 (Fla. 4th Dist. 1970).
116. Fla. Laws 1971, ch. 71-241, § 17, *amending* FLA. STAT. § 61.16 (1969).
117. Fla. Laws 1971, ch. 71-241, § 11, *amending* FLA. STAT. § 61.09 (1969).
118. King v. King, 240 So.2d 326 (Fla. 1st Dist. 1970).
119. Fla. Laws 1971, ch. 71-241, § 11, *amending* FLA. STAT. § 61.09 (1969).
120. Fla. Laws 1971, ch. 71-241, § 15, *amending* FLA. STAT. § 61.13 (1969).

(2) 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. Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody.

The placing of men on a parity with women in custody matters is a long overdue change which, in many cases, should result in a more rational selection process. However, as was stated in a recent case:[121]

> In custody cases it is often impossible to do the right thing because there is no right thing. Here is a case in which both mother and father are less than ideal parents, . . .
>
> We cannot say that the judgment entered was the right one. There is no right one where neither parent is adequate to the challenge of parenthood. But it was agreed to in open court and is not legally erroneous.
>
> Affirmed.

Under the former law, the mother was normally preferred as custodian of young children. However, she was not awarded custody in every case and a temporary custody award to the father would be upheld in appropriate circumstances.[122]

2. JURISDICTION

Once a trial court acquires jurisdiction over minors within the state as an ancillary phase of a divorce proceeding, jurisdiction cannot be defeated by the mother unlawfully removing herself and her children from the state.[123]

The District Court of Appeal, Fourth District, held that a Florida court had no jurisdiction to award custody of a child who was not physically present in Florida, even though both parents were before the court and both were domiciled in Florida. In a very strong dissent, Judge Walden argued that the Florida courts have jurisdiction to award custody when the child is domiciled in Florida, even though the child might be physically living in a foreign state. It is submitted that the dissenting opinion is the correct one; the majority overlooked the distinction between physical presence and domicile.[124]

The Florida court first entering a custody award has continuing jurisdiction over the custody facet and this continuing jurisdiction is exclusive of any other Florida court which subsequently attempts to modify the custody award.[125] In a similar vein, a Florida court which makes a cus-

121. Duffy v. Duffy, 247 So.2d 493 (Fla. 2d Dist. 1971).
122. Curtis v. Curtis, 248 So.2d 204 (Fla. 2d Dist. 1971).
123. Keena v. Keena, 245 So.2d 665 (Fla. 1st Dist. 1971).
124. Castle v. Castle, 247 So.2d 455 (Fla. 4th Dist. 1971).
125. Haley v. Edwards, 233 So.2d 647 (Fla. 4th Dist. 1970).

todial determination retains jurisdiction to modify its custody order. This jurisdiction is exclusive so that a court in another Florida county does not have jurisdiction in habeas corpus proceedings to modify the determination.[126]

The District Court of Appeal, Fourth District, has held that the circuit court, in a habeas corpus proceeding involving child custody, retains continuing jurisdiction in the proceeding to enforce and/or modify its final judgment at a subsequent date. On a petition for rehearing, the court certified the question to the Supreme Court of Florida.[127]

When the maternal grandfather seeks a writ of habeas corpus in the circuit court regarding the custody of his grandchildren who are in the hands of their paternal grandfather, the circuit court may appoint the paternal grandfather as the guardian of the children. Although guardianship matters normally are conducted in the county judge's court, the circuit court has concurrent jurisdiction under the Florida Statutes.[128]

3. DUE PROCESS

In a child custody case, the trial court judge requested investigations regarding custody to be made by the Florida and Pennsylvania welfare departments. The judge also announced that further testimony would be taken after these reports were obtained. When the judge entered a final order without giving the parties the opportunity to present further testimony, it constituted a deprivation of due process.[129]

It is a denial of due process for a trial court judge to enter a final decree of divorce awarding custody of a minor child to a father when the father never prayed for custody. The record showed that the father and mother stipulated that the wife would have custody and a default was entered against the wife who did not appear at the hearing.[130]

It is also reversible error for a trial court judge, in deciding a child custody question, to consider a report from a social worker who interviewed both parents and a report from probation officers when these reports have not been introduced into evidence and are not available to the parties.[131]

4. DIVIDED CUSTODY

"Split custody can be condoned if there are special circumstances or legally unequal facts present to support such an arrangement."[132] However,

126. Jones v. State *ex rel.* Greathouse, 241 So.2d 432 (Fla. 1st Dist. 1970).

127. Crane v. Hayes, 244 So.2d 544 (Fla. 4th Dist. 1971).

128. Brooks v. McCutcheon, 244 So.2d 515 (Fla. 1st Dist. 1970), *citing* FLA. STAT. § 744.06(3) (1969).

129. Burton v. Walker, 231 So.2d 20 (Fla. 2d Dist. 1970).

130. Williams v. Williams, 227 So.2d 746 (Fla. 2d Dist. 1969).

131. *In re* Brown, 246 So.2d 166 (Fla. 3d Dist. 1971).

