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FAMILY LAW

DANIEL E. MURRAY*

The author reviews all of the recent cases and legislation in the area of family law in Florida. The topics surveyed include dissolution of marriage, alimony, child support, property problems arising from dissolution, and miscellaneous related areas.

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I. INTRODUCTION

The quantity of family law cases has begun recently to increase in the manner of a geometric progression. As an illustration, the previous *Survey*¹ covered a period of approximately two years, and reviewed thirty-two volumes of the Southern Reporter. This *Survey* covers nearly the same number of cases over a one year period and reviews twenty-two volumes of the Southern Reporter.² This troubling increase in the number of cases is not, of course, confined solely to the area of family law. Perhaps this burgeoning number of cases in most areas of the law will cause many lawyers and judges to "shoot from the hip," and a self-generating stimulus for more appellate cases will result because the lawyers are unable, within time and economic limitations, to handle the existing body of law. Specialization, the use of paralegal personnel and computer re-

1. Murray, *Family Law, Survey of Florida Law*, 30 U. MIAMI L. REV. 107 (1975).

2. The material surveyed includes the cases reported in 316 So. 2d 1 through 338 So. 2d 1242, and the legislation enacted by the 1976 Legislature.

trieval of cases may prevent, or perhaps only delay, the complete collapse of the case system.

II. MARRIAGE

In an apparent case of first impression in Florida, a district court has held that although it is customary for a woman to adopt her husband's surname upon marriage, there is no legal requirement that she do so.³ As a result, she may use her maiden name and obtain a Florida driver's license in her maiden name.

When a woman marries her second husband before her divorce from her first husband has become final, her second marriage is invalid. But the District Court of Appeal, First District, has held in such a case that if the woman and her second husband were ignorant of the impediment to the marriage, the impediment had ceased to exist prior to the abolition of common law marriage in Florida, and the parties had continued to live with each other, the marriage becomes a valid common law marriage.⁴

III. DISSOLUTION OF MARRIAGE

A. *Jurisdiction*

Sections 49.11 and 49.12 of the Florida Statutes (1975) permit indigents to secure jurisdiction over nonresident defendants in dissolution of marriage proceedings and in adoption proceedings by posting notices in three prominent places in the county and by mailing notice to the defendant at his last known residence in lieu of publication notice in a legal newspaper. These provisions have been upheld as constitutional by the Florida Supreme Court.⁵

If a wife's attorney unsuccessfully challenges the jurisdiction of a California court over the subject matter of a divorce proceeding, but makes no challenge to jurisdiction over the wife's person, this constitutes a general appearance, and the California court's divorce decree will be held valid in Florida.⁶

A sworn statement for service of process by publication which sets forth the last known "address" of a defendant does not comply with the requirements of sections 49.031 and 49.041 of the Florida

3. *Davis v. Roos*, 326 So. 2d 226 (Fla. 1st Dist. 1976).

4. *Day v. Day*, 331 So. 2d 335 (Fla. 1st Dist. 1976).

5. *Sheppard v. Sheppard*, 329 So. 2d 1 (Fla. 1976).

6. *Coyne v. Coyne*, 325 So. 2d 407 (Fla. 3d Dist. 1976).

Statutes (1975). These sections require a statement of the defendant's "residence," and last known "address" is not the equivalent of "residence." Thus, in a Fourth District case, the allegation of an incorrect address, instead of a residence, resulted in the court's not having jurisdiction, and a dissolution judgment was vacated even though the wife had remarried immediately after the dissolution.⁷

In a suit brought against a nonresident defendant in which jurisdiction has been obtained by constructive process, a Florida court does not have jurisdiction over real and personal property located within Florida when neither the notice of the action nor the complaint contains a legal description of the real property.⁸ Section 49.08 (4) of the Florida Statutes (1975) requires that the notice of publication describe the real property. In order to satisfy the requirements of due process, the complaint must also describe the real and personal property over which jurisdiction is being sought.

B. Venue

When an action is brought in Florida to establish a Mexican divorce decree as a Florida judgment and to enforce its terms, the proper venue is determined under section 47.011 of the Florida Statutes (1975).⁹ Under this section, venue lies in the county where the defendant resides. Section 61.14, (Florida Statutes (1975)), in contrast, governs the venue when suit is brought to modify alimony judgments, separation agreements, etc. Under this section, venue is in the county of residence of either party.

The District Court of Appeal, First District, has held, in opposition to an opinion of the Second District,¹⁰ that the cause of action for marriage dissolution cases arises in the county in which the spouses were last present with intent to remain married rather than in another county where the events occurred which finally destroyed the marriage.¹¹ The Supreme Court of Florida has affirmed the First District's position.¹²

The venue for a dissolution of marriage action lies not in the county where a breach may have occurred, but in the county in

7. Callaghan v. Callaghan, 337 So. 2d 986 (Fla. 4th Dist. 1976).

8. Lahr v. Lahr, 337 So. 2d 837 (Fla. 2d Dist. 1976).

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

10. Arnold v. Arnold, 273 So. 2d 405 (Fla. 2d Dist. 1973).

11. Carroll v. Carroll, 322 So. 2d 53 (Fla. 1st Dist. 1975).

12. Carroll v. Carroll, No. 48,495 (Fla. Sup. Ct. Jan. 13, 1977).

which "the intact marriage was last evidenced by a continuing union of partners."¹³ As a result, in a Fourth District case, Pinellas County was the proper venue for dissolution proceedings since the spouses had last lived together there, it was claimed by the husband as his homestead for tax purposes, and he had listed this county as his home on his driver's license. Moreover, the wife had never visited in nor lived in Dade County where the husband took up his residence approximately seven years prior to the dissolution proceedings.

A costly use of venue gamesmanship was illustrated in a recent case in which a marriage was entered into and then broken in Georgia. The wife subsequently moved to Alachua County, Florida, where she instituted suit against her nonresident husband for custody and support of a minor child. The husband then moved to Gadsden County, Florida. Still later, the wife amended her action in Alachua County to ask for dissolution of the marriage. The appellate court held that venue was properly laid in Alachua County for the custody and support action, but that the husband had the right to insist that the dissolution action be brought in Gadsden County, the place of his residence.¹⁴ As a result, two different courts are going to be cluttered with one family squabble. The decision seems to be correct, but an amendment to the statute¹⁵ appears warranted.

C. *In Camera* Hearings

The District Court of Appeal, First District, has refused to follow the case of *State ex rel. Gore Newspapers Co. v. Tyson*,¹⁶ decided by the Fourth District. The *Gore* court held that a writ of prohibition would lie to prevent a trial judge from excluding the public from a dissolution of marriage hearing. In contrast the First District has held that although it might be an abuse of discretion for a trial court judge to exclude the public from a dissolution of marriage proceeding (the issue was not decided), the trial court judge does have jurisdiction to do so.¹⁷ A writ of prohibition thus will lie only when the court lacks jurisdiction.

13. *Auritt v. Auritt*, 334 So. 2d 68 (Fla. 3d Dist. 1976).

14. *Rivenbark v. Rivenbark*, 335 So. 2d 23 (Fla. 1st Dist. 1976).

15. FLA. STAT. § 47.011 (1975).

16. 313 So. 2d 777 (Fla. 4th Dist. 1975), noted in 30 U. MIAMI L. REV. 1075 (1976).

17. *State ex rel. English v. McCrary*, 328 So. 2d 257 (Fla. 1st Dist. 1976).

D. *Defenses*

Sexual relations indulged in by the spouses while they are engaged in dissolution proceedings is not enough to show a clear intent to reconcile and to justify a trial court in denying a judgment of dissolution of the marriage.¹⁸

Rule 1.420(e) of the Florida Rules of Civil Procedure only requires the dismissal of a case when it has not been prosecuted toward a final judgment. It does not apply to a lack of prosecution for matters occurring after the judgment.¹⁹

It is a gross abuse of discretion and reversible error for a trial court to refuse to vacate and set aside a final judgment of dissolution when the moving party has not received notice of the final hearing.²⁰

E. *Procedure*

Section 90.242(3)(b) of the Florida Statutes (1975) provides that in a civil proceeding wherein a party "introduces his mental condition as an element of his claim or defense," the party may not claim a privilege for any relevant communications made to his or her psychiatrist. This provision has been construed to mean that a mother, by simply seeking custody of her children, has not made her mental condition "an element of her claim or defense" thereby waiving her privilege, even though the mental health of a parent may well have been a relevant issue.²¹ The trial court may order the mother to be examined by a court-appointed psychiatrist, rather than forcing her private psychiatrist to divulge confidential communications.

Florida Rule of Civil Procedure 1.380(d) permits a trial court to strike a party's pleadings and to refuse to permit her to introduce any evidence relative to her claims for support, court costs, attorney fees, etc., when she has failed to answer interrogatories submitted by her husband. A district court has affirmed the action of a trial court which struck such pleadings even though no motion or order was ever made to compel her to answer. The court noted that most of its sister courts had been more lenient.²²

18. *Smith v. Smith*, 322 So. 2d 580 (Fla. 2d Dist. 1975).

19. *Ravel v. Ravel*, 326 So. 2d 223 (Fla. 2d Dist. 1976).

20. *Barry v. Barry*, 324 So. 2d 644 (Fla. 4th Dist. 1976).

21. *Roper v. Roper*, 336 So. 2d 654 (Fla. 4th Dist. 1976).

22. *Fearn v. Fearn*, 336 So. 2d 1263 (Fla. 4th Dist. 1976). See *Flynt v. Flynt*, 336 So.

IV. ALIMONY

A. *Jurisdiction*

The Supreme Court of Florida has held that although it may be "prudent" for a trial court judge to reserve jurisdiction to award alimony in the future when he has denied it in the final judgment, this is a matter of judicial discretion.²³ He is not required as a matter of law to reserve jurisdiction upon pain of reversal for failure to do so. Further, an intermediate appellate court should not substitute its judgment for that of the trial court in the awarding or denial of alimony, child support, etc.

In the view of at least one district court, it is reversible error to award alimony to commence six months after the date of the judgment because of a difference between the husband's past and present income.²⁴ If his income were presently insufficient, then no alimony should be awarded, but jurisdiction ought to be retained to award alimony in the future if his income were to increase.

In the ordinary case where an order awarding rehabilitative alimony has a fixed termination date and the court does not reserve jurisdiction, the court will not have jurisdiction to modify the alimony award after the termination date. On the other hand, if at the date of termination the husband were in arrears in paying the alimony, it has been held (in a case of first impression in Florida) that since the court has jurisdiction to enforce the payment of accrued sums, it also has jurisdiction to modify by awarding an increase in alimony.²⁵ The court found that failure to pay has the effect of extending the jurisdiction of the court to increase the award.

2d 690 (Fla. 4th Dist. 1976), for an example of a more lenient judicial attitude than that evinced in the *Fearns* decision. In *Flynt*, a default judgment was entered, dissolving the marriage upon the wife's petition when the husband failed to answer pleadings or appear. A month later, the husband filed his own petition for dissolution, which was dismissed. The husband, learning of the prior final judgment and the dismissal of his suit, moved to set aside the judgment. He claimed he had been misled into not appearing. The trial court set aside the final judgment, but the District Court of Appeals, Fourth District, reversed, and remanded for an evidentiary hearing on the merits of the motion.

23. *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976). See *Hayes v. Hayes*, 325 So. 2d 455 (Fla. 1st Dist. 1976) (jurisdiction should be reserved under appropriate circumstances).

24. *Gesford v. Gesford*, 337 So. 2d 1017 (Fla. 4th Dist. 1976). However, Judge Mager's dissenting opinion seems to be a more intelligent approach to the problem of interpreting the final decree of the trial court. In the dissent's view, the trial court's determination was not speculative as to whether alimony could be paid in six months. It was based on varying factors, including the party's earning capacity.

25. *Brown v. Brown*, 338 So. 2d 916 (Fla. 2d Dist. 1976).

The trial court has jurisdiction to modify the amount of alimony which was set by the agreement of the parties entered into during the dissolution proceedings. The agreement in this situation was incorporated into the final judgment at the instance of the wife who filed a petition for redetermination of alimony prior to the expiration of the period set for the payment of periodic alimony.²⁶ A trial court judge has the power to modify the recommendations of a special master which deal with the award of rehabilitative alimony when the evidence shows that the master's recommendations are clearly erroneous.²⁷ A trial court judge who reserves jurisdiction to adjudicate alimony, property rights, etc., at a later date in accordance with a stipulation of the parties cannot subsequently change his mind and enter a nunc pro tunc order stating that the court had not reserved jurisdiction. A nunc pro tunc order is designed to correct clerical errors or omissions; it cannot modify the substance of a prior ruling.²⁸

B. *Criteria for the Award*

In order to determine whether alimony should be awarded, a trial court must consider the wife's needs, her standard of living during the marriage and the husband's ability to pay. Therefore, if the husband misrepresented his income and the court denied alimony to the wife, she may file a motion to set aside the judgment on the grounds of newly discovered evidence. If she were able to support herself, it would be reversible error for the trial court to deny her motion to set aside the judgment on the ground that the alleged misrepresentation of her husband would be irrelevant.²⁹

A trial court may consider testimony dealing with the husband's persistent adulterous conduct as a factor in awarding alimony and in other related matters.³⁰ The court, however, is not to conduct an unlimited foray into all areas. It must keep the inquiry within reasonable bounds.

