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FAMILY LAW*

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* The material herein surveyed includes the statutes enacted by the 1963 General Session of the Florida Legislature and the cases reported from 132 So.2d 1 through 155 So.2d 352.

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> Then Almitra spoke again and said,
> And what of Marriage, Master?
> And he answered saying:
> You were born together, and together you shall be forevermore.
> You shall be together when the white wings of death scatter your days.
> Ay, you shall be together even in the silent memory of God.
> But let there be spaces in your togetherness,
> And let the winds of the heavens dance between you.***

I. INTRODUCTION

Because of space limitations, family law cases whose primary emphasis was in other fields of law will be discussed in the contracts, torts, property and trusts articles in this *Survey*. Legislation enacted during the 1963 general session of the Legislature will be discussed in the appropriate sections of this article.

The Supreme Court of Florida and the district courts of appeal have decided numerous cases of first impression dealing with almost every facet of family law. In the main, these first impression cases would appear to be welcome additions to the law. Unfortunately, the courts seem to have had difficulties with the more commonplace areas of the law. The district courts have been especially prone to overlook what their sister courts have decided or to overlook their own recent decisions. These faults probably can be attributed, in part, to the inadequate research of the lawyers involved in these cases, as well as to the fact that the case load of the district courts (as well as the supreme court) has reached an alarming level.[1] However, it is submitted that part of this case load

*** GIBRAN, THE PROPHET 19 (1923). See Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 UTAH L. REV. 443 (1961).

1. The following figures reflect the case load for the supreme court and the district courts of appeal during the year 1962:

SUPREME COURT: 281 cases were on the docket at the beginning of the year and 895 were filed during the year. 153 petitions for rehearing were filed. The court decided 911 cases and disposed of 187 petitions for rehearing.

DISTRICT COURTS:

First District: 232 cases were on the docket at the beginning of the year and 399 cases were filed during the year. 144 petitions for rehearing were filed. The court decided 431 cases and disposed of 129 petitions for rehearing.

Second District: 486 cases were on the docket at the beginning of the year and

has been caused by the fine distinctions and endless subtleties articulated by these courts which serve to confuse rather than clarify. The whole subject of family law is badly in need of a comprehensive legislative overhaul, or, at the very least, a "restatement" prepared by experts which would be respected by the courts.

II. Marriage and Annulment

Three cases illustrate the complex questions of presumptions and burden of proof when the parties have contracted second marriages without possessing record evidence of the dissolution of the first marriage. One action was brought to establish the existence of a common law marriage which grew out of a mutually known meretricious relationship of the parties, who were both married to other spouses. It was held that the plaintiff "has the burden of proving by competent and convincing evidence the dissolution of the previous marriages of both parties *prior* to the date of the alleged common law marriage."[2] This requirement is based upon the concept that a marriage is not being attacked, but rather it is an attempt to establish the marriage. The usual prima facie presumption favoring the second marriage does not govern a case involving a relationship which "originated in conscious meretriciousness."[3] This situation should be compared with one involving a ceremonial marriage which was preceded by an allegedly undissolved common law marriage. In the latter situation, the usual rule that a subsequent marriage is presumed valid can only be rebutted by showing the existence of an undissolved common law marriage and this latter fact must be shown by clear proof that the relationship, which had been illicit in its inception, had been transformed into a valid common law marriage. A relationship which is meretricious in its inception is presumed to continue in that state unless clear and convincing evidence is shown that the relationship has been transformed into a valid common law marriage. Proof of this common law marriage and its undissolved status is necessary in order to overcome the presumptive validity of a second marriage; in effect, the person alleging the invalidity of the second marriage has to overcome two presumptions.[4]

In the second appellate appearance of *King v. Keller*,[5] a workmen's

795 cases were filed during the year. 201 petitions for rehearing were filed. The court decided 768 cases and disposed of 224 petitions for rehearing.

Third District: 549 cases were on the docket at the beginning of the year and 791 cases were filed during the year. 299 petitions for rehearing were filed. The court decided 891 cases and disposed of 297 petitions for rehearing.

Eighth Annual Report of the Judicial Council of Florida 14-16 (June 30, 1963).

2. Board of Trustees of Fireman's Relief & Pension Fund v. Daffron, 134 So.2d 522, 525 (Fla. 2d Dist. 1961). (Emphasis by court.) See Annot., 92 A.L.R.2d 1102 (1963).

3. Board of Trustees of Fireman's Relief & Pension Fund v. Daffron, 134 So.2d 522, 525 (Fla. 2d Dist. 1961).

4. *In re* Hind's Estate, 135 So.2d 13 (Fla. 2d Dist. 1961).

5. King v. Keller, 141 So.2d 259 (Fla. 1962); King v. Keller, 117 So.2d 726 (Fla. 1960).

compensation case, the first wife was successful in overcoming the presumption of the validity of the second marriage. She introduced certificates from the Bureaus of Vital Statistics (or similar agencies) of forty-two states which indicated that there was no record evidence of any divorce between her and her husband. In addition, she submitted letters to the same effect from approximately one hundred and fifty counties in states where her husband was known to have traveled, and these were admissible in the workmen's compensation hearing even though many of these letters did not bear the seals of the offices writing the letters.

A. *Common Law and Plural Marriages*

The Florida statute governing the widow's allowance[6] does not provide for a jury trial to determine if the alleged spouse is the common law widow of the deceased. Therefore, a petition under this statute does not constitute a waiver of her right to a jury trial in a later petition for the assignment of dower.[7] Further, a decision by the county judge that she is not the common law widow in a widow's allowance proceedings is not res judicata as to her subsequent petition for an assignment of dower.[8] Of course, any testimony by the alleged widow as to any agreement and consent by the deceased to marry her is prohibited by the Dead Man's Statute.[9]

B. *Legislation*

Under an amendment to the Florida statutes[10] it would appear that a county judge may now, in his discretion, issue a marriage license to any male or female (with or without their parent's consent) under the age of twenty-one if they both swear that they are parents or expectant parents.

C. *Annulment*

The Florida statute which provides that a divorce may be granted when "either party had a husband or wife living at the time of the marriage sought to be annulled" has been construed to mean that an annulment or divorce may be granted "only to an innocent party who entered the relationship believing that the other party was capable of assuming the marital bonds."[11] Therefore, a divorce or annulment will be denied to a party who entered into a "marital" relationship while knowing that the other party was married to another. It is submitted that this decision

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Since the husband deserted the first wife and she was not to blame for the separation, she was entitled to support and was legally dependent upon him within the definition of the term "widow" in the workmen's compensation law. FLA. STAT. § 440.02(15) (1961).

6. FLA. STAT. § 733.20(1) (1963).

7. FLA. STAT. § 733.12(3) (1963).

8. Levine v. Feuer, 152 So.2d 784 (Fla. 3d Dist. 1962).

9. FLA. STAT. § 90.05 (1963). See Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89 (1963).

10. Fla. Laws 1963, ch. 63-238, amending FLA. STAT. § 741.06 (1961).

11. Higgins v. Higgins, 146 So.2d 122, 123 (Fla. 3d Dist. 1962), construing FLA. STAT. § 65.04(9) (1961).

is regretable. All the court has succeeded in doing is to refuse to make it a matter of record that the parties are not married with the result that the "records" indicate a marriage which the law says is void. It would seem that "guilt" or "innocence" should be irrelevant when the court is dealing with a void marriage.[12]

III. Jurisdiction for Divorce

A. *Residence*

In the first square holding on this point in Florida, a district court has held that a long-time resident may leave his family in Florida, move to New York, continue to support his family in Florida and still maintain his Florida residence or domicile for purposes of securing a divorce four months after establishing his "dwelling place" in New York. The proof of Florida residence was supported by the fact that the husband maintained that he intended to retain his Florida residence and that he was an airline pilot flying between New York and Miami.[13] In a similar vein, the factually incomplete case of *Jeffries v. Jeffries*[14] seemingly held that a native Floridian who never resided out of Florida except during the period of his military service was a "resident" for purposes of jurisdiction under the divorce laws. The opinion seems to imply that this Floridian had not actually physically resided in Florida for the six month period preceding the filing of the complaint; however, his original status as a resident would be presumed to continue until it was proved that he had relinquished his Florida residence and established a new residence in some other state. On the other hand it has been held that even though a serviceman had adopted Florida as his permanent domicile, he had not resided in Florida for the requisite six months period and the court would not have jurisdiction to grant a divorce.[15]

As a result of these cases it would appear that physical presence is unnecessary for "residents" who have not acquired another domicile in another state. This concept seems to conflict with the holding of *Brown v. Brown*,[16] which drew a distinction between domicile and residence, but it is in accord with *McIntyre v. McIntyre*.[17]

A mere adjudication of mental incompetency by a court of another

12. This decision appears to be an adoption of the minority "clean hands" rule. See Keezer, Marriage and Divorce § 225 (Moreland, editor 3d ed. 1946); 3 Nelson, Divorce and Annulment §§ 31.14 & 31.15 (2d ed. 1945); I Vernier, American Family Laws § 51 (1931).

13. Hadley v. Hadley, 140 So.2d 326, 327 (Fla. 3d Dist. 1962).

14. Jeffries v. Jeffries, 133 So.2d 751 (Fla. 3d Dist. 1961).

15. Hostler v. Hostler, 151 So.2d 672 (Fla. 1st Dist. 1963). At the time of this suit, the serviceman was serving as United States air attaché for Lebanon, Jordan and Cyprus and was residing in the Middle East.

16. Brown v. Brown, 123 So.2d 382 (Fla. 2d Dist. 1960); noted in 15 U. Miami L. Rev. 409 (1961).

17. McIntyre v. McIntyre, 53 So.2d 824 (Fla. 1951).

state and commitment to a state mental hospital does not prevent a person from acquiring a new domicile in Florida sufficient to give the court jurisdiction of a suit for divorce. If the person has sufficient mental capacity to elect a new domicile he has sufficient legal capacity in the absence of any objection by the guardian. The Florida court will make its own factual determination of the person's capacity to change his domicile, and it will not be bound by the prior determination of a sister state.[18]

B. *Jurisdiction of the Parties*

In a case of first impression in Florida,[19] a district court has held that a husband may not file a counterclaim for divorce when the wife has instituted support proceedings under the Uniform Reciprocal Enforcement of Support Law in effect in Ohio[20] and Florida.[21] The decision is based squarely upon the provisions of section 88.291 of the Florida Statutes, which provide that "[p]articipation in any proceedings under this chapter shall not confer upon any court jurisdiction of any of the parties thereto in any other proceeding."[22]

IV. VACATING OF DECREES

A summary judgment may be entered in favor of a husband when there is no real basis in fact for the wife's complaint in the nature of a bill of review attacking those portions of a divorce decree dealing with child custody, a lump sum settlement and an interest in real property.[23] Laches is an affirmative defense which must be raised in the answer and not in a motion to dismiss;[24] however, it has been held that when laches appears from the face of the complaint it may be reached by a motion to dismiss.[25] This latter exception would not, however, be applicable to a complaint which was filed in December, 1960, attacking a divorce decree entered in February, 1958, in the absence of any facts alleged in the complaint in addition to the time interval; the time interval alone is insufficient to justify the imposition of laches by means of a motion to dismiss.[26]

In *Martz v. Riskamm*[27] a district court of appeal sustained the decree of a chancellor setting aside a divorce decree for fraud. The divorce was

18. Matthews v. Matthews, 141 So.2d 799 (Fla. 1st Dist. 1962). Of course, if the person is in fact mentally incompetent he will not be able to change his domicile.

