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Domestic Relations

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DOMESTIC RELATIONS

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INTRODUCTION**

It is interesting to observe that the cases decided in the last two years have shown an increase in quantity and complexity when compared with the preceding two year period. This increase is in part, of course, due to a constantly increasing population and the existence of the district courts which have been prolific in their work. However, a closer analysis of these cases reveals the very distressing fact that approximately one-half of these cases were decided on procedural rather than substantive grounds. Many of the cases reveal that the chancellors, as well as the attorneys, were either completely ignorant of, or blandly disregard some of the most fundamental rules of procedure. The *sua sponte* actions of some of the chancellors in amending decrees and orders without the slightest attempt to give the adversely affected party an opportunity to be heard can only be described as a type of "Judge Roy Bean justice." When it is remembered that clients have to pay additional attorneys' fees and court costs to correct these judicial *faux pas*, it would behoove the State Bar Association to conduct more institutes on procedure for the judges and lawyers. In an attempt to assist in this problem, the author has added a separate section on procedure and, wherever possible, procedural questions have been discussed throughout the various headings of this article.

MARRIAGE

Common law marriages

Since the last survey, the courts decided only three cases dealing with common law marriages. In the first case,[1] the district court affirmed the Florida Industrial Commission in its affirmance of the findings of the deputy commissioner that a common law marriage had been proved. The court stated that the deputy's position is somewhat analogous to that of a chancellor in that his findings are entitled to great weight and should not be set aside unless there appears no competent substantial evidence to support them. The decision was barren as to any factual discussion. In the

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** The material herein surveyed includes the statutes enacted by the 37th Florida Legislature (1959 session) and the cases reported from 96 So.2d 139 through 113 So.2d 224.

1. Flagler Funeral Service v. Schulz, Fla. 97 So.2d 347 (Fla. App. 1957).

second case,[2] the district court held that the alleged wife failed to prove the existence of a common law marriage. The evidence disclosed that the couple had "held themselves out as man and wife," however, the alleged wife's testimony seemed to indicate that there was an agreement to be married in the future rather than an agreement *per verba de praesenti*. The third case[3] was also barren of any factual discussion and simply held that a common law marriage had been proved. Query: Why do the courts bother to write opinions without a discussion of the pertinent facts?

Legislation

The Legislature had taken a belated (although incomplete) step forward in an act which requires the registration of common-law marriages by both parties with the county judge in any case where welfare payments for dependent children are involved. The Act wisely provides that lack of registration shall not affect others not a party to such common-law marriage; it is limited to cases involving the alleged husband or wife, or both.[4] It is a pity that the Act did not require the registration of all common-law marriages by the alleged husband and wife as a condition precedent to any action between the spouses, or by one of them against the estate of the other or against third parties, either private or public.

Ceremonial Marriage

In the *Perkins* case,[5] a lothario married three women without going to the bother of divorcing his first two wives. His first wife also "married" another. His second "wife" claimed workmen's compensation benefits in opposition to the claim of the first wife. The Industrial Commission's ruling in favor of the first wife was affirmed by the district court. Certificates from the Mississippi and Florida Bureaus of Vital Statistics and two Mississippi chancery courts, which showed an absence of a divorce decree dissolving the deceased's first marriage, effectively destroyed the usual presumption in favor of the validity of a second marriage. It is somewhat surprising that the court did not consider the fact that the first wife's second "marriage" would create a presumption that her first marriage (to the deceased workman) had been dissolved by divorce.[6] The first wife's testimony that she had not divorced or been divorced by her first husband does not seem consistent with her subsequent marriage to another.

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2. Van Derven v. Van Derven, 105 So.2d 805 (Fla. App. 1958).
3. Horning v. Horning, 107 So.2d 756 (Fla. App. 1958). The case of Smith v. Smith, 108 So.2d 761 (Fla. 1959) involved an admittedly meretricious relationship, a "turpentine camp wedding." The case is an interesting ineffectual attempt to establish a constructive trust by the "wife" in the "husband's" property.
4. Ch. 59-472, S.B. No. 170, 37th General Session, Florida (1952).
5. Perkins v. Richards Constructors, Inc., 111 So.2d 494 (Fla. App. 1959).
6. E.g. Teel v. Nolen Brown Motors Inc., 93 So.2d 874 (Fla. 1957).

ANNULMENT

In a case of apparent first impression,[7] the district court ruled that an annulment may not be granted upon the uncorroborated testimony of the plaintiff. The facts (which were not recited by the court) were "of an indelicate nature" and the contention of the plaintiff-wife that "corroboration is neither possible nor required" was summarily brushed aside by the court. Inasmuch as some sexual nonfeasance or malfeasance was apparently involved, it is to be wondered how corroboration could be secured. With the *possible* exception of doctors, who could testify? Is not the court enunciating a cast-iron rule that may be unworkable as well as unjust?

JURISDICTION, DOMICILE AND VENUE FOR DIVORCE

Proof of residence

In accord with the case of *Pepper v. Pepper*,[8] the district court held that "The plaintiff's testimony, corroborated by three witnesses" that he had resided in Florida for more than two years together with his continued residence for a year since he testified should serve to "confirm or disaffirm the validity of his claim of residence."[9] The district court has frowned upon "leading questions of the most obvious nature" utilized to establish residence for divorce. The court dismissed the suit because the plaintiff's witnesses although testifying in 1955 that he was present ninety days before the filing of the suit in 1953, also stated that he was a resident of Florida for a period of nine months. "Certainly nine months prior to August 6, 1955, could not be construed by the wildest stretch of the imagination as having been prior to September 23, 1953."[10]

In *Vega v. Vega*[11] a divorce was entered in favor of the husband based upon his sworn complaint, affidavit and testimony that he did not know his wife's "address or whereabouts or where she went to. . . ," and that no children were born of the marriage. Six months later the wife attacked the divorce alleging that she was living with him at the time he had filed his divorce action, that a child was born of the marriage, and that the divorce was obtained by fraud and perjury. The wife's testimony was "unchallenged." For some incomprehensible reason the chancellor refused to vacate the divorce and he held the wife and her attorney in contempt of court! The district court, in a very stinging opinion, remanded the case "for the purpose of conducting a proper and orderly hearing on the motion to vacate. . . ," and vacated the order of contempt.

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7. Pickston v. Dougherty, 109 So.2d 577 (Fla. App. 1959).
8. Pepper v. Pepper, 66 So.2d 280 (Fla. 1953).
9. Fenton v. Fenton, 100 So.2d 659 (Fla. App. 157).
10. Baker v. Baker, 105 So.2d 506 (Fla. App. 1958).
11. Vega v. Vega, 110 So.2d 29 (Fla. App. 1959).

The somewhat nebulous concept of "domicile" required for divorce received further illustration in the *Wethersetin* case.[12] A couple had lived in Florida since October, 1951. In 1957, the wife filed suit for divorce and shortly thereafter left to undergo medical treatment in Illinois. She returned to Florida for the hearing at which time the chancellor dismissed the cause for lack of jurisdiction. The district court reversed holding that "the record of the testimony before the lower court showed no abandonment of her Florida domicile by the plaintiff." This ruling appears to the author to be a too extreme effort of the court to "find domicile." According to the final decree, the wife had no relatives in Florida; her apartment lease had been cancelled; her relatives would have to be in constant supervision of the wife. Finally, "She has made no arrangements to live in Florida and by her own testimony has no such plans. She has no property in Florida outside of an automobile." If "the best proof of one's domicile is where he says it is,"[13] then it would seem that the wife's testimony that she had made no arrangements to live in Florida would have negatived any presumption that the original domicile continues until a new one is definitely acquired.[14]

PROCEDURE-ESTOPPEL BY JUDGEMENT AND RES JUDICATA; VACATING OF DECREES, APPEALS, ETC.

Conflicts between Florida and New York courts

The *Linguanti* case[15] could be accurately labeled a "strategic nightmare." The husband filed suit for divorce against the wife in Florida. Before she answered, she filed suit for divorce in New York. She was awarded counsel fees and suit money in the Florida case. Later she petitioned the New York court to enjoin her husband from proceeding with his Florida action. The New York trial court declined to do so; she appealed and a restraining order was issued by the New York appellate court. The wife then applied to the Florida court to stay the proceedings until the New York appellate court had completed the cause. The Florida court declined to stay the cause and the wife appealed. The district court held that the chancellor had not abused his discretion in refusing a stay. From the wording of the opinion, it would appear that the court did not look too kindly upon the wife's efforts to interfere with a Florida court which did have jurisdiction over the parties and the subject matter of the action.

Jurisdiction obtained by mail.

In the *Marshall* case[16] (which will be subsequently discussed) the supreme court decided that in proceedings supplementary to divorce brought

12. Wetherstein v. Wetherstein, 111 So.2d 292 (Fla. App. 1959).
13. Frank v. Frank, 75 So.2d 282, 286 (Fla. 1952), cited by the court.
14. 8 FLA. LAW & PRAC. *Domicile* § 19 at 110 (1958), cited by the court.
15. Linguanti v. Linguanti, 96 So.2d 906 (Fla. App. 1957).
16. Marshall v. Bacon, 97 So.2d 252 (Fla. 1957).

to collect delinquencies in the payment of alimony and support money, when the court had expressly retained jurisdiction over these matters, jurisdiction over the defendant could be obtained by service by mail provided he was given reasonable notice and an opportunity to be heard before the decree was adversely modified. In addition, when the defendant filed a special appearance, but then asked for affirmative relief (even though it was allegedly done in response to a question from the chancellor), he was subject to the jurisdiction of the court.

The *Marshall* case should be compared with the *Kosch* case. In *Kosch*, the wife brought proceedings to increase the support provisions of a property settlement which had been confirmed by a divorce decree. The decree provided that the court retained jurisdiction of the cause "to *enforce* the provisions contained in said agreement." (Emphasis added). Copies of the motion for an increase were mailed to the local attorney who had represented the husband in the first suit, to the husband in South Carolina, and to the American Arbitration Association which had arbitration jurisdiction under the terms of the agreement. The district court distinguished these facts from the *Marshall* case by holding that a proceeding brought to increase an alimony award is a new proceeding and service of process must be made upon the husband before the court has jurisdiction over him which would be sufficient to enable the court to enter an *in personam* decree valid under the full faith and credit clause of the federal constitution. Upon appeal, the supreme court reversed stating that the case was controlled by the *Marshall* case. This was not a new suit; it was merely supplementary to the original suit.[17]

The *Schraner* case[18] completes the picture partially painted by the *Marshall* and *Kosch* cases. In *Schraner* the ex-wife petitioned the court to modify a final decree of divorce by "withdrawing the husband's right of visitation and temporary custody." The final decree did *not* expressly retain jurisdiction over the cause. A copy of the petition and a notice of hearing were mailed to the ex-husband in Indiana ten days prior to the date of the hearing. The district court ruled that jurisdiction to modify a divorce decree as to custody of minor children is not dependent upon an expressed reservation in the final decree for, independently of any statute, a court of chancery has inherent jurisdiction to control and protect infants and their property. Therefore, it was not necessary to serve new process and "the informal notice actually served on the defendant met the requirements of due process."

A guardian of an incompetent cannot bring divorce proceedings in behalf of the incompetent.

The district court has aligned Florida with the weight of authority by holding that a guardian has no right to *continue* a divorce action

17. Kosch v. Kosch, 106 So.2d 600 (Fla. App. 1958).
18. Schraner v. Schraner, 110 So.2d 33 (Fla. App. 1959).

instituted by an incompetent prior to his being adjudicated incompetent in the absence of appropriate legislation.[19] It is to be noted that the *Scott* case,[20] decided in 1950, held that the guardian could not *institute* a suit for divorce in behalf of the incompetent. The district court noted that the *Scott* case used the language "instituted" and "maintained" which seems to be consistent with the present case. The writer may be accused of legal heresy in submitting that the pious platitudes used by the court (and by courts cited as precedent) are unrealistic. It is no doubt true that "a marriage relationship, as the foundation of home and family, should not be abrogated without adequate cause." However, where is the "home" when one spouse is insane? Why would a wife, for example, be so zealous in protecting this "home"? Could the answer lie in the fact that she would be entitled to support from his estate during his lifetime and for a share (if not all) of his property at his death? This may be labeled a cynical approach, but platitudes should not be used to conceal reality.

Estoppel by judgment and res judicata.

It is, of course, error to raise the affirmative defenses of estoppel by judgment and res judicata by a motion to dismiss. Being affirmative defenses, they can only be raised by an answer, cross-claim, or counter-claim, or a combination of the foregoing.[21]

A husband brought suit for divorce based upon extreme cruelty and adultery. The wife pleaded res judicata in that in a prior separate maintenance cause brought by the wife with the husband counter-claiming for divorce based upon extreme cruelty, the court had found for the wife. In the separate maintenance proceedings, the husband had introduced testimony relative to the wife's alleged adultery. However, he had confined his pleadings to the question of cruelty and no amendments to conform to the evidence were made. The district court, in affirming the chancellor, held that since no charge of adultery was pleaded by the husband in the separate maintenance suit nor could it be ascertained that the chancellor had considered the adultery testimony in finding that the wife was not guilty of extreme cruelty, the ground of adultery was not barred by res judicata or estoppel by judgment. Of course, the question of cruelty was barred by the former determination which was adverse to the husband.[22]

In the *Berman* case[23] the husband filed suit for divorce based upon extreme cruelty and habitual indulgence in a violent and ungovernable temper. The wife pleaded res judicata based upon a New York decree

19. Wood v. Beard, 107 So.2d 198 (Fla. App. 1958).
20. Scott v. Scott, 45 So.2d 878 (Fla. 1950).
21. Stone v. Stone, 97 So.2d 352 (Fla. App. 1957), and Chambers v. Chambers, 102 So.2d 171 (Fla. App. 1958).
22. Shirley v. Shirley, 100 So.2d 450 (Fla. App. 1958).
23. Berman v. Berman, 103 So.2d 611 (Fla. App. 1958).

of separation from bed and board which was predicated upon: (1) cruel and inhuman treatment, (2) failure to provide for her maintenance and support and (3) abandonment. The lower court determined that estoppel by judgment applied even though apparently it was not pleaded by the wife. The supreme court stated that estoppel by judgment was not applicable because the husband withdrew his defense to the New York action in the midst of the hearing, hence "In these circumstances it cannot be said that the 'points and questions' presented in the instant suit for divorce were 'actually litigated and decided' in the New York proceeding." In addition, neither res judicata nor estoppel by judgment may of necessity be applicable if the degree of proof required for victory in the first action is greater than the degree of proof required for victory in the second action. Therefore, the degree of proof required in New York to sustain a charge of "cruel and inhuman treatment" must be proof of "either actual violence committed with danger to life, limb or health, or a reasonable apprehension of such violence." This is, of course, a much greater degree of proof than is required in Florida to prove charges of extreme cruelty or ungovernable temper. Hence, estoppel by judgment was not applicable under either theory.

