



1-1-1965

Family Law (1965)

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FAMILY LAW

GEORGE J. ALEXANDER

As before, family law provided more than its share of legal curios this year. Of more substantial importance were the decisions supporting Mexican divorces against jurisdictional attack, suggesting that separation agreements, though valid, could be adjusted to provide greater payments to the wife if she was in danger of becoming a public charge, and allowing modification of child support payments when the only changed circumstance was the fact that the mother was no longer faced with the necessity of working out other financial arrangements with her husband. In addition, the New York State Legislature enacted a number of bills which affected familial economics and an intriguing dictum raised the possibility of using arbitration as means of settling child custody disputes.

I

MARITAL DISSOLUTION

Divorce.—The most important cases of the year were the reversals of *Rosenstiel v. Rosenstiel* and *Wood v. Wood*.¹ By its reversals, the Court of Appeals indicated that Mexican divorces would be recognized, at least under some circumstances, despite the absence of an extended Mexican residence or domicile requirement.² The decisions drew acid editorial comment throughout the state, not directed to themselves, but to divorce law which now provides a safe speedy alternative to the New York adultery divorce for those who can afford Mexican proceedings.

Despite the basic approval of Mexican divorces, the Court of Appeals has left unanswered many questions concerning laches and estoppel.³ On the basis of prior law,⁴ one had reason to hope that these doctrines would at some point bar a spouse, "divorced" by a foreign decree, from litigating the validity of that decree. To allow the "spouse" knowingly to sit back while remarriage occurs and a new family is created and to retain indefinitely the power to terminate the second marriage by a declaration of invalidity seems

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1. 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

2. Actually, the decisions skirt making definitive pronouncements on many of the outstanding issues concerning the validity of Mexican divorces. See Herzog, *Conflict of Laws, 1965 Survey of N.Y. Law*, 17 *Syracuse L. Rev.* 139 (1965).

3. See *id.* at 143.

4. *Weiner v. Weiner*, 13 App. Div. 2d 937, 216 N.Y.S.2d 788 (1st Dep't 1961); cf. *Christensen v. Christensen*, 39 Misc. 2d 370, 240 N.Y.S.2d 797 (Sup. Ct., N.Y. Co. 1963). It may be that Mexican "mail-order" divorces are handled differently. See Boardman, *New York Family Law* 984 (1964). Whether such differences as exist are sufficiently pervasive to determine essentially economic interests is another matter. *Querze v. Querze*, 290 N.Y. 13, 47 N.E.2d 423 (1943).

harsh. Nonetheless a Westchester surrogate, in *Matter of Estate of Liebman*,⁵ permitted the issue of invalidity to be raised twenty-nine years after the Mexican divorce was obtained and a remarriage occurred. Finding the divorce faulty, the surrogate ruled that the first wife, and not the "wife" of twenty-nine years of marriage, was entitled to letters of administration of the husband's estate.

Decisions in intrastate divorce law added to an already long list of grotesque examples of where the single-ground law can lead. The Court of Appeals held that evidence of adultery obtained by a raiding party was validly admitted.⁶ Fifteen days later the Appellate Division, Third Department, seemed to suggest yet another use for raiding parties in *Tallent v. Tallent*.⁷ According to Mrs. Tallent, Mr. Tallent, during the interlocutory period of his divorce, had intercourse with her on eight different occasions. The court denied her motion to vacate the interlocutory judgment of divorce on the grounds that her testimony as to condonation was incompetent by virtue of the New York Civil Practice Law and Rules Section 4502. This section literally allows *disproof* of the defenses to adultery, but does not mention proof of the defenses in specifying items to which the parties can testify. Actually, Mrs. Tallent did not come completely unprepared to these proceedings. She presented an affidavit from an affiant who had been stationed on the fire escape and who was prepared to testify as to what transpired between the parties. The court refused to consider the affidavit because it "stated merely that she [the affiant] was in a position to observe but omitted any evidence whatever of her observation."⁸

The public policy against contracting with a spouse to obtain a divorce⁹ has always presented some problems in application. While it has been clear that one could not expressly condition benefits on the obtaining of a divorce, a fault still to be found in some separation agreements,¹⁰ the courts have apparently blinked at the obvious fact that a separation agreement must, in most cases, be written around an understanding as to the terms under which the marital status is to be changed. *Viles v. Viles*,¹¹ approved this year by the Court of Appeals,¹² seems to leave parties in a somewhat greater quandary

5. 44 Misc. 2d 191, 253 N.Y.S.2d 461 (Surr. Ct., Westch. Co. 1963).

