Family Law

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This article reviews Florida cases in family law that were decided in 1992 and through the end of July, 1993.
I. INTRODUCTION

Unlike prior years in which the Florida Supreme Court was relatively silent with respect to marital and family law issues, the past two years brought a virtual torrent of family law opinions from the supreme court, twelve in all, most of which reaffirmed established legal principles, but several of which significantly altered the course of marital and family law in Florida.
At the appellate level, the past two years brought a series of decisions reflecting at least four apparent trends,¹ and six areas of distinct conflict in the opinions of the various appellate courts.²

II. AGREEMENTS

A. Antenuptial Agreements

The first trend that developed in the appellate decisions rendered during the survey period was a clear movement toward very literal and strict interpretation of the provisions of both antenuptial and postnuptial (settlement) agreements, such that the relief or remedies available to the parties entering into such agreements will be limited to what is precisely provided for by the terms of the agreement. In Genunzio v. Genunzio,³ the parties entered into an antenuptial agreement pursuant to which they agreed, in the first paragraph of the agreement, that the property owned by them at the time of the agreement would remain each person’s separate property. The second paragraph of the agreement required that all property acquired during the marriage would be titled in a joint tenancy between them, and said property would be equally divided between them upon dissolution of

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¹. The four trends which appear in the decisional law are a line of opinions indicating that antenuptial and postnuptial agreements will be strictly and literally interpreted in accordance with the precise language used by the parties; the development of a factual standard for the award of permanent alimony; an inclination towards interpretation of the law so as to provide the maximum ability to enforce alimony and child support awards; and a tightening of the standards under which a trial court’s imputation of income to a spouse in alimony and child support cases will be affirmed.

². The six areas of distinct conflict in the opinions of the appellate courts concern the questions of whether a trial court may extinguish an obligor’s temporary support arrearages by the entry of a final judgment; whether a requirement that a spouse maintain medical insurance on behalf of the other spouse or minor children must contain a specific dollar limitation as to the amount of the obligation; whether a child’s conduct toward the parent owing a duty of support on behalf of the child may be so egregious as to warrant a termination of that parent’s support obligation; whether the enhanced value of premarital or non-marital assets for equitable distribution purposes includes all of the enhanced value however caused or whether such value includes only that portion of the enhancement directly attributable to the marital labors or funds devoted thereto; when and under what circumstances may a party claim an entitlement to the fair rental value of property occupied exclusively by a co-tenant former spouse; and whether an income deduction order may be entered solely to enforce an alimony obligation where the case does not involve minor children.

their marriage. Following the execution of this agreement, the husband purchased a home with his separate funds, and titled the home in his sole name.

At the time of the dissolution of marriage, the trial court determined that the wife was entitled to a partial interest in the home purchased by the husband during the marriage. The Second District Court of Appeal reversed, holding that the wife was entitled to a fifty percent interest in the home, and not the partial interest awarded by the trial court.

In reversing, the district court held that the "plain meaning" of the antenuptial agreement was just that, and while the wife was to have no interest in the property of the husband owned at the time of the agreement, she was entitled to one-half of all property acquired during the marriage. The district court based its decision upon a literal reading of the agreement, noting that the second paragraph of the agreement did not exclude from its operation property acquired by either party after the agreement with property owned at the time of the agreement, nor did the provisions of the agreement in this regard distinguish between property acquired with non-marital or marital funds. The sole criterion for the operation of the paragraph was whether property was acquired during the marriage. The court expressed no hesitancy or reluctance in so interpreting the agreement. The court reasoned that, "[i]f the husband's apparent decision not to except from paragraph 2 property purchased with nonmarital funds was unwise in hindsight, that is not something from which a court of law is entitled to protect him. We must construe the contract in accordance with its plain meaning."

Following the decision in Genumzio, the Second District rendered its decision in Osborne v. Osborne, again limiting the parties to an antenuptial agreement to the strict language of their agreement. In Osborne, the husband and wife married when they were both nineteen years of age. Less than two years after they married, the parties divorced, and pursuant to their settlement at the time, the wife received one-half of the equity in the home ($1,012.50), her car, and the household furniture. She received no alimony or other form of support although the husband did agree to pay her attorney's fees of $150. Several years later, the parties decided to remarry but the husband, upset about how he had been "taken to the cleaners" in

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4. Id. at 130.
5. Id. at 131.
6. Id.
7. Id.
their earlier divorce, demanded that the wife execute an antenuptial agreement. The wife did so.

The antenuptial agreement entered into by the parties provided that the wife would waive all of her rights to any property solely owned by the husband. With respect to alimony, the agreement provided that any alimony to be paid by the husband would be rehabilitative in nature, and would not exceed the sum of $1000 multiplied by the number of years of the marriage. The full amount of such alimony, as calculated under the formula set forth in the agreement, was to be paid to the wife in a lump sum provided that the husband possessed the ability to pay the amount in a lump sum payment. The determination of the husband’s ability to pay was to be made solely by the husband, and the agreement provided that his decision as to his own ability to pay was to be “controlling and final.” The agreement further provided that if the husband decided that he lacked the ability to pay the lump sum, then the alimony would be paid to the wife at the rate of $83.33 per month “for so long a period of time as the parties shall have been married at the time their marriage is dissolved.”

Fifteen years after the execution of the antenuptial agreement, the parties divorced. The husband sought to restrict the wife’s alimony award to the formula provided in the antenuptial agreement, but the trial court determined that, despite the detailed language of the agreement regarding the manner in which the wife’s alimony entitlement was to be calculated, the agreement did not contain any type of waiver of the wife’s right to seek modification of the amount of alimony provided for in the agreement, nor did the agreement contain a waiver of the wife’s right to seek permanent alimony. As such, the trial court, noting that a substantial change in the circumstances of the parties occurred following the execution of the antenuptial agreement, awarded the wife substantially more alimony than the $83.33 per month as provided in the agreement. Additionally, the court awarded the wife permanent alimony. Moreover, the trial court awarded the wife the parties’ former marital home which had been owned solely by the husband.

The Second District Court of Appeal reversed the award of the home to the wife, finding that the parties’ antenuptial agreement clearly specified that the wife had waived any claim to the husband’s solely owned property. However, the district court affirmed the trial court’s alimony

9. Id. at 859.  
10. Id.  
11. Id. at 860.  
12. Id.
awards, upholding the authority of the trial court to grant relief not specifically waived by the provisions of an antenuptial agreement. 13

Similarly, in Ryland v. Ryland, 14 the Fourth District Court of Appeal determined that the parties to an antenuptial agreement were bound by the express language of their agreement, but where the agreement did not specifically address a particular issue or waive a particular right, the trial court was free to act within the bounds of its discretion as to that issue or right. 15 The parties in Ryland had entered into a “homemade” antenuptial agreement which provided only that the wife waived any claims to the husband’s premarital property and if the parties divorced, the husband had the right of first refusal to purchase the wife’s interest in their home. In their subsequent divorce case, the trial court awarded the wife lump sum alimony, to be paid from the husband’s separate assets, and attorney’s fees. The district court reversed in part and affirmed in part, finding that the trial court had the authority to award both alimony and attorney’s fees to the wife because the antenuptial agreement neither mentioned nor waived the wife’s right to seek such relief. 16 The court opined that the specific language of the antenuptial agreement only precluded the wife from making a claim against the husband’s separate assets. 17 Therefore, the trial court was empowered to award the wife the relief she sought, provided that the court did not award relief to the wife specifically from the husband’s separate assets. 18

The foregoing trend continued to develop in the decisional law rendered during the first half of 1993. For example, in White v. White, 19 the trial court denied alimony to the wife on the basis that she had waived her claim to alimony in an antenuptial agreement. The Second District reversed, finding that nowhere in the agreement did the parties use the word “alimony,” and also, that the agreement lacked any express waiver of the wife’s right to seek future support. 20

Similarly, in Timble v. Timble, 21 the parties agreed in an antenuptial

13. Osborne, 604 So. 2d at 860.
15. Id. at 140-41.
16. Id. at 140.
17. Id.
18. Id.; In Porter v. Porter, 593 So. 2d 1120, 1121 (Fla. 4th Dist. Ct. App. 1992), the Fourth District reversed the trial court’s award to the wife finding that the award “deviated from [the terms of the parties’] contract.”
20. Id. at 734.
agreement that the husband would have “full rights, liberty [and] authority . . . to use, enjoy, . . . convey, bequeath, mortgage, grant, sell, invest, reinvest, alienate and dispose of . . . every part of any stock or other interest, or security he owns directly or indirectly, or may hereafter acquire” in a certain corporation.\textsuperscript{22} The wife, at the time of the dissolution of marriage, sought an award of the enhanced value of the husband’s stock holdings, and the district court determined that the wife had clearly waived her right to an interest of any kind in the husband’s stock holdings by the clear language of the agreement.\textsuperscript{23}

B. Postnuptial (Settlement) Agreements

The same trend towards strict and literal interpretation of agreements is found in the appellate decisions pertaining to postnuptial or settlement agreements, including one decision rendered by the Florida Supreme Court. In \textit{Pinm v. Pimm},\textsuperscript{24} the supreme court was called upon to answer a question certified by the Second District Court of Appeal, specifically:

\begin{quote}
[1]s the postjudgment retirement of a spouse who is obligated to make support or alimony payments pursuant to a judgment of dissolution of marriage a change of circumstance that \textit{may} be considered together with other relevant factors and applicable law upon a petition to modify such alimony or support payments?\textsuperscript{25}
\end{quote}

The parties in \textit{Pinm} had entered into a settlement agreement which did not address the subject of the husband’s possible or potential retirement. Rather, the agreement required the husband to make alimony payments to the wife until such time as either party died or the wife remarried. When the husband retired, many years after the execution of the agreement, he sought to reduce the amount of his alimony payments to the wife based upon a decrease in his income. The wife contended that the silence of the agreement upon the subject of retirement, coupled with the requirement that the alimony payments continue as long as she was unmarried, indicated that the husband had agreed to pay alimony regardless of his retirement. The supreme court disagreed, finding that although “it would be a better practice to incorporate consideration of retirement and what will happen in the event of retirement in an agreement,” the silence of an agreement on the subject

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 1189.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} 601 So. 2d 534 (Fla. 1992).
\item \textsuperscript{25} \textit{Id.} at 535.
\end{itemize}
will not preclude a trial court from considering a party’s retirement as part of the total circumstances in determining if sufficient changes in circumstances exist to warrant a modification.26

The silence of a settlement agreement as to a particular issue was also addressed by the Fourth District Court of Appeal in Reynolds v. Diamond.27 In Reynolds, the parties had entered into a settlement agreement pursuant to which the husband agreed to provide for the “costs of education” with respect to college, postgraduate and professional training for the parties’ two children. To be sure, twelve years after the execution of the agreement, the parties were before the trial court upon the issue of the meaning of the words “costs of education,” with the wife contending that the term included all expenses associated with higher education and the husband arguing that the term meant only tuition and related expenses.28

At the appellate level, the husband argued that had he intended to agree to pay for every expense attendant to a college education, such intent would have been set forth in the agreement. The district court, however, determined that the converse was true, reasoning that had the husband wished to limit his contribution, “such language could have been included [in the agreement] to make that intention clear.”29

The First District also so held in its 1993 decision of Maclaren v. Maclaren.30 Therein, the husband sought to terminate his permanent alimony obligation to the wife based upon his allegation that the wife had relocated to New Zealand and was living with a man who was substantially contributing to her support. The trial court denied the modification on the basis that the parties’ agreement did not mention cohabitation, and that such silence could be interpreted as precluding a reduction or termination of alimony upon such grounds. The First District refused to interpret the silence of the agreement as a waiver of relief, and remanded the case to the trial court for a determination of the merits of the husband’s claims.31

The Second District, in line with its decisions regarding antenuptial agreements, also determined, with respect to postnuptial agreements, that the clear and specific language used by the parties in a postnuptial agreement will be binding upon the parties. In Agliano v. Agliano,32 the parties were

26. Id. at 537.
27. 605 So. 2d 525 (Fla. 4th Dist. Ct. App. 1992).
28. Id. at 525-26.
29. Id. at 527.
31. Id. at 105-06.
divorced after twenty-seven years of marriage, and entered into a settlement agreement pursuant to which the husband agreed to pay the wife rehabilitative alimony for a period of fifteen years. The parties agreed that they both irrevocably waived any right to modify the alimony provisions of their agreement. After the divorce, the wife was diagnosed with incurable cancer. She sought a modification of the alimony provisions of the settlement agreement and contended that her agreement to accept rehabilitative alimony was impliedly conditioned upon her capacity to achieve a self-supporting status, which, because of her illness, was no longer possible. Although the trial court found that there was no question that the wife’s illness had “exacted a financial toll not anticipated or foreseen at the time of the divorce,” the court nevertheless dismissed the wife’s request for modification. The Second District affirmed the dismissal, finding that the parties’ agreement, “in unmistakable terms,” defined the boundaries of the parties’ financial relationship, and those “boundaries” included a complete waiver of either party’s right to seek modification. The court noted that there was “no indication in the agreement” that any event would “devitalize” the mutual waivers of the right to modify the terms of the agreement, and, in very strong terms, held that the wife’s illness, “however unanticipated, however unfortunate, does not detract from the unqualified terms of [the] agreement.”

All of the foregoing decisions, when read together, appear to indicate a clear trend at the appellate level, with respect to the interpretation of antenuptial and postnuptial agreements that: (1) if the parties intend to place any limitations upon their rights or remedies, they must clearly state so; (2) mere silence in an agreement as to a particular issue will not be interpreted as a limitation or a waiver; and (3) if the parties specifically waive a right or remedy in an antenuptial or settlement agreement, that waiver will be upheld irrespective of the circumstances or conditions which may later occur.

III. ALIMONY

A. Permanent Alimony

The single most significant development in the case law rendered

33. Id. at 598.
34. Id.
35. Id.
during the past two years was the attempt made by several of the district courts of appeal to define the factual circumstances under which an award of permanent alimony is appropriate. In fact, decisions on this subject may have yielded a new "test" to be applied to determine whether permanent alimony should be awarded in a given case. Although a total of eight decisions were rendered addressing this issue during the survey period, nearly all of the decisions trace their antecedent to Geddes v. Geddes, a 1988 opinion of the Fourth District Court of Appeal.

In Geddes, the Fourth District affirmed the trial court's denial of alimony to the wife finding "no genuine inequities . . . created by [the] dissolution" of marriage without permanent alimony. In so finding, the Geddes court commented upon the fact that no minor children were born of the marriage, and that "no skills were lost" by the wife as a result of the marriage. This latter point subsequently became the standard for the award of permanent alimony in cases decided between 1991 and the present.

In Spencer v. Spencer, decided in December of 1991, the First District Court of Appeal reversed a rehabilitative alimony award following a four year marriage, finding that the evidence presented at the trial level did not establish "that the wife is without the means of self-support, as a result of anything that has transpired during the marriage."

Shortly thereafter, in LaHuis v. LaHuis, the Third District Court of Appeal, addressing the denial of rehabilitative alimony, affirmed the trial court's holding, noting that the wife's "earning potential after the marriage was not diminished."

Then, in early 1992, the Second District Court of Appeal rendered its decision in Kremer v. Kremer, and reversed the trial court's award of permanent alimony to a thirty-seven year old wife following a six year marriage. In reversing, the Second District, citing Geddes and Spencer, opined that there was no showing that the wife was without the means of self-support "as a result of anything that [had] transpired during the marriage." The court noted that although the parties' respective incomes

36. 530 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1988).
37. Id. at 1018.
38. Id.
40. Id. at 554 (emphasis added).
41. 590 So. 2d 557 (Fla. 3d Dist. Ct. App. 1991).
42. Id. at 558.
44. Id. at 218.
45. Id. at 216 (emphasis added).
were disparate, that disparity did not result "in any substantial way from the marriage," because the parties' earnings levels were disparate before they married.46

Thereafter, the Fourth District Court of Appeal, in *Wright v. Wright*, reversed the trial court's permanent alimony award to a thirty-nine year old wife following a five year marriage. The court held, as in the prior decisions, that the evidence did not establish that the wife was unable to provide for her own support "as a result of anything that transpired during the marriage."47

Then, in *Gregoire v. Gregoire*, the Second District Court of Appeal attempted to explain the meaning of the term "transpired during the marriage" by comparing the factual circumstances therein to the factual circumstances of *Kremer*.48 According to the court, three specific factual circumstances distinguished the two cases and permitted the award of permanent alimony in *Gregoire*: (1) the parties had two minor children for whom the wife was responsible; (2) the parties had specifically agreed that the wife would stop working, permanently terminating her career, to become a full-time homemaker; and (3) the achievement by the husband of his substantial income producing ability was shown to have been directly attributable to the wife having financially supported the family while the husband's income was relatively minimal and he was beginning his employment.49 Thus, the wife's inability to provide for her own support and the disparity between the parties' earnings level were both the result of events and circumstances that transpired during the marriage.

In 1993, the Fourth District Court of Appeal decided the case of *Cornell v. Smith*.50 Tracing its decision therein back to *Geddes*, the court opined that "the courts of this state have consistently held that mere disparity in incomes is not sufficient to justify an award of permanent alimony where the wife is relatively young and her earning capacity has not been impaired as a result of the marriage."51

Then, following a rendition of all of the above decisions of the various appellate courts, the Fifth District Court of Appeal determined, en banc, the

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46. *Id.* at 215.
47. 613 So. 2d 1330 (Fla. 4th Dist. Ct. App. 1992).
48. *Id.* at 1333 (emphasis added).
49. 615 So. 2d 694 (Fla. 2d Dist. Ct. App. 1992).
50. *Id.* at 694-95.
51. *Id.* at 695.
52. 616 So. 2d 629 (Fla. 4th Dist. Ct. App. 1993).
53. *Id.* at 630 (emphasis added).
case of *Kennedy v. Kennedy*,\(^{54}\) in which it reversed the trial court's permanent alimony award and adopted what it termed the "doctrine of comparable fairness."\(^{55}\) In *Kennedy*, the Fifth District determined that "comparable fairness" can only be achieved if the trial courts specifically state the factors upon which they base alimony awards and the weight given to those factors, so that the appellate courts can ensure that similar results are obtained in similar cases.\(^{56}\) In other words, the propriety and type of alimony award (permanent versus rehabilitative) should be decided by comparison with the specific facts of other cases in which alimony was either awarded or denied.\(^{57}\)

**B. Rehabilitative Alimony**

With respect to rehabilitative alimony, the cases yielded a series of decisions from every district court of appeal which reiterated certain well-established principles, the two most common being: (1) rehabilitative alimony is not appropriate where the recipient demonstrates no need for new training or new skills; and (2) rehabilitative alimony must not be awarded in the absence of an evidentiary showing that the recipient has some ability to become self-supporting following training or education.

