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FAMILY LAW

GEORGE J. ALEXANDER

The year that passed, unlike its predecessor, brought change. The family court, after prior unanimity to the contrary, was held to have jurisdiction over what had been interfamilial felony assaults. Paternity cases ran the gamut from one which read the paternity action statute as barring any proceedings to a married woman through another which found the respondent to be a father despite uncontradicted medical evidence of his sterility. Condonation, in divorce proceedings, was further downgraded as a defense by a decision that strongly suggested that intercourse between the parties was inadequate proof. The most celebrated cases, however, were ones in which judges decided that Mexican divorces were invalid even when the parties appeared in Mexico, one personally and the other by attorney.

Marriage.—New York is a state of easy marriage and difficult divorce. Barring the existence of one of the few grounds which make a purported marriage void,¹ anyone participating in a marriage ceremony celebrated by an appropriate official² is “married” until that status is altered by court decree. Nonetheless, since the immigration laws treat spouses of American citizens more liberally than other aliens, some sanctions exist in federal law against the use of the marital status to achieve an immigration end. As a result, in *Lutwak v. United States*,³ the United States Supreme Court affirmed convictions against the defendants who had, without explanation, claimed themselves “married” when their marriage served no other purpose than their immigration. The Court found it unnecessary, in that case, to face the question of what would happen if such marriages were valid under the relevant law, since they held the validity of the marriage to be inconsequential in a fraud prosecution. The dissenters thought that the prosecution could only be upheld if the marriages were in fact invalid.

Faced this year with marriages celebrated under New York law, the Second Circuit refused to uphold federal convictions against defendants in limited-purpose immigration marriages.⁴ Although distinctions other than that the law of New York validates limited-purpose marriages (at least until annulled) were drawn, readers may find themselves agreeing with the dissenting late Judge Clark, who was “unable to perceive why this case is not precisely governed by *Lutwak* [and who could not] discover what dis-

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1. The principal provisions are contained in N.Y. Dom. Rel. Law §§ 5, 6 (incest and bigamy).

2. N.Y. Dom. Rel. Law § 11.

3. 344 U.S. 604 (1952).

4. *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963).

inction my brothers are actually advancing”⁵ Lest one become concerned that the case has made it possible to use New York for wholesale evasion of small quotas under the immigration laws, it should be added that the immigration laws themselves seem quite adequate to handle such a problem. Indeed, it seems likely that the acquitted defendants in this case are subject to deportation.⁶

Familial Disputes.—In *People v. De Jesus*,⁷ the first appellate test of the family court’s jurisdiction over what would be felony assaults under the family offense provisions of the Family Court Act, the Appellate Division, Fourth Department, found such jurisdiction to be exclusively in the family court. Rejecting the cases which had previously limited such jurisdiction to misdemeanor assaults,⁸ the court held that the mandatory language of the Family Court Act,⁹ when coupled with a similar mandatory provision in the New York Constitution,¹⁰ effectively granted exclusive jurisdiction to the family court. It disposed of the assertion of supreme court jurisdiction in these matters by saying, as is obvious, that the supreme court still retains jurisdiction to dismiss or transfer the matter to family court, and concluded with this interesting suggestion: “It may also well be that Supreme Court could retain the matter, but it would then be acting as a Family Court and would be required to follow the processes and procedures of the Family Court Act.”¹¹ Moving to the constitutional power of the grand jury to indict,¹² the court held that it might be all right to interpret the section as requiring an indictment for infamous crimes but that, by operation of constitutional amendment and legislation which set up the Family Court Act, anything which is a family offense is no longer a crime; at least it is not a crime until the family court makes it so by transferring the proceedings to the criminal court.¹³

The asserted metamorphosis available to the supreme court to convert itself into a family court is difficult to follow. Presumably, the family court was established primarily because it would be a specialized court able to bring its own expertise and the expertise of its staff to bear on the designated

5. *Id.* at ¶99-10.

6. 66 Stat. 204 (1952), 8 U.S.C. §§ 1251(a)(1), (c) (1958).

7. 21 App. Div. 2d 236, 250 N.Y.S.2d 317 (4th Dep’t 1964).

8. *People v. Radison*, 40 Misc. 2d 1063, 244 N.Y.S.2d 941 (Sup. Ct., N.Y. Co. 1963); *Ricapito v. People*, 38 Misc. 2d 710, 238 N.Y.S.2d 864 (Sup. Ct., Nassau Co. 1963), *aff’d*, 20 App. Div. 2d 567, 245 N.Y.S.2d 846 (2d Dep’t 1963) (without reaching the instant question); *People v. Klaff*, 35 Misc. 2d 859, 35 Misc. 2d 862, 231 N.Y.S.2d 875 (Dist. Ct., Nassau Co. 1962).

9. N.Y. Family Ct. Act § 813.

10. N.Y. Const. art. 6, § 13(b) (McKinney Supp. 1964): “The family court shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such family court . . . crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household.”

11. *Supra* note 7, at 239, 250 N.Y.S.2d at 322.

12. N.Y. Const. art. 1, § 6.

13. N.Y. Family Ct. Act § 813(a)(i).

problems. These requirements seem also to have motivated removing these cases from other court calendars. Nonetheless, one is inclined to doubt that the supreme court will be motivated, with the press of other cases, to assert its jurisdiction in matters which it has now been told are properly to be handled by the designated family court. Also, however disturbing the thought of felony-assault made family-offense may be in theory, raising as it does the vision of a near murderer who cannot be prosecuted as a criminal because of the assertion of family court jurisdiction, the dangers are quite likely more fanciful than real. No reason comes to mind why a family court would prevent the prosecution of a miscreant whose offense is grounded more in anti-social behavior than in possibly reparable matrimonial difficulty. The only feature that remains somewhat disturbing to this writer is that families have now been equated with juvenile delinquents for special civil disciplinary treatment. This treatment will be described, as it was in *De Jesus*, as being beneficial to the respondent,¹⁴ but we have had a long history of difficulty with juvenile delinquency problems, which suggests that doing something *for* respondents may subject them to abuses from which they would be protected were the proceedings classed wholly criminal.¹⁵

