

University of Miami Law Review

Volume 22 | Number 2

Article 1

1-1-1967

Family Law

Daniel E. Murray

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Daniel E. Murray, *Family Law*, 22 U. Miami L. Rev. 201 (1967)
Available at: <https://repository.law.miami.edu/umlr/vol22/iss2/1>

This Leading Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

UNIVERSITY OF MIAMI LAW REVIEW

VOLUME 22

WINTER 1967

NUMBER 2

FAMILY LAW

DANIEL E. MURRAY*

I. INTRODUCTION	203
II. MARRIAGE AND ANNULMENT	203
A. <i>Miscegenation</i>	203
B. <i>Common Law Marriages</i>	203
C. <i>Legislation</i>	204
D. <i>Annulment</i>	204
E. <i>Jurisdiction and Venue for Divorce</i>	204
1. JURISDICTION	204
2. VENUE	205
III. DIVORCE	205
A. <i>Grounds for Divorce</i>	205
B. <i>Defenses</i>	206
C. <i>Procedure</i>	206
D. <i>Recognition of and Vacating of Decrees</i>	207
E. <i>Taxation of Costs and Suit Money</i>	208
F. <i>Legislation</i>	208
IV. ALIMONY	208
A. <i>Jurisdiction</i>	208
B. <i>Right to Alimony</i>	209
C. <i>Temporary Alimony</i>	209
D. <i>Criteria for the Award</i>	209
E. <i>Discovery of Assets</i>	210
F. <i>"Go-way money"</i>	210
G. <i>Amounts</i>	210
H. <i>Lump Sum Alimony</i>	211
I. <i>Reserving Jurisdiction to Award Alimony</i>	211
J. <i>Modification of the Award</i>	212
K. <i>Enforcement of the Award</i>	213
L. <i>Foreign Alimony Decrees</i>	213
M. <i>Appeals of Decrees</i>	213
V. PROPERTY RIGHTS	214
A. <i>Community Property</i>	214
B. <i>Execution by Creditors</i>	214
C. <i>Insurance</i>	214
D. <i>Estates by the Entirety</i>	214

* Professor of Law, University of Miami. The materials surveyed herein extend from 177 So.2d 328 through 201 So.2d 224 and the legislation enacted by the 1967 Regular Session and three Special Sessions of the Florida Legislature.

E. Partition	215
F. Inter-Spousal Transactions to Defeat Creditors	216
G. Presumption of a Gift	216
H. Special Equities Rule	216
I. Miscellaneous	217
VI. ATTORNEYS' FEES	217
A. Jurisdiction to Award and Enforce an Award	217
B. Right to Alimony	218
C. Criteria for the Award	219
D. Allocating Fees between the Parties	219
E. Fees Subsequent to Divorce	219
F. Interest on Award	220
VII. ANTENUPTIAL AND POST-NUPTIAL PROPERTY SETTLEMENT AGREEMENTS.....	220
A. Antenuptial Agreements	220
B. Postnuptial Agreements	220
1. VALIDITY AND BURDEN OF PROOF	220
2. MODIFICATION	221
3. CONSTRUCTION OF AGREEMENTS	222
4. SPECIFIC PERFORMANCE	222
VIII. SEPARATE MAINTENANCE	222
IX. CUSTODY AND SUPPORT	223
A. Custody	223
1. JURISDICTION	223
2. CRITERIA FOR THE AWARD	223
3. FOREIGN DECREES	224
4. DIVIDED AND "SPLIT-CUSTODY" PROVISIONS	224
5. VISITATION RIGHTS	225
6. RESIDENCE RESTRICTIONS	225
7. CHANGE OF CUSTODY	225
8. WRONGFUL DEATH ACTIONS	225
9. LEGISLATION	225
B. Support	226
1. JURISDICTION	226
2. FOREIGN DECREES	226
3. INSURANCE POLICIES	226
4. ENFORCEMENT	227
X. ADOPTION	228
XI. JUVENILE COURTS AND JUVENILES	229
A. Jurisdiction of Juvenile Courts	229
B. Procedure	231
C. Appeals	231
D. Criminal and Delinquency Proceedings	231
1. JURISDICTION OF THE JUVENILE COURTS VIS A VIS THE CRIMINAL COURTS	231
2. RIGHT TO COUNSEL	232
3. NOTICE TO PARENTS OR GUARDIAN	232
4. LEGISLATION	233
XII. GUARDIANSHIP	234
A. Jurisdiction	234
B. Procedure	234
C. The "Totten Trust" and the Guardian	235
D. Guardians' and Attorneys' fees	235
E. Legislation	235
XIII. ILLEGITIMACY	237
A. Jurisdiction	237
B. Foreign Decrees	237
C. Visitation Rights	237
D. Proof of Parentage	238
E. The "Tort" of Bastardy	238
XIV. MISCELLANEOUS	238
A. Tort Actions	238

I. INTRODUCTION

In the 1963 *Survey* of this subject, the author suggested that Florida family law was in need of a "restatement prepared by experts . . ."¹ The Florida Bar has more than met this need by publishing *Florida Family Law*. This work is modestly described in the preface as a "how-to-do-it publication"; a tome of 1592 pages of this scope and quality deserves a better appellation. *Florida Family Law* does not purport to be a restatement, but it is a superb statement of the "living law" prepared by practitioners who help make this law live.

The Florida courts displayed much greater attention to their prior cases than this author observed in the periods discussed in the 1963 and 1966 *Surveys*.²

The Florida Legislature is to be commended for its action in abolishing common law marriages in this state;³ many other legislative amendments and additions which were made could have been left un-made without loss to anyone.

II. MARRIAGE

A. *Miscegenation Laws*

The Supreme Court of the United States has held that the Virginia statute forbidding marriage between white and colored persons is unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment. The holding of this case, although limited to a marriage issue, would seem to indicate that any "racially-drawn" statute forbidding sexual congress as a result of fornication or adultery may also have a short life.⁴

B. *Common Law Marriages*

After the proponent of an alleged common law marriage has established a prima facie case, the burden of disproving the marriage shifts to the person asserting its illegality. Application of this rule is particularly warranted when the alleged common law marriage is a remarriage of the parties after they have been divorced.⁵ The testimony of an attorney for a deceased man that the deceased had told the attorney that he did not "consider Virginia his *common law wife*"⁶ would not be enough to rebut the presumption of a valid common law marriage which was established by "habit and repute."⁷

1. Murray, *Family Law, Survey of Florida Law* 18 U. MIAMI L. REV. 231, 233 (1963).

2. Murray, *Family Law, Survey of Florida Law* 18 U. MIAMI L. REV. 231 (1963); Murray, *Family Law, Survey of Florida Law* 20 U. MIAMI L. REV. 561 (1966).

3. See note 8, *infra*.

4. *Loving v. Virginia*, 388 U.S. 1 (1967).

5. *In re Estate of Beacher*, 177 So.2d 838 (Fla. 3d Dist. 1965).

6. *In re Estate of Alcala*, 188 So.2d 903, 908 (emphasis by court) (Fla. 2d Dist. 1966).

7. *Id.* at 905.

C. *Legislation*

At long last, the legislature has provided that common law marriages entered into after January 1, 1968, shall be invalid.⁸ The courts will continue to be faced for many years with common law marriages allegedly entered into prior to this date.

D. *Annulment*

In a husband's suit for divorce and the wife's counterclaim for separate maintenance it is error for the chancellor to invite either party to amend his or her case by asking for an annulment and then to grant an annulment when the husband amends his complaint. A party may amend his pleadings to conform with the proof in order to bring the pleadings in line with the actual issues tried, but this procedure is not permissible when it changes the theory on which the case was tried.⁹

E. *Jurisdiction and Venue for Divorce*

1. JURISDICTION

When a wife files suit for separate maintenance alleging cruelty (under section 65.09) and obtains personal service upon her husband and he then returns to a foreign state, the wife may thereafter file an amended complaint for divorce upon the same charges of cruelty by serving the amended complaint upon her husband's attorney. It is not necessary for the wife to re-serve the husband by constructive service by publication. This will be true even though the wife has not satisfied the six months residency requirement for divorce until immediately before she filed the amended complaint; the residency requirement affects only the jurisdiction over the subject matter of divorce and not the jurisdiction over the person.¹⁰

Prohibition will not lie to review a trial court's order overruling a challenge to its jurisdiction over the person when it has jurisdiction over the subject matter of a suit for alimony unconnected with divorce.¹¹ A chancellor has no power to order the defendant in a final decree of divorce to "cooperate with plaintiff in obtaining a Jewish divorce . . ."¹²

A plaintiff's sworn statement "that the defendant is a citizen and resident of Lewisburg, West Virginia, and receives her mail at P.O. Box 83 in said city" is a sufficient compliance with the Florida statutes¹³ gov-

8. Fla. Laws 1967, ch. 67-571, Comm. Substitute for H.B. No. 1317.

9. *Sack v. Sack*, 184 So.2d 434 (Fla. 3d Dist. 1966).

10. *Gilbert v. Gilbert*, 187 So.2d 49 (Fla. 3d Dist. 1966).

11. *State v. Kehoe*, 179 So.2d 403 (Fla. 3d Dist. 1965).

12. *Turner v. Turner*, 192 So.2d 787, 788 (Fla. 3d Dist. 1966).

13. FLA. STAT. § 48.04(1) (1965).

erning service by publication.¹⁴ When the statement alleges the residence of the defendant in a positive and unequivocal manner, it is not necessary to allege that the affiant has made a diligent search and inquiry to discover the residence of the defendant. Further, when the statement specifies that the defendant's residence is in a small town and includes his mailing address, this is substantial compliance with the statute even without the allegation that the residence is stated "as particularly as is known to the affiant."¹⁵ It should be noted that if the defendant is a resident of a large city, the above form would not be a substantial compliance with the statute.

2. VENUE

A defendant who fails to include the defense of improper venue in his motion to dismiss for failure to state a cause of action waives any right to assert this defense. Further, a motion to transfer the divorce action to another county for purposes of trial convenience is unauthorized.¹⁶

III. DIVORCE

A. *Grounds for Divorce*

Generally, false and unfounded accusations of infidelity may constitute extreme cruelty. However, they will not if the accused spouse has provoked them by her own conduct which gives reasonable foundation for a belief in the truth of the accusations even though they are false in fact.¹⁷

The third district has held that the following allegations are insufficient to constitute extreme cruelty:

The defendant, however, has throughout most of the marriage, demonstrated an attitude of super-sensitivity, especially in matters of triviality; has constantly criticized and belittled plaintiff, both privately and in the presence of friends; has left the home for hours at a time without explanation when things did not suit him; and has, in general, created and maintained an air of tenseness and strain which has caused constant and considerable mental and physical pain and anguish to plaintiff, at times requiring medical care and attention. By reason of these things, and others not mentioned herein, plaintiff charges defendant with extreme cruelty.¹⁸

14. *Walton v. Walton*, 181 So.2d 715 (Fla. 2d Dist. 1966).

15. *Id.* See *Larsen v. Larsen*, 180 So.2d 393 (Fla. 1st Dist. 1965), which reviews the required diligent search and inquiry rules governing service of process by constructive service.

16. *Brennan v. Brennan*, 192 So.2d 782 (Fla. 3d Dist. 1966).

17. *Oncay v. Oncay*, 183 So.2d 878 (Fla. 3d Dist. 1966).

