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Family Law

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FAMILY LAW

DANIEL E. MURRAY*

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I. INTRODUCTION

During the preceding two year period,¹ the Florida courts have dealt with a surprising number of first impression cases. A number of other cases required dramatic broadening of existing rules to new factual situations. It is often difficult to ascertain if the courts were articulating new rules or enlarging old ones; at times, it is obvious that the courts were not quite certain either.

The 1965 Legislature indulged in piece-meal legislative changes and additions which amounted to mere encrustations upon an already unwieldy judicial structure. The common law marriage anachronism remained untouched by the Legislature. No attempt was made to unify the jurisdiction of juvenile courts throughout the state. A number of critical questions remained unanswered. Why should there continue to be a "no-man's land" between the circuit and juvenile courts in child custody matters which requires gap-filling by the courts? Why should a former wife be entitled to attorney's fees in defending a custody order in chancery but not in habeas corpus? Florida's patchwork quilt of family law is in need of replacement.

II. MARRIAGE AND ANNULMENT

A. Common Law Marriages

The archaic concept of common law marriage has continued to plague the courts. The usual rule that there is a strong presumption of the validity of a second ceremonial marriage has been extended to a situation involving an alleged common law marriage which was preceded by another alleged common law marriage.² It is submitted that the giving of presumptive validity to a common law marriage, simply because it is the second marriage, is an unfortunate extension of the presumption rule. The proponent of the alleged second common law marriage should bear the burden of proving the existence of this marriage without the aid of any presumption that the first common law marriage has been dissolved by death or divorce.

The Third District Court of Appeal has expressly rejected the rule of *ex necessitate rei* which allegedly was an exception to the dead man's statute³ permitting the wife to testify to an alleged common law marriage in cases where there would not be any other means of proving the marriage.⁴ Under this holding it would appear that unless an alleged spouse

1. The material herein surveyed includes the *statutes* enacted by the 1965 General Session, the first Extra-Session and the second Extra-Session of the Florida Legislature, and the *cases* reported from 155 So.2d 353 through 177 So.2d 328.

2. *Sikes v. Guest*, 170 So.2d 322 (Fla. 2d Dist. 1964).

3. FLA. STAT. § 90.05 (1965).

4. *Silverman v. Lerner*, 163 So.2d 321 (Fla. 3d Dist. 1964). When a proffer of a witness to an alleged common law marriage is made and his interest is indirect or of a doubtful

can clearly show that the reputation of the parties in the community was that of husband and wife, she has no effective way to prove the marriage unless the contract was witnessed by disinterested third parties—a rather rare event. On the other hand, a woman who claims to be the common law wife, and who sues for the wrongful death of her alleged husband, should be allowed to testify as to the common law marriage over the defendant's assertion of the dead man's statute. This statute only applies to bar the testimony when it is introduced in a suit against an executor, or administrator, heir at law, next of kin, assignee, legatee, devisee or survivors of the deceased person. It has no application when the defendant is not such a party.⁵

In a case of first impression,⁶ the third district has held unmarried, for the purposes of a Florida wrongful death action, a man and woman who lived together in Puerto Rico (which does not recognize common law marriages) and who were never ceremonially married in Puerto Rico or elsewhere. The court went on to hold that there would not be a common law marriage even under Florida law, since the couple "intended to get married but had not gotten around to it."⁷ Finally, the court held that the domicile of the father determines the legitimacy of the children of this union. The case was remanded to the trial court to make a determination of the legitimacy status of the children under the law of Puerto Rico.

B. *Plural Ceremonial Marriages*

The Florida Supreme Court, in reversing the district court,⁸ has held that when both parties innocently enter into a marriage which is bigamous because both of them have spouses, the court has the power to grant a "divorce" to either party under the Florida statute.⁹ The court also has the power to enter a child support award in favor of the children of this union and to dispose of the property rights of the parties. The court may further award the "wife" temporary attorney's fees, but not permanent attorney's fees and permanent alimony.

In *Grace v. Grace*¹⁰ the court articulated three rules governing col-

nature, "the objection goes to the credit of the witness and not to his competency" and he is competent to testify under the Dead Man's Statute. *In re Lynagh's Estate*, 177 So.2d 256, 258 (Fla. 2d Dist. 1965).

5. *Smart v. Foosaner*, 169 So.2d 508 (Fla. 3d Dist. 1964).

6. *Young v. Viruet de Garcia*, 172 So.2d 243 (Fla. 3d Dist. 1965).

7. *Id.* at 244.

8. *Burger v. Burger*, 166 So.2d 433 (Fla. 1964), *reversing in part* *Burger v. Burger*, 156 So.2d 905 (Fla. 3d Dist. 1964). Both parties thought they had secured valid divorces in Mexico from their original spouses; however, the Mexican "magistrate" fraudulently furnished them with forged divorce decrees and both parties at the time of their "marriage" thought that they were capable of marriage.

9. FLA. STAT. § 65.04(9) (1965).

10. *Grace v. Grace*, 162 So.2d 315, 317 (Fla. 1st Dist. 1964). A spouse has no standing to contest his spouse's previous decree of divorce (which is not void on its face) from a prior spouse. *Coltun v. Coltun*, 167 So.2d 336 (Fla. 3d Dist. 1964).

lateral attacks upon a divorce and its effect upon a subsequent marriage: (1) The presumption in favor of the validity of a second ceremonial marriage is so strong that it rebuts the presumption of the continuation of the first marriage, and, in the absence of competent proof to the contrary, it is to be assumed that the previous marriage has been dissolved by divorce. This test of "competent proof to the contrary"¹¹ would not be met when the wife admitted that she had never established residence in any other state than Florida and New Jersey except "temporary residence to get a divorce in Montgomery, Alabama."¹² (2) That the husband of the second marriage who had lived with his alleged wife for four years and had accepted all the marital benefits and privileges during this time should not be allowed to raise the question of his wife's securing an invalid divorce from her first husband. This denial is not predicated upon an estoppel, but upon the clean hands doctrine. (3) The husband to the second marriage was a stranger to the first marriage. He cannot collaterally attack the divorce decree, because he did not occupy a status or have a right at the time of the entry of the decree. The husband was a stranger to the decree, and he may attack it only when it is being enforced against him so as to affect rights or interests acquired by him prior to the rendition of the decree.

Even if the parties to a purported marriage are lacking in capacity to contract a valid marriage (because both parties have an un-divorced spouse), the mother of any children of such bigamous union has standing to seek child support and resolution of the party's rights, as tenants in common, of the home which they had purported to acquire as tenants by the entirety.¹³ On the other hand, a wife who has contracted a second bigamous marriage is estopped from making any claim as a widow to the estate of her deceased first husband.¹⁴ Somewhat the converse situation was presented in *Mason v. Mason*.¹⁵ The court held that a wife who knows that her husband has "married" another woman (who thought that her "husband" had capacity to marry) is estopped from claiming any interest in property purchased jointly by the husband and his second "wife" (who had substantially contributed towards the purchase price) by her failure to assert her marital status during the period of the second "marriage." The third district seemingly approved the lower court's holding which was that the husband was estopped to deny the right of the second "wife" to take title to the jointly held property by right of survivorship, and that this estoppel was binding upon the first wife who takes as "heir" of her husband.

11. *Grace v. Grace*, 162 So.2d 315 (Fla. 1st Dist. 1964).

12. *Id.* at 317.

13. *Whitfield v. Whitfield*, 161 So.2d 256 (Fla. 3d Dist. 1964).

14. *In re Moye's Estate*, 160 So.2d 525 (Fla. 2d Dist. 1964).

15. *Mason v. Mason*, 174 So.2d 620 (Fla. 3d Dist. 1965).

C. *Annulment*

A woman who has gone through a marriage ceremony as a result of hypnosis, induced by her alleged husband, and who has not consummated the marriage may have the marriage annulled; she may also secure a judgment against him for money had and received, where she gave him funds while under the influence of his hypnotic spell.¹⁶

III. JURISDICTION FOR DIVORCE AND POST-DECRETAL RELIEF

A. *Residence*

A domicile of choice may be acquired by the presence of a person plus his intent to make it his home permanently, or for an "indefinite period" of time. Hence, it will be assumed that a Cuban refugee whose presence in Florida is permitted by Federal law under a temporary basis will be permitted to remain for an "indefinite period."¹⁷ As a consequence of this reasoning, aliens with a refugee status may acquire a domicile sufficient to allow the courts to have jurisdiction over divorce actions.

B. *Jurisdiction over the Parties*

In a case of first impression, the district court has held that when a wife files suit for alimony unconnected with divorce,¹⁸ and a decree pro confesso is entered against the husband, it is erroneous to enter a final decree of divorce pursuant to a "motion for the entry of a final decree of divorce"¹⁹ which was filed by the wife after the final hearing. This result obtains unless the husband is given reasonable notice of this motion which, in effect, constitutes an amendment of the wife's initial cause of action. The court specifically refused to decide whether the court lacked jurisdiction over the husband because he was served with a complaint for separate maintenance rather than a complaint for divorce.

When the parties to a divorce case have formed separate corporations to carry on separate retail businesses, it is error to order that the inventory of one corporation be transferred to another when the corporations are not parties to the divorce proceedings.²⁰ However, it is improper to join corporations as parties defendant to a divorce suit when the only relief asked against them is a restraining order to enjoin the sale of their assets.²¹

Corporations and other third parties, who are enjoined without notice

16. *Peller v. Kisiel*, 161 So.2d 573 (Fla. 3d Dist. 1964).

17. *Perez v. Perez*, 164 So.2d 561 (Fla. 3d Dist. 1964).

18. Under FLA. STAT. § 65.09 (1963).

19. *Kitchens v. Kitchens*, 162 So.2d 539 (Fla. 3d Dist. 1964).

20. *Turner v. Turner*, 175 So.2d 47 (Fla. 3d Dist. 1965).