132. Wonsetler v. Wonsetler, 240 So.2d 870, 871 (Fla. 2d Dist. 1970). Hare v. Potter, 233 So.2d 653 (Fla. 4th Dist. 1970) has apparently countenanced a divided custody award in modification proceedings.

when both parents are fit to have custody, it is error to order a split custody arrangement.

5. MODIFICATION OF CUSTODY AWARDS

It would appear to be erroneous for a trial court to modify a child custody award by providing that the father might permanently remove the children to Michigan when this would have the practical effect of preventing the divorced mother from visiting the children which she had been doing on an almost daily basis.[133]

When a wife petitions for a modification of a child support award order based upon a change of circumstances since the last modification, it is incorrect for the trial judge to dismiss her petition upon the grounds of res judicata or collateral estoppel unless he grants a full evidentiary hearing on her petition.[134]

Although the record may reveal that a wife has indulged in conduct contrary to the basic moral standards of any community, the appellate court may refuse to upset an award of child custody to the wife when the custody order recites that the trial court judge reserves jurisdiction for a period of six months in order to review the living conditions of the children at that time.[135]

6. VISITATION RIGHTS

A trial court judge may sua sponte temporarily terminate a stepfather's right of visitation of his stepdaughters when the trial court judge believes that the stepfather is preoccupied with sex, even though the former wife has not sought termination of visitation rights. It is reversible error, however, for the trial court judge to *permanently* deprive the stepfather of his visitation rights without affording him a full hearing on this issue.[136]

7. FOREIGN JUDGMENTS

If minor children are within the state of Florida, the Florida courts need not honor a custody decree of a foreign court and should not defer to what a foreign court may do regarding the custody in a pending action. The Florida courts have a duty to decide the custody question on the merits in accordance with the best interests of the children.[137]

The temporary custody order of a foreign jurisdiction is not entitled to full faith and credit in Florida. However, it is entitled to great weight and respect under the doctrine of comity. Normally, the Florida court, under the comity doctrine, will respect the foreign decree unless there has

133. McManus v. McManus, 238 So.2d 473 (Fla. 2d Dist. 1970).

134. Chandler v. Chandler, 226 So.2d 697 (Fla. 4th Dist. 1969).

135. Bradley v. Bradley, 244 So.2d 498 (Fla. 1st Dist. 1971).

136. Longo v. Longo, 245 So.2d 658 (Fla. 4th Dist. 1971).

137. Anderson v. Anderson, 234 So.2d 722 (Fla. 3d Dist. 1970).

been, since the rendition of the decree, a change in circumstances which would justify a change in custody.[138]

In *Coker v. Montgomery*,[139] the respondent in the habeas corpus action was not a party to the original divorce action but had custody of the child pursuant to a court order entered in the divorce action. The District Court of Appeal, First District, held that habeas corpus is the appropriate remedy to change the provisions of a foreign divorce decree as to the custody of the minor child.

B. *Support*

1. DISSOLUTION OF MARRIAGE ACT

The Dissolution of Marriage Act made great substantive changes in section 61.13 of the Florida Statutes (1969) with regard to the support of children:[140]

> (1) In a proceeding for dissolution of marriage, the court may at any time order either or both parents owing a duty of support to a child of the marriage to pay such support as from the circumstances of the parties and the nature of the case is equitable. The court initially entering an order requiring one or both parents to make child support payments shall have continuing jurisdiction after the entry of such initial order to modify the amount of the child support payments, or the terms thereof, where such is found to be necessary by the court for the best interests of the child or children, or where such is found to be necessary by the court because there has been a substantial change in the circumstances of the parties. The court initially entering a child support order shall also have continuing jurisdiction after the entry of such order to require the person or persons awarded custody of the child or children to make a report to the court on terms prescribed by the court as to the expenditure or other disposition of said child support payments.
>
> (2) ...
>
> (3) In any proceeding under this act, the court at any stage of the proceeding and after final judgment may make such orders about what security is to be given for the care, custody, and support of the minor children of the marriage, as from the circumstances of the parties and the nature of the case is equitable.

The attachment and garnishment section of the statutes, section 61.12, was amended by the Dissolution of Marriage Act to provide that attachment and garnishment may be used in child support matters.[141]

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138. Powell v. Powell, 242 So.2d 138 (Fla. 1st Dist. 1971).

139. 238 So.2d 490 (Fla. 1st Dist. 1970).

