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Family Law (1966)

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FAMILY LAW

GEORGE J. ALEXANDER

INTRODUCTION

This year, the legislature passed a divorce reform bill. By comparison, all other events in the field of family law were trivial.

In litigation, the issues were not revolutionary. Parents fought over the right to child custody. Mothers brought actions to identify fathers of their children and trial courts rushed to their defense despite, in some cases, marriage to other persons at the time of conception. One court was willing to believe respondent to be a father, despite medical testimony of his sterility; when he allowed surgical exploration after the trial which demonstrated his sterility, the court ruled the offer untimely. Another court found itself ready to accept the mother's contested version of events despite the fact that it was premised on a statistically most improbable period of gestation. Appellate courts were somewhat more moderate: the first case was reversed on appeal; the second was affirmed by a closely divided court. A transsexual was denied a change in birth certificate to indicate the opted female role. Mostly, though, the litigation concerned money.

HUSBAND AND WIFE

Marriage.—One of the weapons in the arsenal of the uncompromising one-ground divorce law is the statutory prohibition against remarriage by the guilty party in a divorce action.[1] Designed presumably to prevent the marriage of the adulterer and his lover and thus reduce the temptation to commit adultery, the device had become obsolete as a result of the recognition of out-of-state marriages by divorce defendants and easy modification of remarriage prohibitions.[2] Nonetheless, the barb in the statute occasionally impaled the unwary.

Fannie Farber found her formal New York marriage invalidated for failure to obtain a timely modification of the divorce decree prohibiting her to remarry,[3] and thus was denied death benefits under workmen's compensation upon the decease of her "husband." Fortunately, resourceful counsel has found an avenue of compensation for Mrs. Farber who will now collect workmen's compensation, not on the basis of her invalid formal New York marriage, but on the basis of a somewhat later cohabitation in

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1. N.Y. Dom. Rel. Law § 8.

2. See Alexander, Family Law, 1962 Survey of N.Y. Law, 14 Syracuse L. Rev. 333-34.

3. Farber v. United States Trucking Co., 20 App. Div. 2d 740, 247 N.Y.S.2d 82 (3d Dep't 1964); Alexander, Family Law, 1964 Survey of N.Y. Law, 16 Syracuse L. Rev. 402, 405 nn.21-22 and accompanying text.

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Florida.[4] Since Florida recognizes common-law marriage, the court found the Farbers to be married in Florida. The court was not concerned that the Farbers probably did not exchange marital vows in Florida, although such an exchange is recognized as a prerequisite to a valid common-law marriage. Since the parties assumed themselves validly married in New York they had no occasion to perceive the need for the renewed exchange of present vows. Thus, once again, the injunctive provision of section 8 was defeated. With the effective date of the divorce reform bill, September 1, 1967, such rescue efforts will no longer be required. The provision has been repealed.[5]

Marital Dissolution.—As has so often been true in the past, the most important new events in matrimonial law this year concerned dissolving marriages. After a heated legislative debate and some compromise, a new divorce bill was passed ending the comi-tragic history of single ground divorce in New York State.[6] The most important feature of the new bill[7] is newly written Section 170 of the Domestic Relations Law which recognizes five grounds for divorce: (1) cruelty, (2) abandonment for two or more years, (3) imprisonment for three or more years, (4) adultery (a broadened definition to include sodomy), and finally, (5) two years of living apart under a decree of separation or a filed separation agreement.

In conjunction with the new divorce grounds, the legislature has provided for mandatory conciliation for a period not to exceed 120 days from the service of summons. In essence, during that period, largely in the discretion of a "Conciliation Commissioner" (who is to be an attorney admitted to practice in New York for at least five years), the parties may be required to attend conciliation conferences with counselors. The Commissioner may call a halt to conciliation proceedings at any time by issuing a certificate of no necessity or no further necessity.[8]

A third major feature of the new law is Section 250 of the Domestic Relations Law.[9] That section purports to create a presumption of New York domicile on the part of a person obtaining an out-of-state divorce if either he was domiciled in New York within a year before the divorce and resumed residence within the state during eighteen months afterward, or continued to maintain a residence in New York in the interval between his departure and return to the state. The section is taken from the Uniform Recognition of Divorce Act. It appears on its face to apply equally to divorces granted by courts having in personam jurisdiction of one or both parties. In the latter application, it would appear to offend full faith and

4. Farber v. United States Trucking Co., 24 App. Div. 2d 1047, 265 N.Y.S.2d 324 (3d Dep't 1965).
5. N.Y. Sess. Laws 1966, ch. 254, § 1.
6. See generally Blake, Road to Reno (1962).
7. N.Y. Sess. Laws 1966, ch. 254, § 2.
8. N.Y. Dom. Rel. Law § 215-c (b)(2) & (4) (McKinney Supp. 1966) (effective Sept. 1, 1967).
9. N.Y. Dom. Rel. Law § 250 (McKinney Supp. 1966) (effective Sept. 1, 1967).

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credit provisions of the federal constitution assuming that the divorce-granting state would not allow comparable attack of New York decrees in their own courts.[10] In any application, the new provision would appear to test again the extent to which a state may, constitutionally, protect its interest in the marital status of its domiciliaries against the "quickie" divorce decrees of sister states.[11]

In the case of bilateral divorces, the state can avoid the constitutional question by reliance on the doctrine of estoppel. A precedent in this state would appear strongly to support the estoppel of a person who has appeared in a foreign court, either to bring or to defend a divorce action in that court.[12] Nothing in the new bill prevents the application of the doctrine to bar the suit of one of the parties to a bilateral foreign decree.

The provision also does not speak to the question of the validity of a sister state decree based on residence rather than domicile. Presumably, a finding, prima facie, of no domicile—the only result prescribed in Section 250 of the Domestic Relations Law—would not establish an insufficient basis for such a foreign decree. Mexican decrees of the kind just recently upheld in *Rosenstiel v. Rosenstiel*,[13] are based on residence at best. Again it is difficult to see how the provision that establishes, prima facie, domicile, speaks to the validity of such divorces. On the other hand, it would be even more difficult to understand a provision of this sort if it undermined foreign decrees from sister states which are constitutionally entitled to respect, and left unscathed Mexican decrees, clearly not entitled to the same protection. Section 250 would not seem to be suited to easy application. Divisible divorce has, however, always spawned confusion.[14] The new provisions will merely add another chapter.

One of the most curious changes made by the new law is accomplished by legislative inaction. It is quite uncertain, under the provisions to become effective in 1967, what, if any, defenses apply to actions for divorce. The title of the statute purports to repeal Section 171 of the New York Domestic Relations Law containing the defenses to a divorce action, but the bill accomplishes no such result. The original divorce bill,[15] provided a substitute section 171, broad enough to include of the divorce grounds, but it was not passed. The result, apparently, is that present Domestic Relations Law Section 171 will remain applicable unless further legislative change

10. See Sherrer v. Sherrer, 334 U.S. 343 (1948).

11. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) (protection of economic interests); Williams v. North Carolina II, 325 U.S. 226 (1945) (re-examination of jurisdictional basis for altering status).

12. Senor v. Senor, 272 App. Div. 306, 70 N.Y.S.2d 909 (1st Dep't 1947), aff'd, 297 N.Y. 800, 78 N.E.2d 20 (1948); Boxer v. Boxer, 12 Misc. 2d 205, 177 N.Y.S.2d 85 (Sup. Ct., Queens Co. 1958), aff'd, 7 App. Div. 2d 1001, 184 N.Y.S.2d 303 (2d Dep't), aff'd, 7 N.Y.2d 781, 163 N.E.2d 149, 194 N.Y.S.2d 47 (1959).

