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Special Equities in Dissolution Proceedings

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SPECIAL EQUITIES IN DISSOLUTION PROCEEDINGS

IRMA V. HERNANDEZ*

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I. INTRODUCTION

The term "special equities" is often raised in dissolution (formerly divorce) proceedings,¹ most frequently by the wife's attorney.² Use of this term is not necessarily appropriate nor warranted in many contexts, but it is still considered a threat or weapon by attorneys, and it is often used as such in the bargaining and settlement process. This comment will trace the "special equities" concept throughout Florida law, from its development by the supreme court, to an analysis of the applications of the doctrine by the appellate courts.³

The modern dissolution of marriage law provides that alimony may be granted to either party⁴ and seeks to limit the granting of permanent alimony.⁵ With alimony thus limited, the usefulness of the special equities concept as developed in Florida law should soon become apparent. Today, many women work. Those that do are involved in a positive way in supporting the family and contributing to the family's estate. Special equities, in this context, are a party's interests in properties toward the acquisition of which he or she has materially contributed.⁶ For example, in a dissolution proceeding a wife may claim the right to have the title to the marital home awarded to her, due to her material contributions to the acquisition thereof. This right claimed by the wife is *not* an award of lump sum alimony,⁷ but rather an award of her special equities in the property arising from her contributions to its acquisition.⁸

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1. FLA. STAT. ch. 61 (1971).

2. Special equities can be alleged by either party to a dissolution proceeding. However, for consistency and convenience, the wife will be used throughout the article, unless otherwise stated. Ideally, the principles apply equally to husband and wife.

3. A detailed treatment of each case involving special equities will not be given. For an exhaustive list of cases dealing with this subject, see H. KOOMAN, *FLORIDA CHANCERY PLEADING & PRACTICE* § 238 (1939, Supp. 1958).

4. FLA. STAT. § 61.08 (1971).

5. *Id.* Alimony now can be granted for rehabilitative purposes only.

6. *Heath v. Heath*, 103 Fla. 1071, 138 So. 796 (1932).

7. *Barfield v. Barfield*, 226 So.2d 132 (Fla. 3d Dist. 1969); *Bildner v. Bildner*, 219 So. 2d 749 (Fla. 3d Dist. 1969).

8. *Heath v. Heath*, 103 Fla. 1071, 138 So. 796 (1932).

At the outset, the type of property which may be subject to special equities must be established. Generally, it will be real estate, stocks, and business property.⁹ The fact pattern involved will usually be as follows: (1) both parties participated and materially aided in the accumulation of the property;¹⁰ or (2) one party provided most of the consideration or contribution which enabled them to obtain a jointly owned property;¹¹ or (3) most of the consideration for particular property was obtained from jointly owned funds.¹² Variations upon these themes are endless.

Title to the property sought to be impressed with a special equity in favor of one of the parties is generally in the name of only one of the parties, usually the husband's,¹³ although occasionally the wife's.¹⁴ The property may be held as a tenancy by the entireties, which one party seeks to obtain in fee.¹⁵ In cases of estates by the entireties, the tenants, upon dissolution, automatically become tenants in common;¹⁶ however, the doctrine of special equities has been applied to tenancies by the entireties, giving title to the entire property to the party demonstrating the special equity.¹⁷

A review of the cases dealing with special equities reveals the doctrine to be most useful in dealing with properties held in the name of one of the parties individually. Most of the comments and discussion herein will be addressed to this type of property; however, it should be kept in mind that the same principles apply to jointly owned property, whether it be by the entireties or as a tenancy in common.

The Florida courts can adjust the rights of the parties with respect to both alimony and ownership of property in a dissolution proceeding.¹⁸ The court in *Taylor v. Taylor*¹⁹ held that for the convenience of both the

9. *Heath v. Heath*, 103 Fla. 1071, 138 So. 796 (1932) (business property); *Wollman v. Wollman*, 235 So.2d 315 (Fla. 3d Dist. 1970) (stocks); *Burns v. Burns*, 174 So.2d 432 (Fla. 2d Dist. 1965) (home).

10. *E.g.*, *Heath v. Heath*, 103 Fla. 1071, 138 So. 796 (1932).

11. *E.g.*, *Dupree v. Dupree*, 156 Fla. 455, 23 So.2d 554 (1945).

12. *E.g.*, *Wollman v. Wollman*, 235 So.2d 315 (Fla. 3d Dist. 1970).

13. *Id.*

14. *Bullard v. Bullard*, 195 So.2d 876 (Fla. 2d Dist. 1967).