19. Blois v. Blois, 138 So.2d 373 (Fla. 1st Dist. 1962).

20. Laws of Ohio, §§ 3115.01-3115.22 (1963).

21. FLA. STAT. ch. 88 (1961).

22. FLA. STAT. § 88.291 (1961).

23. Smith v. Bollinger, 137 So.2d 881 (Fla. 2d Dist. 1962).

24. FLA. R. CIV. P. 1.8(d).

25. Flye v. Jeffords, 106 So.2d 229 (Fla. 1st Dist. 1958).

26. Volpicella v. Volpicella, 136 So.2d 231 (Fla. 2d Dist. 1962). The court also ruled that it is an abuse of discretion for a chancellor to deny leave to amend a complaint unless it is clear that the complaint cannot be amended so as to state a cause of action.

27. 144 So.2d 83 (Fla. 1st Dist. 1962).

granted in 1945, based upon the husband's affidavit (for constructive service) that he did not know the residence of his wife when in fact he did know it, and when his fraud was aided and abetted by his mistress who was his sole corroborating witness and who later married him. It is interesting to note that this attack was made subsequent to the husband's death. This case should be compared with *Grammer v. Grammer*,[28] which involved a second wife who was innocent of any connection with the fraud practiced in the divorce of her husband from his first wife.

V. DIVORCE

A. *Pleading*

The third district court of appeal has expressly adopted the minority rule in the United States which allows a party to a divorce proceeding to file a supplemental pleading charging the other party with a new ground for divorce committed after the institution of the suit and the filing of the complaint.[29] This decision is predicated upon the Florida Rules of Civil Procedure which provide for counterclaims maturing or acquired after pleading, supplemental pleadings and amendments generally.[30]

B. *Cruelty*

Letters written by a husband to his wife's attorneys after the institution of divorce proceedings may be used to corroborate the wife's testimony as to the husband's cruel treatment during the marriage. Moreover, the filing of unfounded charges by the husband during the course of the litigation as to alleged adultery by the wife will constitute cruelty.[31]

C. *Desertion*

The filing of a separate maintenance action by a wife will not necessarily toll the running of the time required to sustain a husband's charge of desertion; the lack of a genuine basis for the separate maintenance action or the fact that the wife has refused an unconditional offer of reconciliation by the husband will preclude the suit from tolling the running of the desertion period.[32]

D. *Defenses*

The defenses of condonation and comparative rectitude *vis à vis* recrimination were further confused by the courts. *Seiferth v. Seiferth*[33] held that continued cohabitation and sexual intercourse which occurred

28. 80 So.2d 457 (Fla. 1955).

29. Scherer v. Scherer, 150 So.2d 496 (Fla. 3d Dist. 1963).

30. FLA. R. CIV. P. 1.13, 1.15(d), 1.15(e).

31. Chaachou v. Chaachou, 135 So.2d 206 (Fla. 1961). For a case that comes "dangerously" close to allowing divorces by consent, see Voll v. Voll, 153 So.2d 861 (Fla. 1st Dist. 1963).

32. Smith v. Smith, 148 So.2d 287 (Fla. 1st. Dist. 1963) (dictum).

33. 132 So.2d 471 (Fla. 3d Dist. 1961).

after the hearings in a divorce case had been concluded and after the master filed his report would not per se constitute a condonation in the absence of proof that the wife had in fact forgiven the husband for his cruel conduct. Pearson, J., dissenting, was of the view that sexual intercourse under these circumstances was condonation as a matter of law. If this decision remains unchallenged, the defense of condonation has ceased to exist.

It would appear that the case of *Bennett v. Bennett*[34] has approved (at least indirectly) the concept of comparative rectitude. The chancellor found that the "evidence adduced heretofore sustains the allegations of cruelty upon the part of the parties hereto each to the other."[35] He then entered a divorce decree which failed to indicate which party was granted the divorce. The district court reversed and directed the chancellor to "determine in whose favor the equities exist and to enter a decree of divorce accordingly."[36] Although the label comparative rectitude was not used, the concept was. On the other hand the case of *Carlson v. Carlson*[37] held that when there was sufficient evidence that both parties were guilty of extreme cruelty the chancellor would be justified in denying a divorce to either party under the doctrine of recrimination.

E. *Decrees*

When one of the parties to a divorce suit dies, the chancellor has no power to enter a divorce decree nunc pro tunc as of the date he orally articulated his findings of fact and his view of the equities of the case; oral pronouncements of the chancellor are not the equivalent of a written final decree.[38]

A final decree of divorce reserving jurisdiction "to resolve issues between the adult parties litigant"[39] is too broad. The decree should specify that jurisdiction is reserved with reference to support and alimony for the wife, or as to the care, support and custody of children, or for the purpose of enforcing compliance with the terms of the final decree, or with respect to all of the foregoing matters. Nevertheless, under a decree which provides that the court retains "jurisdiction herein for the entry of such other and further orders as may be proper herein, and for the purpose of modifying any orders herein"[40] it would be improper for the court to modify provisions of the original decree which dealt with prop-

34. 132 So.2d 631, 632 (Fla. 3d Dist. 1961).

35. *Ibid.*

36. *Ibid.*

37. 144 So.2d 240 (Fla. 2d Dist. 1962). For the defense of collusion, which was not dealt with by the Florida courts, see Bradway, *Collusion and the Public Interest in the Law of Divorce*, 47 CORNELL L.Q. 374 (1962).

38. McKendree v. McKendree, 139 So.2d 173 (Fla. 1st Dist. 1962); compare Berkenfield v. Jacobs, 83 So.2d 265 (Fla. 1955).

39. Durden v. Durden, 137 So.2d 29, 31 (Fla. 2d Dist. 1962).

40. McEachin v. McEachin, 154 So.2d 894, 895 (Fla. 1st Dist. 1963).

erty rights because the original decree had become final, although it would be proper to modify the custody provisions of the original decree.

It is error for a chancellor to award a divorce to both parties[41] or to modify a final decree of divorce which has become final and upon which no petition for rehearing was pending.[42]

F. *Appeals*

A wife who has accepted all of the benefits accruing to her under a final decree of divorce in accordance with the agreement which she made with her husband during the pendency of the proceedings is estopped to attack the validity of the divorce itself. The amendment to the Florida Appellate Rules[43] which permits a wife to request the lower court to order the payment of support and alimony pending an appeal without waiving her right to contest the decree is not applicable when the wife accepts the benefits of a *final* decree.[44]

G. *Legislation*

A Florida statute was amended[45] to provide for an additional charge of one dollar for the preparation and execution of "proof of publication or publisher's affidavit" for all counties having a population in excess of 450,000 inhabitants.

VI. ALIMONY

A. *Right to Alimony*

The obligation to pay alimony arises out of and is a continuation of the husband's duty of support during the marriage. Hence, it is reversible error for a chancellor to award a weekly sum payable in 520 weeks in order to compensate the wife for money which she advanced to her husband during the marriage and for what she "might otherwise have accumulated out of her earnings from 1946 to 1956 if she had not been under some degree of necessity to use such earnings to discharge the obligations of the husband to support and educate his family."[46] A wife

41. Mosca v. Mosca, 144 So.2d 80 (Fla. 3d Dist. 1962) (dicta).

42. Goff v. Goff, 151 So.2d 294 (Fla. 3d Dist. 1963).

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

44. Carter v. Carter, 141 So.2d 591 (Fla. 1st Dist. 1962). See also Hadley v. Hadley, 140 So.2d 325 (Fla. 3d Dist. 1962), note 60 *infra*. When a chancellor awards to a former wife a sum which is equivalent to one-half of the value of improvements which she made in the home property jointly owned by her and her former husband, it is considered as a final decree in that it is a final adjudication of her claim for contribution from the former husband of her share of the improvements in the property. As a result, the former husband may appeal from the decree under Rule 3 of the Florida Appellate Rules (which provides for appeals from final decrees) or under Rule 4.2 which permits appeals from decrees entered subsequent to a final decree. In effect, a case may have a number of "final" decrees. Shannon v. Shannon, 136 So.2d 253 (Fla. 1st Dist. 1962).

45. Fla. Laws 1963, ch. 63-49.

46. Spears v. Spears, 148 So.2d 564, 566, 567 (Fla. 1st Dist. 1963). The case was re-

will have no standing to ask for alimony in the future when the final divorce decree fails to provide for alimony and the decree fails to retain jurisdiction.[47]

B. *Criteria for the Award*

The fact that a husband has vilified his wife's attorneys and has instigated a campaign of postcard and letter writing "obviously intended to intimidate"[48] the Florida Supreme Court should not be considered in determining the amount of alimony to be awarded to the wife. The award should be based upon the husband's ability to pay and not upon a conscious or subconscious basis of awarding punitive damages.

The fact that the wife's conduct has been "extremely reprehensible"[49] may be taken into account in determining whether alimony will be awarded and the amount thereof; "[a] wife from whom the husband obtains a divorce because of her misconduct ordinarily is denied alimony *eo nomine*, but allowances have been made in exceptional cases."[50]

It is error for a chancellor to order a husband to pay all of his former wife's medical bills in excess of fifty dollars per year because "it is not a continuing obligation of a former husband to pay a former wife's medical expenses ad infinitum and without any attempt to determine a maximum liability on his part."[51] With all due respect to the court, if alimony is a continuation of the husband's duty of support, it appears that the court has made some esoteric distinction between support for food and shelter and medical expenses. If the court meant that the husband should not be liable for useless or frivolous medical treatment, then the decision seems sound; if the court meant that the husband is not liable for bona fide medical expenses, then the husband's duty of support is much less than if the marriage had been preserved.

The fact that a divorced husband is living with his parents and is not required to contribute to the parents' household expenses should be considered in the awarding of alimony and child support payments.[52] Inasmuch as the right to alimony terminates upon the death of the husband, it is erroneous for a chancellor to decree that the husband maintain a life insurance policy with his wife as the beneficiary, although an order to maintain a life insurance policy for the benefit of minor children would

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manded with the chancellor being directed to consider if alimony should be awarded upon the proper grounds and to consider whether the wife was entitled to reimbursement for money expended for family purposes.

