1-1-1962

Family Law (1962)

George J. Alexander
Santa Clara University School of Law, gjalexander@scu.edu

FAMILY LAW

GEORGE J. ALEXANDER

The most important events of this year in family law concerned divorce. In the wake of an Alabama decision, New York litigants waited anxiously to see whether the rule which barred later collateral attack by parties to a foreign divorce had been swept away. The issue was before the courts, but only forecasts of the answer were available. Another out-of-state divorce, that by the governor's wife, brought a storm of protest against the New York divorce law. Aside from these events, the Family Court Act was passed as part of the court reorganization scheme. It, also, promised considerable change.

I

MATRIMONIAL ACTIONS

Marriage and Annulment.—A rather touching case is presented in the application of Honore E. Kiellman[1] in which the petitioner, "a lady now past 50 years of age," requested permission for her fourth venture into matrimony despite an injunction dating from the termination of her first marriage presumably on statutory grounds.[2] The lady in question, now more concerned about the injunction than she was in her last two marriages which were performed out of state, requested modification of the decree to allow a new alliance. Departing from the uncharitable standard of *Spinks v. Spinks*,[3] the court found the two out-of-state marriages not inconsistent with the "uniformly good" conduct[4] standard to be applied on applications of this sort. Finding it unnecessary to make a determination of petitioner's morality, and finding the moral issue satisfactorily settled anyway, since she attached "a Latin document signed by the Chancery of her church" attesting to the valid dissolution of her prior marriages,[5] the court granted the motion. According to Justice Brenner, the statutory good conduct standard merely requires that the conduct in the period under consideration should be such as not to "break down the institution of marriage."[6] Applying that standard, Justice Brenner concluded that "provided she does not molest an already married man, she may, through successive marriages, conceivably promote the institution of marriage."[7] The injunction against remarriage is, as a practical matter,

George J. Alexander is Assistant Professor of Law at the Syracuse University College of Law and a Member of the Illinois and New York Bars.

1. Kiellman v. Kiellman, 28 Misc. 2d 717, 216 N.Y.S.2d 197 (Sup. Ct., Kings Co. 1961).
2. N.Y. Civ. Prac. Act § 1147.
3. 43 N.Y.S.2d 418 (Sup. Ct., Bronx Co. 1943).
4. N.Y. Dom. Rel. Law § 8.
5. 28 Misc. 2d at 719, 216 N.Y.S.2d at 199.
6. Ibid.
7. Ibid.

unenforceable; out-of-state marriages are recognized as valid although consummated in violation of injunctive provisions.[8] In the context of these legal facts, a graver approach to the problem seems unwarranted.

Annulments are still being liberally awarded,[9] as contrasted with the harshness of single-ground divorce decrees. There are, of course, limitations. Although it is clear that fraud as to the mental health of one of the parties to the marriage may be sufficient ground for an annulment,[10] it has not been clear since *Smith v. Smith*[11] how much candor is required with respect to the immediate relatives of the parties. Facing that problem, the court in *Hameister v. Hameister*,[12] ruled that concealment as to the mental condition of W's mother was insufficient grounds for annulment.

An action to annual a marriage on the ground of fraud was commenced by a party who died during the period between the interlocutory and final judgments. Considering the survival of such an action, the fourth department held that Section 1139 of the Civil Practice Act demanded the entry of the final judgment as a matter of course, consequently disinheriting the ex-wife.[13] In light of the survival of action provisions of Section 82 of the Civil Practice Act, when read with Section 1139 which allows an action to annul a marriage on the ground of fraud by relatives after the death of a party to the marriage, the decision seems sound. The opposite holding would merely require substituting the relatives of the decedent in the same action, a formality, which, after the issuance of the interlocutory judgment, seems unnecessary.