13. 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

14. See notes 23-29 infra and accompanying text.

15. S. Int. No. 627, Pr. No. 627; A. Int. No. 1327, Pr. No. 1327 (1966).

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is forthcoming. Section 171 provides for the defenses of procurement, connivance, condonation, recrimination, and a five-year statute of limitations. The introductory clause to the section, however, prohibits a divorce "although the adultery is established" in the cases mentioned. It remains unclear whether the defenses apply in cases not premised on adutlery.

The new divorce law also amends Section 5-311 of the General Obligations Law. The changes in this section became effective immediately upon the passage of the bill. Its most important feature would appear to be the fact that it overrules the effect of *Viles v. Viles*.[16] It is broadly written, however, and one must wonder whether it has other applications as well. Does the language of the section, which defines a contract to alter or dissolve marriage as one containing as express provision for dissolution of the marriage, or the procurement of grounds for divorce, also effect the making of separation agreements? It is presently true that a separation agreement is valid only when made by parties living apart.[17] Otherwise it is to be treated as an agreement to alter the marriage.[18] Since such an agreement need not contain an express provision requiring dissolution of the marriage or procurement of grounds for divorce, the statute would appear to allow separation agreements prior to actual separation and, indeed, appear to allow married couples to contract for a future separation although not for a future divorce. More farfetched is the inquiry whether one can now provide for the dissolution of marriage as a condition precedent to increased payments under a separation agreement merely by describing the prerequisite dissolution differently. For example, could one now make a separation agreement providing that the economic benefits under the contract will cease in the event that a defense is interposed to an action brought for divorce in a sister state? Such a provision would not seem an "express provision requiring the dissolution of the marriage" but would seem to have the same effect.

The new law also ends the prohibition against remarriage running against a defendant in a divorce action.[19] It alters separation grounds[20] and provides uniform sections relating to statutes of limitations, pleadings and proof, and residence requirements,[21] and accomplishes other minor changes.[22]

Foreign divorces for New York residents raised their usual number of problems during this year. The concept of estoppel has been used in this

16. 36 Misc. 2d 731, 233 N.Y.S.2d 112 (Sup. Ct., N.Y. Co. 1962), aff'd, 20 App. Div. 2d 626, 245 N.Y.S.2d 981 (1st Dep't 1963), aff'd, 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964); see text accompanying note 98 infra for a discussion of the Viles case.

17. Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939).

18. Ibid.

19. See notes 1-5 supra and accompanying text.

20. N.Y. Dom. Rel. Law § 200 (McKinney Supp. 1966) (effective Sept. 1, 1967).

21. N.Y. Dom. Rel. Law §§ 210, 211, 230 (McKinney Supp. 1966) (effective Sept. 1, 1967).

22. For an excellent summary and analysis see Foster & Freed, The Divorce Reform Law (1966).

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state with some frequency to bar relitigation by an appearing party to a foreign divorce.[23] Is the doctrine applicable to a second husband who, although not appearing in the foreign jurisdiction, had participated in the arrangements for his wife's divorce from her former husband? In the wake of *Rosenstiel v. Rosenstiel*,[24] courts differed.[25]

A nonappearing party, absent reasons for estoppel, is of course not estopped. However, suppose that, even in that case, the testimony to prove a fraudulent claim of domicile would have to come from an appearing wife. One would find it easy to agree with the first department: "The facts pertaining to respondent's residence in Alabama are particularly within her knowledge and it is appropriate that her deposition regarding them be taken."[26] Could one argue that such appearing spouse should be estopped to deny her assertion of foreign domicile? Perhaps the effect of the decision in *Wasserman v. Wasserman*[27] is to grant such an estoppel without denominating it as such. The reasoning appears to be as follows: Plaintiff-husband, a stranger to the foreign decree, is not estopped. However, his wife, his only witness, by her prior inconsistent claim of foreign domicile, has made herself a witness unworthy of belief. Since the presumption of validity extended foreign decrees by virtue of the full faith and credit clause cannot be met by the wife's testimony standing alone, she has, in effect, been "estopped" from denying the foreign domicile.

One of the difficulties with the application of the *Wasserman* principle arises from the fact that the state's interest in preserving marriage may well explain either result. In an effort to protect a former spouse, the state may have an interest in allowing a foreign divorce to be attacked in state courts. On the other hand, if the other spouse has remarried, as is frequently the case, it is possible to discuss estoppel in terms of the state's interest in preserving the later marriage. "Finally, a contrary determination here [allowing collateral attack] would violate the strong public policy of this State which favors the continuity of marriage."[28]

Another bizzarre question arising out of the full faith and credit controversy concerns the problem of a sister state divorce decree which has been set aside in the sister state. To which decree must New York give full faith and credit? Is it the initial decree granting the divorce or the later one declaring the first to be void? Since the second decree had been obtained on the wife's application without notice to the husband, both the trial court

23. See note 12 supra and accompanying text.
24. Supra note 13.
25. Yenoff v. Yenoff, 50 Misc. 2d 798, 271 N.Y.S.2d 844 (Sup. Ct., Erie Co. 1966) (not estopped); Parrish v. Parrish, 50 Misc. 2d 827, 271 N.Y.S.2d 792 (Sup. Ct., Nassau Co. 1966) (estopped).
26. Goodman v. Goodman, 25 App. Div. 2d 646-47, 268 N.Y.S.2d 545-46 (1st Dep't 1966).
27. Wasserman v. Wasserman, 49 Misc. 2d 577, 268 N.Y.S.2d 200 (Sup. Ct., Oneida Co. 1966).
28. Id. at 579-80, 268 N.Y.S.2d at 203.

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and the appellate division thought it appropriate to give full faith and credit only to the first decree.[29] However, the Court of Appeals disagreed and granted recognition to the second decree which declared the divorce void.[30]

The reasoning of the appellate division, on which the Court of Appeals based its reversal, pointed out that it was perfectly proper for a party winning a default judgment himself to vacate that judgment without notice to the defaulting party. While that might be perfectly sensible with respect to most default judgments, on the assumption that it is the plaintiff rather than the defendant who benefits from the judgment, divorce decrees, in fact, give both plaintiff and defendant rights: their rights to remarry. Can it be true that a husband's right to remarry based on his wife's divorce decree can be wiped out at the wife's pleasure in a proceeding of which he is given no notice?[31]

A selection of other full faith and credit curios are noted in the footnotes.[32]

CHILDREN

Child Custody.—Highlighted in this year's cases is the pitiful plight of the mistreated child. In an effort to find a way of protecting the child, consistent with leaving him in a setting in which he can obtain a role as a member of the family, courts have become quite inventive. The suggestions made by Family Court judges this year commend themselves to legislative study. For example, in *Godinez v. Russo*,[33] the court awarded custody of an illegitimate child to the putative father. In the process of articulating its finding of fact as to why the father would be a better custodian than the mother, the court suggested that the standard of custody for illegitimate children might more appropriately be the standard of Section 70 of the Domestic Relations Law which deals with the custody of legitimate children.

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29. John v. John, 22 App. Div. 2d 804, 254 N.Y.S.2d 828 (2d Dep't 1964) (mem.).

30. John v. John, 16 N.Y.2d 675, 209 N.E.2d 289, 261 N.Y.S.2d 299 (1965) (mem.).

31. Cf. Herzog v. Herzog, 46 Misc. 2d 362, 259 N.Y.S.2d 479 (Sup. Ct., Monroe Co. 1965) (defeated husband entitled to a divorce decree when successful wife refused to enter it).