47. Marcel v. Marcel, 132 So.2d 210 (Fla. 2d Dist. 1961).

48. Chaachou v. Chaachou, 135 So.2d 206, 224 (Fla. 1961).

49. Hobbs v. Hobbs, 136 So.2d 363, 365 (Fla. 2d Dist. 1962).

50. Hobbs v. Hobbs, 136 So.2d 363, 365 (Fla. 2d Dist. 1962) (dicta). The court did affirm an award of $200 per month.

51. Peteler v. Peteler, 145 So.2d 291, 292 (Fla. 3d Dist. 1962). See Annot., 71 A.L.R.2d 1236 (1960).

52. Rudolph v. Rudolph, 146 So.2d 397 (Fla. 3d Dist. 1962).

seem permissible. It would also seem to be error to order the husband to maintain health insurance policies with the wife as one of the beneficiaries if her inclusion entails any added expense to the husband.[53]

C. *Lump Sum Alimony*

A lump-sum alimony award which has been left undisturbed upon an appeal of the case may not be modified upon remand because the award has become vested.[54] A wife cannot be awarded the family home as lump sum permanent alimony in addition to periodic alimony payments;[55] however, this type of award will now be proper under the amended statute.[56] It is reversible error for a chancellor to approve the report of a special master who recommended an award of lump sum alimony without giving the husband an opportunity to inquire into his wife's assets at the time of their marriage and her ability to earn a living, and who failed to make a determination as to the husband's ability to pay alimony.[57]

Three cases dealing with lump sum alimony which were appealed because of the amount awarded are discussed in the notes.[58]

D. *Appeals*

In a case of first impression under Amended Rule 3.8 of the Florida Appellate Rules,[59] it has been held that if the wife has accepted the payment of alimony and expenses she has waived her right to appeal as

53. Putman v. Putman, 154 So.2d 717 (Fla. 3d Dist. 1963). The West Virginia Supreme Court of Appeals has held that a Florida court has no power (in the absence of an agreement) to award alimony which would continue after the death of the husband, and, thus, a judgment of this kind would not be given full faith and credit. Aldrich v. Alrich, 127 S.E.2d 385 (W.Va. 1962), *cert. granted*, 84 Sup. Ct. 305 (1963). Questions dealing with Florida law were certified to the Supreme Court of Florida by a prior opinion, Aldrich v. Aldrich, 84 Sup. Ct. 184 (1963).

54. Latta v. Latta, 135 So.2d 443 (Fla. 3d Dist. 1961).

55. May v. May, 142 So.2d 110 (Fla. 1st Dist. 1962).

56. Note 75 *infra*.

57. Heller v. Heller, 151 So.2d 35 (Fla. 2d Dist. 1963). The parties had been married less than four years. The husband was 70 years old and the wife was 57, and both of them had grown children by prior marriages. The husband contended that the lump sum alimony constituted approximately 70 percent of his life savings.

58. The second district has approved a lump sum alimony award of $5,000 in cash, $15,000 in land and $2,500 as attorney's fees which, when added to property she had acquired from the husband during the marriage, totaled approximately one-third of the husband's net worth of $290,000. It would appear that the award was based, at least in part, upon the fact that the plaintiff-wife had cohabited illicitly with the defendant for nineteen years prior to their marriage. Klaber v. Klaber, 133 So.2d 98 (Fla. 2d Dist. 1961).

When the wife owns her own home and has other assets worth from $5,000 to $10,000, she is 51 years old and has no special training for earning a living except in the selling of dogs and the husband has a net worth of $63,500, an award of $35,000 as lump sum alimony is excessive and should be reduced to $15,000. Arrington v. Arrington, 150 So.2d 473 (Fla. 3d Dist. 1963).

When the undisputed evidence shows that the husband has assets worth more than $1,600,000, it is not an abuse of discretion to award the wife $300,000 as lump sum alimony. Udell v. Udell, 151 So.2d 863 (Fla. 2d Dist. 1963).

59. FLA. R. APP. P. 3.8.

to the amount of these awards unless she has received an order from the trial court for payment of alimony pending the appeal.[60] What objection would there be to amending the rule again by providing that the acceptance of the alimony would not preclude the wife from appealing the amount awarded? Under the present rule, the wife is forced to insist upon a further hearing for the award of alimony, pending the appeal. This entails further delay and expense to the parties and the courts without any reason except arid formality.

E. *Modification*

It is improper for a chancellor to order a reduction in alimony payments solely because of a decrease in the husband's income without considering the husband's non-income-producing property.[61] It is also erroneous to modify an alimony or support decree unless the question of modification is presented to the court in an appropriate proceeding and each party is given an opportunity to be heard.[62] On the other hand, it would appear that a chancellor's order of a reduction in future support payment without an express finding that the husband is unable to pay accrued unpaid support will be affirmed when the record supplies the necessary basis for the decree.[63]

The multi-faceted decision of *Hartley v. Hartley*[64] held: (1) When a wife received notice of hearing on the husband's petition for modification of alimony payments one day after the date of the hearing, she was not afforded an adequate opportunity to be heard; (2) A Motion to vacate the order was the proper procedure and this motion need not be filed within ten days of the order because it is not controlled by Rule 3.16 of the Florida Rules of Civil Procedure,[65] which pertains to motions for rehearing; (3) The wife's acceptance of past-due alimony, as ordered by the lower court, would not estop her from contesting the order since there was no controversy as to the amount of the past-due alimony; the doctrine of estoppel would be applicable only when there was a controversy as to the amount of the arrearages.

F. *Enforcement*

A judgment or decree of a sister state providing for periodic alimony and child support payments is entitled to full faith and credit as to accrued installments unless the decree is subject to retroactive modification in the state of rendition. Nevertheless, if the parties agreed *prior* to the entry of the foreign decree that the husband's obligation would be less than the amounts provided for in a separation agreement which was the

60. Hadley v. Hadley, 140 So.2d 325 (Fla. 3d Dist. 1961).
61. Simon v. Simon, 137 So.2d 613 (Fla. 3d Dist. 1962).
62. Taylor v. Taylor, 143 So.2d 516 (Fla. 2d Dist. 1962).
63. Mann v. Mann, 145 So.2d 886 (Fla. 3d Dist. 1962).
64. 134 So.2d 281 (Fla. 2d Dist. 1961).
65. FLA. R. CIV. P. 3.16.

foundation of the foreign decree, and if the parties acted upon the strength of this second agreement, the trial court would be justified in refusing to enter a judgment for any arrears ostensibly owing under the foreign decree. Further, the trial court would be justified in transferring the case from the law side to the equity side for enforcement of the child support provisions of the foreign decree.[66] In a somewhat similar vein, a chancellor may refuse to enforce accrued sums of alimony and child support by equitable process; however, he may not reduce sums which are due and payable under a prior domestic decree. Upon proper request, the chancellor may enter a judgment which would be enforceable at law for the accrued sums.[67]

Inasmuch as contempt orders must be definite and certain as to the amounts that the contemnor must pay in order to purge himself, it is error for a chancellor to fix a certain amount of support payments as being accrued and then allowing the contemnor ninety days to purge himself by making "substantial payment."[68] Further, it is error to hold the contemnor in contempt and then to defer punishment if he makes "substantial payment"[69] in ninety days, with an alternative "to appear before this Court without further notice, for sentencing for contempt of this Court"[70] if the payment is not made.

The rather unclear opinion in *Naster v. Naster*[71] seems to hold that inability to pay accrued sums of alimony is no defense unless the husband-contemnor clearly shows that his inability is not caused by his own neglect or misconduct but by factors beyond his control.

When an insurance company denies liability under its policy of insurance issued to a husband, it is improper for the wife to attempt to take the deposition of an agent of the company and to force him to produce documents by means of a notice subsequent to the entry of the divorce decree. Under Rule 1.28 of the Florida Rules of Civil Procedure[72] the deposition and the production of records can be made only by way of motion, not by notice.[73]

A wife has standing to bring an action against third-party grantees to set aside conveyances made by her ex-husband in an attempt to defraud her of her rights to alimony, and her ex-husband is not an indispensable party. Further, when the grantees are related to the ex-husband this tends to establish a prima facie case which must be met by evidence by the transferees.[74]

66. Kramer v. Kramer, 146 So.2d 586 (Fla. 3d Dist. 1962).
67. Goff v. Goff, 151 So.2d 294 (Fla. 3d Dist. 1963).
68. Hilson v. Hilson, 145 So.2d 557, 558-9 (Fla. 3d Dist. 1962).
69. *Id.* at 558.
70. *Ibid.*
71. 151 So.2d 313 (Fla. 2d Dist. 1963).
72. FLA. R. CIV. P. 1.28.
73. McKinley & Co. v. Arpin, 143 So.2d 216 (Fla. 3d Dist. 1962).
74. Frell v. Frell, 154 So.2d 706 (Fla. 3d Dist. 1963).

G. *Legislation*

A long line of Florida cases has been destroyed by an amendment to the Florida Statutes providing that "[i]n any award of permanent alimony the court shall have jurisdiction to order periodic payments or payment in lump sum, *or both*, in its discretion."[75] This amendment will be an excellent vehicle to further an increase in appeals.

VII. CUSTODY OF CHILDREN

A. *Jurisdiction and Conflicts*

Despite the very broad wording in *Rhoades v. Bohn*,[76] which seemed to state that the Florida courts will have jurisdiction over a child custody case even though the child does not reside in Florida, the First District Court of Appeal has held in *Smith v. Davis*[77] that the real holding in *Rhoades* was that once a court acquires jurisdiction of a *resident* minor as an *ancillary* phase of a divorce case, the court will have continuing jurisdiction which will not be affected by the child's later removal to a foreign state. Under the holding of *Rhoades* and *Smith* the non-residence of the minor has no bearing upon the question of jurisdiction only in a custody case which is supplemental to an original proceeding wherein the court had jurisdiction over the minor because he was residing within the state. If the case involves the *initial* determination of the custody of a minor, he must be within the state at the time the case is instituted. It would appear that if a parent removes his child to a foreign state before the initial suit is instituted, the Florida Courts will be unable to give relief unless "the party having custody of the minor voluntarily submits to the court's jurisdiction and litigates in an adversary manner the merits of the issue on which a decree of custody depends."[78] The author submits that this jurisdictional morass has been judicially created by the courts' labeling of a child as a "res" equivalent to property. Inasmuch as the courts of one state are not bound to give full faith and credit to the custody decrees of a foreign state,[79] there does not seem to be any compelling reason for stating that jurisdiction depends upon physical presence of the child within the rendering state.

As previously stated, custody decrees of a foreign state are not necessarily entitled to full faith and credit. As a result of this principle, the third district has held that even though a wife was granted custody by an Ohio court conditioned upon her remaining in the state, Florida can refuse to give credit to a decree of the Ohio court taking custody away from her and giving it to the husband because she took the child to

75. Fla. Laws 1963, ch. 63-145. (Emphasis added.)
76. 114 So.2d 493 (Fla. 1st Dist. 1959), *aff'd*, 121 So.2d 777 (Fla. 1960).
77. 147 So.2d 177 (Fla. 1st Dist. 1962).
78. Rhoades v. Bohn, 114 So.2d 493, 496 (Fla. 1st Dist. 1959).
79. Ford v. Ford, 371 U.S. 187 (1962) and cases cited in note 80 *infra*. See also 16 U. MIAMI L. REV. 753 (1962).

California. Further, Florida can ignore a California decree which recognized the Ohio decree under the doctrine of comity. The court considered that the bad faith of the wife in ignoring the decrees of Ohio and California would not be the determining factor as to custody; rather, the question should be determined by the best interests of the child. The court then continued custody in the wife.[80] Although it is difficult to disagree with the court's concept that the best interests of the child should be controlling, one begins to wonder about the efficacy of equity decrees enjoining a parent who has custody from removing the child from the state without a court order. One also begins to wonder: Whatever happened to the clean hands doctrine?