Finally, *Shepetin v. Shepetin*[14] held that failure to have sexual intercourse, although a ground for separation when willful,[15] is not otherwise a ground. Since separation actions are authorized only for a specified list of misconducts,[16] a refusal to order separation for unwilled abstinence seems correct. Assuming that the impotence to which the court refers did not pre-exist the marriage, H & W are remanded to their sexless marriage, since annulment, under those circumstances, is also unavailable.[17]

Divorce.—Two actions of great potential affect on New York divorce law were occasioned by New York residents in other states. The governor's wife duplicated the pilgrimage taken by many of her husband's constituents[18] and procured an order terminating her marriage.[19] The imme-

8. Thorpe v. Thorpe, 90 N.Y. 602 (1882).
9. See, e.g., Annulment of Marriage in New York for Fraud Based upon Religious Factors, 30 Fordham L. Rev. 776 (1962).
10. Goldsmith v. Goldsmith, 279 App. Div. 579, 107 N.Y.S.2d 691 (1st Dep't 1951).
11. 112 Misc. 371, 184 N.Y. Supp. 134 (Sup. Ct., Kings Co. 1920).
12. 28 Misc. 2d 796, 216 N.Y.S.2d 436 (Sup. Ct., Herkimer Co. 1961).
13. Matter of Estate of Haney, 14 App. Div. 2d 121, 217 N.Y.S.2d 324 (4th Dep't 1961).
14. 16 App. Div. 2d 948, 229 N.Y.S.2d 457 (2d Dep't 1962).
15. Diemer v. Diemer, 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960).
16. N.Y. Civ. Prac. Act § 1161.
17. Anonymous v. Anonymous, 49 N.Y.S.2d 314 (Sup. Ct., Bronx Co. 1944).
18. Some concept of the volume is afforded in an excellent book published this year. Blake, The Road to Reno, at 171 (1962).
19. N.Y. Times, March 17, 1962, p. 1, col. 2.

diate reaction to her action was public recoil from the archaic New York provisions which presumably occasioned the journey.[20] The other notable excursion was taken by the Hartigans to Alabama in order to contest modification of a previous divorce decree. In the aftermath of their case,[21] in which the court on its own motion vacated the original divorce on the ground of the fraudulent claim of Alabama residence, the law of New York has been in some turmoil. The intervening year and a half since that decision has produced no reported case in this state taking a definitive position on the relationship of that ruling to previously settled principles. Before the case, parties to an action for divorce were barred from denying its validity in this state, when they were personally represented in the prior action.[22] It is, of course, still true that where the appearance of one of the parties in the foreign divorce was procured through fraud or coercion, estoppel does not apply.[23] Facing the problem more squarely, two courts have suggested alternative accommodations. In *Sommer v. Sommer*,[24] the appellate division affirmed the dismissal of a declaratory judgment action seeking invalidation of an Alabama decree, but added the sage suggestion that petitioner "may be able to obtain similar or related relief in another jurisdiction."[25] In *Bard v. Bard*,[26] a similar action seeking a declaration of the invalidity of an Alabama divorce, the court refused W's motion to dismiss on procedural grounds but added, "moreover, even if the plaintiff voluntarily appeared in the divorce action, it may be that the holding in *Boxer v. Boxer* . . . and similar cases will have to be re-examined in the light of *Hartigan v. Hartigan*. . . ."[27]

The prediction of the *Bard* case seems well founded. *Boxer v. Boxer*[28] relied primarily on *Sherrer v. Sherrer*,[29] which bars collateral attack on a judgment of a sister state when such attack is not open to citizens of the sister state. *Sherrer* merely limits the extent of collateral challenge permissible; it does not require that any be allowed. Consequently, it would be open to New York to retain the *Boxer* rule for different reasons. Since

20. See, e.g., editorial, Divorce Law Fictions, N.Y. Times, March 17, 1962, p. 24, col. 2. For a more definitive attack, unrelated to the incident in question, see Blake, The Road to Reno (1962).

21. Hartigan v. Hartigan, 272 Ala. 67, 128 So. 2d 725 (1961).

22. Boxer v. Boxer, 7 App. Div. 2d 1001, 184 N.Y.S.2d 303 (2d Dep't), aff'd, 7 N.Y.2d 781, 163 N.E.2d 149, 194 N.Y.S.2d 47 (1959).

23. Bard v. Bard, 16 App. Div. 2d 801, 228 N.Y.S.2d 294 (2d Dep't 1962).

24. 16 App. Div. 2d 629, 226 N.Y.S.2d 730 (1st Dep't 1962).

25. Id. at 629, 226 N.Y.S.2d at 731. On remand, special term refused to consider the effect of the Hartigan decision, holding that matter to have been settled by the appellate division's affirmance of the dismissal of the declaratory judgment action. Sommer v. Sommer, 232 N.Y.S.2d 558 (Sup. Ct., N.Y. Co. 1962).