The cause celebre of *Astor v. Astor*[24] has made its inevitable return[25] to an appellate court in an effort to unscramble the seeming marital maze. The husband first married Gertrude and later secured a Mexican divorce. He then married Delores. Subsequently, Gertrude attacked the Mexican divorce in the New York courts which held the divorce to be invalid. However, before the New York courts had ruled, the husband was ordered to pay separate maintenance to Delores by the Florida courts. The husband, in the Florida separate maintenance suit, attacked his own Mexican divorce. His attack was denied on the grounds of estoppel. Later, the husband filed suit in New York against both Gertrude and Delores asking the court to decide which of the women was his wife and for relief against the Florida decree. The New York court refused to decide, holding that Delores' separate maintenance decree was res judicata and even though Florida must accord the New York decree full faith and credit, it is not bound to accord it any *more* credit than it has in New York which also held against the husband on the grounds of res judicata. It would appear that the husband has no other alternative but to continue the doubtful pleasure of supporting two "wives."

The dichotomy between res judicata and estoppel by judgment was further illustrated in the *Stone* case.[26] A husband sued his wife for divorce

24. Astor v. Astor, 89 So.2d 645 (Fla. 1956).
25. Astor v. Astor, 107 So.2d 201 (Fla. App. 1958). See generally, Comment, *Full Faith and Credit: Extraterritorial Effect of Custody Decrees*, 13 U. MIAMI L. REV. 101 (1958).
26. Stone v. Stone, 111 So.2d 486 (Fla. App. 1959).

in Florida alleging habitual indulgence in a violent and ungovernable temper and desertion. The wife counterclaimed for separate maintenance alleging desertion. Prior to this action, the husband had sued his wife for divorce in Ohio alleging cruelty, while she had cross-claimed alleging desertion and seeking separate maintenance. The Ohio Court denied relief to either party. The Florida trial court entered a summary decree in favor of the wife holding that the husband's Florida action was barred by the doctrine of res judicata and estoppel by judgment. The district court reversed, ruling that since the husband's Florida action did not involve the same grounds as were present in the Ohio action, the rule of res judicata was improperly applied. And, inasmuch as the wife failed to introduce any testimony from the Ohio action showing that every point and question involved in the Florida action was actually litigated and determined in the Ohio action, she had failed to carry the burden of proof which was incumbent upon the party asserting the doctrine of estoppel by judgment. It would seem that if the wife can show (at further hearings) that the matter adjudicated in the Ohio case furnished complete coverage and proof as to the essential elements of the charges of ungovernable temper and desertion now asserted by the husband, her claim of estoppel by judgment would be eventually successful.

Chancery court has jurisdiction to enter a money judgment based upon foreign judgment for delinquent alimony and child support.

A chancery court may enter a money *judgment* based upon a judgment of a sister state for delinquent alimony and support payments over the contention that the suit was one in debt cognizable only in a common law action. The court reasoned that it would be a strained interpretation to hold that this was a debt action "rather than one to procure and enforce by equitable processes a decree for accrued alimony and support for the former wife. . . ." In addition the court considered that to hold that only the common law side of the court had jurisdiction would be "depriving equity of its inherent power of enforcement by attachment and contempt."[27]

Appointment of special matters.

The *Nystrom* case,[28] a procedural "jig saw puzzle," is too lengthy to discuss fully. The main ruling was that it was error to appoint a special master without notice and an opportunity to be heard by the complaining party and, in addition, to overrule a motion attacking this appointment without a hearing. It is interesting to note that the motion to vacate the order of reference to the master contained allegations that he was

27. Miller v. Miller, 105 So.2d 386 (Fla. App. 1958).
28. Nystrom v. Nystrom, 105 So.2d 605 (Fla. App. 1958).

biased; the *special master* overruled this motion which was affirmed by the chancellor!

Sua sponte orders of chancellor condemned.

It was erroneous for a chancellor *sua sponte* to vacate a previous final decree of divorce and to have further testimony taken before a special master and a new "final" decree entered by a different chancellor.[29]

A wife filed an action entitled, "Petition in the Nature of a Bill of Review to Have Divorce Decree Set Aside Because of Fraud." The chancellor found that she had failed to prove her case. It was therefore erroneous for him to sua sponte consider this as a petition to modify a separation agreement and final decree approving such agreement under the provisions of Section 65.15 of the Florida Statutes. This statute provides that, "either party may apply" to the court which may modify "after giving both parties an opportunity to be heard. . . ." The chancellor cannot "upon authority of its equity and discretionary power," enter a decree upon issues not raised in the pleadings.[30]

Vacating of Defaults.

When a default was entered for failure to answer at the proper time, and the parties stipulated for a vacating of the default and an order was entered setting aside the default and giving the additional time in which to file defensive pleadings, it was erroneous for the chancellor to rule that he had no power to enlarge the time for filing pleadings when the period had expired, and to strike the defendant's pleading and to proceed *exparte* in the cause.[31] It is to be noted that the chancellor would not be bound to honor the stipulation; the vacating of the default was still a matter of discretion based upon the circumstances and exigencies of the case. However, it was error for the chancellor to vacate the default and then reverse himself without a showing of a subsequent default by the defendant.

A letter by attorney may amount to a petition for rehearing.

In *Batteiger v. Batteiger*[32] the chancellor orally announced that he was going to enter a final decree divorcing the parties and ordering a conveyance of property. The final decree failed to "grant the divorce specifically to" either party. The plaintiff's attorney wrote the chancellor pointing out the error in the decree and asserting that the wife should be awarded the home; the defendant's attorney wrote the chancellor in

29. Smith v. Smith, 98 So.2d 897 (Fla. App. 1957).
30. Mouyois v. Mouyois, 97 So.2d 718 (Fla. App. 1957).
31. Schroeder v. Schroeder, 102 So.2d 729 (Fla. App. 1958).
32. Batteiger v. Batteiger, 109 So.2d 602 (Fla. App. 1959).

response to this letter. The decree and two letters were filed the same day. The lower court later entered an amended final decree. The district court decided that these letters were "tantamount to the filing of a petition for rehearing, inasmuch as the letters were obviously in response to an announced final decree." Therefore, the court did not lose jurisdiction and could enter an amended final decree changing the property provisions of the original "final decree."

APPELLATE PROCEDURE

Appeals must be directed at final decrees.

The supreme court has concluded *sua sponte* that a notice of appeal which was not directed to the final decree, but only to the order of the chancellor denying a rehearing, did not give the appellate court jurisdiction. "If we were to do this we would be undertaking to review a final decree which has not been assaulted by the appellant herself."[33] The *Scheuermann* case[34] seems to be another affirmation of this rule. The chancellor entered a final decree of divorce which provided for attorney's fees. Four months later, the chancellor re-opened the case for further testimony as to the amount of the attorney's fees. A year later, the chancellor entered a further order reestablishing the original "final" decree as to the attorney's fees. Both parties appealed and the court held that the chancellor's orders entered after the final decree were a nullity. Since the appeals were directed at orders which were a nullity and no appeal was properly perfected from the original "final" decree, the appeal (being treated as a petition for certiorari) was denied.

Time for appeal cannot be extended by stipulation.

After a final decree has been entered (recorded in the chancery order book) the parties may not stipulate that the decree shall be effective as of some subsequent date for the purpose of giving an extension of time for filing an appeal.[35]

Certiorari will not lie from post final decree orders.

The district court has ruled that certiorari does not lie to review a chancellor's post final decree order. Section 59.02(3) of the Florida Statutes which provided for this remedy has been superseded by Rule 4.2(a) of the Florida Appellate Rules which provides for appeals from post final

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33. Klemenko v. Klemenko, 97 So.2d 11 (Fla. 1957). Accord Fenley v. Fenley, 103 So.2d 191 (Fla. 1958) and McNary v. Hudson, 110 So.2d 73 (Fla. App. 1959).
34. Scheuermann v. Shamas, 97 So.2d 314 (Fla. App. 1957).
35. Salinger v. Salinger, 100 So.2d 393 (Fla. 1958).
36. Fort v. Fort, 104 So.2d 69 (Fla. App. 1958). See the prior case of Fort v. Fort, 90 So.2d 313 (Fla. 1956).

orders and decrees.[36] In accordance with this decision, the district court had no jurisdiction of a petition for certiorari to review a post final decree order which modified the amount of an alimony award. Under Section 59.45 of the Florida Statutes, an appeal may be treated as a petition for certiorari, however, the statute fails to provide for the converse situation.[37]

Absence of appellate record precludes court from factual consideration.

The district court affirmed (without prejudice) the lower court's decree because of the absence of an appellate record despite the contention that there should be a modification of a child support award because the child was now in the military service. The court considered that since there was no record, it was not in a position to say what had occurred before the chancellor.[38] It is to be wondered if an appellate record disclosing the testimony would be necessary in such a simple case?

The perennial *Bredin* case[39] has perhaps made its final appearance[40] in the appellate courts. In its closing performance the court ruled that the original plaintiff remains the "original plaintiff" under Section 59.09 of the Florida Statutes and Rule 3.2(f) of the Florida Appellate Rules even though relief is granted to the defendant on her counterclaim. Therefore, the plaintiff's appeal was dismissed when he failed to pay costs which were taxed against him or failed to supersede them by the posting of a supersedeas bond. This decision was avowedly based upon an implication contained in the *Bower's* case.[41]

GROUNDS AND PROOF FOR DIVORCE

Adultery, condonation and connivance therein.

The district court while stating that, "the testimony of hired detectives should be scrutinized with great care," upheld a finding of adultery based to a large degree upon their testimony. However, the detectives' testimony was supported in some aspects by a wife of one of the detectives and by the defendant wife's testifying to "circumstances which in themselves support the finding of the chancellor."[42] However, in a later case the same district court overruled the chancellor who had made a finding of adultery based upon the testimony of two private investigators because

37. Pavey v. Pavey, 112 So.2d 589 (Fla. App. 1959).
38. Brody v. Brody, 105 So.2d 378 (Fla. App. 1958). The case of Murray v. Murray, 106 So.2d 859 (Fla. App. 1958) determined that when "neither the amended complaint nor the parts of it under attack are made a part of the appeal record" the court is not in a position to decide the sufficiency of the pleading.
39. Bredin v. Bredin, 103 So.2d 879 (Fla. 1958); 89 So.2d 353 (1956), *cert. denied*, 89 So.2d 357 (1956).
40. Bredin v. Bredin, 111 So.2d 265 (Fla. 1959).
41. Bower v. Bower, 55 So.2d 797 (Fla. App. 1952).
42. Parker v. Parker, 97 So.2d 136 (Fla. App. 1957).

the facts offered were totally inadequate to support a finding of adultery. The court also decided that a prior act of adultery had been condoned by subsequent cohabitation.[43]

In the quite lengthy case of *Benson v. Benson*[44] the district court made the following rulings: 1. When a wife lived with another man for approximately fourteen months it could only be interpreted that they were living in a state of adultery; "if desire and opportunity were proven adultery would be presumed." 2. The fact that the husband left his wife could not be considered as connivance in her adultery when the wife continued to live in their home and was furnished support including an automobile and $50 per week. And, in addition, she was not exposed to bad company, but was left in the company of her mother who resided in the home. 3. That connivance, if it were proved, would bar the husband from securing a divorce based upon the wife's adultery. The effect of this alleged connivance on the question of the adultery barring an award of alimony, is discussed in the Alimony section of this article.

In *Dworkis v. Dworkis*,[45] the district court disapproved of the actions of the chancellor who made a finding that the wife had been guilty of adultery based solely upon the husband's testimony and "the demeanor and attitude of the wife during the trial." The district court determined that the trial judge's observation of a party's manner and demeanor in the court room should be limited to its bearing on the party's credibility. Observations by the judge should not be the basis for findings on disputed facts, because in so doing a judge may be said to have made himself a witness, unsworn and not cross-examined. "Disbelief of the denials by one party, of facts which must be proved and corroborated, is not the equivalent of affirmative evidence of those facts."

Pleading of "Fifth Amendment" by allegedly adulterous spouse.

The district court has ruled that when a husband seeks a divorce upon the ground of extreme cruelty and the wife alleges the husband's adultery as a defense, the husband may refuse to testify regarding his alleged adultery based upon the privilege against self-incrimination guaranteed by Section 12 of the Declaration of Rights of the Florida Constitution. The court refused to decide the question of the possible effects of this refusal upon the husband's case on the ground that it was premature at this stage of the proceedings.[46]

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43. Goslinowski v. Goslinowski, 97 So.2d 723 (Fla. App. 1957).
44. eBnson v. Benson, 102 So.2d 748 (Fla. App. 1958), noted in 12 U. FLA. L. REV. 107 (1959).
45. Dworkis v. Dworkis, 111 So.2d 70 (Fla. App. 1959).
46. Blais v. Blais, 112 So.2d 860 (Fla. App. 1959).

Extreme cruelty, proof and condonation thereof.

Condonation is a question of fact, hence the district court affirmed the chancellor who found that an alleged act of sexual intercourse which allegedly occurred on the night before the parties separated "did not operate to condone former acts of cruelty and misconduct without some showing of reconciliation or penitence for past mis-conduct or hope for better conduct in the future."[47] The court cited a Missouri case[48] which asserted that one act of intercourse could be considered condonation of adultery, but not of cruelty. The distinguishing factor seems to be the continuity of the wrongful conduct which may be a single occurrence in adultery but a continuous thing in regard to cruelty. The instant case should be compared with the *Goslinowski* case[49] which involved a charge of adultery. It is also interesting to note that in the instant case the plaintiff's testimony was corroborated by only one witness. In a later case, the same district court affirmed the chancellor who had overruled the master and denied a divorce because there was insufficient evidence of extreme cruelty by the plaintiff and his *sole* witness.[50] It must be admitted that the plaintiff's testimony of "mental cruelty" would have been pathetically weak even if corroborated by twenty witnesses. The court approved the actions of the chancellor in reversing the special master because his findings and recommendations were not only clearly erroneous, but he misconceived the legal effect of the evidence.