The doctrine of comity was further discussed (perhaps eviscerated would be the better word) in two cases. In the first it was ruled that Florida courts will refuse to give comity to a Mexican divorce decree (which incorporated a separation agreement providing for the custody of a child) in the absence of proof that the decree partook "of the elements which would support it if procured in this country, such as grounds and domicile."[81] All that this decision accomplished was to allow one of the parties to ignore his own separation agreement. In the second case,[82] the majority of the court effectively destroyed the concept of comity by stating that the chancellor could go behind a foreign habeas corpus decree in order to determine "the manner in which the case was litigated which resulted in the judgment or decree of custody."[83] The fact that both parties might have been before the foreign court and were afforded ample opportunity to develop fully their evidence on the custody issue would be only one factor in determining whether recognition or enforcement should be given the foreign decree. Sturgis, J., dissenting, said that absent a showing of the invalidity of the decree or a showing that it is contrary to the public policy of Florida, comity requires that Florida recognize the foreign decree as controlling the status of the parties as of the date of rendition. "The doctrine of comity between the states contemplates much more than a shallow jug from which to pour according to 'expediency' or 'courtesy.' "[84]

Florida does not have a statute which forbids the removal of a child from the state by the parent who was granted custody, and when the final decree determining custody does not forbid a change of residence, the custodian may change the child's residence to a foreign state and thereby effectively deprive the other parent of his rights of visitation.

80. State v. Webster, 151 So.2d 14 (Fla. 3d Dist. 1963); *accord*, Tom v. State, 153 So.2d 334 (Fla. 2d Dist. 1963).

81. Schwartz v. Schwartz, 143 So.2d 901, 902 (Fla. 2d Dist. 1962), following Pawley v. Pawley, 46 So.2d 464 (Fla. 1950). For the concept of "divisible divorce" articulated in the *Pawley* case, see 76 HARV. L. REV. 1233 (1963).

82. Neal v. State, 135 So.2d 891, 895 (Fla. 1st Dist. 1961).

83. *Id.* at 895.

84. *Id.* at 901.

Similarly, a custodian may remove the child to another county within the state, and a chancellor would not have authority to enter a post-decree order forbiding this change of residence when the original final decree was silent on this matter.[85] It may be asked: Even if the court does forbid the removal of the child what good will it do when another court feels free to disregard the first court's order?

B. *Criteria for Determining Custody*

When there is a continued pattern of parental irresponsibility on the part of the mother, the chancellor may be justified in awarding custody of minor children to their father, although "adultery or marital misconduct in and of itself does not necessarily demonstrate that a parent is unfit to have custody of the children."[86] On the other hand, it would appear that in three cases the courts have taken a jaundiced look at the mother's indulgence in adultery or addiction to alcohol and have awarded custody to the father.[87]

In a custody contest between the natural parents of minor children and others who have had custody of the children, the court must consider in addition to the natural rights of the parents, the following factors: (1) the natural ties and affections formed by children for the persons who have had custody; (2) the character of the adults involved; (3) the age, health, sex and moral surroundings of the children; (4) the benefits of education and development, as well as pecuniary prospects and the general overall welfare of the minors. It would appear that even if the above factors are roughly equal, the scales will be tipped in favor of the persons for whom the minors have expressed a great preference, taking into account their age and stage of intellectual development.[88]

The "God-given right" of a natural parent to the custody of his children is not an infinite right; it is always subject to the best interests of the children.[89] When both parents are fit to have the custody of a two-year-old child, the law will favor giving the mother custody because of the "tender age of the child."[90]

In a case of first impression, it has been held that the report of a social study from the State Welfare Department in a child custody case must be introduced into evidence and be made a part of the record before

85. McCrillis v. McCrillis, 147 So.2d 584 (Fla. 2d Dist. 1962); *accord*, Millman v. Millman, 148 So.2d 728 (Fla. 3d Dist. 1963).

86. Bennett v. Bennett, 146 So.2d 588, 591 (Fla. 2d Dist. 1962).

87. Koones v. Koones, 149 So.2d 88 (Fla. 2d Dist. 1963); Tompkins v. Tompkins, 145 So.2d 769 (Fla. 3d Dist. 1962). Sugg v. Sugg, 134 So.2d 284 (Fla. 1st Dist. 1961) was a per curiam affirmed opinion and Judge Sturgis, concurring specially, seemed to approve the change of custody of three children from their mother to their father because the mother was living in adultery.

88. Justice v. Van Eepoel, 132 So.2d 407 (Fla. 1961).

89. *In re* Pendarvis, 133 So.2d 424 (Fla. 1st Dist. 1961).

90. Bargeon v. Bargeon, 153 So.2d 10 (Fla. 2d Dist. 1963).

it may be considered by the lower court. Consideration of the report without its being made a part of the record is reversible error.[91]

C. *Divided Custody*

In the last *Survey* the author stated that "[i]t now seems fairly well established that it is within the discretion of the chancellor to provide that one parent should have custody of the children during the school year and the other parent should have custody during the summer vacation."[92] Three cases were cited in support of this statement. Since that time four cases have been decided which are not consistent. The third district has held that "[d]ivided custody which involves periodic removal from familiar surroundings is not desirable nor conducive to a child's welfare,"[93] and reversed a chancellor who had awarded custody of a two-year-old boy to the mother during the week and to the father during weekends. The chancellor was directed to give sole custody to the mother with reasonable rights of visitation to the father. The Second District has held that "[w]hile the division of custody is not normally approved, there are circumstances where such is justifiable and there is no clear showing of error on the part of the chancellor."[94] However, the second district, despite the preceding comment, seemingly approved orders of divided custody in two later cases.[95] The question of divided custody would now seem to depend upon the district in which the problem is presented or the skill of the appealing party in demonstrating a "clear showing of error on the part of the Chancellor."[96] It would seem that "law" ought to be a little more certain and uniform.

D. *Modification of Custody*

The third district has held that a petition which alleges "in general terms that the appellant is not providing a proper home for the child"[97] is sufficient to state a cause of action even though it fails to allege the facts upon which the charge is based. It would appear that this decision has countenanced "notice pleading" in custody matters.

In the absence of proper pleading and proof, it is error to modify a final decree by eliminating a clause providing for reasonable rights of visitation by a father denied custody of the children. It would appear that the foregoing rule would not prevent a court in the event of an emergency from making temporary orders which might affect the right

91. McGuire v. McGuire, 140 So.2d 354 (Fla. 2d Dist. 1962).

92. Murray, *Family Law*, 16 U. MIAMI L. REV. 177, 192 (1961).

93. Rudolph v. Rudolph, 146 So.2d 397, 399 (Fla. 3d Dist. 1962).

94. Prevatt v. Penney, 138 So.2d 537, 539 (Fla. 2d Dist. 1962). The court did affirm an order of divided custody in spite of this language.

95. Udell v. Udell, 151 So.2d 863 (Fla. 2d Dist. 1963); Montgomery v. Montgomery, 142 So.2d 326 (Fla. 2d Dist. 1962).

96. Prevatt v. Penney, 138 So.2d 537, 539 (Fla. 2d Dist. 1962). See Annot., 92 A.L.R.2d 695 (1963).

97. Cushen v. Cushen, 143 So.2d 536 (Fla. 3d Dist. 1962).

of visitation, but in the ordinary case the wife must request the elimination of the visitation right and the parties must be given an opportunity to present evidence relating to the request.[98]

When the parents of a child have provided in a separation agreement that the wife (a resident of New York) should have custody, the chancellor should not change custody to the father (a resident of Florida) merely because he believes that "a child in the City of New York needs close supervision that only a father can give."[99]

E. *Custody and the Law of Torts*

A divorced mother may sue for the wrongful death of her child even though the mother's right of custody under a divorce decree was vitiated when she remarried her husband, and then subsequently divorced him with the second decree failing to mention the question of custody.[100] The Wrongful Death Statute provides quite clearly that the cause of action is vested in the "father [who was alive in the instant case] of such minor child, or if the father be not living, the mother may maintain an action."[101] However, the majority of the court considered itself bound by the holding in *Wiggins v. Florida Motor Lines, Inc.*[102] The decision may be justified by the fact that the father had allegedly abandoned the child, who was supported entirely by the mother; hard cases make bad law.

In another case of first impression, it was decided that a parent may not maintain a tort action against an unemancipated minor child for the wrongful death of another minor child of the parent; the decision was placed squarely upon the public policy of Florida in the "necessity for the encouragement of family unity and the maintenance of family discipline."[103] In addition to the statutory method of emancipation, the court gave countenance to the view that emancipation may be shown by "a complete severance of the filial tie."[104] The above decision was held, in a successor case,[105] to operate as an estoppel by judgment against the nominal administrator's action against the same minor defendant because, in both cases, the father was the real party in interest. When will the courts realize that decisions of this nature are not protecting "family unity" but only the insurance companies?

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98. Scheer v. Scheer, 132 So.2d 456 (Fla. 3d Dist. 1961).

99. Schwartz v. Schwartz, 143 So.2d 901, 903 (Fla. 2d Dist. 1962).

100. Covey v. Eppes, 153 So.2d 3 (Fla. 1963), *reversing* Eppes v. Covey, 141 So.2d 747 (Fla. 1st Dist. 1962), noted in 17 U. MIAMI L. REV. 107 (1962).

101. FLA. STAT. § 768.03 (1961).

102. 150 Fla. 848, 9 So.2d 98 (1942).

103. Meehan v. Meehan, 133 So.2d 776, 777 (Fla. 2d Dist. 1961).

104. *Id.* at 779.

105. Russell v. Meehan, 141 So.2d 332 (Fla. 2d Dist. 1962).

VIII. CHILD SUPPORT

A. *Award*

An award of child support need not be confined to future payments; the court may enter a retroactive award for the period when the mother was providing for the child prior to the entry of the final decree.[106] A father who is ordered to pay alimony and child support in one lump sum is entitled to have the court specify what portion is for child support and what portion is for alimony.[107]

B. *Modification*

The Florida courts are empowered by statute[108] to modify the child support provisions of a separation agreement executed in a foreign state.[109] In the absence of a proper foundation in the pleadings and an opportunity afforded to the adverse party to be heard on the matter, it is error for the chancellor to reduce the amount of child support.[110]

The mere fact that a minor child is now in the armed services is not sufficient in itself to enable an appellate court to reverse a chancellor who has refused to modify a child support award, in the absence of an appellate record showing what evidence or testimony was considered by the chancellor.[111] It may be asked, what further testimony was needed?

When the parties have agreed to reduce the amount of child support payments as provided in a divorce decree, the wife has no standing to enforce the original decree when the husband has complied with their subsequent agreement. Further, even though the husband's current income is relatively small, the fact that he has considerable wealth may justify an increase in child support payments in order that the children may have a standard of living commensurate with that of the father.[112]

In a case[113] of apparent first impression, the second district has held that a post-decretal order increasing the amount of child support payments is reviewable only by interlocutory appeal under Rule 4.2 of the Florida Appellate Rules[114] and not by direct appeal under Rule 3.2[115] or

106. Weinstein v. Weinstein, 148 So.2d 737 (Fla. 3d Dist. 1963).

107. Beasley v. Beasley, 154 So.2d 874 (Fla. 1st Dist. 1963); Wilhelm v. Wilhelm, 147 So.2d 589 (Fla. 2d Dist. 1962). See Annot., 78 A.L.R.2d 1110 (1961).

108. FLA. STAT. § 65.15 (1961). See Annots., 89 A.L.R.2d 7 (1963); 89 A.L.R.2d 106 (1963).

109. Margolis v. Margolis, 141 So.2d 1 (Fla. 3d Dist. 1962).

110. Keathley v. Elb, 133 So.2d 471, 473 (Fla. 2d Dist. 1961).

111. Hoffman v. Hoffman, 135 So.2d 747 (Fla. 3d Dist. 1961). It is the author's view that the dissenting opinion of Carroll, J., that the case should have been remanded for further testimony in order to determine the need, if any, of child support, was correct. The majority view in effect forced the husband to file a new petition for modification and then effectively destroyed any basis for the modification.

