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# Family Law

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# FAMILY LAW

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## I. INTRODUCTION

Florida family law underwent a steady accretion of case law during the past two years with the courts deciding over one hundred and eighty cases, and more than fifteen of these cases were of first impression in this state. The legislature added permanent insanity as a ground for divorce and hedged it with safeguards to protect the insane spouse.[1] The legislature has also indicated a disenchantment with the former handling of juvenile delinquents by providing for the fingerprinting and photographing of juveniles who are arrested for felonious acts[2] and by depriving the juvenile court of jurisdiction when a minor has been indicted for a crime calling for the death penalty or life imprisonment.[3] In a perhaps more constructive vein, the legislature has created a new Division of Youth Services which has responsibility over dependent and delinquent juveniles.[4]

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1. *See* note 15 *infra*.
2. *See* note 179 *infra*.
3. *See* note 180 *infra*.
4. *See* note 181 *infra*.

## II. Marriage and Annulment

### A. *Miscegenation*

The Supreme Court of Florida, in bowing to the decision of *Loving v. Virginia*,[5] decided by the United States Supreme Court, has invalidated the inter-racial marriage laws[6] of the State of Florida.[7] Subsequently, the Florida legislature repealed all of the statutes validating certain marriages between whites and blacks and prohibiting marriages between them as well as the statutes relating to cohabitation between the races.[8]

### B. *Common-Law Marriages*

It is incumbent upon an alleged wife who is seeking temporary alimony and child support from her common-law husband (in a marriage contracted before January 1, 1968) to make a prima facie showing of the existence of the common-law marriage; she does not have to prove it conclusively at this stage.[9]

### C. *Annulment*

An annulment should not be granted in the absence of clear and unequivocal proof that cohabitation did not occur before the marriage. The second district held that no annulment should be granted when the wife testified that she entered into the ceremony to provide a name for her unborn child conceived as a result of pre-marital intercourse between the parties.[10] The court also held that there is no fraud if the alleged wife informed her husband prior to the marriage ceremony that she had no intention of having sexual relations with him "right away * * * but * * * if my feelings did change, and when they did, I would certainly let him know."[11]

## III. Divorce

### A. *Jurisdiction and Venue*

When alleged acts of cruelty have occurred in Leon County and in Dade County, venue may be laid in either county; the trial court is not required to weigh the amount of cruelty occurring in the different counties in order to determine the proper forum.[12]

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5. 388 U.S. 1 (1967).

6. Fla. Stat. § 741.11-741.16 (1967).

7. Van Hook v. Blanton, 206 So.2d 210 (Fla. 1968).

8. Fla. Laws 1969, ch. 69-195, *Repealing* Fla. Stat. §§ 741.11, 12, 13, 14, 15, 16, 17, 19, 20, 798.04, 798.05 (1967).

9. Phillips v. Phillips, 215 So.2d 83 (Fla. 3d Dist. 1968).

10. Williams v. Williams, 214 So.2d 48 (Fla. 2d Dist. 1968).

11. *Id.* at 50.

12. Bannerman v. Bannerman, 204 So.2d 234 (Fla. 3d Dist. 1967).

### B. *Grounds for Divorce*

The refusal of a wife to allow her serviceman husband to visit her while he was on furlough and her refusal to allow him to see his child, who had been born while he was absent, was held sufficient to constitute cruelty.[13]

A New York divorce decree which forbids one spouse from remarrying without order of the court entitles this spouse to obtain a divorce in Florida based upon the New York decree in favor of the other spouse.[14]

Incurable insanity is now a ground for divorce; however, the insane person must have been adjudged insane for a period of at least three years, and two court-appointed medical doctors must certify to the court that the defendant is "hopelessly and incurably insane." The Act provides for procedural safeguards for the insane spouse and also requires the sane spouse to provide for the care and maintenance of the insane defendant.[15]

### C. *Defenses*

One act of intercourse between the spouses subsequent to the filing of a divorce complaint does not constitute condonation in the absence of any testimony showing a freely exercised intent to forgive. The act of intercourse might be the result of coercion or trickery, or it might represent a conditional condonation with a later revival of the conditionally condoned wrong; it is an equivocal act which has no legal effect without explanation.[16]

It would not seem to be reversible error to grant a divorce to one party even though the trial court finds that both parties have been guilty of misconduct.[17]

### D. *Procedure*

In a case of first impression, the Second District Court of Appeal has held that a complaint for divorce which tracks the abbreviated Florida Rules of Civil Procedure form 1.943 satisfies the requirements of rule 1.110(b) of the Florida Rules of Civil Procedure.[18]

The Third District Court of Appeal has held that it is error for a trial court to order a plaintiff husband in a divorce suit to answer

13. Peacock v. Peacock, 207 So.2d 292 (Fla. 1st Dist. 1968).

14. Mirras v. Mirras, 202 So.2d 887 (Fla. 2d Dist. 1967), *following* FLA. STAT. § 65.04(8) (1965).

15. Fla. Laws 1969, ch. 69-142.

16. Albritton v. Albritton, 212 So.2d 817 (Fla. 4th Dist. 1968). *Cf.* Glaum v. Glaum, 224 So.2d 390 (Fla. 2d Dist. 1969). Stanley v. Stanley, 201 So.2d 613 (Fla. 3d Dist. 1967), has reaffirmed the rule of condonation articulated in Seiferth v. Seiferth, 132 So.2d 471 (Fla. 3d Dist. 1961), and Pollak v. Pollak, 196 So.2d 771 (Fla. 3d Dist. 1967).

17. Bornstein v. Bornstein, 215 So.2d 60 (Fla. 4th Dist. 1968).

18. Muller v. Muller, 205 So.2d 558 (Fla. 2d Dist. 1967).

his wife's depositions regarding his alleged adultery or to have his complaint dismissed and to be precluded from defending against his wife's counterclaim if he should fail to do so.[19] The decision was based upon the United States Supreme Court cases of *Spevack v. Klein*[20] (which involved a lawyer who upon the grounds of self-incrimination refused to produce financial records and refused to testify regarding his alleged misconduct as a lawyer) and *Garrity v. New Jersey*[21] (which involved the threat of discharge to secure incriminatory evidence from a policeman). The dissent pointed out that both of these cases involved persons who were involuntary parties to judicial or quasi-judicial hearings while in the instant case the husband was a voluntary party-plaintiff.

Because a court always has inherent control over its own decrees before they become final and because the state is a party to every divorce case, a chancellor who has dismissed a divorce case without prejudice after a statement by counsel for both parties that the parties had reconciled may vacate the order of dismissal and reinstate the case for further proceedings when the reconciliation proves to have been an abortive venture. The court noted that there was no specific rule of procedure which provided coverage of this problem.[22]

It is not error for the chancellor to permit the plaintiff to amend a divorce complaint to seek alimony unconnected with divorce when the extreme cruelty ground for both complaints is the same.[23]

It is not an abuse of discretion for a chancellor to refuse to allow the plaintiff husband to amend his complaint for divorce from the ground of cruelty to the ground of adultery at the conclusion of the trial of the case when the husband knew of the fact of adultery when the suit was filed and evidence of the adultery was introduced in support of the cruelty ground.[24]

In a case of apparent first impression in Florida, the Second District Court of Appeal has held that a husband who has testified to confidential communications between himself and his wife in an oral deposition prior to trial will be deemed to have waived his right to assert the privileged communication when portions of the deposition are introduced at the trial. Under rules 1.280(f) and 1.330(c)(1) of the Florida Rules of Civil Procedure, the plea of privilege must be raised at the time of the taking of the deposition.[25]

The Second District Court of Appeal has articulated the view that the Florida courts require only "slight corroboration with respect to the grounds for divorce" in contested divorce actions.[26] The corrob-

19. Simkins v. Simkins, 219 So.2d 724 (Fla. 3d Dist. 1969).
20. 385 U.S. 511 (1967).
21. 385 U.S. 493 (1967).
22. Danner v. Danner, 206 So.2d 650 (Fla. 2d Dist. 1968).
23. Rouse v. Rouse, 212 So.2d 650 (Fla. 3d Dist. 1968).
24. Wooten v. Wooten, 213 So.2d 292 (Fla. 3d Dist. 1968).
25. Tibado v. Brees, 212 So.2d 61 (Fla. 2d Dist. 1968).
26. Hillyard v. Hillyard, 212 So.2d 306, 308 (Fla. 2d Dist. 1968). *But see* Clutter v.

oration rule was designed to guard against collusion of the parties, and when the action is strongly contested the reason for the rule does not exist.

In a somewhat cryptic opinion, the Third District Court of Appeal seemingly has held that it is error to charge costs of a divorce action against an attorney rather than against his losing client.[27]

In a case of apparent first impression in Florida, the Second District Court of Appeal has held that when a husband's suit for divorce for extreme cruelty was dismissed with prejudice the doctrine of res judicata precludes the husband in a subsequent divorce action for extreme cruelty from introducing testimony concerning events which occurred prior to the first judgment.[28] The court pointed out that this decision would not prevent the husband from again filing suit for divorce on the same grounds after he has lost the first action; he cannot, however, introduce testimony concerning events which transpired before the first judgment but must limit the testimony to events occurring thereafter.

