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DOMESTIC RELATIONS

DANIEL E. MURRAY*

The readers of this article, after reading the multitude of cases cited herein, will probably ask the same question that the author did when he finished writing, namely: "Are Florida citizens naturally contentious in domestic matters, or have our northern neighbors decided that Florida is a convenient forum in which to wash their dirty linen?"

COMMON LAW AND STATUTORY MARRIAGES

Recognition of common law marriages.—Although the Supreme Court of Florida has expressed disapproval of the common law marriage, they have reiterated that any change in the law must come from the legislature rather than from the courts.¹

The court held that even though an alleged common law marriage had its inception and consummation in a state (Connecticut) where such unions are not recognized, Florida will recognize it, if the parties come to Florida and continue to live openly as man and wife. The court said further that even though no positive statements were exchanged, when a man and woman agree to resume the relationship of husband and wife, (cohabitation had been interrupted by the pendency of a divorce suit, and the entry of a final divorce decree) the circumstances surrounding that meeting are more eloquent and forceful than "formal language."² It is submitted that the court was influenced by the fact that the parties to this alleged common law marriage had been previously married by a ceremonial marriage. Whether the rule will hold true in a case involving a couple who had not been previously married, is a matter of some question.

Burden of proving common law marriage.—The burden of proof rests on the person asserting the illegality of a common law marriage. The person asserting the legality of the marriage is required to establish a prima facie common law marriage, then, the burden shifts to the person asserting the illegality of the marriage.³

Where a bill of complaint alleged only, "that the parties to this suit lived together as husband and wife, that each represented the other as his or her spouse . . . that no civil ceremony would be had," and the testimony

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1. *Navarro, Inc. v. Baker*, 54 So.2d 59 (Fla. 1951).

2. *Navarro, Inc. v. Baker*, 54 So.2d 59 (Fla. 1951), citing *Travers v. Reinhardt*, 205 U.S. 423 (1907).

3. *Lambrose v. Topham*, 55 So.2d 557 (Fla. 1951), citing *LeBlanc v. Yawn*, 99 Fla. 328, 126 So. 789 (1930).

showed that the parties agreed that they would enter into a marriage, it was held not sufficient to prove even a *prima facie* common law marriage for the reason that no contract *per verba de praesenti* to become husband and wife was shown. In other words, the person alleging the common law marriage must prove the existence of a contract to become husband and wife in the present tense and mere cohabitation and repute is insufficient as proof of a *prima facie* common law marriage. The court reaffirmed the rule that when a *prima facie* marriage has been established by the person asserting the legality of the marriage, the burden of proof, thereafter, shifts to that person asserting the illegality of the marriage.⁴

Where there was evidence that the parties agreed to be husband and wife, that they held themselves out as such, that they cohabitated together, that a child was born, and that on their trips to Europe and Cuba the relation of husband and wife was shown, the court held that the above were legally sufficient to sustain a conclusion that a common law marriage existed between the parties.⁵ No mention was made of the proving of the existence of a contract of marriage *de verba de praesenti*.

In a later case, the court stated: ". . . neither cohabitation and repute nor circumstances whose sole function is to show mutual consent of the parties, establishes a common law marriage of itself. There must be words of present assent *per verba de praesenti*."⁶ Since the alleged wife, upon her direct examination, did not testify to any agreement to "presently become husband and wife," she did not prove the existence of a common law marriage by merely testifying that they (the parties) held each other out as husband and wife and that they had signed certain unidentified instruments as man and wife. The court affirmed, with approval, previous cases regarding who has the burden of proof.⁷

A husband and wife had lived together for twenty-four years when the husband left the wife. When the husband died, a woman claimed, as his wife, tenant by the entirety of a certain parcel of land. The testimony tended to show that a decree had been entered divorcing people with the same last name, but with different first names. The first wife claimed that she had never heard of the alleged divorce. The Florida Supreme Court was in accord with the lower court that the husband was never in a position to marry the alleged second wife because he already had a first wife. They went on to say that "a sexual relationship incepted in meretriciousness will be presumed to continue in that state and when cohabitation begins while the man is ineligible to marry the duty falls on the woman to 'show the metamorphosis' from concubinage to marriage." The court said: "This rule governs here instead of the one that of two marriages the later will be

4. *Fincher v. Fincher*, 55 So.2d 800 (Fla. 1952).

5. *Spinella v. Spinella*, 57 So.2d 588 (Fla. 1952).

6. *Carretta v. Carretta*, 58 So.2d 439 (Fla. 1952).

7. *LeBlanc v. Yawn*, 99 Fla. 328, 126 So. 789 (1930); *Lambrose v. Topham*, 55 So.2d 557 (Fla. 1951).

presumed valid. We are convinced that there was not even a presumptive second marriage"⁸

An alleged common law wife filed a bill of complaint for divorce, which prayed for alimony, both temporary and permanent. The alleged husband filed a motion to dismiss with an affidavit denying the existence of the alleged common law marriage. The chancellor took testimony regarding the existence of the alleged marriage. He held, in effect, that a prima facie common law marriage existed. An award of temporary alimony was granted. The husband filed a petition for a writ of interlocutory certiorari. The Supreme Court denied it. Then the husband filed his formal answer denying the existence of the alleged common law marriage. The chancellor struck it. He considered that the Supreme Court, by its denying the writ of certiorari, in effect decided the issue of marriage against the husband. The husband again petitioned for certiorari to quash the order of the chancellor. The court held that the original hearing of the chancellor was simply to determine if the common law marriage was prima facie established so that he could award temporary alimony, and that the denial by the Supreme Court on the first petition for certiorari was not determinative of the question of the common law marriage. The court granted certiorari and quashed the order which struck out the answer of the defendant.⁹

Waiting period for statutory marriage.—The three-day waiting period, between the application and the issuance of a marriage license, was clarified to include the day of application, so that on the fourth day after application, the license shall issue.¹⁰

Legality of Quaker marriages.—The law governing marriage has been enlarged to recognize as legal those marriages performed by the elders of the Quaker Society.¹¹ Because of the scarcity of Quakers in the State of Florida, it is submitted that this change in the law will not be of an earth-shaking consequence.

ANNULMENT

Fraud.—In the last two years only one case of annulment was decided by the Florida Supreme Court. In that case,¹² a woman married a man without knowledge that he had been convicted of rape prior to their marriage. He was arrested also for armed robbery after their marriage, and she alleged that this knowledge of his being previously convicted of rape and the subsequent arrest for armed robbery caused her intense mental

8. *Maliska v. Dion*, 62 So.2d 4 (Fla. 1953), citing *McClish v. Rankin*, 153 Fla. 324, 14 So.2d 714 (1943).

9. *Fernandez v. Fernandez*, 54 So.2d 238 (Fla. 1951).

10. FLA. STAT. § 741.04 (1953).

11. FLA. STAT. § 741.07 (1953).

12. *Savini v. Savini*, 58 So.2d 193 (Fla. 1952).

and physical pain and suffering. The court held that she was not entitled to an annulment on the grounds of fraud; the apparent reason being that the fraud was not material enough to have the court dissolve the marriage, and also because the marriage had been consummated.¹³

JURISDICTION, DOMICILE AND VENUE

Complying with residence requirement.—When a wife left her husband and went to Georgia six months prior to her filing a suit for divorce in Florida, and she came to Florida for a period of only *four* days, during which time she filed the suit for divorce, the Supreme Court held that she still retained the domicile of her husband and that her mere removal to another state is, without more, insufficient to rebut the presumption that she has the same domicile as her husband. Therefore, the Florida court had jurisdiction of the divorce suit.¹⁴

A plaintiff must be *physically present* in Florida for the full ninety day period, as required by the Florida statutes.¹⁵ A naval officer who sojourned only a few days in Florida, but was living in Germany, did not comply with the residence requirements, although he had a bank account in Florida, filed a domicile affidavit with the clerk of the circuit court, and attempted to buy a home in Florida. The court said that even assuming the plaintiff succeeded in making Florida his "domicile of choice" this is not sufficient, there must be actual residence, not constructive residence. The court noted, in passing, that a plaintiff, assuming that he was physically present, is not prevented from leaving the state at any time. In other words, a business trip or a pleasure trip out of the state would not serve to interrupt the ninety-day period of residence.¹⁶

In a case¹⁷ where a husband, represented in the original divorce suit, waited until six months after his wife divorced him, during which time she remarried, to file a bill of review to set aside the decree upon the grounds that the wife was not a resident for the required ninety-day period and that the decree was entered within fourteen days after the bill was filed contrary to a local court rule, the court said that he is estopped from attacking the divorce now, regardless of his wife's lack of morals. They held further that the fourteen-day rule was not jurisdictional. Whether the Supreme Court would rule in the same manner if the wife had not remarried is a matter of some conjecture. If the Supreme Court is laying down this rule as one of general application, then it would seem to countenance collusion.

13. For the Florida "Consummation" Rule see *Rubenstein v. Rubenstein*, 46 So.2d 602 (Fla. 1950); *Cooper v. Cooper*, 120 Fla. 607, 163 So. 35 (1935).

14. *McIntyre v. McIntyre*, 53 So.2d 824 (Fla. 1951), citing *Bowmall v. Bowmall*, 127 Fla. 747, 174 So. 14 (1937), which cited *Herron v. Passailaigue*, 92 Fla. 818, 110 So. 539 (1926); *Gipson v. Gipson*, 151 Fla. 587, 10 So.2d 82 (1942); *Wade v. Wade*, 93 Fla. 1004, 113 So. 374 (1927).

15. § 65.02 (1941).

16. *Campbell v. Campbell*, 57 So.2d 34 (Fla. 1952).

17. *Edelson v. Edelson*, 58 So.2d 148 (Fla. 1952).