Marriage Dissolution.—The law of marital dissolution in this state has always had its Alice-in-Wonderland aura. This year, however, its otherworldliness is even more pronounced than usual. A number of unsettling and unsettled questions have been raised. For example, what exactly is the status of a marriage when a spouse has been convicted and sentenced to life imprisonment? Our legislation provides neither for divorce nor annulment in such cases, but only for civil death.¹⁶ Predictably, the living “dead” have come back to haunt the courts. The law provides explicitly that a later marriage by the other spouse is not void because of the existence of the life prisoner,¹⁷ and the Court of Appeals in a very careful opinion in *Matter of Lindewall*,¹⁸ made it quite clear that the sentence of life imprisonment, ipso facto, terminates the interest of the prisoner in his marital property. What the opinion of the Court of Appeals did not reach, however, is the puzzling question whether the other spouse must “elect” to terminate the marital relationship (as, for example, by remarriage) or whether it automatically dissolves as on actual death. To be sure, *Lindewall* strongly suggests automatic dissolution. On the other hand, it adverts to “authorities” which have indicated that an election is required. Testing this question this year is an action by a now-released prisoner seeking a declaration that he is unmarried. Granting such a

14. “[I]t cannot be said that this in any way harms anyone who is within the protective scope of [the grand jury provision]” *Supra* note 7, at 241, 250 N.Y.S.2d at 324.

15. See, e.g., *Matter of Ronny*, 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Family Ct., Queens Co. 1963).

16. N.Y. Dom. Rel. Law § 6(2); N.Y. Penal Law § 511.

17. N.Y. Dom. Rel. Law § 6.

18. 287 N.Y. 347, 39 N.E.2d 907 (1942).

declaration, the court in *Zizzo v. Zizzo*,¹⁹ found a basis for its ruling in the wife's declarations, first to a parole officer and later to the released prisoner, that she no longer desired to maintain the marital relationship. Apparently, the court adopted an election theory. The case, however, leaves the question about as unsettled as it was previously, since, obviously, the same result would have been achieved had the marriage terminated, ipso facto, on the life sentence.

Some other people discovered themselves to have been unmarried when they had assumed their marriage valid. New York law still provides that on divorce the defendant shall be enjoined from remarrying during the life of his former spouse for a mandatory period of three years and thereafter until the court modifies the order.²⁰ That these injunctions can be lightly treated is illustrated by *Kiellman v. Kiellman*,²¹ on which the author has previously commented.²² That they can be gravely treated is demonstrated by the following case: In determining whether death benefits under workmen's compensation were to be paid to the plaintiff, the trial court, finding a "widow's" marriage to her deceased "husband" to have been barred by her oversight in failing to obtain a modification of her injunction, gallantly issued a modification *nunc pro tunc*. The trial court was, of course, by Court of Appeals' authority,²³ in error, as the appellate division pointed out. The *nunc pro tunc* order could not be granted. Without such order, the marriage was void; the plaintiff was not a widow.²⁴

Other adjective provisions also caused confusion.²⁵ As always, however, the most significant dissolution cases related not to New York dissolution decrees but to those of sister states. It is apparent that the New York form of marital relief has been largely abandoned by default to the commercial exploitation of the "quickie" divorce states. Consequently, the significant question of state law relates to the continued validity of transitory divorces from one or another of the states.²⁶

19. 41 Misc. 2d 928, 247 N.Y.S.2d 38 (Sup. Ct., Kings Co. 1964).

20. N.Y. Dom. Rel. Law § 8.

21. 28 Misc. 2d 717, 216 N.Y.S.2d 197 (Sup. Ct., Kings Co. 1961).

22. Alexander, Family Law, 1962 Survey of N.Y. Law, 14 Syracuse L. Rev. 333, 334 (1962).

23. *Merrick v. Merrick*, 266 N.Y. 120, 194 N.E. 55 (1934).

24. *Farber v. United States Trucking Corp.*, 20 App. Div. 2d 740, 247 N.Y.S.2d 82 (3d Dep't 1964).

25. For example, is substituted service of process adequate service in a matrimonial proceeding? Reading the statute, one would think so. N.Y.C.P.L.R. § 308 provides for the service of summons generally. Subdivision 2 expressly excludes matrimonial actions; subdivision 3, relating to substituted service, does not. Nonetheless, a court has held such service inappropriate to obtaining jurisdiction. *Root v. Root*, 43 Misc. 2d 337, 250 N.Y.S.2d 933 (Sup. Ct., Westch. Co. 1964). In light of the prior cases under what is now N.Y. Dom. Rel. Law § 232, the result seems correct. *Weiss v. Weiss*, 227 App. Div. 757, 237 N.Y. Supp. 56 (4th Dep't 1929); *Purvis v. Purvis*, 167 App. Div. 717, 153 N.Y. Supp. 269 (4th Dep't 1915). Legislative clarification would be helpful.

26. See Blake, *The Road to Reno* (1962); Alexander, Book Review, 14 Syracuse L. Rev. 512 (1963).

Alabama decrees had weathered the storm over *Hartigan v. Hartigan*,²⁷ and seemed still adequate to keep prior marriages dissolved when the Supreme Court of Alabama supplied a new bolt of lightning²⁸ by reversing a dismissal of a complaint seeking to vacate a divorce decree in a proceeding instituted by a wife who had been represented in the divorce proceeding. Since the case is still in its preliminary stages, it is difficult to tell whether it will eventually squarely hold that an appearing party may attack a divorce decree for fraudulent assertions of residence.²⁹ Because of the recency of the case its effects have not yet been felt in New York, but one can certainly expect another round of cases on the question whether Alabama divorcees are divorced beyond the ability of an appearing spouse to contest.³⁰

Dark also seemed the fate of Mexican divorces. Justice Coleman startled many practitioners by announcing, in *Wood v. Wood*,³¹ that Mexican divorces granted to appearing spouses, in actions in which the other spouse appeared by counsel, are invalid. Actually, that statement was considerably broader than the one on which the court was required to rule.³² Plaintiff in the Mexican action had failed to sign the municipal register and had, thus, failed to make herself a "resident" of Mexico for purposes of a "contested" divorce. This infirmity apparently would have sufficed to invalidate the divorce.³³

Those who clung briefly to the hope that *Wood* could be avoided by the simple act of signing the municipal register were quickly set adrift by *Rosenstiel v. Rosenstiel*,³⁴ in which the court disposed of the contention that such signature was determinative, saying "there is no merit to this contention as it will be observed that there are no requirements in Chihuahua that the party appearing in person be a bona fide resident or domiciliary in order to obtain a divorce."³⁵ Some of the broad language of *Wood* had already been reached.