15. *Id.*

16. FLA. STAT. § 689.15 (1971).

17. *Wood v. Wood*, 104 So.2d 879 (Fla. 3d Dist. 1958); *Benson v. Benson*, 102 So.2d 748 (Fla. 3d Dist. 1958).

18. J. CARSON, LAW OF THE FAMILY, MARRIAGE AND DIVORCE IN FLORIDA ch. 12, § 1 (1950).

[W]here the evidence shows that over a period of years she contributed materially in funds and in industry toward the acquisition of the home and other property of the husband, a reasonable allowance should be made to her from the husband's property for her maintenance and support. . . . This allowance by the court of an amount to the wife for her special equity in the property and business of the husband toward which she has contributed materially in funds and industry through a period of years does not preclude her from obtaining such allowance even though her husband has divorced her for adultery This allowance technically is not alimony, but is construed to be her special equity in her husband's property

Id. at § 2, 74-76 (footnote omitted).

19. 100 Fla. 1009, 130 So. 713 (1930) [hereinafter referred to as *Taylor*]; see also *Carlton v. Carlton*, 78 Fla. 252, 83 So. 87 (1919).

parties and the court, all matters related to the controversy should be adjudicated in the same suit.

The amount of alimony . . . might well be affected to some extent by the decision of the controversy between the parties regarding the property alleged by the wife to have been purchased largely by her earnings²⁰

The matter of special equities must be specifically pleaded and alleged in order for the court to have the power to adjust the rights of the parties involved.²¹ Once the special equity has been alleged, the court must adjudicate the matter and decide the equities as between the parties,²² as the final decree bars all actions thereafter to determine or modify property rights.²³

II. GENESIS OF THE SPECIAL EQUITIES DOCTRINE

The term "special equity" was first mentioned in Florida in *Carlton v. Carlton*.²⁴ The Supreme Court of Florida there awarded the wife a reasonable allowance for "her maintenance and support."²⁵ The wife's application for alimony had been denied, and the husband was awarded a divorce on the grounds of her "habitual indulgence in violent and ungovernable temper and extreme cruelty."²⁶ Although the award was for maintenance and support, which in this context meant alimony, the court stated:

The appellant is the mother of the appellee's six children. She generously contributed in funds and by her personal exertion and industry through a long period of time to the acquisition and development of his home and other property and the establishment of his fortune. This gives her a special equity in the property which she aided in acquiring and preserving.²⁷

Apparently, although the "special equity" was awarded out of the husband's property for the purpose of "maintenance and support,"²⁸ the court was making such allowance because of the wife's contribution to the acquisition and establishment of the husband's fortune.

The special equity concept took a different and more useful meaning in *Heath v. Heath*,²⁹ where the supreme court was faced with the

20. *Taylor v. Taylor*, 100 Fla. 1009, 1011, 130 So. 713, 714 (1930).

21. *Pearson v. Pearson*, 213 So.2d 304 (Fla. 3d Dist. 1968).

22. *Henderson v. Henderson*, 226 So.2d 699 (Fla. 4th Dist. 1969); *Shannon v. Shannon*, 101 So.2d 428 (Fla. 1st Dist. 1958).

23. *Finston v. Finston*, 160 Fla. 935, 37 So.2d 423 (1948); *Henderson v. Henderson*, 226 So.2d 699 (Fla. 4th Dist. 1969).

24. 78 Fla. 252, 83 So. 87 (1919) [hereinafter referred to as *Carlton*].

25. *Id.* at 253, 83 So. at 88.

26. *Id.*

27. *Id.*

28. *Id.*

29. 103 Fla. 1071, 138 So. 796 (1932) [hereinafter referred to as *Heath*].

statutory prohibition of alimony to an adulterous wife. However, the wife had materially assisted the husband in the conduct of his business, and had contributed capital to it. The court resolved the predicament by holding that the statutory provision denying alimony to an adulterous wife did not preclude the "ascertainment and allowance by the court of an amount to the wife for her special equity in property and business of the husband,"³⁰ if it was shown that she had contributed materially in funds and industry during the marriage. The court further stated:

Such an allowance is not alimony and should never be made in any case unless shown to be warranted by special facts and circumstances which support a finding of an equity in the husband's property arising in favor of the wife from contributions of funds and services made by her toward its accumulation over, above and beyond the performance of ordinary marital duties toward the husband.³¹

The court supported its decision in *Heath* by citing *Carlton*,³² which in fact had awarded a special equity to the wife for the purpose of maintenance and support.³³