Plea of privilege.—In a question of venue¹⁸ where the parties lived in one county and the grounds for action (cruelty) arose in the same county, the wife could not sustain her action in a different county, when the husband raised the plea of privilege.¹⁹

For questions of change of venue and privilege under the old rule,²⁰ see the case of *State ex rel. Todd v. Witt*.²¹

Proper venue.—Where the husband was a resident of Duval County and the cause of action occurred in Alachua County, the court of Alachua County had jurisdiction under a plea of venue.²²

The Supreme Court held that a motion to dismiss, based upon venue,²³ should not have been granted when the husband-plaintiff held a suit in Hardee County alleging that his wife had deserted him without cause from their home in Sarasota County, had left the State of Florida, and had become a resident of the State of New York. By the allegations of the husband's bill of complaint, it appeared that the wife-defendant deserted the husband without just cause. Therefore, she could not acquire a separate domicile and her domicile remains that of the husband.²⁴ If she had left for good cause she could have acquired a separate residence or domicile.²⁵

Ninety-day residence period.—Where *undenied* testimony is introduced which shows that the plaintiff has been a bona fide resident of the State of Florida for ninety days prior to the filing of the suit for divorce, it is error for the chancellor to enter an order which continues the case for another three months in order that the chancellor may "make up his mind" as to the fact of residence. The chancellor has no right to "amend Florida Statutes Section 65.02 by fixing six months as a time of residence instead of three months."²⁶

A woman filed a sworn bill for "alimony unconnected with divorce," stated that she was a "temporary resident" of the State of Florida, and then amended her bill and asked for a divorce, alleging that she was a bonafide resident of Dade County, Florida, for more than ninety days prior to the filing of this amendment to the bill of complaint. Her witnesses gave somewhat inclusive testimony regarding her residence. The court held that she had failed to prove the jurisdictional requirement, and reversed the chancellor.²⁷

18. FLA. STAT. § 46.01 (1941).

19. *Copeland v. Copeland*, 53 So.2d 637 (Fla. 1951).

20. FLA. STAT. § 52.10, as amended, Fla. Laws c. 26962, effective June 11, 1951.

21. 61 So.2d 379 (Fla. 1952).

22. *Beck v. Beck*, 62 So.2d 36 (Fla. 1952).

23. Fla. Equity Rule 33(b), FLA. STAT. c. 31 (1951).

24. *Merritt v. Merritt*, 55 So.2d 735 (Fla. 1951).

25. *Herron v. Passailaigue*, 92 Fla. 818, 110 So. 539 (1926); see *Chisholm v. Chisholm*, 105 Fla. 402, 141 So. 302 (1932).

26. *Pepper v. Pepper*, 66 So.2d 280 (Fla. 1953).

27. *Fazio v. Fazio*, 66 So.2d 297 (Fla. 1953).

GROUNDS AND PROOF FOR DIVORCE

Cruelty.—The court, in affirming many other cases, stated that the test of extreme cruelty is not whether the conduct *should* result in infliction of pain and suffering, but whether the conduct *does* result in pain and suffering to the complaining spouse. In other words, the court takes the subjective rather than the objective approach when dealing with a case of extreme cruelty.²⁸

A couple were married for only seven months. The husband was seventy-one years old and the wife sixty-two years old. They were apparently married for reasons of companionship, but were incompatible. A divorce decree was reversed where there was insufficient proof of either mental or physical cruelty. The court was inclined to agree with the comment of the chancellor that a divorce should be entered in the interest of "society generally and the best welfare of these two people," but was unable to find sufficient evidence to justify a decree of divorce.²⁹

In another case a chancellor granted a divorce because "the court is of the opinion that for their general welfare a divorce should be granted," the Supreme Court held that it was reversible error and instructed the lower court to enter a decree based upon extreme cruelty for the reason that the "general welfare of the parties" is not a ground for divorce in the State of Florida.³⁰

Where a wife visited her consumptive husband while he was in a sanatorium, only at rare intervals, and at such times she was "morose and complaining," the court said that the husband was entitled to a decree of divorce upon the grounds of extreme cruelty.³¹

When most of the testimony of both parties was uncorroborated, neither party was free from blame, and the series of disputes could not be defined by a stronger word than "fussing," it was error to enter a decree of divorce for extreme cruelty and indulgence in a violent and ungovernable temper.³²

Desertion.—A decree of divorce (in favor of the husband) based upon desertion was reversed by the Supreme Court when they considered that the husband had written to the wife stating that he was "through" with her. The Supreme Court ordered a decree of divorce awarded to the wife for the husband's desertion.³³

Adultery.—The Chancellor certified questions to the Supreme Court regarding the authority of the court to order a husband, wife and child to submit to blood typing tests to determine if the wife was guilty of

28. *Lyon v. Lyon*, 54 So.2d 679 (Fla. 1951).

29. *Wellman v. Wellman*, 56 So.2d 123 (Fla. 1952).

30. *Hippel v. Hippel*, 63 So.2d 336 (Fla. 1953).

31. *McGlathery v. McGlathery*, 59 So.2d 866 (Fla. 1952).

32. *Fishler v. Fishler*, 61 So.2d 924 (Fla. 1952).

33. *Miller v. Miller*, 60 So.2d 926 (Fla. 1952).

34. *Taylor v. Taylor*, 59 So.2d 868 (Fla. 1952), citing *Schwob Company of Florida v. Florida Industrial Commission*, 152 Fla. 203, 11 So.2d 782 (1942); *Scott v. Scott*, 45 So.2d 878 (Fla. 1950).

adultery, and the weight and admissibility to be accorded the results of such tests. The Supreme Court refused to rule³⁴ on the ground that the questions involved the application of ordinary rules of evidence and were not within the Supreme Court Rules of Practice.³⁵

Intemperance.—Where a naval officer charged his wife with being guilty of habitual intemperance, the court said: "Inebriety must be frequent, excessive and be the dominant passion. The habitual but moderate use of intoxicating liquors does not meet the test." The facts showed that the wife drank at intervals and at times was drunk, but this was held not sufficient to show habitual intemperance. The court said that even assuming that the evidence was sufficient, the husband had no standing in a court of equity for the reasons that he bought and gave her most of the liquor, he took her to cocktail parties where liquor was consumed, and he "kept her eternally in a liquor environment." The Supreme Court reversed the lower court and ordered that a decree of divorce be granted to the wife for the cruelty of the husband, based upon his slapping and beating her and his repeated unfounded charges that she was guilty of adultery.³⁶

Reconciliation.—

The degree of severity of the alleged misconduct or cruelty sufficient to justify a spouse in temporarily leaving the other need not be as strong in character as is necessary to justify the entry of a final decree of divorce . . . of course, the misconduct or cruelty must reach the point of endangering the health or the life of the non-offending spouse or make continued cohabitation an intolerable burden to justify the leaving of the other *permanently* and securing a divorce. However, if a wife should be justified in temporarily leaving her husband and thereafter he should fail in good faith to carry out his duty of attempting a reconciliation he might thereby become guilty of constructive desertion.³⁷

The court said further: "From time immemorial the male has been recognized as the natural aggressor in the matter of courting the woman whom he desires to become his wife."³⁸ There seems to be no logical reason why he should not continue such a role, particularly, subsequent to discord, misunderstandings and separation. Indeed, it is well established that the husband should take an initial step towards a reconciliation. Some courts have gone so far as to hold this to be true although a wife deserts him without cause.³⁹ The immediate case went on to state that where the husband by his cruel conduct forces the wife to leave the marital domicile, he must in *good faith* attempt a reconciliation otherwise he is considered as being the constructive deserter.

35. Rule 38.

36. *Todd v. Todd*, 56 So.2d 441 (Fla. 1952).

37. *Gordon v. Gordon*, 59 So.2d 40, 46 (Fla. 1952).

38. *Id.* at 47.

39. "We recognize the latter rule as being one which obtains generally." *Hudson v. Hudson*, 59 Fla. 529, 51 So. 857 (1910).

Where a prior chancery decree in effect stated that the wife was living separately and apart from her husband through no fault of her own, the Supreme Court held that the prior decree amounted to an adjudication of "constructive desertion." The duty to offer to reconcile was placed upon the husband and if it was not made in good faith and free from improper qualifications, then his desertion would be obstinate as called for in the applicable statute.⁴⁰ When the husband had asked his wife to return to him he was living in a "one-room tin shack with a dirt floor and no water or sanitary facilities," and in effect denied that he had ever done wrong in the first place. The court held that the offer was not made in good faith under such circumstances as would require an acceptance by the wife.⁴¹

Ordinarily, the running of the statute for desertion is stopped while divorce proceedings are pending between the parties.⁴² However, divorce proceedings in bar must be bona fide litigation. If the litigation is not bona fide then the periods before and after the mala fide divorce suit may be added together to arrive at the total statutory period for desertion.⁴³ Where the court found that a husband's suits for divorce filed in Maine were not filed in good faith, but were filed for "defensive reasons," the pendency of these actions would not stop the running of the statutory period for desertion. Secondly, the fact that the wife secured a void Utah decree of divorce, the invalidity of which (due to lack of residence) was known to the husband at the time of entry of this decree, would not interrupt the period of desertion, because he waited until the last moment (under the law of Utah) to attack his wife's decree and the "existence of a null and void decree known by the deserting spouse to be so, cannot transform a causeless abandonment of the marital domicile into an innocent absence."⁴⁴ Thirdly, the fact that the husband admitted he never made an offer to the wife to resume cohabitation and failed to provide a home for her and her minor children and to contribute to their support was sufficient evidence of desertion. While non-support is not a ground for divorce in Florida, it is certainly material as to the question of whether or not the husband had deserted his wife. The court repeated again the rule cited in the *Gordon* case,⁴⁵ that, ordinarily, when the spouses have separated, the husband as the natural aggressor in the courting of the woman he desires to become his wife, has the duty to take the initial steps towards a reconciliation. Some courts have gone so far as to hold this true, although the wife deserts him without cause.⁴⁶

40. FLA. STAT. § 65.04(7) (1951).

41. *Stanton v. Stanton*, 60 So.2d 273 (Fla. 1952).

42. *Palmer v. Palmer*, 36 Fla. 385, 18 So. 720 (1895).

43. *Woodward v. Woodward*, 122 Fla. 300, 165 So. 46 (1936).

44. *Accord, Kusel v. Kusel*, 147 Cal. 52, 81 Pac. 297 (1905).

45. *Gordon v. Gordon*, 59 So.2d 40 (Fla. 1952); *Hudson v. Hudson*, 59 Fla. 529, 51 So. 857 (1910).

46. *Betts v. Betts*, 63 So.2d 302 (Fla. 1953).