21. *Thoni Transp. Co. v. Thoni*, 155 So.2d 838 (Fla. 3d Dist. 1963).

in post-decretal proceedings from transferring or disposing of certain assets allegedly controlled by the former husband, have a right to object to this procedure before the court which issued the injunction. A writ of prohibition will not issue from the district court because the circuit court does have jurisdiction, although it may be acting improperly.²²

In a case decided subsequent to the writing of this survey,²³ the second district has held that a stockbrokerage firm, which received oral notice from a court that the firm had been enjoined from paying money to a husband from his brokerage account, was bound by the injunction and was liable to the wife for the sums of money disbursed to the husband in violation of the injunction. This was true even though the brokerage firm had never been made a party to the divorce action.

It is rather difficult to draw a consistent theme from these four cases. It is submitted that there ought to be a simple, speedy mechanism for the proper joinder and enjoining of corporations as parties defendant in divorce suits because of the widespread use of the "one-man" corporation in modern business practices.

A court which retains jurisdiction in the divorce decree over the custody of children has jurisdiction to modify the decree at a later date (upon the petition of the former wife) in order to restrain the husband from assaulting, harrassing, annoying or berating her. The jurisdiction is predicated upon the basis that the forbidden actions are adverse to the welfare of the minor children²⁴ who are in the former wife's custody.

IV. DIVORCE

A. *Defenses and Evidence*

During the last two years, the Florida courts did not decide any significant cases dealing with the grounds for divorce,²⁵ and only one case dealt with defenses in which the court held that although the failure of a husband to seek a reconciliation will constitute a defense to his suit for desertion against his wife, it will not do so when the case is founded upon the charge of cruelty.²⁶

The courts did decide some interesting cases dealing with the privilege against self-incrimination and corroboration. In *Stockham v. Stock-*

22. *State v. Hall*, 175 So.2d 792 (Fla. 2d Dist. 1965).

23. *Hill, Darlington & Grimm v. Duggar*, 177 So.2d 734 (Fla. 2d Dist. 1965).

24. *Bazzano v. Bazzano*, 175 So.2d 801 (Fla. 3d Dist. 1965).

25. In *Patterson v. Patterson*, 177 So.2d 254, 255 (Fla. 2d Dist. 1965), the district court, in reversing the chancellor, held that evidence that a wife was seen in bed with a man while she was wearing a shortie night gown and he was in his underwear, and "when a light was flashed through the window he was caressing her buttocks" was sufficient to sustain a charge of adultery against the wife.

26. *Rodda v. Rodda*, 159 So.2d 259 (Fla. 3d Dist. 1964).

*ham*²⁷ the court held, as a matter of first impression, that if the plaintiff refuses to answer requests for admissions which deal with the defendant's affirmative defense (apparently adultery) because the answers might tend to incriminate her, it is proper for the court to order her to answer and to dismiss her divorce action if she fails to do so. The holding was based upon a Florida rule of civil procedure which provides that "any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may it be used against him in any other proceeding."²⁸ As a corollary of this rule, if the plaintiff wife (when questioned as an adverse witness) invokes her privilege against self-incrimination and then does answer the questions to her disadvantage after the chancellor informs her that he will dismiss her complaint if she fails to do so, it will not be error.²⁹

A general rule requires that the plaintiff's testimony be corroborated in a divorce action. However, when it seems clear that there is no collusion since the defendant has vigorously contested the action in good faith, the courts will be satisfied with less corroboration than would otherwise be required.³⁰

B. *Res Judicata and Estoppel by Judgment*

In order for *res judicata* to be applicable, the second proceedings must involve the same cause of action as the first proceedings. Hence, a foreign separate maintenance decree which found the husband to be at fault for the separation of the parties would not be *res judicata* to the husband's suit for divorce in Florida based upon the desertion of the wife. The doctrine of estoppel by judgment precludes the parties from litigating in a second case issues which were actually decided in the first case even though the causes of action were different. The doctrine of estoppel by judgment would be applicable only if the party asserting this defense shows what facts and issues were actually litigated in the first suit.³¹

V. VACATING OF DECREES

Bills in the nature of Bills of Review have been abolished by the Florida Rules of Civil Procedure;³² however, an independent action may be brought to set aside a decree for fraud committed upon the court. Nevertheless, an allegation that a wife's attorney "failed in his duty to

27. *Stockham v. Stockham*, 159 So.2d 481 (Fla. 2d Dist. 1964), *aff'd*, 168 So.2d 320 (Fla. 1964).

28. FLA. R. CIV. P. 1.30(b).

29. *Lund v. Lund*, 161 So.2d 873 (Fla. 2d Dist. 1964).

30. *Dings v. Dings*, 161 So.2d 227 (Fla. 3d Dist. 1964).

31. *Hohweiler v. Hohweiler*, 167 So.2d 73 (Fla. 2d Dist. 1964). The fact that a wife secured a decree of separate maintenance in New York would not necessarily be *res judicata* of the husband's suit for divorce in Florida. *Katz v. Katz*, 159 So.2d 241 (Fla. 3d Dist. 1964).

32. FLA. R. CIV. P. 1.38.

present certain evidence which she had furnished him"³³ is not sufficient, in the absence of any allegations that the court was led into error by the actions of the plaintiff-husband.

A non-resident wife, who has been properly served with notice by publication of the fact of her husband's suit for divorce in Florida, may not institute suit to set aside the divorce decree after the death of the husband upon the main grounds that: (1) The husband was not a resident of Florida; and (2) The husband had failed to disclose to the court the fact that a separate maintenance decree had been entered against him in New York. The wife is precluded from attacking the decree for lack of jurisdiction; she could have raised this defense in the original proceedings. Further, the prior New York separate maintenance decree is not a bar to a subsequent divorce suit and the husband's failure to disclose this decree is not a fraud upon the Florida court.³⁴

Under the Florida statutes,³⁵ a declaratory decree action may not be utilized to attack the validity of a Mexican divorce decree. However, a complaint which alleges that the Mexican decree is void may be sustained as a direct attack upon it even if it is improperly labeled as a declaratory decree action.³⁶

VI. ALIMONY

A. *Temporary Alimony*

It would appear that if the wife has liquid assets sufficient to maintain herself in reasonable comfort pending a final divorce hearing, a court should not award temporary alimony even though the record may disclose that the husband is able to pay it. Of course, if the chancellor should see fit to award permanent alimony, he may consider the amounts spent by the wife for her own support during the pendency of the action in determining the amount of the permanent alimony. In short, the denial of temporary alimony may only be a temporary victory for the husband.³⁷ In a somewhat contrary vein, it is seemingly proper to refuse to give a wife credit for her one-half of the funds which she expended from a joint bank account to support herself during the pendency of a divorce when, because of the ample amount of the joint account, she is unable to show undue financial hardship.³⁸

In a case of first impression,³⁹ the second district has held that a

33. *Irving v. Irving*, 157 So.2d 544 (Fla. 3d Dist. 1963).

34. *Simons v. Miami Beach First Nat'l Bank*, 157 So.2d 199 (Fla. 3d Dist. 1963). The wife also attacked the decree because it incorrectly stated that she had answered the complaint and also that after she had received notice of the suit, her husband had lulled her into inaction.

35. FLA. STAT. ch. 87 (1965).

36. *Kittel v. Kittel*, 164 So.2d 833 (Fla. 3d Dist. 1964).

37. *Grace v. Grace*, 162 So.2d 314 (Fla. 1st Dist. 1964).

38. *Gaer v. Gaer*, 168 So.2d 789 (Fla. 3d Dist. 1964).

39. *Holiday Hosp. Ass'n v. Schwarz*, 166 So.2d 493 (Fla. 2d Dist. 1964).

husband, who has separated from his wife and who has instituted divorce proceedings because of her misconduct, is not liable to a hospital for expenses incurred by her subsequent to the entry of an award of temporary alimony when the award was being complied with by the husband at the time of the wife's hospitalization. It should be noted that while the wife would be in a position to ask for an increase in the award of temporary alimony because of her hospitalization, a similar right is not accorded third parties who deal with the wife.

It is error for a chancellor, in an emergency hearing, to enter an award of temporary alimony before process is served upon the husband and without giving him notice of the application for the award; however, if the chancellor reviews the prior order on the merits upon the husband's motion to vacate the award and adheres to it, this will cure the improper procedure.⁴⁰

B. *Permanent Alimony*

The third district has articulated the view that it favors final decrees which provide that the husband is to maintain life insurance in favor of his wife and children, but stated, "while such provision should be encouraged in property settlements, we hold that this provision in the decree is not supported by the record . . . and must be stricken."⁴¹ The reversal was based entirely upon the lack of the financial capacity of the husband.

It is reversible error for a chancellor to fail to reserve jurisdiction to award alimony in the future merely because the wife is self-supporting at the time of the divorce. A change in circumstances in the future may require an award of alimony and the ex-wife would be barred from applying for it unless the court retained jurisdiction.⁴²

The practicing lawyer's adage that persons of moderate means cannot afford a divorce is borne out by *Bennett v. Bennett*.⁴³ Here it was held that an award of sixty dollars per month child support and sixty dollars per month for alimony from a husband whose net earnings amounted to four hundred dollars per month was inadequate. The wife had testified that it would require a minimum of two hundred and seventy-one dollars per month to support herself and one child, and that she was forced by the decree to make mortgage payments on the home, and payments for utility charges and a number of furniture and finance obligations. The

40. *Voss v. Voss*, 169 So.2d 351 (Fla. 3d Dist. 1964).

41. *Wilson v. Wilson*, 163 So.2d 45 (Fla. 3d Dist. 1964). The court also modified the final decree by providing that the husband was responsible for all *major* medical bills of his ex-wife and his children and for all major maintenance and repair bills for the home occupied by the wife and children. This modification was based solely upon the financial condition of the husband.

42. *Dings v. Dings*, 161 So.2d 227 (Fla. 3d Dist. 1964).

43. 158 So.2d 793 (Fla. 3d Dist. 1963).

case was remanded for the entry of an amended decree. A chancellor's lot is not a happy one.

