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Family Law

Daniel E. Murray

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FAMILY LAW*

DANIEL E. MURRAY**

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* The materials surveyed herein extend from 250 So. 2d 257 through 283 So. 2d 102 and the legislation enacted by the 1972 and 1973 Regular and Special Sessions of the Florida Legislature.

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I. INTRODUCTION

The Dissolution of Marriage Act, chapter 61 of the Florida Statutes (1971), was widely heralded as a "no-fault" divorce act, and it was the belief of many (including this author) that it would no longer be necessary for lawyers in dissolution actions to introduce evidence as to the marital transgressions of the parties in order for the courts to find that marriages were irretrievably broken. This belief was destroyed by the Supreme Court of Florida's decision that in all dissolution of marriage cases (whether contested or uncontested) "all of the surrounding facts and circumstances are to be inquired into to arrive at the conclusion as to whether or not indeed the marriage has reached the terminal stage based upon facts which must be shown."¹ Subsequent to this decision, the District Court of Appeal, Fourth District, held (in reversing the trial court judge) that the following facts pointed to an irretrievably broken marriage:

The wife filed her petition to dissolve the marriage because it was irretrievably broken. The husband answered admitting said allegation. . . . At final hearing the wife testified the marriage was irretrievably broken because she no longer loved her

1. *Ryan v. Ryan*, 277 So. 2d 266, 271 (Fla. 1973), followed in *Simmons v. Simmons*, 279 So. 2d 351 (Fla. 2d Dist. 1973).

husband and could not live with him. Further inquiry developed that he had physically abused her during the marriage and that he paid little or no attention to their children; that they had spent untold hours discussing their problems, always without success; that she had suffered mental and physical abuse from him she would never forget; that he had sued her once before for divorce. The trial judge then interrogated the husband who stated essentially that at one time he had tried to get her to seek counselling without success; that in view of her steadfast position for some five months that the marriage was broken, he did not feel they could put it back together. The chancellor then announced he would require them to seek counselling in the hope the marriage might be saved. From such a judgment ordering counselling and withholding a determination as to the termination of the marriage, the wife appealed and the husband joined with her in the appeal.²

A cursory glance at the above quotation reveals that the wife proved a case of "extreme cruelty" under former section 61.041(4) of the Florida Statutes (1970 Supp.). Thus, the courts have resurrected the old "fault" approach.

In a more encouraging vein, the courts have seemed to follow the teachings of the new act in treating the spouses equally in the awarding of alimony, child custody and support, etc.

II. DISSOLUTION OF MARRIAGE

A. *Jurisdiction*

Normally, the death of either party to a divorce action terminates further proceedings in the action; however, the case of *Taylor v. Wells*³ presented an exception (in a case of apparent first impression in the United States) to this rule. A husband brought suit for divorce against his wife. A default was entered against the wife for her failure to file an answer. Within the ten day period provided for by rule 1.540(b) of the Florida Rules of Civil Procedure, the attorney for the wife moved to set aside the default because of excusable neglect on his part in marking his calendar. The husband died on the same day that the hearing on this motion was conducted, and the wife contended that inasmuch as property rights were concerned the divorce should be set aside. The District Court of Appeal, First District, agreed with the wife's contention and held that the divorce should be set aside and that she be permitted to file an answer and to introduce evidence (within limitations articulated by the court) dealing with the allegations of the deceased husband's complaint.

"[N]ormally, and perhaps *presumptively*, but not *inevitably*, a wife

2. *Nelms v. Nelms*, 285 So. 2d 50 (Fla. 4th Dist. 1973).

3. 265 So. 2d 402 (Fla. 1st Dist. 1972).

acquires her husband's domicile upon marriage."⁴ However, when an English husband furnished a marital home in England, and the wife lived there only briefly and maintained a home in Florida for her minor children by a prior marriage in accordance with a court decree, a determination that she had not given up her Florida domicile was supported by the law and the facts.

B. Venue

In a case of first impression under the Dissolution of Marriage Act, the District Court of Appeal, Second District, has held that the county where the marriage is alleged to have become irretrievably broken constitutes the place where the cause of action accrued under the Florida venue statute, section 47.011 of the Florida Statutes (1971). This place where the marriage became irretrievably broken may not necessarily be the county in which the parties lived together. For example, if the wife leaves the marital home in Polk County and moves to Hillsborough County where the husband embarrassed her at her place of employment, then the cause of action arose in Hillsborough County.⁵

A defendant who has resided in a rest home in Orange County, Florida since 1966 is a resident of that county for venue purposes in a dissolution of marriage action even though his legal residence or domicile might be in Lake County, Florida.⁶

A wife who has been granted a judgment of separate maintenance in Escambia County does not have a venue privilege as a defense to her husband's petition filed in Volusia County which sought modification of the judgment of separate maintenance and dissolution of the marriage when the husband was a resident of the latter county. The venue was properly laid as to the husband's modification cause of action and even though venue was improper as to the husband's dissolution action, when venue is proper as to at least one of the causes of action the motion to dismiss for improper venue must be denied.⁷

C. *An Irretrievably Broken Marriage*

In a case of first impression in Florida, the District Court of Appeal, First District, has attempted to define the legislative concept of an "irretrievably broken marriage." A trial court had dismissed a dissolution petition on the ground that the marriage of 39 years had not been irretrievably broken. The appellate court reversed, holding that the standard should be a subjective rather than an objective one. "If refusal of dissolution would amount to a legal perpetuation of a relationship

4. *Ashmore v. Ashmore*, 251 So. 2d 15, 16 (Fla. 2d Dist. 1971) (emphasis in original).

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

6. *Hunt v. Hunt*, 280 So. 2d 63 (Fla. 4th Dist. 1973).

7. *Costner v. Costner*, 263 So. 2d 852 (Fla. 1st Dist. 1972).

which has ceased to exist in fact, the petition should be granted.”⁸ In every case

the important issue is the possibility of a reconciliation and the marriage as a whole must be considered. Before dissolution is granted, the court should be satisfied that the parties can no longer live together because their difficulties are so deep and substantial that no reasonable effort could eradicate them so as to enable the parties to live together in a normal marital relationship. If the trial judge doubts the petitioner’s testimony that his or her marriage has irretrievably broken down, he should continue the proceedings to determine if reconciliation is possible.⁹

It is interesting to contrast the opinion of the majority with the dissenting view of Spector, J., which seems to be a retreat to the past. Justice Spector cited pre-Dissolution Act cases for the proposition that “it would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it.”¹⁰ It may be “a deadly blow at public morals,” but the Dissolution of Marriage Act would seem to express the policy that a dissolution should be granted if the marriage “has ceased to exist in fact.”¹¹

The Supreme Court of Florida has upheld the constitutionality of the Dissolution of Marriage Act by holding that it does not unconstitutionally impair the obligation of the marriage contract nor adversely affect property rights of the parties; that it is not unconstitutionally vague, uncertain and indefinite, and that it does not unconstitutionally apply retroactively to marriages entered into prior to its effective date. The author has no quarrel with the court’s holdings; however, the court’s discussion of the concept that the marriage is “irretrievably broken” is less than clear. The court stated that the petition for dissolution need simply allege that the marriage is irretrievably broken, and that the granting of the petition is not dependent upon any showing of fault. However the court states:

It is suggested by the appellant that a circuit judge would hesitate to adjudicate that a marriage is *not* “irretrievably broken” under the present statute when the petitioner simply says that is the fact; that the judge becomes nothing more than a ministerial officer receiving the “irretrievably broken” message and having so received it, being thus compelled to drop this legislative guillotine upon the marriage, thus excising the troublesome mate from the petitioner because the petitioner has subjectively and unilaterally determined that his marriage is irretrievably broken.

8. *Riley v. Riley*, 271 So. 2d 181, 183 (Fla. 1st Dist. 1972).

9. *Id.* at 183.

10. *Id.* at 183-84.

11. *Id.* at 183.

We do not view the matter of dissolution as being such a simple, unilateral matter of one mate simply saying "I want out." All of the surrounding facts and circumstances are to be inquired into to arrive at the conclusion as to whether or not indeed the marriage has reached the terminal stage based upon facts which must be shown. Even in uncontested dissolutions, the court would properly make inquiry to determine this fact, for the statute itself in section 61.052 provides in subsection (2) the basic predicate: "Based on the evidence at the hearing. . . . [and even] (a) . . . if the respondent does not . . . deny that the marriage is irretrievably broken, the court shall enter a judgment of dissolution of the marriage, *if the court finds that the marriage is irretrievably broken.*"¹²

D. Evidence

The Supreme Court of Florida, in upholding the District Court of Appeal, First District, has held that evidence consisting of telephonic conversations between a wife and her lover which were obtained by the husband tapping the family telephone without the knowledge of the wife are not admissible into evidence under section 934.01(4) of the Florida Statutes (1971), which provides that the interception of telephonic communications should not be allowed without a court order when none of the parties to the communication has consented to the interception.¹³

Admissions of adultery as revealed in diary entries made by the wife together with corroborating testimony by private investigators that the alleged paramour was in the woman's home for entire evenings and into the morning hours are sufficient to lead the guarded discretion of a reasonable and just man to a finding that adultery had been proven.¹⁴

E. Defenses

In a case of first impression decided under the Dissolution of Marriage Act, the District Court of Appeal, Second District, has held that sexual relations indulged in by the parties during separation are not enough without a clear showing of intent to reconcile to deny a dissolution of marriage. Further, the trial court should not deny dissolution of the marriage *with prejudice*; the trial court judge may either deny dissolution or, if he is in doubt, should continue the proceedings for not more than three months to enable the parties to reconcile or order either or both parties to consult professional counselors.¹⁵

12. *Ryan v. Ryan*, 277 So. 2d 266, 271 (Fla. 1973) (original emphasis), *followed in Simmons v. Simmons*, 279 So. 2d 351 (Fla. 2d Dist. 1973).

13. *Markham v. Markham*, 272 So. 2d 813 (Fla. 1973), *aff'g* 265 So. 2d 59 (Fla. 1st Dist. 1972).

14. *Leonard v. Leonard*, 259 So. 2d 529 (Fla. 3d Dist. 1972).

15. *Nooe v. Nooe*, 277 So. 2d 835 (Fla. 2d Dist. 1973).

F. Procedure

Section 57.081(1) of the Florida Statutes (1971) provides that insolvent persons having claims shall receive the services of the sheriff in serving summons in the county in which the insolvents reside without any charge. The District Court of Appeal, Fourth District, has held that although this statute, by its wording, is limited to the county in which the insolvent resides, it would be a denial of due process to hold that an insolvent of one county is not entitled to have the sheriff of another county serve without charges a summons upon the insolvent's spouse in a dissolution of marriage case. As a result, the court issued a writ of mandamus to compel the sheriff of St. Lucie County to serve a summons upon the husband at the request of the wife who was a resident of Dade County, Florida.¹⁶

When a trial court judge resigns his position before signing a final decree of divorce, a successor judge does not have the power to sign a valid final judgment which was drafted by the first judge even though the first judge states in an affidavit that he had mentally decided the case and that the drafted final judgment was in accordance with his mental decision. The case must either be retried before a successor judge or the parties may stipulate that the successor judge may decide the case in whole or in part based upon the transcript of the original trial.¹⁷

It is permissible for a trial court to strike the wife's pleadings and to enter a default against her because of her failure to abide by a court order which deals with discovery.¹⁸ A trial court has the power to enjoin a wife from further prosecution of additional proceedings to enforce rights which she has already litigated in dissolution proceedings.¹⁹

G. Collateral Attack

Under the usual rule in Florida, a stranger to a divorce judgment can impeach the judgment only when enforcement of the judgment is attempted so as to affect the previously acquired rights or interests of the attacker. The District Court of Appeal, Third District, held that this rule does not prevent children of a deceased testator from showing that the alleged widow of the deceased (their step-mother) was not the widow because she had never received any kind of judicial decree in the courts of Mexico divorcing her from her first husband. The children were not attempting to attack a divorce judgment, but rather they were attempting to show that no judgment had ever been entered.²⁰

The District Court then certified to the Supreme Court of Florida

16. *State ex rel. Shellman v. Norvell*, 270 So. 2d 417 (Fla. 4th Dist. 1972).

17. *Silvern v. Silvern*, 252 So. 2d 865 (Fla. 3d Dist. 1971).

18. *Azar v. Azar*, 263 So. 2d 266 (Fla. 3d Dist. 1972).

19. *Herskowitz v. Herskowitz*, 281 So. 2d 595 (Fla. 3d Dist. 1973).

20. *In re Estate of Kant*, 265 So. 2d 524 (Fla. 3d Dist. 1972).

that it had passed on a question of great public interest in that it held that

the heirs-at-law of a deceased may show the fallaciousness of a purported judgment of divorce between the purported widow and her former husband when such attack is necessary to show that the purported widow is not the true widow of the deceased.²¹

The supreme court affirmed the district court and held that the heirs-at-law had standing to collaterally attack the purported Mexican divorce judgment on the ground that it was void (not merely voidable) and that they were financially affected by the judgment insofar as their rights to take by inheritance from their deceased father were concerned.

H. *Legislation*

Service of process may now be used for the dissolution or annulment of marriages.²²

III. ALIMONY

A. *Jurisdiction*

When a non-resident husband has real property in Florida, a Florida court which has jurisdiction over the wife and the marital res may enter a decree dissolving the marriage and awarding alimony and child support to be paid out of the property, but it may not order the husband to pay alimony and child support unless personal jurisdiction is obtained over him.²³

A successor trial court judge may not upon motion clarify a final dissolution of marriage judgment so that additional substantial obligations will relate back to the date of the entry of the original final judgment. Under section 61.14 of the Florida Statutes (1971) the successor trial court judge may modify the judgment prospectively, but he cannot change it retroactively.²⁴

B. *Reservation of Jurisdiction to Award Alimony*

The District Court of Appeal, Third District, has held that a trial court in a dissolution of marriage action is not required as a matter of law to reserve jurisdiction to award periodic alimony in the future, although it may be an abuse of discretion by the trial court to do so when the facts of a particular case call for a reservation of jurisdiction in the

21. *In re Estate of Kant*, 272 So. 2d 153, 154 (Fla. 1973).