*Heath*³⁴ changed the original concept expressed in *Carlton*³⁵ and established the distinction between alimony and special equity. Every wife, unless adulterous,³⁶ was entitled to alimony upon proof of need; but only those wives who could prove contributions of funds and services "over, above and beyond the performance of ordinary marital duties toward the husband"³⁷ would be awarded a special equity in the husband's property. Of course, the awarding of one did not preclude an award of the other.³⁸ *Heath* has been cited for the proposition that an award of "a sum for her 'special equity' in her husband's property" can be made to an adulterous wife, despite a statute denying alimony to an adulterous wife, and that such an award is not alimony.³⁹

Heath places the burden of proof on the person claiming special equities in property. The burden of proof is to show, by special facts, that the person claiming the special equity has made contributions of funds and services, "over, above and beyond the performance of ordinary

30. *Id.* at 1075, 138 So. at 797.

31. *Id.* at 1075, 138 So. at 797-98.

32. 78 Fla. 252, 83 So. 87 (1919).

33. *Id.* at 252, 83 So. at 88.

34. 103 Fla. 1071, 138 So. 796 (1932).

35. 78 Fla. 252, 83 So. 87 (1919).

36. See Fla. Laws 1967, ch. 67-254, creating FLA. STAT. § 61.08 (1969), formerly FLA. STAT. § 65.08 (1967). The current codification provides that adultery is no longer an absolute bar to alimony. FLA. STAT. § 61.08 (1971).

37. *Heath v. Heath*, 103 Fla. 1071, 1075, 138 So. 796, 798 (1932).

38. *Engebretsen v. Engebretsen*, 151 Fla. 372, 11 So.2d 322 (1942); *Dupree v. Dupree*, 156 Fla. 455, 23 So.2d 554 (1945); *Burns v. Burns*, 174 So.2d 432 (Fla. 2d Dist. 1965).

39. Annot., 34 A.L.R.2d 313, 341 n.10 (1954), and accompanying text.

marital duties."⁴⁰ Thus, the mere fact that a wife has been a dutiful wife is not grounds for awarding her a special equity in the husband's estate.⁴¹

The doctrine of special equities gradually began to take form within the divorce law of Florida. An interesting situation dealing with tenancies by the entireties arose in *Strauss v. Strauss*.⁴² In that case, the lower court had ordered the wife to convey to the husband her one-half of the properties held as tenants by the entireties. The supreme court reversed this section of the decree, and, in dictum, reaffirmed its position that "when the wife contributes money or labor over a period of years to the acquisition of property, she acquires a peculiar equity in it which may be enforced."⁴³ This case could have been decided solely on the common law reasoning that, upon divorce, an estate by the entireties is destroyed and converted into one of joint tenancy or of tenancy in common.⁴⁴ However, Justice Terrell chose to apply the special equities concept to allow the wife to retain one-half of the property.

One year later, the *Heath* position was reaffirmed in *Engebretsen v. Engebretsen*.⁴⁵ The wife in *Engebretsen* was accused of adultery, and the lower court, denying alimony, had awarded her only \$2,500 as compensation for services rendered to the husband's business from 1927 to 1939. The supreme court reaffirmed the *Heath* position in regard to contributions made by the wife to the business, stating that she could not be deprived of her property, because

the law will not permit or allow a forfeiture thereof to the husband when marital difficulties appear on the horizon, but the fruits of her labor and industry, or the money advanced, are special equities for adjudication.⁴⁶

40. *Heath v. Heath*, 103 Fla. 1071, 1075, 138 So. 796, 798 (1932).

41. See *Welsh v. Welsh*, 160 Fla. 380, 35 So.2d 6 (1948); *Roberts v. Roberts*, 101 So.2d 884 (Fla. 2d Dist. 1958).

42. 148 Fla. 23, 3 So.2d 727 (1941).

43. *Id.* at 23, 3 So.2d at 728. Justice Terrell explained the historical and philosophical reasons for special equities:

In the southwest where community property is recognized, the husband and wife share equally in all property accumulated during coverture. There is a perfectly sound basis for this rule and it will be applied in this State when the circumstances warrant. Viewed solely as a matter of economy, the labor, pain, and drudgery required of the mother in sustaining the home, giving birth to and rearing the children will often more than offset the contribution of the father to the family budget. There are no five or six day weeks in her cycle of duties, nor is she awarded extra pay for overtime. She is subject to call at all hours of the day and night and in nine cases out of ten, where there comes a rift in the marital ties, she is awarded the custody of the minor children. . . .

The appellant has shown her right to the property in question

Id. at 23, 3 So.2d at 728-29. Justice Terrell's view of the *Heath* test is not generally followed. His description of the wifely duties in *Strauss* are not grounds generally sufficient to support an award of special equities. See note 41 *supra* and accompanying text.