6. *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

7. 22 App. Div. 2d 988, 254 N.Y.S.2d 722 (3d Dep't 1964).

8. *Id.* at 989, 254 N.Y.S.2d at 724.

9. N.Y. Gen. Ob. Law § 5-311.

10. *Fisher v. Fisher*, 43 Misc. 2d 905, 252 N.Y.S.2d 643 (Sup. Ct., N.Y. Co. 1964). The agreement in this case provided that: "In the event that the parties hereto are still united in the bonds of matrimony on the 1st day of March, 1963 then it is mutually agreed that all the terms, covenants and agreements herein contained shall cease to be binding upon either of the parties for any purpose" *Id.* at 906, 252 N.Y.S.2d at 644.

11. See Alexander, *Family Law, 1963 Survey of N.Y. Law*, 15 *Syracuse L. Rev.* 369, 373 n.32 (1963) and accompanying text for a discussion of the case.

12. 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964).

than they previously faced by its invalidation of an agreement because of its unrecorded connection with divorce plans.

A more candid appraisal of the workings of dissolution proceedings seems implicit in the decision in *Herzog v. Herzog*,¹³ where a court granted an interlocutory decree of divorce on motion of the defendant after the plaintiff wife, having won her case, refused to enter a decree. The court reasoned that since the parties had agreed to a financial settlement and the husband had thereafter withdrawn his defense, she could not then prevent his obtaining the benefits of the arrangement—a divorce. Another court felt called upon to tell a plaintiff, this time one who had proceeded a bit further in the procedure, that she could not take back her decree during the interlocutory period because she suddenly discovered it to be to her financial advantage not to have obtained the interlocutory decree.¹⁴

As yet unclear is the extent to which Mr. Justice Harlan is correct in *Simons v. Miami Beach First Nat'l Bank*¹⁵ when he suggests that the United States Supreme Court is now revising the divisible divorce doctrine.

Annulment.—Annulment has, of course, always been a viable alternative to divorce in this state.¹⁶ Of the grounds for annulment, "fraud" presents the most appealing, apparently because no one seems sure of what it means. The Appellate Division, First Department, this year again recited as a controlling test the quotation from *Schoenfeld v. Schoenfeld*:¹⁷ "The court is left free to meet each case as it arises and to apply to the defendant's conduct the immemorial test of fair and conscientious dealing."¹⁸ Such a suggestion of an almost *ad hoc* approach to decisions in the annulment cases, coupled with the still significant quantum of litigation, must be a source of encouragement to plaintiffs with minimal complaints. Take, for example, the complaint of Emma Pankiw¹⁹ who sought annulment in 1964 of a marriage which dated from 1949 on the grounds that her husband had not revealed his premarital paternity of an illegitimate child and that he had misrepresented his age by two years. Since, absent any representation to the contrary, courts have not considered it an obligation of a marital partner to disclose fully his premarital sexual exploits²⁰ and since the paternity issue did not relate to any postmarital difficulty, the fraud ground really stood or fell on the misrepresentation of his age. Not surprisingly, it fell. On the other hand, the first department, employing the test of fair and conscientious dealing, found that a representation by a husband that he was born in Germany,

13. 46 Misc. 2d 362, 259 N.Y.S.2d 479 (Sup. Ct., Monroe Co. 1965).

14. *Gilstein v. Gilstein*, 23 App. Div. 2d 678, 257 N.Y.S.2d 823 (2d Dep't 1965).

15. 381 U.S. 81 (1965). See note 73 *infra* and accompanying text.

16. See Note, 41 Colum. L. Rev. 503 (1941).

17. 260 N.Y. 477, 184 N.E. 60 (1933).

18. *Sophian v. Von Linde*, 22 App. Div. 2d 34, 36, 253 N.Y.S.2d 496, 498 (1st Dep't 1964).

19. *Pankiw v. Pankiw*, 45 Misc. 2d 206, 256 N.Y.S.2d 448 (Sup. Ct., Monroe Co. 1965).

20. *Glean v. Glean*, 70 App. Div. 576, 75 N.Y. Supp. 622 (1st Dep't 1902).

a member of the nobility and a Graf (count), when false, was sufficiently fraudulent to allow the aunt of a deceased wife an annulment on the wife's behalf.²¹ Yet the same department, in *Kober v. Kober*,²² only four months later, denied an annulment where the husband had allegedly concealed his German ancestry and had also concealed that he had been an officer in the German army and a member of the Nazi party, that he was at the time of marriage and at the time of complaint a strong anti-Semite, that he believed that the solution to the Jewish problem was the "Final Solution" of the Jewish question, namely, the extermination of the Jewish people, and that he would require his wife to terminate her friendship with Jews.