In a case involving counter-charges of desertion and conflicting evidence of each spouse's respective charges, the Supreme Court, reversing the lower court which had denied a divorce to either party, held that the husband has the duty "to take the initial step toward effectuating a reconciliation and a restoration of the marital relation even where the original separation was wrongful on her (the wife's) part."⁴⁷ The facts showed that the husband did not wish to resume cohabitation with the wife. Also, he sent her money on only one or two occasions, which was not enough for her support. Furthermore, he went from New York to Daytona Beach, where his wife was residing, but failed to visit her. Therefore, the court reversed with an order to enter a decree of divorce in favor of the wife.⁴⁸

Separate maintenance action as part of desertion period.—In a very interesting opinion, with three justices in the majority, three concurring specially, and two dissenting without opinion, the court held that where a wife filed a suit for separate maintenance unconnected with divorce, and it was dismissed because she had failed to prove her case, and later the husband brought a suit for divorce based on desertion, that the time spent in the separate maintenance action *could* be counted as part of the desertion period, because, under the statute,⁴⁹ the parties may or may not be living together. Hence, this case is distinguishable from those cases⁵⁰ holding that the pendency of *divorce* litigation interrupts the running of the desertion period. The concurring opinions held that the majority opinion was too broad in scope. They contended the question should be decided on the facts of each case, in order to find if the wife is actually living separate from her husband for just cause, "since the fact of such litigation (separate maintenance) is, after all, merely evidence on the question of whether the abandonment is 'wilful and obstinate', as required by the desertion statute."⁵¹

... a wife's rights under an order of separate maintenance which was based simply on the fact of desertion by the husband can be brought to an end by her refusal to accept an unconditional offer of reconciliation made in good faith by her husband, and her refusal thereafter to return to the husband is an abandonment which, when pursued for the requisite period of time, will constitute a just cause for divorce on the ground of desertion.

However, the court held that the alleged offers of the husband were not corroborated.⁵²

47. Citing *Gordon v. Gordon*, 59 So.2d 40 (Fla. 1952).

48. *Brickman v. Brickman*, 64 So.2d 685 (Fla. 1953).

49. FLA. STAT. § 65.10 (1951).

50. *Woodward v. Woodward*, 122 Fla. 300, 165 So. 46 (1936); *Palmer v. Palmer*, 36 Fla. 385, 18 So. 720 (1895).

51. *Hartzog v. Hartzog*, 65 So.2d 756 (Fla. 1953).

52. *Martin v. Martin*, 66 So.2d 268 (Fla. 1953).

ALIMONY

Wife's power to earn, no defense to alimony.—In a marriage of only four years' duration it is error to refuse to award alimony to the wife even though she is "vigorous, young, attractive and able to support herself," when the husband is guilty of destroying his family by his own wilful and wrongful act. The court stated: "The law exacts that he now be required to make contribution to rehabilitate, insofar as money will permit, the one he has wronged. An innocent woman's rights are not to be ignored because of her good looks."⁵³

Also, in a marriage lasting "around six or eight months" where the wife was 40 years old and the husband was 50 years old, the husband was worth "considerably less than \$75,000.00" and the wife was able to earn \$50.00 per week, the court affirmed an award of \$3,000.00 as alimony, payable in monthly installments, together with \$750.00 as attorney's fees.⁵⁴

Need for specificity in alimony decree.—A recent case pointed out the danger in a final decree of divorce of failing to award a specific amount for child support and a specific amount for alimony. A final decree awarded the wife \$375.00 a month for the support of herself and her child without allocating any specific amount to each. The wife later remarried. The court held that the wife thereby lost her right to future alimony accruing after the second marriage, but affirmed the chancellor who ordered that \$200.00 a month be paid for support of the child and that an award of \$7,605.00, was sufficient to discharge the amount of arrearages. The court pointed out that the separation agreement, approved by the court entering the decree of divorce, also stipulated that the monthly payments to the wife "shall cease, shall come to an [sic] end upon . . . the lawful remarriage of the wife."⁵⁵

Alimony and support of a child—when do they cease?—In a very interesting case⁵⁶ where a final decree of divorce was entered in 1929 providing for monthly payments for alimony and support of an infant child, and the wife waited 21 years to bring an action to enforce the decree, the Supreme Court held: one, that laches did not apply because the ex-husband has failed to show that he was or would be damaged by her delay in bringing the action. Two, laches does not apply where the wife did not know of the husband's whereabouts for ten years. Three, the statute of limitations⁵⁷ does not apply because the husband has not lived in Florida since the date of the final decree. Four, the payments for the support of a minor child do not stop automatically because a child reaches her majority

53. *Montgomery v. Montgomery*, 52 So.2d 276 (Fla. 1951).

54. *Schuberth v. Schuberth*, 52 So.2d 332 (Fla. 1951).

55. *Friedman v. Schneider*, 52 So.2d 420 (Fla. 1951).

56. *Stevenson v. Stevenson*, 52 So.2d 685 (Fla. 1951).

57. FLA. STAT. § 95.07 (1951).

and marries. The husband-father must seek a modification if he wishes to terminate payments for the support of the child.⁵⁸ *Query*: Why did not the Supreme Court follow the *Friedman* case,⁵⁹ where it was held that alimony to a wife stops accruing after her remarriage and, by analogy, support to a minor child should also cease when the minor child becomes an adult either by the passage of time or by virtue of marriage?⁶⁰

Proper award of alimony.—Where a wife is 43 years old and able to earn \$50.00 to \$75.00 per week and the husband is 63 years old, in poor physical condition and unable to work, and his sole support is a little rental property, a total award to the wife of \$7,189.53, including attorneys fees, is neither too large nor too small.⁶¹

Where the husband draws \$150.00 a month from his business, an award of \$35.00 per week is not excessive for alimony and for support of four minor children. Under the facts of the case, if the husband's testimony is to be believed, it would seem that the husband is left with the magnificent sum of \$10.00 a month with which to support himself. However, the Supreme Court held it was error to enjoin the husband from disposing of other property when the wife failed to show that the husband would or intended to convey his property or conceal it so as to defeat her right⁶² for alimony and support money.⁶³

Deferment of application for alimony.—The court held that when a common law marriage is alleged by the plaintiff-wife and denied by the defendant-husband, the chancellor should, upon an application for temporary alimony and attorneys fees, sever the issues and "determine conclusively whether a common law marriage actually exists." In the alternative, he should defer passing upon the application for alimony and attorneys fees pendente lite until final hearing, unless the exigencies of the particular case should in equity and good conscience dictate the severance of the issues and an immediate determination as to whether a valid common law marriage exists.⁶⁴

Modification of alimony.—A husband sought modification⁶⁵ of a final decree of divorce providing for alimony because of his remarriage. The Supreme Court held:

When wife number one has the equities in her favor shown here she is entitled to an orchid every time wife two gets one and Schiff cannot take bread from wife one to pay for wife two's

58. *Stevenson v. Stevenson*, 52 So.2d 685 (Fla. 1951).

59. See note 55 *supra*.

60. FLA. STAT. c. 743 (1951).

61. *Christian v. Christian*, 52 So.2d 905 (Fla. 1951).

62. FLA. STAT. § 65.11 (1951).

63. *McRae v. McRae*, 52 So.2d 908 (Fla. 1951). Note that the Supreme Court agreed with the chancellor that the husband's testimony regarding his income "just didn't add up."

64. *Fincher v. Fincher*, 55 So.2d 800 (Fla. 1952).

65. Under FLA. STAT. § 65.15 (1951).

orchids. One who deliberately takes on himself the pleasure of supporting two wives, both of whom are shown to have been faithful, should not in equity be permitted to welch on his agreement.⁶⁶

Denial of alimony.—Where the wife paraded around before her husband and her ex-husband draped “in a beautiful bath towel” and the ex-husband came to live with the couple, who broke up after eight or nine months of marriage, the Supreme Court denied her any alimony and awarded the divorce to the husband upon the grounds of extreme cruelty. The denial of alimony was apparently predicated upon two grounds: one, that the husband was 66, she 20 years younger and apparently in good health with more than the average business experience, and two, that the marriage was apparently entered into by the wife with the intent to mulct him of his money.⁶⁷

Presumption of earning capacity.—When a wife proves that her husband made \$350.00 net income per week, one or two years prior to the hearing on the application for permanent alimony, the court presumes that such earning capacity and ability continues until the contrary is shown. In this case,⁶⁸ the husband did not attempt to contest this testimony, hence, the court had to assume that the wife’s testimony was correct. The failure of the husband to introduce contrary testimony regarding his earning ability may perhaps be explained by the fact that he presently earned more than this amount. However, if this be true, then why did the husband appeal to the Supreme Court basing his appeal mainly on the fact of this presumption?

Intervening divorce no effect on alimony.—In a case affirming the theory of “divisible divorce,”⁶⁹ a wife received a New York decree of separation awarding her a weekly amount for support and maintenance in 1940. The husband was a party to this New York action and left for Florida and secured a final divorce in 1941 by the use of a doubtful notice by publication. In 1950 the wife secured a judgment in New York for arrearages under the New York decree of 1940 and brought an action in Florida based upon the New York decree. The Supreme Court held that the intervening divorce did not cut off her right to alimony accruing before and after the Florida divorce decree.⁷⁰

Alimony unconnected with divorce.—A wife filed an answer denying that her husband had grounds for divorce, and, in the alternative, that if a divorce was granted, she be awarded alimony. The lower court held that the husband had failed to prove his charges of extreme cruelty. The

66. *Schiff v. Schiff*, 54 So.2d 36 (Fla. 1951).

67. *Golembeski v. Golembeski*, 57 So. 2d 654 (Fla. 1952).

68. *Garfield v. Garfield*, 58 So.2d 166 (Fla. 1952).

69. *Pawley v. Pawley*, 46 So.2d 464 (Fla. 1950).

70. *Kruvand v. Kruvand*, 59 So.2d 857 (Fla. 1952).

Supreme Court held it was error for the lower court to enter a decree awarding the wife "alimony unconnected with divorce" and finding that the wife had no equity and interest in the husband's property. When there is no divorce there is no reason to "explore and fix the respective interests of the parties as if dissolution had been decreed."⁷¹ The award of alimony was erroneous because there was no basis in the pleadings for this award. The wife merely asked for alimony if a divorce was granted to the husband.

Modification.—Evidence of earnings for one month, of a professional man (psychiatrist) "is not a proper criterion upon which to base an order for modification of a decree fixing the amount to be paid for alimony and support money for four minor children, . . . because the fees or earnings may decrease during one particular month during a year, is no excuse for modifying a Final Decree only 36 days old."⁷²

Order to pay temporary alimony not a final judgment.—An entry of an order by the chancellor finding that the plaintiff is in default for failure to pay temporary alimony, pursuant to a previous order, and ordering him to pay the amount of arrearages, was not a final "judgment." The chancellor could later set aside his own order against the contention that the order was actually a final judgment which could not be set aside after the appeal period had elapsed.⁷³

Enforcement.—In 1953, the legislature enacted a statute which provides for the enforcement of orders and decrees for alimony, support and maintenance of children, and suit money, by courts other than the one in which such orders or decrees were entered. It fixes the venue for such enforcement proceedings, provides for their transfer (if a modification is asked either in the petition or the answer to the rule to show cause) as well as for costs, fees, and expenses therein.⁷⁴

CUSTODY AND SUPPORT OF CHILDREN

Child's interest is paramount.—In a child custody action, involving a nine year old boy, the Supreme Court affirmed the lower court which placed great emphasis on the testimony of the child as to which parent he preferred.⁷⁵

The mere fact that the plaintiff-mother in a divorce suit lied in her affidavit for service by publication regarding the defendant-father's address does not show she is so depraved or morally unfit as to justify the court in changing the custody of a two year old girl from the mother to the father.