140. Fla. Laws 1971, ch. 71-241, § 15, *amending* FLA. STAT. § 61.13 (1969).

141. Fla. Laws 1971, ch. 71-241, § 14, *amending* FLA. STAT. § 61.12 (1969).

2. CRITERIA FOR THE AWARD

An ex-husband testified that he was willing to pay all medical bills incurred for medical treatment of his children except for expenses for cosmetic forms of dentistry and surgery incurred without his approval. The trial judge ordered the husband to pay only major medical and dental bills. The appellate court reversed the trial court and stated that the husband should pay *all* medical bills "provided that he shall not be required to pay such expenses for cosmetic forms of dentistry and surgery unless incurred after his prior consent thereto."[142]

It is error for a trial court to fail to require a husband to continue paying the premiums on a health and accident insurance policy which he maintained on his wife and minor daughter during the marriage because of the facts of the case which the court failed to disclose. These undisclosed facts also made it error for the trial court judge to fail to require the husband to pay the expenses for summer camp for his daughter and to pay a $1,000 air conditioning bill which the wife had incurred for air conditioning the marital home.[143]

3. ENFORCEMENT OF ALIMONY AND CHILD SUPPORT AWARD

Florida Statute section 61.17 (1969) was amended by the new Dissolution of Marriage Act by the insertion of the word "child" before the word "support" throughout the section.[144] A similar change was made in section 61.18 where the word "party" was substituted for the words "the wife" in order to be consistent with the concept that either party may receive funds from the other for child support.[145]

4. ENFORCEMENT OF SUPPORT AWARD

Under a Florida statute, the wages of the head of a household may be garnished to enforce court orders "for alimony, suit money or support, or other orders in actions for divorce or alimony."[146] The District Court of Appeal, Fourth District, has held that when the wife has secured a common law judgment for arrearages accruing under a support agreement between a husband and wife which was never made part of a divorce decree or judgment, garnishment cannot be employed because the judgment is based upon a contract rather than upon an order of support in an action for divorce or alimony.[147]

In a case of first impression, the District Court of Appeal, First

142. Kirk v. Kirk, 230 So.2d 694, 696 (Fla. 3d Dist. 1970).
143. Taxay v. Taxay, 246 So.2d 616 (Fla. 3d Dist. 1971).
144. Fla. Laws 1971, ch. 71-241, § 18, *amending* FLA. STAT. § 61.17 (1969).
145. Fla. Laws 1971, ch. 71-241, § 19, *amending* FLA. STAT. § 61.18 (1969).
146. FLA. STAT. § 61.12 (1969).
147. Healey v. Toolan, 227 So.2d 55 (Fla. 4th Dist. 1969). *See* Kowel v. Kowel, 240 So.2d 508 (Fla. 3d Dist. 1970), which affirmed the trial court's refusal to compel the husband to produce stock certificates in order to make them available for levy in an anticipated judgment for child support arrearages.

District, held that a trial court loses jurisdiction to cite a father for contempt for his failure to abide by a child support order at the time the children become adults even though the order was for a period long prior to the date of the contempt proceedings.[148]

A former wife sought to have the trial court enforce the support provisions of a final judgment which provided for child support for seven children. The husband defended his failure to comply fully with the judgment on the grounds that three of the children had assumed residence with him rather than with their mother. The appellate court held it was not erroneous for the judge to reject consideration of the husband's defense and limit the question to one of compliance with the original judgment. The appellate court was careful to note, however, that its decision would not preclude the former husband from raising this issue of change of residence in appropriate modification proceedings.[149]

5. MODIFICATION OF SUPPORT AWARD

The case of *Jelke v. Jelke*[150] illustrates the danger in "being a volunteer." Subsequent to a divorce, a father had voluntarily paid child support payments in an amount in excess of that provided for in a separation agreement. The father had also paid taxes on the home and tuition for private schooling for the children even though he was not required to do so by agreement or decree. Subsequently, the former wife brought suit for modification and asked that the former husband be forced to do what he had been doing voluntarily. The trial court refused these requested modifications. The District Court of Appeal, Third District, reversed and gave the former wife what she had requested by using the following semantic hocus-pocus:[151]

> Argument is made that the court properly left the children to the demonstrated generosity of their father, who, having voluntarily made payments, would in all probability continue to do so as soon as this litigation is terminated. While this may in fact be true, it is not a proper basis for the court's failure to make a modification in keeping with the needs of the children and the ability of their father. We are most reluctant to require an individual to do that which he has been doing voluntarily. Nevertheless we must do so in the present instance because courts have the duty to increase or decrease child support payments in accordance with substantial changes in the ability of the father and the needs of the children. Here the uncontroverted testimony shows such changes. And it is these changes—not the factor of voluntary payments—that require today's decision.

This case, and similar ones, will cause lawyers to advise their clients

148. Wilkes v. Revels, 245 So.2d 896 (Fla. 1st Dist. 1970).
149. Simon v. Simon, 235 So.2d 540 (Fla. 3d Dist. 1970).
150. 233 So.2d 408 (Fla. 3d Dist. 1970).
151. *Id.* at 410.

to restrain their generous impulses and, as a consequence, will probably result in an increase in modification suits.

