Survey of Family Law in Florida

Melvyn B. Frumkes*    Cynthia L. Greene†

Copyright ©1988 by the authors. Nova Law Review is produced by The Berkeley Electronic Press (bepress). https://nsuworks.nova.edu/nlr
Survey of Family Law in Florida

Melvyn B. Frumkes and Cynthia L. Greene

Abstract

The year 1987 brought only two Florida Supreme Court decisions in marital and family law.

KEYWORDS: nuptial, agreements, settlement
Survey of Family Law in Florida*

Melvin B. Frumkes**
Cynthia L. Greene***

I. INTRODUCTION ........................................ 207
II. AGREEMENTS .......................................... 207
   A. Post-Nuptial (Settlement) Agreements ............... 207
   B. Antenuptial Agreements ............................ 210
III. ATTORNEY'S FEES, SUIT MONEY AND COSTS ....... 211
    A. Generally ......................................... 211
    B. Applicability of Florida Patient's Compensation Fund v. Rowe to Family Law Cases ............. 212
    C. Standards for Awards of Attorney's Fees ......... 214
    D. Temporary Attorney's Fees ........................ 215
    E. Attorney's Fees Hearings ........................ 215
    F. Appellate Attorney's Fees ......................... 216
    G. Enforcement ...................................... 216
    H. Suit Money and Costs .............................. 218

* This article reviews Florida cases in family law that were decided in 1987 and through the end of March, 1988.
** Melvin B. Frumkes is the senior member of the firm of the Law Offices of Frumkes and Greene, P.A., Miami, Florida, which restricts its practice to matrimonial and custody litigation. He is Board Certified in Marital and Family Law by the Florida Bar. He was admitted to the Florida Bar in 1953 after receiving an LL.B., with honors, from the University of Florida, College of Law. Mr. Frumkes is on the faculty of the National College of Juvenile and Family Law and the National Judicial College in Reno, Nevada. He is a fellow of the American Academy of Matrimonial Lawyers and past President of the Florida Chapter of the American Academy of Matrimonial Lawyers. He has written extensively and lectured throughout the country on matrimonial and custody litigation matters.
*** Cynthia L. Greene is a member of the firm of the Law Offices of Frumkes and Greene, P.A., Miami, Florida. She received her Bachelor of Arts degree from the University of Miami in 1975 and her J.D. from the University of Miami, School of Law, in 1979. She is Board Certified in Marital and Family Law by the Florida Bar, a Fellow of the American Academy of Matrimonial Lawyers, and Chairman-elect of the Family Law Section of the Florida Bar. She has written extensively on issues pertaining to family law.

The authors wish to express their appreciation to Elena B. Langan and Averill L. Dorsett, without whom this article could not have been written.
IV. ALIMONY 219
   A. Awards of Permanent versus Rehabilitative Alimony 219
   B. Rehabilitative Alimony: Purpose 219
   C. Extension and/or Modification of Rehabilitative Alimony Awards 221
      (1) Jurisdiction 221
      (2) Standards 222
   D. Security for Alimony Payments 223
   E. Alimony Payments 225
   F. Modification of Alimony Awards 226

V. CHILD SUPPORT 229
   A. Entitlement to Child Support 229
   B. Age of Majority 230
   C. Modification of Child Support 232
   D. Expenses Paid as Child Support 235

VI. EQUITABLE DISTRIBUTION 236
   A. General 236
   B. Retirement and Pension Plan 236
   C. Valuation 237
   D. Marital Assets 238
   E. Enhanced Value of Non-Marital Assets 239
   F. Interplay of Equitable Distribution, Special Equity and Lump Sum Alimony 241

VII. THE ROLE OF "FAULT" IN FAMILY LAW CASES 241

VIII. MISCELLANEOUS 243
   A. Rights of Unmarried Persons 243
   B. Effect of Loss of Pre-Marital Benefits on Entitlement to Alimony 243
   C. Jurisdiction and Procedure 244
      (1) Jurisdiction 244
      (2) Procedure 245
   D. Role of Guardian Ad Litem 247

IX. PATERNITY 248

X. SHARED PARENTAL RESPONSIBILITY AND VISITATION 249
   A. Shared versus Sole Responsibility 249
   B. Evidence 250
   C. Uniform Child Custody Jurisdiction Act 251
   D. Modification 254
      (1) Parental Responsibility 254
      (2) Relocation 256

1988]  

Frumkes and Greene 207

E. Grandparents Visitation Rights 259
F. Third Party Custody Cases 262
G. Visitation Rights 264
XI. SPECIAL ENTITY 266
   A. Entitlement 266
   B. The Landay Formula 266

XII. CONCLUSION 269

I. Introduction

The year 1987 brought only two Florida Supreme Court decisions in marital and family law. One is a decision of major significance with respect to determining the validity of settlement agreements. The other is of somewhat limited application concerning appellate attorney's fees.

At the appellate court level, the year 1987 brought three major trends: movement toward the concept of equality in the division of marital assets; a continuing effort on the part of all the district courts to clarify the circumstances under which permanent or rehabilitative alimony is to be awarded; and, unfortunately, a continuing conflict between the courts on issues such as the proper use of life insurance to secure alimony awards and whether an award of attorney's fees is limited to the client's contractual liability.

II. Agreements

A. Postnuptial (Settlement) Agreements

The leading family law case from the Florida Supreme Court in 1987 is Casto v. Casto, which dealt with marital agreements. For the first time since Del Vecchio v. Del Vecchio in 1962 and Belcher v. Belcher in 1972, the Court in Casto provided the bench and bar with a detailed analysis of the procedure applicable to determine the validity of an agreement in a domestic relations case. In so doing, the Court recognized two separate grounds by which either spouse may challenge such an agreement and have it vacated or modified.

First, a spouse may set aside or modify an agreement by establishing that it was reached through fraud, deceit, duress, coercion, misrep-
IV. ALIMONY
A. Awards of Permanent versus Rehabilitative
   Alimony ......................................................... 219
B. Rehabilitative Alimony: Purpose .......................... 219
C. Extension and/or Modification of Rehabilitative
   Alimony Awards .................................................. 221
   (1) Jurisdiction .................................................. 221
   (2) Standards .................................................. 222
D. Security for Alimony Payments ............................ 223
E. Alimony Payments ............................................. 225
F. Modification of Alimony Awards .......................... 226

V. CHILD SUPPORT
A. Entitlement to Child Support ............................... 229
B. Age of Majority .............................................. 230
C. Modification of Child Support ............................. 232
D. Expenses Paid as Child Support ........................... 235

VI. EQUITABLE DISTRIBUTION
A. General ....................................................... 236
B. Retirement and Pension Plan ............................... 236
C. Valuation ..................................................... 237
D. Marital Assets ................................................. 238
E. Enhanced Value of Non-Marital Assets ................. 239
F. Interplay of Equitable Distribution, Special
   Equity and Lump Sum Alimony ............................. 241

VII. THE ROLE OF “FAULT” IN FAMILY LAW CASES ..... 241

VIII. MISCELLANEOUS ............................................. 243
A. Rights of Unmarried Persons .............................. 243
B. Effect of Loss of Pre-Marital Benefits on
   Entitlement to Alimony ....................................... 243
C. Jurisdiction and Procedure ............................... 244
   (1) Jurisdiction ................................................. 244
   (2) Procedure ................................................ 245
D. Role of Guardian Ad Litem ................................ 247

IX. PATERNITY ...................................................... 248
X. SHARED PARENTAL RESPONSIBILITY AND VISITATION 249
A. Shared versus Sole Responsibility ....................... 249
B. Evidence ...................................................... 250
C. Uniform Child Custody Jurisdiction Act .............. 251
D. Modification .................................................. 254
   (1) Parental Responsibility ................................ 254
   (2) Relocation ............................................... 256

E. Grandparents Visitation Rights ........................... 259
F. Third Party Custody Cases ................................. 262
G. Visitation Rights ............................................ 264

XI. SPECIAL ENTITY ............................................... 266
A. Entitlement .................................................. 266
B. The Landay Formula ........................................ 266

XII. CONCLUSION .................................................. 269

I. Introduction

The year 1987 brought only two Florida Supreme Court decisions in
marital and family law. One is a decision of major significance with
respect to determining the validity of settlement agreements. The other
is of somewhat limited application concerning appellate attorney’s fees.

At the appellate court level, the year 1987 brought three major
trends: movement toward the concept of equality in the division of mar-
tial assets; a continuing effort on the part of all the district courts to
clarify the circumstances under which permanent or rehabilitative al-
mony is to be awarded; and, unfortunately, a continuing conflict be-
tween the courts on issues such as the proper use of life insurance to
secure alimony awards and whether an award of attorney’s fees is lim-
ited to the client’s contractual liability.

II. Agreements
A. Postnuptial (Settlement) Agreements ....................... 243

   The leading family law case from the Florida Supreme Court in
1987 is Castro v. Castro,1 which dealt with marital agreements. For the
first time since Del Vecchio v. Del Vecchio2 in 1962 and Belcher v.
Belcher3 in 1972, the Court in Castro provided the bench and bar with a
detailed analysis of the procedure applicable to determine the validity
of an agreement in a domestic relations case. In so doing, the Court recog-
nized two separate grounds by which either spouse may challenge
such an agreement and have it vacated or modified.

First, a spouse may set aside or modify an agreement by establish-
ing that it was reached through fraud, deceit, duress, coercion, misrep-

1. 508 So. 2d 330 (Fla. 1987).
2. 143 So. 2d 17 (Fla. 1962).
3. 271 So. 2d 7 (Fla. 1972).
representation, or overreaching.

The second ground upon which a settlement agreement may be vacated contains multiple elements. Initially, the challenging spouse must establish that the agreement makes an unfair or unreasonable provision for that spouse, given the parties' circumstances. To establish such unreasonableness, the challenging spouse must present evidence of the parties' "relative situations" including financial information. From this information the court is to conclude whether an agreement is unreasonable "on its face." 8

Once the challenging spouse establishes that an agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a "presumed lack of knowledge" by the challenging spouse of the defending spouse's finances at the time the parties entered into the agreement. 9 This presumption shifts the burden to the defending spouse who may rebut the presumption by showing either "(a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the incomes of the parties, or (b) a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties." 10

The Casto court pointed out that a bad bargain is not the equivalent of an invalid agreement. "A bad fiscal bargain that appears unreasonable can be knowledgeably entered into for reasons other than insufficient knowledge of assets and income. The critical test . . . is whether there was fraud or overreaching on one side or, assuming unreasonableness, whether the challenging spouse did not have adequate knowledge of the surrounding financial circumstances." 11

At the appellate court level, two cases involving the validity of settlement agreements were rendered, one prior to Casto and one subsequent thereto. In the pre-Casto decision of Cronacher v. Cronacher, 12 the Third District Court of Appeal affirmed the trial court's refusal to set aside a settlement agreement. In Cronacher, the wife alleged six grounds for her contention that the parties' agreement was reached as a result of overreaching and concealment, specifically:

1. The wife's emotional strain at the breakup of the marriage;
2. The husband's "hurry" to conclude a settlement agreement;
3. The husband's threat to hire legal counsel and pursue his case if the agreement was not concluded;
4. The husband's position that his corporate assets were not to be considered in reaching a settlement agreement;
5. The husband's "failure to disclose" the extent of his assets; and
6. The husband's threat to have the wife arrested if she left the State of Florida with the parties' minor child.

The court addressed each of these contentions individually, finding that: (1) emotional stress is not tantamount to coercion because "almost all settlements in domestic relations matters are entered during periods of distress"; (2) the husband's hurry did not equate to duress because the agreement was drafted and redrafted over a period of two weeks, and several of the redrafts were requested by the wife; (3) the husband's threat to pursue the case did not constitute duress because "[e]very person contemplating a settlement is aware that, in the event the case is not settled, heated litigation may result"; (4) the husband's refusal to include corporate assets in the settlement was not coercive but merely a statement of his bargaining position; (5) the husband did not fail to reveal his assets because the wife was his bookkeeper, signed joint tax returns and was fully aware of his financial situation; and (6) the husband's threat to have the wife arrested arose in the context of her threat to leave the state with the parties' child, a conflict resolved by the parties' settlement agreement.

In the post-Casto case of Brighton v. Brighton, 13 the Fourth District Court of Appeal carefully applied the Casto test and reversed the trial court's judgment setting aside a "Separation and Property Settlement Agreement." In Brighton, the parties negotiated their own property settlement without the assistance of counsel. At the time of the agreement, the husband was employed as an air traffic controller and had a second job performing boat maintenance. Subsequently, he undertook additional jobs until he was diagnosed as having blood pressure

---

4. Casto, 508 So. 2d at 333.
5. Id.
6. Id.
7. Id.
8. Id. at 334.
10. Id. at 1271-72.
11. Id. at 1272.
resentation, or overreaching.

The second ground upon which a settlement agreement may be vacated contains multiple elements. Initially, the challenging spouse must establish that the agreement makes an unfair or unreasonable provision for that spouse, given the parties' circumstances. To establish such unreasonableness, the challenging spouse must present evidence of the parties' "relative situations" including financial information. From this information the court is to conclude whether an agreement is unreasonable "on its face." 

Once the challenging spouse establishes that an agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a "presumed lack of knowledge" by the challenging spouse of the defending spouse's finances at the time the parties entered into the agreement. This presumption shifts the burden to the defending spouse who may rebut the presumption by showing either "(a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income[s] of the parties, or (b) a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties." 

The Castro court pointed out that a bad bargain is not the equivalent of an invalid agreement. "A bad fiscal bargain that appears unreasonable can be knowledgeably entered into for reasons other than insufficient knowledge of assets and income. The critical test ... is whether there was fraud or overreaching on one side or, assuming unreasonableness, whether the challenging spouse did not have adequate knowledge of the surrounding financial circumstances." 

At the appellate court level, two cases involving the validity of settlement agreements were rendered, one prior to Castro and one subsequent thereto. In the pre-Castro decision of Cronacher v. Cronacher, the Third District Court of Appeal affirmed the trial court's refusal to set aside a settlement agreement. In Cronacher, the wife alleged six grounds for her contention that the parties' agreement was reached as a result of overreaching and concealment, specifically:

1. The wife's emotional strain at the breakup of the marriage;
2. The husband's "hurry" to conclude a settlement agreement;
3. The husband's threat to hire legal counsel and pursue his case if the agreement was not concluded;
4. The husband's position that his corporate assets were not to be considered in reaching a settlement agreement;
5. The husband's "failure to disclose" the extent of his assets; and
6. [The husband's] threat to have the wife arrested if she left the State of Florida with the parties' minor child.

The court addressed each of these contentions individually, finding that: (1) emotional stress is not tantamount to coercion because "almost all settlements in domestic relations matters are entered during periods of distress;" (2) the husband's hurry did not equate to duress because the agreement was drafted and redrafted over a period of two weeks, and several of the redrafts were requested by the wife; (3) the husband's threat to pursue the case did not constitute duress because "no person contemplating a settlement is aware that, in the event the case is not settled, heated litigation may result;" (4) the husband's refusal to include corporate assets in the settlement was not coercive but merely a statement of his bargaining position; (5) the husband did not fail to reveal his assets because the wife was his bookkeeper, signed joint tax returns and was fully aware of his financial situation; and (6) the husband's threat to have the wife arrested arose in the context of her threat to leave the state with the parties' child, a conflict resolved by the parties' settlement agreement.

In the post-Castro case of Brighton v. Brighton, the Fourth District Court of Appeal carefully applied the Castro test and reversed the trial court's judgment setting aside a "Separation and Property Settlement Agreement." In Brighton, the parties negotiated their own property settlement without the assistance of counsel. At the time of the agreement, the husband was employed as an air traffic controller and had a second job performing boat maintenance. Subsequently, he undertook additional jobs until he was diagnosed as having blood pressure

---

4. Castro, 508 So. 2d at 333.
5. Id.
6. Id.
7. Id.
8. Id. at 334.
10. Id. at 1271-72.
11. Id. at 1272.
above the limits allowable for air traffic controllers. Pursuant to the
doctor's suggestion, the husband gave up his third job. At the time of
the hearing upon the validity of the agreement, however, the husband's
employment and income were the same as at the time of his entry into
the agreement.

The agreement required the husband to pay the following family
living expenses: home mortgage; real estate taxes and insurance; utilities;
cable television; newspaper; exterminators; pool and spa maintenance
and repairs; health insurance and uninsured medical and dental
expenses of the wife and children; credit card purchases of the wife
including but not limited to necessities; car payments for the wife's au-
tomobile including maintenance, gasoline, insurance, license tags, and
purchase payments; food and household goods; household and appliance
maintenance and repair; miscellaneous personal expenses; veterinarian
and kennel expenses; entertainment for the wife and children; and
other reasonable personal expenses.\textsuperscript{12} The evidence established that
payment of these items required nearly all of the husband's net
income.\textsuperscript{13}

The trial court concluded that the agreement was "facially unfair,
\ldots unconscionable and should not be enforced."\textsuperscript{14} The district court
reversed this ruling because, applying \textit{Casto}, the husband had not al-
leged either fraud or overreaching on the part of the wife, and the wife
had established that the husband, although complaining that the agree-
ment was unreasonable, had adequate knowledge of the financial cir-
cumstances of the parties at the time the agreement was made.\textsuperscript{15}

B. Antenuptial Agreements

In \textit{Cladis v. Cladis},\textsuperscript{16} the Fourth District Court of Appeal applied
the rules of \textit{Casto} to antenuptial agreements, holding that the prin-
ciples of \textit{Casto} equally apply. The \textit{Cladis} case involved a "homemade"
antenuptial agreement by which the wife waived all rights to the hus-
band's property.\textsuperscript{17} Neither party was represented by counsel at the time
of the making of the agreement but there was nevertheless "full and
complete disclosure of all assets".\textsuperscript{18} The trial court found the agree-
ment to be "unfair and inequitable" and refused to enforce its terms.\textsuperscript{19}

The district court agreed that the antenuptial agreement was unfair
but held that such unfairness, under \textit{Casto}, is not a sufficient basis to
set aside an agreement:

The trial court did find that "the agreement is basically unfair and
inequitable to the Wife and we certainly agree under the facts of
this case with reference to the husband's property. However, this
finding alone is not enough to support a decision to set aside the
agreement. As reflected in \textit{Casto} [citations omitted], once it is es-

tablished that the agreement is unreasonable, "a presumption arises
that there was either concealment by the defending spouse or a
presumed lack of knowledge by the challenging spouse of the de-

defending spouse's finances at the time the agreement was reached."\textsuperscript{20}

Here, as earlier stated and conceded, the wife had full and com-
plete knowledge of the husband's finances. Thus this presumption
was rebutted and it fails.\textsuperscript{21}

III. Attorney's Fees, Suit Money and Costs

A. Generally

In one of the most talked about cases of the year, the Fourth Dis-

trick Court of Appeal rendered an opinion which devoted a total of two


\begin{footnotesize}
\begin{itemize}
\item[13.] \textit{Id.} at 54-55.
\item[14.] \textit{Id.} at 56.
\item[15.] \textit{Id.} at 55.
\item[16.] \textit{Id.}
\item[17.] 512 So. 2d 271 (Fla. 4th Dist. Ct. App. 1987).
\item[18.] \textit{Id.} at 272-73.
\item[19.] \textit{Id.} at 273.
\item[20.] \textit{Id.} at 274.
\item[21.] \textit{Id.} at 274. The court was particularly concerned about the trial court's reli-


\end{itemize}
\end{footnotesize}
above the limits allowable for air traffic controllers. Pursuant to the
docket's suggestion, the husband gave up his third job. At the time of
the hearing upon the validity of the agreement, however, the husband's
employment and income were the same as at the time of his entry into
the agreement.

The agreement required the husband to pay the following family
living expenses: home mortgage; real estate taxes and insurance; utili-
ties; cable television; newspaper; exterminators; pool and spa mainte-
nance and repairs; health insurance and uninsured medical and dental
expenses of the wife and children; credit card purchases of the wife
including but not limited to necessities; car payments for the wife's au-
tomobile including maintenance, gasoline, insurance, license tags, and
purchase payments; food and household goods; household and appliance
maintenance and repair; miscellaneous personal expenses; veterinarian
and kennel expenses; entertainment for the wife and children; and
other reasonable personal expenses. The evidence established that
payment of these items required nearly all of the husband's net
income.

The trial court concluded that the agreement was "facially unfair,
... unconscionable and should not be enforced." The district court
reversed this ruling because, applying Castro, the husband had not al-
leged either fraud or overreaching on the part of the wife, and the wife
had established that the husband, although complaining that the agree-
ment was unreasonable, had adequate knowledge of the financial cir-
cumstances of the parties at the time the agreement was made.

B. Antenuptial Agreements

In Cladis v. Cladis, the Fourth District Court of Appeal applied
the rules of Castro to antenuptial agreements, holding that the princi-
ple of Castro equally apply. The Cladis case involved a "homemade"
antenuptial agreement by which the wife waived all rights to the hus-
band's property. Neither party was represented by counsel at the time of
the making of the agreement but there was nevertheless "full and

13. Id. at 54-55.
14. Id. at 56.
15. Id. at 55.
16. Id.
17. 512 So. 2d 271 (Fla. 4th Dist. Ct. App. 1987).
18. Id. at 272-73.

19. Id. at 273.
20. Id. at 274.
21. Id. at 274. The court was particularly concerned about the trial court's reli-
ance upon lack of counsel as a ground for vacating the agreement and reiterated its
earlier pronouncements that spouses need not have legal counsel for a valid agreement.
22. 505 So. 2d 25 (Fla. 4th Dist. Ct. App. 1987).
their opportunity for higher education vanish in a nightmarish plethora of motions, transcripts and time sheets.

We urge the Family Law Section of the Florida Bar and the Florida Chapter of the American Academy of Matrimonial Lawyers to consider our concerns. Equally important, we remind ourselves and all trial judges in our district that we are in a position to act upon what a senior member of the Broward County Bar has noted on his docket for over sixty years; namely, that it is not how many hours one puts in, but what one puts into the hours.

What reasonable parties, having spent years accumulating assets while fulfilling the responsibilities of spouse and parent, would knowingly undertake a contested dissolution if they knew — as they should — that any appreciable percentage of those assets would not be available to them or their children because of their own contrariness — or that of their lawyers?23

B. Applicability of Florida Patient's Compensation Fund v. Rowe to Family Law Cases

In Florida Patient's Compensation Fund v. Rowe,24 the Supreme Court of Florida adopted the "federal lodestar approach" for computation of attorney's fees in medical malpractice and personal injury cases.25 Subsequently, the Rowe decision has been applied to a variety of other types of cases, including family law cases, but an open question remains as to the extent to which the Rowe factors are to be applied in domestic relations matters.

The 1987 appellate decisions concerning the application of Rowe in family law cases uniformly require a strict adherence to the "lodestar" methodology in terms of computation of reasonable time and reasonable rates. In Tucker v. Tucker,26 the Second District Court of Ap

23. Id. at 26. The concurring opinion noted that the issue of attorney's fees was not an issue on appeal and that large or excessive attorney's fees are not always the fault of the attorneys because "[s]ometimes warring spouses will go to any lengths to destroy each other's assets." Id.

24. 472 So. 2d 1141 (Fla. 1985).

25. The "lodestar" approach requires the trial court first to determine the number of hours reasonably expended and, second, to determine a reasonable hourly rate based upon a contingency risk factor and the results obtained.

their opportunity for higher education vanish in a nightmarish plethora of motions, transcripts and time sheets.

We urge the Family Law Section of the Florida Bar and the Florida Chapter of the American Academy of Matrimonial Lawyers to consider our concerns. Equally important, we remind ourselves and all trial judges in our district that we are in a position to act upon what a senior member of the Broward County Bar has noted on his door for over sixty years; namely, that it is not how many hours one puts in, but what one puts into the hours.

What reasonable parties, having spent years accumulating assets while fulfilling the responsibilities of spouse and parent, would knowingly undertake a contested dissolution if they knew—as they should—that any appreciable percentage of those assets would not be available to them or their children because of their own contrariness—or that of their lawyers?23

B. Applicability of Florida Patient's Compensation Fund v. Rowe to Family Law Cases

In Florida Patient's Compensation Fund v. Rowe, the Supreme Court of Florida adopted the "federal lodestar approach" for computation of attorney's fees in medical malpractice and personal injury cases.24 Subsequently, the Rowe decision has been applied to a variety of other types of cases, including family law cases, but an open question remains as to the extent to which the Rowe factors are to be applied in domestic relations matters.

The 1987 appellate decisions concerning the application of Rowe in family law cases uniformly require a strict adherence to the "lodestar" methodology in terms of computation of reasonable time and reasonable rates. In Tucker v. Tucker, the Second District Court of Ap-

23. Id. at 26. The concurring opinion noted that the issue of attorney's fees was not an issue on appeal and that large or excessive attorney's fees are not always the fault of the attorneys because "[s]ometime warring spouses will go to any lengths to destroy each other's assets." Id.
24. 472 So. 2d 1145 (Fla. 1985).
25. The "lodestar" approach requires the trial court first to determine the number of hours reasonably expended and, second, to determine a reasonable hourly rate for those services. The number of hours reasonably expended multiplied by the reasonable hourly rate provides the lodestar from which the court may add or subtract based upon a contingency risk factor and the results obtained.
27. Id. at 734.
28. Id. at 735. The attorney refused to produce her time records on the ground that they contained "confidential notations." The court expressed no opinion as to whether such time records are privileged, commenting only that "we are not unmindful that a circumstance not attributable to the claimant may arise precluding the presentation of time records," but finding such not to apply to the case at bar. Id.
Conversely, the Third District Court of Appeal in Levy v. Levy, hold that because attorney's fees in dissolution cases are awarded based upon need and ability to pay, the restrictive language in Rowe, dealing with statutory fees, has no application in the domestic context. The Levy decision thus specifically holds that a reasonable attorney's fee in a family law case is not limited to the "almost necessarily lower amount" which a party has contracted to pay his or her attorney.