In a case based upon "mental cruelty" it was not necessary to prove that the defendant's conduct was deliberate. Hence, when the facts showed that the wife's "nagging, criticizing and kindred complaints" may have been unwittingly pursued because of psychiatric reasons it may constitute extreme cruelty if it caused mental pain and suffering to the plaintiff. The court reaffirmed the subjective test of cruelty; the test is not whether the conduct should result in pain and suffering, but whether it does have this effect upon the other spouse.[51]

In accord with the subjective test of the above case, the district court has ruled that where a husband repeatedly accused his wife of being insane and constantly threatened to have her committed to a mental institution and repeated his charges of insanity before the wife's friends and relatives, this was sufficient to constitute extreme cruelty. The court

47. Mickler v. Mickler, 101 So.2d 157 (Fla. App. 1958).
48. Lowe v. Lowe, 229 S.W.2d 7 (Mo. App. 1950).
49. Note 43, *supra*.
50. Martin v. Martin, 102 So.2d 837 (Fla. App. 1958). The same district court in a still later case (which again was barren of any pertinent facts) affirmed the findings of the master which had been approved by the chancellor because the appellant had failed to show that the findings were clearly erroneous. Bouton v. Bouton, 103 So.2d 680 (Fla. App. 1958). In accordance with the well established rule, the District Court of Appeal, 3rd District, refused to grant a divorce where the plaintiff failed to produce corroborating testimony to substantiate her grounds. Long v. Long, 99 So.2d 641 (Fla. App. 1958).
51. Carlton v. Carlton, 104 So.2d 363 (Fla. 1958).

placed stress on the fact that this conduct was directed at a person who may have been suffering from a mental illness, hence she would be more likely to suffer mental anguish and torture than a person not so afflicted.[52] It is submitted that conduct of this type should constitute cruelty regardless of the mental condition of the complaining spouse.

In the *Berman* case[53] (which has been previously discussed) the supreme court, without completely discussing the facts, reversed the chancellor who had denied a divorce because the plaintiff husband had "failed to sustain the material allegations of his complaint by a preponderance of the evidence." With the exception of physical assaults which *may* have been committed by the wife, the allegations that the wife made disparaging remarks about the husband to his daughter and the attorney of a client of the husband seemed to indicate mental cruelty which made the marriage a "hopeless failure."

In the *Dworkis* case (which was partially discussed in the adultery section), the court *seemed* to say that a wife's filing of criminal and extradition proceedings against the husband for non-support when he had been making sizable payments in support of his family and her attempts to extradite him which were "vengeful and vindictive" would (along with other facts) constitute extreme cruelty.

When both parties claim a divorce, the decree must be specific as to the winning party.

The supreme court has reconciled a somewhat inconsistent line of cases by holding that when both parties claim a divorce, it is the responsibility of the chancellor to "specifically determine by his final decree the relative equities and designate the party entitled to the divorce and the one to whom it is granted."[55]

Naturally impotent does not mean congenitally impotent.

In a case of first impression, the district court ruled that the words "naturally impotent"[56] as grounds for divorce simply mean that the husband was unable to copulate at the time of the marriage "and it makes no difference whether it arose through some act of nature, through accident, through the fault of another, or through fault of the individual

52. Talbot v. Talbot, 104 So.2d 410 (Fla. App. 1958).

53. Berman v. Berman, 103 So.2d 611 (Fla. 1958). In Jurney v. Jurney, 110 So.2d 49 (Fla. App. 1959) the district court reversed the chancellor who had granted the divorce because there was "no substantial evidence of extreme cruelty inflicted on the wife by the husband . . . nor any evidence of substantial dereliction on his part in his obligations as a husband."

54. Dworkis v. Dworkis, 111 So.2d 70 (Fla. App. 1959).

55. Friedman v. Friedman, 100 So.2d 167 (Fla. 1958). Accord Howell v. Howell, 100 So.2d 170 (Fla. 1958). For subsequent proceedings see Howell v. Howell, 109 So.2d 882 (Fla. 1959), which is discussed in the alimony section of this article.

56. FLA. STAT. § 65.04(2) (1957).

himself." It does not mean that this condition must have existed since birth.[57]

Summary judgment may not be granted when there is a genuine controverted issue.

In the *Shulman* case a Wisconsin court awarded custody of children to the mother with the provision that they were not to be removed from the state without a court order or with the mutual consent of the parties. The Wisconsin court later reaffirmed that the mother could not remove the children from the state. Subsequently, the mother removed the children to Florida and instituted an action to recover delinquent child support payments and for an increase in these payments. The court entered a writ of *ne exeat* which the court later quashed and in a further hearing entered a summary decree in favor of the husband because the wife had come into equity with unclean hands. The wife denied the charge contending that the husband had consented to the removal of the children; the husband denied he had given his consent. The district court held there was a genuine controverted issue of fact which precluded the chancellor from entering a summary decree.[58]

Legislation

Section 65.20 of the Florida Statutes was amended to provide that the rule that no testimony on the merits shall be taken for a period of thirty days after the cause is at issue, shall be limited in application to *divorce* suits. This section, before its amendment, seemed to have been possibly applicable to other domestic relations proceedings, for example actions for separate maintenance.[59]

Section 65.04 of the Florida Statutes was amended to include "habitual use of narcotics by defendant" in addition to "habitual intemperance" as a ground for divorce.[60]

ALIMONY

The amount, duration and modification of alimony awards.

The district court affirmed an award of $100 per week as alimony and support for three minor children plus home mortgage payments, taxes and insurance. The husband, for six years preceding the divorce decree, earned an average of approximately $20,000 per year. However, his earnings in 1956 had decreased to $8,600 because of a disability resulting from an

57. Cott v. Cott, 98 So.2d 379 (Fla. App. 1957).
58. Shulman v. Miller, 107 So.2d 274 (Fla. App. 1959).
59. FLA. STAT. § 65.20 (1957), as amended by ch. 59-64, S.B.No. 114, 37th General Session, Florida (1959).
60. FLA. STAT. § 65.04 (1957), as amended by ch. 59-223, S.B.No. 529, 37th General Session, Florida (1959).

injury. The court suggested that if the payments subsequently proved to be a burden or hardship on the husband, he could petition for a reduction.[61]

In an overly terse opinion, the supreme court affirmed a support order without prejudice to the husband's asking for modification based upon his physical disabilities resulting from an automobile accident and any other factors affecting the husband's earning ability or the wife's need for support.[62]

The awarding of temporary alimony and counsel fees is within the sound discretion of the chancellor, and the burden of clearly showing an abuse of discretion rests upon the complaining party.[63]

In the *Slimer* case,[64] the husband was a "man of considerable wealth" who enjoyed a large income. The chancellor granted a divorce to the husband, gave custody of two minor children to the wife and awarded her the sum of seventy dollars per week for each child. However, he denied her any alimony except the sum of two hundred dollars per month for a period of eighteen months in order "to help the wife rehabilitate herself from an earning standpoint." The district court reversed, holding that by the terms of this decree, the wife would soon be forced to leave the home in order to secure employment thereby depriving the children of a family environment. The chancellor was ordered to reconsider the amount of child support, as well as alimony, in order to allow the wife and children to conform with the mode of living that the husband had established for himself.

The *Mack* case, involving a dispute over the amount of alimony and attorney's fees, presented a somewhat involved factual pattern. The husband was a blind, arthritic, fifty year old veteran. He had assets worth in excess of $70,000 and a possible income (from these assets and a disability pension) of $290.24 per month. The wife was 46 years of age with a "take-home pay of $206 per month." She had a child by a former marriage and was entitled to receive $50 per month from the government for support of this child who was the son of a veteran killed overseas. These support payments were to terminate within 17 months. She and her son had a joint bank account in the amount of $300; she was the owner of realty worth $6,250 and her living expenses totaled $276 per month. The district court affirmed the chancellor in his awarding the wife alimony in the amount of $75 per month and attorney's fees of $800. If the husband's testimony (that his living expenses amounted to $345 per month) is believed, it would appear that he will have to withdraw $129.76 per month from his assets in order to exist.[65]

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61. Lewis v. Lewis, 104 So.2d 597 (Fla. App. 1958).
62. Fort v. Fort, 97 So.2d 690 (Fla. 1957).
63. Gilbert v. Gilbert, 105 So.2d 379 (Fla. App. 1958).
64. Slimer v. Slimer, 112 So.2d 581 (Fla. App. 1959).
65. Mack v. Mack, 112 So.2d 861 (Fla. App. 1959).

The wife may have no need for alimony when the husband gives her all his property, or the parties were married for a short period.

In the *Griffin* case[66] the district court decided that when the husband gave his wife property worth $80,000 (his lifetime savings) and that she was an anesthetist capable of earning a substantial income, the chancellor was not in error in denying her alimony.

In determining the amount of alimony it was apparently appropriate for the chancellor to consider that the wife was guilty of extreme cruelty; that the parties had lived together for only two years and eight months; and that the husband had made gifts to the wife during their short sojourn together.[67]

A money judgment may be entered in equity for delinquent alimony payments.

The district court decided that it was proper for a chancellor to award a money *judgment* for delinquent alimony payments rather than enforcing the original order. However, it was improper to reduce the amount of future alimony (as requested in the husband's amended answer) without giving the wife an opportunity to be heard.[68]

Lump-sum awards.

In accord with the *Reid* case[69] the district court determined that a chancellor may award the husband's interest in a tenancy by the entirety (which becomes a tenancy in common at the instant of divorce) to the wife as a lump sum alimony award. Hence, the court upheld the award of the equity worth approximately $2,000 as equivalent to "permanent" alimony of $25 per week for a period of less than two years. The portion of the decree which awarded the wife a half interest in their doughnut shop was not attacked by the husband.[70]

The district court, in another case which was barren of facts, affirmed a lump sum alimony award of $1,500. The court devoted most of its opinion to the error of the appellant in not having an appendix to his brief.[71]

When the facts disclosed that the husband was possessed of a trust estate valued in excess of $200,000 from which he received an annual income of approximately $15,000 after taxes, it was not error to award the wife lump sum alimony of $15,000; $100 per week for the support of two children; $65 per week to the wife for three years, and attorney's

66. Griffin v. Griffin, 107 So.2d 236 (Fla. App. 1958).
67. Howell v. Howell, 107 So.2d 882 (Fla. 1959).
68. Parrish v. Parrish, 99 So.2d 715 (Fla. App. 1958).
69. Reid v. Reid, 68 So.2d 821 (Fla. 1953).
70. Killian v. Killian, 97 So.2d 201 (Fla. App. 1957).
71. Farina v. Farina, 97 So.2d 485 (Fla. App. 1957).

fees of $1,750. It is interesting to note that the court decided that the fact the wife accepted and used alimony of $2,500 which was awarded under the first hearing, did not bar her from seeking and recovering the larger amount of $15,000 on a petition for rehearing. The court drew a distinction between a petition for rehearing and an appeal in that a timely petition for a rehearing is a continuation of the original suit and not an appeal.[72] This case should be compared with the *Brooks* case[73] which is discussed in the following section.

Acceptance of permanent alimony acts as a waiver to an appeal based upon the amount of alimony.

In the *Brooks* case[74] it was determined that a wife who accepted permanent alimony payments under a divorce decree waived her right to appeal as to such award. Hence, when a wife was awarded $6,000 (payable at the rate of $500 per month) and she accepted the full amount before the case was heard in the supreme court, she waived her objections to that portion of the decree. The court noted that this ruling would not leave the wife destitute; she could always ask the court for temporary alimony and attorney's fees pending the appeal.

The plaintiff in *Morton v. Morton*[75] was apparently cognizant of the rule of the *Brooks* case and although being awarded $950 per month as permanent alimony, moved the district court to enter an award of temporary alimony while the case was on appeal. The court was unable to determine what could be a reasonable amount from the record and ordered the amount of the permanent alimony as temporary alimony.

In another case of first impression,[76] the supreme court (after reviewing conflicting dicta in prior cases) determined that the chancellor has the power to modify an award of alimony effective as of the date of the petition rather than the more usual date of the entry of the order.

The court further decided that it did not matter that the wife had accepted alimony payments between the time of filing the petition and the entry of the order of modification. Again the distinction seems to be that the acceptance of alimony while the trial court has jurisdiction cannot be considered in the same category as an acceptance of permanent alimony while the case is on appeal.

Declaratory decree to interpret meaning of alimony clause of final decree.

In a case of apparent first impression the supreme court was called upon in a declaratory decree action to approve or disapprove the inter-

72. Cocalis v. Cocalis, 103 So.2d 230 (Fla. App. 1958).
73. Brooks v. Brooks, 100 So.2d 145 (Fla. 1958).
74. *Supra.*
75. Morton v. Morton, 104 So.2d 472 (Fla. App. 1958).
76. McArthur v. McArthur, 106 So.2d 73 (Fla. 1958).

pretation made by the chancellor of a provision in a divorce decree which awarded the sum of $50 per week "as alimony and maintenance" for two minor children, "until Saul Zalka, the son of the parties hereto, shall have reached the age of Twenty-one (21) years, or until the death or remarriage of the plaintiff, Rose Levin Zalka." The chancellor construed this clause as providing for *alimony* of $50 per week which did not terminate upon the son's reaching his majority. The court stated that this clause was for the benefit of both the wife and children and there was no indication in the parties oral agreement (which was the predicate for this clause) that the payments should stop when the son became twenty-one years old. However, the court determined that this clause provided for both alimony and child support payments and that the wife was entitled to receive alimony after her son reached his majority, but she was not entitled to the original sum. The case was remanded to the lower court to make the proper allocations between the wife and children. Finally, the court after finding a "decided conflict" on this question, adopted the rule that the modification should be effective as of the date of the son's majority.[77]

The incorporation of the husband's profession can not be utilized to circumvent an alimony award.