44. *Strauss v. Strauss*, 148 Fla. 23, 25-26, 3 So.2d 727, 728 (1941). By statute, tenants by the entireties become tenants in common upon divorce. FLA. STAT. § 689.15 (1971).

45. 151 Fla. 372, 11 So.2d 322 (1942).

46. *Id.* at 390, 11 So.2d at 329.

The wife was awarded two-fifths of the husband's property as special equity, and alimony in addition thereto, as adultery had not been established.⁴⁷

Shortly before *Engbretsen, Masilotti v. Masilotti*⁴⁸ was decided. The lower court in *Masilotti* had awarded the wife "\$100.00 per month as alimony in consideration of her contribution to the plaintiff's business."⁴⁹ The court questioned whether the monthly award was intended as a return of "money advanced by her and used by the plaintiff . . . in the promotion and expansion of his business, or whether it was alimony authorized by statute,"⁵⁰ and remanded the case for clarification.

In *Dupree v. Dupree*,⁵¹ Justice Terrell stated that "[a]limony has to do with things to eat and wear and those who strive diligently are entitled to both,"⁵² referring to special equities and alimony. The wife in *Dupree* had contributed "thousands of dollars besides her labor which aided [*sic*] materially to the defendant's estate."⁵³ While *Dupree* did not clearly differentiate special equities and alimony, the court stated:

Appellant has reached the age in which her earning ability is on the decline. The award of alimony runs with the life of defendant and he is shown to be in precarious health. Her children are also entitled to participate in what she has contributed to earn.⁵⁴

Although the award of special equities was given because of the wife's contributions to the husband's estate, the court clearly considered what the practical effect of an award of alimony would be to the wife.⁵⁵ If the quoted paragraph is considered by itself, the choice between alimony and special equities could be considered to have been made in an arbitrary manner rather than based upon proof and evidence of the wife's contribution to the business.

*Foreman v. Foreman*⁵⁶ followed the ambiguous approach evidenced in *Dupree*, when an adulterous wife was granted property, but no alimony. The case does not state clearly whose property was involved, *i.e.*, whether it was held as a tenancy by the entirety or was separately owned by the husband. The master's report stated that the wife had at all times operated for the husband a cafe, a store, or a rooming house, and that the husband " 'didn't make any money but playing poker.' "⁵⁷ These facts were considered by the court as indicia of the worth of "the

47. *Id.*

48. 150 Fla. 86, 7 So.2d 132 (1942).

49. *Id.* at 93, 7 So.2d at 135.

50. *Id.*

51. 156 Fla. 455, 23 So.2d 554 (1945).

52. *Id.* at 455, 23 So.2d at 555.

53. *Id.* at 457, 23 So.2d at 555.

54. *Id.* at 457-58, 23 So.2d at 555.

55. *Id.* Upon the husband's death, alimony payments to the wife would terminate.

56. 40 So.2d 560 (Fla. 1949).

57. *Id.* at 560.

labor and industry" of the wife.⁵⁸ The court cited *Heath*⁵⁹ but gave no clear explanation why the wife was granted "a just portion of the property in question."⁶⁰

The supreme court cases have since been interpreted by the district courts of appeal with varying results.

III. SPECIAL EQUITIES IN PRACTICE

A. *The Burden of Proof*

As previously stated, *Heath* set forth the test used in subsequent cases to determine whether the wife has met the burden of proof in establishing special equities in the husband's estate. In *Heath*, the Supreme Court of Florida stated that an award of special equities must

be warranted by special facts and circumstances which support a finding of an equity in the husband's property arising in favor of the wife from contributions of funds and services made by her toward its accumulation over, above and beyond the performance of ordinary marital duties toward the husband.⁶¹

The District Court of Appeal, Second District, applied the *Heath* test strictly in *Tanner v. Tanner*.⁶² In *Tanner*, the wife had performed valuable services during the early years of the marriage in connection with the operation of the husband's business. She had had equal ownership with the husband of stock in the family corporation until it was dissolved. The assets of the family corporation were never distributed, and, after the dissolution, the husband continued to operate the business as a sole proprietorship. The appellate court disregarded the "valuable services" performed by the wife in the early years of the business and the fact that her equity in shares of the business was never distributed to her in assets or otherwise.⁶³

Instead, the Second District emphasized the fact that "[t]here was no 'clear, strong, and unequivocal' evidence to show any amount of money which the wife may have contributed to any business of the husband."⁶⁴

The wife has performed certain minor services for the business, but the evidence fails to show that she advanced money to him for use in his business or that her services were above and beyond the performance of ordinary marital duties to the husband's accumulations of property.⁶⁵

58. *Id.*

59. 103 Fla. 1071, 138 So. 796 (1932).