The District Court of Appeal, Third District, has adopted the

26. *Hernandez v. Hernandez*, 325 So. 2d 483 (Fla. 3d Dist. 1976).

27. *Goldberg v. Goldberg*, 327 So. 2d 828 (Fla. 3d Dist. 1976).

28. *DeBaun v. Michael*, 333 So. 2d 106 (Fla. 2d Dist. 1976).

29. *Caracristi v. Caracristi*, 324 So. 2d 634 (Fla. 2d Dist. 1976).

30. *McClelland v. McClelland*, 318 So. 3d 160 (Fla. 1st Dist. 1975), following *Pro v. Pro*, 300 So. 2d 288 (Fla. 4th Dist. 1974), and *rejecting Escobar v. Escobar*, 300 So. 2d 702 (Fla. 3d Dist. 1974).

view that a wife does not have the right to be supported forever after the divorce when she has the capacity for self-support. When the facts show that a former wife is now earning \$15,000 per year, and the children are no longer living at home, a trial court should modify a former award by deleting all alimony to the wife, despite the fact that the husband has a substantial income.³¹ In dictum, one district court has noted that a "spouse may not be required to work unusually long hours in order to earn an exorbitant income to support familial obligations."³²

A husband who has established a high standard of living for his family will be compelled to continue to maintain this standard upon dissolution of the marriage unless he is able to show a diminution of income which was not self-induced.³³

It is reversible error for a trial court, having found that a wife is entitled to alimony from her husband, to order that she pay alimony to him.³⁴ It would appear that if a wife were in financial need of alimony she should not be deprived of it solely because she shot and wounded her husband after he filed suit for dissolution but before final judgment.³⁵

It is an abuse of discretion for a trial court to award a relatively young, healthy wife who has good employment capabilities and who has been married only sixteen months, \$521,000 alimony even though her husband, with assets of \$13,000,000, is well able to pay that amount.³⁶ The fact that a husband is wealthy does not entitle the wife to an award disproportionate to her needs.

C. *Duration of the Award*

The District Court of Appeal, Third District, has noted that because a court has no authority to order a former husband to pay alimony from his estate after his death, it may not order him to make his former wife the irrevocable beneficiary of life insurance policies on his life for a period of five years.³⁷ On the other hand, the

31. *Anderson v. Anderson*, 333 So. 2d 484 (Fla. 3d Dist. 1976); *accord*, *Denny v. Denny*, 334 So. 2d 300 (Fla. 1st Dist. 1976); *see* *Anderson v. Anderson*, 194 So. 2d 906, 909 (Fla. 1967), for original advancement of the view adopted by the court in the later *Anderson* case.

32. *Norton v. Norton*, 328 So. 2d 484, 486 (Fla. 1st Dist. 1976).

33. *Hausman v. Hausman*, 330 So. 2d 833 (Fla. 3d Dist. 1976).

34. *Palmer v. Palmer*, 330 So. 2d 839 (Fla. 2d Dist. 1976).

35. *De Castro v. De Castro*, 334 So. 2d 834 (Fla. 3d Dist. 1976).

36. *Gordon v. Gordon*, 335 So. 2d 321 (Fla. 4th Dist. 1976).

37. *Blass v. Blass*, 316 So. 2d 308 (Fla. 3d Dist. 1975).

court has the power to order him to provide a major medical insurance policy for her benefit and the benefit of their minor children.

The District Court of Appeal, Fourth District, has agreed with the Third District that a court does not have the power to order that alimony be a charge against the estate of a husband after his death unless the husband has agreed to it.³⁸ In addition, when a final decree of dissolution orders the husband to make the mortgage payments on the marital home but the decree is silent regarding the question of alimony, the court may, upon a change of circumstances two years after the entry of the decree, treat the mortgage payments as being in the nature of alimony.³⁹ It may order the continuation of these payments as alimony when the former husband has reported them as alimony on his tax returns and the parties together have treated them as alimony.

D. Rehabilitative Alimony

Rehabilitative alimony should be awarded only when the wife (or husband) has actual or potential capacity for self-support. When the wife is middle aged, untrained, has a chronic illness and must make a home for two minor children, an actual or potential capacity for self-support is lacking.⁴⁰ Permanent (rather than rehabilitative) alimony should not be awarded when the wife has the ability and the desire to be self-supporting.⁴¹

It is inappropriate for a court to award rehabilitative alimony to a wife who has been awarded custody of two minor children, ages three and six, and who has expressed a desire to remain at home with them during their formative years.⁴² Even though she is young and the marriage was of short duration, permanent alimony should be awarded where she lacks any employable skill or training.

When it will take substantial time for a wife to convert property into income-producing assets, she should be granted additional re-

38. *Ulbrich v. Ulbrich*, 317 So. 2d 460 (Fla. 4th Dist. 1975), following *Bunn v. Bunn*, 311 So. 2d 387 (Fla. 4th Dist. 1975), in which the court was of the view that the seemingly contrary position in *First Nat'l Bank v. Ford*, 283 So. 2d 342 (Fla. 1973), was in fact dicta rather than a square holding.

39. *Pacetti v. Pacetti*, 332 So. 2d 670 (Fla. 3d Dist. 1976).

40. *Yohem v. Yohem*, 324 So. 2d 160 (Fla. 4th Dist. 1975).

41. *Cann v. Cann*, 334 So. 2d 325 (Fla. 1st Dist. 1976). Unfortunately, this case will be cited widely for almost every proposition in family law because of the fantastic amount of dicta. Twenty-three headnotes for a simple case are ridiculous.

42. *King v. King*, 316 So. 2d 322 (Fla. 4th Dist. 1975).

habilitative alimony to support her during this conversion time.⁴³ The rehabilitative concept of alimony may not be applied retroactively in a modification of alimony proceeding dealing with an award of alimony made prior to the adoption of the Dissolution of Marriage Act.⁴⁴

It is reversible error for a trial court to award rehabilitative alimony when the wife is forty-three years old with no income or training, she will be age fifty-four when her youngest child becomes eighteen, and the husband earns \$52,000 per year.⁴⁵ In the view of at least one district court it is not reversible error for a trial court to award permanent rather than rehabilitative alimony to an unskilled fifty-two year old wife who has been married for twenty-five years and has given birth to five children, when the husband has an income of \$50,000 per year and she says that she has no intention of going to work.⁴⁶ The appellate court stressed that it had to accord utmost respect to the exercise of discretion by the trial court in resolving such a case.

E. *Lump-Sum Alimony*

The Supreme Court of Florida, in reversing the District Court of Appeal, Second District, has held that when the income of a husband and wife is approximately equal, the wife should not be awarded lump-sum alimony, nor should she be awarded attorney's fees.⁴⁷ In addition, the parties should be ordered to share equally the debts incurred by them during marriage. Three justices, in a strong dissent, argued that the court did not have jurisdiction over the case because it was not in conflict with prior cases, and that all the court was doing was disagreeing with the results reached by the trial and district court. In a subsequent supreme court decision the majority followed the dissent's reasoning when they held that an award of lump-sum alimony by the trial court should not be disturbed by an appellate court unless there is a clear showing of an abuse of discretion by the trial judge.⁴⁸

In the event that a husband divests himself of much of his

43. *Lopez v. Lopez*, 326 So. 2d 223 (Fla. 2d Dist. 1976).

44. *Mosher v. Mosher*, 321 So. 2d 450 (Fla. 2d Dist. 1975).

45. *McNaughton v. McNaughton*, 332 So. 2d 673 (Fla. 3d Dist. 1976).

46. *Sommese v. Sommese*, 324 So. 2d 647 (Fla. 1st Dist. 1976).

47. *Cummings v. Cummings*, 330 So. 2d 134 (Fla. 1976).

48. *Sisson v. Sisson*, 336 So. 2d 1129 (Fla. 1976), *rev'g* 311 So. 2d 799 (Fla. 1st Dist. 1975).

property by placing it in a spendthrift trust in a situation where the wife had contributed her services during the marriage to the parties' operation of a motel and other rental property, a court may order lump-sum alimony in addition to an award of permanent alimony.⁴⁹

While recognizing the broad discretion of the trial court in awarding alimony, the Court of Appeals for the First District has ruled that it is reversible error to award lump-sum alimony to a wife who is seven years younger than her husband, is better educated, and has an income almost equal to his.⁵⁰ It is also reversible error for a trial court to award lump-sum alimony to a wife where the wife is earning more than her husband and her husband has no assets of any real consequence, is indebted to the Internal Revenue Service, and is being sued by several creditors.⁵¹ "An award of lump-sum alimony should never be made unless the spouse being required to pay is in a financial position to make payment of such gross award without impairing or endangering his economic status."⁵²

Where, prior to dissolution proceedings, the husband has conveyed his half interest in the marital home to his wife, an award of lump-sum alimony should not be used to force the husband to reimburse the wife for money taken out of a joint account or to protect her from liability for a note on which the husband forged his wife's name.⁵³ The note would not be enforceable against her in any event because of the forgery.

It is the view of at least one district court of appeal that when a wife has devoted herself to her family as a housewife "rather than pursuing and acquiring material goods,"⁵⁴ while her husband has acquired a substantial estate and has earned a substantial income, she is entitled to lump-sum alimony in an amount sufficient to compensate her for her contribution to the marriage.

F. *Enforcement of the Award*

Under section 61.12 of the Florida Statutes (1975), pension funds held by the City of Miami under its municipal employee's

49. *Thompson v. Thompson*, 325 So. 2d 480 (Fla. 4th Dist. 1975).

50. *Cannon v. Cannon*, 323 So. 2d 9 (Fla. 1st Dist. 1975).

51. *Bradley v. Bradley*, 327 So. 2d 253 (Fla. 4th Dist. 1976).

52. *Id.* at 254.

53. *Robinson v. Robinson*, 321 So. 2d 459 (Fla. 4th Dist. 1975), *cert. denied*, 336 So. 2d 603 (Fla. 1976).

54. *Goldman v. Goldman*, 333 So. 2d 120, 121 (Fla. 1st Dist. 1976).

retirement system are subject to garnishment by the wife of a retired fireman who is seeking alimony and child support, even though a city ordinance provides that such funds are not subject to garnishment.⁵⁵ The rationale is that the city ordinance is designed to prevent creditors of the family from depriving it of support rather than to prevent a member of the family (the wife) from obtaining funds for the support of the family.

Even though Texas may forbid the awarding of alimony because of its community property laws, Florida may characterize a Texas decree dividing community property as tantamount to an award of alimony.⁵⁶ Thus, a Florida court may permit garnishment of a husband's federal pension under Federal law which permits garnishment for alimony, where the husband is in arrears on a community property settlement pursuant to a Texas divorce decree.

The Supreme Court of Florida, reversing a district court opinion,⁵⁷ has held that in contempt proceedings for failure to pay alimony as ordered, the trial court, prior to entering an order of contempt, must make an affirmative finding that the contemtor presently has the ability to pay and willfully refuses to do so, or that he previously had the ability to pay but divested himself of that ability through his own fault or neglect in order to frustrate a subsequent order.⁵⁸

A contempt order which imprisons the contemtor for a fixed period of time for his willful failure to pay support is invalid on its face, because the order must provide that the contemtor may be released at any time if he complies with the order.⁵⁹ It is reversible error to order that a contemtor not only must pay accrued alimony and child support (which is proper) but that he also must pay sums which are to become due in the future in order to purge himself of contempt.⁶⁰ Likewise, it is reversible error to enter a judgment of contempt for failure to make future payments of alimony.⁶¹ The adjudication of contempt must refer to past not future conduct.

55. *City of Miami v. Spurrier*, 320 So. 2d 397 (Fla. 3d Dist. 1975), *cert. denied*, 334 So. 2d 604 (Fla. 1976).

56. *Williams v. Williams*, 338 So. 2d 869 (Fla. 1st Dist. 1976), *applying* 42 U.S.C. 659 (Supp. V 1975).

57. *Faircloth v. Faircloth*, 321 So. 2d 87 (Fla. 1st Dist. 1975).

58. *Faircloth v. Faircloth*, 339 So. 2d 650 (Fla. 1976).

59. *Damkholer v. Damkholer*, 336 So. 2d 1243 (Fla. 4th Dist. 1976).

60. *Roberts v. Roberts*, 328 So. 2d 461 (Fla. 4th Dist. 1976).

61. *Wright v. Wright*, 331 So. 2d 395 (Fla. 4th Dist. 1976).