It is reversible error for the trial court to order that the husband's duty of child support should terminate at a future date which would be in advance of the majority of the children. A trial court should retain jurisdiction to modify a child support award in accordance with the changing conditions, *i.e.*, the father's financial ability, necessity of a college education, etc., which may occur during the minority of the children.[152]

In *Eaton v. Eaton*,[153] the parties executed a separation agreement in which the wife relinquished any right for child support from her husband. The parties were divorced, and the trial court approved the agreement and made it part of the final judgment. A few months later, the wife petitioned for child support on the ground that the agreement was void. The trial court agreed with the wife's contention and awarded a token payment of $10 per month. The husband appealed. While the district court recognized that a father may not abrogate his duty of support by contract, it nevertheless reversed the trial court's decision on the grounds that there had not been a change in circumstances since the entry of the divorce judgment. Of course, if the facts do change, the former wife may then have the trial court award her child support.

6. FOREIGN JUDGMENTS

Florida is not bound to give full faith and credit to Colorado judgments for arrearages in child support when the defendant father was not given notice of the Colorado proceedings wherein the arrearage judgments were rendered.[154]

X. ADOPTION

A. *Jurisdiction*

The juvenile court loses jurisdiction over a child upon the entry of an order permanently committing him to the State Department of Public Welfare for subsequent adoption.[155] Likewise, a Florida court has no jurisdiction to enter a decree of adoption subsequent to the death of the adopting father.[156]

B. *Rights and Duties*

In a case of first impression, the District Court of Appeal, First District, has held that, although a judgment permanently committing a

152. Register v. Register, 230 So.2d 684 (Fla. 1st Dist. 1970).
153. 238 So.2d 166 (Fla. 4th Dist. 1970).
154. Villano v. Harper, 248 So.2d 205 (Fla. 3d Dist. 1971).
155. *In re* D.A.W., 240 So.2d 524 (Fla. 4th Dist. 1970).
156. Korbin v. Ginsberg, 232 So.2d 417 (Fla. 4th Dist. 1970). It is to be noted that the children were seeking neither specific performance of an agreement to support them during their minority nor a child's share of the adopting father's estate.

child to a licensed child placing agency for adoption deprives the natural parents of all rights in the child, it does not relieve the father of his duty to contribute to the support of the child while in the hands of the agency or in the custody of the mother after the agency has voluntarily relinquished custody.[157]

Except for the right of an adopted child to inherit from his natural parents, the effect of a legal adoption is to completely sever all legal ties between the child and its natural parents. As a result, a child who has been adopted has no cause of action for the wrongful death of his natural father.[158]

C. *Proof of Parentage*

The District Court of Appeal, Second District, has held that it is within the discretion of the trial court judge in adoption proceedings to order that blood samples be taken from the child, the adopting father and from a man who was married to the child's mother in order to determine paternity. The case involved a child born during coverture. The adopting father claimed that he, rather than the husband of the child's mother, was the natural father. In effect, the adopting father was attempting to bastardize the child.[159]

D. *Adoption of an Adult*

When it is demonstrated that a proposed adoption of an adult will be for the permanent benefit of the adult adoptee, it would appear that the adoption should be granted regardless of the strong opposition of the father of the adult adoptee and regardless of the fact that the father never abandoned his child during his minority.[160]

XI. Juvenile Courts and Juveniles

A. *Dependency Proceedings*

At a prior hearing, the paternal grandparents had been awarded temporary custody of the children. At the dependency hearing, the juvenile judge refused to permit the grandparents' counsel to be present. At a later hearing dealing with the custody question, the juvenile judge refused the grandparent's counsel the right to examine the social worker's report concerning the condition of the children. The District Court of Appeal, First District, held that these refusals by the juvenile judge during the dependency proceedings constituted reversible error.[161]

157. Morris v. Stone, 236 So.2d 455 (Fla. 1st Dist. 1970).

158. Gessner v. Powell, 238 So.2d 101 (Fla. 1970).

159. *In re* Adoption of Samples v. Manousos, 226 So.2d 135 (Fla. 2d Dist. 1969).

160. *In re* Adoption of Miller, 227 So.2d 73 (Fla. 4th Dist. 1969).

161. *In re* A.W., 230 So.2d 200 (Fla. 1st Dist. 1970).