112. Luedke v. Behringer, 143 So.2d 218 (Fla. 2d Dist. 1962).

113. Finneran v. Finneran, 137 So.2d 844 (Fla. 2d Dist. 1962).

114. FLA. R. APP. P. 4.2.

115. FLA. R. APP. P. 3.2.

by certiorari. It should be noted that this decision applies only to post-decretal orders or decrees which are interlocutory in nature; if the particular post-decretal order or decree constitutes a final adjudication, then a direct appeal would be in order under Rule 3.2.

A clause in a divorce decree which provided for future consideration by the court of a petition by the wife for the college education of a child at the expense of the husband when the child reached college age was disapproved on the ground that the chancellor "may not make a declaratory decree as to facts which may or may not occur in the future."[116] The court did not decide whether a father is legally obligated to defray the costs of his child's college education because the question was not presented.[117]

On the other hand, a decree which provided that the amount of support payments for a wife and child should be reduced if the minor child "fails or refuses to attend the public schools"[118] has been approved. The apparent basis of the decision was the idea that this provision was designed as an incentive for the child to continue his education and that if the child should fail to do so for any reason, the trial court could modify the decree in the best interests of the child.

C. *Enforcement*

A Florida court which grants a divorce and awards child support has jurisdiction to enforce the support provisions even though the wife subsequently moves to New York and the husband moves to Mexico. The proceeding is a continuation of the original one and reasonable notice to defend may be served by mail.[119]

The district courts of appeal are inconsistent on again another issue. The third district has held that a Florida court has no right to condition a father's right of visitation upon his timely payment of future child support as provided in a divorce decree.[120] It would appear that this case is in direct conflict with *Hardy v. Hardy*[121] decided by the first district. Also in opposition to the third district's decision, the second district has held that courts should not ordinarily order a father to make child support payments in accordance with a prior divorce decree so long as the mother fails to accord him visitation privileges granted in the divorce decree. Further, a court should not order the father to pay

116. Harris v. Harris, 138 So.2d 376, 377 (Fla. 3d Dist. 1962).

117. See 15 U. MIAMI L. REV. 108 (1960); Annot., 56 A.L.R.2d 1207 (1957).

118. Beasley v. Beasley, 154 So.2d 874, 875 (Fla. 1st Dist. 1963).

119. Prensky v. Prensky, 146 So.2d 604 (Fla. 3d Dist. 1962).

120. Howard v. Howard, 143 So.2d 502 (Fla. 3d Dist. 1962).

121. 118 So.2d 106 (Fla. 1st Dist. 1960); *accord*, Clawson v. Clawson, 125 So.2d 104 (Fla. 3d Dist. 1960).

any *arrearages* of child support which accrued during the time that the mother has denied him visitation privileges.[122]

Under the Uniform Reciprocal Enforcement of Support Act,[123] it would appear proper for a Florida court to enter a final decree based solely upon the authenticated transcript of the proceedings in a foreign state when the Florida husband has failed to introduce any testimony in rebuttal of the foreign proceedings, which are presumed to be prima facie correct.[124] Whether the failure of the wife to testify in person or by deposition in Florida could be raised by a husband who presented testimony in rebuttal was not decided.

Rule 1.5(d) of the Florida Rules of Civil Procedure[125] provides that oral agreements between parties or their counsel will not be valid unless made in the presence of the court. Therefore, the chancellor may disregard an oral stipulation of counsel agreeing to the amount of arrearages of child support under a foreign decree, even though the judge is informed of the stipulation when the final decree is presented for his signature.[126]

A sentence of a father for a term of two years in the state prison for the crime of withholding support from his minor children is excessive when the maximum imprisonment under the statute at the time of the conviction[127] was one year, although the sentence was imposed after the revocation of probation and after the statute had been amended[128] by increasing the maximum sentence to two years.[129]

IX. ANTENUPTIAL AND SEPARATION AGREEMENTS[130]

A. *Antenuptial Agreements*

Litigation, like fashion, seems to go in cycles and the vogue now seems to be antenuptial agreements—with a four-fold increase in cases over the preceding two-year period.

In a four-to-three decision,[131] the Supreme Court of Florida has articulated the following rules to be followed in determining the validity of antenuptial agreements: (1) There must be a fair and reasonable

122. Denton v. Denton, 147 So.2d 545 (Fla. 2d Dist. 1962).
123. FLA. STAT. ch. 88 (1961).
124. Clark v. Clark, 139 So.2d 195 (Fla. 2d Dist. 1962).
125. FLA. R. CIV. P. 1.5(d).
126. Morris v. Truax, 152 So.2d 515 (Fla. 2d Dist. 1963).
127. FLA. STAT. § 856.04 (1955).
128. Fla. Laws 1959, ch. 59-147.
129. Carroll v. Cochran, 140 So.2d 300 (Fla. 1962).
130. The reader is referred to Beuchert, *Power of Florida Courts to Modify Marital Settlements*, 15 U. FLA. L. REV. 487 (1963) for a comprehensive analysis of this field.
131. Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962), *reversing* 132 So.2d 771 (Fla. 3d Dist. 1961). For subsequent proceedings dealing with appellate jurisdiction, see Del Vecchio v. Del Vecchio, 152 So.2d 457 (Fla. 1963); 157 So.2d 530 (Fla. 3d Dist. 1963).

provision for the wife, or if it is not fair, a full and frank disclosure of the husband's worth must be made to the wife before she signs the agreement, or in the absence of this disclosure, she must have "a general and approximate knowlege . . . of the prospective husband's property."[132] (2) "[S]he must have signed freely and voluntarily, preferably, but not necessarily a required pre-requisite, upon competent and independent advice."[133] (3) Inadequate provisions for the wife will not invalidate the agreement if she had some understanding of her rights and had been fully informed by the husband as to his worth, or if "she had or reasonably should have had"[134] a general and approximate knowledge of his worth in the event that the husband failed to disclose this information. (4) In determining the fairness of the agreement the courts will consider matters which include the relative situation of the parties, their respective properties, their family ties and connections and the wife's needs. (5) The fairness of the agreement is measured primarily by whether the provisions of the agreement will allow her to live after a divorce "in a manner reasonably consonant with her way of life before such dissolution."[135] (6) Ordinarily, the burden of proving the invalidity of the agreement rests upon the wife, but if the agreement is unreasonable on its face a presumption of concealment arises and the burden then shifts to the husband. However, this presumption should not be automatic; it depends upon such factors as the experience and knowledge of the parties. (7) "The test is the adequacy of the knowledge of the woman—she must have had some understanding of her rights and a general and approximate knowlege of his property and resources. The basic issue is concealment, not the absence of disclosure . . . ."[136] The author submits that this decision is going to plague the courts because the stress it places upon disclosure is immediately counter-balanced by the notion that the wife is bound by the agreement if "she had or reasonably should have had"[137] (shades of tort law!) a general and approximate knowledge of her future husband's wealth.

It would appear that a prospective bride may divest herself in an antenuptial agreement of all homestead rights in the property owned by the prospective husband.[138] It has been held in the past that a widow's allowance[139] from the estate of a deceased husband may be awarded prior to a determination of the validity of an antenuptial agreement;[140] however, the question as to whether a widow's support allowance will be

132. 143 So.2d at 20.
133. *Ibid.*
134. *Ibid.*
135. *Ibid.*
136. *Id.* at 21.
137. *Id.* at 20.
138. Johnson v. Johnson, 140 So.2d 358 (Fla. 2d Dist. 1962).
139. FLA. STAT. § 733.20(1)(d) (1961).
140. *In re* Stein's Estate, 106 So.2d 2 (Fla. 3d Dist. 1958).

barred by a valid antenuptial agreement remains unanswered.[141] If the widow can divest herself of any rights of homestead by an antenuptial agreement, there should be little question that she can likewise divest herself of any claim for a widow's allowance.

A widow's complaint against the executor of her husband's estate for a declaratory judgment, alleging the invalidity of an antenuptial agreement, fails to state a cause of action when it fails to allege: (1) that the executor has asserted any rights under the agreement; (2) that the widow has elected to take dower; and (3) that her husband conveyed any property during his lifetime without her joinder or consent pursuant to the terms of the agreement. If her husband did convey property without her consent, then the grantees would be necessary parties.[142]

B. *Separation Agreements*

1. APPROVAL AND EFFECT

In the absence of fraud, concealment or overreaching, a chancellor should respect a property settlement agreement, and he is not at liberty to accept part of the agreement and omit another part without according an opportunity to be heard to the party who has had a decree pro confesso entered against him. If real property which was the subject matter of the omitted clause has been destroyed by fire subsequent to the execution of the agreement, the chancellor may take testimony in order to determine the rights of the parties in the fire insurance proceeds.[143]

When a property settlement has been made by the parties and approved by a divorce decree of another state's court which had jurisdiction over the parties, the wife cannot subsequently bring a suit to impose a resulting trust on a land trust allegedly purchased by the husband with funds belonging to the wife prior to the execution of the agreement.[144]

2. CONSTRUCTION AND MODIFICATION

Under a clause in a separation agreement which provided that the husband was to "continue to make all mortgage payments on said property [a home and a vacant lot] and to maintain and support the First Party and the minor children of the parties in the identical manner that they have been maintained and supported since the separation of the parties,"[145] the court construed that the husband was obligated to pay all the real estate taxes assessed against the home. However, the court

141. *In re* Anderson's Estate, 149 So.2d 65 (Fla. 2d Dist. 1963).
142. Miller v. Miller, 151 So.2d 869 (Fla. 2d Dist. 1963).
143. McNeill v. McNeill, 135 So.2d 785 (Fla. 1st Dist. 1961).
144. Jones v. Jones, 140 So.2d 318 (Fla. 3d Dist. 1962).
145. Hall v. Hall, 135 So.2d 432, 433 (Fla. 3d Dist. 1961).

determined that there was no intent apparent in the agreement or in the record that the husband was to pay the taxes assessed against the vacant property as part of the maintenance and support of the wife and children. It would appear that if the wife is forced to pay the taxes from the support money received from her husband, she is not going to be supported in the "identical manner" as in the past.

A property settlement agreement which provides that the mother is to have custody of the minor children and that she will give them a Roman Catholic education "if such should be reasonably available"[146] cannot be modified by allowing the mother to enroll the children in a private non-Catholic school and ordering the father to pay the increased tuition because the wife would encounter difficulties in performing the agreement.

A separation agreement which has been approved by a divorce decree will not be modified because the wife was emotionally upset when she signed it unless her emotional state prevented her from making an independent assessment of the net worth of her husband.[147]

It is error for a chancellor to cancel support payments which have accrued under a separation agreement and to reduce future payments in the absence of any changes in the circumstances of the parties.[148] Query: does a court have power to cancel accrued support payments under a separation agreement even if there are changes in the circumstances of the parties?