In the first line of decisions, the appellate courts consistently reversed rehabilitative alimony awards in cases in which the recipient did not demonstrate an entitlement to any type of alimony in an attempt to reverse a tendency on the part of trial judges to use rehabilitative alimony awards as a means of providing the wife with "something" following a dissolution of marriage.

In *Spencer v. Spencer*,\(^{58}\) the wife was unemployed and was receiving welfare benefits at the time of the parties' marriage. When the parties

\(^{54}\) 622 So. 2d 1033 (Fla. 5th Dist. Ct. App. 1993).

\(^{55}\) Id. at 1033.

\(^{56}\) Id.

\(^{57}\) In reality, the doctrine of "comparable fairness" appears to describe that which the appellate courts have been doing for quite some time. For example, in *Gregoire*, the Second District went to great lengths to explain the difference between the facts therein (in which the trial court's award of permanent alimony was affirmed), and the facts in *Kremer* (in which the trial court's award of permanent alimony was reversed). *See Gregoire*, 615 So. 2d at 694-95. The significance of the *Kennedy* case is the Fifth District's insistence upon specific findings of fact as to the factors considered and the weight given those factors so that the same set of factors or weighing of factors will lead to the same or similar results in all cases. *See Kennedy*, 622 So. 2d at 1033.

\(^{58}\) 590 So. 2d at 553.
divorced four years later, the wife was employed on a full-time basis, yet the trial court awarded the wife “rehabilitative alimony.” The First District Court of Appeal reversed the award, finding that the record failed to demonstrate any need on the part of the wife for the “redevelopment” of skills or for “training necessary to develop potential supportive skills.”

In *Lozano-Ciccia v. Lozano*, the Third District Court of Appeal affirmed the trial court’s refusal to grant rehabilitative alimony following a short-term marriage to a wife who was a medical doctor in Peru but not licensed in the United States, and who voluntarily elected not to seek employment in this country. The district court affirmed the denial of alimony because the wife was found to have had a number of “marketable skills.”

In *Mahaffey v. Mahaffey*, the trial court’s rehabilitative alimony award was reversed where the evidence established that the wife was a fully employed college graduate who was earning more at the time of the dissolution of marriage than she had earned during the marriage. Because the wife did not indicate the need or the intent to further her education or training, the rehabilitative alimony award was erroneous.

In the second line of cases, the district courts attempted to correct another apparent tendency on the part of the trial courts to award rehabilitative alimony in circumstances where the more appropriate award would have been permanent alimony. The district courts have had to remind the trial courts that rehabilitative alimony is to be awarded only in cases where the evidence establishes that the recipient will be able to become self-supporting in the standard enjoyed during the marriage as a result of the use of the award to obtain job skills or training.

In *Lanier v. Lanier*, the First District Court of Appeal reversed a rehabilitative alimony award to a forty-seven year old wife who had been married for twenty-five years, and was seeking to become employed as a teacher who would then earn approximately $20,000 per year. Noting that the husband earned $50,000 per year, the district court opined that the

59. *Id.* at 554.
60. 599 So. 2d 718 (Fla. 3d Dist. Ct. App. 1992).
61. *Id.* at 718.
62. *Id.*
63. 614 So. 2d 649 (Fla. 2d Dist. Ct. App. 1993).
64. *Id.* at 650.
65. *Id.*
67. *Id.* at 810.
wife's potential teacher's salary would never permit her to "support herself at a standard of living commensurate with that established during the marriage," and, therefore, the award of rehabilitative alimony instead of permanent alimony was erroneous. 68

In Grant v. Grant, 69 the First District again reversed a rehabilitative alimony award where the trial record revealed "neither any previous skills the [wife] could redevelop nor the potential for developing new supportive skills." 70 Finding that the evidence did not show any ability on the part of the wife to become self-supporting, "or any substantial capacity for rehabilitation," the court remanded the case for the entry of an award of permanent alimony. 71

In Bible v. Bible, 72 the Third District Court of Appeal reversed the trial court's award of rehabilitative alimony to a wife following a twenty-five year marriage, where, despite evidence of the wife's employment as a receptionist, the evidence also established that her earnings would never approach the husband's earnings level. 73

Similarly, in Adams v. Adams, 74 a rehabilitative alimony award following a twenty year marriage was reversed upon the basis that the wife's potential earnings as a teacher would not provide her a level of self-support commensurate with the standard of living established during the marriage, and permanent periodic alimony was awarded in its place. 75

In Steinberg v. Steinberg, 76 the trial court awarded rehabilitative alimony for a period of one year to a wife suffering from severe emotional problems who had been unemployed for over eight years. In reversing this award, the district court opined that "[o]nly if the wife is capable of establishing a standard of living commensurate with the standard set throughout the marriage . . . is an award of rehabilitative alimony proper." 77

68. Id. at 811.
70. Id. at 68.
71. Id. at 68-69.
73. Id. at 361.
74. 604 So. 2d 494 (Fla. 3d Dist. Ct. App. 1992), review denied, 614 So. 2d 502 (Fla. 1993).
75. Id. at 496.
76. 614 So. 2d 1127 (Fla. 4th Dist. Ct. App. 1993), review denied, ___ So. 2d ___ (Fla. 1993).
77. Id. at 1129.
C. Temporary Alimony

An interesting development in the decisional law arose in 1992 with respect to whether a trial court may extinguish, in a final judgment, temporary alimony arrearages which accrued prior to the entry of the final judgment. Although two cases decided in 1992 held that the trial court may not do so, a third case held otherwise. In Grant v. Grant, the husband owed the wife substantial sums of money pursuant to the trial court's temporary support order. However, the trial court's final judgment relieved the husband of the arrearages. The First District Court of Appeal reversed, determining that an "unchallenged" temporary support order carries with it the presumption of an ability to comply with the order on the part of the payor. Inasmuch as the husband had never moved for modification of the terms of the temporary order, the district court held that the trial court erred in relieving the husband of his obligation to pay the accrued arrearages.

Similarly, in Burdick v. Burdick, the Fourth District Court of Appeal held that the trial court erred in discharging, through the entry of a final judgment, the arrearages accrued pursuant to an agreed temporary support order prior to the entry of the final judgment. In Burdick, the husband had requested a modification of his temporary obligation and the trial court had granted the modification. The district court found no error in the trial court's granting of the requested modification, but held that the trial court erred in entering a final judgment which "effectively discharged" the arrearages that had accrued prior to the filing of the modification request.

However, after deciding Burdick, the Fourth District decided the case of Allison v. Allison. Therein, at the time of the entry of the final judgment, the husband owed the wife the sum of $7,500 pursuant to the terms of a temporary support order. The trial court, in the final judgment, reduced the amount of the arrearages to $3,500. The district court affirmed,

78. See Grant, 603 So. 2d at 68; Burdick v. Burdick, 601 So. 2d 632 (Fla. 4th Dist. Ct. App. 1992).
81. Id. at 69.
82. 601 So. 2d 632 (Fla. 4th Dist. Ct. App. 1992).
83. Id. at 634.
84. Id.
85. 605 So. 2d 130 (Fla. 4th Dist. Ct. App. 1992), review denied, 618 So. 2d 208 (Fla. 1993).
finding that a trial court “can modify a temporary alimony award before final judgment is entered.”\textsuperscript{86}

Unfortunately, the \textit{Allison} case recites few facts. The opinion does not indicate whether the husband had requested a modification of his temporary support obligation or whether the trial court modified the husband’s obligation upon its own findings from the evidence presented at the final hearing. Furthermore, the opinion does not indicate if, in fact, there was a request for modification by the husband, and whether such a request was made by written motion or by oral request at the time of the final hearing. Thus, from the language of the \textit{Allison} opinion, it appears that the decision may conflict with both \textit{Grant} and \textit{Burdick} to the extent that the latter cases require that some type of request for a reduction in temporary support be made in order to authorize the trial court to reduce or eliminate temporary support arrearages in a final judgment.

D. \textit{Lump Sum Alimony}

Although it is now established law that lump sum alimony may be awarded either for the purpose of equalizing a distribution of marital assets and liabilities, or as a means of providing support to the recipient spouse, one decision rendered in 1992 makes it clear that such purposes are the only two purposes for which such alimony may be awarded.\textsuperscript{87}

In \textit{Harvey v. Harvey},\textsuperscript{88} the trial court attempted to resolve a recurring problem which may, in fact, have no resolution, at least under the present status of our law. Therein, the wife contributed immeasurably to the husband’s career, enabling the husband to find and obtain employment that had the potential to double his salary over that which he had earned during the years in which the parties were married. The trial court, believing that the wife was entitled to be recompensed in some manner for her efforts on behalf of the husband (which would now benefit only the husband), awarded her the sum of $60,000 as lump sum alimony.\textsuperscript{89} The district court reversed, holding that the Florida courts recognize only two types of lump sum alimony: (1) that relating to support and requiring a showing of need

\textsuperscript{86} \textit{Id.} at 131.

\textsuperscript{87} \textit{But cf:} Handsel v. Handsel, 614 So. 2d 631, 631 (Fla. 3d Dist. Ct. App. 1993) (affirming an award of lump sum alimony made for the purpose of partially compensating the wife “for the overwhelming medical expenses incurred and anticipated because of the husband’s egregious behavior.”). Such an award, of course, can be viewed as serving a support purpose.

\textsuperscript{88} 596 So. 2d 1251 (Fla. 4th Dist. Ct. App. 1992).

\textsuperscript{89} \textit{Id.} at 1252.
and ability to pay; and (2) that pertaining to an equitable division of the parties’ marital assets and liabilities.90 Because the lump sum alimony award in this case did not pertain to either recognized type of lump sum alimony, it was reversed.91

E. Enforcement

In what appears to be another emerging trend in Florida law, the appellate courts, as a group, rendered a series of 1992 decisions liberally interpreting existing law in a manner calculated to provide maximum assistance to parties seeking to enforce alimony and child support awards.

With respect to alimony awards, the First District held that pre-judgment interest must be awarded on amounts due for alimony and child support arrearages;92 the Second and Fifth Districts held that the statute of limitations does not apply to proceedings to enforce alimony or child support orders;93 the Third District held that an equitable lien for the purpose of enforcing an alimony award could be applied to homestead property;94 and the Fourth District held that an income deduction order may be entered solely to enforce an alimony award, even in the absence of minor children,95 and that an incarcerated husband’s assets may be sequestered to secure alimony and child support awards.96

In Romans v. Romans,97 the trial court refused to award pre-judgment interest with respect to the alimony and child support arrearages which the wife was attempting to collect. The First District simply held that the wife was “entitled” to such interest as a matter of law.98

In Frazier v. Frazier,99 the wife filed a petition for registration of the parties’ twenty-seven year old Colorado divorce decree. The district court held that the husband’s statute of limitations defense was inapplicable

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90. Id.
91. Id.
93. See Frazier v. Frazier, 616 So. 2d 575, 579 (Fla. 2d Dist. Ct. App. 1993); Popper v. Popper, 595 So. 2d 100, 103 (Fla. 5th Dist. Ct. App.), review denied, 602 So. 2d 942 (Fla. 1992).
94. See Radin v. Radin, 593 So. 2d 1231, 1231-32 (Fla. 3d Dist. Ct. App.), review denied, 605 So. 2d 1265 (Fla. 1992).
98. Id. at 93.
because proceedings to enforce alimony and child support orders are equitable in nature, and therefore, not barred by a statute of limitations in Florida.\textsuperscript{100}

Similarly, in \textit{Popper v. Popper},\textsuperscript{101} the wife sought to enforce and collect alimony due her from 1972. The husband’s alimony obligation was based upon the provisions of a settlement agreement which was incorporated into a final judgment several years after its execution. The husband defended on the basis that the wife’s claim was barred by the statute of limitations. The Fifth District held that the wife’s claims stemming from the agreement were, in fact, barred by the statute of limitations, but the claims arising after the incorporation of the agreement into a judgment were not so barred.\textsuperscript{102} The court opined that the enforcement of periodic alimony and child support orders are equitable proceedings in nature, and such obligations are not barred by the running of the statute of limitations.\textsuperscript{103}

In \textit{Radin v. Radin},\textsuperscript{104} the trial court, in order to enforce its earlier alimony award which had been unpaid by the husband, imposed an equitable lien against the husband’s post-judgment separate property, which the husband was in the process of selling. The trial court specifically found that the husband had engaged in a “pattern of egregious conduct” represented by significant nonpayment of alimony for a period of nearly ten years. Although the district court reversed the trial court’s order because the amount of the lien could not be determined from the face of the judgment, the court upheld the authority of the trial court to impose an equitable lien upon homestead property in order to enforce an alimony award.\textsuperscript{105}

In \textit{Coleman v. Coleman},\textsuperscript{106} the parties were divorced in 1964, at which time the husband was ordered to pay alimony. He did so until 1989, when he sought a modification which was ultimately denied. Eventually, the trial court entered a judgment against the husband, and then entered an income deduction order. The husband appealed, contending that an income deduction order is not proper when no minor children reside with the wife receiving alimony. The Fourth District held otherwise, opining that the “unmistakable language” of section 61.1301(1)(a) of the Florida Statutes, is

\textsuperscript{100} \textit{Id.} The district court, however, noted that the husband could still raise the affirmative defense of laches. \textit{Id.}

\textsuperscript{101} 595 So. 2d 100 (Fla. 5th Dist. Ct. App. 1992).

\textsuperscript{102} \textit{Id.} at 103.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} 593 So. 2d 1231 (Fla. 3d Dist. Ct. App. 1992).

\textsuperscript{105} \textit{Id.} at 1232-33.

\textsuperscript{106} 614 So. 2d 532 (Fla. 4th Dist. Ct. App. 1993).
that the enforcement of any alimony obligation requires an income deduction order.\textsuperscript{107} In so holding, however, the Fourth District recognized conflict with the Second District's opinion in \textit{Schorb v. Schorb}.\textsuperscript{108} This conflict was resolved by the Florida Supreme Court, which approved the Fourth District's holding in \textit{Coleman}.\textsuperscript{109}

F. Security/Insurance\textsuperscript{110}

The single clearest area of conflict between the various appellate courts in Florida deals with whether a trial court must specify a dollar amount limitation upon the financial exposure of a spouse who has been required to maintain medical insurance on behalf of the other spouse, or to pay for the costs of uncovered medical expenses incurred by the other spouse. The decisions addressing this question appear to routinely confuse and overlap the two issues—maintaining medical insurance as distinct from providing for uncovered medical expenses—and the various districts are clearly in conflict.

With respect to medical insurance, the First District Court of Appeal has held, in \textit{Ginsburg v. Ginsburg},\textsuperscript{111} that “it is error for the court to require the husband [to] secure medical coverage [for the wife] without setting an amount or limitation on that obligation.”\textsuperscript{112}

In the Second District, in \textit{Kremer v. Kremer},\textsuperscript{113} the district court reversed the trial court's order that the husband maintain medical insurance on behalf of his former wife for a period of three years, and held that the trial court was required to place “reasonable limitations on the maximum costs to the husband” regarding the insurance requirement.\textsuperscript{114}

\textsuperscript{107} \textit{Id.} at 533.
\textsuperscript{108} 547 So. 2d 985 (Fla. 2d Dist. Ct. App. 1989).
\textsuperscript{109} Coleman v. Coleman, 18 Fla. L. Weekly S546 (Fla. Oct. 21, 1993) (applying the plain meaning rule of statutory construction in finding that section 61.1301(1)(a) was not ambiguous, and that it was unnecessary, therefore, to look to legislative intent).
\textsuperscript{110} The following discussion addresses only the requirement that a party provide either medical insurance or the costs of medical expenses with respect to the other party as a form of alimony and not awards made as a form of child support.
\textsuperscript{111} 610 So. 2d 655 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{112} \textit{Id.} at 656-57.
\textsuperscript{113} 595 So. 2d 214 (Fla. 2d Dist. Ct. App. 1992).
\textsuperscript{114} \textit{Id.} at 218. The Second District has consistently so held. For example, in \textit{Burgess v. Burgess}, 576 So. 2d 1348 (Fla. 2d Dist. Ct. App. 1991), the court held that “the amount of money the husband should pay for . . . health insurance [for the wife] be limited to the amount the husband currently pays to maintain health insurance coverage for his spouse under his present insurance policy.” \textit{Id.} at 1348.
In the Fourth District, the waters become quite muddy. Three medical expense and medical insurance cases were decided by the Fourth District in 1992: one dealing solely with a requirement that insurance be maintained,\footnote{115. See Blythe v. Blythe, 592 So. 2d 353 (Fla. 4th Dist. Ct. App. 1992).} and two dealing with both a requirement that insurance be maintained and that the payor provide for uncovered medical expenses.\footnote{116. See Loss v. Loss, 608 So. 2d 39 (Fla. 4th Dist. Ct. App. 1992); Watford v. Watford, 605 So. 2d 1313 (Fla. 4th Dist. Ct. App. 1992).}

In \textit{Blythe v. Blythe},\footnote{117. 592 So. 2d 353 (Fla. 4th Dist. Ct. App. 1992).} the trial court had ordered the husband to maintain medical insurance on the wife’s behalf, of a type and an amount equal to the insurance that had been provided during the intact marriage by the husband’s employer. On appeal, the husband contended that the order was erroneous because the trial court had failed to set a monetary limit on the cost of the health insurance. The Fourth District disagreed, finding that the trial courts are not required to limit a payor’s responsibility to “a specific dollar amount.”\footnote{118. Id. at 355.}