### E. *Contempt Proceedings*

A former husband who admits to the court that he lied (about the place of residence of his wife and that he was sending money to her for her support and the support of their children) in prior divorce proceedings is guilty of direct criminal contempt and may be punished by the court in subsequent proceedings without the necessity of a jury trial. The court noted that the fact that the statute of limitations for the crime of perjury had run would not bar the use of contempt proceedings by the court.[29]

### F. *Appeal of Divorce Judgments*

If a divorced wife enters her appeal from a divorce decree subsequent to the death of her husband, the decree must be revived in the trial court by making the representatives of the deceased husband a party to the appeal. It should be noted that if the revivor occurs in the trial court later than sixty days (now thirty days) after the appeal from the original decree or judgment, the appeal will be dismissed. The First District Court of Appeal, in light of these rules, has held that it would not dismiss the appeal when no revivor was made in the trial court but

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Clutter, 207 So.2d 499 (Fla. 3d Dist. 1968), *cert. denied,* 210 So.2d 217 (Fla. 1968), which held that there was insufficient evidence of cruelty and insufficient corroboration of the husband's testimony relating to the alleged cruelty of his wife to justify the granting of a divorce. A perceptive reading of this case dramatically illustrates the futility inherent in our present "fault" approach to divorce.

27. Thurman v. Thurman, 223 So.2d 572 (Fla. 3d Dist. 1969), *citing* FLA. STAT. § 57.041 (1967).

28. Telford v. Telford, 225 So.2d 165 (Fla. 2d Dist. 1969).

29. Chavez-Rey v. Chavez-Rey, 213 So.2d 596 (Fla. 3d Dist. 1968).

would relinquish jurisdiction to the trial court in order to give the appellant an opportunity to revive the divorce decree against the representative of the deceased husband.[30]

If the parties are living apart by virtue of a separate maintenance decree of a foreign state and the husband subsequently sues for divorce in Florida on the grounds of desertion and extreme cruelty and the wife pleads res judicata to the charge of desertion but does not plead res judicata or estoppel by judgment to the cruelty charge at the trial level, she may not do so at the appellate level.[31]

A wife who has accepted payment of $5,000 (as the return of a "peace offering" which she gave the husband) and a payment of $450 which was her portion of the parties' joint bank account does not waive her right to appeal on the grounds that the trial court was in error in granting the divorce and in determining the amount of alimony.[32]

## IV. ALIMONY

### A. *Jurisdiction and Venue: Florida and Foreign Judgments*

It is error to enter a divorce judgment ordering the payment of alimony and child support when jurisdiction was obtained by constructive service and neither jurisdiction in personam nor in rem was obtained.[33]

A court has no power to award alimony subsequent to the entry of a divorce judgment which failed to provide alimony unless the judgment provides that the court has reserved jurisdiction to award alimony in the future.[34]

A Pennsylvania alimony decree predicated upon constructive service entered against a nonresident husband is not binding in Florida and is subject to collateral attack when the wife seeks to enforce the decree in Florida. Further, since she did not seek to make the foreign decree a Florida judgment, she is not entitled to an award of attorney's fees.[35] Under *Sackler v. Sackler*[36] a Florida court may award attorney's fees when the former wife is seeking to *establish* and enforce the foreign decree as a domestic decree.

Under section 61.14 of the Florida Statutes, the venue for proceedings seeking the modification of the support provisions of a separation agreement (or a divorce decree) may be laid in the circuit in which either of the parties reside, and this statute controls the general venue statute[37] which provides that the actions shall be brought only in the

30. Belvin v. Belvin, 202 So.2d 595 (Fla. 1st Dist. 1967).
31. Aufseher v. Aufseher, 217 So.2d 868 (Fla. 3d Dist. 1969).
32. Rund v. Rund, 215 So.2d 763 (Fla. 3d Dist. 1968).
33. Adams v. Adams, 218 So.2d 777 (Fla. 1st Dist. 1969).
34. DuVernoy v. DuVernoy, 202 So.2d 620 (Fla. 1st Dist. 1967).
35. Orlowitz v. Orlowitz, 208 So.2d 849 (Fla. 3d Dist. 1968).
36. 47 So.2d 292 (Fla. 1950).
37. FLA. STAT. § 47.011 (1967).

county where the defendant resides, where the cause of action accrued, or where the property in litigation is located. Hence, a husband who is seeking a modification of the support provisions of a foreign divorce decree may institute the action in the county in which he resides rather than in the county in which his former wife resides.[38]

### B. *Criteria for the Award*

It is an abuse of discretion for a chancellor to award alimony of $200 per month and child support of $100 per month for one child and to order the wife to pay mortgage payments of $281.30 per month out of the alimony payments when the uncontradicted testimony showed that the husband for years prior to the divorce had given the wife $700 per month with which to make the mortgage payments and run the home and he admitted at the trial that approximately $500 per month would be necessary to maintain the home. The district court increased the alimony award to $300 per month, affirmed the child support award, and ordered the husband to pay the second mortgage payments of $110.20 per month.[39] It is submitted that neither the trial court nor the appellate court paid much attention to the uncontradicted testimony.

When the combined income of a husband and wife is small, the chancellor has discretion to refuse to award alimony to the wife. In addition, the chancellor's award of child support will not be reversed when the award is within the proper exercise of his discretion, particularly if he reserves jurisdiction to modify the award in the future because of a possible change in circumstances.[40]

In making an alimony award it is error for the trial court to refuse to consider amounts which a husband is to receive from the distribution of his deceased mother's estate. The trial court judge should consider these amounts but should also consider the federal and state tax liability to be paid from the husband's share, the probability of claims being filed against the estate, the probability of a probate contest, and other factors which may reduce the net amount of the husband's inheritance.[41]

Even though the court finds that the needs of the wife include a need to have an automobile supplied for her use by the husband, it is error to order him to furnish a new car every three years. If the wife is now supplied "with an adequate automobile"[42] the court should reserve jurisdiction to determine a later need for a replacement car and

38. Stewart v. Carr, 218 So.2d 525 (Fla. 2d Dist. 1969).

39. Farbman v. Farbman, 208 So.2d 648 (Fla. 3d Dist. 1968). *See* Preston v. Preston, 216 So.2d 31 (Fla. 3d Dist. 1968), in which the Third District Court of Appeal increased an alimony and child support award because of the high living standard of the family which had been established by the husband-father. For a painstaking analysis of a couple's income and expenses in determining alimony and child support, *see* Crocker v. Crocker, 222 So.2d 258 (Fla. 3d Dist. 1969).

40. Baker v. Baker, 206 So.2d 683 (Fla. 1st Dist. 1968).

41. Schreiber v. Schreiber, 224 So.2d 407 (Fla. 3d Dist. 1969).

42. Lyons v. Lyons, 208 So.2d 137, 139 (Fla. 3d Dist. 1968).

the kind and condition of a replacement car which may be required at that later time. Under the doctrine of "necessities," a husband is not liable for the debts of the wife incurred prior to separation nor is he liable for the wife's income tax payments made after the separation of the parties but prior to divorce.[43]

When an award of alimony has been reversed because it is so inadequate as to shock the conscience of the court and the case has been remanded for an increased award, the increased award must be made retroactive from the date of the original award.[44]

### C. *Lump Sum vis-à-vis Periodic Alimony*

The Florida statute authorizing lump-sum alimony was enacted in 1947. As a result, the third district court has held that the following language in a 1938 divorce decree that the home of the parties:

> be and the same is hereby awarded unto the plaintiff . . . for her life time and upon her death the same shall go to the surviving children of the parties hereto.
> That the defendant (the husband) shall pay all taxes, insurance assessments . . . in and upon said home during the lifetime of of said . . . (the wife), as long as she shall remain single . . . .[45]

did not make the estate of the deceased former husband liable for these payments because they could not be considered as lump-sum alimony but as continuing alimony payments which terminate upon the death of the former husband unless the husband has agreed to bind his estate subsequent to his death.

Both lump-sum alimony and periodic alimony may be awarded to a wife,[46] but if a chancellor merely awards lump-sum alimony the former wife will be unable subsequently to seek modification in the event of a change of circumstances and be awarded periodic alimony *unless* the court reserves jurisdiction to modify the ward in the future.[47]

In the event that lump-sum alimony is awarded to the wife and she appeals and is awarded temporary alimony pending the appeal, the amounts of temporary alimony which are paid should be deducted from the lump-sum alimony award and the wife will be entitled to interest from the day of judgment on the net amount of the lump-sum award.[48]

### D. *Insurance Premiums*

It is error to order the husband to pay substantial annual premiums on a life insurance policy which is owned by the wife and which

43. Vaccaro v. Vaccaro, 224 So.2d 742 (Fla. 3d Dist. 1969).
44. Massey v. Massey, 213 So.2d 260 (Fla. 3d Dist. 1968).
45. Payne v. Payne, 201 So.2d 590, 591 (Fla. 3d Dist. 1967).
46. Blume v. Blume, 203 So.2d 627 (Fla. 4th Dist. 1967).
47. Gordon v. Gordon, 204 So.2d 734 (3d Dist. 1968), *citing* FLA. STAT. §§ 65.08, .16 (1967).
48. Frischkorn v. Frischkorn, 223 So.2d 380 (Fla. 3d Dist. 1969).

names her as beneficiary when the decree refers to these premium payments as being "in addition" to lump-sum alimony. It would appear that if the court had labeled these premium payments as constituting alimony, the decree would be proper.[49]

It is proper for a chancellor to order a husband to furnish a major medical insurance policy for the benefit of the divorced wife. "It would have been appropriate to require the husband to pay major medical expenses, and the furnishing of an insurance policy to cover these could be a less expensive alternative."[50]

### E. *Modification and Termination of the Award*

A trial court has the discretion to reduce the amount of payments of temporary alimony in the future even though the defendant may be in arrears at the time of the reduction.[51]

The fact that the former wife has become substantially self-supporting and that the husband has suffered a diminution in his earnings since the entry of the divorce decree will justify the chancellor in ordering a reduction of alimony payments.[52]

A wife's rights to alimony terminate upon her marriage to another even though the latter marriage is annulled on the grounds of fraud, when the second marriage is voidable rather than void. If the second marriage is bigamous, however, it is void and will not cut off her right to alimony from the first husband.[53]