60. *Foreman v. Foreman*, 40 So.2d 560, 561 (Fla. 1949).

61. *Heath v. Heath*, 103 Fla. 1071, 1075, 138 So. 796, 798 (1932).

62. 194 So.2d 702 (Fla. 2d Dist. 1967) [hereinafter referred to as *Tanner*].

63. *Id.* at 704.

64. *Id.*

65. *Id.*

The District Court of Appeal, Third District, has been somewhat less strict in the application of the *Heath* test. In *Wollman v. Wollman*,⁶⁶ a wife was awarded a one-half interest in certain stock which was held solely in the husband's name. The fact cited by the court to sustain the award of special equities to the wife was that "the husband admitted that 'they both owned everything' referring to their interest in marital property."⁶⁷ The term "marital property" is usually understood to mean jointly owned property. The majority in *Wollman* stated that the husband's admission in regard to the marital property was sufficient for the wife to have "met her burden of proof in establishing a special equity . . ."⁶⁸ It also stated that if "a wife advances money to her husband for use in his business or for the purchase of property she may . . . be awarded a special equity therein."⁶⁹ Accordingly, the wife in *Wollman* was awarded a special equity in the husband's property.

Justice Barkdull dissented from the majority opinion.⁷⁰ His dissent reveals the liberality of the Third District's approach in granting special equities.

The funds, at all times, were co-mingled [*sic*] and I find nothing in the record which indicates that the wife is in any position to contend that the funds taken from the joint account by the husband and invested in the stock in his own name were one-half her funds rather than his. The record reveals that the vast majority of the funds contributed to the joint account, from which the stock was purchased, were his funds.⁷¹

Thus, it appears that the Third District will consider property bought with joint funds, regardless of the parties' relative contributions to the joint funds, as subject to the special equity doctrine. This approach also suggests that mere purchase of property with joint funds may justify the award of a special equity in one-half thereof, without the necessity of further proof.

There is an obvious difference between the *Tanner*⁷² and *Wollman*⁷³ approaches to proving special equities. The burden of proof required by *Tanner* is exceedingly heavy and few wives would be able to sustain it, even though they may have contributed valuable services to the husband's

66. 235 So.2d 315 (Fla. 3d Dist. 1970) [hereinafter referred to as *Wollman*].

67. *Id.* at 315.

68. *Id.* The court cited, *inter alia*, *Tanner*, which requires "clear, strong and unequivocal" evidence. *Tanner v. Tanner*, 194 So.2d 702, 704 (Fla. 2d Dist. 1967). See notes 62-65 *supra* and accompanying text.

69. *Wollman v. Wollman*, 235 So.2d 315, 315-16 (Fla. 3d Dist. 1970). The court cited, *inter alia*, *Heath*, which required contributions by the wife "over, above and beyond the performance of ordinary marital duties . . ." *Heath v. Heath*, 103 Fla. 1071, 1075, 138 So. 796, 798 (1932).

70. *Wollman v. Wollman*, 235 So.2d 315, 316 (Fla. 3d Dist. 1970) (dissenting opinion).

71. *Id.*

72. 194 So.2d 702 (Fla. 2d Dist. 1967).

73. 235 So.2d 315 (Fla. 3d Dist. 1970).

business which effectively equal or surpass the contributions of money seemingly required by *Tanner*.⁷⁴ On the other hand, the *Wollman* approach may not even be sufficient to satisfy the *Heath* test of contributions "over, above and beyond the performance of ordinary marital duties."⁷⁵ In addition, consistent application of the *Wollman* approach may create serious inequities, since many bank accounts, stocks and other properties are held by husband and wife as joint tenants, even though the funds may have been contributed by just one party.

The lower court in *Turner v. Turner*⁷⁶ was unable to trace the equitable interest of the parties in the various assets acquired during their marriage, because of the "devious and deceptive" dealings of the parties.⁷⁷ The District Court of Appeal, Third District, affirmed the lower court's finding in this respect, leaving the parties as it found them.⁷⁸

B. *Alimony Distinguished*

The reported cases dealing with special equities reveal that some trial courts fail to appreciate the distinction between special equities and alimony. Opinions from several district courts have been written simply to explain when and how the special equities doctrine should be applied.

