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Family Law

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FAMILY LAW*

DANIEL E. MURRAY **

The subject matter of this article is divided into the following sections:

1. Marriage and Annulment
2. Jurisdiction for Divorce
3. Vacating of Decrees
4. Grounds for Divorce
5. Alimony
6. Custody and Support of Children
7. Separation and Antenuptial Agreements
8. Separate Maintenance
9. Attorney's Fees
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11. Adoption
12. Juveniles and Juvenile Courts
13. Illegitimacy

The reader is referred to other articles in this *Survey* for additional cases which touched upon family law matters, but whose primary emphasis was in the areas of contracts, torts, property, conflict of laws, and other fields.

Legislation enacted during the 1961 General Session of the Legislature will be discussed in the appropriate sections of this article.

MARRIAGE AND ANNULMENT

Common Law Marriage

By the continued inaction of the Legislature, Florida remains one of the sixteen¹ American states which still recognizes common law marriages. Only four common law marriage cases reached the appellate level in Florida in the last two years, and in each case the courts ruled against the existence of the alleged marriage.

* The material herein surveyed includes the statutes enacted by the 1961 General Session of the Florida Legislature and the cases reported from 113 So.2d 225 through 131 So.2d 927.

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1. Weyrauch, *Informal and Formal Marriage — An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 89 (1960). But see, Foster, *Common Law Divorce*, 46 MINN. L. REV. 43, 48 (1961), who states that only fifteen states still recognize common law marriages. Professor Foster's excellent article traces the development of the common law marriage in Europe and in America. For a more sociological treatment of the common law marriage problem, see Jordan, *The Doctrine of Common Law Divorce*, 14 U. FLA. L. REV. 264 (1961).

The fundamental requisite in Florida for a common law marriage is the proof of the mutual agreement to be husband and wife. This agreement should be proved by the testimony of the parties if this is available; if it is not, then proof of general repute and cohabitation will usually support a presumption that there has been a marriage agreement. Nevertheless, if the one seeking to establish the existence of the common-law marriage is not one of the parties, it may not be sufficient for him to prove only cohabitation and general repute when one of the alleged spouses denies the existence of the common law marriage.²

It is the general rule in Florida that when the relationship between a man and woman living together is meretricious in the beginning, it is presumed to continue until the contrary is proved. Therefore, when a man and a married woman lived together for years and also for an additional period of eight months after the death of the woman's first husband, it was held that there was no evidence that the parties mutually agreed *per verba de praesenti* to be husband and wife after the impediment was removed. Thus, the presumption was not rebutted.³

When a husband and wife have been divorced, have kept the divorce secret for religious reasons, and resumed cohabitation subsequent to the divorce, it is proper for the court to disregard the testimony of the witnesses that they considered the couple to be man and wife since the witnesses had no knowledge of a change from the former status of husband and wife.⁴

Although the state of New York does not recognize common law marriages, seemingly it will recognize a common law marriage which was consummated in Florida by citizens of New York,⁵ so long as there is no impediment to their marriage under the law of New York.⁶

Plural Marriages

In order to rebut the presumption of the validity of a second marriage, a presumption that is one of the strongest known to the law,⁷ it is necessary

2. *McBride v. McBride*, 130 So.2d 302 (Fla. App. 1961).

3. *Marshall v. Sarar*, 118 So.2d 258 (Fla. App. 1960). This case should be compared with *Jones v. Jones*, 119 Fla. 814, 161 So. 836 (1935), in which the second "husband" was unaware of the existence of his "wife's" first husband until two years after the death of the first husband. The court held that a common law marriage came into existence after the impediment was removed.

4. *Harrington v. Miller*, 123 So.2d 736 (Fla. App. 1960). It should be noted that the testimony indicated that the alleged husband: (1) continued alimony payments to his alleged wife until her death and filed a separate income tax return showing these payments; (2) remained silent about the decedent's marital status when asked by the mortician and remained silent when the undertaker was told that the decedent was a divorced woman; and (3) did not contribute towards the funeral expenses of the deceased.

5. *Unowitz v. Unowitz*, 210 N.Y.S.2d 286 (Sup. Ct. 1960).

6. Goebel, *Family Law*, 1960 *Survey of New York Law*, 35 N.Y.U.L. REV. 1552 (1960).

7. *McBride v. McBride*, 130 So.2d 302, 304 (Fla. App. 1961).

for the first wife to exhaust every reasonable possibility that her husband did not secure a divorce from her. She must secure certificates negating the fact of divorce from the bureau of vital statistics of each state in which her husband resided. If any of these states does not have a central recording office, she must then obtain certificates from each county in those states "in which there is evidence to show her husband resided."⁸

Annulment

The district court has held, in an equivocal opinion, that a "suit for annulment of marriage of an adult may not be maintained by an alleged next friend."⁹ The court seemed to base its decision upon the statute which provides that suits to enforce rights of an incompetent ward "shall be brought jointly in the name of the guardian and the ward."¹⁰ Does this mean that the court would have permitted a guardian to bring an annulment action? It is clear that a guardian may neither institute¹¹ nor maintain¹² a divorce action for an incompetent adult. The instant case should not be construed as an adoption of a similar rule for annulment.

Legislation

Section 741.057 of the Florida Statutes was amended¹³ to provide that the county judge may destroy physicians' certificates and laboratory reports of blood tests of those applying for marriage licenses after they have been filed for a period of sixty days.

JURISDICTION FOR DIVORCE

Residence

Proof of residence is not required as a condition precedent for proceeding with a suit for divorce; it is only a condition precedent to the granting of a final decree of divorce. Therefore, when a husband wishes to contest his wife's residence upon the basis that she did not leave the family's northern domicile for just cause, he must assert this defense in his answer and not by a special appearance and a motion to dismiss for lack of jurisdiction over the person of the defendant.¹⁴

8. *King v. Keller*, 117 So.2d 726, 730 (Fla. 1960). See *Quinn v. Miles*, 124 So.2d 883 (Fla. App. 1960), for a similar view when the husband married *three* wives and the first wife attempted to overcome the presumption of validity which existed in favor of the last marriage.

9. *Eden v. Eden*, 130 So.2d 887 (Fla. App. 1961).

10. FLA. STAT. § 744.61 (1961).

11. *Scott v. Scott*, 45 So.2d 878 (Fla. 1950).

12. *Wood v. Beard*, 107 So.2d 198 (Fla. App. 1958).

13. Fla. Laws 1961, ch. 61-17.

14. *Fine v. Fine*, 122 So.2d 494 (Fla. App. 1960). Corroborated and undenied testimony that the plaintiff moved to Florida in September 1956, that he filed suit in December 1956, and the last hearing before the lower court was in January 1958, was sufficient to show a compliance with the former ninety day residence requirement. *Trethewey v. Trethewey*, 115 So.2d 712 (Fla. App. 1959).

In an alleged case of first impression, the district court has held that although a wife who is living in a foreign state acquires the "domicile" of her husband when he moves to Florida, she must actually reside in Florida for the required six month period in order for the Florida court to have jurisdiction of her divorce suit — domicile and residence being treated as separate concepts.¹⁵ It is submitted that the court overlooked the principle of *McIntyre v. McIntyre*¹⁶ wherein the Florida Supreme Court held that when a wife moved from Florida to Georgia while her husband continued to reside in Florida, this alone did not deprive the Florida courts of jurisdiction even though she had been in Florida for a period of only four days out of the six month period immediately preceding the filing of her suit for divorce. In *McIntyre* the court drew no dichotomy between domicile and residence.¹⁷

In the last two years there have been relatively few attacks in foreign states upon the validity of Florida divorces; the attack has been concentrated upon Nevada and Mexican mail order divorces.¹⁸

Subject Matter

Seemingly, the Florida courts have jurisdiction over the subject matter in a divorce suit when service of process has been perfected by constructive service even though the marriage may have been dissolved by a prior foreign divorce decree.¹⁹

Process

An allegation contained in a sworn statement for service of process by publication (and reiterated under oath in the complaint) "that the last known address of said defendant was General Delivery, Los Angeles, California"²⁰ is not a compliance with the statute²¹ which requires that the sworn statement specify "that the residence of such person is either unknown or in some state or country other than Florida." The word "address" is not synonymous with "residence," hence, the court had no jurisdiction over the defendant. This lack of jurisdiction could not be cured by personal service upon the defendant when the return of the sheriff was not made until after the court had entered a divorce decree. Valid personal service gives the

15. *Brown v. Brown*, 123 So.2d 382 (Fla. App. 1960); noted in 15 U. MIAMI L. REV. 409 (1961).

16. 53 So.2d 824 (Fla. 1951).

17. The case of *Campbell v. Campbell*, 57 So.2d 34 (Fla. 1952), which was cited by the court in *Brown* would not appear to be as relevant factually as the *McIntyre* case.

18. See Foster, *Family Law*, 1960 *Annual Survey of American Law*, 36 N.Y.U.L. REV. 629, 630 (1961); Goebel, *Family Law*, 1960 *Survey of New York Law*, 35 N.Y.U.L. REV. 1552, 1556 (1960); Ploscowe, *Family Law*, 1959 *Annual Survey of American Law*, 35 N.Y.U.L. REV. 388, 395 (1959).

19. *Camp v. Camp*, 120 So.2d 813 (Fla. App. 1960).

20. *Wilmott v. Wilmott*, 119 So.2d 54, 55 (Fla. App. 1960).

