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ALIMONY AND PROPERTY SETTLEMENT IN FLORIDA

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Upon the granting of a divorce decree, the court is confronted with two separate but related problems: (1) the right of the divorced wife to alimony and (2) the division of the property owned by the spouses. Although these problems are somewhat interrelated, their solutions are based upon different principles. Misapplication of these principles can result in reduced awards for the client as well as a confusion of property rights.

ALIMONY

The ensuing discussion of alimony is concerned with permanent alimony as distinguished from temporary payments for support and maintenance during suit.

At common law, an absolute divorce precluded the granting of alimony, on the theory that the duty to support the wife no longer existed.[1] The law has, of course, been changed by statute in Florida.[2] The cases construing an earlier version of this statute adopted the theory that the husband owes a duty to support the wife even after dissolution of the marriage.[3] The duty was said to continue until the husband dies[4] or the wife remarries.[5] Although the power to grant alimony was established by statute, an early case held that a court of equity has the inherent power to grant alimony because "the right to decree alimony is incidental to the power to grant divorces."[6]

With the exception of the last sentence, which was added in 1947, Florida's alimony statute has remained substantially unchanged since 1828. The current version reads:[7]

"In every decree of divorce in a suit by the wife, the court

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[1]Gill v. Gill, 107 Fla. 588, 145 So. 758 (1933).

[2]FLA. STAT. §65.08 (1957).

[3]Phelan v. Phelan, 12 Fla. 449 (1868); Chaires v. Chaires, 10 Fla. 308 (1864).

[4]Allen v. Allen, 111 Fla. 733, 150 So. 237 (1933).

[5]Carlton v. Carlton, 87 Fla. 460, 100 So. 745 (1924).

[6]Chaires v. Chaires, 10 Fla. 308, 312 (1864).

[7]FLA. STAT. §65.08 (1957).

> shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife. In any award of permanent alimony the court shall have jurisdiction to order periodic payments or payment in a lump sum."

The Florida Supreme Court, in construing an early version of this statute, held that the granting of alimony was restricted to cases in which the wife instituted the suit.[8] It further declared that alimony could not be granted if the divorce was predicated on the fault of the wife.[9] These early restrictions were subsequently modified in *Gill v. Gill*,[10] which held that if the husband had injured the wife, thereby impairing her ability to support herself, alimony could be granted even though the divorce was predicated on the wife's fault. More recent cases have completely abolished the early restrictions. Alimony may now be granted even though the wife is entirely at fault[11] and regardless of whether she brought suit.[12] The only bar that persists is the statutory prohibition against granting alimony to an adulterous wife.

As evidenced by the statute, the awarding of alimony is discretionary with the chancellor. However, the Florida Supreme Court has stated that the husband's financial ability to pay and the wife's need are controlling factors.[13] Both of these factors must be present in order to allow an award.[14] The husband's ability to pay usually depends upon the amount of his income, but the fact that he has no income does not prevent an award provided he has earning capacity.[15] The fact that a wife has income or property separate and distinct from her husband will not necessarily prevent an award,[16] although it does tend to diminish her need for support.

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[8]Phinney v. Phinney, 77 Fla. 850, 82 So. 357 (1919).
[9]*Ibid.*
[10]107 Fla. 588, 145 So. 758 (1933).
[11]Cowan v. Cowan, 147 Fla. 473, 2 So.2d 869 (1941).
[12]*Ibid.*
[13]Jacobs v. Jacobs, 50 So.2d 169 (Fla. 1951).
[14]*Ibid.*
[15]Chastain v. Chastain, 73 So.2d 66 (Fla. 1954).
[16]Chesnut v. Chesnut, 160 Fla. 83, 33 So.2d 730 (1948).