Separations.—Even separations are not necessarily easy to obtain. For example, one justice, in ruling against a separation, stated:

The plaintiff admitted that at various times she spat on defendant, that since December, 1963, she has refused to have sexual relations with him and has told him to go and get another woman, that prior to the incident in which defendant held her head under the bathtub faucet she had thrown a pot of water on him and that prior to the incident in which he tied her hands and feet, he had sought to make love to her and she had repulsed him, slapping and kicking him.²³

Since this is an almost perfect case illustrating the defense of recrimination, the result is not novel.

II

CHILDREN

A nagging problem has been the right of a mother to the return of her child from an agency with which the child may have been placed.²⁴ The crux of the problem lies in the length of time required to terminate permanently a parental right to custody.²⁵ It seems clear that strong public policy suggests leaving an avenue open by which parental custody can be reestablished. Apparently, it is only in the service of that end that the parents' interests are to be given controlling weight. In *People ex rel. Anonymous v. Talbott Perkins Adoption Serv.*,²⁶ a mother who sought custody of her child in December following a September surrender to the commissioner of welfare was denied her child because her purpose was to accomplish a private placement adoption and not to take custody herself.

It has long been established that the parents of a child may agree on his religious upbringing while they continue to live together or as an incident to

21. *Sophian v. Von Linde*, 22 App. Div. 2d 34, 253 N.Y.S.2d 496 (1st Dep't 1964).

22. 22 App. Div. 2d 468, 256 N.Y.S.2d 615 (1st Dep't 1965). Subsequent to the writing of this article the decision of the appellate division was reversed in 16 N.Y.2d 191, 211 N.E.2d 817, 264 N.Y.S.2d 364 (1965).

23. *Becker v. Becker*, 46 Misc. 2d 858, 859, 260 N.Y.S.2d 879, 880 (Sup. Ct., Nassau Co. 1965).

24. See *Alexander*, supra note 11, at 377-78.

25. N.Y. Family Ct. Act § 611 (substantial abandonment for more than one year); cf. N.Y. Dom. Rel. Law §§ 111-12.

26. 46 Misc. 2d 369, 259 N.Y.S.2d 440 (Sup. Ct., Kings Co. 1965).

an agreement to separate.²⁷ Such an agreement, however, does not interfere with a court's power to redetermine the issue in the best interests of the child. When the child is mature enough to have his wishes considered, they may be found to override his parents' agreement.²⁸ Where the parties have not reached an agreement on the religious upbringing of the child, courts have been careful to avoid decreeing the form of religious training the child is to obtain.²⁹ Since the courts will not direct that the child be raised in a religion different from that of the custodial parent, the result may be to change the child's religion.³⁰ The court may, however, require that the non-custodial parent be given an opportunity to have the child trained religiously during his visitations or during a period of temporary custody,³¹ and failure of the custodial parent to allow such religious training can be punished by contempt.³² The question of the importance of an agreement between the parties in cases where children were too young to advise the court of the appropriate disposition has remained unresolved. In *O'Neill v. O'Neill*,³³ the court allowed a child formerly raised in a Catholic home to be brought up by the custodial mother in the Jewish faith, despite her having executed a written undertaking that any children of the marriage would be raised in the Roman Catholic religion and despite the child's baptism as a Roman Catholic. The court noted:

As a mother has and will have custody of the child, it would lead to great conflict and probable injury to the child's psychological well-being to attempt to compel the mother to raise the child against the mother's will in a religion that is different from the religion of the mother's home and it would represent for the child a sharp compulsory break from the religion with which she now feels herself to be affiliated and which she knows is the religion in which her mother wishes to raise her.³⁴

Several courts this year concluded that while they were under no obligation to enforce foreign custody decrees, they were inclined to accept them by comity where the decrees did not seem injurious to the best interest of the child. At a minimum, there was no need to redetermine custody provisions *de novo* when a determination had been made by a foreign court.³⁵ Beyond

27. *Weinberger v. Van Hessen*, 260 N.Y. 294, 183 N.E. 492 (1932).

28. *Martin v. Martin*, 308 N.Y. 136, 123 N.E.2d 812 (1954).

29. *People ex rel. Sisson v. Sisson*, 271 N.Y. 285, 2 N.E.2d 660 (1936). "The court cannot regulate by its process the internal affairs of the home. Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law." *Id.* at 287, 2 N.E.2d at 661. Thus it is normally improper to change the custody of children solely to effect a change in religious training.