The last Rowe issue addressed by the appellate courts in 1987 was whether, in a family law case, the lodestar figure could be increased or diminished because of the results achieved. In Margulies v. Margulies, the Third District Court of Appeal determined that Rowe reconfirmed that the results obtained are still to be considered as a factor in awarding attorney's fees in domestic relations cases.

C. Standards for Awards of Attorney's Fees

The 1987 decisions of the several appellate courts with respect to the standard for an award of attorney's fees in family law cases reflects a significant split of authority among the districts.

The Fifth District Court of Appeal continues to hold that attorney's fees should not be awarded in cases where the distribution of marital assets is equal. However, the facts set forth in these various opinions indicate that in addition to such equal division, the fact that each of the parties possessed his or her own resources was also considered by the court. The Second and Third District Courts of Appeal, however, held that attorney's fees are properly awarded in cases where one party's income and net worth exceeds that of the other party even in cases involving an equal division of assets.

D. Temporary Attorney's Fees

The only case rendered by a Florida appellate court in 1987 involving temporary or pendente lite attorney's fees was ultimately clarified by the Florida Supreme Court in 1988. In Nichols v. Nichols, the Second District Court of Appeal affirmed a denial of temporary attorney's fees upon the basis that the wife, who had sought the fees, had failed to show an inability to secure counsel. Although the Florida Supreme Court approved the district court's result, it rejected the "suggestion" that a spouse can be denied attorney's fees solely because the request was made at a temporary fee hearing at which that spouse was represented:

Under Section 61.16, it is irrelevant that the legal fees in question are temporary or final or that a spouse appears at a hearing with counsel.

Where one spouse effectively is unable to pay for legal counsel and the other suffers no similar disability, the very purposes of Florida's dissolution statute are jeopardized and the trial court risks inequity. This conclusion is no less true because the request is for temporary fees.

E. Attorney's Fees Hearings

In Irizar v. Irizar, the Third District Court of Appeal held, for the first time in Florida, that a prayer for an award of attorney's fees in a pleading implicitly carries with it "a request for a separate hearing on the amount of attorney's fees and costs" in the event the court rules that the seeking party is entitled to such fees and costs at the final hearing and, therefore, a separate request for a reservation of jurisdiction to conduct such a hearing is not necessary. In so ruling, the court reversed the trial court's denial of attorney's fees. The denial was based upon the seeking party's failure to specifically request a reservation of jurisdiction for a further hearing.

Also, for the first time in Florida, the Irizar court further opined,
Conversely, the Third District Court of Appeal in Levy v. Levy, held that because attorney's fees in dissolution cases are awarded based upon need and ability to pay, the restrictive language in Rowe, dealing with statutory fees, has no application in the domestic context. The Levy decision thus specifically holds that a reasonable attorney's fee in a family law case is not limited to the "almost necessarily lower amount" which a party has contracted to pay his or her attorney.

The last Rowe issue addressed by the appellate courts in 1987 was whether, in a family law case, the lodestar figure could be increased or diminished because of the results achieved. In Margulies v. Margulies, the Third District Court of Appeal determined that Rowe reconfirmed that the results obtained are still to be considered as a factor in awarding attorney's fees in domestic relations cases.

C. Standards for Awards of Attorney's Fees

The 1987 decisions of the several appellate courts with respect to the standard for an award of attorney's fees in family law cases reflects a significant split of authority among the districts.

The Fifth District Court of Appeal continues to hold that attorney's fees should not be awarded in cases where the distribution of marital assets is equal. However, the facts set forth in these various opinions indicate that in addition to such equal division, the fact that each of the parties possessed his or her own resources was also considered by the court. The Second and Third District Courts of Appeal, however, held that attorney's fees are properly awarded in cases where one party's income and net worth exceeds that of the other party even in cases involving an equal division of assets.

D. Temporary Attorney's Fees

The only case rendered by a Florida appellate court in 1987 involving temporary or pendente lite attorney's fees was ultimately clarified by the Florida Supreme Court in 1988.

In Nichols v. Nichols, the Second District Court of Appeal affirmed a denial of temporary attorney's fees upon the basis that the wife, who had sought the fees, had failed to show an inability to secure counsel. Although the Florida Supreme Court approved the district court's result, it rejected the "suggestion" that a spouse can be denied attorney's fees solely because the request was made at a temporary fee hearing at which that spouse was represented.

Under Section 61.16, it is irrelevant that the legal fees in question are temporary or final or that a spouse appears at a hearing with counsel.

Where one spouse effectively is unable to pay for legal counsel and the other suffers no similar disability, the very purposes of Florida's dissolution statute are jeopardized and the trial court risks inequity. This conclusion is no less true because the request is for temporary fees.

E. Attorney's Fees Hearings

In Iribar v. Iribar, the Third District Court of Appeal held, for the first time in Florida, that a prayer for an award of attorney's fees in a pleading implicitly carries with it "a request for a separate hearing on the amount of attorney's fees and costs" in the event the court rules that the seeking party is entitled to such fees and costs at the final hearing and, therefore, a separate request for a reservation of jurisdiction to conduct such a hearing is not necessary. In so ruling, the court reversed the trial court's denial of attorney's fees. The denial was based upon the seeking party's failure to specifically request a reservation of jurisdiction for a further hearing.

Also, for the first time in Florida, the Iribar court further opined,
that the preferred method of determining attorney’s fees in family law cases is by a separate hearing conducted subsequent to the final hearing.  

F. Appellate Attorney’s Fees

In one of the two family law cases rendered by the Florida Supreme Court in 1987, the court ruled that appellate courts cannot award attorney’s fees in matters litigated in the appellate courts absent an evidentiary basis. In Sierra v. Sierra, the Supreme Court held that the appellate courts must either remand the issue of the amount of an attorney’s fee award to the trial court for determination after an evidentiary hearing or provide a method for receiving evidence by affidavit or otherwise in the appellate court.

G. Enforcement

Two attorneys’ charging lien cases relative to family law matters were decided in the Florida appellate courts during 1987. In the first such case, Zimmerman v. Livnat, the issue presented was whether an attorney’s charging lien could be satisfied from proceeds, including alimony payments, received by a wife from her former husband.

In Zimmerman, the wife’s attorney withdrew as her counsel in a dissolution of marriage proceeding. The order permitting withdrawal reserved jurisdiction to award attorney’s fees and costs at a later date. Subsequently, the husband and wife entered into a settlement agreement and the wife accepted as her obligation any attorney’s fees to be paid to her former attorney. The wife’s former attorney was not advised of the entry of the final judgment incorporating the terms of the settlement agreement and, one year later, petitioned the court for entry of a charging lien. The court recognized the lien and ordered the husband to pay a weekly sum to the attorney from the amount otherwise payable to the wife. These payments were not made and the attorney sought enforcement of the charging lien. The trial court refused to enforce it.

The district court held that an attorney’s establishment of an enti-
that the preferred method of determining attorney’s fees in family law cases is by a separate hearing conducted subsequent to the final hearing.44

F. Appellate Attorney’s Fees

In one of the two family law cases rendered by the Florida Supreme Court in 1987, the court ruled that appellate courts cannot award attorney’s fees in matters litigated in the appellate courts absent an evidentiary basis. In *Sierra v. Sierra*,48 the Supreme Court held that the appellate courts must either remand the issue of the amount of an attorney’s fee award to the trial court for determination after an evidentiary hearing or provide a method for receiving evidence by affidavit or otherwise in the appellate court.48

G. Enforcement

Two attorneys’ charging lien cases relative to family law matters were decided in the Florida appellate courts during 1987. In the first such case, *Zimmerman v. Livnat*,47 the issue presented was whether an attorney’s charging lien could be satisfied from proceeds, including alimony payments, received by a wife from her former husband.

In *Zimmerman*, the wife’s attorney withdrew as her counsel in a dissolution of marriage proceeding. The order permitting withdrawal reserved jurisdiction to award attorney’s fees and costs at a later date. Subsequently, the husband and wife entered into a settlement agreement and the wife accepted as her obligation any attorney’s fees to be paid to her former attorney. The wife’s former attorney was not advised of the entry of the final judgment incorporating the terms of the settlement agreement and, one year later, petitioned the court for entry of a charging lien. The court recognized the lien and ordered the husband to pay a weekly sum to the attorney from the amount otherwise payable to the wife. These payments were not made and the attorney sought enforcement of the charging lien. The trial court refused to enforce it.

The district court held that an attorney’s establishment of an en-

44. Id. at 1024-25.
45. 505 So. 2d 432 (Fla. 1987).
46. Id. at 434.
47. 507 So. 2d 1205 (Fla. 4th Dist. Ct. App. 1987).
48. Id. at 1207.
49. Id. (citing Dyer v. Dyer, 438 So. 2d 954 (Fla. 4th Dist. Ct. App. 1983)).
50. Id. at 1207.
51. 501 So. 2d 1386 (Fla. 4th Dist. Ct. App. 1987).
between them by agreement at any time and an agreement settling all issues in the case is binding not only upon the parties but also upon the court."

As to the second issue, the trial court found that the wife's attorney was entitled to a charging lien but declined either to determine the amount of a reasonable fee or to permit enforcement of the lien. Rather, the trial court determined that the attorney could proceed "by suit at law" for the balance of the fees owed. On public policy grounds, the district court rejected such an approach:

Avoiding multiplicity of suits is a policy underlying a number of legal devices including the recognition of class action. Refusal to enforce an attorney's charging lien for the full amount of an earned fee contravenes the policy underlying this equitable remedy, earlier expressed by our Supreme Court and quoted with approval in Sinclair [citations omitted]:

"While our courts hold the members of the bar to strict accountability and fidelity to their clients, they should afford them protection and every facility in securing them their remuneration for their services. An attorney has a right to be remunerated out of the results of his industry, and his lien on these fruits is founded in equity and justice."

H. Suit Money and Costs

In Manuel v. Manuel, the trial court awarded, as suit money and costs, an expert witness fee to an accountant who submitted only an invoice and who did not testify as to the fee at the attorney's fee and suit money hearing. The First District Court of Appeal determined that an evidentiary hearing is not required to determine the reasonableness of fees sought for an expert witness: "the trial court has the authority to award an expert witness fee based on its experience, its observation of the witness's testimony at trial, and its review of the record, so long as the amount is not 'of such magnitude as to indicate grossly excessive charges.'"

IV. Alimony

A. Awards of Permanent versus Rehabilitative Alimony

The 1987 decisions of the Florida district courts reflect a continuation of their efforts to distinguish between situations in which an award of permanent alimony is appropriate and those in which an award of rehabilitative alimony is proper.

In Evans v. Evans, the trial court awarded rehabilitative alimony to a 46 year old wife with a high school level education who was disabled as a result of injuries sustained during a World War II bombing raid. The wife had not worked from 1969 until 1985 when she obtained a part time job as a store clerk. The district court held that the trial court's award of rehabilitative alimony rather than permanent alimony was an error of law because the remedy of rehabilitative alimony was not available to a trial court "where there is no record evidence to support a consideration of rehabilitation."

In Holcomb v. Holcomb, consideration of the wife's age and lack of education and training resulted in the reversal of a rehabilitative alimony award and a remand for the entry of permanent alimony. The record in Holcomb demonstrated that the wife had not held a job outside the home since her marriage in 1959 when she was a senior in high school. The trial court's seeming assumption that the wife could return to college and obtain a teaching degree and therefore, the trial court's award of rehabilitative alimony for a period of four years, was found to lack any record support. The district court opined that the only fact in the record which supports such a "speculation" was that the wife had taught Sunday school. Such "speculation" is not the equivalent of substantive evidence of a potential for rehabilitation.

B. Rehabilitative Alimony: Purpose

The year 1987 also brought a continuing series of cases reiterating

57. 505 So. 2d 1130 (Fla. 3d Dist. Ct. App. 1987).
58. Id. at 1131. In Moler v. Moler, 508 So. 2d 520 (Fla. 4th Dist. Ct. App. 1987), the trial court awarded rehabilitative alimony in a case which the appellate court described as a "classic case in which to award alimony." Id. at 521. The Moler facts included an unemployed 52-year-old wife with a high school education who had failed the examination to become a real estate salesperson and who suffered from high blood pressure and arthritis.
59. Id. at 1385 (Fla. 1st Dist. Ct. App. 1987).
60. Id. at 1387.

52. Id. at 1387.
53. Id.
54. Id. at 1388 (quoting Carter v. Bennett, 6 Fla. 214, 258 (1855)).
55. 498 So. 2d 1369 (Fla. 1st Dist. Ct. App. 1986).
56. Id. at 1370.
between them by agreement at any time and an agreement settling all issues in the case is binding not only upon the parties but also upon the court."52

As to the second issue, the trial court found that the wife's attorney was entitled to a charging lien but declined either to determine the amount of a reasonable fee or to permit enforcement of the lien. Rather, the trial court determined that the attorney could proceed "by suit at law" for the balance of the fees owed.53 On public policy grounds, the district court rejected such an approach:

Avoiding multiplicity of suits is a policy underlying a number of legal devices including the recognition of class action. Refusal to enforce an attorney's charging lien for the full amount of an earned fee contravenes the policy underlying this equitable remedy, earlier expressed by our Supreme Court and quoted with approval in Sinclair [citations omitted].

"While our courts hold the members of the bar to strict accountability and fidelity to their clients, they should afford them protection and every facility in securing them their remuneration for their services. An attorney has a right to be remunerated out of the results of his industry, and his lien on these fruits is founded in equity and justice."

H. Suit Money and Costs

In Manuel v. Manuel,68 the trial court awarded, as suit money and costs, an expert witness fee to an accountant who submitted only an invoice and who did not testify as to the fee at the attorney's fee and suit money hearing. The First District Court of Appeal determined that an evidentiary hearing is not required to determine the reasonableness of fees sought for an expert witness: "the trial court has the authority to award an expert witness fee based on its experience, its observation of the witness's testimony at trial, and its review of the record, so long as the amount is not 'of such magnitude as to indicate grossly excessive charges.'"64

IV. Alimony

A. Awards of Permanent versus Rehabilitative Alimony

The 1987 decisions of the Florida district courts reflect a continuation of their efforts to distinguish between situations in which an award of permanent alimony is appropriate and those in which an award of rehabilitative alimony is proper.

In Evans v. Evans,67 the trial court awarded rehabilitative alimony to a 46 year old wife with a high school level education who was disabled as a result of injuries sustained during a World War II bombing raid. The wife had not worked from 1969 until 1985 when she obtained a part time job as a store clerk. The district court held that the trial court's award of rehabilitative alimony rather than permanent alimony was an error of law because the remedy of rehabilitative alimony is not available to a trial court "where there is no record evidence to support a consideration of rehabilitation."68

In Holcomb v. Holcomb,69 consideration of the wife's age and lack of education and training resulted in the reversal of a rehabilitative alimony award and a remand for the entry of permanent alimony. The record in Holcomb demonstrated that the wife had not held a job outside the home since her marriage in 1959 when she was a senior in high school. The trial court's seeming assumption that the wife could return to college and obtain a teaching degree and therefore, the trial court's award of rehabilitative alimony for a period of four years, was found to lack any record support. The district court opined that the only fact in the record which supports such a "speculation" was that the wife had taught Sunday school. Such "speculation" is not the equivalent of substantive evidence of a potential for rehabilitation.69

B. Rehabilitative Alimony: Purpose

The year 1987 also brought a continuing series of cases reiterating

57. 505 So. 2d 1385 (Fla. 1st Dist. Ct. App. 1987).
58. Id. at 1383.
59. Id. at 1131. In Moler v. Moler, 505 So. 2d 520 (Fla. 4th Dist. Ct. App. 1987), the trial court awarded rehabilitative alimony in a case which the appellate court described as a "classic case in which to award alimony." Id. at 521. The Moler facts included an unemployed 52-year-old wife with a high school education who had failed the examination to become a real estate salesperson and who suffered from high blood pressure and arthritis.
60. Id. at 1387.
the definition and description of the purpose of rehabilitative alimony, In Hobart v. Hobart, the court defined rehabilitative alimony as an award which "presupposes a potential for self-support that has been undeveloped or completely lost during the marriage." The court went on to hold that, [r]ebilitative alimony is appropriate only where the evidence suggests the wife can be raised to a financial stature that would permit her to become self-supporting."

Although the law is well established that permanent alimony is to be awarded in cases in which the recipient lacks the capacity for self-support and rehabilitative alimony is to be awarded in cases where the recipient possesses the capacity for self-support which was lost or underdeveloped during the marriage, two decisions rendered in 1987 make it clear that, absent evidence of either of the foregoing factors, no alimony award at all should be made.

In Long v. Long, the trial court's award of rehabilitative alimony to the wife was reversed by the district court because there was no evidence that the wife's earning ability suffered in any way during the marriage. The trial court was instructed to set aside the award of rehabilitative alimony.

In Fowler v. Fowler, the trial court's two year rehabilitative alimony award was reversed on the basis that there was no evidence that the wife's earning ability during the parties' 9-month marriage had been impaired.

One rehabilitative alimony case rendered in December of 1986, reached a result disallowed under prior case law. In Blumberg v. Blumberg, the Third District Court of Appeal affirmed an award of rehabilitative alimony provided for the purpose of enabling the wife, a trained social worker, to return to school to become an attorney. The court distinguished its earlier decision in Poppe v. Poppe, which held that rehabilitative alimony was not necessary to provide a party already trained in one field with training in a new field, by holding that the Poppe decision was based, in part, upon the fact that the parties had been in similar financial positions.

C. Extension and/or Modification of Rehabilitative Alimony Awards

(1) Jurisdiction

Three 1987 decisions address the issue of the trial court's jurisdiction to extend and/or modify rehabilitative alimony. All three reiterate earlier pronouncements that a petition for modification and/or extension of rehabilitative alimony must be filed within the rehabilitative period.

In Parde v. Parde, the court merely repeated this jurisdictional standard by holding that, with respect to an award of rehabilitative alimony, "should the wife not become rehabilitated prior to the expiration of the rehabilitative period, she may file a petition to continue the rehabilitative alimony or convert it to permanent alimony." The court in Pauk v. Pauk, demonstrated how the "rehabilitative period" is calculated. In Pauk, the parties' marriage was dissolved on April 9, 1984, and the husband was ordered to pay rehabilitative alimony to the wife for a period of two years. The first such payment was due and payable on May 1, 1984 and, according to the terms of the final judgment, payments were to "continue on the first day of each month thereafter for a period of two years." The husband made the last payment to the wife on April 1, 1986. Thereafter, on April 28, 1986, the wife filed a petition for modification seeking to extend or modify the rehabilitative alimony to permanent alimony. The trial court dismissed the wife's petition for modification on the ground that it lacked jurisdiction to extend the rehabilitation alimony permanently. In Akers v. Akers, the appellate court reversed the trial court's

62. Id. at 993.
63. Id.
64. 505 So. 2d 10 (Fla. 5th Dist. Ct. App. 1987).
65. Id. at 11.
66. 516 So. 2d 113 (Fla. 5th Dist. Ct. App. 1987).
67. 498 So. 2d 1387 (Fla. 3d Dist. Ct. App. 1986).
68. 412 So. 2d 38 (Fla. 3d Dist. Ct. App. 1982).
69. 510 So. 2d 660 (Fla. 2d Dist. Ct. App. 1987).
70. Id. at 661 (citing Lee v. Lee, 309 So. 2d 26 (Fla. 2d Dist. Ct. App. 1975)).
71. 504 So. 2d 790 (Fla. 1st Dist. Ct. App. 1987).
72. Id. at 790.
73. Id. Although on April 1, 1986, the husband had made 24 payments of rehabilitative alimony, the "rehabilitative period" was for two years, or 730 days, and, therefore, extended from May 1, 1984 until May 1, 1986. Id.
the definition and description of the purpose of rehabilitative alimony. In *Hobart v. Hobart*, the court defined rehabilitative alimony as an award which "presupposes a potential for self-support that has been undeveloped or completely lost during the marriage." The court went on to hold that, "[r]ehabilitative alimony is appropriate only where the evidence suggests the wife can be raised to a financial stature that would permit her to become self-supporting."

Although the law is well established that permanent alimony is to be awarded in cases in which the recipient lacks the capacity for self-support and rehabilitative alimony is to be awarded in cases where the recipient possesses the capacity for self-support which was lost or underdeveloped during the marriage, two decisions rendered in 1987 make it clear that, absent evidence of either of the foregoing factors, no alimony award at all should be made.

In *Long v. Long*, the trial court's award of rehabilitative alimony to the wife was reversed by the district court because there was no evidence that the wife's earning ability suffered in any way during the marriage. The trial court was instructed to set aside the award of rehabilitative alimony.

In *Fowler v. Fowler*, the trial court's two year rehabilitative alimony award was reversed on the basis that there was no evidence that the wife's earning ability during the parties' 9-month marriage had been impaired.

One rehabilitative alimony case rendered in December of 1986, reached a result disallowed under prior case law. In *Blumberg v. Blumberg*, the Third District Court of Appeal affirmed an award of rehabilitative alimony provided for the purpose of enabling the wife, a trained social worker, to return to school to become an attorney. The court distinguished its earlier decision in *Poppe v. Poppe*, which held that rehabilitative alimony was not necessary to provide a party already trained in one field with training in a new field, by holding that the *Poppe* decision was based, in part, upon the fact that the parties there had been in similar financial positions.

1987

C. Extension and/or Modification of Rehabilitative Alimony Awards

(1) Jurisdiction

Three 1987 decisions address the issue of the trial court's jurisdiction to extend and/or modify rehabilitative alimony. All three reiterate earlier pronouncements that a petition for modification and/or extension of rehabilitative alimony must be filed within the rehabilitative period.

In *Parde v. Parde*, the court merely repeated this jurisdictional standard by holding that, with respect to an award of rehabilitative alimony, "should the wife not become rehabilitated prior to the expiration of the rehabilitative period, she may file a petition to continue the rehabilitative alimony or convert it to permanent alimony." The court in *Paulk v. Paulk*, demonstrated how the "rehabilitative period" is calculated. In *Paulk*, the parties' marriage was dissolved on April 9, 1984, and the husband was ordered to pay rehabilitative alimony to the wife for a period of two years. The first such payment was due and payable on May 1, 1984 and, according to the terms of the final judgment, payments were to "continue on the first day of each month thereafter for a period of two years." The husband made his last payment to the wife on April 1, 1986. Thereafter, on April 28, 1986, the wife filed a petition for modification seeking to extend or modify the rehabilitative alimony to permanent alimony. The trial court dismissed the wife's petition for modification on the ground that it lacked jurisdiction to consider it because the petition was filed after the date of the last payment of rehabilitative alimony.

The First District Court of Appeal reversed the trial court's decision finding that, according to the final judgment, the "rehabilitative period" was for a period of two years beginning May 1, 1984 and, therefore, the wife's April 28, 1986 petition was timely.

In *Akers v. Akers*, the appellate court reversed the trial court's

---

62. Id. at 993.
63. Id.
64. 585 So. 2d 10 (Fla. 5th Dist. Ct. App. 1987).
65. Id. at 11.
66. 516 So. 2d 113 (Fla. 5th Dist. Ct. App. 1987).
67. 498 So. 2d 1387 (Fla. 3d Dist. Ct. App. 1986).
68. 412 So. 2d 38 (Fla. 3d Dist. Ct. App. 1982).
69. 510 So. 2d 660 (Fla. 2d Dist. Ct. App. 1987).
70. Id. at 661 (citing Lee v. Lee, 309 So. 2d 26 (Fla. 2d Dist. Ct. App. 1975)).
71. 504 So. 2d 790 (Fla. 1st Dist. Ct. App. 1987).
72. Id. at 790.
73. Id. Although on April 1, 1986, the husband had made 24 payments of rehabilitative alimony, the "rehabilitative period" was for two years, or 730 days, and, therefore, extended from May 1, 1984 until May 1, 1986. Id.
rehabilitative alimony award, which permitted the husband, at his option, to divest his former wife of her right to seek modification by permitting the husband the right to pay the rehabilitative alimony in a lump sum "and thereby fully satisfy any legal requirement for rehabilitative alimony."75 Although the district court did not disagree with the concept of "lump sum rehabilitative alimony," the court did find the provision allowing the husband to terminate the "rehabilitative period" at his sole discretion to be error.76

Once the "rehabilitative period" has ended, however, the court is divested of jurisdiction to modify or extend the alimony and a party cannot "piggyback" on other alimony awards to find a jurisdictional basis. In Griffin v. Griffin,77 a wife sought modification of a 1982 judgment which had awarded lump sum alimony payable monthly for five years and rehabilitative alimony for three years. Her petition was filed after the rehabilitative alimony had terminated but before the lump sum installment period had concluded. The court held her petition to be untimely.

(2) Standards

A continuing question in family law cases is whether a request for an extension of rehabilitative alimony is tantamount to a request for modification and, if so, whether the petitioning party seeking such an extension is required to establish a "substantial change in circumstances" as in other modification cases. In prior cases, the Fourth and Second District Courts of Appeal have held that a showing of a "substantial change in circumstances" is not required to support a petition for extension of rehabilitative alimony but, rather, the showing that must be made is that despite diligent and reasonable efforts, the party receiving the rehabilitative alimony has not been rehabilitated.78 In 1987, the Second District Court of Appeal, in Reaves v. Reaves,79 expressly determined that a party filing a petition for modification for the purpose of extending rehabilitative alimony is not required to show a substantial change in circumstances.