An over-all view of the cases reveals, as might be expected, that when the divorce is predicated upon the fault of the husband, alimony is very likely to be granted. In fact, the Court has held that if the husband is the cause of the divorce, and the wife's need and the husband's ability to pay are established, it is error to deny an award of permanent alimony.[17] Justice Adams expresses the sentiment of the Court in *Montgomery v. Montgomery*:[18]

> "We cannot agree that alimony should be denied simply because the chancellor is of the opinion that *in this case* it is inequitable since defendant is young, attractive and able to support herself. Equitable discretion must be exercised in keeping with established principles of law. This husband was found guilty of violating his marital vows. He destroyed his family structure by his own wilful and wrongful act; the law exacts that he now be required to make contribution to rehabilitate, insofar as money will permit, the one he has wronged . . . . The general rule is that where the husband has caused the separation he should remain liable for support."

As indicated above, a divorce predicated on the wife's fault will not preclude the awarding of alimony, but it will diminish the possibility of an award.[19] In situations in which the equities are fairly well balanced, the wife's earning capacity and ability to support herself may well be the determinative factors. For example, Justice Roberts stated in *Kahn v. Kahn*:[20]

> "[U]ntil recent years, a divorced wife had little prospect of being able to work and earn a livelihood. . . . Times have now changed. . . . We do not construe the marriage status, once achieved, as conferring on the former wife of a ship-wrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess to making her own way."

No discussion has been presented concerning the effect of children on the alimony award, this factor being purposely avoided. Child

[17]Newman v. Newman, 94 So.2d 841 (Fla. 1957).
[18]52 So.2d 276, 277 (Fla. 1951).
[19]Longino v. Longino, 67 So.2d 203 (Fla. 1953).
[20]78 So.2d 367, 368 (Fla. 1955).

support is a separate problem, and in many instances the chancellor's award includes an amount for child support as well as alimony. Of necessity there is some overlapping, because that which is necessary for the support and care of the children will indirectly benefit the mother. Useless as it is to generalize, it would seem that the greater the allotment for child support the smaller the award for alimony.

LUMP SUM AWARD

Prior to the 1947 amendment of the alimony statute, an award of permanent alimony was required to be a continuous allotment of sums payable at regular periods for the wife's support.[21] Although the amendment permits a lump sum payment for permanent alimony, the door is only slightly ajar; the Florida Supreme Court in *Yandell v. Yandell* said:[22]

> "We are constrained to the view that ordinarily the better practice is to direct periodic payments of permanent alimony and a lump sum award should be made only in those instances where some special equities might require it or make it advisable; for instance, where the wife may have brought to the marriage, or assisted her husband in accumulating, property and where it is clearly established that the husband has assets sufficient in amount to pay the gross award."

The Court went on to declare that an important consideration is whether the husband is in a financial position to make such payment without disturbing the maintenance of his business or profession. Procedure-wise, in order to obtain a decree for a lump sum award, the wife's claim or counterclaim should contain a prayer for such an award.[23] Evidence of the wife's age and life expectancy is also necessary.[24]

Because the lump sum award may take the form of cash[25] or real property,[26] the alimony award may appear on its face to be a property settlement. The propriety of a lump sum alimony award, though de-

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[21]Welsh v. Welsh, 160 Fla. 380, 35 So.2d 6 (1948).
[22]39 So.2d 554, 556 (Fla. 1949).
[23]Goode v. Goode, 76 So.2d 794, 796 (Fla. 1954) (dictum).
[24]*E.g.*, Yandell v. Yandell, 39 So.2d 554 (Fla. 1949).
[25]Reid v. Reid, 68 So.2d 821 (Fla. 1953).
[26]Bezanilla v. Bezanilla, 65 So.2d 754 (Fla. 1953).

termined by principles similarly applicable to property settlements, is nevertheless a separate factor to be considered by the chancellor when determining the rights of the parties. The courts, in deciding whether to grant lump sum alimony awards, have often considered the amount of the wife's contributions to the husband's estate as a determinative factor.[27] This factor is also considered in determining her right to a special equity in the husband's property in regard to a property settlement. The wife's contribution to the husband's property should not be a factor in determining whether a lump sum alimony payment should be decreed.[28] If the wife has made a special contribution, this fact can be adequately recognized in determining the property settlement. The cases have not always distinguished these separate rights when arriving at a final decree that includes both a division of property and lump sum alimony. In the usual divorce case it is impractical for the chancellor to assess the right to alimony and the right to a certain division of property on separate principles or by using a different yardstick for each. The distinction may well be very important, however, in cases involving substantial property rights, and failure to recognize it can conceivably result in an inadequate award to the wife.