27. 272 Ala. 67, 128 So. 2d 725 (1961).

28. *Winston v. Winston*, 161 So. 2d 588 (Ala. 1964).

29. The complaint relied not only on such fraud but also on coercion and duress. The court clearly did not reach either the question whether fraud is sufficient by itself or whether the plaintiff was ultimately entitled to the relief requested even if her proof established several elements of her complaint. Nonetheless, the court specifically allowed an appearing party to challenge the decree granted and thus supplied one missing element in the interpretation of *Hartigan*: an action apparently may be maintained by a party to the proceeding as well as by the court, *Aiello v. Aiello*, 272 Ala. 505, 133 So. 2d 18 (1961), notwithstanding.

30. See Alexander, *Family Law*, 1962 Survey of New York Law, 14 *Syracuse L. Rev.* 333 (1962).

31. 41 Misc. 2d 95, 245 N.Y.S.2d 800 (Sup. Ct., N.Y. Co. 1963). After the submission of this article, the appellate division reversed. *Wood v. Wood*, 22 App. Div. 2d 660, 253 N.Y.S.2d 204 (1st Dep't 1964).

32. An excellent discussion of the case is to be found in Foster, *Family Law*, 1963 Annual Survey of American Law 407, 409-12 (1964).

33. See Berke, *The Present Status of Mexican Divorces*, 36 *N.Y. State Bar J.* 111 (1964).

34. 43 Misc. 2d 462, 251 N.Y.S.2d 565 (Sup. Ct., N.Y. Co. 1964). After the submission of this article, the appellate division reversed. *Rosenstiel v. Rosenstiel*, 21 App. Div. 2d 635, 253 N.Y.S.2d 206 (1st Dep't 1964).

35. *Id.* at 473, 251 N.Y.S.2d at 576-77.

In many respects Mrs. Rosenstiel's position appeared stronger than Mrs. Wood's. Not only had she scrupulously signed the registry, but she had actually successfully litigated the validity of her divorce in Mexico with a person she claimed was her present husband who now sought a declaration of its invalidity in New York. Thus she had two defenses to his attempt to impugn their marriage: (1) she was free to marry since she had validly divorced her prior husband in Mexico; and (2) she was at least immune from suit concerning the validity of her divorce by her present mate since she had adjudicated her previous marital res with him and could now rely on res adjudicata.

The court, however, found the absence of domicile of either party to the divorce determinative of the validity of the divorce; it was invalid. As for res adjudicata, the court was unprepared to accept its application for a number of reasons. Irrespective of the others, one objection voiced would seem insurmountable: "there was no determination by any of the Mexican courts that the 1954 divorce was valid in New York under New York law as obviously it could not determine."³⁶ It boils down to this. Mexican courts, under these circumstances, cannot be given jurisdiction by the parties to hear divorce actions; they also cannot acquire jurisdiction to determine the validity of divorces previously granted.

In its opinion, the court castigated the parties for violating Section 51 of the Domestic Relations Law in the arrangement for the Mexican appearances, although it is not clear what result its finding of brazenness in this respect had on its legal conclusions. In this portion of the opinion one can sense, perhaps better than in the others, the moral indignation of the trial justice. Why such wrath should be visited on Mrs. Rosenstiel, whose arrangements were neither unique nor clandestine, is not clear. Why Mexican divorces should be treated with such contempt in light of sister state "quickie divorces" is equally puzzling. In the long standing climate of contrived arrangements, of which Mexican divorces are only a part, a more fruitful object for condemnation must be the chasm between written law and human experience.

The broad statements of both *Wood* and *Rosenstiel* seem to fly in the face of other decisions, the latest of which is *Heine v. Heine*.³⁷ It is too early to tell, however, whether they are to become obscurities or leading cases.³⁸

Divorce decrees may be given harsh treatment by local courts in other respects as well. It has long been clear that, as an aspect of the divisible divorce doctrine, a New York court might provide for the support of a

36. *Id.* at 466-67, 251 N.Y.S.2d at 570.

37. 19 App. Div. 2d 695, 242 N.Y.S.2d 705 (2d Dep't 1963) (mem.).

38. Cf. *Kantrowitz v. Kantrowitz*, 21 App. Div. 2d 654, 249 N.Y.S.2d 723 (1st Dep't 1964) (W allowed to contest Mexican divorce in which she appeared by attorney on ground of H's fraud respecting his support and marital plans). See also notes 31 and 34 *supra*.

domiciled spouse notwithstanding an ex parte sister state divorce against her.³⁹ The other part of the "division," however, the status change of the divorce, was entitled to full faith and credit. It would appear that even this part may sometimes be attacked.⁴⁰ H had gone to California and obtained an order of divorce, which, under California law, was to become final one year after the date of the decree. W sued for separation and alimony in New York. H's motion to dismiss W's action was denied, apparently not only on the ground of her right to alimony but also on the ground of her right to a separation. The divorce, ruled the court, was an interlocutory decree not entitled to full faith and credit. In that respect the court may well be following the mainstream of opinion,⁴¹ but it is certainly moving a long way toward making diffusible divorce out of divisible divorce where states have interlocutory periods as long as California's.