X. SEPARATE MAINTENANCE

The federal courts will entertain a suit by a wife against her husband, the beneficiary of an Illinois trust, and the trustee to set aside a supplemental trust agreement allegedly executed during the pendency of separate maintenance proceedings in order to deprive her of a fair allowance from the husband. The action was in personam against the beneficiary and the trustee and not against the trust res located in Illinois. The court noted that the wife allegedly was unaware of the existence of the original trust and the supplemental trust agreement until after she had filed the separate maintenance suit. The court cited the law of Illinois as controlling the question of setting aside the agreement for fraud upon the wife.[149]

A court has no power to award separate maintenance to a wife

146. Butler v. Butler, 132 So.2d 437, 438 (Fla. 3d Dist. 1961). Subsequently, the juvenile court modified this education clause on the basis that the welfare of the children was affected. *In re* W.S.B., 157 So.2d 548 (Fla. 3d Dist. 1963).

147. Cross v. Cross, 151 So.2d 837 (Fla. 3d Dist. 1963).

148. Brenske v. Brenske, 151 So.2d 58 (Fla. 3d Dist. 1963).

149. Sax v. Sax, 294 F.2d 133 (5th Cir. 1961).

when she has relinquished any claim to alimony in a separation agreement, unless the court invalidates the agreement.[150]

It is error for a chancellor to decree that a wife has "the right to live separate and apart from"[151] her husband when she has asked for separate maintenance[152] because this will be construed as the granting of a limited divorce, which is forbidden in Florida.[153] The court has no power in a separate maintenance proceeding[154] to award lump sum alimony or to order a division of the property of the parties; however, the court may provide that a home owned as an estate by the entireties shall be used by the wife and children as part of their separate maintenance,[155] and the court may further adjudicate a dispute concerning the ownership of personal property claimed by the spouses.[155a]

Separate maintenance under section 65.10 of the Florida Statutes[156] is predicated upon the concept that the wife must be living apart from her husband through his fault. Therefore, if the husband has made repeated offers of unconditional reconciliation and the wife has failed to return because "she was not well"[157] this negates the allegation that she is living apart through his fault. Similarly, it would appear that a wife will not be entitled to an award of separate maintenance if she has refused to make a reasonable effort to join her husband in his new domicile, even though the statutory desertion period of one year has not elapsed.[158] Under the statute just mentioned,[159] the Florida courts have jurisdiction over suits brought for alimony unconnected with causes for divorce even though neither party is a resident of Florida, and even though the husband's property which is sought to be reached is not in the state.[160]

XI. Attorney's Fees

A. *Tax Problems*

The Supreme Court of the United States has decided two cases which may have a serious impact upon the amount of attorney's fees in divorce cases. In the first case, *United States v. Gilmore*,[161] the Court

150. Hostler v. Hostler, 151 So.2d 672 (Fla. 1st Dist. 1963).
151. Hieber v. Hieber, 151 So.2d 646, 648 (Fla. 3d Dist. 1963).
152. Fla. Stat. § 65.09 (1961).
153. Fla. Stat. § 65.03 (1961).
154. Fla. Stat. § 65.09 (1961).
155. Zakutney v. Zakutney, 151 So.2d 299 (Fla. 3d Dist. 1963); Smith v. Smith, 151 So.2d 448 (Fla. 3d Dist. 1963).
155a. Smith v. Smith, 160 So.2d 697 (Fla. 1964), *reversing* Smith v. Smith, 151 So.2d 448 (Fla. 3d Dist. 1963) on this point.
156. Fla. Stat. § 65.10 (1961).
157. Stone v. Stone, 151 So.2d 301, 303 (Fla. 3d Dist. 1963).
158. Fisher v. Fisher, 134 So.2d 277 (Fla. 1st Dist. 1961).
159. Fla. Stat. § 65.10 (1961).
160. St. Anne Airways, Inc. v. Webb, 142 So.2d 142 (Fla. 3d Dist. 1962).
161. 372 U.S. 39 (1963); discussed in *The Supreme Court, 1962 Term*, 77 Harv. L. Rev. 152-56 (1963).

held that section 23[162] of the Internal Revenue Code, which permits deductions from gross income of "ordinary and necessary expenses . . . incurred . . . for the conservation . . . of property held for the production of income," will not include fees paid by a husband in defending a divorce suit and preserving his controlling interest in a business from the claims of his wife. In the second case, *United States v. Patrick*,[163] the Court held that section 212 of the Internal Revenue Code of 1954,[164] which permits deductions of the same nature as enumerated in section 23 above, will not include fees paid by a husband to his attorneys and the attorneys of his wife for services performed in negotiating a property settlement whereby the husband retained control of his business and real property. The rationale of both cases was that the claims of the wives arose out of the marital relationship and not out of the business activities of the husbands. It would seem logical to predict that these cases will result in lower fees being paid to attorneys. In the past, clients could afford to be generous if the fees were being paid, in effect, by the treasury.

B. *Power to Award*

It would now appear settled that when a chancellor reserves jurisdiction in a divorce decree to award alimony in the future, this reservation is not broad enough to empower the court to award attorney's fees in the future.[165] In the first definitive ruling in Florida on a knotty question, a district court has held[166] that when a husband and wife have resolved their differences and resumed cohabitation, the chancellor may dismiss a divorce suit but retain jurisdiction in order to enter an order against the husband for his wife's attorney's fees and costs. The court seemingly followed the rationale (as disclosed in the court file) of *Baldwin v. Baldwin*[167] and distinguished the seemingly contrary holding of *Welborn v. Welborn*,[168] which held only that the lower court lost jurisdiction over a case after the expiration of a term of court and, therefore, could not enter an award of attorney's fees during a subsequent term. On the other hand, the death of a wife during the pendency of a divorce proceeding terminates the proceedings and thereby prevents the chancellor from awarding attorney's fees for services rendered to the wife prior to her death.[169]

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162. Int. Rev. Code of 1939, § 23(a)(2), 53 Stat. 1 (now INT. REV. CODE OF 1954, § 212).

163. 372 U.S. 53 (1963).

164. INT. REV. CODE OF 1954, § 212(2).

165. Cone v. Cone, 132 So.2d 611 (Fla. 3d Dist. 1961) following Zoercher v. Zoercher, 114 So.2d 728 (Fla. 2d Dist. 1959).

166. Hadlock v. Hadlock, 137 So.2d 873 (Fla. 2d Dist. 1962). See Annot., 92 A.L.R.2d 1009 (1963).

167. 154 Fla. 624, 18 So.2d 681 (1944).

168. 47 Fla. 348, 36 So. 61 (1904).

169. Rosenhouse v. Ever, 150 So.2d 732 (Fla. 3d Dist. 1963).

In another case of first impression, the third district has held that attorney's contingent fee employment contracts in matrimonial actions are against public policy and are not enforceable.[170]

In an apparent case of first impression, it has been held that the Florida Statutes[171] providing for "suit" money for the wife in divorce matters refer solely to causes of action instituted in Florida and exclude compensation for services rendered to the wife "long before the 'suit' is brought in this jurisdiction."[172] It was also decided that it was error to award attorneys' fees to foreign attorneys based upon their invoice because this is not adequate proof to support an award.

The general rule is that a non-resident party-witness to one legal proceeding is immune from service of process in another proceeding. This rule will be applied when a non-resident former husband is bringing a second action against the wife for child custody; he is immune from service of process brought by his former Florida attorney for unpaid legal services rendered in the first Florida child custody case.[173]

The usual rule that an attorney's fee is not allowable when the wife petitions for an increase in a child support award should be applied even though the father in his answer has asked for a change of custody, provided that the father's request was never litigated and the wife never prepared to litigate this issue by discovery or other methods.[174] It would appear that a chancellor has no power to award attorney's fees to a husband because his wife has filed a "frivolous" motion to transfer the questions of child custody and support to the juvenile court from the circuit court.[175]

In *Cone v. Cone*[176] the court *seemingly* affirmed a chancellor's award of attorney's fees for services performed in the trial court as well as in three prior appellate proceedings despite the fact that the Florida Appellate Rules[177] provide that the appellate court has the sole power to make an award for services performed in an appellate court.

C. *Discretionary Factors*

It is not an abuse of discretion for a chancellor to refuse to order the husband to pay his wife's attorney's fees when she is able to pay them; conversely, it will not be an abuse of discretion if the chancellor does order the husband to pay a portion of his wife's attorney's fees even

170. Sobieski v. Maresco, 143 So.2d 62 (Fla. 3d Dist. 1962).
171. FLA. STAT. §§ 65.07 & 65.08 (1961).
172. Scanlon v. Scanlon, 154 So.2d 899, 904 (Fla. 1st Dist. 1963).
173. Lawson v. Benson, 136 So.2d 353 (Fla. 3d Dist. 1962).
174. Harris v. Harris, 138 So.2d 376 (Fla. 3d Dist. 1962).
175. Friedman v. Friedman, 144 So.2d 866 (Fla. 3d Dist. 1962).
176. 142 So.2d 330 (Fla. 3d Dist. 1962).
177. FLA. R. APP. P. 3.16.

if she is able to pay them.[178] It is to be wondered if this area of discretion is not a little too broad.

The second district has approved an award of $10,000 as attorney's fees when the undisputed testimony of attorneys disclosed that a reasonable fee would be between $20,000 and $35,000.[179] It is submitted that judicial discretion should be limited by the undisputed testimony in a case.

XII. GUARDIANSHIP AND CURATORSHIP

A. *Jurisdiction and Venue*

The guardianship laws provide in the case of incompetents that "the venue shall be in the county where the incompetent resides,"[180] and that whenever "the domicile of an incompetent is changed to another county, the guardian of said incompetent . . . may have the venue of said guardianship changed to the county of acquired domicile."[181] The court in the case of *In re Guardianship of Mickler*[182] has interpreted the word venue "as denoting a limitation upon jurisdiction . . . ."[183] Further, the word resides means "the last place of legal residence . . . prior to the adjudication of incompetency,"[184] and the word domicile means "legal domicile of the incompetent . . . ."[185] As a result of these interpretations the court held that the county judge's court of the county where an incompetent had resided for many years had jurisdiction over incompetency proceedings, while the court where the incompetent had lived for approximately one week immediately prior to the adjudication was without jurisdiction and its appointment of a guardian was subject to collateral attack. It seems that the court held that "jurisdiction and venue are synonymous . . . ."[186] This result is wrong conceptually, a misinterpretation of the statute, and seemingly inconsistent with *In re De Hart*.[187]

The county judge's court of one county which has jurisdiction over a probate proceeding has jurisdiction to award attorneys fees to an attorney for a minor legatee even though that same county judge's court has transferred jurisdiction over the guardianship of the minor legatee to the county judge's court of another county.[188]

178. Turney v. Turney, 149 So.2d 83 (Fla. 3d Dist. 1963); *accord*, Arrington v. Arrington, 150 So.2d 473 (Fla. 3d Dist. 1963). For the converse situation, see Helsel v. Helsel, 138 So.2d 99 (Fla. 3d Dist. 1962). For some unusual factors considered by an appellate court in awarding attorney's fees and court costs to the wife, see Ames v. Ames, 153 So.2d 737 (Fla. 2d Dist. 1963).

179. Udell v. Udell, 151 So.2d 863 (Fla. 2d Dist. 1963).

180. FLA. STAT. § 744.11(1) (1961).

181. FLA. STAT. § 744.11(4) (1961).

182. 152 So.2d 205 (Fla. 1st Dist. 1963).

183. *Id.* at 208.