In a case of apparent first impression, it has been held that when a judicial circuit embraces more than one county a husband is entitled, in the absence of a waiver, to be tried on a contempt charge in the county in which the case was filed, rather than in another county where the judge resided.⁶²

Where arrearages have not been reduced to a money judgment, a Florida court has no jurisdiction to hold a husband in contempt for failure to pay alimony and child support as ordered by a Georgia court.⁶³ The husband may be held in contempt by a Georgia court, but he is not in contempt of a Florida court. On the other hand, if the arrearages under the Georgia judgment are reduced to a money judgment in Florida, the husband can be sentenced for contempt for failure to comply with the Florida judgment. Moreover, since foreign money judgments for past due alimony and support payments have long been enforceable in Florida by a nonresident wife through contempt proceedings, there is no reason why a domestic money judgment for arrearages in alimony and support money may not also be enforced by the contempt process. However, an order sentencing the husband to jail for an indeterminate period, or until he pays past due alimony, or until further order of the court is void for indefiniteness.⁶⁴

Expenditures made by a husband upon a building owned by him and his former wife as tenants in common are not sufficiently compelling criteria to permit a setoff against his alimony obligations, although a trial court may have jurisdiction to impose such a setoff.⁶⁵ Once it is determined that the husband has the financial ability to pay the back alimony but willfully refuses to do so, a contempt order is appropriate.

G. *Modification of Alimony*

If a foreign decree which deals with alimony and child support is made a Florida decree, it may be modified only upon a showing of a substantial change of circumstances in the same way that an

62. *Taylor v. Taylor*, 325 So. 2d 63 (Fla. 1st Dist. 1976).

63. *Grotnes v. Grotnes*, 338 So. 2d 1122 (Fla. 4th Dist. 1976), *receding from State v. Muldrew*, 308 So. 2d 136 (Fla. 4th Dist. 1975), which had held that the contempt process could not be used after accrued alimony under a Florida decree had been reduced to a money judgment because this would be imprisonment for debt.

64. *Grotnes v. Grotnes*, 338 So. 2d 1122, 1126 (Fla. 4th Dist. 1976).

65. *Bock v. Bock*, 336 So. 2d 661 (Fla. 2d Dist. 1976).

original Florida decree could be changed.⁶⁶ A foreign judgment for alimony or child support is entitled to full faith and credit in Florida as to past due installments. The Florida court may not modify the foreign decree retroactively unless the rendering state's laws permit it. Further, in the absence of any proof to the contrary, there is a presumption in Florida that the rendering state's laws do not permit retroactive modification.⁶⁷

It is reversible error for a trial court and an appellate court to modify an alimony award without any showing of changed circumstances.⁶⁸ When a husband's financial condition has improved and the wife's financial condition has also improved, but the wife's improvement was contemplated by the parties when they agreed on alimony provisions, it is not an abuse of discretion for the judge to refuse to reduce the amount of the wife's alimony.⁶⁹

A husband is not entitled to a reduction in the amount of his alimony payments in the event that he becomes totally disabled when his income from the Veterans Administration, Social Security and a disability income insurance policy greatly exceed his former earned income.⁷⁰

H. *Legislation*

The Department of Health and Rehabilitative Services has now been charged with the responsibility of establishing and operating a program to aid "displaced homemakers," i.e., those who have been displaced by death of their spouses, dissolution of marriage, etc., in becoming financially secure.⁷¹

V. PROPERTY

A. *Jurisdiction*

A chancellor has the power in a marriage dissolution proceeding to refer matters concerning temporary alimony and child support to a general master, but he does not have a similar power to refer the matters concerning property rights. The chancellor himself must

66. *Lazar v. Lazar*, 317 So. 2d 854 (Fla. 2d Dist. 1975).

67. *Fugassi v. Fugassi*, 332 So. 2d 695 (Fla. 4th Dist. 1976).

68. *Protheroe v. Protheroe*, 328 So. 2d 417 (Fla. 1976).

69. *Reese v. Reese*, 330 So. 2d 89 (Fla. 1st Dist. 1976).

70. *Levine v. Levine*, 329 So. 2d 381 (Fla. 3d Dist. 1976).

71. FLA. STAT. § 409.511 (Supp. 1976).

determine this matter.⁷²

In a well-researched opinion, the District Court of Appeal, Fourth District, has held that a California divorce judgment which orders the parties to sell Florida real estate and to divide the proceeds, is entitled to full faith and credit in Florida as a valid in personam judgment.⁷³ The husband was served in Utah, where he was residing, by the use of certified air mail, return receipt requested, in accordance with California in personam service requirements. The defendant husband had sufficient minimum contacts with California to justify the imposition of personal jurisdiction, since the marital relationship had been established in that state.

The Supreme Court of Florida discharged a writ of certiorari in the case of *Hyman v. Hyman*.⁷⁴ The district court had held that a trial court has the power in a marriage dissolution proceeding to reserve jurisdiction for the purpose of settling property rights after the judgment of dissolution is entered.⁷⁵ The writ was discharged because this decision was not in conflict with any prior Florida appellate decision.

One of the dangers implicit in the current practice of a court's entering an order dissolving a marriage and then reserving jurisdiction to determine property rights at a later time was presented in *Garfinkl v. Garfinkl*.⁷⁶ The trial court entered an order dissolving the marriage in spite of the fact that the defendant wife had not presented testimony by deposition concerning whether the marriage was irretrievably broken. The court, however, was content to base a finding of an irretrievably broken marriage on the plaintiff-husband's testimony alone. The husband later died, and the wife appealed the order of dissolution. The appellate court reversed and held that the entry of the order of dissolution upon the court's own motion was error. It was also error to determine the dissolution without hearing the wife's testimony. The court then proceeded to certify the decision in the case as well as the question whether a dissolution decree which reserves jurisdiction to determine property rights is in the nature of an interlocutory judgment or a partial judgment.

72. *Little v. Little*, 325 So. 2d 424 (Fla. 3d Dist. 1976).

73. *Pinebrook v. Pinebrook*, 329 So. 2d 343 (Fla. 4th Dist. 1976).

74. 329 So. 2d 299 (Fla. 1976); *accord*, *Kipnis v. Kipnis*, 330 So. 2d 67 (Fla. 3d Dist. 1976).

75. *Hyman v. Hyman*, 310 So. 2d 378 (Fla. 2d Dist. 1975).

76. 330 So. 2d 812 (Fla. 3d Dist. 1976).

A writ of prohibition will not lie to prohibit a trial court judge from carrying out an order holding a wife in contempt for her failure to execute deeds in favor of her former husband, even though it is obvious that the judge who ordered the conveyance has misconstrued the relevant circumstances.⁷⁷ The proper remedy for the wife in such a case is an appeal from the order and not a writ of prohibition.

The court does not have the power to modify a provision in a judgment which settles property rights between the parties. Hence, when a judgment orders the husband to pay "the first, second and third mortgages on the marital home," and the wife later pays off the second mortgage after the first and third were paid by the husband, the court may not refuse to enter an order compelling the former husband to continue to make payments to the wife in payment of the second mortgage.⁷⁸

A trial court in a dissolution of marriage proceeding has the power to enter an in personam order against the settlor of a Massachusetts trust even though it may affect assets in a foreign state, provided the order does not interfere with the trustees or the corpus in the foreign state.⁷⁹

B. Partition

When a final judgment of dissolution provides that "until the said resident dwelling [held as an estate by the entirety prior to dissolution] can be sold by the parties, the wife is hereby granted exclusive possession thereof to reside therein with the minor children of the parties,"⁸⁰ this provision has the effect of making the former wife the head of the family residing on the property. As a result the dwelling becomes the homestead of the wife and children, and a court cannot compel the partition of the property at the request of the former husband while it is being so used. The court noted that the dissolution judgment contemplated that the property would be sold within a reasonable time, hence the trial court had the power to order a sale, but not partition.

When property is held as a tenancy in common and one coten-

77. *State ex rel. Pearson v. Johnson*, 334 So. 2d 54 (Fla. 4th Dist. 1976).

78. *Horton v. Horton*, 330 So. 2d 69 (Fla. 1st Dist. 1976).

79. *Belsky v. Belsky*, 324 So. 2d 112 (Fla. 3d Dist. 1975).

80. *Hoskin v. Hoskin*, 329 So. 2d 19 (Fla. 3d Dist. 1976).

ant pays more than his share of the expenses such as taxes and insurance, he has a right to require the other tenant to pay his proportionate share. However, when a judgment provides that one tenant is to have the exclusive right to live on the property, this right of contribution is deferred until the property is partitioned or sold at a later date. It is, therefore, reversible error for a trial court to provide that a wife, who is to have possession of the marital home and is to pay for the expenses, shall not have any right of contribution from her former husband for one-half of these expenses.⁸¹

A husband who is ordered to make the full mortgage payments on the marital domicile should be awarded an equitable credit when the property is subsequently partitioned.⁸² A court may not order the partition of property unless the parties have agreed to it or there has been a request for partition in the pleadings.⁸³

The District Court of Appeal, Second District, has held that when a former wife has vacated a marital home held as a tenancy in common, and married another, and her former husband then occupies the house, he is liable for the fair use value of the house as an offset against his partition claim against the wife for one-half of the mortgage payments, taxes, and insurance paid by him after her remarriage.⁸⁴ The court rejected the notion that the husband would not be liable for the use value unless he refused to allow his former wife the right to occupy the house. The court said it was unrealistic to expect former spouses to live peacefully in a house when they could not do so when married to each other.

It is reversible error for a trial court to order a marital home (held as an estate by the entirety) to be sold in 1980 when interjection of the issue of sale of the home was not with the consent of the wife and she had been awarded the use of the home for herself and her children, the youngest of whom would be age twelve in 1980.⁸⁵ A trial court must grant a partition of jointly held property when the wife's petition is in accordance with section 64.041 of the Florida Statutes,⁸⁶ and the husband does not contest the issue.⁸⁷

81. *Whitely v. Whitely*, 329 So. 2d 352 (Fla. 4th Dist. 1976); *accord Jones v. Jones*, 330 So. 2d 536 (Fla. 1st Dist. 1976).

82. *Buckley v. Buckley*, 336 So. 2d 708 (Fla. 4th Dist. 1976).

83. *O'Hara v. O'Hara*, 327 So. 2d 242 (Fla. 1st Dist. 1976).

84. *Adkins v. Edwards*, 317 So. 2d 770 (Fla. 2d Dist. 1975).

85. *McNaughton v. McNaughton*, 332 So. 2d 673 (Fla. 3d Dist. 1976).

86. FLA. STAT. § 64.041 (1975). This statute requires allegation of specific factors which are material to the court's determination of the partition arrangement.

87. *Pantuso v. Pantuso*, 335 So. 2d 361 (Fla. 2d Dist. 1976).

A trial court judge may deny partition of real property when it has been charged with various special claims of the parties in a prior divorce judgment.⁸⁸ A court may make a division of real property held as an estate by the entirety if one spouse asks for it and the other spouse fails to object since the question ought to be decided in formal partition proceedings.⁸⁹ Further, the court may make a division of properties without any finding of a special equity in one spouse or the other if the parties have agreed to this procedure.⁹⁰

C. Homestead

The legal morass which can occur when the law of dower is mixed with the law of homesteads was illustrated in *Creary v. Estate of Creary*.⁹¹ A husband-father lived on a homestead owned in his name alone. After his death his three children conveyed their interests to their mother. The former wife of one of the children had joined in the deed, but the current wife of that child had not. Over twenty years later, this child died leaving his widow who claimed dower. The court held that the fact that she had not joined in the deed did not defeat her right to dower. She was awarded a one-third interest in her deceased husband's one-third remainder interest in the homestead. The lapse of time did not bar her claim under any curative statute.

Inasmuch as the owner of a cooperative apartment has only a stock interest in the corporation which owns the realty, the apartment cannot be the subject matter of a homestead for descent purposes,⁹² even though there may be a homestead exemption for taxation purposes.⁹³

D. Special Equities Doctrine

In order for a court to award a spouse a special equity in jointly held real property the testimony must show that she made contributions to the acquisition of the asset in a manner "above and beyond

88. *Wilisch v. Wilisch*, 335 So. 2d 861 (Fla. 3d Dist. 1976).

89. *Schwartz v. Schwartz*, 336 So. 2d 18 (Fla. 3d Dist. 1976), following *Walton v. Walton*, 290 So. 2d 110 (Fla. 3d Dist. 1974); accord, *McKenry v. McKenry*, 336 So. 2d 20 (Fla. 3d Dist. 1976).

90. *McKenry v. McKenry*, 336 So. 2d 20 (Fla. 3d Dist. 1976).

91. 338 So. 2d 26 (Fla. 1st Dist. 1976).

92. *In re Estate of Wartels*, 338 So. 2d 48 (Fla. 3d Dist. 1976).

93. *Ammerman v. Markham*, 222 So. 2d 423 (Fla. 1969).

the performance of ordinary marital duties."⁹⁴ The fact that the wife made loans to her husband to enable him to take pilot training would not meet this standard.

The District Court of Appeal, Third District, has decided that when a wife has contributed to the down payment for the purchase of the marital home (held as an estate by the entirety), and has made forty of the forty-nine mortgage payments, she may be granted a special equity in the husband's interest as lump-sum alimony.⁹⁵ It is unfortunate that the Third District chose to use these two terms synonymously when they are separate concepts.