22. Fla. Laws, 1973, ch. 73-5, amending FLA. STAT. § 49.011(4) (Supp. 1972).

23. *Wood v. Wood*, 276 So. 2d 527 (Fla. 3d Dist. 1973).

24. *Floyd v. Floyd*, 281 So. 2d 63 (Fla. 1973).

event of a subsequent change in circumstances.²⁵ However, the same district court subsequently held that it is an abuse of discretion and reversible error if the trial court fails to reserve jurisdiction in such cases.²⁶

The same Third District also held that it is proper for a trial court to award lump sum alimony payable in monthly installments over a period of years and to reserve jurisdiction to award periodic alimony at the conclusion of the monthly installments if it should be needed at that time.²⁷

An award of \$1.00 per year periodic alimony has been upheld on the basis that it is simply a reservation of jurisdiction over the issue of periodic alimony; it is proper to deny alimony when there is a lack of present need and to reserve jurisdiction to award alimony in the future upon a change of circumstances. The award of a nominal amount is apparently just another way of accomplishing the same end.²⁸

C. *Rehabilitative Alimony*

In a case of first impression under section 61.14 of the Florida Statutes (1971) (the Dissolution of Marriage Act) the District Court of Appeal, Third District, has held that when a trial judge reserves jurisdiction over the parties and the case, he may exercise his discretion in either

(1) setting a definite date at which rehabilitative alimony should terminate (or to set a specific date for a hearing on such matter at a time in the future) or, (2) in failing to set such a date. Thus, the chancellor would be reversed only for an abuse of such discretion under the circumstances of the case then being reviewed.²⁹

It has been held that it is not reversible error for a trial court to limit an award of alimony to a period of 26 weeks, even though a former wife seemingly showed a need for the alimony (because of physical and emotional problems) and the former husband was wealthy, when the court retained jurisdiction over the parties and subject matter. The ex-wife could seek modification before or after the expiration of the 26 week period.³⁰

A former wife is not necessarily entitled to an award of alimony which will enable her to maintain her pre-divorce standard of living. The court may, in appropriate circumstances, award lump sum alimony to tide her over until she can acquire sufficient training to support herself. The court should further retain jurisdiction to award alimony in the future upon a proper showing by the former wife.³¹

25. *Poe v. Poe*, 263 So. 2d 644 (Fla. 3d Dist. 1972).

26. *Marshall v. Marshall*, 273 So. 2d 107 (Fla. 3d Dist. 1973).

27. *Langston v. Langston*, 257 So. 2d 625 (Fla. 3d Dist. 1972).

28. *Munger v. Munger*, 249 So. 2d 772 (Fla. 4th Dist. 1971).

29. *Stamm v. Stamm*, 266 So. 2d 413, 415 (Fla. 3d Dist. 1972).

30. *Melin v. Melin*, 265 So. 2d 414 (Fla. 3d Dist. 1972).

31. *McRee v. McRee*, 267 So. 2d 21 (Fla. 4th Dist. 1972).

Without any citation to the new Dissolution of Marriage Act, the District Court of Appeal, First District, has held that a wife who has had a sufficient time to rehabilitate herself and to regain her health by overcoming her drinking problem should not receive an award of permanent alimony.³²

The District Court of Appeal, Third District, has refused to disturb an award of rehabilitative alimony in the amount of \$25 per week for a period of three months and the payment of the former wife's medical bills by the former husband for a period of only three months.³³

When a husband was earning between \$11,000 and \$12,000 per year, the wife and a young child had returned to her parents' home where they had no living expenses, and the wife was to take training as beautician at a cost of approximately \$800, an award of \$15 per week "rehabilitative alimony" was considered to be inadequate by the District Court of Appeal, Third District, and was increased to \$30 per week for a period of one year.³⁴

It is reversible error to award alimony for a fixed period of four years at the rate of \$85 per week for a period of two years and \$40 per week for the following two years when the spouses had been married for twenty-three years, the wife was ill and did not possess any marketable skill. The case was remanded with instructions to award permanent alimony in an amount based upon her needs and her former husband's ability to pay.³⁵

D. *Defenses to an Award*

In accordance with the new Dissolution of Marriage Statute,³⁶ the District Court of Appeal, Third District, has held that the husband's defense of adultery by the wife is not a complete bar to an award of alimony. Instead, the trial court has discretion to consider the circumstances in determining whether alimony should be awarded and the amount thereof to the adulterous spouse. The trial court judge may in the proper exercise of his discretion completely disregard the question of adultery in making the award.³⁷

In one of the first cases arising under the alimony provisions of the new Dissolution of Marriage Act,³⁸ the District Court of Appeal, First District, in reversing a trial court award of alimony, held that when the property of the parties has been evenly divided between them, each of them is able to work, and the one child of the marriage is an adult and self-supporting, the wife is not entitled to any alimony. The court based its decision on the view that:

32. *Beard v. Beard*, 262 So. 2d 269 (Fla. 1st Dist. 1972).

33. *Kirchheiner v. Kirchheiner*, 278 So. 2d 639 (Fla. 3d Dist. 1973).

34. *Primato v. Primato*, 274 So. 2d 568 (Fla. 3d Dist. 1973).

35. *Wilson v. Wilson*, 279 So. 2d 893 (Fla. 4th Dist. 1973).

36. FLA. STAT. § 61.08 (1973).

37. *Vandervoort v. Vandervoort*, 265 So. 2d 77 (Fla. 3d Dist. 1972).

38. FLA. STAT. § 61.08 (1973).

The new concept of the marriage relation implicit in the so-called "no fault" divorce law . . . places both parties to the marriage on a basis of complete equality as partners sharing equal rights and obligations in the marriage relationship and sharing equal burdens in the event of dissolution.³⁹

It is reversible error for a trial court to allow a husband to set-off against his alimony obligations monies paid by him on account of a business transaction between the parties in the absence of compelling equitable considerations.⁴⁰

In a case of first impression in Florida, the Fourth District Court of Appeal has held that "*in the absence of compelling equitable criteria and considerations to the contrary*, a husband shall not be permitted to set-off against his alimony obligation monies paid by him on account of a joint and several income tax liability."⁴¹

It is not an abuse of discretion for a trial judge to deny alimony to a wife when the marriage was of short duration, the wife's son by a prior marriage had stolen the husband's credit card and check book and had committed forgeries, the wife received the couple's mobile home and the husband was a victim of Parkinson's disease and was receiving a V.A. pension.⁴²

E. Criteria for the Award

In a case of first impression under the Dissolution of Marriage Act, the District Court of Appeal, Fourth District, has held that since under the former law the wife's entitlement to alimony depended upon a showing of her need and the husband's ability to pay, now the husband's entitlement to alimony likewise depends upon a showing of his need and the wife's ability to pay.⁴³

If a husband and wife have approximately the same amount of income, it is an abuse of discretion for a trial court judge to award alimony of \$50 per week to the wife and the exclusive use of the jointly held former home; an alimony award in the form of the use of the home is sufficient.⁴⁴

An award of \$100 per week for approximately three months and \$75 per week thereafter for alimony and child support for one child is proper when the facts show that the husband was drawing \$200 to \$300 per week from a business in which he is the one-half owner, and he owns a 1972 Cadillac automobile and two parcels of property held with his wife as an estate by the entirety.⁴⁵

39. Thigpen v. Thigpen, 277 So. 2d 583, 585 (Fla. 1st Dist. 1973).

40. Rankin v. Rankin, 268 So. 2d 573 (Fla. 3d Dist. 1972).

41. Chappell v. Chappell 253 So. 2d 281, 287 (Fla. 4th Dist. 1971) (original emphasis).

42. Swain v. Swain, 270 So. 2d 747 (Fla. 3d Dist. 1972).

43. Lefler v. Lefler, 264 So. 2d 112 (Fla. 4th Dist. 1972).

44. Weston v. Weston, 251 So. 2d 315 (Fla. 4th Dist. 1971).

45. Maroun v. Maroun, 277 So. 2d 572 (Fla. 3d Dist. 1973).

The District Court of Appeal, Third District, has held it to be reversible error to award a wife \$25 per week alimony (in addition to \$15,000 lump sum alimony) for a limited period to terminate when the parties' sixteen-year-old child becomes emancipated or sooner if the wife remarries, when the parties had been married for 23 years, the wife had earned only three or four hundred dollars a year in recent years, she had custody of the minor child and the husband had assets worth approximately \$200,000. The court increased the award to \$50 per week and provided that the award should continue until her remarriage or death.⁴⁶

The primary criteria to be used in determining the amount of an alimony award are the husband's ability to pay (which is based upon his income as well as his capital assets) and the needs of the wife to live in a manner reasonably commensurate with that provided by her husband during the marriage.⁴⁷

F. *Allocation of Amounts*

The District Court of Appeal, Third District, has disapproved a final judgment which ordered a former husband to pay numerous items (such as gas expense, mortgage payments, camp expenses, etc.) which collectively would consist of alimony and child support, and it ordered the trial court to divide the amounts awarded into separate alimony and child support payments for the benefit of the parties, the court and for income tax reasons.⁴⁸

It is reversible error to award a lump sum per week for both alimony and child support; the judgment should specify amounts for each recipient.⁴⁹

G. *Lump Sum Alimony*

A lump sum alimony award is not appropriate when the wife is permanently disabled, is of advanced years and lacks income and assets.⁵⁰

Although the remarriage of the wife will normally terminate her right to continued payments of alimony, remarriage will not terminate a lump sum alimony award even though it is payable in installments.⁵¹

If a husband continues to make payments of temporary alimony after the wife has filed her appeal, he is entitled to offset these payments against an award of lump sum alimony.⁵²

46. *Fligelman v. Fligelman*, 272 So. 2d 199 (Fla. 1973).

47. *Firestone v. Firestone*, 263 So. 2d 223 (Fla. 1972); *Royal v. Royal*, 263 So. 2d 277 (Fla. 3d Dist. 1972).

48. *Landsberg v. Landsberg*, 259 So. 2d 727 (Fla. 3d Dist. 1972).

49. *Ecklund v. Ecklund*, 253 So. 2d 455 (Fla. 2d Dist. 1971).

50. *Calligarich v. Calligarich*, 256 So. 2d 60 (Fla. 4th Dist. 1971).

51. *Keller v. Belcher*, 256 So. 2d 561 (Fla. 3d Dist. 1972).

52. *Rankin v. Rankin*, 275 So. 2d 283 (Fla. 2d Dist. 1973).

An award of \$25 per week as alimony payable for a period of four years or until the marriage of the wife should not be construed as lump sum alimony payable in installments, but as periodic alimony. Hence, when the wife dies before the expiration of the four-year period the husband's obligation to continue payments ceases.⁵³

H. *Enforcement of the Award*

It is reversible error for a trial court to enter an order of civil contempt for non-payment of alimony which provides that the offender "may purge himself of this contempt and be released from . . . jail after six (6) months from the date of said hearing. . . ." ⁵⁴ In civil contempt proceedings for non-payment of alimony the offender has the right to purge himself of contempt at any time.

I. *Modification of Alimony*

Section 61.191 of the Florida Statutes (1971) clearly provides that the Dissolution of Marriage Act applies to all proceedings commenced on or after July 1, 1971; hence, it is error for a trial court retroactively to apply the alimony provisions of the Dissolution Act by eliminating permanent alimony which was awarded years before the act and awarding rehabilitative alimony instead.⁵⁵

An alimony award (which was based upon a separation agreement) may not be modified by the trial court upon the basis of the husband's testimony that some of his financial expectations were not achieved in the absence of any actual substantial change in his financial condition between the date of the award and the hearing for modification.⁵⁶

The District Court of Appeal, Third District, has held that periodic alimony may be increased upon application by the ex-wife when the only change of circumstance is a substantial increase in the earnings of the former husband. Judge Barkdull, in a strong dissent, was of the view that in light of modern concepts of divorce it is wrong to allow the wife to apply for modification upon this sole ground at any time during the remainder of the ex-husband's lifetime.⁵⁷

Pure property settlement agreements may not be judicially modified in Florida; however, if the agreement provides for periodic alimony for an indefinite duration and the amount of alimony is not based upon the wife's relinquishing her special equity in property held by the spouses then (under section 61.14 of the Florida Statutes (1971)) the amount of

53. *Morris v. Morris*, 272 So. 2d 202 (Fla. 2d Dist. 1973).

54. *Williams v. Williams*, 277 So. 2d 542, 543 (Fla. 2d Dist. 1973).

55. *Carmel v. Carmel*, 282 So. 2d 6 (Fla. 3d Dist. 1973).

56. *Mazzula v. Mazzula*, 275 So. 2d 29 (Fla. 4th Dist. 1973).

