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FAMILY LAW

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If this was not a year marked by the importance of decisions in family law, it was a year in which a large number of curious issues were raised and settled. This year provided answers to such questions as: whether a non-resident mother-in-law is a member of the family for purposes of the Family Court Act; whether an antenuptial agreement preceding an incestuous marriage is enforceable and, indeed, whether antenuptial agreements are enforceable at all because of anti-heart-balm legislation. Finally, a definitive position has been taken on a husband's duty of support for his wife's child conceived through artificial insemination.

Marriage.—It has been evident for some time that the New York courts take a rather liberal view of the statutory provision declaring marriages between uncle and niece void. While it is clear that such a marriage validly contracted elsewhere in the United States would be recognized in New York,[1] it was equally clear until this year that such a marriage contracted in New York was, by operation of statute, void.[2] A decision this year cast some doubt on the latter rule. In *Matter of Estate of Saffer*,[3] the court held an antenuptial agreement made prior to such a "marriage" in New York State to be valid and enforceable. Since the validity of an agreement of this sort depends on the validity of the proposed marriage, the court suggested that the parties might have gone out of the state to consummate a valid marriage at any time in the future. The difficulty with this position, in light of other cases holding an antenuptial agreement void when based on a proposed bigamous marriage, is that, on the death of the first spouse, it would be equally possible to effect a valid marriage. Alternatively, it would be possible to obtain a divorce and then remarry. In point of fact, in any case, the marriage would be void when contracted.

The case is in rather sharp contrast to another case which this year assaulted the enforceability of antenuptial agreements generally.[4]

Marital Property.—The extent of the wife's ownership of property connected with the marriage still raises a considerable problem. For example, consider joint bank accounts which, undoubtedly, are often opened without serious consideration of the extent of interest in the fund by husband and wife. When ownership of the fund is disputed, however, it is distributed in accordance with the intention of the person who made the

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1. Matter of Estate of May, 305 N.Y. 486, 114 N.E.2d 4 (1953).
2. Audley v. Audley, 196 App. Div. 103, 187 N.Y. Supp. 652 (1st Dep't 1921).
3. 39 Misc. 2d 691, 241 N.Y.S.2d 681 (Surr. Ct., Kings Co. 1963).
4. Wasserman v. Weisner, 36 Misc. 2d 916, 234 N.Y.S.2d 128 (Sup. Ct., N.Y. Co. 1962).

deposit. Consequently, a wife is entitled to half of a joint account, even if the husband has since withdrawn the entire fund, unless he can overcome the presumed intention of making a gift of one-half by the deposit.[5] The wife must also litigate the issue since the presumption is clearly rebuttable.[6]

Even more difficult is the question of intention in the purchase of household goods which are primarily useful in furnishing the marital home. Here, it is even more difficult to look to the intention of the parties as a means of determining property interests since their likely intention was to use the property jointly during their marriage. Faced with this problem, one court has given each a one-half interest.[7] To further complicate the matter, the husband is apparently entitled to immediate possession of his property, even if it is a part of the marital residence, when he no longer chooses to live with his wife. Indeed, this is true even when he wrongfully abandons her.[8] In the interim between the abandonment and a court order determining property rights and the extent of the duty of support, this conclusion may leave a wife in an embarrassing position.

Paternity.—Few cases in Anglo-Saxon jurisprudence have grappled with the difficult problem of the paternity of a child born of artificial insemination. New York has two such cases as of this year. Unfortunately, they are diametrically opposed in theory. The case decided this year, *Gursky v. Gursky*,[9] refused the status of a legitimate child to an infant so born, although it held the husband of the inseminated liable for the child's support because of the husband's consent. In refusing the argument that the child was entitled to support as a legitimate child of the marriage, the case flies in the face of the other instance in which a judicial determination of the status of such a child was made. In *Strnad v. Strnad*,[10] the court was asked to decide the right of visitation to be accorded the husband who had consented to his wife's artificial insemination. The court stated that the child was a legitimate child of the marriage. Not finding this theory applicable on any of the grounds on which court legitimation may occur nor on any quasi-adoption theory urged by the prior court, the court, in the *Gursky* case, found the rationale erroneous. It pointed out that both legitimation and adoption are matters governed solely by statute and that, consequently, the court has no power to initiate new theories of legitimation. Certainly, the law provides no present answers, unless they can be derived through court construction, for the status of a child born of artificial insemination.