21. FLA. STAT. § 48.04(3) (1961).

court jurisdiction over the person, but this jurisdiction must lie "dormant" until proper proof of the regularity of the service is made prior to a decree pro confesso and the final divorce decree.²²

VACATING OF DECREES

The distinction between a direct and a collateral attack on a final decree of divorce was illustrated in the cases of *Macfadden v. Muckerman*²³ and *Horra v. Horra*.²⁴ In *Macfadden*, a former wife filed a complaint in the nature of a bill of review to set aside a divorce decree granted thirteen years previously to her husband. She alleged that her former husband (now deceased) had falsely claimed to be a legal resident of Florida when in fact he was a mere sojourner or visitor. The court held that the complaint did not state a cause of action because it merely alleged intrinsic fraud rather than extrinsic fraud, *i.e.*, the residence issue was intrinsic in that it could have been litigated in the original proceedings. Extrinsic fraud, which would be a basis for a collateral attack, could consist of allegations that the husband fraudulently kept the wife from defending the action, or kept her in ignorance of the proceedings, or indulged in other misconduct which deprived the wife of an opportunity to defend the original proceedings. In *Horra*, the divorce decree was set aside for fraud because the husband relied upon his wife's representations that she was dismissing her suit for divorce, and he lived with her during the fourteen months intervening between the filing of the suit and the final decree. The wife's fraud upon which the husband relied denied him "an opportunity to have his day in court."²⁵

GROUND FOR DIVORCE

The complete futility of our adversary system of divorce, which is based upon the concept of fault, was well illustrated in the second appearance of *Vecsey v. Vecsey*.²⁶ The district court affirmed the actions of the chancellor in denying a divorce, because of a lack of corroboration of his allegations, to a bigamist husband who had been separated from the defendant (his first wife) for thirty years. Will this decision preserve the sanctity of marriage?

Adultery

The incredibly protracted case of *Chaachou v. Chaachou*²⁷ has wended its way back into the appellate level for its fourth visit. The district court

22. *Wilmott v. Wilmott*, 119 So.2d 54 (Fla. App. 1960).

23. 116 So.2d 448 (Fla. App. 1959).

24. 118 So.2d 670 (Fla. App. 1960).

25. *Id.* at 671.

26. 115 So.2d 719 (Fla. App. 1959).

27. 118 So.2d 73 (Fla. App. 1960). It has been litigated for the last eight years. The opinion seemed to indicate that the weary court was somewhat resigned to further delay in order to allow the husband to present his claim as a ground for divorce and as a

ruled that the husband should be allowed to amend his answer and to file a counterclaim for divorce in order to allege adultery by his wife, even though he allegedly knew of the adultery when he filed the original answer some years ago.

It would seem obvious that when a husband procured an Alabama divorce to be entered against himself (with the wife being the supposed plaintiff) and the Alabama court later voided the decree, he had no standing in Florida to claim a divorce based upon the ground that his wife had obtained a divorce in Alabama.²⁸ Further, when he continues to live with his second "wife" after knowing of the voiding of the divorce decree, he is guilty of adultery and his first wife would be entitled to a divorce.²⁹

Cruelty

The district court has affirmed the findings of a chancellor that it is extreme cruelty for a seventy year old wife to accuse her sixty-nine year old husband of having other women in his life and to leave him on eight different occasions during their relatively brief marriage.³⁰ It is submitted that many men of this age would consider these accusations as flattery rather than cruelty.

Desertion

After a husband leaves his wife she may move from the marital domicile to other quarters, and this will not be construed as a willful and obstinate desertion by her. The duty then rests upon the husband to prove that he has re-established a home and invited the wife to join him before he can support a charge of desertion.³¹ The period of desertion does not run during the pendency of a suit for divorce, unless the divorce proceedings are a sham and a pretense.³²

Defenses

Although no acts of cruelty occurring after a defendant becomes insane can be used as a ground for divorce, cruelty occurring before the adjudication of insanity can be utilized. However, when a husband cohabits with an insane wife and a child is born thirteen months after the adjudication, it constitutes a condonation of any cruelty which occurred before the fact of

possible bar to alimony. For further proceedings see: *Chaachou v. Chaachou*, 122 So.2d 24 (Fla. App. 1960) and *Cypen, Salmon & Cypen v. Chaachou*, 130 So.2d 885 (Fla. 1961).

28. FLA. STAT. § 65.04(8) (1961). See also *Furman v. Furman*, 130 So.2d 316 (Fla. App. 1961).

29. *Choucherie v. Choucherie*, 120 So.2d 821 (Fla. App. 1960).

30. *McFarland v. McFarland*, 131 So.2d 749 (Fla. App. 1961).

31. *Reid v. Reid*, 113 So.2d 574 (Fla. App. 1959). See also *Bednar v. Bednar*, 121 So.2d 456 (Fla. App. 1960).

32. *Poerschke v. Poerschke*, 114 So.2d 30 (Fla. App. 1959). Accord, *Coppersmith v. Coppersmith*, 127 So.2d 711 (Fla. App. 1961).

insanity. Any contention by a husband that his cohabitation was "therapeutic rather than marital" would be unavailing.³³

Two cases indicate that the courts may be attempting to tread the delicate paths between recrimination, comparative rectitude and connivance, and an innominate defense may be the result. In the first case,³⁴ the district court ruled that a chancellor had a duty to grant a divorce to the husband when the testimony showed that the wife was "obviously at fault" and "the husband, as near as possible, is free from fault."³⁵ In the second case³⁶ it was decided that when a wife is more at fault than her husband in that she contributed by her own conduct to the conduct of her husband of which she complained, she has failed to prove grounds for divorce because she "engendered and aggravated the marital trouble."³⁷ This result is not based upon the concept of recrimination, wherein each party has been guilty of a ground for divorce, but rather on the notion that if a spouse has caused the other spouse to act in an objectionable manner, she cannot complain about it.

If a husband lives with his second "wife" after his first wife's Mexican mail-order divorce decree has been invalidated by a court of competent jurisdiction, he is barred from obtaining a divorce because of the "clean hands" doctrine.³⁸ This would appear to be a euphemistic term for adultery.

Proof

Inasmuch as the state is an interested party in all divorce litigation, it is proper for the chancellor to conduct a "somewhat extensive examination" of the complaining party when the defendant has failed to produce any testimony and was not present either in person or by counsel. This "wide discretion and latitude of examination of witnesses" would seem to be confined to ex parte divorce hearings.³⁹

Legislation

The former rule forbidding the taking of testimony on the merits in divorce cases within a period of thirty days after the filing of the suit has been repealed. The law now provides that no final decree of divorce may be

33. *Trethewey v. Trethewey*, 115 So.2d 712, 714 (Fla. App. 1959). See also *Raynes v. Raynes*, 128 So.2d 417 (Fla. App. 1961). See the dissenting opinion of Milledge, A. J. in *Simon v. Simon*, 114 So.2d 21, 22 (Fla. App. 1959), for a discussion of the defense of condonation.

34. *Brummitt v. Brummitt*, 115 So.2d 576 (Fla. App. 1959).

35. *Id.* at 577.

36. *Harman v. Harman*, 128 So.2d 164 (Fla. App. 1961).

37. *Id.* at 166.

38. *Furman v. Furman*, 130 So.2d 316 (Fla. App. 1961).

39. *Walker v. Walker*, 123 So.2d 692, 694 (Fla. App. 1960). In this connection, the reader should be referred to the case of *Bergh v. Bergh*, 127 So.2d 481 (Fla. App. 1961), wherein the district court has effectively emasculated the rule of the case of *Harmon v. Harmon*, 40 So.2d 209 (1949), as to the weight to be accorded the finding of a special master.

entered until at least twenty days have elapsed from the date of the filing of the original complaint. If injustice will result from this delay, the court is authorized to enter a decree at an earlier date.⁴⁰

ALIMONY

Right to Alimony

In answer to a certified question of the chancellor, a district court has ruled that absent a statute there is no basis for a Florida court to award alimony to a husband even though the equities are with him; the wife was guilty of extreme cruelty and she "has done physical violence to him which has resulted in his being wholly incapacitated to earn a livelihood."⁴¹ This matter should receive the careful consideration of the legislature. Since the wife is free from suit for injuries inflicted during coverture⁴² and is not liable for alimony upon divorce, the husband is at the mercy of his wife.

Alimony is an allowance to the wife from the husband for her support in lieu of the legal obligation of the husband to support her. It is, therefore, error to order that alimony and medical bills for the wife should be charged against *joint* funds of the husband and wife.⁴³

Retention of Jurisdiction

A series of cases have delineated the dangers involved when a final decree fails to provide for alimony and fails to retain jurisdiction in the future. In the first case⁴⁴ it was decided that an ex-wife has no right in equity to apply for alimony when a prior divorce decree did not allow her alimony and did not retain jurisdiction to award it. Section 65.15^{44a} of the Florida Statutes which provides for modification of decrees relative to alimony is of no assistance because it applies, by its terms, only in those cases where alimony was provided for by agreement or by the decree itself. In the second case, *Schiff v. Schiff*,⁴⁵ it was held that it is an abuse of discretion for a chancellor to deny alimony to a wife without reserving jurisdiction of the case in the event that a change in the wife's financial condition makes an award of alimony necessary. It is seemingly impossible to reconcile this case with *Kirby v. Kirby*⁴⁶ which held that it was within the discretion of a chancellor to deny an award of alimony without reserving

40. Fla. Laws 1961, ch. 61-123.

41. *Davies v. Davies*, 113 So.2d 250, 251 (Fla. App. 1959).

42. Comment, 14 U. MIAMI L. REV. 99 (1959). See also *Amendola v. Amendola*, 118 So.2d 13 (Fla. 1960), *appeal transferred*, *Amendola v. Amendola*, 121 So.2d 805 (Fla. App. 1960).

43. *Simon v. Simon*, 123 So.2d 41 (Fla. App. 1960).

44. *Weiss v. Weiss*, 118 So.2d 833 (Fla. App. 1960).

44a. FLA. STAT. § 65.15 (1961).

45. 123 So.2d 295 (Fla. App. 1960).

46. 111 So.2d 299 (Fla. App. 1959). Odom, J. in the *Schiff* case pointed out the apparent conflict between *Schiff* and *Kirby*.

jurisdiction. Until the conflict between *Kirby* and *Schiff* is resolved, it would appear unwise for a wife's counsel to acquiesce in the drafting of a decree which does not retain jurisdiction to award alimony in the future if the circumstances change.