26. 29 Misc. 2d 453, 219 N.Y.S.2d 493 (Sup. Ct., Nassau Co. 1961), aff'd, 16 App. Div. 2d 801, 228 N.Y.S.2d 294 (2d Dep't 1962).

27. Id. at 454, 219 N.Y.S.2d at 494.

28. 7 App. Div. 2d 1001, 184 N.Y.S.2d 303 (2d Dep't), aff'd, 7 N.Y.2d 781, 163 N.E.2d 149, 194 N.Y.S.2d 47 (1959).

29. 334 U.S. 343 (1948).

Alabama has become a notorious divorce haven, however, it is not unlikely that the court will adopt a rule sanctioning collateral attack by a spouse in a New York proceeding despite his participation in the Alabama action. The impact of the case will primarily crush those who have relied on pre-existing law. It is to be assumed that the ultimate effect of the case, unless other states adopt the *Hartigan* rule, will be merely to divert the divorce business from Alabama to, for example, Nevada. The practical effect on parties previously "divorced" in Alabama is yet one more result of a divorce law incompatible with national mores. Another shocking spawn of the same law is *Sackler v. Sackler*[30] more fully discussed in this Survey in the evidence section, in which the appellate division felt compelled to allow introduction of evidence of adultery procured by H in an unlawful entry of W's residence. It is little wonder that, in a state in which a method of obtaining judicial approbation for a divorce consists of battering down doors with allies who can testify to W's indiscretion, out-of-state divorces have become a normal *modus operandi.*

Mexican divorces were also being challenged. In *Busk v. Busk*[31] the court held that irrespective of the validity of a Mexican divorce terminating a second marriage, such a decree could not validate an otherwise invalid Mexican mail-order divorce for H's first marriage. Recognizing the rule of *Statter v. Statter,*[32] that a valid adjudication of separation includes an adjudication of the validity of the prior marriage, the court, nonetheless, held such principle inapplicable to Mexican divorces.

II

Separation Agreements and Alimony

Separation Agreements.—This year a number of separation agreements proved themselves more perdurable than expected. Following the Court of Appeals mandate in *Borax v. Borax,*[33] which barred a judicial action for separation during the pendency of a valid separation agreement, a court had little difficulty in dismissing an action by W, party to such an agreement, to the extent that it sought separation.[34] The court refused, understandably, to read the standard separation agreement provision, that the terms of the contract may be incorporated into a judgment of separation or divorce, as in any manner negating the continuation of the underlying agreement. In *Brownstein v. Brownstein,*[35] another court carried this reasoning one step further and refused to honor an express

30. 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (2d Dep't 1962).
31. 229 N.Y.S.2d 904 (Sup. Ct., Nassau Co. 1962).
32. 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957).
33. 4 N.Y.2d 113, 149 N.E.2d 326, 172 N.Y.S.2d 805 (1958).
34. Cohen v. Cohen, 28 Misc. 2d 558, 212 N.Y.S.2d 809 (Sup. Ct., Bronx Co. 1961).
35. 34 Misc. 2d 1097, 229 N.Y.S.2d 463 (Sup. Ct., N.Y. Co. 1962).

provision in the separation agreement allowing an action for separation.[36] While the *Borax* decision is probably necessary in order to validate the contractual terms of the agreement, which might otherwise be subject to repudiation at the parties' whims, it is not clear why the same result should apply in circumstances in which the signatories expressly refused to limit themselves to the negotiated terms, presumably because of a wariness concerning the arrangement.[37]

The Hartigans, who have already made a major contribution to national domestic relations law,[38] also contributed to proving the longevity of separation agreements. Despite a five-year hiatus in the operation of a separation agreement, which had, apparently, been superseded by a divorce decree, a court ruled that merger of the separation agreement did not occur and that it was consequently valid and subsisting when the intervening divorce was invalidated.[39] Of course, where the parties expressly contract to terminate the support provisions of an agreement on a given date, expressly leaving the wife such judicial remedy as is available, the remaining sections, whether they still constitute a "separate agreement" or not, are a bar to a separation action.[40]