18. *Morgan v. Morgan*, 180 So.2d 684, 685 (Fla. 3d Dist. 1965). See *Steele v. Steele*, 177 So.2d 873 (Fla. 3d Dist. 1965), which illustrates facts showing "mental cruelty" as grounds

A divorce will not be granted in Florida upon the uncorroborated testimony of the plaintiff.¹⁹ Furthermore, the testimony of a husband asserting extreme cruelty will not be corroborated when his wife admits, after being called as an adverse witness, that she changed the ownership of a savings account and government bonds from joint ownership to sole ownership in her name.²⁰ Lawyers who are as acquisitive as the author may disagree with this holding.

B. *Defenses*

The doctrine of recrimination should not be applied unless a party seeks to take advantage of an act or omission which he himself has induced. The doctrine may be invoked because of the nature of the wrong, either for the benefit of the court and society or for the benefit of the defendant in order to prevent one party from taking an unfair advantage of the other.²¹ A divorce will be denied to either party when they fail to make a showing of sufficient equity on their own behalf or a lack of equity in the other party and when both parties have violated the clean hands doctrine.²²

When a husband has asserted a counterclaim asking for a divorce in the wife's suit for separate maintenance and he has refused to answer questions dealing with his improper relationship with another woman, it is error for the chancellor to permit him to assert his privilege against self-incrimination without penalizing him by striking his counterclaim.²³ The party to a divorce who pleads *res judicata* has the burden of proving this affirmative defense, and this burden will not be met by the mere introduction of a copy of a decree of a foreign state.²⁴

C. *Procedure*

The Soldiers' and Sailors' Civil Relief Act of 1940 provides that in any action wherein a person in military service is involved either as a plaintiff or defendant, the court shall stay the proceedings at his request "unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."²⁵ If the plaintiff's ability is not "materially affected by . . . his military service" the court may deny a stay of the proceedings. This would seem particularly true if the plaintiff-

for divorce. Compare this case with FLA. R. Civ. P. 1.110 which permits a very generalized allegation of extreme cruelty. See Form 1.943, FLA. R. Civ. P., 1967 Revision.

19. *Simkins v. Simkins*, 198 So.2d 648 (Fla. 3d Dist. 1967).

20. *Doyle v. Doyle*, 189 So.2d 369 (Fla. 2d Dist. 1966).

21. *Spencer v. Spencer*, 193 So.2d 40 (Fla. 4th Dist. 1966).

22. *Sharp v. Sharp*, 185 So.2d 508 (Fla. 2d Dist. 1966).

23. *Nuckols v. Nuckols*, 189 So.2d 832 (Fla. 4th Dist. 1966).

24. *Harless v. Harless*, 185 So.2d 728 (Fla. 4th Dist. 1966).

25. 50 U.S.C., App. § 521.

husband after instituting a divorce suit has done nothing to prosecute it and has not complied with a separation agreement which was entered into at his instance and which was prepared by his attorney before the suit was filed.²⁶

D. *Recognition of and Vacating of Decrees*

The Third District Court of Appeal has refused to recognize a Mexican divorce decree which was granted to a Florida husband against his wife who was a resident of Florida when all acts of alleged cruelty occurred in Florida, the Mexican ground for divorce was not one accorded by Florida law and the husband failed to prove that he was a resident of Mexico at the time of the divorce.²⁷ From the language of the opinion, it is difficult to determine whether the court voided the decree on the basis that the Mexican court lacked jurisdiction, or that the ground for divorce was one not recognized in Florida or for a combination of these two reasons. This opinion further confuses the already confused "comity" doctrine in Florida.

Rule 1.38(b) of the 1954 Florida Rules of Civil Procedure provided that judgments or decrees procured by fraud could be set aside by a motion filed in the case within a reasonable time, but not later than one year after the entry of the decree or judgment. However, this rule does not prevent an independent suit being filed during this period to attack a decree obtained by fraud (this holding was incorporated in Rule 1.540(b) of the 1967 Revision of the Florida Rules of Civil Procedure). As a result, when a husband falsely swears in his affidavit for constructive service of process that his wife is concealing herself in order to prevent personal service of process upon her when in fact the wife is "temporarily residing" at a known address in a foreign state, he has committed a fraud upon the court and the decree may be set aside.²⁸

A divorce decree may be set aside for fraud if the affidavit for service of process was false in that the affiant knowingly gave a false address or stated that the address of the defendant was unknown. However, the burden of proof is on the person alleging fraud, especially when the party charged with making the false affidavit is dead.²⁹

A chancellor may refuse to vacate an order modifying a divorce decree upon the petition of the husband when the wife has died subsequent to the entry of the modified order and the husband has not substituted the representative of the deceased wife's estate as a party to the case.³⁰ If a chancellor has vacated a decree pro confesso it is error to vacate por-

26. *Robbins v. Robbins*, 193 So.2d 471 (Fla. 2d Dist. 1967).

27. *Kittel v. Kittel*, 194 So.2d 640 (Fla. 3d Dist. 1967).

28. *Corrigan v. Corrigan*, 184 So.2d 644 (Fla. 4th Dist. 1966).

29. *Gravel v. Bailey*, 187 So.2d 667 (Fla. 3d Dist. 1966).

30. *Chaachou v. Hughes*, 177 So.2d 554 (Fla. 3d Dist. 1965).

tions of the final decree of divorce; the divorce decree must be vacated in its entirety.³¹

E. *Taxation of Costs and Suit Money*

In the absence of any procedural court rule regarding the taxing of costs, the first district has stated (in a divorce case) that the successful party should file a motion or other application to tax costs to which should be attached a verified statement of the items claimed as costs. A copy of this motion or application should be served upon the opposing party a reasonable time before the court enters the final decree or judgment in order for the opposing party to be able to file objections. The court should then conduct a hearing to adjudicate the motion and objections to it. The court held that it was error to adjudicate costs as to matters which were not in evidence and without notice to the adverse party.³²

The third district has intimated that a chancellor has discretion to order the husband to pay for services incurred by the wife for the services of private investigators used in preparing her case under the idea that this would be classified as "suit money" pursuant to section 65.07 of the Florida Statutes. However, the court refused to reverse the chancellor who had denied an award because the court was "not convinced that the chancellor clearly abused his discretion in denying suit money to the wife for this purpose"³³

F. *Legislation*

The divorce statutes, sections 65.01-.09, 65.101, 65.11, 65.13, 65.14 and 65.15-.21 of the Florida Statutes, have been transferred to chapter 61 as a part of the revision of civil procedure sponsored by The Florida Bar.³⁴

IV. ALIMONY

A. *Jurisdiction*

When a wife brings a suit for divorce and seeks to enjoin a foreign corporation (a majority of whose stock is owned by her husband) which has not qualified to do business in Florida from disposing of its assets or removing them from Florida, service of process against the corporation is insufficient even though the president of the corporation was personally served while passing through Florida. The Florida Statutes³⁵ require that service may be made on a foreign corporation when the cause of action

31. *Preston v. Preston*, 201 So.2d 87 (Fla. 3d Dist. 1967).

32. *Burnett v. Burnett*, 197 So.2d 854 (Fla. 1st Dist. 1967).

33. *Simkins v. Simkins*, 198 So.2d 648, 649 (Fla. 3d Dist. 1967).

34. Fla. Laws 1967, ch. 67-254, S.B. No. 441.

35. FLA. STAT. §§ 47.16-47.171 (1965).

arises out of a transaction or operation connected with or incidental to the activities of the corporation in Florida, and seemingly the hiding of assets would not meet this requisite.³⁶

The circuit court for one county has the power to impose an equitable lien upon property located in another county when the property is owned by a non-resident and is specifically described in a notice by publication which states that the property is being proceeded against for payment of alimony and child support in a divorce suit.³⁷

B. *Right to Alimony*

A wife may allege as a ground for divorce that her husband had a living spouse at the time of their marriage and may receive alimony from him upon divorce provided that she is the innocent victim of his fraud.³⁸

The Supreme Court of Florida, in reversing the Third District Court of Appeal, has held that a bigamous second marriage entered into by a divorced woman will not serve to bar her rights to receive alimony from her first husband under the terms of the original divorce decree. The rationale is that a bigamous marriage is void and therefore ineffective to alter the legal rights of the former wife and her first husband.³⁹

C. *Temporary Alimony*

It is reversible error for a chancellor in considering an award of temporary alimony in a divorce action to take judicial notice of the record in a separate divorce action between the parties even though he was the chancellor in the prior proceedings.⁴⁰ The rules ought to provide that a chancellor has the power to adopt the record (or a portion of it) of a prior proceeding and incorporate it into a subsequent proceeding in order to avoid needless expense.

D. *Criteria for the Award*

When a forty-one-year-old man marries a twenty-one-year-old woman and they separate after four days of marriage, it is error for the chancellor to hold that the wife's age, condition of health, education and ability to earn a living, the short duration of the marriage and the minimal change in the circumstances of the parties are immaterial matters in considering whether to award alimony.⁴¹

A wife is not entitled to an award of permanent alimony when it is

36. *Manus v. Manus*, 193 So.2d 236 (Fla. 4th Dist. 1966).

37. *Wheatland Hills Corp. v. Morton*, 199 So.2d 122 (Fla. 3d Dist. 1967).

38. *Brown v. Brown*, 186 So.2d 510 (Fla. 1966).

39. *Reese v. Reese*, 192 So.2d 1 (Fla. 1966), *rev'g* *Reese v. Reese*, 178 So.2d 913 (Fla. 3d Dist. 1965).

40. *Novack v. Novack*, 196 So.2d 499 (Fla. 3d Dist. 1967).

41. *Whitehead v. Whitehead*, 189 So.2d 397 (Fla. 1st Dist. 1966).

her second marriage, the marriage lasted only three months, she has lost nothing by the marriage, she is able to support herself and when she

entered the first sour note in this marriage by announcing on the second or third day after the wedding that she did not care what she did or what [her husband] did, but since he had married her, he was going to support her the rest of his life.⁴²

It is to be wondered if this woman was penalized for articulating a motive which many wives are too discreet to utter.

E. *Discovery of Assets*

Under Rules 1.21(b), 1.27 and 1.28, of the 1954 Florida Rules of Civil Procedure, a wife is entitled to an order which orders the husband to produce a copy of his income tax return and a list of his assets together with valuations and location, even when the husband admits (through his attorney) in writing that he has assets in excess of five million dollars and the ability to support his dependents. The wife and the court are entitled to the whole truth "to the end that an independent complete understanding and evaluation may be had."⁴³

In a similar vein, a husband's statement during the taking of his deposition that "I am ready, willing and able to answer any reasonable order for costs, fees or other allowances" is not a proper demonstration to the court of his ability and willingness to pay such amounts as may reasonably be decreed.⁴⁴ Hence, the court is justified in ordering that he produce copies of his income tax returns which were filed during the marriage.

F. *"Go-way Money"*

In addition to permanent alimony and lump-sum alimony, the Supreme Court of Florida and the First District Court of Appeal have apparently countenanced a new concept known as "go-way" money. A chancellor may award a nominal sum for a limited number of months as "go-way" money like severance pay to aid in the re-orientation of the recipient" even though she is guilty of adultery.⁴⁵ The Great Society has evidently made an imprint on Florida divorce law.

G. *Amounts*

The first district has refused to reverse an alimony and child support decree which left the husband with \$49.47 per month for the first six

42. *Gordon v. Gordon*, 192 So.2d 514, 517 (Fla. 1st Dist. 1966).

43. *Parker v. Parker*, 182 So.2d 498, 500 (Fla. 4th Dist. 1966). *Accord*, *Orlowitz v. Orlowitz*, 199 So.2d 97 (Fla. 1967), *rev'g* *Orlowitz v. Orlowitz*, 187 So.2d 670 (Fla. 3d Dist. 1966); *See* 22 U. MIAMI L. REV. 195 (1967).