32. In Sacks v. Sacks, 47 Misc. 2d 1050, 263 N.Y.S.2d 891 (Sup. Ct., N.Y. Co. 1965), it was held that N.Y. CPLR § 314(1), cannot constitutionally be applied to allow a declaration of nullity of a second marriage, following an allegedly invalid divorce, without in personam jurisdiction over both marital partners to the second marriage, although an action to declare the nullity of the Mexican divorce would lie. In Schoenbrod v. Siegler, 50 Misc. 2d 202, 270 N.Y.S.2d 19 (Sup. Ct., N.Y. Co. 1966), it was held that a husband who had obtained a Mexican divorce could obtain a decree in New York nullifying the Mexican decree by demonstrating that the divorced wife had never legally married him. Comity does not require accepting Mexican court's statement as to the validity of the marriage it purportedly dissolved. In Rocker v. Celebrezze, 358 F.2d 119 (2d Cir. 1966), H was divorced from W in Nevada; the Nevada divorce was declared invalid in New York where W was domiciled. For purposes of W's social security benefits, H, apparently domiciled in Nevada, was held not to be her husband since Nevada was entitled to prefer their own decrees over New York decrees.

33. 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Family Ct., Westch. Co. 1966).

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Specifically, Judge Slifkin suggested an abolition of the mother's presumptive right to custody in these cases.

In another case Judge Polier, in the course of a scholarly exposition of the history of New York's battered child legislation, suggested many changes in such legislation.[34] In the interim before new legislation is forthcoming some popularity seems to have been achieved for shifting to the approach which puts the burden of proof on the parent of an apparently battered child.[35] In addition to the difficulty of obtaining proof of neglect, is the difficulty of enforcing better care for the child in the future. One answer may be to find a new custodian. In *Godinez v. Russo*,[36] the court thought the putative father might be a better custodian. In *Matter of Frances*,[37] Judge Polier thought the maternal grandmother would do a better job and ordered custody changed to her.

Even when the decision is made to leave the custody of the child undisturbed some method of providing access to the child by the court, should it be required, seems needed. Two approaches to that end were suggested this year. In *State v. Dinin*,[38] a court upheld the family court's right, under Section 251 of the New York Family Court Act, to conduct a medical examination of a neglected child, who was eight years old, when it appeared necessary in order to assure the Welfare Department's surveillance of the treatment the child was receiving. In *Anonymous v. Anonymous*,[39] the court granted visitation rights to a paternal grandmother who had apparently appointed herself a watchdog of the grandchildren's interest, cautioning the grandmother not to interfere in any way with the relationship between the children and their mother.

On the other end of the child custody spectrum lie the unfortunates whose custody has become the subject of a judicial fight between their parents. Unguided by the sterile provision that the court's decree award custody "as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child,"[40] courts continue to grope for an easier way to make the difficult custody decision. This year, as in the past, trial courts had to be reminded to obtain all the professional help possible in making the decision and not to foreclose a hearing to the interested parties.[41] One appellate court suggested:

> We are also of the opinion that the court should consider utilizing the service of some appropriate person such as a family counsellor whose report might lead to

34. Matter of Frances, 49 Misc. 2d 372, 267 N.Y.S.2d 566 (Family Ct., N.Y. Co. 1966).
35. Matter of Young, 50 Misc. 2d 271, 270 N.Y.S.2d 250 (Family Ct., Westch. Co. 1966); Matter of S, 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Family Ct., Kings Co. 1965).
36. Supra note 33.
37. Supra note 34.
38. 49 Misc. 2d 585, 267 N.Y.S.2d 953 (Sup. Ct., Westch. Co. 1966).
39. 50 Misc. 2d 43, 269 N.Y.S.2d 500 (Family Ct., Queens Co. 1966).
40. N.Y. Dom. Rel. Law § 240.
41. Siclari v. Siclari, 25 App. Div. 2d 677, 268 N.Y.S.2d 552 (2d Dep't 1966) (mem.).

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> the introduction of common-law evidence and appropriate questions by the court —in the event the parties refuse to stipulate that such report be considered as one of the bases for decision. . . . This procedure seems required by the patent disadvantages of attempting to determine from the simple testimonial record before the Referee [questions concerning the interaction of the parties].[42]

One of the important reasons for disallowing custody determinations based on off-the-record information, received without the parties' consent,[43] has been the court's concern that no relevant information be overlooked. Another interest, not so often articulated, is the concern for due process in the litigation itself. Surely, however, there must be a limit to inquiry even if the goal of the court is to make an appropriate decision concerning child custody. A case this year suggests a need for greater limitation. In *Johnson v. Johnson*[44] the court admitted testimony of the husband concerning his wife's adultery. Admitting that the testimony would be incompetent with respect to the divorce,[45] the court held it admissible nonetheless on the question of custody. Furthermore, the court permitted the wife's physician, at the husband's request, to testify and found his disclosure to fall within the exceptions to the physician-patient privilege. More disturbing was the dictum:

> In any event, we would not reverse even if the testimony concerning defendant's physical condition were inadmissible. That testimony was received on the question of custody of the children and was given little weight by the trial court in reaching the conclusion that custody should be given to the husband.[46]

What of the child for whom no one is willing to assume a parental role? According to Judge Polier in *Matter of Bonez*,[47] quite a few of them remain in the permanent limbo of foster care by a succession of foster families "and become just one more agency child without a family."[48] Disapproving continued foster placement in this case, Judge Polier criticized the adoptive placement program of the Department of Welfare:

> The conclusion seems inescapable that the Department of Welfare, which has largely delegated its responsibility for the care of dependent and neglected children to voluntary agencies, is providing only infinitesimal adoptive services for Protestant Negro children.[49]

She then ordered the Probation Service to make referrals for adoptive placements directly to all adoption agencies in the area and to report back to the court.

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42. Id. at 677, 268 N.Y.S.2d at 553. See also Matter of Dulay, 24 App. Div. 2d 208, 265 N.Y.S.2d 247 (4th Dep't 1965): "[The] errors require a reversal and a new hearing at which the court should hear fully all persons who can assist him in arriving at a proper determination as to what is best for the welfare of this infant . . . ." Id. at 211, 265 N.Y.S.2d at 250.

43. See generally Alexander, Family Law, 1962 Survey of N.Y. Law, 14 Syracuse L. Rev. 333, 342.

44. 25 App. Div. 2d 672, 268 N.Y.S.2d 403 (2d Dep't 1966).

45. N.Y. CPLR § 4502(a).

46. Johnson v. Johnson, supra note 44, at 673, 268 N.Y.S.2d at 406.

47. 48 Misc. 2d 900, 266 N.Y.S.2d 756 (Family Ct., N.Y. Co. 1966).

48. Id. at 904, 266 N.Y.S.2d at 760.

49. Id. at 906, 266 N.Y.S.2d at 761.

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A number of other shocking criticisms were aired in Judge Polier's decision. When the court requested help with adoptive placement of the children from voluntary agencies and the Department of Welfare, "the Department notified the court that it did not accept Catholic or Jewish families, and that its direct adoption services were 'set up to implement private voluntary agencies to assist with Protestant Negro children.' "[50] Furthermore, the court noted that the Department of Welfare required that a specific home be available for a child before a surrender of the child would be accepted by the Department and that the Department has now imposed an additional condition to accepting surrender: The court must commit the child to the Department of Welfare, thus surrendering jurisdiction over the child to the Department. Judge Polier concluded that such restrictive requirements were inconsistent with the requirements of Section 398(6)(f) of the Social Welfare Law, where the only consideration for the acceptance of surrender by the Department is the welfare of the child.

Adoption.—When the Family Court Act was passed, section 115-v purported to give the family court exclusive original jurisdiction over adoption proceedings, though section 641 gave the surrogate's court concurrent jurisdiction until September 1, 1964. By 1964 enough resistance to exclusive jurisdiction in the family court had been mounted to obtain an amendment to section 115 striking from it the exclusive original jurisdiction for adoption proceedings[51] and postponing the date of exclusive jurisdiction until September of 1965. In 1965 the date was advanced to 1966,[52] and in 1966 to to 1967.[53] No clear end to the temporizing is in sight. Since the exclusive jurisdiction of the family court is based on a state constitutional provision,[54] some question as to the constitutionality of the continued concurrent jurisdiction has been raised. This year provided a test case—*Adoption of Ekstrom.*[55] Surrogate McCall held that his court had adoption jurisdiction and that the statutory provision did not violate the New York State Constitution.