A foreign state's alimony decree which is subject to retroactive modification or cancellation of arrearages under the law of the rendering state is not entitled to full faith and credit in Florida. It is presumed, however, that the law of the state which entered the decree does not permit the retroactive modification or cancellation, and the burden of proof to the contrary rests upon the person contesting the foreign award as the basis for a Florida judgment.[54]

The fact that a formerly unemployed former wife has now become employed is not enough to justify a reduction or elimination of alimony payments when the possibility of the wife's subsequent employment was reasonably anticipated at the time of the original divorce decree which set the amount of alimony.[55]

A change in custody of a minor child from his mother to his father and the consequent decrease in the husband's payments to the former wife because of the elimination of child support will justify the chancellor in ordering an increase in alimony payments in an amount which

49. Bildner v. Bildner, 219 So.2d 749 (Fla. 3d Dist. 1969).
50. Lyons v. Lyons, 208 So.2d 137, 139 (Fla. 3d Dist. 1968).
51. Burton v. Burton, 216 So.2d 480 (Fla. 4th Dist. 1968).
52. Ludacer v. Ludacer, 211 So.2d 64 (Fla. 2d Dist. 1968).
53. *Compare* Evans v. Evans, 212 So.2d 107 (Fla. 4th Dist. 1968), *with* Reese v. Reese, 192 So.2d 1 (Fla. 1966).
54. Harrington v. Harrington, 213 So.2d 744 (Fla. 1st Dist. 1968).
55. Waller v. Waller, 212 So.2d 352 (Fla. 3d Dist. 1968).

is less than the former combined total of alimony and child support. This is especially true when the husband's income has increased and there is some controverted evidence reflecting upon the former wife's physical condition and ability to work.[56]

The Fourth District Court of Appeal has held that the transfer by prior Florida Supreme Court decision,[57] has held that the mere fact that a former wife uses her alimony payments for alcohol and drugs which has resulted in her being arrested at least fifty times is not sufficient to justify a court in reducing the amount of alimony.[58]

It would appear that a trial court has the power to order a former husband to deliver to his former wife copies of income tax returns filed each year by him and his new wife (or in the alternative to deliver an affidavit as to his gross income) over the objection that this constitutes an invasion of privacy of the new wife.[59]

### F. *Enforcement of the Award*

A Florida statute permits the garnishment of the salary of the head of a family residing in Florida "to enforce the orders by the courts of this state for alimony, suit money or support or other orders in actions for divorce or alimony."[60] The Third District Court of Appeals has held that a " 'final decree' which, inter alia, reduced to judgment certain past-due sums which the former husband . . . owed his former wife . . ."[61] did not come within the meaning of the above statute. It is suggested that if the words "past-due sums" were meant to include alimony or support payments to the ex-wife (the case does not clearly state the source), then the court was indulging in semantic hocus-pocus in distinguishing an "order" from a "judgment." If the past-due sums were in the nature of a property settlement, then the decision may have some basis.

Due process requires that reasonable notice should be given to a husband when contempt charges have been brought against him for the failure to pay alimony and child support. As a result, it is erroneous for a chancellor to hold a former husband in contempt in response to an oral request by his former wife, made at a hearing on his petition to reduce the amount of payments.[62]

In accordance with the Florida statutes,[63] a municipality is subject to garnishment against money owing to an employee in order to enforce an alimony award entered against the employee.[64]

56. Coggan v. Coggan, 214 So.2d 368 (Fla. 2d Dist. 1968).
57. Phillippi v. Phillippi, 148 Fla. 393, 4 So.2d 465 (1941).
58. Horner v. Horner, 222 So.2d 791 (Fla. 4th Dist. 1969).
59. Ramona v. Ramona, 223 So.2d 569 (Fla. 3d Dist. 1969).
60. FLA. STAT. § 61.12 (1967).
61. Noyes v. Cooper, 216 So.2d 799, 800 (Fla. 3d Dist. 1968).
62. Delves v. Delves, 213 So.2d 895 (Fla. 3d Dist. 1968).
63. FLA. STAT. § 61.12 (1967).
64. City of Jacksonville v. Jones, 213 So.2d 259 (Fla. 1st Dist. 1968).

A chancellor is justified in refusing to hold a husband in contempt for his failure to maintain a medical insurance policy for his wife (in accordance with the terms of a court-approved property-settlement agreement) when the policy was cancelled by the insurance company because of the wife's single status and the wife is now uninsurable because of a severe back complaint. Inasmuch as the husband in unable to comply with the decree, he cannot be in contempt. Of course, the former wife may now institute proceedings asking for an increase in support payments because of her physical condition.[65]

The inaction of a former wife in waiting nine years to press a claim for accrued alimony does not create an estoppel against her, and her delay, without a change in position of her former husband to his detriment in reliance on her inaction, does not amount to laches.[66]

A trial court judge may within the proper exercise of his discretion temporarily refuse to enter a judgment and order execution on arrearages of alimony, even though he enters an order decreeing that the husband is in arrears.[67]

### G. *Appeals of Judgments*

A single assignment of error that the court erred in entering a final judgment of divorce will be sufficient to support two separate points on appeal dealing with the award of alimony. The court drew a distinction between equity and common law actions: in equitable actions usually the only judicial act which the appellant can assign is the final decree, while in common law actions many judicial acts occur which may give rise to separate assignments of error.[68]

Rule 3.8(b) of the Florida Appellate Rules (which authorizes an appellant wife to apply to the trial court for an award of alimony or support money pending the appeal) is permissive and not mandatory; a failure by the wife to comply with this rule will not result in the dismissal of her appeal if she has accepted payment of alimony or support money from her husband pursuant to the trial court's decree from which the appeal is taken. However, under the principle of estoppel, if the wife has accepted payment and the husband is able to show that this acceptance has caused injury or prejudice to him, the appeal may be defeated. Of course, if the husband is unable to show this harm and the facts indicate that a dismissal of the appeal would cause harm and prejudice to the wife, there is an additional reason for denying the defense of estoppel by the husband.[69]

65. Wiener v. Wiener, 210 So.2d 721 (4th Dist. 1968). *See* Fisher v. Fisher, note 117, *infra*, and accompanying text.

66. *Compare* Gottesman v. Gottesman, 202 So.2d 75 (Fla. 3d Dist. 1967), *with* Brown v. Brown, 108 So.2d 492 (Fla. 2d Dist. 1959).

67. Gottesman v. Gottesman, 220 So.2d 640 (Fla. 3d Dist. 1969).

68. Cohen v. Cohen, 217 So.2d 908 (Fla. 3d Dist. 1969).

69. Schreiber v. Schreiber, 217 So.2d 301 (Fla. 1968), *rev'g* Schreiber v. Schreiber, 208 So.2d 681 (Fla. 3d Dist. 1968).

## V. Property Rights

### A. *Jurisdiction*

The chancellor does not have jurisdiction to order a wife to join in the execution of a mortgage on foreign real property even though the purpose of the mortgage is to enable the husband to secure funds to pay alimony to the wife.[70]

A court does not have jurisdiction over the real property of a non-resident husband when the notice of publication for constructive service fails to describe the property.[71]

### B. *Insurance*

A property settlement which is entered into during the course of divorce proceedings and which provides that the wife gives up all rights or claims "then or theretofore existing" against the husband will not bar the wife from taking as beneficiary under an insurance policy which was applied for by the husband during the marriage but which was issued by the insurance company after the divorce.[72]

The "paramour presumption" received an interesting application in *Hill v. Hill*.[73] A husband left his wife and cohabitated with another woman as husband and wife. The husband then designated the second woman as his wife in a group life insurance policy of his employer. The husband died and both "wives" claimed the proceeds of the policy. The first wife asserted that there is a presumption of undue influence which must be overcome before a paramour may recover the proceeds of the insurance. The court stated that although there may be a presumption of undue influence by a paramour when there is a change of beneficiary and the paramour has the burden of proving an absence of undue influence, the instant case involved the initial designation of a beneficiary as "a routine request at the place of employment."[74] As a result, the court stated that the *bare* presumption of undue influence by the paramour is not sufficient "to overcome the routine act, common in everyday experience, of designating a beneficiary of life insurance provided through the insured's employer on a group basis. Our holding is no broader than that."[75]

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70. Burton v. Burton, 216 So.2d 480 (Fla. 4th Dist. 1968).

71. Nethery v. Nethery, 212 So.2d 10 (Fla. 1st Dist. 1968).

72. *Compare* Raggio v. Richardson, 218 So.2d 501 (Fla. 3d Dist. 1969), *with* Beatty v. Strickland, 136 Fla. 330, 186 So. 542 (1939), *and* Benner v. Pedersen, 143 So.2d 722 (Fla. 2d Dist. 1962).

73. 222 So.2d 454, 455 (Fla. 2d Dist. 1969). *Compare with* Beatty v. Strickland, 136 Fla. 330, 186 So. 542 (1939), *and* Benner v. Pedersen, 143 So.2d 722 (Fla. 2d Dist. 1962).

74. 222 So.2d at 455.