5. Russo v. Russo, 17 App. Div. 2d 129, 232 N.Y.S.2d 577 (1st Dep't 1962).
6. Florio v. Florio, 19 App. Div. 2d 526, 240 N.Y.S.2d 197 (1st Dep't 1963).
7. Tausik v. Tausik, 38 Misc. 2d 11, 235 N.Y.S.2d 776 (Sup. Ct., N.Y. Co. 1962).
8. Rosenstiel v. Rosenstiel, 17 App. Div. 2d 106, 232 N.Y.S.2d 221 (1st Dep't 1962).
9. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct., Kings Co. 1963).
10. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct., N.Y. Co. 1948).

The onus of illegitimacy remains as strong as ever. As at common law, a court within this year has held than an illegitimate child is no-one's child.[11] The court found that the Welfare Department may not charge a father with liability for support of his daughter's illegitimate child, although he is liable for her support and would presumably be liable as a grandparent for the child's support were it legitimate.[12] The case not only is contra to another holding under a similar statute[13] but may be unsupportable in theory as well. Whatever purpose the legislature had in allowing welfare indemnification would seem to support the right to indemnification in the case of illegitimate children. A broad reinvocation of the filius nullius doctrine now may wash over into other contacts where the results fall on less affluent risk bearers.

Under what circumstances may a married woman bring paternity proceedings against a person not her husband? Under the Domestic Relations Law, the answer was simple: A paternity action could be brought if the child was born out of wedlock.[14] That, in turn, required either that the child be begotten and born out of wedlock or that the mother have been separated from her husband by court order or for a period of one year prior to the birth of the child.[15] If neither of these conditions applied, no action would lie.[16] A court this year reiterated the rule.[17] Under the present Family Court Act, however, the result is far from clear.[18] Gone are the provisions allowing an action based on judicial separation and those making reference to a year's absence of the husband. A child is born out of wedlock now only if he is born and begotten out of lawful matrimony. If the old rationale applies and the section is still taken as governing, it would seem that no paternity action would ever lie if the mother was married. The result seems peculiar when one considers the retention of the provision allowing husband and wife to testify to non-access in paternity proceedings.[19]

In any event, what does one do under either statute when the child is conceived while the wife is married to a man who is not the father, and born at a time when she has married the father? Following the analysis suggested above, and conceivably also under the prior Domestic Relations

11. McManus v. Lollar, 36 Misc. 2d 1046, 235 N.Y.S.2d 61 (Sup. Ct., Nassau Co. 1962).
12. N.Y. Soc. Wel. Law § 101 includes grandparent among those responsible. Cf. Calhoun v. Calhoun, 256 App. Div. 672, 11 N.Y.S.2d 415 (1st Dep't 1939).
13. Jones v. Jones, 161 Misc. 660, 292 N.Y. Supp. 221 (N.Y. Dom. Rel. Ct. 1937) (illegitimate child is "stepchild" for similar support liability).
14. N.Y. Sess. Laws 1925, ch. 225, § 1; repealed, N.Y. Sess. Laws 1962, ch. 690.
15. Id. at § 119.
16. Matter of "Dunn," 203 Misc. 181, 115 N.Y.S.2d 348 (Child. Ct., Onondaga Co. 1952), aff'd, 281 App. Div. 1068, 121 N.Y.S.2d 766 (4th Dep't 1953) (no paternity proceeding though blood test excluded husband's paternity).
17. Lovelace v. Arcieri, 17 App. Div. 2d 465, 235 N.Y.S.2d 501 (3d Dep't 1962).
18. See N.Y. Family Ct. Act art. 5.
19. N.Y. Family Ct. Act § 531.

Law,[20] the child was legitimate as to the first husband and not the subject of a paternity proceeding against the second. A court, however, had little difficulty in holding the second husband to be the father.[21] The policy serving legitimation of children does not require an opposite result. Nonetheless, it would seem that in this area legislative clarification would be appropriate.