75. Id. at 294.
76. Id.
77. 502 So.2d 1315 (Fla. 3d Dist. Ct. App. 1987).
79. 514 So.2d 1147 (Fla. 2d Dist. Ct. App. 1987).

D. Security for Alimony Payments

The year 1987 brought a significant number of family law cases attempting to clarify Section 61.08(3), Florida Statutes, which, as amended in 1985, permits the trial courts to order any party who is required to pay alimony to purchase or maintain a life insurance policy or a bond, or to otherwise secure such alimony award "to the extent necessary to protect the award of alimony."80 These cases reflect a continuing controversy between that which appears permissible under the statute and the long established rule that a husband's obligations to pay alimony terminates upon his death. Unfortunately, the cases themselves are imprecise, unclear and conflicting.

In Kooser v. Kooser,81 the First District Court of Appeal affirmed the trial court's refusal to order the husband to purchase life insurance to "protect his alimony obligation[s]."82 The court found that the wife's request for life insurance "was to perpetuate the payment of alimony subsequent to the husband's death" and found that it is "questionable" whether Section 61.08(3) "legitimates what is otherwise a prohibition against ordering a spouse to obtain life insurance as a form of post-mortem alimony."83 Rather, the Kooser court concluded that the purpose of section 61.08(3) is to permit the use of security where there exists a need for protection of "other alimony awarded to the spouse."84 By implication, therefore, the Kooser court concluded that the use of life insurance as "security" would not be appropriate to an award of periodic alimony but, instead, to an award of "other alimony" as, for example, lump sum alimony.85

In the Second District Court of Appeal, the court continued its attempt to distinguish between an order concerning insurance intended as security for alimony and an order concerning insurance intended in itself to be lump sum alimony. In 1986, the court, in Sobelman v. Sobelman,86 (hereinafter Sobelman I), held that situations could arise in which a trial court would consider an insurance policy to be a marital asset and distribute that policy as lump sum alimony, requiring that the husband make the premium payments on the policy as permanent.

82. Id. at 82.
83. Id.
84. Id.
85. Id.
86. 490 So.2d 225 (Fla. 2d Dist. Ct. App. 1986).
rehabilitative alimony award, which permitted the husband, at his option, to divest his former wife of her right to seek modification by permitting the husband the right to pay the rehabilitative alimony in a lump sum “and thereby fully satisfy any legal requirement for rehabilitative alimony.”76 Although the district court did not disagree with the concept of “lump sum rehabilitative alimony,” the court did find the provision allowing the husband to terminate the “rehabilitative period” at his sole discretion to be error.77

Once the “rehabilitative period” has ended, however, the court is divested of jurisdiction to modify or extend the alimony and a party cannot “piggyback” on other alimony awards to find a jurisdictional basis. In Griffin v. Griffin,78 a wife sought modification of a 1982 judgment which had awarded lump sum alimony payable monthly for five years and rehabilitative alimony for three years. Her petition was filed after the rehabilitative alimony had terminated but before the lump sum installment period had concluded. The court held her petition to be untimely.

(2) Standards

A continuing question in family law cases is whether a request for an extension of rehabilitative alimony is tantamount to a request for modification and, if so, whether the petitioning party seeking such an extension is required to establish a “substantial change in circumstances” as in other modification cases. In prior cases, the Fourth and Second District Courts of Appeal have held that a showing of a “substantial change in circumstances” is not required to support a petition for extension of rehabilitative alimony but, rather, the showing that must be made is that despite diligent and reasonable efforts, the party receiving the rehabilitative alimony has not been rehabilitated.79 In 1987, the Second District Court of Appeal, in Reaves v. Reaves,80 expressly determined that a party filing a petition for modification for the purpose of extending rehabilitative alimony is not required to show a substantial change in circumstances.

75. Id. at 294.
76. Id.
77. 502 So. 2d 1315 (Fla. 3d Dist. Ct. App. 1987).
79. 514 So. 2d 1147 (Fla. 2d Dist. Ct. App. 1987).
80. FLA. STAT. § 61.08(3) (1986).
82. Id. at 82.
83. Id.
84. Id.
85. Id.
86. 490 So. 2d 225 (Fla. 2d Dist. Ct. App. 1986).
periodic alimony. Such an award, under such circumstances, would not be erroneous. On the other hand, a requirement that a party maintain life insurance only as security for the payment of permanent periodic alimony would have the actual effect of providing post-mortem alimony and, in such circumstances, would be error.

In 1987, in *Sobelman v. Sobelman*, (**Sobelman II**), the court reversed the trial court’s order which required the husband to maintain a life insurance policy with the wife as a beneficiary because the evidence reflected that no such life insurance policy existed prior to the dissolution of marriage and, therefore, the court could not have considered the non-existent life insurance as a “marital asset.”

*Sobelman II* went on to hold that the trial court may require a spouse to maintain a life insurance policy for the purpose of securing the payment of any arrearage in the payment of permanent periodic alimony that might be due at the time of the payor-spouse’s death. The court, however, strictly limited the circumstances under which such an order might be entered:

The party requesting such a policy, however, must first establish the need for such security. Furthermore, although the court can order a spouse to maintain such a policy, the terms and conditions of the policy should be limited in such a manner that the receiving spouse will receive only what may reasonably be necessary to protect arrearages in alimony so that the actual effect of the insurance requirement is not to provide post-mortem alimony.**

The Third District Court of Appeal affirmed an order requiring the husband to maintain the wife as an irrevocable beneficiary on his life insurance policy until he retired. In *Benson v. Benson*, the court determined that because the final judgment specified that the husband’s alimony obligations cease upon his death, “any proceeds from the life insurance could not go to the wife as invalid post-mortem alimony should the husband die prior to retirement.”** It is not clear how the court concluded that the insurance proceeds could not go to the wife” since she was to be the irrevocable beneficiary and since neither the trial court’s final judgment nor the appellate court’s opinion placed any limitation upon the payment of the life insurance proceeds to the wife.

In the Fourth District Court of Appeal, a final judgment ordering that the husband’s estate would be obligated to pay permanent periodic alimony to his former wife if he predeceased her was reversed. In *Clark v. Clark*, the court reiterated the well-established rule that alimony obligations cease upon the death of the payor and rejected the wife’s argument that section 61.08(3), Florida Statutes, can be construed to give the trial court discretion to award a spouse permanent periodic alimony that shall become chargeable against the estate of the former spouse. Inexplicably, however, the district court remanded the case to the trial court with directions that if the trial court was concerned with “providing the wife with security to protect the alimony award after the husband’s death,” it could secure the award with life insurance. The court did not explain why such a life insurance award, “protecting” permanent alimony, would not be the equivalent of post-mortem alimony.

In an unrelated but unique “insurance case,” the Fourth District Court of Appeal held that the trial court did not have authority to prohibit a former wife from maintaining insurance upon the life of her former husband. In *Moskowitz v. Moskowitz*, the court directed the trial court:

[To determine its authority to prohibit the wife from maintaining insurance on the former husband’s life. Even if the wife has no insurable interest, we have not been informed why that gives the court general prohibitory authority in the absence of some specific reason for having such authority. The matter appears to be one for the wife and the insurer to dispute should she elect to continue to pay for coverage in the absence of an insurable interest.]

E. Alimony Payments

Two decisions were rendered during 1987 relative to the payment of alimony, both providing “new slants” to the general rule that alim-
periodic alimony. Such an award, under such circumstances, would not be erroneous. On the other hand, a requirement that a party maintain life insurance only as security for the payment of permanent periodic alimony would have the actual effect of providing post-mortem alimony and, in such circumstances, would be error.

In 1987, in Sobelman v. Sobelman,87 (Sobelman II), the court reversed the trial court’s order which required the husband to maintain a life insurance policy with the wife as a beneficiary because the evidence reflected that no such life insurance policy existed prior to the dissolution of marriage and, therefore, the court could not have considered the non-existent life insurance as a “marital asset.” Sobelman II went on to hold that the trial court may require a spouse to maintain a life insurance policy for the purpose of securing the payment of any arrearage in the payment of permanent periodic alimony that might be due at the time of the payor-spouse’s death. The court, however, strictly limited the circumstances under which such an order might be entered.

The party requesting such a policy, however, must first establish the need for such security. Furthermore, although the court can order a spouse to maintain such a policy, the terms and conditions of the policy should be limited in such a manner that the receiving spouse will receive only what may reasonably be necessary to protect arrearages in alimony so that the actual effect of the insurance requirement is not to provide post-mortem alimony.88

The Third District Court of Appeal affirmed an order requiring the husband to maintain the wife as an irrevocable beneficiary on his life insurance policy until he retired. In Benson v. Benson,89 the court determined that because the final judgment specified that the husband’s alimony obligations cease upon his death, “any proceeds from the life insurance could not go to [the wife] as invalid post-mortem alimony should [the husband] die prior to retirement.”90 It is not clear how the court concluded that the insurance proceeds “could not go to the wife” since she was to be the irrevocable beneficiary and since neither the trial court’s final judgment nor the appellate court’s opinion placed any limitation upon the payment of the life insurance proceeds to the wife.

In the Fourth District Court of Appeal, a final judgment ordering that the husband’s estate would be obligated to pay permanent periodic alimony to his former wife if he predeceased her was reversed. In Clark v. Clark,91 the court reiterated the well established rule that alimony obligations cease upon the death of the payor and rejected the wife’s argument that section 61.08(3), Florida Statutes,92 can be construed to give the trial court discretion to award a spouse permanent periodic alimony that shall become chargeable against the estate of the former spouse. Inexplicably, however, the district court remanded the case to the trial court with directions that if the trial court was concerned with “providing the wife with security to protect the alimony award after the husband’s death,”93 it could secure the award with life insurance. The court did not explain why such a life insurance award, “protecting” permanent alimony, would not be the equivalent of post-mortem alimony.

In an unrelated but unique “insurance case,” the Fourth District Court of Appeal held that the trial court did not have authority to prohibit a former wife from maintaining insurance upon the life of her former husband. In Moskowitz v. Moskowitz,94 the court directed the trial court:

To determine its authority to prohibit the wife from maintaining insurance on the former husband’s life. Even if the wife has no insurable interest, we have not been informed why that gives the court general prohibitory authority in the absence of some specific reason for having such authority. The matter appears to be one for the wife and the insurer to dispute should she elect to continue to pay for coverage in the absence of an insurable interest.95

E. Alimony Payments

two decisions were rendered during 1987 relative to the payment of alimony, both providing “new slants” to the general rule that al-

87. 516 So. 2d 7 (Fla. Dist. Ct. App. 1987). This decision is presently pending review in the Florida Supreme Court.
88. Id. at 9.
89. 503 So. 2d 384 (Fla. 3d Dist. Ct. App. 1987).
90. Id. at 385.
91. 509 So. 2d 364, 365.
92. 515 So. 2d 370 (Fla. 4th Dist. Ct. App. 1987).
93. Id. at 371.
mony payments cannot be “prospectively modified.”

In *Rao v. Rao,* the trial court awarded the wife rehabilitative alimony in the amount of $1,000.00 per month increasing to $1,500.00 per month for a period of two years from the time of her enrollment in a master’s program if she enrolled prior to October 1, 1986. Thereafter the award was to be converted to permanent periodic alimony in the amount of $500.00 per month. The district court held that although an automatic modification of alimony is generally inappropriate, circumstances may exist where such “prospective modifications” will be affirmed if the judgment is “precisely drawn and conditioned upon a specifically identified occurrence.”

In *Stone v. Stone,* the trial court entered a final judgment reducing the husband's obligation for alimony by 50 cents for each dollar that the wife’s net income increased over the sum of $134.00 per week. The trial court did not include any form of corresponding provision which would have increased the husband's obligation to pay alimony should the former wife's income diminish. Surprisingly, the husband appealed and argued that automatic future increases or decreases in alimony awards constitute error. The Fifth District Court of Appeal agreed that it had so held in the past but did so upon an appeal brought by the party adversely affected by the provision. In *Stone,* the provision in question worked to the appellant's benefit and, therefore, the court concluded that he had no standing to raise the issue on appeal.

F. Modification of Alimony Award

The significant alimony modification issues addressed in 1987 primarily concern the effect of the recipient's cohabitation, or “de facto remarriage,” the retroactive effect of an alimony modification, and the effect of the payor's retirement upon his alimony obligations.

Two “de facto remarriage” cases were decided during 1987, one by the First District Court of Appeal and one by the Fifth District Court of Appeal. In 1985, the Fifth District Court of Appeal decided the case of *Schneider v. Schneider,* and held that although a “de facto marriage” does not automatically terminate an alimony award it

“may constitute a factor in determining whether the financial circumstances of the parties had changed.”

The dissent in *Schneider* viewed it otherwise:

If the wife [of a de facto marriage] had been legitimized, alimony would terminate, but the majority holds that because it is illegitimate, the ex-husband’s obligation is reduced only to the extent his ex-wife contributed to the support of his replacement.

[...]

[I think we expect too much when we require a person to support an ex-spouse who has “married” another, legally or illegally.]

In the 1987 case of *Lowry v. Lowry,* the court expressed some displeasure with its earlier ruling in *Schneider.*

If the element of estoppel were not present and the evidence sufficient, the present majority in this case would seek an en banc reconsideration of *Schneider* for the reason that we do not believe it represents sound law in regard to the issue of termination of permanent alimony where a subsequent de facto marriage of a former spouse is established at a modification hearing.

The court went on to hold:

It is invidious and illogical for the law to discriminate against those who enter into *de jure* marriages and favor those who enter into *de facto* marriages instead. There may be a problem of proof in establishing a *de facto* marriage, but once such a “marriage” is established, it should have the same legal consequences in support matters as would a *de jure* marriage.

In *DePooter v. DePooter,* the First District Court of Appeal held otherwise. In *DePooter,* the trial court entered an order finding that the wife had entered into a *de facto* marriage and as result of this living arrangement her financial needs had been reduced. The district court reversed:

96. 501 So. 2d 38 (Fla. 2d Dist. Ct. App. 1986).
97. Id. at 39.
98. 501 So. 2d 74 (Fla. 5th Dist. Ct. App. 1987).
100. Id. at 467.
101. Id. at 468.
102. 512 So. 2d 1142 (Fla. 5th Dist. Ct. App. 1987).
103. Id. at 1142-43.
104. Id. at 1143.
mony payments cannot be “prospectively modified.”

In *Rao v. Rao,* the trial court awarded the wife rehabilitative alimony in the amount of $1,000.00 per month increasing to $1,500.00 per month for a period of two years from the time of her enrollment in a master's program if she enrolled prior to October 1, 1986. Thereafter the award was to be converted to permanent periodic alimony in the amount of $500.00 per month. The district court held that although an automatic modification of alimony is generally inappropriate, circumstances may exist where such “prospective modifications” will be affirmed if the judgment is “precisely drawn and conditioned upon a specifically identified occurrence.”

In *Stone v. Stone,* the trial court entered a final judgment reducing the husband's obligation for alimony by 50 cents for each dollar that the wife's net income increased over the sum of $134.00 per week. The trial court did not include any form of corresponding provision which would have increased the husband's obligation to pay alimony should the former wife's income diminish. Surprisingly, the husband appealed and argued that automatic future increases or decreases in alimony awards constitute error. The Fifth District Court of Appeal agreed that it had so held in the past but did so upon an appeal brought by the party adversely affected by the provision. In *Stone,* the provision in question worked to the appellant's benefit and, therefore, the court concluded that he had no standing to raise the issue on appeal.

F. Modification of Alimony Award

The significant alimony modification issues addressed in 1987 primarily concern the effect of the recipient's cohabitation, or “de facto remarriage,” the retroactive effect of an alimony modification, and the effect of the payor's retirement upon his alimony obligations.

Two “de facto remarriage” cases were decided during 1987, one by the First District Court of Appeal and one by the Fifth District Court of Appeal. In 1985, the Fifth District Court of Appeal decided the case of *Schneider v. Schneider,* and held that although a “de facto marriage” does not automatically terminate an alimony award it

may constitute a factor in determining whether the financial circumstances of the parties had changed. The dissent in *Schneider* viewed it otherwise:

If [the wife's de facto marriage] had been legitimated, alimony would terminate, but the majority holds that because it is illegitimate, the ex-husband's obligation is reduced only to the extent his ex-wife contributed to the support of his replacement.

*C."

I think we expect too much when we require a person to support an ex-spouse who has “married” another, legally or illegally.

In the 1987 case of *Lowry v. Lowry,* the court expressed some displeasure with its earlier ruling in *Schneider.*

If the element of estoppel were not present and the evidence sufficient, the present majority in this case would seek an en banc reconsideration of *Schneider* for the reason that we do not believe it represents sound law in regard to the issue of termination of permanent alimony where a subsequent de facto marriage of a former spouse is established at a modification hearing.

The court went on to hold:

It is invidious and illogical for the law to discriminate against those who enter into de jure marriages and favor those who enter into de facto marriages instead. There may be a problem of proof in establishing a de facto marriage, but once such a “marriage” is established, it should have the same legal consequences in support matters as would a de jure marriage.

In *DePoorter v. DePoorter,* the First District Court of Appeal held otherwise. In *DePoorter,* the trial court entered an order finding that the wife had entered into a de facto marriage and as result of this living arrangement her financial needs had been reduced. The district court reversed:

96. 501 So. 2d 38 (Fla. 2d Dist. Ct. App. 1986).
97. Id. at 39.
98. 501 So. 2d 74 (Fla. 5th Dist. Ct. App. 1987).
100. Id. at 467.
101. Id. at 468.
102. 512 So. 2d 1142 (Fla. 5th Dist. Ct. App. 1987).
103. Id. at 1142-43.
104. Id. at 1143.
Florida jurisprudence does not accord legal status to the concept of de facto marriage. In the context of an alimony modification proceeding, the test is whether there has been a substantial change in the circumstances or the financial ability of the parties since entry of the agreement or order containing the alimony provision. While unmarried cohabitation raises a presumption of changed circumstances, this factor alone will not support a reduction of alimony.104

The foregoing cases illustrate a split of opinion between the courts, the Fifth District clearly being of the opinion that a de facto marriage, if convincing established, should result in an automatic termination of alimony and the First District continuing to hold that a de facto marriage, absent changed financial circumstances, should not result in a modification of alimony.

On the issue of the effect of an alimony payer’s retirement, the opinion of the Third District Court of Appeal in Ward v. Ward,105 rapidly became another of the “most talked about” family law cases of the year.

In Ward, the former husband, having reached age 63, decided to retire from his long-held job at a hospital. His retirement resulted in a decrease in his income and he reacted to his financial loss by ceasing to pay his permanent alimony obligation. The wife sought to have the husband held in contempt and the husband sought to modify his alimony obligation. The trial court refused to hold the husband in contempt and reduced his permanent periodic alimony obligation. The district court of appeal reversed.

The district court based its reversal upon the fact that the husband’s retirement had been “voluntary” and that “but for his precipitous decision to retire” the husband remained “fully capable of earning his pre-retirement income.”106

In our view, there is no reason why the decision to voluntarily retire should be on any different footing than is the decision to change lifestyles at some younger age. The obligation to support a former wife of a long-term marriage does not diminish in the later years of life. Only when the ability to carry out that obligation is lessened by circumstances beyond the control of the party required to pay support will such party be entitled to have the amount of the

104. Id. at 1144.
105. 502 So. 2d 477 (Fla. 3d Dist. Ct. App. 1987).
106. Id. at 482.
Florida jurisprudence does not accord legal status to the concept of de facto marriage. In the context of an alimony modification proceeding, the test is whether there has been a substantial change in the circumstances or the financial ability of the parties since entry of the agreement or order containing the alimony provision. While unmarried cohabitation raises a presumption of changed circumstances, this factor alone will not support a reduction of alimony.

The foregoing cases illustrate a split of opinion between the courts, the Fifth District clearly being of the opinion that a de facto marriage, if convincingly established, should result in an automatic termination of alimony and the First District continuing to hold that a de facto marriage, absent changed financial circumstances, should not result in a modification of alimony.

On the issue of the effect of an alimony payer’s retirement, the opinion of the Third District Court of Appeal in *Ward v. Ward* rapidly became another of the “most talked about” family law cases of the year.

In *Ward*, the former husband, having reached age 63, decided to retire from his long-held job at a hospital. His retirement resulted in a decrease in his income and he reacted to his financial loss by ceasing to pay his permanent alimony obligation. The wife sought to have the husband held in contempt and the husband sought to modify his alimony obligation. The trial court refused to hold the husband in contempt and reduced his permanent periodic alimony obligation. The district court of appeal reversed.

The district court based its reversal upon the fact that the husband’s retirement had been “voluntary” and that “but for his precipitous decision to retire” the husband remained “fully capable of earning his pre-retirement income.”

In our view, there is no reason why the decision to voluntarily retire should be on any different footing than is the decision to change lifestyles at some younger age. The obligation to support a former wife of a long-term marriage does not diminish in the later years of life. Only when the ability to carry out that obligation is lessened by circumstances beyond the control of the party required to pay support will such party be entitled to have the amount of the obligation reduced.

Though *Ward* makes it clear that cases in which a party’s retirement is “forced and involuntarily” may be decided on a different basis, the case leaves little doubt that spouses having support obligations to former spouses have little, if any, discretion to make “lifestyle” changes which would result in diminished income.

V. Child Support

A. Entitlement to Child Support

In 1987, the district courts continued to address cases in which the parties had allegedly agreed between themselves to reduce or eliminate child support payments. In *Paris v. Bolland*, a 1975 judgment required the husband to pay child support of $20.00 per week and to pay for all of the child’s medical and dental bills. “In 1981, the parties allegedly entered into an oral modification of the child support order. The modification agreement provided that the [husband] would maintain the child in his home during the summer months in lieu of any other support obligations.” In 1983, the wife filed a complaint for support pursuant to the Hawaii Uniform Reciprocal Enforcement of Support Act. The court denied the claim and “found that the modification agreement, with which the husband had complied by maintaining the child during the summer months, operated to relieve him of any other child support responsibilities.” The wife did not appeal the 1983 order. In 1985, the wife again filed a complaint for support and the trial court dismissed the petition, concluding that there was no basis to depart from its earlier decision.

109. *Id.*

110. The case may leave open certain equal protection issues as, for example, why do divorced spouses have a “right” to effectively halt their former spouse’s voluntarily retirement or voluntarily reduction in income if spouses in intact marriages have no such rights? Clearly, the same duty of support exists and, in fact, the duty of support placed upon a former spouse is merely an extension of that duty imposed by marriage. Yet, if a husband came home and advised his wife that he had just left his employment, that wife would have no legal means available to her to “compel” her husband to continue to support her at his pre-employment termination rate.

111. *503 So. 2d 1387* (Fla. 4th Dist. Ct. App. 1987).

112. *Id.* at 1388.

113. *Id.*

114. *Id.*
On appeal, the Third District Court of Appeal reversed the trial court and ordered child support modified retroactive to the filing of the wife's 1985 petition, holding that "the right to child support belongs to the child. It is not an obligation imposed by one parent on the other. Therefore, a child's parents may not bargain away the child's right to support."114

In Breslow v. Baltruch,115 the trial court summarily denied a petition to modify child support upon the legal conclusion that the increased age of the child and the substantially "increased expenses associated therewith could not, as a matter of law, constitute a proper change in circumstances so as to modify child support payments" when such payments had been set by an agreement between the parties.116 The Third District Court of Appeal reversed, noting that the fact that the child support payments were previously set by an agreement does not change the fact that those payments are modifiable upon a showing of a substantial change in circumstances. The parties cannot contract away the child's right to adequate support.

B. Age of Majority

Despite the Florida Supreme Court's four-year-old decision in Grapin v. Grapin,118 the 1987 decisions of the various district courts of appeal reflect a continued misunderstanding at the trial court level of the duration for which child support may be ordered.119

In Stultz v. Stultz,120 the trial court ordered the husband to continue child support payments for his 18-year-old daughter until she graduated from high school. The parties' daughter had turned 18 on January 4, 1986, but was not scheduled to graduate until June of 1986. The trial court found that the child had an "economic dependency" which required continuing the father's child support obligation. The appeal court was compelled to reverse the trial court's order:

"There is no legal duty to pay child support beyond the age of 18 — the age of majority in Florida — absent a finding of physical or mental deficiencies. The excellent trial judge in this case was obviously well-intentioned in ordering support through the daughter's high school graduation date. We agree with the trial court's implicit belief that a parent — divorced or married — should not have to be forced by court order to provide for his or her child's education. However, if a legal duty to provide post-majority high school education support is to be created, the legislature is the fountain out of which that legal duty is to spring."121

In Carter v. Carter,122 the trial court entered a modification order requiring the husband's child support obligation to continue beyond the child's eighteenth birthday if the child was, at that time, still attempting to complete high school. Again the appellate court was compelled to reverse upon the ground that "[t]he fact that a post-majority child is still attending high school does not make that child dependent within the meaning of [Florida Statutes]"123 which would permit the continuation of child support for a "dependent" child.124

The Fourth District Court of Appeal, like the Second District in Stultz, also commented upon the seeming inequities of the situation:

"In short, as the law stands in Florida today, a parent has no legal obligation to support a child who has attained his majority unless that child is statutorily dependent. Although we may wish it otherwise, attendance at high school or college classes, resulting in economic dependence upon the parents, does not transform an otherwise ineligible adult child into a dependent . . . ."