71. *Zook v. Zook*, 63 So.2d 642 (Fla. 1953), citing *Clawson v. Clawson*, 54 So.2d 161 (Fla. 1951).

72. *Gardner v. Gardner*, 64 So.2d 679 (Fla. 1953).

73. *Young v. Young*, 65 So.2d 28 (Fla. 1953).

74. Fla. Laws 1953, c. 28187.

75. *Ricketson v. Girtman*, 53 So.2d 102 (Fla. 1951).

The court should not punish or attempt to punish the woman by taking her child from her, for the interests of the child are paramount.⁷⁶

Homestead exemption allowed for non-resident child.—Where the divorced wife was awarded custody of a child and resides with the child in North Carolina, the father, domiciled in Florida, who is ordered to pay for the support of the child, is entitled to homestead exemption from execution and levy even though the child does not reside in Florida.⁷⁷ The homestead exemption is based upon the duty to support, regardless of who has custody or where the child lives.

Visitation privileges.—Where the husband was restricted to visiting his child on alternate Sundays for a few specified hours at the child's place of residence and the child was not to be taken from the home, upon the application of the father, the court held that under the evidence shown and considering the tender age of the child (three years old) the father had not been unduly restricted in his visitation privileges.⁷⁸

Full faith and credit.—Where the Supreme Court of Ontario, Canada, had obtained personal service on a wife and granted her husband a divorce and granted custody of a child to the child's paternal grand-parents, Florida should give "faith and credit" to the Ontario decree and should not change custody, unless "new facts or conditions have arisen or that old facts have been revealed that were not before and were not considered by the Supreme Court of Ontario and which would have produced a different decree if they had been before the Canadian Court."⁷⁹

Divided custody.—The Supreme Court reaffirmed the old rule that a court should not order divided custody of children. The court said: "There is a vast difference between divided custody and reasonable visitation." It was error also for the chancellor to order that payments to the wife for the support of the children should cease while the children were in the temporary custody of the father.⁸⁰

Children of tender age.—In a case previously cited,⁸¹ after finding that the mother of the children was not guilty of habitual intemperance, the court affirmed the final decree vesting custody of the children of the marriage in the husband. However, because the children were of a tender age the wife was granted permission to apply for custody whenever she regained her health and was no longer *addicted* to the use of alcohol. *Query*: How could the court find that she was not guilty of habitual intemperance and then mention the word "addicted" which is synonymous with the word "habitual"?

76. *Teel v. Sapp*, 53 So.2d 635 (Fla. 1951).

77. *Larsen v. Austin*, 54 So.2d 63 (Fla. 1951).

78. *Smith v. Smith*, 55 So.2d 735 (Fla. 1951).

79. *Willson v. Willson*, 55 So.2d 905 (Fla. 1951).

80. *Kelley v. Kelley*, 56 So.2d 439 (Fla. 1951).

81. *Todd v. Todd*, 56 So.2d 441 (Fla. 1952).

Adult child.—The Supreme Court held that an action for divorce is not the proper proceedings in which to compel the father to pay money to the wife for support of an adult child, 33 years old, even though the child is mentally retarded and spastic physically. The court left open the question of an action for support in a different proceeding.⁸²

Damages for child support unanswered.—A divorced wife brought an action for damages against the husband for expenses incurred in the support of a child of whom she had custody by a divorce decree, but which decree failed to provide for support payments for the child. Whether there exists a cause of action in this situation the court declined answering, but they reversed the lower court on questions of pleading under the old common law rules.⁸³ For the guidance of attorneys in Florida, it would have been advisable for the Supreme Court to decide the ultimate issue rather than ruling on a question of pleading.

Step-father maintains custody against natural father.—The divorced mother was awarded custody of her child, remarried, and later died. The step-father initiated adoption proceedings during the pendency of which the natural father obtained custody of the child from the chancery court. On appeal, the Supreme Court held that the order awarding custody of the child to the natural father was erroneous.⁸⁴ However, the natural father was given the right to file such defenses to the adoption proceedings as he could.⁸⁵

Stipulation against appeal invalid.—The court has intimated that they would not uphold a stipulation expressly providing that there would be no appeal from a decree with reference to the custody of a child, for it is doubtful that it would be compatible with a sound public policy to so rule. It is the welfare of the child with which the court should be and is concerned. They did not decide the question, because they thought it was unnecessary to do so in the case.⁸⁶

Res judicata as to custody of a child.—A New Jersey court awarded custody of a child, who was living in Florida, to the maternal grandparents and the mother defended the action in New Jersey. The mother refused to give the child to the maternal grandparents. The court held it was error to enter a judgment for the mother upon a petition for a writ of habeas corpus brought by the grandparents for the reason that the mother, having elected to take part in the New Jersey proceedings, consented to be bound by that court's decision and she may not later re-litigate the same issue in another form.⁸⁷

82. *Perla v. Perla*, 58 So.2d 689 (Fla. 1952).

83. *Tuggle v. Maddox*, 60 So.2d 158 (Fla. 1952).

84. Under the facts and law of *Steets v. Gammarino*, 59 So.2d 520 (Fla. 1952); see note 150 *infra*.

85. *Browning v. Favreau*, 60 So.2d 186 (Fla. 1952).

86. *Fauts v. Fauts*, 61 So.2d 322 (Fla. 1952).

87. *Lambertson v. Williams*, 61 So.2d 478 (Fla. 1952).

Change in conditions necessary for change in custody.—Where both spouses agreed that one spouse should have custody of a child and a final decree was entered in accordance with that agreement, the custody would be changed only upon proof of a change in conditions subsequent to the entry of the final decree.⁸⁸

Unfit to have custody.—Where a mother had been rehabilitated by psychiatric treatment, a change in custody of the children to her was affirmed.⁸⁹ Where a wife filed a petition for rehearing twenty-one days after the entry of the final decree of divorce, based on the allegations that her husband had committed adultery prior to the date of the final decree, but subsequent to the time the divorce complaint was filed, the court held that since the custody of the child was awarded to the husband, they should grant the rehearing to determine if the husband is a fit and proper person.⁹⁰ When a master found, and the decree of the chancellor held, that the mother was an unfit person to have custody of the children, the Supreme Court assumed, in the absence of a statement to the contrary, that the master and chancellor found such by considering that the mother was guilty of extreme cruelty, habitual indulgence in a violent and ungovernable temper, and adultery, not just adultery alone as contended by the wife.⁹¹

In a case between the father and the maternal grandparents involving custody of the children after the death of the wife, the Supreme Court reversed the lower court and awarded the custody to the maternal grandmother. The father lived in a small efficiency apartment, but he testified that he intended to obtain larger quarters if custody were given to him. However, the grandmother had a comfortable, modern home and a nice yard in which the child could play. She was caring for the children and sending them to church while the father spent his time going to the beach or going to the movies. The children themselves expressed their preference for the grandmother. The court said this preference is not controlling, but it is "certainly entitled to special consideration." They said further that jurisdiction to modify custody of children of divorced parents does not depend upon an expressed reservation of jurisdiction in the final decree of divorce. Jurisdiction to modify such final decrees as to custody of children does not cease upon the death of one of the former spouses. Although a decree of divorce is final (after the time for appeal has expired) as to those portions dealing with the dissolution of the marriage, those portions dealing with child custody and support are, in a sense, "inter-

88. *Prince v. Carrington*, 62 So.2d 77 (Fla. 1952).

89. *Dunlap v. Dunlap*, 66 So.2d 221 (Fla. 1953).

90. *Blue v. Blue*, 66 So.2d 228 (Fla. 1953).

91. *Williams v. Williams*, 62 So.2d 729 (Fla. 1953).

locutory" and may be modified from time to time as the welfare of the child requires.⁹²

Jurisdiction over non-resident child.—A prior divorce decree gave the mother, a New York resident, custody of the child who lived with her. The father asked the court to modify the former decree as to support for the child and, in effect, to clarify the rights of visitation granted by the former decree. The chancellor decreed that the father had the right to have the child come from New York to Miami to visit him provided that the father paid for the transportation and that while the child visited him he was relieved of support payments. The court held that the child was "constructively present" by virtue of the fact that they had jurisdiction over its mother and that the decree was not a change or modification of "custody," but simply clarified the visitation rights and support payments; jurisdiction of said visitation rights being retained by the chancellor in the original decree. The prior case of *Dorman v. Friendly*⁹³ was distinguished on the facts, and the court held that "should this opinion be in conflict with any portion of the opinion in *Dorman v. Friendly*, *supra*, the same is overruled and receded from the extent of such conflict."⁹⁴

Lump sum does not absolve father from additional support.—Where the chancellor's findings (said findings not being included in the divorce decree) provided that the husband, as a lump sum settlement of alimony, should convey to the wife an apartment house, having a net income of approximately \$300.00 per month, and that out of this income she should furnish support for the children, the divorce decree was affirmed with directions to enter a decree showing that the award of the house was a lump sum award for alimony and to provide that a specific portion of the apartment's income was to be alimony and the remaining portion for the children's support.⁹⁵ The court pointed out that this award would not absolve the husband from all financial obligation for the support of his children, for if additional support were needed in the future, the husband could be compelled to pay it.⁹⁶

Jurisdiction of custody in juvenile court.—A couple were divorced. Later the wife applied to the circuit court for a modification of custody

92. *Cone v. Cone-Evans*, 62 So.2d 907 (Fla. 1953).

93. 146 Fla. 732, 1 So.2d 734 (1941).

94. *James v. James*, 64 So.2d 534 (Fla. 1953).

95. *Bezanilla v. Bezanilla*, 65 So.2d 754 (Fla. 1953).