30. *Paoletta v. Phillips*, 27 Misc. 2d 763, 209 N.Y.S.2d 165 (Sup. Ct., Suffolk Co. 1960); cf. *Seltzer v. Wendell*, 11 App. Div. 2d 805, 205 N.Y.S.2d 218 (2d Dep't 1960).

31. *Seltzer v. Wendell*, *supra* note 30.

32. *Gluckstern v. Gluckstern*, 31 Misc. 2d 58, 220 N.Y.S.2d 623 (Sup. Ct., N.Y. Co. 1961).

33. 45 Misc. 2d 1, 255 N.Y.S.2d 776 (Sup. Ct., N.Y. Co. 1965).

34. *Id.* at 4, 255 N.Y.S.2d at 779.

35. *Sloane v. Sloane*, 15 N.Y.2d 561, 203 N.E.2d 217, 254 N.Y.S.2d 536 (1964). For a discussion of the case see Alexander, *Family Law*, 1964 Survey of N.Y. Law, 16 *Syracuse L. Rev.* 402, 416 (1964).

that, the agreement of the parents may be accepted as an appropriate basis for disposition where circumstances have remained substantially unchanged.³⁶ To say that the parties may by agreement or as a result of litigation in an out-of-state court relieve the courts of the necessity of making a de novo inquiry does not suggest that custodial questions can be summarily handled by trial courts, absent such an agreement or judgment, without a hearing.³⁷ Since the focus of the inquiry is on the best interests of the child, and not of his parents, the fact that one of the litigants is a parent and the other is not, need not be determinative.³⁸ On the other hand, parental rights are strong enough, in most cases, to require an inquiry into their termination before the ties are judicially declared cut. Consequently, a first husband must be given a hearing on the issue of abandonment before an adoption of his child by a second husband can be approved without his consent.³⁹

The involvement of courts in an attempt to find other means of effectuating the best interest of children led to three rather remarkable cases this year. In the *Matter of S*,⁴⁰ a family court judge, apparently sharing the frustration of some of his brethren concerning the inability to establish a child battering case, decided that a case would be sufficiently made out by the production of a young child bearing evidence of physical abuse absent a satisfactory explanation as to his condition. According to the judge, he had borrowed the *res ipsa loquitur* principle. While one can sympathize with the court's motive, it seems doubtful that the situation is far different from criminal proceedings in which it would be equally expeditious to make a defendant exculpate himself.

In *Matter of Higgins*,⁴¹ a family court judge was faced with a demand by Michigan authorities that she sign a guarantee against the child's becoming a public charge in Michigan in order to validate a private arrangement that had been made for the child with his maternal aunt in Michigan upon the death of the child's mother. The easy solution for the judge would have been to hold, as she did, that she lacked statutory authority to enter any such agreement. Noting, however, that it is "poor laws" of the kind which here required a guarantee that make satisfactory placement of children outside of the state difficult, Judge Polier, in a carefully worded opinion, held additionally that the Michigan statute contravened the United States Constitution. Although one may doubt that there will be an immediate response to the court's opinion by the Michigan Legislature it can be hoped that the

36. *Foussier v. Uzielli*, 23 App. Div. 2d 260, 260 N.Y.S.2d 329 (1st Dep't 1965); *Abreu v. Abreu*, 45 Misc. 2d 952, 261 N.Y.S.2d 687 (Family Ct., Ulster Co. 1965).

37. *People ex rel. Jackson v. Mitchell*, 22 App. Div. 2d 903, 255 N.Y.S.2d 300 (2d Dep't 1965); *People ex rel. Putziger*, 22 App. Div. 2d 821, 254 N.Y.S.2d 916 (2d Dep't 1964).

38. *People ex rel. Conti v. Molinari*, 23 App. Div. 2d 893, 260 N.Y.S.2d 551 (2d Dep't 1965).

39. *Matter of Favro*, 44 Misc. 2d 464, 254 N.Y.S.2d 278 (Family Ct., Steuben Co. 1964).

40. 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Family Ct., Kings Co. 1965).

41. 46 Misc. 2d 233, 259 N.Y.S.2d 874 (Family Ct., N.Y. Co. 1965).

opinion will make agencies concerned with child placement more reluctant to accept at face value state poor laws as a bar to child placement.

The most curious decision of the group is *Matter of Anonymous*.⁴² In that case, a child had been placed, upon discharge from the hospital after its birth, in the home of adoptive parents by an attorney apparently acting as an intermediary between them and the mother. An action for adoption was brought when the child was fourteen. Since there was apparently no objection as to the adoptive parents, only two issues remained in the way of a judicial approval of the adoption. The first was that the natural mother of the child was Protestant while the adoptive parents were Jewish. The second was that the child had been placed by the attorney in apparent contravention of Social Welfare Law Section 374. Under section 389 of the same act, the attorney might be subject to misdemeanor prosecution.

