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Domestic Relations

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DOMESTIC RELATIONS

I. DIVORCE

A. Legislation

While continuous separation for a specified period of time as a basis for divorce has gained wide acceptance among the American jurisdictions,[1] South Carolina divorce law up until now has rested entirely on the concept of marital fault. This year, however, the state followed the trend by adopting a fifth ground for divorce: *three years' separation.*[2] The constitutional amendment and the subsequent statute are premised on the judgment that a marriage which has failed in fact should be legally terminable without the presence of morally condemnable conduct. A couple wanting a divorce can now get one without the traditional wife-beating, desertion, adultery, collusion, or forum-shopping. Three years' separation — a long period unsuited to easy, "quick" divorces — is sufficient.

B. Jurisdiction

In *Carnie v. Carnie*[3] the wife's attorney initiated a divorce proceding against the husband by mailing copies of the summons and complaint to him while he was stationed with the military in Iran. A divorce decree, accompanied by alimony, child support, and attorney's fees, was granted on grounds of desertion. Al-

1. For a partial list *see* M. PLOSCOWE & D. FREED, FAMILY LAW 193 (1963).

2. Following approval of the new ground by referendum, the amendment was ratified and then S.C. CODE ANN. § 20-101 (1962) was amended by R258, May 2, 1969, so that it now reads:

> No divorce from the bonds of matrimony shall be granted except upon one or more of the following grounds, to wit:
> 1) Adultery;
> 2) Desertion for a period of one year;
> 3) Physical cruelty;
> 4) Habitual drunkenness; *provided,* that this ground shall be construed to include habitual drunkenness caused by the use of any narcotic drug; or
> 5) On the application of either party if and when the husband and wife have lived separate and apart without cohabitation for a period of three continuous years. A plea of res judicata or a recrimination with respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground.

The amendment states that the time for computing the separation period can be made without regard to the effective date of the act or ratification of the amendment.

3. 167 S.E.2d 297 (S.C. 1969).

though the wife was a resident of South Carolina, her husband was not, nor did he own property in the state.

Upon his return the husband appeared specially, claimed the court lacked personal jurisdiction, but moved to strike only the provisions of the decree granting alimony, child support, and attorney's fees, leaving the divorce itself intact. The motion was refused, but on appeal the South Carolina Supreme Court reversed, stating that

> a divorce decree which grants, in addition to the divorce, alimony, child support and attorney's fees against a nonresident defendant personally is, to that extent, a judgment in personam, which may not be rendered without jurisdiction of the person . . . .
>
> . . . .
>
> [C]onstructive service in itself, whether made by publication or by actual service of process upon the defendant outside the state, is insufficient to give jurisdiction to render a judgment for alimony against a nonresident which will be binding upon him except as to his property within the jurisdiction.[4]

The court doubted that jurisdiction had been obtained at all and further observed that a divorce should not have been granted on the scanty evidence presented,[5] even if the lower court had gained jurisdiction. Nevertheless, since the initial divorce had been granted long ago, the court declined to reverse the divorce portion of the decree, fearing that some innocent party might have married in reliance upon it.

In a brief concurring opinion Justice Littlejohn flatly stated that the lower court had never obtained jurisdiction and that the entire decree was void.

C. Desertion

Bond v. Bond[6] presented the court with several issues, the first of which concerned the sufficiency of the evidence supporting a decree of divorce on grounds of desertion. The court reversed, finding that the wife and children left the husband by agreement because of his financial straits and poor health, intending to reunite when conditions improved. Separation by mutual

4. *Id.* at 299, *quoting* 24 AM. JUR. 2d *Divorce and Separation* § 544 (1966).
5. *See* Machado v. Machado, 220 S.C. 90, 66 S.E.2d 629 (1951).
6. 166 S.E.2d 302 (S.C. 1969).

consent doesn't constitute desertion, the essential elements of which are: (1) cessation from cohabitation; (2) intent on the part of the absenting spouse not to resume it; (3) absence of consent by the deserted spouse; and (4) absence of justification.[7] The court found no showing that an intent to end the marriage had existed for a period of one year before the institution of the action. The court further held that it retained the power to determine the other issues in the case although the wife was not entitled to a divorce, and upheld a grant of alimony[8] over the husband's objections. An award of alimony is not precluded upon a proper showing even though the wife fails to show that she is entitled to a divorce on the ground of desertion.[9] She was also awarded attorney's fees even though she was gainfully employed. It was uncontradicted that her earnings were insufficient to pay her attorney. The court found it unnecessary to decide whether under the circumstances the wife's failure to sustain her action for divorce deprived her of the right to an allowance of attorney's fees but stated instead that such an allowance could be sustained as an incident to the other issues of the case — custody and support of the children,[10] and claim for alimony.[11] The court pointed out that gainful employment does not automatically deprive a wife of the allowance of attorney's fees. Such an allowance remains in the discretion of the trial court.[12]