96. FLA. STAT. § 65.14

... contains no authorization for a complete and final settlement for maintenance of the minor children and the release and discharge of the father from his obligation in that regard. Its plain implication is that orders made for their support are ambulatory depending upon the needs of the children and his financial ability to furnish support. The highest spiritual and moral concepts, as well as the law, demand that the father, as far as his means reasonably permit, support them and this is a continuing duty until the children reach their majority or become self-supporting. *Heckes v. Heckes*, 129 Fla. 653, 176 So. 541 (1937).

rights. That court transferred the cause to the juvenile court which denied the mother's petition. The mother re-applied to the juvenile court and was granted her petition. The husband brought certiorari in the circuit court which held that the juvenile court had no jurisdiction of the case, that the juvenile court, pursuant to a new act⁹⁷ has concurrent jurisdiction with the circuit court of cases involving child custody, regardless of the questions of dependency or delinquency, and that the act is not unconstitutional⁹⁸ since although a "population act," it is a reasonable regulation because of the tremendous number of child custody cases in Dade County and problems dealing with children in a large urban area are more complex and difficult than in a small rural community.⁹⁹ The three dissenters stated that the act was not a reasonable classification; "the welfare of a child is just as important in the county of 350,000 population as it is in a county of 10,000 population"; the act increases the workload of the *one* juvenile court judge, and decreases the workload of the *ten* circuit judges; and it should only affect "dependent" children.¹⁰⁰

SEPARATE MAINTENANCE

Limiting award.—Where a wife prevailed in a suit for separate maintenance, it was error for the chancellor to limit her award of support for a period of one year when there were no facts showing that she, a woman 60 years of age, would be any better off either by working or inheriting.¹⁰¹

Division of property.—A wife asked for separate maintenance and a declaration of property rights. The lower court dismissed the separate maintenance suit because she was living apart through her own fault, but then the lower court attempted a division of the property and appointed a receiver who was to remain in charge of the property so long as the parties continued to be husband and wife or until they agreed on a division of the property. The Supreme Court held (with a dissent by three judges) that when a separate maintenance suit was dismissed, the court had no power or jurisdiction to divide up the property and to appoint a receiver. It is the familiar story of a man and wife starting their life together with little or nothing and gradually accumulating property through joint efforts, not as a business relationship, but by the contribution of each to every aspect of the marriage venture. Probably, neither could trace in terms of currency, an interest in the whole or part of the estate. The court stated further that a married woman might enter into a business partnership

97. Fla. Laws 1951, c. 27000.

98. *As contra* to FLA. CONST. Art. III, §§ 20, 21.

99. Citing *Waybright v. Duval County*, 142 Fla. 875, 196 So. 430 (1940).

100. *In re Rouse*, 66 So.2d 42 (Fla. 1953).

101. *Sorrells v. Sorrells*, 53 So.2d 645 (Fla. 1951) (two cases).

with her husband¹⁰² which could be dissolved irrespective of the marriage status. The interest of each in the latter agreement is easily distinguishable from the interest in common property acquired as a result of their living together in their efforts to further the marriage venture. In the absence of a regular business partnership agreement, the majority of the court could see no point whatever to adjudicate the respective interests of a man and wife in a property that has come to them as a consequence of their living as one, both contributing in services of different kinds to the marriage enterprise. Receivership is not an end in itself, but a means to an end; it is remedial and as such serves to preserve the thing in controversy for the benefit of the parties against the day when the court will adjudicate their interests. Thus a receivership is ancillary to the main relief, and since the main relief has been denied, there is no point in continuing on with a receiver.

The dissent contended that since the bill of complaint was dual in nature, that is, it prayed for separate maintenance *and* for a declaration of property rights, the court had jurisdiction to adjudicate the property rights between husband and wife while they were still living as husband and wife. Under the theory of a resulting trust, the entry of the lower court decree was proper, but the dissent agreed with the majority that the appointment of a receiver under the facts of this case was improper. Under the dissent's interpretation of the statutes,¹⁰³ there would seem to be no question that either spouse could sue the other for a partition in a proper case and that the chancellor could have decreed the parties to be tenants in common, each of an undivided one-half interest, in all their properties now held in the husband's name alone and that either party could thereafter bring partition, or, if additional pleadings to that effect were filed therein, seek partition as part of the relief in the pending suit.¹⁰⁴

It is the opinion of the writer that the dissenting opinion contained better reasoning than did the majority opinion.

Standard of living test.—A defendant-husband, 80 years of age, left Florida and went to New Jersey. His wife, 60 years of age, brought an action in Florida for separate maintenance and the court impounded the husband's funds in a Florida bank. The husband answered the suit, apparently in order to protect his bank deposits. The wife gave notice, under Equity Rule 30,¹⁰⁵ to take the husband's deposition in Daytona Beach. His lawyer, both orally and by written stipulation, agreed to the taking of the deposition. However, the husband did not appear. He gave the excuse that he did not feel well enough to travel to Daytona Beach. In the lower court he was held in contempt, but it was provided that if he would

102. FLA. STAT. § 708.09 (1951).

103. FLA. STAT. §§ 708.01-708.10 (1951).

104. *Clawson v. Clawson*, 54 So.2d 161 (Fla. 1951).

105. FLA. STAT. § 31 (1951).

pay the cost of taking the deposition in New Jersey, he could purge himself of the contempt. The husband did not appear in Florida or pay the sums for the cost of taking deposition. The lower court then held the husband in contempt, struck his answer, and entered a decree pro confesso. The Supreme Court held, on rehearing, that ordinarily, when a defendant has filed no affirmative defenses, he should not be compelled to travel any great distance in order to be examined by the plaintiff; however, when the defendant-husband brings his wife to this state and abandons her, it is proper for the court to order the husband either to appear in Florida or to supply money in order that the wife may examine him at his place of refuge. A court may, under Equity Rule 30, strike his answer when the husband wilfully refuses to answer or appear for the taking of depositions. The court went on to say that an award of \$75.00 per week for the wife may have been excessive, but when he has complied with all the orders of the lower court, the husband may apply for modification of this amount. The wife's standard of living should be unchanged by separation. The law does not allow the husband to reduce the standard of living of his wife so as to drive her from him and then use this standard to measure the support which the law requires of him. Neither does the law permit a woman to demand as separate maintenance, money sufficient to maintain herself on a substantially more luxurious scale than that which she found satisfactory before the parties fell into disagreement.¹⁰⁶

ATTORNEY'S FEES AND MASTER'S FEES

No lien on property awarded wife.—A chancellor cannot order in the final decree that the wife's attorneys have a lien on her undivided one-half interest in property, formerly held as an estate by the entirety, and the court cannot retain jurisdiction in order to award such lien. The court pointed out that the husband is the one who is responsible for the payment of the wife's claim for the expenses of the litigation.¹⁰⁷

Adequate attorney's fees.—An award of \$100.00 to the wife's attorneys as counsel fees is grossly inadequate where the husband's net worth is shown to be between \$75,000.00 and \$100,000.00. The amount was raised to \$750.00 by the Supreme Court.¹⁰⁸

Master's compensation.—The compensation of a master should be computed as provided for by law.¹⁰⁹ However, the legislature in the last session amended this law by providing that in addition to the compensation provided by the former section, he shall be allowed further compensation for any extraordinary services that the court may deem just and reasonable,

106. *Kaufman v. Kaufman*, 63 So.2d 196 (Fla. 1953).

107. *Stern v. Stern*, 50 So.2d 119 (Fla. 1951).

108. *Raley v. Raley*, 50 So.2d 870 (Fla. 1951).

including time consumed in legal research required in preparing and summarizing his findings of fact and law.¹¹⁰

Fees in modification proceedings.—Three very interesting cases have arisen in the last two years under Florida Statutes, Section 65.16 (1).¹¹¹

The first case decided under this statute held that when an ex-husband files a suit to *modify* a final decree of divorce awarding custody of children to the ex-wife, the ex-wife's attorneys are entitled to counsel fees for *defending* this suit.¹¹²

In the second case, where an ex-wife filed suit to *increase* a former award of alimony and the ex-husband counterclaimed to have the court relieve him from paying any further alimony, the court held that the lower court was correct in awarding the ex-wife counsel fees in order to *defend* his counterclaim.¹¹³

In the third case, where the husband petitioned for a reduction of the amounts allowed for alimony and child support, the wife who defended and resisted such petition is entitled to suit money, including reasonable attorney's fees under this section.¹¹⁴ The court, in the dicta, pointed out that the statute will not be applied to give suit money to an ex-wife who attacks a former decree by applying for an alimony or child support amount. In other words, if the wife asks the court to increase an alimony or child support amount she will not be granted attorney's fees, but, if she defends an action by the husband who asks to be relieved of paying alimony or to have the amounts reduced, then she is entitled to attorney's fees for defending the action under the theory that, defending is in effect enforcing the alimony decree. Justice Thomas dissented upon the ground that the majority opinion gave a strained interpretation to the word "enforcing," with which view the author of this article is constrained to agree.

Reduction of fees.—An award of attorney's fees to the wife's attorney will be reduced when much of the work done is an "unnecessary and unjustified amount of skirmishing over preliminary matters."¹¹⁵

109. FLA. STAT. § 62.07 (1951).

110. Fla. Laws 1953, c. 28169.

111. Whenever any legal proceeding is brought for the purpose of enforcing a decree or order of the Court, providing for the payment of alimony or support for children, the Court may, in exercise of a sound judicial discretion, allow to the divorced wife such sums of suit money, including a reasonable attorney's fee, as from the circumstances of the parties and the nature of the case shall be fit, equitable and just.

112. McNeil v. McNeil, 59 So.2d 57 (Fla. 1952).

113. Selinsky v. Selinsky, 62 So.2d 24 (Fla. 1952).

114. Simpson v. Simpson, 63 So.2d 764 (Fla. 1953).

115. Kaufman v. Kaufman, 63 So.2d 196 (Fla. 1953).

SUPPORT OF DEPENDENTS

Uniform support of dependents law.—Florida has enacted the Uniform Support of Dependents Law,¹¹⁶ the purpose of which act is to secure, in civil proceedings, support for dependent wives and children from persons legally responsible for their support. Section four of the act provides that a husband in one state is liable for support of his wife and any child or children under 17 years of age residing or found in the same state or another state having substantially similar or reciprocal laws. A mother in one state is liable for support of her child or children under 17 years of age whenever the father of said child or children is dead, or cannot be found, or is incapable of supporting such child or children and if she possesses sufficient means or is able to earn such means. The parents in one state are liable for the support of a child 17 years of age whenever such child is unable to maintain himself and is likely to become a public charge. Section six provides that a proceeding to compel the support of a dependent may be maintained under this act in any of the following cases. One, when a petitioner and respondent are residents of or domiciled or found in the same states. Two, where the petitioner resides in one state and the respondent is a resident of or is domiciled or found in another state having substantially similar or reciprocal laws. Three, where the respondent is not and never was a resident of or domiciled in the initiating state and the petitioner resides or is domiciled in such state and the respondent is believed to be a resident of or domiciled in another state having substantially similar or reciprocal laws. Four, where the respondent was or is a resident of or domiciled in the initiating state and has departed from such state leaving therein a dependent in need of and entitled to support under this act and is believed to be a resident of or domiciled in another state having substantially the same or reciprocal laws.