75. *Id.*

### C. *Estates by the Entirety*

A conveyance of real property to a husband and wife presumably creates a tenancy by the entirety, and this presumption may not be rebutted by the testimony of one of the spouses after the death of the other.[76]

When a car title is registered in the name of "J.L. Fischer *or* Susann G. Fischer" (husband and wife, but this is not indicated) and the husband trades in the car to a car dealer without the joinder of the wife, the court may use extrinsic evidence (*e.g.*, joint funds used to purchase the car, joint lien on the vehicle, joint use, etc.) to determine that the car was actually held as an estate by the entirety. The wife, therefore, had the right to replevin the car from the car dealer when the trade-in purchase-sale was not consummated. The opinion seems to indicate that the dealer is put on notice in a case of this type that the parties may be married and that he ought to make inquiry about the marital status before he accepts the car. The court noted that some jurisdictions have held that the use of the disjunctive "or" prevents the formation of an estate by the entirety; it is a pity that the Florida court did not follow this other view.[77]

The Fourth District Court of Appeal has held that the transfer by a husband to his wife of his interest in a tenancy by the entirety in Maryland property pursuant to the parties' agreement as "security" for their reconciliation will be upheld in favor of the wife when divorce proceedings are subsequently brought. The original resumption of marital relations is sufficient consideration for the transfer of the property interest.[78]

Tenants by the entirety become tenants in common upon divorce, and as tenants in common each tenant has the duty to pay one-half of the mortgage encumbering the property. Hence, it is error for the chancellor to order the divorced wife to pay the entire monthly mortgage payments and then to give her credit for only one-half of the reduction of the principal of the mortgage as a result of these payments.[79] On the other hand, it is not erroneous for the judgment to require the former wife to pay taxes, insurance, upkeep, and utility charges and to make the mortgage payments, when the same judgment divides certain funds of the parties and places one-half into a trust account for the payment of the above items.[80]

There is no presumption that a wife intended to make a gift to her husband, and the burden is on him to prove that a gift was made

76. Losey v. Losey, 221 So.2d 417 (Fla. 1969).
77. Roger Dean Chevrolet, Inc. v. Fischer, 217 So.2d 355 (Fla. 4th Dist. 1969).
78. Fuller v. Fuller, 215 So.2d 507 (Fla. 4th Dist. 1968).
79. Lyons v. Lyons, 208 So.2d 137 (Fla. 3d Dist. 1968). *Accord,* Tillman v. Tillman, 222 So.2d 218 (Fla. 1st Dist. 1969).
80. Harris v. Harris, 224 So.2d 368 (Fla. 3d Dist. 1969).

when she used her funds to purchase property taken as an estate by the entirety.[81]

A wife who advances her personal funds to pay the entire purchase price of real property taken as an estate by the entirety with her husband has a special equity in the property "or the transaction may be construed a loan between the parties"[82] in the event of a subsequent divorce. Based upon the quoted words, the Second District Court of Appeals ordered the trial court to find a "special equity or loan in favor of the wife to the extent of $6,888.00 [the amount she advanced], plus interest, from the date of advancement."[83] It should be noted that the property in question was sold and the husband received $22,500. It would appear that the award to the wife of $6,888 plus interest at the rate of six percent per annum from the date of the purchase (August, 1959) gives the wife much less than if the court had awarded her $22,500—the amount the husband received from the sale.

It is well established law in Florida that when a husband purchases property and the deed is taken in both his and his wife's name, there is a presumption that the husband intended to make a gift to his wife. The Second District Court of Appeal has held that this presumption is not the usual presumption which may be rebutted by a preponderance of evidence to the contrary; the husband is required to prove "his lack of donative intent beyond a reasonable doubt, not merely by a preponderance of the evidence."[84]

Some of the dangers inherent in the election of remedies concept were illustrated in the unusual case of *Black v. Miller*.[85] Mrs. Black secured a divorce from her husband and the final decree awarded child support, alimony, and exclusive possession of the family home held as an estate by the entirety. Subsequently, the trial court granted Mrs. Black a lien on the husband's one-half of the property as security for past due amounts and all amounts to come due. The court also entered a judgment for the arrearages. An execution sale was conducted on the judgment and Miller purchased at the sale. A few months later, the court gave Mrs. Black two more judgments for the arrearages. Miller then brought suits for partition and the court held that Miller (who was an attorney who had examined the divorce file) took subject to Mrs. Black's right to continued possession of the home pursuant to the original divorce decree, and he had no right to partition. His purchase at the execution sale, however, gave him all of the title of Mr. Black, and therefore the judgments given Mrs. Black after the sale could not attach to Miller's prior-acquired interest under the theory that Mrs. Black by electing to execute on the judgment had given up her lien on her hus-

81. Mays v. Mays, 203 So.2d 674 (Fla. 3d Dist. 1967).
82. Sharpe v. Sharpe, 202 So.2d 822, 823 (Fla. 2d Dist. 1967).
83. *Id.*
84. Schoenrock v. Schoenrock, 202 So.2d 571 (Fla. 2d Dist. 1967).
85. 219 So.2d 106 (Fla. 3d Dist. 1969).

band's one-half interest. If Mrs. Black had elected to wait each time the husband was in arrears in his payments and had foreclosed on her security lien for these arrears in equity rather than in law, she would have preserved the lien and gradually wiped out her husband's title and taken complete ownership in her own name.

Although neither spouse may individually contract so as to affect the title of homestead property held as an estate by the entirety, a husband who individually contracts in writing with a realtor for the sale of homestead-entirety property is liable to the realtor for the agreed commission in the event of a sale of the property.[86]

### D. *Partition*

The Second District Court of Appeal has held that a pre-trial conference is a "hearing" and, as a result, a party may orally move the court to enter an order providing that the former husband in a partition suit grant access to an appraiser to appraise property held as an estate in common by the parties. Of course, the oral motion and the ruling of the court must be reduced to writing.[87]

In *Bailey v. Stewart*[88] a court-approved settlement provided that a husband's father should have a lien upon one-fourth of the proceeds of the marital home in the event of sale; the agreement did not spell out that the wife was to sell or attempt to sell the home. As a result, it was held that the court could not imply from the agreement that the property was to be sold, and there was no duty to sell.

It is not proper for the chancellor to award title to the wife of property formerly owned as an estate by the entirety in the absence of any pleadings asking for this kind of an award;[89] and in the absence of appropriate pleadings or the agreement of the parties, it is error for the chancellor to decree a partition of an estate by the entirety during the divorce proceedings.[90]

In the absence of pleadings before the trial court which ask for a partition of real property or the partition of the proceeds from real property, it is error for the chancellor to award the wife one-half of the rental proceeds of property which is held as a tenancy in common by the spouses.[91] Upon proper application by the ex-wife, however, a court does have jurisdiction to modify its decree (which granted the ex-wife possession of the marital home) to permit her to lease the property and to use the proceeds as support for herself and the children when the court also reduces the amount of monthly payments to be made by the husband. It should be noted that the court is not affecting the title to

86. Keyes Company v. Moscarella, 223 So.2d 83 (Fla. 3d Dist. 1969).
87. Coggan v. Coggan, 213 So.2d 902 (Fla. 2d Dist. 1968).
88. 213 So.2d 442 (Fla. 4th Dist. 1968).
89. Pearson v. Pearson, 213 So.2d 304 (Fla. 3d Dist. 1968).
90. Goodstein v. Goodstein, 212 So.2d 321 (Fla. 3d Dist. 1968).
91. Holton v. Holton, 216 So.2d 35 (Fla. 3d Dist. 1968).

the property but is merely acting incident to its power over questions dealing with child support and alimony.[92]

### E. *Resulting Trusts*

A resulting trust (which can be reached by a wife in a divorce action) is not created by the fact that a man has conveyed real property to his relatives years prior to his marriage and has then continued to manage and enjoy the profits from the property subsequent to his marriage in the absence of any proof of fraud.[93]

### F. *Bequests and Divorce*

A bequest to a spouse is invalidated by a Florida statute when the parties are divorced subsequent to the execution of the will,[94] and the bequest is not renewed by the subsequent remarriage of the spouses.[95]

## VI. Attorney's Fees

### A. *Jurisdiction*

It is permissible for a trial court judge to enter a decree of divorce and to provide in the decree that he retains jurisdiction to award attorney's fees at a later time.[96]

### B. *Rights to an Award*

In a four-to-three opinion the Florida Supreme Court, in reversing the Third District Court of Appeal, has held that there is no statutory basis in Florida for a court to award attorney's fees to a wife who has successfully invalidated her husband's Mexican divorce decree in a Florida declaratory decree action.[97]

It is permissible for a court to award attorney's fees to a former wife when the ex-husband moves to modify custody provisions of a former decree, she responds by moving for additional modifications of the custody provisions and to allow her to rent the marital home and use the proceeds for child support, and the court merges both motions into one proceeding upon the basis that she was defending the original final decree. In light of this decision, it would seem wise for attorneys for ex-husbands to insist that each motion be treated separately and to resist any attempt to "merge" the motions.[98]

92. Thompson v. Thompson, 223 So.2d 95 (Fla. 3d Dist. 1969).
93. Mordue v. Case, 201 So.2d 844 (Fla. 4th Dist. 1967).
94. Fla. Stat. § 731.101 (1967).
95. *In re* Estate of Guess, 213 So.2d 638 (Fla. 3d Dist. 1968).
96. Hunter v. Hunter, 221 So.2d 189 (Fla. 3d Dist. 1969).
97. Kittel v. Kittel, 210 So.2d 1 (Fla. 1968), *rev'g* Kittel v. Kittel, 194 So.2d 640 (Fla. 3d Dist. 1967), *construing* Fla. Stat. § 65.16(1) (1965).
98. Thompson v. Thompson, 223 So.2d 95 (Fla. 2d Dist. 1969), applying Fla. Stat. § 61.15 (1967).