The question remains: what is the status of the remaining terms of an agreement where the support provisions have been terminated by contractual agreement or judicial intervention? When a separation agreement has been invalidated for contravention of Section 51 of the Domestic Relations Law, as relieving the husband of his duty to support his wife, courts have, despite this fact, enforced releases and waivers contained in the agreement.[41] When the judicial invalidation is attributable to another portion of section 51, which prohibits a contract to alter or dissolve a marriage, no previously reported case appears to have enforced any provisions of the agreement. The first department, however, by a three-to-two vote, has now ruled that mutual waivers of the right to share in the estate of the other spouse survive a separation agreement otherwise nullified as a contract to invalidate a marriage. The analogy made by the court to the duty of support cases seems strained. In the cases in which the courts found the husband remiss in the measure of support, they have excised the support provisions, substituted their own judgment and determined the fairness of the old provisions in the new context. Ultimate

36. "Nothing in this agreement shall bar the institution of any action for separation by either party." Id. at 1098, 229 N.Y.S.2d at 464.

37. But see Stoddard v. Stoddard, 227 N.Y. 13, 124 N.E. 90 (1919) (refusing to enforce contractual provision for redetermination of support payments); Carluccio v. Carluccio, 22 Misc. 2d 854, 198 N.Y.S.2d 596 (Sup. Ct., Queens Co. 1960).

38. See Note 21 supra and accompanying text.

39. Hartigan v. Hartigan, 30 Misc. 2d 949, 219 N.Y.S.2d 92 (Sup. Ct., N.Y. Co. 1961), modified on other grounds, 16 App. Div. 2d 145, 226 N.Y.S.2d 31 (1st Dep't 1962).

40. Stampler v. Stampler, 224 N.Y.S.2d 185 (Sup. Ct., Nassau Co. 1961).

41. Schiff v. Schiff, 270 App. Div. 845, 60 N.Y.S.2d 318 (2d Dep't 1946); Hoops v. Hoops, 266 App. Div. 512, 42 N.Y.S.2d 635 (1st Dep't 1943).

fairness to the wife was all that had to be accomplished. In the contract-to-terminate-a-marriage cases, such as the one now considered, however, the reason for invalidation differs. The contract is unenforceable because the underlying consideration is unlawful. No readjustment of financial provisions can transform it into a mere contract for support. Indeed, on the instant facts, a strong case can be made for the dissent's suggestion that, even accepting the majority's rule, the waivers enforced should not have survived on contract principles.

It has long been settled in this state[42] that willful breach of visitation privileges by W suspends H's contractual duty of support. The policy is apparently salutary. Indeed, within this year one court has indicated reluctance in applying the provisions of an Arizona judgment where there had allegedly been a willful denial of visitation rights, despite its recognition of a rule requiring independent application of the support-based judgment.[43] Feeling constrained by prior decisions, the court nonetheless enforced the foreign judgment.[44] It is apparently error, however, for a court to condition support payments on visitation privileges where the children themselves resist the visitation.[45]

In any event, before relying on the terms of a separation agreement relating to visitation rights as a justification for the suspension of support payments, one would be well advised to scrutinize the agreement in question. In *Kuniholm v. Kuniholm*,[46] the Court of Appeals rejected the decisions of special term and the Appellate Division, First Department, that a question of fact existed with respect to the visitation provisions of the separation agreement. The agreement in question provided that H's infant children should not be removed from the continental United States and, in addition, that H should have the right to visit the children at mutually agreeable times and specifically during Easter, Christmas, and for two weeks during the summer. W's daughter accompanied her on a two-year foreign assignment. H subsequently defended an action to recover support payments on several grounds, including breach of visitation rights. The Court of Appeals held that no question of fact existed, the daughter not having been "permanently" removed and the rights to visitation having remained unaffected. A number of factors suggest that the Court of Appeals reached the appropriate result in this case. The wife had sought permission; her letters were ignored. At the time the agreement was signed, the wife was apparently already employed in the occupation which led to her overseas assignment. The daughter alleged that she had taken the matter up with her father and he had indicated

42. Duryea v. Bliven, 122 N.Y. 567, 25 N.E. 908 (1890).
43. Lynde v. Lynde, 162 N.Y. 405, 56 N.E. 979 (1900), aff'd, 181 U.S. 183 (1901).
44. Greene v. Greene, 31 Misc. 2d 1009, 221 N.Y.S.2d 236 (Sup. Ct., Monroe Co. 1961).
45. Babin v. Babin, 16 App. Div. 2d 884, 228 N.Y.S.2d 434 (4th Dep't 1962).
46. 11 N.Y.2d 358, 183 N.E.2d 692, 229 N.Y.S.2d 412 (1962).

no opposition. The disturbing aspect of the opinion, however, is the court's suggestion that the result follows from the agreement. The court found that the voluntary trip by the twenty-year-old girl for a two-year period was not a permanent removal from the United States, without making it clear whether this result followed from the girl's maturity, the voluntary nature of the trip, or the temporary nature of a two-year period. More disturbing is the suggestion that, in any event, a trip abroad would not interfere with the husband's *"right of visitation,"*[47] thereby seemingly suggesting that a right of visitation is available irrespective of its geographical impracticability.