C. Appeals of Alimony Awards

Rule 3.8(b) of the Florida Appellate Rules seemingly articulates the notion that it is necessary for a wife who intends to appeal from a final decree awarding her alimony to apply to the trial court for an award of temporary alimony pending the appeal. Accordingly, the district courts have held that a wife is estopped to maintain the appeal if she accepts the permanent alimony specified in the final decree.⁴⁴ In reversing this trend, the Florida Supreme Court has held that Rule 3.8(b) of the Florida Appellate Rules is remedial in nature and not mandatory.⁴⁵ If the husband is not prejudiced or injured by the wife's receiving the permanent alimony "there is no waiver or estoppel in merely the payment or receipt of the alimony pursuant to order of court [the trial court]."⁴⁶ This holding of the Florida Supreme Court also affects appeals from post-decretal orders modifying alimony awards, and this will be discussed in a subsequent section of this Survey.⁴⁷

D. Lump Sum Alimony

In awarding lump sum alimony, the chancellor, in addition to considering the financial worth of the parties, must take into account the age and life expectancy of the wife, and it is error to award a sum which will support her for five or six years when she has a much longer life expectancy.⁴⁸ In addition, an award of lump sum alimony should not be based upon the relative merits of the personal lives of the parties, nor as a salve to the wife's feelings.⁴⁹

A Florida court has no jurisdiction to award to the wife a non-resident husband's interest in a Florida tenancy by the entirety as lump sum alimony unless he is personally served with process in Florida, or unless the notice of publication for constructive service describes the property and informs the husband that the wife is asserting a claim against it.⁵⁰

44. *Claus v. Claus*, 163 So.2d 26 (Fla. 1st Dist. 1964); *Brackin v. Brackin*, 167 So.2d 604 (Fla. 1st Dist. 1964); *Hadley v. Hadley*, 140 So.2d 325 (Fla. 3d Dist. 1961).

45. *Brackin v. Brackin*, 182 So.2d 1 (Fla. 1966), *reversing* *Brackin v. Brackin*, 167 So.2d 604 (Fla. 1st Dist. 1964).

46. *Id.* at 6-7.

47. Notes 63-65, *infra*.

48. *Sommers v. Sommers*, 169 So.2d 496 (Fla. 3d Dist. 1964).

49. *Olsen v. Olsen*, 158 So.2d 775 (Fla. 3d Dist. 1963); for further proceedings, see *Olsen v. Olsen*, 172 So.2d 276 (Fla. 3d Dist. 1965).

50. *Webb v. Webb*, 156 So.2d 698 (Fla. 3d Dist. 1963). This holding would appear to be in accord with the case of *Torchiana v. Torchiana*, 111 So.2d 103 (Fla. 1959) which was overlooked by the court. *Accord*, *Hennig v. Hennig*, 162 So.2d 288 (Fla. 3d Dist. 1964).

An interesting aspect of the doctrine of *res judicata* was applied in *Durham v. Ellis*.⁵¹ In *Durham* a chancellor awarded the wife six thousand dollars as lump sum alimony. This award was predicated upon the husband's testimony that he was the holder of a mortgage (with a balance of eighteen thousand dollars) when the mortgage was, in fact, payable to the husband and wife, and was, therefore, payable to them as tenants in common (by operation of law after a divorce). Two years later, the wife brought suit to collect her share of the mortgage, and the husband counter-claimed to reform it. Despite the fact that the lower court admitted in the second suit that in the first suit it had "inadvertently, as a matter of law, brought an unjust enrichment to the wife,"⁵² the second district denied that the chancellor had any power to order restitution of the six thousand dollar lump sum alimony from the wife's nine thousand dollar share of the mortgage because of the doctrine of *res judicata*.

E. Modification of Alimony Awards

In a case of first impression in Florida, the second district has held that a Florida court does not have jurisdiction to modify alimony⁵³ when the marriage, divorce and the entry of the alimony decree all took place out of Florida, and when the wife has never submitted to the jurisdiction of the Florida court.⁵⁴

In the last two years the Florida courts have continued to articulate standards for determining when there has been a change in circumstances which would justify a modification of an alimony award. When a husband's financially worsened condition has been caused in substantial part by his voluntary agreement to pay his ex-wife large annual sums for her interest in jointly held property, it is not an abuse of discretion for the chancellor to refuse to reduce the amount of alimony and child support payments.⁵⁵ An order modifying an award of alimony should be based upon a change in the financial conditions of the parties and the husband's ability to pay, not upon the fraudulent or inequitable conduct of the ex-wife.⁵⁶

Inasmuch as the modification of an alimony award is based upon a change in circumstances, "the clean hands doctrine has a limited application,"⁵⁷ and the refusal of the chancellor to apply it would seem to be a matter of discretion. Further, a chancellor, in the proper exercise of his discretion, may make the modification effective on a date subsequent to

51. 157 So.2d 185 (Fla. 2d Dist. 1963).

52. *Id.* at 187, 189.

53. Under FLA. STAT. § 65.15 (1963).

54. *Borst v. Borst*, 161 So.2d 693 (Fla. 2d Dist. 1964).

55. *Bergh v. Bergh*, 160 So.2d 145 (Fla. 1st Dist. 1964).

56. *Glass v. Glass*, 166 So.2d 487 (Fla. 2d Dist. 1964).

57. *Simon v. Simon*, 155 So.2d 849 (Fla. 3d Dist. 1963).

the filing of the petition for modification but prior to the date of the final hearing.

A Florida statute⁵⁸ provides that alimony or support provisions of a separation agreement, which were incorporated into a divorce decree, may be modified under certain circumstances. However, when the separation agreement provides for the complete division of the property of the parties, the wife has thereby relinquished her interest in property of the husband, and he, in return, has agreed to pay her a fixed sum so long as she should live and does not remarry, the court has no power to rewrite the contract of the parties and may not modify it in favor of the husband even if there has been a change of circumstances.⁵⁹ On the other hand, it is proper for a court to relieve a father of the obligation to pay one-half of the mortgage payments on the home occupied by his divorced wife and his minor child (which was ordered under a prior decree) when the ex-husband has conveyed his interest in the home to his ex-wife and she has remarried and is living with her new husband on the property.⁶⁰

In the event that a divorced wife should incur unusually large medical bills after an award of permanent alimony, she may move for a modification of the award upon the basis of a change in circumstances.⁶¹ However, it is error for a chancellor to reduce alimony payments in an amount which is equal to the amount that the ex-husband must pay for the hospitalization of an adult daughter which occurred subsequent to the award of alimony. A more equitable solution would be to require the former spouses to share the hospitalization expenses equally.⁶²

As stated in a preceding section of this Survey,⁶³ the Florida Supreme Court has now held that a wife who accepts the payment of alimony under a divorce decree will not be estopped to contest the amount of the alimony upon appeal unless the husband is able to show that he is prejudiced in some manner by the receipt and payment of the alimony. The Florida Supreme Court,⁶⁴ in affirming the second district,⁶⁵ has extended this rule to hold that when a post-decretal order has reduced the amount of alimony, the former wife may accept the reduced amounts ordered by the trial court without being estopped to appeal the modifying award. The

58. FLA. STAT. § 65.15 (1963).

59. *Howell v. Howell*, 164 So.2d 231 (Fla. 2d Dist. 1964). When property rights have become fixed by the final decree and the decree fails to retain jurisdiction of the case, the chancellor does not have the power to modify the decree. *Rogers v. Rogers*, 175 So.2d 232 (Fla. 2d Dist. 1965).

60. *In the Interest of P.A.R.*, 168 So.2d 710 (Fla. 3d Dist. 1964).

61. *Clutter v. Clutter*, 171 So.2d 544 (Fla. 3d Dist. 1965).

62. *Brill v. Brill*, 173 So.2d 490 (Fla. 3d Dist. 1965).

63. Notes 44-46 *supra*.

64. *Blue v. Blue*, 183 So.2d 205 (Fla. 1966). It would appear that the holding of *Fort v. Fort*, 167 So.2d 315 (Fla. 1st Dist. 1964) has been tacitly overruled by the *Blue* case.

65. *Blue v. Blue*, 172 So.2d 502 (Fla. 2d Dist. 1965).

wife may petition the trial court for an award of temporary alimony under the Florida Appellate Rules,⁶⁶ but she is not obliged to do so.

F. *Enforcement of Alimony Awards*

When a foreign state's decree for alimony and child support is sought to be enforced in Florida by making it a domestic decree, it is error to incorporate the terms of the foreign decree by reference without clearly specifying the terms and provisions of the foreign decree which are being made a part of the Florida decree.⁶⁷

A former husband who moves to vacate a judgment for arrearages of alimony and child support under the Florida Rules of Civil Procedure⁶⁸ must set forth a meritorious defense to his former wife's allegations as to the amount of the arrearages. Therefore, the mere fact that a former husband's attorneys withdrew from the case with the consent of a chancellor (who made a notation on the court file jacket that he was going to recuse himself, but entered no order of recusation), and that the hearing on the motion for judgment was not attended by either the former husband or his attorneys was not prejudicial to him in the absence of any meritorious defense to the wife's claim.⁶⁹

It is proper for a chancellor to refuse to award a money judgment for accrued support payments under a property settlement agreement when another division of the same circuit has enjoined the executor of the deceased former wife's estate from proceeding with the litigation. However, the refusal to award the money judgment must provide that it is interlocutory pending the disposition of the former husband's separate suit which seeks the reformation or cancellation of the property settlement agreement.⁷⁰

In proceedings, supplemental to a divorce decree, which involve the enforcement of alimony, the defendant is not entitled to actual service of process but only to adequate and reasonable notice of the proceedings. Hence, if notice is sent to the defendant in a foreign state by mail and two of his attorneys appear at the hearing, even though only as "spectators," and the arrearages of alimony were paid to the former wife by one of these attorneys during the pendency of the proceedings, the husband has received adequate and reasonable notice. Further, if a Florida mortgagor owes money to the non-resident former husband and receives notice by *lis pendens* of the suit for enforcement, he may intervene in the proceedings⁷¹ and a "Petition for Interpleader" by the mortgagor will be

66. FLA. R. APP. P. 3.8(b).

67. *Tischler v. Tischler*, 173 So.2d 769 (Fla. 2d Dist. 1965).