57. *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. 1973).

alimony may be increased or decreased because of a change in the circumstances of the parties.⁵⁸

The value of the husband's assets must be taken into consideration by the trial court when determining change of circumstances to support modification of an alimony award; current income is not the sole criterion.⁵⁹

A trial court may not eliminate the husband's obligation to pay alimony as a sanction for the wife's denial of child visitation privileges.⁶⁰

It is reversible error for a court to modify a final judgment of alimony and child support upon an oral motion of the father; any modification must be supported by a written pleading.⁶¹

It is also reversible error to terminate an alimony award upon the husband's allegations of ill health which allegedly interfered with his performance as a surgeon when the facts show that his gross income had increased. Of course, if the husband's health condition should force him to discontinue his practice or to reduce it causing an inability to pay the awarded alimony, he may petition at that time for a reduction or termination.⁶²

When a wife is awarded the use and occupation of the marital domicile held as an estate by the entirety and the husband is required to pay one-half of the cost of maintenance, this obligation is in lieu of alimony and the husband should be relieved from this obligation upon the remarriage of the wife. However, the remarriage does not automatically terminate the husband's obligation and the obligation will continue until he institutes proceedings to terminate it.⁶³

J. Duration of Liability

Normally, an award of alimony will terminate upon the death of the husband—it will not be a charge against his estate. However, if the husband consents to an award binding his estate it will be given effect. The case of *Ford v. First National Bank*⁶⁴ concerned a final divorce decree which provided for alimony "for the rest of her life or until she remarries."⁶⁵ The husband did not appeal this decree, and he made payments under it for a number of years before his death. The District Court of Appeal, Second District, held, in accordance with the teachings of the case of *Aldrich v. Aldrich*,⁶⁶ that when a husband does not appeal

58. *Schulman v. Schulman*, 273 So. 2d 403 (Fla. 3d Dist. 1973).

59. *Adams v. Adams*, 273 So. 2d 794 (Fla. 1st Dist. 1973).

60. *Vance v. Vance*, 274 So. 2d 5 (Fla. 4th Dist. 1973).

61. *Lourcey v. Lourcey*, 256 So. 2d 25 (Fla. 1st Dist. 1971).

62. *Osman v. Osman*, 280 So. 2d 67 (Fla. 3d Dist. 1973).

63. *Bernst v. Cotter*, 256 So. 2d 529 (Fla. 4th Dist. 1972).

64. 260 So. 2d 876 (Fla. 2d Dist. 1972).

65. *Id.* at 877.

66. 163 So. 2d 276 (Fla. 1964).

from a decree containing this wording and he makes payments for years he, in effect, has consented to the provision and he cannot collaterally attack this decree which has become final. As a result, his estate remains bound for the continued payments subsequent to his death.

It is reversible error for the trial court to limit the award of alimony to a six month period in the absence of proof that the needs of the wife or the ability of the husband to pay would terminate at that time.⁶⁷

K. *Legislation*

Section 61.181 has been added to the Florida Statutes to provide for the establishment by the chief judge of each judicial circuit of a depository to receive and disburse all support, alimony or maintenance payments. The chief judge is empowered to impose a fee for this service which shall not exceed three percent of the amount of the payment.⁶⁸ The Supreme Court of Florida adopted this statute as an amendment to rule 1.611 of the Florida Civil Rules of Procedure.⁶⁹

L. *Miscellaneous*

When a woman's second marriage has been declared void ab initio on the grounds of bigamy and she files suit to reinstate the alimony provisions contained in the divorce judgment against her first husband, it is error for the trial court to look behind the annulment judgment to determine whether it was based upon a bigamous marriage.⁷⁰

It is reversible error for a trial court to proceed to a final hearing and to determine questions of alimony and support without the presence of the wife or her counsel when such absence resulted from the sudden illness of the wife's attorney.⁷¹

IV. PROPERTY RIGHTS

A. *Jurisdiction*

When a dissolution judgment has awarded the wife possession of a jointly held motel, whose income after the payment of a mortgage, taxes, etc. is to be used to support the wife and children, the court does not have jurisdiction approximately one year later to award the wife a salary for her management of the motel. If she is entitled to a salary, she must file an independent law suit against her former husband.⁷²

Although it may have been erroneous and subject to reversal upon

67. *Schwarb v. Schwarb*, 259 So. 2d 745 (Fla. 1st Dist. 1972).

68. Fla. Laws, 1973, ch. 73-112, creating FLA. STAT. § 61.181 (1973).

69. *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204 (Fla. 1973).

70. *Wertheim v. Wertheim*, 262 So. 2d 723 (Fla. 3d Dist. 1972).

71. *Diaz v. Diaz*, 258 So. 2d 37 (Fla. 3d Dist. 1972).

72. *Serge v. Serge*, 276 So. 2d 86 (Fla. 4th Dist. 1973).

direct appeal for a trial court judge to have awarded sole possession of the family home (owned as an estate by the entirety) to the husband, the judgment was not subject to attack two years after its rendition under rule 1.540 of the Florida Rules of Civil Procedure. The judgment was not void, and its provisions are binding even though they might be considered erroneous.⁷³

Once a trial court has adjudged that a tenancy by the entirety has become a tenancy in common as the result of the divorce of the parties, the court does not have jurisdiction a few years later to order that the husband's interest be conveyed to the wife as a means of providing housing for her and the children of the marriage.⁷⁴

When a trial court judge has confirmed the findings of a special master regarding the property rights of the parties, this judgment is res judicata (after the expiration of the period for appeal) and the court is without power to modify these property rights.⁷⁵

A trial court does not have jurisdiction to partition real and personal property of the spouses in a divorce action when the husband's counterclaim merely contains a simple prayer for the partition; a partition action must be supported by pleadings which will satisfy the due process requirements of the partition statutes.⁷⁶

B. Gifts

When title to property (whether real or personal) is taken in the joint names of husband and wife, a presumption of a gift to the wife arises, and this presumption can only be defeated by a "clear, positive and unequivocal showing that no gift was intended."⁷⁷ In order to rebut this presumption of a gift, it is necessary to prove the lack of donative intent beyond a reasonable doubt; a mere preponderance of the evidence is not enough. If, however, a husband should purchase property and then later make a gift of a one-half interest to the wife, the presumption that the husband made a gift to the wife is not conclusive and may be rebutted by a mere preponderance of the evidence. This decision seems to be inconsistent with the Florida Constitution which provides that "there shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal."⁷⁸

On the other hand, if a wife should contribute funds used in the acquisition and improvement of real property jointly owned with her

73. *Cribb v. Cribb*, 261 So. 2d 566 (Fla. 4th Dist. 1972).

74. *Walborsky v. Walborsky*, 258 So. 2d 304 (Fla. 1st Dist. 1972).

75. *Vandervoort v. Vandervoort*, 277 So. 2d 43 (Fla. 3d Dist. 1973).

76. *Rankin v. Rankin*, 258 So. 2d 489 (Fla. 2d Dist. 1972), *followed in* *Coyrendall v. Coyrendall*, 260 So. 2d 558 (Fla. 2d Dist. 1972); *Coscia v. Coscia*, 262 So. 2d 254 (Fla. 4th Dist. 1972). *But see* *Mitchell v. Mitchell*, 268 So. 2d 469 (Fla. 2d Dist. 1972).

77. *Pollak v. Pollak*, 282 So. 2d 30, 32 (Fla. 3d Dist. 1973).

78. FLA. CONST., art. X, § 5 (1968).

husband, it is presumed that she intended to make a gift to him. If the presumption is not rebutted by her, then the property is divided equally between the spouses as tenants in common.⁷⁹

C. Estates by the Entirety and In Common

A divorce decree which provides that "[t]he home is to be owned jointly between the plaintiff and the defendant,"⁸⁰ creates a tenancy in common between the parties.

In order for there to be a valid joint tenancy in either personal or real property the four unities of possession, interest, title and time must be present.⁸¹

The legend in a deed which states, "Note Pursuant to Section 689.15 Florida Statutes (F.S.A.), provision is hereby and in this instrument expressly made for the right of the survivorship between the grantees"⁸² is sufficient to create a joint tenancy with right of survivorship in the grantees.

A cotenant (former husband) who is in possession of property held as a tenancy in common with his former wife is not liable or accountable to her for the use value of the premises, unless he holds adversely to her in the sense that he has refused her the right to enjoy possession as a tenant in common.⁸³

It is reversible error for a trial court to order the wife to convey to her husband all of her interest in property held by the spouses as an estate by the entirety in the absence of an agreement between the parties providing for this division or in the absence of proper pleadings showing some special equity of the husband in the property.⁸⁴

In the absence of any reason found in the record, it is an abuse of discretion for the trial court judge to order a husband to pay off the mortgage on a marital home within 90 days in the absence of any facts in the record which show that the husband could not continue to make the mortgage payments in monthly installments.⁸⁵

The District Court of Appeal, Fourth District, has held that a conveyance of a tenancy by the entirety in realty by a husband and wife to the husband by means of a common form warranty deed which purports to also convey "dower and right of dower"⁸⁶ does not divest

79. *Davis v. Davis*, 282 So. 2d 655 (Fla. 4th Dist. 1973).

80. *Englebright v. Englebright*, 275 So. 2d 287, 288 (Fla. 3d Dist. 1973) (emphasis deleted).

81. *La Pierre v. Kalergis*, 257 So. 2d 33 (Fla. 1972), following *First Nat'l Bank v. Hector Supply Co.*, 254 So. 2d 277 (Fla. 1971).

82. *La Pierre v. Kalergis*, 251 So. 2d 885, 886 (Fla. 1st Dist. 1972).

83. *Seeholts v. Beers*, 270 So. 2d 434 (Fla. 4th Dist. 1973).

84. *Harder v. Harder*, 264 So. 2d 476 (Fla. 3d Dist. 1972); accord, *Sharpe v. Sharpe*, 267 So. 2d 665 (Fla. 3d Dist. 1972); *Kamensky v. Kamensky*, 282 So. 2d 670 (Fla. 2d Dist. 1973).

85. *King v. King*, 271 So. 2d 159 (Fla. 1st Dist. 1973).

86. *In re Estate of Hiley*, 262 So. 2d 476, 478 (Fla. 4th Dist. 1972).

the wife of her right of dower in the property when her husband predeceases her. The court was careful to note that there could, of course, be a release of dower by a wife to her husband but it must "be clearly and unequivocally accomplished"⁸⁷ by something other than a common form warranty deed.

In *Toby v. Toby*⁸⁸ a husband and wife had a joint savings account in the amount of \$15,000. The husband admitted that the money belonged to both of them. Subsequently, the funds were withdrawn and used to form a corporation and to purchase its corporate stock, with 99 shares going to the husband and one share to the wife. Subsequently, the marriage was dissolved and the District Court of Appeal, Third District, held that the wife was not entitled to one-half of the corporate stock. She did not work for the corporation, nor did she contribute any monies except the initial investment and, consequently, she was entitled only to her initial one-half of the account, \$7,500, with interest.

In a case arising under the Florida Constitution of 1885, it has been held that a husband may convey homestead property to himself and his wife (or through a straw man) as an estate by the entirety if the conveyance is supported by valid consideration, which includes a promise of marriage by a woman to the transferor, and the conveyance is not a device to circumvent the homestead rights of children by the first marriage of the husband.⁸⁹

D. *Special Equities Doctrine*

A court may adjudicate a special equity in favor of the wife in real property which is merely described by the street address, rather than by a legal description, when there is no confusion between the spouses as to which property is involved.⁹⁰

A trial court judgment which awards the family home to the wife without clearly specifying that it is because she has a special equity in it or that it is awarded upon the basis of alimony may be upheld by an appellate court when the record shows that the award is supported by both reasons.⁹¹ On the other hand, the same district court has held that in order for a wife to claim a special equity in the family home, it is incumbent upon her to prove it to the exclusion of a reasonable doubt by tracing her funds into the acquisition of the home or its furnishings.⁹²

In a somewhat confused opinion, the District Court of Appeal, Third District, has held that when a wife claims a special equity in property the court has jurisdiction to continue the case subsequent to the entry

87. *Id.* at 479.

88. 280 So. 2d 523 (Fla. 3d Dist. 1973).

89. *Camblin v. Miller*, 280 So. 2d 61 (Fla. 1st Dist. 1973).

90. *Baker v. Baker*, 271 So. 2d 798 (Fla. 3d Dist. 1973).

91. *Barbosa v. Barbosa*, 249 So. 2d 776 (Fla. 3d Dist. 1971).

92. *Singer v. Singer*, 262 So. 2d 731 (Fla. 3d Dist. 1972).

of a divorce decree to determine the special equity issue. This is particularly true when the husband's counsel has urged this conduct, the wife's counsel has agreed and the trial court has acted accordingly.⁹³

In a decision which seemingly has gone beyond the facts of the case, the District Court of Appeal, Fourth District, has held that a husband and wife are equal partners and, as a result, when property is held as an estate by the entirety by the couple it should be presumed that the property was acquired by their joint efforts. Further, a jointly held domicile ought to be divided equally between each partner with the wife's and the husband's financial contribution to the acquisition of such property to be considered as gifts to each other. A financial contribution by the wife should be interpreted as being within the realm of "ordinary marital duties"⁹⁴ or a prima facie presumption of a gift. To establish a special equity, the wife's contributions must be shown to have been "above and beyond the performance of ordinary marital duties."⁹⁵

In a relatively unusual case, it has been held that when a wife dominated the financial affairs in her family, advanced sums of money to the husband during coverture, and the husband had a "free ride" during the marriage, the wife was not entitled to a money judgment for the sums of money advanced to him.⁹⁶ The decision was based upon the idea that to award a judgment in this setting would tend to destroy the unity concept of marriage and to violate the rule that financial contributions between the spouses should be presumed to be gifts rather than loans.

On the other hand, when the spouses have saved money which has been deposited in joint savings accounts during coverture, each of them is entitled to a one-half interest in these accounts upon dissolution of the marriage.⁹⁷

When a judgment has been entered against the husband awarding his wife a special equity of a one-half interest in corporate stock held by the husband, if he appeals the award and obtains a stay of the proceeding without a bond, he is not liable for a substantial loss in value caused by a decline in the stock market during the pendency of the appeal.⁹⁸

E. Insurance

It is reversible error for a trial court to order a husband in a dissolution action to maintain an insurance policy on his life for the benefit of his former wife and to make her an irrevocable beneficiary.⁹⁹

93. *Farr v. Farr*, 249 So. 2d 761 (Fla. 3d Dist. 1971). The court stated that the case of *Sistrunk v. Sistrunk*, 235 So. 2d 53 (Fla. 4th Dist. 1970) was distinguishable on the facts, "and if it is not so distinguishable then this opinion will be in conflict therewith." *Id.* at 762.