Thereafter, in \textit{Watford v. Watford},\footnote{119. 605 So. 2d 1313 (Fla. 4th Dist. Ct. App. 1992).} where the trial court had ordered a husband to provide for both medical insurance and uncovered medical expenses, the Fourth District again held that no specific dollar limitation was required, and that a limitation “of reasonable and necessary medical expenses [is] an adequate limitation” as either party could apply for relief from such expenses should the circumstances require it.\footnote{120. Id. at 1315.}

However, in \textit{Loss v. Loss},\footnote{121. 608 So. 2d 39 (Fla. 4th Dist. Ct. App. 1992).} a different panel of the Fourth District held contrary to both \textit{Blythe} and \textit{Watford}, finding that a limitation to “reasonable and necessary” was not sufficient, at least with respect to a requirement that a spouse pay for the medical expenses of the other.\footnote{122. Id. at 42.}

In \textit{Loss}, the trial court had ordered the husband to maintain medical insurance on behalf of the wife and minor children, and to provide for the costs of any uncovered medical expenses. The Fourth District reversed the award, initially holding that earlier opinions of the Fourth District had established a requirement that a payor providing for medical expenses must, “at a minimum,” be limited to those expenses which are “reasonable and necessary.”\footnote{123. Id.} However, the court then went further and opined that even if the trial court had imposed a “reasonable and necessary” restriction upon
the husband's obligation to provide for medical expenses, "it would still be error" because "[s]uch an open-ended and unlimited financial liability is unenforceable." 124

In Young v. Young,125 the Fifth District reversed the trial court's requirement that a husband maintain medical insurance on behalf of the former wife, finding that the obligation "should have been limited to a specific sum commensurate with his current level of premium expense." 126

With respect to medical expenses, as opposed to medical insurance, the First District held in Payne v. Payne, 127 in accordance with their opinions dealing with medical insurance costs, that "open-ended" awards of medical expenses are error and must be reversed. 128 The requirement therein that the husband pay "all reasonable and customary medical, hospital and dental bills" was reversed and the case remanded to the trial court "to determine the husband's maximum liability" for such expenses. 129

In the Second District, there are no opinions on the subject of medical expenses during the survey period. The court's 1991 decision in Gay v. Gay 130 applied the Second District's rule that the payor's exposure be limited to a specific amount to both orders pertaining to medical insurance and orders pertaining to the payment of medical expenses. 131

As the foregoing demonstrates, there is a clear conflict of opinion between the First, Second, and Fifth District Courts of Appeal and the Fourth District Court of Appeal with respect to whether the trial court must provide a specific dollar limitation when one spouse is required to provide medical insurance coverage on behalf of the other spouse. There is a possible further conflict between the First and Second Districts and the

124. Id. at 42-43.
125. 600 So. 2d 1140 (Fla. 5th Dist. Ct. App.), review denied, 613 So. 2d 13 (Fla. 1992).
126. Id. The Fifth District has also consistently so held. In Szemborski v. Szemborski, 530 So. 2d 361 (Fla. 5th Dist. Ct. App. 1988), the court opined that although a trial court has the power to order one party to obtain insurance coverage on behalf of the other, the requirement must be "reasonable in amount." Id. at 361. Thereafter, in Marsh v. Marsh, 553 So. 2d 366 (Fla. 5th Dist. Ct. App. 1989), the language in Szemborski was interpreted to require the trial court to set a specific amount of the husband's obligation. The court held that the trial court's failure to "set a monetary limit on the costs of the ordered health insurance" was reversible error. Id. at 367 n.2.
128. Id. at 749.
129. Id. at 748-49.
131. Id.
Fourth District, as to whether a dollar limitation is required with respect to orders requiring one spouse to provide for the medical expenses of the other spouse. The Fifth District has required such a limitation with respect to medical insurance but has not, as yet, addressed the question of the cost of medical expenses. The Third District has not addressed either issue as of this date.

G. Imputed Income

Following several years in which appellate decisions affirming the trial court’s imputation of income to a spouse were legion, the past two years have brought a series of decisions restricting the circumstances under which imputation of income will be deemed appropriate and requiring compliance with strict standards for such imputation of income. For example, in *Wendroff v. Wendroff*, the trial court imputed income to the husband apparently based on a calculation of the amount of deposits made into his checking account over a seventeen month period. The district court reversed, however, holding that the trial court erred in imputing income without setting forth the amounts imputed and the sources of the alleged imputed income.

The Second District Court of Appeal rendered four “imputed income” decisions during the survey period which reversed the trial court’s findings of imputed income, and one decision which affirmed the trial court’s finding. In *Gildea v. Gildea*, the parties had been married for twenty years during which time the husband was employed in medical sales. Six months after the dissolution action was commenced, the husband was fired from his position due to a general decline in the industry. He sought reemployment and interviewed regularly. The trial court based its alimony award upon the husband’s prior earnings history. The district court reversed, holding that although a trial court may impute income to a party who has no income or is earning less than is available to him, it must do so based upon a showing that the party has the capacity to earn more by the use of his or her best efforts. However, such a determination must be based upon a finding that the party to whom income is imputed has chosen

132. The following discussion addresses the issue of imputation of income with respect to alimony awards. The issue of imputed income in child support cases is discussed in part VI, section D.
133. 614 So. 2d 590 (Fla. 1st Dist. Ct. App. 1993).
134. Id. at 595.
136. Id. at 1213.
to earn less and has the ability to remedy the situation. In this case, the husband had been involuntarily terminated from employment through no fault of his own and had sought reemployment without success. Thus, the imputation of income under the facts of this case was deemed erroneous.137

In *Kinne v. Kinne*,138 the husband had sought a modification of his alimony obligation because he had lost his job and began his own business, but was earning substantially less than he had earned when employed. The trial court denied the husband’s requested modification, finding that the husband was “underemployed” and was “capable of earning a greater income.”139 The district court disagreed and determined that the trial court failed to apply the good faith test in determining whether the husband needed to begin his own proprietorship.140 Absent bad faith on the part of the paying spouse, the district court opined that, “a court is not entitled effectively to decide what an ex-husband’s current employment should or should not be.”141

Thereafter, in *Brooks v. Brooks*,142 the Second District Court of Appeal again reversed an imputation of income in an alimony case. The evidence established that the husband had been diligently seeking employment, but failed to obtain work despite his best efforts.143 The district court noted that the husband had sent out over one hundred resumes, and that at least twelve rejection letters were introduced into evidence at the trial level.144 One of the rejection letters received by the husband indicated that over one hundred and fifty people had applied for the position in question. Under these circumstances, the district court held that there was no evidence establishing that the husband could have earned more than he was earning at the time of the dissolution of marriage.145

In *McCall v. McCall*,146 the trial court imputed income to the husband based upon the court’s assumption that the husband’s live-in girlfriend was, or should be, paying one-half of the husband’s living expenses. The district court reversed the imputation of income, noting first, that it is “improper”

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137. *Id.*
139. *Id.* at 192.
140. *Id.* at 194.
141. *Id.*
143. *Id.* at 631.
144. *Id.*
145. *Id.*
146. 616 So. 2d 607 (Fla. 2d Dist. Ct. App. 1993).
for a trial court to treat a roommate’s income as though it belonged to the spouse, and second, that there was no evidence presented that the husband’s live-in companion actually contributed to the husband’s expenses.147

Within the past two years, Ugarte v. Ugarte148 was the sole decision rendered in which the trial court’s imputation of income was affirmed. This decision differed from the other decisions relating to imputed income in one significant way: the case involved a self-employed physician who, the court noted, was “able to control and regulate” his own income level.149 Thus, in Ugarte, the trial court’s imputation of income to the husband was affirmed.150 The court noted that self-employed individuals, “in contrast to salaried employees,” may possess tax returns and business records which “may not reflect their true earnings, earning capacity, and net worth.”151 The Ugarte case was the only imputed income case rendered in 1992, whether involving alimony or child support, in which an imputation of income by the trial court was affirmed.

The theme of the foregoing decisions is apparent in light of the fact that in five of the six decisions addressing imputed income in alimony cases rendered within the past two years, the trial court’s imputation of income was reversed. Therefore, it is clear that the appellate courts are developing strict standards with respect to imputation of income, and that those standards must be met in order for such imputation to be sustained on appeal.

H. Modification

One of the two most significant decisions of 1992 rendered by the Florida Supreme Court involved the issue of modification of alimony. In Pimm v. Pimm,152 the supreme court responded to a question certified by the Second District Court of Appeal regarding the effect of the voluntary retirement of the payor on the payor’s alimony obligation. The supreme court responded that voluntary retirement could justify a reduction in a payor’s alimony obligation provided that such retirement was reasonable.153 In determining whether a retirement is reasonable, the supreme

147. Id.
148. 608 So. 2d 838 (Fla. 3d Dist. Ct. App. 1992), cause dismissed, 617 So. 2d 322 (Fla. 1993).
149. Id. at 840.
150. Id. at 839-40.
151. Id.
152. 601 So. 2d 534 (Fla. 1992).
153. Id. at 537.
court directed the trial courts to consider "the payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire."\textsuperscript{154} The court further opined that the age of sixty-five "has become the traditional and presumptive age of retirement for American workers" and, therefore, a retirement prior to the age of sixty-five would place upon the payor "a significant burden" to show that earlier voluntary retirement is reasonable.\textsuperscript{155} The foregoing notwithstanding, the court cautioned that "[e]ven at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty," and directed the trial courts to "consider the needs of the receiving spouse and the impact a termination or reduction of alimony would have on him or her."\textsuperscript{156}

The \textit{Pimm} decision also addressed another issue which had been unresolved by earlier decisions of the various district courts of appeal: whether a party seeking a modification of the provisions of an agreement carries a \textit{heavier burden} than a party seeking modification of the provisions of a final judgment. In \textit{Pimm}, the Florida Supreme Court specifically held that "where the alimony sought to be modified was . . . set by the court upon an agreement of the parties, the party who seeks a change carries a heavier than usual burden of proof."\textsuperscript{157}

I. Amount

Section 61.08(2) of the Florida Statutes specifies a list of criteria which the trial courts are required to take into consideration in determining whether alimony shall be awarded and, if so, the nature, type and amount of such alimony.\textsuperscript{158} In 1991, the Florida Legislature amended section

\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Pimm}, 601 So. 2d at 537 (quoting \textit{Tinsley v. Tinsley}, 502 So. 2d 997, 998 (Fla. 2d Dist. Ct. App. 1987)). \textit{See also Tietig v. Boggs}, 602 So. 2d 1250 (Fla. 1992). In \textit{Tietig}, the Florida Supreme Court made it clear that the \textit{heavy burden rule of Pimm} is to be applied only to alimony modification cases, and that the substantial change in circumstances standard is to be applied to child support modification cases. \textit{Id.} at 1251.
\textsuperscript{158} \textit{FLA. STAT.} \textsection 61.08(2) (1991). The statute requires the courts to consider all relevant economic factors, including, but not limited to:

(a) The standard of living established during the marriage.
(b) The duration of the marriage.
(c) The age and the physical and emotional condition of each party.
61.08 providing that, effective July 1, 1991, the trial courts “shall include findings of fact relative to the factors enumerated” therein supporting an award or denial of alimony.\textsuperscript{159} This amendment, and the case law interpreting the amendment, led to three decisions from the First and Fifth District Courts of Appeal, which reversed the trial courts holdings for a failure to include such findings of fact within the final judgment of dissolution of marriage.\textsuperscript{160} These decisions mark the first time that such holdings have appeared in Florida law.

In \textit{Walsh v. Walsh},\textsuperscript{161} the First District Court of Appeal reversed the trial court’s final judgment in its entirety, finding itself unable to review the judgment because of the absence of findings of fact concerning the wife’s need for alimony and the husband’s ability to pay.\textsuperscript{162} The district court opined that the lack of findings made the award of alimony to the wife “impossible to review,” and, therefore, the case was reversed and remanded.\textsuperscript{163}

Similarly, in \textit{Jacques v. Jacques},\textsuperscript{164} the First District found themselves “unable to reach any reasoned decision” because the final judgment lacked written findings of fact to support the alimony award.\textsuperscript{165} Holding that the amendment to section 61.08(1) required such findings, the First District reversed the case, noting, “we are unable to discern the trial court’s determination as to the wife’s needs and the husband’s ability to provide for such needs.”\textsuperscript{166}

\begin{itemize}
  \item \textbf{(d)} The financial resources of each party, the non-marital and the marital assets and liabilities distributed to each.
  \item \textbf{(e)} When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
  \item \textbf{(f)} The contribution of each party to the marriage, including, but not limited to, services rendered in home-making, child care, education, and career building of the other party.
  \item \textbf{(g)} All sources of income avoidable to either party.
\end{itemize}

\textit{Id.}

\textsuperscript{159} Ch. 91-246, § 3, 1991 Fla. Laws 2408, 2410 (codified at FLA. STAT. § 61.08(1) (1991)).


\textsuperscript{161} 600 So. 2d 1222 (Fla. 1st Dist. Ct. App. 1992).

\textsuperscript{162} \textit{Id.} at 1223.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} 609 So. 2d 74 (Fla. 1st Dist. Ct. App. 1992).

\textsuperscript{165} \textit{Id.} at 75.

\textsuperscript{166} \textit{Id.}
In *Moreno v. Moreno*, the Fifth District Court of Appeal reached the same conclusion. Upon the authority of section 61.08(1) of the Florida Statutes, as amended, the district court reversed the trial court's alimony award for its failure to make findings of fact, commenting that such findings are necessary to "meaningful appellate review." All of the foregoing came to a head in the en banc decision of the Fifth District Court of Appeal in *Kennedy v. Kennedy*. Therein, the majority determined that, although the effective date of the statutory requirement for findings of fact regarding alimony awards was July 1, 1991, the requirement applied retroactively to cases in which decisions were rendered after such date. The majority also concluded that the requirement of findings of fact means written findings in the judgment and not merely oral statements in the record.

IV. ATTORNEY'S FEES, SUIT MONEY AND COSTS

A. Standards for Awards of Attorney's Fees

Among the most significant decisions of 1992 were three cases addressing the question of attorney's fee awards. The first, *P.A.G. v. A.F.*, discussed the issue of attorney's fee awards in child support modification actions brought in cases where the underlying child support award was entered in a paternity action rather than a dissolution of marriage action. The second case, *Brown v. Dykes*, determined the validity of section 742.031 of the Florida Statutes. A literal reading of the statute authorized an award of fees in paternity actions only to mothers against putative fathers. In the third, *Sotolongo v. Brake*, the Florida Supreme

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167. 606 So. 2d 1280 (Fla. 5th Dist. Ct. App. 1992).
168. *Id.* at 1281.
169. 622 So. 2d 1033 (Fla. 5th Dist. Ct. App. 1993).
170. *Id.* at 1034.
171. *Id.* Both Judge Sharp and Judge Diamantis, dissenting, did not agree. *Id.* at 1037-39 (Sharp, J., dissenting); *Id.* at 1040-46 (Diamantis, J., dissenting). Both opined that the finding of fact requirement of section 61.08(1) of the Florida Statutes may be met with findings in the record and that the statutory language does not specify that written findings are required. *Kennedy*, 622 So. 2d at 1038, 1044. Both also opined that the requirements of the statute apply only to cases filed after July 1, 1991, and to decisions rendered after July 1, 1991. *Id.* at 1139, 1043-44.
172. 602 So. 2d 1259 (Fla. 1992).
173. 601 So. 2d 568 (Fla. 2d Dist. Ct. App.), *review denied*, 613 So. 2d 2 (Fla. 1992).
174. 616 So. 2d 413 (Fla. 1992).
Court dealt with whether an attorney's fee award may exceed the amount of fees provided for in the contract between the attorney and client.

In *P.A.G.*, the Fourth District Court of Appeal had certified the following question to the Florida Supreme Court: "Whether the Florida Statutes provide for an award of attorney's fees in a postjudgment proceeding for modification of a child support obligation which was entered in a paternity action?" The question had arisen because the portion of the paternity statute dealing with awards of attorney's fees, Florida Statutes section 742.031, authorizes attorney's fees only for the determination of paternity proceedings and does not address the award of attorney's fees for subsequent proceedings.

The Florida Supreme Court answered the certified question in the affirmative, finding that the right to seek modification of a child support order is established by section 61.14 of the Florida Statutes, which pertains to "enforcement and modification of support, maintenance, or alimony agreements or orders." The statute does not limit the court's enforcement and modification authority to court-ordered payments arising from dissolution of marriage proceedings. Instead, the statute provides that, upon motion of either party, the circuit court has jurisdiction to modify an agreement, whether in connection with a dissolution or separate maintenance proceeding or with a voluntary property settlement. The court also has jurisdiction "when a party is required by court order to make any payments." Thus, the fact that an order of child support is entered as a result of a paternity proceeding does not alter the fact that it is a "court order" for child support and, therefore, subject to modification pursuant to section 61.14. Because the modification action is brought under the authority of Chapter 61 and specifically section 61.14 of the Florida Statutes, the attorney's fee provisions of Chapter 61, which apply to "any proceeding under this chapter," apply to the action.