When the legislature last amended Section 117 of the Domestic Relations Law it provided that, on an order of adoption, the natural parents of the foster child shall be relieved of parental duties and divested of rights in the child's property. The legislature also provided that the foster child shall not inherit from or through his natural parents. So strongly did the legislature feel about the termination of the former parental relationship that they made the provision applicable to wills and inter vivos instruments then in effect so long as they were still subject to the grantor's power to

50. Id. at 902-03, 266 N.Y.S.2d at 758.
51. N.Y. Sess. Laws 1964, ch. 383, § 2.
52. N.Y. Sess. Laws 1965, ch. 339, § 1.
53. N.Y. Family Ct. Act § 641 (McKinney Supp. 1966).
54. N.Y. Const. art. VI, § 13(b). "The family court shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such family court in the manner provided by law: . . . (3) The adoption of persons . . . ."
55. 49 Misc. 2d 224, 266 N.Y.S.2d 1008 (Surr. Ct., Albany Co. 1966).

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revoke or amend. This year they apparently decided that they had gone too far. The new provision, section 117(2), only curtails intestate descent and distribution between the child and his natural parents and provides furthermore that, with respect to wills and inter vivos instruments, the provisions shall

> not affect the right of any child to distribution of property under the will of his natural parents or their natural or adopted kindred whether such natural parent or kindred shall have died heretofore or shall die hereafter or under any inter vivos instrument heretofore or hereafter executed by such natural parent or his or her kindred.[56]

For instruments that became final or irrevocable between March 1, 1964 and March 8, 1966 (the effective date of this statute) the old law provided for inheritance by the adopted child and the new law purports to provide against such inheritance. One would think that a spate of litigation would follow.

Paternity.—A paternity question much in doubt with the passage of the Family Court Act, whether a married woman might initiate a paternity action against a putative father not her husband,[57] appears now to be rather well settled. The answer is a qualified yes. While *Matter of Estate of Findlay*,[58] is still conceived to be a correct statement concerning the presumption of legitimacy for a child born to a married mother, Judge Cardozo's additional comment in *Findlay*,[59] that legitimacy will be presumed even though the wife harbored an adulterer seems no longer correct. Now, apparently, a husband who has had intercourse with his wife almost to the time of conception and even one who has continued to cohabit without intercourse beyond that time may be found not to be the father in favor of a finding against a third party.[60] In addition a father who has had intercourse during the time of conception may be excluded if he can offer blood tests precluding his paternity.[61]

The liberality with which the presumption of paternity has been ignored seems premised on the reasoning of *Commissioner of Public Welfare v. Koehler*,[62] where it was held that an adjudication of paternity against a putative father is not equivalent to a finding of illegitimacy of the child. Indeed, if it becomes clear in a paternity proceeding that the holding of the court will affect the legitimacy of the child, the court will view the matter entirely differently. The child will then become a necessary party entitled to representation in the proceedings.[63] Presumably, the presumption of legitimacy would be applied much more stringently.

56. N.Y. Dom. Rel. Law § 117(2) (McKinney Supp. 1966).
57. See Alexander, Family Law, 1964 Survey of New York Law, 16 Syracuse L. Rev. 402, 414.
58. 253 N.Y. 1, 170 N.E. 471 (1930).
59. Id. at 8, 170 N.E. at 473.
60. Anonymous v. Anonymous, 25 App. Div. 2d 350, 269 N.Y.S.2d 653 (2d Dep't 1966).
61. Oliver v. England, 48 Misc. 2d 335, 264 N.Y.S.2d 999 (Family Ct., Monroe Co. 1965).
62. 284 N.Y. 260, 30 N.E.2d 587 (1940).
63. Roe v. Roe, 49 Misc. 2d 1070, 269 N.Y.S.2d 40 (Sup. Ct., N.Y. Co. 1966).

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While the dichotomy between proceedings merely seeking support from the putative father and those which would have the effect of determining the illegitimacy of the child in a more permanent fashion may make good sense to lawyers and others sophisticated in law, one must wonder whether, in the lay community, an order of filiation is not as clearly a mark of illegitimacy as that afforded by any other legal determination. Other questions also turn on the ability to separate the determination of child support from that of filiation. For example, a court approved support agreement for an illegitimate child, while fully performed "bars other remedies of the mother or child for the support or education of the child."[64] Does that mean that the mother, having entered an agreement with a person who has not admitted paternity but who has agreed to child support, cannot sue for an order of filiation? Because support and paternity are two different questions, the answer appears to be no; she may still sue to have paternity determined.[65] Of course her suit must be timely; the agreement does not extend the time allowed.[66]

Paternity is another area in which bizarre cases are no novelty.[67] This year added another one to the list. In *Commissioner of Welfare v. Wendtland*,[68] the respondent was held to be the father of a child on the basis of a single act of sexual intercourse with the mother. The order of filiation was issued, despite the fact that respondent testified at trial that he had had a vasectomy and despite the introduction of testimony by two physicians that they concluded he was sterile on the basis of the absence of spermatozoa in his semen. A third physician had refused to testify to sterility without a surgical examination. After an adverse finding, respondent submitted to the third doctor's surgery and was able to obtain an affidavit from him after the operation which stated with reasonable certainty that the respondent was sterile at the time of conception. On that basis, respondent moved in the family court to reopen the proceedings and to vacate the order of filiation. Family court denied the motion on the grounds that respondent had already had a trial. The appellate division reversed and remanded for a new trial.

The law delights in absolutes. Things are possible or impossible. Within the range of likely and next to impossible, the matter is not one of law but of fact and is decided by a jury. Probabilities may help jurors but they do not, as a general matter, make rules of law. When dealing with things as difficult to demonstrate as the responsibility for conception, that may be too bad. For example, if 93.6 per cent of full term babies have a period of gestation running a mean period of 282 days and falling within a range

64. N.Y. Family Ct. Act § 516(c).
65. ABC v. XYZ, 50 Misc. 2d 792, 271 N.Y.S.2d 781 (Family Ct., N.Y. Co. 1966) (dictum).
66. Ibid.
67. See, e.g., Commissioner of Welfare v. Simon, 20 App. Div. 2d 865, 248 N.Y.S.2d 611 (1st Dep't 1964). See also Alexander, Family Law, 1964 Survey of N.Y. Law, supra note 57, at 412-13.
68. 25 App. Div. 2d 640, 268 N.Y.S.2d 547 (1st Dep't 1966) (per curiam).

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of 263 and 299 days, should that not affect a disputed paternity issue in which the mother urges the court to accept her story premised on a full term of 236 days? The first department thought that such evidence is not conclusive of nonpaternity. Affirming the trier of fact's resolution of the factual dispute, the appellate court, by a three to two decision, found the respondent to be the father.[69]

In any event, it would appear that one cannot bring a paternity proceeding in New York against an itinerant putative father. Whatever may be said of the act leading to pregnancy, it is not the kind of tortious act to which New York's long-arm statute[70] applies. Therefore, in personam jurisdiction of a putative father, who has left the state, will not be available, under the long-arm statute in a New York paternity proceeding.[71]

MISCELLANEA

In *Anonymous v. Weiner*,[72] an action under Article 78 of the New York Civil Practice Law and Rules [hereinafter referred to as CPLR], was brought by a transsexual who, as a result of conversive surgery, has become outwardly female though remaining genetically male. Petitioner sought an order directing the New York City Department of Health to change the sex indicated on petitioner's birth certificate from male to female to accord with petitioner's assumed role.