What factors, then, should determine whether a lump sum payment, as opposed to periodic payments, should be decreed? A *sine qua non* should be the husband's ability to make a lump sum payment without damaging his business or profession.[29] If the husband's past instability indicates a probability of his reneging on future payments, a lump sum award is desirable.[30] On the other hand, if it be proved that the wife is likely to squander a lump sum payment intended for her support, this fact will militate against a lump sum decree, especially if there is no showing of the husband's unreliability and there are children in the wife's custody to be cared for.

If there is no showing of unreliability on either side, a factor which might be considered is the likelihood of the wife's remarriage. Periodic payments cease when the wife remarries.[31] But a lump sum

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[27]*E.g.*, Yandell v. Yandell, 39 So.2d 554 (Fla. 1949).

[28]Because income from property tends to diminish the wife's need, the amount awarded the wife as her share in the property settlement may bear indirectly on the quantum of her periodic or lump sum award. See Taylor v. Taylor, 100 Fla. 1009, 130 So. 713 (1930).

[29]Yandell v. Yandell, 39 So.2d 554 (Fla. 1949).

[30]Lindley v. Lindley, 84 So.2d 17 (Fla. 1953).

[31]*E.g.*, Friedman v. Schneider, 52 So.2d 420 (Fla. 1951).

payment, computed by finding the present value of periodic payments during the wife's life expectancy,[32] is final and irretrievable[33] even if the wife remarries shortly after the lump sum decree. Therefore, the likelihood of remarriage should be considered by the chancellor and a lump sum decree denied if something like unjust enrichment to the wife seems likely to result. Perhaps it is the difficulty of determining the probability of the wife's remarriage that has caused the courts to cast about for other criteria for granting a lump sum award. It is believed that a solution to this problem can be found in following the often-expressed preference for periodic payments[34] in every case except those in which the husband is found to be unreliable or the chancellor is willing to make a determination that the wife is unlikely to remarry.

Property Settlement

The spouses may, in contemplation of divorce, enter into a property settlement agreement which can be incorporated into the divorce decree. In the absence of such an agreement, however, the chancellor must determine the property rights of the parties. Three classes of property are involved: property owned outright by the wife, property owned by the husband, and property held as an estate by the entirety.

Determination of what property is owned outright by the wife depends on a number of factors. Did the wife own the property prior to the marriage? If acquired during the marriage was the property purchased with her own funds? Is title to the property in her own name? As to the last situation, however, it may be shown that the wife held title merely as a convenience and that the property was meant to be owned jointly. In such case the chancellor can declare that the property was held as a tenancy by the entirety.[35]

Real property owned by the spouses as a tenancy by the entirety presents few problems. Prior to the enactment of any statutory provisions concerning this situation, the Florida Supreme Court upheld a decree which declared that the divorced spouses would thenceforward hold the property as tenants in common.[36] Since 1941 the same

[32]White v. White, 75 Iowa 218, 39 N.W. 277 (1888); Reid v. Reid, 74 Iowa 681, 39 N.W. 102 (1888). *Contra,* Lowry v. Lowry, 170 Ga. 349, 153 S.E. 11 (1930).

[33]Yandell v. Yandell, 39 So.2d 554, 556 (Fla. 1949) (dictum).

[34]Yandell v. Yandell, 39 So.2d 554 (Fla. 1949).

[35]Francis v. Francis, 133 Fla. 495, 182 So. 833 (1938).