The case of *Hood v. Hood*[78] illustrates the unsuccessful attempts of a husband to reduce his alimony payments by incorporating his profession. The husband, a successful doctor, entered into a settlement agreement (which was approved by the court subsequent to a divorce decree), whereby he agreed to pay his wife a percentage of his adjusted gross income "derived solely from his medical practice." Subsequently, the husband incorporated his medical practice. The husband and wife each held 49 per cent of the stock of the corporation. Under the new arrangement, the husband's income suffered a serious dimunition. The court stated that even if the husband were free from moral wrong (as found by the lower court), "such an arrangement cannot be used to impair the right of the appellant to her income as reasonably expected through the formula agreed upon and sanctioned by the court." The court did not attempt to invalidate the corporation, but held only that the arrangement could not be used to circumvent the court sanctioned alimony agreement.

Contempt orders must relate the amount of arrearages and how the contemptee is to purge the contempt.

It was erroneous for a court to enter a contempt order for failure to pay alimony without including a finding as to the amount of arrearages

77. Zalka v. Zalka, 100 So.2d 157 (Fla. 1958). On similar facts the court in Katiba v. Katiba, 110 So.2d 693 (Fla. App. 1959) cited the *Zalka* case as controlling.
78. Hood v. Hood, 100 So.2d 422 (Fla. App. 1958).
79. Lord v. Lord, 104 So.2d 624 (Fla. App. 1958).

and a provision that the husband may purge himself and be released by paying the arrearages.

Even though adultery may be committed through connivance of the husband, it will still bar wife from alimony.

In the *Benson case*[80] (which has been previously discussed) the court held that although the connivance of the husband in the adultery of his wife would bar him from securing a divorce for adultery, her adultery would bar her from receiving any alimony "because of the statutory interdiction." In addition, the court ruled that in the absence of a proper lump sum award of alimony, or proof that the wife contributed to the acquisition of real property held as tenants by the entirety, the chancellor had no power to award the husband's interest (which would be as a tenant in common at the instant of divorce) to the wife.

The killing of the ex-husband by the ex-wife deprives her of alimony, even though entitled "lump sum alimony."

A wife secured two judgments in New York against her husband. Subsequently she secured a divorce from him in Florida. The divorce decree gave the New York judgments effect as Florida decrees and judgments and in addition awarded her "as lump sum alimony the sum of five thousand dollars, to be paid at the rate of fifteen dollars per week." Shortly after the decree, she killed her divorced husband and was convicted of manslaughter. The district court ruled that the maxim "that no person should be permitted to profit from his own wrong," would not bar recovery on the two judgments or decrees because they were pre-existing debts and the equitable enforcement was an additional remedy which the woman deprived herself of; actually she suffered a detriment rather than a benefit. However, this equitable maxim would be utilized to deprive her of the right to recover the alimony. Although the alimony was labeled "lump sum alimony it was actually alimony payable in weekly installments." It was not a present debt, but a periodic obligation which could not be accelerated by the woman's own wrong.[81]

Laches may be asserted as a defense to the collection of delinquent alimony and support payments.

An ex-husband defaulted in the making of alimony and support payments in 1946. The ex-wife made no demand for payment until 1957, soon after the ex-husband had sold his interest in a business to his sons. The district court upheld the defense of laches because the ex-husband had,

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80. Benson v. Benson, 102 So.2d 748 (Fla. App. 1958), noted in 12 U. FLA. L. REV. 107 (1959).

81. Morgenstern v. Ruza, 101 So.2d 429 (Fla. App. 1958).

in reliance upon her acquiescence, changed his position to his injury in that: 1. He hired his sons and later sold the business to them; 2. he married again and had children as a result of this marriage; 3. he would not have disposed of his business had he not had an understanding that the ex-wife would refrain from demanding payments, and 4. he had no income except the monthly payments from the sale of the business.[82]

Accrued alimony may not be judicially modified nor may future alimony be modified unless delinquent alimony is paid or good cause is shown for non-payment.

In *Watson v. McDowel*,[83] the ex-wife brought suit in Florida for arrearages of alimony and child support awarded by a Kentucky decree. A portion of the arrearages was based upon a judgment of the Kentucky court, while the remainder consisted of amounts due under the divorce decree as modified by two subsequent decrees. On a question of pleading, the Florida court decided that: 1. Kentucky, like Florida, holds that installments of alimony and maintenance become vested when they become due and the court has no power to modify the accrued payments; 2. when existing arrearages are still outstanding, no counter-claim for modification of the final decree as to the future payments under changed financial circumstances will be permitted unless the arrearages are paid, or the ex-husband demonstrates his inability to pay them.

The *Fischbach* case[84] seems difficult to reconcile with the preceding case. A wife brought suit in Florida to enforce past due and currently maturing alimony which had been awarded to her pursuant to a separate maintenance decree (and seemingly a subsequent judgment) entered in New York. The chancellor decreed that the New York decree be established as a Florida decree, authorized execution for the amount of the New York judgment, ordered compliance with the New York decree as to future payments and then reserved to the husband the right to apply for modification of future payments. The district court affirmed by stating that, "The Chancellor properly refused to order the defendant to pay the amounts which had accrued under the New York decree between the time of the judgment there for arrears and the hearing in the local court; . . ." The author has no quarrel with that part of the decision which enforced the New York judgment. However, why should the Florida courts "properly refuse" to enforce an existing, unmodified order of the New York courts? Under the usual conflict of laws rule, if accrued alimony is not subject to modification in New York, then it cannot be modified in Florida. Inasmuch as both Florida and New York provide that accrued

82. Brown v. Brown, 108 So.2d 492 (Fla. App. 1959).
83. Watson v. McDowell, 110 So.2d 680 (Fla. App. 1959).
84. Fischbach v. Fischbach, 112 So.2d 880 (Fla. App. 1959).

alimony may not be modified, what is the possible reason for denying enforcement of it?

A wife may be forever foreclosed from receiving alimony because a court confused a substantive right with a procedural device.

The majority ruling in the *Kirby* case[85] seems to have been a poorly conceived one. The Chancellor entered a divorce decree in favor of the wife awarding her custody of the children and support money for them. However, the chancellor denied her any alimony because she had no economic need for it. The wife appealed contending that the main error of the chancellor was in his failing to retain jurisdiction over the cause to award her alimony if there ever was a subsequent change in the financial circumstances of the parties. She contended that since the chancellor failed to retain jurisdiction, she would be forever foreclosed from receiving any even if she became ill and could not work and the husband inherited a substantial sum of money. The district court (on the original hearing) seemed to agree with the wife's contentions that she would be forever foreclosed from receiving any alimony. However, they did not believe that the chancellor's actions were an abuse of discretion. Upon re-hearing, Justice Sturgis dissented by succintly stating that there is a distinction between the fundamental *right* to alimony and the collateral questions "as to the amount, kind and character thereof, and . .. whether, when, and by what method the party entitled shall enjoy the fruits of the right." The fallacy of the majority position was beautifully stated by Justice Sturgis:

> Surely it would be a travesty on logic and justice to hold that the Chancellor, by the device of finding that there exists no equity requiring the *immediate payment of alimony* and coupling that finding with a decree that does not affirmatively retain jurisdiction for the purpose of awarding alimony at a later date as the equities might require, can obliterate entirely the *right to alimony* where it is unequivocally established by the proofs. (Emphasis by the court.)

PROPERTY RIGHTS BETWEEN SPOUSES

Former resident not entitled to plead that insurance is exempt from creditors.

The supreme court has ruled[86] that when a former wife institutes proceedings to secure collection of arrearages in alimony and child support payments, the Florida court may sequester insurance policies issued on the life of the non-resident husband in order to satisfy the money decree. Section 222.14 of the Florida Statutes which exempts "cash surrender values of life insurance policies issued upon the lives of citizens or residents of the State of Florida. . . ," does not exempt the former husband when

85. Kirby v. Kirby, 111 So.2d 299 (Fla. App. 1959).
86. Marshall v. Bacon, 97 So.2d 252 (Fla. 1957).

he is a resident of a foreign state at the time he asserts the exemption. In accordance with the *Slatcoff*[87] decision, the question is the domiciliary status of the insured at the time when creditors attempt to subject the cash value of the insurance to their claims, not at the time when the policies were purchased.

Tenancies by the entirety.

The supreme court approved (in part) a decree of the chancellor which gave the divorced wife the right to live in a house for the remainder of her life in lieu of any alimony. Prior to the divorce the parties held the property as a tenancy by the entirety (which, of course, became a tenancy in common upon divorce) and the court dismissed the husband's contention that the wife's life expectancy was greater than his. The court modified the decree by stating that the wife should have possession and the profits (from rentals) for the remainder of her life or until she remarried because the award was in lieu of alimony.[88]

Inasmuch as an adulterous wife is not entitled to alimony, she is not entitled to the complete title to property formerly held as a tenancy by the entirety "in lieu of alimony and all other claims," absent a showing that the wife has an equity in the property arising from the contribution of funds or services in its acquisition or improvement which are above and beyond the usual marital duties.[89]

When a husband "scrambled" his *own* property by conveying it to various corporation which were allegedly his alter ego, the chancellor was not obligated to "unscramble" the transactions which occurred prior to the filing of the divorce complaint because they did not constitute a fraud upon the wife. In addition, where the wife and husband contracted jointly to purchase their home, but the title was placed in the husband's name alone, the chancellor had the right to determine that the husband took the "legal title as a trustee for the benefit of his wife and himself." Therefore, the property was held as a tenancy by the entirety which became a tenancy in common by virtue of the divorce decree.[90]

In the *Wood* case[91] the wife proved that she contributed substantially all of the purchase price of the property held as tenants by the entirety; that she made the monthly payments from her funds and used a $2,000 inheritance which either went into the real property or into an automobile

87. Slatcoff v. Dexen, 76 So.2d 792 (Fla. 1954).
88. Banks v. Banks, 98 So.2d 337 (Fla. 1957).
89. Eakin v. Eakin, 99 So.2d 854 (Fla. 1958).
90. Picchi v. Picchi, 100 So.2d 627 (Fla. 1958).
91. Wood v. Wood, 104 So.2d 879 (Fla. App. 1958). The reader is referred to the case of Demetriou v. Demetriou, 108 So.2d 786 (Fla. App. 1959) for a further illustration of property and alimony allocation. The author believes the case is not worthwhile discussing in the text.

which was awarded to the husband. Hence, the court affirmed an award of the sole ownership of the real property to her.

The district court has ruled that the law of New York is comparable to that of Florida in that upon divorce, tenants by the entirety in real property become tenants in common.[92] It was therefore erroneous for a Florida chancellor to order that New York real estate (held as an estate by the entirety) be sold and the proceeds equally divided absent an award of alimony or support obligation attached to the property or absent a showing of special equities in the property.

When a husband and wife contributed moneys to a bank account held in their joint names, "as joint tenants with the right of survivorship and not as tenants in common," and the husband withdrew the money (without the consent of the wife) and made a gift of it to his brother, the wife could assert her claim to the entire amount upon the death of the husband. Similarly, when the couple contributed to the purchase price of real property, held as an estate by the entirety, and the wife and husband conveyed to a corporation which gave stock to the husband as consideration for the conveyance, and the husband made a gift (without the knowledge of the wife) of the stock to his brother, the surviving wife could assert her claim to all the stock upon the death of the husband. On the other hand, when the husband changed the beneficiary of his life insurance policy from his wife to his brother, and this change was made without any fraud, duress, or undue influence, the wife had no claim to the proceeds.[93]

The claims of the wife in the husband's business.

When a wife in her divorce complaint and at the hearing claimed an alleged partnership interest in a business, it was erroneous for the chancellor to fail to adjudicate the respective interests. The court mentioned that "An award of alimony will not suffice as a substitute for a wife's special equity in her husband's property, nor will her failure to qualify for alimony bar her from recovering any special interest to which she may be entitled."[94]

When the wife's testimony about working in her husband's store was vague as to over what period of time it took place and that when she served as her husband's bookkeeper she was paid $50 per month until he employed someone else at one half that amount, she failed to show sufficient proof that she contributed financially to the husband's business or acquisition of property or that she rendered personal services to the business which would entitle her to any equity in it.[95]

92. Bell v. Bell, 112 So.2d 63 (Fla. App. 1959).
93. Lerner v. Lerner, 113 So.2d 212 (Fla. App. 1959).
94. Shannon v. Shannon, 101 So.2d 428 (Fla. App. 1958).
95. Roberts v. Roberts, 101 So.2d 884 (Fla. App. 1958).

In *Lacker v. Zuern*[96] two married couples each owned, as tenants by the entirety, an undivided one-half interest in a partnership business. The plaintiff wife alleged that she had been ejected from the partnership by her husband and the other couple and that they were "draining off the profits in salaries." She asked for a dissolution of the partnership and for other relief. The district court stated that the right to dissolve the partnership was not in irreconcilable conflict with the rule which forbids the unilateral destruction of an estate by the entirety. The court, after quoting from the *Dodson* case[97] that, "*The income from,* or the proceeds of, the sale of real estate held by the entireties is *equally* the property of the husband and wife. . . . *Either one taking possession holds for the benefit of both,*" said that this case (and others cited in the opinion), by necessary implication, was authority for granting equitable relief against the husband when he is draining off the profits. This case merely decided that the complaint stated a cause of action, hence, the court did not specify what relief could or would be given to the wife.

The wife's living in adultery will not bar her right of dower.