The approach of the District Court of Appeal, First District, to the doctrine of special equities is shown in *Rampton v. Rampton*.⁷⁹ The wife had alleged a special equity in certain properties and assets of the husband, requesting the court to award her an equitable interest in those properties, either as "lump sum alimony or as an equitable beneficiary owner."⁸⁰ She was awarded \$950.00 per month as alimony and \$110 per month for child support. In addition, she was awarded a car, the home's furniture and fixtures, and certain other provisions for medical care. The lower court denied the wife's claim for an award of special equities.⁸¹

The *Rampton* opinion does not discuss any allegations of contributions by the wife to the acquisition of the husband's properties. The appellate court affirmed the lower court's decision, stating:

[I]t appears that the court has awarded ample alimony and support money as well as providing a home for the appellant and the children. The fact that the defendant-husband may have additional wealth is not in the criteria upon which a Chancellor must or should base his determination. . . .⁸²

74. 194 So.2d 702 (Fla. 2d Dist. 1967). See notes 62-65 *supra* and accompanying text.

75. *Heath v. Heath*, 103 Fla. 1071, 1075, 138 So. 796, 798 (1932). See notes 29-41 *supra* and accompanying text.

76. 192 So.2d 787 (Fla. 3d Dist. 1966).

77. *Id.* at 788.

78. *Id.*

79. 197 So.2d 846 (Fla. 1st Dist. 1967).

80. *Id.* at 846.

81. *Id.*

82. *Id.* at 847.

This language does not differentiate alimony and special equities. Further, it could be interpreted to mean that if the wife is adequately provided for in alimony and support, the lower court's finding must be upheld regardless of the special equities alleged or proven. This interpretation would be in opposition to the guidelines set by the Supreme Court of Florida.⁸³

The District Court of Appeal, Third District, applied the doctrine in *Latta v. Latta*.⁸⁴ In that case, the husband was granted a divorce and the wife was ordered to convey her one-half interest in the marital home to the husband. The husband was also ordered to pay \$10,000 in lump sum alimony. The lower court failed to appreciate the difference between special equities and alimony, and stated:

"The [wife] has obviously contributed to the upbuilding and the success of the [husband's] business and is, therefore, entitled to some consideration in the matter of alimony in periodic installments or in a lump sum award."⁸⁵

The *Latta* court wrote an explanatory opinion describing, for the benefit of the lower court, how this case should be decided. The court set forth a three-step procedure for handling alimony and property claims.

First, the trial court must decide whether alimony should be granted; if so, whether it will be permanent or lump sum alimony; and how much alimony should be awarded in either or both categories. The alimony award or awards should be based upon the need of the wife, the ability of the husband to pay, and the right of the wife to continue to look to the husband for support. It is discretionary for the trial court to award lump sum alimony pursuant to statute.⁸⁶

Second, the trial court must make a determination as to whether either of the parties has a special equity in jointly owned property, assuming that such special equity has been properly alleged and adequately proven. If so, a special equity can be awarded to that party in the jointly owned property; that is, the special equity will be awarded as to the other party's one-half interest in that property.⁸⁷ In *Latta*, the appellate court reversed the trial court's order requiring the wife to convey her interest in the home to the husband, and directed the trial court to consider "whether or not either party has an equitable interest in the home which must be protected."⁸⁸

Finally, the chancellor must make a determination as to whether either party has a special equity in the other's separately owned property. The appellate court in *Latta* directed the trial court to determine

83. See notes 29-41 *supra* and accompanying text.

84. 121 So.2d 42 (Fla. 3d Dist. 1960) [hereinafter referred to as *Latta*].

85. *Id.* at 44, quoting circuit court's decree.

86. *Id.* at 45.

87. *Id.*

88. *Id.*

the extent of the wife's interest in the husband's business and to provide for its payment to the wife. The wife had alleged such an equity and had introduced sufficient evidence in support of the allegation.⁸⁹

In *Comcowich v. Comcowich*,⁹⁰ the wife was awarded a special equity in the marital home to the extent of the monies she had expended in the maintenance and improvement of the property after the divorce. However, her claim of a special equity in the marital home to the extent of expenditures allegedly made in connection with the purchase and improvement of the home prior to the divorce was denied. In this case, the wife's petition for a determination of the special equities was filed almost two years after entry of final judgment. Concurrently with the claim for special equities, she requested that lump sum alimony be awarded; this claim was denied by the court.⁹¹

The court in *Comcowich* affirmed the trial court's denial of alimony and property rights in the marital home, stating that

“‘a court of equity possesses no power to go back and grant a new right or impose a new duty unadjudicated [*sic*] in its former decree after it has become final and absolute.’”⁹²

The finding of a special equity for expenditures subsequent to the divorce was affirmed without further authority.⁹³ The dissenting judge in *Comcowich* would have ordered the trial court to consider the evidence in regard to the wife's equities in the home and make a determination accordingly.⁹⁴ Thus, it seems that a court can make an award of special equities acquired by a wife subsequent to the entry of a final judgment of dissolution.