This retention of jurisdiction facet was further illustrated in a case in which the divorce decree stated, *inter alia*, "that the parties . . . are satisfied to leave the question of alimony and the support of the child to the necessities and requirements of the plaintiff and the liberality and ability of the defendant father."⁴⁷ The decree retained jurisdiction of the cause "to make from time to time such orders as may from time to time become proper"⁴⁸ The court denied the wife's claim to collect amounts of money which the husband had failed to pay pursuant to an oral agreement because there was no finding in the original decree as to any specific amount for alimony. Nevertheless, the wording of the final decree was broad enough to show that the chancellor reserved jurisdiction to award alimony to be paid in the future upon proper application by the wife.

Amount

A husband's liability for alimony cannot be based solely upon his annual income as disclosed by his federal income tax returns. If he spends more than his reported income for living expenses his wife is entitled to alimony commensurate with his living standards "in the absence of a full disclosure by the husband showing his inability to pay."⁴⁹

The district court (in affirming a chancellor's award of alimony) approved a novel "Quarterly Income Adjustment Formula" as a solution to the perplexing problem faced by a professional golfer who must pay alimony to his ex-wife, but who is faced with the fact that his income will vary depending "upon the element of luck, continued good health, as well as his skill"⁵⁰ This formula, or some modification of it, would seem applicable to many occupations and professions which have erratic income fluctuations.

47. *Zoercher v. Zoercher*, 114 So.2d 728, 729-30 (Fla. App. 1959).

48. *Id.* at 731.

49. *Klein v. Klein*, 122 So.2d 205, 206 (Fla. App. 1960); *accord*, *Howard v. Howard*, 130 So.2d 83 (Fla. App. 1961).

50. *Sanders v. Sanders*, 125 So.2d 916, 917-18 (Fla. App. 1961).

"By his decree the chancellor accepted and approved the Special Master's recommendation that defendant husband be required to pay to his wife as alimony a sum equivalent to \$175 per month or \$2,100 annually. However, in view of the husband's complete dependence for a livelihood upon the element of luck, continued good health, as well as his skill, the chancellor was unwilling to require that the alimony to be paid by him be in equal and even-flowing amounts on the first day of each month. Instead, the chancellor devised a formula under which the defendant is required to pay to the wife \$100 a month for child support as recommended by the Master, together with the sum of \$50 a month as alimony. The decree further provides that since these two items, together with the husband's normal expenses of operation, amount to approximately \$20,000 a year, the husband is required to file with the court at the end of each calendar quarter a state-

Tax Factors

In a case of apparent first impression, a district court of appeal has decided that a divorce decree which awards one weekly sum for alimony and support of the minor child may be modified by having the chancellor (upon remand of the case) allocate separate amounts for child support and alimony for tax purposes of the husband.⁵¹ The tax consequences of this decision (and those that followed it) may be affected by a recent decision of the United States Supreme Court.⁵²

Lump Sum Alimony

In a case of first impression in Florida, a district court has ruled that when a husband has requested a decrease in an alimony award and the wife has counterclaimed for an increase, or in the alternative for a lump sum award, the chancellor has discretion to enter a lump sum award.⁵³ It is submitted that this decision is based upon a somewhat strained construction of sections 65.08⁵⁴ and 65.15^{54a} of the Florida Statutes.

In the absence of an agreement between the parties, alimony ceases upon the death of the husband.⁵⁵ Section 65.08 provides that alimony may be awarded in the form of "periodic payments or payment in a lump sum." A synthesis of these two principles makes it clear that it is error to award alimony in weekly installments and a fixed sum "in lieu of post-demise alimony."⁵⁶

ment of his total earnings during the preceding quarterly period. The decree provides that if the husband's quarterly earnings exceed the sum of \$5,000 (this being one-fourth of his annual fixed obligations as mentioned above), then he is required to pay to his wife in a lump sum one-fifth of all income received by him during such quarter above the fixed sum of \$5,000. Such payments out of excess earnings shall be made each quarter until the wife has received the full \$2,100 a year alimony as recommended by the Special Master. The husband must look to the remaining excess earnings for the payment of income taxes, extraordinary expenses and the accumulation of an estate. It is obvious from the decree appealed that if the husband's gross earnings do not exceed \$5,000 during any quarterly period of the calendar year, then his obligation to pay alimony to his wife is limited to the sum of only \$50 a month as otherwise provided for in the decree. By the same token, his inability to earn in excess of the stipulated amount in any quarterly period will conclusively demonstrate his financial inability to meet the needs of his former wife." *Ibid.*

51: Rogoff v. Rogoff, 115 So.2d 456 (Fla. App. 1959); *accord*, Ginsberg v. Ginsberg, 127 So.2d 137 (Fla. App. 1961); Hardy v. Hardy, 118 So.2d 106 (Fla. App. 1960).

52. The reader should be cautioned that these cases must be considered in light of the recent case of Commissioner v. Lester, 81 Sup. Ct. 1343 (1961). It was held that a property settlement which provided that a divorced husband's payments to his ex-wife were to be reduced one-sixth as each child of the marriage reached his majority did not preclude him from deducting the full amount of the payments. Under section 22(k) of the Internal Revenue Code of 1939, added by Revenue Act of 1942, ch. 619, § 120, 56 Stat. 816 (1942), the husband cannot deduct those amounts for support of children if the agreement fixes specific portions of the payments as payable for this support.

53. Moore v. Moore, 113 So.2d 878 (Fla. App. 1959).

54. FLA. STAT. § 65.08 (1961).

54a. *Supra* note 44a, and accompanying text.

55. 13 U. MIAMI L. REV. 378 (1959).

56. Deigaard v. Deigaard, 114 So.2d 516, 517 (Fla. App. 1959); *accord*, Ehrlich v. Ehrlich, 130 So.2d 630 (Fla. App. 1961).

When a husband and wife own their home as tenants by the entirety, it is proper for the chancellor to award the home to the wife as a lump sum alimony award. This is particularly true when the wife contributed more to the purchase and maintenance of the home than did the husband, the husband will soon reach retirement age, and the wife has no income, but has been able to maintain the home by renting rooms. This arrangement provides for the wife without burdening the husband with periodic payments from a small income.⁵⁷ On the other hand, it is error to award the wife a one-half interest in the home which was owned by the husband alone, in addition to periodic alimony, because this would constitute a lump sum alimony award in the absence of proof that the wife had a separate equity in the home acquired by her contributions towards its acquisition or maintenance.⁵⁸

Enforcement

The proof of unpaid amounts of alimony will not entitle a wife, as a matter of right, to an order of commitment of her husband for contempt. Hence, when the ex-husband demonstrates his inability to pay, he is not in willful contempt and the chancellor would not be in error in refusing to make the rule absolute.⁵⁹ The respondent need not be personally served with process, but he may be served by mail or other method which will convey notice to him of the proceedings. If the cause is still pending because of an undisposed of petition for rehearing and the same attorney is prosecuting the petition, then notice upon the attorney will bind the respondent. However, if the decree has become final, service upon the attorney who represented the respondent in the original cause will not be sufficient if the respondent does not receive notice of the proceedings and the attorney denies that he presently represents the respondent.⁶⁰

A district court in the first appearance of *Howard v. Howard*⁶¹ artfully avoided the question of whether alimony payments to a former wife may be

57. Janczewski v. Janczewski, 114 So.2d 428 (Fla. App. 1959).

58. Harrison v. Harrison, 115 So.2d 709 (Fla. App. 1959); *accord*, Bailey v. Bailey, 126 So.2d 165 (Fla. App. 1961). It is proper for a chancellor to order that the home be utilized as a residence place for the wife and children. *Ibid.* Correspondingly, when the custody of children has been taken from the mother and given to the father, the court has the right to amend a prior decree which gave the mother the right to occupy the home formerly owned as an estate by the entireties and to adjudicate the interests of children whose trust funds were utilized in the purchase of the property. It is proper for the chancellor to establish the rights of the parties in the property, but not to divide it. Brown v. Brown, 123 So.2d 298 (Fla. App. 1960). In appropriate circumstances, it is within the discretion of the chancellor to enter a temporary restraining order, ordering a husband to remove himself from the marital domicile and enjoining him from interfering with or molesting his wife. Ginsberg v. Ginsberg, 113 So.2d 565 (Fla. App. 1959). See also McFarland v. McFarland, 131 So.2d 749 (Fla. App. 1961) (presumption of a gift to the wife in an estate by the entireties) and the excellent article by Starling, *The Tenancy by the Entireties in Florida*, 14 U. FLA. L. REV. 111 (1961).

59. English v. English, 117 So.2d 559 (Fla. App. 1960).

60. Ginsberg v. Ginsberg, 122 So.2d 30 (Fla. App. 1960). See also Arrington v. Brown, 116 So.2d 461 (Fla. App. 1959), regarding a judgment entered for unpaid child support after notice by mail.

61. 118 So.2d 90 (Fla. App. 1960). The court stated that "a net loss in income

satisfied out of property held as an estate by the entirety by a former husband and his second wife. The chancellor raised this question and decided that it could not be done. The district court directed the chancellor to increase the alimony award, and stated that if the husband failed to pay the amount of any increased award this may "ultimately pose a question in the solution of which the law relating to satisfaction of judgments out of property held by the entireties may have to be necessarily considered."⁶² The chancellor then increased the amount of alimony and, upon default of the husband, held him in contempt. The district court affirmed the increased award under the theory that both the husband and his second wife were charged with knowledge of the continuing liability of the husband when they acquired property as tenants by the entirety. The court expressly avoided ruling as to whether the act of vesting title in this manner was voidable as tending to delay or defraud the former wife in the enforcement of her claims. In effect, the court placed the burden upon the husband to convince his second wife that they should liquidate some of their holdings in order to purge himself of the contempt.⁶³

Contempt proceedings are not the sole method of enforcing alimony awards. If the original alimony award was entered by a Florida court, the enforcing court can enter a money judgment for past due amounts and also adjudicate a husband guilty of contempt for failure to pay the sums adjudged in arrears.⁶⁴ If the original alimony award was made in a foreign state, Florida courts may enter a money judgment for past due alimony installments even though they have not been reduced to judgment in the rendering foreign state. Of course, if the law of the foreign state provides that the original decree may be modified as to accrued installments, then the Florida court has no power to enter a judgment. The burden of alleging and proving that the foreign state permits the modification of accrued installments rests upon the defending party, and he is not assisted by the Uniform Judicial Notice of Foreign Law Act⁶⁵ since it does not work automatically.⁶⁶ The Florida courts may refuse to enforce a foreign state's judgment for arrears of alimony and support when the original decree for alimony and child support had been obtained by trickery and fraud on the husband, and the husband is able to present "other equitable defenses."⁶⁷

during one year is not determinative of a husband's ability to pay alimony. In addition to income, consideration must also be given to the extent and value of the husband's capital assets. The manner in which title to the husband's assets is held is not necessarily controlling in determining his ability to pay." *Id.* at 94.