It is reversible error for a trial court to permit a husband to assert an oral counterclaim for a special equity in jointly held real property over the objections of the wife's counsel.⁹⁶ Reversible error occurs because the wife could have relied on the law of marital gifts and therefore have taken no steps to enter into discovery proceedings to determine the issues and to present testimony relative to the new claim. If a court fails to make a finding that the wife has a special equity in property held as an estate by the entirety, it cannot order later that the wife is entitled to more than a one-half interest in the proceeds of the sale of the property.⁹⁷

When a wife's father conveys land to the husband in return for a promissory note and the husband not only secures a loan to build a home but also puts some of his own time and money into the construction, he has created a special equity in the home. A special equity exists even though the husband had conveyed the property by quitclaim deed to his wife because the deed recited that the conveyance was in consideration of the wife's father's cancelling the note and was "not determinative of any special equity the husband may have in the wife's property."⁹⁸

In the absence of a special equity in a house or in the absence of a lump-sum alimony award, it is error to award the wife a life estate in the marital home. She may be granted possession, however, in order to make a home for minor children in her custody.⁹⁹

94. *Olson v. Olson*, 321 So. 2d 462, 463 (Fla. 3d Dist. 1975).

95. *Collazo v. Collazo*, 318 So. 2d 164 (Fla. 3d Dist. 1975).

96. *Gaunt v. Gaunt*, 326 So. 2d 49 (Fla. 2d Dist. 1976).

97. *Stossel v. Stossel*, 331 So. 2d 352 (Fla. 4th Dist. 1976).

98. *Poston v. Poston*, 332 So. 2d 363, 364 (Fla. 1st Dist. 1976).

99. *Coalla v. Coalla*, 330 So. 2d 802 (Fla. 2d Dist. 1976).

E. *Awarding of Possession*

It is reversible error to award exclusive possession of the marital home, held as an estate in common, to the wife until any sale or other disposition of the home by the parties, unless this is part of a lump-sum alimony award, or it is awarded to the wife in order to carry out the husband's obligation of child support.¹⁰⁰ When all of the children are adults, it is error to award exclusive possession of the marital home to the wife in the absence of an agreement so providing or the finding of a special equity in the wife.¹⁰¹

When awarding the marital home (owned during coverture as an estate by the entirety) to the wife alone resulted in the wife having assets of approximately \$202,000 and the husband having approximately \$21,000, the award was reversed.¹⁰² The parties became tenants in common of the home and the wife was given the right to use and occupy the home until the minor child became an adult or until she remarried, whichever first occurred.

F. *Presumptions*

The Supreme Court of Florida has held that article X, section 5 of the 1968 Florida Constitution, which provides that there shall be no distinction between married women and married men in the holding, disposition, etc., of their real and personal property, has the effect of making all judicially-created presumptions unnecessary and no longer effective.¹⁰³ For example, a conveyance of property by a wife to herself and her husband as an estate by the entirety, no longer creates a presumption that she intended to make a gift to her husband. Now, record title is "the touchstone," but evidence may be introduced that one party has a special equity in spite of the record title. The wife who conveys to herself and her husband for example, may show during subsequent dissolution proceedings that she furnished all of the consideration for the purchase of the property. The result may be that she is awarded title to all of it.

100. *Watson v. Watson*, 324 So. 2d 126 (Fla. 3d Dist. 1976).

101. *Church v. Church*, 338 So. 2d 544 (Fla. 3d Dist. 1976).

102. *Pike v. Pike*, 332 So. 2d 147 (Fla. 3d Dist. 1976).

103. *Ball v. Ball*, 335 So. 2d 5 (Fla. 1976). This case overruled the presumption rule which was applied in the following cases decided during the survey period: *Coulton v. Coulton*, 330 So. 2d 533 (Fla. 2d Dist. 1976); *Atkins v. Atkins*, 326 So. 2d 259 (Fla. 4th Dist. 1976); *Hyatt v. Hyatt*, 331 So. 2d 356 (Fla. 1st Dist. 1976); *Rutenberg v. Rutenberg*, 334 So. 2d 633 (Fla. 2d Dist. 1976).

G. Conveyances

A contract vendor who is married may not use the refusal of his wife to join in the conveyance as an excuse for refusing to convey property to a vendee who did not know of the marital status of the vendor. The vendee is entitled to specific performance with abatement of the price for the wife's inchoate right of dower.¹⁰⁴

In a case of apparent first impression in Florida, the District Court of Appeal, Fourth District, held that a husband and wife, owners of an estate by the entirety in real property, may convey the property to a third person by executing separate, identical deeds.¹⁰⁵ They need not execute a joint deed.

A court may order a wife to deliver a deed to her husband in accordance with a prior property settlement, dependent upon his paying attorney's fees, a dental bill for a child, and extra monthly schooling funds for the child, all of which were accrued at the time of the order.¹⁰⁶ But the court may not make the transfer of the deed dependent upon the husband's making future monthly payments for the support and education of the child, because the husband would not have full title to the property until the child completed her schooling. Such a precondition would prevent the husband from dealing with the property in order to fulfill his support obligations.

When a release and quitclaim deed are given by a husband to a wife as part of a property settlement agreement in a dissolution action and the parties reconcile, causing the action to be dismissed, the quitclaim deed is void.¹⁰⁷ The husband will remain a joint owner of the property with his wife.

If a husband and wife own an estate by the entirety in non-homestead land, the husband can convey his interests to his wife as part of a bona fide dissolution settlement adopted and ratified by a divorce court.¹⁰⁸ This is possible even where the husband has had numerous judgment liens levied against him. The wife's entire interest in the land is not subject to the claims of lien creditors.

104. *Romano v. Pandapas*, 330 So. 2d 96 (Fla. 1st Dist. 1976). See also *Herzog v. Herzog*, 330 So. 2d 116 (Fla. 3d Dist. 1976), which upheld an agreement between husband and wife that the wife would sell her one-half interest in the marital home to her husband. The agreement was upheld on the grounds that the husband had paid consideration for the sale.

105. *MacGregor v. MacGregor*, 323 So. 2d 35 (Fla. 4th Dist. 1975).

106. *Lamar v. Lamar*, 323 So. 2d 43 (Fla. 4th Dist. 1975).

107. *Zullo v. Zullo*, 317 So. 2d 453 (Fla. 3d Dist. 1975).

108. *State Dep't of Commerce, Div. of Employment Security v. Lowery*, 333 So. 2d 495 (Fla. 1st Dist. 1976).

The Supreme Court of Florida has reversed the holding of a district court which had held unconstitutional that part of section 689.11(1), (2) of the Florida Statutes (1973) which permitted one spouse, without the joinder of the other, to convey his or her interest in homestead property to the other.¹⁰⁹ The court noted that one tenant in an estate by the entirety may convey to the other without the necessity of the receiving spouse's joining in the conveyance. The court, however, agreed with the trial court that the deed in question was invalid because there was only one witness to its execution, and because the husband grantor did not really intend to convey his interest to his wife. The dissent correctly noted, however, that the husband, who was an expert in real property law, deliberately executed the deed knowing that it was invalid. The dissent concluded that the husband should be estopped from asserting the deed's invalidity against his former spouse.

H. *Miscellaneous*

In a case of first impression in Florida, a district court has held that an engagement ring is a gift conditioned upon subsequent marriage.¹¹⁰ If the marriage is not entered into, the man is entitled to the return of the ring, which can be enforced by an action in replevin.

Former sections 731.34 and 731.35 of the Florida Statutes (1971),¹¹¹ which provided for dower rights to widows, but denied a reciprocal right to widowers, have been upheld as constitutional by the Supreme Court of Florida.¹¹² The court reasoned that the discrimination did not violate the equal protection clauses of the state and federal constitutions because it was based upon the disparity between the parties' economic capabilities.

Spouses who had accumulated personal property in Cuba as Cuban citizens before coming to the United States are governed by the community property law of Cuba.¹¹³ This law controls as to those movables brought into the United States as of the date of entry.

109. *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976), *rev'g* 300 So. 2d 33 (Fla. 1st Dist. 1974).

110. *Gill v. Shively*, 320 So. 2d 415 (Fla. 4th Dist. 1975).

111. FLA. STAT. § 731.34-35, (1971) *as amended* by Fla. Laws 1973, ch. 73-107 (repealed 1974).

112. *In re Estate of Rincon*, 327 So. 2d 224 (Fla. 1976).

113. *Camara v. Camara*, 330 So. 2d 818 (Fla. 3d Dist. 1976).

In a dissolution proceeding, a trial court may not award shares of stock in a corporation to the wife merely because she was an original subscriber for the shares.¹¹⁴ It is necessary that evidence be adduced to determine whether the wife ever became entitled to the shares through gift, purchase, or otherwise.

VI. ATTORNEY'S FEES AND COSTS

A. Fees

A client may discharge her attorney at any time. When the client does so, a court may not prevent a successor attorney from representing the client at a Rule 1.540¹¹⁵ hearing on the grounds that she has not paid the discharged attorney.¹¹⁶ In a similar vein, the trial court does not have the power in a dissolution proceeding to order the husband to pay a fee to his attorneys, past or present.¹¹⁷ Any claim must be adjudicated in a separate proceeding.

In dissolution of marriage actions a court has jurisdiction to award attorney's fees payable by one party to the other's attorney. But in the absence of a claim of a charging lien, the court does not have power to adjudicate the fee due from a party to his or her own attorney; this issue would have to be decided in a separate action.¹¹⁸

A court does not have jurisdiction to award attorney's fees to the wife's former counsel to be paid by the husband when a final judgment of dissolution has already been entered and the time for filing a petition for rehearing has expired.¹¹⁹

The Dissolution of Marriage Act¹²⁰ places the spouses on an equal plane, sharing equal rights and responsibilities. Therefore, an appellate court may award attorney's fees to the appellee husband. The amount of the fees is to be set by the trial court and if the wife's appeal is devoid of merit, the court should take this fact into consideration in setting the amount.¹²¹

An appellate court in Florida may award attorney's fees for

114. *Whitener v. Whitener Builders, Inc.*, 334 So. 2d 322 (Fla. 1st Dist. 1976).

115. FLA. R. CIV. P. 1.540 deals with a motion for relief from judgment because of clerical error, excusable neglect, newly discovered evidence, fraud, or similar defects.

116. *Tirone v. Tirone*, 327 So. 2d 801 (Fla. 3d Dist. 1976).

117. *Kucera v. Kucera*, 330 So. 2d 38 (Fla. 4th Dist. 1976).

118. *Herold v. Hunt*, 327 So. 2d 240 (Fla. 4th Dist. 1976).

119. *Frumkes v. Frumkes*, 328 So. 2d 34 (Fla. 3d Dist. 1976).

120. FLA. STAT. ch. 61 (1975).

121. *Mummaw v. Mummaw*, 325 So. 2d 20 (Fla. 1st Dist. 1976).

services rendered in the appeal. The court may set the amount itself or preferably, remand the case to the trial court to assess the amount. In the latter case, the trial court may not reevaluate the wife's need for attorney's fees and the husband's ability to pay because these factors have been decided by the appellate court.¹²² Rather, it must determine the reasonable value of the services. It cannot award a low amount based upon its view of the need and ability of the parties.

An attorney whose only legal services consisted of an examination of an antenuptial agreement and some legal research into its validity is not entitled to an award of attorney's fees from the husband when the wife retained other attorneys to represent her in the dissolution proceedings.¹²³

Canon 2 of the Code of Professional Responsibility provides that one of the factors in determining a reasonable attorney's fee is the amount "customarily charged in the locality for similar legal service." In a case of first impression, it has been held that when a custody proceeding is filed and tried in Dade City, Florida, and the wife employs an attorney from Sarasota, her husband may not be charged for travel time incurred by his wife's attorney in traveling from Sarasota to Dade City.¹²⁴ Further, the amount of the fee may not be based upon testimony showing a reasonable fee in Sarasota. Rather, it is to be a reasonable fee based upon Dade City standards.

A court may not enter an award of attorney's fees which is based only upon the self-serving testimony of the attorney and his invoice for services.¹²⁵ It is reversible error for a trial court to require proof of the amount of attorney's fees by the use of affidavits.¹²⁶

Rule 1.611(a) of the Florida Rules of Civil Procedure requires that a spouse who is seeking attorney's fees in a dissolution proceeding must accompany his or her application with an affidavit stating the financial circumstances of the applicant. However, since this rule does not provide for any sanction for failure to comply, an appellate court will not reverse for a failure to follow this rule when the issue was not raised in the trial court and there is sufficient evidence to sustain the award.¹²⁷

122. *Ludemann v. Ludemann*, 317 So. 2d 860 (Fla. 4th Dist. 1975).

123. *Fisher v. Fisher*, 318 So. 2d 434 (Fla. 3d Dist. 1975).

124. *Chandler v. Chandler*, 330 So. 2d 190 (Fla. 2d Dist. 1976).

125. *Benitez v. Benitez*, 337 So. 2d 408 (Fla. 4th Dist. 1976).

126. *In re Marriage of Arnold*, 335 So. 2d 13 (Fla. 4th Dist. 1976).

127. *Williamson v. Williamson*, 335 So. 2d 346 (Fla. 1st Dist. 1976).