44. *Ortiz v. Ortiz*, 194 So.2d 38, 39-40 (Fla. 3d Dist. 1967).

45. *Brackin v. Brackin*, 190 So.2d 816, 817 (Fla. 1st Dist. 1966); *Brackin v. Brackin*, 182 So.2d 1, 7 (Fla. 1966).

months after the decree and \$74.47 per month thereafter. The court threw a bone to the husband by providing that "[I]f there are changed circumstances, arising out of the employment of the wife, the way is clearly open to apply for relief under the reservation of jurisdiction."⁴⁶ And lawyers and judges wonder why laymen are disenchanted with the legal profession.

It is an abuse of discretion for a chancellor to award only two hundred dollars a month as alimony when the record shows that the former wife needs nine hundred and forty dollars per month to live and the husband is worth in excess of 250,000 dollars.⁴⁷

H. *Lump-Sum Alimony*

A chancellor who awards lump sum alimony to the wife in an amount which is based, in part, upon the fact that the wife is concurrently suing her husband on an alimony judgment of a foreign state, should reserve jurisdiction over the awarding of alimony for further consideration in the event that the foreign judgment is invalidated because of lack of jurisdiction over the husband.⁴⁸ When a property settlement agreement (which is made part of a divorce decree) provides for lump sum alimony but fails to provide for the time of payment except for a provision that the husband is to pay interest on the sum until it is paid, the wife has the right to determine when it should be paid.⁴⁹

I. *Reserving Jurisdiction to Award Alimony*

A series of three cases illustrate the problems arising when a final decree of divorce fails to award alimony and fails to reserve jurisdiction in the court to award it at a later date. The third district has held that it is error for the chancellor to deny an award of alimony without reserving jurisdiction to award it in the future if it should become necessary.⁵⁰ However, the fourth district has refused to follow the rule of the third district by holding that "[W]here a wife has no absolute right to alimony, she also has no absolute right to a provision in the decree denying alimony that reserves jurisdiction for the purpose of awarding alimony in the future."⁵¹

The Supreme Court of Florida, in reversing the third district, has held that when a chancellor enters a divorce decree and fails to reserve jurisdiction to award alimony in the future, the divorced wife is unable

46. *Wiebe v. Wiebe*, 190 So.2d 592, 593 (Fla. 1st Dist. 1966).

47. *Sommers v. Sommers*, 183 So.2d 744 (Fla. 3d Dist. 1966). The third district awarded the wife six hundred dollars per month, rather than remanding the case to the chancellor because of his death during the pendency of the appeal.

48. *Orlowitz v. Orlowitz*, 187 So.2d 670 (Fla. 3d Dist. 1966), *rev'd on other grounds*, *Orlowitz v. Orlowitz*, 199 So.2d 97 (Fla. 1967).

49. *Clem v. Clem*, 183 So.2d 742 (Fla. 3d Dist. 1966).

50. *Steele v. Steele*, 177 So.2d 873 (Fla. 3d Dist. 1965).

51. *Pendleton v. Pendleton*, 189 So.2d 499, 501 (Fla. 4th Dist. 1966).

to re-open the divorce proceedings two years after the divorce decree became final. A final decree passes out of the control of the court and is not subject to modification after the passage of time provided in the Florida Rules of Civil Procedure. The court stated that this holding was to be without prejudice to any independent proceeding which the wife may have to alimony.⁵²

J. *Modification of the Award*

A chancellor may refuse to reduce an award of alimony (which was based upon a separation agreement) upon the ground that the former husband's income has diminished because of a change in his business investments when this diminishment must have been contemplated by him when he executed the separation agreement, and he is unable to show that the change has materially affected his standard of living or financial ability to pay. This is particularly true when the former husband is unable to show that his change of economic position is of a permanent rather than a temporary nature.⁵³

The mere fact a former husband has remarried and assumed the custody and support of his children who were in the custody of a relative of the husband is not a sufficient change of facts to justify a reduction of alimony payments which were based upon a property settlement agreement incorporated in the divorce decree.⁵⁴

In *Ropke v. Ropke*⁵⁵ the chancellor reduced the amount of weekly alimony payments for a temporary period because the former wife had cashed an insurance policy belonging to the former husband. The district court of appeal affirmed by saying:

Without deciding whether the Chancellor was correct as to the ownership of the insurance policy or not, we are of the opinion that the Chancellor was within his rights in reducing the alimony payments for any period of time he saw fit *and it is immaterial as to what the Chancellor's reasons were.* (emphasis added).⁵⁶

Surely, this is merely loose wording by the court, but it is the kind of loose wording that will plague the court in future cases.

A chancellor who discharges a rule to show cause because the husband had complied with a prior support order has no authority to modify the amount of support in the absence of pleadings requesting this action.⁵⁷

52. *Coleman v. Coleman*, 190 So.2d 332 (Fla. 1966), *rev'g* *Coleman v. Coleman*, 180 So.2d 199 (Fla. 3d Dist. 1965).

53. *Tewksbury v. Tewksbury*, 178 So.2d 346 (Fla. 2d Dist. 1965).

54. *Bagley v. Bagley*, 182 So.2d 621 (Fla. 1st Dist. 1966).

55. *Ropke v. Sopke*, 179 So.2d 122 (Fla. 1st Dist. 1965).

56. *Id.* at 123.

57. *Petrucci v. Petrucci*, 199 So.2d 516 (Fla. 3d Dist. 1967).

K. *Enforcement of the Award*

A final decree of divorce which orders the divorced husband to pay a civil judgment entered against the wife by a third party who was not a party to the divorce suit may not be enforced by contempt proceedings. Contempt jurisdiction is limited to the enforcement of claims for alimony and support. If the chancellor attempts to enforce a decree of this nature by contempt proceedings, a writ of prohibition will be granted.⁵⁸

Although a judgment of contempt is defective when it fails to fix the amount of unpaid temporary alimony and the period for which the contemtor shall be held imprisoned unless he purges himself of contempt by payment, this deficiency may be cured when the final decree includes these missing items.⁵⁹

L. *Foreign Alimony Decrees*

Under the law of New York there is no authority for the bringing of a suit at law to recover the arrears in payments awarded by the Domestic Relations Court of the City of New York. Consequently, a suit at law may not be brought in Florida.⁶⁰

A Nevada divorce decree ordering that the former husband pay support and maintenance to the wife until her death or remarriage in accordance with the separation agreement executed by the parties will be enforced in Florida as a charge against the husband's estate after his death. The court was careful to note that an award of alimony will not survive the husband's death; however, a decree which incorporates a separation agreement providing for support until the death or re-marriage of the wife will survive the husband's death.⁶¹

M. *Appeals of Decrees*

The Supreme Court of Florida has held that a wife may accept alimony and support payments ordered by the trial court without estopping herself from appealing as to the amount of the award. The court further held that Appellate Rule 3.8(b), which permits a wife to apply to the lower court for alimony or support money for children pending the appeal, is remedial in nature and its non-use does not affect the rights of anyone.⁶²

58. *State ex rel Gillham v. Phillips*, 193 So.2d 26 (Fla. 2d Dist. 1966).

59. *Saunders v. Saunders*, 183 So.2d 239 (Fla. 1st Dist. 1966).

60. *Levatin v. First Nat'l Bank*, 183 So.2d 581 (Fla. 3d Dist. 1966).

61. *Hazlewood v. Hazlewood*, 178 So.2d 752 (Fla. 2d Dist. 1965).

62. *Brackin v. Brackin*, 182 So.2d 1, 6-7 (Fla. 1966). The key to the holding seems to be contained in the following language: "In the absence of other intervening or controlling equities, when the husband is not injured or prejudiced in any way by the wife receiving the money, there is no waiver or estoppel in merely the payment or receipt of the alimony pursuant to order of court." *Accord*, *Blue v. Blue*, 183 So.2d 205 (Fla. 1966); *Lyons v. Lyons*, 200 So.2d 817 (Fla. 3d Dist. 1967), and *Hines v. Hines*, 184 So.2d 510 (Fla. 1st Dist. 1966).

V. PROPERTY RIGHTS

A. *Community Property*

An interesting question involving community property under the law of Cuba was at issue in *de Quintana v. de Ordone*.⁶³ While the spouses were domiciled in Cuba, the husband acquired corporate stock in a Florida corporation. Cuban law provides that all property of the marriage shall be considered as community property until proven to be the separate property of the husband or wife. The court held that the domicile of the couple determines that the movable property—the corporate stock—is owned equally by them. Subsequently, the couple changed their domicile to Florida and the husband exchanged the stock for a promissory note, and the court held that this latter transaction was governed by Florida law. Under Florida law if a part of the consideration belongs to the wife and title is taken in the husband's name alone, the law then creates a resulting trust to the extent that her property was used to acquire the new asset. Therefore, the husband (and the administrators of his estate) held title to a one-half interest in trust for the widow.

B. *Execution by Creditors*

The property of a judgment debtor husband which is in the hands of his wife may be ordered sold to satisfy the judgment. However, when the wife claims title to the property adversely to her husband and the judgment creditor, her rights in the property may not be cut off in proceedings supplementary to execution unless she is fully impleaded in the case.⁶⁴

C. *Insurance*

A life insurance policy which by its terms provides that it is payable to the estate of the insured is payable under a Florida statute⁶⁵ to the surviving children and spouse in equal portions. In effect, the statute writes in the names of these persons in the policy.⁶⁶

D. *Estates by the Entirety*

The fourth district has held⁶⁷ that an estate by the entirety can be converted into an estate in common by a separation agreement between the spouses which clearly indicates this intent and which is executed in conformity with the Florida Statute providing that a married woman has

63. *de Quintana v. de Ordone*, 195 So.2d 577 (Fla. 3d Dist. 1967).

64. *State v. Kehoe*, 189 So.2d 268 (Fla. 3d Dist. 1966).

65. FLA. STAT. § 222.13 (1965).

66. *Clemons v. Clemons*, 197 So.2d 38 (Fla. 2d Dist. 1967).

67. *Snow v. Matthews*, 190 So.2d 50 (Fla. 4th Dist. 1966).

"the power to execute and acknowledge deeds to property owned by her or by herself and her husband as tenants by the entirety. . . ." ⁶⁸

In the absence of pleadings and proof, it is error for a chancellor to award a husband his wife's interest in an estate by the entirety, because such an estate becomes a tenancy in common upon divorce. Further, it is error to award corporate stock to the husband when the stock was in the sole name of the wife in the absence of allegations and proof that this stock was not the separate property of the wife or that it was subject to some equitable interest or lien of the husband. ⁶⁹

When a tenancy by the entireties is converted into a tenancy in common by divorce, one of the tenants may hold the property adversely to the other by returning the property for taxation as her sole property, by paying all of the taxes on the property and by retaining sole possession of it. ⁷⁰

It is error for the court to award the husband exclusive occupancy and possession of the home and its furnishings and furniture when he does not deny his obligation to support the children and does not ask for sole use of the marital home, which is held as an estate by the entirety. ⁷¹

E. Partition

A chancellor does not have the authority to order the partition and sale of an estate by the entirety in a divorce case in the absence of an agreement or pleadings asking for partition to be granted upon the entry of the divorce decree. ⁷² It would appear that when a former wife has been awarded possession of an estate by the entirety, which became a tenancy in common upon divorce, she is not liable for the rental value of the property when a partition action is brought by the former husband. ⁷³

Although a chancellor may be justified in decreeing partition of jointly held personal property in a somewhat informal manner after he has granted a divorce, he may not do so unless Florida Statutes, sections 66.06 and 66.07 (1965) are complied with. ⁷⁴

68. FLA. STAT. § 708.09 (1965).

69. *Glasser v. Glasser*, 178 So.2d 749 (Fla. 3d Dist. 1965); for further proceedings, see *Glasser v. Glasser*, 190 So.2d 788 (Fla. 3d Dist. 1966).