D. Reconciliation and Condonation

If the plaintiff in a divorce action is shown to have conditionally pardoned the offending spouse, whether explicitly or implicitly, for the matrimonial transgression upon which the suit is based, then the defense of condonation is available.[13] After struggling through the appellant's brief in *Neves v. Neves*[14] the court concluded that there was no evidence of condonation and affirmed the wife's divorce decree. The defendant had failed to plead condonation and was thus limited to arguing that such a defense was patently revealed in the record. After

7. Cleveland v. Cleveland, 238 S.C. 547, 121 S.E.2d 98 (1961).
8. Referred to in some earlier cases under these circumstances as separate maintenance.
9. Machado v. Machado, 220 S.C. 90, 66 S.E.2d 629 (1951).
10. Sovereign v. Sovereign, 361 Mich. 528, 106 N.W.2d 146 (1961); Annot., 82 A.L.R.2d 1088 (1962) (cited by the court).
11. Smith v. Smith, 51 S.C. 379, 29 S.E. 227 (1898).
12. Nienow v. Nienow, 245 S.C. 542, 141 S.E.2d 648 (1965).
13. Odom v. Odom, 248 S.C. 144, 149 S.E.2d 353 (1966).
14. 167 S.E.2d 568 (S.C. 1969).

reaffirming its identification of condonation as "an affirmative defense which should be pleaded"[15] the court nonetheless proceeded to examine the record for traces of forgiving conduct by the wife. The court could find none, yet seemed ready, despite the defendant's faulty pleadings, to reverse had condonation manifested itself in the record.

E. Adultery

Adultery must be proved by a clear preponderance of the evidence.[16] On appeal the court does not limit itself to deciding whether the trial judge could reasonably have found what he did, but will review the record anew for the required degree of proof. In *Mann v. Mann*[17] the court reiterated the characteristics of the clear and positive quantum of proof required: it must identify the time, place, and circumstances of the act — yet it may be partly or wholly circumstantial.[18] Although the court declined to illuminate its opinion with a review of the record in *Mann*, it seems inescapable that the plaintiff's inability to pinpoint the exact occasion of his wife's infidelity was fatal to his cause.[19]

II. CUSTODY

The South Carolina Supreme Court twice reversed lower court decisions granting child custody to an adulterous wife. Two justices dissented on both occasions.

In *Johnson v. Johnson*[20] the husband won a divorce on grounds of adultery and was granted custody of his two young sons by the Juvenile and Domestic Relations Court. The wife appealed to the Court of Common Pleas, which affirmed the divorce decree but awarded custody to the wife. On appeal the South Carolina Supreme Court reinstated the decision of the Juvenile and Domestic Relations Court granting custody to the father, since it was not contrary to the preponderance of the

15. *Id.* at 570.
16. Odom v. Odom, 248 S.C. 144, 146, 149 S.E.2d 353, 354 (1966); Lee v. Lee, 237 S.C. 532, 535, 118 S.E.2d 171, 173 (1961).
17. 165 S.E.2d 632 (S.C. 1969).
18. Odom v. Odom, 248 S.C. 144, 149 S.E.2d 353 (1966). *See also Domestic Relations, 1966 Survey of South Carolina Law,* 18 S.C.L. REV. 56 (1966).
19. The husband's proof was good enough for the master, whose decision was first affirmed by the Juvenile and Domestic Relations Court, then reversed by the circuit court. The testimony is convincing, yet it lacks the specificity the supreme court requires. *See* Record at 62ff.
20. 251 S.C. 420, 163 S.E.2d 229 (1968).

evidence. The father, an engineer with a comfortable income, was of uncontested fitness. In concluding that he should receive custody the court relied heavily on facts of record such as: (1) the husband desired his wife to refrain from working and to stay home to care for the children; (2) during the divorce proceedings he continued his employment with his father-in-law, and his wife admitted that her parents were still fond of him; (3) he included a statement of his continuing love for his wife in their separation agreement; (4) after the separation agreement was concluded, the wife and her partner in adultery saw each other frequently and traveled together. Such a record amply supported the family court judge's findings, which should not be disturbed unless without evidentiary support or against the clear weight of the evidence.[21]

Justices Bussey and Brailsford dissented, recommending a rehearing since the record contained no evidence specifically directed toward the question of fitness.

In *Adams v. Miller*[22] the father was granted a Virginia divorce on grounds of desertion. His wife received custody while he retained visitation rights. But for about a year and a half after the divorce, the husband did not know the whereabouts of his ex-wife and children. When he finally found her living with a married man, he instituted custody proceedings but lost in the trial court. In reversing that judgment and granting custody to the father, the supreme court noted that the wife had engaged in immoral, illegal acts by committing adultery, fraudulently renouncing dower by designating herself as the wife of her lover, and concealing her and the children's whereabouts.