In *Brown v. Dykes*, the Second District Court of Appeal was called upon to determine whether the provisions of the Florida statute dealing with awards of attorney's fees in paternity actions was invalid on equal protection grounds, in light of the fact that a literal reading of the statute would authorize the award of fees only on behalf of prevailing mothers in paternity

175. *P.A.G.*, 602 So. 2d at 1260.
176. *Id.* at 1261.
178. *P.A.G.*, 602 So. 2d at 1261.
179. *Id.*
cases. In order to find the statute valid, the Second District determined that either prevailing party—whether such party be the mother or the putative father—must be entitled to an award of attorney's fees.181

The Second District noted that Florida's paternity statutes were amended in 1986 in order to allow either party—the mother or putative father—to initiate an action for the determination of paternity.182 Prior to the amendment, only the mother of a child born out of wedlock could initiate a paternity proceeding under the paternity statutes and the putative father was left to resort to other legal remedies, such as an action for declaratory judgment. A number of constitutional challenges to the paternity statutes were brought by putative fathers, but the Florida Supreme Court consistently upheld the validity of the statutes on the basis that putative fathers had other legal remedies, such as declaratory relief, through which to seek a determination of paternity. The constitutional challenges eventually compelled the Florida Legislature to amend the statutes in 1986 to allow paternity actions to be initiated by either party or by the child.183 However, when the statute was broadened, the Legislature failed to amend the attorney's fee portion of the statute (section 742.031) which authorizes the imposition of attorney's fees against the father only.184

The Second District concluded that a gender-based classification must be substantially related to the achievement of an important governmental objective to withstand constitutional challenge.185 The court opined that, "the validity of any such classification must be determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."186 However, the court further noted that when a statute treats a class of people covered by the statute unequally, as compared to a class not so covered, a court may make the choice of applying the statute to both classes or neither. Thus, the Second District elected to construe the statute as applicable regardless of gender and held that "a father may apply for attorney's fees under section 742.031 of the Florida Statutes."187

181. Id. at 570.
182. Id. at 569.
185. Brown, 601 So. 2d at 569.
186. Id.
187. Id. at 570.
In *Sotolongo v. Brake*, the wife had retained her counsel through a pre-paid legal services plan and contractually agreed to pay her attorney at the rate of $60 per hour. At the conclusion of the dissolution of marriage proceedings, the trial court required the husband to pay the wife’s attorney’s fees and the wife’s attorney sought a fee award at a higher hourly rate than called for by the contract with the wife. The supreme court determined that in cases involving pre-paid legal service contracts, the hourly rate specified in the contract is presumed to be reasonable and may not be exceeded in a fee award against the other party. Accordingly, the contract attorney is not entitled to compensation over and above the amount specified in the legal services contract. However, the court further opined that in cases not involving pre-paid legal service contracts, an attorney’s fee award may exceed the contract amount if the spouse seeking the fee award establishes that because of the spouse’s inferior economic status, the agreed upon fee was below the customary and reasonable rate charged for similarly situated clients. If the spouse seeking the fee award establishes such facts, then the burden will shift to the defending spouse to disprove the allegation. The failure of the defending spouse to disprove the allegation will justify the trial court enhancing the fee to compensate for the reduction below the customary and reasonable rate.

B. Miscellaneous

Although the foregoing decisions were the leading cases with respect to the issue of the standard for awards of attorney’s fees, several other significant decisions were rendered by the appellate courts.

In *Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A. v. Mullin*, the Third District Court of Appeal ordered the husband to pay the wife’s attorney’s fees with respect to a certiorari proceeding in which the husband was not a party. The court found that the basis of the wife’s claim in the appellate court arose from an order entered in a dissolution of marriage action and, therefore, the appellate proceeding could be considered a chapter 61 proceeding pursuant to which attorney’s fees may be awarded. In *Jacobson v. Jacobson*, the Fifth District Court

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188. 616 So. 2d 413 (Fla. 1992).
189. *Id.* at 413-14.
190. *Id.* at 414.
192. *Id.* at 957.
of Appeal held that, where the parties contract through a settlement agreement, the prevailing party in any enforcement proceeding shall be awarded his or her attorney's fees. Further, the trial court must enforce such an agreement and has no discretion to decline to award attorney's fees to the prevailing party.

In *Cooper v. Kahn*, the Third District Court of Appeal held that a guardian ad litem in a matrimonial matter must present the same type of evidence in support of an award of attorney's fees as is required of an attorney seeking such an award. The trial court must also enter a judgment setting forth the same type of findings of fact as are required in any other attorney's fee proceeding.

In *Mishoe v. Mishoe*, the First District Court of Appeal held that a trial court may not "reserve jurisdiction" to award attorney's fees at a subsequent time if the party to be ordered to pay lacks the ability to pay at the time of the proceedings. In *Mishoe*, the trial court found that the husband lacked the ability to pay attorney's fees at the time of the final hearing in the parties' divorce case. However, the court "reserved jurisdiction" to award such fees to the wife in the future, when the husband would presumably be financially better off. The First District held that once a trial court makes the factual finding that the husband lacked the ability to pay attorney's fees, any attempt to defer consideration "into the indefinite future" was "ineffectual." The test, according to the district court, is the parties' relative ability to obtain counsel at the time of the proceedings in question. The First District opined that if a court could reserve such a determination until years after the dissolution, it would stand to reason that if a party receiving an award of attorney's fees greatly improved his or her circumstances in the future, that party could be required to reimburse the payor spouse by the simple means of "reserving jurisdiction."

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194. *Id.* at 293-94.
195. *Id.*; see also *Rose v. Rose*, 615 So. 2d 203 (Fla. 4th Dist. Ct. App. 1993). Of course, the parties must have specifically agreed to the use of a "prevailing party" standard because, absent such an agreement, a "prevailing party" basis for the award of fees in family law cases is erroneous.
197. *Id.* at 36.
199. *Id.* at 1101.
200. *Id.*
201. *Id.* The court distinguished the type of "reservation of jurisdiction" attempted by the trial court in *Mishoe* from the more customary situation in which the trial court determines an entitlement to attorney's fees and reserves jurisdiction to set the award at a
There were two decisions rendered in 1993 that are of most interest regarding the issue of the standard for awards of attorney's fees in dissolution of marriage actions. First, in *Pelton v. Pelton*, the First District Court of Appeal determined that the trial court must, in determining both “need” and “ability to pay,” reduce the income of the payor spouse by the amounts required to be paid under the final judgment and increase the income of the recipient spouse by such amounts. Only after having done such calculations is the trial court permitted to determine the respective incomes of the parties for the purpose of awarding attorney's fees.

Second, in *Steele v. Steele*, the Second District determined that an award of attorney's fees in a dissolution of marriage action must pertain to the relief requested in the actual dissolution proceedings. In *Steele*, as part of the dissolution of marriage action, the wife filed a constructive trust and partition action against the husband’s parents who owned the former marital residence jointly with the husband. At the conclusion of the case, the trial court awarded the wife attorney's fees to be paid, in part, by the husband’s parents. The Second District reversed, holding that there was no statute or case law permitting the award of attorney's fees in a constructive trust and partition case and, therefore, the husband’s parents could not be made liable for the wife’s attorney's fees.

### C. Enforcement

Two significant attorney’s fees enforcement cases were decided in 1992 and early 1993, specifically *City of Tampa v. Hines* and *Reyf v. Reyf*. In *Hines*, a writ of garnishment for the collection of attorney’s fees was issued against the city of Tampa with respect to a city employee, a police officer, who owed attorney’s fees on behalf of his former wife. The city contended: that the garnishment statute, section 61.12 of the Florida Statutes, did not permit garnishment of a municipality because only states and counties are mentioned; that the statute does not mention subsequent date, noting that the latter is “clearly proper.”

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204. Id. at 717.

205. 617 So. 2d 736 (Fla. 2d Dist. Ct. App. 1993).

206. Id. at 738.

207. Id.


209. 620 So. 2d 218 (Fla. 3d Dist. Ct. App. 1993).
attorney’s fees among the matters for which such garnishment may be obtained; that “as a matter of public policy, attorney’s fees are not as important as child support” and, therefore, represent a “mere debt” for which garnishment should not lie; and that being subject to the writ would constitute an unreasonable burden on the city. The Second District Court of Appeal did not agree and held, with respect to three of the city’s four arguments: that the statute has been construed as applicable to municipalities; that the words “suit money” which do appear in section 61.12 include attorney’s fees; and that being subject to a writ of garnishment constitutes a “relatively small administrative inconvenience” to the city. With respect to the city’s third argument (the public policy argument) the Second District, without commenting upon the accuracy of the city’s “ranking” of the importance of the fee award, noted that, even if such an award were of lesser importance than a child support or alimony award, “such a ranking would not mean that attorney’s fees do not justify garnishment.” Without counsel, the court commented, “a spouse might well not be on an equal footing with the opposing spouse and be able to provide a court with the necessary evidence to support an award of all the alimony and child support he or she needs.”

Hines dealt with an ordinary writ of garnishment. With respect to a continuing writ of garnishment, however, the Third District held, in Reyf v. Reyf, that such a writ is not available for the enforcement of an attorney’s fee award.

V. CHILD SUPPORT

A. Age of Majority

The fact that for over twenty years the age of majority in Florida has been eighteen has not seemed to diminish the number of cases addressing the issue of the age of majority and child support issues. During the survey period, no less than eight cases rendered by the appellate courts dealt with this issue.

211. Id. at 161-62.
212. Id. at 162.
213. Id.
214. 620 So. 2d 218 (Fla. 3d Dist. Ct. App. 1993).
In *Haydu v. Haydu*, the trial court ordered the husband to maintain life insurance in order to secure the child support ordered paid on behalf of the parties’ minor children. The court did not specify, in the final judgment, however, that the husband would have the right to remove the children as beneficiaries as each child attained the age of majority. The First District reversed the trial court for having failed to include such a cancellation provision in the judgment, noting that “a father’s duty of support expires when his children achieve their majority.”

Similarly, in *Harris v. Deeb*, the Second District, in a brief, one paragraph decision setting forth no facts, stated, “the ex-husband should not be required to provide life insurance to secure his obligation for support of a child who dies, marries, becomes emancipated, or reaches majority and its not thereafter entitled to support.”


In *Herron*, the father had been ordered to pay child support until each of his children were emancipated pursuant to a decree entered in Indiana where the age of majority is twenty-one. The father moved from Indiana to Florida but the children remained in Indiana. In an enforcement proceeding brought by the mother, the father contended that he was only obligated to pay support until the children attained the age of majority. Since he lived in Florida, such an order could only be enforced against him in Florida until his children attained Florida’s age of majority or, in other words, the age of eighteen. Not surprisingly, the Second District Court of Appeal did not agree with the father’s position and held that “[t]he mere fact that the father has moved to this jurisdiction which requires support only to eighteen will not defeat his obligation required under the law of the foreign jurisdiction which is now being enforced in Florida.”

216.  Id. at 657.
218.  Id.
221. 600 So. 2d 575 (Fla. 2d Dist. Ct. App. 1992).
McCauley v. McCauley, a Second District Court of Appeal was heard en banc for the purpose of resolving the conflict between two earlier decisions of the Second District, Thomasson v. Thomasson and Stultz v. Stultz. McCauley involved a husband who had been ordered to pay child support until his child had attained the age of eighteen despite the fact that at age eighteen the child would still be in high school. The wife appealed from the trial court's decision to award child support only until age eighteen and the district court affirmed, holding that if a legal duty to provide post-majority support while a child remains in high school is to be created, the legislature "is the fountain out of which that legal duty is to spring."

In the en banc decision in McCauley, the Second District noted that "there is no legal duty to pay child support beyond the age of eighteen—the age of majority in Florida—absent a finding of physical or mental deficiencies." In Monitzer v. Monitzer, the Second District addressed a case in which such deficiencies were, in fact, present. The evidence presented to the trial court in Monitzer established that the parties' child, although she had attained the age of eighteen, remained "dependent" as a result of "a mental or physical incapacity which began prior to her reaching majority." Despite evidence that the child would become independent at some time in the future, the child was dependent at the time of the hearing and had been dependent for years prior to attaining the age of

224. 562 So. 2d 428 (Fla. 2d Dist. Ct. App. 1990) (holding that trial court could properly find that an eighteen year old child who was still in high school was dependent and therefore entitled to continuing child support).

225. 504 So. 2d 5 (Fla. 2d Dist. Ct. App. 1986) (holding that a parent cannot be ordered to continue child support payments on behalf of a child still in high school despite fact that the child was economically dependent and required continuing support until graduation from high school).

226. McCauley, 599 So. 2d at 1003. The Second District did not mention the 1991 revision to section 743.07 of the Florida Statutes, which became effective on October 1, 1991, and allows for continuing child support if the child is dependent in fact, is between the ages of 18 and 19, and is still in high school performing in good faith with a reasonable expectation of graduation before the age of 19. Ch. 91-246, § 8, 1991 Fla. Laws 2408, 2416 (amending FLA. STAT. § 743.07 (1991)). In Walworth v. Klauder, 615 So. 2d 219 (Fla. 5th Dist. Ct. App. 1993), the Fifth District certified to the Florida Supreme Court the question of whether section 743.07 is violative of equal protection because of the seemingly arbitrary cut-off date of the age of 19.

227. McCauley, 599 So. 2d at 1002.


229. Id. at 575.
eighteen. As such, the Second District reversed the trial court's refusal to order the husband to continue to pay support.\textsuperscript{230}

In the Third District, in \textit{Carbonell v. Carbonell},\textsuperscript{231} the trial court's requirement that the husband continue to pay child support until such time as the child "graduates from high school, becomes nineteen years of age while still attending high school, dies, marries or becomes self-supporting," was stricken. The court held that attending high school does not make a child dependent and that absent a statutory dependency, the obligation to provide child support ends upon the child attaining the age of majority.\textsuperscript{232}

The last of the post-majority child support cases decided by the Second District during 1992 involved a situation in which the parties' twenty-six year old son sued the husband seeking to enforce the terms of his parents' 1980 settlement agreement pursuant to which the husband had agreed to pay for the son's college education. In \textit{Potts v. Potts},\textsuperscript{233} the district court reversed the trial court's dismissal of the action for "failure to state a cause of action," and held that the child was "entitled to maintain an action against his father on purely contractual grounds."\textsuperscript{234}

In arguably the most interesting post-majority child support case of the year, at least from the perspective of family law practitioners, the Third District Court of Appeal in \textit{Krstic v. Krstic},\textsuperscript{235} affirmed an order of the trial court which "reserved jurisdiction" to order the husband to pay for his children's college education "should that relief become available under Florida law."\textsuperscript{236} The Third District opined that the order was not objectionable as it "simply left open the possibility that should the law change, such relief may be available for the children."\textsuperscript{237}

In the Fifth District, a very unusual fact pattern emerged in the case of \textit{Department of Health \\& Rehabilitative Services v. Holland},\textsuperscript{238} which involved post-majority enforcement of post-majority arrearages. In \textit{Holland},

\begin{itemize}
  \item \textsuperscript{230} \textit{Id.}
  \item \textsuperscript{231} 618 So. 2d 326 (Fla. 3d Dist. Ct. App. 1993).
  \item \textsuperscript{232} \textit{Id}. The Third District did not mention in this opinion the revisions to section 743.07 of the Florida Statutes, which became effective October 1, 1991.
  \item \textsuperscript{233} 615 So. 2d 695 (Fla. 2d Dist. Ct. App. 1992).
  \item \textsuperscript{234} \textit{Id}. at 697.
  \item \textsuperscript{235} 604 So. 2d 1244 (Fla. 3d Dist. Ct. App. 1992).
  \item \textsuperscript{236} \textit{Id}. at 1246.
  \item \textsuperscript{237} \textit{Id}. The \textit{Krstic} case leaves open the question of whether attorneys should now seek to have included in final judgments a \textit{reservation of jurisdiction} with respect to all possible forms of relief which are not yet available under the existing law, but may be in the future, and whether a failure to do so could constitute malpractice.
  \item \textsuperscript{238} 602 So. 2d 652 (Fla. 5th Dist. Ct. App. 1992).
\end{itemize}
the father was obligated to pay support for the parties’ minor child beyond the child’s attaining the age of eighteen. After the child attained majority, child support arrearages accrued and, thus, when the Department of Health and Rehabilitative Services sought to collect the arrearages from the father on behalf of the mother, they were seeking post-majority arrearages through a post-majority enforcement action. The trial court determined that under such circumstances, only the child had standing to enforce the obligation and the district court affirmed.239

The Fifth District began its discussion by noting that there are several sources for the duty to pay child support.240 The duty can be strictly legal based on common law or statute, strictly contractual, or a confusion of both. The confusion arises from the fact that separation agreements appurtenant to dissolution of marriage actions are often a combination of both legal and contractual duties, blurred by two practices. The first practice is using agreements to contract as to the amount satisfactory to discharge a duty imposed by statute or common law. The second practice is having a court approve and order payment of purely contract based duties. Thus, confusion results from the practice of having a trial court approve an agreement relative to child support, and ordering payment, without distinction as to, or appreciation for, the difference between a support agreement merely quantifying the amount correctly necessary to discharge a legal (statutory or common law) duty, and an agreement establishing a purely contractual duty to pay an agreed amount of child support.241

The foregoing notwithstanding, the Fifth District opined that

(1) under law only one cause of action exists in one entity or person at one time; (2) that a child for whom child support is due from a parent is the equitable and legal beneficiary and the real party in interest and in legal contemplation owns the cause of action to recover due monies for its support; (3) when a child is under legal disability of non-age or otherwise, the mother, or anyone else, who is the lawful custodial or legal guardian for the child or even a next friend, is entitled to collect child support money owed by the parent to discharge a legal duty for child support . . . ; (4) any non-volunteer stranger has a common law cause of action against either parent for the cost of necessities provided a child because of the parent’s neglect to meet his or her legal parental duties to support that minor child . . . ; (5) a child of lawful age and under no legal disability has the legal right to make the decision to

239. Id. at 653-54.
240. Id. at 654.
241. Id.
enforce, and when to enforce, or not to enforce, its own legal rights; and (6) one parent of a child, as such, does not have the legal right or standing to enforce the child’s cause of action or to collect support money from the other parent after the child is of age and is under no other legal disability.\(^{242}\)

### B. Modification

Six significant decisions regarding child support modification were rendered in 1992 and 1993, three of them by the Florida Supreme Court. In *Pimm v. Pimm*,\(^ {243}\) the Florida Supreme Court was called upon to respond to a question certified by the Second District Court of Appeal with respect to the effect of a payor’s voluntary retirement upon the payor’s alimony obligation. The court responded to the question by holding that voluntary retirement could, under circumstances in which the retirement was *reasonable*, constitute a substantial change in circumstances for the purpose of decreasing the payor’s alimony obligation. The court further noted, however, that the obligation to pay child support differs from the obligation to pay alimony and, therefore, “voluntary retirement cannot be considered a change of circumstances which would warrant a modification of child support.”\(^ {244}\)

In reaching its decision in *Pimm*, the supreme court also opined that a party seeking a modification of the terms of an agreement, as opposed to the terms of a judgment, faces a *heavier burden* of proof with respect to such modification. Having so held, the supreme court found itself faced with the problem presented in *Tietig v. Boggs*,\(^ {245}\) in which a husband seeking a downward modification of child support, had been denied the requested relief on the basis that he had failed to meet his *heavier burden*. The *Tietig* case then came before the Florida Supreme Court on the basis of conflict with *Bernstein v. Bernstein*,\(^ {246}\) in which the Fourth District Court of Appeal had held that the *heavier burden* standard did not apply to child support cases because Florida’s public policy does not permit the terms of a contract between parents to impinge upon the best interest of their children.\(^ {247}\)

\(^{242}\) *Id.* at 654-55.