68. FLA. R. CIV. P. 1.38.

69. *Butler v. Butler*, 172 So.2d 899 (Fla. 3d Dist. 1965).

70. *Staples v. Staples*, 168 So.2d 705 (Fla. 3d Dist. 1964).

71. Under FLA. R. CIV. P. 3.4.

treated as an application to intervene. Finally, when the former husband has displayed a recalcitrant attitude in paying alimony, the chancellor is justified in ordering that he give security for the future performance of this obligation, and he may order him to deposit money in a secured savings account as security.⁷²

Actual notice to a former husband is necessary upon a motion to reduce an alimony award to judgment. However, the former husband's statement that he did not receive notice in a foreign state where he was living is not sufficient to authorize the court to vacate the judgment in the absence of his denial that he was living at the address to which the notice was sent or that the registered notice was returned to the sender.⁷³

The Florida Supreme Court has sustained the third district's decision in *Naster v. Naster*,⁷⁴ that in contempt proceedings for the failure of the former husband to pay alimony the burden of proof is on the husband to show that his failure to pay has not been wilful. In determining the question of wilfulness, the chancellor may take into consideration the husband's inability to pay together with other circumstances such as the husband's failure to apply to the court for relief when the fact of inability arises, as well as the fact that the husband has intentionally brought about his financial incapacity. It would seem obvious that if the former husband has suffered a decline in his financial ability to pay alimony, the burden is on him to apply seasonably for a modification of the award; he is courting disaster if he waits until his ex-wife brings contempt proceedings.

Since the sequestration and application of a former husband's property to the discharge of his alimony obligations under a divorce decree is an equitable process, he should be entitled to the benefit of the value of the property in reduction of his obligations. Hence, an ex-husband is entitled to equitable relief when the trial court permits a former wife to bid five thousand dollars upon the execution sale (initiated by her) for property worth fifty thousand dollars with the result that only five thousand dollars was to be credited towards the accrued alimony.⁷⁵

A mortgage executed solely by the husband of an estate by the entirety is not absolutely void so that it cannot be given effect after a divorce. The divorce converts the tenancy by the entirety into a tenancy in common, and the mortgage given by the husband alone attaches to his one-half interest. If the divorce decree awards the husband's interest to the wife as lump sum alimony, she receives the property encumbered by the mortgage.⁷⁶

72. *Carter v. Carter*, 164 So.2d 219 (Fla. 1st Dist. 1964).

73. *Davis v. Davis*, 159 So.2d 879 (Fla. 3d Dist. 1964).

74. *Naster v. Naster*, 163 So.2d 264 (Fla. 1964), *affirming* 151 So.2d 313 (Fla. 2d Dist. 1963).

75. *Frell v. Frell*, 162 So.2d 293 (Fla. 3d Dist. 1964).

76. *Hillman v. McCutchen*, 166 So.2d 611 (Fla. 3d Dist. 1964).

G. Duration of an Award of Alimony

In response to certified questions from the United States Supreme Court,⁷⁷ the Supreme Court of Florida⁷⁸ has held that it is erroneous for a chancellor to award alimony as a continuing charge against the former husband's estate during the lifetime of the wife in the absence of any agreement of the former husband to bind his estate. However, when an erroneous decree of this nature has been entered and the husband has not appealed from the decree and has acquiesced in making payments under it for many years, it will not be subject to collateral attack in Florida or in foreign states after the death of the husband. The main rule of the above case was applied by the Florida Supreme Court in *In re Freeland's Estate*.⁷⁹ In *Freeland* a final decree of divorce provided "that by consent of the parties and their solicitors . . . an agreement has been reached, as hereinafter set forth, providing for payment of permanent alimony."⁸⁰ The decree then stated that permanent alimony was to be paid "during the remainder of the life of the Plaintiff, or until the remarriage of the Plaintiff . . ."⁸¹ There never was any written agreement as to the payment of alimony. The trial court and the majority of the district court agreed that the above words obligated the former husband's estate for the payment of alimony during the remainder of the ex-wife's lifetime so long as she remained single, but the Florida Supreme Court held that there was no agreement between the parties evidencing a clear intention that the estate of the former husband was to be bound to continue the payment of alimony.

VII. INTER-SPOUSAL PROPERTY RIGHTS

Although a court has power in a divorce action to award a husband's interest in an estate by the entirety to the wife as lump sum alimony, or because she may have a "special equity" in the property, the court lacks the power to dispose of jointly held property unless the parties have agreed to it, or unless the partition statutes are complied with.⁸² Even though the complaint for divorce prays for a partition of the property held as an estate by the entirety, the court has no jurisdiction to do so unless appropriate pleadings asking for partition are filed *subsequent* to the entry of the final decree of divorce.⁸³

In the absence of a divorce, a court has no power to decree the liquidation of the husband's interest in property. However, a court does have

77. *Aldrich v. Aldrich*, 378 U.S. 540 (1964).

78. *Aldrich v. Aldrich*, 163 So.2d 276 (Fla. 1964). For a prior note on this case see Murray, *Family Law*, 18 U. MIAMI L. REV. 231, 241, n.53 (1964).

79. 182 So.2d 425 (Fla. 1966), *reversing* Scott v. Gratigny, 166 So.2d 816 (Fla. 3d Dist. 1964).

80. *Id.* at 426.

81. *Id.* at 426.

82. *Kitchen v. Kitchen*, 162 So.2d 539 (Fla. 3d Dist. 1964).

83. *Gonzalez v. Gonzalez*, 156 So.2d 206 (Fla. 3d Dist. 1963).

power to adjudicate a dispute between the spouses involving the ownership of property even in the absence of a divorce.⁸⁴

The "special equity" interest rule of the wife was illustrated in *Perine v. Perine*⁸⁵ which held that the chancellor was correct in ruling that certain jointly held property belonged to the wife because the husband never contributed to the support of the family during the fourteen years of married life and the property was purchased with the wife's funds. Likewise, this "special equity" rule has been extended to a husband who contributed the funds for the acquisition of a tenancy by the entirety.⁸⁶

The third district has held that a Florida court could enter a valid judgment upholding the wife's claim of a lien against a non-resident husband's "interest" in a tenancy by the entirety for unpaid separate maintenance payments. The property was purchased by the wife at a foreclosure sale. The court was careful to state that it was only upholding the validity of the judgment while not expressing any opinion about whether it was erroneous. As a result of this holding, the court then upheld a judgment (obtained in a subsequent suit) against the wife in favor of her attorney for his services performed in the obtaining of the husband's "interest" in this property by the wife. The court noted that the husband might attack the original judgment "by independent proceedings in equity."⁸⁷ If this occurred and the husband was able to upset the decree and recover his "interest," it would appear that the wife may be placed in the unhappy position of having paid her attorney for work that was not successful.

Inasmuch as a Florida statute⁸⁸ provides that a tenancy by the entirety is converted into a tenancy in common upon divorce, a divorce decree which provides that the parties are to hold as joint tenants after the divorce will be corrected upon appeal, even though the error of the chancellor was not brought to his attention by a petition for rehearing.⁸⁹

When title to property is in the name of the husband alone and then he and his wife execute a ninety-nine year lease which calls for payment of the rents to the husband, there is insufficient evidence that he intended to create an estate by the entirety in the unaccrued rents. Any implication that the husband intended to create an estate by the entirety, because of the inclusion of the wife's name as lessor, is refuted by the fact that it was necessary for her to join in the execution of the lease in order to release her inchoate right of dower during the term of the lease.⁹⁰

84. *Berlin v. Berlin*, 174 So.2d 69 (Fla. 3d Dist. 1965).

85. 175 So.2d 71 (Fla. 3d Dist. 1965).

86. *Burns v. Burns*, 174 So.2d 432 (Fla. 2d Dist. 1965).

87. *Klausner v. Ader*, 156 So.2d 193 (Fla. 3d Dist. 1963).

88. FLA. STAT. § 689.15 (1963).

89. *Wild v. Wild*, 157 So.2d 532 (Fla. 1st Dist. 1963).

90. *Cantor v. Palmer*, 163 So.2d 508 (Fla. 3d Dist. 1964).

In the absence of any evidence as to how the title to the property is vested and the interests of the respective parties, it is error to award the marital home to the husband, with right of occupancy to the wife, until the property is sold in good faith to a bona fide purchaser.⁹¹

The "divisible divorce" concept⁹² was further delineated by the United States Supreme Court in *Simons v. Miami Beach First Nat'l Bank*.⁹³ A wife secured a separate maintenance decree in New York. Later the husband secured an ex parte Florida divorce based upon constructive service. The former husband continued to comply with the requirements of the New York decree despite his divorce. Upon the death of the former husband, the former wife claimed dower on the grounds that Florida could not, under the principles established in *Estin v. Estin*,⁹⁴ constitutionally deny her a dower interest when the divorce was secured by constructive service and she did not appear in the action. In distinguishing *Estin*, the court stated that *Estin* held that a Nevada court which had no personal jurisdiction over the wife could not terminate the husband's obligation to support the wife as provided by a New York separate maintenance decree, while in the instant case, the former husband complied with the New York decree until his death which terminated the obligation of support under this decree. "[W]hen he died there was consequently nothing left of the New York decree for Florida to dishonor." The court then applied the rule of *Pawley v. Pawley*,⁹⁵ that the inchoate right of dower in Florida property was extinguished by a divorce decree predicated upon constructive service. When joint checking accounts are owned by the parties as an estate by the entirety and the wife has withdrawn sums in a manner not consistent with the joint interests of the parties, the chancellor may order the wife to return the money without determining that she is guilty of fraud because the adjustment of property rights during the divorce proceedings is in the nature of an accounting which is not dependent upon any finding of fraud.⁹⁶

The vexing evidentiary questions involving "donative intent" in joint savings accounts in federal savings and loan associations should at long last be cured by an amendment to section 665.15 of the Florida Statutes⁹⁷ which provides:

The establishment of a stock account, savings share account, or investment share account in joint and survivorship form shall, in the absence of fraud or undue influence, *be conclusive evi-*

91. *Davy v. Davy*, 176 So.2d 379 (Fla. 2d Dist. 1965).