The importance of good draftsmanship in separation agreements was also suggested by the decision in *Taus v. Taus*[48] where the court held that an agreement to pay $70 per week for support of the wife and children during their minority committed H to pay $70 per week after the children attained majority since no reduced payment was specifically provided for such an event.

Alimony.—Alimony criteria have undergone some refinement in the past year. In *Newburger v. Newburger*,[49] the court held that the applicable level of support in annulment cases differs from the support standard to be applied following divorce or separation. Without articulating the new standard to be applied, the court appears to have sought the middle ground between the level of preseparation living and the wife's premarital "menial income," reasoning that it would not be justified in awarding alimony on the divorce or separation standards, there being neither proof of fault nor a continuing marital relationship to which such standard would relate. Since H in this case obtained the annulment from W because of fault on her part, the result is not harsh. Were the roles reversed, however, the suggestion of the court that the standard would be less than the preseparation standard since there had never been a valid marriage, would seem undesirable.

Another case suggested that the preseparation standard may be inadequate as a gauge of the level of alimony, even where it is substantially above the level required to keep the wife from becoming a public charge. In *Hunter v. Hunter*[50] the court found that both husband and wife had diligently applied themselves to H's career and he had, at the pinnacle of his success, left his spouse for another. Under these circumstances, the court held the wife entitled to share in the standard the couple would have achieved considering his potential future earnings. However salutary such a rule may be, especially under the facts of the *Hunter* case where

47. Emphasis added by the court. Id. at 361, 183 N.E.2d at 695, 229 N.Y.S.2d at 415.
48. 35 Misc. 2d 396, 229 N.Y.S.2d 124 (Sup. Ct., App. T., 1st Dep't 1962).
49. 228 N.Y.S.2d 323 (Sup. Ct., Westch. Co. 1961).
50. 30 Misc. 2d 776, 216 N.Y.S.2d 711 (Sup. Ct., N.Y. Co. 1961), aff'd, 15 App. Div. 2d 821, 226 N.Y.S.2d 675 (1st Dep't 1962).

the marriage lasted nineteen years, it is questionable whether the standard described was actually applied. The alimony awarded was $20,000 per annum, but even this generous amount could be justified on the income at the time of separation (which, according to court figures, was slightly less than $84,000) and need not relate to H's income at the time of trial (over $111,000). Of course, the standard is easier to articulate than to apply. The wrangling over appropriate amounts for temporary and permanent alimony continues unabated in the courts. This year, as in the past, appellate courts have been required to review alimony awards and the review has turned up startling results. In *Mack v. Mack*,[51] the fourth department reversed alimony payments of $24,000 plus additional benefits to be paid by a husband whose income after taxes was $25,000.

At least one voice has been raised against the extent of appeal allowed on temporary alimony awards. Justice Eager, dissenting in *Wexler v. Wexler*,[52] would refuse to consider the sufficiency of temporary alimony awards if there were some support for the determination below and would utilize speedy trial rather than appeal as a method of vindicating the parties' rights.

III

CHILDREN

Adoption.—May a foster parent abrogate an adoption because of his inability to support his adopted child? This issue was raised in *Matter of Anonymous*.[53] After ruling against allegations of fraud in the initial adoption proceeding, the court held that the statutory grounds in Section 117 of the Domestic Relations Law[54] which allow a foster child "or any person" on "behalf of such child" to abrogate on several grounds, among them: "inability or refusal to support, maintain, or educate the child," were designed exclusively for the benefit of the child and could not be invoked by the foster parent. The decision is a salutary recognition of the permanence of foster parental relations.