\(^{243}\) 601 So. 2d 534 (Fla. 1992).

\(^{244}\) *Id.* at 537.

\(^{245}\) 602 So. 2d 1250 (Fla. 1992).

\(^{246}\) 498 So. 2d 1270 (Fla. 4th Dist. Ct. App. 1986).

\(^{247}\) *Id.* at 1273.
The supreme court resolved the apparent conflict between its decision in *Pimm*—that a party seeking a modification of the terms of an agreement bears a *heavier burden* than one seeking the modification of the terms of a judgment—and Florida’s public policy that prevents parents from contracting to the detriment of their children, by holding that in child support modification cases stemming from an agreement rather than a judgment, only the party seeking a reduction in the amount of child support to be paid bears a *heavier burden*. On the other hand, a party seeking an increase in the amount of child support required pursuant to the terms of an agreement does not bear such a “burden” and need only establish a substantial change in circumstances.\(^{248}\)

In *Miller v. Schou*,\(^{249}\) the husband in a child support modification case stipulated to his ability to pay any reasonable increase in child support ordered by the court. Based upon this stipulation, the husband thereafter refused to file a financial affidavit, contending it was unnecessary. The trial court ordered him to do so. The Third District reversed, and the Florida Supreme Court determined that the husband was, in fact, required to submit a financial affidavit irrespective of his stipulated ability to pay.\(^{250}\) On the issue of the modification of child support itself, the supreme court opined that an increase in the financial ability of the paying parent is sufficient, in and of itself, to warrant an increase in child support.\(^{251}\)

Two other decisions of import regarding child support modification were rendered in 1992: *Evans v. Evans*\(^{252}\) and *Manning v. Manning*,\(^{253}\) both from the First District Court of Appeal. In *Evans*, the parties had been divorced in 1987, at which time they agreed that the husband would be the

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\(^{248}\) *Id.* at 1271. *Contra* Landa v. Massie, 593 So. 2d 1146 (Fla. 3d Dist. Ct. App.), *review denied*, 602 So. 2d 942 (Fla. 1992). A request for an upward modification of child support was denied on the basis that the petitioner had a “heavier burden” of proof because the amount of child support was determined by an agreement between the parties. *Id.* at 1147. The *Landa* case, however, was rendered prior to the rendition of the supreme court’s opinion in *Tietig v. Boggs*.

\(^{249}\) 616 So. 2d 436 (Fla. 1993).

\(^{250}\) *Id.* at 438.

\(^{251}\) *Id.* at 437-38. But see Kersh v. Kersh, 613 So. 2d 585 (Fla. 4th Dist. Ct. App. 1993), in which the fact that the husband’s income had increased by twenty-five percent was held to be an insufficient basis upon which to order increased child support in which the husband did not stipulate to an ability to pay any award made, and the husband’s lifestyle had not improved as a result of his increased income as he also had increased expenses. *Id.* at 586.


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primary residential parent of their minor children. There was no mention of child support in the parties’ agreement or in the final judgment incorporating the agreement. Thereafter, the wife petitioned for modification of custody and the husband counter-petitioned for child support.\footnote{Evans, 595 So. 2d at 988-89.} The wife’s petition for modification was denied and, again, no mention was made in any court order of child support. In 1990, the husband filed a petition for child support labeled “petition for modification.” The trial court denied the husband’s request for child support on the basis that the original agreement and final judgment did not award any support, and that no support had been awarded in the parties’ first modification case. The district court reversed, holding that neither the final judgment nor the order entered as a result of the first modification proceeding bore any indication that the issue of child support had been considered by the court and that neither a marital settlement agreement nor any other contract will serve to abrogate a parent’s obligation to support minor children.\footnote{Id. at 990.}

In Manning, the First District Court of Appeal expressly stated that the standard for a downward modification of child support is a substantial change in the circumstances of the payor that is “permanent in nature.”\footnote{Manning, 600 So. 2d at 1275-76.} The court noted that there is no set “time periods or particular circumstances” which in and of themselves will demonstrate “permanence”; rather, each case must be decided on a “reasonable examination of the facts” of the particular case.\footnote{Id.; see also Freeman v. Freeman, 615 So. 2d 225 (Fla. 5th Dist. Ct. App. 1993). In Freeman, the Fifth District determined that the requirement that a change in circumstances be “permanent” does not require a showing that the change is “forever.” Id. at 226. Rather, a showing of permanent change requires proof that the change is not temporary or transient, but rather encompasses an extended period of time.}

C. Enforcement

In one of several Florida Supreme Court decisions rendered within the past two years addressing family law issues, the court determined that section 61.181(5) of the Florida Statutes, does not violate the Florida Constitution by pledging public credit.\footnote{State v. Dixon, 594 So. 2d 295 (Fla. 1992).} In Dixon, the clerk of the court of Polk County filed a declaratory action asserting that section 61.181(5) of the Florida Statutes, which requires the disbursement by the clerk of funds paid to the depository within four days, pledged the public credit because

\footnotesize{\begin{itemize}
\item 254. Evans, 595 So. 2d at 988-89.
\item 255. Id. at 990.
\item 256. Manning, 600 So. 2d at 1275-76.
\item 257. Id.; see also Freeman v. Freeman, 615 So. 2d 225 (Fla. 5th Dist. Ct. App. 1993). In Freeman, the Fifth District determined that the requirement that a change in circumstances be “permanent” does not require a showing that the change is “forever.” Id. at 226. Rather, a showing of permanent change requires proof that the change is not temporary or transient, but rather encompasses an extended period of time.
\item 258. State v. Dixon, 594 So. 2d 295 (Fla. 1992).
\end{itemize}}
the clerk was required to disburse the funds even if the check had not then cleared. The Florida Supreme Court stated that the statute did not require the pledging of public credit but, further noted, that even to the extent that it could be held to pledge the public credit, doing so served a strong public purpose:

It is a matter of national and state concern that children of broken marriages and children born out of wedlock constitute a large percentage of people living in poverty in the United States today. Not only is the amount of support ordered to be paid often inadequate, but also a large percentage of the ordered support is never paid. The efforts of the legislature to increase voluntary compliance with orders of support by allowing the convenience of payment by personal check, and by making the funds readily available to dependent spouses and children are sufficiently strong public purposes to support any incidental pledge of public credit.

Three other child support enforcement decisions rendered in 1992 are of interest to the extent that two imply and one holds directly that the Florida Supreme Court’s decision in Putnam v. Putnam, rendered over fifty years ago, is no longer “good law.”

In Putnam, the Florida Supreme Court had held that a child’s refusal to visit with his or her father could serve as the basis of terminating the father’s child support obligation or, in some cases, could serve as the basis of “forgiving” any child support arrearages that had accrued during the period of time during which the child refused to visit. Not surprisingly, Putnam continues to be cited as authority for these propositions sixty-four years after its rendition.

In Carroll v. Carroll, the Second District determined that the numerous changes in Florida law and Florida statutes over the past sixty years have overruled the holding in Putnam. The Second District reached this conclusion in a case where the parties’ sixteen year old son petitioned the trial court, in his own name, to terminate his father’s visitation rights.

259. Id. at 296.
260. Id. at 298-99 (footnotes omitted).
263. 186 So. 517 (Fla. 1939).
264. Id. at 518.
The trial court did so but also terminated the father's child support obligation. The district court determined that it was unwilling to say that conduct of a child, not shown to be orchestrated by one of the parents, should relieve a parent of his or her duty to support the child because doing so "would punish only the other parent's ability to pay for that child's needs."\textsuperscript{266}

The Second District continued this line of reasoning in \textit{Department of Health \& Rehabilitative Services v. Lemaster},\textsuperscript{267} in which the Department, on behalf of a mother who was owed child support, attempted to collect nearly twelve years of child support arrearages from the father. The father defended the enforcement proceeding by alleging that he had not seen his child during the entire period of time for which he owed child support. The trial court found that the father had not known the whereabouts of his child during the time in which the arrearages accrued and thus "forgave" approximately $9,400 of the $14,900 in child support arrearages due and owing to the mother. The district court reversed, holding that the obligation to pay child support and visitation rights are unrelated and that the inability to exercise visitation does not relieve the non-custodial parent from the obligation to pay child support.\textsuperscript{268}

These two decisions of the Second District Court of Appeal, particularly the decision in \textit{Carroll}, appear to conflict with the earlier decision of the Fifth District Court of Appeal in \textit{Riley v. Connor},\textsuperscript{269} in which the Fifth District opined that "there may be conduct, on the part of a child who has reached an age of discretion, of such disrespectful and contumacious character, directed toward the obligor parent," which would justify the suspension of the duty of support.\textsuperscript{270} The Second District noted this apparent conflict in its \textit{Carroll} decision, but felt that it was simply unable to agree with the Fifth District as to this point.\textsuperscript{271}

In \textit{Parker v. Parker},\textsuperscript{272} the parties' child refused to visit with the husband (who had adopted the child at the age of four) because, according to the child, he felt that the husband "was making him do things he didn't

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\textsuperscript{266} \textit{id.} at 1132-33.
\textsuperscript{267} 596 So. 2d at 1117.
\textsuperscript{268} \textit{id.} at 1118. The court further opined that it would have been "a simple matter" for the father to have "set aside each child support payment as it became due. Had he done so, he would not now find the twelve year accumulation of arrearages to constitute an intolerable lump sum for him to shoulder." \textit{id.}
\textsuperscript{269} 509 So. 2d 1177 (Fla. 5th Dist. Ct. App. 1987).
\textsuperscript{270} \textit{id.} at 1178.
\textsuperscript{271} \textit{Carroll}, 593 So. 2d at 1133.
\textsuperscript{272} 610 So. 2d 719 (Fla. 1st Dist. Ct. App. 1992).
\end{flushright}
want to do." The child had regained contact with his natural father and refused to continue to use his adoptive father's surname. The child threatened to run away if he were ordered to visit with the husband. The district court awarded child support over the husband's objection that the child's conduct was so disrespectful and offensive that any requirement that he pay child support would be an abuse of discretion. The district court affirmed the support award on the basis that the trial court, through mandatory counselling and structured visitation, was attempting to resolve the problems presented by the case.

D. Imputed Income

As with the imputed income decisions rendered in alimony cases over the past two years, the appellate courts have reversed every reported case in which income was imputed by the lower court with respect to child support awards. During the survey period there were five such cases: one from the First District Court of Appeal; two from the Second District Court of Appeal; and two from the Third District Court of Appeal.

In Neal v. Meek, the parties were before the trial court in a paternity action. The father was unemployed but received income from the estate of his late mother. The trial court determined that the father was "capable of [earning] additional income." The court, however, did not state any basis upon which it reached this conclusion nor state any presumed amount which the father was "capable" of earning. The First District Court of Appeal reversed, finding that the trial court failed to set forth findings of fact indicating that it had determined the father's "employment potential and probable earnings level" or his "recent work history, occupational qualifications, and prevailing earnings level in the community."

Similarly, the Second District Court of Appeal reversed the two imputed income cases it decided during 1992 based upon the trial court's

273. Id. at 720.
274. Id.
275. Id.
280. Id. at 1045.
281. Id. at 1046.
failure to state the basis upon which the income was imputed. In *Braman v. Braman*, 282 the trial court imputed income to the wife for child support determination purposes despite the fact that the wife was unemployed at the time of the final hearing. The trial court nevertheless assumed that the wife was capable of earning the "minimum wage," and imputed such income to her. The Second District Court of Appeal reversed, finding that although the trial court was empowered to impute income to the wife if it was determined that she was voluntarily unemployed, the trial court nevertheless erred in failing to disclose the manner in which it calculated the amount of the wife’s child support obligation. 283

Likewise, in *Wollschlager v. Veal*, 284 the First District reversed the trial court’s imputation of income to the father, a full time dental student who was not employed, because the trial court “failed to make sufficient factual findings as to imputation of income and deviation from the child support guidelines.” 285

Recently, the Third District Court of Appeal has also reversed two imputed income cases. In *Levine v. Best*, 286 the trial court’s imputation of income was reversed with a finding that the trial court erred in imputing income “without setting forth what amounts it imputed and the sources of this income.” 287 Similarly, in *Edwards v. Edwards*, 288 the trial court’s imputation of income was reversed where the evidence failed to demonstrate an ability on the husband’s part to pay the amount of the award made by the trial court. 289

VI. EQUITABLE DISTRIBUTION

A. Marital versus Non-marital Assets

All equitable distribution cases may be divided into three categories of issues: classification, valuation, and distribution. Classification is the question of which of the parties’ assets and liabilities are marital in nature and, therefore, subject to equitable distribution, and which of their assets and

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283. Id. at 683.
285. Id. at 275.
287. Id. at 279.
288. 615 So. 2d 178 (Fla. 3d Dist. Ct. App. 1993).
289. Id. at 179.
liabilities are the separate property of one spouse or the other. With respect to classification issues, nine significant decisions were rendered by the district courts of appeal during the survey period.

At first blush, it would appear that the determination of the marital or non-marital status of an asset or liability would be relatively simple to make under the provisions of section 61.075, Florida’s equitable distribution statute. The statute provides that if an asset or liability was “acquired... during the marriage,” then the asset or liability is “marital” unless it was acquired during the marriage by “noninterspousal gift, bequest, devise, or descent.”

The complicating factors, however, are the questions of commingling—the combination of non-marital or premarital assets with marital assets—and enhancement—the appreciation in value of a non-marital or premarital asset due to expenditure of marital labor or funds upon the asset.

On the subject of enhancement, six significant decisions were rendered during 1992 and 1993. Unfortunately, a clear conflict between these decisions is readily apparent. In Moon v. Moon, the husband was a participant in a profit sharing plan which had been commenced prior to the marriage but was also funded during the marriage. The district court opined that the portion of the plan funded during the marriage would be a marital asset. The court went on to state that when a premarital asset has been enhanced in value by the contribution of either marital funds or labors to the asset, then “further enhancement in value of such marital asset due to inflation or market conditions will become a marital asset.” In other words, once appreciation in value has been shown, and once it has been established that marital labors or funds contributed in any way to that appreciation, then all of the enhanced value will be deemed a marital asset.

The First District repeated this principle in Glover v. Glover. Therein, the husband had owned a home prior to his marriage but subsequently transferred title jointly to himself and his wife during the marriage. In reversing the trial court’s finding that the husband had a “special equity” in the home, the district court noted, that “[o]nce the threshold requirement of marital labor or funds has been established, increases in value attributable to marital labor, funds, inflation and market conditions will all apply.”

292. Id. at 820.
293. Id. at 822 (citation omitted).
295. Id. at 233 (citation omitted).
Although nearly identical circumstances were present in *Young v. Young*, another decision from the First District, the decision substantially differs from the decisions in both *Glover* and *Moon*. In *Young*, the husband owned a home prior to his marriage but during the marriage a number of improvements were made to the home, involving both marital labor and marital funds. The trial court found that the home was entirely the husband’s non-marital property and the First District reversed, holding that the wife’s burden was only to show that marital funds or labors had been devoted to the non-marital property. Once the wife met that burden, the asset would be deemed marital in its entirety, unless the husband were able to show that “any part of the enhanced value was exempt from distribution because it was ‘unrelated to either party’s management, oversight or other contribution, but instead due solely to purely passive appreciation of the original asset.’”

Meanwhile, in *Dyson v. Dyson*, the husband owned ten acres of land prior to the parties’ marriage but during the marriage marital funds were used toward payment of the mortgage. The district court directed the trial court to use a four step “formula” in determining the marital value of the property, specifically: (1) determine the value of the property prior to the marriage; (2) determine the current value of the property; (3) determine the extent to which the value of the property “was enhanced by causes other than the parties’ contribution of marital funds and labor”; and (4) determine the extent to which the value of the property was enhanced by use of marital funds and labor.

In 1993, the Second District Court of Appeal “joined the fray” with the rendition of its opinion in *Straley v. Frank*. In *Straley*, the district court reversed the trial court’s determination that the appreciated value of certain property was a marital asset, finding the appreciation was not due to the expenditure of marital funds, but instead, was the result of “inflation and fortuitous market forces.” However, with respect to certain real estate partnerships owned by the husband prior to the marriage, the evidence that the partnerships were enhanced by marital funds was overwhelming.

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297. *Id.* at 1270.
298. *Id.* (citation omitted).
300. *Id.* at 324.
301. 612 So. 2d 610 (Fla. 2d Dist. Ct. App. 1992), review denied, _ So. 2d __ (Fla. 1993). Although *Straley* is technically an opinion of the Second District Court of Appeal, it was actually a decision of the Fifth District Court of Appeal, en banc, sitting as the Second District.
302. *Id.* at 612 (citation omitted).
established that marital funds had been used to make mortgage payments on the properties. The district court opined that, "[t]he appreciation in value of these two partnerships as a result of the infusion of marital funds was the amount by which [the husband’s] share of the mortgage debt . . . was reduced during the marriage." In other words, even though marital funds had been used in the preservation of the asset, the amount of enhancement was determined to be only that attributable directly to the funds.

In *Sandstrom v. Sandstrom*, the Fourth District Court of Appeal, in a footnote, commented that the increased value of assets solely owned by one spouse prior to the marriage should be considered marital assets subject to equitable distribution under certain circumstances. The court stated that equitable distribution would apply *to the extent* the increased value of the assets was the result of either or both spouse’s work efforts, or the expenditure of marital funds or earnings of the parties.

Three decisions on the subject of commingling of marital and non-marital assets were rendered during the survey period, *Amato v. Amato*, *Heinrich v. Heinrich*, and *Adams v. Adams*. In *Amato*, the parties had been married for thirty-five years and had four children. In 1983, one of the parties’ adult children was killed in an automobile accident. Prior to his death he had obtained a life insurance policy through his employer and had designated his mother (the wife) as the beneficiary. Thus, upon his death, the wife received insurance proceeds totaling $70,000. The wife deposited the insurance proceeds into the parties’ only bank account, a joint account, and over the years the parties regularly utilized the funds and deposited other funds into the account. At the time of the dissolution of marriage, the wife asserted a “special equity” in $70,000 of the funds maintained in the parties’ joint bank account. The district court determined the insurance proceeds had lost “their separate identity” and had become “untraceable” because of the intermingling of funds for a several year period before the dissolution action. Thus the funds were marital assets.