62. *Ibid.*

63. *Howard v. Howard*, 130 So.2d 83 (Fla. App. 1961).

64. *Ginsberg v. Ginsberg*, 123 So.2d 57 (Fla. App. 1960). The court also reaffirmed the holding in the first hearing that service upon the attorney in a pending cause will bind the client. See text accompanying note 60 *supra*.

65. FLA. STAT. § 92.031 (1961).

66. *Miller v. Schulman*, 122 So.2d 589 (Fla. App. 1960).

67. *Klein v. Klein*, 113 So.2d 855, 856 (Fla. App. 1959).

A claim for accrued alimony may be barred by the defense of waiver by acquiescence when the wife has delayed in the assertion of her claim, thereby putting the husband off his guard and leading him to believe that she has waived her claim. This defense must be pleaded and proved by the husband as it is an affirmative defense.⁶⁸

Modification

Even though a husband is in arrears in the payment of alimony, he may seek modification of future alimony if his failure to pay has been caused by conditions beyond his own control. Of course, the accrued alimony cannot be modified because it is a vested property right.⁶⁹ Correspondingly, when a decree which modifies the amount of alimony is ambiguous in that it fails to indicate clearly that the modification shall be prospective rather than retroactive, it should be interpreted as being prospective only in order to uphold its validity.⁷⁰ A petition for modification is not the proper procedure for the claiming of alimony after a wife has relinquished monthly alimony payments in consideration for the conveyance of property and this arrangement has been approved by the chancellor.⁷¹ A petition for a rehearing enables a chancellor to reconsider not only the particular points involved in the rehearing but the entire matter. Therefore, the chancellor may alter alimony provisions of a final decree even though no additional evidence is introduced on this issue and the rehearing is confined to the introduction of additional testimony relative to the custody of children.⁷² A petition to modify a prior alimony decree is supplemental to the original decree. Nevertheless, it is not necessary for the petition to be filed in the original divorce suit; it may be separately styled and assigned a new file number.⁷³

Florida Appellate Rules

Rule 3.8 of the Florida Appellate Rules has been amended to provide that in appeals from orders or decrees awarding separate maintenance, support or alimony, the lower court may order the payment of separate maintenance, support or alimony pending the appeal. The acceptance of these benefits is to be without prejudice to the wife's attacking the correctness of any of the provisions of the original decree which is being appealed.⁷⁴

68. *Davis v. Davis*, 123 So.2d 377 (Fla. App. 1960).

69. *English v. English*, 117 So.2d 559 (Fla. App. 1960) (separate maintenance action).

70. *Mack v. Mack*, 115 So.2d 447 (Fla. App. 1959).

71. The wife would have to offer to return the property and prove fraud, mistake or misrepresentation in the original agreement before she would have a cause of action which would not fall under the provisions of FLA. STAT. § 65.15 (1961). *Graves v. Graves*, 115 So.2d 451 (Fla. App. 1959).

72. *Cole v. Cole*, 130 So.2d 126 (Fla. App. 1961).

73. *Green v. Green*, 130 So.2d 293 (Fla. App. 1961).

74. *In re Florida Appellate Rules*, 131 So.2d 740 (Fla. 1961).

CUSTODY AND SUPPORT OF CHILDREN

Custody

JURISDICTION

The old rule articulated in *Dorman v. Friendly*⁷⁵ that a child must be within the jurisdiction of a state which attempts to determine custody has been overruled by *Rhoades v. Bohn*.⁷⁶ In *Rhoades*, a Wisconsin decree (pursuant to a stipulation of the parties) awarded custody of a minor to the father. The father and child moved to Florida, and years later the mother petitioned the Wisconsin court for custody which was granted to her. The wife sought to enforce the Wisconsin decree in Florida, and the husband resisted upon the ground that the Wisconsin court lacked jurisdiction over the child. The Florida courts overruled *Dorman* upon the basis that the times have changed; a "substantial segment of our population may be characterized as highly mobile"⁷⁷ with the result that parents may remove their children from Florida "within a matter of hours"⁷⁸ and thereby render the Florida courts powerless to deal with their custody. However, the court did refuse to grant "unquestioned enforcement"⁷⁹ to the Wisconsin decree (under the full faith and credit clause) because a custody decree is interlocutory under the law of Wisconsin and Florida in that it is subject to modification for the welfare of the child. The case was remanded for further consideration on the merits. Somewhat in accord with this reasoning, a temporary custody order entered in a Georgia court in habeas corpus proceedings was held not entitled to full faith and credit in Florida, nor would habeas corpus proceedings lie for the purpose of determining which parent was entitled to custody of a minor child when that issue was involved in another current proceeding between the parents.⁸⁰ Although the custody decree of a foreign state is not entitled to full faith and credit in Florida, it is proper for the Florida court to determine that the foreign decree is a valid and subsisting order of a court of competent jurisdiction and to refuse to disturb the order in the absence of proof that there has been a change in circumstances since the rendition of the foreign decree.⁸¹

The posting of a supersedeas bond on appeal is required in order to deprive the lower court of jurisdiction over a custody case; in the absence of the bond, the appellate court will refuse to enforce the order of the chancellor or direct the entry of any specific order.⁸²

75. 146 Fla. 732, 1 So.2d 734 (1941).

76. 114 So.2d 493 (Fla. App. 1959), *aff'd*, 121 So.2d 777 (Fla. 1960).

77. *Rhoades v. Bohn*, 114 So.2d 493, 497 (Fla. App. 1959).

78. *Ibid.*

79. *Id.* at 499.

80. *Wilmott v. Wilmott*, 122 So.2d 486 (Fla. App. 1960).

81. *Shenk v. Shenk*, 126 So.2d 286 (Fla. App. 1961).

82. *Justice v. Van Eepoel*, 113 So.2d 545 (Fla. 1959). Upon remand of this case, the chancellor failed to make a final disposition as directed by the mandate of the supreme

FACTORS DETERMINING CUSTODY

The touchstone in all child custody cases is the ultimate welfare of the child. This glittering generality is deceptive in that it seems difficult, if not impossible, to weave a continuous thread running through the cases. Four cases will illustrate this point. In the first case,⁸³ the custody of two children was awarded to their maternal grandmother against the claim of their father. The desire of the children to live with their grandmother was treated as "a very decisive factor."⁸⁴ In the second case,⁸⁵ custody of a young girl was maintained by the maternal grandparents over the objection of both parents of the child. The wishes of the child were not presented to the court and the father alleged substantial changes in circumstances. The decision of the chancellor was based primarily upon "the effect upon the child of changing custody so close to the inception of a new school year."⁸⁶ In the third case,⁸⁷ a wife secured a divorce, but custody of the two children was awarded to the husband who was to keep them in the home of his parents. Subsequently, the wife petitioned for a change of custody upon the basis that the home of the two children had been changed to another city with the result that it was difficult for her to see them. The district court affirmed the chancellor's awarding of custody to the mother because the father had remarried and had not attempted to take the children into his new home; the mother had steady employment and had an apartment which would accommodate the two children and the move of the children had made it difficult for her to visit them. The court believed that the lower court's decree recognized the "natural God-given right of a parent"⁸⁸ to have custody, and that the best interests of the children lay with custody in the mother. It seems a bit difficult to apply the maxim "God-given right of a parent"⁸⁹ when there are two parents. The fourth case⁹⁰ is basically in accord with the preceding case. However, the court did caution that a finding by the trial judge that "'it is in the best interest' of the child that she remain with her aunt and uncle is not equivalent to a finding that the ultimate welfare of the child requires that she be with her aunt and uncle."⁹¹ This semantic divergence was based upon the view that the lower court gave weight to the fact that the aunt and

court, but entered only a temporary order which the court, on the fourth appearance, affirmed subject to the right of both parties to introduce evidence and to apply for a final order concerning the custody of the two children. *Justice v. Van Eepoel*, 121 So.2d 655 (Fla. 1960).

83. *Eades v. Dorio*, 113 So.2d 232 (Fla. App. 1959).

84. *Id.* at 234.

85. *Bouchard v. Bouchard*, 119 So.2d 819 (Fla. App. 1960).

86. *Id.* at 822.

87. *Johnson v. Johnson*, 114 So.2d 338 (Fla. App. 1959).

88. *Id.* at 341.

89. This "God-given right" reasoning of the Florida courts has been termed "horrible" by one distinguished author. Foster, *Family Law*, 1960 *Annual Survey of American Law*, 36 N.Y.U.L. REV. 629, 636 n.44 (1961).

90. *Foster v. Sharpe*, 114 So.2d 373 (Fla. App. 1959).

91. *Id.* at 376.

uncle could afford to give more to the child than the child's mother could — this is not the sole criterium to be used in determining custody.