Section seven provides that if the respondent is not a resident of, or is not domiciled in, or cannot be found in a state, a judge of the initiating state shall certify that a petition has been filed and a summons duly issued out of his court for service and has been returned with an affidavit to the effect that respondent is believed to be residing or domiciled in the responding state and that in his opinion the respondent should be compelled to answer such petition and should be dealt with according to the law and he shall transmit such certificate and exemplified copies of such petition and summons to the appropriate court in the responding state. Any judge in a responding state, in which the respondent resides or is domiciled, upon presentation to him of such certificate and exemplified copies of such petition and summons shall fix a time and place for hearing

116. Fla. Laws 1953, c. 27996.

of such petition and shall issue a summons out of his court, diverted to the respondent, duly requiring him to appear at such time and place.

Section eight provides that for enforcement it is the duty of the state attorney of each and every judicial circuit of the State of Florida to enforce the provisions of this act and to represent the petitioner in all proceedings hereunder unless the petitioner shall engage a private attorney. Part seven of Section four provides "notwithstanding the fact that the respondent has obtained in any state or country a final decree of divorce or separation from his wife or decree dissolving his marriage, the respondent shall be deemed legally liable for the support of any dependent child of such marriage." The section above quoted does not spell out the duty of a husband to his wife in the event that a divorce has been granted in favor of either party when alimony was not granted by the court for the reason of lack of jurisdiction over the husband. It is submitted that under the divisible theory of divorces enunciated in the case of *Pawley v. Pawley*,¹¹⁷ that under this act it would seem that divorce does not cut off the wife's right of support in a subsequent action for alimony.

SEPARATION AGREEMENTS

Separating agreement does not revoke will.—The mere fact of a divorce and property settlement does not impliedly revoke a prior will or bequest.¹¹⁸ In accord with this principle, where husband and wife executed a separation agreement and it was approved and confirmed by a final decree of divorce and the ex-husband died leaving a last will and testament, executed before the divorce proceedings, making the ex-wife a legatee and devisee, the separation agreement does not impliedly revoke the will.¹¹⁹

Laches.—It would seem that after a wife accepts the provisions of a separation agreement for a period of three years it is too late for her to file a bill of review to set aside the separation agreement and divorce decree upon the ground of fraud and duplicity.¹²⁰

Where a property settlement signed in 1934 provided that weekly payments should continue until the agreement be modified or terminated by mutual consent of the respective parties, or until a court having jurisdiction should modify the agreement, and the agreement was not incorporated or referred to in the final decree of divorce entered in 1935, and where the wife agreed to accept \$75.00 from her ex-husband and relinquished all claim to future payments, she is barred from recovering on the agreement in 1952, because the agreement was terminated in 1936 by mutual consent, and she has been guilty of such laches as to bar any recovery by her from

117. 46 So.2d 464 (Fla. 1950).

118. 46 So.2d 464 (Fla. 1950).

119. Ireland v. Terwilliger, 54 So.2d 52 (Fla. 1951).

120. Davis v. Davis, 57 So.2d 8 (Fla. 1952).

120. Jordan v. Jordan, 57 So.2d 581 (Fla. 1952).

her ex-husband from the date (1936) of her second marriage. The separation agreement further provided that the husband was to endeavor to sell a house and to give one-half of the proceeds to the wife. Fifteen years later, the ex-husband informed the ex-wife that he had found a buyer for the home and asked her for a quit claim deed. She immediately filed suit to establish a constructive trust with reference to the property. The court held that the wife was not guilty of laches, because she had no duty or reason to take action until her ex-husband informed her that he was in effect trying to repudiate the agreement, which agreement the court held to be a continuing trust until the attempted repudiation, and then a constructive trust after it.¹²¹

Public policy.—A signed separation agreement which provides and requires, inter alia, “the permanent, irrevocable separation of the parties,” is neither contrary to the public policy of Pennsylvania, where the agreement was signed, nor to the public policy of Florida.¹²²

Property settlement.—Where a husband and wife entered into a separation agreement, which included a property settlement, and said agreement was approved and made a part of the final decree of divorce, and the wife later remarried, the Supreme Court held that the remarriage is not sufficient ground for relieving the ex-husband of his duty to make monthly payments as called for by the agreement and the divorce decree, regardless of the fact that both the agreement and the decree called the monthly payments “alimony.” The court decided, after thoroughly examining the agreement, that it was actually a property settlement. “It is not what it is *called* but what it *is* that fixes its legal status.”¹²³

PROPERTY

Descent and distribution.—Where a man and wife owned real property as tenants by the entirety, and the husband murdered the wife and committed suicide, and it was not known who died first, the court followed the law of the State of Missouri and held that the murderer does not have complete title upon the death of his spouse, but is a tenant in common to an undivided one-half interest in the property. One-half of the property in this case descended to the heirs of the wife and one-half of the property to the heirs of the husband.¹²⁴

In accord, a husband who murders his wife while they are owners as tenants by the entirety becomes a tenant in common to a one-half

121. *LeCain v. Becker*, 58 So.2d 527 (Fla. 1952).

122. *Scott v. Scott*, 61 So.2d 324 (Fla. 1952).

123. *Underwood v. Underwood*, 64 So.2d 281 (Fla. 1953).

124. *Ashwood v. Patterson*, 49 So.2d 848 (Fla. 1951).

undivided interest and the heirs of the deceased wife inherit the other one-half undivided interest.¹²⁵

Vestment of title.—In accord with previous cases,¹²⁶ where a wife uses her money to purchase land and title is taken in name of the husband, a presumption arises that the husband holds in trust for the wife. However, when the husband pays for property and title is taken in the name of the wife, the law presumes it is an advancement.¹²⁷

In 1951, a parcel of land, together with improvements, was conveyed to a man and woman as "husband and wife, as an estate by the entirety and with full rights of survivorship." The man died. The lower court found that the man and woman were not married and that the woman was the owner of the entire estate entitling her to the proceeds of the sale under a contract entered into before the man's death. The Supreme Court, in a per curiam opinion, affirmed the lower court's decree. *Query*: Did the Supreme Court, in effect, state that an unmarried couple may hold as tenants by the entirety, or as the dissent pointed out, as joint tenants¹²⁸ with right of survivorship?¹²⁹

Where a testator deposited money in two banks and the signature cards allowed both the testator and his wife to draw checks on these accounts, the court held that a tenancy by the entirety had been created in the accounts regardless of the fact that all of the money deposited was the testator's. The testator was presumed to have made a gift to the wife, but such gift is not measured by the rule requiring delivery in inter vivos gifts. As to the lack of unity of control, the court stated that the "unity of control would not preclude one spouse from acting for the other," i.e., when the account is payable on the order of the husband or his wife, there is an immediate expression of authority of agency (of either) to act for both.¹³⁰

When a husband and wife were divorced and a mortgage had been made payable to the couple as man and wife and the chancellor in the divorce suit ignored the mortgage, although adjudicating other property rights, the Supreme Court held that the couple, prior to the divorce, held as an estate by the entirety which "metamorphosed" into an estate in common by virtue of the divorce decree.¹³¹ The fact that the husband owned the property before the marriage did not affect this result because

125. *Hogan v. Martin*, 52 So.2d 806 (Fla. 1951), but see dissent which contends that the murderer should be held as the constructive trustee for the estate of the deceased wife.

126. *Williams v. Williams*, 147 Fla. 419, 2 So.2d 725 (1941); *Foster v. Thornton*, 131 Fla. 277, 179 So. 882 (1938).

127. *Pyle v. Pyle*, 53 So.2d 312 (Fla. 1951).

128. Pursuant to FLA. STAT. § 689.15 (1951).

129. *Vaughn v. Mandis*, 53 So.2d 705 (Fla. 1951).

130. *Hagerty v. Hagerty*, 52 So.2d 432 (Fla. 1951). This case also decided questions regarding federal estate taxes and the question of who has the burden of paying them.

131. Pursuant to FLA. STAT. § 689.15 (1951).

he is presumed to have made a gift to the wife¹³² and he failed to offer any testimony to refute or rebut the presumption.¹³³

Where a couple owned four lots jointly and the lower court ordered the plaintiff-wife to quit claim two of the lots to the husband-defendant and ordered the husband to quit claim title to two of the lots to the wife, the Supreme Court reversed and held that they were tenants in common¹³⁴ of all four lots.¹³⁵ It is submitted that the Supreme Court ruled correctly in this case pursuant to the statute, but as a practical matter this couple are now facing the problem of either selling all four lots in order to divide the proceeds, or for one of the spouses to get mortgages on the four lots to pay off the other spouse. It is believed that the lower court decree, although legally and technically incorrect, was a practical solution to a somewhat involved situation.

Mutual and reciprocal wills.—A couple held all of their property as an estate by the entirety. Orally they agreed to execute, and did execute, mutual and reciprocal wills bequeathing everything to a daughter. However, when the husband died, the widow destroyed and changed her will. The court held that this agreement was ineffectual because made prior to 1943 when the law was changed¹³⁶ to give a wife power to contract with her husband. The result of the case was that the daughter was in effect disinherited and she had no recourse against her mother's estate.¹³⁷

Rights growing out of tort.—It is settled in Florida, and many other jurisdictions, that the rights of parties to a tort action are governed by the law of the place where the tort was committed. Hence, in a case where a man and wife, natives and domiciliaries of Puerto Rico, were injured in an automobile collision in Florida, in which collision the husband was the driver and the wife a passenger, the Florida court refused to follow the community law of Puerto Rico which holds that a husband and wife are co-owners of personal property so as to bar the wife from recovery due to the negligence of the husband. If the court had applied the community property rule prevailing in Puerto Rico, the wife would be barred because she would be considered a co-owner of the automobile and it would be considered that the husband's negligence is imputed to the wife.¹³⁸ It is submitted that the defense attorneys for the insurance company set forth one of the most original defenses ever heard in Florida.

Homestead.—Where a homestead consisted of forty acres, five of which were owned by the deceased as a tenant by the entirety, and the remaining

132. The court citing *Kollar v. Kollar*, 155 Fla. 705, 21 So.2d 356 (1945).

133. *Powell v. Metz*, 55 So.2d 915 (Fla. 1952).

134. See note 131 *supra*.

135. *Boles v. Boles*, 59 So.2d 871 (Fla. 1952).

136. FLA. STAT. § 708.09 (1943).

137. *Nock v. Wayble*, 59 So.2d 875 (Fla. 1952).