B. Costs

Costs of suit are neither damages nor a penalty and need not be specially claimed. As a result, a court can award costs against a party in dissolution proceedings long after the final judgment, even though there is no reservation of jurisdiction in the final judgment regarding the awarding of costs.¹²⁸ A trial court may not award court costs by also including certain costs of the appeal.¹²⁹

VII. ANTENUPTIAL AND POSTNUPTIAL PROPERTY SETTLEMENT AGREEMENTS

A. Antenuptial Agreements

A trial court will be justified in invalidating an antenuptial agreement when it is shown that: (1) the wife's counsel was actually representing her future husband; (2) her counsel did not properly advise her of her rights; (3) her future husband's income tax return which was shown to her did not show his true worth; (4) she was shown the agreement the day before her marriage and she had no prior knowledge that her husband was going to ask her to sign any agreement; (5) the agreement tended to facilitate divorce in its provisions dealing with the homestead; and (6) the husband by his failure to purchase a life insurance policy in accordance with the terms of the agreement thereby abandoned the agreement.¹³⁰

The District Court of Appeal, Fourth District, avowedly following the holding of *Del Vecchio v. Del Vecchio*,¹³¹ has held that when a prospective husband, eighty-one years old, makes full disclosure of his assets to his future bride, age forty-seven, and she receives the advice of her own attorney not to sign the antenuptial agreement because of its parsimonious provisions in her behalf relative to alimony and support after death of the husband, the court will not set the agreement aside after the husband's death even though the financial provisions in favor of the widow are completely improvident. "Stated another way, any adult contemplating marriage who is sui juris can voluntarily agree to take all, little, or nothing from

128. *Golub v. Golub*, 336 So. 2d 693 (Fla. 2d Dist. 1976).

129. *Feldman v. Feldman*, 324 So. 2d 117 (Fla. 3d Dist. 1976).

130. *Plant v. Plant*, 320 So. 2d 455 (Fla. 3d Dist. 1975).

131. 143 So. 2d 17 (Fla. 1962) (where a prospective wife knows or has reason to know the nature and extent of her future husband's property, an antenuptial agreement is valid notwithstanding the parsimonious nature of its terms).

his or her prospective spouse's estate upon the latter's death, if the former is fully informed at the time he or she so elects."¹³²

A husband, with assets of between \$3,000,000 and \$25,000,000, induced his wife to sign an antenuptial agreement a few minutes before the wedding, after she had talked to his attorneys. He told her that the wedding would not take place unless she did sign and that by the agreement she was to receive \$1,000 per month as long as she did not remarry. The District Court of Appeal, Second District, held that, in such circumstances, a presumption arises that her signature was involuntary and the agreement was set aside.¹³³ A trial court is not at liberty to ignore the alimony provisions of a valid antenuptial agreement unless there is proof of a change of circumstances in accordance with section 61.14 of the Florida Statutes (1975).¹³⁴

B. *Postnuptial Agreements*

In a situation where an alcoholic wife, unrepresented by counsel, signed a property settlement agreement with her husband without knowledge of his wealth; the husband did not inform even his own attorney of his wealth; and the wife had no skills and she had quitclaimed her interest in property worth \$140,000 for the sum of \$500 in cash, a \$12,000 bank deposit from which she would be allowed to withdraw only \$200 per month and the husband's promise to pay the premiums on any insurance which she owned, a presumption that the agreement was obtained by fraud was found to arise as a matter of law.¹³⁵ If such a presumption were to remain un rebutted, the court would have to set the agreement aside.

When neither the husband, a college graduate, nor the wife, who had only a high school education, had advice of counsel, and the husband's father, a layman, had drafted a property settlement agreement for the parties, it was reversible error for the trial court to refuse to adopt the alimony provisions of the agreement at the request of the *husband* in the absence of evidence of unfairness or overreaching.¹³⁶ The husband had the ability to comply with the support provisions and the wife needed permanent alimony. In reli-

132. *Potter v. Collin*, 321 So. 2d 128, 132 (Fla. 4th Dist. 1975).

133. *Lutgert v. Lutgert*, 338 So. 2d 1111 (Fla. 2d Dist. 1976).

134. *Singer v. Singer*, 318 So. 2d 438 (Fla. 4th Dist. 1975).

135. *Demaggio v. Demaggio*, 317 So. 2d 848 (Fla. 2d Dist. 1975).

136. *Byrd v. Byrd*, 324 So. 2d 659 (Fla. 2d Dist. 1975).

ance upon the agreement she had joined in the sale of real estate to enable her husband to pay marital debts.

A wife who enters into a separation and property settlement agreement with full knowledge of her husband's financial worth may not, in the absence of any fraud, deceit, duress, or coercion by him, obtain modification of it even though his income has shown a dramatic improvement since the making of the agreement.¹³⁷ On the other hand, when a chancellor finds that a separation and property settlement agreement is the unconscionable product of overreaching by the wife, with the result that the provisions are oppressive to the former husband who did not have legal counsel when he signed the agreement, and when the judge has been misled as to the circumstances surrounding the agreement, the chancellor is justified in setting the agreement aside two years after it was executed and confirmed by the court.¹³⁸

When a separation agreement provides that the husband is to supply (either build or purchase) a home for the price of \$65,000 to the wife and children and his bad faith prevents performance for a period of three years, a court has the power to modify the agreement and order him to supply a home for the price of \$75,000 because of the increase in costs occurring during the interval.¹³⁹

Even though a property settlement agreement provides that the husband is to pay \$500 for the wife's attorney fees in the event of a dissolution, a trial court may, after upholding the validity of the agreement, award the sum of \$12,000 as attorney's fees.¹⁴⁰ The basis of this finding is that the agreement is not binding as to temporary alimony, suit money, and attorney's fees while the marriage is still in existence and the obligation of support still exists. The agreement is binding for permanent alimony, dower, and inheritance which accrue after the marriage is terminated.

If a separation agreement provides for the payment of alimony by the husband's estate in the event that he predeceases his wife, but it provides neither that this post mortem alimony is to be a charge against his separate property during his lifetime nor that his right to convey the property is restricted, it would appear that the husband's conveyance of his property to himself and his new wife

137. *Zedeck v. Zedeck*, 334 So. 2d 87 (Fla. 3d Dist. 1976).

138. *Moss-Jacober v. Moss*, 334 So. 2d 89 (Fla. 3d Dist. 1976).

139. *Forte v. Forte*, 320 So. 2d 446 (Fla. 3d Dist. 1975).

140. *Young v. Young*, 322 So. 2d 594 (Fla. 4th Dist. 1975).

as an estate by the entirety will not, per se, constitute a fraud upon his former wife.¹⁴¹ Unless the former wife can prove fraud, her right to post mortem alimony will be simply a charge against an insolvent estate.

The Fourth District has concluded that although a court may not use the contempt process to compel a former husband to make support payments in accordance with a property settlement agreement, the contempt process may be used to compel other acts provided for in the agreement, such as the execution of instruments.¹⁴² The dissent in the case, however, noted that inasmuch as the property settlement agreement was ratified by the trial court and the parties were ordered to comply with its terms, the contempt process should be available to enforce the final judgment, in addition to the property settlement agreement.¹⁴³

Although the parties to a separation agreement use the word "alimony" in the agreement, use of the term is not conclusive. If the "alimony" is to be paid as part of a property settlement agreement wherein each party relinquishes all claims against the other except as provided for in that agreement, then the agreement may not be modified upon a change in circumstances as alimony normally would.¹⁴⁴ Modification can take place only upon proof that would justify modification or cancellation of a contract between strangers.

VIII. SEPARATE MAINTENANCE

One of the dangers implicit in filing a motion to dismiss on the merits was demonstrated in a recent case.¹⁴⁵ A wife filed a suit seeking a declaratory decree that she and her nonresident husband were husband and wife. She alleged that her husband had purchased a home jointly with another woman as husband and wife. The husband's lawyer filed pleadings, including a motion to dismiss for failure to state a claim upon which relief could be granted. The wife then amended her suit asking for alimony unconnected with divorce, and alleged basically the same facts as in her original complaint. The court held that the motion to dismiss constituted a general appearance and the court had jurisdiction over the husband.

141. *Scott v. Dansby*, 334 So. 2d 331 (Fla. 1st Dist. 1976).

142. *Burke v. Burke*, 336 So. 2d 1237 (Fla. 4th Dist. 1976).

143. *Id.* at 1239.

144. *White v. White*, 338 So. 2d 883 (Fla. 3d Dist. 1976).

145. *McKelvey v. McKelvey*, 323 So. 2d 651 (Fla. 3d Dist. 1976).

IX. CUSTODY AND SUPPORT OF CHILDREN

A. *Custody Jurisdiction*

If a child is within the state of Florida on the date that a dissolution action is filed which seeks his custody, the court has jurisdiction to award custody. This jurisdiction cannot be defeated by a nonresident spouse's coming to Florida and removing the child without the consent of the other spouse.¹⁴⁶

B. *Criteria for the Award*

In order to determine the question of custody of very young children, it often becomes necessary to attempt to reconcile apparently conflicting rules. One of the clearest articulations appeared in a recent case:

In any child custody proceeding, the welfare of the child is the prime consideration. . . .

Other things being equal, prime consideration should be given to the mother of a child of tender years in custody proceedings. . . .

However, when the evidence reveals that "other things" are not equal then the primary consideration accorded the mother is subservient to the best interests and welfare of the child.

There is a clear distinction between fitness of parents and the best interests of a child. Both parents may be fit but "other factors" may determine with which of the fit parents a child's interests and welfare will be best served.

When, as here, there is a dearth of evidence in support of the position of the mother, as opposed to overwhelming evidence indicating that it is for the interests of the child for its custody to be awarded to its father, any "presumption", "prime consideration", or "natural edge", abiding with the mother is overcome and custody should be awarded to that parent in whose custody the best interests of the child will be served, *in the light of the evidence adduced*.¹⁴⁷

However, where the parents are both equally fit to have custody, the custody of very young children will be awarded to the mother.¹⁴⁸ It is reversible error to enter an order providing for div-

146. *Periolat v. Periolat*, 336 So. 2d 1256 (Fla. 2d Dist. 1976).

147. *Snedaker v. Snedaker*, 327 So. 2d 72, 73 (Fla. 1st Dist. 1976) (emphasis by the court) (citations omitted).

148. *Klavans v. Klavans*, 330 So. 2d 811 (Fla. 3d Dist. 1976).

ided custody of sibling children between mother and father in the absence of compelling reasons for such an order.¹⁴⁹

Under section 39.10(6) of the Florida Statutes (1975), when both parents are unfit to have custody of their children, the court is not to award custody to a foster home or state agency when the children have close relatives who are "fit, ready, able, and willing to be awarded such custody. . . ."¹⁵⁰ If, however, the court finds that these close relatives (for example, maternal grandparents) are not fit, then custody is to be awarded to the Division of Family Services.

It is reversible error for a trial court judge to order that "neither party is given primary custody of the children of the parties, said children remaining in their joint custody and being entitled to live with either party."¹⁵¹ As the appellate court noted: "[T]o give a fourteen year old girl the unbridled discretion to choose the parent with whom she will live invites the possibility of serious disciplinary problems."¹⁵²

There must be a showing of an abuse of discretion by the trial court before an appellate court may substitute its judgment for that of the trial court on the issue of which parent should have custody of a child. As a result, when a trial court awards custody of a minor to his mother, even though she has been guilty of adultery, because the judge thought it was in the best interests of the child to do so, the district court may not reverse this award without making a finding of an abuse of discretion.¹⁵³

It is reversible error to condition a father's temporary custody upon his compliance with each provision of the final judgment of dissolution.¹⁵⁴

C. *Social Investigators' Reports*

In a case of first impression in Florida, the Supreme Court of Florida has held that section 61.20 of the Florida Statutes (1975) is

149. *Doane v. Doane*, 330 So. 2d 753 (Fla. 2d Dist. 1976).

150. *Delafield v. Vreeland*, 334 So. 2d 292, 293 (Fla. 1st Dist. 1976), *quoting*, FLA. STAT. § 39.10(6) (1975).

151. *Gall v. Gall*, 336 So. 2d 10, 12 (Fla. 2d Dist. 1976).

152. *Id.*

153. *Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975); *accord*, *Ross v. Ross*, 321 So. 2d 443 (Fla. 3d Dist. 1975).

154. *Dubocq v. Dubocq*, 338 So. 2d 67 (Fla. 3d Dist. 1976).

not unconstitutional on the ground of lack of due process, nor on the ground that it infringes on a parent's right to confront witnesses.¹⁵⁵ The statute permits a court in custody proceedings to order the Department of Health and Rehabilitative Services to make an investigation and social study concerning all pertinent details relating to the child and each parent, and further permits a court to consider the written report in making a decision on the child's custody. The Supreme Court of Florida opined that the nature of custody proceedings necessitates certain modifications in traditional trial processes. The dangers of false reports are alleviated because of the special skills and training of the social workers who make them. As long as these reports are made available to the parties and their counsel for rebuttal evidence, procedural due process requirements are satisfied.