Since the decision involved in this case had apparently been a difficult one for the Department of Health, the Department had sought guidance from the Board of Health which in turn had requested assistance from the New York Academy of Medicine to study the problems involved. The academy convened a group of specialists including gynecologists, endocrinologists, cytogenetics, psychiatrists and a lawyer. After deliberation, and despite information that ten states had permitted birth certificate changes of this sort by legislative action, the committee recommended that changes in birth certificates for transsexuals not be permitted. The Board of Health adopted the committee's resolution and the Department of Health applied it to petitioner.

Seeing the issue before it as limited to an examination of respondent's act to determine if it was arbitrary, capricious or otherwise illegal, the court felt bound to affirm its determination. It would, presumably, be difficult to label a decision so carefully made on such eminent advice as either arbitrary or capricious. One may ask, however, what interest is being protected? Surely it is not the transsexual's. As the court notes,[73] transsexuals have been

69. Kiamos v. Chiladakis, 25 App. Div. 2d 647, 268 N.Y.S.2d 539 (1st Dep't 1966) (mem.).
70. N.Y. CPLR § 302.
71. Anonymous v. Anonymous, 49 Misc. 2d 675, 268 N.Y.S.2d 710 (Family Ct., Queens Co. 1966).
72. 50 Misc. 2d 380, 270 N.Y.S.2d 319 (Sup. Ct., N.Y. Co. 1966).
73. Id. at 382, 270 N.Y.S.2d at 321.

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described by an eminent authority as among the most miserable people he has met. What is the state's interest? What is the interest of a prospective employer? Whatever the answer to these questions, are these interests sufficiently weighty to explain the decision in this petitioner's case?

FAMILY ECONOMICS

Support.—The standard of support imposed on the husband living separately from his wife is left in large part to the discretion of the trial court. Judge Meyer has helpfully explored the exercise of that discretion.[74] Few of the hard and fast former rules governing the grant or denial of alimony have been retained in the present relevant section, New York Domestic Relations Law Section 236. For example, in *Baker v. Baker*,[75] the court ruled that absent extraordinary circumstances temporary alimony could not be awarded during a period in which the spouses shared the same residence. The statute, probably with an eye to changing the result in *Baker*, provides that an order awarding temporary alimony "may be made notwithstanding that the parties continued to reside in the same abode . . . ."[76] This year the Appellate Division, First Department, which had refused to award temporary alimony without physical separation despite the contrary decisions, *Schultz v. Schultz*[77] and *Lowenfish v. Lowenfish*,[78] in other departments, had an opportunity to deal with the question again under the present law. Apparently it remained unconvinced. Denying temporary alimony, the court in a per curiam decision wrote:

> The effect of the statute is certainly that a complaint is no longer dismissable under the rule in the Baker case; but the effect is not to overrule all the factors mentioned in the Baker case as influential in determining the court's discretion. As was said in that case, it is not every discord or even substantial wrong committed by a spouse which inevitably results in judicial intervention in the marriage relationship. Whether or not the parties continue living together, particularly where the wife has substantial resources of her own, is a significant datum in determining if the material discord has become so intolerable as to warrant or necessitate such intervention. Moreover, Domestic Relations Law, § 236, rather than denying, expressly provides for the exercise of the discretionary power of the court.[79]

It would appear that the first department is still prepared to exercise its discretion in favor of its predeliction in *Baker v. Baker*.[80] To those who agree with the stated goal of the appellate division, to avoid judicial intervention until marital discord becomes intolerable and, presumably, to leave to the parties the effecting of relationships before that time, the opinion may seem desirable. Others will no doubt feel that the court is merely providing

74. Meyer, Judicial Discretion and Matrimonial Actions, 38 N.Y.S.B.J. 119 (1966).
75. 16 App. Div. 2d 409, 288 N.Y.S.2d 470 (1st Dep't 1962).
76. N.Y. Dom. Rel. Law § 236.
77. 1 App. Div. 2d 930, 150 N.Y.S.2d 568 (4th Dep't 1956).
78. 278 App. Div. 716, 103 N.Y.S.2d 357 (2d Dep't 1951).
79. Ross v. Ross, 24 App. Div. 2d 125, 126-27, 264 N.Y.S.2d 485, 487 (1st Dep't 1965) (per curiam).
80. Supra note 75.

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one more impediment in the way of possible reconciliation by requiring the parties as a condition to obtaining judicial relief to live apart and thus perhaps reduce the possibility of resolving their conflicts.

Another of the rules swept away by Section 236 of the Domestic Relations Law was the one which required that the wife be a successful litigant in one of the matrimonial actions in order to be entitled to support. Under the new law she may be entitled to alimony despite the fact she fails to win in her matrimonial action. Thus the supreme court could grant alimony where the parties lived apart by agreement, or as a result of a dispute not grave enough to provide either party with grounds for separation.

Section 236 would appear to prohibit a wife's recovery of alimony only in the event that her improper behavior would allow a successful action to be brought against her. Even prior to section 236 it was clear that a wife could live separately from her husband where she had grounds for a decree of separation, and that as an incident to that decree, alimony would be awarded.[81]

Absent the wife's fault, a husband who fails adequately to provide her with support, though they live apart, is guilty of nonsupport and subject to an award of alimony against him.[82] The first department had an opportunity to consider such a case in *Brownstein v. Brownstein*.[83] Though denying a divorce to the wife, the court awarded alimony at trial. On review the appellate division modified and affirmed. After a review of the basic provisions of section 236, demonstrating the extent of discretion allowed courts in fixing alimony, the court concluded:

> The accepted marital relations contemplates the proper and continued cohabitation of the parties as husband and wife. Such cohabitation is vital to proper family life which is the backbone of our society. When parties marry, the state has an abiding interest in the preservation of a normal family relationship between them and with their offspring. The separation of spouses is not to be encouraged by an award of separate maintenance to the wife where, voluntarily and without justification she maintains a separate home. Public policy required that the discretion of the court to award separate maintenance to a wife be exercised in light of these considerations.[84]

Even so, the appellate division found the 3,500 dollars annual alimony award not excessive and "properly supported" although it reduced several items that the trial court had ordered reimbursed.

A more difficult question was raised in *Steinberg v. Steinberg*.[85] While the judges of the second department had no doubt of the obligation of a

81. People ex rel. Comm'r of Pub. Charities & Correction v. Cullen, 153 N.Y. 629, 47 N.E. 894 (1897).

82. St. Germain v. St. Germain, 23 App. Div. 2d 763, 258 N.Y.S.2d 594 (2d Dep't 1965), aff'd, 16 N.Y.2d 764, 209 N.E.2d 813, 262 N.Y.S.2d 492 (1965) (mem.). It should be noted that the Court of Appeals while affirming without opinion did note a caveat. "We do not reach the interpretation or applicability of section 236 of the Domestic Relations Law." Id. at 765, 209 N.E.2d at 814, 262 N.Y.S.2d at 492.

83. 25 App. Div. 2d 205, 268 N.Y.S.2d 115 (1st Dep't 1966).

84. Id. at 209, 268 N.Y.S.2d at 121.

85. 25 App. Div. 2d 432, 265 N.Y.S.2d 1011 (2d Dep't 1963) (mem.).

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husband to support his separately residing wife, they were less unanimous in deciding whether a family court acting under Section 412 of the Family Court Act had been relieved by Section 236 of the Domestic Relations Law of the strictures of older law prohibiting support to a separately living wife unable to succeed in a matrimonial action. A majority of the court held that the family court had such authority and affirmed the decree. Two of the five justices dissented, noting that section 236 specifically refers to annulments, declarations of nullity, separation and divorces, none of which properly lie in the family court.