70. *Kennedy v. Vandine*, 185 So.2d 693 (Fla. 1966).

71. *Berger v. Berger*, 182 So.2d 279 (Fla. 4th Dist. 1966).

72. *Schultz v. Schultz*, 197 So.2d 310 (Fla. 3d Dist. 1967).

73. *Joyner v. Rogers*, 182 So.2d 628 (Fla. 4th Dist. 1966). *Hickman v. Hickman*, 177 So.2d 844 (Fla. 2d Dist. 1965), discusses damages for use of the house after a partition judgment between a former husband and wife.

74. *Lubarr v. Lubarr*, 199 So.2d 123 (Fla. 3d Dist. 1967). See also *Greene v. Greene*, 199 So.2d 147 (Fla. 1st Dist. 1967).

F. *Inter-spousal Transactions to Defeat Creditors*

The third district has held that a husband who formed a corporation and had all of its stock issued to his wife in order to protect his "earning capacity" from a tort suit filed against the husband's partnership is guilty of a fraudulent conveyance and he will not be able to recover the stock from his wife even though the tort judgment has been satisfied.⁷⁵ However, the Supreme Court of Florida disagreed with the view of the district court of appeal that the husband had a fraudulent intent. The supreme court, in reversing the district court, held that the real object of the husband's transactions was to change a partnership into a corporate enterprise and the transfer of the partnership assets to the corporation was to facilitate this change in the manner of doing business and not to defraud a tort creditor who received a judgment subsequent to the formation of the corporation. Further, the judgment creditor was not hindered in any manner in the settlement of his judgment. As a result, the husband was held entitled to the return of the stock from his wife.⁷⁶

G. *Presumptions of a Gift*

A transfer of property from a husband to a wife is presumed to be a gift; however, a transfer by the wife to the husband is not, and the husband has the burden of proving that any transfer from the wife is donative in nature.⁷⁷ Conclusive evidence is necessary to overcome the presumption of a gift to the wife upon a transfer to an estate by the entirety. This burden of proof is not met by the husband when the evidence shows that the husband conveyed the property to himself and his wife as an estate by the entirety in order to secure a loan from a lender who insisted upon this conveyance as a condition for making a loan secured by a mortgage.⁷⁸

When the husband's funds have been used to purchase real property in the name of the husband and wife as joint tenants and there is no evidence to rebut the presumption of a gift, it is erroneous for the chancellor to order the wife upon divorce to convey her interest to her husband.⁷⁹

H. *Special Equities Rule*

A wife may not be given a "special equity" in her husband's property merely because she has been a dutiful wife. However, she will be entitled to a special equity if property is acquired from funds received in the sale

75. *Sponholtz v. Sponholtz*, 180 So.2d 497 (Fla. 3d Dist. 1965).

76. *Sponholtz v. Sponholtz*, 190 So.2d 572 (Fla. 1966).

77. *Olsen v. Olsen*, 195 So.2d 864 (Fla. 3d Dist. 1967).

78. *Holton v. Holton*, 189 So.2d 214 (Fla. 3d Dist. 1966).

79. *Smith v. Smith*, 177 So.2d 351 (Fla. 2d Dist. 1965). See *Porterfield v. Porterfield*, 181 So.2d 16 (Fla. 3d Dist. 1965), which held that a transfer of corporate stock to the wife as an estate by the entirety was a present gift and not one in the future.

of a home residence which was originally in their joint names, or because the husband used his home for his business office and the wife was his "right arm" in assisting him in his business affairs.⁸⁰

An unusual application of the "special equities" rule was involved in *Bullard v. Bullard*.⁸¹ A wife left her husband and minor son and allegedly withdrew the couple's life savings from a bank. The wife returned later to the marital domicile (held as an estate by the entirety) and shot the husband, causing him to be incapacitated. The wife was convicted in the criminal court. The chancellor ruled that he did not have jurisdiction to award the wife's tenancy in common interest to the husband. The second district disagreed with the chancellor's view that he lacked jurisdiction and remanded the case to the chancellor to take further testimony relative to the alleged withdrawal of the bank account as a factor to be considered in the possible awarding of the wife's interest in the home to the husband.

A husband may be compelled to answer interrogatories concerning his financial worth when his wife seeks a special interest in his property based upon her industry and services used in the acquisition of his property.⁸² A wife who claims a special equity in the assets of her husband has the burden to prove, to the exclusion of a reasonable doubt, that she either contributed financially to the husband's business or to the acquisition of property, or that her personal services contributed materially to his acquisition of property.⁸³

I. Miscellaneous

A Florida court may decline to enjoin a husband from continuing his suit in New York against a bank (which is custodian of securities held by the husband and wife) to compel it to deliver the securities to him when the New York litigation will not be vexatious and expensive to a wife who has adequate means for protecting her rights in New York.⁸⁴

VI. ATTORNEY'S FEES

A. Jurisdiction to Award And to Enforce The Award

A trial court is without jurisdiction to fix attorney's fees for service rendered in the district courts of appeal and the Supreme Court of Florida, even though the parties have stipulated to this in the trial court; jurisdiction may not be conferred by stipulation.⁸⁵

When the Supreme Court of Florida has failed to rule expressly upon a motion for attorney's fees for the appeal, as provided for in the

80. *William v. Williams*, 177 So.2d 865, 867 (Fla. 3d Dist. 1965).

81. 195 So.2d 876 (Fla. 2d Dist. 1967).

82. *Novack v. Novack*, 187 So.2d 385 (Fla. 3d Dist. 1966).

83. *Tanner v. Tanner*, 194 So.2d 702 (Fla. 2d Dist. 1967).

84. *Mullinix v. Mullinix*, 182 So.2d 268 (Fla. 4th Dist. 1966).

85. *Howell v. Howell*, 183 So.2d 261 (Fla. 2d Dist. 1966), applying FLA. APP. R. 3.16.

Florida Appellate Rules,⁸⁶ it will be considered as the equivalent of a denial of attorney's fees. Thus, the trial court, upon remand of the case, has no jurisdiction to award attorney's fees for the appeal.⁸⁷

In a somewhat inconsistent vein, the third district has held that a former wife is entitled to an award of attorney's fees incurred in defending an attempt to modify the provisions of a property settlement agreement, and an appellate court may direct the trial court to determine, upon remand of the case, the amount of attorney's fees to be awarded for services performed in the appellate court.⁸⁸ There is no authority which permits a chancellor to set the amount of attorney's fees for the husband in a divorce case, and any imposition of an attorney's lien for such a fee would be premature.⁸⁹

The third district has held that a Florida attorney may not commence a suit for attorney's fees by attachment of real property owned by his former clients who are non-residents at the time of suit when the amount of attorney's fees is entirely conjectural and unliquidated. The Florida attachment statute⁹⁰ which permits attachment for a "debt or the sum demanded" is to be narrowly construed to mean the historic, common law term of the action of debt for a sum certain.⁹¹

A Florida statute provides that the decision of an appellate court shall be executed by the officers of the lower court without expressed direction of the appellate court.⁹² Therefore, a trial court has the authority to execute a judgment of the appellate court awarding attorney's fees on an appeal without any express direction by the appellate court to carry out the execution.⁹³

B. *Rights to Alimony*

Although a wife might not be entitled to attorneys' fees for prosecuting a counterclaim for separate maintenance because of the wording of a property settlement agreement, she will be entitled to them in the defense of divorce proceedings brought against her.⁹⁴

A plaintiff wife may be awarded attorneys' fees even though she is unsuccessful in her divorce suit, and it would seem that there need not be any correlation between the amount of the attorneys' fees and the amount of alimony awarded to her.⁹⁵

86. Rule 3.16 (e), Florida Appellate Rules.

87. *Anderson v. Anderson*, 180 So.2d 360 (Fla. 3d Dist. 1965); for further proceedings, see *Anderson v. Anderson*, 194 So.2d 906 (Fla. 1967).

88. *Salomon v. Salomon*, 186 So.2d 39 (Fla. 3d Dist. 1966).

89. *Wilkerson v. Wilkerson*, 179 So.2d 592 (Fla. 2d Dist. 1965).

90. FLA. STAT. § 76.09 (1965).

91. *Papadakos v. Spooner*, 186 So.2d 786 (Fla. 3d Dist. 1966).

92. FLA. STAT. § 59.27 (1965).

93. *Harrison v. Harrison*, 178 So.2d 889 (Fla. 2d Dist. 1965).

94. *Seraydar v. Seraydar*, 178 So.2d 32 (Fla. 3d Dist. 1965).

95. *Hall v. Hall*, 200 So.2d 544 (Fla. 3d Dist. 1967).

C. *Criteria for the Award*

When the parties have reconciled before any testimony has been taken, it is an abuse of discretion for a chancellor to award seventy-five dollars per hour for eight hundred hours' work by the wife's attorney (a total of \$60,000) when only six hours were spent in court appearances, about two hundred hours out of the eight hundred were expended by a law school student, and another two hundred and eighty hours were expended by an associate and others in the attorney's law firm. The district court reduced the fee by twenty thousand dollars.⁹⁶ It is error for a chancellor to award attorney's fees based upon valuations made in affidavits of lawyers and upon the arguments of the attorneys seeking the award, because the award of attorney's fees must be based upon testimony which is subject to cross-examination.⁹⁷ On the other hand, expert testimony is not required in every case for the initial award of attorney's fees *pendente lite*.⁹⁸ It is error for a chancellor to grant attorney's fees to the wife in the absence of any pleadings seeking this item and in the absence of any evidence presented to support an award.⁹⁹

D. *Allocating Fees Between the Parties*

It is not an abuse of discretion for a chancellor to order a husband to pay his wife's attorney's fees even though the wife may be financially able to pay them, and, conversely, it will not be an abuse of discretion if the chancellor should refuse to do so.¹⁰⁰ Further, a chancellor may order the husband to pay one-half of his wife's attorney's fees in a divorce action even though the wife is financially able to pay them.¹⁰¹

E. *Fees Subsequent to Divorce*

A wife is not entitled to an award of attorney's fees incurred in directly and successfully attacking the validity of her husband's Mexican divorce.¹⁰² The wife is entitled to an award of attorney's fees when a husband brings suit to modify as well as clarify a property settlement agreement which the parties had amended subsequent to a divorce decree which adopted the original agreement.¹⁰³ When a former wife brings a petition for a rule to show cause against her former husband to enforce provisions of a separation agreement, the chancellor may deny attorney's fees to the wife when the proceedings primarily concern a business matter between the parties.¹⁰⁴

96. *Novack v. Novack*, 189 So.2d 513 (Fla. 3d Dist. 1966); *writ of cert. discharged*, *Novack v. Novack*, 195 So.2d 199 (Fla. 1967).

97. *Thoni v. Thoni*, 179 So.2d 420 (Fla. 3d Dist. 1965).

98. *Muskin v. Muskin*, 184 So.2d 923 (Fla. 3d Dist. 1966).

99. *Fairall v. Fairall*, 178 So.2d 339 (Fla. 2d Dist. 1965).

100. *Wilkerson v. Wilkerson*, 179 So.2d 592 (Fla. 2d Dist. 1965).

101. *Bencomo v. Bencomo*, 195 So.2d 874 (Fla. 3d Dist. 1967).

102. *Pollack v. Pollack*, 184 So.2d 915 (Fla. 3d Dist. 1966).