92. See Note, 76 HARV. L. REV. 1233 (1963).

93. 381 U.S. 81 (1965).

94. 334 U.S. 541 (1948).

95. 46 So.2d 464 (Fla. 1950). For the question of dower in Florida, see generally Swigert, *Some Problems of Dower In Florida*, 17 U. FLA. L. REV. 368 (1964).

96. *Beaty v. Beaty*, 177 So.2d 54 (Fla. 2d Dist. 1965).

97. Fla. Laws 1965, ch. 65-463 (Emphasis added).

dence, in any action or proceeding to which either the association or the surviving shareholder or shareholders may be a party, of the intention of all such shareholders or account holders to vest title to such share accounts, and the additions thereto, in such survivor or survivors.

VIII. ATTORNEY'S FEES

A. *Grounds for an Award*

Attorneys' contingent fee contracts in family matters are against public policy and are unenforceable when they deal with alimony, support, or property settlements in lieu of support or alimony, but they are valid when they deal with the return of the wife's separate property.⁹⁸

The rule allowing attorney's fees to a "wife" in a divorce action even though the marriage is determined to be invalid has been extended to a suit for alimony unconnected with divorce⁹⁹ in which it is initially determined that the marriage is invalid.¹⁰⁰

A former wife may be awarded attorney's fees under the Florida statutes¹⁰¹ when she is defending the provisions of a custody decree against attack by the former husband in a court of chancery.¹⁰² This rule has been extended to cases involving habeas corpus proceedings relative to the custody of children when there is a property settlement agreement to pay these fees.¹⁰³ The third district has refused to extend these rules to include a case where the former wife incurs attorney's fees in defending a habeas corpus suit brought by her former husband and there was no agreement to defray these fees.¹⁰⁴ It is submitted that the statute¹⁰⁵ ought to be amended by including a provision that the former wife is entitled to attorney's fees in habeas corpus suits as well as in chancery suits as a matter of law rather than agreement.

A former wife is entitled to attorney's fees when she resists her former husband's efforts to modify a divorce decree, even when the modification extends only to visitation rights to the children who are in her custody.¹⁰⁶

The amount of fees to be awarded to attorneys in family matters

98. *Salter v. St. Jean*, 170 So.2d 94 (Fla. 3d Dist. 1965), *distinguishing* *Sobieski v. Maresco*, 143 So.2d 62 (Fla. 3d Dist. 1962).

99. Under FLA. STAT. § 65.09 (1963).

100. *Dawson v. Dawson*, 164 So.2d 536 (Fla. 1st Dist. 1964).

101. FLA. STAT. § 65.16 (1963).

102. *McNeill v. McNeill*, 59 So.2d 57 (Fla. 1952); *Metz v. Metz*, 108 So.2d 512 (Fla. 3d Dist. 1959).

103. *O'Neal v. O'Neal*, 158 So.2d 586 (Fla. 3d Dist. 1963), *but see* the strong dissent of Pearson, J.

104. *State v. Paine*, 166 So.2d 708 (Fla. 3d Dist. 1964).

105. FLA. STAT. § 65.16 (1963).

106. *Wilner v. Wilner*, 167 So.2d 234 (Fla. 3d Dist. 1964).

must be proved by expert testimony, and a court may not make an award based solely upon the testimony of the interested attorney.¹⁰⁷

B. Appeals of Awards of Attorney's Fees

Although the wife's attorneys are entitled to an award of attorneys' fees even though the case is not finally concluded by a decree of divorce because of a settlement or reconciliation of the parties, the attorneys are unable to appeal the award if they are dissatisfied with the amount since they are not parties of record in the case, and, therefore, "they have no standing to prosecute an appeal."¹⁰⁸

IX. ANTENUPTIAL AND SEPARATION AGREEMENTS

A. Antenuptial Agreements

In a case of first impression,¹⁰⁹ the third district has held that antenuptial agreements purporting to relieve a husband of any duty to pay "alimony, temporary or permanent, attorney's fees, costs or separate maintenance money"¹¹⁰ are void as being contrary to public policy. It has previously been held that a bride-to-be may contract away her dower rights by an antenuptial agreement,¹¹¹ but the court refused to extend this rule by analogy to the question of support.

In the absence of any fraudulent concealment or active misrepresentation by a husband-to-be, an antenuptial agreement will not be set aside when the wife-to-be was represented by counsel and she had "at least approximate knowledge of the potential resources of the prospective husband."¹¹² The fact that the assets of the parties, at the time of the execution of the agreement, were disproportionate will not of itself void the agreement if the wife-to-be was aware, or should have been aware, of the disproportionate condition of their respective assets. Antenuptial agreements should be upheld "particularly in view of the fact that generally, as in this case, the complaining wife awaits until death has sealed the lips of her husband before she makes an attack on the agreement."¹¹³

B. Separation Agreements

Under a Florida statute¹¹⁴ the chancellor has the discretion to settle alimony questions, and, as a result, the chancellor may approve all of the

107. *Lyle v. Lyle*, 167 So.2d 256 (Fla. 2d Dist. 1964).

108. *Hope v. Lipkin*, 156 So.2d 659 (Fla. 3d Dist. 1963).

109. *Lindsay v. Lindsay*, 163 So.2d 336 (Fla. 3d Dist. 1964).

110. *Id.* at 337.

111. *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962).

112. *Compare Cantor v. Palmer*, 166 So.2d 466 (Fla. 3d Dist. 1964), with the facts of *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962).

113. *Cantor v. Palmer*, *supra* note 112, at 468.

114. FLA. STAT. § 65.08 (1963).

provisions of a separation and property settlement agreement with the exception of those provisions dealing with alimony if he believes that they were obtained by over-reaching and are unfair.¹¹⁵ A property settlement agreement, executed prior to a divorce suit, which provides for alimony and child support payments, may be modified during the divorce proceedings if the husband shows a change in the financial circumstances of the parties.¹¹⁶

Federal law prohibits the assignment of a United States War Risk Insurance Policy or any agreement between the insured and another to prevent the insured from changing the beneficiary of the policy.¹¹⁷ In *Lindeburg v. Lindeburg*¹¹⁸ a husband and wife executed a property settlement agreement (which was incorporated into a divorce decree) which purported to obligate the husband to maintain such a policy for the benefit of his wife. At the time of the husband's death, he had received most of the face value of the policy, and his former wife brought suit against his estate. The court upheld the agreement by stating that no claim was being brought against the government, nor was the wife making any claim under the policy; rather the cause of action was predicated upon a contractual right enforceable against the estate and not upon the policy of insurance itself. This bit of judicial dialectics would be envied by the most subtle medieval philosophers.

In the absence of fraud, undue influence, duress or misrepresentation, a property settlement which is executed during the pendency of a divorce and which provides for a fixed amount for the wife's attorneys' fees is binding upon the parties and the court.¹¹⁹

X. SEPARATE MAINTENANCE

The first district has held that judicial constructions of sections 65.09 and 65.10 of the Florida statutes¹²⁰ have practically merged the two sections so that under either section it is necessary for the wife to prove that her husband has the ability to support her and any children of the marriage and that he has failed to do so. If the husband is furnishing support to the wife and children, she does not have a cause of action for separate maintenance under either section.¹²¹ The Legislature apparently agreed with this case by repealing section 65.10 as a separate section and consolidating its provisions in an amended section 65.09.¹²² In separate main-

115. *Dawkins v. Dawkins*, 172 So.2d 633 (Fla. 2d Dist. 1965).

116. *Rieder v. Rieder*, 157 So.2d 93 (Fla. 3d Dist. 1963), *construing* FLA. STAT. § 65.15 (1963).

117. 38 U.S.C. § 3101 (1965).

118. 162 So.2d 1 (Fla. 3d Dist. 1964).

119. *D'Amato v. D'Amato*, 176 So.2d 907 (Fla. 3d Dist. 1965).

120. FLA. STAT. §§ 65.09, 65.10 (1963).

121. *Wood v. Wood*, 166 So.2d 627 (Fla. 1st Dist. 1964).

122. Fla. Laws 1965, ch. 65-498.

tenance proceedings under either section (former sections 65.09 and 65.10) the court does not have the power to order a division of the property of the parties.¹²³ It would not appear that the consolidation of these sections will change this result.

In *Dawson v. Dawson*¹²⁴ the court held that a court has no power to award separate maintenance unless the plaintiff is married to the defendant. In *Dawson* a man and woman journeyed to Mexico, and the man secured a divorce from his wife who was an inmate in the Florida State Mental Hospital. The man and woman then went through a Mexican marriage ceremony and returned to Florida. The court held that the relationship was meretricious from the beginning, and that the parties were guilty of bad faith in flaunting the laws of Florida by resorting to a spurious divorce. The court refused to hold that the "husband" was estopped from denying his marriage, but from the tenor of the decision it would appear that the doctrine of estoppel would be unavailing in any case because the court lacks the power to award separate maintenance unless a marriage relationship exists.

When a wife brings a suit for alimony unconnected with divorce, the court has no power to force a divorce upon her against her will under a prayer for general relief in the complaint.¹²⁵

The Nevada Supreme Court has held that a Florida separate maintenance decree obtained by the wife in ex parte proceedings after personal service of process on the husband does not bar his Nevada divorce action based upon the cruelty of his wife even though his charges could have been litigated in the Florida proceeding. The Nevada court refused to consider itself bound by the Florida notions of res judicata or collateral estoppel but used its own definitions in weighing the full faith and credit effect of the Florida decree.¹²⁶ As previously indicated in this article,¹²⁷ the Florida courts have been giving somewhat similar treatment to separate maintenance decrees of New York which are asserted as a bar to divorce proceedings in Florida.