DIVIDED CUSTODY

It now seems fairly well established that it is within the discretion of the chancellor to provide that one parent should have custody of the children during the school year and the other parent should have custody during the summer vacation.⁹²

LEGISLATION

The change of name laws have been amended so as to provide that when only one parent petitions for a change of a minor's name, notice of the petition must be served upon the other parent with proof of service being filed in the cause. This change will give some protection to a father whose former wife has remarried.⁹³

*Support*⁹⁴

The general rule is that a father is not legally obligated to support his children after they become adults.⁹⁵ Nevertheless, this rule may be circumvented, indirectly, under certain circumstances. For example, it has been held that when a husband had previously deposited money in a bank in his name as trustee for his wife, it was not erroneous for the court upon the divorce of the parties to order the wife to hold a portion of the money in trust for the son's college education. The father's protests that this decree would in effect force him to support his son after he had reached his majority and while he was still in college were held unavailing.⁹⁶

It is also the general rule that a father is not obligated to support his minor children after his death. However, if one provision of an ambiguously worded separation agreement indicates that the father was to support the child from his estate, the court will choose that interpretation which is in accordance with the best interests of the child. This is particularly true when the father has indicated in his will that he considered that the separation agreement had made provision for the child.⁹⁷

Two cases illustrated the difficulties which will arise in determining the father's financial obligations when children are in his custody tempo-

92. *Metz v. Metz*, 108 So.2d 512 (Fla. App. 1959), and *Harrison v. Harrison*, 115 So.2d 709 (Fla. App. 1959). See also *Hutchinson v. Hutchinson*, 127 So.2d 136 (Fla. App. 1961), which seemed to approve of a decree awarding split custody.

93. Fla. Laws 1961, ch. 61-152.

94. The reader is referred to the comprehensive annotation, *Father's Liability for Support of Child Furnished After Entry of Decree of Absolute Divorce Not Providing for Support*, 69 A.L.R.2d 203 (1960).

95. See 15 U. MIAMI L. REV. 108 (1960).

96. *Deigaard v. Deigaard*, 114 So.2d 516 (Fla. App. 1959).

97. *Reinhardt v. Reinhardt*, 131 So.2d 509 (Fla. App. 1961).

rarily or in the temporary custody of the wife. If a father sends his child to visit with the child's mother, he is obligated to pay the child's transportation costs together with a sufficient amount to support the child while he is in the custody of his mother. However, the father should not be compelled to pay money "to finance a true vacation for the child and the mother to be together."⁹⁸ On the other hand, if the divorce decree provides that the father is to pay a fixed weekly amount for the support of the children, he cannot be relieved of this obligation in contempt proceedings for the period when he had custody of the children. The decree providing for a fixed weekly sum cannot be interpreted in contempt proceedings when it is clear and unambiguous; the court may modify the decree (in a proper proceeding) if a change in circumstances can be shown.⁹⁹

If a nonresident husband appears specially and moves to dismiss the complaint for want of jurisdiction over either of the parties, it is error for the court to enter a decree for child support; the court may determine that it has jurisdiction to enter the divorce, but it cannot enter an in personam decree unless it has jurisdiction over the defendant.¹⁰⁰ If jurisdiction of the cause is not retained for any purpose, it is error for the chancellor *ex mero motu* to vacate portions of a final decree which invalidated a declaration of trust for the support of minor children.¹⁰¹

ENFORCEMENT OF SUPPORT DECREES

If all of the principles of *Hardy v. Hardy*¹⁰² are followed in subsequent decisions, it would appear that fathers now have an effective means of enforcing visitation rights granted in divorce decrees. In *Hardy* the court enunciated these principles: (1) a court may not cancel past due alimony because of the wife's failure to accord child visitation privileges provided for in the divorce decree; (2) when the mother is able to support her children, the court has the discretion to cancel future child support payments by the father in order to penalize the mother for her refusal to accord visitation privileges; (3) the court has the power to "cancel and discharge an accumulated indebtedness for support of a minor child where the mother has failed or refused to comply with the custody provisions of the decree."¹⁰³ The author has no quarrel with the first two statements; however, it would appear that the court has confused the distinction between the equitable discretion of a chancellor to refuse to enforce the payment of accrued child support by contempt proceedings with the separate problem of cancelling the indebtedness. The cases cited by the court seemed to agree that a

98. *Zoercher v. Zoercher*, 114 So.2d 728, 732 (Fla. App. 1959).

99. *Morrison v. Morrison*, 122 So.2d 199 (Fla. App. 1960).

100. *Lawrence v. Lawrence*, 130 So.2d. 639 (Fla. App. 1961).

101. *Ames v. Ames*, 126 So.2d 754 (Fla. App. 1961).

102. 118 So.2d 106 (Fla. App. 1960); *accord*, *Clawson v. Clawson*, 125 So.2d 104 (Fla. App. 1960).

103. *Hardy v. Hardy*, 118 So.2d 106, 109 (Fla. App. 1960).

chancellor may refuse to lend the equitable process of contempt to the collection of accrued support payments; apparently, none of them decided the more important question of cancelling vested property rights.

If a valid divorce has been obtained in a foreign state, but portions of the final decree dealing with child support have been obtained by fraud and trickery upon the husband, the Florida court may refuse to enforce the foreign decree for child support. Nevertheless, under the doctrine of "divisible divorce,"¹⁰⁴ the Florida court should then enter a domestic decree for support based upon the circumstances and needs of the parties.¹⁰⁵ On the other hand, Florida will accord full faith and credit to valid foreign decrees for child support in order to enforce a claim for unpaid amounts unless the decree is subject to retroactive modification by the rendering state. The presumption is that the foreign state has no power to modify accrued amounts, and the burden of proving the contrary rests upon the person defending the claim.¹⁰⁶

In a case of apparent first impression, a district court of appeal has held that a chancellor has the power, under appropriate circumstances, to "require a divorced father to maintain insurance on his life as security for the payment of maintenance and support awarded his minor children."¹⁰⁷ The court, in dicta, stated "that a court has no power to require a divorced father to build an estate payable to his children upon his death."¹⁰⁸ Justice Sturgis, in dissenting, clearly showed that the majority opinion has the effect of requiring a father to "build an estate" for his children — an act which the court admits it is without power to require.¹⁰⁹

A court is entitled to sequester real property belonging to an ex-husband in order to apply it in payment of amounts due from him to his ex-wife for past due child support and for her advances on his behalf in payments on the mortgage encumbering this real property.¹¹⁰ In addition to juridical proceedings, a wife may also be permitted to employ extra-judicial remedies. It is error to enjoin a wife from communicating with her former husband, a career officer in the United States Army in Germany, "or with any officials

104. *Pawley v. Pawley*, 46 So.2d 464 (Fla. 1950). It would appear that Florida is one of the few states that has the "divisible divorce" concept as the result of judicial law-making. With the recent notable exception of California, few states have achieved this result without the aid of a statute. Foster, *Family Law*, 1960 *Annual Survey of American Law*, 36 N.Y.U.L. REV. 629, 633 (1961).

105. *Klein v. Klein*, 113 So.2d 855 (Fla. App. 1959).

106. *Edgar v. Edgar*, 126 So.2d 585 (Fla. App. 1961).

107. *Riley v. Riley*, 131 So.2d 491, 494 (Fla. App. 1961).

108. *Id.* at 491.

109. *Ibid.*

110. *Garland v. Garland*, 118 So.2d 52 (Fla. App. 1960). The decree should state: (1) the amount of these mortgage payments; (2) the value of the real property in order that no more of its value than is needed for repayment to the ex-wife should be taken; (3) the net value of the property over and above any existing mortgages; and (4) the amount of the reduction of the debt to his wife which will ensue by the sequestration of this property.

of the War Department of the United States" about the conduct of her ex-husband "or concerning his legal obligations to her and/or his children"¹¹¹ because this would preclude her from any real means of enforcing the decree for support.¹¹²

LEGISLATION

The act relating to the crime of desertion and withholding of support (for a wife and children) has been amended¹¹³ to provide that the withholding of support by either the husband or the wife must be done wilfully. The amended act^{113a} *seemingly* places the husband and wife on a plane of equality by eliminating the former requirement that a mother had to be required by law to care for and support her child before she was guilty of withholding support. Finally, the former provision for a bond and release from jail has been eliminated.

It is now a crime for any person wilfully to misapply funds paid by another or by any governmental agency for the support of a child. Misapplied funds are those "spent for any purpose other than for necessary and proper home, food, clothing, and the necessities of life, which expenditure results in depriving the child of the above named necessities."¹¹⁴ Although this statute seems designed to eliminate the abuse of welfare funds, it may result in a number of criminal charges being filed by vengeful divorced husbands.

SEPARATION AND ANTENUPTIAL AGREEMENTS

The obligation of a man to support his former wife usually terminates upon his death or upon her remarriage.¹¹⁵ This obligation can, of course, be continued after death by proper provisions in a separation agreement. For example, in *Pentland v. Pentland*¹¹⁶ the parties agreed that the husband was to make annual "gifts" of 3,000 dollars to the wife for a period of five years, and 1,000 dollars per year thereafter until the wife remarried or died. In the event that the husband predeceased his wife, the "gifts" were to continue as a lien upon the estate of the husband. The court, although recognizing the usual rule that a promise to make a gift is unenforceable because of a lack of consideration, ruled that consideration was to be found in the "overall agreement"¹¹⁷ between the parties.

Almost all separation agreements are made during periods of emotional stress. However, unless there is proof that a husband "was not fully capable

111. *Mason v. Mason*, 122 So.2d 577, 578 (Fla. App. 1960).

112. *Mason v. Mason*, *supra* note 111.

113. Fla. Laws 1961, ch. 61-335.

113a. FLA. STAT. § 856.04 (1961).

114. Fla. Laws 1961, ch. 61-216.

115. See 13 U. MIAMI L. REV. 378 (1959).

116. 113 So.2d 872 (Fla. App. 1959).