94. *Steinhauer v. Steinhauer*, 252 So. 2d 825 (Fla. 4th Dist. 1971).

95. *Id.* at 830.

96. *Rey v. Rey*, 279 So. 2d 360 (Fla. 4th Dist. 1973).

97. *Shannon v. Shannon*, 279 So. 2d 397 (Fla. 3d Dist. 1973).

98. *Green v. Green*, 254 So. 2d 802 (Fla. 3d Dist. 1971).

99. *Moses v. Moses*, 279 So. 2d 370 (Fla. 4th Dist. 1973).

F. *Constructive Trusts*

It may be proper for a trial court to impose a constructive trust in favor of the wife as a joint owner of the marital home when the husband and wife borrowed the downpayment for the purchase of the home from the wife's grandmother and the wife had the understanding that she was to have an interest in the property but the husband took title in his name alone.¹⁰⁰

G. *Fraudulent Transactions*

In a divorce proceeding the trial court judge has the power and the rightful discretion to order a husband to repurchase shares of stock which he had sold to his wife by means of fraud one and one-half years prior to their marriage and when he further defrauded her by the manner in which he conducted the corporate affairs during the 17 days they lived together as husband and wife.¹⁰¹

A husband who has conveyed real property to his wife for the purpose of hindering or defrauding his creditors has no standing in a court of equity to recover the property from the grantee-wife.¹⁰² However, the District Court of Appeal, Fourth District, has held that when a wife fraudulently acquires virtually all of her husband's property and then subsequently conveys it to her lover as a result of his fraud and of her desire to protect the property from the reach of her husband's divorce action, the wife may recover the property from the lover on the theory that she was less guilty of wrongdoing than her lover was.¹⁰³

H. *Miscellaneous*

A judgment for arrearages in alimony which was recorded prior to the time that a former husband acquired a homestead with a new wife may be enforced by execution against the homestead.¹⁰⁴

I. *Legislation*

At long last, the Florida Legislature has decided to give men equal rights with women by legislating that either spouse has the right to elect to take a one-third dower interest in all the real and personal property left by a deceased spouse at the time of his or her death. In addition, the enactment eliminates dower of any widow whose husband died prior to the effective date of the Act (October 1, 1973) in any property sold by the husband without the joinder of the wife unless she files a claim within three years after his death.¹⁰⁵

100. *Genter v. Genter*, 270 So. 2d 388 (Fla. 3d Dist. 1972).

101. *Truxell v. Truxell*, 259 So. 2d 766 (Fla. 1st Dist. 1972).

102. *Studdle v. Studdle*, 267 So. 2d 688 (Fla. 3d Dist. 1972).

103. *Schetter v. Schetter*, 279 So. 2d 58 (Fla. 4th Dist. 1973).

104. *Kirkland v. Kirkland*, 253 So. 2d 728 (Fla. 3d Dist. 1971).

105. Fla. Laws, 1973, ch. 73-107, *amending* FLA. STAT. §§ 731.34, .35(1)-(3), .36, 733.09, .10, .11, .13 and 734.14 (1971).

The Florida Gift to Minors Act was amended to provide for testamentary gifts and gifts in trust of securities, money or life insurance policies or annuities to minors and, to establish procedures whereby the legal representative or trustee may distribute these items to the legal custodian.¹⁰⁶

An equal rights statute which prohibits any discrimination based on sex, marital status or race in the areas of loaning money, granting credit, or equal pay for services performed has been enacted. The victim of any discrimination under this act may bring a civil action, and he or she shall be entitled to collect not only compensatory damages but also punitive damages and reasonable attorney fees.¹⁰⁷

V. ATTORNEY'S FEES

A. *Jurisdiction*

When a court enters a default judgment against a husband in a dissolution of marriage case and subsequently grants the dissolution and awards attorney's fees, the court does not have power, eleven months later, to vacate the award of attorney's fees upon the basis that the court originally lacked jurisdiction to do so because the former husband had allegedly divorced the wife (without her knowledge) prior to her suit against the husband.¹⁰⁸

Chapter 73-84 of the Florida Statutes provides that when motions are filed in the appellate courts for awards of attorneys' fees for services in such courts, the courts are to remand the motions to the trial court for assessment of the fees. The District Court of Appeal, Third District, has held that this statute is unconstitutional because section 2(a) of article V of the Florida Constitution provides that only the Supreme Court of Florida has the power to adopt rules of practice and procedure in all courts. The Legislature has the power to repeal a court-created rule of practice, but it does not have the power to adopt a rule of practice. As a result, the appellate courts have jurisdiction to award attorney's fees.¹⁰⁹

B. *Appeals*

Section 733.19 of the Florida Statutes (1971) prohibits levy of execution of judgment against the estate of a deceased which was obtained prior to the death of the deceased. Consequently, it is reversible error for a trial court judge to order the posting of a supersedeas bond as a condition to appeal from an order awarding attorney's fees in a dissolution of marriage action which was entered prior to the death of the deceased.¹¹⁰

106. Fla. Laws, 1973, ch. 73-202, *amending* FLA. STAT. § 710.03 (1971).

107. Fla. Laws, 1973, ch. 73-251.

108. *West v. West*, 269 So. 2d 689 (Fla. 4th Dist. 1972).

109. *Carmel v. Carmel*, 282 So. 2d (Fla. 3d Dist. 1973).

110. *Donner v. Donner*, 276 So. 2d 516 (Fla. 3d Dist. 1973).

When a dissolution of marriage case is appealed and the appealing wife does not ask the appellate court to award attorney's fees for the appeal, and if the appellate court does not fix or refer to attorney's fees in the decision or mandate, the trial court upon remand of the case will not have the power to award attorney's fees for the appeal.¹¹¹

Inasmuch as the Dissolution of Marriage Act provides that an attorney may enforce an award of attorney's fees in his name,¹¹² it would appear that the very recent case of *Simkins v. Simkins*¹¹³ has been effectively overruled. *Simkins* held that since an attorney for whose benefit a fee is allowed is not a party to a divorce case he may not appeal therefrom and is not entitled to move in his own name for a rehearing or to file other post-trial motions for reconsideration of the order making the fee award. Further, when he does file a post-trial motion it does not operate to toll or extend the period for appeal.

C. *Rights to an Award*

Even though a trial court may be correct in refusing to award alimony to a wife because she has assets which produce income sufficient to support her in accordance with her former standard of living, it may be reversible error to refuse to order her husband to pay her attorney's fees. "[T]he discretion of the court should not have been exercised to require the [wife] to pay her attorneys out of the monies or assets which the court found were [bases] for denying her application for alimony."¹¹⁴

A court does not have the power to order that in the event of any subsequent proceedings dealing with the modification of child support payments, each of the parties would be responsible for his or her own attorney's fees; this issue must be decided when and if it is raised in the future.¹¹⁵

Under former section 61.15(1) of the Florida Statutes (1969), it has been held that a wife may be awarded attorney's fees in the appellate court for litigation dealing with her execution of an alimony judgment against the property of her former husband.¹¹⁶

D. *Amount*

The Supreme Court of Florida has upheld an attorney's fee award of "slightly over \$100 per hour for legal services"¹¹⁷ (the fee was \$85,000)

111. *Fatolitis v. Fatolitis*, 271 So. 2d 227 (Fla. 2d Dist. 1973).

112. FLA. STAT. § 61.16 (1973).

113. 249 So. 2d 444 (Fla. 3d Dist. 1971).

114. *Nadeau v. Nadeau*, 259 So. 2d 541, 542 (Fla. 3d Dist. 1972).

115. *Griffin v. Griffin*, 276 So. 2d 211 (Fla. 4th Dist. 1973).

116. *Kirkland v. Kirkland*, 253 So. 2d 728 (Fla. 3d Dist. 1971).

117. *Bosem v. Bosem*, 279 So. 2d 863, 866 (Fla. 1973), *rev'g* 269 So. 2d 758 (Fla. 3d Dist. 1972), wherein the district court had frowned upon an award of attorney's fees based upon an hourly rate of \$101.70 for a total award of \$85,000 and reduced the award to \$45,000, which amounted to approximately \$50.00 per hour. Unfortunately for the wife's

in a "complex and demanding"¹¹⁸ dissolution of marriage case involving a husband who was worth over \$2,210,000 with an annual income of over \$100,000.

The District Court of Appeal, Third District, has reduced an attorney's fee award of \$85,000 to \$50,000 in a case involving from 175 to 200 hours of legal work spent primarily in investigating the amount of the husband's wealth. The wife received lump sum alimony of \$427,000 and a promise of an additional \$1,000,000 if she survived him; however, the actual negotiation of the settlement was made by the wife and the husband without the direct intervention of the wife's attorneys. The court seemed to stress the fact that an award of fees which amounted to \$425 per hour for all of the work (irrespective of the kind of work done) was excessive. It is submitted that the reduced award amounts to a fee of \$250 per hour and that this is also excessive if judged solely on an hourly basis. It is also submitted that the court erred in stressing the hourly rate of compensation over other considerations. Judge Henry, in dissent, pointed out that the fee should be measured by the results obtained, etc; the amount of time devoted is merely one factor to be used.¹¹⁹ It is unfortunate that both the majority and dissenting opinions turned on the Third District's decision in *Bosem v. Bosem*¹²⁰ because it was reversed by the Supreme Court of Florida.

A trial court's award of attorney's fees to the wife will not be upset when the amount is considerably less than the amount stated by expert witnesses, the husband produced no testimony that the amount was excessive, and a large amount of the time devoted by the lawyers for the wife was directly attributable to the "husband's recalcitrance and evasiveness."¹²¹

E. Enforcement

Contempt proceedings are available to enforce payment of attorney's fees which were awarded to a wife in a divorce judgment pursuant to an agreement between the parties which stipulated as to the amount of the fees.¹²²

attorneys, she had revealed upon deposition that she had agreed to pay her attorneys \$50.00 per hour for out of court work and \$75.00 per hour for court work and the court was obviously affected by this fact. See *Lodding v. Dunn*, 251 So. 2d 560 (Fla. 3d Dist. 1971), which affirmed an award of attorney's fees in the amount of \$75,000 from a wife and \$25,000 from the husband based upon a quantum meruit basis when the lawyers worked approximately 600 hours and the property involved was worth approximately \$500,000.

118. *Bosem v. Bosem*, 279 So. 2d 863, 866 (Fla. 1973).

119. *Donner v. Donner*, 281 So. 2d 399 (Fla. 3d Dist. 1973).

120. See note 117 *supra*.

121. *Lee v. Lee*, 262 So. 2d 6 (Fla. 4th Dist. 1972).

122. *Heitzman v. Heitzman*, 281 So. 2d 578 (Fla. 1973).

VI. ANTENUPTIAL AND POST-NUPTIAL PROPERTY SETTLEMENT AGREEMENTS

A. *Antenuptial Agreements*

The Supreme Court of Florida has held that a husband cannot in an antenuptial agreement disclaim liability for alimony, suit money and attorney's fees in a suit brought for alimony unconnected with dissolution under section 61.09 of the Florida Statutes (1969). The husband in an antenuptial agreement can disclaim liability for these items after dissolution of the marriage, but while the marriage continues (even though the parties are separated) he remains liable in spite of the agreement.¹²³ It is submitted that this decision makes no sense whatsoever. As Justice Carlton stated in a rather stinging dissent:

Being unable to find any rational distinction between a validly entered into antenuptial agreement waiving alimony subsequent to marriage which agreements have been upheld by this Court, and a validly entered into agreement which contains a paragraph providing for waiver of alimony before consummation of dissolution of the marriage, I must respectfully dissent.¹²⁴

The validity of an antenuptial agreement is presumed as a matter of law. Hence when it provides that the wife disclaims any interest in the estate of her husband and this agreement is introduced in the probate court as a purported bar to the allowance of a family allowance and election of dower, the county judge must give effect to this agreement. The burden of proving the invalidity of the agreement rests upon the party who so charges to bring separate proceedings in the circuit court. It should be noted that even though the county judge must give effect to the agreement (unless it is invalidated in the circuit court), he may still award a family allowance prior to a determination of the legal effect of the agreement, and perhaps continue it during the pendency of circuit court proceedings.¹²⁵

The case of *Posner v. Posner*¹²⁶ has made its second appearance¹²⁷

123. *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972), *rev'g* 256 So. 2d 75 (Fla. 3d Dist. 1972), which held that an antenuptial agreement which gives substantial consideration to a wife in return for her waiving all claims to alimony, suit money or other maintenance is not contrary to public policy and it will be effective to preclude the wife from recovering alimony unconnected with divorce under former section 61.09 of the Florida Statutes (1969).

124. *Belcher v. Belcher*, 271 So. 2d 7, 18 (Fla. 1972).

125. *In re Estate of Macarell*, 254 So. 2d 240 (Fla. 4th Dist. 1971). See *Benke v. Benke*, 254 So. 2d 828 (Fla. 3d Dist. 1971), for a lengthy antenuptial agreement which completely covered the parties' property interests in the event of death but which failed to cover the question of alimony in the event of death.

126. *Posner v. Posner*, 257 So. 2d 530 (Fla. 1972).

127. *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), *rev'g* 206 So. 2d 416 (Fla. 3d Dist. 1968). See also *Posner v. Posner*, 237 So. 2d 186 (Fla. 3d Dist. 1970), and *Posner v. Posner*, 245 So. 2d 139 (Fla. 3d Dist. 1971).

in the Supreme Court of Florida, and the court has held that the failure of the husband to disclose to his wife that he had the right to receive distribution from a trust corpus of \$8,400,000 and the fact that the antenuptial agreement failed to make adequate provision for her in light of this trust renders the agreement void.