The law has always required a rather high standard of proof to establish paternity. The concept of protecting putative fathers, apparently underlying the proof requirement, has gone unchallenged. Only rarely, however, does one get a chance to review the factual standards which actually apply. One such case came up this year, suggesting the possibility that the standard may not be as vigorous in practice as in pronouncement. In *Lozano v. Platt*,[22] the appellate division reversed a lower court determination of paternity. The dissenting justice found occasion to review the evidence which he believed supported paternity: Petitioner bought merchandise where the respondent worked. She was ably to identify the type of car respondent drove although wrong about its color. She alleged intercourse.

Separation, Support and Alimony.—It may be that the courts this year have created a level of separation below both the level of absolute divorce and divorce from bed and board. It has always been reasonably clear that, absent proof of one of the statutory grounds for separation, a spouse is not entitled to a legal separation from the other spouse.[23] However, pending their reconciliation and their ability to "live happily ever after,"[24] the parties may remain apart.[25] What was unclear until this year was whether a court could immunize a party, who removed himself from the marital residence, from a decree of separation based on his abandonment despite an inability to find grounds for separation. *Gladstone v. Gladstone*[26] did just that. It found that, while the wife had not established her right to a judicial separation based on cruelty and inadequate support, the husband had not established his counterclaim based, in part, on abandonment. The court concluded that the wife had proved enough to estblish her right to live separately from her husband but not enough to prove her right to a judicial separation. Presumably, having proved her right to live separately the wife is now immunized from a later suit based on abandonment. If this is true, then it is submitted that the parties are

20. It is not clear from the case whether the mother and her earlier husband cohabited when she became pregnant by the present husband.
21. Anonymous v. Anonymous, 18 App. Div. 2d 932, 238 N.Y.S.2d 349 (2d Dep't 1963).
22. 18 App. Div. 2d 1071, 239 N.Y.S.2d 565 (1st Dep't 1963).
23. See Brighton v. Brighton, 38 Misc. 2d 479, 237 N.Y.S.2d 596 (Sup. Ct., N.Y. Co. 1963).
24. Id. at 480, 237 N.Y.S.2d at 598.
25. Ibid.
26. 35 Misc. 2d 206, 232 N.Y.S.2d 449 (Sup. Ct., Nassau Co. 1962).

as adequately judicially separated as if a decree of separation had issued except, of course, that the financial aspects of this settlement are different.

On the related problem of separation agreements, the usual number of cases found their way into court. Drafting proved, as in prior years, to be one of the important stumbling blocks. Thus, in a dispute over a provision to provide for the education of both Peter and Stephen the sum of twenty dollars per week and for Richard the sum of ten dollars per week until each shall attain the age of twenty-one, a court found that the agreement unambiguously provided for the payment of fifty dollars per week rather than the husband's contended thirty dollars.[27]

Surviving the chasm of drafting, a separation agreement must hurdle the illegality provision embodied in Section 51 of the Domestic Relations Law.[28] This year the hurdle was raised. For one thing, a court held that the parties may not agree to have the wife supported out of a portion of a personal injury recovery not yet obtained, as such a provision (when the exclusive provision for support) contravenes the husband's duty to provide support for the wife.[29] Whatever merit there may be in allowing the wife to attack such an agreement on these grounds, it is not clear why the husband, having recovered in his personal injury action, should be able to set up the "illegality" of the agreement as a defense. It should be noted, however, that there were other grounds for the decision.

An even stranger application of the prohibition against contractually removing the husband's duty to support arose in *Lacks v. Lacks*.[30] In that case, the Court of Appeals seemed to invalidate a reconciliation support agreement, which provided handsomely for the wife, on the grounds that it affected the husband's duty of support at a time when the parties were living together. In so doing, the Court managed to invoke a principal originally intended to keep husbands from financially inducing separation in such a manner as to prevent husbands from financially inducing reconciliation.[31]

Furthermore, the perennial problem of contracting to obtain a divorce through a separation agreement received what may be a harsher treatment than had been provided for many years. In *Viles v. Viles*,[32] the separation agreement entered into by the parties, and presumably entirely valid on its face, was invalidated by the court on the ground that the negotiations leading to it included the factor of the wife's obtaining a divorce. Actually, there were two separation agreements. The first one, after the parties become estranged, called for a level of support for less than half a year and