If one's spouse is going to a state with an interlocutory period somewhat shorter than California's, the standard adjective remedy to prevent his obtaining a divorce has been the injunction. It has been clear that such an injunction would issue against any New York resident whose sole purpose in going abroad was to defeat the right of his New York spouse.⁴² It has been equally clear that such a decree would not issue when the spouse was legitimately domiciled in the state where he sought the divorce.⁴³ What then if the spouse returned to a state such as Connecticut, which opens its divorce courts to persons domiciled at the time of marriage and returning with the intention of permanently remaining?⁴⁴ A New York court this year, in *Lowe v. Lowe*,⁴⁵ held that although Connecticut could set its own rules for domicile, New York could protect the remaining spouse by injunction. Even this heady application of the injunctive powers of the New York courts may, however, prove somewhat illusory, since another court suggested that the injunction which issues in such cases does not prevent respondent's effective divorce. In *Gidney v. Gidney*,⁴⁶ W, seeking separation, sought to block an application by H to serve a supplemental answer pleading a final divorce. W's claim was that the divorce had been obtained in violation of an injunction and was consequently void. Without reaching the merits of the controversy, the court granted H's request to supplement his answer and voiced grave doubts whether full faith and credit would allow it to do otherwise. Should the court be correct in its suggestion, and the injunction be enforceable solely by contempt proceedings, conceivably the Connecticut application and, indeed, even its general usefulness, will become considerably less significant.

39. *Vanderbilt v. Vanderbilt*, 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1 (1956).
aff'd, 354 U.S. 416 (1957).

40. *Iverson v. Iverson*, 42 Misc. 2d 338, 247 N.Y.S.2d 960 (Sup. Ct., N.Y. Co. 1964).

41. See Note, 41 Colum. L. Rev. 878 (1941).

42. *Garvin v. Garvin*, 302 N.Y. 96, 96 N.E.2d 721 (1951).

43. *Rosenstiel v. Rosenstiel*, 15 App. Div. 2d 880, 225 N.Y.S.2d 912 (1st Dep't 1962).

44. Conn. Gen. Stat. § 46-15 (1958 rev.).

45. 41 Misc. 2d 258, 244 N.Y.S.2d 847 (Sup. Ct., Bronx Co. 1963).

46. 40 Misc. 2d 429, 242 N.Y.S.2d 924 (Sup. Ct., Erie Co. 1963).

Finally, it should be noted that the decision of last year, which appeared to allow a divorce despite the fact that the parties continued to live together for fifteen months after the cause of action accrued,⁴⁷ seems to be substantially reinforced this year. In one case H had succeeded at trial in establishing the adultery of W but, subsequent to the trial and prior to the decree, had returned to his wife, told her that he knew she was innocent of wrongdoing, and asked her to have intercourse with him, which she did. Since the statute makes condonation an absolute defense to divorce⁴⁸ and makes condonation turn on either affirmative proof or "voluntary cohabitation,"⁴⁹ the trial court granted leave to file a supplemental answer alleging condonation. On the husband's appeal, the appellate division, in *Prytherch v. Prytherch*,⁵⁰ barely affirmed the lower court on the ground that the act was "some evidence" of condonation.⁵¹ Apparently, putting together the interesting cases of the last two years, the law now is that the defense of condonation, which may be established according to statute by voluntary cohabitation, is not necessarily established either by living together or by having intercourse. These novel decisions seem consistent with an effort to encourage reconciliation even though they appear not too faithfully to follow either the statutory law or prior case law.

It may be that this line of cases has been somewhat encouraged by the provision added to Section 236 of the Domestic Relations Law in an apparent attempt to resolve a conflict between departments on the narrow question whether temporary alimony may be granted to a wife while she continues to live in her husband's home:⁵² "[alimony may be granted by the court] notwithstanding that the parties continue to reside in the same abode"⁵³ One court has held that implicit in this provision is a determination that the court may issue a separation decree while the parties are living together.⁵⁴

Support, Marital Property.—Although alimony decrees were being appealed this year as previously, few principles were changed. The first department has again demonstrated its irritability at appeals from temporary alimony decrees. In *Haber v. Haber*,⁵⁵ although some members of the court believed that the alimony awarded was "in excess of what the affidavits would justify," the court affirmed the trial court's disposition and instructed

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

48. N.Y. Dom. Rel. Law § 171(2).

49. *Ibid.*

50. 20 App. Div. 2d 721, 247 N.Y.S.2d 579 (2d Dep't 1964).

51. "while a single act of sexual intercourse may not establish condonation as a matter of law, we are of the opinion that such an act is some evidence of forgiveness, and that it should not be held as a matter of law that under no circumstances may a finding of condonation be based upon a single act." *Id.* at 722, 247 N.Y.S.2d at 581.

52. *Schultz v. Schultz*, 1 App. Div. 2d 930 (4th Dep't 1956) (it may); *Lowenfish v. Lowenfish*, 278 App. Div. 716, 103 N.Y.S.2d 357 (2d Dep't 1951) (it may); *Berman v. Berman*, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950) (it may not).

53. N.Y. Dom. Rel. Law § 236 (McKinney Supp. 1964).

54. *Okun v. Okun*, 41 Misc. 2d 244, 245 N.Y.S.2d 92 (Sup. Ct., Bronx Co. 1963).

55. 20 App. Div. 2d 858, 248 N.Y.S.2d 83 (1st Dep't 1964).

appellant to seek his remedy at trial. This was done despite the fact that the court recognized "that in many instances lawyers believe that the trial court is to some degree influenced in fixing permanent alimony by a prior award of temporary alimony" adding, "there ought to be no basis for such relief."⁵⁶

Mrs. Rosenstiel, who had been summarily evicted at the time of the last Survey, has since had her rights vindicated. The appellate division, in *Rosenstiel v. Rosenstiel*,⁵⁷ stated that the law under which she had been evicted, now Real Property Actions and Proceedings Law, Section 713(7), was not applicable to spouses since a spouse was not a "licensee" whose license "has been revoked." However ambiguous the statute might be in this respect,⁵⁸ the court held, "the occupation of the marital home by the wife as such is not, however, a possession existing by virtue of the 'permission' of her husband or under a 'personal' and 'revocable privilege' extended by him. On the contrary, her possession of the premises exists because of special rights incidental to the marriage contract and relationship."⁵⁹ Also, said the majority, "where a matrimonial action is pending between a husband and wife, then, ordinarily, the matter of the occupancy and possession of the marital home should be determined by proper proceedings in such action."⁶⁰ Mr. Justice Steuer disagreed. It was his position that where the husband has apparently provided for his wife, he has no obligation to allow her to remain on his property and can, presumably, invoke the summary remedy to evict her. How "summary" a proceeding can be which must, as a prerequisite, determine that the husband has appropriately provided for the support of his wife is conjectural. In any event, all five justices agreed on one thing: Mrs. Rosenstiel would not be granted permission to return to her apartment since she had already moved out and there was a pending matrimonial action.