The same broad discretionary power which is accorded the court in initially setting alimony is applicable in redetermination of the level of alimony as well. Thus in *Covert v. Covert*,[86] the court reduced the alimony award of a divorce decree from one hundred dollars to forty dollars a week primarily because of the additional expense that the husband faced as a result of his remarriage and the birth of three children. Such a result illustrates the change made by the granting of broad discretion. Under prior law, the additional expenses caused by the husband's remarriage could not be asserted as a change of circumstances sufficient to reduce alimony.[87]

Whatever the authors of the lament that "it is always the woman who pays" had in mind, their statement has certainly not been true of post marital support in this state. So entrenched is the thought that the ex-husband is the only party ever obligated to make payments that the statutory sections dealing with post-marital finances occasionally slip into the error of identifying the recipient of payments as "wife." One such section is Domestic Relations Law Section 233 which relates to sequestration against out of state parties. While the section does not expressly state that husbands may not benefit by its application, and does expressly provide the remedy for child support, the repeated mentioning of wives and the total absence of any reference to husbands appears to limit the use of the section to the distaff side. Nonetheless, the third department sequestered a wife's interest in a tenancy by the entirety for the benefit of her children residing with the husband.[88] If the statute was unclear, the court suggested, that matter should be called to the attention of the legislature. It seems strange that at so late a time there would be doubt about the obligation of women, as well as men, to help pay the enormous cost of marital reorganization.

In the usual case of course, it is the husband who pays. In cases where the wife is in doubt as to his financial condition, discovery appears to be an increasingly viable device.[89]

86. 48 Misc. 2d 386, 264 N.Y.S.2d 820 (Sup. Ct., Rockland Co. 1965).
87. Levy v. Levy, 149 App. Div. 561, 133 N.Y.S. 1084 (1st Dep't 1912).
88. Haslett v. Haslett, 25 App. Div. 2d 526, 268 N.Y.S.2d 809 (3rd Dep't 1966).
89. See Kasden v. Kasden, 49 Misc. 2d 743, 268 N.Y.S.2d 571 (Sup. Ct., Suffolk Co. 1966).

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Broad discretion has always marked the award of alimony for the support of children. Thus, the improved financial condition of the husband may be a sufficient basis for an upward revision of alimony payments for child support, even though the children's need has not changed.[90]

The support of a former wife ceases on her remarriage.[91] What if that marriage is void? Conceptually one might argue that a declaration of nullity for the remarriage would lead to a revival of the obligation which terminated because of the second marriage.[92] Such literalism is unwarranted, however, since it is quite clear that, whatever its theory, annulment does not destroy all vestiges of the intervening marriage. For example, the "marriage" is sufficient consideration for a gift in contemplation of marriage, sufficient to make remarriage of one of the parties during its continuance bigamy, and sufficient by statute to legitimate any children born of the union, according to the court in *Gaines v. Jacobsen*.[93] Furthermore, the declaration of nullity does not bar charging the "husband" of the second marriage with the duty to support his "wife." Thus, in terms of the obligation to support the woman in question, an annulment can be treated similarly to a divorce since the financial obligations are merely shifted to the latest marital partner.[94]

The New York Court of Appeals in *Gaines* accordingly overruled the prior case of *Sleicher v. Sleicher*,[95] and relegated the wife to support by her second marital partner. This year, a more difficult question arose. Would the *Gaines* rule be applied if the wife, because of the applicability of foreign law, was not entitled to support from the person with whom she entered into the void second marriage? In *Denberg v. Frischman*,[96] the court ruled that it made no difference. Even though the wife may consequently find herself without support from either of the men she married, the first husband was relieved of his obligation of support.

If one purpose of the termination of support obligations on remarriage is to allow the hubsand of the prior marriage the opportunity of remaking his life financially, and of possibly establishing a new family, the *Denberg* results would appear to facilitate reaching these goals.

> [I]f the Gaines rule were not applicable, many years may pass. First husband may have remarried, as did the one in the Gaines case, and as did the plaintiff husband in this case. New families may have been established on the basis of the seeming duty to support but one family. Innocents, in the way of subsequent wives of such

90. See Schwartz v. Schwartz, 48 Misc. 2d 859, 265 N.Y.S.2d 820 (Family Ct., N.Y. Co. 1965).
91. N.Y. Dom. Rel. Law § 248.
92. Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501 (1929).
93. 308 N.Y. 218, 225, 124 N.E.2d 290, 294 (1954).
94. But see Newburger v. Newburger, 228 N.Y.S.2d 323 (Sup. Ct., Westch. Co. 1961), aff'd, 17 App. Div. 2d 323, 233 N.Y.S.2d 1020 (1962), discussed in Alexander, Family Law, 1962 Survey of New York Law, supra note 42, at 339 n.49 and accompanying text (suggesting a different alimony standard for annulment cases).
95. Supra note 92.
96. 24 App. Div. 2d 100, 264 N.Y.S.2d 114 (1st Dep't 1965).

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> husbands, and the children of such unions, may suffer, because the first wives may have made foolish errors in their remarriages. At the same time, plain language with the plainest of manifested intentions would be distorted to effect an assumed substantial justice based on subsequent events not necessarily within the control or contemplation of the immediate parties to the agreement. Chaos and trouble enough already exist in this troubled field without adding new chaos and new trouble.[97]

Contemplation of Divorce.—It was predictable that *Viles v. Viles*,[98] with its holding that an agreement to obtain a divorce invalidated a separation agreement between the parties, although the separation agreement made no express mention of it, would lead to extensive litigation. It has. Since the decision appears basically unsound,[99] it is fortunate that the courts have, on the whole, found ways of avoiding its holding.[100]

The new divorce law appears to put the *Viles* problem to rest.[101] Section 5-311 of the New York General Obligations Law as amended reads as follows:

> An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of marriage or provides for the procurement of grounds for divorce.

So urgent was the need for this revision after *Viles* that it, with one exception, was the only section of the bill to become law on passage, rather than on September 1, 1967.

Drafting Agreements.—This year again demonstrated the importance to the parties of thinking through the conditions which will cause the termination of payments under separation agreements, before such agreements are signed. If a husband feels that his wife's adultery ought to terminate his obligation to support her, he should not sign a separation agreement that fails so to provide. Otherwise his contract will be enforceable irrespective of his wife's conduct.[102] If a separation agreement ter-

97. Id. at 104, 264 N.Y.S.2d at 118.

98. 36 Misc. 2d 731, 233 N.Y.S.2d 112 (Sup. Ct., N.Y. Co. 1962), aff'd, 20 App. Div. 2d 626, 245 N.Y.S.2d 981 (1st Dep't 1963), aff'd, 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964).

99. See Alexander, Family Law, 1963 Survey of New York Law, 15 Syracuse L. Rev. 369, 373 n.32 and accompanying text.

100. Friedman v. Friedman, 25 App. Div. 2d 468, 265 N.Y.S.2d 991 (3d Dep't 1966) (incorporation in foreign decree makes separation agreement immune from collateral attack); Fitzgerald v. Morgenstern, 48 Misc. 2d 575, 265 N.Y.S.2d 467 (N.Y.C. Civ. Ct. 1965); Laye v. Shepard, 48 Misc. 2d 478, 265 N.Y.S.2d 142 (Sup. Ct., N.Y. Co. 1965), aff'd, 25 App. Div. 2d 498, 267 N.Y.S.2d 477 (1st Dep't 1966) (husband's remarriage estops his contesting legality of separation agreement); McLean v. Friar, 47 Misc. 2d 422, 262 N.Y.S.2d 721 (N.Y.C. Civ. Ct. 1965) (appearance by husband bars his contesting validating of separation agreement when agreement incorporated in decree); Werber v. Werber, 47 Misc. 2d 399, 262 N.Y.S.2d 679 (N.Y.C. Civ. Ct. 1965) (incorporation of separation agreement into Mexican decree estops challenge by appearing party). But see Gunter v. Gunter, 47 Misc. 2d 861, 263 N.Y.S.2d 219 (Sup. Ct., N.Y. Co. 1965) (staying arbitration of a separation agreement which had been incorporated in a Mexican decree because the validity of the separation agreement could not summarily be determind on affidavits).