27. Tremper v. Tremper, 35 Misc. 2d 846, 231 N.Y.S.2d 430 (Sup. Ct., Nassau Co. 1962).
28. N.Y. Dom. Rel. Law § 51.
29. Taylor v. Taylor, 36 Misc. 2d 747, 233 N.Y.S.2d 100 (Sup. Ct., N.Y. Co. 1962).
30. 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963).
31. See Comment, 14 Syracuse L. Rev. 681 (1963).
32. 36 Misc. 2d 731, 233 N.Y.S.2d 112 (Sup. Ct., N.Y. Co. 1962).

an agreement on long range plans thereafter. The parties lived apart. When the initial period of support expired, the husband agreed to pay a somewhat higher level of support. Significantly, the husband also made a payment designed to pay for the wife's trip to the Virgin Islands where she proposed to obtain a divorce. Thereafter, she obtained the divorce. The court in this action allowed the husband to repudiate the agreement. If this case stands for the proposition that the husband's agreeing to pay the expenses of the divorce constitutes a violation of Section 51 of the Domestic Relations Law, or if it stands for the proposition that an agreement to make increased support payments when the parties decide to divorce is invalid, then it seems doubtful that many separation agreements can survive court challenge. It should be remembered that the parties in the instant case, unlike many other persons who have litigated their separation agreements, had already separated and had, indeed, lived apart for several months under an agreement which clearly did not envisage a permanent separation. Having thereupon decided that their marriage could not be saved, they contracted for a permanent support provision and the wife went abroad for her divorce. It seems difficult on these facts to find more of a taint in the agreement than that which normally accompanies separation agreements coupled with a party's divorce.

Where no separation agreement existed, the question of the extent of the husband's duty to support was also the subject of the usual amount of litigation. During this year a new provision in Section 51 of the Domestic Relations Law became effective.[33] By clear implication, a wife might now, under appropriate circumstances, be required to support her husband. No case has as yet applied that provision. Wives were, however, in for their share of judicial castigation. In refusing to increase alimony in one case, the court made it clear that it had less than complete sympathy with the petitioner's wife who, the court indicated, was now having trouble holding her fifth husband.[34] In another case, the appellate division reduced even temporary alimony against a wealthy man, in part because of a history of prior marriages and the fact that the marriage on which the alimony order had been based had only lasted a few months.[35] Another court, finding itself disenchanted with the wife's claim, awarded her nothing when she sought support payments following an annulment.[36] Finding that she had a job and that there were no children, the court held that she might well fend for herself.

Of course, not all husbands were appealing either, and another court

33. The gist of the provision is that husband and wife may not contract to remove the wife's obligation to support the husband under certain circumstances. N.Y. Dom. Rel. Law § 51.
34. Kesseler v. Kesseler, 236 N.Y.S.2d 477 (Sup. Ct., N.Y. Co. 1963).
35. Salzberger v. Salzberger, 18 App. Div. 2d 991, 238 N.Y.S.2d 601 (1st Dep't 1963).
36. Fleck v. Fleck, 237 N.Y.S.2d 116 (Sup. Ct., Queens Co. 1963).

took an opportunity to berate, at some length, the "playboy" antic of a husband who was seeking to avoid alimony on his lack of employment. Needless to say, substantial alimony was awarded.[37]

As in other years, appellate courts have had to review the excessive alimony granted by lower courts. Some instances arose in which the appellate court had difficulty finding enough left after alimony to allow for the husband's support. Such was the case in *Mercier v. Mercier*,[38] where the husband, whose earnings were primarily limited to salaries of about $21,500, was ordered to pay $16,000 per year to his wife.

It has always been a matter of discretion with the trial court to determine the level of alimony appropriate to the circmstances. Consequently, the range of considerations going into any given award are difficult to determine. At least one interesting consideration which may have some novelty in alimony cases was raised this year. One court, in setting the level of support in an application for increase from a prior alimony decree, considered that the husband was in a better position to pay an increased amount because he was living with another woman and claiming her as his wife on his income tax return, thereby effecting the benefits of a joint return.[39] Whether a comparable reduction will be allowed in the future, should the government press for back taxes based on these false returns, was not indicated. The same case has made another interesting contribution to the law in its suggestion that the increased cost of living is, by itself, a sufficient reason to increase alimony. The prior cases indicate that an alimony decree cannot be changed unless the condition of the parties changes. If an increase in the cost of living is a sufficient change in condition, it would seem that few alimony decrees have any permanency in a time of progressive inflation.