[36]*Ibid.*

result has been effectuated by statute: "[I]n cases of estates by entirety, the tenants, upon divorce, shall become tenants in common."[37] The statute is self-executing, so that if the divorce decree is silent as to such property, the same result occurs.[38] It should be reiterated that even though the property is not held as an estate by the entirety the chancellor may make a finding that such is the case.[39] Although the chancellor cannot compel the parties to convey their half-interests as tenants in common of various lots in order to achieve the result of having each spouse become the sole owner of one half the property,[40] the parties can request a partition proceeding incidental to the divorce suit.[41]

Property owned outright by the husband or by the husband and wife as tenants by the entireties at the time of the divorce may be subject to a special equity in the wife. This doctrine, first set forth in *Carlton v. Carlton*,[42] is ably discussed in Carson's *Law of the Family, Marriage and Divorce in Florida*:[43]

> "Where the wife has made material contributions to her husband's property, she is entitled to a special equity in it; thus where the evidence shows that over a period of years she contributed materially in funds and in industry toward the acquisition of the home and other property of the husband, a reasonable allowance should be made to her from the husband's property for her maintenance and support. 'Whatever consequences the wife may be compelled under the law to suffer for her marital derelictions by the severance of the bonds of matrimony, she is not required to incur the forfeiture of any of her already vested equitable property rights which were acquired by her while the matrimonial barque was sailing on smoother seas.' This allowance by the court of an amount to the wife for her special equity in the property and business of the husband toward which she has contributed materially in funds and in industry through a period of years does not preclude her from obtaining such allowance even though her husband has

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[37]FLA. STAT. §689.15 (1957).
[38]Powell v. Metz, 55 So.2d 915 (Fla. 1952).
[39]Francis v. Francis, 133 Fla. 495, 182 So. 833 (1938).
[40]Boles v. Boles, 59 So.2d 871 (Fla. 1952).
[41]Strauss v. Strauss, 148 Fla. 23, 3 So.2d 727 (1941).
[42]87 Fla. 460, 100 So. 745 (1924).
[43]At 74-76 (1950).

> divorced her for adultery and the statute says that no adulterous wife shall be entitled to alimony. This allowance technically is not alimony, but is construed to be her special equity in her husband's property which is over and above the performance of her ordinary marital duties. The same rule applies where a divorce is granted to the husband for the wife's extreme cruelty or where a divorce is granted to the wife for the extreme cruelty of the husband."

A relevant factor in the special equity doctrine seems to be the length of the marriage. The doctrine has been successfully invoked in cases in which the marriage had lasted seventeen to thirty-five years;[44] and in a case in which the special equity was denied[45] the Court placed emphasis on the fact that the marriage had lasted for only eight years. One case involving an elderly couple declared that a property settlement consisting of a special equity was appropriate when the husband was of precarious health, since any alimony award would terminate on the death of the husband.[46] Presumably the Court entertains the view that if the wife can endure the old bear for thirty years she ought to have some reward.

The special equity doctrine is most often a consideration when the property to be divided is held solely in the husband's name, but property held as an estate by the entirety may also be subject to this doctrine.[47] Thus the court may award the wife part or all of the husband's record interest in property owned by them as tenants by the entireties to the extent that she establishes a special equity therein.[48]

In summation, the practitioner should keep in mind the distinction between alimony and property settlement. Although the problem is not critical in the case of divorces involving small estates, the consequences of ignoring the distinction and muddling through on the equities can be quite harmful to the client when large estates are involved.

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[44]Engebretsen v. Engebretsen, 151 Fla. 372, 11 So.2d 322 (1942); Windham v. Windham, 144 Fla. 563, 198 So. 202 (1940); Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932); Carlton v. Carlton, 78 Fla. 252, 83 So. 87 (1919).

[45]Welsh v. Welsh, 160 Fla. 380, 35 So.2d 6 (1948).

[46]Dupree v. Dupree, 156 Fla. 455, 23 So.2d 544 (1945).

[47]Wood v. Wood, 104 So.2d 879 (3d D.C.A. Fla. 1958); Benson v. Benson, 102 So.2d 748, 753 (3d D.C.A. Fla. 1958) (dictum).

[48]*Ibid.*

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