Under section 61.20 of the Florida Statutes (1975), the court may request the Department of Health and Rehabilitative Services to make an investigation in any action where the custody of children is at issue. The statute is permissive, however, and the court, in its discretion, need not request such an investigation and report.¹⁵⁶

A social investigator's report in custody matters must be made part of the record and be made available for review by the parties, unless they have consented to its being considered without being made part of the record and without being available for their review.¹⁵⁷

D. *Visitation Privileges*

It is an abuse of discretion and reversible error for a trial court to increase the visitation privileges of a father when the available evidence tends to show that this increase would be detrimental to the welfare of the child.¹⁵⁸

E. *Removal of Children from the Jurisdiction*

It may not be abuse of discretion for a trial court to provide, in a custody judgment, that the mother having custody may not remove the child from the judicial circuit. Such a restriction was

155. *Kern v. Kern*, 333 So. 2d 17 (Fla. 1976).

156. *Elliott v. Weyman*, 337 So. 2d 832 (Fla. 1st Dist. 1976).

157. *Hosking v. Hosking*, 318 So. 2d 559 (Fla. 2d Dist. 1975).

158. *Purvis v. Carver*, 326 So. 2d 40 (Fla. 4th Dist. 1976).

imposed in a case in which the court had reservations about awarding custody to the mother, the paternal grandparents (who lived in the circuit) were interested in the child, and it was in the best interest of the child to maintain her residence in the circuit.¹⁵⁹

In the event that the parties stipulate that a judicial hearing shall be confined to the issue of a husband's request to remove a child from Florida temporarily, it is a denial of due process and reversible error for the trial court judge to decide the question of permanent custody over the appellant husband's objections.¹⁶⁰

In a case of apparent first impression since the adoption of the Dissolution of Marriage Act,¹⁶¹ it has been held that even though a final judgment of dissolution is silent about the continued residence of the former wife and children in Florida, a court in subsequent proceedings does have the power to enjoin temporarily the former wife from removing the children permanently from Florida.¹⁶² The original dissolution judgment had given liberal visitation rights to the father, and at the time of the final hearing in the dissolution action, the mother had no intention of taking the children out of the state. The standard for enjoining such a move is the best interests of the children.

F. *Modification of the Award*

It is difficult to alter custody arrangements based upon a change in circumstances. The movant must prove "substantial" change from the time of entry of the original judgment. The District Court of Appeal, Second District, has held the following facts insufficient to justify a change in custody from the mother to the father: (a) the child changed schools three times in one year; (b) the child's grandparents live in the same city as the father; (c) the mother's work schedule in California would require other persons to care for the child for two hours a day; and (d) the father has remarried and overcome a drinking problem.¹⁶³ The court reasoned that

159. *Brandon v. Faulk*, 326 So. 2d 76 (Fla. 1st Dist. 1976).

160. *Connors v. Connors*, 327 So. 2d 877 (Fla. 2d Dist. 1976).

161. See text accompanying note 120 *supra*.

162. *Scheiner v. Scheiner*, 336 So. 2d 406 (Fla. 3d Dist. 1976).

163. *Robinson v. Robinson*, 333 So. 2d 526 (Fla. 2d Dist. 1976). The court in *Robinson* reversed a trial court's modification of a custody decree. In a case involving change of custody, the Supreme Court of Florida recently held that an appellate court cannot overturn the decision of a trial court unless a clear abuse of discretion has been shown. *Spradley v. Spradley*, 335 So. 2d 822 (Fla. 1976), *rev'g* 312 So. 2d 215 (Fla. 1st Dist. 1975).

the father had not met his burden of proof because: (a) despite changes in schools, the child was at the top of her various classes; (b) the location of the grandparents was not controlling; (c) the original judgment had contemplated that the mother would work, and (d) the father's recovery from his drinking problem was not enough to justify a modification of custody.

Where both spouses claim a change in circumstances and seek modification, no modification of custody will be granted where each spouse fails to prove a "material" change in circumstances.¹⁶⁴

X. SUPPORT

A. *Adult Children*

The District Court of Appeal, First District, is of the view that a divorced parent is not liable for the support of his children who are over the age of eighteen and who are in college unless there is a finding that the children are "dependent children."¹⁶⁵ The mere fact of college attendance does not indicate dependency. The court noted that since a parent in a family living in domestic tranquility has no duty to furnish a college education, a parent has no greater duty when the marriage has been dissolved.

B. *Modification*

If custody of a child is removed from the mother to the father, who is awarded permanent custody, then the order should also provide that the support payments previously awarded to the mother for the support of this child should cease.¹⁶⁶ A modification of the support provisions of a dissolution judgment may be made when conditions actually change. It cannot be based upon some change anticipated in the future.¹⁶⁷

It is an abuse of discretion for a trial court judge to refuse to grant an increase in child support solely because the agreement of the parties at the time of the dissolution contemplated that the

164. *Carroll v. Carroll*, 336 So. 2d 130 (Fla. 1st Dist. 1976).

165. *Dwyer v. Dwyer*, 327 So. 2d 74 (Fla. 1st Dist. 1976); *accord Krogen v. Krogen*, 320 So. 2d 483 (Fla. 3d Dist. 1975); *Coalla v. Coalla*, 330 So. 2d 802 (Fla. 2d Dist. 1976). Unless a court finds that children are dependent for support because of some physical or mental handicap, it may not award child support beyond the age of eighteen. *Baldi v. Baldi*, 323 So. 2d 592 (Fla. 3d Dist. 1975).

166. *Curley v. Curley*, 327 So. 2d 834 (Fla. 3d Dist. 1976).

167. *Anderson v. Anderson*, 317 So. 2d 458 (Fla. 1st Dist. 1975).

physician-father's income would increase in a few years.¹⁶⁸ This contemplated increase is a factor to be considered, but it is not to constitute a bar to an increase when the father's income has shown a dramatic improvement and the needs of the children have also increased.

A father who continues to pay child support in ignorance of the fact that his child has married is entitled to a credit against future payments for another child.¹⁶⁹

C. *Criminal Nonsupport*

In a recent case, the former wife testified that she had not received support checks, but the defendant-former husband testified that he had placed one check in her mailbox and had mailed a second one to her.¹⁷⁰ The court held that the conviction of the father for the crime of withholding support from a minor cannot be upheld when there is an absence of proof that the minor was in need of support, and the only testimony about nonsupport was given by the former wife.

D. *Support Duties of Grandparents*

A court cannot order the paternal grandparents of children to support them when the maternal grandparents have actual custody of the children.¹⁷¹ When the children do not reside with paternal grandparents, they do not stand in loco parentis, and they are not bound to support them on this basis. The legal duty of support rests with the father of the children and not the grandparents, even though custody has been taken from the father and given to the maternal grandparents.

E. *Miscellaneous*

The District Court of Appeal, First District, has receded from its decision in *Hardy v. Hardy*.¹⁷² The First District now holds that

168. *Siegel v. Zimmerman*, 319 So. 2d 187 (Fla. 3d Dist. 1975).

169. *Holt v. Holt*, 330 So. 2d 489 (Fla. 4th Dist. 1976).

170. *Griner v. State*, 322 So. 2d 647 (Fla. 1st Dist. 1975).

171. *Engle v. Engle*, 323 So. 2d 658 (Fla. 3d Dist. 1975).

172. 118 So. 2d 106 (Fla. 1st Dist. 1960). The court in the *Hardy* case had held that "[s]eparate amounts should be awarded for alimony and for support of each minor child in all cases." *Id.* at 107.

it is not necessary for a trial court to allocate separate amounts of child support for each child in all cases.¹⁷³ It is still necessary, however, to allocate separate amounts for alimony and child support.

At least one district court of appeal is of the view that when the father's income is quite limited he should not be liable for the payment of ordinary optical and dental bills in addition to paying for child support.¹⁷⁴ If extraordinary optical and dental bills were incurred, then the trial court could consider modifying the award. A final judgment of dissolution which provided that the husband was to pay "all extraordinary medical bills for the said minor children" has been interpreted by another appellate court as encompassing medical bills for a medically supervised weight reduction program for an obese daughter who has been unable to lose weight by her own efforts.¹⁷⁵

Under section 61.13 of the Florida Statutes (1975), a parent may be ordered to give security for the payment of child support when the other parent has custody of the children. However, the court may not order the father to maintain his term life insurance policy as security for child support when the children are in his custody.¹⁷⁶

F. *Legislation*

The law governing support of dependent children has been extensively amended with the repeal of sections 409.2452-2509 of the Florida Statutes (1975),¹⁷⁷ and the adoption of a new act. The new act provides that: (a) any payment of public assistance by the Department of Health and Rehabilitative Services to a dependent child creates a debt owing to the Department by a responsible parent since the dependent child, by receiving aid, has made, in effect, an assignment to the state of his right against the parent;¹⁷⁸ (b) the Department is authorized to bring actions for support;¹⁷⁹ and (c) apparently, persons who are not otherwise eligible for aid from the Department may use the Department's facilities to collect support

173. *Jones v. Jones*, 330 So. 2d 536 (Fla. 1st Dist. 1976).

174. *Kippert v. Kippert*, 327 So. 2d 97 (Fla. 1st Dist. 1976).

175. *Bertram v. Bertram*, 334 So. 2d 70 (Fla. 3d Dist. 1976).

176. *Simon v. Simon*, 319 So. 2d 46 (Fla. 3d Dist. 1975).

177. FLA. STAT. §§ 409.2452-.2509 (1975) (repealed 1976).

178. FLA. STAT. § 409.2561 (Supp. 1976).

179. FLA. STAT. § 409.2564 (Supp. 1976).

if they pay reasonable fees.¹⁸⁰ The act seems well intentioned, but the description of a "dependent child" it provides appears troublesome. A dependent child "means any person under the age of 18, or under the age of 21 and still in school, who has been deprived of parental support or care by reasons of death, continued absence from the home, or physical or mental incapacity of a parent."¹⁸¹ This provision could be construed to mean that a father who has deserted his family will be liable for college education of his children between the ages of 18 and 21, while a father who has continued to fulfill his support role would not likewise be liable.

XI. ADOPTION

Section 63.072 of the Florida Statutes (1975), authorizes a court to enter an order of adoption in the absence of consent by a natural parent when he has abandoned the child. In a case of apparent first impression in Florida, it has been held that the imprisonment of a father under a lifetime sentence of rape and kidnapping does not, per se, constitute abandonment of the child.¹⁸² As a result, when the natural father contests the adoption proceedings, an order of adoption in favor of the stepfather may not be granted. On the other hand, another district court has upheld a trial court's finding in an adoption proceeding that the voluntary conduct of the mother in committing some illegal act resulting in her being imprisoned for nine months constituted an abandonment of her child.¹⁸³

In order to deprive the natural father of his child in adoption proceedings it is necessary to show by clear and convincing evidence that he has abandoned the child.¹⁸⁴ His mere failure to furnish support is not enough by itself to justify the adoption over his protests.

An acknowledgment is not mandatory to a valid consent given voluntarily by the natural mother in adoption proceedings. Once it has been given it may not be revoked unless it was obtained by fraud or duress.¹⁸⁵ A natural mother's oral consent to an adoption made when she participated in the adoption proceedings before the court

180. FLA. STAT. § 409.2567 (Supp. 1976).

181. FLA. STAT. § 409.2554 (Supp. 1976).

182. *Harden v. Thomas*, 329 So. 2d 389 (Fla. 1st Dist. 1976).

183. *Watson v. Watson*, 330 So. 2d 848 (Fla. 3d Dist. 1976).

184. *In re Adoption of Wilson*, 328 So. 2d 50 (Fla. 2d Dist. 1976).

185. *In re Adoption of Cox*, 327 So. 2d 776 (Fla. 1976), *rev'g* 299 So. 2d 104 (Fla. 4th Dist. 1974), *following In re Stonehouse's Adoption*, 155 Fla. 223, 19 So. 2d 788 (1944).

would be a sufficient compliance with section 63.082(2) of the Florida Statutes (1975),¹⁸⁶ even if her prior written consent was not in compliance with the section.¹⁸⁷

A trial court does not have the authority to preclude the Division of Family Services from filing a future petition for the permanent commitment of five children to the Division for the purpose of adoption.¹⁸⁸ Orders dealing with the welfare of children are always subject to modification upon a substantial change in circumstances.

The plea of *res judicata* is generally an affirmative defense which must be pleaded unless its existence appears on the face of the opposing pleading. Hence, when grandparents allege in their petition of adoption that the circumstances have substantially changed since the rendition of a judgment two years previously which denied their right to adopt, the defense of *res judicata* would have to be pleaded specifically by the opposing natural mother.¹⁸⁹

When paternal grandparents have been denied the right to adopt a grandchild, it is reversible error for the court to award visitation privileges to them over the objection of the natural mother.¹⁹⁰

A. *Legislation*

The legislature has sought to remedy the lot of "special needs children" (children whose permanent custody has been awarded to the Department of Health and Rehabilitative Services or to a licensed child placing agency and who have established significant emotional ties with their foster parents, or who are not likely to be adopted because they are six years old or older, mentally retarded, or physically or emotionally handicapped, or of black or racially mixed parentage) by authorizing subsidies for support and medical expenses to be paid to adopting parents of these children. Adoption fees are also waived for parents who participate in this program.¹⁹¹

186. FLA. STAT. § 63.082(2) (1975) provides that a consent that does not name or otherwise identify the adopting parent is valid if the consent states that it was voluntarily executed and that identification of the adopting parent is not required.