The district court has seemingly held that the Statute of Westminster II (which barred a wife from her dower interest if she left her husband and lived in adultery with another man) is not in force in Florida because this statute was enacted when there was no absolute divorce in England while today adultery is a ground for divorce in Florida. Therefore, the statute is inconsistent with the present laws of marriage and divorce. It is submitted that this rejection of the Statute is pure dicta. The reported case did *not* state that the wife had lived in adultery with another man. It stated that her husband had lived in adultery with another woman, hence the Statute, by its own terms, was not germane to the case. Finally, the court ruled that the wife was not estopped to assert her dower interest due to the fact that her husband lived with another woman and represented this woman to be his wife when he executed mortgages on his property.[98]

The preceding case should be compared with the case of *Kreisel v. Ingham.*[99] In *Kreisel,* a wife secured a separate maintenance decree against the husband in 1942. The husband became in arrears, disappeared from his home city and was not seen or heard from until his wife died, some fourteen years later. The district court ruled that the mere delinquency of the husband in making the support payments would not estop him,

96. Lacker v. Zuern, 109 So.2d 181 (Fla. App. 1959).
97. Dodson v. National Title Ins. Co., 159 Fla. 371, 31 So.2d 402, 404 (1947).
98. Wax v. Wilson, 101 So.2d 54 (Fla. App. 1958), discussed in Comment, *Misconduct in the Marital Relation: Adultery As A Bar to Dower,* 13 U. MIAMI L. REV. 83 (1958).
99. Kreisel v. Ingham, 113 So.2d 205 (Fla. App. 1959).

as sole heir of his wife, from inheriting her estate. *Doherty v. Traxler*[100] (which applied an estoppel against the husband) was distinguished because there the husband had never consummated the marriage, had married the wife for the sole purpose of acquiring an interest in her property, and had consummated a bigamous "marriage" with another for over twenty years. The author must agree that *Kreisel* is clearly distinguishable from *Doherty*. However, the court should be criticized for an incomplete task of research. The court made an exhaustive research of how *other* states have treated this problem and the related problem presented when the wife leaves the husband, lives with another man and then the Statute of Westminster is asserted against her claim of dower, but for some strange reason, the court overlooked the *Wax v. Wilson* decision[101] of the district court, third district, on the Statute of Westminster. It would appear that the right hand should know what the left hand is doing!

A conveyance of property made shortly before and in contemplation of marriage may result in a trust being created in the mala fide granteee.

The *Davis* case[102] had the following involved fact pattern. A couple were divorced and the husband was ordered to pay alimony. Thereafter, the ex-husband acquired a lot through an exchange with his mother. Nine months prior to his re-marriage to his ex-wife, the ex-husband conveyed the lot back to his mother. After his re-marriage his mother granted the lot to him for his life or until his marriage should terminate. The wife invested some of her funds in the construction of a house on this lot. This second marriage was ended by a divorce and the wife sought to hold the mother as trustee of the property for her son. The supreme court found there was insufficient proof that the husband intended to place his property beyond the reach of his prospective wife because there was no evidence at the time that he conveyed to his mother that he intended to remarry, or propose remarriage to his former wife. The court reviewed numerous cases (from other jurisdictions) which raised a trust because of the proof of an agreement to marry and facts showing that the conveyances were made very shortly before the marriage. Howveer, the court did state that the wife, upon remand of the case, could seek to have an equitable lien impressed upon the property for the money which she contributed.

The rationale of the *Davis* case, supra, obviously seemed to control the decision in the *King* case,[103] although the district court failed to cite it as authority. In *King* the district court upheld the chancellor who found that at the time a man conveyed property to his mother, he was engaged

100. Doherty v. Traxler, 66 So.2d 274 (Fla. 1953).
101. Note 98, *supra*.
102. Davis v. Davis, 98 So.2d 777 (Fla. 1957).
103. King v. King, 107 So.2d 259 (Fla. App. 1958).

to marry; that when he did marry, he and his wife treated the property as though they were tenants by the entirety; that their joint funds and efforts went into improving the property and in the payment of the mortgage indebtedness. Therefore, the wife was entitled to one-half interest in this property upon the entry of the divorce decree. However, the Florida Supreme Court reversed[104] because it conflicted with the holding of the *Davis* case. In *Davis*, the Supreme Court specified that the proof must partake of a clear and convincing character in order for the court to raise a trust. In *King*, the district court was content to rely upon the view that, "There is evidence to support the chancellor's findings" and he will not be reversed on a question of fact unless his findings are clearly erroneous. Therefore, the *King* case failed to utilize the proper evidentiary rule.

A declaratory decree may be utilized to determine the liability of each spouse for capital gains taxes.

In *Bartholf v. Bartholf*[105] a couple were living apart pursuant to a decree of separate maintenance. They agreed that each owned an undivided one-half interest in dairy property although the record title was in the name of the husband alone. The property was sold and the Federal government assessed all the capital gains income tax against the husband who brought suit to have the Florida court determine that he was liable for only one-half (pursuant to the agreement of the parties) of the tax. The court determined that he was entitled to a decree under the statute.[106] The strong dissent stated that since the husband alleged a complete and unambiguous agreement, there was nothing to construe; that the decree would be useless because it would not bind the Federal Government which was not a party to the proceedings; and this agreement being oral, rather than written, it did not fall within the Florida statute.[107] The writer is forced to agree with the dissent that the majority opinion was plainly erroneous.

County judge's court has no jurisdiction to determine the validity of antenuptial agreements.

Although jurisdiction to assign dower rests exclusively in the county judges' court, the jurisdiction to test the validity of an antenuptial agreement

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104. King v. King, 111 So.2d 33 (Fla. 1959). See also Moskovits v. Moskovits, 112 So.2d 875 (Fla. App. 1959) which seemingly held that where a wife alleged she was forced to leave her husband because of his misconduct; he then executed a will leaving all his property to others and the wife reconciled with him upon the strength of his promising to revoke the will, she had stated a cause of action for the equitable revocation of the will.

105. Bartholf v. Bartholf, 108 So.2d 905 (Fla. App. 1959).

106. FLA. STAT. § 87.01 (1957).

107. FLA. STAT. § 87.02 (1957).

(which denied the wife any share in the husband's estate) is in the circuit court.[108]

Requirements for affidavit for publication enabling court to award husband's real property to the wife.

In *Torchiana v. Torchiana*[109] the wife secured a divorce decree which awarded her, in lieu of a lump sum alimony award, certain Florida lands owned by the husband who was apparently living out of the state. The affidavit for publication stated, "you are hereby notified that a complaint for divorce has been filed against you. . . ." The affidavit failed to comply with Section 48.08 of the Florida Statutes which requires that the notice shall state "the description of the real property, if any, proceeded against." Therefore, the district court ruled that the chancellor had no jurisdiction to award the husband's interest in his property to his wife.

Legislation.

Section 222.13 of the Florida Statutes was amended[110] to provide that life insurance proceeds which are payable to the insured's estate can be bequeathed by the insured's last will and testament free from all claims by creditors. If the insured leaves no will (or fails to bequeath the insurance proceeds in a will) the administrator is to pay the proceeds to the surviving spouse and children if the insurance policy is payable to the estate. Whether the proceeds will be exempt from creditors in this latter situation, seems to be left in some doubt by the wording of the amendment.

The Free Dealer Law of 1943[111] was amended[112] by providing that the service of publication on the husband must be based upon a sworn statement showing that diligent search and inquiry had been made in order to discover his residence.

PROPERTY, TORTS AND INSURANCE

Cases concerning property, torts, wills and insurance which incidentally involve a family relationship are discussed elsewhere in this issue.

ATTORNEY'S FEES

Amount of wife's attorney's fees awarded by appellate courts.

The courts are usually awarding the sum of $200 to the wife's attorney for undertaking the appeal;[113] even when the husband is in a financially

108. *In re* Estate of Guze, 109 So.2d 170 (Fla. App. 1959).
109. Torchiana v. Torchiana, 111 So.2d 103 (Fla. App. 1959).
110. FLA. STAT. § 222.13 (1957), as amended by ch. 59-333, H.B. No. 1330, 37th General Session, Florida (1959).
111. FLA. STAT. § 62.42 (1943).
112. FLA. STAT. § 62.421 (1959), created by ch. 59-44, S.B. No. 116, 37th General Session, Florida (1959).
113. Smith v. Smith, 100 So.2d 391 (Fla. 1958); Nelson v. Nelson, 101 So.2d 582 (Fla. App. 1958); Stigelbaur v. Stigelbaur, 105 So.2d 584 (Fla. App. 1958); Nystrom v. Nystrom, 105 So.2d 605 (Fla. App. 1958).

enviable position, the fee seldom exceeds $350.[114] It is to be wondered if the somewhat common violation of court rules relative to the forms of the briefs, appendices and record could be possibly attributed (at least in part) to this penurious attitude (particularly in this inflationary period) of the courts?

Innocent wife entitled to attorney's fees in divorce even when "husband" has another wife.

In the first case *squarely* on point, the supreme court decided that "in a divorce action by an innocent wife when she is met by a counter-claim of her punative husband announcing the invalidity of the 'marriage' because of the existence of a prior living spouse (of the husband), the wife is entitled to recover reasonable attorney's fees for the services of her attorney to the date of the final decree."[115] Inasmuch as the court twice repeated the word "innocent," it is to be wondered if the court will recede from the ruling in the *Therry* case[116] (which was cited by the court) which allowed the wife who had a living spouse to recover attorney's fees in the lower court as well as in the supreme court. In the instant case no mention was made of attorney's fees to be awarded for the appeal.

"Damages for delay" clause of a supersedeas bond does not include attorney's fees for wife's attorney.

In *Smith v. Smith*[117] the supreme court ordered the husband to pay his wife's attorneys $200 as their fee. A rule to show cause was issued by the court upon the husband's failure to pay and the surety on the supersedeas bond disclosed that it held a $1,000 cash deposit from the husband as security for the bond. The husband showed that, because of his economic circumstances, he was paying the attorneys ten dollars per month. The court held that under a bond which recited a provision to pay "costs, interest if chargeable, and damages for delay," attorneys' fees paid by an appellee in resisting an unsuccessful appeal were not recoverable as damages. In addition, since the husband was making installment payments, he was not in willful contempt of court. Finally, the court ordered the surety company to pay $200 to the wife's attorneys from the sum that it held as security.

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114. Parker v. Parker, 97 So.2d 136 (Fla. App. 1957) ($250); Hood v. Hood, 100 So.2d 422 (Fla. App. 1958) ($300); Demetriou v. Demetriou, 108 So.2d 786 (Fla. App. 1959) ($300); McKenzie v. McKenzie, 105 So.2d 614 (Fla. App. 1958) ($350); Roberts v. Roberts, 101 So.2d 884 (Fla. App. 1958) ($500); Griffin v. Griffin, 107 So.2d 236 (Fla. App. 1958) ($500); Morton v. Morton, 108 So.2d 779 (Fla. App. 1959) ($500).

115. Young v. Young, 97 So.2d 470 (Fla. 1957).

116. Therry v. Therry, 117 Fla. 453, 158 So. 120 (1934).

117. Smith v. Smith, 100 So.2d 391 (Fla. 1958).

Mother of illegitimate child who successfully defends her custody is not entitled to attorney's fees.

In another case of apparent first impression[118] the district court held that the mother of an illegitimate child who successfully resisted the efforts of the father to modify a former custody order and thereby gain custody of the child was not entitled to attorney's fees. The court stated that the only statute remotely in point was Section 65.16.[119] However, this statute provides only for attorney's fees to "the divorced wife" and the statute could not be stretched "under the guise of interpreting this legislative act."

Attorney's fees are payable to the wife for "enforcing" an alimony award, but not for attacking or modifying it.

A former wife who institutes proceedings to have a divorce decree set aside for fraud is not entitled to attorney's fees and travel expenses incurred in the prosecution of the action. Section 65.16 of the Florida Statutes which gives the chancellor discretion to award attorney's fees is limited to the "enforcement" of decrees of alimony and support; it does not apply when the wife is attempting to have the decree set aside.[120]

However, in the later case of *Gullette v. Ochoa*[121] the wife filed suit under Section 65.18 of the Florida Statutes for an increase in child support payments and for attorney's fees and expenses; the evidence showed that the husband was not in arrears in payments but had voluntarily increased his payments. The court ruled that Section 65.18 was limited to the enforcement, not the modification of support orders, and that the lower court could have considered the suit as being brought under Section 65.15. However, this section makes no provision for the awarding of attorney's fees, hence none could be awarded.

In the *Hood* case[122] (which has been previously discussed) the court stated that since the wife brought an action to enforce the court sanctioned agreement as against the husband's incorporating his professional activities, she was entitled to an award of attorney's fees because "she is litigating in effect to enforce her alimony rights. . . ."

The *Blunda* case[123] is another facet of this "enforcement" concept. When the wife resisted the efforts of the husband to modify an award (which was based on a property settlement) she was in effect enforcing

118. Dillman v. Dillman, 105 So.2d 33 (Fla. App. 1958).
119. FLA. STAT. § 65.16 (1957).
120. Mouyois v. Mouyois, 97 So.2d 718 (Fla. App. 1957).
121. Gullette v. Ochua, 104 So.2d 799 (Fla. App. 1958).
122. Hood v. Hood, 100 So.2d 422 (Fla. App. 1958).
123. Blunda v. Blunda, 101 So.2d 41 (Fla. 1958).

the award and entitled to attorney's fees of $150 under the ruling of the *Simpson* case.[124]

This "enforcement" concept was again illustrated in the *Miller* case[125] where the awarding of counsel fees in the lower court for securing a money *judgment* based upon a New York judgment for delinquent alimony and support was approved under Section 65.16 of the Florida Statutes.

In the *McArthur* case[126] (which has been previously discussed) which was making its second appearance in the supreme court, the wife asserted that her actions in the trial court after the case had been sent back were required in the carrying out of the supreme court's mandate and "therefore were in the nature of enforcement of an order providing for alimony so as to come within the confines of Sec. 65.16, F.S.A." Despite this ingenious argument, the court stated that the issuance of the mandate in the supreme court hearing did not change the character of the proceedings; it still remained "an affirmative effort on the part of the wife to increase her alimony." It is to be noted that in the *Hood* case[127] the wife was entitled to her attorney's fees because she was *enforcing* her alimony rights, while in the *McArthur* case the wife was not enforcing an existing order but was asking for an increase.

No reversal of an alimony award unless abuse of discretion is proved.

The district court reiterated the well established rule that when the statutory basis for an award of alimony, counsel fees and suit money pendente lite has been established, the appellate court will not reverse "unless a clear abuse of discretion is made to appear."[128]

If husband and wife's ability to pay are about equal, no attorney's fees will be awarded.

A lower court award of $750 as attorneys fees was reversed when the evidence disclosed that the husband earned only $53 per week; that the wife "cleared" $44 per week in her employment and received $15 per week child support from the husband. The court stated that, "the wife's ability to pay her attorney almost parallels that of the husband," and remanded the case to the chancellor for reconsideration.[129]

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124. Simpson v. Simpson, 63 So.2d 764 (Fla. 1953).
125. Miller v. Miller, 105 So.2d 386 (Fla. App. 1958).
126. McArthur v. McArthur, 106 So.2d 73 (Fla. 1958), note 76, *supra*.
127. Note 122, *supra*.
128. Vecsey v. Vecsey, 100 So.2d 437 (Fla. App. 1958).
129. Davis v. Davis, 98 So.2d 777 (Fla. 1957).