Under section 61.15 of the Florida Statutes (which deals with attorney's fees for a former wife who is seeking enforcement of an alimony or child-support order or who is resisting modification of such order), the ex-wife should not be denied an allowance for attorney's fees "except for sufficient circumstances or equitable considerations which are found and recited or otherwise made to appear in the order of the court."[99]

### C. *Criteria for the Award*

In spite of the chancellor's experience and familiarity with the case, he must base an award of attorney's fees on expert testimony rather than on this experience and familiarity.[100]

The Third District Court of Appeal has refused to disturb an award of $15,000 as attorney's fees for a wife who admitted marital indiscretions early in the trial of the case and who occasioned a large part of the lengthy trial by allegedly false defenses.[101]

### D. *Attorney's Fees Are Not Costs*

The Third District Court of Appeal has held that attorney's fees awarded to a defendant wife in a divorce action are not part of the "costs" which the husband-plaintiff must pay or assign as error and supersede within the intent of Rule 3.2(f) of the Florida Appellate Rules; therefore, the amount of any attorney's fees should not be considered by the trial court when setting the amount of the supersedeas bond.[102]

### E. *Interest on the Award*

Interest accrues on a conditional remittitur of attorneys' fees from the date of the original award; however, when the appellate court fixes a new award in lieu of the original trial court award (rather than ordering a remittitur of the award), then interest accrues from the date of the appellate award.[103]

## VII. Antenuptial and Post-Nuptial Property Settlement Agreements

### A. *Antenuptial Agreements*

The efficacy, if not the validity, of alimony provisions of antenuptial agreements has been placed in grave doubt by the third district.[104] Judge

99. Gottesman v. Gottesman, 220 So.2d 640, 643 (Fla. 3d Dist. 1969).
100. Ortiz v. Ortiz, 211 So.2d 243 (Fla. 3d Dist. 1968).
101. Silberman v. Katcher, 214 So.2d 726 (Fla. 3d Dist. 1968).
102. Ortiz v. Ortiz, 208 So.2d 857 (Fla. 3d Dist. 1968).
103. Novack v. Novack, 210 So.2d 215 (Fla. 1968), *rev'g* Novak v. Novak, 203 So.2d 187 (Fla. 3d Dist. 1967).
104. Posner v. Posner, 206 So.2d 416 (Fla. 3d Dist. 1968).

Hendry for the majority stated that the alimony provisions of an antenuptial agreement are not binding upon the chancellor who should exercise his sound judicial discretion in fixing the amount of alimony.[105] Judge Carroll, concurring specially, was of the view that antenuptial agreements which purport to set the amount of alimony in the event of a divorce are contrary to public policy and are therefore void.[106] Judge Swann, dissenting, was of the view that the alimony provisions of an antenuptial agreement should be binding upon the court when it has been entered into freely and voluntarily, without duress, trickery, over-reaching, concealment, or coercion.[107] The author is of the view that Judge Swann's opinion clearly demonstrates the fallacy of the other opinions expressed by the court.

An unusual factual and legal problem was presented in *O'Shea v. O'Shea*.[108] A sixty-six year old wife divorced her thirty-six year old husband, and subsequently she wished to remarry him. The ex-husband agreed to remarriage upon the condition that she would make him joint owner of certain property in return for which he would leave his northern employment and seek work in Florida. This agreement was entirely oral, but both parties performed. Subsequently, the wife again sued for divorce, and the trial court ordered the husband to give back his one-half interest in the jointly held property. The Fourth District Court of Appeal reversed, holding that an oral antenuptial agreement which has been performed by both parties is enforceable; or, aside from the contractual aspect of the agreement, the husband is entitled to keep one-half of the property upon the basis that the wife had made a gift of the property to him.

When an antenuptial agreement provided that the wife was to receive $150,000 from the estate of her husband if she survived him and then the will of the husband bequeathed $250,000 to her and provided that if she contested the will or the antenuptial agreement she was to receive only the $150,000 rather than the bequest, it is proper to construe the antenuptial agreement as a promise to make a will. The will therefore superseded the antenuptial contract, with the result that the widow could not take under the contract as well as under the will—she was limited to the bequest.[109]

### B. *Post-Nuptial Agreements*

#### 1. JURISDICTION

The Florida courts have jurisdiction to review and adjudicate the reasonableness of a separation agreement entered into in a foreign state

105. *Id.* at 416-18.
106. *Id.* at 418-19 (concurring opinion).
107. *Id.* at 419-22 (dissenting opinion).
108. 221 So.2d 223 (Fla. 4th Dist. 1969).
109. Sharps v. Sharps, 219 So.2d 735 (Fla. 3d Dist. 1969).

when the agreement has never been reviewed by any court and to modify it upon a sufficient showing of a change of circumstances of the parties occurring since the agreement was entered into.[110]

In a case of first impression in Florida, the Fourth District Court of Appeal has held that the county judge's court has jurisdiction to determine whether a post-nuptial agreement precludes a surviving husband from contesting the probate of his deceased wife's will. The court was careful to note that if the matter involved the boundaries or title to real estate, homesteads, or disputes cognizable in equity (*e.g.*, cancellation, reformation) then the circuit court would have jurisdiction.[111]

### 2. CONSTRUCTION OF AGREEMENTS

A property-settlement agreement (approved by a divorce decree) which provided that the parties had agreed upon a settlement "of all of their respective financial and property rights . . ."[112] and that "any and all property . . . has been segregated and divided between the parties hereto, and each of the parties hereto represents and admits that each of them has in his or her possession his or her rightful property"[113] has been construed as covering United States Savings Bonds, even though the agreement did not mention these bonds. As a result, bonds which were in the possession of the husband at the time of his death, some of which were registered in the name of the husband or the wife and others which were payable on death to the wife, were held to be the sole property of the husband.

In *Northup v. Northup*[114] the court construed the following language as being ambiguous: "The husband hereby agrees that he shall be responsible for and pay all and any medical or dental bills in excess of $25 incurred for services rendered to their minor sons." The court then held that in the event any single medical or dental bill for any one month exceeded $25, the husband would be liable for the entire amount and not just for the excess over and above the $25. When a court seems fired with a zeal to find an ambiguity, it will find one.

A property-settlement agreement which recites that its purpose is to provide for a division of the joint properties of the spouses as well as for the support and maintenance of the wife, but which contains no provision that the property given to the wife is to be in lieu of or as

110. Cordrey v. Cordrey, 206 So.2d 234 (Fla. 2d Dist. 1968).

111. *In re* Estate of White, 212 So.2d 324 (Fla. 4th Dist. 1968).

112. Meer v. Garvey, 212 So.2d 97, 98 (Fla. 3d Dist. 1968).

113. *Id.* at 98.

114. 217 So.2d 850, 851 (Fla. 3d Dist. 1969). *See* Walter v. Walter, 208 So.2d 498 (Fla. 4th Dist. 1968), for a questionable construction of a separation agreement which provided that alimony payments were to be based upon "the last filed United States income tax" return. Does this mean that the husband must pay alimony during the year in which it was payable or during the following year based upon the "last filed" return? The court held the former, with Justice Reed dissenting.

consideration for a waiver of the right to alimony, does not bar the wife from seeking alimony in a separate-maintenance proceeding.[115]

A former wife has no claim for alimony payments accruing after the death of her former husband unless there is an agreement clearly evidencing the intention of the husband to bind his estate to continue to make payments subsequent to his death. An agreement between the spouses providing that "alimony will cease upon the death or remarriage of"[116] the wife does not clearly evidence the husband's intention to bind his estate.

### 3. MODIFICATION

When a husband has agreed (in a property-settlement agreement) to make his wife an irrevocable beneficiary of his group health insurance policy or to purchase substitute insurance if the original health policy could not be maintained because of the divorce of the parties, and the husband is unable to purchase substitute insurance because of the physical condition of the wife, the wife may petition under section 65.15 of the Florida Statutes that her former husband now be held responsible for her medical expenses.[117]

Periodic payments which a husband agrees to make to his wife pursuant to a property-settlement agreement in consideration for her relinquishing her interests in property are not "alimony" payments but in reality monetary incidents to a property-settlement agreement. Hence, these "periodic payments are not subject to modification nor may enforcement of these payments be made by means of the contempt power of the court, even though the parties have described these payments as 'alimony.'" In each case, the courts must determine whether the payments are in fact alimony or merely payments made in furtherance of the parties' agreement in splitting up the property rights between them.[118]

When a wife has accepted the benefits of a property-settlement agreement for a period in excess of two years, it is proper to hold that she is estopped to seek an increase in alimony payments.[119]

A wife who relinquishes all claims for alimony in a property-settlement agreement (which has been approved by the court) may not subsequently ask the trial court to modify the agreement and grant her alimony under section 61.14 of the Florida Statutes.[120]

It would appear that after an ex-wife has accepted the benefits of a property-settlement agreement she may not set it aside unless she offers to return the parties to the status quo.[121]

115. Campbell v. Campbell, 220 So.2d 920 (Fla. 4th Dist. 1969).
116. Farrar v. Keyser, 212 So.2d 677, 678 (Fla. 1st Dist. 1968).
117. Fisher v. Fisher, 202 So.2d 868 (Fla. 4th Dist. 1967).
118. Howell v. Howell, 207 So.2d 507 (Fla. 2d Dist. 1968).
119. Gillotte v. Gillotte, 212 So.2d 657 (Fla. 3d Dist. 1968).
120. McKenna v. McKenna, 220 So.2d 433 (Fla. 3d Dist. 1969).
121. Markham v. Markham, 222 So.2d 759 (Fla. 3d Dist. 1969).

## VIII. SEPARATE MAINTENANCE

The case of *Hubble v. Hubble*[122] presents a troublesome procedural point. The wife brought suit for divorce, and she asked for custody and support of the couple's four children. The chancellor dismissed the suit with prejudice; however, on petition for rehearing, the chancellor modified the decree to the extent that it would not operate to preclude the allowance of further proceedings for the support of the wife and children should the defendant father fail to continue support of the children "as he is now doing . . . ."[123] The father was contributing $50 per week for the support of the wife and children out of his weekly earnings of $250. The First District Court of Appeal held that this award "is inequitable, unrealistic and constitutes an abuse of discretion."[124] The court then remanded the case to the trial court "to fix a more adequate amount for the support of the plaintiff and children, as he may determine, taking additional testimony, if he sees fit."[125] Query: is it proper for the appellate court to direct the trial court to fix the amount of child support in the absence of a complaint filed pursuant to section 61.09 of the Florida Statutes asking for alimony unconnected with divorce? Admittedly, a prayer for general relief in a divorce complaint gives the chancellor considerable latitude, but does it allow him to reshape the case without any attention to the rules of procedure?