The religious problem did not cause the judge great difficulty. He read *Matter of Maxwell*⁴³ as allowing sufficient discretion to approve this adoption, in light of the natural mother's consent that her child be raised as a Jew. This conclusion raises again the meaning of the religious matching requirement⁴⁴ which controls the placement of children. It is not too clear by what standard one judges the religious faith of a newborn child, although that appears to be the controlling focus. However one answers that question, it would seem to relate to an objective fact, not to a maternal right which the mother is capable of altering by contract. *Matter of Maxwell* could well be read as limited to circumstances in which the natural mother lied about her religion and the adoptive parents relied on her statement, a situation which would be inapplicable in the instant case.⁴⁵ Since it is easy to have grave reservations about the desirability of forced religious matching both from the standpoint of church-state separation⁴⁶ and its utility in proper child placement,⁴⁷ one may hope that the instant extension of the *Maxwell* case finds judicial favor.

The other issues sufficiently troubled the judge so that he ultimately denied the adoption. Although the relevant sections of the Social Welfare Law may well support the judge's conclusion that the placing out by an attorney is unlawful, the conclusion that a child unlawfully placed out cannot be adopted seems curious indeed. The apparent reason for these provi-

42. 46 Misc. 2d 928, 261 N.Y.S.2d 439 (Family Ct., Dutchess Co. 1965).

43. 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).

44. See Ramsey, *The Legal Imputation of Religion to an Infant in Adoption Proceedings*, 34 N.Y.U.L. Rev. 649 (1959).

45. In any event, the later amendment of the religious matching requirement, Family Ct. Act § 116(e), so as to restrictively define "when practicable," the words relied upon by the Maxwell majority, seems to make even the Maxwell holding questionable.

46. Ramsey, *supra* note 44, at 680-84.

47. It is interesting to contrast the mandatory religious matching provisions with the suggestion that racial considerations may not even be considered. See *Rockefeller v. Nickerson*, 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct., Nassau Co. 1962), discussed in Alexander, *supra* note 11, at 378.

sions of the Social Welfare Law was a legislative concern for black market babies.⁴⁸ One may doubt the judge's assertion, made on the basis of these sections, that the Legislature has declared a public policy "prohibiting adoptions which begin improperly."⁴⁹ Equally curious is what appears to be the major rationale for the decision. "The motivation and professional approach which welfare departments and authorized adoption agencies can give cannot be substituted for [*sic*] one unskilled in social work no matter how benevolent his motives in investigating and evaluating the material elements of an adoption proceeding and placing a child in a family unit."⁵⁰ Such an argument might well explain the result in a state where placement is a state monopoly, but it is hard to follow in New York where private placement adoption is a legislatively established alternative to the placement by authorized agencies.⁵¹ It seems clear that the mother could have directly placed the child,⁵² and it is apparently accepted by the court that the foster parents were appropriate adoptive parents. Why Judge Giudice felt compelled to punish the child and the adoptive parents as a means of implementing the misdemeanor provisions of the Social Welfare Law is unclear.

Of greatest importance in this area is the dictum of the appellate division in *Sheets v. Sheets*,⁵³ in which the court went to considerable lengths to endorse the legitimacy of a provision for arbitration of disputed custody questions in private agreements. Apparently, between the parents, arbitration may provide a final answer to disputes should the parents choose to include an appropriate provision in their separation agreement. Of course, the court reserves the right to override their wishes in the interest of the child.⁵⁴

III

PATERNITY AND ILLEGITIMACY

The question of whether a married woman may bring a suit for paternity of her child in light of the rewording of the definition of "child born out

48. See *People v. Scapas*, 11 N.Y.2d 120, 181 N.E.2d 754, 227 N.Y.S.2d 5 (1962) (dissenting opinion).

49. *Matter of Anonymous*, supra note 42, at 930, 261 N.Y.S.2d at 442.

50. *Ibid.*

51. N.Y. Dom. Rel. Law §§ 115-16.

52. N.Y. Soc. Wel. Law § 374(2).

53. 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1st Dep't 1964).

54. The court adds:

[S]ubmission of disputes in custody and visitation matters to voluntary arbitration need no longer receive general interdiction, and such procedures should be encouraged as a sound and practical method for resolving such disputes. But as indicated hereinabove, arbitration awards which may adversely affect the best interests of the child will be disregarded by the courts whose paternal jurisdiction is paramount. As a consequence, there may in certain instances be a duplication of effort, where the court decides to look into the matter *de novo* and reaches the same or different result.