Attorney's fees may constitute a lien against wife's assets which she obtained after reconciliation as the result of a separate maintenance action.

In the *Robertson* case[130] the wife employed an attorney to prosecute her separate maintenance action. Originally, the attorney was to look to the husband for his fees. However, the parties reconciled, with the wife obtaining all of the family assets. The district court held: 1. that after reconciliation of the parties, the court may retain jurisdiction to award attorney's fees to be secured by a lien upon the property obtained by the wife from the husband as a result of the attorney's efforts; 2. the first fee agreement had been abandoned and a new implied fee agreement was substituted whereby the attorney would look to the wife, rather than the husband; 3. that a public sale of the assets could be held to enforce this lien. The *Robertson* case should be compared with the *Brasch* case.[131] In *Brasch* the parties were divorced. Years later the wife retained an attorney (under a contingent fee retainer contract) to enforce her rights under the divorce decree and to obtain an accounting. The ex-husband and ex-wife settled their differences by entering into an agreement securing the rights granted to her under the decree together with an accounting. The attorney and the ex-wife then entered into a new employment contract which superseded the first. Subsequently, the ex-wife dismissed her attorney. However, he refused to be dismissed as counsel and continued on with the suit, being awarded attorney's fees by the court. The district court held that the amount of the attorney's fees under the contract could not be determined in the chancery proceedings, but only in a proceeding on the law side of the court. In *Robertson*, a fee for her attorney, if allowed would have been payable by the husband to the wife's attorney directly,[132] and in addition the court would have determined the amount which *could* perhaps be based upon the amount fixed in the agreement. In addition, all of the husband's assets were turned over to the wife and there was an implied agreement after this transfer that the attorney should look to the wife for payment. In *Brasch*, the husband would not be liable to the wife's attorney for fees and the wife's liability for payment of the fees and the amount of the fees could only be decided on the law side of the court. It would appear as a result of these two cases, that if the husband is liable for the fees, the chancery court can establish the amount. If the wife receives all or most of the husband's assets and her attorney's fees "would necessarily have to be paid out of the assets thus obtained," the fee can be set by the chancery court. However, if the wife alone is liable for her attorney's fees pursuant to a contract, then the law side of the court must adjudicate the amount.

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130. Robertson v. Robertson, 106 So.2d 590 (Fla. App. 1958).
131. Brasch v. Brasch, 109 So.2d 584 (Fla. App. 1959).
132. FLA. STAT. § 65.09 (1957).

CUSTODY AND SUPPORT OF CHILDREN

CUSTODY

No jurisdiction over non-resident child and custodian of child.

A Florida final decree of divorce gave custody of children to the mother, but later custody was awarded to the paternal grandparents who resided in Ohio. The grandparents seemingly surrendered the children to the father in Ohio. The wife petitioned for a change of custody and a copy of the rule nisi was served in Ohio. The supreme court found[133] that the trial court did not retain jurisdiction of the cause and the extraterritorial service did not give the court jurisdiction over the respondents under the doctrine of *Pennoyer v. Neff*.[134] Justice Thornal in his concurring opinion stated that the *Pennoyer* case was not in point, but that the case was controlled by the facts that neither the children nor the person to whom custody had been awarded was within the state of Florida and therefore the case was controlled by the rule of *Dorman v. Friendly*.[135]

When the child and the father were domiciled in Florida, the Alabama courts had no jurisdiction to change custody of the child, and Florida need not, of course, accord full faith and credit to the Alabama decree.[136]

A Parent has a "God-given legal right" to custody of his children.

The case of *State v. Reeves*[137] made its second appearance before the supreme court and the court while affirming the lower court which refused to make a change in custody from the maternal grandparents to the father, in effect told the father "to renew his application for custody of his children at an early date consistent with their welfare." The court cited the Bible as one of two sources for the proposition that "a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring." Of course, once the court used the word "right" it had to tailor its opinion accordingly and stated, "once the father's ability reaches adequacy, his legal right should not be overcome by the fact that the respondents' offerings may be more adequate than his, or that they may continually out-do him, at least in material matters." The court concluded by stating:

> It is the spirit and intent of this opinion that if, since the order of July 20, 1956, the appellant [father] has continued to demonstrate a continuity of the conduct evidenced at the last hearing, then his legal right to his children should be recognized, the equities otherwise being equal.

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133. Dahlke v .Dahlke, 97 So.2d 16 (Fla. 1957).
134. Pennoyer v. Neff, 95 U.S. 714 (1878).
135. Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1941).
136. State v. Kuhl, 103 So.2d 225 (Fla. App. 1958).
137. State v. Reeves, 96 So.2d 18 (Fla. 1957) and 81 So.2d 754 (Fla. 1955). For another case which approved this concept of a "God given legal right" see Johns v. Johns, 108 So.2d 784 (Fla. App. 1959).

It is submitted that this case is a compounding of errors. In the original case, if the court had followed the dissenting view of Justice Drew, the necessity for the new petition and this appeal would have been obviated. In addition, the court's order affirming the lower court is in the next breath counteracted by, in effect, telling the lower court to give custody to the father when he files a new petition—a further expensive court hearing ordered in the name of arid formalism.

There can be no modifications in support decrees unless issue was properly presented.

In the much cited *Cortina* case[138] the father filed a contempt proceeding against the mother alleging that she had refused to comply with the reasonable visitation privileges contained in a divorce decree. The chancellor heard the testimony and *sua sponte* amended the custody decree by revoking the support provision for the daughter which would be reinstated when the mother and daughter complied with the visitation provisions of the decree. The supreme court reversed and stated that the chancellor had no power to amend unless the issue of modification was presented in an appropriate proceeding and each party was given an opportunity to be heard on the issue of modification. The court refused to rule on the question of whether modifications could be made in a contempt proceeding if the pleadings raised the issue. After the remand of this case, the father petitioned to be relieved of making support payments because he was destitute and because he had been denied visitation rights to see his daughter. The district court affirmed[139] the chancellor who ordered a suspension of support payments until visitations were allowed to him by the mother and daughter. The court cautioned that the father does not have an absolute right to visit his child; this "right" may be curtailed for "various sociological, psychiatric and other reasons . . . ," which apparently were not involved in this case.

Custody rights can be adjudicated in habeas corpus proceedings.

The district court ruled that in a habeas corpus proceeding between the father and the maternal grandparents, the court has the power to consider and adjudicate the question of granting temporary custody or visitation rights to the grandparents during the summers.[140]

In another habeas corpus proceeding, the district court affirmed an award of custody of a minor granddaughter to her grandmother because of the mother's "intemperate use of alcohol, and failure to show a proper interest in the minor's welfare."[141]

138. Cortina v. Cortina, 98 So.2d 334 (Fla. 1957).
139. Cortina v. Cortina, 108 So.2d 63 (Fla. App. 1959).
140. Martens v. State, 100 So.2d 440 (Fla. App. 1958).
141. Mattison v. State, 107 So.2d 747 (Fla. App. 1959).

A successor chancellor has no authority to reverse the original chancellor when re-hearing is merely a reargument of the original testimony.

In the *Epperson* case[142] the supreme court reaffirmed the rule that when a petition for re-hearing is merely a reargument of points and facts considered by the original chancellor, a successor has no authority to reverse the original chancellor. The court also frowned upon the filing of a petition for modification less than four months after a prior custody decree. Finally the court stated that when a daughter 18 years old expresses a desire to live with her mother, and the three boys, ages 16, 12 and 7, express a desire to live with their father, the lower court should give great weight to these desires.

Custody contest between uncles.

In a custody contest between a paternal aunt and uncle and a maternal aunt and uncle where the home environments were approximately equal, except that one was rural and one urban, the court upheld the chancellor in continuing the custody of the child with the rural paternal aunt and uncle. The case involved questions of fact rather than law.[143]

Divided custody provisions changed when child became emotionally upset.

In another factually sterile case, the district court affirmed the chancellor who ordered that the father was not to have custody of the child during the months of July and August (which had been ordered by a prior divorce decree) when the child became six years of age. It appears that the decision was based upon the fact that the child became "highly excited, nervous and emotionally upset" when she had visited her father prior to her sixth birthday.[144]

Children can be removed from the state unless custody decree forbids it.

If a divorce decree is devoid of a requirement that the mother must keep the children in this state, she is free to move from the state and take her children with her. Therefore, it was erroneous for a chancellor to hold a mother in contempt and to order that she had forfeited her right to alimony when she moved to California because it apparently

142. Epperson v. Epperson, 101 So.2d 367 (Fla. 1958). The Epperson case should be compared with the case of Montgomery v. Montgomery, 110 So.2d 39 (Fla. App. 1959), which affirmed a custody decree but stated: "This order is without prejudice to the wife to apply to the chancellor for a re-consideration of the order hereby affirmed in the light of the contention that she has refrained from the use of alcohol since December, 1956. If this fact is established to the chancellor's satisfaction and if the mother in other respects is qualified to have the custody of said child, on reconsideration, he may desire to alter the custodial order in the light of present conditions and what is then to the best interest of the minor child."

143. Marsh v. Marsh, 105 So.2d 507 (Fla. App. 1958).

144. Wertheimer v. Wertheimer, 108 So.2d 58 (Fla. App. 1959).

was not an "arbitrary or capricious" denial of visitation privileges to the father. Visitation privileges can be protected by a proper order of court made in compliance with the wording of the final decree of divorce.[145]

Legislation.

A provision was added to the divorce statutes authorizing a chancellor to request the State Welfare Department to make an "investigation and social study" concerning children and "each parent" when the custody of a minor is in issue. The report and recommendations must be in writing and "the technical rules of evidence shall not exclude such report from consideration by the court." The statute unfortunately makes no provision for disclosure of this report to the parties or their counsel. Perhaps this is another example of cases being "tried" outside of the courtroom.[146]

SUPPORT

Scope of contempt hearings.

The district court has held that a rule requiring a divorced husband to show cause why he should not be held in contempt for failure to make support payments is sufficient notice authorizing the chancellor to reduce the arrearages to a judgment and allowing execution to issue. The court stated that the chancellor had to determine the amount of the arrearages in order to enter the judgment, hence the husband was not misled to his prejudice.[147] It is submitted that the husband had little to complain about; a judgment is certainly less burdensome (in the average case) than being confined to jail for contempt.

In accord with the theory of the *Cortina* case,[148] the district court ruled that when the wife filed a motion for an order to show cause for delinquent child support payments and the husband at the hearing filed a petition for modification of future payments and testimony was received on this modification petition, it was error for the chancellor to order a reduction. The wife, by not having any prior notice that this petition was to be heard, was denied an adequate opportunity to present testimony. The court did not state how much advance notice is required in order to afford the opposing party "an opportunity to be heard on such issue."[149]

It was erroneous for a chancellor to enter a contempt order confining a father for a fixed period of time for failure to make support payments. The contempt order should have contained a finding of the amount of

145. Bell v. Bell, 112 So.2d 63 (Fla. App. 1959).
146. FLA. STAT. § 65.21 (1959), created by ch. 59-186, H.B. No. 332, 37th General Session, Florida (1959).
147. Taylor v. Taylor, 97 So.2d 35 (Fla. App. 1957).
148. Cortina v. Cortina, 98 So.2d 334 (Fla. 1957), note 138, *supra*.
149. Ray v. Ray, 99 So.2d 721 (Fla. App. 1958).

arrearages and provided that he could purge himself of the contempt by paying the amount of the arrearages.[150]

A cash bond can be required of father to guarantee compliance with the provisions of a divided custody decree.

The *Metz* case[151] decided that: 1. a father had the right to remove his child from the state during the time that he had custody (pursuant to a divided custody decree), but that this right was conditioned upon the posting of a cash bond to defray the expenses of bringing the child back to Florida if the father failed to do so. The court stated that this bond should be deposited in the registry of the court rather than with the attorney for the wife; 2. that under Section 65.16 of the Florida Statutes, the wife was entitled to attorney's fees in her contesting of the husband's application for divided custody because the word "'enforcing' should be given a broad and liberal interpretation."

Amount of a child support award can be based upon father's net worth, rather than current income.

In *Dworkis*,[152] the district court, on re-hearing, increased a support award for an eleven year old boy from $15 to $30 per week. The father was possessed of property worth $114,000 with a yearly income of approximately $5,000. The fact that the mother "possessed all the indications of wealth" would not relieve (in whole or in part) the father's duty to support his child, even though his ability to pay was measured by his net worth rather than current income.

Appellate determination of support amounts.

In accord with the *Brooks*[153] and *Morton*[154] cases, the district court decided that when the husband has superseded a final decree which provides for child support payments, the appellate court can order the same amount (as provided in the lower court) in the absence of any other facts upon which th appellate court can predicate a different finding.[155]

Construction of Uniform Reciprocal Enforcement of Support Law.

In a case of first impression, a Florida resident was ordered extradited to the State of Illinois to answer a criminal charge of nonsupport of his minor child and the father initiated habeas corpus proceedings to contest

150. Dykes v. Dykes, 104 So.2d 598 (Fla. App. 1958).
151. Metz v. Metz, 108 So.2d 512 (Fla. App. 1959).
152. Dworkis v. Dworkis, 11 So.2d 70 (Fla. App. 1959).
153. Brooks v. Brooks, 100 So.2d 145 (Fla. 1958).
154. Morton v. Morton, 104 So.2d 472 (Fla. App. 1958).
155. McKenzie v. McKenzie, 105 So.2d 614 (Fla. App. 1958).

the extradition. The supreme court ruled: (1). that Section 88.071 of th Florida Statutes (the Uniform Reciprocal Enforcement of Support Law) does not require that a civil enforcement proceeding be initiated in the demanding state (Illinois) before extradition may be made; a criminal enforcement proceeding is sufficient; (2) that a person about to be extradited may relieve himself from extradition by voluntarily submitting himself to a court of competent jurisdiction and complying with such court's order as to the amount of support he should pay to the obligee.[156]

Legislation.