B. *Delinquency Proceedings*

Florida Statutes section 39.06(2) (1969) requires that the summons, served on a custodian of a child in delinquency proceedings, must briefly recite the substance of the petition asking for the adjudication of delinquency. The District Court of Appeal, Fourth District, has held that, under this statute and under due process standards, the summons must state the alleged misconduct with reasonable particularity. Also, it must be served sufficiently in advance of the scheduled court hearing to provide a reasonable opportunity for preparation to meet the charges.[162]

Under Florida Statutes section 39.03(3) (1969), a person arresting a juvenile must deliver him by the most practicable route to the juvenile court in the county. The statute is violated if arresting officers take a juvenile to the police station and interrogate him for two hours in order to obtain a confession of armed robbery. Therefore, the confession must be suppressed in delinquency proceedings subsequently brought against the minor.[163]

The District Court of Appeal, Fourth District, applied *Miranda v. Arizona*[164] to a juvenile delinquency hearing. The court held that if the child were not given the proper warnings after arrest, or otherwise significantly deprived of his liberty, then any statements given to the officer could not be used as "direct evidence or for impeachment . . . ."[165] The holding with reference to impeachment would seem to be displaced by the recent United States Supreme Court case of *Harris v. New York*.[166]

The Supreme Court of Florida has devised a clever solution to the statutory rule[167] which fails to provide for any supersedeas in cases involving delinquency proceedings:[168]

> It is our view that after a determination of delinquency shall have been made, juvenile court judges may, in their discretion, release children from custody, under reasonable conditions which they may impose, during a valid appeal taken in good faith and if the court finds that such release shall not be detrimental to the child or to society.

Florida Statutes section 39.03(7) (1969) was amended by adding language which provides that no child held in custody under a special order, *i.e.*, on order of the juvenile court judge ordering the detention of

162. *In re* V.D., 245 So.2d 273 (Fla. 4th Dist. 1971), *citing In re* Gault, 387 U.S. 1 (1967). *See In re* A.J., 241 So.2d 439 (Fla. 3d Dist. 1970), as to the degree of proof necessary in an adjudication of delinquency.

163. *In re* A.J.A., 248 So.2d 690 (Fla. 3d Dist. 1971).

164. 384 U.S. 436 (1966).

165. *In re* V.D., 245 So.2d 273, 276 (Fla. 4th Dist. 1971).

166. 401 U.S. 222 (1971).

167. FLA. STAT. § 39.14(5) (1969).

168. A.J. v. Presley, 234 So.2d 660 (Fla. 1970).

a child for more than 2 days, shall be held for more than thirty days without being adjudicated as a dependent or delinquent child.[169]

Section 39.01(12)(b) of the Florida Statutes (1969) was also amended. It now provides that a child who has been adjudicated for the second time by a juvenile court for having committed an act which would justify his being adjudicated as a "child in need of supervision," (*e.g.*, the child is incorrigible, or a persistent truant from school, or is growing up in idleness or crime, etc.) may be adjudicated to be a delinquent child.[170]

C. *Criminal Proceedings*

Under section 39.02(6) of the Florida Statutes (1969) it is the duty of a juvenile court judge to make specific findings that it is in the best interests of the public that jurisdiction over the juvenile be waived and jurisdiction transferred to the appropriate court for criminal proceedings against the juvenile. These findings of fact are a prerequisite to the entry of an order transferring the cause to a criminal court.[171]

Section 932.38 of the Florida Statutes (1969) requires written notice to the father of the charges against his son. If, however, the father has actual knowledge of the charges, written notice is not required. Where the father of an unmarried minor attended his arraignment and one trial session and heard in open court that the trial was to be continued to a definite future date, this constituted sufficient actual knowledge of a charge lodged against his son so as to come within the exception to the statutory requirement of written notice.[172]

D. *Legislation*

Chapter 959 of the Florida Statutes (1969) was amended by the addition of section 959.115.[173] The new statute provides that, as an alternative to sentencing a child to a state prison, or county or municipal jail, the judge of any court having criminal jurisdiction may commit the child to the division of youth services, provided that the director of the division of youth services is willing to receive the child. The commitment shall be for an indeterminate period of time, but shall not exceed either the maximum sentence allowable by law for the offense for which the child has been found guilty or the child's twenty-first birthday, whichever is sooner.

Florida has recently adopted a statewide probation and parole system for juveniles designed to foster the treatment of juvenile offenders

169. Fla. Laws 1970, ch. 70-353, § 1, *amending* FLA. STAT. § 39.03(7) (1969).

170. Fla. Laws 1971, ch. 71-117, § 1, *amending* FLA. STAT. § 39.01(12)(b) (1969).

171. Gagliano v. State, 234 So.2d 159 (Fla. 1st Dist. 1970).

172. State v. Whitter, 245 So.2d 913 (Fla. 3d Dist. 1971). *See also* Higginbotham v. State, 248 So.2d 540 (Fla. 3d Dist. 1971).

173. Fla. Laws 1970, ch. 70-353, § 6. The same bill added FLA. STAT. §§ 959.23, 959.24, 959.25 and amended FLA. STAT. § 959.13 (1969).

in the community rather than in an institution. The rationale underlying the system is that it is more efficient and less expensive to treat the juvenile in his home community than in an institution.[174] It is suggested that this juvenile probation and parole system will be as ineffective as Florida's adult probation and parole system because of a lack of adequate financing.