Id. at 179-80, 254 N.Y.S.2d at 325.

of wedlock" is still being litigated.⁵⁵ The ever increasing consensus appears to be that, under appropriate circumstances, she may.⁵⁶

A number of procedural matters were also clarified. Section 517(b) of the Family Court Act is an obvious attempt to preserve the State's interest in having children supported by their parents. This section provides that the commissioner of welfare may bring an action for paternity within a period of ten years after the birth of the child, although the mother is only permitted two years for such action in most circumstances. Reading this intent into the unqualified language of the statute, a court this year conditioned the exercise of the commissioner's right on a demonstration that the mother would likely become a recipient of welfare payments.⁵⁷ It remained clear, however, that paternity orders protect the child's interest in support as well as relieving the State's concern that it might otherwise shoulder the burden. Thus, orders could properly issue commanding fathers to support children who were out of state.⁵⁸

A new provision of the Decedent Estate Law, Section 83-a, fills a long felt need for greater inheritance rights for illegitimate children.⁵⁹ The statute provides, broadly, that for purposes of intestate succession an illegitimate child shall inherit from and through his mother and from his father if an order of paternity has issued against him. In turn, those from whom the illegitimate child is entitled to distribution, inherit from him. What appears to be most controversial in this new statute is provision (1)(c) which bars inheritance from the father on the basis of an agreement or compromise of the paternity question short of an order of filiation. This section would seem to provide at least one reason for the bringing of some paternity actions that might otherwise be settled. If, in practice, it will have that result, one may regard this qualification as unfortunate.

IV

FAMILY ECONOMICS

The question of the title to marital property, always a thorny problem,⁶⁰ has not been made easier by the passage of Domestic Relations Law Section

55. For prior installments of the dispute see Alexander, *supra* note 35, at 412.

56. *Fitzsimmons v. De Cicco*, 44 Misc. 2d 307, 253 N.Y.S.2d 603 (Family Ct., Ulster Co. 1964); *Anonymous v. Anonymous*, 43 Misc. 2d 1050, 252 N.Y.S.2d 797 (Family Ct., Albany Co. 1964).

57. *Anonymous v. Anonymous*, 44 Misc. 2d 770, 254 N.Y.S.2d 946 (Family Ct., N.Y. Co. 1964).

58. *Urbancig v. Pipitone*, 23 App. Div. 2d 193, 259 N.Y.S.2d 625 (1st Dep't 1965) (child in Canada); *Anonymous v. Anonymous*, 44 Misc. 2d 721, 255 N.Y.S.2d 122 (Family Ct., N.Y. Co. 1964).

59. See Alexander, *supra* note 35, at 414.

60. For a discussion of recent problems concerning jointly held property, see Alexander, *supra* note 11, at 369-70.

234.⁶¹ Slowly, ambiguities will, no doubt, resolve themselves. One thing is reasonably clear. The section which allows a court in a matrimonial action to (1) determine questions of title to property and (2) make directions concerning possession of property in the court's discretion, does not alter extant rules governing the determination of title questions between spouses. Consequently, general equities concerning the need for or the use of property will not alter vested titles.⁶² If that is correct, it would seem to follow that the provision of section 234 allowing directions to be made in "one or more orders from time to time before or subsequent to final judgment or by both such order or orders and final judgment" cannot relate to questions of title which presumably remain immutable. That in turn suggests that the entire quoted section relates only to directions concerning the possession of property as opposed to its title. So holding, Justice Coleman, in *Roth v. Roth*,⁶³ refused to consider the question of title on a motion subsequent to a determination in the underlying matrimonial dispute.

As is well known, the rules governing alimony display a bias in favor of the wife. For example, even excessive awards of alimony retroactively reduced by appeal cannot be recovered from the wife once paid.⁶⁴ If the husband can avoid making required payments until he obtains a dismissal of his wife's action, can he avoid payment? After *Polizotti v. Polizotti*,⁶⁵ one would have thought so. A case this year suggests otherwise. Punishing a defendant for contempt of court for failure to make temporary alimony payments prior to a dismissal of the complaint, the court⁶⁶ distinguished *Polizotti* on the basis that the contempt action there had not been concluded prior to the dismissal of the complaint. Whether the contempt would lie for arrearages held erroneously excessive remains to be seen.

As usual, alimony amounts were contested and recontested. Courts, tiring of hearing the same parties argue change of circumstances to alter a previous decree, have had to be admonished to provide a hearing for the claimant.⁶⁷ One may well doubt that a system requiring such extensive commitments of judicial energy is the best means of handling the problem of the postmarital support of the wife.