184. *Ibid.*

185. *In re* Guardianship of Mickler, 152 So.2d 205, 209 (Fla. 1st Dist. 1963).

186. *Ibid.* (Wigginton, J., dissenting).

187. 114 So.2d 13 (Fla. 2d Dist. 1959).

188. *In re* Straitz's Estate, 135 So.2d 239 (Fla. 2d Dist. 1961).

B. *Suits Against Guardians*

Any suit brought by a former ward against his guardian which is based upon negligence, willful misconduct or omission must be brought within one year from the date of the final discharge of the guardian;[189] an allegation of fraud or concealment might serve to suspend the running of the statute.[190]

A Florida statute[191] provides that no annual returns "previously approved by order of the county judge upon notice shall be subject to objection." Conversely, an order of the county judge made without notice to the ward is subject to collateral attack by him. Although the county judge's court has the power to require the guardian to pay to the ward any amounts found to be due from the guardian, the court does not have the power to enter a money judgment against the guardian. Nor does the court have the power to establish a resulting trust in property which was purchased by the guardian with the funds of the ward; this power belongs exclusively to a court of equity.[192]

C. *Fees and Costs*

It is erroneous for the county judge to confine the payment of fees for an attorney who has rendered services to an estate to a particular fund or property of the estate; the attorney is entitled to compensation out of any property of the estate which may be available.[193] A fee of $1,000 to a guardian ad litem for routine services (which allegedly took only four hours time) in investigating and consenting to the sale of real and personal property worth $54,500 has been held "grossly excessive."[194] Also, the court ordered that the heirs of the estate (which was to pay the guardians' fees) would have to be given notice pursuant to the statute.[195]

The statute[196] which provides that the fees of the county judge shall be $7.50 for each case in which it is sought to have a person adjudicated physically or mentally incompetent is exclusive; the county judge may not charge additional fees for the issuance, filing, docketing and recording of the instruments necessary to a complete adjudication of the proceedings.[197]

D. *Setting Aside Conveyances*

The report of *Saks v. Smith*[198] is not entirely clear because the court confused the use of the words "prior" and "subsequent." The case in-

189. FLA. STAT. § 746.14 (1961).
190. Beck v. Barnett Nat'l Bank, 142 So.2d 329 (Fla. 1st Dist. 1962).
191. FLA. STAT. § 745.26(1) (1961).
192. *In re* Guardianship of White, 140 So.2d 313 (Fla. 1st Dist. 1962).
193. *Ibid.*
194. *In re* Hollenbeck's Estate, 137 So.2d 854, 856 (Fla. 3d Dist. 1962).
195. FLA. STAT. § 734.01(2) (1961).
196. FLA. STAT. § 394.23(1) (1961).
197. Howard v. Davis, 139 So.2d 463 (Fla. 1st Dist. 1961).
198. 145 So.2d 895 (Fla. 3d Dist. 1962).

volved the allegation that a prior conveyance of property by an incompetent to her son was set aside at the suit of a third person who four months later received property from this incompetent. It would appear that the court held that this would not be a sufficient "allegation or proof of the existence of fraud and duress or that the incompetent's mind was impaired at the time of the"[199] second conveyance. As a result, a cause of action for declaratory relief was not stated.

Under Rule 1.8(g) of the Florida Rules of Civil Procedure[200] it is permissible to allege in one count that the grantor of a deed was incompetent at the time of the conveyance and in the second count that the deed was obtained by the grantee's exercise of undue influence upon the grantor, even though the two allegations are inconsistent.[201]

E. *Curatorship*

A will executed by a testatrix after a curator has been appointed is not an "instrument in writing" under the Florida statute[202] which provides that after the appointment of a curator, the ward shall be wholly incapable of making "any instrument in writing, of legal force and effect" unless notice is given to the curator and leave of court obtained. The court refused to hold that section 731.04 of the Florida Statutes,[203] which deals with the required testamentary qualifications, is limited by the curator statute.[204]

F. *Legislation*

In an effort to clear up an ambiguity, section 518.01 of the Florida Statutes[205] was amended to provide specifically that guardians who receive funds from the Veterans Administration may invest them in savings accounts and certificates of deposit in any bank chartered under the laws of the United States or Florida. The original wording of section 518.01 had been limited to deposits in savings and loan associations.

It is unnecessary for any incompetent person to have a guardian appointed in order to receive welfare payments, provided that the incompetent is living in the household with an adult member of his family.[206]

Section 659.29 of the Florida Statutes has been amended[207] to provide that in the case of bank and trust company deposits made in the

199. *Id.* at 896.
200. FLA. R. CIV. P. 1.8(g).
201. Mather-Smith v. Fairchild, 135 So.2d 233 (Fla. 2d Dist. 1961).
202. FLA. STAT. § 747.11 (1961).
203. FLA. STAT. § 731.04 (1961).
204. Skelton v. Davis, 133 So.2d 432 (Fla. 3d Dist. 1961).
205. Fla. Laws 1963, ch. 63-111, amending FLA. STAT. § 518.01 (1961).
206. Fla. Laws 1963, ch. 63-353, amending FLA. STAT. ch. 409 (1961).
207. Fla. Laws 1963, ch. 63-472, amending FLA. STAT. § 659.29 (1961).

name of two or more persons, payable to either, the depositary may pay the account to either of these persons or to the guardian of the property of one of the depositors who is incompetent "whether the other or others be living or not and whether the other or others be competent or not."

The wrongful death of minors provisions of the Florida Statutes have been amended[208] to provide that the right of action "shall extend to and include actions ex contractu and ex delicto." This amendment should remove any obstacle to the assertion of a cause of action for wrongful death caused by a breach of warranty.

XIII. ADOPTION

A. *Jurisdiction and Procedure*

When a court has retained jurisdiction to amend those provisions of a final decree which deal with child custody, this jurisdiction may not be ousted by the commencement of adoption proceedings in another county by grandparents who were not made parties to the custody action. In effect, both actions may be continued although it would appear foolish to do so because the adoption decree (if favorable to the adopters) would seemingly change the custody of the children.[209] There ought to be a better way of handling this question of "conflicting" jurisdictions.

In accordance with the provisions of section 72.18 of the Florida Statutes,[210] it is error to enter a final decree in an adoption proceeding without conducting a hearing subsequent to the filing of the report and recommendations of the State Welfare Board, when the natural parents have filed a formal opposition to the adoption. This principle prevails even when the natural parents retain custody of the children and the petition for adoption is denied.[211]

When a father's lack of interest in his child's welfare closely approaches the point of abandonment and his conduct when visiting the child in the home of his former wife and her new husband "was such as to justify a forfeiture of the parental rights accorded him under law,"[212] this will justify a decree of adoption granted to the mother and her new husband when these factors coincide with the best interests of the child.

B. *Rights of Inheritance*

The district courts of appeal have decided three cases of first impression dealing with the inheritance rights of adopted children. In the

208. Fla. Laws 1963, ch. 63-469, amending FLA. STAT. § 768.03 (1961).

209. Moses v. Moses, 141 So.2d 297 (Fla. 3d Dist. 1962).

210. FLA. STAT. § 72.18 (1961).

211. McMillan v. Findley, 135 So.2d 873 (Fla. 3d Dist. 1962).

212. *In re* Adoption of Corcuera, 145 So.2d 493, 494 (Fla. 1st Dist. 1962). Compare Meyers v. Shifrin, 146 So.2d 770 (Fla. 3d Dist. 1962), wherein the facts failed to show an abandonment by the father. See Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347 (1962).

first case[213] it was held that when a will leaves property to the "then living descendants" of a person who adopts a child after the death of the testator, the adopted child shall be considered as a descendant (pursuant to the statute)[214] of the adopting parent. The adopted child does not take as an heir or descendant of the testator, but rather as a descendant of the adopting parent. In the second case[215] it was decided that the Florida statute[216] which provides that an adopted child may inherit from the natural children of the adopting parents does not impliedly revoke the adopted child's rights of inheritance from his natural brothers, sisters and blood kindred. In the third case[217] it was ruled that an adult who was adopted in Greece by a single person who had never been married could not be an heir of the adopter under the Pretermitted Heir Statute.[218] The Florida statute[219] providing that a "married couple, or the survivor thereof" may adopt an adult implies that an adoption by an adult who has never been married "is repugnant to the laws and policy of this state."[220] Although the status of the adoptee may be governed by the laws of Greece, the incidents of the adoption with regard to inheritance are governed by the laws of Florida. The holding of this case would seem to have been destroyed by an amendment to this statute which is discussed in the following section.

C. *Legislation*

Under an amendment to section 72.34 of the Florida Statutes, any married or unmarried adult may petition for the adoption of another adult whether married or single provided that the adopter (or adopters) are more than ten years older than the adoptee.[221]

Section 72.13 of the adoption law has been amended by deleting the words "and legal disabilities, if any" so that now the affidavit for constructive service must merely state that diligent search has been made to ascertain the names and residence of the natural parents or the legal guardian.[222]

XIV. JUVENILES AND JUVENILE COURTS

A. *Juvenile Courts*

If a child custody case is transferred from the juvenile court of one county to the juvenile court of another, the latter county has exclusive

213. First Nat'l Bank v. Bobcik, 132 So.2d 299, 300 (Fla. 3d Dist. 1961).
214. FLA. STAT. § 731.30 (1961).
215. *In re* Levy's Estate, 141 So.2d 803 (Fla. 2d Dist. 1962).
216. FLA. STAT. § 731.30 (1961).
217. Tsilidis v. Pedakis, 132 So.2d 9 (Fla. 1st Dist. 1961). See Annot., 87 A.L.R.2d 1240 (1963).
218. FLA. STAT. § 731.11 (1961).
219. FLA. STAT. § 72.38 (1961).
220. Tsilidis v. Pedakis, 132 So.2d 9, 13 (Fla. 1st Dist. 1961).
221. Fla. Laws 1963, ch. 63-273, amending FLA. STAT. § 72.34 (1961).
222. Fla. Laws 1963, ch. 63-211, amending FLA. STAT. § 72.13 (1961).

jurisdiction and has the power to utilize contempt proceedings for a failure to comply with a custody order entered by the original court prior to its transferring the case.[223]

The second district has decided that the special act[224] creating the Broward County Juvenile Court does not authorize the circuit court to transfer jurisdiction over child custody matters to this juvenile court in the absence of any question that the children are dependent or delinquent or both. As dicta, the court stated that if it were to hold to the contrary, it would be required to hold the act unconstitutional under prior decisions.[225]

When an appellant subsequent to an appeal files a motion to remand jurisdiction to the juvenile court because allegedly false testimony was introduced before the court, the motion to remand may be treated as a request for leave to file a petition in the nature of a petition for a writ of error coram nobis. As a consequence, the appellate court will stay the appellate proceedings pending further proceedings before the juvenile court.[226]

The Florida Attorney General has ruled that pursuant to section 39.12(2) of the Florida Statutes[227] the records of the juvenile court, with the exception of those which permanently sever the custody of children from their parents, may be destroyed after a period of ten years subject to the approval of the Records Screening Board.[228]

B. *Legislation*

The jurisdictional provisions of the juvenile court act were amended to provide that if any juvenile is brought into the juvenile court for committing an act which would constitute a violation of federal law, state law or city ordinances in the operation of a motor vehicle if he were an adult, the judge may waive jurisdiction and certify the case to the court which would have jurisdiction if the child were an adult.[229]

Every physician (including medical doctors and licensed osteopaths) is now required to make a written report to the juvenile judge whenever a child under the age of sixteen years is examined or treated for injuries, other than accidental, inflicted upon the child by a parent or caretaker. The doctor is immune from liability in making the report and participating in a judicial hearing unless he "acted in bad faith or

223. Graham v. State, 144 So.2d 97 (Fla. 2d Dist. 1962).

224. Laws of Fla., ch. 22709, Special Acts of 1945, § 15.

225. O'Connell v. O'Connell, 138 So.2d 83 (Fla. 2d Dist. 1962).

226. Chambers v. Chambers, 143 So.2d 656 (Fla. 3d Dist. 1962). For an interesting article on the subject of delinquency, see Fox, *Delinquency and Biology*, 16 U. MIAMI L. REV. 65 (1961).