A wife does not have a right to an adjudication of alimony and child support under section 61.09 of the Florida Statutes (alimony unconnected with divorce) when she has grounds for divorce and the husband is in fact supporting her and their children within his ability to do so.[126]

In a suit for alimony unconnected with divorce on the grounds of cruelty, the wife must allege and prove her grounds to the same extent as if she were suing for divorce, and a divorce may not be granted upon uncorroborated testimony of the plaintiff. Further, when the only corroborated act of cruelty occurred three years prior to the separation this is insufficient corroboration of the wife's cause of action.[127]

An alleged wife is not entitled to separate maintenance when it is shown that her husband secured a valid foreign divorce from her; however, she may be entitled to alimony under the provisions of section 61.08 of the Florida Statutes.[128]

An unusual application of the contempt power was displayed in *Friedman v. Friedman*.[129] A final judgment of separate maintenance re-

122. 214 So.2d 896, 897 (Fla. 1st Dist. 1968).
123. *Id.* at 897.
124. *Id.*
125. *Id.*
126. Feldhusen v. Feldhusen, 214 So.2d 772 (Fla. 2d Dist. 1968).
127. Barco v. Barco, 221 So.2d 22 (Fla. 4th Dist. 1969).
128. Brandt v. Brandt, 217 So.2d 573 (Fla. 1st Dist. 1968).
129. 224 So.2d 424 (Fla. 3d Dist. 1969).

strained each of the parties "from interfering, molesting or threatening the other."[130] Subsequently, the wife moved the court to hold the husband in contempt upon the grounds that he had instituted Mexican divorce proceedings against her and that this constituted a violation of the above restriction. The trial court then enjoined the continuance of the Mexican proceedings, and no appeal was taken from this order. Still later, evidence was introduced showing that the Mexican decree had been granted and that the husband had remarried. The trial court then held the husband in contempt. The Third District Court of Appeal held that the Mexican proceedings did not constitute a violation of the restrictions contained in the original decree and it was erroneous to enjoin the husband (upon these facts) from continuing with the Mexican action. Even though the original injunction was erroneous, however, it was not void and must be obeyed; the court affirmed the contempt order.

## IX. CUSTODY AND SUPPORT OF CHILDREN

### A. *Custody*

#### 1. JURISDICTION

New York does not have jurisdiction to award custody of a child in a divorce action if the child was not within the state during the pendency of the action. As a result, the decree is not entitled to recognition in Florida in subsequent proceedings involving the custody of the child.[131]

When the children of the marriage are residing within the State of Florida, constructive service of process may be used to obtain jurisdiction over the husband; however, if the complaint fails to allege that the children are residing in Florida, then the court does not have jurisdiction over the children and constructive service against the husband would be ineffective to give the court jurisdiction. The key is jurisdiction over the resident children.[132]

A court has no jurisdiction to initially adjudicate the custody of a minor child who is not physically present in the state even though personal service is made upon the defendant and even though both spouses are residents of Florida.[133]

#### 2. VENUE

When children are temporarily in the custody of their father in one county, the father may institute proceedings in his own county over the protest of the mother that the proper venue of the action is where she resides. Venue is proper in the father's county on the basis that the chil-

130. *Id.* at 425.
131. Mirras v. Mirras, 202 So.2d 887 (Fla. 2d Dist. 1967).
132. Rich v. Rich, 214 So.2d 777 (Fla. 4th Dist. 1968).
133. Nieburger v. Nieburger, 214 So.2d 382 (Fla. 1st Dist. 1968).

dren are the subject matter of the case and they are physically present in the county where the father resides.[134]

### 3. DIVIDED CUSTODY

The Second District Court of Appeal has upheld a custody order providing that the father should have custody of his young twin daughters four days one week and three days the next week alternating with the mother.[135] Whatever happened to the rule forbidding divided custody of children?

### 4. MODIFICATION OF CUSTODY AWARDS

It is error for the trial court to modify the custody provisions of a divorce decree by taking custody from the mother and granting it to the father when both parties are fit to have custody and the only apparent reason for the change is a substantial increase in the father's income since the entry of the original custody decree.[136]

A custody decree of a foreign jurisdiction may be modified in Florida only upon a showing that there has been a material change in conditions since the rendition of the decree or that there were material facts which were not presented to the foreign court and that modification would be in the best interests of the children.[137]

The fact that a wife is in contempt of court because of her harassing her former husband in spite of an injunction by the court to refrain from this conduct is not sufficient, in itself, to justify the court in changing the custody of the children of the marriage in the absence of proof that this conduct was detrimental to the welfare of the children of the marriage.[138]

A former wife who shows that she has regained her physical and mental health since the divorce decree, that she is employed and has purchased a house, and that her former husband since the divorce decree has been working in a distant city and has been forced to leave the children with a baby-sitter during the workweek, has shown a substantial change of circumstances which would justify a decree removing custody of minor children from the former husband and awarding them to her.[139]

In the normal case, it is proper for a court to award custody of children to the father after the death of their mother to whom custody had previously been awarded. Custody may be granted, however, to the brother and sister-in-law of the deceased mother when it is in the best interests of the children to do so.[140]

134. Dones v. Green, 212 So.2d 919 (Fla. 3d Dist. 1968).
135. Lindgren v. Lindgren, 220 So.2d 440 (Fla. 2d Dist. 1969).
136. Hutchins v. Hutchins, 220 So.2d 438 (Fla. 2d Dist. 1969).
137. Brownlow v. Earthman, 220 So.2d 28 (Fla. 4th Dist. 1969).
138. Doran v. Doran, 212 So.2d 100 (Fla. 4th Dist. 1968).
139. Smith v. Smith, 212 So.2d 117 (Fla. 2d Dist. 1968).
140. DeGroot v. Fuller, 210 So.2d 244 (Fla. 2d Dist. 1968).

When custody of a minor boy has been given to his mother, a court will not ordinarily be justified in taking the custody of the child from his mother and giving it to the father unless the mother has become unfit to retain custody. However, when the minor son has expressed a decided preference in favor of his father who is a practicing psychiatrist, able to offer proper guidance to his son who is suffering an emotional disturbance, the court may modify the custody award and grant custody to the father in the best interests of the child.[141]

The court which has entered a divorce decree providing for custody and support of children has continuing jurisdiction over the child custody facet of the case in the event that the mother later institutes divorce proceedings alleging that she subsequently entered into a common law remarriage with her first husband, and the court determines that she is not married. As a result, the court may not modify the custody provisions of the original decree unless there is a showing of a substantial change of conditions occurring since the entry of the original decree.[142]

A court may modify a prior custody award because of a material change in circumstances occurring since the original decree or because the court has subsequently learned of material facts which were unknown to it at the time of the original decree and *"then only when it is shown to be essential to the welfare of the child."*[143]

Even though a mother has been deprived of the custody of her children in a post-divorce decree because of her unfitness, she may subsequently show that she is now fit and be awarded custody of her young children even though her former husband also is a fit parent.[144] It is to be wondered what effect four changes of custody will have on two girls ages five and six.

#### 5. RESIDENCE RESTRICTIONS

A chancellor may, in the proper exercise of his discretion, order that a minor child may not be removed from the state of Florida for a period in excess of six weeks.[145]

### B. *Support*

#### 1. JURISDICTION

The chancellor does not have jurisdiction to order a divorced husband to redeposit funds in a bank creating a trust for the education of minor

141. Nixon v. Nixon, 209 So.2d 878 (Fla. 3d Dist. 1968), *aff'd on rehearing*, 209 So.2d 878 (Fla. 3d Dist. 1968).

142. Frye v. Frye, 205 So.2d 310 (Fla. 4th Dist. 1967).

143. Klein v. Klein, 204 So.2d 239, 241 (Fla. 3d Dist. 1967) (emphasis of the court).

144. Hoffman v. Linley, 201 So.2d 638 (Fla. 3d Dist. 1967).

145. Adams v. Adams, 207 So.2d 7 (Fla. 1st Dist. 1968). For two cases dealing with the requirement that children be kept within a certain geographical area, see Albritton v. Carraway, 215 So.2d 69 (Fla. 1st Dist. 1968) and Martin v. Martin, 215 So.2d 80 (Fla. 1st Dist. 1968).

children six months after the entry of the divorce decree, even though the decree retained jurisdiction " 'of further orders pertaining to child custody and support.' "[146]

### 2. COLLATERAL ESTOPPEL

A former wife is not collaterally estopped to seek support for a child born subsequent to a divorce decree when the issue of paternity was placed in issue during the divorce action but the judge failed to decide the issue.[147]

### 3. CRITERIA FOR THE AWARD

A wife may waive any claim for alimony; however, if she also waives child support, her waiver may be disregarded by the court in the interests of the child, and a support award may be granted.[148]

It is error for a chancellor to award child support payments (and other payments for mortgage debts) in an amount which exceeds the father's monthly income by $216. It is also improper for the chancellor to consider the fact that the husband has a potential interest in his father's living trust when the amount of the trust is not shown in the record. The record does not show that there is any real likelihood that this interest will materialize into income to the former husband when he has not received any income for a six-year period since the establishment of the trust.[149]

When a father in his complaint for divorce prays that he be ordered to pay $750 per month alimony and child support and that he be ordered to pay for the medical care of the children, to purchase clothes for them, and to create an educational fund for them providing his financial position improves, and that he be required to pay the taxes on the homestead of the parties, it is error for the chancellor to order the father to do much *less* than he has requested.[150]

### 4. STEPFATHERS' NONLIABILITY FOR SUPPORT

A stepfather who has supported his stepchildren from the time of his marriage to the death of the mother has no obligation to support them after her death unless he has legally adopted them. As a result, when a stepfather has recovered for the wrongful death of his wife the stepchildren have no cause of action against him for a share of the recovery obtained from the tort-feasor.[151]

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146. Ellis v. Ellis, 207 So.2d 57, 58 (Fla. 1st Dist. 1968).
147. Wacaster v. Wacaster, 220 So.2d 914 (Fla. 4th Dist. 1969).
148. Kirkconnell v. Kirkconnell, 222 So.2d 441 (Fla. 2d Dist. 1969).
149. Traylor v. Traylor, 214 So.2d 15 (Fla. 1st Dist. 1968).
150. Massey v. Massey, 205 So.2d 1 (Fla. 3d Dist. 1967).
151. Fussell v. Douberly, 206 So.2d 231 (Fla. 2d Dist. 1968).