B. *Post-Nuptial Agreements*

When a separation agreement was never introduced into evidence in a North Carolina suit for divorce and it was not referred to, ratified, confirmed nor made a part of the final judgment of divorce, the separation agreement was not, therefore, incorporated in the North Carolina judgment and was not entitled to full faith and credit in Florida. However, the foreign separation agreement could be sued upon in Florida as a contract right which entitles the former wife to monthly support payments. Further, under section 61.14 of the Florida Statutes (1971) the husband could counterclaim for modification of the agreement because of a change of the financial circumstances of the parties since the agreement was executed.¹²⁸

If a separation agreement provides that child support payments shall decrease in the event of the remarriage of the wife and the wife does marry another, then the liability of the father will automatically be reduced without the necessity of the father instituting modification proceedings.¹²⁹

A court has the power to modify a clause in a property settlement agreement (which was approved by a divorce decree) which provided for alimony of \$250 per month for a period of four years with the husband having the right to pay "in a lump sum the entire balance due, rather than making periodic payments over a four year period"¹³⁰ upon the basis that this alimony was neither a lump sum award nor was it a sum to be paid in return for the wife's conveying her interest in property to the husband.

A trial court is not bound by the alimony provisions of a separation agreement and may in the judgment of dissolution of marriage decrease the amounts specified in the agreement.¹³¹

A property settlement agreement (which was made part of a divorce decree) provided that if the husband should die before the wife, the estate of the husband would "be chargeable only with five years support and maintenance for said defendant wife *from the date of any Order of Court or decree that may be entered in this cause.*"¹³² The District Court of Appeal, Third District, held that the wife was entitled to

128. *Martin v. Martin*, 261 So. 2d 179 (Fla. 1st Dist. 1972).

129. *Mendel v. Mendel*, 257 So. 2d 293 (Fla. 3d Dist. 1972).

130. *Paras v. Paras*, 262 So. 2d 203, 205 (Fla. 4th Dist. 1972).

131. *Risteen v. Risteen*, 280 So. 2d 488 (Fla. 3d Dist. 1973).

132. *Graham v. Graham*, 277 So. 2d 540, 541-42 (Fla. 3d Dist. 1973) (original emphasis).

support for a period of five years after the date of the divorce decree, not for a period of five years after his death.

VII. SEPARATE MAINTENANCE

Separate maintenance has not been abolished by the new Dissolution of Marriage Act, and it may be awarded even though it may be categorized by another designation by the trial court.¹³³ It was reversible error to award alimony unconnected with divorce under former section 61.09 of the Florida Statutes (1969) in the absence of written pleadings asking for this remedy and in the absence of any proof that the husband had the ability to furnish support and was failing to do so.¹³⁴

A court cannot adjudicate property rights in real estate in a suit for separate maintenance.¹³⁵

VIII. CUSTODY AND SUPPORT OF CHILDREN

A. Custody

In an incredibly complex case, the Supreme Court of Florida has held that a nonresident father who has come to Florida to obtain custody of his child pursuant to a Florida habeas corpus order (which afforded full faith and credit to a previous North Carolina custody order) was immune from service of process in habeas corpus proceedings. These proceedings were instituted by the former wife on the day he came to Florida, and he returned to North Carolina and failed to abide by the decision of the Florida court which awarded custody of the child to its mother. Since he was immune, he could not be held in contempt of court for his failure to abide by the custody order.¹³⁶

1. CONFLICTS OF LAW

A custody decree of a foreign state is not entitled to full faith and credit in Florida because it is subject to modification as the interests of the children may require in the event of a change in circumstances; however, the decree is entitled to great weight and respect in Florida in the absence of clear and convincing proof of a change in circumstances since the rendition of the decree.¹³⁷

2. CRITERIA FOR THE AWARD

It would appear that the District Court of Appeal, First District, has broken with prior case law by upholding a trial court award of

133. Nooe v. Nooe, 277 So. 2d 835 (Fla. 2d Dist. 1973).

134. Neel v. Neel, 255 So. 2d 698 (Fla. 4th Dist. 1971).

135. Lamers v. Lamers, 277 So. 2d 582 (Fla. 4th Dist. 1973).

136. Crane v. Hayes, 253 So. 2d 435 (Fla. 1971).

137. Schmidt v. Reyes, 274 So. 2d 242 (Fla. 1st Dist. 1973); *accord*, Krasnosky v. Krasnosky, 282 So. 2d 186 (Fla. 1st Dist. 1973); Powell v. Powell, 274 So. 2d 24 (Fla. 1st Dist. 1973); Scarpetta v. DeMartino, 254 So. 2d 813 (Fla. 3d Dist. 1971).

custody of three boys, ages six, eight and ten, to the father even though the mother was found to be a fit parent. The court stated that when both parents are equally fit to have custody, normally custody of young children will be awarded to the mother. However, in this case the father was an unusually devoted parent, and the court obviously felt that this devotion tipped the scales in his favor.¹³⁸ The result of this case is consistent with section 61.13(2) of the Dissolution of Marriage Act which provides that "upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody."

Similarly, it is within the sound judicial discretion of the trial court judge to award custody of a minor child to the father when the evidence shows that it would be in the best interests of the child that he remain with the father.¹³⁹

Adulterous behavior of the wife is not sufficient in itself to deprive her from having custody of her minor children; she may be a good mother in spite of being a bad wife.¹⁴⁰ This view was reiterated by the Supreme Court of Florida which held, however, that when the adulterous relationship involves more than a casual adulterous rendezvous and the wife was living with the man in the same house with the children, the paramour physically disciplining them and giving vent to outbursts when the natural father visited his children, a trial court judge would be justified in changing custody from the mother and awarding it to the father.¹⁴¹

The District Court of Appeal, Fourth District, has held that it is reversible error for a trial court to decide the questions of child custody and support without the testimony of the mother even though a default judgment had been entered against her. The case was remanded for the purpose of taking further testimony bearing upon these two issues.¹⁴²

3. MODIFICATION OF CUSTODY

It is an abuse of discretion for the trial court judge to refuse to restore full-time custody of a child to her parents when they have made a strong showing of fitness and there was no evidence to contradict their evidence. The fact that the parents had previously lost custody because the child had suffered injuries of an undetermined origin and the judge

138. *Brust v. Brust*, 266 So. 2d 400 (Fla. 1st Dist. 1972). In a pre-Dissolution of Marriage Act case, the District Court of Appeal, Second District, held that in child custody cases the natural parents are preferred over other relatives and third persons, and, other things being equal, the welfare of the minor child is best served by awarding custody to the mother. *Howard v. Howard*, 259 So. 2d 188 (Fla. 2d Dist. 1972).

139. *Cardillo v. Cardillo*, 269 So. 2d 773 (Fla. 3d Dist. 1972).

140. *Farrow v. Farrow*, 263 So. 2d 588 (Fla. 2d Dist. 1972).

141. *Smothers v. Smothers*, 281 So. 2d 359 (Fla. 1973), *discharging cert. in* 257 So. 2d 591 (Fla. 4th Dist. 1972).

142. *Doane v. Doane*, 279 So. 2d 46 (Fla. 4th Dist. 1973).

was concerned that the child might be mistreated by her parents is not enough in light of the parents' uncontradicted showing of fitness.¹⁴³

The expressed desire of a child to live with one parent or the other is entitled to weight during custody proceedings, and the degree of weight depends upon the circumstances of the case. When six or seven years have elapsed between the original award of custody and the proceeding brought to change custody and the child has matured to high school age of fifteen or sixteen, his expressed desires should be given great weight.¹⁴⁴

It is the view of another court, however, that the desires of a child to live with one parent rather than the other is only one factor to consider in custody modification proceedings, and the rights of the parent will not be disregarded in order to satisfy the child.¹⁴⁵

The District Court of Appeal, Fourth District, has held that it is not an abuse of discretion for the trial court to award custody of two children ages fourteen and twelve to their stepmother when they had been in the custody of their natural father for ten years and they expressed a desire to remain with the stepmother after the death of the father. It is to be noted that the natural mother strenuously contested the award of custody to the stepmother, and the court admitted that the trial court judge could have awarded custody to either the natural mother or the stepmother and there would not have been a clear showing of an abuse of discretion.¹⁴⁶ When the welfare of a child has been adversely affected by the vengeful attitude of the mother (who has custody) towards the father and there is evidence that the development of the child has not been wholesome while in the custody of the mother, a sufficient change of circumstances has been shown to justify a change of custody from the mother to the father.¹⁴⁷

A judgment of a juvenile court which permanently committed a child to a state agency is not subject to collateral attack by the child's mother who sought to regain custody through a habeas corpus action.¹⁴⁸

4. VISITATION RIGHTS

The District Court of Appeal, First District, has approved a final judgment which provided that a husband could not visit his daughters (who were in the custody of the mother) without the mother's consent and which also forbade the mother from visiting her sons (who were in the custody of the father) except with his consent because of the degree of animosity existing between the ex-spouses.¹⁴⁹

143. *In re G.M.*, 270 So. 2d 473 (Fla. 3d Dist. 1972).

144. *Goldstein v. Goldstein*, 264 So. 2d 49 (Fla. 3d Dist. 1972).

145. *Wilson v. Condra*, 255 So. 2d 702 (Fla. 1st Dist. 1971).

146. *Heffernan v. Goldman*, 256 So. 2d 522 (Fla. 4th Dist. 1971).

147. *Stewart v. Stewart*, 261 So. 2d 864 (Fla. 3d Dist. 1972).

148. *State ex rel. Young v. Florida State Dept. of Health & Rehabilitative Services*, 254 So. 2d 374 (Fla. 3d Dist. 1971).

149. *Walborsky v. Walborsky*, 258 So. 2d 304 (Fla. 1st Dist. 1972).

B. Support

1. JURISDICTION

A Florida court has no jurisdiction to award child support to the wife when the husband, a resident of Alabama, has never resided in Florida and has no property in Florida.¹⁵⁰

2. CRITERIA FOR THE AWARD

Under the former divorce statutes the financial wealth of the wife was not relevant evidence in fixing the amount of child support.¹⁵¹ The new Dissolution of Marriage Act provides that a change in amount of child support may be made in the event of a change of circumstances of either party. The District Court of Appeal, Second District, has held that in proceedings brought under the Act to modify a child support award which was made under the divorce statutes, the wealth of the wife at the time of the original divorce is relevant.¹⁵²

It is reversible error for the trial court to exclude testimony (on the grounds of immateriality) dealing with the mental and physical capacity of a 26 year old daughter before and after she reached her majority, the facts of her marriage which was subsequently annulled and her employment with her father prior to her adjudication of incompetency, when the court was to adjudicate the father's responsibility for her support after she reached her majority.¹⁵³

The District Court of Appeal, Fourth District, has held that when a man married a woman who was pregnant as the result of intercourse with another man and the child was born after wedlock, the husband was not liable for child support even though he had represented to the world that the child was his and had supported him for three months until the parties separated. Section 731.29 of the Florida Statutes (1971), which provides that a man may acknowledge an illegitimate child in writing as his child, would have no application because the statute was intended to cover the natural father, not the husband in this case who was not the natural father. Judge Walden, in a very strong dissent, was of the view that the marriage deprived the mother of her cause of action for bastardy against the natural father, and, therefore, the man who married her should be liable for the support of the child.¹⁵⁴

It is reversible error for a trial court to order the husband to pay all reasonable electrical bills, gas and fuel oil bills, water, sewage, garbage and telephone bills incurred in the maintenance of the home for the wife and children, and to pay all reasonable and necessary medical, dental and

150. *Carnes v. Carnes*, 256 So. 2d 550 (Fla. 4th Dist. 1972).

151. *Cheves v. Cheves*, 269 So. 2d 414 (Fla. 2d Dist. 1972).

152. *Id.*

153. *Lasky v. Golden*, 265 So. 2d 70 (Fla. 3d Dist. 1972).

154. *Taylor v. Taylor*, 279 So. 2d 364 (Fla. 4th Dist. 1973).

other health charges incurred by or on behalf of the minor children of the parties. Insofar as the requirement to pay all reasonable utility bills, the District Court of Appeal, Second District, was of the view that this made the former wife "the final arbiter of the [husband's] economic fate."¹⁵⁵ The court was also of the view that the provisions calling for payment of all reasonable medical bills obviated part of the basis for granting specific child support payments. The case was remanded with instructions for the trial court to place some definable limits on these provisions.

The Supreme Court of Florida has finally held that a trial court in a dissolution of marriage action has the power to order a husband to maintain a life insurance policy on his life payable to his minor children until they reach majority or are emancipated. The court was of the view that former section 61.13 of the Florida Statutes (1969) was broad enough to support this result.¹⁵⁶ Similarly, the District Court of Appeal, Second District, had previously held that a trial court may require a divorced father to maintain insurance on his life as security for the payment of maintenance and support awarded his minor children. The father may later seek modification of such an award when any of the children become an adult or become self-supporting.¹⁵⁷

3. ENFORCEMENT OF THE AWARD

In proceedings brought in Florida to collect arrearages which have accrued under the provisions of a foreign decree, a Florida court may consider equitable defenses such as a subsequent modification between the parties and the fact that the plaintiff (the former wife) has received the greater part of the proceeds of the property of the parties.¹⁵⁸

When a wife brings suit to collect arrearages in child support which accrued under a divorce judgment, it is reversible error for the trial judge to strike the husband's affirmative defenses that the former wife had abandoned the children for a number of years without giving him an opportunity to introduce his evidence for a judicial evaluation. The court noted that the former wife's right to the arrearages might have become vested and the husband might not have any defense; however, there might be extraordinary facts involving such defenses as estoppel or laches which might constitute a defense. The adjudication by striking the defense was premature.¹⁵⁹

When a father has agreed in a property settlement agreement to pay the college expenses of a child and this agreement has been incorporated

155. *Sapp v. Sapp*, 275 So. 2d 43, 45 (Fla. 2d Dist. 1973).