303. *Id.*
304. 617 So. 2d 327 (Fla. 4th Dist. Ct. App. 1993).
305. *Id.* at 329 n.2.
306. *Id.* (citation omitted).
310. *Amato*, 596 So. 2d at 1244-45.
311. *Id.* Interestingly, this holding was not the original holding of the Fourth District when this case was first decided. *See Amato v. Amato*, 16 Fla. L. Weekly D2803 (Fla. 4th Dist. Ct. App. 1992).
In *Heinrich*, the husband established a trust with his non-marital, separate assets during the marriage. However, the husband then purchased additional trust assets while married with marital funds. The Third District held the commingling of marital and non-marital funds in the trust transformed the trust income into a marital asset and any assets purchased during the marriage with trust income were also deemed to be marital assets.312

Similarly, in *Adams*, the Third District determined that commingling occurred where the husband used his separate non-marital stock as collateral for marital borrowing. The loans were then repaid with marital funds. According to the Third District, the use of separate property as collateral for marital loans causes the collateral to lose its “separate character.”313

**B. Valuation**

Although valuation issues in equitable distribution cases are largely evidentiary matters involving the presentation of testimony as to the specific value of a specific asset, two issues of statutory interpretation were in the forefront of the decisional law in 1992. First, what is the proper date for valuation of assets in equitable distribution cases? Second, does the trial court have to make specific findings of fact as to its valuation of the parties’ assets?

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312. *Heinrich*, 609 So. 2d at 95-96.
313. *Adams*, 604 So. 2d at 496.

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Dist. Ct. App. Nov. 6, 1991), opinion superseded on grant of reh’g, Amato v. Amato, 596 So. 2d 1243 (Fla. 4th Dist. Ct. App. 1992). Initially, the Fourth District determined that the insurance proceeds were the wife’s separate property and that the husband had the burden to prove that the wife intended to make a gift to him when she deposited the funds into the parties’ joint account. *Id.* at D2803. The district court first held that the funds in the joint account at the time of the dissolution were clearly “traceable” because the amount of insurance proceeds paid to the wife was known. *Id.* The Fourth District opined that once the wife was able to establish that a portion of the funds in the joint account was derived from a non-marital source, then the burden shifted to the husband to prove that the wife intended to make a gift to him when she deposited the funds into the joint account. *Id.* Judge Farmer dissented from the original opinion, noting that once the funds were deposited into the joint account, they became intermingled with marital funds and were no longer identifiable. *Id.* at D2804. Following the rendition of the original opinion in *Amato*, the Florida Supreme Court rendered its decision in Robertson v. Robertson, 593 So. 2d 491 (Fla. 1991), a case originating from the Fourth District. The supreme court held that section 61.075 of the Florida Statutes, creates a presumption that jointly titled property is a marital asset and the burden is upon the party seeking to have such property declared separate to prove that a gift was not intended when title was taken in joint names. *Id.* at 493-94. Thereafter, on rehearing, the Fourth District revised its opinion in *Amato*. See Amato v. Amato, 596 So. 2d 1243 (Fla. 4th Dist. Ct. App. 1992).
assets? In 1992, the case law on these two issues was entirely from the First District Court of Appeal.

Section 61.075 of the Florida Statutes directs trial courts to value marital assets at one of three points in time. The marital assets are valued as the parties enter into a valid separation agreement, or at another date expressly set forth in such a separation agreement, or as of the filing of the dissolution of marriage action. However, the statute further provides that the trial court may use another date if doing so would be just and equitable under the circumstances of the case.\(^\text{314}\) In Moon v. Moon,\(^\text{315}\) the First District determined that the trial court could value the parties' assets as of the date that their separation provided that the court established in the final judgment that such a date was "just and equitable under the circumstances."\(^\text{316}\)

However, in Dyson v. Dyson,\(^\text{317}\) the First District further opined that the trial courts must state the date of valuation used in the written final judgment in order to allow for meaningful appellate review. Accordingly, the First District noted that,

> [u]nless the circuit court distributing marital assets in a final judgment of dissolution of marriage specifically identifies a valuation date of these assets that is different from the date of filing of the petition and also recites the specific circumstances and considerations that make use of this date just and equitable, we shall presume that for such valuation the circuit court used the date of filing the petition or the date the parties entered into a valid separation agreement, whichever is earlier, unless the record contains a specific written agreement executed and filed by the parties establishing a specific date of valuation.\(^\text{318}\)

The second issue with respect to valuation is whether the trial court must specifically recite the value of each marital asset and liability in the written final judgment. In a series of three cases: Dyson v. Dyson,\(^\text{319}\)


\(^{316}\) Id. at 822 (citing FLA. STAT. § 61.075(4) (1989)).

\(^{317}\) 597 So. 2d 320 (Fla. 1st Dist. Ct. App. 1992).

\(^{318}\) Id.; see also Wendroff v. Wendroff, 614 So. 2d 590 (Fla. 1st Dist. Ct. App. 1993) (holding that the date of valuation should be the date of filing unless the court recites specific circumstances and considerations that make use of another date just and equitable); Barker v. Barker, 596 So. 2d 1187 (Fla. 1st Dist. Ct. App. 1992) (holding that compliance with section 61.075 of the Florida Statutes requires that the trial court specifically state the date of valuation in the written final judgment).

Walsh v. Walsh,\textsuperscript{320} and Nicewonder v. Nicewonder,\textsuperscript{321} the First District held that such specific valuation findings are required.

In Dyson, the district court concluded that it was unable "to adequately perform [its] appellate review function in determining whether the circuit court abused its discretion in distributing the parties' assets" because the final judgment contained no findings of fact with respect to the value and amount of the parties' various marital assets and liabilities.\textsuperscript{322} Similarly, in Walsh, the lack of findings as to valuation was deemed to have made the trial court's distribution plan "impossible to review."\textsuperscript{323}

In Nicewonder, the First District concluded that, "[i]f the parties are to be accorded full and fair appellate review of the findings of fact and rulings made by the court below, that can be done only if the appealed order sets forth adequate findings of fact as to valuation assigned to the various properties by the court."\textsuperscript{324}

This particular problem was resolved by the 1991 amendments to section 61.075 of the Florida Statutes. Pursuant to section 61.075(3), "any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment or order based on competent substantial evidence . . . ."\textsuperscript{325} Further, the statute specifically requires written findings of fact with respect to the classification (identification) of marital and non-marital assets and liabilities, the valuation of each marital asset and liability and the party to whom each asset and liability is awarded.\textsuperscript{326}

C. Distribution

The question of findings of fact pertaining to equitable distribution in written final judgments does not solely involve findings as to the date of valuation or the value of the assets and liabilities distributed. Rather, the question extends to the actual distribution of assets and whether the trial courts must specifically state the basis upon which a particular equitable distribution scheme was made. In 1992, the First, Second and Third Districts all held that specific findings of fact are required in any case in which the parties' assets and liabilities are not equally distributed.

\textsuperscript{320} 600 So. 2d 1222 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{321} 602 So. 2d 1354 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{322} Dyson, 597 So. 2d at 323.
\textsuperscript{323} Walsh, 600 So. 2d at 1223.
\textsuperscript{324} Nicewonder, 602 So. 2d at 1356.
\textsuperscript{325} FLA. STAT. § 61.075(3) (1991).
\textsuperscript{326} Id.
In *Barker v. Barker*, the First District reversed the trial court's equitable distribution scheme because it was "unable to determine the basis upon which the trial court distributed the marital assets." The court further noted "[i]t is appropriate to require explicit findings with respect to disputed facts that form the factual basis on which a trial court undertakes to award equitable distribution."

In *Spillert v. Spillert*, the trial court distributed sixty-two percent of the parties' assets to the wife. The First District first noted that the final judgment did not "set forth any findings in justification of [the] unbalanced split of the marital assets" and then held that "[i]f the trial court decides to make an unequal division, the court should make findings which support its conclusion."

In the Second District, in *Burston v. Burston*, a case very similar to *Spillert*, the trial court distributed the parties' only asset—their home—to the husband without stating any basis for the award. The Second District held that although specific findings of fact as to the court's rationale for distribution of assets are not required, the record must show "some logic and justification for the division." In *Burston*, because the record did not indicate such "logic and justification," the absence of written findings of fact was significant because, as the court noted, "without findings to support the final judgment we are unable to discern a proper basis therefor."

Three cases from the Third District Court of Appeal addressed the issue of findings of fact with respect to the trial court's equitable distribution scheme, if that scheme was such that the distribution of assets was not equal between the parties, specifically, *Sinclair v. Sinclair*, *Lozano-Ciccia v. Lozano*, and *Ibanez-Vogelsang v. Vogelsang*.

In *Sinclair*, although no facts are stated in the opinion, the trial court's equitable distribution was reversed. The district court held that "no extraordinary showing renders the unequal division appropriate."
In both *Lozano-Ciccia v. Lozano* and *Ibanez-Vogelsang v. Vogelsang*, the trial court's equitable distribution was clearly unequal and in favor of the husband. However, the Third District affirmed the unequal distribution in both cases because the trial court had made specific findings of fact regarding its justification for the disparate distribution.339

D. Considerations of "Fault" in Equitable Distribution Cases

Two decisions of major significance were rendered by the Third District Court of Appeal in 1992 regarding the relevance of a party's "fault" or "marital misconduct" with respect to equitable distribution. In *Rosenfeld v. Rosenfeld*, 340 the trial court awarded all of the parties' marital assets to the wife, finding that the husband had "wasted" assets during the marriage and, therefore, had "already received his equitable distribution."341 The "waste" alleged by the wife included the husband having used marital funds (his income) to support his mother and sister, to pay alimony to his former wife and to pay attorney's fees to his lawyer with respect to his divorce from his former wife. The district court reversed, finding that the wife's allegations were essentially a request that the trial court "revisit the parties' expenditures throughout the marriage, and should retroactively decide that certain of the expenditures should not have been made."342 The Third District held that a judicial determination of "which spouse was the more prudent investor and spender" was not an appropriate nor a valid justification for a disparate distribution of marital assets.343

In *Heilman v. Heilman*, 344 the wife, after twenty-two years of marriage, left the husband to move in with a woman with whom she had fallen in love. The trial court denied the wife alimony and made no equitable distribution to her of the parties' marital assets. The Third District reversed the denial of equitable distribution to the wife and held that "absent a showing of a related depletion of marital assets, a party's misconduct is not a valid reason to award a greater share of marital assets to the innocent spouse."345

339. *See Lozano-Ciccia*, 599 So. 2d at 718; *Ibanez-Vogelsang*, 601 So. 2d at 1303.
341. Id. at 837.
342. Id.
343. Id. (citation omitted).
344. 610 So. 2d 60 (Fla. 3d Dist. Ct. App. 1992).
345. Id. at 61 (citation omitted).
VII. MARITAL HOME

A. Right To Credit

The right of a spouse to a credit at the time of sale, for mortgage and other related payments made upon the former marital residence following an exclusive possession award to the other spouse, remains one of the most confused and complex areas of marital and family law in Florida.

Although, generally speaking, the principles of real estate law applicable to tenancies in common apply, questions abound. Is an award of exclusive use and possession to one spouse an “ouster” of the other spouse? What is the effect of an agreement or a judgment which is silent upon the subject of credit? Is the spouse out of possession entitled to an award of the fair rental value of the home? Although a number of appellate courts attempted to resolve some of these issues in 1992, the questions remain.

There are three possible combinations of factual circumstances giving rise to the question of credit upon the sale of a residence following an exclusive possession award. First, the party in possession may pay for all of the expenses associated with the home during his or her occupancy. In such case, the party in possession would then seek a “credit” for having made the other co-tenant’s payments during the time of his or her occupancy. Second, if the party in possession has provided for all of the expenses associated with the home, and seeks a credit for having done so on behalf of the other co-tenant, then the co-tenant out of possession may seek an “offset” against such a credit for the fair rental value of the home. Third, the co-tenants may equally pay for the expenses associated with the home during one co-tenant’s exclusive occupancy but, at the conclusion of that exclusive occupancy, the co-tenant out of possession may seek reimbursement for the fair rental value of the home for the period of time in which he or she was out of possession. Various combinations of these factual circumstances arise on a regular and continuing basis in marital law because of the prevalence of awards of exclusive use and occupancy to one party in dissolution of marriage actions.

In Adkins v. Adkins,346 the First District opined that where one co-tenant has exclusive use of property, and uses the property for his or her own benefit and does not receive rents or profits from the use of the property, then the co-tenant in possession is not liable for rent to the co-tenant out of possession unless he or she holds the property adversely or

as a result of ouster or its equivalent. However, if the co-tenant in possession under such circumstances makes a claim for a contribution from the co-tenant out of possession for amounts expended in the improvement or preservation of the property, then the co-tenant out of possession is entitled to an offset against such claim for the reasonable rental value of the property. Thus, the First District answered one of the many questions surrounding exclusive use awards and credits upon the sale of the parties’ former marital residence as follows: the party out of possession will be entitled to an award of the rental value of the property only as an offset to a claim by the party in possession for reimbursement of his or her expenses associated with the property during the term of his or her exclusive occupancy.

Two conflicting opinions were rendered regarding entitlement to credit in cases where the judgment or agreement is silent upon the issue of credits. In *Agerskov v. Gabriel*, the parties’ agreement (which was incorporated into a final judgment) provided that the husband would pay the mortgage, taxes and insurance on the former marital residence until such time as it was sold, and upon the sale of the property would receive credit for any reduction in principal and interest paid, after which the net proceeds of the sale would be divided equally between the parties. The wife sought an offset against the husband’s credit for the rental value of the home. The trial court found that because the parties’ agreement was silent upon the issue, general real estate principles applied and, therefore, the wife was entitled to such an offset. The Second District reversed, holding that because the parties’ agreement made no mention of any entitlement on the part of the wife to rental value, the trial court could not “modify” the agreement by providing such a right to her.

However, in *Leventhal v. Leventhal*, the First District held that a party’s right to reimbursement for ownership expenses “exists apart from

347. Id. at 1033.
348. Id. at 1033-34.
349. Id.; see also Brisciano v. Byard, 615 So. 2d 213 (Fla. 1st Dist. Ct. App.) (holding that if the co-tenant in possession seeks contribution for amounts expended in improvement or preservation of property, including payments for mortgages, insurance, and taxes, that claim may be offset by the reasonable rental value of the property), review denied, _ So. 2d ___ (Fla. 1993).
352. Id. at 1172-73.
any judgment or agreement. Such right is an implied term of any judgment that is silent on the issue."  

To be sure, there are distinctions between *Agerskov* and *Leventhal*. In *Agerskov*, the party out of possession was seeking a credit for the rental value of the property while the credit to be received by the party in possession was specifically addressed by the parties' agreement. In *Leventhal*, the party in possession was seeking a credit for the payments made by him upon the property during the time of his possession. The distinction between: who is seeking the credit, the party in possession or the party out of possession; and, for what entitlement, reimbursement for expenses actually paid or the fair rental value of the property, may be of significance.

### B. Other Issues

Two cases involving the propriety of the filing of a lis pendens in dissolution of marriage actions were decided in 1992, specifically, *Finkelstein v. Finkelstein*, and *Gay v. Gay*.  

In *Finkelstein*, the husband and wife entered into a settlement agreement pursuant to which, in pertinent part, the wife was completely absolved of any responsibility to pay child support. Thereafter, the husband moved for modification and sought an award of child support from the wife. The wife then petitioned to set aside the entire agreement which had also required her to transfer her interest in the parties' former marital residence to the husband. The wife filed a lis pendens against the property and the husband moved to dissolve the lis pendens upon the grounds that he was

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354. Id. at 1272 (citation omitted).

355. The *Agerskov* court noted an apparent conflict in the decisional law between the Fourth District Court of Appeal, and the First and Third District Courts of Appeal. The Fourth District held in both *Brandt v. Brandt*, 525 So. 2d 1017 (Fla. 4th Dist. Ct. App. 1988) and *Goolsby v. Wiley*, 547 So. 2d 227 (Fla. 4th Dist. Ct. App. 1989), that the right to credit for payments made upon property by one co-tenant is an implied term of any agreement or judgment that is silent upon the issue. In *Janer v. Janer*, 532 So. 2d 59 (Fla. 3d Dist. Ct. App. 1988) and *Everett v. Everett*, 561 So. 2d 1267 (Fla. 1st Dist. Ct. App.), *review denied*, 576 So. 2d 286 (Fla. 1990), the Third and First Districts held that the trial court cannot grant a right to a credit if such right does not appear in an agreement or judgment, as doing so would be an impermissible modification of the property terms of a judgment or agreement. The Second District distinguished its opinion in *Agerskov* from *Brandt* by opining that the party seeking the credit in *Brandt* was the party in possession whereas the party seeking the credit in *Agerskov* was the party out of possession. *Agerskov*, 596 So. 2d at 1173.