Section 856.04 of the Florida Statutes which forbids the desertion by a husband of his wife and children or the withholding of support from them, or either of them, or the deserting by a mother of her children or the withholding of support of them, was amended by increasing the penalty (from one year's imprisonment in the state prison or by a fine not to exceed one thousand dollars) to a maximum penalty of two years' imprisonment, or two thousand dollars fine. The remainder of the section provides for a method of posting a bond, before or after conviction, which will result in the release of the husband or wife.[157]

The Uniform Reciprocal Enforcement of Support Law was amended to provide that foreign support orders may be registered upon petition by the obligee. If the obligor defaults, the circuit court shall enter an order confirming the registered support order and determining the amounts remaining unpaid. The support order, as confirmed, shall have the same effect and may be enforced as if originally entered in Florida.[158]

Dependent Children.

Section 409.18 of the Florida Statutes relating to eligibility for aid to dependent children was amended. Space does not permit any discussion of the amendments.[159]

SEPARATE MAINTENANCE

Adjudication of property rights in separate maintenance proceedings.

A tenancy by the entirety may exist in personal property. Therefore, when a husband sold property and took back a purchase money mortgage payable to himself and his wife and a year later the mortgage was paid in full, there was a presumption that the husband made a gift of one-half

156. Jackson v. Hall, 97 So.2d 1 (Fla. 1957).
157. FLA. STAT. § 856.04 (1957) as amended by ch. 59-147, H.B. No. 454, 37th General Session, Florida (1959).
158. FLA. STAT. § 88.321 (1959), as added by ch. 59-393, S.B. No. 525, 37th General Session, Florida (1959).
159. FLA. STAT. § 409.18 (1957), as amended by ch. 59-202, H.B. No. 312, 37th General Session, Florida (1959).

interest to the wife and she was therefore entitled to one-half of the payment, the property rights to be adjudicated in a separate maintenance action.[160]

However, the *same* district court in the *Naurison* case decided that it was improper in an action for alimony unconnected with divorce to give the wife an undivided one-half interest in the marital home, held as an estate by the entireties, and equitable ownership of eleven shares of corporate stock held in the name of the husband. It is submitted that these cases are utterly irreconcilable.[161]

Constructive service not applicable in suits for alimony unconnected with divorce.

In a suit brought under Section 65.09 for alimony unconnected with divorce, service of process by publication under chapter 48 of the Florida Statutes will *not* give the court jurisdiction. Section 48.01 (4) provides for service of process in cases "For divorce or annulment of marriage," which cannot be interpreted to apply to actions for alimony unconnected with divorce.[162]

Liability for, and amounts of separate maintenance awards.

Under Section 65.10 of the Florida Statutes it was error to enter a decree of separate maintenance absent a showing that the husband was able to support the wife, but "nevertheless fails to support or withholds it."[163]

The *Platt* case[164] (which was based primarily on disputed questions of fact rather than law) held that while an award of $350 per month as separate maintenance to the wife may be "ample, if not somewhat generous," it did not constitute an abuse of discretion by the chancellor. The husband owned a motor court worth approximately $30,000 from which he received a net income of $100 per month. In addition the husband owned realty (mainly vacant lots) worth $9,500 and had earned, for a period of four months, the sum of $600 per month as an automobile salesman. The husband contended that he had lost this employment and his present net income did not exceed $140 per month. Assuming that the husband's defense was even partly true, the writer is forced to agree that the award was "somewhat generous."

In the first hearing of the *Bredin* case,[165] the supreme court reversed the chancellor by holding that in a separate maintenance proceeding, the courts have no power to make a lump sum alimony award. The court

160. Lauderdale v. Lauderdale, 96 So.2d 663 (Fla. App. 1957).
161. Naurison v. Naurison, 108 So.2d 510 (Fla. App. 1959).
162. Greenberg v. Greenberg, 101 So.2d 608 (Fla. App. 1958).
163. Perry v. Perry, 97 So.2d 152 (Fla. App. 1957).
164. Platt v. Platt, 103 So.2d 253 (Fla. App. 1958).
165. Bredin v. Bredin, 89 So.2d 353 (Fla. 1956).

further stated that the wife had established her entitlement to separate maintenance which should be based on her need and the husband's ability to pay. Upon remand, the chancellor misunderstood the supreme court's mandate and refused to allow the husband to introduce any new testimony relative to a decrease in his earnings and a betterment in his wife's financial position occurring since the final decree. The husband appealed and the court held that the parties should be permitted to introduce testimony showing any substantial changes in the financial status of the parties subsequent to the entry of the final decree.[166]

Although appellate courts are reluctant to disturb the amount of an alimony award, the district court reduced a separate maintenance award from $3,000 per month to $2,200 per month after a "realistic appraisal of the record. . . ." The court mentioned that it is more expensive to support two homes than one; that the wife's former monthly allowance was $1,800 per month plus moneys for household expenses, automobiles, furs, etc. may have influenced the chancellor in awarding her $3,000 per month.[167] It is submitted that reversing the chancellor because of a "realistic appraisal of the record," without detailing the method of arriving at the figure of $2,200, is not very helpful to the chancellor or to the legal profession.

SEPARATION AGREEMENTS

Property rights vested under a property settlement cannot be modified; while alimony provisions may be modified.

A separation and property setlement agreement provided that the husband would maintain a life insurance policy with his wife as beneficiary and his children as alternate beneficiaries and would do no acts which would impair the efficacy of the policy. This agreement was made a part of a final decree of divorce. Subsequently, the chancellor upon petition by the husband, changed the effect of the agreement by providing that the wife should be trustee of the policy for the children and that when the children reached their majority, the insurance policy would become the sole property of the husband. The district court reversed stating that this provision was a right in property which became vested by the contract, and contracts of this type cannot be altered or modified except as would be allowable between strangers, particularly where the contract has been ratified and confirmed by a court.[168] The distinguishing point remains that if the provision is a settlement of property rights between the parties

166. Bredin v. Bredin, 103 So.2d 879 (Fla. 1958).

167. Guilden v. Guilden, 104 So.2d 737 (Fla. App. 1958). In Stigelbaur v. Stigelbaur, 105 So.2d 584 (Fla. App. 1958), the court without discussing the facts, merely reiterated the rule that since no error of the chancellor was shown, the decree must be affirmed.

168. Sedell v. Sedell, 100 So.2d 639 (Fla. App. 1958).

it cannot be altered; if it merely provides for support and alimony rights it may be altered upon sufficient showing. This distinction was abstrusely developed in the *Blunda* case.[169] A husband and wife agreed in a separation and property settlement agreement that the husband would contribute $250.00 per month for the support of the wife and children. Years after the divorce, the husband filed a petition to have the chancellor allocate the amounts due to the wife and the amounts due to the children who had since reached their majority. The court stated that this agreement "was a combined arrangement for care of the wife and children and a settlement of the property interests of the signatories. The attainment of majority by the children was not mentioned as a condition which would effect a change in the remittances." Therefore, the court refused to disturb the agreement by making any allocation of amounts between the mother and the children.

This distinction was more clearly expressed in the *Kroll* case.[170] After an "Alice in Wonderland" procedural journey through the lower court, the chancellor modified a property settlement agreement (which originally provided that the husband was to have sole ownership of property previously held as a tenancy by the entirety) by providing that the real property was to be held by the father as trustee for his minor children, the trust to terminate upon their reaching their majority. The district court held that Section 65.15 of the Florida Statutes provides for modification of property settlement agreements only as to "provisions for support, maintenance and alimony" and none of these were present here. In addition the court criticised the chancellor's *sua sponte* raising of this trust without giving the husband an opportunity to be heard.

The *Fowler* case further illustrates this dichotomy between a modification of alimony and "property rights." An agreement whereby the husband agreed to continue payment of premiums on life insurance policies payable to the wife as beneficiary "was part of the property settlement, and is not subject to modification in a proceeding brought under F.S. Section 65.15, F.S.A." The claim of the husband that because of his wife's "invidious and vindictive" actions he was forced to sell his laundry business and was therefore unable to continue alimony payments in the agreed amount, was summarily brushed aside. Assuming that the wife was guilty of this conduct, it would still not justify a reduction in alimony payments. The test is the husband's "financial incapacity" to pay, or that "it is beyond the husband's capacity to pay from his present resources the amount of alimony fixed in the divorce decree" pursuant to his voluntary agreement. To summarize, Section 65.15 of the Florida Statutes refers to modifications of final decrees of divorce which relate to support, maintenance or alimony. Therefore, a property settlement agreement which is limited solely to

169. Blunda v. Blunda, 101 So.2d 41 (Fla. 1958).
170. Kroll v. Kroll, 105 So.2d 495 (Fla. App. 1958).

questions of the division of property owned by the spouses is not subject to modification by the court.[171]

Provisions of a separation agreement may render father's estate liable for support of minor children.

The Florida Supreme Court has previously ruled[172] that when a property settlement provided that weekly support payments to the wife were to be terminated only by her death or remarriage, the ex-husband's obligation for the payments did not terminate with his death and his estate remained liable until the death or remarriage of the ex-wife. The district court considered this case as analogous and decided that when the separation agreement provided for child support "until each child respectively shall have reached the age of eighteen years," this obligation also survived the death of the father and was a charge against his estate. The court noted that a court *order* for support terminates with the death of the father.[173]

ADOPTION

Potential conflict between "juvenile" courts and circuit courts over adoptions not decided.

In the case of *Ponce v. Children's Home Society of Florida*,[174] the Juvenile Court of Dade County temporarily committed an infant to the Children's Home Society while retaining jurisdiction over the cause. The society placed the child with a couple who were agents and employees of the Children's Home. Later the children were removed and the couple petitioned for adoption of the child in the circuit court. The supreme court held: 1. That the usual rule that an agent cannot acquire an interest in the subject matter of the agency would not apply to the present facts. 2. That since the juvenile court was not attempting to exercise any adoption jurisdiction, there was no constitutional question to be decided as to whether the juvenile court did have jurisdiction over adoptions. 3. That the circuit court had jurisdiction over the matter, but it should not exercise this power until the juvenile court had made a permanent commitment of the child to a licensed child placing agency or relinquished jurisdiction.

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171. Fowler v. Fowler, 112 So.2d 411 (Fla. App. 1959). See also: Strozier v. Strozier, 107 So.2d 134 (Fla. 1958). In Hunter v. Hunter, 108 So.2d 478 (Fla. App. 1959), the court, after a thorough examination of the agreement, decided that the agreement was to pay sums in lieu of alimony rather than a property settlement, hence it was subject to modification upon petition by the ex-wife.

172. Johnson v. Every, 93 So.2d 390 (Fla. 1957). See Note, *Divorce—Liability of the Husband's Estate to Pay Alimony*, XIII U. MIAMI L. REV. 378 (1959).

173. Simpson v. Simpson, 108 So.2d 632 (Fla. App. 1959).

174. Ponce v. Children's Home Society of Florida, 97 So.2d 194 (Fla. 1957).

Illustration of the dichotomy between adoption and custody.

Although the findings of a chancellor are to be accorded "a full measure of presumptive correctness," the supreme court seemingly had no alternative but to reverse an adoption order which took children away from their mother when her alleged indifference to their welfare was not (according to the findings of the chancellor) per se sufficient to support the decree and when her alleged immoral conduct terminated in a marriage with a substantial individual. It is submitted that the somewhat strange wording of the adoption decree was an invitation for reversal.[175] After the remand of this case, the chancellor misunderstood the supreme court's mandate by believing that it meant he could take no further testimony. He therefore ordered the children delivered to their mother. The supreme court stated that its former opinion concluded only the question of adoption, it did not decide the question of custody. Therefore, the chancellor had the power to consider the evidence and arirve at a proper decision as to the future custody of the children.[176] It is submitted that in cases of this type, it is a mistake to create a dichotomy between adoption and custody and to require hearings on each issue. If the chancellor awards the custody of the children to others, it would be an empty victory for the mother who may have her children in a legal sense but not in a factual sense. It is also submitted that because of the obscure wording of the original opinion, the chancellor's "misunderstanding" was perfectly natural.

"Abandonment" by the natural parents as a major influencing factor in adoption cases.

The *Hamilton* case[177] (which seems to be incorrectly reported as to the alignment of the justices) simply held as a factual matter that: where a natural mother delivered her child to the adopting parent when the child was nineteen months old; the natural mother had virtually abandoned the child for six years; the father had expressed no objection to the adoption; the minor now eight years old expressed a desire to stay with the adopting parent (her aunt), it was erroneous for the chancellor to deny the petition. In accord with the "abandonment" features of the foregoing case is the *Wiggins* case[178] which held that when the natural father had maintained as close a contact and relationship (support, gifts, affection, etc.) as was permitted by the fact that his divorced wife had custody and had remarried, he should not be deprived of his daughter, and a decree of adoption in favor of the stepfather was reversed. The lengthy case of *In re De Walt's Adoption*[179] (which again reversed the chancellor)

175. Torres v. Van Eepoel, 98 So.2d 735 (Fla. 1957).
176. Van Eepoel v. Justice, 104 So.2d 586 (Fla. 1958).
177. Hamilton v. Rose, 99 So.2d 234 (Fla. 1957).
178. Wiggins v. Rolls, 100 So.2d 414 (Fla. 1958).
179. DeWalt v. DeWalt, 101 So.2d 915 (Fla. App. 1958).

further illustrates the "abandonment" rule of the foregoing cases. The district court held: 1. That when a circuit court of one county grants custody of a child and subsequently that child and his custodian remove to another county, the circuit court of the second county does have jurisdiction over adoption proceedings. The theory being that the adoption proceedings caused the child to cease to sustain any relationship to its natural parents; it was withdrawn as a part of the res of the custody proceeding. 2. That the finding of the first circuit court that the mother was unfit to have custody of her child together with other allegations satisfied the requirements of Sections 72.08 and 72.12 of the Florida Statutes. 3. That Section 72.07 which describes children subject to adoption is not all inclusive or exclusive, and even though the child had *not* been abandoned by his natural parents, he may still be the subject matter of adoption proceedings. 4. That a natural parent should not be deprived of the "right" to her child unless she has abandoned her offspring or has otherwise demonstrated that she is not a fit subject to continue to enjoy the "privilege." The co-mingling of the terms "right" and "privilge" in these adoption cases seems somewhat inconsistent and illogical.