E. *Miscellaneous Legislation Affecting Minors*

Surgical or medical care by doctors, hospitals or public clinics rendered minors afflicted with an infectious, contagious or communicable disease may now be administered with the consent of the minor patient alone. The consent of a parent or guardian is no longer necessary.[175]

Any minor who is at least 18 years old may now be a blood donor without compensation and may give his consent to "the penetration of tissue which is necessary to accomplish such donation."[176] The consent of the minor's parents is not required and the minor may not disaffirm his consent.

Public school students who marry, or who are pregnant and unmarried, or who have already had a child outside of wedlock are now entitled to attend school. They are likewise "entitled to the same educational instruction or its equivalent as other students, but may be assigned to a special class or program better suited to their special needs."[177]

The penalty for willful torture, caging or mutilating of a child under age sixteen has been increased from two years imprisonment or a fine not exceeding $2,000, or both, to 20 years imprisonment or a fine not exceeding $10,000, or both.[178]

Sections 743.01 to 743.05 of the Florida Statutes (1969), dealing with the removal of disabilities of nonage of minors, were substantially reworded to delete obsolete and unnecessary language.[179]

XII. GUARDIANSHIP

A. *In General*

When the record of an incompetency proceeding contains no evidence indicating that the notice of hearing was properly served on the alleged incompetent or that he was given reasonable notice of the hearing prior to the day it was held, the question of the court's jurisdiction to enter a judgment of incompetency may properly be brought into question by a petition filed by the alleged incompetent. These questions may be

174. Fla. Laws 1971, ch. 71-130, §§ 1-12, *adding* FLA. STAT. §§ 39.01, 39.03, 39.04, 39.05, 39.06, 39.11, 39.12, 959.011, 959.28.

175. Fla. Laws 1970, ch. 70-58, § 1, *adding* FLA. STAT. § 384.061.

176. Fla. Laws 1970, ch. 70-430, § 1, *amending* FLA. STAT. § 743.06 (1969).

177. Fla. Laws 1971, ch. 71-21, § 1, *amending* FLA. STAT. § 232.01(1)(c) (1969).

178. Fla. Laws 1970, ch. 70-8, § 1, *amending* FLA. STAT. § 824.04 (1969).

179. Fla. Laws 1971, ch. 71-147, §§ 1-3, *amending* FLA. STAT. §§ 743.01-.05 (1969).

resolved only by a full evidentiary hearing, and it is error for the county judge to deny the petition on the basis of the court record and to refuse to grant the hearing.[180]

If, at the time of the commitment of an incompetent, there is no statute allowing the state to recover reasonable costs for his care and maintenance from his estate, the state may not recover for such costs. This is true even though a statute is subsequently enacted while the incompetent is still being cared for by the state.[181]

B. *Guardianship Legislation*

Florida has adopted a detailed "Mental Health Act"[182] which provides for long overdue civil rights safeguards for mentally ill incompetents. The provisions of the act include the appointment of lawyers as "hearing examiners," rights of habeas corpus, and the right of incompetents to be represented by legal counsel, including appointed counsel for indigents. This civil rights approach is also found in the new "Comprehensive Alcoholism Prevention Control and Treatment Act"[183] which is designed to treat alcoholism as a disease rather than a crime. However, it is submitted that the new act's definition of the term "alcoholic" as meaning "any person who chronically and habitually uses alcoholic beverages (a) to the extent that it injures his health or substantially interferes with his social or economic functioning . . ." is subject to constitutional attack for overbreadth. Fortunately, this broadness is tempered by a later provision[184] which appears to condition involuntary adjudication to cases where the

> alcoholic . . . has lost the power of self-control with respect to the use of alcoholic beverages and (a) that he has threatened, attempted or actually inflicted physical harm on himself or others; or (b) that he is in need of medical treatment and care, and that by reason of chronic alcoholism his judgment has been so impaired that he is incapable of appreciating his need for care and of making a rational decision in regard thereto . . . .

Apparently, this act is in need of some re-drafting.

Florida has enacted the "Interstate Compact of Mental Health" which is designed to provide for the transfer of mentally ill and mentally deficient patients between various states adopting the compact. Provision

180. *In re* White, 230 So.2d 480 (Fla. 1st Dist. 1970).

181. Kirk v. Wiggin, 242 So.2d 725 (Fla. 3d Dist. 1971).

182. Fla. Laws 1971, ch. 71-131, *transferring and amending* FLA. STAT. § 402.10 (1969), *amending* FLA. STAT. § 744.31 (1969), *repealing* FLA. STAT. §§ 394.01, 394.011, 394.012, 394.013, 394.02, 394.03, 394.031, 394.04, 394.05, 394.06, 394.07, 394.08, 394.09, 394.10, 394.11, 394.12, 394.13, 394.14, 394.15, 394.16, 394.17, 394.18, 394.191, 394.192, 394.20, 394.201, 394.22, 394.23, 394.24, 394.25, 394.251, 394.26, 394.27, 394.271, 394.272, 394.39, 394.40, 394.41, 394.42, 394.43, 394.45 (1969).