357. 604 So. 2d 904 (Fla. 5th Dist. Ct. App. 1992).
attempting to secure refinancing and the existence of the lis pendens interfered with his ability to do so. The trial court discharged the lis pendens and the district court reversed, holding that the party moving for the discharge of a lis pendens has the burden of proving that the lis pendens was inappropriate to the circumstances and cause of action stated in the complaint, and that the party filing the lis pendens has an adequate remedy at law and would not suffer irreparable harm if the court were to discharge the notice. 358

Of interest is the fact that the Fourth District’s holding in Finkelstein appears to be in direct conflict with the holding of the Fifth District in Chiusolo v. Kennedy, 359 in which the Fifth District, en banc, held that the proponent of a notice of lis pendens bears the burden of proving irreparable harm, an inadequate remedy at law and a substantial likelihood of success on the merits. 360

In any case involving the filing of a lis pendens, if the filing is not premised upon a duly recorded instrument or a mechanic’s lien, then the trial court may control and discharge the lis pendens in the same manner as the court may control and dissolve an injunction. In Gay, the Fifth District was called upon to determine whether a deed to property held in the wife’s sole name entitled the husband in a dissolution of marriage action to file a lis pendens against such property based upon a “duly recorded instrument.” 361

The wife, in Gay, initiated dissolution of marriage proceedings and the husband filed a lis pendens with respect to two parcels of property that were titled in the sole name of the wife but conceded to be marital assets. Both properties were encumbered by a single mortgage which was delinquent and neither party had the ability to pay the note. The wife negotiated for the sale of the property and the husband objected to the sale alleging that he had not been consulted with respect to the negotiations and that the sales price was too low. The trial court dissolved the husband’s lis pendens in order to permit the wife to sell the property. On appeal, the husband contended that the trial court lacked the authority to dissolve the lis pendens because his underlying action (a counterclaim for dissolution of marriage) was founded upon a recorded instrument, specifically, the deed to the property which recited that the wife was “a married woman.” 362 The Fifth District

358. Finkelstein, 603 So. 2d at 715.
360. Id. at 421.
361. Gay, 604 So. 2d at 905.
362. Id.
disagreed, holding that the husband’s action was founded upon the statutory provisions that allow the dissolution of an irretrievably broken marriage and that the award of marital assets in such a case is a collateral issue. The court further held that the existence of a deed reciting that the owner of the property in question was a “married woman” at the time she acquired the title to the property “did nothing to establish rights between the parties.”

VIII. MISCELLANEOUS

A. Jurisdiction

In one of the most talked about decisions of the past decade, the Florida Supreme Court abrogated the doctrine of interspousal immunity in *Waite v. Waite*. Therein, the supreme court determined that sufficient reason for the continuation of the doctrine no longer existed and that both public necessity and fundamental rights required judicial abrogation of the doctrine. In discussing the principles under which the continuation of the doctrine was formerly upheld, the court opined that there was no reason to believe that married couples are any more likely to engage in fraudulent conduct against insurers than anyone else; and, that there was also no reason to believe that the type of lawsuits prohibited by the doctrine, if allowed, are likely to foster unwarranted marital discord.

As to other jurisdictional issues arising in family law cases, a review of the case law reported during the survey period reflects that the district courts of appeal were called upon to address nearly every jurisdictional issue imaginable in dissolution of marriage actions, specifically: long-arm jurisdiction, the type of jurisdiction obtained when service is constructive rather than personal, and the definition and meaning of the residency requirement.

In *McCabe v. McCabe*, the husband was in the military throughout the parties’ marriage. He retained his legal residency in Florida, maintained

363. *Id.* Another interesting holding in *Gay* is that a trial court has the power to order a marital asset sold during the pendency of a dissolution of marriage action despite the objection of the other spouse. The district court opined that “a trial court should have the discretion to issue such orders as will preserve an asset or its proceeds for ultimate disposition for the benefit of both parties.” *Id.* at 907.

364. 618 So. 2d 1360 (Fla. 1993).
365. *Id.* at 1361.
366. *Id.*
367. 600 So. 2d 1181 (Fla. 5th Dist. Ct. App. 1992).
a Florida driver's license and filed federal income tax returns using a Florida address. The husband petitioned for dissolution of marriage in Florida and served the wife in North Carolina. The wife contested Florida's jurisdiction and filed an affidavit stating that the parties had lived in Maine throughout their marriage and, following the husband's discharge from the military, had taken up residency in North Carolina with the intent to remain there permanently. The trial court nevertheless determined that the wife was a resident of Florida. The district court reversed, finding the husband's allegations in his petition deficient for long-arm jurisdiction purposes because the husband did not allege that the parties had maintained a marital domicile in Florida at the time of the commencement of the action or that the wife had resided in Florida prior to the filing of the action. The husband's failure to so plead rendered the service of process upon the wife under the long-arm statute void.

McCabe also addressed a second jurisdictional issue—the meaning and definition of the residency requirement—as did two other decisions rendered in 1992: Anechiarico v. Thompson and Sragowicz v. Sragowicz. In McCabe, the trial court relied upon the "general rule" that a wife's residency follows that of her husband, despite the fact that the wife filed an affidavit contesting the residency claims raised in the husband's petition for dissolution of marriage. The district court reversed, holding that the fact that the husband may be a resident of Florida does not "automatically confer upon the trial court personal jurisdiction over the wife because the residence of a wife does not necessarily follow that of her husband when facts pertinent to her particular case indicate otherwise.

In a case that may be read as a corollary to McCabe, the Fourth District, in Anechiarico, held that the trial courts are required to hold evidentiary hearings when jurisdictional issues are raised by either party.

368. Id. at 1184.
369. Id.
370. Id. at 1184-85. See also Bimbaum v. Bimbaum, 615 So. 2d 241, 243 (Fla. 3d Dist. Ct. App. 1993), in which the wife attempted to secure long-arm jurisdiction over the husband by alleging that the husband had committed a tortious act, physically abusing her, while the parties resided in Florida. The Third District held that the allegation of tortious acts of abuse cannot provide the basis for long-arm jurisdiction and, further, that long-arm jurisdiction based upon previous residence in the State of Florida may only be obtained where the residency in Florida "proximately precede[d]" the cause of action. Id.
373. McCabe, 600 So. 2d at 1184.
374. Anechiarico, 596 So. 2d at 514.
Lastly, in Sragowicz, the Third District determined that the claims of residency by a wife were insufficient to establish her residency for dissolution of marriage purposes.\(^{375}\) In this case, the wife came to Florida from Brazil for the purpose of visiting her mother and attending a wedding. The wife left all of her furniture, most of her clothing and most of the children's clothing and toys in Brazil. The wife came to Florida with one suitcase and did not register to vote or seek a homestead exemption with respect to the parties' Florida condominium. The district court determined that the evidence established that the wife had no intention of residing in Florida at the time she came to Florida and did not develop an intention to remain in Florida until sometime later when she and the husband had an altercation.\(^{376}\) As such, it was held that the wife failed to show "by clear and convincing evidence" that she had resided in Florida with the intention to make Florida her permanent residence six months prior to the filing of her dissolution of marriage action.\(^{377}\)

Meanwhile, the Second District Court of Appeal, in Steffens v. Steffens,\(^{378}\) determined the extent of jurisdiction obtained by resort to constructive service of process in a dissolution of marriage action. Therein, the husband was never personally served with process and the trial court obtained jurisdiction over the dissolution proceeding through publication of notice and constructive service. The husband never appeared and a default judgment was entered against him. The default judgment, however, purported to award the wife a sum in excess of $100,000 representing the "proceeds" of a certificate of deposit which was in the joint names of the parties and which the husband had cashed in when the parties separated. The default judgment further awarded the wife a series of "credits" against the husband's share of the certificate of deposit for certain costs, which the wife claimed to have incurred as a result of an attempted purchase of property which could not go forward following the parties' separation. Lastly, the default judgment also purportedly awarded the wife her attorney's fees, suit money and costs incurred in the proceedings. Ultimately, the husband moved to set aside the judgment. The district court determined that such relief was entirely proper because of the court's total lack of personal jurisdiction over the husband at the time of the entry of the judgment in question.\(^{379}\) Without such personal jurisdiction, the district

\(^{375}\) Sragowicz, 591 So. 2d at 1084.
\(^{376}\) Id.
\(^{377}\) Id. at 1085.
\(^{378}\) 593 So. 2d 1156 (Fla. 2d Dist. Ct. App. 1992).
\(^{379}\) Id. at 1157.
court opined, all of the relief granted in the judgment other than the basic dissolution of marriage, was "void and unenforceable." "

Three interesting venue cases were decided during the survey period, specifically, Brown v. Brown, Bowman v. Bowman, and Washington v. Washington. The Brown decision merely recited the established long established rule that venue in a dissolution of marriage action lies in the county in which "the intact marriage was last evidenced by a continuing union of the parties who intended to remain married, indefinitely, if not permanently."

The Bowman case is unique because of the wife’s attempt therein to place a new slant to the firmly established rule as recited in Brown. In Bowman, the wife, with the husband’s consent and cooperation, moved from Tallahassee to Palm Beach. Five months later, the husband petitioned for dissolution of marriage and filed the action in Tallahassee. The wife sought a change in venue from Tallahassee to Palm Beach, contending that venue should lie in Palm Beach because the husband had agreed to her relocation to that county. The district court, in holding fast to the well established rule of venue in dissolution of marriage actions, held that it was unable to locate any case finding that one party’s consent to the other party’s relocation had any relevance to the issue of venue in a dissolution matter.

The Fifth District Court of Appeal addressed the issue of venue in Washington, a child support modification case. The court held that venue may lie either in the county of the court issuing the original decree, or in the county in which either party is residing when the modification petition is filed.

380. Id. at 1157. The wife in Steffens also claimed that the trial court had jurisdiction because it acquired “in rem” jurisdiction over the certificate of deposit which she claimed had been described in her pleadings. The district court, however, held that property over which such in rem jurisdiction is sought or obtained must be specifically described in the petition and notice of constructive service. Id. at 1158. In the Steffens case, however, the wife’s pleading only stated that the parties had owned a certificate of deposit and the husband had withdrawn the proceeds thereof several months before the filing of the action. Further, according to the wife’s petition, the whereabouts of the proceeds was unknown to her. As such, no property was described in the wife’s petition in a sufficient manner as to permit the court to acquire in rem jurisdiction over such property. Id.

381. 592 So. 2d 325 (Fla. 4th Dist. Ct. App. 1992).
383. 613 So. 2d 594 (Fla. 5th Dist. Ct. App. 1993).
384. Brown, 592 So. 2d at 326.
385. Bowman, 597 So. 2d at 399.
386. Washington, 613 So. 2d at 594-95.
B. Discovery and Privileges

Three very significant decisions regarding discovery issues in family law cases were rendered by the appellate courts within the past two years, specifically, *Schouw v. Schouw*, 387 *Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A. v. Mullin,* 388 and *Swift v. Swift.* 389

In *Schouw*, the wife sought to compel the release of the husband’s psychological records, claiming that the husband was “mentally unstable” based upon circumstances which the wife claimed existed approximately six years earlier. The district court reversed the trial court’s order releasing the records and held that the wife’s “mere allegations” that the husband was “mentally unstable” were not sufficient to place the husband’s mental health in issue in the case and thereby overcome the psychotherapist-patient privilege. 390

Similarly, in *Swift*, the wife sought to depose the husband’s psychologist and to inquire about “any extramarital relationship” which the husband may have had during the parties’ marriage. The wife attempted to defend her discovery request by asserting that she was merely investigating the husband’s credibility because he had been asked in deposition whether he had been faithful to his wife. The trial court denied the husband’s request for protection and the district court reversed holding, first, that issues of “marital misconduct” are relevant in dissolution proceedings only where such misconduct is alleged to have caused or contributed to economic difficulties such that regardless of how the marital resources are divided, the parties will suffer economic hardship. 391 As to the wife’s argument that the discovery related to issues of the husband’s credibility, the district court opined:

> [T]here is no case law support for the proposition that the psychotherapist-patient privilege is waived simply when a patient answers a question by opposing counsel as to whether he engaged in any affairs. Neither is there any support for the contention that denying such a suggestion by counsel makes the issue suddenly relevant. 392

389. 617 So. 2d 834 (Fla. 4th Dist. Ct. App. 1993).
390. *Schouw*, 593 So. 2d at 1201.
391. *Swift*, 617 So. 2d at 835.
392. *Id.*
In *Mullin*, the wife issued a subpoena to the law firm employing the husband, seeking to determine the husband's interest in the law firm. The law firm was not a party to the dissolution proceedings but nevertheless filed an affidavit stating that the husband was a non-equity partner. The trial court refused to issue a protective order following the submission of the law firm's affidavit despite the fact that the wife's subpoena sought the production of extensive documentation regarding the assets and income of the law firm and the partners in the firm. The district court reversed, finding the wife's discovery request overbroad, and limited the wife to discovery specifically pertaining to the husband and documents (such as the stock register) establishing the husband's lack of ownership interest in the firm. 393

C. Judges and Masters

The past two years brought three significant decisions with respect to the role of masters in the family court: one from the Florida Supreme Court and two at the appellate level. 394 The decisions rendered at the appellate level indicate a clear pattern of the appellate courts advancing a rather "hard line" with respect to compliance with procedural requirements.

In *Heilman v. Heilman*, 395 the supreme court determined that a party's consent is not required in order for a master to hear a child support enforcement proceeding because of the difference between Rule 1.490 and Rule 1.491 of Florida Rules of Civil Procedure. The wife, in *Heilman*, filed a motion for contempt against the husband with respect to the husband's alleged failure to pay child support. The matter was referred to a hearing officer pursuant to Rule 1.491 of Florida Rules of Civil Procedure, and the husband objected to having the hearing held before a hearing officer. In order to preserve his objection, the husband refused to participate in the hearing. The trial court determined that the consent of both parties is not required in order for a child support enforcement proceeding to be heard by a hearing officer. 396 The Fourth District Court of Appeal affirmed, but certified the question to the Florida Supreme Court. The supreme court held that Rule 1.491 constitutes a distinct and separate process from Rule 1.490

393. *Mullin*, 602 So. 2d at 955.
395. 596 So. 2d 1046 (Fla. 1992).
396. *Id.* at 1046.
of Florida Rules of Civil Procedure, the latter of which addresses the power and authority of masters (general and special) and requires the consent of both parties to such a hearing, and the former of which provides for certain child support matters to be heard by "hearing officers" and does not expressly require the consent of the parties.\footnote{397}

In \textit{Petrakis v. Petrakis},\footnote{398} the Third District Court of Appeal determined that the responsibility of ensuring that a written record of proceedings held before a master lies with the master, not with the parties. Therein, the trial court had denied the husband's exceptions to a master's report and recommendations upon the basis that the husband had failed to present a record of the proceedings to the trial court for review. The district court reversed, holding that Rule 1.490 of the Florida Rules of Civil Procedure requires that the evidence presented to a master be reduced to writing and filed with the master's report. The burden of doing so, according to the Third District, is upon the master and it is not the burden or responsibility of the parties to create or produce the required written record.\footnote{399}

Similarly, in \textit{Gordin v. Gordin Int'l, Inc.},\footnote{400} the Fourth District held that a master's "sketchy, handwritten notations of the proceedings" were insufficient to comply with the requirement that the master file a written record of the evidence along with the report.\footnote{401} Thus, as in \textit{Petrakis}, the district court placed the burden of creating, preparing and producing a written record of the proceedings upon the master, not upon either party.

In \textit{Prater v. Lehmbeck},\footnote{402} the Fourth District struck a trial court order that required a party to object to a referral to the general master within five days or be deemed to have waived any objection. The court held that "such a practice violates the above-cited rule and has been condemned in other cases."\footnote{403} The court also held that where one party has filed a "blanket objection" to any and all referrals to the master, the trial court may not require that party to file a separate objection each and every time a referral is attempted.\footnote{404}

On the subject of trial judges and disqualification, the last two years brought a number of decisions involving the impropriety of certain actions
and statements by trial judges in terms of the appearance of impartiality. However, the more interesting development was the discussion of the standards for disqualification of a trial judge where a previous disqualification had occurred in the case.

Pursuant to section 38.10 of the Florida Statutes, when a judge has been disqualified on the basis of alleged bias and prejudice in a given case, the second judge in the case “is not disqualified on account of alleged prejudice . . . unless such judge admits and holds that it is then a fact that he does not stand fair and impartial between the parties.”

In Rodriguez-Diaz v. Abate, a non-matrimonial case, the Third District described the distinction between a first and a later request for disqualification as requiring that a “more stringent standard” be applied to a second request for disqualification, specifically, a trial judge may not be disqualified for bias and prejudice in a case once a previous judge was so disqualified unless the judge specifically “admits and holds” that it is fact that he or she does not stand fair and impartial between the parties. In Radin v. Radin, the Third District applied this “more stringent standard” to a disqualification request in a matrimonial case.

IX. PATERNITY

A. HLA Testing

Although the past two years brought a number of cases dealing with what has become a rather “standard” issue in family law—the use of a denial of paternity to attempt to avoid enforcement of child support arrearages—the more interesting development in the law has been a line

405. See, e.g., Loss v. Loss, 608 So. 2d 39 (Fla. 4th Dist. Ct. App. 1992) (trial judge became overly involved in the parties’ settlement negotiations); Wayland v. Wayland, 595 So. 2d 234 (Fla. 3d Dist. Ct. App. 1992) (trial judge was disqualified for advising the divorcing parties that she might know someone who would be interested in buying their house).


408. Id. at 198.

409. 593 So. 2d 1233 (Fla. 3d Dist. Ct. App. 1991), review denied, 599 So. 2d 1279 (Fla. 1992).

410. See, e.g., Schaffer v. Overby, 613 So. 2d 128 (Fla. 3d Dist. Ct. App. 1993). The result in all such cases is consistent: The award of child support presumes that the putative father was determined to be the father of the child and such finding is res judicata and the father is estopped to deny paternity thereafter. Id.
of cases addressing the propriety of a party’s denial of paternity within a
dissolution of marriage action. In 1993, the Florida Supreme Court
addressed this issue for the first time in Department of Health & Rehabilita-
tive Services v.Privette.411

In Privette, a petition was filed on behalf of the mother of a minor
child, alleging that the mother was unmarried and that Privette was the
natural father of the child. In fact, the mother was married at the time of
the birth of the child and the child’s birth certificate listed her husband as
the father of the child. Privette objected to the court-ordered HLA testing
and claimed an invasion of his privacy rights. The supreme court, however,
was far more concerned with the rights of the minor child and the rights of
the person presumed to be the child’s father to a continued relationship with
the child he believed to be his own:

Once children are born legitimate, they have a right to maintain that
status both factually and legally if doing so is in their best interests. The
child’s legally recognized father likewise has an unmistakable
interest in maintaining the relationship with his child unimpugned such
that his opposition to the blood test and reasons for so objecting would
be relevant evidence in determining the child’s best interests.412

Thus, the supreme court opined, even if an HLA test were to show that
a person other than the husband in an intact marriage in which a child is
born is the natural father of a child, this fact, without more, would not
constitute grounds to grant a paternity petition:

While there may be some cases where the child has had little contact
with the legal father, other cases will be quite the contrary. It is
conceivable that a man who has established a loving, caring relationship
of some years’ duration with his legal child later will prove not to be
the biological father. Where this is so, it seldom will be in the
children’s best interests to wrench them away from their legal fathers.
The law does not require such cruelty toward children.413

Once HLA testing has been performed, the next question to arise is the
manner in which, from an evidentiary perspective, the results are presented
to the trial court. In Department of Health & Rehabilitative Services v.