117. *Id.* at 877.

of understanding the situation with which he was faced or that he was unable to exercise good judgment,"¹¹⁸ the agreement will not be set aside. Further, the validity of a separation agreement does not depend upon a provision "for the continued separation of the parties."¹¹⁹

Required Formalities

Three cases dealing with "oral" separation agreements and "oral" modifications of separation agreements serve to confuse an already muddled subject. In *Dodd v. Dodd*¹²⁰ a former wife filed suit asking the court to enforce a property settlement which allegedly had been made orally between the parties prior to divorce. The wife alleged that she had contributed by her efforts to the husband's acquisition of a substantial estate, and that he had failed to comply with his promise to give her one-half of his estate subsequent to the divorce. The court held that she stated a cause of action even though her testimony at the original divorce hearing (a transcript of the testimony was attached to the complaint) showed that she had voluntarily waived all claims against her husband in return for a cash settlement which she had received. It is difficult to ascertain the basis for this decision unless one is prepared to characterize the complaint as being based upon fraud; if it is so based, the facts do not seem to fit the charge. This latitude in accepting an oral out-of-court separation agreement was not repeated when the oral agreement was made in the presence of the court, for it was held that a chancellor is not bound under the rules of procedure¹²¹ to accept an oral property settlement agreement made in open court even though it is "incorporated in the stenographic notes of the proceedings."¹²² The chancellor may qualify his acceptance by requiring that the agreement be reduced to writing by the parties when the wife indicates a lack of definiteness as to her understanding of the agreement which had a "very sketchy nature."¹²³ Finally, one court has apparently countenanced the temporary modification of alimony and child support payments (as provided by a final decree which incorporated a separation agreement) by the oral agreement of the parties.¹²⁴

It has been held that the amount of alimony provided for in a separation agreement may be increased when the husband's income has increased considerably and the wife's *anticipated* expenses will also increase substan-

118. *Bare v. Bare*, 120 So.2d 186, 188 (Fla. App. 1960).

119. *Ibid.*

120. 114 So.2d 508 (Fla. App. 1959).

121. FLA. R. Civ. P. 1.5(d).

122. *Ibid.*

123. *Cooke v. Cooke*, 126 So.2d 160, 162 (Fla. App. 1961).

124. *Hilson v. Hilson*, 127 So.2d 126 (Fla. App. 1961); *but see, Walden v. Walden*, 114 So.2d 815 (Fla. App. 1959), which reversed the lower court because it considered a purported release by the wife of monies due under an approved separation agreement at an ex parte hearing.

tially.¹²⁵ The facts alleged failed to indicate that the anticipated increase in expenses was based upon any past experience; it is to be wondered if conjectural estimates should be utilized when most wives have little trouble in anticipating additional needs.

Antenuptial Agreements

If an antenuptial agreement provides that the wife is to receive a sum of money in lieu of any interest in her husband's estate provided that the "sum shall be paid not later than six (6) months after the death"¹²⁶ of the husband, the payment of this money within the provided period is a condition precedent to her performance. Therefore, the widow would not have to surrender possession of homestead property unless the payment were made within the stipulated time.¹²⁷

SEPARATE MAINTENANCE

The Supreme Court of Florida, in reversing a district court, has adhered to the view that the Florida courts have jurisdiction over separate maintenance actions brought under section 65.09^{127a} of the Florida Statutes even though neither party has resided in this state for the six month period required for a divorce.¹²⁸ The court has reiterated the same rule when the separate maintenance action was brought under section 65.10,^{128a} even though neither spouse ever resided in Florida and the wife secured service upon the defendant "when he landed at the Miami Airport on his way to Nassau."¹²⁹

In order for a wife to be entitled to alimony unconnected with divorce under section 65.09 of the Florida Statutes, she must allege that a ground for divorce exists and that the parties are married. Therefore, when the wife alleges in her complaint that her husband secured a divorce from her in a foreign state and she does not attack this divorce, this operates as a bar to her suit. Her only recourse is under sections 65.04(8)^{129a} and 65.09 of the Florida Statutes under the theory of a "divisible divorce."¹³⁰ And if the husband has not been guilty of a ground for divorce and has not failed to support his wife, she is not entitled to separate maintenance under either section of the statutes.¹³¹

125. *Terry v. Terry*, 126 So.2d 890 (Fla. App. 1961).

126. *Cohen v. Rothman*, 127 So.2d 143, 144 (Fla. App. 1961).

127. *Cohen v. Rothman*, *supra* note 126.

127a. FLA. STAT. § 65.09 (1961).

128. *Tinsley v. Tinsley*, 125 So.2d 553 (Fla. 1960), *reversing* 116 So.2d 649 (Fla. App. 1960).

128a. FLA. STAT. § 65.10 (1961).

129. *Martin v. Martin*, 128 So.2d 386, 387 (Fla. 1961).

129a. FLA. STAT. § 65.04(8) (1961).

130. *Coppersmith v. Coppersmith*, 127 So.2d 711 (Fla. App. 1961).

131. *Poerschke v. Poerschke*, 114 So.2d 30 (Fla. App. 1959); *accord*, *Raynes v. Raynes*, 128 So.2d 417 (Fla. App. 1961).

A wife will be estopped from claiming separate maintenance when she has obtained a Mexican mail-order divorce even though the decree is subsequently invalidated by a New York court.¹³²

In a divorce suit when a wife counterclaims for alimony unconnected with divorce, it is erroneous to increase a prior support order of a foreign state unless the counterclaim seeks to enforce the foreign order. Nevertheless, when the amount of the increase is justified by the circumstances of the parties, the error will be treated as a harmless one.¹³³

Only two cases dealt with the measurement of the amount of separate maintenance. The first case merely held that when a wife shared an apartment with her self-supporting daughter by a prior marriage, the amount of the separate maintenance should be decreased by one half of the rent for the apartment.¹³⁴ In the second case the court held that a wife is entitled to support from her husband "so long as he has any means of support and she has need for support."¹³⁵ As a result of this reasoning, the wife was awarded sixty dollars per month from a husband who received 300 dollars per month as the proceeds from the sale of his business and who was unable to work because of a heart condition.¹³⁶

Legislation

A husband living in this state separate and apart from his wife and minor children, whether or not the separation is through his fault, may now obtain a decree adjudicating his obligation to support his wife and minor children and his visitation rights in regard to the children. Of course, this remedy may not be granted when there are other pending civil proceedings.¹³⁷ With the usual propensity of women to institute litigation promptly, it is doubtful that this statute will be of much practical use.

ATTORNEY'S FEES

There is no legal authority for a chancellor to order that a wife pay attorney's fees to her counsel in a divorce suit; her attorneys must bring a law action in order to recover. As a corollary, a chancellor has no authority to deny the wife the right to relief in any future divorce litigation until she pays the judgment for attorney's fees.¹³⁸ Similarly, when there is a dispute between a husband and his former attorneys as to the amount of legal fees, the chancellor has no power to enter a rule to show cause against the husband for the fees. The amount of fees must be determined by a separate

132. *Furman v. Furman*, 130 So.2d 316 (Fla. App. 1961).

133. *Brickel v. Brickel*, 122 So.2d 37 (Fla. App. 1960).

134. *Reid v. Reid*, 113 So.2d 574 (Fla. App. 1959).

135. *Bloom v. Bloom*, 131 So.2d 27, 29 (Fla. App. 1961).

136. *Bloom v. Bloom*, *supra* note 135.

137. Fla. Laws 1961, ch. 61-112 (Now FLA. STAT. § 65.101 (1959)).

138. *Cristiani v. Cristiani*, 114 So.2d 726 (Fla. App. 1959).

action on the law side of the court. The chancellor may (and seemingly should) order that when there has been a substitution of attorneys, the client must file a bond in such amount as the chancellor deems proper to secure payment to the attorneys of any judgment that may be entered in the separate law action.¹³⁹

It is error to charge the joint assets of a husband and wife with sums awarded to the wife's attorney when the husband was ordered to pay these sums.¹⁴⁰ If the divorce decree fails to provide that the husband is to pay attorney's fees and suit money to the wife, she may not recover these amounts in a subsequent suit against the husband.¹⁴¹ Although it is proper to award attorney's fees for services performed in the enforcement of a decree providing for alimony, it is improper to award fees for services rendered in proceedings to increase a prior award.¹⁴²

GUARDIANSHIP

It would appear that a child may be removed from one county to another with the oral consent of the county judge of the first county, and the second county will have jurisdiction of the child in guardianship proceedings. Any questions relating to venue must be raised in the lower court; they cannot be raised for the first time in the appellate court in order to invalidate the proceedings.¹⁴³

Some thorny questions relating to appeals in guardianship cases have been answered during the last two years. It appears that an order of the county judge denying a petition for restoration of competency must be appealed to the district court (not the circuit court), and the appeal must be filed within 15 days (rather than 60 days) from the entry of the order.¹⁴⁴ The temporary commitment of a person for medical treatment by the county judge may not be attacked in the circuit court in habeas corpus proceedings for "a determination of irregularity, insufficiency in form or substance or for other matters going to the propriety of the order."¹⁴⁵ The habeas corpus jurisdiction of the circuit court is limited to those cases in which it appears that the commitment order was void.¹⁴⁶ The rights of an adjudicated incompetent will be protected, for the adjudication does not preclude him from employing an attorney and perfecting an appeal from the adjudicatory

139. *Chaachou v. Chaachou*, 122 So.2d 24 (Fla. App. 1960), *approved and cert. denied sub nom. Cypen, Salmon & Cypen v. Chaachou*, 130 So.2d 885 (Fla. 1961).

140. *Simon v. Simon*, 123 So.2d 41 (Fla. App. 1960).

141. *Zoercher v. Zoercher*, 114 So.2d 728 (Fla. App. 1959).

142. *Terry v. Terry*, 126 So.2d 890 (Fla. App. 1961). In *Pentland v. Pentland*, 114 So.2d 515 (Fla. App. 1959), the court refused to award \$16,500 as the wife's attorney's fees for perfecting a successful appeal and ordered that \$2,500 was sufficient.

143. *In re De Hart*, 114 So.2d 13 (Fla. App. 1959).

144. *In re Guardianship of Campbell*, 114 So.2d 352 (Fla. App. 1959). See Nash, *Florida Appeal Times*, 16 U. MIAMI L. REV. 24, 47 (1961).

145. *Clark v. State ex rel. Rubin*, 122 So.2d 807, 812 (Fla. App. 1960).