227. FLA. STAT. § 39.12(2) (1961).

228. Fla. Att'y Gen. Op. 062-56 (April 20, 1962).

229. Fla. Laws 1963, ch. 63-12, amending FLA. STAT. § 39.02(1) (1961).

with malicious purpose," and he is presumed to have acted in good faith. Further, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries or the cause of his injuries. Any physician who knowingly and wilfully violates this law will be guilty of a misdemeanor.[230]

Section 295.02 of the Florida Statutes was amended to provide for scholarship benefits to children of deceased veterans on a quarter, semester or trimester basis, and the sum of eight thousand dollars per year was appropriated for this purpose.[231]

Section 450.061(1) was amended to provide that no one under the age of sixteen (whether his disabilities of nonage have been removed by marriage or otherwise) shall be permitted to engage in the manufacture, transportation or use of radioactive materials.[232]

C. *Criminal Cases Involving Juveniles and Pertinent Legislation*

Under section 39.02(6) of the Florida Statutes,[233] the juvenile court has no authority to transfer jurisdiction over a non-felony case involving a minor fourteen years of age or older to a municipal court without the demand of the minor; only in felony cases may the juvenile court make this transfer without the demand of the minor.[234]

Section 932.38 of the Florida Statutes[235] requires that service of notice must be made upon the parents or guardian of any minor before he is tried for any offense. In the preceding two-year period, twenty-two cases arose under this statute.[236] During the period being surveyed at least thirteen more cases arose. In a four-to-three opinion the Florida Supreme Court apparently held that notice need not be given to a minor's mother when the mother's brother had actual notice of the minor's predicament, came before the court and employed an attorney to represent him. The rationale seemingly was that the minor's mother was a former inmate at a state mental hospital, she now resided with her brother, and she had contributed little to the upbringing of her son.[237] On the other hand, the court refused to order a hearing to determine whether a minor's grandfather or aunt had actual knowledge of the charges brought, because even if these parties had had actual knowledge it would not have excused the lack of notice to the minor's parents. Further, the court refused to order a hearing to determine if the minor had entered into a common law marriage which would obviate the neces-

230. Fla. Laws 1963, ch. 63-24. See Annot., 89 A.L.R.2d 396 (1963).
231. Fla. Laws 1963, ch. 63-124, amending FLA. STAT. § 295.02 (1961).
232. Fla. Laws 1963, ch. 63-82, amending FLA. STAT. § 450.061(1) (1961).
233. FLA. STAT. § 39.02(6) (1961).
234. *In re* C.A.P., 155 So.2d 157 (Fla. 2d Dist. 1963).
235. FLA. STAT. § 932.38 (1961).
236. Murray, *Family Law*, 16 U. MIAMI L. REV. 177, 204-6 (1961).
237. Davis v. Cochran, 132 So.2d 154 (Fla. 1961).

sity for notice to the parents. The refusal was based upon the complexity of the question of marital status along with the fact that a determination of the question would have far reaching implications as to the marital rights and obligations of the petitioner and might also be construed to fix such status, rights and obligations of the girl involved, who would not be a party to the proceedings.[238]

In a case of first impression, the Florida Supreme Court held that notice must be given to the parents of a minor before he is tried for an offense even though he was a member of the Armed Forces at the time of the commission of the crime. The emancipation of the minor by virtue of his military service does not remove him from the express provisions of the statute requiring notice.[239]

It would appear that unless the state alleges and proves that an alleged minor lied about his age and that the trial court relied upon this lie in the belief that the minor was over twenty-one years of age, a criminal conviction is void because of a failure to give notice to his parents.[240] The statute requires that notice be given for each charge; therefore, even though the parents were informed of two charges the court could not convict the minor for two additional charges even though all four charges were tried on the same day.[241] If a minor's parents have actual notice of his predicament and have discussed the possibility of probation with the trial judge, the requirements of the statute have been satisfied.[242] The statutory notice is required even when the minor is being tried for the offense of unlawful escape from the state prison.[243] The statute is not complied with when the written notice to the parents is returned with the notation by the postal authorities "Returned Unknown."[244]

The revocation of a minor's probation by a court in one county solely because the minor was convicted of a crime in another county is erroneous when the conviction was invalid because of a failure to give the required notice to the minor's parents. However, this holding would seem to be an empty one because the court noted that the probation county's court could make its own independent examination of the minor's conduct in the convicting county to ascertain if he had violated the conditions of his probation,[245] which the trial court did upon remand.[246]

238. Patrick v. Cochran, 134 So.2d 5 (Fla. 1961).

239. Dora v. Cochran, 138 So.2d 508 (Fla. 1962).

240. Vellucci v. Cochran, 138 So.2d 510 (Fla. 1962), following Willis v. Cochran, 131 So. 728 (Fla. 1961).

241. Keene v. Cochran, 146 So.2d 364 (Fla. 1962).

242. Craig v. Cochran, 132 So.2d 196 (Fla. 1961).

243. Morgan v. Cochran, 142 So.2d 4 (Fla. 1962); Champion v. Cochran, 133 So.2d 68 (Fla. 1961).

244. Collins v. Wainwright, 156 So.2d 97 (Fla. 1962). The unclear decision in Habich v. Cochran, 148 So.2d 5 (Fla. 1962), may be in accord.

245. State *ex rel.* Roberts v. Cochran, 140 So.2d 597 (Fla. 1962).

246. Roberts v. State, 154 So.2d 695 (Fla. 2d Dist. 1963).

Inasmuch as the failure to give notice to a minor's parents renders a conviction void, it is proper for the judge to set aside the conviction upon his own motion, grant a new trial and then impose a seven-year sentence even though the same judge imposed only a one-year sentence at the first trial. There would not be double jeopardy because the prior proceedings, being null and void, would not place the accused in jeopardy.[247]

XV. ILLEGITIMACY

In a case of first impression it has been held that a summary judgment should not be entered in favor of a man accused of bastardy who presents medical proof of his sterility as the result of a vasectomy, when this proof is opposed by testimony of the woman that the defendant was the sole person who had intercourse with her during the period of conception and that a child was born as a result of this intercourse. It should be noted that there was some question as to whether the vasectomy was performed prior to or subsequent to the alleged intercourse.[248] It would perhaps appear from this decision that no matter how overwhelming the weight of medical testimony in proof of sterility, testimony by the woman will be sufficient to establish a genuine issue of fact precluding the entry of a summary judgment. In still another case of first impression it was decided that an appellate court may, within its discretion, dismiss an appeal by the father of an illegitimate child when he is in contempt of the trial court for his failure to pay the sums of money decreed by the court. The dismissal of the appeal may be conditioned upon the appellant's purging himself of contempt or by the fact that he had been taken into custody by the sheriff.[249]

The Florida courts have jurisdiction in bastardy actions even though the illegitimate child happens to be a resident of a foreign country. Further, the court may issue a writ of ne exeat to prevent the putative father from leaving the state.[250]

One of the pitfalls in the Uniform Reciprocal Enforcement of Support Law[251] was demonstrated in *Clarke v. Blackburn*.[252] The governor of Florida issued an extradition warrant in response to the demand of the governor of North Carolina. The demand stated that Clarke's extradition was requested for trial of the crime of non-support of an illegitimate child. The demand charged Clarke with fathering the child, but it failed to allege that he was present in North Carolina during the period of the non-support with which he was charged. Therefore, the Florida

247. Michell v. State, 154 So.2d 701 (Fla. 2d Dist. 1963). The cases of Branson v. Cochran, 138 So.2d 316 (Fla. 1962) and McEwen v. Wainwright, 147 So.2d 317 (Fla. 1962) merely held that the required notice had been given.

248. Crepaldi v. Wagner, 132 So.2d 222 (Fla. 1st Dist. 1961).

249. Morris v. Rabara, 145 So.2d 265 (Fla. 2d Dist. 1962).

250. De Moya v. De Pena, 148 So.2d 735 (Fla. 3d Dist. 1963).

251. FLA. STAT. ch. 88 (1961).

252. 151 So.2d 325 (Fla. 2d Dist. 1963).

court held that under section 88.081 of Florida Statutes[253] the duties of support are those imposed by the state where the obligor (Clarke) was present during the period of non-support, which in this case was Florida. The Florida law dealing with bastardy provides that there is no duty to support an illegitimate child until there has been a judicial determination by a court of chancery. Since North Carolina law did not apply and since no judicial determination had been made in Florida that Clarke was under a duty to support his putative child, he was released from custody upon a writ of habeas corpus.

XVI. MISCELLANEOUS

A. *Change of Name of a Child*

It is an abuse of discretion for a chancellor to deny a father's request for a postponement of hearing when he was given only six days notice in New York that the child's mother was seeking to have the child's name changed in Florida.[254]

B. *"Confidential Relationship of a Mistress"*

When a husband and father (who is considerably older than his mistress) substitutes the mistress' name in place of his wife as the beneficiary of a life insurance policy, a presumption of over-reaching or undue influence arises which may justify avoidance of the transaction in the absence of positive evidence of good faith and fair dealing. The presumption of overreaching arises because of "a confidential relationship or a *quasi* confidential relationship through meretricious association,"[255] and the mistress has the burden of overcoming the presumption of undue influence.

C. *Divorce and Wills*

In a case of apparent first impression, it has been decided that the Florida statute[256] which provides that all provisions in a will in favor of a wife are rendered void when the parties are divorced is applicable even when the parties were never legally married. The testator executed the will when the parties were living as man and wife, although they went through a civil marriage approximately one year later. Subsequently, the wife divorced the husband, but later it was disclosed that the husband

253. FLA. STAT. § 88.081 (1961).

254. Lazow v. Lazow, 147 So.2d 12, 14 (Fla. 3d Dist. 1962):
To change the name of a minor son so that he no longer bears his father's name is a serious matter, and such action may be taken only where the record affirmatively shows that such change is required for the welfare of the minor. Society has a strong interest in the preservation of the parental relationship, . . . and a possible adverse effect on the relationship between a father and child is a valid ground for refusing to change the name of a 12-year-old child. At this tender age a child is not capable of making an intelligent choice in the matter of his name.

255. Benner v. Pederson, 143 So.2d 722, 726 (Fla. 2d Dist. 1962).

256. FLA. STAT. § 731.101 (1961).

had a prior undivorced spouse. The court held that although the claimant "wife" was never the legal wife of the deceased testator, it would be contrary to the purpose and intent of the legislature to allow her to recover.[257]

257. Conascenta v. Giordano, 143 So.2d 682 (Fla. 3d Dist. 1962).