138. *Astor Electric Service v. Cabrera*, 62 So.2d 759 (Fla. 1953).

thirty-five owned by him alone, the Supreme Court ruled that upon the death of the deceased, the five acre tract became the property of his widow, the surviving tenant by the entirety, but that the remaining thirty-five acres descended by virtue of the Homestead Law,¹³⁹ and the widow had a life estate which was not subject to the widow's claim for dower.¹⁴⁰

Creditors.—In a case involving a creditor's bill, the Supreme Court, affirming the lower court, held that the facts showed that the property sued on was purchased with funds of the wife, rather than with funds of the husband.¹⁴¹

No partition of property without divorce.—Where the chancellor denied a divorce to the wife, he could not give her "full possession and control of the home," which consisted of an estate by the entirety, for there is no reason to explore and establish respective property rights of spouses where one of them has been unsuccessful in a quest for divorce.¹⁴²

Tenancy by the entirety not defeated by condition subsequent.—A prominent attorney had property conveyed to himself and his wife as an estate by the entirety. Approximately ten years later he claimed, in a counter-claim for divorce, that said property was conveyed upon the assumption that the wife would be a proper wife to him; the lower court found that the wife was at fault. During the action the husband died, and his child instituted a suit for a declaratory decree as to his rights in the property. The lower court found that the husband's contention was correct and awarded the property to the child. The Supreme Court, reversing in part the lower court, held in effect, that a tenancy by the entirety cannot be defeated by a condition *subsequent*.

A holding that misconduct on the part of a spouse . . . would justify invalidation of an estate by the entirety created early in the marriage venture would come perilously close to announcing that such estate had no efficacy until death has placed the whole interest in the survivor, for not until then would it be thoroughly established that the marriage had been successful and that the expectations of rectitude had been realized.¹⁴³

Justice Roberts, in his dissent, stated that the peculiar facts of this case would justify the decree of the lower court.

Deserting husband estopped to assert claim to wife's estate.—In a case of first impression in Florida, where a man married a woman, never consummated the marriage, deserted her twenty-four hours after the

139. FLA. STAT. § 731.27 (1951).

140. *Wilson v. Florida National Bank and Trust Co.*, 64 So.2d 309 (Fla. 1953).

141. *MacNeill v. Marks*, 64 So.2d 922 (Fla. 1953).

142. *Junk v. Junk*, 65 So.2d 728 (Fla. 1953); *accord*, *Zook v. Zook* 63 So.2d 642 (Fla. 1953); *Clawson v. Clawson*, 54 So.2d 161 (Fla. 1951).

143. *Copeland v. Copeland*, 65 So.2d 853 (Fla. 1953), the reader is referred to the dissenting opinion, pp. 856-857, for cases from other jurisdictions regarding the questions where a wife has an intention *prior* to marriage not to perform her marital vows.

marriage, and married another woman and lived (happily!) in bigamy with her for twenty years, and then upon the death of the first wife, the "husband" claimed her estate and the right to be administrator of it, the outraged court held that he was estopped to assert his claims in a court of equity and conscience.¹⁴⁴

ADOPTION

Consent.—The court apparently held¹⁴⁵ that a simple letter written by the mother of an illegitimate child to a couple who wished to adopt the child, agreeing to let the couple adopt the child, coupled with the delivery of the child and its wearing apparel to the couple, constituted sufficient consent to adoption as required by the applicable statute.¹⁴⁶

The statute,¹⁴⁷ requiring that the consent of a "living mother of a child born out of wedlock" be obtained prior to adoption, is satisfied when the mother executes the instrument 12 days *prior* to the birth of a child and uses an *assumed or fictitious name* to secure anonymity. Contracts under an assumed name will be binding if unaffected by fraud.¹⁴⁸

In a case where the divorced natural father does not support the child, and sees the child once, for five minutes, in a period of five years, the lower court was in error in refusing to enter a decree of adoption to the petitioning step-father, the present husband of the child's mother.¹⁴⁹

Laws of descent and distribution in relation to adopted children.—A recent case would have taxed the powers of Solomon. The court was faced with a unique problem. Mr. and Mrs. Passmore adopted a young boy who rapidly developed into an incorrigible delinquent. The Passmores owned their home as an estate by the entirety. Mr. Passmore died. Three months later Mrs. Passmore died, leaving a will devising the home to her sister. The adopted boy claimed that the home was the homestead of Mrs. Passmore when her husband died; therefore, she could not will it to her sister, but it descended to him by virtue of the Homestead Laws. The majority opinion held that since the Passmores had twice consented to have their adopted child adopted by the child's grandmother (even though the adoption proceedings were never completed by the grandmother), they had thereby given up and released all claims and interest in the custody of the boy; furthermore, the boy had not lived in the home or depended on them for two years, because of his incarceration in various reform schools, and the potential germ of love and affection had long been discharged. The mere fact that the second adoptive proceedings had not been concluded would not support any expectancy under the facts of this

144. *Doherty v. Traxler*, 66 So.2d 274 (Fla. 1953).

145. *Pugh v. Barwick*, 56 So.2d 124 (Fla. 1952).

146. FLA. STAT. § 72.14 (1951).

147. *Ibid.*

148. *In re Adoption of Long*, 56 So.2d 450 (Fla. 1952).

149. *Steets v. Gammarino*, 59 So.2d 520 (Fla. 1952).

case. The majority therefore concluded that the property was not the homestead; therefore, it would not descend to the adopted boy. Justice Drew, concurring, said that the homestead status was never acquired because the widow did not live in her home with the adopted boy.¹⁵⁰ Justice Hobson dissented upon the ground that the widow had a duty to support the child and his errant nature would not deprive him of this right of support; therefore, his temporary absences away from the home while he was in the reform schools could not change the homestead status of the property.¹⁵¹ To the writer, it would seem that the majority were subconsciously influenced by the fact of this young boy's incorrigibility and were therefore bound and determined that this "juvenile delinquent" should not recover. It would seem that the mere giving up of all claim and interest in the custody of the child would not release the adoptive parent anymore than it would release the right and claim of a natural parent until the second adoption proceedings were completed. The child remained their child entitled to all of the rights of a natural child under the adoption laws of the State of Florida. *Query*: If the adopted child had demanded from the authorities the right to have his adopting parents support him, would the authorities have denied this claim on the ground that the adopting parents had given up and released all claim and interest in his custody?

In a four to three opinion, the court held that when the natural father agreed that a couple could adopt his two children and he delivered the two children to the couple, then upon the death of the couple (the wife dying last), that the two children could recover against the administrator of the wife's estate even though the couple had apparently never taken any legal steps to adopt the children. The dissent felt that there was not sufficient evidence that the wife also agreed to the contract to adopt made with the natural father. The majority further held that there was sufficient performance to take this oral contract out of the Statute of Frauds if the Statute of Frauds was applicable (which the court expressly declined to decide).¹⁵²

Black market babies.—In 1951, the legislature enacted a statute¹⁵³ in an attempt to stop the black market selling of babies. The section forbids the receiving of any fee or compensation for the placement of a child or for the selling or surrendering of the child to the adopting parents, or a natural parent selling his child or assigning rights to custody of this child to the adopting parents or to advertise or to cause to be advertised for the placement or adoption or any offer or visitation for the placement of adoption of a minor child. The violation of this act is a felony carrying

150. Citing the special concurring opinion of Justice Whitfield in *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932).

151. *Passmore v. Morrison*, 63 So.2d 297 (Fla. 1953).

152. *Roberts v. Caughell*, 65 So.2d 547 (Fla. 1953). See *Sheffield v. Barry*, 153 Fla. 144, 14 So.2d 417 (1943), which both the majority and dissenting opinions cited.

153. FLA. STAT. § 72.40 (1951).

a penalty of imprisonment in a state prison for not less than one year and not more than five years or by a fine not less than \$1,000.00 or not exceeding \$5,000.00, or both.

Adoption governed by rules of chancery.—A statute enacted in 1953,¹⁵⁴ provides that all proceedings regarding adoption shall be as in chancery and shall be governed by the same rules as other chancery causes, except as may be herein expressly changed or modified.

Adoption of adults.—The section of the adoption statutes, relating to the adoption of an adult, was changed to provide that the adopters must allege and prove that they or either of them (i.e., a married couple) have had the custody of such adoptee for at least five years during the infancy of the adoptee and that the married couple or survivor must be ten years older than the adoptee.¹⁵⁵

GUARDIANSHIP

Where a separation agreement and a final decree placed three minor children in the custody of the father, who later died, it was not error to make one of the children, now an adult, guardian of her sisters as against the claim of the mother that she was the natural guardian and entitled to guardianship of her own children.¹⁵⁶

Where a mother of a minor and the minor child are party defendants, it is not error for the court to fail to appoint a guardian ad litem¹⁵⁷ when it is shown that the mother, who is the natural guardian of her child, has no adverse interests to the minor.¹⁵⁸

The legislature in 1951¹⁵⁹ enacted a statute which gives a guardian of the property of an incompetent ward power to convey the ward's interest, when the ward happens to be an incompetent wife, in regard to her right of dower, or incompetent husband, or the ward owns property as a tenant by the entirety with his or her spouse. The act sets forth the procedure required in the collection and disbursement of any consideration received for such conveyances.

ILLEGITIMACY

Hotel register evidence of father-daughter relationship.—When a man signed a hotel register as "L. E. Manson and daughter, Lewisburg, W.V." in front of the hotel clerk, who later testified that the man signed the registry card in her presence and in the presence of the alleged

154. FLA. STAT. § 72.21 (1953).

155. FLA. STAT. § 72.34 (1953).

156. *In re Wingo's Guardianship*, 57 So.2d 883 (Fla. 1952).

157. FLA. STAT. §§ 744.03, 744.12, 744.13 (1951).

158. *Bronstein v. Roth*, 64 So.2d 272 (Fla. 1953).

159. FLA. STAT. § 745.15 (1951).

daughter, there was sufficient acknowledgement of paternity,¹⁶⁰ especially where other corroborating evidence showed the alleged father paid the maternity bills of the child, her living expenses, etc.¹⁶¹

At the risk of being considered facetious, it is submitted that under the common law marriage rule in Florida, where a man signs a hotel registry as husband and wife, he may be held to be the common law husband of the woman. If he is afraid of doing that, and he registers the woman as his daughter, he might end up having a daughter.