It is well settled in this state that once alimony payments have been made they cannot be recovered from the wife even if their payment was premised on an order reversed on appeal.⁶¹ Thus, this year a husband won a Pyrrhic victory when he had a rent payment decree reduced. His overpayment was not recoverable.⁶²

56. *Id.* at 858, 248 N.Y.S.2d at 84. But cf. *Weisner v. Weisner*, 20 App. Div. 2d 523, 244 N.Y.S.2d 843 (1st Dep't 1963) (reversing trial court pretrial order for the third time in same case).

57. 20 App. Div. 2d 71, 245 N.Y.S.2d 395 (1st Dep't 1963); accord, *Brennecke v. Smith*, 42 Misc. 2d 935, 249 N.Y.S.2d 602 (Sup. Ct., Westch. Co. 1964).

58. In 1960 the same department, in *Tausik v. Tausik*, 11 App. Div. 2d 144, 202 N.Y.S.2d 82 (1st Dep't 1960), *aff'd*, 9 N.Y.2d 664, 173 N.E.2d 51, 212 N.Y.S.2d 76 (1961), had held a spouse to be a licensee within the meaning of this section. In *Rosenstiel*, *Tausik* is distinguished on the basis that in *Tausik* the parties had executed an agreement which gave the wife her tenant status and that this agreement had expired.

59. *Supra* note 57, at 76, 245 N.Y.S.2d at 401.

60. *Id.* at 77, 245 N.Y.S.2d at 402.

61. *Haas v. Haas*, 271 App. Div. 107, 64 N.Y.S.2d 11 (2d Dep't 1946).

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

Does the same principle bar a husband's challenge of the support money given his wife for the support of children? If, irrespective of its use, the father cannot recover prior payments, one would think not. There were apparently no decisions squarely facing this problem in this jurisdiction before *Rosenblatt v. Birnbaum*.⁶³ A husband brought an action to compel his ex-wife and her present husband to account for child support payments. By a majority of one, the appellate division held the wife a trustee for such payments and ordered an accounting.

It is clear that the wife may expressly be made a trustee by the separation agreement. Certainly attorneys drafting agreements in which the wife's supporting the children is in doubt would be well advised to include such provisions. To make the absence of such a provision determinative, however, would seem to place form ahead of substance. When money is provided for the support of children, it is presumably provided on the assumption that the husband will have his children supported from the fund.

While there is authority in this state for avoiding Section 51 of the Domestic Relations Law, which prohibits contracting to dissolve a marriage, by drafting two agreements, one a separation agreement and the second an escrow agreement which would irrevocably vest only upon the wife's divorce,⁶⁴ the case hardly seems compatible with the purpose of section 51 and with the other cases under that section. It consequently comes as little surprise to find such an escrow agreement held invalid this year.⁶⁵

Section 51 of the Domestic Relations Law also expressly prohibits contracting to avoid support obligations between spouses. By analogy to this section, or by reason of the court's supervisory authority in these matters,⁶⁶ a parent is also prohibited from contractually erasing his obligation to support his child. May a father nonetheless do so as part of an undertaking between the spouses which envisages the adoption of the child by the wife's next husband? Apparently not.⁶⁷

With increased longevity, the problem of support for the aged will predictably become a more important problem as time progresses. The Family Court Act specifically provides, in section 415, for the support of parents who are recipients of public assistance by children who can afford such support. This year one court felt called upon to lecture a child about the importance of these provisions.⁶⁸ Whether the public treasury is reim-

63. 20 App. Div. 2d 556, 245 N.Y.S.2d 72 (2d Dep't 1963).

64. *Tanburn v. Tanburn*, 114 N.Y.S.2d 670 (Sup. Ct., N.Y. Co. 1952).

65. *Taylor v. Renzi*, 41 Misc. 2d 160, 245 N.Y.S.2d 456 (Sup. Ct., Onondaga Co. 1963).

66. *Van Dyke v. Van Dyke*, 278 App. Div. 446, 106 N.Y.S.2d 237 (3d Dep't 1951), aff'd, 305 N.Y. 671, 112 N.E.2d 766 (1953).

67. *Smith v. Jones*, 43 Misc. 2d 350, 250 N.Y.S.2d 955 (Family Ct., Kings Co. 1964).

68. *Anonymous v. Anonymous*, 41 Misc. 2d 533, 534, 246 N.Y.S.2d 227, 229 (Family Ct., Bronx Co. 1963).

Formerly, indigent parents of advanced age were ordinarily cared for within the family group but today the feeling seems to prevail among many children that the government should assume the entire responsibility for the care of

bursed, however, may depend on the substantiality of the familial relationship.⁶⁹

Paternity.—Analyzing revised provisions in the Family Court Act last year's Survey indicated, "it would seem [under the new provisions] that no paternity action would ever lie if the mother was married."⁷⁰ A conjecture has become holding.⁷¹ It still "seems peculiar."⁷²

Explicitly rejected in the above case is the application of *Matter of Findlay*,⁷³ the principal case on the presumption of legitimacy and the standard of rebuttal required to overcome it. It is quite evident, however, that other courts continue to use *Matter of Findlay* as the basic determinant of the paternity of a married woman's child. One such case this year was *Moy Mee Soo v. Leong Yook Yick*.⁷⁴ It, too, concluded that the woman's child was her husband's but did so on the basis of the presumption in *Findlay* of the husband's paternity, given access and sexual potency. That even the presumption may be quite rebuttable can be seen in the opinion of the dissenting justice who would have held it rebutted on the basis of the wife's testimony denying intercourse with the husband, with whom she shared an apartment at the time of probable conception, and alleging intercourse only with the putative father. He would have done this despite the fact that the husband did not join his wife in this action in denying intercourse. Indeed, the majority seemed prepared to follow his lead but for the failure of the husband to testify.