In *Levison v. Levison*,⁹⁵ the wife was denied the right to recover alleged loans and contributions that she had made to the husband's business. She was also denied her share of the proceeds from the refinancing of a mortgage on the marital home. The trial court's decision was affirmed as the District Court of Appeal, Third District, was “unable to agree with the appellant's contention that the decree was not supported by substantial competent evidence.”⁹⁶ There is no mention of special equities in the court's opinion. If the wife in *Levison* had alleged special equities and the court had applied the *Wollman*⁹⁷ interpretation of the *Heath*⁹⁸

89. *Id.* at 45-46.

90. 237 So.2d 66 (Fla. 3d Dist. 1970) [hereinafter referred to as *Comcowich*].

91. *Id.*

92. *Id.* at 67, quoting *Sobol v. Sobol*, 191 So.2d 68 (Fla. 3d Dist. 1966), quoting *Morrison v. Morrison*, 122 So.2d 199, 201 (Fla. 1st Dist. 1960). The latter two cases actually read “not adjudicated” rather than “unadjudicated.”

93. *Comcowich v. Comcowich*, 237 So.2d 66, 67 (Fla. 3d Dist. 1970).

94. *Id.* (dissenting opinion); cf. *Kroll v. Kroll*, 105 So.2d 495 (Fla. 3d Dist. 1958); see also *Guise v. Guise*, 245 So.2d 120 (Fla. 4th Dist. 1971).

95. 193 So.2d 630 (Fla. 3d Dist. 1967) [hereinafter referred to as *Levison*].

96. *Id.* at 631.

97. 235 So.2d 315 (Fla. 3d Dist. 1970). See notes 66-71 *supra* and accompanying text.

98. 103 Fla. 1071, 138 So. 796 (1932). See notes 29-41 *supra* and accompanying text.

test, she should have been awarded one-half of the mortgage proceeds on the facts as stated in the opinion.

The District Court of Appeal, Third District, has denied an award of alimony to the wife in two cases in which a special equity in the husband's property has been found in her favor. In *Volpe v. Volpe*,⁹⁹ the trial court awarded the wife the husband's interest in a condominium, but denied her an award of alimony. There are not enough facts given in this opinion to determine whether the wife was denied alimony simply because she was awarded a special equity in the condominium. In *Green v. Green*,¹⁰⁰ the wife's request for an award of alimony was denied by the lower court "in view of the award of special equities herein granted . . ." ¹⁰¹ Hopefully, the courts will evaluate a request for an award of alimony as the Third District directed in *Latta*,¹⁰² *i.e.*, separately from any allegations or awards of special equities given to the wife.

*Green*¹⁰³ presents the classical situation in which special equities will be granted to the wife. The wife had worked with the husband in the management of the family business from the beginning of the marriage. She managed their stores, her family at times loaned money to them, and the lower court stated that she had proved her special equities "unequivocally and to the exclusion of reasonable doubt."¹⁰⁴ She was awarded a special equity in one-half of all assets of the husband.¹⁰⁵

C. Use of the Supersedeas Bond

There is a lesson to be learned from a subsequent development in *Green*. Two years later,¹⁰⁶ the wife was asserting her claim for one-half of the loss or depreciation in the market value of stocks held without supersedeas bond in a curator's account pending appeal from the judgment granting her a special equity in those stocks. The District Court of Appeal, Third District, affirmed the denial of her claim, stating that "the order appealed was not a supersedeas, but a stay entered upon certain conditions."¹⁰⁷ The lesson found in this later *Green* case is that in similar situations a supersedeas bond should always be used.

IV. SPECIAL EQUITIES AND THE HUSBAND

Few reported cases involved the award of special equities to husbands. From *Heath*,¹⁰⁸ it is clear that special equity is not alimony; there-

99. 227 So.2d 534 (Fla. 3d Dist. 1969).

100. 228 So.2d 112 (Fla. 3d Dist. 1969) [hereinafter referred to as *Green*].

101. *Id.* at 114.

102. 121 So.2d 42 (Fla. 3d Dist. 1960). See notes 84-89 *supra* and accompanying text.

103. 228 So.2d 112 (Fla. 3d Dist. 1969).

104. *Id.* at 113.

105. *Id.*

106. *Green v. Green*, 254 So.2d 802 (Fla. 3d Dist. 1971).

107. *Id.* at 805.