The Third District Court of Appeal, however, declined to specifically determine that high school attendance does not equate to "dependency" and, in Plant v. Plant,125 remanded the case to the trial court for a determination of whether the parties' 18-year-old son, who had not yet completed high school, "was a dependent entitled to

115. The court did not order the support to be made retroactive to the 1983 petition because the trial court's unappealed 1983 order "although correct, elevated the parties' agreement to the status of a court decree and established [the husband's] support obligation at that time." As such, no arrears accrued between 1983 and 1985.
116. Id. at 1388.
117. 508 So. 2d 498 (Fla. 3d Dist. Ct. App. 1987).
118. Id. at 499.
119. 450 So. 2d 853 (Fla. 1984).
120. Grapin holds that the duration be determined by the length of time until the child reaches the age of maturity. Id. at 854.
121. 504 So. 2d 5 (Fla. 2d Dist. Ct. App. 1986).
122. Id. at 6.
124. Id. at 406.
125. Id. at 408.
On appeal, the Third District Court of Appeal reversed the trial court and ordered child support modified retroactive to the filing of the wife’s 1983 petition, holding that “the right to child support belongs to the child. It is not an obligation imposed by one parent on the other. Therefore, a child’s parents may not bargain away the child’s right to support.”

In *Breslow v. Balruch*, the trial court summarily denied a petition to modify child support upon the legal conclusion that the increased age of the child and the substantially “increased expenses associated therewith could not, as a matter of law, constitute a proper change in circumstances so as to modify child support payments” when such payments had been set by an agreement between the parties. The Third District Court of Appeal reversed, noting that the fact that the child support payments were previously set by an agreement does not change the fact that those payments are modifiable upon a showing of a substantial change in circumstances. The parties cannot contract away the child’s right to adequate support.

### B. Age of Majority

Despite the Florida Supreme Court’s four-year-old decision in *Grain v. Grapin*, the 1987 decisions of the various district courts of appeal reflect a continued misunderstanding at the trial court level of the duration for which child support may be ordered.

In *Stultz v. Stultz*, the trial court ordered the husband to continue child support payments for his 18-year-old daughter until she graduated from high school. The parties’ daughter had turned 18 on January 4, 1986, but was not scheduled to graduate until June of 1986. The trial court found that the child had an “economic dependency” which required continuing the father’s child support obligation. The appellate court was compelled to reverse the trial court’s order:

‘There is no legal duty to pay child support beyond the age of 18 — the age of majority in Florida — absent a finding of physical or mental deficiencies. The excellent trial judge in this case was obviously well-intentioned in ordering support through the daughter’s high school graduation date. We agree with the trial court’s implicit belief that a parent — divorced or married — should not have to be forced by court order to provide for his or her child’s education. However, if a legal duty to provide post-majority high school education support is to be created, the legislature is the fountain out of which that legal duty is to spring.”

In *Carter v. Carter*, the trial court entered a modification order requiring the husband’s child support obligation to continue beyond the child’s eighteenth birthday if the child was, at that time, still attending high school. Again the appellate court was compelled to reverse upon the ground that “[t]he fact that a post-majority child is still attending high school does not make that child dependent within the meaning of [Florida Statutes]” which would permit the continuation of child support for a “dependent” child.

The Fourth District Court of Appeal, like the Second District in *Stultz*, also commented upon the seeming inequities of the situation:

In short, as the law stands in Florida today, a parent has no legal obligation to support a child who has attained his majority unless that child is statutorily dependent. Although we may wish it otherwise, attendance at high school or college classes, resulting in economic dependence upon the parents, does not transform an otherwise ineligible adult child into a dependent...

The Third District Court of Appeal, however, declined to specifically determine that high school attendance does not equate to “dependency” and, in *Plant v. Plant*, remanded the case to the trial court for a determination of whether the parties’ 18-year-old son, who had not yet completed high school, “was a dependent person entitled to...”
support."128

In the Second District Court of Appeal, the sole case dealing with child support and the age of majority was *Acree v. Acree*,129 which concerned the effect of a 1982 modification upon child support ordered in 1969.

The parties in *Acree* were divorced in 1969. The final judgment required the husband to pay child support until the child turns 21 years old, which was the age of majority at the time the final judgment was entered. The age of majority was lowered from 21 to 18 on July 1, 1973.130 In 1976, the trial court, upon the wife's petition for modification, increased the husband's support obligation from $20 per week to $30 per week and stated that same "shall continue until such time as the child attains majority."131 Subsequently, in 1982, the trial court again increased the child support payments to $50 per week. In 1986, the father filed a petition to terminate child support and alleged that the parties' child had attained the age of 18. The mother argued that child support was payable under the 1969 final judgment, until the child attains the age of 21. The District Court ruled that the husband's original support obligation of $20 per week did, in fact, continue until the child attains the age of 21 but the child support payments ordered by the court after the age of majority was lowered in 1973 terminated when the child attained the age of 18.

C. Modification of Child Support

*In Essex v. Ayres*,132 the Third District Court of Appeal, following the lead of the Fourth District Court of Appeal in *Bernstein v. Bernstein*,133 rendered one of the most significant and far-reaching family law decisions of the year. Prior to *Bernstein* and *Essex*, the law had held that a party seeking a change in the amount of child support established by a settlement agreement had "a heavier burden" than a party seeking a change in child support established by the court. In *Bernstein*, the Fourth District Court of Appeal, sitting *en banc*, rejected that proposition and, in *Essex*, the Third District Court of Ap-

---

128. Id. at 45.
129. 306 So. 2d 742 (Fla. 2d Dist. Ct. App. 1987).
130. Id. at 45, FLA. STAT. § 743.07 (1973).
131. Id. at 45.
132. 503 So. 2d 1365 (Fla. 3d Dist. Ct. App. 1987).
133. 498 So. 2d 1376 (Fla. 4th Dist. Ct. App. 1986).
134. 503 So. 2d at 1366.
135. 503 So. 2d 518 (Fla. 1st Dist. Ct. App. 1987).
137. Id. at 407.
support. 128

In the Second District Court of Appeal, the sole case dealing with child support and the age of majority was Accree v. Accree, 129 which concerned the effect of a 1982 modification upon child support ordered in 1969.

The parties in Accree were divorced in 1969. The final judgment required the husband to pay child support until the child turns 21 years old, which was the age of majority at the time the final judgment was entered. The age of majority was lowered from 21 to 18 on July 1, 1973. 130 In 1976, the trial court, upon the wife's petition for modification, increased the husband's support obligation from $20 per week to $30 per week and stated that same "shall continue until such time as the child attains majority." 131 Subsequently, in 1982, the trial court again increased the child support payments to $50 per week. In 1986, the father filed a petition to terminate child support and alleged that the parties' child had attained the age of 18. The mother argued that child support was payable, under the 1969 final judgment, until the child attains the age of 21. The District Court ruled that the husband's original support obligation of $20 per week did, in fact, continue until the child attains the age of 21 but the child support payments ordered by the court after the age of majority was lowered in 1973 terminated when the child attained the age of 18.

C. Modification of Child Support

In Essex v. Ayres, 132 the Third District Court of Appeal, following the lead of the Fourth District Court of Appeal in Bernstein v. Bernstein, 133 rendered one of the most significant and far-reaching family law decisions of the year. Prior to Bernstein and Essex, the law had been that a party seeking a change in the amount of child support established by a settlement agreement had "a heavier burden" than a party seeking a change in child support established by the court. In Bernstein, the Fourth District Court of Appeal, sitting en banc, rejected that proposition and, in Essex, the Third District Court of Ap-

128. Id. at 45.
129. 508 So. 2d 742 (Fla. 2d Dist. Ct. App. 1987).
130. Id. at 743, FLA. STAT. § 743.07 (1973).
131. Id. at 743.
132. 503 So. 2d 1365 (Fla. 3d Dist. Ct. App. 1987).
133. 498 So. 2d 1270 (Fla. 4th Dist. Ct. App. 1986).

134. 503 So. 2d at 1366.
137. Id. at 407.

peal agreed with the Fourth District "that parties who have agreed on the amount of child support should not be saddled with a heavier burden to modify the amount than parties who have had the amount determined by a court." 134

The Third District's opinion in Essex, however, goes further than Bernstein and concludes that a party seeking a change in the amount of child support provided in an agreement which has not previously been reviewed and approved by a court is not required to prove a substantial change in circumstances but need prove only that the amount previously agreed upon is not in the best interests of the child.

The second significant area of the law addressed by the district courts in 1987 concerned "set-offs" against child support. In Kolb v. Kolb, 135 the trial court determined that the father was entitled to a credit against child support otherwise payable during the time frame that one of the children resided with him. Because the order could be read as erroneously effecting cancellation of accrued child support payments due under a prior order, the First District Court reversed.

In Ragan v. Thomas, 136 the husband was in arrears in payments for his share of certain medical expenses incurred by the minor children. The trial court awarded the husband a credit against those arrearages for child support paid for the child while the child lived in a drug and alcohol abuse residential treatment facility. Therefore, although the husband owed $2,127.90 in medical expense arrearages, he was ordered to pay only $377.90. The trial court rejected the wife's argument that past due medical bills, like child support payments, constitute vested property rights which are not subject to modification. To the contrary, the trial court determined that it had the authority as part of its general equitable powers to grant a set-off against the husband's obligation for medical bills. The district court disagreed and held that the "credit has the appearance of retroactively modifying [the wife's] previous award of child support and if that is the situation it constitutes error. Such an interpretation violates the legal principle that as child support payments accrue they constitute vested property rights which are not subject to modification." 137

On the issue of what constitutes sufficient grounds upon which to reduce a party's child support obligation, the Fourth District Court of
Appeal, in *Dean v. Dean*, held that a party’s remarriage resulting in an additional family to support does not constitute “a valid basis for avoiding his previous obligation of support.”

A different, although equally interesting child support modification case is *Riley v. Connor*, from the Fifth District Court of Appeal. In *Riley*, the trial court suspended the father’s duty to pay support until such time as “a loving father-son relationship has been reestablished with the complete cooperation and full participation by the son.” The Fifth District Court of Appeal held:

> We understand and are not in disagreement with what we perceive to have been the intent of the trial court in this case. However, the condition as imposed is too vague and indefinite to adequately advise this sixteen year old son of his conduct which this condition may be designed to dispel or dissuade, and, more importantly, it fails to describe the conduct with such particularity that this court can review it as a matter of law.

The court went on to hold that circumstances could exist which would permit the entry of an order such as that attempted by the trial court.

On the issue of the retroactivity of a child support modification, it has long been assumed that such modifications are nearly always to be made retroactive. However, in *Bloom v. Bloom*, the Fourth District Court of Appeal held that circumstances can exist in which a refusal to grant a modification of child support retroactive to the date of the filing of the petition would be proper. The court held that the matter of retroactive application is one within the discretion of the trial court.

138. 503 So. 2d 439 (Fla. 4th Dist. Ct. App. 1987).
139. Id.
140. 509 So. 2d 1177 (Fla. 5th Dist. Ct. App. 1987).
141. Id. at 1178.
142. Id.
143. Id. The court said:
> Without attempting to delineate it, we recognize 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 justifies the trial court’s coercive suspension of the obligor parent’s duty of support during the time of the child’s willful persistence in such conduct.

144. 503 So. 2d 933 (Fla. 4th Dist. Ct. App. 1987).
145. 510 So. 2d 908 (Fla. 4th Dist. Ct. App. 1987).
146. Id. at 909.
147. Id.

D. Expenses Paid as Child Support

In *Sulman v. Sulman*, the final judgment dissolving the parties’ marriage ordered the former husband, as an element of child support, to be responsible for all of the child’s medical, dental, drug and hospital expenses. Thereafter, the husband refused to pay expenses incurred for the cost of the son’s psychologist and the trial court “reluctantly found” that the term “medical expenses” did not include psychological counseling. The Fourth District Court of Appeal disagreed.

Citing earlier Florida decisions, the appellate court determined that treatment for such things as obesity and orthodontic problems may be included as an extraordinary medical expense which a former husband may be ordered to pay. Relying on decisions of other states, the court noticed a recent trend to recognize the need and obligate the parent paying child support to be responsible for all health problems of the child, including psychological problems. Finally, the court reviewed recent Florida legislation regulating the licensure of professionals practicing psychology, school psychology, clinical social work, marriage and family therapy, and mental health counseling “to further secure the health, safety and welfare of the public” and found that the legislature had recognized “that as society becomes increasingly complex, emotional survival is equal in importance to physical survival.” Upon this analysis, the court held:

Consistent with the courts’ continuing obligation to protect minor children, we do not believe the court should allow a child to be deprived of necessary and reasonable mental health care when his parents have the financial ability to provide such services. Of course, we also believe the father has a right to contest the necessity and reasonableness of the services in issue and his ability to pay for those services.
Frumkes and Greene: Survey of Family Law in Florida

appeal, in *Dean v. Dean*, held that a party’s remarriage resulting in an additional family to support does not constitute “a valid basis for avoiding his previous obligation of support.”

A different, although equally interesting child support modification case is *Riley v. Connor*, from the Fifth District Court of Appeal. In *Riley*, the trial court suspended the father’s duty to pay support until such time as “a loving father-son relationship has been reestablished with the complete cooperation and full participation by the son.” The Fifth District Court of Appeal held:

We understand and are not in disagreement with what we perceive to have been the intent of the trial court in this case. However, the condition as imposed is too vague and indefinite to adequately advise this sixteen year old son of his conduct which this condition may be designed to dispel or dissuade, and, more importantly, it fails to describe the conduct with such particularity that this court can review it as a matter of law.

The court went on to hold that circumstances could exist which would permit the entry of an order such as that attempted by the trial court.

On the issue of the retroactivity of a child support modification, it has long been assumed that such modifications are nearly always to be made retroactive. However, in *Bloom v. Bloom*, the Fourth District Court of Appeal held that circumstances can exist in which a refusal to grant a modification of child support retroactive to the date of the filing of the petition would be proper. The court held that the “nature of the court’s discretion is one within the discretion of the trial court and

---

138. 503 So. 2d 439 (Fla. 4th Dist. Ct. App. 1987).
139. Id.
140. 509 So. 2d 1177 (Fla. 5th Dist. Ct. App. 1987).
141. Id. at 1178.
142. Id.
143. Id. The court said: Without attempting to delineate it, we recognize 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 justifies the trial court’s coercive suspension of the obligor parent’s duty of support during the time of the child’s willful persistence in such conduct.

144. 503 So. 2d 932 (Fla. 4th Dist. Ct. App. 1987).

D. Expenses Paid as Child Support

In *Sluman v. Sluman*, the final judgment dissolving the parties’ marriage ordered the former husband, as an element of child support, to be responsible for all of the child’s medical, dental, drug and hospital expenses. Thereafter, the husband refused to pay expenses incurred for the cost of the son’s psychological and the trial court “reluctantly found” that the term “medical expenses” did not include psychological counseling. The Fourth District Court of Appeal disagreed.

Citing earlier Florida decisions, the appellate court determined that treatment for such things as obesity and orthodontic problems may be included as an extraordinary medical expense which a former husband may be ordered to pay. Relying on decisions of other states, the court noticed a recent trend to recognize the need and obligate the parent paying child support to be responsible for all health problems of the child, including psychological problems. Finally, the court reviewed recent Florida legislation regulating the licensure of professionals practicing psychology, school psychology, clinical social work, marriage and family therapy, and mental health counseling “to further secure the health, safety and welfare of the public” and found that the legislature had recognized “that as society becomes increasingly complex, emotional survival is equal in importance to physical survival.” Upon this analysis, the court held:

Consistent with the courts’ continuing obligation to protect minor children, we do not believe the court should allow a child to be deprived of necessary and reasonable mental health care when his parents have the financial ability to provide such services. Of course, we also believe the father has a right to contest the necessity and reasonableness of the services in issue and his ability to pay for those services.

---

145. 510 So. 2d 908 (Fla. 4th Dist. Ct. App. 1987).
146. Id. at 909.
147. Id.

Published by NSUWorks, 1988
VI. Equitable Distribution

A. General

In Halberg v. Halberg, the Third District Court of Appeal opined that although the principles of equitable distribution do not require an equal division of marital assets, equal apportionment "is a good starting point." Significantly, the court stated that there should be a legal or practical reason for unequal or inequitable distributions.

In Angle v. Angle, an award to the wife of an undivided one-half interest in the husband's partnership property was reversed, the court holding that instead the wife should be awarded a dollar amount equal to one-half of the husband's interest in the property.

B. Retirement and Pension Plans

In 1986, the Florida Supreme Court rendered its decision in Diffenderfer v. Diffenderfer, holding that a spouse's entitlement to pension or retirement benefits must be considered as a marital asset for purposes of equitably distributing marital property if those benefits were not otherwise used in calculating support obligations. As a result of Diffenderfer, the year 1987 brought a series of decisions reversing trial court judgments entered either without the benefit of the Diffenderfer opinion or in violation thereof.

In addition, one appellate court held that the Supreme Court's pronouncements in Diffenderfer apply equally to vested military pension benefits and to private pension or retirement funds, while another appellate court held that an annuity tax-deferred savings plan acquired during marriage also constitutes marital property subject to equitable distribution.

---

148. The new Equitable Distribution statute, FLA. STAT. Ch. 61.075(1988), became effective on October 1, 1988. Now, most equitable distribution issues will be controlled by the new statute.
149. 519 So. 2d 15 (Fla. 3d Dist. Ct. App. 1987) (quoting, Carroll v. Carroll, 471 So. 2d 1358, 1361 (Fla. 3d Dist. Ct. App. 1985)).
150. 506 So. 2d 16 (Fla. 2d Dist. Ct. App. 1987).
151. 491 So. 2d 265 (Fla. 1986).
154. Frumkes and Greene

C. Valuation

One of the most significant current issues in family law is the question of whether trial courts should be required to make explicit written findings of fact in awarding equitable distribution of marital assets, particularly concerning the court's valuation and evaluation methodology of distribution as to such assets. The problem presented by a lack of such findings was addressed by the First District Court of Appeal in Barrs v. Barrs, without explicit findings of fact resolving the hotly disputed character and valuations of the many properties owned by the parties, it is impossible, for all practical purposes, for us to accord any meaningful appellate review of whether the result reached by the trial court accomplished an equitable distribution that conforms with the law of Florida.

Do we, as an appellate court required to review judgments to assure that they comply with the law, possess the inherent power to reverse and remand to the trial court for explicit findings of fact, on equitable distribution issues when we are unable to provide effective review without such explicit findings? Are we relegated, in such circumstances, to the presumption of correctness that is said to attach to appealed judgments and simply rest our decision on that rule of appellate convenience, without understanding the true facts (which must be found by the trial court) and without being able to determine that the judgment presents a correct application of the law to those facts? Although the need for requiring written findings of fact in dissolution cases should be readily apparent to all concerned, the answer to these questions is — in the absence of a pronouncement from the Supreme Court — far from certain.

Having reviewed the problem, the court reversed the trial court's final judgment and remanded the case for further proceedings to result in "explicit findings with respect to disputed facts that form the factual basis on which the trial court undertakes to award equitable distribution," and certified to the Florida Supreme Court the following ques-
VI. Equitable Distribution

A. General\textsuperscript{148}

In \textit{Halberg v. Halberg},\textsuperscript{149} the Third District Court of Appeal opined that although the principles of equitable distribution do not require an equal division of marital assets, equal apportionment is "a good starting point." Significantly, the court stated that there should be a legal or practical reason for unequal or inequitable distributions.

In \textit{Angle v. Angle},\textsuperscript{150} an award to the wife of an undivided one-half interest in the husband's partnership property was reversed, the court holding that instead the wife should have been awarded a dollar amount equal to one-half of the husband's interest in the property.

B. Retirement and Pension Plans

In 1986, the Florida Supreme Court rendered its decision in \textit{Diffenderfer v. Diffenderfer},\textsuperscript{151} holding that a spouse's entitlement to pension or retirement benefits must be considered as a marital asset for purposes of equitably distributing marital assets if those benefits were not otherwise used in calculating support obligations. As a result of \textit{Diffenderfer}, the year 1987 brought a series of decisions reversing trial court judgments entered either without the benefit of the \textit{Diffenderfer} opinion or in violation thereof.\textsuperscript{152}

In addition, one appellate court held that the Supreme Court's pronouncements in \textit{Diffenderfer} apply equally to vested military pension benefits and to private pension or retirement funds,\textsuperscript{153} while another appellate court held that an annuity tax-deferred savings plan acquired during marriage also constitutes marital property subject to equitable distribution.\textsuperscript{154}

\textsuperscript{148} The new Equitable Distribution statute, Fla. Stat. Ch. 61.075(1988), became effective on October 1, 1988. Now, most equitable distribution issues will be controlled by the new statute.

\textsuperscript{149} 519 So. 2d 15 (Fla. 3d Dist. Ct. App. 1987) (quoting Carroll v. Carroll, 471 So. 2d 1358, 1361 (Fla. 3d Dist. Ct. App. 1985)).

\textsuperscript{150} 306 So. 2d 16 (Fla. 2d Dist. Ct. App. 1987).

\textsuperscript{151} 491 So. 2d 265 (Fla. 1986).


\textsuperscript{153} Trigg v. Trigg, 510 So. 2d 1109 (Fla. 4th Dist. Ct. App. 1987).

\textsuperscript{154} Iverson v. Iverson, 508 So. 2d 1109 (Fla. 4th Dist. Ct. App. 1987).

\textsuperscript{155} 505 So. 2d 602 (Fla. 1st Dist. Ct. App. 1987).

\textsuperscript{156} Id. at 603-4.

\textsuperscript{157} Id. at 604.
tion: “Whether the trial court can be required to make explicit written findings regarding disputed issues of fact in awarding equitable distribution of marital assets in a dissolution of marriage proceeding.”

D. Marital Assets

During 1987, several district courts addressed the issue of what constitutes “marital assets” for equitable distribution purposes. The assets in question ranged from gifts to worker’s compensation benefits.

In Krumnick v. Krumnick, the parties were disputing their respective rights to certain personal property, particularly a mink coat and a diamond ring which the husband had inherited from his mother and which the wife claimed he had subsequently given to her as a gift. The appellate court affirmed the award of the coat and ring to the wife on the basis that they were gifts to her.

In another “gift case,” the Fourth District Court of Appeal determined that a parcel of real estate deeded from the wife’s parents to the husband and wife was not a gift solely to the wife but, rather, a gift to both parties.

In a case of first impression in Florida, the Third District Court of Appeal determined that worker’s compensation benefits are not necessarily marital property subject to equitable distribution. In Weisfeld v. Weisfeld, the court discussed the various decisions on the subject from a number of states which have considered the issue and concluded that two different approaches have been utilized: the “mechanistic” and “analytical” approaches.

158. The parties having settled after the district court of appeals opinion, the Barks case was dismissed while pending in the Florida Supreme Court. At present, therefore, there is some conflict within the state as to whether specific findings of fact as to values in equitable distribution cases are or may be required. The earlier case of Carroll v. Carroll, 471 So. 2d 1358 (Fla. 3d Dist. Ct. App. 1985) had suggested that such findings were required but, in Zalis v. Zalis, 498 So. 2d 505 (Fla. 3d Dist. Ct. App. 1986), the court held that Carroll imposed no such requirement. The Fourth District Court of Appeal has exercised its inherent power to require such findings. See, e.g., Smith v. Smith, 487 So. 2d 339 (Fla. 4th Dist. Ct. App. 1986); VanBoven v. VanBoven, 453 So. 2d 937 (Fla. 4th Dist. Ct. App. 1984).

159. 502 So. 2d 95 (Fla. 5th Dist. Ct. App. 1987).

160. In Beasley v. Beasley, 508 So. 2d 23 (Fla. 4th Dist. Ct. App. 1987), the district court reversed the award of the entire parcel of land to the wife finding that “it was, in large measure, a gift, but not solely to her.” Id. at 25.

161. 513 So. 2d 1278 (Fla. 3d Dist. Ct. App. 1987). (At the time this issue went to press, this case was pending in the Florida Supreme Court.)

E. Enhanced Value of Non-Marital Assets

The year 1987 brought several family law decisions on the issue of whether the enhanced value of non-marital assets or separate property is a marital asset subject to equitable distribution.

In Crapps v. Crapps, the husband’s father incorporated a tree farming company with the estate plan of transferring assets to his ten children. After the parties married, the wife stayed home and raised the parties’ children. The husband arose at 5:30 A.M., he would go to the tree farm and get the workers started for the day, and return home around 7:30 A.M. for breakfast, which the wife had prepared. He would then dress and go to the bank where he worked and remain until 1:00 or 2:00 P.M. when the bank closed. His father would pick him up and they would go back to the tree farm until sundown. This routine was followed six days a week.

Throughout the marriage, the husband drew a salary only from his job as a banker. He received no wages from the tree farming company. Nevertheless, there were days during certain tree planting seasons that

162. Id. at 1281.

163. Id. at 1282.

tion: "Whether the trial court can be required to make explicit written findings regarding disputed issues of fact in awarding equitable distribution of marital assets in a dissolution of marriage proceeding."\textsuperscript{158}

D. Marital Assets

During 1987, several district courts addressed the issue of what constitutes "marital assets" for equitable distribution purposes. The assets in question ranged from gifts to worker's compensation benefits.

In Krummick v. Krummick,\textsuperscript{188} the parties were disputing their respective rights to certain personal property, particularly a mink coat and a diamond ring which the husband had inherited from his mother and which the wife claimed he had subsequently given to her as a gift. The appellate court affirmed the award of the coat and ring to the wife on the basis that they were gifts to her.

In another "gift case," the Fourth District Court of Appeal determined that a parcel of real estate deeded from the wife's parents to the husband and wife was not a gift solely to the wife but, rather, a gift to both parties.\textsuperscript{188}

In a case of first impression in Florida, the Third District Court of Appeal determined that worker's compensation benefits are not necessarily marital property subject to equitable distribution. In Weisfeld v. Weisfeld,\textsuperscript{38} the court discussed the various decisions on the subject from a number of states which have considered the issue and concluded that two different approaches have been utilized: the "mechanistic" and "analytical" approaches.