The *Modacsi* case,[180] is a full development of this dichotomy. The natural mother placed her son in the custody of her parents in West Virginia. Later the mother married and some difficulty arose between her and her parents over her son. The West Virginia court awarded custody of the child to the grandparents. The child was delivered to his mother and she, her husband and her child moved to Florida. The Florida court, without notice to the grandparents in West Virginia, entered an order of adoption in favor of the stepfather. The grandparents instituted the instant action in Florida for custody and the lower court awarded them custody. The district court reversed, holding that there was no statutory requirement of notice to the grandparents in West Virginia. The West Virginia decree was concerned solely with custodial rights of the parties as of that date; while adoption is an entirely separate proceeding "unconnected with and not controlled by prior custody awards." Therefore, the question as to whether "the West Virginia order is entitled by comity to full faith and credit" was not involved. It is submitted that the decision is correct. However, the mixing of the terms "comity" with "full faith and credit" seems erroneous.

The abandonment rule was further illustrated in the case of *Roy v. Holmes*.[181] A ten-month old child was placed in the custody of a couple by the child's parents because they were unable to care for it due to their illness. The natural parents permitted the custody to continue for

180. Modacsi v. Taylor, 104 So.2d 664 (Fla. App. 1958).
181. Roy v. Holmes, 111 So.2d 468 (Fla. App. 1959), in accord with Torres v.

over four years, during which time the natural father was almost completely derelict in supporting the child. The lower court found an abandonment of the child by his natural parents and entered a decree of adoption in favor of the couple which had custody of the child. The district court reversed by holding that except in cases of clear, convincing and compelling reasons to the contrary, the child's welfare is presumed to be best served by care and custody in the natural family relation by its natural parents. Although "transitory failures and derelictions of the parents might justify temporary deprivation of custody by appropriate proceeding but seldom the permanent deprivation of parental rights with the finality of an adoption decree."

Consent to adoption which has been freely given, may not be withdrawn.

Where consent to adoption had been "executed voluntarily with knowledge of the effect thereof, with no fraud, duress, or undue influence being practiced on the mother," her consent may not be withdrawn.[182]

GUARDIANSHIP

Fees for guardians and attorneys allowable when guardianship proceedings are involved.

In a case of apparent first impression,[183] the supreme court has ruled that a guardian of the property of a ward is entitled to reasonable compensation for services rendered in good faith even though it later develops that the guardianship proceedings were a nullity. The same rule also applies to attorneys for the guardian. The compensation for the guardian must be based on what is just and reasonable for services rendered rather than on a percentage of the value of the estate. The compensation for the attorneys for the guardian must also be fixed on quantum meruit or a quid pro quo basis.

After the lapse of five years, a county judge revoked orders which had approved the guardian's final returns and had discharged him from his duties as guardian. The surety for the guardian filed a petition for certiorari with the circuit court which seemingly dismissed the petition because the order of the county judge had not become final. The district court affirmed the order of the circuit court apparently because it was reluctant to prejudge what ruling the county judge would make at the hearing on his order.[184] It is to wondered why the court "side-stepped" consideration of Section 746.14 of the Florida Statutes which places a

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Van Eepoel, 98 So.2d 735 (Fla. 1957).

182. Sken v. Marx, 105 So.2d 517 (Fla. App. 1958).

183. Lucom v. Atlantic National Bank of West Palm Beach, 97 So.2d 478 (Fla. 1957).

184. United States Fidelity & Guaranty Co. v. Davis, 97 So.2d 715 (Fla. App. 1957).

one year limitation on suits against the guardian or his surety. Did not this case involve a question of law rather than fact?

When a county judge enters an order discharging the guardian (and his surety) and rules that the question of attorney's fees (for the attorney who rendered services to the guardian and his ward) are to be decided by the county judge of another county, it closes the case. Hence, it is a final order which must be appealed from within the usual sixty day period if an appeal is to be properly taken. This rule may not be circumvented by the attorney filing a "motion to vacate" after the appeal time has expired.[185]

Testamentary guardian of person derives appointment from will, not from order of appointment.

In another case of first impression, the supreme court ruled that under Sections 744.03 (4), 744.14 and 744.35, of the Florida Statutes, when a deceased appointed a guardian of the *persons* of his surviving children, "that whatever may be required of a testamentary guardian in the way of qualification before the court, he derives his powers by appointment of the testator and not by appointment of the court." Therefore, a petition by third parties to oust the testamentary guardian must contain allegations of his unfitness to be guardian because it is a question of "ouster," rather than his qualifications for an original appointment. The court made mention of the fact that under Section 744.14, a testator has no power to appoint a guardian of the *property* of his child.[186]

Recourse against incompetent maker of promissory note.

When an incompetent executed a note and mortgage to his attorneys for services rendered the note would be *voidable* as between the parties. This voidability could be asserted against an alleged holder in due course. However, when this holder paid for the note and mortgage and these proceeds were used to pay the attorneys for services performed for the incompetent, then the holder is entitled to recover to the extent to which the incompetent maker benefited.[187]

Attorneys fees in curatorship proceedings.

The *cause celebre* of *Gay v. McCaughan*[188] involved a curatorship rather than a guardianship. However, the court drew on the rules of guardianship as analogies for its decision. The main point was that if a

185. *In re* Guardianship of Straitz, 112 So.2d 889 (Fla. App. 1959).
186. Comerford v. Cherry, 100 So.2d 385 (Fla. 1958).
187. Machtei v. Campbell, 102 So.2d 722 (Fla. 1958).
188. Gay v. McGaughan, 105 So.2d 771 (Fla. 1958). For further proceedings see Gay v. Heller, 108 So.2d 610 (Fla. App. 1959).

client retains legal counsel to prosecute a curatorship proceeding, only the estate of the ward seems to be liable for counsel fees, not the client. However, even assuming liability of the client for the fees, the amount can only be adjudicated in adversary proceedings, not in the curatorship proceeding itself.

Election to take dower is not an absolute right of the guardian of an incompetent widow.

A widow has an absolute right to elect to take dower when she herself makes the election. However, when she is incompetent the election of dower made by her guardian in her behalf is not an absolute right because, under Section 731.35(2) of the Florida Statutes, "the county judge shall grant or deny such election *as the best interest of the widow may require.*" (Emphasis added.) In the instant case, the supreme court affirmed an order of the county judge denying such an election because a detailed examination of the assets of the deceased and the widow; her advanced age; and the terms of the trust created by the deceased disclosed that it was not in her best interests to have dower set aside for her.[189] This case was obviously in the minds of the legislature when it amended Section 731.35 of the Florida Statutes to give the widow an additional period of sixty days in which to file her election of dower in the event that a will contest is filed (either as to its construction or validity), or if the county judge extends the time for the filing of claims by creditors, or if any claim be contested. The sixty day period begins to run from the date to which such extension for filing claims is extended, or from the date of a final judgment determining any litigation or contested claim, or from the time allowed to the personal representative for filing his objections to any claim. Subsection (3) was repealed and a new subsection added which seems to be a clear statement of the rationale of the case of *Edwards v. Edwards, supra.*[190]

A curator may be appointed even though incompetent is not actually insane.

It is not necessary that a person be actually insane or mentally ill before a curator can be appointed to manage his or her estate. A curator can be appointed when a person has "become physically incapacitated. . . or so mentally or physically defective by reason of age. . ." that he is unable to take care of his property and is likely to dissipate or loose it, or become the victim of a designing person.[191]

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189. Edwards v. Edwards, 106 So.2d 558 (Fla. 1958).
190. FLA. STAT. § 731.35 (1957), as amended by ch. 59-123, S.B. No. 287, 37th General Session, Florida (1959).
191. Davis v. Carter, 107 So.2d 129 (Fla. 1958).

Prohibition can be used to attack the jurisdiction of the county judge's court predicated upon improper service of process.

The Florida Statutes[192] require that service of process in incompetency hearings be made either by an official of the state or by any person by a delivery of a true copy of the notice or citation to the alleged incompetent and one or more members of his family. Hence, service of notice by registered mail was not a compliance with the law. In addition, the statute[193] requires that the time and place of the hearing be specified in the notice or citation. Therefore, a citation which stated that the, "Time and Place To Be Determined by the Doctors," was improper in that it "can only be deemed an abdication by the court of its duties and an abrogation of the protective function of the notice." Finally, the alleged incompetent need not contest the jurisdiction of the court through an appeal, but may directly attack the proceedings by a writ of prohibition.[194]

Legislation.

Section 394.22(12) of the Florida Statutes ("Mental Health" Law) was amended to provide for the appointment of a "temporary guardian of the property" of a person who has been temporarily hospitalized or confined for mental incompetency. The guardian's duties and his discharge are to be governed by the general guardianship laws.[195]

JUVENILES AND JUVENILE COURTS

Jurisdiction of "dependent children"—juvenile courts vis-a-vis circuit courts.

The case of *State Department of Public Welfare v. Galilean Children's Home*[196] is another effort to clear the maze in the conflicting and overlapping statutes concerning the jurisdiction of the juvenile courts vis-a-vis the circuit courts. The district court held that Section 409.05 of the Florida Statutes which requires all child-caring institutions that care for "dependent" children to have a license issued by the Department of Public Welfare is valid, and that the Department may apply to a court of equity for an injunction for a violation of this section. This is so despite the fact that Section 39.02 (1) of the Florida Statutes states that, "The juvenile court shall have exclusive original jurisdiction of *dependent* and delinquent children. . . ." (Emphasis added.) The court stated that the *Rogers* case[197] limited the effect of Section 39.02(1) to

192. FLA. STAT. §§ 394.22(4) (1957) and 744.29(4) (1891).
193. FLA. STAT. § 394.22(4) (1957).
194. Rehrer v. Weeks, 106 So.2d 865 (Fla. App. 1958).
195. FLA. STAT. § 394.22(12) (1957), as amended by ch. 59-42, H.B. No. 378, 37th General Session, Florida (1959).
196. State Department of Public Welfare v. Galilean Children's Home, 102 So.2d 388 (Fla. App. 1958).
197. State *ex rel.* Watson v. Rogers, 86 So.2d 645 (Fla. 1956).

"those minors involved in criminality or delinquency," hence the two statutes must be so construed as to make both operational, therefore, the equity court had jurisdiction. As the court indicated, in order to carry out the injunctive process, the equity court would have to be utilized because the "relief sought could not be obtained in juvenile court. . . ." (sic).

Standards governing juvenile courts in deciding custody questions of "dependent" children.

The district court ruled that when a child has been adjudged to be dependent or delinquent and his custody awarded to others than his natural parents, the juvenile court is not bound "forthwith" to restore his custody to his parents when they make a showing of "fitness, ability and willingness to assume their parental responsibilities." Once the child has been made a ward of the state, a broad discretion is in the juvenile court to rule in the best interests of the child. The court refused to define the area of the juvenile court's discretion, the only indication was that, "Evidence that may be totally inadequate to deprive a parent of the custody of his child in the first instance may be altogether adequate to support the court's refusal to restore custody to the parent once the child has become a ward of the state."[198]

The district courts have appellate jurisdiction from juvenile courts.

The district court has construed Article V of the Florida Constitution to mean that the district courts are the appellate courts for review of the judgments of the juvenile courts. This interpretation was based upon the wording that, "Appeals from trial courts in each appellate district. . .," are to be heard by the district court, and the juvenile court was considered to be a "trial court."[199]

This view was approved by another district court in the case of *In re* C.E.S.[200] which, after a thorough review of the facts, affirmed the juvenile court in its findings that a minor child was a "dependent child" and its awarding of custody to the uncle of the child, rather than to his mother.

Legislation.

Section 39.03 of the Florida Statutes was amended to provide that when a juvenile is taken into custody, his parents (or legal custodian) and the principal of the school in which the child is enrolled shall be notified at the earliest practicable time.[201]

198. Pendarvis v. State of Florida, 104 So.2d 651 (Fla. App. 1958).
199. State of Florida v. J. K., 104 So.2d 113 (Fla. App. 1958).
200. State v. Brock, 106 So.2d 610 (Fla. App. 1958).
201. FLA. STAT. § 39.03(3) (1957), as amended by ch. 59-441, H.B. No. 728, 37th General Session, Florida (1959).

ILLEGITIMACY

In a case of first impression, the district court held that in bastardy actions brought under Section 742.011 of the Florida Statutes for periodic payments for the support of an illegitimate child, the three year general statute of limitations begins to run from the date of birth rather than from the date of conception.[202]

Legislation.

Section 742.031 of the "Bastardy Act" was amended to provide that the judicially ascertained father is to pay "all taxable costs of the proceedings."[203]

The statute of limitations was increased in bastardy proceedings so that now an action can be brought at any time until such illegitimate child reaches four years of age. If the defendant during the four year period makes payments to the mother, then the four year limitation period begins to run from the date of the last payment.[204]

MISCELLANEOUS

A person standing in loco parentis to a minor "may" be liable for the minor's torts.

A sixteen year old minor deliberately shot a neighbor's child. The victim and his father sued the uncle of the child as standing in "loco parentis" to the child. The custody of the child had been awarded to his mother by a divorce decree, but he had been living with the uncle and his family. The district court affirmed the entry of a summary judgment in favor of the uncle because, aside from certain conclusions made by affiants in their affidavits, there were no facts that showed a relationship of father and son.[205]

Legislation.

Section 232.01 of the Florida Statutes was amended to provide that married "children" shall not be required to attend school.[206]

Provision was made, at long last, for the care and treatment of emotionally disturbed and psychotic children at the South Florida State Hospital in Broward County.[207]

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202. Kieser v. Love, 98 So.2d 381 (Fla. App. 1957).
203. FLA. STAT. § 842.031 (1957), as amended by ch. 59-45, S.B. No. 119, 37th General Session, Florida (1959).
204. FLA. STAT. § 95.11 (1957), as amended by ch. 59-188, H.B. No. 551, 37th General Session, Florida (1959).
205. Weigl v. Ombres, 106 So.2d 614 (Fla. App. 1958).
206. FLA. STAT. § 232.01 (1957), as amended by ch. 59-412, H.B. No. 306, 37th General Session, Florida (1959).
207. Ch. 59-383, H.B. No. 436, 37th General Session, Florida (1959).