An alternative to litigating the level of support is, of course, a separation agreement. By making such an agreement the parties settle their own support arrangements and, if there is neither overreaching nor contraven-

61. See Siegel, Practice Commentary, N.Y. Dom. Rel. Law § 234, at 123-28 (McKinney) on the sketchy legislative history.

62. Fluhr v. Fluhr, 44 Misc. 2d 1098, 255 N.Y.S.2d 996 (Sup. Ct., Suffolk Co. 1965).

63. 45 Misc. 2d 150, 256 N.Y.S.2d 92 (Sup. Ct., N.Y. Co. 1964).

64. Glassman v. Glassman, 41 Misc. 2d 132, 245 N.Y.S.2d 298 (Sup. Ct., Queens Co. 1963).

65. 305 N.Y. 176, 111 N.E.2d 869 (1953).

66. Rosenthal v. Rosenthal, 44 Misc. 2d 980, 255 N.Y.S.2d 307 (Sup. Ct., N.Y. Co. 1964).

67. Gilbert v. Gilbert, 23 App. Div. 2d 757, 258 N.Y.S.2d 580 (2d Dep't 1965); Reiss v. Reiss, 23 App. Div. 2d 692, 257 N.Y.S.2d 729 (2d Dep't 1965).

tion of public policy against contracting for a divorce, such agreements are upheld and prevent litigation, by either party, of the support level determined. Two decisions this year suggest important qualifications. In *McMains v. McMains*,⁶⁸ the Court of Appeals determined that a separation agreement, otherwise valid to bar suit for an increase in support payment, will not bar such an increase if it is required to prevent the wife's becoming a public charge. In *Guillermo v. Guillermo*,⁶⁹ interpreting a separation agreement that had been incorporated into a foreign decree, the court hinted at the possibility of another exception. The Guillemos had negotiated their financial arrangement and then obtained a Mexican divorce decree which incorporated the terms of their separation agreement. Petitioning the court for an alteration in support payments for the child, the wife claimed, as the only changed circumstance, the fact that the child's support needs could now be considered independently of the other complications inherent in the dissolution of the marriage. In effect, she argued, she had been forced to accept too low a figure for the child's support as a means of effecting the final settlement. The court allowed the alteration, apparently giving controlling weight to the fact that the payments were to be for the support of the child.

One cannot be sure what position the court would have taken had the petitioner also sought modification of alimony payments for her support on the same basis. Presumably, it would have denied her additional request despite the fact that, having been conciliatory to obtain a settlement on other issues, she would now feel less restrained if allowed to address herself solely to the question of her needs.

For spouses, the choice may be between agreeing to the terms of a separation agreement intended to survive the divorce decree which, according to the reasoning of *McMains*, would remain controlling short of the indigency of the wife, and having their agreement incorporated in the divorce decree, which might leave it open to modification on changed circumstances (although probably more than the *Guillermo* showing would be required to constitute the change). The choice has other ramifications. For example, while court decrees terminate on remarriage, separation agreements may survive remarriage.⁷⁰ The Legislature, probably realizing the importance of alimony payments to many parties, wisely equated a *de facto* family relationship on the wife's part with her remarriage.⁷¹ A husband obligated under the terms of a separation agreement which does not contain such an alternative

68. 15 N.Y.2d 283, 206 N.E.2d 185, 258 N.Y.S.2d 93 (1965).

69. 43 Misc. 2d 763, 252 N.Y.S.2d 171 (Family Ct., N.Y. Co. 1964).

70. See generally, Boardman, *New York Family Law* 575-76 (1964).

71. Thus, by § 248 of the Domestic Relations Law, a court may terminate alimony payments when a woman habitually resides with a man other than her former husband and holds the new man out as her husband. This provision is, of course, not as strong as the mandatory requirement, in the same section, that alimony be terminated on remarriage.

cut off date found himself, this year, forced to support a wife who had apparently established a *de facto* relationship with another man.⁷²