101. N.Y. Gen. Ob. Law § 5-311 (McKinney Supp. 1966).

102. DiCicco v. DiCicco, 50 Misc. 2d 347, 270 N.Y.S.2d 148 (Sup. Ct., Kings Co. 1966).

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minates child support payments only on majority, then a son's enlistment or induction into the military service does not terminate the husband's obligation to pay his wife the agreed-on sum even though the son resides with the armed forces.[103]

Another note of caution with respect to drafting separation agreements is contained in the affirmance of *Rosenblatt v. Birnbaum*.[104] While the court held the former wife and her present husband accountable for child support payments made by the former husband, on the contractual basis of accord and satisfaction, it refused to rule on the question of whether a wife who diverts payments made under a separation agreement for child support is accountable in equity as a trustee for the moneys paid to her.[105] As previously noted,[106] it would seem wise to make a former wife an express trustee of child support payments made under a separation agreement.

The open question of the wife's status, with respect to payments she receives under child support provisions of a separation agreement, was answered by a court in Westchester County. In *Landau v. Ostrowe*,[107] the court held that the wife was not a trustee, basing its logic on the dissenting opinion in *Rosenblatt*, and adding some practical considerations of its own:

> A rule which would impose the duties of a trustee upon a wife under these circumstances seems to ignore the realities of family day-to-day living. It would mean that a wife, who has just experienced the trauma of a broken marriage, and who is suddenly faced with the responsibility and duty of bringing up the children of the marriage alone, must keep detailed records of every expenditure, must keep the funds she receives from her husband separate from any other funds, and must be prepared, upon the attainment by the children of their majority, to institute final judicial settlement proceedings or to obtain her discharge by recording instruments. Presumably, she would be entitled to commissions at the expense of her own children. The remedy proposed for the evil of the occasionally dishonest mother is too drastic.[108]

Of course, creating a trust to support children only resolves the question of the disposition of the money. The amount to be paid under changing circumstances may still lead to disputes which, absent an agreement providing for them, may lead to cantankerous litigation. An important decision this year, *Schneider v. Schneider*,[109] suggests an alternative to litigation—arbitration. The case is a useful companion to *Sheets v. Sheets*,[110] which, in dictum, suggested that arbitration might appropriately be provided for child custody questions. *Schneider* was decided despite the provisions of CPLR Section 1209, which prohibit the arbitration of a controversy involving an infant or judicially declared incompetent without prior court

103. Craig v. Craig, 24 App. Div. 2d 588, 262 N.Y.S.2d 398 (2d Dep't 1965).
104. 16 N.Y.2d 212, 212 N.E.2d 37, 264 N.Y.S.2d 521 (1965).
105. For a discussion of the Rosenblatt case see Alexander, Family Law, 1964 Survey of New York Law, 16 Syracuse L. Rev. 402, 411 n.63 and accompanying text.
106. Ibid.
107. 50 Misc. 2d 474, 270 N.Y.S.2d 722 (Sup. Ct., Westch. Co. 1966).
108. Id. at 477, 270 N.Y.S.2d at 726.
109. 17 N.Y.2d 123, 216 N.E.2d 318, 269 N.Y.S.2d 107 (1966).
110. 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1st Dep't 1964).

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approval. The decision can be justified on the formal basis relied on by the court: Children are not contracting parties in separation agreements and, therefore, are not involved in the controversy. It also appears to make good sense to provide the parties the easier route of arbitration in the resolution of what may well be a continuing problem.

Although children are not contracting parties to separation agreements, the Court of Appeals ruled that they might enforce provisions of such agreements as third party beneficiaries despite defenses available against a custodial mother.[111]

Measuring Alimony.—A curious feature of the law relating to alimony is its stark deviation from the norm in determining damages. We insist that a personal injury judgment must be reduced to a single figure large enough to take care of future expenses, and do this in the face of the recognition of the trier's inability to know such things as the actual life span of the victim, his future medical progress, his future employability, his future consequential personality changes and a whole host of other variables.[112] When it comes to the future support of a divorced wife, however, just the opposite is true. Courts insist on making judgments on the basis of existing facts, and holding the husband to periodic payments which are almost always subject to alteration in the event that variables make the amount either excessive or inadequate. One result of such policy is to open the courts to post-marital litigation without any determinable finite end. The parties, whose animosities toward each other led to their separation, are given an opportunity to vent their spleen as the occasion suggests itself by hauling their former spouse back into court. The result is especially curious when the parties have contractually agreed to avoid such future combat. Parties are still free, apparently, to determine the level of future support by a separation agreement, and, if the level does not threaten to make a public charge out of the wife at some future time, it is generally held that the existence of the agreement will prevent further litigation as to the alimony required for the spouse's support.[113] In the event that the wife is in danger of becoming a public charge, the Court of Appeals made clear last year that a separation agreement would not bar future support litigation.[114] In retaining the right to re-examine the level of support, should the wife become a public charge, courts have found their authority to protect the public interest sufficient reason to seek support for the wife from other than public funds. Whatever one's views on the appropriateness of such indemnification, the policy is one mandated by the law of the state.[115]

111. Forman v. Forman, 17 N.Y.2d 274, 217 N.E.2d 645, 270 N.Y.S.2d 586 (1966).
112. See generally Gregory & Kalven, Torts, 429-41 (1959).
113. Galusha v. Galusha, 116 N.Y. 635, 22 N.E. 1114 (1889).
114. McMains v. McMains, 15 N.Y.2d 283, 206 N.E.2d 185, 258 N.Y.S.2d 93 (1965). For further discussion see Alexander, Family Law, 1965 Survey of New York Law, 17 Syracuse L. Rev. 318, 328.
115. N.Y. Family Ct. Act § 415; N.Y. Gen. Ob. Law § 5-311; N.Y. Soc. Wel. Law § 101.

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What policy is served by refusing to honor a commitment between the parties barring future relitigation when the wife is in no danger of becoming a public charge? In *Spector v. Spector*,[116] the parties had previously agreed to a lump sum alimony settlement. The husband was to pay over 100,000 dollars in alimony and attorney's fees, in return for which the wife agreed not to make any future application for alimony or counsel fees. The agreement was made after a trial court had granted an annulment and awarded 3,600 dollars a year alimony. After the agreement was signed, the trial justice ruled that it was fair and equitable, modified the alimony decree by striking the provision for annual alimony, and by order barred the wife from making any application to any court for further support payments. None of these facts dissuaded the Onondaga County Supreme Court, on the wife's petition, from ordering the husband to provide future support when much of the money had run out. The court apparently realized that it was establishing a right on the wife's part to continuous periodic support, even though not necessary to keep her from welfare rolls, since it said: " 'Justice' would not be satisfied by keeping a wife at mere subsistence and denying relief just because she had not yet become a public charge."[117] It is submitted that once the court is satisfied that both parties to a post-marital financial settlement have fairly treated each other, and that the state's interest in avoiding the support of the wife through welfare payments has been satisfied, there is no legitimate interest to be protected which is strong enough to account for this manner of intervention in the private agreement of the parties.