XI. CUSTODY AND SUPPORT OF CHILDREN

A. Custody

Neither a juvenile judge nor a chancellor is required to make specific findings of fact as to the fitness or unfitness of the parents in entering a custody order; an indication in the decree that the award is based upon the best interests of the children is sufficient.¹²⁸

123. *Rambo v. Rambo*, 155 So.2d 817 (Fla. 1st Dist. 1963). As to the property rights, *accord*, *Kitchen v. Kitchen*, 162 So.2d 539 (Fla. 3d Dist. 1964).

124. 164 So.2d 536 (Fla. 1st Dist. 1964).

125. *Daniel v. Daniel*, 171 So.2d 180 (Fla. 2d Dist. 1965).

126. *Clark v. Clark*, 389 P.2d 69 (Nev. 1964).

127. Note 31 *supra*.

128. In the Interest of F., 166 So.2d 486 (Fla. 3d Dist. 1964).

The fact that a court-appointed psychiatrist's report is "objectively, less than reassuring as to appellee's [the wife's] mental stability and fitness"¹²⁹ will not justify an appellate court's reversing the chancellor who awarded custody of the children to her. Custody of a seven year old boy and a three year old girl should be awarded to their mother, rather than to their paternal grandparents, when the record fails to disclose the mother's lack of fitness or moral standards. The fact that the paternal grandparents are able to provide more financially than the mother can is merely one, but not the primary consideration.¹³⁰

B. *Modification of Custody*

It is not an abuse of discretion for a chancellor to refuse to modify an award of custody (which gave custody to the father) upon petition of the former wife who had remarried within three weeks after the divorce. Sufficient time had not elapsed to evidence the stability of the former wife's second marriage.¹³¹ Likewise, when a father has been granted custody of the children, the mere fact that the mother has remarried, and is now more affluent than her former husband, is not sufficient to justify a change of custody. If the change in the financial condition is coupled with improper care of the children by the father, then, of course, a change of custody will be in order.¹³²

Custody decrees of a foreign state are not entitled to full faith and credit, nor are they *res judicata* "except as to facts before the court [the foreign court] at the time of the Judgment."¹³³ Hence, they may be modified at any time upon a showing of a change in circumstances.

C. *Enforcement*

In *State v. Bettner*¹³⁴ a mother had been given custody of children by a foreign divorce decree, but she left the children with their maternal grandparents in Florida. A petition for habeas corpus was served upon the grandparents by the father, and the mother took the children from Florida to New York. The court held that the grandparents could not be held in contempt in the absence of proof that they removed the children from Florida.

D. *Visitation Rights*

It is proper for a chancellor to qualify the father's visitation rights by providing that he "shall not take the minor children in an airplane

129. *Harrison v. Harrison*, 165 So.2d 235, 236 (Fla. 2d Dist. 1964).

130. *Kelly v. Kelly*, 163 So.2d 498 (Fla. 2d Dist. 1964).

131. *Longstreth v. Frischkorn*, 171 So.2d 550 (Fla. 3d Dist. 1965).

132. *Ritsi v. Ritsi*, 160 So.2d 159 (Fla. 3d Dist. 1964).

133. *O'Neal v. O'Neal*, 158 So.2d 586, 587 (Fla. 3d Dist. 1963).

134. 158 So.2d 561 (Fla. 3d Dist. 1963).

other than a certified carrier"¹³⁵ even though he is a qualified pilot, though not for a certified carrier. This restriction was upheld because of "the dangers incident to the type of flights suggested here."¹³⁶

When there is a petition for modification of a divorce decree, there should be a hearing where evidence may be introduced. However, when the petition for modification is, in fact, a request that a mistake in the wording of the decree be corrected as to the rights of visitation by the father, it would appear that the chancellor may deny the introduction of evidence which indicates that it might be unsafe to allow the husband to visit his child alone. Of course, the wife may petition for a modification of the visitation provisions of the decree upon this ground.¹³⁷

The second district has seemingly characterized an amended final decree which provided that the wife was to have¹³⁸ custody of a daughter every other week-end and during a thirty day period during June, July or August of each year as an enlargement of "visitation" rights rather than as an order for divided custody which would be condemned under prior authority.

E. *Child Support and Basis for the Award*

In a case of first impression,¹³⁹ the first district has held that a father has the duty to support an adult child who is incapacitated because of mental or physical infirmities, who has never married and who has lived with her mother since birth. It is error to order the sale of property held as an estate by the entirety in order to use the proceeds to establish a trust fund for the college education of the minor children of the parties to a divorce suit.¹⁴⁰

F. *Modification of the Award*

It is erroneous for a chancellor to refuse to award travel and maintenance expenses to a non-resident wife incurred in defending a Florida divorce suit merely because the wife received child support (pursuant to a foreign decree) for six years after the child became an adult. It is incumbent upon a former husband to seek modification of a child support decree when the child reaches his majority, and the wife should not be penalized for continuing to accept payments after the child's majority if the husband fails to seek modification.¹⁴¹

135. *Sutter v. Sutter*, 172 So.2d 910 (Fla. 3d Dist. 1965).

136. *Id.* at 911.

137. *McLeod v. McLeod*, 172 So.2d 274 (Fla. 2d Dist. 1965).

138. *McCown v. McCown*, 167 So.2d 250, 252 (Fla. 2d Dist. 1964).

139. *Fincham v. Levin*, 155 So.2d 883 (Fla. 1st Dist. 1963). This case was decided under the Uniform Reciprocal Enforcement of Support Law, FLA. STAT. § 88 (1963).

140. *Allen v. Allen*, 158 So.2d 546 (Fla. 3d Dist. 1963), following *Weinstein v. Weinstein*, 148 So.2d 737 (Fla. 3d Dist. 1963).

141. *Hohweiler v. Hohweiler*, 167 So.2d 73 (Fla. 2d Dist. 1964).

A court should reduce the amount of child support upon petition of the father when the re-marriage of the mother has resulted in a substantial reduction of the amount necessary for the support of the minor child.¹⁴² On the other hand, it is erroneous to relieve a father of all liability for support of his minor child after his former wife (who has custody) enters into a subsequent marriage. This is true even though the wife has succeeded in having the child's name changed to that of her new husband. Further, it is improper to relieve the former husband of liability for alimony and child support which accrued between the entry of the final decree and the wife's remarriage. If the original decree failed to allocate amounts for alimony and child support but provided a lump sum for both, it is the former wife's responsibility to petition the court to make an apportionment for child support upon her re-marriage if she intends to seek collection of child support subsequent to her re-marriage.¹⁴³

It is proper for a chancellor to refuse to clarify the unambiguous child support provisions of a final decree of divorce without prejudice to the right of the former wife to file a petition for modification of the child support provisions because of a change of circumstances occurring since the final decree.¹⁴⁴

G. *Enforcement of the Award*

A sentence of an ex-husband to jail for contempt for his failure to pay support payments to his ex-wife must provide for a sentence for a definite period of time coupled with a provision that the contemnor may secure his release at any time during the sentence by payment of the accrued support payments.¹⁴⁵

H. *Collateral Attack on Award*

A divorce decree which requires a husband to support a minor child who was not adopted by the parties but who had been placed in their custody by the order of a foreign court is not void, "although it may have been erroneous and subject to reversal on appeal."¹⁴⁶ In the absence of an appeal, the decree cannot be attacked under the Florida statutes¹⁴⁷ or under the Florida Rules of Appellate Procedure.¹⁴⁸

XII. ADOPTION

The consent of the father of an illegitimate child is not necessary for the adoption of the child by another, nor does the father have any stand-

142. *Boyle v. Boyle*, 164 So.2d 566 (Fla. 3d Dist. 1964).

143. *Plager v. Perlmutter*, 159 So.2d 273 (Fla. 3d Dist. 1964).

144. *Harrell v. Harrell*, 171 So.2d 214 (Fla. 1st Dist. 1965).

145. *State v. Anderson*, 168 So.2d 554 (Fla. 1st Dist. 1964).

146. *Teply v. Key*, 158 So.2d 549 (Fla. 3d Dist. 1963).

147. FLA. STAT. § 65.15 (1963).

148. FLA. R. APP. P. 1.38(b).

ing to contest the adoption merely because he has been supporting the child. His voluntary support is no more than a compliance with his legal responsibilities.¹⁴⁹

In a case of first impression,¹⁵⁰ the second district has held that a child who is adopted after the execution of a will is a pretermitted child, entitled to a child's part of the estate under the Florida statute.¹⁵¹

The Florida statutes provide that an adopted child is the "legal heir"¹⁵² and "lineal descendant of his adopting parents."¹⁵³ As a result, when property is devised or bequeathed to an adopting parent who dies before the testator, the legacy or devise does not lapse¹⁵⁴ and the adopted child takes the property in the same manner as the devisee or legatee would have done had he survived the testator.¹⁵⁵

The Supreme Court of the United States has recently held that the failure to notify a father of the pendency of adoption proceedings instituted by his former wife and her new husband is a deprivation of due process of law which renders the adoption decree constitutionally invalid. This constitutional infirmity would not be cured by a hearing, granted to the former husband upon his petition to set aside the decree, because the burden which was placed upon him to show affirmatively that he had contributed to the support of his child during the preceding two year period (as required by the law of Texas) would not have been placed upon him if he had been given notice of the proceedings at the beginning.¹⁵⁶

Section 72.22 of the Florida Statutes has been amended¹⁵⁷ to provide that an adopting parent may maintain an action for the wrongful death of his adopted child while the natural parent or parents are deprived of this right after adoption.

XIII. JUVENILES AND JUVENILE COURTS

A. Jurisdiction

Juvenile courts are empowered to deal with the custody of children who are delinquent or dependent, or both. In addition, the Juvenile Court

149. *Clements v. Banks*, 159 So.2d 892 (Fla. 3d Dist. 1964).

150. *In re Frizzell's Estate*, 156 So.2d 558 (Fla. 2d Dist. 1963).