If it is difficult for a married woman to win a paternity proceeding, it may be equally difficult for a man to defend himself against an action by an unmarried woman. In *Commissioner of Welfare v. Simon*,⁷⁵ the respondent offered, by the testimony of a physician specializing in venereal disease, proof that he had a venereal disease making him then and at the time of conception infertile. An examination had been made of the respondent's

their aged parents. Too often we hear children complain that they must deprive themselves of a certain luxury or lower their high standard of living, if called upon to even help, much less support their parents. One of their excuses is that they pay taxes and that this is an obligation of the government. Indeed, in most cases there is little or no love or even consideration for the aged and destitute father or mother. Today we see parents of advanced ages, totally disabled and on the threshold of death, being cared for in nursing homes and hospitals at public expense. The children of these parents are living very comfortably in homes of considerable worth, earning substantial salaries and money in the bank but are not contributing to the support of these parents.

So stating, the court held the respondent, age sixty-one, liable for the support of his destitute mother.

69. *Lasher v. Decker*, 43 Misc. 2d 211, 250 N.Y.S.2d 615 (Family Ct., Dutchess Co. 1964) (child abandoned during minority is not required to support mother).

70. Alexander, *Family Law*, 1963 Survey of N.Y. Law, 15 Syracuse L. Rev. 369, 371 (1963).

71. *Kehn v. Mainella*, 40 Misc. 2d 55, 242 N.Y.S.2d 732 (Family Ct., Blair Co. 1963).

72. *Op. cit. supra* note 70, at 371.

73. 253 N.Y. 1, 170 N.E. 471 (1930).

74. 21 App. Div. 2d 45, 248 N.Y.S.2d 61 (1st Dep't 1964).

75. 20 App. Div. 2d 865, 248 N.Y.S.2d 611 (1st Dep't 1964).

seminal fluid and had shown no sperm.⁷⁶ Respondent declared himself ready to allow similar testing on behalf of petitioner but no such tests were requested. Nonetheless, the trial judge held respondent to be the father. The appellate division affirmed. Speaking of the doctor's testimony the majority stated:

Considering the rather unimpressive qualifications of the doctor as an expert in fertility, the fact that he first examined appellant almost six years after the child was conceived, and that the laboratory test of what purported to be appellant's seminal fluid was also made six years after conception of the child, and in view of the absence of proof as to the circumstances under which the laboratory specimen was obtained . . . we believe that the trier of the facts was warranted in not adopting the opinion of appellant's expert as controlling in the case.⁷⁷

The dissent explains it this way:

[T]he court refused to credit the doctor's testimony on the ground that, while he was an active practitioner in the field of venereal disease, he was not doing research in fertility . . . All that was offered in opposition was the possibility that the semen had not been analyzed under proper conditions . . . and the court's independent research that the number of cells in an individual's semen varies from time to time and the impregnable quality of the cells may vary with different partners to the act of copulation.⁷⁸

If the dissent is to be believed, it would appear that the appellate division held the physician to be an unimpressive expert in fertility whose testimony must bow to the court's expertise in fertility based on "independent research."

The defense of sterility is unusual in paternity proceedings but a demand for blood grouping is not. It is specifically recognized in the Family Court Act,⁷⁹ under appropriate circumstances, to exculpate putative fathers. This year, requests for blood tests raised a number of questions. In a divorce proceeding brought by H, W requested a blood test of her child and her husband to demonstrate that someone other than her husband had fathered the child. Apparently, she sought by this method to gain custody of the child. The court denied the test on the theory that she could not, after a long period of marriage, thus bastardize her offspring, which she and H had treated as a child of the marriage for at least six years and which he still claimed to be his child.⁸⁰ In light of the strong public policy favoring the legitimation of children, the court's conclusion seems appropriate.

Even the paternity proceedings in which blood tests are relevant seem to cause some difficulty. Whatever the merits of the use of blood tests to

76. The majority found the test unconvincing since it was performed six years after the child was conceived. Since it was petitioner rather than respondent who presumably delayed the action for the intervening period, it is not clear why the lapse of time should militate against respondent's evidence.

77. *Supra* note 75, at 866, 248 N.Y.S.2d at 612-13.

78. *Id.* at 866-67, 248 N.Y.S.2d at 613.

79. N.Y. Family Ct. Act § 532.

80. *Hill v. Hill*, 20 App. Div. 2d 923, 249 N.Y.S.2d 751 (2d Dep't 1964).

provide evidence of possible paternity,⁸¹ the legislature specifically provided for their use "only in cases where definite exclusion is established."⁸² The legislature has also provided that the court shall order blood-grouping tests on demand of the respondent.⁸³ This creates something of a dilemma. It is clear that were the question of paternity tried to a jury, which it is not,⁸⁴ the results of nonexculpating tests could well be kept from the trier of fact, as is apparently contemplated. It is difficult, however, to see how the family court judge will fail to discover the results of the tests either way. Presumably, if the tests exculpate, the respondent will introduce them; if tests have been ordered and respondent does not come forward, what conclusion can be drawn but that the tests are not helpful to him?

Realizing that the judge will likely discover the results anyway, should it make any difference if the report of the results of the tests are made directly to him? In addition, should it be determinative that the court, in apparent violation of the statutory rule, "made it [the blood-grouping test report] a part of the record"? The third department thought not.⁸⁵ It may well be that all one can hope for is that the court not give such results evidentiary weight; the appellate division found that they had not been given weight in this case. Whatever ideal was expressed in the qualified-admissibility theory seems to be rather impracticable in the context of a paternity trial.