103. *Ash v. Ash*, 193 So.2d 677 (Fla. 3d Dist. 1967).

104. *Albert v. Albert*, 196 So.2d 809 (Fla. 3d Dist. 1966).

F. *Interest on Award*

A final decree awarding attorney's fees automatically includes interest at the rate of six per cent per annum until paid.¹⁰⁵

VII. ANTENUPTIAL AND POST-NUPTIAL PROPERTY SETTLEMENT AGREEMENTS

A. *Antenuptial Agreements*

The third district has held that when an antenuptial agreement provided that the wife gave up her dower and homestead rights in the "lands, messuages, tenements, and hereditaments"¹⁰⁶ of the husband these words were susceptible to more than one interpretation. As a result, it was error to enter a summary decree in favor of the widow on the basis that these words covered only real property of the deceased husband.

When an antenuptial agreement is designed to commingle the property of the spouses by having each of them create an estate by the entirety in their separate property but this purpose is frustrated when one spouse acts inconsistently and the other spouse acquiesces in these acts, a court may declare that the agreement has been rescinded by mutual consent.¹⁰⁷

B. *Postnuptial Agreements*

1. VALIDITY AND BURDEN OF PROOF

The burden is on the person seeking to set aside a property settlement to prove that it was entered into by the fraud, deceit, duress, coercion or overreaching of the other spouse. This is particularly true when the wife has an intimate knowledge of the husband's financial worth and she may not, therefore, claim ignorance on her part or non-disclosure by her husband as a reason for setting the agreement aside.¹⁰⁸

In an apparent holding of first impression, the second district has held that if a separation agreement is on its face unreasonable with respect to the wife, the husband has the burden of establishing its validity. The court held that when the husband was an attorney possessing superior knowledge and skill; when the wife received nothing tangible for the relinquishment of her rights in valuable corporate stock; when the transfer occurred during the pendency of a divorce suit and the consideration for the transfer—the forgiveness of the wife's misconduct by

105. *Coggan v. Coggan*, 183 So.2d 839 (Fla. 2d Dist. 1966).

106. *Mead v. Mead*, 193 So.2d 476, 477, 478 (Fla. 3d Dist. 1967).

107. *McMullen v. McMullen*, 185 So.2d 191 (Fla. 2d Dist. 1966).

108. *Pemelman v. Pemelman*, 186 So.2d 552 (Fla. 2d Dist. 1966); *compare with* *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962), which dealt with an antenuptial agreement. *Accord*, *Fisher v. Fisher*, 199 So.2d 338 (Fla. 4th Dist. 1967).

the husband—had failed because of her subsequent misconduct, the transfer was unreasonable on its face and the husband would have to sustain the burden of proving its validity.¹⁰⁹

It is error for a chancellor to refuse to admit a separation agreement into evidence at a divorce hearing when the pleadings raise no issue as to its validity and it appears to be properly executed. After the agreement is admitted into evidence it can be attacked under proper pleadings as being invalid because of duress, coercion, fraud or lack of full disclosure.¹¹⁰ A wife may bring a declaratory decree action against her mentally incompetent husband to test the validity of a postnuptial agreement allegedly obtained by his fraud, concealment and overreaching.¹¹¹

Even in the absence of fraud, duress or coercion, a chancellor may invalidate a provision in a "Separate Property Agreement" whereby the wife relinquished all rights to alimony and support on the grounds that it is "unconscionable" as lacking "consideration."¹¹² Inasmuch as the husband transferred property to the wife and gave her money pursuant to other provisions of the agreement, it is difficult to comprehend how the court decided that there was no consideration; it would appear that the court does not understand the concept.

2. MODIFICATION

When a property settlement agreement provides that the former husband is to make monthly payments to the former wife which shall terminate if she ceases to own and live in the former residence of the parties and the parties have relinquished claims in each other's property, the monthly payments would not be subject to modification by court order because of a change in conditions other than those mentioned in the agreement.¹¹³

If alimony payments as provided for in a separation agreement have been reduced by court order because of a decrease in the former husband's earnings, it is unreasonable for the court to refuse to increase the alimony payments to the amounts specified in the separation agreement when the former husband's income now equals or exceeds his income at the time of the separation agreement.¹¹⁴

109. *Wilkerson v. Wilkerson*, 179 So.2d 592 (Fla. 2d Dist. 1965).

110. *Rouse v. Rouse*, 192 So.2d 77 (Fla. 3d Dist. 1966).

111. *Gormley v. Gormley*, 187 So.2d 676 (Fla. 1st Dist. 1966). The court, in a rather tongue-in-cheek opinion, upheld the sufficiency of the complaint in accordance with the requirements of the case of *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962).

112. *Gelfo v. Gelfo*, 198 So.2d 353 (Fla. 3d Dist. 1967).

113. *Salomon v. Salomon*, 196 So.2d 111 (Fla. 1967), *aff'g* *Salomon v. Salomon*, 186 So.2d 39 (Fla. 3d Dist. 1966).

114. *Nixon v. Nixon*, 200 So.2d 263 (Fla. 3d Dist. 1967).

The somewhat common misconception of many lawyers that alimony provisions in a "property settlement agreement" may not be modified subsequently by court order should be eliminated by the lucid decision in *Okmes v. Okmes*,¹¹⁵ which held that section 65.16 (now section 61.14) of the Florida Statutes becomes a part of every property settlement agreement. Therefore, the alimony provisions are subject to modification upon a showing of substantial change in the financial affairs of the parties even though the court might not have expressly reserved jurisdiction in the divorce decree which approved the property settlement agreement.

3. CONSTRUCTION OF AGREEMENT

The third district has construed the following wording in a property settlement agreement:¹¹⁶

In addition to the above provisions [payments of education expense for the children], the husband will pay to the wife the sum of Two Thousand Five Hundred Dollars (\$2,500.00) annually for each child, until each of said children marries, said sums to be paid in monthly installments.

as requiring the husband to continue to make the support payments even after the children have become twenty-one and self-employed, but not yet married. Under this holding, it is mandatory for a property settlement agreement to spell out that the father is not liable for the support of his children after they reach their majority.

4. SPECIFIC PERFORMANCE

A complaint for specific performance which alleges that a former husband and his former wife entered into a property settlement agreement whereby the husband conveyed his interest in the home to the wife and she agreed to execute a note and mortgage to him states a cause of action even though the parties were divorced, remarried and then divorced again and neither final decree of divorce approved or rejected the property settlement agreement.¹¹⁷

VIII. SEPARATE MAINTENANCE

In the absence of an award of temporary alimony in a suit by the wife for alimony unconnected with divorce under the Florida statutes, it is error for the chancellor to award the wife a sum of money as arrear-

115. 200 So.2d 849 (Fla. 2d Dist. 1967).

116. *Vineberg v. Vineberg*, 177 So.2d 367, 368 (Fla. 3d Dist. 1965).

117. *Wagner v. Wagner*, 196 So.2d 453 (Fla. 4th Dist. 1967). See *Staples v. Staples*, 184 So.2d 903 (Fla. 3d Dist. 1966), which affirmed the actions of the chancellor in refusing to hold a former husband in contempt for failure to pay monthly installments of a property settlement agreement to a wife who was dead at the time of the institution of the contempt proceedings.

ages for temporary alimony, even though the parties may have had some kind of an informal agreement providing for the husband to support the wife during the action.¹¹⁸

When a decree of separate maintenance gives the wife exclusive possession of the marital home for her benefit and the benefit of the children, and the decree reserves jurisdiction for the purpose of modifying the decree in the future, the chancellor should, upon a showing of a change of circumstances, modify the decree or provide that the husband make repairs on the home and to maintain it in a reasonable condition. On the other hand, the chancellor is justified in refusing to order the husband to provide an automobile for his wife and to pay for life insurance on his life for the benefit of his wife and children when the original decree of separate maintenance made no provision for these matters.¹¹⁹

IX. CUSTODY AND SUPPORT

A. *Custody*

1. JURISDICTION

The fact that a plaintiff-husband has voluntarily dismissed his complaint for divorce does not prevent the court from awarding temporary custody of the children to the wife and awarding child support and maintenance to her in accordance with her motion (which was filed prior to the voluntary dismissal pursuant to Rule 1.35(a)(2) of the Florida Rules of Civil Procedure), the inherent power of the equity court over children and section 65.14 of the Florida Statutes.¹²⁰

2. CRITERIA FOR THE AWARD

A chancellor's compassionate concern over the emotional strain and monetary expense incurred by a mother in prior child custody proceedings wherein she was denied custody and his apprehension that she would suffer additional strain and expense in any subsequent custody proceedings is not enough to justify the chancellor in taking custody from the paternal grandparents and awarding it to her.¹²¹

When the wife-mother is suffering from a personality disorder and a fifteen-year-old son expresses a decided preference for living with his father, a chancellor is justified in granting custody to the father.¹²² A chancellor may award custody of children to a father without making a specific finding that the mother is unfit to have custody,¹²³ and when

118. *Quarngesser v. Quarngesser*, 177 So.2d 875 (Fla. 3d Dist. 1965), construing FLA. STAT. § 65.09 (1963).

119. *Fleming v. Fleming*, 177 So.2d 384 (Fla. 3d Dist. 1965).

120. *Cooper v. Cooper*, 194 So.2d 278 (Fla. 2d Dist. 1967).

121. *Garner v. Garner*, 193 So.2d 673 (Fla. 2d Dist. 1967).

122. *Borden v. Borden*, 193 So.2d 15 (Fla. 3d Dist. 1966).

123. *Wilkerson v. Wilkerson*, 179 So.2d 592 (Fla. 2d Dist. 1965).

both parents are fit, the custody of young children should be awarded to their mother.¹²⁴ Although an adulterous wife may not be a fit wife, she may otherwise be a fit mother for young children and should be given their custody.¹²⁵

3. FOREIGN DECREES

It is well established that a child custody decree of a foreign state is not necessarily entitled to full faith and credit in Florida because it is interlocutory in nature and subject to modification in the best interests of the child. As a result, it is error for a Florida chancellor who has jurisdiction over the child because of his presence in this state to refuse to consider the question of custody and to order the return of the child to the foreign state. The chancellor may consider the foreign decree as one factor in deciding the custody issue in Florida, and he may enforce the foreign decree under the principle of comity only after he has determined that it is in the best interest of the child to do so.

We note several guidelines for determining whether a foreign decree is entitled to recognition under the comity principle in a custody case. They are: 1) the length of time which has elapsed since the decree; 2) whether the custody issue was actively litigated by the same parties now before the court; and 3) whether there has been a change in any material circumstances affecting the fitness of the parties relevant to the custody of the child.¹²⁶

An authenticated copy of a California interlocutory divorce decree awarding custody which is attached to an answer is a part of the court record, and the court may take judicial notice of it even though it was not formally introduced into evidence.¹²⁷

4. DIVIDED AND "SPLIT-CUSTODY" PROVISIONS

The first district has articulated the view that a custody order may provide for divided custody and "split-custody" (two children with one parent and two children with the other) in unusual situations.¹²⁸ It is not an abuse of discretion for a chancellor to award custody of three sons, ranging in age from nine to fifteen years old, to the father, and awarding custody of a seventeen-year-old daughter to her mother when this is in accordance with the expressed wishes of the children and other relevant facts.¹²⁹

124. *Julian v. Julian*, 188 So.2d 896 (Fla. 2d Dist. 1966).

125. *McAnespie v. McAnespie*, 200 So.2d 606 (Fla. 2d Dist. 1967).

126. *Morris v. Kridel*, 179 So.2d 130, 133 (Fla. 2d Dist. 1965); *Fox v. Fox*, 179 So.2d 103 (Fla. 3d Dist. 1965).