Under the mechanistic approach, all property, including worker's compensation or personal injury awards, acquired during marriage is deemed to be marital property unless it is specifically excepted by statute.

Under the analytical approach, whether the award is marital property does not look only to the timing of the acquisition of the award.\textsuperscript{188} Rather, the inquiry looks to the purpose of the award. The court deemed the analytical approach to be the more enlightened view.

Damage awards, on the other hand, may be separated into three different components: (1) compensation for pain and suffering, disability, and disfigurement; (2) compensation for lost wages, lost earning capacity, and medical and hospital expenses, and (3) compensation for the uninsured spouse for loss of consortium.

Applying the foregoing analysis, the court concluded that compensation paid to a spouse for non-economic and strictly personal loss is that spouse's personal property, while the portion of damages paid to the injured spouse as compensation for economic loss during the marriage is marital property.\textsuperscript{168}

E. Enhanced Value of Non-Marital Assets

The year 1987 brought several family law decisions on the issue of whether the enhanced value of non-marital assets or separate property is a marital asset subject to equitable distribution.

In Crapps v. Crapps,\textsuperscript{184} the husband's father incorporated a tree farming company with the estate plan of transferring assets to his ten children. After the parties married, the wife stayed home and raised the parties' children. The husband arose at 5:30 A.M., he would go to the tree farm and get the workers started for the day, and return home around 7:30 A.M. for breakfast, which the wife had prepared. He would then dress and go to the bank where he worked and remain until 1:00 or 2:00 P.M. when the bank closed. His father would pick him up and they would go back to the tree farm until sundown. This routine was followed six days a week.

Throughout the marriage, the husband drew a salary only from his job as a banker. He received no wages from the tree farming company. Nevertheless, there were days during certain tree planting seasons that

\textsuperscript{158} The parties having settled after the district court of appeals opinion, the 
\textsuperscript{168} Bars case was dismissed while pending in the Florida Supreme Court. At present, therefore, there is some conflict within the state as to whether specific findings of fact as to values in equitable distribution cases are or may be required. The earlier case of 
\textsuperscript{184} Carroll v. Carroll, 471 So. 2d 1358 (Fla. 3d Dist. Ct. App. 1985) held that such findings were required but, in Zalaz v. Zalaz, 496 So. 2d 505 (Fla. 3d Dist. Ct. App. 1986), the court held that Carroll imposed no such requirement. The Fourth District Court of Appeal has exercised its inherent power to require such findings. See, e.g., Smith, 487 So. 2d 339 (Fla. 4th Dist. Ct. App. 1986); VanBoven v. VanBoven, 453 So. 2d 937 (Fla. 4th Dist. Ct. App. 1984).

\textsuperscript{159} 502 So. 2d 95 (Fla. 5th Dist. Ct. App. 1987).

\textsuperscript{160} In Beasley v. Beasley, 508 So. 2d 23 (Fla. 4th Dist. Ct. App. 1987), the district court reversed the award of the entire parcel of land to the wife finding that "it was, in large measure, a gift, but not solely to her." Id. at 25.

\textsuperscript{161} 513 So. 2d 1278 (Fla. 3d Dist. Ct. App. 1987). (At the time this issue went to press, this case was pending in the Florida Supreme Court.)

\textsuperscript{162} Id. at 1281.

\textsuperscript{163} Id. at 1282.

\textsuperscript{164} 501 So. 2d 661 (Fla. 1st Dist. Ct. App. 1987).
the husband worked on the tree farm to the exclusion of his banking job.

During the marriage, the husband used the proceeds of the sale of timber, stock dividends, salary and bonus income to acquire bank stock and various land parcels in his sole name. The wife used her salary from her teaching position to purchase clothes for herself and the family, jewelry, trips for herself and the family and furniture for the parties' marital home.

During the marriage, the husband received several gifts from his family, the last one being several hundred acres of pines. It was the wife's position that the enhanced value of such separate property, or the increase in value that accumulated during the marriage, should have been included as a marital asset in the trial court's equitable distribution plan. The appellate court agreed and held that if the separate property was enhanced by the husband's marital labor, the enhanced value should be a marital asset in an equitable distribution plan.166

Subsequent to the Crapps decision, the Fifth District Court of Appeal decided the case of Wright v. Wright.168 In Wright, the trial court refused to treat the appreciated value of a building owned by the wife prior to the marriage as a marital asset subject to equitable distribution. Unlike Crapps, however, the parties in Wright stipulated that the appreciated value of the property was not attributable to the business operations of either party during the marriage nor attributable to any change, repair, renovation or maintenance paid for by either party during the marriage. Rather, in Wright, the increase in value was a "passive increase."169

The Fifth District Court of Appeal reaffirmed its distinction between "active enhancement" and "passive appreciation" in Szemborski.170

---

165. Id. at 665.
166. 505 So. 2d 699 (Fla. 5th Dist. Ct. App. 1987).
167. Id. at 700. The Wright court discussed the holding in Crapps as to enhanced value of non-marital assets but distinguished between an increase in value attributable to the efforts of one or both of the parties and "passive appreciation." Marital assets are assets acquired during the marriage, created or produced by the work effort, services or earnings of one or both spouses. They are the fruit of the couple's activities, working, living and supporting one another as a team. The passive appreciation of an asset due to inflation or inflated market forces, which as in this case, is not attributable in any way to marital funds or efforts, is not a 'marital asset'.
168. In Szemborski, the husband owned an interest in two family corporations which owned motels. There was no dispute that the husband's parents financed the acquisition of the first motel; however, there was testimony that the husband's parents intended the operation to be a family and not a personal venture. On the issue of whether the motel business constituted a "marital asset," the court held that the motel business was developed by the efforts of the husband and wife, regardless of the initial financing, and therefore should be included with the marital assets subject to equitable distribution.
169. F. Interplay of Equitable Distribution, Special Equity and Lump Sum Alimony

In a decision of subtle significance, the First District Court of Appeal held that a party's non-marital or separate property may be awarded to the other party if the purpose of doing is for support rather than "equitable distribution." Thus, although a particular asset may be "non-marital" or even the object of a special equity, that categorization alone will not prohibit the court from awarding the asset to the other party if a need for support exists which cannot be met from another source. In Gelman v. Gelman,175 the trial court awarded the wife the parties' former marital residence which had been titled in the husband's sole name and had been purchased entirely with money loaned to the husband by his father. The district court agreed that the residence was a "non-marital asset" but concluded that non-marital assets may be drawn upon where marital assets are insufficient to provide alimony for support.

VII. The Role of "Fault" in Family Law Cases

In 1986, the Supreme Court of Florida, in Noah v. Noah,176 determined that it is not proper for trial courts to routinely consider alleged marital misconduct of the non-alimony-seeking spouse absent a showing that either the misconduct played a role in the depletion of family resources or that economic hardship will result to both parties following
the husband worked on the tree farm to the exclusion of his banking job.

During the marriage, the husband used the proceeds of the sale of timber, stock dividends, salary and bonus income to acquire bank stock and various land parcels in his sole name. The wife used her salary from her teaching position to purchase clothes for herself and the family, jewelry, trips for herself and the family and furniture for the parties' marital home.

During the marriage, the husband received several gifts from his family, the last one being several hundred acres of pines. It was the wife's position that the enhanced value of such separate property, or the increase in value that accumulated during the marriage, should have been included as a marital asset in the trial court's equitable distribution plan. The appellate court agreed and held that if the separate property was enhanced by the husband's marital labor, the enhanced value should be a marital asset in an equitable distribution plan.166

Subsequent to the Crapps decision, the Fifth District Court of Appeal decided the case of Wright v. Wright.164 In Wright, the trial court refused to treat the appreciated value of a building owned by the wife prior to the marriage as a marital asset subject to equitable distribution. Unlike Crapps, however, the parties in Wright stipulated that the appreciated value of the property was not attributable to the business operations of either party during the marriage nor attributable to any change, repair, renovation or maintenance paid for by either party during the marriage. Rather, in Wright, the increase in value was a "passive increase."167

The Fifth District Court of Appeal reaffirmed its distinction between "active enhancement" and "passive appreciation" in Szemborski v. Szemborski.168 In Szemborski, the husband owned an interest in two family corporations which owned motels. There was no dispute that the husband's parents financed the acquisition of the first motel; however, there was testimony that the husband's parents intended the operation to be a family and not a personal venture. On the issue of whether the motel business constituted a "marital asset," the court held that the motel business was developed by the efforts of the husband and wife, regardless of the initial financing, and therefore should be included with the marital assets subject to equitable distribution.169

F. Interplay of Equitable Distribution, Special Equity and Lump Sum Alimony

In a decision of subtle significance, the First District Court of Appeal held that a party's non-marital or separate property may be awarded to the other party if the purpose of doing so is for support rather than "equitable distribution." Thus, although a particular asset may be "non-marital" or even the object of a special equity, the categorization alone will not prohibit the court from awarding the asset to the other party if a need for support exists which cannot be met from another source. In Gelman v. Gelman,170 the trial court awarded the wife the parties' former marital residence which had been titled in the husband's sole name and had been purchased entirely with money loaned to the husband by his father. The district court agreed that the residence was a "non-marital asset" but concluded that non-marital assets may be drawn upon where marital assets are insufficient to provide alimony for support.171

VII. The Role of "Fault" in Family Law Cases

In 1986, the Supreme Court of Florida, in Noah v. Noah,172 determined that it is not proper for trial courts to routinely consider alleged marital misconduct of the non-alimony-seeking spouse absent a showing that either the misconduct played a role in the depletion of family resources or that economic hardship will result to both parties following

---

164. Id. at 665.
166. 505 So. 2d 699 (Fla. 5th Dist. Ct. App. 1987).
167. Id. at 700. The Wright court discussed the holding in Crapps as to enhanced value of non-marital assets but distinguished between an increase in value attributable to the efforts of one or both of the parties and "passive appreciation." Marital assets are assets acquired during the marriage, created or produced by the work effort, services or earnings of one or both spouses. They are the fruit of the couple's activities, working, living and supporting one another as a team. The passive appreciation of an asset due to inflation or fortuitous market forces, which as in this case, is not attributable in any way to marital funds or efforts, is not a "marital asset".

168. 512 So. 2d 987 (Fla. 5th Dist. Ct. App. 1987).
169. Id. at 989.
171. Id. at 237.
dissolution which should more appropriately be borne by the party "at fault." During the year 1987, the district courts struggled with the proper balancing of these factors in a series of "fault" cases.

In Barry v. Barry,[173] the Fourth District Court of Appeal reversed the trial court's order denying "more generous allowances or awards to the wife or for her benefit" on the basis of her "marital misconduct."[174] The marital misconduct found by the trial court was the wife's alcoholism. The district court did not agree that alcoholism constitutes either fault or marital misconduct but rather an illness. For purposes of determining property rights in dissolution cases, a spouse's additional services to the family are not considered to be services beyond normal marital duties where they were necessitated by the other spouse's illness.[175]

The most extensive discussion of marital fault during 1987 appeared in the decision of the Fourth District Court of Appeal in Smith v. Bloom.[176] In Smith, the wife sought to depose the husband's live-in girlfriend and specifically sought to ask, at the deposition, "when did you first have sexual relations with [the husband]?"[177] The witness sought a protective order which was denied by the trial court and the Fourth District Court of Appeal granted certiorari review. The district court clarified the standard under which marital misconduct may be considered by the trial courts, as, for example, where the parties will suffer economic hardship caused by the marital misconduct in question, regardless of how available resources are divided.[178] The Smith court concluded that on issues of marital misconduct, the trial courts must maintain a "delicate balance" between the rights and obligations of the respective parties:

Inquiry too narrowly confined may prevent a spouse from obtaining evidence necessary to show that marital misconduct of the other spouse was a substantial contributing factor to the economic disaster that befell the family. Permitting an unfettered fishing expedition, on the other hand, will simply encourage the return of the fault concept to dissolution proceedings with all its attendant

174. Id.
175. Id. at 650.
176. 506 So. 2d 1173 (Fla. 4th Dist. Ct. App. 1987).
177. Id. at 1176.
178. Id. at 1176.
179. Id. at 1177.
181. Id. at 537.

VIII. Miscellaneous

A. Rights of Unmarried Persons

According to Hustin v. Holmes,[180] parties cohabitating without the benefit of marriage are not entitled to an equitable distribution of assets accumulated during the period of cohabitation. In Hustin, after living with the defendant for five years, the plaintiff filed a petition for declaratory relief seeking damages and other relief under theories of express and implied contract, quantum meruit and constructive trust. The plaintiff contended that she and the defendant had an agreement to pool their resources and to jointly acquire real property. The defendant filed a counter-petition based on fraud, conversion, replevin and constructive trust. The crux of the dispute was the division of six parcels of real estate acquired during the parties' relationship.

In its final judgment, the trial court distributed the parcels of property to one or the other party without considering how title was held, effecting, in essence, an equitable distribution of property as in a dissolution of marriage case.

The Second District Court of Appeal found no record support for the distribution ordered by the trial court, who divided the assets as if the action were a dissolution of marriage. It did not approve of such a division of property between two non-marital partners in this case.[181]

Consequently, the court remanded the case to the trial court for consideration of the nature of the agreement, if any, between the parties concerning the acquisition of assets and directed that the court consider what relief might be appropriate under the theories of law asserted by the parties.

B. Effect of Loss of Pre-Marital Benefit on Entitlement to Alimony

In 1987, the Third District Court of Appeal decided, en banc,
dissolution which should more appropriately be borne by the party "at fault." During the year 1987, the district courts struggled with the proper balancing of these factors in a series of "fault" cases.

In *Barry v. Barry*, the Fourth District Court of Appeal reversed the trial court's order denying "more generous allowances or awards to the wife or for her benefit" on the basis of her "marital misconduct." The marital misconduct found by the trial court was the wife's alcoholism. The district court did not agree that alcoholism constitutes either fault or marital misconduct but rather an illness. For purposes of determining property rights in dissolution cases, a spouse's additional services to the family are not considered to be services beyond normal marital duties where they were necessitated by the other spouse's illness.

The most extensive discussion of marital fault during 1987 appeared in the decision of the Fourth District Court of Appeal in *Smith v. Bloom*.* In Smith*, the wife sought to depose the husband's live-in girlfriend and specifically sought to ask, at the deposition, "when did you first have sexual relations with [the husband]?

The witness sought a protective order which was denied by the trial court and the Fourth District Court of Appeal granted certiorari review. The district court clarified the standard under which marital misconduct may be considered by the trial courts, as, for example, where the parties will suffer economic hardship caused by the marital misconduct in question, regardless of how available resources are divided.* The *Smith* court concluded that on issues of marital misconduct, the trial courts must maintain a "delicate balance" between the rights and obligations of the respective parties:

Inquiry too narrowly confined may prevent a spouse from obtaining evidence necessary to show that marital misconduct of the other spouse was a substantial contributing factor to the economic disaster that befell the family. Permitting an unfettered fishing expedition, on the other hand, will simply encourage the return of the fault concept to dissolution proceedings with all its attendant

VIII. Miscellaneous

A. Rights of Unmarried Persons

According to *Hustin v. Holmes*, parties cohabiting without the benefit of marriage are not entitled to an equitable distribution of assets accumulated during the period of cohabitation.

In *Hustin*, after living with the defendant for five years, the plaintiff filed a petition for declaratory relief seeking damages and other relief under theories of express and implied contract, quantum meruit and constructive trust. The plaintiff contended that she and the defendant had an agreement to pool their resources and to jointly acquire real property. The defendant filed a counter-petition based on fraud, conversion, replevin and constructive trust. The crux of the dispute was the division of six parcels of real estate acquired during the parties' relationship.

In its final judgment, the trial court distributed the parcels of property to one or the other party without considering how title was held, effecting, in essence, an equitable distribution of property as in a dissolution of marriage case.

The Second District Court of Appeal found no record support for the distribution ordered by the trial court, who divided the assets as if the action were a dissolution of marriage. It did not approve of such a division of property between two non-marital partners in this case.

Consequently, the court remanded the case to the trial court for consideration of the nature of the agreement, if any, between the parties concerning the acquisition of assets and directed that the court consider what relief might be appropriate under the theories of law asserted by the parties.

B. Effect of Loss of Pre-Marital Benefit on Entitlement to Alimony

In 1987, the Third District Court of Appeal decided, *en banc*,
Wright v. Wright, a case which included amicus curiae support for the position of the wife from the National Organization for Women. In Wright, the trial court had denied alimony to a wife where the parties had separated after a "mere 11 months" and where the wife had made "no substantial contribution to the marriage." The wife argued that the trial court erred by refusing to take into account the fact that her marriage to the husband resulted in a loss to her of alimony she had been receiving from a former husband.

Prior to Wright, the Third District Court of Appeal had decided the case of Duttenhofer v. Duttenhofer, which held that "pre-marital sacrifices" were not a factor properly considered by a trial court in awarding alimony. In Wright, the court further extended Duttenhofer and held:

So even as the court in Duttenhofer held that the forfeiture of widow benefits were such a non-compensable pre-marital sacrifice, so, too, the termination of the wife's entitlement to alimony from an ex-husband is a mere consequence of the event of the remarriage which is not to be considered in fixing the next husband's alimony obligation.

C. Jurisdiction and Procedure

(1) Jurisdiction

Although the divorce court possesses many equitable powers and may use several equitable remedies to achieve fairness and protect the children of the parties, it cannot, however well intended, order non-parties to perform any act. In Silvers v. Silvers, the trial court, concerned about the effect of the parties' hostility towards one another on the parties' children, ordered both parties and their current spouses to attend parenting classes and psychological counseling. In so doing, the trial court expressed the hope that the parties and their spouses would "recognize the importance of setting aside the hostile attitudes of the parties toward each other and the development of a more amicable relationship for the benefit of their children and for their own peace of mind." The Second District Court of Appeal shared the trial court's hope but was compelled to reverse on the ground that the court had no jurisdiction over the non-party spouses.

(2) Procedure

Two cases of interest with respect to procedure in family law cases were rendered during 1987. In the first such case, Broussard v. Broussard, the husband filed for a dissolution of marriage in Hillsborough County and the wife, a resident of Tallahassee, responded with a motion for change of venue, which was denied. The record thereafter did not contain an answer, a default or a notice of trial.

On July 30, 1986, at approximately 8:30 A.M., the wife received, in Tallahassee, a notice scheduling a final hearing in Tampa on July 31, 1986 at 4:00 o'clock P.M. The notice was certified by the husband's attorney as being mailed on July 16, 1986, but was postmarked on July 24, 1986.

The Second District Court of Appeal held that Rule 1.440(c), Florida Rules of Civil Procedure, requires 30 days notice before a trial may take place. The approximately thirty-three hours notice provided to the wife did not comport with the rule. Therefore, the final judgment entered by the trial court was reversed and the case remanded for a new trial.

In the second case, Gubana v. Gubana, the husband and wife entered into a settlement agreement which, in pertinent part, established the amount of the husband's child support obligation. An uncontested final hearing was scheduled and the wife advised the husband that it was not necessary for him to attend the hearing because, in view of the parties' settlement agreement, the hearing would be only a formality. At the hearing, however, the trial court reviewed the agreement and sua sponte doubled the husband's child support obligation. The First District Court of Appeal held that although a trial judge has a duty to determine the appropriateness of child support provisions in an agreement, the trial court nevertheless erred in modifying the husband's child support obligation because the husband should have had the opportunity to be heard before the amount was modified. The district court specifically held that if, at a final hearing for an uncontested

183. 474 So. 2d 251 (Fla. 3d Dist. Ct. App. 1985)).
184. Id.
185. 504 So. 2d 30 (Fla. 2d Dist. Ct. App. 1987).
dissolution of marriage, the trial court perceives the need to modify the child support to which the parties have agreed, the matter should be continued and reset with notice to all parties.

One of the most interesting decisions of 1987 concerned the normally benign subject of venue in dissolution of marriage cases. In Goedmakers v. Goedmakers,189 the parties last maintained a marital residence in Broward County, Florida. The parties separated and the husband moved to Dade County, Florida, the location of the husband's business in which the wife held a substantial ownership interest. The husband brought an action for dissolution of marriage in Dade County, Florida, and the wife moved to dismiss the case as having been brought in an improper venue. The trial court's denial of the motion to dismiss was affirmed by the Third District Court of Appeal on the basis that the "disclosure and division of the property located in Dade County will be the focus of the trial"190 and that the trial court has broad discretion in dealing with matters of venue.

Historically, however, venue in a dissolution of marriage case lies in the county in which the marriage last existed. As such, the Goedmakers decision marked the first time in Florida law that a court deemed it proper to determine venue for dissolution of marriage purposes upon the basis of where marital property was located. In 1988, however, the Supreme Court of Florida quashed the Goedmakers decision.191 The Supreme Court addressed the issue of whether the "property in litigation" provision of Florida's general venue statute192 applies to marital dissolution cases.

The Court concluded that the "property in litigation" clause applies only to real property that is the subject of a local action and not, therefore, to marital dissolution cases. The court opined:

[A] resident defendant in a dissolution proceeding has the right or privilege of being sued in the county of his residence or in the county where the cause of action accrued. Moreover, a prayer for a determination of property rights between spouses, even when the property includes real estate, does not transform a divorce suit into a local action.

While we recognize that many dissolution proceedings today in-volve disputed property, we believe the dissolution of marriage is still the focal point of the action. Moreover, permitting plaintiffs to bring divorce actions in any county where either of the parties' property is located would defeat the primary purpose of the venue statute.193

D. Role of Guardian Ad Litem

Two opinions rendered during 1987 reflect the Florida courts' attempt to balance their clear concern over the protection of children in dissolution of marriage cases with the proper role of a guardian ad litem in a family law case.

In Yargel v. Yargel,194 a special concurring opinion was filed in a case in which the panel issued a per curiam affirmation. The message of the special concurrence is, and should be, of great import to the family law bar and bench:

A contested custody case is probably the most difficult case a trial judge has to handle, and it becomes even more difficult when both parents, as here, are fit and proper custodians.

The three children all expressed their wish to reside with their mother and the H.R.S. report recommended that the mother be the residential parent. The trial judge admitted that he 'agonized' over his decision to make the father the residential parent.

Both parents were represented by experienced competent counsel. Yet the lives of the children would be the most affected by the trial judge's decision. Who represented the children? No one! Who did the children have to place their case before the court? No one!

I believe that in a truly contested custody battle, the objects of the battle should have a voice in their future. I believe the trial judge should see to it that they are protected by independent counsel. The trial judge is guided by 'the best interests of the children,' based on evidence presented by two diametrically opposed interests who may or may not put the children's interests first. It would be preferable for this to be accomplished by the appointment of an attorney ad litem who will be there to advocate the children's and only the children's best interests.

I take this opportunity to urge all trial judges handling cus-

189. 504 So.2d 24 (Fla.3d Dist. Ct. App. 1987).
190. Id.
191. 520 So.2d 573 (Fla. 1988).
192. FLA. STAT. § 47.011 (1985).
193. 520 So. 2d at 574.
194. 505 So. 2d 636 (Fla. 4th Dist. Ct. App. 1987).
dissolution of marriage, the trial court perceives the need to modify the child support to which the parties have agreed, the matter should be continued and reset with notice to all parties.

One of the most interesting decisions of 1987 concerned the normally benign subject of venue in dissolution of marriage cases. In *Goedmackers v. Goedmackers*, the parties last maintained a marital residence in Broward County, Florida. The parties separated and the husband moved to Dade County, Florida, the location of the husband's business in which the wife held a substantial ownership interest. The husband brought an action for dissolution of marriage in Dade County, Florida, and the wife moved to dismiss the case as having been brought in an improper venue. The trial court's denial of the motion to dismiss was affirmed by the Third District Court of Appeal on the basis that the "disclosure and division of the property located in Dade County will be the focus of the trial” and that the trial court has broad discretion in dealing with matters of venue.

Historically, however, venue in a dissolution of marriage case lies in the county in which the marriage last existed. As such, the *Goedmackers* decision marked the first time in Florida law that a court deemed it proper to determine venue for dissolution of marriage purposes upon the basis of where marital property was located. In 1988, however, the Supreme Court of Florida quashed the *Goedmackers* decision. The Supreme Court addresses the issue of whether the "property in litigation" provision of Florida's general venue statute applies to marital dissolution cases.

The Court concluded that the "property in litigation" clause applies only to real property that is the subject of a local action and not, therefore, to marital dissolution cases. The court opined:

[A] resident defendant in a dissolution proceeding has the right or privilege of being sued in the county of his residence or in the county where the cause of action accrued.

Moreover, a prayer for a determination of property rights between spouses, even when the property includes real estate, does not transform a divorce suit into a local action.

***

While we recognize that many dissolution proceedings today in-

189. 504 So. 2d 24 (Fla. 3d Dist. Ct. App. 1987).
190. Id.
191. 520 So. 2d 575 (Fla. 1988).

volve disputed property, we believe the dissolution of marriage is still the focal point of the action. Moreover, permitting plaintiffs to bring divorce actions in any county where either of the parties' property is located would defeat the primary purpose of the venue statute.

D. Role of Guardian Ad Litem

Two opinions rendered during 1987 reflect the Florida courts' attempt to balance their clear concern over the protection of children in dissolution of marriage cases with the proper role of a guardian ad litem in a family law case.

In *Yurgel v. Yurgel*, a special concurring opinion was filed in a case in which the panel issued a per curiam affirmation. The message of the special concurrence is, and should be, of great importance to the family law bar and bench:

A contested custody case is probably the most difficult case a trial judge has to handle, and it becomes even more difficult when both parents, as here, are fit and proper custodians.