Florida Bastardy Act.—The mere fact that a bastard child is born in a foreign state *two years before* the effective date of the Florida Bastardy Act¹⁶² does not bar the mother from relief against the putative father, the act being considered "retroactive as well as prospective in effect."¹⁶³

A judgment in bastardy instituted under the old law¹⁶⁴ is not res adjudicata of a similar proceeding brought under the amended act,¹⁶⁵ because a judgment is not res adjudicata as to rights which were not in existence and which could not have been litigated at the time the prior judgment was entered. The court further stated that the former judgment is not res adjudicata as to the question of *paternity* as well as the question of *amount*. The result of this decision is that a putative father after having once paid for his "sin" is obliged to pay again (only in a larger amount). The danger of this decision is succinctly pointed out by Justice Thomas, with whose dissenting opinion Justices Sebring and Mathews concurred.¹⁶⁶

JUVENILE COURT SYSTEM OF FLORIDA

On October 1st, 1951, Florida's new Juvenile Court Act became effective governing the jurisdiction, procedure, personnel, and to a large extent the

160. Under FLA. STAT. § 731.29 (1951).

161. *Laramore v. Laramore*, 49 So.2d 517 (Fla. 1950).

162. Fla. Laws 1951, c. 26949.

163. *Rooney v. Teske*, 61 So.2d 376 (Fla. 1952); *accord*, *Phillips v. McGriff*, 61 So.2d 634 (Fla. 1952).

164. FLA. STAT. c. 742 (1951).

165. The main improvement under § 742.04(1) provides that the monthly support payments for an illegitimate child will be as follows:

The Court shall order the Defendant to pay monthly for the care and support of such child the following amount, from date of birth to 6th birthday—\$40.00 a month, from 6th birthday to 12th birthday—\$60.00 per month, from 12th birthday to 15th birthday—\$90.00 per month, from 15th birthday to 18th birthday—\$110.00 per month, such amounts may be increased or reduced by the Judge in his discretion depending upon the circumstances and the ability of the Defendant.

Section 742.06 provides that the court shall retain jurisdiction for the purpose of entering such other orders as changed circumstances of the parties in justice and equity require. Section 742.08 provides that upon default of payment of any monies ordered by the court, the court may enter a judgment which shall be a lien upon all property of the Defendant both real and personal and also that a willful failure to comply with the order of the court shall be deemed contempt and can be punished as such. The court may also require a bond of the defendant to force the performance of his obligation under the order of the court in such amount and upon such conditions as the court shall direct.

166. *Wagner v. Baron*, 64 So.2d 267 (Fla. 1953).

financing of the juvenile courts in each of the 67 counties of Florida. Space does not permit a synopsis of the new Juvenile Court Act; therefore, the reader is referred to the Florida Statutes Chapter 39 (1951) and the excellent comment on it by Roger J. Waybright, entitled "Florida's New Juvenile Court Act."¹⁶⁷

The legislature in 1953 amended a portion of the new Juvenile Act¹⁶⁸ providing for the transfer of certain cases involving children brought in juvenile courts as delinquent children from such courts to courts having criminal trial jurisdiction by adding thereto a provision that jurisdiction over children so transferred shall revert to and be reinvested in the juvenile courts under certain prescribed conditions.

MISCELLANEOUS

Liability of husband for wife's tort.—A statute¹⁶⁹ passed in 1951 has eliminated the rule that a husband is liable for the pure torts of his wife. However, a 1951 case held that a husband is liable for the torts of the wife, especially where the husband "acquiesced in and condoned the conduct of his wife."¹⁷⁰ Perhaps, based on the husband's condonation, the court might rule the same way today despite the passage of the statute referred to.

Appeals.—A defendant who files a counterclaim praying for affirmative relief is not an "original" plaintiff under the laws¹⁷¹ which require the original plaintiff to pay all costs "which have accrued, in or about the suit, up to the time the appeal is taken before an appeal may be taken."¹⁷² The court may have been influenced by the poverty of the husband and the grasping nature of the wife.

Where an ex-husband was personally served with an order to show cause why he should not be held in contempt for failure to comply with a final decree of divorce, and he failed to appeal (which he had ample time to do), a rule nisi in prohibition issued upon the husband's petition would be quashed¹⁷³ because his remedy would be by appeal and not prohibition.¹⁷⁴

Florida court has no right to enjoin non-resident from leaving the state.—Where a New York court ordered a defendant-husband to pay to the wife alimony and support for the minor children, and the

167. 6 MIAMI L.Q. 1 (1951).

168. FLA. STAT. § 39.02(6) (1951).

169. Burnett v. Rushton, 52 So.2d 645 (Fla. 1951).

170. FLA. STAT. § 741.23 (1951).

171. FLA. STAT. § 59.09 (1951) and Fla. Equity Rule 35.

172. Bower v. Bower, 55 So.2d 797 (Fla. 1951).

173. Citing as authority Burkhardt v. Circuit Court, 146 Fla. 457, 1 So.2d 872 (1941), which was quoted with approval from the opinion in Pennington v. Fourth National Bank, 243 U.S. 269 (1917).

174. Yearwood v. Circuit Court, 63 So.2d 767 (Fla. 1953).

husband fled from New York and came to Florida, it was error for the Florida court to enjoin the husband from leaving the state or transferring any of his assets therefrom and the order was quashed on condition that the husband's assets be ascertained in order that security be arranged for alimony and support payments. The court also held that it was permissible to amend a divorce action by asking for separate maintenance rather than divorce.¹⁷⁵

Ne exeat bond.—If a ne exeat bond merely provides that the defendant is to appear and not to depart from the jurisdiction of the court, it is error for the court to order that the bonding company be liable if the husband did not pay a lump sum alimony award. It was not a bond to guarantee support of the minor child or alimony payments;¹⁷⁶ it was a mere appearance bond.¹⁷⁷

Effect of death on appeal and property rights.—Ordinarily, death of one of the parties pending an appeal in a divorce case renders the appeal moot since the marriage has been dissolved by death.¹⁷⁸ However, if property rights¹⁷⁹ have been adjudicated in the divorce appealed from, or if the appealing party will lose rights of inheritance if the decree is allowed to stand, the appeal does not become moot by the death of one of the parties and it may be continued in order to decide the question of property rights.¹⁸⁰

Loss of consortium.—In a case of first impression in Florida, the court held that although a wife may recover for loss of consortium when her husband is a victim of a *wrongful death*,¹⁸¹ if the husband *lives*, the wife has no cause of action for loss of consortium. The right of action for loss of consortium is confined to a husband's right against a tort-feasor for injuries caused to the wife.¹⁸²

Discovery of financial condition.—Where a husband admits he is worth between two and three million dollars and is financially able to pay all installments of alimony that the court may decree to the wife, and all reasonable and just costs and attorney's fees, it is error to order him to produce copies of his income tax returns, together with the names of corporations in which he owns fifty-one per cent of the stock and financial statements for said corporations, and bank statements of his accounts and contents of six deposit boxes for the reason that the said records are not

175. *Landy v. Landy*, 62 So.2d 707 (Fla. 1953).

176. *Accord*, *Pan American Surety Co. v. Walteson*, 44 So.2d 94 (Fla. 1950).

Cf. *American Surety Co. of New York v. Gedney*, 123 Fla. 703, 167 So. 355 (1936).

177. *State Fire and Casualty Company v. Hynes*, 62 So.2d 723 (Fla. 1953).

178. *North v. Ringling*, 149 Fla. 739, 7 So.2d 476 (1942).

179. *Price v. Price*, 114 Fla. 233, 153 So. 904 (1934).

180. *Busch v. Busch*, 62 So.2d 68 (Fla. 1952).

181. Pursuant to *FLA. STAT. § 768.01* (1951).

182. *Ripley v. Ewell*, 61 So.2d 420 (Fla. 1952).

material, relevant or pertinent to the issues¹⁸³ under the *Florida discovery rules*.¹⁸⁴

Presumption of validity of last marriage.—In a workmen's compensation case where three women claimed to be the widow of a deceased Lothario, the court reaffirmed the old rule that a very strong presumption of validity exists in favor of a last marriage and the burden rests upon the person attacking such marriage.¹⁸⁵ But the court went on to state that "a first wife is not required to eliminate every remote possibility that a divorce may have been secured by her husband" in order to rebut the presumption; "it is sufficient if the evidence when weighed collectively establishes that there could be no reasonable probability that the husband secured a divorce." In other words, the first wife does not have to account for the movements and whereabouts of her errant husband for every moment of the time which elapsed between his desertion of her and his death in order to rebut the presumption.¹⁸⁶

No recovery for suffering of father by child's death.—A father of a minor child, who is killed while employed by an employer covered by workmen's compensation, cannot recover damages for his mental pain and suffering, because the law bars the father from recovery based upon the theory that the relations of the employer and employee are contractual, and other statutes¹⁸⁷ authorizing recovery for negligent death become ineffective.¹⁸⁸

Financial responsibility for commitment of insane.—The court ruled¹⁸⁹ that where a wife is committed to the Florida State Hospital for the Insane, the husband is not liable for the cost of food, board, lodging, etc., rendered to the wife, unless he signs an agreement¹⁹⁰ and posts a bond.

The *estate* of a lunatic, who is committed to the Florida State Mental Hospital "via judicial process" cannot be subjected to assessments for the care and maintenance of the lunatic, unless he is received at the hospital "on the assurance of a parent, guardian, or friend, able and willing to pay for the care and custody of said lunatic, idiot or insane person."¹⁹¹

In accord with the prior case, where an insane person is sent to the hospital by virtue of the *Criminal Procedure Act*, his *estate* is not liable

183. Fla. Equity Rule 49.

184. *Jacobs v. Jacobs*, 50 So.2d 169 (Fla. 1951).

185. Citing *Roberts v. Roberts*, 124 Fla. 116, 167 So. 808 (1936); *Cater Furniture Company v. Banks*, 152 Fla. 377, 11 So.2d 776 (1943).

186. *Johnson v. Johnson*, 51 So.2d 421 (Fla. 1951).

187. FLA. STAT. § 768.03 (1951).

188. *Howze v. Lykes Bros.*, 64 So.2d 277 (Fla. 1953).

189. *Warren v. Bang*, 52 So.2d 896 (Fla. 1951), but see the exhaustive dissent of Justice Chapman on pp. 897-903.

190. As provided in FLA. STAT. §§ 394.11 and 394.12 (1951).

191. *Warren v. Pope*, 64 So.2d 564 (Fla. 1953).

for his support and maintenance.¹⁹² As pointed out by the Supreme Court, it would behoove the legislature to enact a bill which would allow the state to recover from the estate of a *solvent* lunatic rather than having him cared for by the taxpayers of the State of Florida.

Minor spouses given advantages of federal act.—In 1953, the legislature enacted a statute which removes the disabilities of minors and their minor spouses in regard to obtaining loan benefits pursuant to the Servicemen's Readjustment Act of 1944, and further provides that their minority will not affect the validity of any incumbrance or conveyance, provided that the obligation be guaranteed or insured under the said federal act.¹⁹³

192. *Warren v. Rhea*, 64 So.2d 567 (Fla. 1953).

193. Fla. Laws 1953, c. 28204.