187. *In re Adoption of Degroot*, 335 So. 2d 845 (Fla. 4th Dist. 1976).

188. *Division of Family Servs., Dep't of Health & Rehab. Servs. v. S.R.*, 328 So. 2d 270 (Fla. 1st Dist. 1976).

189. *Glass v. Armstrong*, 330 So. 2d 57 (Fla. 1st Dist. 1976).

190. *Roberts v. Davis*, 328 So. 2d 879 (Fla. 2d Dist. 1976).

191. FLA. STAT. § 409.166 (Supp. 1976).

In all cases in which the custody of a child has been awarded to the Department or to a licensed child-placing agency, the Department of Health and Rehabilitative Services or the child-placing agency must petition a court to review the status of the child after the child has been in foster care for six months. The department or agency must then conduct an investigation and supply a report along with its recommendations to the court. The court may then conduct a hearing and determine if the child is to continue in foster care, or to be returned to a parent, guardian, or relative, or if proceedings should be instituted to terminate parental rights and legally free the child for adoption. This act is designed to help ensure a permanent home for children who are in foster care by requiring a periodic review of their statuses. If the child is continued in foster care, at least an annual review of his status must be made.¹⁹²

XII. JUVENILES

A trial court has the power under chapter 39 of the Florida Statutes (1975), to order the Division of Family Services to place five dependent siblings in the same foster home pending an adjudicatory hearing.¹⁹³ It is reversible error to adjudicate a child to be a dependent child in the absence of a filed written petition and without notice being given to the Division of Family Services.¹⁹⁴

A trial court has the power to order a doctor to administer blood transfusions in life and death cases to minors when the parents have refused permission because of their religious beliefs and the doctor has asked for the order to protect himself against a possible malpractice suit if he should be "authorized" by a guardian ad litem rather than "ordered" by the court to do so.¹⁹⁵

XIII. DELINQUENCY AND CRIMINAL PROCEEDINGS

A. Jurisdiction

A court has no power to order a twenty-three year-old man who is charged with a crime to be transferred to the juvenile divi-

192. FLA. STAT. § 409.168 (Supp. 1976).

193. Division of Family Servs. v. State, 319 So. 2d 72 (Fla. 1st Dist. 1975); *In re F.B. v. State*, 319 So. 2d 77 (Fla. 1st Dist. 1975).

194. Division of Family Servs. Dep't of Health & Rehab. Servs. v. J.F., 327 So. 2d 128 (Fla. 1st Dist. 1976).

195. *In re Ivey*, 319 So. 2d 53 (Fla. 1st Dist. 1975).

sion of the circuit court for trial, despite the fact that he has the mentality of a ten year-old child.¹⁹⁶ The juvenile division of the circuit court does not have jurisdiction to supervise the daily operations of the Division of Youth Services in the care and custody of juveniles committed to its care.¹⁹⁷

A court has no authority under Florida case law or legislation to award a fee to a guardian ad litem in a juvenile detention proceeding. It may not order the Division of Health Services to pay the fee,¹⁹⁸ nor may it award an attorney's fee to be paid by the state for representation of a child.¹⁹⁹

A juvenile court cannot require the Division of Youth Services to place a child in a particular school as a condition of probation, nor can the court put a child on a fixed probation period, because the law requires that probation continue until the child reaches his twenty-first birthday unless he is sooner released.²⁰⁰

B. *Waiver of Jurisdiction*

A trial court judge who waives jurisdiction over a minor and transfers his case for criminal prosecution must state in his order the reasons for finding that there are no reasonable prospects for rehabilitating the minor.²⁰¹ A mere recital of the serious crimes charged against the minor is not sufficient.

Rule 8.090 of the Florida Rules of Juvenile Procedure provides that a summons shall be served on a parent having custody or on the actual custodians, notifying them that a hearing is to be conducted to determine whether jurisdiction over the minor is to be waived in order that he might be tried in a criminal case as an adult. Rule 8.090 has not been satisfied and waiver proceedings are invalid where the record shows that the required notice was given to a minor's sister with whom he was living, and she expressed a lack of interest; where there was no proof that a summons had been delivered to the minor's mother (a certified letter was sent but there was

196. *State v. Bradshaw*, 337 So. 2d 1032 (Fla. 2d Dist. 1976).

197. *Florida Dep't of Health & Rehab. Servs., Div. of Youth Servs. v. Crowell*, 327 So. 2d 115 (Fla. 1st Dist. 1976).

198. *Florida Dep't of Health & Rehab. Servs., Div. of Youth Servs., Bureau of Field Servs. v. R.M.A.*, 327 So. 2d 844 (Fla. 1st Dist. 1976).

199. *State v. Gladstone*, 325 So. 2d 443 (Fla. 3d Dist. 1976).

200. *T.W. v. State*, 338 So. 2d 549 (Fla. 2d Dist. 1976).

201. *Spencer v. State*, 332 So. 2d 30 (Fla. 1st Dist. 1976).

no return receipt); and where the mother did not attend the hearing.²⁰²

Section 39.09(2)(e) of the Florida Statutes (1975) and Rule 8.110(b)(5), Florida Rules of Juvenile Procedure, provide that a minor and his parents have the right to examine psychological and psychiatric reports used in proceedings to transfer a juvenile to the criminal division of the circuit court. The minor and his counsel have the right to question the parties responsible for these reports. However, when the minor's counsel advises the judge to read a report and "take it for its weight," without admitting it as an exhibit, this constitutes a waiver of the minor's rights of confrontation and cross-examination, even though a portion of the report was read to the judge at closing argument.²⁰³

A grand jury indictment of a juvenile for alleged criminal acts may not be used in lieu of a petition alleging delinquency in waiver of jurisdiction hearings designed to transfer the juvenile's case to a criminal court.²⁰⁴

In upholding the constitutionality of section 959.115 of the Florida Statutes (1975), the Supreme Court of Florida held that:

We conclude that a juvenile offender, who is properly certified to be tried as an adult without a prior juvenile adjudicatory hearing, may be sentenced either as an adult or as a juvenile under Section 959.115, Florida Statutes. When he fails to comply with or adapt to the rehabilitative treatment authorized by the statute, he may be returned to the trial court for an evidentiary determination that he is not amenable to such a rehabilitative program. The trial court, upon so finding, may impose any sentence it could have originally imposed. The situation is identical to a revocation of probation. To hold otherwise would eliminate any incentive the youthful offender might have to successfully complete this less restrictive rehabilitative program, and would cause trial judges to rarely use this sentencing alternative.²⁰⁵

202. *L.C.L., Jr. v. State*, 319 So. 2d 133 (Fla. 2d Dist. 1975).

203. *D.A.B. v. State*, 329 So. 2d 40 (Fla. 3d Dist. 1976).

204. *A.D.T. v. State*, 318 So. 2d 478 (Fla. 1st Dist. 1975); see *State v. Robinson*, 336 So. 2d 437 (Fla. 2d Dist. 1976), which deals with the question of the applicability of Transition Rule 18 and section 39.02(5)(c) Florida Statutes (1973), to a person who allegedly committed murder when he was seventeen but was not arrested and indicted until he was 18; and with the effect of the change of age of majority from 21 to 18. The court held that the juvenile court lost jurisdiction when the indictment was returned.

205. *Jones v. State*, 336 So. 2d 1172, 1174 (Fla. 1976).

C. Speedy Trial Rule

In a case whose facts predated the adoption of rule 8.120 of the Rules of Juvenile Procedure, which provides for the right of speedy trial to juveniles, the Supreme Court of Florida held that because of the difference between delinquency proceedings and criminal court proceedings, a juvenile may not substantiate a claim of a denial of a speedy trial under the sixth amendment to the United States Constitution.²⁰⁶ Nor may he claim that he was denied equal protection under the fourteenth amendment because the procedural rights of juveniles and adults do differ. The decision seems questionable, but because of the adoption of rule 8.120 the decision may not have much impact.

Section 39.05(7) of the Florida Statutes (1975), provides that "[o]n motions by or in behalf of a child, a petition alleging delinquency *shall* be dismissed with prejudice if it was not filed within thirty days from the date the complaint was referred to the intake office."²⁰⁷ On the other hand, rule 8.020(b)(5) uses similar language but it uses the verb "may" rather than "shall." A district court has held that the statute is substantive while the rule is procedural and therefore, the statute supersedes the rule.²⁰⁸ The result is that a court must discharge a juvenile from a delinquency charge which was filed more than thirty days after the complaint was referred to the intake office. Another district court has held, however, that the statute is procedural (not substantive) and is subject to the exclusive rule-making power of the Supreme Court of Florida, with the result that the child may be discharged within the discretion of the court.²⁰⁹ This court also held that the word "shall" when used by the legislature to prescribe the actions of a court should be construed to mean "may," with the result that even if the statute were controlling, dismissal would still be discretionary.

Discharge of a juvenile under the speedy trial rule for failure to prosecute in a timely fashion for delinquency on armed robbery offenses cannot support a plea of former jeopardy since he had not been placed in jeopardy.²¹⁰ No trial ever started. But such a dis-

206. *State v. Boatman*, 329 So. 2d 309 (Fla. 1976), *rev'g* 306 So. 2d 592 (Fla. 2d Dist. 1975).

207. FLA. STAT. § 39.05(7) (1975) (emphasis added).

208. *In re S.L.M.*, 336 So. 2d 391 (Fla. 4th Dist. 1976).

209. *S.R. v. State*, 336 So. 2d 662 (Fla. 2d Dist. 1976).

210. *Rawlins v. Kelley*, 322 So. 2d 10 (Fla. 1975).

charge is an estoppel against a subsequent prosecution of the juvenile for the same offenses.

D. *Delinquent Conduct*

If the evidence shows, at most, that a juvenile allegedly engaged in prostitution in a "quiet and orderly manner," and the judge acquits her of the charge of prostitution, he may not find her guilty of disorderly conduct.²¹¹ The activities of the juvenile might be sufficient to show that she was in a need of supervision, but not that she was guilty of disorderly conduct.

When the facts show that a juvenile mother spends her nights on a street corner in an area in which she does not live, and that she approaches cars and engages the drivers in conversations for the purpose of prostitution, and fails to leave the area after being warned by a police officer, this is sufficient to show a violation of the Florida loitering and prowling statute.²¹² These facts show that she was prowling at a place and time and in a manner not usual for law-abiding citizens, and such prowling threatens a breach of the peace or the public safety.

A determination that a juvenile is guilty of delinquency for loitering and prowling cannot be sustained in the absence of proof that the arresting officer gave the juvenile an opportunity to explain his presence and conduct, or proof that it was impracticable to give the juvenile such an opportunity in accordance with the requirements of section 856.021 of the Florida Statutes (1975), which makes loitering unlawful under certain circumstances.²¹³

It is reversible error for a judge to find, as a matter of fact, that a juvenile accidentally broke a window and then to find her guilty of willfully, maliciously and intentionally damaging the property of another.²¹⁴

If no testimony is produced showing that a juvenile had any knowledge that a short-barreled rifle was in the trunk of his car, and the testimony does show that he did not have a key to the trunk of the car and that the key was given to a police officer by a third person who was not a passenger in the car, an adjudication of delin-

211. *E. G. v. State*, 326 So. 2d 445 (Fla. 1st Dist. 1976).

212. *B.A.A. v. State*, 333 So. 2d 552 (Fla. 3d Dist. 1976).

213. *L.L.J. v. State*, 334 So. 2d 656 (Fla. 3d Dist. 1976).