### 5. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT LAW

A chancellor should not deny relief to a wife who has brought proceedings under the Uniform Reciprocal Enforcement of Support Law to compel her former husband to support their minor children simply because the former wife has failed to abide by a prior court order which ordered her to return the children to Florida from a foreign state. The actions of the mother should not be extended to the children.[152]

### 6. MOTHER'S TRAVEL COSTS AS "SUIT MONEY"

In a case of apparent first impression in Florida, the Third District Court of Appeal has held that it is proper for a trial court to award a former wife travel money for coming to Miami from New Jersey in order to defend a suit for modification of custody of a child. The travel money was found to come within the meaning of "suit money" as provided for in section 61.15 of the Florida Statutes.[153]

### 7. CRIMINAL SANCTIONS FOR NONSUPPORT

A Florida statute makes it a criminal offense for "[a]ny man . . . in this state [to] desert his wife and children. . . ."[154] This statute is not violated when a nonresident of Florida withholds support of his wife and children who are residents of Florida—the statute requires the presence of the defendant and his family in this state.[155]

### 8. MODIFICATION OF SUPPORT AWARD

Under section 65.14 of the Florida Statutes and the inherent powers of a court of equity, the chancellor has the power to modify a child-support award because of a later change in circumstances even though the original award was based upon a court approved stipulation of the parties. The stipulation may bind the parties vis-à-vis each other, but it cannot tie the hands of the court with relationship to the children.[156]

The Third District Court of Appeal has held that it is proper for a chancellor to reduce the amount of child-support payments upon the remarriage of the wife and to order the father to pay part of the former child-support payments into a trust fund (with a bank as trustee) for his children.[157]

When the support provisions of a divorce decree have awarded $500 per month for the support of two minor children and one of the children has reached his majority, it is within the discretion of the

152. Hill v. Hill, 204 So.2d 346 (Fla. 4th Dist. 1967).
153. Foster v. Foster, 220 So.2d 447 (Fla. 3d Dist. 1969).
154. FLA. STAT. § 856.04 (1967).
155. State v. Darnell, 217 So.2d 127 (Fla. 3d Dist. 1968), *rev'd*, 230 So.2d 151 (Fla. 1970).
156. Sirkin v. Sirkin, 204 So.2d 13 (Fla. 3d Dist. 1967).
157. Rosenberg v. Rosenberg, 201 So.2d 615 (Fla. 3d Dist. 1967).

chancellor to reduce the support award to $300 per month for the remaining minor child upon the petition of the father. The mother may petition for an increase in this amount if she can show increasing needs arising subsequent to the date of the original final decree of divorce.[158]

In a petition for modification of a child-support award necessitated by the requirement that the child needs special schooling because of a physical defect, the court may only make the modification retroactive to the date of the filing of the petition. Hence, the court may not order the husband to pay for school tuition incurred prior to the date of the filing of the petition for modification.[159]

An increase in child-support payments should not be granted merely upon the mother's showing of a change in her financial assets occurring since the original support order; she must also show either a change in the ability of the father to pay or an increase in the needs of the children for support.[160]

## X. ADOPTION

When adoption proceedings are instituted in one county by the stepfather and natural mother and then separate proceedings for adoption are instituted in another county by the maternal grandparents, the court of the first county has jurisdiction, and the court of the second should dismiss the proceedings upon proper motion.[161]

Although evidence may be insufficient to show that a father has abandoned his child, it may be enough to show a high degree of indifference to the child's welfare so as to place him in a poor position to object to the child's adoption by her stepfather. The law will not hesitate to sever the relationship when the best interest of the child so requires.[162]

It would appear that a father can be deemed to have constructively abandoned his child because the father has been incarcerated in a mental institution, and a court can then enter an order of adoption of the child when it is in the best interest of the child to do so.[163]

When a minor child has been permanently committed to the care of the State Department of Welfare which has placed the child with foster parents under an agreement that the foster parents will not seek adoption of the child, the foster parents may seek the adoption despite the agreement, and the refusal of the Department to give its consent will not prevent the court from entering a decree of adoption.[164]

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158. Witlin v. Witlin, 206 So.2d 275 (Fla. 3d Dist. 1968).

159. Alterman v. Alterman, 208 So.2d 472 (Fla. 3d Dist. 1968). For a case requiring the husband to pay for special schooling for one child and psycho-therapy for another, *see* Gregory v. Gregory, 208 So.2d 483 (Fla. 3d Dist. 1968).

160. Andary v. Andary, 220 So.2d 687 (Fla. 4th Dist. 1969).

161. Hogan v. Millican, 209 So.2d 716 (Fla. 1st Dist. 1968).

162. *In re* Adoption of Vincent, 219 So.2d 454 (Fla. 1st Dist. 1969).

163. Smith v. Lyst, 212 So.2d 921 (Fla. 3d Dist. 1968).

164. *In re* Alexander, 206 So.2d 452 (Fla. 2d Dist. 1968).

## XI. JUVENILE COURTS AND JUVENILES

### A. *Custody Awards*

In a somewhat equivocal opinion, the Second District Court of Appeal has frowned upon an order of a juvenile court which awarded custody of five minor children to their maternal grandmother and permitted her to remove the children to England upon her posting of a surety bond to insure that they would be returned to the jurisdiction of the court upon any further proceedings instituted by the father.[165]

### B. *Support Awards*

The juvenile court has the power to order an ex-husband to support a child conceived during wedlock without any necessity for the court to find that the ex-husband is the father of the child in response to his allegation that the child is not his. The court stated that the alleged father may subsequently institute proceedings in a court of competent jurisdiction to overcome the presumption that the child is his.[166]

An order of commitment of minor children to care of foster parents may require the natural parents of the children to pay for the amount of this care.[167]

### C. *Criminal and Delinquency Proceedings*

#### 1. APPOINTMENT OF COUNSEL

The Supreme Court of Florida, in reversing the Third District Court of Appeal, has held that *In re Gault*[168] (which held that a juvenile is entitled to the assistance of counsel in delinquency hearings) does not apply retroactively to a waiver of jurisdiction hearing in a Florida juvenile court dealing with the transfer of a juvenile to the jurisdiction of the criminal court.[169]

Prior to this decision, the Fourth District Court of Appeal had already held that the constitutional protections extended to juvenile court proceedings by *In re Gault* are not to be given retroactive effect in Florida so as to upset proceedings occurring before the decision in *Gault*.[170]

In avowedly following the holding of *State v. Steinhauer*,[171] the Third District Court of Appeal has held that the rule of *In re Gault* is neither to be applied retroactively to a juvenile court hearing wherein the initial determination of delinquency is made, nor to a petition for revo-

165. Holman v. State, 203 So.2d 653 (Fla. 2d Dist. 1967).

166. *In re* P., 220 So.2d 665 (Fla. 3d Dist. 1969). *But see* the cases discussed under the illegitimacy section of this *Survey*, p. 328 *supra*.

167. *In re* the Interest of V.F.B. v. State, 223 So.2d 556 (Fla. 1st Dist. 1969).

168. 387 U.S. 1 (1967).

169. State v. Steinhauer, 216 So.2d 214 (Fla. 1968), *rev'g* Steinhauer v. State, 206 So.2d 25 (Fla. 3d Dist. 1968).

170. Sult v. Weber, 210 So.2d 739 (Fla. 4th Dist. 1968).

171. 216 So.2d 214 (Fla. 1968).

cation of probation which was filed before *Gault* was decided but which entailed a hearing that took place after the *Gault* decision, when the court believed that the reliability of the ultimate fact finding process was not measurably affected by the absence of counsel. The court indicated that if the juvenile had stated to the juvenile court at this latter hearing that he and his family were without funds to employ an attorney and that he was ignorant of his right to state-supplied counsel, then the court would have applied *Gault* in a retroactive fashion.[172]

A juvenile who appeals from an order adjudicating him a delinquent has the same right to the appointment of counsel as does a defendant on appeal from a criminal conviction. If the juvenile who is appealing a delinquency adjudication is completely destitute, he may not be denied the benefit of the insolvency statute which provides for the appointment of counsel at state expense on the basis that his parents have the ability to bear the costs of the appeal. The parents are not under a legal duty to furnish such funds.[173]

### 2. NOTICE TO JUVENILES' PARENTS

The failure to give written notice to the parents of a minor child that he is to be tried in a criminal action does not make the proceedings void when the record shows that the child's mother had actual (as distinguished from written) notice of the trial and was present with him in the courtroom during the trial.[174] On the other hand, if the state sends written notice to an address different from the one given by the minor and this notice is returned with the notation "no such address," the statutory notice provision has not been complied with and the minor is entitled to a new trial.[175]

### 3. WAIVER OF JURISDICTION

In a case of apparent first impression in Florida, the Third District Court of Appeal has held that it is proper for a juvenile court judge to waive jurisdiction over a child and to certify the case to the circuit court upon finding after a properly conducted hearing that the child is over age fourteen; that the child, if an adult, would be charged with the crime of murder; that as a result of the foregoing and together with a consideration of the psychological and psychiatric evaluation performed, the child is not a suitable candidate for the rehabilitation program of the juvenile court; and that it is in the best interest of the public that jurisdiction be waived.[176]

172. Richardson v. State *ex rel.* Milton, 219 So.2d 77 (Fla. 3d Dist. 1969).

173. *In re* L.G.T., 216 So.2d 54 (Fla. 4th Dist. 1968).