Even setting the amount of alimony is, of course, not the final court action. Obtaining compliance with the decree is sometimes difficult. Jail is often an unpalatable alternative. A carefully reasoned opinion reviewed the advantages of payroll deductions from the husband's salary as an alternative means of accomplishing the collection goal.[40]

Marriage Dissolution.—Whatever may have been the case before, the courts this year seem to have become stricter with respect to annulments. Thus, a petitioner claiming to have been defrauded by a false claim of her spouse's wealth was admonished for her credulity and denied an annulment.[41] Even the usual unfulfilled promise to have children lost its approval under unexceptional facts.[42] It was more heartily disapproved when

37. Brandt v. Brandt, 36 Misc. 2d 901, 233 N.Y.S.2d 993 (Sup. Ct., N.Y. Co. 1962) ($10,400 per annum).
38. 18 App. Div. 2d 880, 237 N.Y.S.2d 428 (4th Dep't 1963).
39. Damsey v. Damsey, 39 Misc. 2d 385, 240 N.Y.S.2d 671 (Sup. Ct., Kings Co. 1963).
40. "Doe" v. "Doe," 37 Misc. 2d 788, 234 N.Y.S.2d 688 (Family Ct., Bronx Co. 1962).
41. Avery v. Avery, 236 N.Y.S.2d 379 (Sup. Ct., Nassau Co. 1962).
42. Primmer v. Primmer, 37 Misc. 2d 589, 234 N.Y.S.2d 795 (Sup. Ct., Monroe Co. 1962).

urged after ten years of marriage.[43] No more favorable response was achieved where the grounds were a breach of the promise to love and of a contract of support.[44]

The effect of out-of-state divorces proved more consistent this year despite previously discussed infirmities.[45] Alabama divorces seemed immune from collateral attack by a party before the Alabama court.[46] An analogous situation arose with respect to a Virgin Island divorce in which the court refused to allow collateral attack in the absence of a decision in the Virgin Islands on the propriety of such attack.[47]

Mexican divorces have always raised problems of their own. Under appropriate circumstances, New York courts will respect such divorces on a comity principle, but this does not mean that they will be given the respect accorded under the doctrines of res judicata or full faith and credit to a sister state decree. For example, mental derangement not rising to a rather stringent standard is an inappropriate defense to a New York divorce action.[48] Institutionalization of a woman for mental disease, however, may persuade a New York court to deny validity to a Mexican divorce when she denies the service of papers on her.[49] When Mexican divorces are of the "mail order" variety, they are afforded no status at all.[50] As a result, the New York decisions have been uniform in denying an injunction against obtaining such a divorce on the ground of its apparent invalidity.[51] However, this year saw a contrary result reached.[52] The court found itself able to distinguish its case from those that preceded it on the ground that in prior cases the petitioner had achieved a separation order in New York prior to the other's invocation of the jurisdiction of the Mexican court. Since the petitioner in the instant case had not achieved that status, the court found her more in need of its equitable power. It is possible that the result is more desirable than that achieved in the other cases since it allows an earlier declaration of the invalidity of the Mexican decree. The distinction between it and the prior cases is, however, not very useful. If the Mexican decree is invalid, the status of New York litigation at the time that it is decreed would seem irrelevant.

43. Ackerman v. Ackerman, 35 Misc. 2d 890, 231 N.Y.S.2d 493 (Sup. Ct., Nassau Co. 1962).
44. Cantor v. Cantor, 234 N.Y.S.2d 600 (Sup. Ct., Queens Co. 1962).
45. See Alexander, Family Law, 1962 Survey of N.Y. Law, 14 Syracuse L. Rev. 333, 334-36 (1962).
46. Shapiro v. Shapiro, 18 App. Div. 2d 34, 238 N.Y.S.2d 102 (1st Dep't 1963); Sommer v. Sommer, 36 Misc. 2d 379, 232 N.Y.S.2d 558 (Sup. Ct., N.Y. Co. 1962); Greene v. Greene, 236 N.Y.S.2d 732 (N.Y. Civ. Ct. 1963).
47. Klarish v. Klarish, 19 App. Div. 2d 170, 241 N.Y.S.2d 179 (1st Dep't 1963).
48. Anonymous v. Anonymous, 37 Misc. 2d 773, 236 N.Y.S.2d 288 (Sup. Ct., Nassau Co. 1962). See Comment, 14 Syracuse L. Rev. 677 (1963).
49. Donohue v. Donohue, 236 N.Y.S.2d 890 (Sup. Ct., Westch. Co. 1962).
50. Marum v. Marum, 8 App. Div. 2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959).
51. Rosenbaum v. Rosenbaum, 309 N.Y. 371, 130 N.E.2d 902 (1955).
52. Fernandez v. Fernandez, 39 Misc. 2d 471, 240 N.Y.S.2d 926 (Sup. Ct., Bronx Co. 1963).