The three children all expressed their wish to reside with their mother and the H.R.S. report recommended that the mother be the residential parent. The trial judge admitted that he 'agonized' over his decision to make the father the residential parent.

Both parents were represented by experienced competent counsel. Yet the lives of the children would be the most affected by the trial judge's decision. Who represented the children? No one! Who did the children have to place their case before the court? No one!

I believe that in a truly contested custody battle, the objects of the battle should have a voice in their future. I believe the trial judge should see to it that they are protected by independent counsel. The trial judge is guided by 'the best interests of the children,' based on evidence presented by two diametrically opposed interests who may or may not put the children's interests first. It would be preferable for this to be accomplished by the appointment of an attorney ad litem who will be there to advocate the children's and only the children's best interests.

I take this opportunity to urge all trial judges handling cus-
today disputes to seriously consider such an appointment.\textsuperscript{186}

In \textit{Rose v. Rose},\textsuperscript{187} the district court had before it consolidated emergency petitions brought from two orders entered after a dissolution of marriage which appointed a guardian ad litem for the minor children of the parties and appointed a psychiatrist to examine the children. The court found no error in the appointment of a guardian for the limited purpose of facilitating the father's exercise of visitation rights. In a footnote, however, the court noted what it perceived to be the role of a guardian ad litem absent specific authority in the order of appointment:

[T]he ‘guardian ad litem’ has no independent authority by the order of appointment to file any pleadings or to assert any position relative to the child’s best interests in these post-dissolution proceedings, except as recommendations to the trial judge. A guardian ad litem is a guardian appointed by a court to prosecute or defend for an infant in any suit to which the infant is a party. The only parties in the present action are the divorced parents of the children.\textsuperscript{187}

IX. Paternity

In 1987, two cases recognized that both spouses in a dissolution of marriage proceeding have the right to contest paternity of children born during wedlock.

In \textit{Rymer v. Rymer},\textsuperscript{190} the Fifth District Court of Appeal reversed and remanded a trial court's final judgment finding the husband to be the father of a child born during the marriage and ordering him to pay child support. At the trial court level, the husband had requested that the court order HLA testing of the wife and minor child. The wife, who admitted to having sexual relations with two other men at or near the time of conception, did not object. The trial court, finding that "the child should have a father,"\textsuperscript{191} refused to order the requested blood testing.

\textsuperscript{185} Id. at 636-37.
\textsuperscript{186} 519 So. 2d 6 (Fla. 3d Dist. Ct. App. 1987).
\textsuperscript{187} Id. at 2036 (emphasis in original).
\textsuperscript{188} 508 So. 2d 789 (Fla. 5th Dist. Ct. App. 1987).
\textsuperscript{190} Id. at 790.

The district court held that the HLA test should properly have been ordered despite the presumption that the husband was the father of the child born during the marriage. In doing so, the court cautioned that it did not intend to imply "that the result of [the HLA] test is conclusively binding on the trier of fact," but "[t]he probability indicated by the test is simply a factor to be weighed and evaluated at trial."\textsuperscript{200}

In \textit{Holmes v. Owens},\textsuperscript{200} the Second District Court of Appeal granted the putative father's petition for certiorari to review the trial court's order directing HLA testing. The district court held that, under the facts disclosed, the mother was not entitled to an order requiring such testing. The mother, married to another man when the child was born, was awarded child support pursuant to a final judgment of dissolution of marriage which found the husband to be the father of the children born during the marriage. Subsequently, she filed an action against the putative father, to whom she had never been married, seeking a declaration of paternity and child support.

The court held that although the mother was not precluded from bringing a paternity action against the putative father by virtue of the fact that she was married to another man at the time of conception and birth of the child, she was prohibited from accepting the benefits under the final judgment finding her husband to be the father and awarding her child support and later seeking support from the putative father.\textsuperscript{200}

X. Shared Parental Responsibility and Visitation

A. Shared versus Sole Responsibility

In \textit{Wheeler v. Wheeler},\textsuperscript{200} the district court reversed the trial court's order granting the primary residential parent “ultimate responsibility” for the parties' children's welfare. The district court held that the effect of the order was to lump all decision-making authority in one parent for all matters, undermining the mandate of the law that decisions be “jointly made” unless there is a finding that shared parental responsibility would be detrimental to the child. The court concluded that a blanket, non-specific award of “ultimate responsibility” is con-
today disputes to seriously consider such an appointment.\textsuperscript{186}

In \textit{Rose v. Rose},\textsuperscript{187} the district court had before it consolidated emergency petitions brought from two orders entered after a dissolution of marriage which appointed a guardian ad litem for the minor children of the parties and appointed a psychiatrist to examine the children. The court found no error in the appointment of a guardian for the limited purpose of facilitating the father’s exercise of visitation rights. In a footnote, however, the court noted what it perceived to be the role of a guardian ad litem absent specific authority in the order of appointment:

> [T]he ‘guardian ad litem’ has no independent authority by the order of appointment to file any pleadings or to assert any position relative to the child’s best interests in these post-dissolution proceedings, except as recommendations to the trial judge. A guardian ad litem is a guardian appointed by a court to prosecute or defend for an infant in any suit to which the infant is a party. The only parties in the present action are the divorced parents of the children.\textsuperscript{188}

IX. Paternity

In 1987, two cases recognized that both spouses in a dissolution of marriage proceeding have the right to contest paternity of children born during wedlock.

In \textit{Rymer v. Rymer},\textsuperscript{189} the Fifth District Court of Appeal reversed and remanded a trial court’s final judgment finding the husband to be the father of a child born during the marriage and ordering him to pay child support. At the trial court level, the husband had requested that the court order HLA testing of the wife and minor child. The wife, who admitted to having had sexual relations with two other men at or near the time of conception, did not object. The trial court, finding that “the child should have a father,”\textsuperscript{190} refused to order the requested blood testing.

---

\textsuperscript{185} Id. at 636-37.
\textsuperscript{186} 519 So. 2d 6 (Fla. 3d Dist. Ct. App. 1987).
\textsuperscript{187} Id. at 2036 (emphasis in original).
\textsuperscript{188} 508 So. 2d 789 (Fla. 5th Dist. Ct. App. 1987).
\textsuperscript{189} Id. at 790.

---

The district court held that the HLA test should properly have been ordered despite the presumption that the husband was the father of the child born during the marriage. In doing so, the court cautioned that it did not intend to imply “that the result of the [HLA] test is conclusively binding on the trier of fact,” but “[t]he probability indicated by the test is simply a factor to be weighed and evaluated at trial.”\textsuperscript{189}

In \textit{Holmes v. Owens},\textsuperscript{201} the Second District Court of Appeal granted the putative father’s petition for certiorari to review the trial court’s order directing HLA testing. The district court held that, under the facts disclosed, the mother was not entitled to an order requiring such testing. The mother, married to another man when the child was born, was awarded child support pursuant to a final judgment of dissolution of marriage which found the husband to be the father of the children born during the marriage. Subsequently, she filed an action against the putative father, to whom she had never been married, seeking a declaration of paternity and child support.

The court held that although the mother was not precluded from bringing a paternity action against the putative father by virtue of the fact that she was married to another man at the time of conception and birth of the child, she was prohibited from accepting the benefits under the final judgment finding her husband to be the father and awarding her child support and later seeking support from the putative father.\textsuperscript{202}

X. Shared Parental Responsibility and Visitation

A. Shared versus Sole Responsibility

In \textit{Wheeler v. Wheeler},\textsuperscript{203} the district court reversed the trial court’s order granting the primary residential parent “ultimate responsibility” for the parties’ children’s welfare. The district court held that the effect of the order was to lump all decision-making authority in one parent for all matters, undermining the mandate of the law that decisions be “jointly made” unless there is a finding that shared parental responsibility would be detrimental to the child. The court concluded that a blanket, non-specific award of “ultimate responsibility” is con-

---

\textsuperscript{200} Id.
\textsuperscript{201} 508 So. 2d 563 (Fla. 5th Dist. Ct. App. 1987).
\textsuperscript{202} \textit{See also} Narcisi v. Brusko, 510 So. 2d 1132 (Fla. 2d Dist. Ct. App. 1987).
\textsuperscript{203} 501 So. 2d 729 (Fla. 1st Dist. Ct. App. 1987).
try to the statutory concept of shared parental responsibility.

In *Saferstone v. Saferstone*, the Third District Court of Appeal reversed an order denying shared parental responsibility for the parties’ three minor children because no showing was made at the trial court level that such shared responsibility would be detrimental to the children.

B. Evidence

Three decisions were rendered during 1987 pertaining to the type of evidence which may be considered by trial courts in child custody cases. In *Perlman v. Perlman*, an evidentiary hearing on the father’s petition for change of custody was continued for the purpose of an investigation of the proposed new home of the custodial mother and minor children. When the written report of the investigation was completed, the court considered it *ex parte* without another hearing, over the father’s objections, and then denied the petition. The trial court’s order was reversed upon the basis that when a trial court relies on investigative reports for the purpose of resolving a child custody dispute, due process requires that the parties be given an opportunity to review the reports and to present any evidence which might rebut the recommendations contained in the reports.

In *Sims v. Sims*, when the marriage between the parties was dissolved there was no personal service upon the wife but the petition for dissolution, filed by the husband, alleged that the wife was “a fit and proper person for the child’s primary physical residence.” The husband prayed for “liberal visitation rights.” The judgment entered upon the husband’s petition for dissolution of marriage failed to mention child custody or primary residence whatsoever.

Notwithstanding the absence of a custodial determination in the judgment, the husband petitioned the court to “modify” the final judgment and award the custody of the children to him. At the modification hearing, the judge refused to allow the wife to present any evidence concerning events occurring before the dissolution. The district court held that such refusal was error and determined that the judge may have had the discretion to so rule if the hearing were a true modification hearing. However, the judge should have allowed evidence of

To the statutory concept of shared parental responsibility.

In *Saferstone v. Saferstone*, the Third District Court of Appeal reversed an order denying shared parental responsibility for the parties’ three minor children because no showing was made at the trial court level that such shared responsibility would be detrimental to the children.

B. Evidence

Three decisions were rendered during 1987 pertaining to the type of evidence which may be considered by trial courts in child custody cases. In *Perlman v. Perlman*, an evidentiary hearing on the father’s petition for change of custody was continued for the purpose of an investigation of the proposed new home of the custodial mother and minor children. When the written report of the investigation was completed, the court considered it *ex parte* without another hearing, over the father’s objections, and then denied the petition. The trial court’s order was reversed upon the basis that when a trial court relies on investigative reports for the purpose of resolving a child custody dispute, due process requires that the parties be given an opportunity to review the reports and to present any evidence which might rebut the recommendations contained in the reports.

In *Sims v. Sims*, when the marriage between the parties was dissolved there was no personal service upon the wife but the petition for dissolution, filed by the husband, alleged that the wife was “a fit and proper person for the child’s primary physical residence.” The husband prayed for “liberal visitation rights.” The judgment entered upon the husband’s petition for dissolution of marriage failed to mention child custody or primary residence whatsoever.

Notwithstanding the absence of a custodial determination in the judgment, the husband petitioned the court to “modify” the final judgment and award the custody of the children to him. At the modification hearing, the judge refused to allow the wife to present any evidence concerning events occurring before the dissolution. The district court held that such refusal was error and determined that the judge may have had the discretion to so rule if the hearing were a true modification hearing. However, the judge should have allowed evidence of

207. Id. at 1161.
209. Id. at 1107.
211. 498 So. 2d 1060 (Fla. 5th Dist. Ct. App. 1986).
212. Id. at 1061.
trary to the statutory concept of shared parental responsibility.

In *Safferstone v. Safferstone*, the Third District Court of Appeal reversed an order denying shared parental responsibility for the parties' three minor children because no showing was made at the trial court level that such shared responsibility would be detrimental to the children.

B. Evidence

Three decisions were rendered during 1987 pertaining to the type of evidence which may be considered by trial courts in child custody cases. In *Perlman v. Perlman*, an evidentiary hearing on the father's petition for change of custody was continued for the purpose of an investigation of the proposed new home of the custodial mother and minor children. When the written report of the investigation was completed, the court considered it *ex parte* without another hearing, over the father's objections, and then denied the petition. The trial court's order was reversed upon the basis that when a trial court relies on investigatory reports for the purpose of resolving a child custody dispute, due process requires that the parties be given an opportunity to review the reports and to present any evidence which might rebut the recommendations contained in the reports.

In *Sims v. Sims*, when the marriage between the parties was dissolved there was no personal service upon the wife but the petition for dissolution, filed by the husband, alleged that the wife was "a fit and proper person for the child's primary physical residence." The husband prayed for "liberal visitation rights." The judgment entered upon the husband's petition for dissolution of marriage failed to mention child custody or primary residence whatsoever.

Notwithstanding the absence of a custodial determination in the judgment, the husband petitioned the court to "modify" the final judgment and award the custody of the children to him. At the modification hearing, the judge refused to allow the wife to present any evidence concerning events occurring before the dissolution. The district court held that such refusal was error and determined that the judge may have had the discretion to so rule if the hearing were a true modification hearing. However, the judge should have allowed evidence of con-

---

204. 501 So. 2d 165 (Fla. 3rd Dist. Ct. App. 1987).
206. 509 So. 2d 1160 (Fla. 5th Dist. Ct. App. 1987).

---

Frumkes and Greene

duct occurring before and after dissolution because there was no initial custody determination.0

In a decision widely known for its impassioned dissent, the Third District Court of Appeal determined that evidence of the effect on a child of conflicting religious beliefs held by the child's parents is admissible and can form the basis for a child custody determination. In *Mendez v. Mendez*, the mother contended that the trial court made the father the primary residential parent solely because of its disapproval of her religion; she was a practicing Jehovah's Witness. The appellate court held that the evidence did not so reflect and further determined that the trial court had a "right" to consider "the effect on the child caused by the conflicting religious beliefs of the parents."0

C. Uniform Child Custody Jurisdiction Act

Several cases involving the Uniform Child Custody Jurisdiction Act were decided in 1987, the earliest of which was *Prickett v. Prickett*, actually rendered in December, 1986. In *Prickett*, the parties were divorced in Florida in 1982. In 1984, the wife and child moved to Connecticut. There was no court order restricting the wife's relocation and the wife's move to Connecticut did not, therefore, violate any provisions of the final judgment. In 1985, the husband secured an order of modification of custody from the Florida court which admonished the wife for changing her residence without prior approval of the court and modified the husband visitations rights because of the wife's move to Connecticut. Later in 1985 the wife filed a complaint in Connecticut seeking to enjoin the husband from exercising his visitation rights. The husband appeared for a hearing in Connecticut and the parties submitted a visitation agreement which was approved by the Connecticut court in January, 1986. However, also in January, 1986, the husband moved, in the Florida court, for a modification of custody and to hold the wife in contempt. The Florida trial court found that it had jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act as the "home state" because all parties had resided in Florida.

---

207. Id. at 1161.
208. 527 So. 2d 820 (Fla. 3rd Dist. Ct. App. 1987); (reh'g denied). U.S.
210. Id. at 1107.
212. 498 So. 2d 1060 (Fla. 5th Dist. Ct. App. 1986).
213. Id. at 1061.
On appeal, the district court reversed the trial court's finding that Florida constituted the "home state" of the child in view of the fact that the wife and the child had resided in Connecticut for the previous 17 months. The district court opined that since Florida was not the "home state," exceptional circumstances must be alleged in order to establish a basis for subject matter jurisdiction in Florida. The court went on to conclude that no "exceptional circumstances" existed and that the state of Connecticut was better able to evaluate the child's situation. The court ruled that the Florida trial court should have declined to exercise its jurisdiction under the Uniform Child Custody Jurisdiction Act.

In Sommer v. Sommer, the parties and their child were formerly residents of Michigan. In 1985, a Michigan court granted the parties a divorce and awarded custody of the child to the wife. It also gave the husband liberal visitation rights. In June, 1985, the husband filed a petition in Michigan to change custody to himself. Thereafter, in July, 1985, the wife sought permission from the Michigan court to move with the child to Florida. Her petition was granted and she and the child moved to Florida in August, 1985.

Meanwhile, the modification filed by the husband was not brought to trial in Michigan until June, 1986. The Michigan court denied the husband's petition but granted visitation from June, 1986 to October, 1986 and from May, 1987 to August, 1987. During one such visitation, the wife took the child from the husband, went back to Florida and thereafter refused to allow the child to leave Florida. As a result, the wife was fined and held in contempt by the Michigan court.

The husband then filed suit in Florida asking the Florida court to enforce the Michigan court's decree regarding his visitation rights. The wife filed a petition asking the Florida court for an injunction to prevent the husband from exercising his visitation rights. She did not seek to modify the Michigan decree, but rather alleged that an emergency situation existed because the child was suffering severe psychological problems which might require hospitalization unless his condition stabilized. The Florida trial court entered an order enjoining the husband from removing the child from Florida and altering the husband's visitation rights from those set forth in the Michigan decree.

At the appellate level, the wife argued that Florida has jurisdiction to modify the Michigan decree pursuant to the "emergency subject matter jurisdiction provisions" of the Uniform Child Custody Jurisdiction Act. The District Court, however, held that such "emergency jurisdiction" does not give a Florida court subject matter jurisdiction to modify a decree of a sister court entered while that state had subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act. In Brett v. MacDonald, the father of a minor child was awarded custody in a 1986 decree from a Texas court. He brought the child to Florida in the late summer for a temporary stay and, while in Florida, was served with a "rule to show cause" issued on the mother's motion. At the hearing on the "rule to show cause," the court entered a "temporary custody order" awarding "temporary joint custody." The father filed a motion to dismiss and made the Florida trial court aware of the Texas proceedings and the Texas judgment. The father's motion to dismiss was denied.

On writ of prohibition, the Third District Court of Appeal concluded that under the Uniform Child Custody Jurisdiction Act, the State of Florida lacked subject matter jurisdiction and that one of the express purposes of the Uniform Child Custody Jurisdiction Act is to "avoid relitigation of custody decisions of other states in this state as far as feasible." The district court held that the trial court should have refused to exercise jurisdiction over the mother's motion for custody where the Texas court had recently considered the same circumstances and where the child and the husband were in Florida only temporarily.

In Newcomb v. Newcomb, the parties obtained a divorce in California where they were living at the time. The mother subsequently moved to Florida and, five months later, the father filed an action in California seeking a change of child custody. Six months after the move to Florida, while the father's action was pending, the mother brought an action in Florida. The trial court determined that it was without jurisdiction to hear the mother's petition. The District court reversed, holding that "Florida was the home state of the minor child when the custodial mother filed the Florida petition; therefore, Florida had jurisdiction to determine whether the California court, which also had jurisdiction, was exercising jurisdiction 'substantially in conformity' with the Uniform Child Custody Jurisdiction Act."

215. Id. at 169.
216. 507 So. 2d 1145 (Fla. 3rd Dist. Ct. App. 1987).
217. Id.
On appeal, the district court reversed the trial court's finding that Florida constituted the "home state" of the child in view of the fact that the wife and the child had resided in Connecticut for the previous 17 months. The district court opined that since Florida was not the "home state," exceptional circumstances must be alleged in order to establish a basis for subject matter jurisdiction in Florida. The court went on to conclude that no such "exceptional circumstances" existed and that the state of Connecticut was better able to evaluate the child's situation. The court ruled that the Florida trial court should have declined to exercise its jurisdiction under the Uniform Child Custody Jurisdiction Act.

In Sommer v. Sommer, the parties and their child were formerly residents of Michigan. In 1985, a Michigan court granted the parties a divorce and awarded custody of the child to the wife. It also gave the husband liberal visitation rights. In June, 1985, the husband filed a petition in Michigan to change custody to himself. Thereafter, in July, 1985, the wife sought permission from the Michigan court to move with the child to Florida. Her petition was granted and she and the child moved to Florida in August, 1985.

Meanwhile, the modification filed by the husband was not brought to trial in Michigan until June, 1986. The Michigan court denied the husband's petition but granted him visitation from June, 1986 to October, 1986 and from May, 1987 to August, 1987. During one such visitation, the wife took the child from the husband, went back to Florida and thereafter refused to allow the child to leave Florida. As a result, the wife was fined and held in contempt by the Michigan court.

The husband then filed suit in Florida asking the Florida court to enforce the Michigan court's decree regarding his visitation rights. The wife filed a petition asking the Florida court for an injunction to prevent the husband from exercising his visitation rights. She did not seek to modify the Michigan decree, but rather alleged that an emergency situation existed because the child was suffering severe psychological problems which might require hospitalization unless his condition stabilized. The Florida trial court entered an order enjoining the husband from removing the child from Florida and altering the husband's visitation rights from those set forth in the Michigan decree.

At the appellate level, the wife argued that Florida has jurisdiction to modify the Michigan decree pursuant to the "emergency subject jurisdiction provisions" of the Uniform Child Custody Jurisdiction Act. The District Court, however, held that such "emergency jurisdiction" does not give a Florida court subject matter jurisdiction to modify a decree of a sister court entered while that state had subject jurisdiction under the Uniform Child Custody Jurisdiction Act.

In Brett v. MacDonald, the father of a minor child was awarded custody in a 1986 decree from a Texas court. He brought the child to Florida in the late summer for a temporary stay and, while in Florida, was served with a "rule to show cause" issued on the mother's motion. At the hearing on the "rule to show cause" the court entered a "temporary custody order" awarding "temporary joint custody." The father filed a motion to dismiss and made the Florida trial court aware of the Texas proceedings and the Texas judgment. The father's motion to dismiss was denied.

On writ of prohibition, the Third District Court of Appeal concluded that under the Uniform Child Custody Jurisdiction Act, the State of Florida lacked subject matter jurisdiction and that one of the express purposes of the Uniform Child Custody Jurisdiction Act is to "avoid relitigation of custody decisions of other states in this state insofar as feasible." The district court held that the trial court should have refused to exercise jurisdiction over the mother's motion for custody where the Texas court had recently considered the same circumstances and where the child and the husband were in Florida only temporarily.

In Newcomb v. Newcomb, the parties obtained a divorce in California where they were living at the time. The mother subsequently moved to Florida and, five months later, the father filed an action in California seeking a change of child custody. Six months after the move to Florida, while the father's action was pending, the mother brought an action in Florida. The trial court determined that it was without jurisdiction to hear the mother's petition. The District court reversed, holding that "Florida was the home state of the minor child when the custodial mother filed the Florida petition; therefore, Florida had jurisdiction to determine whether the California court, which also had jurisdiction, was exercising jurisdiction 'substantially in conformity' with the Uniform Child Custody Jurisdiction Act."

213. 508 So. 2d 773 (Fla. 5th Dist. Ct. App. 1987).
215. Id. at 169.
216. 507 So. 2d 1145 (Fla. 3rd Dist. Ct. App. 1987).
217. Id.
In *Howard v. Howard*, the parties were married in Ohio in 1972. In 1985 the husband came to Florida looking for work. The wife and the parties' two children remained in Ohio. In 1985, the husband filed for divorce in Florida but made no request for the custody of his children in the petition. The wife filed an answer and a request for child support but asserted that Florida did not have jurisdiction to make a custody determination.

The wife subsequently filed a complaint in Ohio for custody determination. The Ohio court stayed that proceeding upon discovering that an action was pending in Florida. In 1986, the Ohio court entered a judgment finding it had jurisdiction to determine custody and visitation.

In the interim, the Florida court rendered a final judgment in 1986 ordering the husband to pay child support and finding that it had jurisdiction to order the wife to allow the husband visitation with the children by virtue of the wife's appearance in the Florida proceeding. The appellate court disagreed.

Analyzing the Uniform Child Custody Jurisdiction Act, the *Howard* court determined that a Florida court would be the appropriate forum for a child custody determination if Florida is the "home state" of the child at the commencement of the proceedings. In *Howard*, however, the children of the parties never lived in Florida and the physical presence of one parent in the state is insufficient by itself to confer custody jurisdiction on a Florida court except in cases of abandonment, abuse, or neglect.

The husband, however, argued that the wife, by appearing before the Florida court, submitted herself and, constructively, her children, to the jurisdiction of the court. Again, the district court disagreed and found that the submission of a person to the jurisdiction of the court does not confer jurisdiction under the Uniform Child Custody Jurisdiction Act.

D. Modification

(1) Parental Responsibility

During the year 1987, several appellate courts attempted to describe and define the type of circumstances which justify a modification of custody. In *Ours v. Ours*, the trial court modified custody upon a finding that the mother's home was "unstable" and the father's home was "apparently stable." The only changed circumstances suggesting instability were that the mother had moved several times and had lived with three unrelated males, the latter of whom she married. The district court reversed, finding that there was no evidence in the record that these changes adversely affected the children such that it would be in their best interest to change custody.

In a decision demonstrating the type of changes upon which a modification of custody may be based, the First District Court of Appeal, in *Wilson v. Wilson*, affirmed a trial court's modification order on the basis of evidence showing that, within a relatively short period after the final judgment, the parties' youngest child began experiencing emotional problems and went from being a "very outgoing, delightful child to a very despondent, quiet child." At a time when the child was especially vulnerable, and contrary to the advice of knowledgeable people — including her school counselor — the wife decided to transfer her daughter to another school because it was more convenient for her work schedule. As a result, the daughter's emotional state became even more acute. The evidence also showed that the wife was living with her married boyfriend and that the child became resistant to returning to that living environment after visitation with her father.