156. *Bosem v. Bosem*, 279 So. 2d 863 (Fla. 1973), *rev'g* 269 So. 2d 758 (Fla. 3d Dist. 1972).

157. *Harloff v. Harloff*, 279 So. 2d 91 (Fla. 2d Dist. 1973).

158. *Stokes v. Crews*, 265 So. 2d 741 (Fla. 1st Dist. 1972).

159. *Hurst v. Hampton*, 274 So. 2d 891 (Fla. 4th Dist. 1973).

in the dissolution judgment, it may be enforced even after the child reaches his majority. After the child reaches his majority, however, a court may not use a contempt order as a means of enforcing the collection of accrued payments.¹⁶⁰

An interesting aspect of the Uniform Reciprocal Enforcement of Support Act¹⁶¹ was involved in *Cochran v. Cochran*.¹⁶² A Florida court as part of a divorce action entered a child support provision which required the father to pay support "so long as visitation rights . . . are complied with."¹⁶³ The mother failed to comply with the visitation rights as provided for, and the court subsequently relieved the father of his obligation until the former wife complied. The former wife, who had become a Pennsylvania resident, brought proceedings in that state under the Support Act. The Florida court then dismissed the proceedings brought in Florida under the Act upon the basis that the Florida court had reserved jurisdiction to insure that its judgment would be complied with and that the proceedings brought under the Act were brought with unclean hands and in contempt of the Florida court.

4. MODIFICATION OF SUPPORT AWARD

a. Jurisdiction

A Florida court has no power to modify vested unpaid amounts due under a child support award,¹⁶⁴ and any restrictions cannot predate the date of the filing of the petition for modification.¹⁶⁵ An order increasing the amount of child support ought to be effective from the date of the filing of the petition for modification when the evidence shows that the children had an increased need at the date of filing.¹⁶⁶

An Ohio judgment which orders a former husband to pay arrearages of support which had originally been ordered by an Alabama decree is entitled to full faith and credit in Florida even though the Ohio court may have possibly made an error in interpreting the Alabama decree. The parties appeared in both foreign actions and the Ohio court had jurisdiction.¹⁶⁷

A Florida court has power to modify child support provisions of a separation agreement (subsequently approved in a divorce judgment) even though the agreement was signed in New York and even though it provided that the agreement could not be modified without the written consent of the parties.¹⁶⁸

160. *Gersten v. Gersten*, 281 So. 2d 607 (Fla. 3d Dist. 1973).

161. Fla. Stat. ch. 88 (1971).

162. 263 So. 2d 292 (Fla. 2d Dist. 1972).

163. *Id.* at 293.

164. *Petrucci v. Petrucci*, 252 So. 2d 867 (Fla. 3d Dist. 1971).

165. *Hynes v. Hynes*, 277 So. 2d 557 (Fla. 3d Dist. 1973).

166. *Meltzer v. Meltzer*, 262 So. 2d 470 (Fla. 3d Dist. 1972).

167. *Taylor v. Taylor*, 258 So. 2d 500 (Fla. 3d Dist. 1972).

168. *Lang v. Lang*, 252 So. 2d 809 (Fla. 4th Dist. 1971).

In the event that parties are divorced in a foreign state and the wife continues to reside in that foreign state, a suit to modify the foreign judgment by reducing the amount of child support cannot be maintained against the foreign wife by service of process by publication. If the parties were divorced in Florida a modification proceeding could be maintained, and service of process could be effectuated by publication even if the wife remains a resident of a foreign state. The key is, of course, that if the modification proceeding is ancillary to a prior Florida dissolution action, then Florida has continuing jurisdiction. Conversely, if the dissolution proceeding took place in a foreign state then any modification proceeding in Florida is completely separate and independent of the prior action and jurisdiction must be obtained by personal service in Florida.¹⁶⁹

A motion to modify a child custody judgment which is filed in the trial court while an appeal from the same judgment is pending in an appellate court is premature, and the trial court should dismiss it upon this ground.¹⁷⁰

b. Criteria for Modification

In proceedings for modification of a child support award, a wife presents a prima facie case when she shows that the former husband's salary has almost doubled in the preceding seven year period and that the needs of the children have increased substantially since the original award.¹⁷¹

Child support payments may be increased subsequently when "found to be necessary by the court for the best interests of the child or children,"¹⁷² or when there has been a substantial change in the circumstances of the parties. The court can use the "best interests" standard and increase the amounts even when there has not been a change in the circumstances of the parties.¹⁷³

The District Court of Appeal, Fourth District, apparently upheld a trial court's refusal to modify an award of child support even though the father's decrease in income resulted in his paying 71 percent of his income for the support of one child.¹⁷⁴

It is reversible error for the trial court judge in child custody proceedings instituted subsequent to divorce to modify the amount of child support payments when this issue was not raised in the pleadings nor tried by the parties during the proceedings.¹⁷⁵

169. Zuccarello v. Zuccarello, 280 So. 2d 37 (Fla. 3d Dist. 1973).

170. Brust v. Brust, 275 So. 2d 598 (Fla. 1st Dist. 1973).

171. Banks v. Graham, 252 So. 2d 864 (Fla. 3d Dist. 1971).

172. Wood v. Wood, 272 So. 2d 14, 14 (Fla. 3d Dist. 1973), construing FLA. STAT. § 61.13(1) (1971).

173. *Id.*

174. Sadlowski v. Sadlowski, 254 So. 2d 847 (Fla. 4th Dist. 1971).

175. Williams v. Williams, 272 So. 2d 827 (Fla. 1st Dist. 1973).

It is not proper for a trial court to modify a provision for child support based upon the former wife's suspicion that her former husband might leave the United States when he retired; modification must be made upon changed facts, not suspicions.¹⁷⁶

Although a stepfather may not have any legal duty to support his stepchildren, his income and financial status are material and relevant to his wife's ability to contribute to the support of her children when the former husband seeks to elicit this evidence when he brings proceedings to modify a prior support award, and it is reversible error for the trial court to refuse to allow the former husband to make inquiry into these matters.¹⁷⁷

5. LEGISLATION

Persons eighteen years of age now have the rights, privileges, and obligations of all persons twenty-one years of age, except as otherwise precluded by the Constitution of the State of Florida. However, courts may still require support for a dependent person beyond the age of eighteen, and this change in the law shall not affect the rights and obligations existing prior to the effective date of the act. For example, child support orders entered before the act became effective (July 1, 1973) would not be affected.¹⁷⁸

IX. ADOPTION

A. *Adoption Proceedings*

In a four to three opinion, the Supreme Court of Florida has held that Florida Statute sections 49.011(10) and 49.10 (1973) which provide for the publication of notice to a natural mother in adoption proceedings are unconstitutional when applied to indigent adopting parents under the due process and equal protection provisions of the State and Federal Constitutions, and the state should be required to pay the costs of publication.¹⁷⁹ The decision was based upon the rationale of *Boddie v. Connecticut*,¹⁸⁰ which held that it was a deprivation of due process for a state to deny indigents access to its courts solely because of their inability to pay court costs in order to secure divorces. *Boddie* was based upon the idea that the state has exclusive jurisdiction over divorce which is the only method of altering a fundamental human relationship, and the Florida court was of the view that adoption should be treated as a like area wherein the state has sole jurisdiction over altering a fundamental human relationship.

176. *Lamar v. Lamar*, 266 So. 2d 376 (Fla. 4th Dist. 1972).

177. *Birge v. Simpson*, 280 So. 2d 482 (Fla. 1st Dist. 1973).

178. Fla. Laws, 1973, ch. 73-21, *creating* FLA. STAT. § 1.01(14) (1973).

179. *Grissom v. Dade County*, 293 So. 2d 59 (Fla. 1974), *rev'g* 279 So. 2d 899 (Fla. 3d Dist. 1973).

180. 401 U.S. 371 (1971).

Section 63.151 of the Florida Statutes (1971) provides that after the adoption of a child, its natural parents are "divested of all rights with respect to the child." In light of this statute, the District Court of Appeal, Second District, has held that when maternal grandparents adopt their granddaughter over the strenuous contest of the natural father, the trial court may not grant rights of visitation to the father. Of course, the adopting parents may voluntarily consent to visits by the father.¹⁸¹

A finding of the father's laxity in supporting his child may not be sufficient to support a finding of abandonment by him so as to make the child a subject for adoption.¹⁸²

When a natural mother gives her written consent for the adoption of her child the Florida Statute requires that the consent be executed in the presence of two witnesses and be acknowledged. This statutory requirement is not met when the testimony indicates that a written consent was signed in the presence of neither of the two subscribing witnesses and the acknowledgment was forged; a decree of adoption based upon this invalid consent must be set aside.¹⁸³

Section 63.081(3) of the Florida Statutes (1971) provides that the written consent of any adoptee-child twelve years of age or older shall be required in adoption proceedings. The District Court of Appeal, Second District, has held that the primary purpose of this provision is to insure that all interested parties are given notice of the proposed adoption, and when the child in his testimony in open court consents to his adoption, the failure to follow the statute does not constitute reversible error.¹⁸⁴

In an apparent case of first impression in Florida, it has been held that when the trial court refuses to decree the adoption of a child by his stepfather it is not permissible to change the surname of the child to that of the stepfather.¹⁸⁵

B. Legislation

Under an amendment to section 731.30 of the Florida Statutes (1971), an adopted child is now to be considered "as the natural issue of his adopting parents and shall inherit from and through his adopting parents."¹⁸⁶

The adoption laws of Florida have been completely revamped to provide, among other things, for all placements of minors for adoptions to be reported to the Division of Family Services of the Department of

181. *Jones v. Allen*, 277 So. 2d 599 (Fla. 2d Dist. 1973).

182. *Wiedeman v. Mickel*, 269 So. 2d 53 (Fla. 2d Dist. 1972); *accord*, *In re Adoption of Gossett*, 277 So. 2d 832 (Fla. 1st Dist. 1973).

183. *Pole v. Bowen*, 269 So. 2d 707 (Fla. 1st Dist. 1972), *construing* FLA. STAT. § 63.081 (1971).

184. *Carlson v. Keene*, 282 So. 2d 204 (Fla. 2d Dist. 1973).

185. *Arnett v. Matthews*, 259 So. 2d 535 (Fla. 1st Dist. 1972).

186. Fla. Laws, 1973, ch. 73-43, *amending* FLA. STATS. § 731.30 (1971).

Health and Rehabilitative Services; for an investigation and a recommendation concerning the home in which the minor has been placed; the complete procedure required in adoption proceedings, and the effect of adoption which terminates all legal relationship between the adopted child and his parents (and relatives) for all purposes, including inheritance.¹⁸⁷

X. JUVENILES

A. *Children Under Need of Supervision*

Section 39.02(1)(a) of the Florida Statutes (1971) provides that juvenile courts shall have jurisdiction over "dependent and delinquent children," but no mention is made of children under need of supervision, and article V, section 5(b) of the Florida Constitution and section 26.012(2) now confer jurisdiction in the circuit courts since juvenile courts have been abolished. The Supreme Court of Florida has held that chapter 39 taken as a whole shows an intent to confer jurisdiction in the circuit courts over children in need of supervision.¹⁸⁸

The question of public school integration received a new twist in the case of *T.A.F. and E.M.F. v. Duval County* which held that the state had made out a prima facie case establishing that minor children were in need of supervision as persistent truants from school "upon the bare showing that they had failed to attend the public school to which they had been assigned."¹⁸⁹ The children were being taught by their mother in their home, but she was not certified as a teacher nor did she have the qualifications of a private tutor under state law. The court then held that the children were not attending a parochial school under the aegis of the Covenant Church of Jesus Christ because this church has not been established in Florida and the children's father (an ordained minister of this church) did not hold services for others.

In the case of *In re T.A.F.*¹⁹⁰ a juvenile court adjudicated that a minor child was in need of supervision and incorrectly advised the parents that they could appeal this decision within 30 days after they received a copy of the court order rather than within 30 days from the entry of the order. The District Court of Appeal, First District, held that a proceeding of this nature was analogous to a criminal case and that a child is, therefore, entitled to a number of constitutional safeguards, one of which is the rule that when the court frustrates an appeal the abortive appeal may be treated as a writ of habeas corpus in which the parents will be afforded a full appellate review of the court's order.

Provisional Rules of Procedure for Juvenile Cases were adopted

187. Fla. Laws, 1973, ch. 73-159, *repealing* FLA. STAT. §§ 63.011 to .291 (1971) and 828.031 (1969).

188. State *ex rel.* Price v. Duncan, 280 So. 2d 422 (Fla. 1973).

189. 273 So. 2d 15, 17 (Fla. 1st Dist. 1973).