174. Holloway v. State, 216 So.2d 248 (Fla. 2d Dist. 1968), *construing* FLA. STAT. § 932.38 (1967).

175. Jackson v. State, 224 So.2d 734 (Fla. 3d Dist. 1969).

176. B.P.W. v. State, 214 So.2d 365 (Fla. 3d Dist. 1968). For further waiver of jurisdiction cases see L.W. v. State, 216 So.2d 479 (Fla. 3d Dist. 1968), and *In re* J.E.M. v. State, 217 So.2d 135 (Fla. 3d Dist. 1968).

#### 4. SCOPE OF APPELLATE REVIEW

The scope of review of a finding of delinquency by a juvenile court judge is limited to a determination of the question whether the juvenile court judge misinterpreted the legal effect of the evidence as a whole or whether in some fashion he departed from the essential requirements of the law.[177]

#### 5. LEGISLATION

Juveniles who are now taken into custody upon probable cause that they have committed acts which would be felonious if they were adults shall be fingerprinted and photographed. The fingerprints and photographs are to be kept in a separate file by the agency making the arrest and the file is to be available only to the juvenile court, law enforcement agencies, the juveniles, and their parents and attorneys. The act provides procedures for destroying the file if the juveniles are acquitted, etc., and for the distribution of the files to various law enforcement agencies upon conviction.[178]

The juvenile court has been deprived of jurisdiction when a grand jury indicts a juvenile of any age with a crime punishable by death or life imprisonment, "and the child shall be handled, in every respect as if he were an adult."[179]

The legislature has created the Florida Division of Youth Services which has supervision over all state-owned facilities used for the detention, training, care, treatment, and aftercare supervision of children committed to it as delinquent or dependent children. The act appears to be a comprehensive unified approach to the delinquency problem.[180]

## XII. GUARDIANSHIP

### A. *Adjudication of Incompetency*

When an examining committee's report states that a "hippie" is suffering from chronic schizophrenia without classifying the type of schizophrenia, the committee members do not testify at the competency hearing, and this opinion is in direct conflict with the testimony of the alleged incompetent's expert that he is sane, there is insufficient evidence that the alleged incompetent is incapable of caring for himself or of managing his affairs. The judgment of incompetency is not supported by sufficient evidence.[181]

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177. *In re* Marshall, 214 So.2d 486 (Fla. 2d Dist. 1968).
178. Fla. Laws 1969, ch. 69-113, at 327, *amending* FLA. STAT. § 39.03(6) (1967).
179. Fla. Laws 1969, ch. 69-146, at 390, *amending* FLA. STAT. § 39.02(6)(c) (1967).
180. Fla. Laws 1969, ch. 69-365, at 762-69, adding chapter 959 to the Florida Statutes.
181. *In re* Sealy, 218 So.2d 765 (Fla. 1st Dist. 1969).

### B. *Litigation Procedure*

When a guardian is suing as a guardian it is improper for the defendant to file a counterclaim against the guardian individually for acts allegedly committed by the guardian acting for her own benefit. A guardian is regarded as a separate legal person while acting in this capacity.[182]

### C. *Guardians and the Dead Man's Statute*

In a suit brought by a guardian ad litem of an incompetent against the guardian of the person of the incompetent and the guardian of the property of the incompetent, it is permissible to call the guardian of the person as an adverse witness, and the Dead Man's statute will not bar this testimony because of the personal representative status of the guardian. However, when the guardian ad litem and intervening children of the incompetent call other children as their witnesses, then the Dead Man's statute will apply.[183]

### D. *Administration of the Estate*

Section 744.53 of the Florida Statutes, which requires a guardian to file an inventory of his ward's assets within sixty days from the date of the guardian's appointment, is mandatory rather than directory. However, in the event that a guardian fails to file an inventory but later testifies under oath (in a hearing objecting to the guardian's discharge) and gives full disclosure of all assets which came into his possession; files accountings of his administration; and no contention is made that his accounting was false or erroneous and no evidence is submitted that the estate suffered a loss as the result of his failure to file the inventory, the sworn testimony may be considered as "tantamount to a verified inventory of the assets owned by the ward. . . ."[184] As a result, the error of the probate court in failing to require the inventory is a harmless one under these facts.

An interesting aspect of the law of guardianship as it relates to devises was involved in *Forbes v. Burket*.[185] A testator devised real property and was later declared incompetent. His guardian was given court permission to sell the devised property, and subsequently the testator died. The records of the guardianship revealed that the proceeds of this sale were not necessary for the support of the ward because there was sufficient *income* available for this purpose, and at the time of death of the ward there were more funds available in the estate than in the proceeds of the sale. As a result, the district court held that the inten-

182. Hall v. McDonough, 216 So.2d 84 (Fla. 2d Dist. 1968), *construing* FLA. R. CIV. P. 1.170.

183. Roberts v. Bryant, 201 So.2d 811 (Fla. 2d Dist. 1967).

184. *In re* Estate of Dobbins, 215 So.2d 312, 313 (Fla. 1st Dist. 1968).

185. 208 So.2d 670 (Fla. 2d Dist. 1968).

tion of the testator to make this specific devise should be carried out and the amount of the proceeds of the sale of this property should be paid to the devisee without requiring any tracing of the proceeds.[186]

## XIII. Illegitimacy

The proper venue in bastardy actions is in the county in which the mother resides or in the county in which the father resides, under section 742.021 of the Florida Statutes. Section 46.01, the general venue statute which gives the defendant the right to be sued in the county in which he resides, is controlled by section 742.021. Hence, the mother may choose to sue in the county in which she resides over the contention of the alleged father that he has a right to be sued in his home county.[187]

A woman cannot have her child declared illegitimate and receive support for it from the putative father if she was married to another person at the time of conception.[188] On the other hand, the Second District Court of Appeal has held that an annulment of a marriage secured by the husband renders the woman unmarried, and she thereby has standing to bring bastardy proceedings against another man (who was married) who was intimate with her. Further, the "presumption" that a child who is born after wedlock is the legitimate child of the husband is a rebuttable presumption which may be overcome by medical and other proof that the husband is not the father and that the child was sired by another.[189]

## XIV. Miscellaneous

### A. *Interfamily Tort Actions*

In a case of apparent first impression, the Second District Court of Appeal has held that a minor child may not maintain a suit against his parents for injuries suffered as a result of his parents' alleged negligence in providing an "unsafe place" for him to play.[190] The same court had previously ruled that a parent of a deceased minor child may not sue another of his minor children for his negligence in causing the death of his sibling.[191] In a similar vein, another district court held that an unemancipated minor may not sue his parent for personal injuries

186. *Id.* at 673.

187. Paulett v. Hickey, 206 So.2d 29 (Fla. 2d Dist. 1968).

188. Kennelly v. Davis, 221 So.2d 415 (Fla. 1969), *aff'g* Kennelly v. Davis, 216 So.2d 795 (Fla. 3d Dist. 1968). The Third District Court of Appeal had held that a married woman cannot maintain bastardy proceedings against her paramour for a child conceived during wedlock, even though the facts indicate that the woman's husband could not possibly be the father of the child and the paramour admitted the fact of intercourse during the conception period.

189. B.S.B. v. B.S.F., 217 So.2d 599 (Fla. 2d Dist. 1969).

190. Rickard v. Rickard, 203 So.2d 7 (Fla. 2d Dist. 1967)

191. Meehan v. Meehan, 133 So.2d 776 (Fla. 2d Dist. 1961).

caused by the simple and gross negligence of the parent which caused an automobile accident.[192] These decisions are based upon the notion that the allowance of suit would interfere with family unity and family discipline. Sense or Nonsense? The courts are really protecting insurance companies, not family unity.

A slight turning away from the interfamily tort rule was expressed in *Gaston v. Pittman*, [193] wherein the Supreme Court of Florida held that when a woman's child (by a prior marriage) was killed through the negligence of a man who subsequently married the woman the cause of action was not extinguished but merely abated during the continuance of the marriage. Upon divorce of the couple the procedural bar was lifted, and the mother could sue her former husband for the tort committed prior to their marriage.

### B. *Wrongful Death Actions*

The right to recover for the loss of a deceased child's services belongs to the parent who was actually supporting the child, regardless of the fact that the parents might be separated and no court order awarding custody had been entered.[194]

A forty-two year old daughter who is one-hundred percent disabled and totally dependent upon her mother for financial support is a "dependent" under the wrongful death statute and may sue for the wrongful death of the mother. Under the "collateral source rule," the fact that the daughter received a lump-sum divorce settlement from her former husband would not serve to decrease the liability of the tort-feasor.[195]

### C. *Inheritance*

Section 731.23 of the Florida Statutes has been amended to permit parents to disclaim, renounce, or refuse in writing any inheritance of real and personal property from any child of such parent. The written disclaimer may be made prior to or within thirty days after the death of the child and "a parent . . . shall be deemed to have predeceased such child."[196]

192. Denault v. Denault, 220 So.2d 27 (Fla. 4th Dist. 1969).
193. 224 So.2d 326 (Fla. 1969).
194. Williams v. Legree, 206 So.2d 13 (Fla. 2d Dist. 1968).
195. Wadsworth v. Friend, 201 So.2d 641 (Fla. 4th Dist. 1967).
196. Fla. Laws 1969, ch. 69-173, at 415.