In *Dugan v. Dugan*, the First District held that, "although a trial court may legitimately take into consideration the custodial parent's remorse or contrition for past conduct in fostering an unfit environment for raising a child, such past actions and conduct must . . . at some point outweigh, as a matter of law, [their] promises to do better." Upon such finding, the district court reversed an order denying a change in custody where the custodial parent, after the entry of the final judgment awarding custody, had been institutionalized in a psychiatric hospital, had undergone mental health counseling for several months, had taken anti-depressant medication, and had allowed her child to share a room with a 30 year old alcoholic while she shared a room with her 18 year old boyfriend. The district court felt that such circumstances required the entry of an order modifying custody and that the wife's remorse and sudden recognition of "the significance of

220. 504 So. 2d 1278 (Fla. 1st Dist. Ct. App. 1986).
221. 504 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1986).
222. Id. at 1285.
In *Howard v. Howard*, the parties were married in Ohio in 1972. In 1985 the husband came to Florida looking for work. The wife and the parties’ two children remained in Ohio. In 1985, the husband filed for divorce in Florida but made no request for the custody of his children in the petition. The wife filed an answer and a request for child support but asserted that Florida did not have jurisdiction to make a custody determination.

The wife subsequently filed a complaint in Ohio for a custody determination. The Ohio court stayed that proceeding upon discovering that an action was pending in Florida. In 1986, the Ohio court entered a judgment finding it had jurisdiction to determine custody and visitation.

In the interim, the Florida court rendered a final judgment in 1986 ordering the husband to pay child support and finding that it had jurisdiction to order the wife to allow the husband visitation with the children by virtue of the wife’s appearance in the Florida proceedings. The appellate court disagreed.

Analyzing the Uniform Child Custody Jurisdiction Act, the *Howard* court determined that a Florida court would be the appropriate forum for a child custody determination if Florida is the “home state” of the child at the commencement of the proceedings. In *Howard*, however, the children of the parties never lived in Florida and the physical presence of one parent in the state is insufficient by itself to confer custody jurisdiction on a Florida court except in cases of abandonment, abuse, or neglect.

The husband, however, argued that the wife, by appearing before the Florida court, submitted herself and, constructively, her children, to the jurisdiction of the court. Again, the district court disagreed and found that the submission of a person to the jurisdiction of the court does not confer jurisdiction under the Uniform Child Custody Jurisdiction Act.

D. Modification

(1) Parental Responsibility

During the year 1987, several appellate courts attempted to describe and define the type of circumstances which justify a modification of custody. In *Ours v. Ours*, the trial court modified custody upon a finding that the mother’s home was “unstable” and the father’s home was “apparently stable.” The only changed circumstances suggesting instability were that the mother had moved several times and had lived with three unrelated males, the latter of whom she married. The district court reversed, finding that there was no evidence in the record that these changes adversely affected the children such that it would be in their best interest to change custody.

In a decision demonstrating the type of changes upon which a modification of custody may be based, the First District Court of Appeal, in *Wilson v. Wilson*, affirmed a trial court’s modification order on the basis of evidence showing that, within a relatively short period after the final judgment, the parties’ youngest child began experiencing emotional problems and went from being a “very outgoing, delightful child to a very despondent, quiet child.” At a time when the child was especially vulnerable, and contrary to the advice of knowledgeable people — including her school counselor — the wife decided to transfer her daughter to another school because it was more convenient for her work schedule. As a result, the daughter’s emotional state became even more acute. The evidence also showed that the wife was living with her married boyfriend and that the child became resistant to returning to that living environment after visitation with her father.

In *Dugan v. Dugan*, the First District held that, “although a trial court may legitimately take into consideration the custodial parent’s remorse or contrition for past conduct in fostering an unfit environment for raising a child, such past actions and conduct must . . . at some point outweigh, as a matter of law, [their] promises to do better.” Upon such finding, the district court reversed an order denying a change in custody where the custodial parent, after the entry of the final judgment awarding custody, had been institutionalized in a psychiatric hospital, had undergone mental health counseling for several months, had taken anti-depressant medication, and had allowed her child to share a room with a 30 year old alcoholic while she shared a room with her 18 year old boyfriend. The district court felt that such circumstances required the entry of an order modifying custody and that the wife’s remorse and sudden recognition of “the significance of

220. 504 So. 2d 1278 (Fla. 1st Dist. Ct. App. 1986).
221. 504 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1986).
222. Id. at 1285.
her role as a mother” were insufficient to outweigh the factors requiring a modification of custody.

In a unique custody modification case, the Fourth District Court of Appeal determined that a change in primary physical residence cannot be imposed as a punishment for contempt. In Breeding v. Breeding,\textsuperscript{223} a hearing was scheduled for the purpose of compelling the wife to provide to the husband the address and whereabouts of the parties' children. The wife failed to appear at the hearing although she was given adequate notice. The court held her in criminal contempt of court but failed to utilize the proper procedure for such an adjudication. The trial court also changed the physical residential custody of the children from the wife to the husband “as punishment . . . until further order of the court.”\textsuperscript{224} On appeal, the district court held that the trial court cannot change residential custody purely as a method of punishment; the order was thus reversed.\textsuperscript{225}

In a second unique custody modification case, the First District Court of Appeal determined that the trial court does not have jurisdiction to declare children dependent as part of dissolution of marriage proceedings. In McLean v. McLean,\textsuperscript{226} the trial court dissolved the parties' marriage and adjudicated the parties' minor children dependent. Primary physical residence of the children was awarded to the former wife with supervision to be provided by the Department of Health and Rehabilitative Services. The district court reversed because the adjudication of “dependency” was not accomplished in a dependency proceeding as provided for in Chapter 39, Florida Statutes.\textsuperscript{227}

(2) Relocation

Four “relocation cases” were rendered in 1987 by several district courts of appeal. The Second District Court of Appeal, in Wells v. Wells,\textsuperscript{228} reversed a modification of a final judgment that restricted the residence of the parties' children to Highland County. In Wells, the parties were divorced in 1980. During the three to four year period before the hearing on the husband's motion to modify the final judgment, the wife pursued courses at the University of South Florida to fulfill her life ambition of becoming a librarian. During 1985, however, the wife met a man from Atlanta whom she made plans to marry. The evidence established that it would be impossible for the wife's prospective husband to relocate from Atlanta to Florida. The evidence further established that the wife would not be able to marry if the children were not permitted to relocate. In addition, before the hearing on the motion to modify, the wife had obtained a position as a librarian in Atlanta. That position would result in an increase in her income and would enable her to spend more time with her children. The trial court, however, ruled that the evidence demonstrated that it was in the best interests of the children to continue to reside in Florida. The trial court further found that it was in the best interests of the children to have “continuing contact with the former husband.” The district court framed the question otherwise: “The question is whether the wife should have to give up her plans to marry and her ambition to become a librarian in order to maintain custody of the children.”\textsuperscript{229} Because the evidence established that the wife was “willing to see to it” that her former husband had extensive visitation, and because the wife expressed an agreement to pay for such visitation, the district court found that the residency restriction upon the wife was erroneous and contrary to the best interests of the children.

In the Third District Court of Appeal, in Bragassa v. Bragassa,\textsuperscript{230} an order modifying custody from the wife to the husband because of the wife's relocation was affirmed upon the finding that the court could properly consider the fact that the children went from a position of living in the same city with their father, who had been granted extremely liberal visitation privileges, to a position of living hundreds of miles away, with little opportunity for visitation. The court went on to add that the fact that the wife did not have to receive written permission from the husband before moving did not mean that such a move could not constitute a substantial change of circumstances.

In the Fourth District Court of Appeal, in Pace v. Pace,\textsuperscript{231} the trial court's order permitting the wife to relocate from Florida to Aruba was affirmed. The factual background of the Pace case, however, was quite complex.

\textsuperscript{223} 515 So. 2d 374 (Fla. 4th Dist. Ct. App. 1987).
\textsuperscript{224} Id. at 375.
\textsuperscript{225} The district court carefully pointed out that the wife should not regard its reversal “as an exoneration of her behavior” or as a “condonation of wilful disobedience.” Id.
\textsuperscript{226} 512 So. 2d 1155 (Fla. 1st Dist. Ct. App. 1987).
\textsuperscript{227} Id. FLA. STAT. § 39.404(1) (1985).
\textsuperscript{228} 501 So. 2d 700 (Fla. 2d Dist. Ct. App. 1987).

\textsuperscript{229} Id. at 701.
\textsuperscript{230} 503 So. 2d 556 (Fla. 3d Dist. Ct. App. 1987).
\textsuperscript{231} 510 So. 2d 1031 (Fla. 4th Dist. Ct. App. 1987).
her role as a mother" were insufficient to outweigh the factors requiring a modification of custody.

In a unique custody modification case, the Fourth District Court of Appeal determined that a change in primary physical residence cannot be imposed as a punishment for contempt. In *Breeding v. Breeding*, a hearing was scheduled for the purpose of commanding the wife to provide to the husband the address and whereabouts of the parties' children. The wife failed to appear at the hearing although she was given adequate notice. The court held her in criminal contempt of court but failed to utilize the proper procedure for such an adjudication. The trial court also changed the physical residential custody of the children from the wife to the husband "as punishment ... until further order of the court." On appeal, the district court held that the trial court cannot change residential custody purely as a method of punishment; the order was thus reversed.

In a second unique custody modification case, the First District Court of Appeal determined that the trial court does not have jurisdiction to declare children dependent as part of dissolution of marriage proceedings. In *McLean v. McLean*, the trial court dissolved the parties' marriage and adjudicated the parties' minor children dependent. Primary physical residence of the children was awarded to the former wife with supervision to be provided by the Department of Health and Rehabilitative Services. The district court reversed because the adjudication of "dependency" was not accomplished in a dependency proceeding as provided for in Chapter 39, Florida Statutes.

(2) Relocation

Four "relocation cases" were rendered in 1987 by several district courts of appeal. The Second District Court of Appeal, in *Wells v. Wells*, reversed a modification of a final judgment that restricted the residence of the parties' children to Highland County. In *Wells*, the parties were divorced in 1980. During the three to four year period before the hearing on the husband's motion to modify the final judgment, the wife pursued courses at the University of South Florida to fulfill her life ambition of becoming a librarian. During 1985, however, the wife met a man from Atlanta whom she made plans to marry. The evidence established that it would be impossible for the wife's prospective husband to relocate from Atlanta to Florida. The evidence further established that the wife would not be able to marry if the children were not permitted to relocate. In addition, before the hearing on the motion to modify, the wife had obtained a position as a librarian in Atlanta. That position would result in an increase in her income and would enable her to spend more time with her children. The trial court, however, ruled that the evidence demonstrated that it was in the best interests of the children to continue to reside in Florida. The trial court further found that it was in the best interests of the children to have "continuing contact with the former husband." The district court framed the question otherwise: "The question is whether the wife should have to give up her plans to marry and her ambition to become a librarian in order to maintain custody of the children." Because the evidence established that the wife was "willing to see to it" that her former husband had extensive visitation, and because the wife expressed an agreement to pay for such visitation, the district court found that the residency restriction upon the wife was erroneous and contrary to the best interests of the children.

In the Third District Court of Appeal, in *Bragassa v. Bragassa*, an order modifying custody from the wife to the husband because of the wife's relocation was affirmed upon the finding that the court could properly consider the fact that the children went from a position of living in the same city with their father, who had been granted extremely liberal visitation privileges, to a position of living hundreds of miles away, with little opportunity for visitation. The court went on to add that the fact that the wife did not have to receive written permission from the husband before moving did not mean that such a move could not constitute a substantial change of circumstances.

In the Fourth District Court of Appeal, in *Pace v. Pace*, the trial court's order permitting the wife to relocate from Florida to Aruba was affirmed. The factual background of the *Pace* case, however, was quite complex.

223. 515 So. 2d 374 (Fla. 4th Dist. Ct. App. 1987).
224. Id. at 375.
225. The district court carefully pointed out that the wife should not regard its reversal "as an exonerating of her behavior" or as a "condonation of wilful disobedience." Id.
228. 501 So. 2d 700 (Fla. 2d Dist. Ct. App. 1987).
229. Id. at 101.
230. 505 So. 2d 556 (Fla. 3d Dist. Ct. App. 1987).
231. 510 So. 2d 1031 (Fla. 4th Dist. Ct. App. 1987).
In Pace, the wife instituted a dissolution proceeding in Florida in 1982. The trial court awarded temporary custody of the parties’ five-year-old child to the wife but the husband disappeared with the child. In the final judgment of dissolution, the court determined that it had jurisdiction over the parties and noted that the husband had removed the child through false pretenses and had refused to disclose the child’s whereabouts. The court then awarded custody of the child to the wife and specifically reserved jurisdiction to enforce the order.

In 1983, the husband, who had taken the child to Italy, instituted an action in that country for her custody. The wife appeared personally and was allegedly awarded custody. The husband then again took the child and fled to Florida where he resided with the child until 1984. He then moved to California with the child.

In 1986, the authorities located the child in California, and returned her to Florida pursuant to Florida warrants. The wife then filed a motion for an emergency hearing on the removal of the child from the United States and the husband defended by asserting a California order determining that the child could not move the child from the United States. The Florida trial court, however, found that it had jurisdiction and permitted the wife and child to move to Aruba.

On appeal, the father argued that Florida lacked jurisdiction under the Uniform Child Custody Jurisdiction Act to enter the order permitting the wife’s relocation. The appellate court disagreed and held that “[t]he parties were married in Florida, and raised their child here. The divorce and custody award occurred in Florida. The father’s success in secreting the child for so long should not be rewarded by a change in forum.”

In the Fifth District Court of Appeal, in Jones v. Vrba, the district court reversed an order permitting the wife to relocate with the minor child. In Jones, after the dissolution of marriage between the parties, the wife remarried and again divorced. She married a third time and moved to Largo, Florida. The wife’s third husband was in the Armed Forces and was living in Denver when they first married. He later moved to Clearwater, Florida, and then sought and obtained a transfer to the Pentagon to enhance his career opportunities. The wife sought and received permission from the trial court to permanently remove the parties’ child to Washington, D.C. to be with her new husband.

The district court noted that the father’s “devotion to his son is extraordinary.” After the dissolution of the parties’ marriage the father consistently and thoroughly exercised his visitation rights. In the words of the district court, “[he] did all a father can do in such circumstances to raise and nurture his son and provide the love and guidance only a father can.” The district court opined that the move from Florida would severely restrict the contacts between father and son; that it would be against the intention of the parties at the time of dissolution and against the judgment of the court at the time of dissolution. The court found that the record failed to show any bona fide reason for the removal of the child from the father’s ready access except the mother’s desire to be with the person she chose to marry and travel with as his career requires. The appellate court concluded that such “reasons” are not sufficient to warrant a change of residence.

E. Grandparental Visitation Rights

Two decisions concerning the rights of grandparents to visitation with their grandchildren were rendered in 1987, one by the First District Court of Appeal and the other by the Second District Court of Appeal.

In Mauldin v. Richter, the First District affirmed the trial court’s order dismissing a grandparent’s petition for visitation with her grandchild.

In Mauldin, a 1981 final judgment of dissolution of marriage dissolved the marriage between Mrs. Mauldin’s son and his wife. Custody of the couple’s child, Mrs. Mauldin’s granddaughter, was awarded to the wife. The child’s father, Mrs. Mauldin’s son, was given visitation rights. At that time, there was no statutory provision for a grant of grandparental visitation rights and, therefore, none were sought or awarded. Thereafter, the former wife remarried and, with the consent of both natural parents, a final judgment was entered whereby the former wife’s new husband adopted the child. The grandmother, Mrs. Mauldin, was not notified of the proceedings and, eleven months after the adoption became final, she filed a petition for grandparental visitation.

The appellate court reviewed sections 752.01(2) and 752.07, Flor-
In Pace, the wife instituted a dissolution proceeding in Florida in 1982. The trial court awarded temporary custody of the parties’ five year old child to the wife but the husband disappeared with the child. In the final judgment of dissolution, the court determined that it had jurisdiction over the parties and noted that the husband had removed the child through false pretenses and had refused to disclose the child’s whereabouts. The court then awarded custody of the child to the wife and specifically reserved jurisdiction to enforce the order.

In 1983, the husband, who had taken the child to Italy, instituted an action in that country for her custody. The wife appeared personally and was allegedly awarded custody. The husband then again took the child and fled to Florida where he resided with the child until 1984. He then moved to California with the child.

In 1986, the authorities located the child in California, and returned her to Florida pursuant to Florida warrants. The wife then filed a motion for an emergency hearing on the removal of the child from the United States and the husband defended by asserting a California order determining that the wife could not remove the child from the United States. The Florida trial court, however, found that it had jurisdiction and permitted the child to move to Aruba.

On appeal, the father argued that Florida lacked jurisdiction under the Uniform Child Custody Jurisdiction Act to enter the order permitting the wife’s relocation. The appellate court disagreed and held that “[t]he parties were married in Florida, and raised their child here. The divorce and custody award occurred in Florida. The father’s success in secreting the child for so long should not be rewarded by a change in forum.”

In the Fifth District Court of Appeal, in Jones v. Vrba, the district court reversed an order permitting the wife to relocate with the minor child. In Jones, after the dissolution of marriage between the parties, the wife remarried and again divorced. She married a third time and moved to Largo, Florida. The wife’s third husband was in the Armed Forces and was living in Denver when they first married. He later moved to Clearwater, Florida, and then sought and obtained a transfer to the Pentagon to enhance his career opportunities. The wife sought and received permission from the trial court to permanently remove the parties’ child to Washington, D.C. to be with her new husband.

The district court noted that the father’s “devotion to his son is extraordinary.” After the dissolution of the parties’ marriage the father consistently and thoroughly exercised his visitation rights. In the words of the district court, “[h]e did all a father can do in such circumstances to raise and nurture his son and provide the love and guidance that a father can.” The district court opined that the move from Florida would severely restrict the contacts between father and son; that it would be against the intention of the parties at the time of dissolution and against the visitation rights. The court found that the record failed to show any bona fide reason for the removal of the child from the father’s ready access except the mother’s desire to be with the person she chose to marry and travel with as his career requires. The appellate court concluded that such “reasons” are not sufficient to warrant a change of residence.

E. Grandparental Visitation Rights

Two decisions concerning the rights of grandparents to visitation with their grandchildren were rendered in 1987, one by the First District Court of Appeal and the other by the Second District Court of Appeal.

In Mauldin v. Richter, the First District affirmed the trial court’s order dismissing a grandparent’s petition for visitation with her grandson.

In Mauldin, a 1981 final judgment of dissolution of marriage dissolved the marriage between Mrs. Mauldin’s son, and his wife. Custody of the couple’s child, Mrs. Mauldin’s granddaughter, was awarded to the wife. The child’s father, Mrs. Mauldin’s son, was given visitation rights. At that time, there was no statutory provision for a grant of grandparental visitation rights and, therefore, none were sought or awarded. Thereafter, the former wife remarried and, with the consent of both natural parents, a final judgment was entered whereby the former wife’s new husband adopted the child. The grandmother, Mrs. Mauldin, was not notified of the proceedings and, eleven months after the adoption became final, she filed a petition for grandparental visitation.

The appellate court reviewed sections 752.01(2) and 752.07, Flor-

232. Id. at 1032.
233. 515 So. 2d 1080 (Fla. 5th Dist. Ct. App. 1987).
234. Id. at 1081.
235. Id.
236. 515 So. 2d 1030 (Fla. 1st Dist. Ct. App. 1987).
ida Statutes, and was "compelled" to conclude that Mrs. Mauldin's failure to seek an award of visitation prior to the adoption precluded her from seeking such visitation after the adoption. Because of this conclusion, the district court opined that:

[A] grandparent of a child who is subsequently adopted by a step-parent has no avenue to obtain visitation rights with that grandchild unless such visitation rights were previously secured by that grandparent following the parents' dissolution of marriage and prior to the child's adoption. Conceivably a grandparent might not feel any need to secure court-ordered visitation rights before the time of the child's parent's remarriage or the stepparent's adoption of the child. The fact of an impending adoption, however, may be the catalyst for the necessity of such an award, yet Chapter 752 contains no provision for notice to the grandparent that an adoption is eminent.

The First District went on in the Mauldin case to describe its concerns about the nature of its decision:

The outcome of this case, albeit legally correct, troubles us. The obvious intent of Chapter 752 is to preserve the grandparental relationship when the stability of a child's familial life is threatened by divorce or other such potentially disruptive circumstances. And yet, the operation of this chapter in conjunction with Chapter 63 has the lamentable outcome of barring the appellant grandmother from ever being assured of visitation with her granddaughter. We can foresee numerous other circumstances where this chapter's operation will serve to eviscerate the very familial relationships it seeks to preserve and foster, and we question whether these unfortunate results, such as in the instant case, were anticipated by the drafters of Chapter 752.

The Second District Court of Appeal held to the contrary in Beard v. Hamilton. Mr. and Mrs. Beard sought visitation with their grandchild. Their daughter had died and their former son-in-law, the father, had remarried. The stepmother adopted the Beard's grandchild in 1984 at which time the grandparents had no court ordered visitation.

rights. The grandparents did have, at the time of adoption, a motion for visitation pending since May, 1983. No notice of the adoption proceedings was provided to the grandparents.

Following the initial order of adoption, the grandparents' first petition for visitation rights was granted but that order was orally vacated upon the trial court's conclusion that the grandparents "lost standing" by virtue of the adoption. The grandparents did not appeal this order but, rather, filed a new motion for visitation in October, 1984. This second motion was dismissed. The district court initially found that the motion for grandparental visitation rights filed in October, 1984, was properly filed to assert the grandparents' visitation rights established by Chapter 752, Florida Statutes.

The court then turned to a review of section 63.172(1)(B), Florida Statutes, which, in absolute terms, severs all previously existing family relationships upon adoption. The court perceived an ambiguity in that statute regarding whether it applies to the status of grandparents where one of the natural parents retained custody of the child. The court recognized that the adoption statutes seek "to assure that the sev- erance of family ties by adoption be complete so as to protect the 'new family union which the law had created,'" but went on to opine that where one of the natural parents is married to the adopting stepparent, the need for such an utter severance of family ties between the grandparents and the grandchild is lacking.

Having so concluded, the court commenced a review of section 752.07, Florida Statutes, a chapter enacted as a means to remedy, in part, the failure of Chapter 63, Florida Statutes, to adequately protect the family bonds between grandparents in the context of stepparent adoptions. The court noted that Chapter 752 abrogates the absolute terms of section 63.172, Florida Statutes, by providing for the survival of a grandparent's rights to visitation where a stepparent adopts the minor child. However, Chapter 752, by its own terms, preserves such rights, only where "visitation rights have been granted to a grandparent pursuant to § 752.01, Florida Statutes."

238. 515 So. 2d at 1032.
239. Id.
240. 512 So. 2d 1088 (Fla. 2d Dist. Ct. App. 1987).
243. 512 So. 2d at 1090 (quoting Jones v. Allen, 277 So. 2d 599 (Fla. 2d Dist. Ct. App. 1973)).
ida Statutes, and was "compelled" to conclude that Mrs. Mauldin's failure to seek an award of visitation prior to the adoption precluded her from seeking such visitation after the adoption. Because of this conclusion, the district court opined that:

[A] grandparent of a child who is subsequently adopted by a step-parent has no avenue to obtain visitation rights with that grandchild unless such visitation rights were previously secured by that grandparent following the parents' dissolution of marriage and prior to the child's adoption. Conceivably a grandparent might not feel any need to secure court-ordered visitation rights before the time of the child's parent's remarriage or the stepparent's adoption of the child. The fact of an impending adoption, however, may be the catalyst for the necessity of such an award, yet Chapter 752 contains no provision for notice to the grandparent that an adoption is eminent.

The First District went on in the Mauldin case to describe its concern about the nature of its decision:

The outcome of this case, albeit legally correct, troubles us. The obvious intent of Chapter 752 is to preserve the grandparental relationship when the stability of a child's familial life is threatened by divorce or other such potentially disruptive circumstances. Yet, the operation of this chapter in conjunction with Chapter 63 has the lamentable outcome of barring the appellant grandmother from ever being assured of visitation with her granddaughter. We can foresee numerous other circumstances where this chapter's operation will serve to eviscerate the very familial relationships it seeks to preserve and foster, and we question whether these unfortunate results, such as in the instant case, were anticipated by the drafters of Chapter 752.

The Second District Court of Appeal held to the contrary in Beard v. Hamilton. Mr. and Mrs. Beard sought visitation with their grandchild. Their daughter had died and their former son-in-law, the father, had remarried. The stepmother adopted the Beard's grandchild in 1984 at which time the grandparent had no court ordered visitation.

rights. The grandparents did have, at the time of adoption, a motion for visitation pending since May, 1983. No notice of the adoption proceedings was provided to the grandparents.

Following the initial order of adoption, the grandparents' first petition for visitation rights was granted but that order was orally vacated upon the trial court's conclusion that the grandparents "lost standing" by virtue of the adoption. The grandparents did not appeal this order but, rather, filed a new motion for visitation in October, 1984. This second motion was dismissed. The district court initially found that the motion for grandparental visitation rights filed in October, 1984, was properly filed to assert the grandparents' visitation rights established by Chapter 752, Florida Statutes.

The court then turned to a review of section 63.172(1)(B), Florida Statutes, which, in absolute terms, severs all previously existing family relationships upon adoption. The court perceived an ambiguity in that statute regarding whether it applies to the status of grandparents where one of the natural parents retained custody of the child. The court recognized that the adoption statutes require "to assure that the severance of family ties by adoption be complete so as to protect the new family union which the law had created," but went on to opine that where one of the natural parents is married to the adopting stepparent, the need for such an utter severance of family ties between the grandparents and the grandchild is lacking.