190. 252 So. 2d 255 (Fla. 1st Dist. 1971).

by the Supreme Court of Florida. These rules are to govern juvenile proceedings until permanent rules are submitted by the Florida Bar and adopted by the court.¹⁹¹ These rules are discussed in the Civil Procedure Survey.¹⁹²

B. *Delinquency Proceedings*

The Supreme Court of Florida has held that in order to adjudge a child to be delinquent where the act of delinquency charged is one which would constitute a crime if committed by an adult the required standard is proof beyond a reasonable doubt.¹⁹³

When a finding of delinquency is based entirely upon a confession and evidence discovered as a result of the confession given by a minor who has not been advised of his constitutional rights, his conviction must be reversed and he should be discharged.¹⁹⁴

If a juvenile has been charged with possession of drug paraphernalia she may not be adjudicated a delinquent upon the finding that she may have used the paraphernalia. Juveniles as well as adults may not be charged with one crime and then convicted for another. Further, the state's burden of proof in juvenile delinquency proceedings is exactly the same as in adult criminal proceedings.¹⁹⁵

It is reversible error to summarily revoke a juvenile's probation and to remand him to the custody of the Division of Youth Services of the State of Florida. The juvenile is entitled to a full hearing before his probation may be revoked.¹⁹⁶

The District Court of Appeal, First District, has held that proceedings in juvenile courts are not criminal but civil in nature, hence any time spent in a juvenile detention home (because of alleged lewd and lascivious behavior) cannot be counted in computing the 180 day period involved in the speedy trial rule as provided in rule 3.191(a)(1) of the Florida Rules of Criminal Procedure.¹⁹⁷ This case appears to be inconsistent with the preceding four cases.

A finding of delinquency because of a violation of section 877.11 of the Florida Statutes (1971) (inhalation or possession of harmful chemical substances) does not require the submission of a chemical analysis when other evidence supports the finding.¹⁹⁸

191. *In re* Transition Rule 11, 270 So. 2d 715 (Fla. 1972).

192. Massey, Hoffman & Linder, *Civil Procedure, 1972-73 Survey of Florida Law*, 28 U. MIAMI L. REV. 257 (1974).

193. *State v. V.D.B.*, 270 So. 2d 6 (Fla. 1972); *accord*, *D.R.W. v. State*, 271 So. 2d 114 (Fla. 1973) *rev'd* 262 So. 2d 701 (Fla. 3d Dist. 1972); *In re G.H. v. State*, 271 So. 2d 820 (Fla. 3d Dist. 1973); *J.D.D. v. State*, 268 So. 2d 457 (Fla. 4th Dist. 1972).

194. *In re J.R.H. v. State*, 278 So. 2d 314 (Fla. 3d Dist. 1973).

195. *D.M.M. v. State*, 275 So. 2d 308 (Fla. 2d Dist. 1973).

196. *State ex rel. D.E. v. Keller*, 251 So. 2d 703 (Fla. 2d Dist. 1971), *aff'd*, *Keller v. State ex rel. Epperson*, 265 So. 2d 497 (Fla. 1972).

197. *State v. Bryant*, 276 So. 2d 184 (Fla. 1st Dist. 1973).

198. *In re P.G. & G.G.*, 280 So. 2d 490 (Fla. 3d Dist. 1973).

In appropriate circumstances, a court of competent jurisdiction under rule 8.040 of the Rules of Juvenile Procedure may provide for detention of juveniles; jurisdiction is not vested solely with "intake officers."¹⁹⁹

C. *Criminal Proceedings*

Section 925.07 of the Florida Statutes (1971) requires that when an unmarried minor is charged with a crime in Florida notice of the charge must be given before the trial to his parents or guardian. The statute imposes a duty upon the court to ascertain the name and address of the minor's parents or guardian. If written notice to these persons is returned by the post office because "[n]o such post office in State named,"²⁰⁰ it is incumbent upon the court or its executive officers to ascertain other reasonably available sources of information as to the proper address.

The failure of the state to give a minor's parents or guardian notice of the fact that the minor is going to be tried for a criminal offense renders any conviction and sentence void and subject to collateral attack by the minor.²⁰¹

The act of a minor in telephoning his parents and saying that he had been "busted"²⁰² is not sufficient notice to them as required by section 925.07 of the Florida Statutes (1971) when there is no evidence that the parents knew the nature of the criminal charge against their son, that it was a felony or in which court the case was pending.

A trial court, before finding that a minor accused is emancipated and that notice of a criminal charge against the minor need not be given to his parents, must, at the very least, attempt to communicate with the child's parents and should not rely upon the minor's statement that he has attempted to reach them and has been unable to do so.²⁰³

A juvenile may waive his rights after he has been given the appropriate Miranda²⁰⁴ warnings by the police; the state bears a heavy burden to establish that the minor intelligently waived his constitutional rights.²⁰⁵

In a well reasoned, well researched opinion, the District Court of Appeal, First District, held that it would not constitute double jeopardy

199. *Florida Dept. of Health & Rehabilitative Services v. Patten*, 277 So. 2d 320 (Fla. 1st Dist. 1973). The Juvenile and Domestic Relations Court for Palm Beach County did not have the power in March, 1972, to direct the Division of Youth Services to receive and treat a delinquent child in a facility different from the one in which the child had previously been assigned by personnel of the Division of Youth Services. *In re J.N. & S.H.*, 279 So. 2d 50 (Fla. 4th Dist. 1973).

200. *Warren v. State*, 266 So. 2d 114, 115 (Fla. 1st Dist. 1972).

201. *Romero v. State*, 276 So. 2d 541 (Fla. 4th Dist. 1973).

202. *McIntosh v. State*, 274 So. 2d 23 (Fla. 2d Dist. 1973).

203. *King v. State*, 281 So. 2d 612 (Fla. 2d Dist. 1973).

204. *Miranda v. Arizona*, 384 U.S. 436 (1966).

205. *State v. Roberts*, 274 So. 2d 262 (Fla. 1st Dist. 1973).

nor would it violate due process standards of fundamental fairness for a juvenile to be tried for forcible rape even though he had already been adjudicated as a delinquent for the same offense.²⁰⁶ Subsequent to this decision, however, the juvenile brought habeas corpus proceedings in the federal courts, and the Court of Appeals, Fifth Circuit, held that any reprosecution of the juvenile would violate both conceptions of fundamental fairness and the Constitution's protection against double jeopardy. It would seem that the court implicitly characterized delinquency proceedings as being equivalent to criminal proceedings in order to reach its decision.²⁰⁷

D. Legislation

Physicians and osteopathic physicians who are licensed in Florida may now furnish emergency medical care and treatment to a minor for injuries and acute diseases without the consent of his parents if delay would within a reasonable degree of medical certainty endanger the health of the minor, provided, however, that this emergency medical care is administered in a licensed hospital. The new act defines when the parental consent cannot be obtained and provides for immunity to the physician, hospital or college health service because of such treatment provided that the care was in accordance with acceptable standards of medical practice.²⁰⁸

Section 959.022 of the Florida Statutes was extensively amended in 1973 to provide for the Department of Health and Rehabilitative Services to implement state operated but regionally administered detention services for children and for the state to take title to or lease some existing county detention facilities.²⁰⁹

The 1972 Legislature made a number of changes in the statutes affecting the trials and detention of juvenile traffic offenders, and provided for the transfer of minors convicted of crimes from the Division of Corrections to the Division of Youth Services, provided for commitment of minors to the Department of Health and Rehabilitative Services by courts other than juvenile courts, and for investigations and recommendations, adjudications of delinquency by courts other than juvenile courts, and indeterminate commitments.²¹⁰

A classical example of a special interest bill is presented by a 1972 act which provides that "[a]ny judge of any existing separate juvenile court on February 1, 1972, who is not a member of the bar of Florida, shall be eligible to seek election as county court judge of his

206. *State v. R.E.F.*, 251 So. 2d 672 (Fla. 1st Dist. 1971), *aff'd*, 265 So. 2d 701 (Fla. 1972).

207. *Fain v. Duff*, 42 U.S.L.W. 2343 (U.S. Jan. 8, 1974).

208. FLA. STAT. § 458.21 (Supp. 1972).

209. FLA. LAWS, 1973, ch. 73-230, *amending* FLA. STAT. § 959.022 (Supp. 1972).

210. FLA. STAT. § 316.045 (Supp. 1972).

respective county."²¹¹ It is difficult to find a better reason for the abolition of juvenile courts than this statute.

Chapter 39 of the Florida Statutes (Supp. 1972), which sets forth the procedures governing juvenile delinquents, juveniles in need of supervision and dependent children, has been completely revamped to provide for, among other things, jurisdiction in the circuit court (rather than in the former juvenile courts); jurisdiction over children under the age of eighteen (rather than the former age of seventeen); for detention of juveniles and the preliminary screening of juvenile cases by the Department of Health and Rehabilitative Services; that answers filed in proceedings must acknowledge that the juvenile has been advised of his rights to counsel and of his right to remain silent; the furnishing of medical services to juveniles under certain conditions, etc.²¹²

Chapter 959 of the Florida Statutes (1971) which pertains to the duties and functions of the Division of Youth Services and the Department of Health and Rehabilitative Services has been revised as to the duties of these agencies in the prevention, control and treatment of juvenile delinquency and the operation of juvenile detention facilities.²¹³

XI. GUARDIANSHIP

A. *Incompetency Proceedings*

It is reversible error to adjudge a person incompetent when he has received notice of the incompetency hearing two days before it is held; when he was not represented by counsel; he did not attend the hearing; he was never informed of the alleged acts showing his alleged incompetency and the order of the court failed to indicate that he was incapable of caring for himself or "managing his property, or [was] likely to dissipate or lose his property or become the victim of designing persons."²¹⁴

Section 394.22(4) of the Florida Statutes (1971) provides that an opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court may appoint counsel. The Supreme Court of Florida has held that this statute does not make it mandatory for the trial court judge in an incompetency hearing to appoint counsel, but the court must determine whether counsel should be afforded and the failure to make a finding invalidates the adjudication of incompetency.²¹⁵

211. Fla. Laws, 1972, ch. 72-150.

212. Fla. Laws, 1973, ch. 73-231, *amending* FLA. STAT. §§ 39.01-14 and 39.19 (Supp. 1972), *amending and renumbering* FLA. STAT. § 39.20 as § 39.001, and *repealing* FLA. STAT. §§ 39.16, 39.17, 39.18 and 39.181 (Supp. 1972).

213. Fla. Laws, 1973, ch. 73-241, *creating* FLA. STAT. §§ 959.001, .156, .185 (1973) and *repealing* FLA. STAT. § 959.09 (1971).

214. *In re Moyer*, 263 So. 2d 286, 287 (Fla. 1st Dist. 1972).

215. *In re Hnat*, 250 So. 2d 890 (Fla. 1971).

A person is mentally incompetent when he is incapable of managing his own affairs, but when it is shown that a seventy-three year old woman of considerable wealth has made only two bad investments involving relatively small amounts of money and that she is alert and capable of managing her affairs when she is not drinking (even though she drinks to a degree which impairs her physical health) it is reversible error for the trial court to refuse to restore the woman to legal competency.²¹⁶

While a natural parent has a "God-given legal right to enjoy the custody, fellowship, and companionship of his offspring,"²¹⁷ this "right" may be taken from the father when the maternal grandparents seek the guardianship of a minor daughter who has lived with them for years after her father killed her mother and it would be in the best interests of the child that she remain with the grandparents.

B. *The State's Right to Reimbursement of Costs*

The Supreme Court of Florida in affirming the District Court of Appeal, First District,²¹⁸ and overruling the District Court of Appeal, Third District,²¹⁹ has held that section 394.22(13) of the Florida Statutes (1971) (which provides that the State of Florida has a right of reimbursement against the estate of a solvent incompetent for care, maintenance and treatment furnished to him as a patient in a state mental institution) is enforceable against the estate of an incompetent who was committed before the adoption of the statute for expenses incurred after the adoption of the statute even though the incompetent was adjudicated prior to the adoption of the statute. The court noted that it was not giving the statute a retroactive application; any incompetent who was committed prior to the adoption of the statute would not be liable for services rendered prior to that date.

C. *Legislation and Rules of Procedure*

Sections 744.13 and 744.60 of the Florida Statutes (1971) which deal with the definition of natural guardians and their powers to settle and collect claims filed in behalf of minors has been extensively amended to permit the natural guardians to settle a claim in favor of their minor children in certain cases. Unfortunately, some of the changes make little sense; for example:

[T]he natural guardians or guardian of a minor may settle any claim by or on behalf of a minor that exceeds \$2,500.00 without

216. *In re McDonnell*, 266 So. 2d 87 (Fla. 4th Dist. 1972).

217. *In re Guardianship of Davidson*, 259 So. 2d 762, 763 (Fla. 1st Dist. 1972), *citing* *Johnson v. Johnson*, 114 So. 2d 338, 341 (Fla. 1st Dist. 1959).

218. *Harrell v. Department of Health & Rehabilitative Services*, 272 So. 2d 151 (Fla. 1973), *aff'g* 258 So. 2d 340 (Fla. 1st Dist. 1972).

219. *Kirk v. Wiggins*, 242 So. 2d 725 (Fla. 3d Dist. 1971).

bond; [provided that] a bond may be required when the amount of settlement exceeds \$2,500.00, but no legal guardianship shall be required unless the amount exceeds \$10,000.00.²²⁰

Upon the death of a ward, a guardian may now pay \$1000 as reasonable funeral expenses rather than the former sum of \$750.²²¹

The Supreme Court of Florida has adopted amendments to the Guardianship Rules of Procedure which were effective February 1, 1973;²²² these rules are discussed in the Civil Procedure Survey.²²³

Guardians of veterans who receive funds from the Veterans Administration for their wards now have authority to invest these funds in credit unions which are insured under the federal share insurance program or an approved state share insurance program.²²⁴

The statutory requirements governing the execution of deeds by the spouses of incompetent persons and by guardians for incompetent persons were extensively changed; now the joinder of the husband is no longer required in the sale of the wife's separate estate and when both spouses are incompetent, realty including homestead property may be sold or encumbered by the guardians of the spouses.²²⁵

The guardianship laws have been amended to provide for "limited guardianships." A "limited guardian" may be appointed in any case involving an incompetent adult who is wholly or substantially self-supporting in order to manage "only such property . . . as shall be received from other than the incompetent persons's wages or earnings."²²⁶ "Standby guardians" may also be appointed "to assume the duties of guardianship or limited guardianship upon the death or adjudication of incompetency of the last surviving natural or adoptive parent of an incompetent person."²²⁷ Florida nonprofit corporations which have the power to act as guardians may be appointed guardians of the person or property of an incompetent person.²²⁸

A number of changes were made in the statutes dealing with mental health, including a new provision which authorizes the jailing of mentally ill patients for no longer than five days in cases of emergency and a requirement that the written consent of the parent of a minor patient or the guardian of an incompetent patient must be obtained prior to the

220. FLA. STAT. § 744.60(2) (Supp. 1972), *amending* FLA. STAT. § 744.60 (1971). Another example is FLA. STAT. § 744.13 (Supp. 1972), *amending* FLA. STAT. § 744.13 (1971).