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411. 617 So. 2d 305 (Fla. 1993).
412. Id. at 307-08.
413. Id. at 309.
Moore, HLA testing performed upon the putative father and the child indicated that the putative father was, in fact, the child's father within a 99.9% degree of likelihood. The trial court, however, never knew of the results of the HLA testing because counsel for the mother was unable to lay a proper evidentiary predicate. When the father’s objections to the admission of the test results were sustained, counsel for the mother attempted to argue that the results should be admitted into evidence because, first, the father had not objected “in advance” of the trial and, second, because the test was performed at the father’s insistence. The Fifth District Court of Appeal opined that neither of such facts overcame the rules of evidence and there is no such things as “advance notice of the intent to adhere to the rules of evidence . . .”

B. Other Issues

Without question, the three most talked about decisions from the Florida Supreme Court during the survey period are Mize v. Mize, addressing parental relocation issues; Waite v. Waite, in which the court abrogated the doctrine of interspousal immunity in Florida; and B.J.Y v. M.A., in which the Florida Supreme Court determined that the statute which eliminated the right to trial by jury in paternity cases was unconstitutional.

In B.J.Y., the Florida Supreme Court traced the history of paternity law in Florida, finding that the nature of such proceedings has not changed since 1828. Although the procedure for bringing such an action has changed somewhat, the proceeding and its purpose remain the same: to establish paternity for the purpose of providing for the support of the child. The Constitution provides for a right to a jury trial in situations where a jury trial was conducted as a matter of right prior to the adoption of the Constitution. The supreme court’s history of paternity actions established that at the time of the adoption of Florida’s constitution, paternity cases were tried by jury. Therefore, the constitution requires that the right to trial by jury in a paternity case be preserved and, as such, the statute which

415. Id. at 14
416. 621 So. 2d 417 (Fla. 1993).
417. 618 So. 2d 1360 (Fla. 1993).
418. 617 So. 2d 1061 (Fla. 1993).
419. Id. at 1062-63.
420. Id. at 1062.
eliminated the right to a jury trial in such cases was deemed unconstitutional.

Although *B.J.Y.* was clearly one of the most interesting cases of the last two years, one of the more compelling cases of the last two years, at least from a perspective of a lay person's traditional view of "equity" was *Wollschlager v. Veal.* At issue in this paternity case was a father's claim that he should not be ordered to support the child that he fathered because he had been "defrauded" by the mother, who had assured him that she was taking birth control pills. According to the father, it would be "inequitable" to require him to bear the financial responsibility of a child who would never have been born except for the "fraud" committed upon him. This argument notwithstanding, the First District Court of Appeal held that there was nothing in the statutory history of the paternity statutes which would indicate that "the court should look at the question of which party was more responsible for conception or the factors leading up to the conception in determining the appropriate child support.

A second common issue to arise in paternity proceedings is the appropriate surname to be given to the child. Within the past two years, two cases have addressed this issue.

In *Brown v. Dykes*, the trial court ordered that the child bear the surname of the mother, believing it was statutorily required to so order because custody had been awarded to the mother. The district court reversed, holding that section 382.013(6)(c) of the Florida Statutes permits the trial court, in a paternity action, to determine the appropriate surname for the child.

Similarly, in *Levine v. Best*, the Third District Court of Appeal held that the trial court has the power and authority to determine what shall be a child’s surname in a paternity case and that the basis for the trial court’s decision should be the “best interest of the child.”

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422. Id. at 277.
423. 601 So. 2d 568 (Fla. 2d Dist. Ct. App.), review denied, 613 So. 2d 2 (Fla. 1992).
424. Id. at 569.
426. Id. at 279.
X. SHARED PARENTAL RESPONSIBILITY

A. Relevant Factors

Because of the deference given to a trial court’s “custody” (now termed “primary residence”) decision, cases at the appellate level discussing the factors which may weigh in favor of one party or the other are somewhat rare. However, within the past two years three decisions have been rendered reversing the trial court’s custody decisions.

In Wagler v. Wagler,\(^{427}\) the trial court determined that both parties were “equally fit” despite the fact that the husband lived in a fine home and had enrolled the child in an excellent school in which the child was doing very well, and the wife lived in a “dirty, cluttered room,” had lived in twelve different residences in the three years prior to the final hearing, and, at the time of the final hearing, was on probation for selling drugs. Further, at the time of the final hearing, the wife had just completed an earlier probation from an adjudication, in three criminal cases, that she was guilty of passing worthless checks. The trial judge commented, “I’m still old fashioned enough to believe that a child of this age is best served in the custody of the mother . . . .”\(^{428}\) To be sure, the appellate court reversed this decision and remanded the case to the trial court so that the trial court could “explain on what basis it determined that the child’s interest would be equally served by the father or the mother.”\(^{429}\)

In Braman v. Braman,\(^{430}\) the Second District was similarly confronted with a situation in which the facts demonstrated the mother of the child to be a less than sterling moral example to others. In Braman, the wife engaged in “recurring episodes of . . . extramarital activity while the child was present in the home.”\(^{431}\) Indeed, only one of the parties’ two children was fathered by the husband. The trial court awarded sole parental responsibility of the child to the father on the basis that the mother was “morally unfit” to share in the parental responsibility of the child. The district court of appeal reversed, holding that a trial court must consider all of the relevant factors set forth in section 61.13 of the Florida Statutes, in

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\(^{427}\) 593 So. 2d 602 (Fla. 1st Dist. Ct. App. 1992).
\(^{428}\) Id. at 603.
\(^{429}\) Id. at 604. But see Murphy v. Murphy, 621 So. 2d 458 (Fla. 4th Dist. Ct. App. 1993) (holding that specific, written findings of fact regarding the basis upon which the trial court reached its custody decision are neither required nor favored). The Wagler case, of course, is somewhat exceptional because of its facts.
\(^{430}\) 602 So. 2d 682 (Fla. 2d Dist. Ct. App. 1992).
\(^{431}\) Id. at 683.
making a custody decision and may not base such a decision entirely upon just one of those factors.\footnote{432} 

In \textit{Lane v. Lane},\footnote{433} the Fourth District addressed the factors to be considered by the trial courts in making a custody and/or visitation determination. The court held that it is the trial judge who must weigh the factors, gauge the appearance and demeanor of the parties and make the decision and the judge may not abdicate such decision-making to any other person be that person a parent or an expert.\footnote{434} The parties stipulated in mediation that the question of whether the husband's visitation with the minor child should be supervised or unsupervised would be made by a certain psychologist. The psychologist rendered a report recommending unsupervised visitation and the trial court reached its decision in the case by resort to the "novel time saver" of the case being submitted upon written submissions by each party setting forth each party's position. The district court held that the type of decision made in custody and visitation cases is "too important to both the child and parents to restrict a determination to a reading of unemotional and dispassionate words on a printed page."\footnote{435}

\section*{B. Third Party Custody}

Third party custody claims involve actions for custody of a child initiated by a person other than the mother or father of the child. Normally, such claims are initiated by a relative of the child and frequently that relative is the child's grandparent. The standard for the determination of such custody claims is not the "best interest of the child" standard used in dissolution of marriage or other proceedings between the child's natural parents, but rather, is a far stricter standard under which custody will not be denied a natural parent absent a showing that the parent is "unfit." 

In \textit{In re Matzen},\footnote{436} the First District Court of Appeal reversed the trial court's refusal to grant custody of a child to his natural father and award of custody to the child's grandparent, holding that a natural parent's right to fellowship and companionship with his or her offspring is "a rule older than the common law itself."\footnote{437} The trial court had determined, at the time of the parent's divorce, that neither parent was "fit." The minor

\begin{itemize}
\item[432.] Id.
\item[433.] 599 So. 2d 218 (Fla. 4th Dist. Ct. App. 1992).
\item[434.] Id. at 219.
\item[435.] Id.
\item[436.] 600 So. 2d 487 (Fla. 1st Dist. Ct. App. 1992).
\item[437.] Id. at 488.
\end{itemize}
children were then living with the maternal grandmother which the trial court continued in effect. The father later petitioned for modification of custody, alleging that he was fit and able to assume the custody of his children. The trial court denied the modification request and the district court reversed, holding that a denial of custody to the natural parent may be sustained only upon a finding by the trial court, supported by clear, convincing and compelling evidence, that the natural parent is unfit or the placement of the child with the parent will be detrimental to the welfare of the child. 438

The number of such “third party custody cases” notwithstanding, there remains a substantial question under Florida law regarding the manner in which such “custody cases” are brought before the court. In In re C.M., 439 the Fourth District Court of Appeal determined that there is no authority, statutory or otherwise, which permits a non-parent to petition for “custody” other than through a chapter 39 dependency proceeding. 440

C. Uniform Child Custody Jurisdiction Act

Over the past several years the number of decisions interpreting and implementing the Uniform Child Custody Jurisdiction Act have continued to increase despite the fact that the Act has been law in the State of Florida for nearly fifteen years. In 1992 and 1993, four significant appellate decisions were rendered regarding the U.C.C.J.A.

In Lamon v. Rewis, 441 the parties were divorced in Georgia in 1988. The parties agreed that the husband would be the custodial parent of the minor children. In 1989, the parties’ son, by mutual consent, began to live with the wife in Florida. In 1990, the wife filed an action, in Georgia, to modify the custody of the son from the husband to her. When the case was called for hearing, however, the wife did not appear. On the day the Georgia case was to have been heard, the wife filed a modification proceeding in Florida. The husband moved to dismiss for lack of jurisdiction over him, and the Florida court granted the motion but determined that it would nevertheless proceed to adjudicate the custody issue at a future date. Meanwhile, the Georgia court entered an order finding that it had

438. Id.
440. Id.; accord Schilling v. Wood, 532 So. 2d 12 (Fla. 4th Dist. Ct. App. 1988). But see Waters v. Waters, 578 So. 2d 874 (Fla. 2d Dist. Ct. App. 1991) (holding that a trial court has “inherent jurisdiction” over minor children even when no underlying proceeding is pending under either chapter 61 or chapter 39).
jurisdiction over the parties and the subject matter and adjudicated the wife in contempt of court for wrongfully withholding the custody of the child from the husband. The Florida court then determined that it had jurisdiction and entered an order listing the reasons why the Florida court had “significant connections” with the minor child. The First District Court of Appeal reversed, holding: (1) only the court in the state where the initial custody order was entered should evaluate the contacts between the child and the states involved in determining whether the initial state should relinquish jurisdiction; (2) modification petitions should be addressed to the court which rendered the original decree even if a second state has become the “home state” of the child in the intervening period of time; (3) a second state may only exercise jurisdiction where the court of continuing jurisdiction (the court where the original custody decree was entered) expressly determines that its exercise of jurisdiction is no longer appropriate or where virtually all contacts with the state of continuing jurisdiction have ceased; (4) only when the child and all parties have moved away is the deference to another state’s continuing jurisdiction no longer required. 442

In Greenfield v. Greenfield,443 the Fourth District was presented with the “reverse side” of Lamon v. Rewis, in which Florida was the state of continuing jurisdiction. In Greenfield, the parties were divorced in Broward County in 1982. Thereafter, in September of 1990, the Broward County court entered an agreed order as to child support which also provided that all other provisions of the final judgment (which included a retention of jurisdiction) remained in full force and effect. In October, 1990, the wife and minor child moved to Illinois. According to the wife, the move was temporary: she maintained her driver’s license, voter’s registration and vehicle registration in Florida and continued to own real property in Florida. In January of 1991, the wife secured employment in Florida but delayed her return until the child had finished the school year in Illinois. One month after the wife and child left Illinois, the husband entered an ex parte motion in Illinois for an order granting him temporary custody of the child. The order was granted. The wife then sought relief in Florida, and in August of 1991, the husband removed the child from Florida and took her to Illinois. Thereafter, the wife obtained, in Florida, a temporary order finding that Florida had jurisdiction and ordered the husband to return the child to the wife. The Florida trial judge then entered an order for communication between the two courts and found that Florida was the child’s “home state;”

442.  Id. at 1224-25.
443.  599 So. 2d 1029 (Fla. 4th Dist. Ct. App.), review denied, 613 So. 2d 4 (Fla. 1992).
had “significant connections” with the child; and Illinois had no significant connections with the child. The district court affirmed the finding of continuing jurisdiction in the State of Florida.\footnote{444. \textit{Id.} at 1030-31.}

The Fourth District also affirmed Florida’s continuing jurisdiction in \textit{Rothman v. Rothman.}\footnote{445. 599 So. 2d 260 (Fla. 4th Dist. Ct. App. 1992).} Therein, the parties’ minor child travelled to Georgia in July of 1990 for visitation with the husband. In August, 1990, the Georgia court found the child to be “deprived” and ordered that the temporary custody of the child be with his grandparents. The wife attended the hearing in Georgia and consented to the child’s placement with the grandparents. For the next year the child lived with the grandparents and then, in 1991, the Georgia court ordered the child placed in the custody of the Department of Family and Children Services for eventual placement with the husband. The Fourth District determined that the State of Florida continued to have jurisdiction over the issue of the child’s custody, holding that Georgia had exercised only emergency jurisdiction and that such emergency jurisdiction did not give the State of Georgia the authority to render a final, permanent custody decision.\footnote{446. \textit{Id.} at 261.}

Lastly, in \textit{McCabe v. McCabe},\footnote{447. 600 So. 2d 1181 (Fla. 5th Dist. Ct. App. 1992).} where throughout the parties’ marriage the husband had been in the military but retained his legal residency in Florida, the Fifth District Court of Appeal reversed the trial court’s finding of jurisdiction based upon the husband’s residency in Florida. Instead of basing its jurisdiction upon the husband’s legal residence in Florida, the district court opined that the trial court should have inquired as to whether Florida was the “home state” of the child or whether Florida had significant connections with the child. Because the trial court did not do so, the trial court failed to apply the proper standards to a determination of jurisdiction under the U.C.C.J.A.\footnote{448. \textit{Id.} at 1186.}

D. Geographical Limitations and Relocation Cases

The most eagerly awaited decision rendered in marital and family law within the past decade was the Florida Supreme Court’s 1993 decision in \textit{Mize v. Mize},\footnote{449. 621 So. 2d 417 (Fla. 1993).} a decision which ended literally years of appellate court conflict upon the issue of parental relocation.

\textit{Id.} at 1030-31.


\textit{Id.} at 261.

600 So. 2d 1181 (Fla. 5th Dist. Ct. App. 1992).

\textit{Id.} at 1186.

621 So. 2d 417 (Fla. 1993).
In Mize, the Florida Supreme Court adopted the approach enunciated by the Third District Court of Appeal in Hill v. Hill,\(^450\) and held that as long as a parent who has been granted the primary custody of the child desires to move for a well-intentioned reason and founded belief that the relocation is best for that parent's, and it follows, the child's well-being, rather than from a vindictive desire to interfere with the visitation rights of the other parent, the change in residence should ordinarily be approved. The trial courts were directed to determine the following with respect to any requested relocation: (1) whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children; (2) whether the motive for seeking the move is for the express purpose of defeating visitation; (3) whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements; (4) whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the non-custodial parent; (5) whether the cost of transportation is financially affordable by one or both of the parents; and (6) whether the move is in the best interests of the child.\(^451\)

**XI. SPECIAL EQUITY**

The question of what is a "special equity" and when a "special equity" in property should be granted to a party in a dissolution of marriage action continues to be an issue plaguing the trial courts. Within the past two years, four decisions relative to "special equity" principles were rendered, three of which reverse findings of "special equity" made by the trial court and one of which contains a new statement of the law pertaining to "special equity."

In Glover v. Glover,\(^452\) the husband owned a home prior to the parties' marriage but during the marriage transferred title to the home from himself to he and the wife jointly. The trial court determined that the husband had established a "special equity" in the home and the First District Court of Appeal reversed, holding that, pursuant to section 61.075 of the Florida Statutes, the fact that property is titled in joint names raises a presumption that such property is a marital asset. Accordingly, the party

\(^{450}\) 548 So. 2d 705 (Fla. 3d Dist. Ct. App. 1989), review denied, 560 So. 2d 233 (Fla. 1990).

\(^{451}\) Id. at 706.

\(^{452}\) 601 So. 2d 231 (Fla. 1st Dist. Ct. App. 1992).
seeking to establish otherwise has the burden to prove that a gift was not intended when title was taken in joint names. 453

The Third District held identically in *Smith v. Smith*, 454 determining that there is a presumption that jointly held property is marital property regardless of who paid for it. Additionally, to establish a special equity the party attempting to overcome the presumption must prove that a gift was not intended when title was taken as tenants by the entireties. 455

However, the Third District also announced in *Smith* a new statement of the law of special equity, specifically, that the burden of establishing the special equity is to prove same “beyond a reasonable doubt” and not merely by clear and convincing evidence. This statement of the law marks the first time that a traditionally criminal law standard of proof has been applied to relief in a dissolution of marriage action.

**XII. CONCLUSION**

If one thing is clear from the family law decisions rendered during the survey period, it is that significant questions remain to be decided by Florida’s appellate courts. Issues continue to arise which will need resolution and the numerous conflicts between the appellate courts must be resolved. However, the direction in which family law appears to be moving is quite positive from both a social perspective and a legal perspective and the trends evidenced in the recent decisional law give every indication that such development will continue.

453. *Id.* at 233; *see also* Young v. Young, 606 So. 2d 1267 (Fla. 1st Dist. Ct. App. 1992). In *Young*, the husband’s mother conveyed the property’s title to the husband and wife jointly and the trial court awarded the husband a “special equity” therein. The district court reversed, holding that the burden was upon the husband to establish that his mother had not intended to convey the property as a gift to both the husband and the wife. *Id.*


455. *Id.* at 371.