146. *Clark v. State ex rel. Rubin*, *supra* note 145.

order. If the converse were the rule, "the law would be doing a monstrous thing, for such a person would be precluded from appealing by the appellate court's giving effect to an order the very validity of which is sought to be reviewed by appeal."¹⁴⁷

In accordance with the usual rule governing a guardianship case, a curator of an incompetent's property who is accused of mismanagement will not be protected by the fact that his previous accountings have been approved by the circuit court. The approval of the accountings by the court does not have the force of a judgment, and the court may make an additional examination of annual accountings made years previously.¹⁴⁸

An incompetent widow must elect (through her guardian) to take dower within nine months after the first publication of the notice to creditors, otherwise the right to elect is lost even though the guardian might not be appointed until after the nine month period had elapsed.¹⁴⁹ Although this seems to be a correct application of the statutes,¹⁵⁰ it would seem that an incompetent can be deprived of her right to dower by the deliberate or inadvertent actions of members of her family in delaying the institution of guardianship proceedings. This does not seem to be consistent with the usual solicitude of the law for the protection of incompetents. The remedy would seem to lie with the legislature.

The obligation of an estate to pay fees to a guardian pursuant to a court order cannot be evaded by the fact that the guardian is also a member of a law firm which is acting as counsel for the estate; his intra-firm dealings with his guardianship fees are of no concern to the estate.¹⁵¹ The Florida Supreme Court has approved the use of a local bar association's minimum fee schedule as the criterium for awarding attorney's fees in a guardianship matter. Inasmuch as the minimum fee schedule is based upon a percentage of the assets of the estate under the control of the guardian, any assets which were not under the control of the guardian because they were located in a foreign state could not be included in the arithmetic computations.¹⁵²

Legislation

The Florida Legislature has finally abandoned the use of the medieval

147. *Marshall v. Howe*, 121 So.2d 201, 202 (Fla. App. 1960).

148. *Stevens v. Hooks*, 125 So.2d 581 (Fla. App. 1960).

149. *In re Estate of Aron*, 118 So.2d 546 (Fla. App. 1960).

150. FLA. STAT. §§ 731.35 and 744.62 (1961).

151. *Farish v. Jewett*, 120 So.2d 642 (Fla. App. 1960). The county judge ordered that the sum of \$5,090 be paid to a law firm as attorney's fees and \$4,900 to the guardian who was also a member of this law firm. The guardian endorsed his guardianship fee checks over to the firm, terminated his association with the firm and then claimed that the estate owed only \$190. The county judge entered an order in accordance with the contentions of the guardian, but the district court held that the order provided that the estate was to pay \$5,090 to the firm as well as \$4,900 to the guardian. What the guardian did with his checks after receiving them was no concern of the court and would not alter the obligation of the estate to pay the fees awarded.

152. *Lucom v. Potter*, 131 So.2d 724 (Fla. 1961).

terms "insane asylums" and "lunatics and insane persons" by substituting the more euphemistic terms "hospitals for the mentally ill" and "mentally ill persons" in those statutes dealing with the state hospitals.¹⁵³

The venue provisions of the guardianship law have been amended to provide that whenever the domicile of an incompetent is changed to another county, the guardian may file a petition reciting this fact and the venue of the guardianship proceedings will be changed to the county of acquired domicile.¹⁵⁴ The guardianship laws now provide the procedure necessary in the closing of a Florida guardianship when the domicile of the ward has been lawfully changed to a foreign state which has appointed a guardian of the property of the ward.¹⁵⁵

The Uniform Act for Simplification of Fiduciary Security Transfers¹⁵⁶ has been enacted. It is obviously designed to protect corporations and transfer agents from liability to beneficiaries when the fiduciary has acted in breach of his duties, and the corporation or transfer agent has no actual notice of the breach. The theory of constructive notice has been virtually eliminated by the statute. In accord with this new act, the guardianship laws have been amended to provide that upon the entry of an order by a court of competent jurisdiction, a guardian shall have the power to hold corporate stock or mutual investment trust shares in his name "with or without disclosing any fiduciary relationship."¹⁵⁷

Section 665.15 of the Florida Statutes was amended¹⁵⁸ to provide that in the event that one or more of the cotenants of an account in a building and loan association or in a federal savings and loan association is declared incompetent, the account and any dividends thereon may be paid to the guardian or to the remaining cotenant. The release or quittance of the person receiving payment shall be a valid release and discharge of the association. This act will have the effect of protecting the associations at the expense of incompetents.

Section 744.13(2) of the Florida Statutes has been amended¹⁵⁹ to provide that the natural guardians of a child may without appointment collect and dispose of property inherited or "otherwise accruing" to the child when the amount is not in excess of 1,000 dollars. In the event that a personal injury or other tort claim is involved, the powers of the natural guardians may be exercised only when the amount of the settlement does not exceed 500 dollars.

153. Fla. Laws 1961, ch. 61-18.

154. Fla. Laws 1961, ch. 61-114.

155. Fla. Laws 1961, ch. 61-393 (now FLA. STAT. § 746.121 (1961)).

156. Fla. Laws 1961, ch. 61-204.

157. Fla. Laws 1961, ch. 61-327.

158. Fla. Laws 1961, ch. 61-136.

159. Fla. Laws 1961, ch. 61-395.

The case of *Sheafer v. Sheafer*,¹⁶⁰ which held that the provisions of section 745.11 of the Florida Statutes which forbade the sale of an incompetent's property for more than seventy-five per cent credit on the purchase price and for longer than five years as being binding upon a county judge, has been superseded by an amendment to the statute.¹⁶¹ The amendment provides that the county judge may in his discretion by a written order authorize a "larger per cent of credit" and enlarge the time for payment.

The family allowance provisions of the probate laws have been amended to provide that mentally or physically incompetent adult children have the right to share in the family allowance.¹⁶² Formerly, only the widow and minor children could share.

ADOPTION

A natural parent has a legal right to the custody of his child which should not be denied because the child expresses a desire to remain with persons who have had de facto custody in the past. The child's welfare is presumed to be served best by the care and custody of his natural parents, and this presumption will not be overcome unless there are compelling reasons to the contrary. This would seem particularly true when the father was awarded custody by a decree of a foreign state, and there has been no change in circumstances since the rendition of this decree.¹⁶³ This legal right to continued custody becomes even more pronounced when the child is the subject of adoption proceedings by others. For example, the natural mother should not be deprived of her child when she did not abandon him and has shown fitness and ability to care for him, even though the child has spent nearly all his life with his paternal grandparents who sought to adopt him. This is true in spite of the fact that the State Welfare Board recommended that the adoption be granted.¹⁶⁴ Adoption will be granted when it is for the best interests of the child, particularly when the adopting parent is the child's stepmother who has married the child's natural father.¹⁶⁵

160. 126 So.2d 893 (Fla. App. 1961).

161. Fla. Laws 1961, ch. 61-184.

162. Fla. Laws 1961, ch. 61-391.

163. *In re Adoption of Vermeulen*, 114 So.2d 192 (Fla. App. 1959). Subsequent proceedings in this case illustrate the point that even though the chancellor disagrees with the mandate of the appellate court which has reversed the chancellor in a child custody case, he has no right to disqualify himself because of the fact that his "mind . . . is so firmly fixed upon the correctness of said decree that it might influence his official action in any further consideration of this matter." *In re Adoption of Vermeulen*, 122 So.2d 318, 320 (Fla. App. 1960). Compliance with the mandate by the chancellor is a ministerial act which cannot be avoided because of some preconceived notion as to the correctness of the appellate decision. It was also error for the substituted chancellor to take the case under advisement; he also must comply with the mandate and upon his failure to do so, the appellate court had no other recourse but to enter a decree which the lower court should have entered.

164. *In re Adoption of Chakmakis*, 116 So.2d 75 (Fla. App. 1959). In subsequent proceedings, the court clarified its opinion by reiterating that the adoption decree was vacated and that the chancellor was directed to transfer the possession and custody of the child to his mother. *In re Adoption of Chakmakis*, 116 So.2d 256 (Fla. App. 1959).

165. *Rose v. Rose*, 128 So.2d 156 (Fla. App. 1961).

This legal right to custody may be lost when the parent has abandoned his child. Abandonment is a factual question which would not be proved by the fact that a father left his child with his wealthy wife (pursuant to their separation agreement which was confirmed by the trial court) until he had completed his medical school training. Whether this agreement would validly relieve a father of his legal duty to support his child is a matter of some conjecture.¹⁶⁶

In a case of first impression,¹⁶⁷ the district court has held that a written consent for adoption given by the natural mother need not contain the names of the adopting parents. The court further held that the consent must be executed in the presence of two witnesses; a consent executed in the presence of only one witness is invalid. The court attempted to distinguish *Pugh v. Barwick*¹⁶⁸ which held that a simple unwitnessed letter agreeing to an adoption was sufficient in the "particular instance."¹⁶⁹ It is difficult for the author to understand how the statute¹⁷⁰ can be a cast-iron rule in the instant case and a flexible standard in *Pugh*.

Legislation

Section 72.34 of the Florida Statutes has been amended¹⁷¹ to provide that a spouse of a natural parent may adopt the adult children of the natural parent, provided that the adopting spouse is more than ten years older than the adult adoptees.

JUVENILES AND JUVENILE COURTS

Juvenile Courts

An appeal from a final order of a juvenile court must be made within ten days (rather than sixty days) after entry of the order.¹⁷² The remedy of habeas corpus may not be utilized to reach alleged errors in substance and procedure in the juvenile and domestic relations court which occurred prior to contempt proceedings; these errors, which do not affect the legality of custody, may be reached only by appeal.¹⁷³

When a juvenile court has returned custody of two older children to their natural parents, it is an abuse of discretion for the court later to refuse to restore custody of three younger children when the evidence

166. *In re Adoption of Prangley*, 122 So.2d 423 (Fla. App. 1960).

167. *McKinney v. Weeks*, 130 So.2d 310 (Fla. App. 1961).

168. 56 So.2d 124 (Fla. 1952).

169. *Id.* at 126.

170. FLA. STAT. § 72.14 (1961).

171. Fla. Laws 1961, ch. 61-445.

172. *In re Evans*, 116 So.2d 783 (Fla. App. 1960).