183. Fla. Laws 1971, ch. 71-132, *repealing* FLA. STAT. § 856.01 (1969), *amending* FLA. STAT. ch. 856 (1969).

184. Fla. Laws 1971, ch. 71-132, § 10(1).

is also made for the care of patients while they are within the various states.[185]

Section 65.061(2) of the Florida Statutes (1969) deals with quieting title to real estate. It was amended by the addition of the following language in the middle of the present subsection: "a guardian ad litem shall not be appointed unless it shall affirmatively appear that the interest of minors, persons of unsound mind, or convicts are involved."[186]

A guardian of the property may now execute a deed, lease or mortgage in the name of the ward conveying, leasing, mortgaging or releasing any actual or apparent interest of the ward in any property including homestead property.[187]

Section 710.08 of the Florida Statutes (1969), the Gifts to Minors Act, was substantially reworded with respect to the resignation, death or removal of custodians, the appointment of successor custodians, performance bonds, etc. It is interesting to note that a minor who is fourteen and who does not have a guardian has the power under this amended section to designate a successor custodian.[188]

C. *Conservatorship Legislation*

The Florida law governing "conservatorships" was substantially changed by the following: rewording of the provision relating to the jurisdiction of the circuit court to authorize the appointment of a conservator of the estate of an "absentee"; by adding a summary procedure system; authorizing procedure for use by the wife or next of kin of an absentee; providing for the posting of a bond by the conservator; delineating the rights, powers and duties of a conservator; adopting the guardianship provisions governing the resignation of a conservator; and providing for the termination of conservatorship proceedings.[189]

XIII. ILLEGITIMACY

A Florida court needs personal jurisdiction to adjudicate whether an individual is the father of an illegitimate child. Likewise, the court does not have jurisdiction to award an in personam judgment against a nonresident for support of the child.[190]

Section 731.29 of the Florida Statutes (1969) provides that an illegitimate child may not inherit any part of the estate of his parents' kin-

185. Fla. Laws 1971, ch. 71-219, *repealing* FLA. STAT. §§ 394.27, 394.271 (1969), *amending* FLA. STAT. ch. 394 (1969) (in general).

186. Fla. Laws 1970, ch. 70-278, § 1, *amending* FLA. STAT. § 65.061(2) (1969).

187. Fla. Laws 1970, ch. 70-45, *amending* FLA. STAT. § 745.15(1) (1969).

188. Fla. Laws 1971, ch. 71-23, § 1, *adding* FLA. STAT. § 710.08.

189. Fla. Laws 1971, ch. 71-103, §§ 1-13, *amending* FLA. STAT. §§ 747.01, 747.02, 747.03, 747.04 (1969), *adding* §§ 747.021, 747.022, 747.031, 747.032, 747.033, 747.034, 747.035, 747.036.

190. T.J.K. v. N.B., 237 So.2d 592 (Fla. 4th Dist. 1970), *followed* in J.E.S. v. B.J.F. 240 So.2d 520 (Fla. 4th Dist. 1970).

dred unless they subsequently marry. The section further provides that the illegitimate inherits from his mother and his father if the father acknowledges his paternity in writing in the presence of a competent witness. The constitutionality of section 731.29 was upheld by the Supreme Court of Florida in the case of *In Re Estate of Caldwell.*[191] The court refused to find that this statute was a denial of equal protection despite the fact that the Supreme Court of the United States had previously held that it is a denial of equal protection for a state to deny an illegitimate child the right of recovery for the wrongful death of his mother[192] and to deny a mother of an illegitimate child a cause of action for his wrongful death.[193] The Florida court held that these federal cases were distinguished upon the ground that they involved wrongful death actions rather than rights of inheritance. Subsequent to the filing of the opinion in *Caldwell*, the Supreme Court of the United States apparently ruled in accordance with the Supreme Court of Florida that inheritance is a matter to be decided by the states.[194]

In a case of apparent first impression in Florida, the District Court of Appeal, Fourth District, has held that a father of an illegitimate son has no standing to sue for the son's wrongful death. The right of action seems to be confined to the mother.[195]

A California decree provided that the father had to support his illegitimate child until the child's twenty-first birthday. Subsequently, the mother brought suit on the judgment in Florida to make it a domestic judgment. In another case of apparent first impression, the District Court of Appeal, Second District, held that Florida has the power to modify the California decree to provide that the obligation of support will terminate when the child becomes eighteen.[196]

It should be noted that it is legally possible for a father, now deceased, to have acknowledged paternity of a child four days after its conception even though the father died before the birth of the child.[197]

The District Court of Appeal, Third District, has held that the mother of a child born in wedlock, or conceived while she was married (even though it was born 283 days after the divorce of the mother), cannot maintain an action to have a man other than her spouse declared to be the father of the child. The presumption of legitimacy is rebuttable, but it may not be challenged by the mother.[198]

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191. 247 So.2d 1 (Fla. 1971).