214. *K.G. v. State*, 330 So. 2d 519 (Fla. 1st Dist. 1976).

quency cannot be sustained on appeal.²¹⁵

Section 775.087(2) of the Florida Statutes (1975), provides that whoever is convicted of certain enumerated crimes while he is carrying a firearm must be sentenced to a minimum term of three years imprisonment. In a case of first impression, it has been held that when a juvenile is adjudicated delinquent as a result of committing one of the acts proscribed by the statute while carrying a firearm, he does not come within the statute because: (a) he is not convicted but merely adjudicated a delinquent child; and (b) section 39.11(4)²¹⁶ states that commitment of a delinquent child to the Division of Youth Services shall be for an indeterminate period of time, and a court has no jurisdiction to commit for a fixed period of time.²¹⁷

E. Confessions

Section 39.03(3)(a) of the Florida Statutes (1975), provides that if the person taking a juvenile into custody determines that the child shall be detained, he shall immediately notify the child's parents or legal custodians. Hence, when a juvenile is taken into custody and detained as an escapee from the state training school and his requests for permission to telephone his parents are denied, any confessions given by the juvenile relating to grand larceny are inadmissible into evidence even though he was given the *Miranda* warnings.²¹⁸ The same section of the statute also provides that an arrested juvenile should not be detained in an adult police station or jail. If he is so detained and confesses to a crime after being removed to a youth hall and after being given the *Miranda* warnings, the effect of this overnight detention is a factor which must be considered by the trier of fact in determining whether the confession was voluntary.²¹⁹

A fourteen year old boy was invited by a deputy sheriff to go to the sheriff's office for questioning. The sheriff declined to tell the boy the purpose of the questioning until they arrived at the office when the deputy gave the boy the *Miranda* warnings. After being questioned for approximately forty minutes, the boy confessed to

215. C.W.C., Jr. v. State, 334 So. 2d 275 (Fla. 1st Dist. 1976).

216. FLA. STAT. § 39.11(4) (1975).

217. M.W.B. v. State, 335 So. 2d 10 (Fla. 1st Dist. 1976).

218. Dowst v. State, 336 So. 2d 375 (Fla. 1st Dist. 1976).

219. B.M. v. State, 337 So. 2d 423 (Fla. 3d Dist. 1976).

breaking and entering a building with intent to commit a misdemeanor. The District Court of Appeal, First District, held that his confession was invalid because it was not the result of his free and unrestrained choice and was a violation of his fourth amendment rights.²²⁰

F. Appeals

Section 39.14(1) of the Florida Statutes (1975), provides that appeals in juvenile delinquency proceedings may be taken in the manner prescribed by the Florida appellate rules, but nothing is stated as to whether the appeal is perfected under the civil or criminal appellate rules. A district court has held that considering the nature of a juvenile delinquency proceeding, an appeal ought to be perfected under the criminal appellate rules.²²¹

G. Criminal Proceedings

In accordance with the United States Supreme Court's decision in *Breed v. Jones*,²²² the Supreme Court of Florida has held that when a juvenile court has taken jurisdiction over a juvenile accused of criminal conduct, taken testimony and adjudicated him to be a delinquent child, jeopardy has attached, and the state may not thereafter try the juvenile for murder as an adult.²²³

For cases where a minor is charged with a crime which is punishable by death or by life imprisonment, a Florida statute provides: "should the grand jury fail to act within the fourteen-day period, the court may proceed as otherwise required by law."²²⁴ This statute has been interpreted to mean that the state has fourteen days to indict before there can be an adjudicatory hearing in a juvenile court.²²⁵ If the grand jury fails to indict then the juvenile court is free to proceed. The grand jury may indict after the expiration of fourteen days in the event that the juvenile court has done nothing in the interim.

The common law rule that a child between the ages of seven and fourteen was rebuttably presumed incapable of committing a

220. *In re R.L.J.*, 336 So. 2d 132 (Fla. 1st Dist. 1976).

221. *D.J. v. State*, 330 So. 2d 34 (Fla. 4th Dist. 1975).

222. 421 U.S. 519 (1975).

223. *Smith v. State*, 316 So. 2d 552 (Fla. 1975).

224. FLA. STAT. § 39.02(5)(c) (1975).

225. *State v. Meagher*, 323 So. 2d 26 (Fla. 4th Dist. 1975).

crime has been held by two district courts to be inapplicable to juvenile court proceedings.²²⁶ These courts reason that the common law rule developed from the desire to protect children from the rigors of the early penal system, while the juvenile court system is designed to help the child. The remaining two district courts recently articulated a contrary view.²²⁷

XIV. GUARDIANSHIP

Section 744.3105 of the Florida Statutes (1975),²²⁸ required that a verified petition for appointment of a guardian be filed with the circuit court. Hence a circuit court did not have jurisdiction to appoint a guardian unless a statutory petition was filed.²²⁹

At the time their parents were killed in an automobile crash, the legal residence of minor twins was in St. Johns County. The circuit court in St. Johns County assumed jurisdiction and appointed a local bank as guardian of the minors' property. Subsequently, a suit for guardianship of the persons was instituted in Putnam County where the children were residing with the relatives who instituted the suit. Since venue had never been waived in St. Johns County, the District Court of Appeal, First District, held that the Putnam County proceedings should have been transferred to St. Johns County.²³⁰ Therefore, the order of the circuit court in Putnam County, which granted the guardianship of the person to a maternal uncle, was reversed and remanded with instructions to transfer the case to St. Johns County.

In a case of first impression in Florida, the District Court of Appeal, Second District, has held that a court may award attorney's fees to a petitioner whose actions resulted in the resignation of the guardian and a consequential benefit to the estate of the ward, even though a third person was eventually appointed guardian.²³¹

The guardian of a ward has the right to withdraw funds from a bank account which is in the name of the ward and another person

226. *R.D.C. v. State*, 332 So. 2d 134 (Fla. 3d Dist. 1976); *K.P. v. State*, 327 So. 2d 820 (Fla. 1st Dist. 1976).

227. *State v. D.H.*, 309 So. 2d 601 (Fla. 2d Dist. 1976); *In re E.P.*, 291 So. 2d 238 (Fla. 4th Dist. 1974).

228. Repealed by Fla. Laws 1975, ch. 75-222, § 25.

229. *In re Guardianship of Lewis*, 323 So. 2d 14 (Fla. 1st Dist. 1975).

230. *In re Guardianship of Ettel*, 324 So. 2d 194 (Fla. 1st Dist. 1976).

231. *In re Guardianship of Dean*, 319 So. 2d 589 (Fla. 2d Dist. 1975).

as joint tenants with right of survivorship in the same way that the ward could if he were competent.²³²

Section 440.19(3) of the Florida Statutes (1975), provides that the running of the period of limitations in workmen's compensation proceedings is suspended until a guardian is appointed to represent an incompetent workman. If compensation proceedings are conducted without the appointment of a guardian they are improper even if the incompetent is represented by counsel.²³³ The losing claimant may insist upon the appointment of a guardian and new proceedings to award compensation.

XV. ILLEGITIMACY

A court has the power to enjoin the Division of Family Services of the Department of Health and Rehabilitative Services from attempting to ascertain the identity of a natural father of an illegitimate child being placed for adoption.²³⁴ If the natural father has had custody of the child, has contributed to its support, or has otherwise tangibly indicated interest in the child, he must be given notice of the hearing for adoption, but a father who does not fall within this category need not be notified. Any attempt to identify him would be constitutionally unnecessary and counterproductive.

An unwed pregnant woman cannot enter into a valid agreement with the alleged father to release him from liability to her for child support in a paternity action.²³⁵ This decision seems somewhat incongruous (as pointed out by the dissenting opinion of Chief Judge Boyer), in light of the fact that the mother may undergo an abortion without the father's consent. She may kill the fetus but she may not contract away its right of support.

Section 742.011 of the Florida Statutes (1975), provides that "any unmarried woman who shall be pregnant . . . may bring proceedings . . . to determine the paternity of such child." This section has the effect of preventing a married woman from bringing such an action. The statute has been held unconstitutional by the Florida

232. *Cape Coral Bank v. Kinney*, 321 So. 2d 597 (Fla. 2d Dist. 1975).

233. *Aris v. Big Ten Taxi Corp.*, 330 So. 2d 465 (Fla. 1976).

234. *Dep't of Health & Rehab. Servs. v. Herzog*, 317 So. 2d 865 (Fla. 2d Dist. 1975), following *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972). See also FLA. STAT. § 63.062(1)(b)(4)-(5) which requires notice to the natural father if he has acknowledged and supported the child.

235. *Shinall v. Pergeorelis*, 325 So. 2d 431 (Fla. 1st Dist. 1976).

Supreme Court as an unreasonable and invidious discrimination against the child, depriving him of equal protection of the law as required by the Florida and federal constitutions.²³⁶ In light of this case, a district court has held that a mother who is validly married to another may testify that her children were the illegitimate children of a person now deceased in order for them to claim inheritance rights.²³⁷ A son who was born out of wedlock, but whose father subsequently, on repeated occasions both before and after he married the mother, acknowledged in writing that he was the father and raised his son until he was an adult, is a legitimate son under section 742.091 of the Florida Statutes (1975) and section 731.29(1) of the Florida Statutes (1973).²³⁸ He is, of course, also the "blood issue" of his father. Therefore he may take as a beneficiary of a trust established by his grandfather.

A. Legislation

An unwed pregnant minor may now consent to the performance of medical or surgical care or services relating to her pregnancy as if she were an adult.²³⁹ An unwed minor mother may also consent to the performance of medical or surgical care or services by a hospital, clinic or physician as if she were an adult.

No abortion now may be performed on any woman during the last trimester of her pregnancy unless: (1) two physicians certify in writing that, to a reasonable degree of medical probability, the abortion is necessary to save her life or preserve her health; or, (2) one physician certifies in writing to the medical necessity for legitimate emergency medical procedures for termination of pregnancy in the last trimester, and another physician is not available for consultation.²⁴⁰

XVI. MISCELLANEOUS

A. Torts

A wife's action for loss of consortium is a derivative right. She may recover only if her husband has a valid cause of action against

236. *Gammon v. Cobb*, 335 So. 2d 261 (Fla. 1976), *overruling* *Kennelly v. Davis*, 221 So. 2d 415 (Fla. 1969).

237. *Williams v. Estate of Long*, 338 So. 2d 563 (Fla. 1st Dist. 1976).

238. *Barnett v. Barnett*, 336 So. 2d 1213 (Fla. 1st Dist. 1976).

239. FLA. STAT. § 458.215 (Supp. 1976).

240. FLA. STAT. § 458.225 (Supp. 1976).

the tort-feasor. A judgment in favor of the tort-feasor when he is sued by the husband would bar the wife's action under an estoppel by judgment theory. By the same token, if the husband has been successful in a tort suit against the tort-feasor, then estoppel by judgment should also operate in favor of the wife insofar as the issue of liability is concerned when she sues the tort-feasor in a subsequent action.²⁴¹

The Supreme Court of Florida, upholding the District Court of Appeal, Third District, has held that the Florida Emancipation Act,²⁴² which removed the disability of nonage for all persons who are eighteen years of age or older, impliedly repealed or amended the Florida Wrongful Death Act²⁴³ which provided that a minor child meant an unmarried child under twenty-one years of age.²⁴⁴

Section 768.21 of the Florida Statutes (1975), which denies parents of an adult child the right to damages for mental pain and suffering for his death, again has been upheld as constitutional by the Florida Supreme Court.²⁴⁵

In a case of first impression in Florida, it has been decided that minor children of an injured father do not have any derivative claim against a tort-feasor for loss of support, instruction or companionship in any case where the father does not die from his injuries.²⁴⁶

The Florida Dog Bite Statute makes the dog owner an insurer against injury caused by his dog unless the injured person "shall mischievously or carelessly provoke or aggravate the dog."²⁴⁷ In a case of first impression, it has been decided that because a child under six is legally incapable of negligence she is likewise incapable of carelessness.²⁴⁸ As a result, when a five and one-half year old girl accidentally rode her bicycle over the tail of a German Shepherd, and was bitten in the face when she went back to comfort the dog, she could recover from the owner of the dog.

Section 768.21(6)(c) of the Florida Statutes (1975), provides that in wrongful death actions "evidence of remarriage of the dece-

241. *Davis v. Asbell*, 328 So. 2d 204 (Fla. 1st Dist. 1976).

242. FLA. STAT. § 743.07 (1975).

243. FLA. STAT. § 768.18(2) (1975).

244. *Hanley v. Liberty Mut. Ins. Co.*, 334 So. 2d 11 (Fla. 1976), *aff'g* 323 So. 2d 301 (Fla. 3d Dist. 1975).

245. *Bassett v. Merlin, Inc.*, 335 So. 2d 273 (Fla. 1976).

246. *Clark v. Suncoast Hosp., Inc.*, 338 So. 2d 1117 (Fla. 2d Dist. 1976).

247. FLA. STAT. § 767.04 (1975).

248. *Harris v. Moriconi*, 331 So. 2d 353 (Fla. 1st Dist. 1976).

dent's spouse is admissible." In a case of first impression, it has been held that although the evidence of remarriage of the decedent's spouse is admissible, it is admissible solely so that the whole truth may be known by the jury.²⁴⁹ The jury may not consider this remarriage in mitigation of any elements of damage recoverable under the statute by the surviving spouse. In addition, when the parents of an adult married daughter are parties to the suit filed by her husband, the parents may recover for loss of services of a household nature which were regularly performed for them by the daughter even though the parents did not replace these services with hired help after her death.

In another case of first impression, it has been held that when a plaintiff husband does not meet at least one of the threshold requirements of the no-fault insurance law of Florida, his wife will also lose her right of action for loss of consortium against the insured tort-feasor.²⁵⁰

B. Legislation

Any minor who has reached the age of seventeen may now donate blood (without compensation) without the consent of his parents.²⁵¹ Consent may not be disaffirmed because of minority unless the parents specifically object in writing to the donation or to the penetration of the minor's skin.

The legislature has recognized the importance of neonatal health care and has authorized the Department of Health and Rehabilitative Services to designate and support (by grants) Regional Neonatal Intensive Care Program Centers in hospitals in the state.²⁵²

249. *Smyer v. Gaines*, 332 So. 2d 655 (Fla. 1st Dist. 1976).

250. *Faulkner v. Allstate Ins. Co.*, 333 So. 2d 488 (Fla. 2d Dist. 1976).

251. FLA. STAT. § 743.06 (Supp. 1976).

252. FLA. STAT. §§ 383.15-21 (Supp. 1976).