127. *Lindsey v. Lindsey*, 200 So.2d 643 (Fla. 4th Dist. 1967).

128. *Brackin v. Brackin*, 190 So.2d 816 (Fla. 1st Dist. 1966).

129. *Pollak v. Pollak*, 196 So.2d 771 (Fla. 3d Dist. 1967).

5. VISITATION RIGHTS

It is not erroneous for a final decree of divorce to provide that a former husband shall have visitation rights with his minor child "at reasonable times and places, which may be in or out of the State of Florida" when the husband failed to ask for definite visitation rights during the course of the proceedings or by petition for rehearing.¹³⁰ An order which grants weekend visitation rights to a non-parent (grandparent) of a child whose custody has been awarded to a fit parent is unjustified and unenforceable against the parent who fails to abide by the order. Further, when a child is adopted by a stepmother any rights of visitation or partial custody granted to a non-parent (grandparent) are negated insofar as the stepmother is concerned and are not enforceable against her or the child's father.¹³¹

6. RESIDENCE RESTRICTIONS

In the absence of a residence restriction in the custody provision of a final decree of divorce, the juvenile court, upon receiving jurisdiction of the case from the circuit court, has no right to require the custodian of the child to keep him in Florida or to post a surety bond to insure performance of this restriction in the absence of a change of circumstance occurring since the divorce decree.¹³²

7. CHANGE OF CUSTODY

It would appear that although a chancellor has the power to change custody upon an emergency basis pending a full hearing upon a petition for change in custody, it may be considered erroneous to do so.¹³³

8. WRONGFUL DEATH ACTIONS

A divorced woman who has been granted custody of her child has a legal cause of action for its death even though the divorced father contributed to the support of the child and exercised his visitation rights. Further, when the mother has been appointed administratrix of the child and brings suit as mother and as administratrix of the child, the father has no interest in the litigation and may not intervene.¹³⁴

9. LEGISLATION

When one parent petitions for a change in the name of his or her minor child and the other parent is a non-resident of Florida, construc-

130. *Smith v. Smith*, 177 So.2d 351, 352 (Fla. 2d Dist. 1965).

131. *Lee v. Kepler*, 197 So.2d 570 (Fla. 3d Dist. 1967).

132. *In re E. P.*, 186 So.2d 801 (Fla. 3d Dist. 1966).

133. *Orlowitz v. Orlowitz*, 178 So.2d 878 (Fla. 3d Dist. 1965).

134. *Jordan v. Jordan*, 187 So.2d 68 (Fla. 3d Dist. 1966).

tive service of process may now be used to notify the non-resident parent of the petition.¹³⁵

B. *Support*

1. JURISDICTION

A trial court does not have jurisdiction to enter an order decreeing a trust in jointly held property and, in effect, making a property settlement (part of which was for the support of the children to the marriage) in a post-decretal proceeding twenty-two months after a final decree of divorce, even though the final decree reserved jurisdiction as to custody and support of the children of the marriage.¹³⁶

2. FOREIGN DECREES

When a former wife brings suit in Florida to establish a foreign decree providing for child support payments, to collect for arrearages under this foreign decree and to increase the amount of these payments, the Florida court may establish the foreign decree as a Florida decree but refuse to enter an award for arrearages based on equitable defenses such as a subsequent modification by the parties.¹³⁷

A former wife may not secure a Florida judgment based upon an Illinois award of child support when the Illinois court subsequently takes custody of the child from her and grants it to her former husband. The subsequent Illinois decree did not expressly relieve the husband from the duty of continuing child support payments, but the Florida court construed the Illinois decree as impliedly relieving the former husband from the mandates of the first decree.¹³⁸

A California paternity and support decree which is not subject to collateral attack in California is also not subject to collateral attack in Florida when a proceeding is brought in Florida under the Uniform Reciprocal Enforcement of Support Law to make the California decree a domestic one.¹³⁹

3. INSURANCE POLICIES

A provision in a final decree of divorce which requires a husband-father to "maintain and keep current with his employment any and all policies on his life, which such policies shall be made payable to the minor

135. Fla. Laws 1967 ch. 67-475, S.B. No. 1261, amending section 69.02(6) of the Florida Statutes (1967).

136. *Ayers v. Ayers*, 191 So.2d 63 (Fla. 1st Dist. 1966).

137. *Smith v. Smith*, 197 So.2d 16 (Fla. 3d Dist. 1967).

138. *Cassidy v. Cassidy*, 181 So.2d 179 (Fla. 3d Dist. 1965).

139. *Holcomb v. Holcomb*, 198 So.2d 32 (Fla. 4th Dist. 1967).

child"¹⁴⁰ operates to vest in his child an indefeasible interest in a term group insurance contract of the husband's employer. This rule governs even though the father never notified the insurance company of a change of beneficiary from his second wife to his son and a new insurance company was substituted for the original one.

4. ENFORCEMENT

In a case of first impression, the third district has held that the Florida constitutional one thousand dollar personal property exemption from forced sale may be asserted by a former husband who has re-married when a writ of execution is issued upon a judgment obtained by a former wife for arrearages of child support provided in a final decree of divorce.¹⁴¹ It would appear that the only practical means of enforcement is through the contempt powers of the court.

An interesting illustration of the dichotomy between an attempt to modify retroactively a child support order and the attempted enforcement of the same order by contempt was presented in *Boyle v. Boyle*.¹⁴² A mother had been awarded custody of her minor son, and the father was ordered to make child support payments. Subsequently, the son, age twenty, took up his abode with his father, and the father stopped making support payments to his former wife. The former wife then filed contempt proceedings against the father, and he was adjudged in contempt. The third district held that a court has no power to modify retroactively a child support order upon the petition of the husband. On the other hand, the court has the discretion to refuse to use its contempt power to force compliance in paying the arrearages of child support depending upon the facts of the case. However, the court refused to disturb the discretion of the chancellor in holding the father in contempt because of the factual setting of the case.

It is within the sound discretion of a chancellor to hold that a former wife has "waived" her rights to arrearages in child support payments when she has acquiesced in the actions of her second husband who refused visitation rights to the father and who insisted that he alone would support the children and did so until he disappeared. In effect, the notion that unpaid child support is a "vested property right" is an overstatement; it may become "unvested" by subsequent conduct of the parties.¹⁴³

A sentence of a five hundred dollar fine or four months in jail for contempt of court by a husband who failed to deposit support payments in the registry of the court is excessive when the facts showed that the

140. *Dixon v. Dixon*, 184 So.2d 478, 479 (Fla. 2d Dist. 1966), *cert. denied*, 194 So.2d 897 (Fla. 1967). Compare *Cadore v. Cadore*, 67 So.2d 635 (Fla. 1953).

141. *Azar v. Graham*, 194 So.2d 684 (Fla. 3d Dist. 1967).

142. 194 So.2d 64 (Fla. 3d Dist. 1967).

143. *Warrick v. Hender*, 198 So.2d 348 (Fla. 4th Dist. 1967).

husband had lived with and supported his dependents during the period when he failed to deposit the support payments in the court registry. "The order of commitment here is in the nature of punishment for a contempt more technical than real."¹⁴⁴

The general extradition statute of Florida requires that the demanding state allege that the accused was present in the demanding state at the time of the alleged crime.¹⁴⁵ However, under the Uniform Reciprocal Enforcement of Support Law¹⁴⁶ extradition may be made even though the accused was not in the demanding state at the time of the commission of the crime and although he has not fled from the demanding state.¹⁴⁷

Prima facie evidence of fraud exists when a father who is in arrears in the payment of child support conveys real property for a nominal consideration to a relative.¹⁴⁸

X. ADOPTION

The Florida statutes¹⁴⁹ require that a juvenile court judge must make and recite in his order specific findings of facts as a prerequisite for permanently removing children from their parents and placing them with a licensed child placing agency for adoption.¹⁵⁰ Advanced age will not per se serve as an automatic disqualification of a person who seeks to adopt a minor. For example, in unusual circumstances a person aged sixty-eight may be approved as an adopting parent.¹⁵¹ It is proper to permit a stepfather to adopt a child over the objections of the natural father who has abandoned his child by failing to support him and by attempting to communicate with him on only one occasion.¹⁵²

Formal legal documents wherein a natural mother has consented to the adoption of her child should ordinarily be respected by the courts and should not be set aside for frivolous or inconsequential reasons. However, when a natural mother executes such an instrument agreeing to the adoption of her child by the child's grandmother and grandfather (the parents of the natural mother), there is a strained relationship between the mother and her parents and the agreement was executed when the mother was young and intellectually immature, a court will be justified in allowing a revocation of the agreement by the mother especially when

144. *State v. Boyer*, 180 So.2d 165, 166 (Fla. 2d Dist. 1965).

145. FLA. STAT. Ch. 941.03 (1965).

146. FLA. STAT. § 88.061 (1965).

147. *Cox v. State*, 186 So.2d 467 (Fla. 2d Dist. 1965).

148. *Gyorok v. Davis*, 183 So.2d 701 (Fla. 3d Dist. 1966), applying FLA. STAT. § 726.01 (1965).

149. FLA. STAT. § 39.11(1)(d) (1965).

150. *In re G. S., A. S., and R. S. v. State*, 190 So.2d 603 (Fla. 2d Dist. 1966).

151. *In re Adoption of Christian*, 184 So.2d 657 (Fla. 4th Dist. 1966).

152. *In re Adoption of Layton*, 196 So.2d 784 (Fla. 3d Dist. 1967).

she shows a change in circumstances arising since the execution of the consent agreement.¹⁵³

A non-consenting parent has the right to present arguments against the adoption of his child by others even though he has not presented his formal answer to the adoption petition within the proper time. Further, a petition for adoption over the protests of the natural father should not be granted unless there is clear and convincing evidence that he has abandoned his child, or he is unfit, or that it is "manifestly in the interest of the child to allow the adoption in favor of strangers."¹⁵⁴

Sections 72.07-.09, 72.041, 72.10-.12, 72.14-.18, 72.20-.22, 72.24, 72.25, 72.27-.30, and 72.32-.39 of the Florida Statutes, which dealt with adoption, have been transferred to chapter 63, Florida Statutes and are renumbered 63.011-.031, 63.041, 63.051-.071, 63.081-.121, 63.131-.151, 63.161, 63.171, 63.181-.211 and 63.211-.291. In addition, renumbered sections 63.081, 63.101-.161, 63.181, 63.201, 63.211, 63.231, 63.241 and 63.261-.291 were amended in minor detail as to adoption procedures.¹⁵⁵

Section 72.18 of the former Florida Statutes (section 63.121 of the re-numbered 1967 version of the adoption statutes) was amended to provide that the court may, upon a showing of impracticability, excuse either or both petitioners for adoption and the adoptee who is twelve years of age or older from attending the adoption hearing.¹⁵⁶

XI. JUVENILE COURTS AND JUVENILES

A. *Jurisdiction of Juvenile Courts*

Another chapter was written in the overlapping jurisdictional morass between the juvenile and circuit courts in *Lewison v. State*.¹⁵⁷ In *Lewison* the Broward County Juvenile Court adjudicated that a child was a dependent child and awarded temporary custody to the mother. The mother then moved to Dade County and instituted divorce proceedings. The Dade County Circuit Court awarded custody to the mother and transferred the custody portion of the decree to the Dade County Juvenile Court. The mother placed her child in the home of a couple who later petitioned for adoption of the child in the Dade County Circuit Court. Subsequent to the commencement of the adoption proceedings, the Broward County Juvenile Court issued a Rule to Show Cause directed to the mother and ordered that the child be brought back to Broward County. The child was brought back. The Dade County Circuit Court then ordered that custody be returned to the adopting couple and that

153. *In re Adoption of Arnold*, 184 So.2d 192 (Fla. 4th Dist. 1966).