151. FLA. STAT. § 731.11 (1963).

152. FLA. STAT. §§ 72.22, 72.38 (1963).

153. FLA. STAT. § 731.30 (1963).

154. FLA. STAT. § 731.20 (1963).

155. *In re Baker's Estate*, 172 So.2d 268 (Fla. 2d Dist. 1965).

156. *Armstrong v. Manzo*, 380 U.S. 545 (1965).

157. Fla. Laws 1965, ch. 65-384. The Attorney General has ruled (under chapters 28 and 72 of the Florida Statutes) that a final decree in adoption cases may be recorded only in the names of the petitioners seeking the adoption and that the name of the child neither before or after adoption shall appear in the public record of the clerk's office outside of the court file. Further, if it is impracticable to obliterate the name of the child from the final decree, the decree shall not be recorded and shall only be indexed as provided by FLA. STAT. § 72.27 (1963). FLA. ATT'Y GEN. OP. 064-89 (July 14, 1964).

in Dade County has the power to act in regard to the custody of children even when they are not delinquent or dependent.¹⁵⁸ However, this additional power of the Dade County Juvenile Court does not authorize it to determine the question of fitness for custody of one of the natural parents unless the question is presented in a court of competent jurisdiction in divorce, separate maintenance, or on habeas corpus to determine custody. The court has no power to entertain a declaratory decree action that one spouse is unfit to have custody. Further, when a former wife has initiated a so-called declaratory decree action of this nature, the court cannot take custody from her and award it to her former husband in the absence of any pleading filed by him. It constitutes a denial of due process.¹⁵⁹

In a county which does not have a separate juvenile court, the county judge is also denominated as a juvenile judge.¹⁶⁰ The juvenile court has exclusive-original jurisdiction over dependent children living within the county.¹⁶¹ As a result, the county-juvenile court judge has jurisdiction over a case brought by a guardian of a dependent child against the child's father for an increase of a child support award entered by a foreign court.¹⁶²

The circuit court for Broward County does not have the power to transfer a child custody matter to the Juvenile Court of Dade County; the power to transfer is limited within the county.¹⁶³

In a rather cloudy opinion,¹⁶⁴ the first district has seemingly held that when a juvenile court has taken jurisdiction over children as being "dependent" and awarded custody to their father, jurisdiction will remain with the juvenile court when the wife later files suit for alimony unconnected with divorce and for temporary custody of the children. The court seemingly construed the Florida Constitution and statutes as requiring this holding.¹⁶⁵ However, the court, in citing *Ponce v. Children's Home Soc'y of Florida*¹⁶⁶ as controlling authority, quoted an extract from this opinion which was couched in language to the effect that although the chancellor had jurisdiction over the children he should defer to the juvenile court.

Two of the district courts are in apparent conflict over the question of jurisdiction over children who have been committed to an industrial school. The second district has held¹⁶⁷ that a child who has been committed by a juvenile court to an industrial school as a delinquent child

158. Fla. Laws 1951, ch. 27000, § 3.

159. *In re My*, 162 So.2d 551 (Fla. 3d Dist. 1964).

160. FLA. STAT. ch. 39 (1963).

161. FLA. STAT. §§ 39.01(10), 39.02(1) (1963).

162. *Conrad v. Rose*, 173 So.2d 762 (Fla. 2d Dist. 1965).

163. *In the interest of M*, 166 So.2d 154 (Fla. 3d Dist. 1964).

164. *Perdue v. Perdue*, 155 So.2d 665 (Fla. 1st Dist. 1963).

165. FLA. CONST. art. 5, §§ 6(3), 12, and FLA. STAT. §§ 65.14, 39.02 (1963).

166. *Ponce v. Children's Home Soc'y*, 97 So.2d 194 (Fla. 1957).

167. *Dixon v. State*, 155 So.2d 632 (Fla. 2d Dist. 1963).

is under the jurisdiction of the executive branch of the government, and, therefore, a mother who obtained the release of her child by lying to the officials of the industrial school cannot be in contempt of the juvenile court. The first district has held¹⁶⁸ (in an opinion which was seemingly tacitly approved by the Florida Supreme Court¹⁶⁹) that the juvenile court does not lose jurisdiction over children who have been committed to an industrial school as delinquent children and the court may subsequently order their release and return to the control of their parents under the supervision of the court.

A Florida statute¹⁷⁰ provides that when a minor moves to have his felony case removed from the juvenile court to the court which would have jurisdiction if he were an adult, the juvenile court judge's jurisdiction is limited to ordering the transfer and he has no jurisdiction to conduct a hearing in order to determine which particular criminal court should have jurisdiction.¹⁷¹

A sentence of one year at *hard labor* in the county jail imposed by a juvenile court for criminal contempt is void. The Florida statutes¹⁷² permit a sentence at hard labor to be imposed against a convict, but criminal contempt is not a crime and the contemnor is therefore not a convict.¹⁷³

The Attorney General has ruled that when a juvenile court judge, acting pursuant to the Florida statutes,¹⁷⁴ waives jurisdiction and transfers a case against a juvenile to a court which would have jurisdiction if the child were an adult, the child is subject to imprisonment as if he were an adult.¹⁷⁵

Section 39.02(1) of the Florida Statutes has been amended to provide that the juvenile court, upon the filing of a petition and the holding of a hearing, may revoke or suspend the driver's license of a child upon a finding that the child has violated a federal law, state law or city ordinance relating to the operation of a motor vehicle without adjudicating the child to be delinquent.¹⁷⁶

B. *Dependent and Delinquent*

A child will be considered "dependent" if she is without proper parental care and supervision,¹⁷⁷ and a child may be found to be "dependent"

168. A.N.E. v. State, 156 So.2d 525 (Fla. 1st Dist. 1963).

169. State v. Walters, 158 So.2d 513 (Fla. 1963).

170. FLA. STAT. § 39.02 (1963).

171. State v. Culbreath, 168 So.2d 339 (Fla. 3d Dist. 1964).

172. FLA. STAT. § 922.05(2) (1963).

173. State v. Boyer, 166 So.2d 694 (Fla. 2d Dist. 1964).

174. FLA. STAT. § 39.02(1) (1963).

175. FLA. ATT'Y GEN. OP. 063.99 (Aug. 12, 1963).

176. Fla. Laws 1965, ch. 65-219.

177. O'Brien v. Juvenile & Domestic Relations Court, 161 So.2d 220 (Fla. 3d Dist. 1964).

even though the custodian-mother has financial means because "the statute"¹⁷⁸ . . . clearly encompasses conditions other than financial necessity for public welfare."¹⁷⁹

A juvenile court will not be considered as having abused its discretion in revoking probation and reinstating an order of commitment when the juvenile court files "indicate a strong trend of delinquent and incorrigible conduct on the part of"¹⁸⁰ the juvenile.

The purpose of the Legislature in enacting the juvenile courts acts was to provide a forum which could consider the problems of dependent children in an informal fashion without the necessity of applying the technicalities that often accompany routine litigation. Therefore, the court may treat a "petition for re-hearing" as a petition for modification of visitation rights in a prior custody award and order a change in custody even though no witnesses were sworn and the court heard only the parties and their counsel.¹⁸¹

C. Appeals

The Florida statute,¹⁸² which provides that in appeals from the juvenile courts to the district courts of appeal it is not necessary to file any briefs or papers other than the juvenile court file, has been superseded by the Florida Appellate Rules which require the filing of assignments of error, directions to the clerk, records on appeal and briefs.¹⁸³

D. Juveniles and Criminal Procedure

In the absence of allegations that a minor is a near mental defective, it would seem that he is competent to waive the appointment of counsel in a criminal case.¹⁸⁴ The same district court in the prior decision of *Mullins v. State*¹⁸⁵ seemed to articulate greater safeguards for this "intelligent waiver" concept that it did in the subsequent case. In *Mullins* the minor alleged that when he pleaded guilty to a felony charge he was insolvent; that he was not advised of full knowledge of the charge against him; that his mother, who accompanied him at the trial, was also an insolvent with only a fifth grade education; that she stated that she did not desire counsel for her son because she was financially unable to retain counsel; and that the judge failed to advise her that her son was entitled to court-appointed counsel if she desired one. The trial court held a hearing under Criminal Procedure Rule 1, but ruled that "the merits of the

178. FLA. STAT. § 39.01 (1963).

179. In the Interest of W.S.B., 157 So.2d 548 (Fla. 3d Dist. 1963).

180. In the Matter of J.S.D., 156 So.2d 780, 781 (Fla. 2d Dist. 1963).

181. *In re M*, 176 So.2d 600 (Fla. 3d Dist. 1963).

182. FLA. STAT. § 39.14 (1963).

183. A.N.E. v. State, 167 So.2d 769 (Fla. 1st Dist. 1964).

184. Mankus v. State, 161 So.2d 547 (Fla. 1st Dist. 1964).

185. Mullins v. State, 157 So.2d 701, 704 (Fla. 1st Dist. 1963).

motion and its grounds did not warrant the production of the prisoner at the hearing."¹⁸⁶ The first district reversed, holding that if the minor proved his allegations at a new hearing there clearly was no effective waiver of his constitutional right to counsel. The lower court was directed to permit the minor, or his court-appointed counsel, full opportunity to present evidence "in support of the allegations of the motion, particularly with reference to the critical issue of competent and intelligent waiver."¹⁸⁷

In a case of first impression, the second district has held that the Florida statute¹⁸⁸ which requires that notice be given to the parents or guardian of an unmarried minor when he is being charged with a crime prior to the trial is not satisfied by the fact that a minor may be represented by counsel at the trial. Notice must be given to the parents or guardian regardless of the presence of counsel. Further, the wilful withholding or the wilful giving of false information by the minor as to the whereabouts of his parents or guardian will constitute a waiver of the statute, provided that the court or the executive officers of the court pursue reasonable measures in attempting to ascertain the whereabouts of the minor's parents or guardian and attempt to serve notice upon them.¹⁸⁹

XIV. GUARDIANSHIP

The holding in the case of *In re Guardianship of Mickler*,¹⁹⁰ which was criticized by the author in the last *Survey*,¹⁹¹ has been reversed by the Florida Supreme Court.¹⁹² The court held that venue and jurisdiction are not synonymous terms in guardianship matters. When an incompetent had lived for many years in Hernando County and was then moved by a friend (later appointed guardian) to Taylor County a short time before guardianship proceedings were instituted, either county had power—in the sense of jurisdiction—to conduct guardianship proceedings. However, the venue was properly in Hernando County in the absence of any waiver by the next of kin of the incompetent as to the appointment of a guardian in Taylor County.