Condonation was put in issue by a number of cases this year. Two cases seem to demonstrate the rule usually applied in separation cases: A short period of time of continued cohabitation and intercourse does not establish condonation[53] while an extended period does.[54] It was thought, however, that in a divorce action any continued cohabitation after knowledge of adultery would invoke condonation to defeat the action. One case this year suggests the contrary.[55] Continued cohabitation for a period of fifteen months during which the parties occupied the same bedroom was held insufficient for condonation, at least in the absence of intercourse between the parties. If the courts are attempting to encourage reconciliation, the rule seems highly desirable.

Children.—Among the most important decisions concerning children were those relating to the respective rights to the custody of children by parents and by the state. One court ruled that the family court had power to "place" a child in a state institution if it felt her to be a "person in need of supervision," even if she had not committed an act which, if done by an adult, would constitute a crime.[56] Thus, it appears that the loss of the power to "commit" to a state institution[57] in such cases is largely a euphemistic change. Another court was equally clear, however, that the family court is at least a necessary intermediary.[58] Thus, whatever the right of peace officers to apprehend a juvenile, this right does not extend to his indefinite detention without a family court proceeding.

Another difficult problem, long vexing the courts, has been the problem of the rights of the natural mother to a return of her child from others. Her relative power, where the child is being held by foster parents, has been previously examined.[59] Her position vis-à-vis an "authorized agency" or the Welfare Department has not been spelled out as thoroughly. In both cases, either by contract or statute, a mother normally agrees to a termination of her maternal rights by the initial placement.[60] The cases suggest, however, that neither the contract nor the statute will be strictly followed in this respect, and that the determinative question will be the ability of the mother to provide a fit home for the child.[61] It

53. Fusaro v. Fusaro, 236 N.Y.S.2d 525 (Sup. Ct., Kings Co.), 18 App. Div. 2d 714, 237 N.Y.S.2d 989 (2d Dep't 1962).

54. Takagi v. Takagi, 38 Misc. 2d 476, 237 N.Y.S.2d 109 (Sup. Ct., Erie Co. 1963).

55. Miller v. Miller, 237 N.Y.S.2d 95 (Sup. Ct., Nassau Co. 1962).

56. Matter of "Doe," 36 Misc. 2d 611, 232 N.Y.S.2d 715 (Family Ct., N.Y. Co. 1962).

57. The Family Court Act limits the permissible orders for persons in need of supervision to discharge, suspended judgment, probation and placement. N.Y. Family Ct. Act § 754.

58. People ex rel. Johnson v. Michael, 39 Misc. 2d 365, 240 N.Y.S.2d 779 (Sup. Ct., N.Y. Co. 1963).

59. See Alexander, Family Law, 1962 Survey of N.Y. Law, 14 Syracuse L. Rev. 333, 340-42 (1962).

60. The authority for both types of relinquishment is N.Y. Soc. Wel. Law § 383. A common type of "contract" is contained in People v. Free Synogogue Child Adoption Comm., 194 Misc. 332, 85 N.Y.S.2d 541 (Sup. Ct., N.Y. Co. 1949).

61. See, e.g., People v. Free Synogogue Child Adoption Comm., supra note 60.

may be, however, that the fit home which she must provide will be judged on very demanding psychiatric standards.[62]

In a year which was marked by an increased testing of Negro rights in many areas, family law was not exempt. In *Rockefeller v. Nickerson*,[63] the court was asked to intervene in a denial of a petition by white parents to adopt a Negro child. The petitioners alleged a Welfare Department policy to deny interracial adoption which the department denied. Finding sufficient basis for the denial as an exercise of discretion in the best interests of the child, and giving credence to the department's denial of a racial policy, the court avoided a holding on the question whether an adoption may be denied solely on a racial basis, although it did, by way of dictum, adopt an out-of-state case holding that it may not. It would be peculiar if, in a state in which a child must be placed with parents of its religious faith,[64] and in which parent-child matching is attempted in fine detail on a number of other criteria, race were an insignificant distinction. An appropriate resolution would seem to be not greater matching but an abandonment of the present requirement of religious matching in favor of the criterion adopted by this and other courts generally; that is, the best interests of the child.