221. Fla. Laws, 1973, ch. 73-94, *amending* FLA. STAT. § 744.68 (1971).

222. *In re* Florida Probate & Guardianship Rules, 271 So. 2d 97 (Fla. 1972).

223. Massey, Hoffman & Linder, *Civil Procedure*, 1972-73 *Survey of Florida Law*, 28 U. MIAMI L. REV. 257 (1974).

224. Fla. Laws, 1973, ch. 73-41, *adding* FLA. STAT. § 518.01(14) (1973).

225. Fla. Laws, 1973, ch. 73-61, *amending* FLA. STAT. §§ 745.15(2)(a),(3)(b) and (4) (1971).

226. Fla. Laws, 1973, ch. 73-222.

227. *Id.*

228. *Id.*

use of surgical procedures which require the use of a general anesthetic or electroconvulsive treatment.²²⁹

The Advisory Council on mental retardation was abolished in 1973.²³⁰

XII. ILLEGITIMACY

A. *Standing*

The District Court of Appeal, Fourth District, has held in a case of apparent first impression in the United States, that the putative father of an illegitimate child does not have standing to seek an injunction prohibiting the unwed mother from obtaining an abortion.²³¹ The court noted that the Florida Abortion Statute²³² does not give the putative father standing, and the United States Supreme Court cases²³³ hold that the decision to terminate pregnancy during the first trimester must be left to the mother and her attending physician as based upon her right of privacy.

B. *Bastardy Actions*

Under Section 742.021 of the Florida Statutes (1971) a suit for bastardy may be brought in the county in which the mother resides or in the county in which the alleged father resides, at the option of the mother. The general venue statute, section 47.01 of the Florida Statutes (1971), which provides that suit may be brought in the county wherein the defendant resides does not have any application.²³⁴

It is reversible error for a court to dismiss a complaint upon the ground of lack of jurisdiction when a bastardy complaint is filed by a minor female-plaintiff rather than by her guardian or next friend. Under rule 1.210(b) of the Florida Rules of Civil Procedure the trial court judge must determine whether it is necessary to appoint a guardian ad litem or permit the minor plaintiff to amend her complaint by bringing the action in her name by her mother as next friend. However, this requirement is procedural and not jurisdictional.²³⁵

Florida has adhered to the majority rule that the mother of an illegitimate child "has a natural primary or prima facie right to the custody of the child as against a putative father unless she is proved to be an unfit person to be entrusted with such a charge."²³⁶

229. Fla. Laws, 1973, ch. 73-133, *creating* FLA. STAT. § 394.459(3) (1973), *and amending* FLA. STAT. §§ 394.459(1), (10), (12) (1971).

230. Fla. Laws, 1973, ch. 73-2, *repealing* FLA. STAT. § 402.14 (1971).

231. *Jones v. Smith*, 278 So. 2d 339 (Fla. 4th Dist. 1973).

232. FLA. STAT. § 458.22 (Supp. 1972).

233. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

234. *Ferguson v. Little*, 266 So. 2d 363 (Fla. 1st Dist. 1972).

235. *Smith v. Langford*, 255 So. 2d 294 (Fla. 1st Dist. 1971).

236. *In re R.L.G.*, 274 So. 2d 4, 5 (Fla. 4th Dist. 1973).

It has been the rule in Florida that a woman cannot have her child declared illegitimate and thus receive support for the child from the putative father if she was married to another at the time of conception.²³⁷ However, the Supreme Court of Florida has refused to apply this rule when the mother and the putative father assumed cohabitation during her marriage to another; the child was conceived during this cohabitation; the mother was divorced from her husband and entered into a common-law marriage with the putative father after this divorce, and the putative father acknowledged his paternity, furnished support for the child and the birth certificate showed that he was the father. The putative father also claimed the child as his on his income tax returns, and he obtained a draft deferment on the basis of being a married man and the father of a child.²³⁸ In the instant case the mother was suing the putative father for divorce and for child support, while the usual rule which prevents the mother from alleging the illegitimacy of her child has arisen in cases where the mother has sought support from a father who refused to admit paternity or when the mother has sought to prevent a father from gaining custody on the basis that the child was not his, while in this case the father admitted the child was his.

The adage that truth is stranger than fiction was illustrated in *V.S. v. B.M.*²³⁹ A woman was regularly having intercourse with two men. She became pregnant and married one of the men. The child was born and the parties were divorced. The trial court relieved the husband of all duty to support the child. The woman then brought bastardy proceedings against the second man, and the trial court and the appellate court agreed that in spite of the prior decree it would have to be presumed that the child was a child of the marriage and was legitimate. Hence, the woman could not have a cause of action for bastardy. The court noted that the child is deemed legitimate but will not receive support from either man.

In the bastardy case of *B.B.S. v. R.C.B.*²⁴⁰ a man accused of bastardy was deposed and he invoked his privilege against self-incrimination sixty-one times. One of the questions he refused to answer dealt with whether he had ever given any money to the mother of the child for its support. Subsequently, in summary judgment proceedings the man filed an affidavit which alleged that he had not given money for the support of the child, but this affidavit was given to support his defense that the statute of limitations had expired. The woman then requested the court to order the husband to answer the questions on the basis that his affidavit was a waiver of his constitutional privilege. The court held that since the affidavit was merely given in support of his position with regard

237. *E.g.*, *Kennelly v. Davis*, 221 So. 2d 415 (Fla. 1969).

238. *Sacks v. Sacks*, 267 So. 2d 73 (Fla. 1972), *rev'g* 254 So. 2d 572 (Fla. 3d Dist. 1971).

239. 281 So. 2d 587 (Fla. 2d Dist. 1973).

240. 252 So. 2d 837 (Fla. 2d Dist. 1971).

to the statute of limitations, it did not go to the merits of the case which dealt with the paternity of the child and did not waive his right to assert his constitutional privilege against self-incrimination.

In a case of apparent first impression in Florida, the District Court of Appeal, First District, has held that a release given by the mother of an illegitimate child to the alleged father is invalid even though at the time of the release the alleged father had neither acknowledged the child nor had he been adjudicated as the father. The court cited cases from other jurisdictions upholding the validity of releases when the father had not been adjudged to be the father nor had he acknowledged the fact of paternity, while denying validity to releases given after the father acknowledged his paternity or had been adjudged to be the father. The Florida court was of the view that to draw a distinction between releases given before paternity had been established and afterwards would be unconstitutionally discriminatory as a denial of due process of law.²⁴¹

The District Court of Appeal, First District,²⁴² has joined the Third District²⁴³ in holding that section 742.031 of the Florida Statutes (1971) which provides that the court in a bastardy action which finds the defendant to be the father of the illegitimate child "shall further order the defendant to pay the complainant . . . such sum or sums as shall be sufficient to pay reasonable attorney's fee[s]" uses the word "shall" in a mandatory fashion and, therefore, the trial court must award an attorney's fee. However, the same statute makes no mention of court costs and the court held that it is a matter of discretion to award costs against the defendant.

In a case of apparent first impression, it was held that a bastardy action cannot be brought against the estate of a deceased putative father who died prior to the filing of the suit unless the bastardy statutes provide for survival of the action. The court held that the general Survival of Action Statute²⁴⁴ does not preserve the cause of action after the death of the putative father.²⁴⁵

The statutory amounts provided for the support of an illegitimate child by his father may be increased or decreased depending upon the circumstances and ability of the father.²⁴⁶

C. The Illegitimate Child and His Equal Protection Rights

The United States Supreme Court has held that when the common and statutory law of Texas provides that a legitimate child has a right to support from his father during minority, it is a denial of the right of

241. *Walker v. Walker*, 266 So. 2d 385 (Fla. 1st Dist. 1972).

242. *White v. Means*, 280 So. 2d 20 (Fla. 1st Dist. 1973).

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

244. FLA. STAT. § 46.021 (1971).

245. *Carpenter v. Sylvester*, 267 So. 2d 370 (Fla. 3d Dist. 1972).

246. *Pleever v. Bray*, 266 So. 2d 54 (Fla. 3d Dist. 1972).

equal protection when the common law of that state refuses a like right to an illegitimate child.²⁴⁷ This case is merely a continuation of recent cases which have held that a state may not create a right of action in favor of children for the wrongful death of a legitimate parent and exclude illegitimate children from the same right,²⁴⁸ and that illegitimate children may not be excluded from sharing equally with legitimate children in the recovery of workmen's compensation benefits for the death of a parent.²⁴⁹

The District Court of Appeal, Fourth District, has held that in a wrongful death action brought for the death of a man, proper parties plaintiff include the deceased's widow, a son by a prior marriage, as well as the deceased's three illegitimate children and their mother with whom the deceased had been living for nine and one-half years prior to his death. The court also held it was not necessary for any earlier adjudication that the alleged illegitimate children were, in fact, the children of the deceased; this issue can be decided in the wrongful death action.²⁵⁰

Section 222.13 of the Florida Statutes (1969) provided that life insurance "shall inure exclusively to the benefit of the surviving child or children and husband and wife of" a deceased in equal proportions. In a case of first impression in Florida under this statute, it has been held that an illegitimate child comes within the statute even though the father had not acknowledged the child in writing, as would be the requirement if the child were claiming a right to inherit from his father under section 731.29 of the Florida Statutes (1969).²⁵¹

D. Legislation

The Florida Legislature has, at long last, adopted the principle that any child who is born within wedlock as a result of artificial insemination is "irrebuttably presumed to be legitimate, provided that both husband and wife have consented in writing to the artificial insemination."²⁵²

XIII. MISCELLANEOUS

A. Torts

The Supreme Court of Florida has held that both parents of an injured child are necessary parties in any action brought against a tort

247. *Gomez v. Perez*, 409 U.S. 535 (1973).

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

249. *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972).

250. *Evans v. Atlantic Cement Co.*, 272 So. 2d 538 (Fla. 4th Dist. 1973).

251. *In re Estate of R.L.B.*, 259 So. 2d 206 (Fla. 2d Dist. 1972). The court held that the applicable statutory law must be determined as of the date of the decedent's death. Thus, FLA. STAT. § 222.13 (1969) was applied although it had subsequently been amended. See FLA. STAT. § 222.13(1) (1971).

252. Fla. Laws, 1973, ch. 73-104.

feasor who has injured the child for medical expenses, indirect economic losses and loss of the child's companionship. If only one parent brings the action, he or she must either file as trustee for the other parent or name the other parent as a party defendant. If one parent receives a judgment as trustee for the other, then all such trust funds shall be paid in the registry of the court for the benefit of the absent parent.²⁵³

The District Court of Appeal, First District, has held that a wife's cause of action for loss of consortium for injury to her husband is not barred by a consent judgment which was entered into between the husband and the defendant when the judgment did not find that the defendant was negligent or that the husband was free from contributory negligence. However, the wife would have the burden of proof that the defendant was negligent and that her husband was free from contributory negligence.²⁵⁴

Section 768.02 of the Florida Statutes (1971) provides that actions for wrongful death of a decedent shall be brought by the widow and if there is no widow then by the surviving minor children. The Supreme Court of Florida has held that it was not the intent of the legislature in enacting this statute to deprive dependents of a deceased person when the original family unit has been destroyed through divorce or adoption, etc. As a result, when a wrongful death action is brought by the widow who is the second wife of the deceased, the first wife may intervene in her own behalf and in behalf of the minor children of the first marriage.²⁵⁵

In order to charge a parent for the tort of his child in using matches in setting fire to a building it is necessary to allege that the parent entrusted the child with an instrumentality which because of the lack of age, skill or judgment of the child may become a source of danger to others, or that the parents failed to exercise parental control over the child although he knew or should have known that injury to another was a probable consequence.²⁵⁶

B. Crimes

A man who lives with the mother and her children and supports them may be tried for the felony of willfully or wantonly, unnecessarily or excessively chastising "his child or ward" even though he is neither the natural nor adoptive father of the child. "The statute was enacted for protection of children, and is entitled to liberal construction."²⁵⁷

253. *Yordon v. Savage*, 279 So. 2d 844 (Fla. 1973).

254. *Resmondo v. International Builders, Inc.*, 265 So. 2d 72 (Fla. 1st Dist. 1972).

255. *Garner v. Ward*, 251 So. 2d 252 (Fla. 1971), *rev'g* 237 So. 2d 25 (Fla. 1st Dist. 1970). FLA. STAT. § 768.02 (1971) was repealed by FLA. LAWS 1972 § 2, ch. 72-35, *creating* FLA. STAT. §§ 768.16-.27 (1973).

256. *Spector v. Neer*, 262 So. 2d 689 (Fla. 3d Dist. 1972).

257. *Robinson v. State*, 254 So. 2d 379, 381 (Fla. 3d Dist. 1971), *construing* FLA. STAT. § 828.04(2) (1971).

C. Family Planning Legislation

Florida has adopted a "Family Planning Act" which is designed to make family planning and maternal health care available to citizens of child-bearing age of Florida. The act authorizes physicians to furnish contraceptive information and services to minors under certain conditions and authorizes the Department of Health and Rehabilitative Services to implement a comprehensive family planning program.²⁵⁸

258. FLA. STAT. § 381.382 (Supp. 1972).