Having so concluded, the court commenced a review of section 752.07, Florida Statutes, a chapter enacted as a means to remedy, in part, the failure of Chapter 63, Florida Statutes, to adequately protect the family bonds between grandparents in the context of stepparent adoptions. The court noted that Chapter 752 abrogates the absolute terms of section 63.172, Florida Statutes, by providing for the survival of a grandparent's rights to visitation where a stepparent adopts the minor child. However, Chapter 752, by its own terms, preserves such rights, only where "visitiation rights have been granted to a grandparent pursuant to § 752.01, Florida Statutes." In the Beard case, as

---

238. 515 So. 2d at 1032.
239. Id.
240. 512 So. 2d 1088 (Fla. 2d Dist. Ct. App. 1987).
243. 512 So. 2d at 1090 (quoting Jones v. Allen, 277 So. 2d 599 (Fla. 2d Dist. Ct. App. 1973)).
in *Mauldin*, the grandparents did not have an order of visitation rights under § 752.01, Florida Statutes, at the time of the child's adoption. Whereas the *Mauldin* court found the lack of such an order to be fatal to the grandparent's claim for visitation rights, the *Beard* court held otherwise:

We believe that neither the legislative intent of Chapter 752 nor notions of fairness would be served by affirming the order that dismissed the grandparents' motion for visitation rights. Rather, we believe that § 752.07 is designed to protect orders granting visitation rights under § 752.01 from the legal effects, if any, of a subsequent adoption by the stepparent. Section 752.07 provides clearly that grandparental visitation rights cannot be terminated by a stepparent adoption. Further, we believe that the presence of a pre-existing order of visitation is not required to gain such rights.

F. Third Party Custody Cases

Three decisions relative to custody cases involving third parties against natural parents were rendered in 1987. The first of such cases, *Wilkes v. Crum*, involved a dispute between the child's natural father and the sister and brother-in-law of the child's deceased mother. The father and mother met in 1982 while the father was serving in the United States Marine Corps. Thereafter, the father continued to see the mother while on leave. A child was born in 1983 at which time the father was stationed in Hawaii. During the mother's pregnancy and for the first ten months of the child's life, the mother lived with her sister and brother-in-law. After hearing of his daughter's birth, the father returned to Florida to be with her and the mother, but, after 30 days, he was ordered to sea duty at his assigned duty station in Hawaii. After the child's birth, the mother began receiving support from the father and she was able to move into her own apartment. She arranged daycare care for the child and her sister and brother-in-law took care of the child during the evenings and the weekends that she worked. Sadly, the mother was killed in an automobile accident in May, 1985. Upon learning of her death, the father obtained an early release from the Marine Corps and returned to Florida to be with his daughter.

The sister and brother-in-law filed a petition for appointment as guardian and the father filed an answer and cross-petition for appointment as guardian. The trial court appointed the sister- and brother-in-law as temporary guardians and, subsequently, an evidentiary hearing was held on the issue of appointment of a permanent guardian for the child.

At that hearing the trial court reviewed a report by the Department of Health and Rehabilitative Services that found all parties to be suitable parents. The report was "very positive" about the father and indicated that all references and neighbors contacted were positive in regard to the father's character and abilities. The Department of Health and Rehabilitative Services concluded that the father was "a capable and confident young man who is genuinely interested in the well-being of his natural daughter."

The trial court also received testimony at the evidentiary hearing from a child psychologist who testified that the child had formed a parent-child bond with her deceased mother's sister and brother-in-law. The psychologist opined that the loss of her natural mother, combined with the loss of her new parental figures, could have severe long-term effects on the child.

The trial judge entered an order appointing the sister- and brother-in-law as permanent guardians. In the order he stated that the child would be better off remaining with the sister and brother-in-law. Notwithstanding this ruling, the trial judge found the father to be "a fit parent for custody."

The district court of appeal reversed this order finding that a different standard must be applied when a custody dispute is between a parent and a third party because the primary consideration in such cases must be the right of a natural parent to enjoy the custody, fellowship, and companionship of his offspring. As such, the court concluded, the natural parent of a child born out of wedlock should be denied custody only where it is demonstrated that the parent is disabled from exercising custody or that such custody will, in fact, be detrimental to the welfare of the child.

In *Cherry v. Cherry*, the trial court's award of custody to a child's grandparents was reversed as being an order outside of the jurisdiction of the court. In *Cherry*, a 1984 dissolution decree awarded joint...
in Mauldin, the grandparents did not have an order of visitation rights under § 752.01, Florida Statutes. at the time of the child's adoption. Whereas the Mauldin court found the lack of such an order to be fatal to the grandparent's claim for visitation rights, the Beard court held otherwise:

[W]e believe that neither the legislative intent of Chapter 752 nor notions of fairness would be served by affirming the order that dismissed the grandparents' motion for visitation rights. Rather, we believe that § 752.07 is designed to protect orders granting visitation rights under § 752.01 from the legal effects, if any, of a subsequent adoption by the stepparent . . . . Section 752.07 provides clearly that grandparental visitation rights cannot be terminated by a stepparent adoption. Further, we believe that the presence of a pre-existing order of visitation is not required to gain such rights.***

F. Third Party Custody Cases

Three decisions relative to custody cases involving third parties against natural parents were rendered in 1987. The first of such cases, Wilkes v. Crum, involved a dispute between the child's natural father and the sister and brother-in-law of the child's deceased mother. The father and mother met in 1982 while the father was serving in the United States Marine Corps. Thereafter, the father continued to see the mother while on leave. A child was born in 1983 at which time the father was stationed in Hawaii. During the mother's pregnancy and for the first ten months of the child's life, the mother lived with her sister- and brother-in-law. After hearing of his daughter's birth, the father returned to Florida to be with her and the mother, but, after 30 days, he was ordered to sea duty at his assigned duty station in Hawaii.

After the child's birth, the mother began receiving support from the father and she was able to move into her own apartment. She arranged daytime care for the child and her sister and brother-in-law took care of the child during the evenings and the weekends that she worked. Sadly, the mother was killed in an automobile accident in May, 1985. Upon learning of her death, the father obtained an early release from the Marine Corps and returned to Florida to be with his daughter.

The sister and brother-in-law filed a petition for appointment as guardian and the father filed an answer and cross-petition for appointment as guardian. The trial court appointed the sister- and brother-in-law as temporary guardians and, subsequently, an evidentiary hearing was held on the issue of appointment of a permanent guardian for the child.

At that hearing the trial court reviewed a report by the Department of Health and Rehabilitative Services that found all parties to be suitable parents. The report was "very positive" about the father and indicated that all references and neighbors contacted were positive in regard to the father's character and abilities. The Department of Health and Rehabilitative Services concluded that the father was "a capable and confident young man who is genuinely interested in the well-being of his natural daughter."

The trial court also received testimony at the evidentiary hearing from a child psychologist who testified that the child had formed a parent-child bond with her deceased mother's sister and brother-in-law. The psychologist opined that the loss of her natural mother, combined with the loss of her new parental figures, could have severe long-term effects on the child.

The trial judge entered an order appointing the sister- and brother-in-law as permanent guardians. In the order he stated that the child would be better off remaining with the sister and brother-in-law. Notwithstanding this ruling, the trial judge found the father to be "a fit parent for custody."

The district court of appeal reversed this order finding that a different standard must be applied when a custody dispute is between a parent and a third party because the primary consideration in such cases must be the right of a natural parent to enjoy the custody, fellowship, and companionship of his offspring. As such, the court concluded, the natural parent of a child born out of wedlock should be denied custody only where it is demonstrated that the parent is disabled from exercising custody or that such custody will, in fact, be detrimental to the welfare of the child.

In Cherry v. Cherry, the trial court's award of custody to a child's grandparents was reversed as being an order outside of the jurisdiction of the court. In Cherry, a 1984 dissolution decree awarded joint

247. Id.
248. 512 So. 2d at 1091.
250. 508 So. 2d 782 (Fla. 5th Dist. Ct. App. 1987).
custody to the parties, with primary residence to the former husband and liberal visitation to the former wife. In June, 1986, the former wife filed a petition to modify the decree by changing the child's residence to her residence because she alleged the former husband had secreted the child from her and had denied her visitation rights.

While the modification suit was pending, the former husband allowed his parents to have temporary custody of the child. Thereafter, in July, a final hearing was held following which the trial court denied the former wife's petition and placed the child in the custody of the paternal grandparents, granting both parties overnight visitation privileges.

The Fifth District Court of Appeal initially noted that grandparents do not have any standing to seek custody of a child in a dissolution case pursuant to Chapter 61. The court went on to note, however, that if grandparents have custody of a child, then they are entitled to notice and an opportunity to be heard and, through filing proper pleadings with the court, they may be granted custody if the child is dependent, or the parents unfit. However, the court reiterated that “[i]n a custody dispute between a natural parent and another person, the rights of the parent are paramount unless there is a showing the parent is unfit, or that for some substantial reason, the parent's custody will be detrimental to the child's welfare.”

G. Visitation Rights

In Crippen v. Crippen, the court held that the mother's frustration of the father's visitation rights with his children, standing alone, will not justify a change of custody. In Crippen, the parties were divorced in 1982 and the mother was awarded custody of the parties' two children. In 1985 the mother sought permission to move with the children to New York. However, before filing the petition, she had removed the children to New York in violation of the final judgment. Nevertheless, her petition was subsequently approved.

Following the mother's move to New York, a series of post-dissolution proceedings continued between the parties involving three orders adjudicating the mother in contempt for her failure to permit visitation. In 1986, the father, having failed in his efforts to obtain visitation, filed a petition for change of custody. A copy of the petition and a notice of hearing was served upon the mother's Florida attorney and the mother appeared, through counsel, at the hearing.

At the time of the hearing on the father's petition for change of custody, the father testified that despite repeated attempts, he had been denied any contact with his children. Solely on the basis of this testimony, the trial court changed custody of the children from the mother to the father.

The District Court reversed, holding:

The record, in the instant case, supports a finding that the mother has frustrated the father's visitation with their children. Nevertheless, [the father] has failed to show that wresting custody from the mother and placing it with the father would promote the best interest of the children. The trial court was understandably frustrated with the mother's apparent defiance of his court orders to permit visitation. Certainly, willfully depriving a non-custodial parent of visitation rights is a serious matter. It requires the court's prompt attention and is a factor to be considered in a custody dispute. It cannot, however, constitute the sole reason for a change of custody. The affront to the trial court's authority should be subordinated to the welfare of the children. We need not preserve the dignity of the court at the expense of the minor children. There must be evidence that the interest of the children will be promoted by a change of custody. Changing the custody of a child is not a device to be used to obtain compliance with other court orders.

In a similar vein, in Peterson v. Jason, an order terminating a father's visitation rights with his minor child until such time as he complies with certain child support orders was reversed. The court stated, "[i]t is the general rule that visitation may not be changed or denied based merely on non-payment of child support." The Peterson court, however, went further and determined that although "the right to visitation does not terminate upon an excusable failure to pay support, in the face of a wilful and intentional refusal to pay child support which is detrimental to the welfare of the child, the right to visitation may be terminated." Based upon this conclusion, the court determined that a trial court can terminate a parent's right to visitation with a minor child for non-payment of support when the non-payment has been will-

253. Id. at 1340 (quoting Agudo v. Agudo, 411 So. 2d 249, 251 (Fla. 3d Dist. Ct. App. 1982)).
254. 513 So. 2d 1339 (Fla. 4th Dist. Ct. App. 1987).
255. Id. at 1351.
256. Id. (emphasis in original).
custody to the parties, with primary residence to the former husband and liberal visitation to the former wife. In June, 1986, the former wife filed a petition to modify the decree by changing the child's residence to her residence because she alleged the former husband had secreted the child from her and had denied her visitation rights.

While the modification suit was pending, the former husband allowed his parents to have temporary custody of the child. Thereafter, in July, a final hearing was held following which the trial court denied the former wife's petition and placed the child in the custody of the paternal grandparents, granting both parties overnight visitation privileges.

The Fifth District Court of Appeal initially noted that grandparents do not have any standing to seek custody of a child in a dissolution case pursuant to Chapter 61. The court went on to note, however, that if grandparents have custody of a child, then they are entitled to notice and an opportunity to be heard and, through filing proper pleadings with the court, they may be granted custody if the child is dependent, or the parents unfit. However, the court reiterated that “[i]n a custody dispute between a natural parent and another person, the rights of the parent are paramount unless there is a showing the parent is unfit, or that for some substantial reason, the parent’s custody will be detrimental to the child’s welfare.”

G. Visitation Rights

In Crippen v. Crippen, the court held that the mother's frustration of the father’s visitation rights with his children, standing alone, will not justify a change of custody. In Crippen, the parties were divorced in 1982 and the mother was awarded custody of the parties' two children. In 1985 the mother sought permission to move with the children to New York. However, before filing the petition, she had removed the children to New York in violation of the final judgment. Nevertheless, her petition was subsequently approved.

Following the mother's move to New York, a series of post-dissolution proceedings continued between the parties involving three orders adjudicating the mother in contempt for her failure to permit visitation. In 1986, the father, having failed in his efforts to obtain visitation, filed a petition for change of custody. A copy of the petition and a notice of hearing was served upon the mother's Florida attorney and the mother appeared, through counsel, at the hearing.

At the time of the hearing on the father's petition for change of custody, the father testified that despite repeated attempts, he had been denied any contact with his children. Solely on the basis of this testimony, the trial court changed custody of the children from the mother to the father.

The District Court reversed, holding:

The record, in the instant case, supports a finding that the mother has frustrated the father's visitation with their children. Nevertheless, [the father] has failed to show that wresting custody from the mother and placing it with the father would promote the best interest of the children. The trial court was understandably frustrated with the mother's apparent defiance of his court orders to permit visitation. Certainly, willfully depriving a non-custodial parent of visitation rights is a serious matter. It requires the court's prompt attention and is a factor to be considered in a custody dispute. It cannot, however, constitute the sole reason for a change of custody. The affront to the trial court's authority should be subordinated to the welfare of the children. We need not preserve the dignity of the court at the expense of the minor children. There must be evidence that the interest of the children will be promoted by a change of custody. 'Changing the custody of a child is not a device to be used to obtain compliance with other court orders.'

In a similar vein, in Peterson v. Jason, an order terminating a father's visitation rights with his minor child until such time as he complies with certain child support orders was reversed. The court stated, "[i]t is the general rule that visitation may not be changed or denied based merely on non-payment of child support." The Peterson court, however, went further and determined that although "the right to visitation does not terminate upon an excusable failure to pay support, in the face of a wilful and intentional refusal to pay child support which is detrimental to the welfare of the child, the right to visitation may be terminated." Based upon this conclusion, the court determined that a trial court can terminate a parent's right to visitation with a minor child for non-payment of support when the non-payment has been willful.

251. Id. at 783.
252. 508 So. 2d 1339 (Fla. 4th Dist. Ct. App. 1987).
253. Id. at 1340 (quoting Agudo v. Agudo, 411 So. 2d 249, 251 (Fla. 3d Dist. Ct. App. 1982)).
255. Id. at 1352.
ful, intentional and detrimental to the welfare of the child.

XI. Special Equity

A. Entitlement

In *Shepard v. Shepard*, the Fourth District Court of Appeal upheld the trial court's award of a special equity in real property which the husband transferred to the wife and himself as tenants in common three weeks prior to the marriage. The court found that although the property was transferred prior to the marriage the determinative factor in awarding the special equity was the fact that the husband had provided all of the consideration for the acquisition of the property and therefore was entitled to 100% interest in the real estate at the time of dissolution of marriage.

The court rejected the wife's argument that the husband was not entitled to an interest in the property greater than that which he held at the time of the marriage. To accept such argument would result in too mechanical a reading of the case law which defines a special equity as "vested interest in property that is either "brought into the marriage or acquired during the marriage because of contributions of services or funds over and above normal marital duties." In *Shepard*, the court reasoned that there is no basis for treating a pre-marital transfer any differently than a transfer after the marriage had been solemnized.

B. The Landay Formula

Two cases in 1987 evidenced both the trial court and appellate court's apparent continuing difficulty in applying the formula recited in the Florida Supreme Court decision of *Landay v. Landay*. used in calculating a spouse's special equity once one has been found to exist. In *Neustein v. Neustein*, the court found "merit ... to the wife's argument that the trial court either failed to apply, or applied incorrectly, the formula for computing a special equity set out in *Landay*." In *Neustein*, the husband contributed $12,000.00 toward the purchase of the marital residence at a price of $64,000.00. The appellate court remanded the case to the trial court after determining the husband's special equity as follows:

Applying *Landay*, the husband's special equity in the home is "one-half the ratio which that spouse's contribution bears to the entire consideration... or $6,000.00; not $12,000.00 as found by the trial court. Thus, on the sale of the home, the husband will receive half the sales price plus $6,000.00, and the wife will receive half the sales price less $6,000.00, giving the husband full credit for the down payment from his funds, as he will receive $12,000.00 more than the wife." 

A reading of *Landay*, however, indicates that the appellate court's calculation is erroneous because it merely awards to the husband one-half of his initial investment as a "special equity" rather than the ratio that the investment bore to the purchase price.

The First District Court grappled with the application of the *Landay formula in Roberts v. Roberts*. In *Roberts*, the wife contributed $7,207.45 from funds she received as a death benefit to the down payment for the purchase of a residence in Illinois at a cost of $35,200.00. She acquired the residence prior to the marriage and it

257. 526 So. 2d 95 (Fla. 4th Dist. Ct. App. 1987).
258. Id. at 97 (quoting Antonini v. Antonini, 473 So. 2d 739, 741 (Fla. 1st Dist. Ct. App. 1985)).
259. 429 So. 2d 1197 (Fla. 1983).
260. 503 So. 2d 439 (Fla. 4th Dist. Ct. App. 1987).
261. Id. at 44.
ful, intentional and detrimental to the welfare of the child.

XI. Special Equity

A. Entitlement

In *Shepard v. Shepard*, the Fourth District Court of Appeal upheld the trial court's award of a special equity in real property which the husband transferred to the wife and himself as tenants in common three weeks prior to the marriage. The court found that although the property was transferred prior to the marriage the determinative factor in awarding the special equity was the fact that the husband had provided all of the consideration for the acquisition of the property and therefore was entitled to 100% interest in the real estate at the time of dissolution of marriage.

The court rejected the wife's argument that the husband was not entitled to an interest in the property greater than that which he held at the time of the marriage. To accept such argument would result in too mechanical a reading of the case law which defines a special equity as "vested interest in property that is either "brought into the marriage or acquired during the marriage because of contributions of services or funds over and above normal marital duties." In *Shepard*, the court reasoned that there is no basis for treating a pre-marital transfer any differently than a transfer after the marriage had been solemnized.

B. The Landay Formula

Two cases in 1987 evidenced both the trial court and appellate court's apparent continuing difficulty in applying the formula recited in the Florida Supreme Court decision of *Landay v. Landay* used in calculating a spouse's special equity once one has been found to exist. In *Neustein v. Neustein*, the court found "merit . . . to the wife's argument that the trial court either failed to apply, or applied incorrectly, the formula for computing a special equity set out in *Landay*. " In *Neustein*, the husband contributed $12,000.00 toward

the purchase of the marital residence at a price of $64,000.00. The appellate court remanded the case to the trial court after determining the husband's special equity as follows:

Applying *Landay*, the husband's special equity in the home is "one-half the ratio which that spouse's contribution bears to the entire consideration" . . . , or $6,000.00; not $12,000.00 as found by the trial court. Thus, on the sale of the home, the husband will receive half the sales price plus $6,000.00, and the wife will receive half the sales price less $6,000.00, giving the husband full credit for the down payment from his funds, as he will receive $12,000.00 more than the wife.

A reading of *Landay*, however, indicates that the appellate court's calculation is erroneous because it merely awards to the husband one-half of his initial investment as a "special equity" rather than the ratio that the investment bore to the purchase price.

The First District Court grappled with the application of the *Landay* formula in *Roberts v. Roberts*. In *Roberts*, the wife contributed $7,207.45 from funds she received as a death benefit to the down payment for the purchase of a residence in Illinois at a cost of $35,200.00. She acquired the residence prior to the marriage and it

262. Id.

263. In Neustein, the trial court simply gave the husband a special equity equal to the total amount of cash contributed by the Husband to the acquisition of the residence, i.e., $12,000.00. The appellate court, in turn, decided that the husband was only entitled to one-half of his investment, or $6,000.00. In doing so, the court dealt what the Landay court thought was the element of "fairness" built into the formula. According to *Landay*, because the ratio or percentage which the contribution bears to the entire consideration is used to determine the dollar value of the contributing spouse's interest, "situations of both appreciation and depreciation are adequately covered" by the formula. In Neustein, no consideration was given to the fact that the initial investment made by the husband appreciated or depreciated in proportion to the appreciation or depreciation of the overall value of the property. The husband in Neustein should have received an interest in the residence, including his special equity, in a percentage, rather than a dollar amount. If the court intended to apply the Landy formula, which it expressly stated was its goal, then the husband should have been awarded a special equity of 9.375%, for a total interest in the property of 59.375%. ($12,000.00 divided by $64,000.00 equals 18.75% times one-half equals 9.375%, plus 50% equals 59.375%).


265. The wife argued that the amount of her contribution to the down payment totaled $7,207.45, whereas the trial court found that the contribution amounted to $7,207.45. The district court remanded the matter for the trial court to hear additional
was titled solely in her name. The husband lived in the house by himself prior to the marriage and subsequently both parties resided there. The parties jointly contributed to the monthly mortgage payments. The house was later sold at a price of $41,006.50. Prior to the sale, the parties jointly purchased another home with a down payment provided in the form of a loan from the wife's father. The loan was fully satisfied with a portion of the proceeds from the sale of the initial residence. The remainder of the proceeds were deposited into a joint bank account. Thereafter, the second residence was sold and the proceeds, amounting to $10,683.27, were deposited into another joint account where they remained until a third residence was purchased in Florida approximately one year later and which was the marital residence at the time dissolution of marriage proceedings were instituted. The Florida residence was purchased at a cost of $47,500.00 with a down payment of $10,776.51.

The trial court in Roberts found that the wife was entitled to a special equity in the marital residence by virtue of the contribution of non-marital funds to the acquisition of the residence. The trial court determined that the wife's special equity in the residence amounted to 8.7% by calculating one-half of the ratio of the wife's contribution to the purchase of the original house in Illinois to the sales price of such house ($7,207.45 divided by $41,006.50 times one-half equals 8.7%).

The First District Court of Appeal found that the trial court erred in applying the Landay formula to the purchase price inasmuch as Landay clearly states that it is the ratio of the contribution to the entire consideration which is to be used. The court found that the wife's special equity would be equal to one-half of the ratio which her contribution to the purchase of the Illinois home bears to the entire consideration for the purchase of the Florida home; i.e., $7,207.45 divided by $47,500.00 times one-half equals 7.6%. This result also appears erroneous upon a careful reading of Landay.266

XII. Conclusion

Case law in the area of marital and family law during the year 1987 appears to have resolved some issues while leaving others still open to question.

Although equitable distribution cases will be controlled by statute after October 1, 1988, the movement of the appellate courts toward equality of distribution between the parties should nevertheless be recognized by the trial courts in interpreting the statutory language. The continuing efforts on the part of the district courts to clarify the circumstances under which permanent or rehabilitative alimony is to be awarded should serve as a guide to the bench and bar alike. Lastly, decisions from the Florida Supreme Court in the areas of the proper use of life insurance to secure alimony awards and the status of workers compensation and personal injury awards as marital or non-marital assets are awaited. When rendered, they will provide further guidance to matrimonial law practitioners in this ever-evolving area of the law.
was titled solely in her name. The husband lived in the house by himself prior to the marriage and subsequently both parties resided there. The parties jointly contributed to the monthly mortgage payments. The house was later sold at a price of $41,006.50. Prior to the sale, the parties jointly purchased another home with a down payment provided in the form of a loan from the wife's father. The loan was fully satisfied with a portion of the proceeds from the sale of the initial residence. The remainder of the proceeds were deposited into a joint bank account. Thereafter, the second residence was sold and the proceeds, amounting to $10,683.27, were deposited into another joint account where they remained until a third residence was purchased in Florida approximately one year later and which was the marital residence at the time dissolution of marriage proceedings were instituted. The Florida residence was purchased at a cost of $47,500.00 with a down payment of $10,776.51.

The trial court in Roberts found that the wife was entitled to a special equity in the marital residence by virtue of the contribution of non-marital funds to the acquisition of the residence. The trial court determined that the wife's special equity in the residence amounted to 8.7% by calculating one-half of the ratio of the wife's contribution to the purchase of the original house in Illinois to the sales price of such house ($7,207.45 divided by $41,006.50 times one-half equals 8.7%).

The First District Court of Appeal found that the trial court erred in applying the Landay formula to the purchase price inasmuch as Landay clearly states that it is the ratio of the contribution to the entire consideration which is to be used. The court found that the wife's special equity would be equal to one-half of the ratio which her contribution to the purchase of the Illinois home bears to the entire consideration for the purchase of the Florida home; i.e., $7,207.45 divided by $47,500.00 times one-half equals 7.6%. This result also appears erroneous upon a careful reading of Landay.366

Evidence on this issue.

266. Although the court had good intentions in attempting to correct the trial court's error, it also erred in failing to recognize that the wife in fact had three special equities which needed to be calculated to determine her interest in the marital residence. As the wife's initial contribution was invested in the first Illinois home, then the second residence and finally the marital residence, it increased or decreased in value as the overall value of each of the properties appreciated or depreciated. By taking the amount of the wife's initial investment in the first property and applying it against the consideration paid to purchase the third property, the court totally eliminated the appreciation/depreciation factor which the Landay court determined was built into the