The right of children to bring suit against their parents was as abridged this year as it was previously.[65] Indeed, it may have become a bit more abridged by a holding that a child, who was adopted at the time of suit but not at the time of the tort, could not bring an action against his parents.[66] Other children were barred in their suit against a foster father, not on the basis of the inter-familial tort immunity, but because of New York heart-balm legislation.[67] These children were the donee beneficiaries of an antenuptial agreement made by their mother with her present husband. As part of his obligation he had agreed to bestow certain favors on her children, among them a million dollar trust for each. When he reneged, the children sued. The court found the agreement unenforceable, in part because it tended to alienate the children from their natural father whose support they renounced on discovering their claim to greater wealth. Primarily, however, the court held the agreement to be in contravention of the New York statute against heart-balm actions. The reasoning appears to be that the failure to provide the support agreed on for the children was a breach of the antenuptial contract (although the marriage took place). The antenuptial contract was reduced to its basis, a contract for

62. Mittenthal v. Dumpson, 37 Misc. 2d 502, 235 N.Y.S.2d 729 (Family Ct., Bronx Co. 1962). See Comment, 14 Syracuse L. Rev. 679 (1963).
63. 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct., Nassau Co. 1962).
64. N.Y. Dom. Rel. Law § 113.
65. See Alexander, Family Law, 1962 Survey of N.Y. Law, 14 Syracuse L. Rev. 333, 342-43 (1962).
66. Isabella v. Isabella, 19 App. Div. 2d 540, 240 N.Y.S.2d 945 (2d Dep't 1963).
67. N.Y. Civ. Rights Law §§ 80-84.

marriage. Breach of a contract for marriage was not actionable because of the anti-heart balm legislation.[68] One wonders, if this decision should prove correct, whether any suit can be brought on an antenuptial agreement.

The Family Court Act.—A year under the New York Family Court Act has apparently brought more questions than answers. Many problems remain to be resolved.[69] Perhaps one of the greatest problems, however, is the fact that the new family courts have not in all instances complied with the clear sections of the law designed to protect the rights of individuals. Unfortunately also, the appellate courts have not demanded a rigorous compliance with those aspects of the law but have dealt with the question of compliance in terms of the prejudice to the defendant.[70] It may well be that such rulings are more explainable in terms of the novelty of the act than of the ultimate position of the court. If not, however, many of the salutory provisions of the act will be swept away by the argument of lack of prejudice to the respondent.

One of the most novel areas in the Family Court Act is the provision for family offense proceedings, which are apparently the civil counterpart for what would otherwise be criminal proceedings.[71] Much remains to be discovered about these proceedings. A few answers, however, are available. For one thing, whatever the act may say with respect to the jurisdiction of the family court over assault generally,[72] the supreme court has been quick to point out that its jurisdiction over a felony assault remains unchanged and that the family court has no jurisdiction in this area.[73] This leaves misdemeanor assault to be handled by the family court for members of the family and raises the rather interesting question of who is a member of the family. What about a non-resident mother-in-law? One court gave her familial status.[74]

68. Wasserman v. Weisner, 36 Misc. 2d 916, 234 N.Y.S.2d 128 (Sup. Ct., N.Y. Co. 1962).
69. See Note, 14 Syracuse L. Rev. 481 (1963).
70. Fasolo v. Probation Dep't, 19 App. Div. 2d 775, 241 N.Y.S.2d 873 (4th Dep't 1963) (mem.).
71. N.Y. Family Ct. Act art. 8.
72. "Any criminal complaint charging . . . an assault between . . . members of the same family . . . shall be transferred by the criminal court . . . to the family court . . . ." N.Y. Family Ct. Act § 813.
73. Ricapito v. People, 38 Misc. 2d 710, 238 N.Y.S.2d 864 (Sup. Ct., Nassau Co. 1963).
74. People v. Keller, 37 Misc. 2d 122, 234 N.Y.S.2d 469 (Dist. Ct., Nassau Co. 1962).