Two cases illustrated serious difficulties with respect to obtaining an order for counsel fees. In *Dannheim v. Babbitt*[118] attorney's fees were denied to a mother seeking support under the Uniform Support of Dependents Law.[119] The rationale suggested was not only the dearth of express authority for counsel fees in such cases, but the express provision of Section 39 of the Domestic Relations Law affording plaintiffs the gratuitous assistance of public counsel and requiring public counsel to undertake representation. In *McKenna v. McKenna*[120] attorney's fees were denied, under Domestic Relations Law Section 237, to an attorney for services rendered in negotiating a separation agreement. The decision apparently turned on a strict reading of section 237(a). The court recognized the possibility of an alternative interpretation broad enough to allow attorney's fees in the case, but chose to be guided by cases decided under the prior law. The *McKenna* result appears especially unfortunate because it is quite clear that the

116. 49 Misc. 2d 591, 267 N.Y.S.2d 959 (Sup. Ct., Onondaga Co. 1965), aff'd, 24 App. Div. 2d 1082, 265 N.Y.S.2d 632 (4th Dep't 1965).
117. Id. at 594, 267 N.Y.S.2d at 962.
118. 48 Misc. 2d 310, 264 N.Y.S.2d 639 (Family Ct., Allegheny Co. 1965).
119. N.Y. Dom. Rel. Law art. 3-A.
120. 49 Misc. 2d 563, 267 N.Y.S.2d 984 (Sup. Ct., Westch. Co. 1966).

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attorney fees in this case would have been included in the decree had the attorney spent the same amount of time preparing the issue of alimony for litigation. If there is merit to the policy allowing parties privately to settle their financial affairs and barring relitigation of such settlements, decisions such as *McKenna* would appear to thwart the policy.

Enforcing Support Obligations.—It is one thing to obtain an order for support against the husband. It is another thing to collect it. Wives and children are, in law, somewhat preferred creditors. Apparently they are not preferred enough to allow a contractual provision, that outstanding alimony installments shall be a general lien against the estate of the deceased husband, to give them priority over a statutory tax lien.[121] Where the other contestant is a less preferred general creditor, however, the result may be different. The problem of payroll deductions presents an interesting example. In *Beahm v. Beahm*,[122] where four separate cases were joined, Judge Midonick dealt with a problem which he described as "typical of a welter of others daily being heard and heard again in the Family Court of the State of New York."[123] What effect does a payroll deduction order made under Section 49-b of the Personal Property Law have on an income execution under CPLR Section 5231(e)? In a very articulate opinion, Judge Midonick concluded that a later payroll deduction for support of a wife or children may either be granted priority by making it the exclusive authorized deduction from wages, or may be given concurrent effect with extant income executions. Each case must apparently be decided on its own merits. Indeed, he decided two of the cases differently than the remaining two. While the reader may not find in the decision a blueprint for future certainty, since the Judge subscribes to Curtis' fondness for selective and adjustable inexactitude,[124] he does identify the competing interests:

> The problem involved here is to analyze and, hopefully, to reconcile fairly, the complicated and conflicting interests of at least five quite separate elements of the community:
>
> 1. The interests of the wife in her own support and in the support of her children.
>
> 2. The interests of the husband in what remains of his earnings for his own living needs, and also for the support of his wife and children.
>
> 3. The interest of judgment creditors in the collection of their debts despite the claims for support by the debtor's family.
>
> 4. The interest of society in the prevention of deprivation to children, the wife and the husband.
>
> 5. The interest of society in minimizing the payment of public money to the Department of Welfare. In the great majority of cases which appear in this court showing conflicting problems of family support and judgment debt, the Department of Welfare is supporting in whole or in part the deprived wife and children.[125]

121. Matter of Estate of Greene, 47 Misc. 2d 140, 261 N.Y.S.2d 977 (Surr. Ct., N.Y. Co. 1965).

122. 47 Misc. 2d 900, 263 N.Y.S.2d 533 (Family Ct., Kings Co. 1965).

123. Id. at 900, 263 N.Y.S.2d at 534.

124. Curtis, A Better Theory of Legal Interpretation in Jurisprudence in Action (1953).

125. Beahm v. Beahm, supra note 122, at 905-06, 263 N.Y.S.2d at 538-39.

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The Judge also spells out in detail his reasons for decision with respect to the four cases being considered.[126]

Wives and their lawyers, like other creditors, can go beyond the stock remedies, and, by the use of ingenuity, on occasion find a new means of enforcing husbands' obligations. When she failed to receive the payments due her under a separation agreement, the wife in *Federated Department Stores, Inc. v. Seizer*[127] charged her needs in the plaintiff's store. The store collected from the husband despite the fact that the husband had previously notified them that he would no longer be responsible for his wife's debts. The court made it clear that the husband was obligated to provide necessaries and that the shop keeper was fully justified in extending credit to the wife as a means of allowing her the necessities to which she was entitled. The court also made it clear that it was not discussing the basic needs of shelter and food when it spoke of necessaries, but was speaking instead of items reasonably required by the wife for the support of herself and her child.

Not all theories are successful, however. In *Karron v. Karron*[128] the wife sought to impress a constructive trust on her husband's business partners in an effort to keep them from what she alleged was systematic exploitation. According to the wife, her husband was either unable or unwilling to look after his interests; apparently she proposed to look after them for him in order to secure sufficient financial stability on his part to assure payments due her under a family court order. The court would not intervene.

The success of Esther James in recovering from Representative Adam Clayton Powell an amount in addition to her prior judgment, for the additional expenses incurred by her in her attempt to collect the judgment, by use of a tortious conspiracy theory, is now well known.[129] Less well known is the fact that three months before the *James* decision an angered wife successfully prosecuted such a theory in *Wolf v. Wolf*.[130] While the analogue suggested in the *Wolf* case appears extremely inapropos to the decision in the case, both *Wolf* and *Powell* suggest that creditors may yet have another avenue of relief: the tort of unfairly avoiding creditors.

The state's asserted interest in being reimbursed for welfare payments by close relatives still finds its expression in reported cases. Thus, where a recipient of welfare payments dies, it is the Commissioner of Welfare who first satisfies his claim, arising out of previous welfare payments, rather than the children of the decedent who also extended assistance and who were also owed a debt.[131] Grandparents, however, are no longer subject to the

126. Id. at 912-14, 263 N.Y.S.2d at 544-45.
127. 49 Misc. 2d 429, 267 N.Y.S.2d 774 (N.Y.C. Civ. Ct. 1965).
128. 48 Misc. 2d 928, 266 N.Y.S.2d 158 (Sup. Ct., Kings Co. 1965).
129. James v. Powell, 25 App. Div. 2d 1, 266 N.Y.S.2d (1st Dep't 1966).
130. 47 Misc. 2d 756, 263 N.Y.S.2d 195 (Sup. Ct., N.Y. Co. 1965).
131. Matter of Estate of Errico, 49 Misc. 2d 1055, 269 N.Y.S.2d 62 (Surr. Ct., N.Y. Co. 1966).

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mandate to indemnify the state for welfare payments made to their grandchildren. The legislature removed their obligation by amending Section 415 of the Family Court Act and Section 101(1) of the Social Welfare Law to exclude their liability. Apparently overlooked was Section 32(7) of the Domestic Relations Law, which also provided for grandparental liability. Faced with an assertion that grandparents still had an obligation to support under the Uniform Support of Dependents Law, the family court in *Lenti v. Lenti*,[132] found a public policy statement in the two previous amendments and incorporated it into the Uniform Support of Dependents Law. The legislature has since corrected its error. Chapter 131 of the Laws of 1966 removes grandparental responsibility from the Uniform Support of Dependents Law. The obligation to keep one's blood line from public welfare now runs only two generations.

132. 48 Misc. 2d 206, 264 N.Y.S.2d 597 (Family Ct., Dutchess Co. 1965).

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