192. Levy v. Louisiana, 391 U.S. 68 (1968).

193. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

194. Labine v. Vincent, 401 U.S. 532 (1971).

195. City of West Palm Beach v. Cowart, 241 So.2d 748 (Fla. 4th Dist. 1970).

196. D.R.T. v. O.M., 244 So.2d 752 (Fla. 2d Dist. 1971).

197. Ezell-Titterton, Inc. v. A.K.F., 234 So.2d 360 (Fla. 1970).

198. Smith v. Wise, 234 So.2d 145 (Fla. 3d Dist. 1970).

XV. MISCELLANEOUS

A. *Intrafamily Litigation*

In a case of first impression in Florida (and perhaps of second impression in the United States), the District Court of Appeal, Third District, held that a father may sue his son on an oral contract entered into when the son was eighteen wherein the father agreed to advance monies for the education of the son as a dentist in return for the son's promise to pay back the sums advanced subsequent to his starting his dental practice. The facts showed that the son, after reaching his majority, wrote a letter to his father confirming the oral contract and agreeing to make monthly payments, and that substantial payments were made until the son expressed the view that he was never obligated to repay the sums advanced. The court held that the evidence showed that the son ratified the contract after reaching his majority and that this ratification is binding without consideration.[199]

Even though a son has not been emancipated by statutory proceedings, there may be evidence sufficient to show that he has been, in fact, emancipated and is, therefore, competent to sue his father for injuries suffered in an automobile accident.[200] A wife, however, has no cause of action against her husband for slander which occurred during coverture but after the parties separated and while divorce proceedings were in progress.[201]

B. *Loss of Consortium and Tort Actions*

The Supreme Court of Florida has finally held that a wife has a cause of action for loss of consortium (husband's companionship, affection and sexual relations) against a person who negligently injures her husband.[202] The cause of action is derivative in nature. That is, the wife may recover only if her husband has a cause of action against the same defendant. Although it is not entirely clear, the decision apparently was based upon the notion that the common law rule was now outdated because of the change in the legal status of women as reflected by the Florida Constitution and statutes, federal civil rights statutes, case decisions from other jurisdictions, and legal literature in general.

C. *Torts*

In a case of first impression in Florida, the District Court of Appeal, Fourth District, has held that a minor child who had been adopted by others during the lifetime of his natural father does not have a cause of

199. Robertson v. Robertson, 229 So.2d 642 (Fla. 3d Dist. 1969).

200. Owen v. Owen, 234 So.2d 165 (Fla. 1st Dist. 1970).

201. Papy v. Frischkorn, 234 So.2d 718 (Fla. 3d Dist. 1970).

202. Gates v. Foley, 247 So.2d 40 (Fla. 1971), *rev'g* 233 So.2d 190 (Fla. 4th Dist. 1970). Banores v. Austin, 248 So.2d 648 (Fla. 1971), *rev'g* 240 So.2d 850 (Fla. 2d Dist. 1970).

action for the wrongful death of his natural father. The rationale for the court's decision was twofold. First, section 63.151 of the Florida Statutes provides that the natural parents are relieved of all legal duties towards their child subsequent to adoption. Second, the intent of the wrongful death statute is to give a cause of action to those who have suffered a compensable loss as the result of the wrongful death. Therefore, it would be wrong to deprive others who may have suffered this loss in favor of the adopted child who would suffer no legal loss.[203]

A divorced mother may recover for the wrongful death of her minor child which occurred during the marriage.[204]

D. *Child Abuse Legislation*

The Child Abuse statutes were extensively amended to provide that a physician, nurse, teacher, social worker or employee of a public or private facility serving children who has reason to believe that a child has been abused shall report this fact to the Department of Health and Rehabilitative Services. The amendment made some interesting changes dealing with immunity and privileged evidence:[205]

> (9) Immunity.—Anyone participating in the making of a report pursuant to this act or participating in a judicial proceeding resulting therefrom prima facie shall be presumed to be acting in good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed.
>
> (10) Evidenced privileged.—The physician-patient privilege, husband-wife privilege, or any privilege except the attorney-client privilege and the privilege provided in Chapter 90.241 of the Florida Statutes, provided for or covered by law, both as they relate to the competency of the witness and to the exclusion of confidential communications, shall not pertain in any civil or criminal litigation in which a child's neglect, dependency, abuse or abandonment is in issue nor in any judicial proceedings resulting from a report submitted pursuant to this act.

203. Powell v. Gessner, 231 So.2d 50 (Fla. 4th Dist. 1970).
204. McDonald v. Forman, 238 So.2d 131 (Fla. 4th Dist. 1970).
205. Fla. Laws 1971, ch. 71-97, § 1, *amending* FLA. STAT. § 828.041 (1969).