Custody.—In the child custody cases, the major problem remains the reneging parent. Although both the Social Welfare Law and Domestic Relations Law provide expressly for waiving parental consent to the placement of children where the children have been "abandoned,"[55] abandonment continues to be an elusive concept with the odds strongly in favor of the natural parent. In *Matter of Lewis*,[56] the court refused to commit two children to a welfare agency under Section 384 of the Social Welfare Law, although both had been placed with the Department of Welfare on birth

51. 16 App. Div. 2d 1029, 230 N.Y.S.2d 112 (4th Dep't 1962).
52. 15 App. Div. 2d 451, 221 N.Y.S.2d 737 (1st Dep't 1961).
53. 29 Misc. 2d 580, 213 N.Y.S.2d 10 (Surr. Ct., Nassau Co. 1961).
54. Now N.Y. Dom. Rel. Law § 118-a.
55. N.Y. Soc. Welfare Law § 884-e; N.Y. Dom. Rel. Law § 111.
56. 35 Misc. 2d 117, 230 N.Y.S.2d 481 (Surr. Ct., N.Y. Co. 1962).

and had remained under foster care for four and three years respectively. The decision negated abandonment by the mother who had apparently not visited either child more than three times, the last visit in both cases being two years prior to the institution of the action in question. The court suggested that the mother's lack of visitation was in part due to active interference by the welfare agency and that other factors explained her absence. Finally, the court concluded that the appropriate abandonment standard requires a willfulness which must be more than neglect caused by illness due to temporary mental disturbance. What is most disturbing about the case is that it seems reasonably evident that the mother was not seeking custody of the children but was merely seeking to prevent placing the children for adoption. Indeed, the court characterized her as "emotionally and perhaps mentally disturbed."[57] If abandonment requires more than temporary emotional disturbance and if emotional disturbance of over five years, as in this case, is temporary, one wonders under what circumstances the child of a person mentally ill could ever find a permanent home. The Court of Appeals in *Isaac v. Greenberg*[58] also refused to find abandonment in the father's placement of his daughter with his mother and grandmother for a period of over six years while he served in the Navy. Only Judge Van Voorhis seemed shocked at the effect on the daughter.

Abandonment was, however, found in one Court of Appeals case.[59] In that case the mother gave her four-day-old child to foster parents, via an intermediary. For the next three years she made no inquiries as to his whereabouts. Under these circumstances, a divided Court of Appeals found her to have abandoned her child. The judges who concurred in the opinion of the court may have been somewhat persuaded by the resolution of the other issue in the case, the fitness of the mother to raise the child. On the fitness issue, the court found that the foster parents had proven the mother's "sexual promiscuity at the age of 13 and . . . indulgence at 16 in both normal and abnormal sex relations with a married man over a period of several months while separated from her husband. . . ."[60] Even on these facts, however, only a bare majority of the court could be mustered for permanently depriving the mother of her child. Two judges, in a concurring opinion, suggested that if the mother would mend her ways, she should later be allowed to institute new proceedings for custody. Chief Judge Desmond would have given her immediate custody of the child.

It is, of course, difficult to accommodate the right of a natural parent to his child and the policy of protecting the child's welfare. One com-

57. Id. at 119, 230 N.Y.S.2d at 483.
58. 11 N.Y.2d 869, 183 N.E.2d 290, 227 N.Y.S.2d 683 (1962).
59. Anonymous v. Anonymous, 10 N.Y.2d 332, 179 N.E.2d 200, 222 N.Y.S.2d 945 (1961).
60. Id. at 336, 179 N.E.2d at 201, 222 N.Y.S.2d at 947.

promise is suggested by *Laub v. Caltobelotta*[61] in which the court expressly refused to find abandonment in a case in which the child had been left with grandparents for almost all of his twelve years and granted custody to the mother on condition that the infant continue to reside with the grandparents.