Finally, the Supreme Court of the United States, at least in Mr. Justice Harlan's opinion, has taken the first step toward a repudiation of *Vanderbilt v. Vanderbilt*⁷³ which held New York entitled to enforce a separation decree's support obligation despite an out-of-state divorce. In *Simons v. Miami Beach First Nat'l Bank*,⁷⁴ the Court held that a Florida divorce terminated the dower right, in accordance with Florida law, of a New York domiciliary who had not appeared in the Florida action. All the Justices except Mr. Justice Harlan denied that the case repudiated the *Vanderbilt* approach. They pointed out that Florida, and not New York, had undertaken to provide dower and that the support payment ordered by the New York court had, in this case, faithfully been paid during the life of the former husband. To be sure, this is true. One could have supposed, however, that the division in divisible divorce was one separating economic rights for which full faith and credit would not be required, unless in personam jurisdiction had been obtained over both spouses and status considerations which could be altered by a foreign court with in personam jurisdiction over only one. Carrying such a dichotomy to its conclusion, the Florida court would have been without power to change the wife's economic right—her right to dower. So long as New York law, by its perversity, makes migratory divorce common, any assault on *Vanderbilt* poses a threat to basic New York interests.

If postmarital economics are complicated and occasionally unjust, at least the Legislature has seen fit to remove actions for restitution of gifts given in contemplation of marriage from the interdiction of the anti-heart balm legislation; consequently, one can hope that premarital finances will be equitably adjusted.⁷⁵ Other economic changes of importance altered aspects of a surviving spouse's right of election,⁷⁶ relieved persons of the obligation to support grandchildren who are recipients of welfare assistance,⁷⁷ and gave illegitimate children considerably greater rights of inheritance.⁷⁸

V

THE FAMILY COURT ACT

In no field of law is the gulf between normative assumptions underlying law and conduct any greater than in family law. As a result, when not bound by precedent, courts are free to come to entirely different conclusions

72. *Rosenberg v. Rosenberg*, 46 Misc. 2d 693, 260 N.Y.S.2d 508 (App. T., 1st Dep't 1965).

73. 354 U.S. 416 (1957).

74. 381 U.S. 81 (1965).

75. N.Y. Civ. Rights Law § 80-b (McKinney Supp. 1965).

76. N.Y. Dec. Est. Law § 18-b (McKinney Supp. 1965).

77. N.Y. Family Ct. Act § 415.

78. N.Y. Dec. Est. Law § 83-a (McKinney Supp. 1965), and see text accompanying note 59 *supra*.

by choosing to focus on either the stated norms or on well-known realities. Take, for example, the *de facto* family. It will startle no one that "there are countless households where man and woman reside with their offspring in a domestic relationship on a permanent basis without being legally married."⁷⁹ But how can a judge respond to such a relationship? On the one hand, without any difficulty, he can point to the many instances in legislation and court decrees in which the public policy in favor of marriage and against "illicit" relationships is established. On that basis a judge may make a decision helping to bring about a termination of the irregular relationship. On the other hand, it is possible to view the problem with a recognition that the *de facto* family is probably both too useful and too well established to fall in the face of judicial bluster.

Article 8 of the Family Court Act creates family offense proceedings which are designed to render help to families with internal strife. In legislative contemplation, the procedure was essentially conciliatory in nature.⁸⁰ Does it apply to members of *de facto* families? In *People v. Dugar*, the court realistically stated:

Such households are responsible for many of the most difficult social problems They present behavior problems, support problems, mental and emotional problems. They concern the health, welfare and safety of children. They result in filiation proceedings, support proceedings and juvenile proceedings. In short, from a social point of view, this is a situation where the unique and flexible procedures and services available in the Family Court may possibly find a remedy.⁸¹

This year a court thought differently:

It is the public policy of this State not to place children in a situation which would impair their morals. . . .

Assuming this court accepted jurisdiction, the most that we could do in order to help would be to effect a marital reconciliation, which is impossible in this situation. Actually, it would make the court a party, not only to an immoral relationship, but also, this court would be encouraging this relationship to continue.

The conciliation procedures cannot be utilized in this situation where there is no marriage to begin with.⁸²

On the other hand, it would seem that once a marital knot is tied, it may remain tied for family offense proceedings purposes. In *Koeppel v. Judges of Family Court*,⁸³ a former husband was unsuccessful in pleading his prior divorce as a bar to the invocation of family offense proceedings against him by his wife. Is the aim of the proceeding to reunite the former spouses?

79. *People v. Dugar*, 37 Misc. 2d 652, 653, 235 N.Y.S.2d 152, 153 (Dist. Ct., Nassau Co. 1962).

80. See N.Y. Family Ct. Act § 811.

81. *Supra* note 79, at 653-54, 235 N.Y.S.2d at 153.

82. *Best v. Macklin*, 46 Misc. 2d 622, 623, 260 N.Y.S.2d 219, 221 (Family Ct., Dutchess Co. 1965).

83. 44 Misc. 2d 799, 254 N.Y.S.2d 600 (Sup. Ct., Nassau Co. 1964).