It is easy to understand why courts are still solicitous of the status of the child. Aside from the social stigma of bastardy, the legal attributes of illegitimacy are still rather frightening. Within the year another court decided that the illegitimate's estate was not entitled to participate in the distribution of the estate of a legitimate child of the same mother.⁸⁶ The result is governed by a statute.⁸⁷ Since a legitimate child of the mother was alive, the illegitimate child would not inherit even from his sole potential source of intestate distribution: his mother. Even where the statute is less clearly controlling, however, New York courts have been chary of allowing inheritance by illegitimates.⁸⁸ In one respect, however, illegitimates fare better today than in the past. The Family Court Act provides for their support by the father for twenty-one years,⁸⁹ as opposed to the previous minimum-of-sixteen years standard, and, apparently, the act will be retroactively applied.⁹⁰

81. See 7 Syracuse L. Rev. 162 (1955).

82. N.Y. Family Ct. Act § 532.

83. *Ibid.*

84. N.Y. Family Ct. Act § 531.

85. *People v. Kelly*, 20 App. Div. 2d 740, 246 N.Y.S.2d 877, 878 (3d Dep't 1964).

86. *Matter of Estate of Stanco*, 41 Misc. 2d 419, 245 N.Y.S.2d 69 (Surr. Ct., Nassau Co. 1963).

87. N.Y. Dec. Est. Law § 83(13).

88. *Matter of Estate of Cady*, 281 N.Y. 688, 23 N.E.2d 18 (1939).

89. N.Y. Family Ct. Act § 545.

90. *Anonymous v. Anonymous*, 40 Misc. 2d 492, 243 N.Y.S.2d 630 (Family Ct., N.Y.C. 1963).

Contraception and Abortion.—Although discussion of the population explosion and means of family planning abound, the law appears to take little cognizance of the problem. An archaic statute, which is apparently unenforced,⁹¹ seems to bar the use of contraceptives in this state except under the direction of a physician for the prevention of disease (which pregnancy presumably is not).⁹² Also, in New York as in other states, strong penal sanctions exist for abortion.⁹³ The vigor with which the abortion provisions may be enforced is well demonstrated this year by *People v. Lovell*,⁹⁴ in which the defendant was charged with the felony of abortion on the ground that she had told the abortee where to find an abortionist.⁹⁵

Misconduct of Children.—The question where to place a person “in need of supervision” under the Family Court Act,⁹⁶ which was troublesome last year,⁹⁷ was temporarily resolved this year. After *Anonymous v. People*⁹⁸ determined that a child could be placed in a departmental social welfare training school under these provisions,⁹⁹ the legislature amended Section 756 of the Family Court Act to provide for such placement for a temporary period to end July 1, 1965. In the interim, one family court judge, in *Matter of Anonymous*,¹⁰⁰ felt obliged to release a girl to the custody of her parents “with concern and reluctance,” being unable otherwise to solve the dilemma.

Procedural safeguards were apparently also coming to the fore. Departing from its more charitable position of the year before,¹⁰¹ the appellate division this year, in a rather strong opinion, denounced the mishandling of *Matter of Dennis*, by the family court¹⁰² and concluded, “we are not unmindful that we are dealing with an Act which is of very recent origin and that Family Court Judges in all good conscience may find the transition

91. But see *Barretta v. Barretta*, 182 Misc. 852, 46 N.Y.S.2d 261 (Sup. Ct., Queens Co. 1944) (insistence on use of contraceptives is moral turpitude barring a separation decree because of statute).

92. N.Y. Penal Law §§ 1142-45.

93. N.Y. Penal Law §§ 80-82.

94. 40 Misc. 2d 458, 242 N.Y.S.2d 958 (Oneida County Ct. 1963).

95. While not called on to rule on this question directly, the court expressed some skepticism as to the soundness of the theory. Since the abortee herself is not guilty of a section 80 violation, *People v. Vedder*, 98 N.Y. 630 (1885), defendant could not be a principal to that crime, nor, opines the court, does disclosing the location of an abortionist constitute advising abortion within the meaning of section 80(1), at least where it is not demonstrated that an act of abortion even took place. It thus appears that the defendant may escape a felony conviction unless she can be demonstrated to be more materially implicated in the attempted act.

96. N.Y. Family Ct. Act § 712.

97. Alexander, Family Law, 1963 Survey of N.Y. Law, 15 Syracuse L. Rev. 369, 377 (1963).

98. 20 App. Div. 2d 395, 247 N.Y.S.2d 323 (1st Dep't 1964).

99. Reversing a contrary determination in *Matter of Anonymous*, 40 Misc. 2d 8, 242 N.Y.S.2d 571 (Family Ct., Bronx Co. 1963).

100. 43 Misc. 2d 213, 215, 250 N.Y.S.2d 395, 397 (Family Ct., Bronx Co. 1964).

101. See Alexander, Family Law, 1963 Survey of N.Y. Law, 15 Syracuse L. Rev. 369, 379 (1963).

102. 20 App. Div. 2d 86, 244 N.Y.S.2d 798 (4th Dep't 1964).

from the procedures of the Children's Court to be difficult. Nevertheless, all of us who are charged with the responsibility of dealing with proceedings under the Family Court Act must constantly be vigilant to observe and follow its provisions."¹⁰³ Acting vigilantly, it also reversed *Matter of Smith*¹⁰⁴ for failure to hold a dispositional hearing and ordered that a hearing be held whether or not the family court thought it knew enough about the respondent to dispense with the hearing.

Custody Proceedings.—One of the significant problems in child custody cases, where parents have contact with courts of more than one jurisdiction, is the fact that courts are not bound by prior decrees of sister states. This means that the issue of custody is relitigable and the results may be unsettling. They may also be absurd. Mr. Sloane had obtained a divorce from Mrs. Sloane in Massachusetts, but Mrs. Sloane was given the custody of the child subject to rights of visitation of the father. The arrangement worked poorly; in order to get his visitation rights, the father once had to apply for habeas corpus in a New York court. The order which issued granted him his rights to custody, qualified by a direction to return the child to the mother at the end of the period allowed by the Massachusetts decree. Mr. Sloane thereupon sought and obtained a modification of the Massachusetts decree from the Massachusetts court. The modified decree made him the custodian of his child. He thereupon applied for a modification of the New York judgment which would, by its express terms, have required him to relinquish the custody of his child (as under the unmodified Massachusetts decree) to his wife. Special term denied his application. Fortunately, the appellate division, in *Sloane v. Sloane*,¹⁰⁵ corrected the error. Although it lectured the trial court about its confusion of a proceeding premised on compliance with the existing Massachusetts decree and a hearing on the merits of child custody, the appellate court also pointed out that had there been a plenary hearing, special term would have been justified in ignoring the Massachusetts modification as an insufficient intervening change in circumstances to warrant modifying a New York order. To add to the problems of a child of a broken home, the problem of conflicting custody decrees in adjoining states seems unfortunate.