Custody hearings: off-the-record information.—The use of reports by courts in custody cases, when those reports have not been shown to the attorneys, continues as a problem. In *Matter of Zebo*,[62] the fourth department, over a strong dissent by Presiding Justice Williams, affirmed a case in which the trial court had studied a probation department report that had not been shown to the attorneys. The next day the Court of Appeals reversed the authority primarily relied on by the appellant in *Zebo* by deciding *Kesseler v. Kesseler*.[63] In *Kesseler*, Judge Van Voorhis, writing for the majority, addressed himself to a resolution of the major problems respecting the use of confidential information by the court. Specifically, it was held that the confidential use of psychiatric reports, without stipulation of the parties, was reversible error despite the fact that the appellate division had found that the record fully supported the judgment without reference to the objectionable material. On the other hand, insofar as the parties had stipulated to the submission of a report by the family counselor attached to the court, no error had been committed in refusing to show the report to the parties. The rule appears to be a clear one: without stipulation of the parties, the judge is not entitled, in custody proceedings, to use information obtained by means incompatible with the adversary process. Where the parties are willing to agree to exceptions, for example, a private interview between the judge and the child or the confidential use of professional reports, the reception of the resulting information is entirely proper although the parties have not been apprised of its content. The court did suggest that, even absent stipulation, a trial court might call upon qualified experts to examine the infant and consenting parents. The court-appointed expert would then be available to either party. Calling of such an expert appears to exhaust the court's power to take independent means of acquiring information. Judge Van Voorhis' lucid opinion should go far in resolving any remaining doubt concerning independent judicial inquiry in custody cases. The later memorandum affirmance of *Zebo* indicates, however, that it is not as yet reversible error for a judge to receive non-evidentiary reports confidentially where only reception has been stipulated.

Children's Rights and Status.—In the matter of parent-child suits, the trend continues in the direction of the *Badigian* case[64] criticized in last

61. 33 Misc. 2d 397, 219 N.Y.S.2d 363 (Sup. Ct., Nassau Co. 1961).
62. 15 App. Div. 2d 726, 223 N.Y.S.2d 227 (4th Dep't), aff'd, 11 N.Y.2d 771, 181 N.E.2d 766, 227 N.Y.S.2d 22 (1962).
63. 10 N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1 (1962).
64. Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).

year's survey.[65] In *St. Croix v. St. Croix*[66] the appellate division reversed the trial court determination that, as a matter of law, a child who had been removed from his parental home by order of the children's court (although he resided with his parents from time to time by permission) was emancipated and could, consequently, recover damages from a parent for negligent injury. If an infant stands a poor chance of recovery against a parent for accidental injury, at least a tort recovery seems barred from seizure by the Director of Public Welfare for use in support of the infant or his parents.[67] Admitting the applicability of Sections 101 and 104 of the Social Welfare Law, which make an infant liable under some circumstances for his parents' support, a court, in so concluding, relied on a line of cases suggesting the sanctity of personal injury recoveries. It is difficult to quarrel with the proposition that a crippled infant may be more in need of the money at his majority than the public treasury.

As to the status of children born of void marriages, a case of first impression has allowed a surrogate to legitimatize a child of a void marriage when the marriage was held void as an incident to probate proceedings in the surrogate's court.[68] While Section 1135 of the Civil Practice Act expressly grants the power to legitimatize children of a void marriage only in connection with annulment actions, the court reasoned that an annulment action would be impossible because of the death of one of the parties.[69] In light of the social policy favoring legitimization it held the surrogate's action proper. As a matter of statutory interpretation, the result may be doubted; as a matter of public policy, it seems unimpeachable.

IV

MISCELLANEA

A taxpayer who had left his wife and thereafter defeated her action for separation in this state, has been excluded from the "head of household" category of Section 1(2)(b) of the Internal Revenue Code.[70] Whatever else his status, he is not a person "legally separated from his spouse under a decree of divorce or separate maintenance" and consequently must pay income tax as a single person.[71] It should also be noted that whatever demerit there is to a meritricious relationship does not carry over into insurance law. In *United States Fire Ins. Co. v. Cruz*,[72] the lady in question,

65. Goebel & Rashap, Family Law, 1961 Survey of N.Y. Law, 36 N.Y.U.L. Rev. 1549, 1559 (1961).
66. 17 App. Div. 2d 692, 229 N.Y.S.2d 969 (4th Dep't 1962).
67. Woods v. Mason, 32 Misc. 2d 745, 222 N.Y.S.2d 903 (Sup. Ct., Onondaga Co. 1961).
68. Matter of Newins, 16 App. Div. 2d 436, 229 N.Y.S.2d 279 (2d Dep't 1962).
69. It is not clear why annulment could not be declared posthumously under N.Y. Civ. Prac. Act § 1139 unless the "wife" of the void marriage had knowledge of the prior marriage.
70. Int. Rev. Code of 1954, § 1(2)(B).
71. Wesemann v. Commissioner, 298 F.2d 527 (2d Cir. 1962).
72. 35 Misc. 2d 272, 230 N.Y.S.2d 779 (Sup. Ct., N.Y. Co. 1962).