154. *In re Adoption of Shaw*, 198 So.2d 87, 92 (Fla. 3d Dist. 1967).

155. Fla. Laws 1967, ch. 67-254, S.B. No. 441.

156. Fla. Laws 1967, ch. 67-390, S.B. No. 845.

157. 193 So.2d 53 (Fla. 4th Dist. 1966).

the child be brought back from Broward County. The Broward County Juvenile Court then held the attorney for the mother in indirect contempt because of his actions in the Dade County Circuit Court. The fourth district held that although the jurisdiction of the juvenile and circuit courts may overlap in some instances, the Broward County Juvenile Court had jurisdiction only in cases involving a child's delinquency or dependency. At best, the jurisdiction of the Broward Juvenile Court was concurrent with the Dade County Circuit Court and not exclusive. Furthermore, the adoption proceedings in the Circuit Court are neither connected with nor controlled by the prior custody award in the Juvenile Court. The Broward County Juvenile Court may still have had some limited jurisdiction over the case, but the jurisdiction of the Circuit Court for Dade County was unaffected. As a result, the attorney for the mother was within his rights in representing the mother in the Dade County Circuit Court and, therefore, not in contempt of the Broward County Juvenile Court.

The Juvenile and Domestic Relations Court of Dade County has jurisdiction to modify a final decree of a circuit court involving child custody even though the child is not delinquent or dependent when jurisdiction is transferred to the juvenile court by the circuit court.¹⁵⁸ But the Dade County Juvenile and Domestic Relations Court does not have jurisdiction to increase a child support award of a circuit court when the father has complied with the decree of the circuit court.¹⁵⁹

An order of the juvenile court which awards temporary custody of a child to the father, on the basis that the child is a dependent child, will not necessarily preclude a permanent award of custody by the circuit court in divorce proceedings.¹⁶⁰

A child, for whom custody and support provisions have been made in the circuit court in a divorce proceeding, may thereafter be adjudged a dependent or delinquent child in a juvenile court. The jurisdiction of a juvenile court usually depends upon delinquency or dependency while support of a child in divorce proceedings in the circuit court is adjudicated without such determination. Hence, the causes of action are different and the jurisdiction is different. As a result of this reasoning, a father who is in arrears in making child support payments as ordered by the circuit court in its divorce decree may be ordered subsequently by a juvenile court to make support payments to his "dependent children" and may be held in civil contempt of the juvenile court if he fails to do so.¹⁶¹

Prohibition will lie only to prevent a court from acting without or in excess of its jurisdiction. It may not be used as a substitute for an appeal

158. *State v. Chastain*, 197 So.2d 561 (Fla. 3d Dist. 1967).

159. *In re McG.*, 188 So.2d 845 (Fla. 3d Dist. 1966).

160. *In re G. K. L.*, 194 So.2d 36 (Fla. 3d Dist. 1967).

161. *In re S. L. T., R. L. T., R. L. T.*, 180 So.2d 374 (Fla. 2d Dist. 1965). McNatt, Associate Judge, concurring specially, was of the opinion that the juvenile court did not have jurisdiction. *Accord, In re S. T. P., D. K. P.*, 149 So.2d 29 (Fla. 3d Dist. 1967).

from a custody award of a juvenile court which may be erroneous but not void.¹⁶²

Although a juvenile court is empowered to order an allegedly dependent child to undergo psychiatric or psychological examinations, the court has no power to order similar examinations of his parents. As a result, it is error for a juvenile court judge to "permit" the parents to submit to these examinations upon condition that if they fail to do so the child will be placed with a child placing agency for adoption.¹⁶³

B. Procedure

A Florida statute provides that no child taken into custody who has not been adjudicated to be a dependent or delinquent child shall be detained in custody longer than two days unless a special order of the judge finds that the release of the child would be inimical to the welfare of the child or the public.¹⁶⁴ The reasons for the findings of the judge are subject to review by appeal or in habeas corpus proceedings. The third district has held that this statute means that a juvenile court judge is not required to conduct a hearing within this two-day period when a juvenile has been adjudicated a delinquent in three prior cases, even though he had fully complied with the punishment or probation accorded him in these cases.¹⁶⁵ This holding seems most unfortunate in that once a child has been adjudicated a delinquent (even though he has paid for his sins), he may be confined on a new charge without any effective means to secure a hearing or release.

C. Appeals

Under Florida Statutes, section 39.03(7) the time for taking an appeal from an order of the juvenile court was ten days rather than the sixty-day period provided for general appeals. The statute has been repealed and the time for taking an appeal is now governed by the Florida Appellate Rules.¹⁶⁶

D. Criminal and Delinquency Proceedings

1. JURISDICTION OF THE JUVENILE COURTS *vis a vis* THE CRIMINAL COURTS

A juvenile who has not reached his seventeenth birthday at the time of arraignment or at the time he allegedly committed a crime may not be tried by a criminal court unless the juvenile court judge transfers

162. *State v. Yergey*, 188 So.2d 833 (Fla. 4th Dist. 1966).

163. *In re D. A. W.*, 178 So.2d 745 (Fla. 2d Dist. 1965), applying FLA. STAT. § 39.08 (1965).

164. FLA. STAT. § 39.03(7) (1965).

165. *State v. Dennis*, 185 So.2d 12 (Fla. 3d Dist. 1966).

166. *In re D. A. W.*, 186 So.2d 786 (Fla. 4th Dist. 1966), *aff'd*, 193 So.2d 433 (Fla. 1967), applying FLA. STAT. § § 39.14(2) and 59.08 (1965). FLA. LAWS ch. 67-175 provides for the repeal of all statutes prescribing time for taking an appeal.

jurisdiction over the minor to the criminal court pursuant to a Florida statute.¹⁶⁷

This statute was amended to provide that if any child, who is fourteen years of age or older, is brought into the juvenile court charged with an act which would be a felony if he were an adult, then the juvenile court judge may waive jurisdiction and transfer the child to the appropriate criminal court. However, this waiver may not be made until a hearing is conducted as to the desirability of waiving jurisdiction. When the waiver is based upon social histories, psychological or psychiatric reports, the child, his parents, guardian or counsel shall have a right to question the parties responsible for the preparation of these reports. The juvenile court judge shall also waive jurisdiction if the child and at least one parent or his guardian or counsel demand that jurisdiction be waived. Finally, if the child is indicted by a grand jury for a capital offense, the juvenile court shall be without jurisdiction and the child shall be handled as if he were an adult.¹⁶⁸

2. RIGHT TO COUNSEL

In a long overdue decision, the Supreme Court of the United States has held that a juvenile charged with delinquency in a juvenile court has a right at the trial stage to be notified of the charges, the right to retain counsel or to have counsel appointed to represent him, the right to confrontation and cross-examination of witnesses and the privilege against self-incrimination.¹⁶⁹ This decision should result in the tacit overruling of the unhappy decision of *In re T.W.P.*,¹⁷⁰ which held that a juvenile may be committed to the Florida School for Boys for the duration of his minority for his delinquent acts without being given the benefit of counsel. It should be noted that the Supreme Court of the United States denied certiorari on this case because the boy had been released and the case was moot.¹⁷¹

3. NOTICE TO PARENTS OR GUARDIAN

In order to determine whether a convicted person was an unmarried minor at the time of his trial and, if so, whether his parents or guardian were notified of his trial pursuant to the Florida statute,¹⁷² evidentiary hearings are needed under Criminal Procedure Rule I, and the judge may not make a finding that the parents or guardian were notified from a mere examination of the original trial record.¹⁷³

167. *Wade v. State*, 184 So.2d 462 (Fla. 2d Dist. 1966), applying FLA. STAT. § 39.02 (1965).

168. Fla. Laws 1967, ch. 67-71, S.B. No. 66.

169. *Application of Gault*, 387 U.S. 1 (1967).

170. 184 So.2d 507 (Fla. 3d Dist. 1966).

171. *In re T. W. P.*, 388 U.S. 912 (1967).

172. FLA. STAT. § 932.38 (1957).

173. *Ziegler v. State*, 180 So.2d 477 (Fla. 3d Dist. 1965).

When the conviction of a minor is a nullity because of the state's failure to notify his parents or guardian as required by statute, and the minor made a post-conviction statement in order to mitigate his sentence in these void proceedings, it is error to introduce this statement against the minor in a subsequent trial and it is a denial of due process.¹⁷⁴

When the parents of a minor child have received notice of criminal offenses charged against him, and four years have elapsed since the giving of notice, the minor may be arraigned, tried, convicted and sentenced without any further notice being given to the parents.¹⁷⁵

4. LEGISLATION

Section 39.12(2) of the Florida Statutes was amended to provide that the juvenile courts shall furnish statistical data to the department of statistics and research of the division of youth services.¹⁷⁶

Under an amendment to section 39.11(1)(e) of the Florida Statutes, the parents, guardian, etc., of a child who has been committed to the state industrial school for boys or girls may now be ordered by the juvenile court to make payments to these institutions for the care and support of the child.¹⁷⁷

Section 39.03(6) of the Florida Statutes was amended to provide for the taking and compiling of fingerprints of juveniles over the age of fourteen who are adjudicated delinquent and who have committed an act which would be a felony if they were adults.¹⁷⁸

Juvenile court judges may now authorize the publication of proceedings in juvenile court hearings with the exception of cases dealing with unwed mothers or placement of illegitimate children.¹⁷⁹

Section 39.01 of the Florida Statutes was amended in a rather curious way.¹⁸⁰ A "delinquent child" now means "a child who commits a violation of law, regardless of where the violation occurred." The amendment then goes on to define a "child in need of supervision" as a child:

[W]ho is incorrigible; or is a persistent truant from school; or who is beyond the control of the child's parent or other legal custodian; or who associates with criminals, reputed criminals, or vicious or immoral persons; or is growing up in idleness or crime; or whose occupation, behavior or associations are such as to injure or endanger the welfare of the child or the welfare

174. *Brooks v. State*, 183 So.2d 550 (Fla. 3d Dist. 1966).

175. *Falagon v. State*, 186 So.2d 804 (Fla. 4th Dist. 1966).

176. Fla. Laws 1967, ch. 67-60, S.B. No. 67.

177. Fla. Laws 1967, ch. 67-61, S.B. No. 68.

178. Fla. Laws 1967, ch. 67-116, H.B. No. 172.

179. Fla. Laws 1967, ch. 67-509, S.B. No. 45, *amending* FLA. STAT. § 39.09 (1965).

180. Fla. Laws 1967, ch. 67-585, S.B. No. 1505, *amending* FLA. STAT. § 39.01 (1965).

of others; or who is found in a place predominately used for selling intoxicating drinks for consumption on the premises.

Then, to confuse matters, the amendment provides that "a child alleged for a second time before a juvenile court to have committed an act defined [above] . . . may be alleged to be a delinquent child." Does this mean, for example, that a child who is twice accused of "growing up in idleness" has committed a violation of the law? The courts should have a merry field day with this legislative nightmare.