173. *Cook v. Culbreath*, 124 So.2d 24 (Fla. App. 1960).

indicates without contradiction that the parents have been rehabilitated morally and economically.¹⁷⁴

The Attorney General of the State of Florida has ruled that a juvenile court is without authority to deprive parents of the permanent custody of their children under the age of seventeen years unless the children are first committed to a licensed child placing agency for adoption. Of course, notice would have to be given to the parents before the children were permanently committed to the agency.¹⁷⁵ The Juvenile and Domestic Relations Court of Dade County has the authority to award attorney's fees in cases transferred to it from the circuit court in the same manner that the circuit court would have had if the case had continued in the circuit court.¹⁷⁶

LEGISLATION

The protective veil surrounding the identity of juvenile offenders has been partially removed in that the records of juvenile traffic violators must be kept in the full names of the violators and must be open to inspection and publication in the same manner as adult traffic violators.¹⁷⁷ The former law which seemed to provide that the juvenile court had original and exclusive jurisdiction of all violations of the school attendance laws whether by juveniles or adults has been clarified. The juvenile court retains jurisdiction over juvenile offenders while adult offenders (parents and employers) are to be tried in the court in each county "having jurisdiction of misdemeanors wherein trial by jury is afforded the defendant."¹⁷⁸

Criminal Cases Involving Juveniles

Section 932.38¹⁷⁹ of the Florida Statutes is a simply written statute requiring that notice be given to the parents or guardians of any minor who is charged with any offense before any court of this state. In the last two years, at least twenty-two cases have arisen under this statute. The majority of these cases indicate that the officials of the criminal courts of this state are either unwilling or unable to follow the simple requirements which protect the basic due process rights of juveniles.

174. *Kersey v. State*, 124 So.2d 726 (Fla. App. 1960).

175. [1959-1960] FLA. ATT'Y. GEN. BIENNIAL REP. 452.

176. Fla. Att'y. Gen. Op. No. 060.11, January 13, 1960, see 34 FLA. B. J. 146 (1960).

177. Fla. Laws 1961, ch. 61-54.

178. Fla. Laws 1961, ch. 61-101.

179. FLA. STAT. § 932.38 (1961). "Parent or guardian to be notified before trial of offense against minor; service of notice.—When any minor, not married, may be charged with any offense and brought before any of the courts, including municipal courts, of this state, due notice of such charge prior to the trial thereof shall be given to the parents or guardian of such minor, provided the name and address of such parent or guardian may be known to the court, or to the executive officers thereof. In the event that the name of such parent or guardian is not known or made known to the court or executive officer or cannot be reasonably ascertained by him, then such notice shall be given to any other relative or friend whom such minor may designate.

If the minor is brought to trial without the required notice being given, he is entitled to be discharged upon a writ of habeas corpus. The failure to comply with the statute is absolutely fatal.¹⁸⁰ A failure to comply with this statute is fatal even though the minor subsequently is convicted of the offense of escape while imprisoned for a prior felony conviction.¹⁸¹ If the minor has been married and subsequently divorced, no notice need be given to his parents.¹⁸² If the minor's marital status is not clear because of statements made by the minor, the trial court should either give the required notice or undertake to clarify his marital status.¹⁸³ In the absence of positive allegations by the state in habeas corpus proceedings that the judge in the criminal trial inquired of the minor as to his marital status, it is not sufficient for the state to rely on the "unvarying custom"¹⁸⁴ of the particular judge to ask whether prisoners are or have been married. Further, in the absence of definite allegations that the minor misrepresented his marital status to the judge, there would not be a sufficient basis for an estoppel because of an absence of reliance by the judge. Whether the principle of estoppel will be applicable to this statute under proper circumstances was not decided.¹⁸⁵

The notice requirement is not met when an official of the court writes to the minor's mother after the minor has entered a plea of guilty, but before he has been sentenced; the statute requires due notice "prior to the trial thereof."¹⁸⁶ The phrase "due notice" is satisfied if the notice is sent by registered mail to the appropriate person a full ten days before the date of conviction.¹⁸⁷ It is not satisfied when the parent of a minor child is hundreds of miles from where the child is imprisoned and a letter sent by the minor is received by his mother one day in advance of the trial.¹⁸⁸ Similarly, notice sent by a juvenile probation officer to the minor's mother in New Hampshire advising that her minor son was held for hearing on

The service of notice required by this section to be given to the parent, or guardian or other person provided therein may be made as the service of summons ad respondendum is made; or in the event such parent, or guardian or other person provided herein may be beyond the jurisdiction of the court, then, and in that event, service may be made by registered mail, or by telegram, and return of such service shall be made by the executive officer of the court in the same manner as returns are made upon summons ad respondendum."

Note, 14 U. FLA. L. REV. 290 (1961).

180. Jones v. Cochran, 125 So.2d 99 (Fla. 1960); Di Marco v. Cochran, 124 So.2d 130 (Fla. 1960); Kinard v. Cochran, 113 So.2d 843 (Fla. 1959).

181. Raggen v. Cochran, 126 So.2d 145 (Fla. 1961); accord, Giles v. Cochran, 129 So.2d 426 (Fla. 1961); Williams v. Cochran, 126 So.2d 887 (Fla. 1961).

182. Harris v. Cochran, 122 So.2d 465 (Fla. 1960); Hewett v. Cochran, 117 So.2d 3 (Fla. 1960).

183. State ex. rel. York v. Cochran, 127 So.2d 885 (Fla. 1961). See also Penley v. Cochran, 131 So.2d 721 (Fla. 1961); Negron v. Cochran, 130 So.2d 65 (Fla. 1961); Champion v. Cochran, 128 So.2d 386 (Fla. 1961).

184. Willis v. Cochran, 131 So.2d 728, 729 (Fla. 1961).

185. Willis v. Cochran, *supra* note 184.

186. Thompson v. Cochran, 126 So.2d 564 (Fla. 1961).

187. Johnson v. Cochran, 124 So.2d 488 (Fla. 1960).

188. Thompson v. Cochran, 126 So.2d 564 (Fla. 1961).

the following day in the juvenile court was not a compliance with the statute, particularly when the juvenile court transferred jurisdiction to a criminal court and two weeks later the minor pleaded guilty to a felony and was sentenced to the state prison.¹⁸⁹

Notice need not be given if the parents have actual notice of the minor's predicament prior to the trial.¹⁹⁰ If the minor writes to his mother simply telling her he is in jail without detailing the serious charges which are pending against him, this would not be actual notice.¹⁹¹ Under this statute, the minor has no duty to disclose the names and addresses of his parents or guardian; the duty rests upon the state to ascertain from the minor or from other sources of information the names and addresses of the minor's parents or guardians. When the minor informs the court that his parents are dead, it is the duty of the court official to inquire as to the existence of a guardian. If there is no guardian, then the minor must be requested to name a relative or friend to receive the notice.¹⁹²

In addition to the procedural due process safeguard of notice, it would appear to be a denial of due process for a court to fail to make a determination whether or not a sixteen year old boy with a third grade education is competent to represent himself without the assistance of counsel when he is being tried for grand larceny. This is particularly true when it appears that the juvenile court had jurisdiction over the minor, and the record does not show that the juvenile court transferred jurisdiction to the circuit court.¹⁹³

LEGISLATION

The maximum penalty for encouraging or contributing to the delinquency of a dependent or delinquent child has been increased to a fine of 1,000 dollars or imprisonment in the county jail for one year, or both.¹⁹⁴ In addition, the offense of causing a minor under the age of eighteen to become a delinquent or dependent child has been redefined and maximum penalties were added.¹⁹⁵

The child labor laws were amended as to occupational exemptions, messenger girls, hazardous occupations, hours of work in certain occupations, and vocational education of children.¹⁹⁶

ILLEGITIMACY

The appointment of a guardian *ad litem* to represent a minor defendant

189. *Di Marco v. Cochran*, 127 So.2d 674 (Fla. 1961).

190. *Bowen v. Cochran*, 121 So.2d 154 (Fla. 1960); *accord*, *Brockman v. Cochran*, 127 So.2d 443 (Fla. 1961); *Centanni v. Cochran*, 126 So.2d 146 (Fla. 1961).

191. *McGuirk v. Cochran*, 126 So.2d 555 (Fla. 1961).

192. *State ex rel. Fox v. Cochran*, 126 So.2d 883 (Fla. 1961).

193. *Jones v. Cochran*, 121 So.2d 657 (Fla. 1960).

194. Fla. Laws 1961, ch. 61-319.

195. Fla. Laws 1961, ch. 61-320.

196. Fla. Laws 1961, ch. 61-182.

in a bastardy proceeding is not mandatory; however, the trial court is obligated either to appoint a guardian or make a determination that the infant is protected without a guardian. A failure to make this determination renders the decree voidable upon appeal even though the minor's father (his natural guardian) was present during most of the court proceedings and the minor was represented by able counsel.¹⁹⁷ When due notice of a final hearing has been served upon a defendant in a bastardy case and the final decree recites that the court has jurisdiction over the subject matter and the parties, and the record is silent as to whether a hearing was actually held, the appellate court must assume that the chancellor acted properly despite the contentions of the putative father that no hearing was held.¹⁹⁸

Although it appears that the husband may contest the parentage when a child is born in wedlock, the wife does not have a similar right. If this rule is based upon the notion that it "most wisely and properly protects the sanctity of married intercourse,"¹⁹⁹ it seems difficult to justify a dual standard. This decision seems to be based upon a historical anachronism rather than logic.²⁰⁰

197. *Brown v. Ripley*, 119 So.2d 712 (Fla. App. 1960).

198. *Murray v. Murray*, 117 So.2d 425 (Fla. App. 1960).

199. *Sanders v. Yancey*, 122 So.2d 202, 204 (Fla. App. 1960).

200. *Sanders v. Yancey*, *supra* note 199. Substantially in accord, *Illgen v. Carter*, 123 So.2d 368 (Fla. App. 1960). See Annot., 53 A.L.R.2d 572 (1957).