who lived with and had children by a man without the benefit of marriage, collected on an insurance policy which would have been unavailable to a wife because of Section 167(3) of the Insurance Law.[73] Since she was not "a spouse" of the insured within the meaning of the statute, the insurer was held liable. The parties considered themselves husband and wife, and would, but for the abolition of common-law marriage,[74] probably have been held to be spouses. The opposite result in *Cruz* would seem permissible as a matter of statutory interpretation and certainly permissible from the standpoint of probable legislative intent. Since insurers are likely to close the gap created by this case, it will probably be relegated to a conversation piece.

New Legislation.—The only legislative change of general applicability is the establishment, effective September 1 of this year, of a state family court, in accordance with the Family Court Act.[75] Rules applicable to the state-wide family court have been issued by the Administrative Board of the Judicial Conference. The Family Court Act is designed to give a single court (the family court) jurisdiction over related matters of family life encompassing most intrafamilial legal problems except separations, annulments and divorce (which are reserved to the supreme court). In matters of neglect, support, paternity, family offenses and juvenile proceedings, the jurisdiction of the court is exclusive.[76] In adoption, its jurisdiction will become exclusive on September 1, 1964, being until that time concurrent with the surrogate's court.[77]

A few provisions appear especially worthy of note. The first relates to law guardians[78] which are established to assist minors in neglect proceedings, juvenile delinquency proceedings, and proceedings to determine the need of supervision of minors. In addition, Section 241 contains the salutary provision declaring the right to counsel for minors in these proceedings. Because of the suggested permissibility of utilizing the Legal Aid Society as law guardian,[79] a number of such societies will presumably become significantly involved in the application of the new act. Certain to cause more difficulty are two other parts of the act. One of them deals with conciliation proceedings[80] over which the court has original jurisdiction. Sections 924 and 925 allow a court, after hearing, to order parties to attend reconciliation proceedings. Section 926 terminates such proceedings, except on consent of both spouses, after ninety days. It is not clear whether, at the

73. "No policy . . . shall be deemed to insure against any liability of an insured because of death of or injuries to his . . . spouse [unless the contract expressly provides otherwise]." N.Y. Ins. Law § 167(3).
74. N.Y. Dom. Rel. Law § 11.
75. N.Y. Sess. Laws 1962, chs. 686, 687, 700, 702, and 703.
76. N.Y. Family Ct. Act § 115.
77. N.Y. Family Ct. Act § 641.
78. N.Y. Family Ct. Act §§ 241-49.
79. N.Y. Family Ct. Act § 243.
80. N.Y. Family Ct. Act §§ 911-26.

end of that time, a new petition may be brought. There will, no doubt, be difficulty in effectuating the conciliation proceeding. The parties, forced to confer, may be hostile to the proceedings. Time lost in attendance may make conferences an effective sanction against errant husbands. It will take time for the court to accustom itself to the procedure and to work out the necessary accommodation with the probation service and the voluntary agencies which are to handle the proceedings. All this notwithstanding, if the availability of this procedure diverts claims which would otherwise be brought in criminal courts, if it relieves enough marital pressure to save some marriages and, especially, if it really reconciles spouses, the procedure will fill a distinct present void.

The other part, considerably broader in scope, is Section 251 which expressly permits the court, once a petition has been filed under this act, to order "any person within its jurisdiction" to be examined by a physician, psychiatrist or psychologist "when such an examination will serve the purposes of the act," and continues by providing that the court may remand the person for a maximum of thirty days for purposes of such physical or psychiatric study. That a provision so broadly drafted, allowing commitment and examination of so vaguely described a category of people, will escape constitutional attack seems unlikely.

No less novel, if apparently more constitutional, is the transfer of jurisdiction over several criminal provisions to the family court under Article 8, Family Offenses Proceedings.[81] Under these provisions, criminal acts between spouses and between other members of the family "which would constitute disorderly conduct or an assault" may be brought in proceedings in the family court.[82] Functional integration of family problems seems a desirable aim.

81. N.Y. Family Ct. Act §§ 811-16.
82. People v. Klaff, 231 N.Y.S.2d 875, 35 Misc. 2d 859 (1962), held: only misdemeanor assaults transferred to Family Cts.—court denied transfer of felony assault.