It may have been unduly optimistic to hope that "Judge VanVoorhis' lucid opinion [in *Kessler v. Kessler*]¹⁰⁶ should go far in resolving any remaining doubt concerning independent judicial inquiry in custody cases."¹⁰⁷ A Kings County justice seems to have gone farther this year than even the prior decisions presumably rejected in *Kessler*. In *Chitti v. Fitzgerald*,¹⁰⁸

103. *Id.* at 89-90, 244 N.Y.S.2d at 801.

104. 21 App. Div. 2d 737, 249 N.Y.S.2d 1016 (4th Dep't 1964).

105. 20 App. Div. 2d 862, 248 N.Y.S.2d 445 (1st Dep't 1964).

106. 10 N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1 (1962).

107. Alexander, Family Law, 1962 Survey of N.Y. Law, 14 Syracuse L. Rev. 333, 342 (1962).

108. 40 Misc. 2d 966, 244 N.Y.S.2d 441 (Sup. Ct., Kings Co. 1963).

a wife sought to alter her husband's rights to visitation. Frustrated in his attempt to inform himself of the husband's mental condition, the trial justice, over the husband's objection, examined the husband's hospital records. On the basis of his perusal of these records, he removed the husband's right to visitation until the husband would submit to a psychiatric examination. The result may be defensible. A trial court should probably be given a great deal of discretion in altering custodial decrees. On the other hand, an assertion that the court has "inherent power to do what is best to protect the welfare of the infant"¹⁰⁹ and the conclusion that this requires admitting otherwise inadmissible evidence, which in this case is also specifically protected by statute,¹¹⁰ seems unsupportable in light of *Kessler*.

In the third department, *Kessler* fared better. In *Johnson v. Johnson*,¹¹¹ the appellate division reversed a trial court determination which was based in part on the report of a probation officer. The report was the product of an investigation ordered at "the direction of the Court." There was no consent or stipulation. Furthermore, the probation officer, called as a witness at the trial by the father, testified to information she had gleaned, but refused to identify a "neighbor" with whom she testified she had had several conversations about respondent-mother. The court admitted the testimony over objection and also refused to order the probation officer to name her informant. The case thus put in issue not only the question of the use by the court of an unstipulated probation report, but also the meaning of the reservation in *Kessler* preserving the right of a court to order an investigation with the resultant testimony to be available to the parties "to deal with under common-law rules in the absence of their consent" and also "to furnish leads for the introduction of common-law evidence."¹¹² Holding that the trial court had committed error by admitting the testimony, the appellate division added that the "to furnish leads" language of *Kessler* "is limited to the use of the report as a basis for questions put to the witnesses during the course of the hearing" and, generally, that probation "reports may properly provide avenues of inquiry but may not form in any degree a basis for the court's decision in the absence of stipulation or consent. The oral testimony of the investigating officer may, of course, be received but in that case it is subject to all common-law rules of evidence."¹¹³

Psychiatric testimony, which poses many of the same problems in custody cases, also was again in issue. One court not only ordered a psychiatric report to help it (apparently without stipulation by the parties) but,

109. *Id.* at 967, 244 N.Y.S.2d at 442.

110. N.Y.C.P.L.R. § 4504.

111. 21 App. Div. 2d 256, 258, 250 N.Y.S.2d 137, 138 (3d Dep't 1964).

112. *Supra* note 106, at 452, 180 N.E.2d at 405, 225 N.Y.S.2d at 5-6.

113. *Supra* note 111, at 260, 250 N.Y.S.2d at 141.

having received the report, decided the custody question without giving the parents a post-report hearing. The appellate division reversed.¹¹⁴

The problem of determining custody in the best interest of the child is, of course, staggering. One can understand the motivation of courts in accepting professional guidance uncritically. The matters in question seem, at first blush, to be rather removed from the types of issues which the courts are experienced at handling. As one court illustrated this year, however,¹¹⁵ deference to psychiatric expertise may, in some instances, be an abdication of traditional judicial expertise in fact finding. Ruling on an application to certify a child to the Meadowbrook Hospital, made by the superintendent of that hospital, a court was faced with review of a diagnosis of schizophrenic reaction to childhood coupled with a recommendation of certification. Without contradicting medical testimony it, nonetheless, refused to certify the child. According to the court, the diagnosis turned primarily on the implications of the child's prior acts of fire setting. These, in turn, since they were not observed by the examining physicians, depended on assertions by the child's adoptive parents. Suspecting the reliability of the assertions, the court refused to accept the conclusion based on them.

The case illustrates again a unique quality of psychiatric diagnosis. Unlike instances of bacteriological infection for which independent empirical testing is feasible, the accuracy of a diagnosis may depend significantly on the physician's ability to determine the truth of assertions made concerning the patient's prior conduct; this fact finding process would seem singularly reviewable by courts accustomed, also, to making such determinations.¹¹⁶

114. *Knapp v. Knapp*, 21 App. Div. 2d 761, 250 N.Y.S.2d 390 (1st Dep't 1964).

115. *Matter of Anonymous*, 42 Misc. 2d 572, 248 N.Y.S.2d 608 (Nassau County Ct. 1964).

116. See generally, Szasz, *Law, Liberty, and Psychiatry* (1963); Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Sceptical Inquiry into the Courtroom Functions of Psychiatrists*, 14 *Syracuse L. Rev.* 564 (1963).