108. 103 Fla. 1071, 138 So. 796 (1932). See notes 29-41 *supra* and accompanying text.

fore, even under the former divorce law, which did not provide for the granting of alimony to the husband, a husband could, theoretically, obtain a special equity in property.

*Burns v. Burns*¹⁰⁹ granted a special equity in the marital home to the husband in an amount equivalent to a loan which had been obtained to finance the building of the house. The construction was effected with funds received from the loan, from the sale of a house owned by the husband before the marriage, and from joint funds of the couple. The appellate court stated:

We find that the chancellor erred in decreeing that the loan was the obligation of both parties. The controversial loan was initiated, agreed upon, and evidenced as a result of dealings between defendant and [a third party].¹¹⁰

The court did not set forth a specific test in awarding the special equity to the husband. In support of its decision, the court cited *Francis v. Francis*,¹¹¹ where the Supreme Court of Florida granted the husband a special equity in "the 'home place' which had been substantially improved through the efforts of the husband,"¹¹² because the "defendant husband substantially improved the property out of his own funds."¹¹³ Such language implies that the court was using a test similar to the one set forth in *Heath*,¹¹⁴ which emphasizes substantial contribution.

In *Bullard v. Bullard*,¹¹⁵ the District Court of Appeal, Second District, instructed the chancellor that, despite the scarcity of reported cases, he indeed could, upon dissolution, award the husband a special equity in an estate by the entireties. The wife had taken \$8,000 from the parties' joint savings; thereafter, she shot her husband, causing him to be permanently disabled. The lower court determined that the jointly owned home passed upon divorce to the parties as tenants in common, stating that it lacked the power to do otherwise.¹¹⁶

The appellate court did not state the burden of proof to be used in considering the special equity allegation made by the husband; rather, it stated:

We remand this case back to the chancellor to re-examine all evidence, to determine whether the \$8,000.00 "accumulated by both parties" is relevant, or take new evidence, as the reviewed factual situation may require.¹¹⁷

*Hegel v. Hegel*¹¹⁸ did involve the burden of proof required of a

109. 174 So.2d 432 (Fla. 2d Dist. 1965).

110. *Id.* at 435.

111. 133 Fla. 495, 182 So. 833 (1938).

112. *Burns v. Burns*, 174 So.2d 432, 436 (Fla. 2d Dist. 1965).

113. *Id.* at 436.

114. 103 Fla. 1071, 138 So. 796 (1932). See notes 29-41 *supra* and accompanying text.

115. 195 So.2d 876 (Fla. 2d Dist. 1967).

116. *Id.* at 877.

117. *Id.* at 879.

118. 248 So.2d 212 (Fla. 3d Dist. 1971) [hereinafter referred to as *Hegel*].

husband alleging special equities in the wife's property. In *Hegel*, the wife proved to have contributed the entire purchase price of all the assets discussed in the opinion. Therefore, she was awarded all such property. The husband claimed to have a special equity in some of the wife's property because of his personal services in managing the wife's estate. The court stated that

the value of any personal services performed by [the husband] in and about the acquisition of such property and the care and management of [the wife's] separate estate is purely speculative and insufficient to establish a basis for any "special equity."¹¹⁹

The burden of proof suggested in *Hegel* seems to require clear evidence of both the contribution and the value of substantial services.

V. CONCLUSION

The *Heath* test¹²⁰ requires a person claiming a special equity to prove contributions "over, above and beyond the performance of ordinary marital duties."¹²¹ *Tanner* requires that the proof of the legal or equitable interest be "to the exclusion of reasonable doubt."¹²² Thus, the wife must prove contributions of sums of money to the husband's property. The *Wollman*¹²³ application, on the other hand, simply requires that joint funds have been used to purchase the property, regardless of contributions to the funds. One approach, *Tanner*, presents an exceedingly heavy and impractical burden of proof when applied to real life situations, while *Wollman* would give rise to serious inequities if applied consistently. A more realistic approach would be to consider the wife's contributions of both services and money to the family's estate. Also in this respect, contributions made by a wife who worked to enhance the family's living standard should be considered. Such an approach would satisfy the *Heath* test and would fairly compensate both the working wife and the wife who contributed money and services to the family's estate.

119. *Id.* at 215.

120. 103 Fla. 1071, 138 So. 796 (1932). See notes 29-41 *supra* and accompanying text.

121. *Id.* at 1075, 138 So. at 798.

122. *Tanner v. Tanner*, 194 So.2d 702, 703 (Fla. 2d Dist. 1967). See notes 62-65 *supra* and accompanying text.

123. *Wollman v. Wollman*, 235 So.2d 315 (Fla. 3d Dist. 1970). See notes 66-71 *supra* and accompanying text.