Since jurisdiction is vested in both the county judge's court of the county where the incompetent resides, as well as in the county in which he may be found, an incompetent, after he has regained his sanity, may not collaterally attack the adjudication of incompetency entered by the county judge of the county where the incompetent was found, even though the proper venue was in a different county where the incompetent resided. The county judge who has entered the adjudication of incompetency also

186. *Id.* at 704.

187. *Id.* at 705.

188. FLA. STAT. § 932.38 (1963).

189. *Milligan v. State*, 177 So.2d 75 (Fla. 2d Dist. 1965).

190. 152 So.2d 205 (Fla. 1st Dist. 1963).

191. *Murray, Family Law*, 18 U. MIAMI L. REV. 231, 258 (1964).

192. *In re Guardianship of Mickler*, 163 So.2d 257 (Fla. 1964).

has jurisdiction to order the sale of the incompetent's property, but he has no jurisdiction to determine the title to property located in a different county.¹⁹³

The county judge's court does not have power to award fees to guardians and attorneys in guardianship proceedings for services performed subsequent to the ward's being declared competent. Of course, fees may be awarded for services performed prior to the date that the ward is declared competent, even though the award is made afterwards.¹⁹⁴

An unclassified diagnosis of schizophrenia is insufficient to support an adjudication of incompetency under the Florida statutes;¹⁹⁵ the determinative question is not:

whether the person is suffering from a mental illness, is in need of psychiatric treatment, is in need of counseling, is staying out of trouble, or is leading a normal life. The pertinent question presented to the judge in cases such as this is whether the alleged incompetent is suffering from a mental illness to such an extent that he is incapable of caring for himself, or managing his property or is likely to dissipate or lose his property or become the victim of designing persons.¹⁹⁶

Florida Statute section 394.22(16) was amended by deleting the former thirty day observation requirement for restoring to mental competency.¹⁹⁷

Sections 965.01(4) and 965.04(3) were amended by providing for the creation of a "Division of Mental Retardation" which is charged with the responsibility "for the planning, development and coordination of a complete and comprehensive state-wide program for the mentally retarded."¹⁹⁸

Chapter 394 of the Florida Statutes was amended by the addition of a provision which empowers the staff of a state hospital to release patients for "trial visits" to their homes after it has been determined from observation, examination and treatment that the patients would benefit from these visits.¹⁹⁹

Section 745.121 of the Florida Statutes was amended to provide that upon entry of an order or decree of a court of competent jurisdiction, the guardian shall have the power to hold any corporate stock, mutual investment trust share, registered bonds, notes, debentures, or revenue certificates issued by any corporation, government, municipality, or sub-

193. *Bambrick v. Bambrick*, 165 So.2d 449 (Fla. 2d Dist. 1964).

194. *Poling v. City Bank & Trust Co.*, 167 So.2d 52 (Fla. 2d Dist. 1964).

195. FLA. STAT. ch. 394 (1963).

196. *In re Pickles' Petition*, 170 So.2d 603, 613 (Fla. 1st Dist. 1965).

197. Fla. Laws 1965, ch. 65-5.

198. Fla. Laws 1965, ch. 65-14.

199. Fla. Laws 1965, ch. 65-23.

division or agencies thereof, in the name of the guardian or in the name of one or more joint guardians, or in the name of a nominee, with or without disclosing any fiduciary relationship. The guardian shall be responsible for his own acts or omissions and for the acts or omissions of the nominees of such property.²⁰⁰

Section 828.04 of the Florida Statutes was amended by increasing the scope of the crimes of torturing and unlawfully depriving children of food, clothing, support and shelter and providing for a penalty of imprisonment not exceeding two years or a fine not exceeding two thousand dollars, or both.²⁰¹

Section 828.042 of the Florida Statutes was enacted providing that whoever negligently deprives a child under the age of sixteen of necessary food, clothing or shelter, and "whoever negligently and without malice deprives of necessary sustenance or raiment, or negligently and without malice deprives of necessary treatment and attention his child or ward" is guilty of a misdemeanor punishable by imprisonment for not exceeding six months, or by fine not exceeding five hundred dollars, or both.²⁰²

Sections 710.02-05 and 710.07 of the Florida Statutes have been amended to include life insurance policies and annuity contracts which are on the life of a minor or a member of his family within the provisions of the Florida Gifts to Minors Act.²⁰³

The Uniform Principal and Income Law, chapter 690 of the Florida Statutes, has been made applicable to the principal and income of the estates of wards.²⁰⁴

Section 744.40 of the Florida Statutes was amended to provide that letters of guardianship shall be issued to the guardian of the person or of the property or both, but failure to issue letters shall not affect the validity of the order appointing the guardian.²⁰⁵

XV. ILLEGITIMACY

In a bastardy proceeding it is not sufficient merely to allege that the plaintiff is the mother and natural guardian of a child who is the natural child of the defendant. Under the Florida statutes,²⁰⁶ it is necessary that the plaintiff allege that she is an unmarried woman and that the child is a bastard. Unless the child is born to the plaintiff out of wedlock the plaintiff has no cause of action under the statute.²⁰⁷

200. Fla. Laws 1965, ch. 65-106.

201. Fla. Laws 1965, ch. 65-113.

202. Fla. Laws 1965, ch. 65-113.

203. Fla. Laws 1965, ch. 65-354.

204. Fla. Laws 1965, ch. 65-205.

205. Fla. Laws 1965, ch. 65-285.

206. FLA. STAT. §§ 742.011, 742.021 (1963).

207. *Lorenz v. Jiminez*, 163 So.2d 500 (Fla. 3d Dist. 1964).

A Florida statute²⁰⁸ provides for a four year statute of limitations in bastardy actions which begins to run from the time of the child's birth or four years after the last payment made by the father for the child's support. If the mother files suit more than four years after the child was born and the alleged father moves for a summary judgment which is supported by an affidavit which fails to make any mention of whether any support payments were made by him, the court may not enter a summary judgment because all doubts as to the existence of a material fact must be resolved against the moving party. Further, since statutes of limitations relate to the remedy, the Legislature may increase the period of limitations from three to four years when the original cause of action has not become barred under the former statute.²⁰⁹

Section 856.04 of the Florida Statutes has been amended to provide that a father who deserts or wilfully withholds the means of support from his illegitimate child after he has been adjudged to be the father of such child by a court of competent jurisdiction of Florida or any other jurisdiction shall be guilty of a felony punishable by imprisonment for not more than two years or by a fine not exceeding two thousand dollars or both.²¹⁰

Section 39.11(1) of the Florida Statutes has been amended to provide that the juvenile court judge has the power to order support payments from a father of an illegitimate child who acknowledges his paternity in writing before the judge.²¹¹

XVI. MISCELLANEOUS

A. *Meretricious Relationship and Constructive Trusts*

Mutual promises to live together in a meretricious relationship are not legal consideration to support a partnership agreement. However, when a married woman has reposed trust and confidence in her married paramour and she has contributed property and money for the acquisition of property for their mutual benefit, but the paramour has placed the title to the property in his own name or in the name of corporations, the court may impose a constructive trust against the widow, estate and heirs of her paramour.²¹²

B. *Wills and Estates*

In *Bauer v. Reese*²¹³ the first district has held that under the Florida statutes²¹⁴ the will of a husband leaving property to his wife is revoked

208. FLA. STAT. § 95.11(9) (1963).

209. *Patterson v. Soddors*, 167 So.2d 789 (Fla. 2d Dist. 1964).

210. Fla. Laws 1965, ch. 65-210.

211. Fla. Laws 1965, ch. 65-462.

212. *Botsikas v. Yarmack*, 172 So.2d 277 (Fla. 3d Dist. 1965).

213. 161 So.2d 678 (Fla. 1st Dist. 1964). Noted 17 U. FLA. L. REV. 646 (1965).

214. FLA. STAT. § 731.101 (1963).

by their divorce and their subsequent re-marriage to each other does not reactivate or reestablish the will. The will left only the homestead to the wife. Since the will was held revoked by the divorce, the husband died intestate and his widow was his sole heir. It is wondered if the draftsman of his statute ever visualized this situation?

In a case of first impression,²¹⁵ the third district has held that the common law duty of a husband to pay for his wife's funeral expenses is abrogated when the wife leaves a will providing for the payment of her funeral expenses out of her estate.

C. Torts

A father does not have a cause of action for the wrongful death of his minor daughter who, at the time of her death, was married and living with her husband. The fact that the daughter's husband dies soon after her death does not affect this result.²¹⁶

An unemployed married woman living with, and supported by, her husband may not recover medical expenses from a tortfeasor when her husband has not joined in the suit, and she has failed to allege and prove that she has any separate property, or that she has obligated any of her separate property for these medical expenses.²¹⁷

D. Homestead Exemption

In a case of first impression,²¹⁸ the Florida Supreme Court has held that it is legally possible for a married woman in good faith to claim a permanent home in Florida property for purposes of homestead tax exemption even though her husband is legally domiciled out of the state and she continues to live in a "congenial" marital relationship with him.

215. *Garett v. Rawlings*, 167 So.2d 794 (Fla. 3d Dist. 1964).

216. *Guarniere v. Henderson*, 171 So.2d 617 (Fla. 1st Dist. 1965).

217. *O'Quinn v. Central Truck Lines, Inc.*, 157 So.2d 539 (Fla. 1st Dist. 1963).

218. *Judd v. Schooley*, 158 So.2d 514 (Fla. 1963).