XII. GUARDIANSHIP

A. *Jurisdiction*

The domicile of a resident ward is the county in which the guardian of the person was lawfully appointed, and this domicile may be changed only upon order of the county judge based upon a petition of the guardian of the person showing good cause for a change of domicile. Relatives of the ward may not unilaterally remove the ward to a foreign state and then offer proof after the death of the ward that he had sufficient capacity to change his domicile to the foreign state.¹⁸¹

The circuit court may have jurisdiction over a suit brought against a guardian which seeks a resulting or constructive trust, an accounting, and injunctive relief, all based upon a wilful conversion of the ward's property allegedly committed before and during the guardian's tenure when it is shown that adequate relief may not be granted in the county judge's court.¹⁸²

A court-ordered settlement of property rights between a husband and wife during the continuance of their marriage when the husband was an adjudged incompetent is void ab initio as rendered in excess of the county judge's jurisdiction. The fact that the judge's order of settlement was made pursuant to a stipulation of the wife and her husband's guardian does not change this result because jurisdiction may not be conferred on a court by the agreement of the parties.¹⁸³

Under the inherent power of a court of equity, a chancellor may appoint a guardian ad litem for "absent and possibly incompetent parties" even though these parties have not been adjudicated incompetent in the county judge's court.¹⁸⁴

B. *Procedure*

Faced with an ambiguity in the Florida statutes,¹⁸⁵ the second district has held that an alleged incompetent has the right to examine a

181. *In re Estate of Phillips*, 190 So.2d 15 (Fla. 4th Dist. 1966); compare with *Matthews v. Matthews*, 141 So. 2d 799 (Fla. 1st Dist. 1962).

182. *King v. King*, 178 So.2d 35 (Fla. 3d Dist. 1965).

183. *Miller v. Eatmon*, 177 So.2d 523 (Fla. 1st Dist. 1965).

184. *Peppard v. Peppard*, 198 So.2d 68 (Fla. 3d Dist. 1967).

185. FLA. STAT. § §394.22(4) and 394.22(9) (1965).

physician's report which was used by the trial court in determining the question of his competency.¹⁸⁶

Due process has not been afforded alleged incompetents when the notice of hearing to adjudicate their competency was served on them on the same day as the hearing and when there was no evidence that they were violent or likely to harm themselves or others so as to require an immediate hearing.¹⁸⁷

C. *The "Totten Trust" and the Guardian*

The county judge's court has no jurisdiction over an action (against the guardian of the minor beneficiary) brought by the executors of the estate of a deceased creator of a Totten Trust who claim that the will of the deceased revoked the Totten Trust. Such jurisdiction rests in the circuit court.¹⁸⁸

The guardian of an incompetent who, prior to the order adjudicating the incompetency, established a Totten Trust does not have authority to withdraw the funds from the trust unless a court orders the revocation of the Totten Trust because the funds are required for the support and care of the incompetent-trustee.¹⁸⁹

D. *Guardian's and Attorney's Fees*

When a guardian contracts to sell real property of the ward which is located in a foreign state and the attorney for the purchaser in this foreign state performed legal services in having the sale approved by the appropriate court of this foreign state, he is entitled to attorney's fees on an implied contract of employment under section 745.33 of the Florida Statutes. Even if there were no implied contract of employment, fees could still be awarded on a quantum meruit basis.¹⁹⁰

E. *Legislation*

Section 394.192 of the Florida Statutes was adopted to provide for criminal sanctions against persons who falsely conspire to secure the involuntary hospitalization of persons who are not mentally ill, and sections 394.191, 394.20 and 394.201, which deal with the hospitalization of mentally ill persons, were amended as to the use of private hospitals, emergency and non-emergency hospitalization of the mentally ill, payment for their care, release procedures, etc.¹⁹¹

186. *Whealton v. Whealton*, 184 So.2d 228 (Fla. 2d Dist. 1966).

187. *In re Guardianship of Swain*, 199 So.2d 736 (Fla. 1st Dist. 1967). Rawls, C. J., dissenting, was of the view that the county judge never had jurisdiction over the persons of the incompetents because of the inadequate notice.

188. *In re Estate of Young*, 199 So.2d 115 (Fla. 2d Dist. 1967).

189. *First Nat'l Bank v. First Fed. Sav. & Loan Ass'n*, 196 So.2d 211 (Fla. 2d Dist. 1967).

190. *Dierickx v. Wischart*, 195 So.2d 614 (Fla. 3d Dist. 1967).

191. Fla. Laws 1967, ch. 67-7, H.B. No. 22.

An act was adopted which gives the county judge the power to appoint a guardian of property for a physically incompetent person who is incapable of managing his own estate. The county judge is empowered to act solely upon the petition of the physically incompetent, and the order appointing a guardian shall be made without adjudicating that the person is incompetent.¹⁹² The statute seems a bit paradoxical.

Section 744.20 of the Florida Statutes was amended to provide that the county judge may within his discretion appoint an attorney as guardian ad litem for property of an alleged incompetent nonresident.¹⁹³

Section 745.15 of the Florida Statutes was amended to provide that the county judge may authorize guardians to transfer the separate property of an incompetent wife without the joinder of her husband when there is a need to do so in order to provide support for her.¹⁹⁴

Under amended section 744.64 of the Florida Statutes, the county judge may now authorize the use of the ward's funds for the last illness and burial of the ward's dependents. The amended statute gives a very broad definition to the word "dependents."¹⁹⁵

Florida Statute, section 745.03(2) was amended to provide that the county judge may authorize the reinvestment of the proceeds acquired by a married incompetent ward from the sale of a home held by the entireties into the purchase of another home held in the same manner.¹⁹⁶

Sections 744.481, 744.482(a), (b), (c), (d), (e), (f) and 744.484 were added to the Florida Statutes to require a guardian to have his ward examined annually by a licensed physician as to his mental and physical condition unless the county judge orders, after hearing and notice, that the examinations are not necessary. Examinations are not required for wards who are maintained in a state institution.¹⁹⁷

Section 409.411 of the Florida Statutes was amended to permit the receipt of welfare payments when the incompetent person is living in the household of an adult member of his family or there is a responsible person who will act in his behalf. In such cases, a guardian need not be appointed.¹⁹⁸

Under an amendment to the Florida Statutes, the guardian may pay from the ward's estate, subject to the approval of the county judge, reasonable funeral expenses for the ward in an amount not to exceed seven hundred and fifty dollars.¹⁹⁹

192. Fla. Laws 1967, ch. 67-12, H.B. No. 14.

193. Fla. Laws 1967, ch. 67-80, H.B. No. 201.

194. Fla. Laws 1967, ch. 67-81, H.B. No. 202.

195. Fla. Laws 1967, ch. 67-82, H.B. No. 203.

196. Fla. Laws 1967, ch. 67-83, H.B. No. 205.

197. Fla. Laws 1967, ch. 67-155, H.B. No. 45.

198. Fla. Laws 1967, ch. 67-291, Comm. Substitute for S.B. No. 650.

199. Fla. Laws 1967, ch. 67-391, S.B. No. 604, adding section 744.68 to the Florida Statutes (1967).

XIII. ILLEGITIMACY

A. *Jurisdiction*

The Florida statutes require that personal service of process upon a minor must be made by the officer reading the summons to the minor and also to the guardian or other person who has care or custody of the minor.²⁰⁰ Hence, the reading of the summons in a bastardy action to the mother of the minor defendant without reading it to him is improper service of process. Further, a guardian ad litem must be appointed for the minor defendant in order for the court to have jurisdiction over him in a bastardy action.²⁰¹

B. *Foreign Decrees*

A bastardy decree of a sister state which adjudicates paternity is entitled to full faith and credit in Florida, and this foreign decree must be established as a Florida decree if the mother of the child seeks to enforce its support provisions in this state. Once the foreign decree has been made a domestic decree, the mother may seek to modify the decree by having the Florida court increase the amount of support payments even though the mother and child are residents of the foreign state while the father is now a resident of Florida.²⁰²

The third district has held that a Florida court may lend its equitable remedies on the basis of comity to enforce a decree of a court in the Dominican Republic which held that the defendant is the father of an illegitimate child and ordered him to make child support payments. The dissenting opinion considered that the foreign decree was penal in nature because it ordered the father's imprisonment for two years and the primary purpose of the foreign proceeding was punishment not compensation, and that comity should not be used to enforce foreign penal decrees.²⁰³

C. *Visitation Rights*

In a case of apparent first impression in Florida, the first district has held that when a natural father acknowledges paternity of an illegitimate child, is interested in its welfare and provides it with support, he should be granted visitation rights unless it is shown that it would be detrimental to the child's welfare. Further, it is proper for the chancellor to order that the natural father be given notice of any adoption proceedings regarding this child.²⁰⁴

200. FLA. STAT. § § 47.23 and 47.24 (1965).

201. *Flint v. Baker*, 189 So.2d 654 (Fla. 2d Dist. 1966).

202. *Mocher v. Rasmussen-Taxdal*, 180 So.2d 488 (Fla. 2d Dist. 1965).

203. *Cox v. Pow*, 182 So.2d 31 (Fla. 3d Dist. 1966).

204. *Mixon v. Mize*, 198 So.2d 373 (Fla. 1st Dist. 1967).

D. *Proof of Parentage*

In bastardy proceedings, when the plaintiff-woman admits that she had intercourse with another man as well as the defendant during the medically recognized time in which conception may have occurred, the trier of fact may not determine the fact of parentage based upon speculation in the absence of medical facts showing which man was the father.²⁰⁵

E. *The "Tort" of Bastardy*

In a case of first impression in Florida, the first district has held that an illegitimate child has no cause of action against her natural father for the illicit relations which he had with her mother which resulted in her being born a bastard—a cause of action sounding in tort arising out of acts causing one to be born in a state of illegitimacy.²⁰⁶

XIV. MISCELLANEOUS

A. *Tort Actions*

A husband has a cause of action against a third party for the wrongful death of his wife under the Florida statutes²⁰⁷ which will not be denied him because his negligence or gross negligence caused or contributed to her death. If a husband intentionally causes the death of his wife he may not recover, but gross negligence may not be equated to an intentional act.²⁰⁸

A parent is not necessarily liable for the torts of his minor child simply because he is a parent; however, it is a question of fact for the jury to decide if it is negligent for a mother to entrust a stroller to her five-year-old son with instructions to push it in a crowded department store without supervision while she is shopping and the child pushes the stroller into a female shopper, knocking her down and causing personal injuries.²⁰⁹

In a somewhat similar vein, the fourth district has held that it is a jury question whether it is negligence for the parents of a fourteen-year-old boy (who allegedly deliberately shot a playmate) to leave a loaded pistol in a place where the child had access to it during times of unsupervised activity. The court expressly declined to hold that this conduct by the parents was negligence as a matter of law, but that the jury was authorized in finding a lack of due care by the parents.²¹⁰

205. *Yarmark v. Strickland*, 193 So.2d 212 (Fla. 3d Dist. 1966).

206. *Pinkney v. Pinkney*, 198 So.2d 52 (Fla. 1st Dist. 1967).

207. FLA. STAT. § § 768.01 et. seq. (1965).

208. *Strickland v. Atl. Coast Line R.R.*, 194 So.2d 69 (Fla. 1st Dist. 1967).

209. *Bullock v. Armstrong*, 180 So.2d 479 (Fla. 2d Dist. 1965). This case itemizes the four different situations in which a parent may be held liable for the torts of his minor child.

210. *Seabrook v. Taylor*, 199 So.2d 315 (Fla. 4th Dist. 1967).

The Florida Supreme Court donned its medieval, myopic spectacles and reaffirmed the common law rule that a former wife may not sue her husband for an intentional tort committed against her during coverture. The decision was avowedly based upon the "unity" or "merger" theory of marriage and the desire to promote domestic felicity. The court admitted that a wife could sue her husband for her separate property.²¹¹ There is something radically wrong with the law which allows a wife to sue her husband if he deliberately breaks her vase but denies her a remedy if he deliberately breaks her back.

211. *Bencomo v. Bencomo*, 200 So.2d 171 (Fla. 1967).