The court distinguished *Langston v. Langston*[23] — another custody case involving an adulterous wife. In *Langston* the court had refused to reverse an award of custody to the adulteress, since she had been a good mother before and after her

21. S.C. CONST. art. 5, section 4 allows the supreme court to review findings of fact as well as law in equity cases. The South Carolina Supreme Court, however has followed an apparently self-imposed limitation by frequently holding that findings of fact made by a master or referee and concurred in by the trial court will not be disturbed on appeal unless they appear to be without evidentiary support or are against the clear preponderance of the evidence. *See, e.g.,* Oswald v. Oswald, 230 S.C. 299, 95 S.E.2d 493 (1956). The court must decide issues according to its own view of the evidence when there is no concurrent finding below. *See, e.g.,* McLaughlin v. McLaughlin, 244 S.C. 265, 136 S.E.2d 537 (1964).

22. Smith's Advance Sheet #8 (March 1, 1969).

23. 250 S.C. 363, 157 S.E.2d 858 (1967).

infatuation. But in the present case the mother's long-term notorious cohabitation, concealment of whereabouts, and fraudulent renunciation of dower were considered decisive. The majority concluded: "We cannot agree that the best interest of the children would be served by granting custody to one whose recent life is such an example of flagrant violation of the law and the morality of contemporary society."[24]

While giving lip service to the principle that the best interest of the child controls, the court seemed more interested in assessing sexual blameworthiness than in ascertaining the effect of the mother's conduct on her children. Persuasively dissenting, Justice Bussey, joined by Justice Lewis, noted the absence of anything in the record showing that the impropriety of their mother's conduct had been brought home to her children, aged 3 and 6 at the time. The majority saw Mrs. Adams as a scandalous adulteress who had no compunctions about falsely renouncing dower. Justice Bussey saw a woman whose *husband's* conduct, not her own, "was the greater causative factor in the disruption of the marriage,"[25] and drove her to behavior which, though "far from excusable, . . . is at least understandable."[26]

The court disclaimed any interest in formulating a per se rule which would automatically deny custody to an adulteress, yet, as Justice Bussey pointed out, it is difficult to see how this decision was guided by a factual consideration of the children's welfare. By holding that a child's best interest cannot lie with a mother like this one because she is guilty "of flagrant violation of the law and the morality of contemporary society,"[27] the majority seems to reject the possibility that adulterous cohabitation could ever consist with fitness as a parent.[28]

III. ADOPTION

South Carolina's five-year-old adoption act[29] provides that both parents, if living, must consent to the adoption of their

24. Adams v. Miller, Smith's Advance Sheet #8 (March 1, 1969) at 16.
25. *Id.* at 17.
26. *Id.*
27. *Id.* at 16.
28. The fact that the defendant's lover, a physician, had almost completed the process of obtaining a divorce from his wife when the cohabitation began and married the defendant as soon as he was free to do so made little impression on the majority but seemed significant to Justice Bussey. *Quaere* whether the majority's "morality of contemporary society" standard for assessing the child's best interests would require an opposite result if the contest were between members of a sub-culture or socio-economic class which attached no stigma to cohabitation under these circumstances.
29. S.C. CODE ANN. §§ 10-2587.1 to -2585.18 (Supp. 1968).

legitimate child before the adoption can be decreed. But such consent is not required from one whose parental rights have been judicially terminated, "or from one who has been made a party to the adoption proceeding and duly served. . . ."[30] In *Goff v. Benedict*,[31] paternal grandparents sought to adopt their granddaughter after her parents' divorce. Although the divorce decree had granted custody to the father, the child had lived with her grandparents continuously since her parents' initial separation in 1962. When the mother refused to consent to the proposed adoption, she was "made a party to the adoption proceeding and duly served." The trial court granted the adoption despite the mother's continued refusal to consent.

In reversing the judgment of the lower court, the South Carolina Supreme Court reasoned that a parent's refusal to consent to the child's adoption by someone else cannot be ignored simply by making the unwilling parent a party to the proceeding. This statutory provision is not intended to by-pass the objections of the child's non-consenting parent but to permit a contest on whether the non-consenter has been guilty of conduct forfeiting parental rights.

> The mere fact that the [mother] was made a party to this action and duly served does not give the court the authority to forfeit her rights as a parent of this child without a judicial determination, upon a sufficient legal ground, that [her] parental right should be forfeited and severed and the best interest of the child will be served and promoted [thereby].[32]

IV. CHILD ABANDONMENT

It is now unlawful for *any* parent or guardian of a minor child under sixteen to wilfully abandon the child.[33] This new statute appears to differ from earlier ones[34] in that it applies to both parents, not just the father.

30. S.C. CODE ANN. § 10-2587.7(a) (Supp. 1968).
31. 165 S.E.2d 269 (S.C. 1969).
32. *Id.* at 271.
33. R114, March 5, 1969, provides that:
> It shall be unlawful for any parent, male or female, or any other person legally responsible for the care and support of a minor child under the age of sixteen years to wilfully abandon such child. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished within the discretion of the court.

34. S.C. CODE ANN. §§ 15-1385 and 20-303 (1962) provided for punishment of any able-bodied *man* who failed to provide for his family or abandoned them.

V. FAMILY COURT RULES

By virtue of the Family Court Act[35] a set of rules was adopted to govern practice and procedure in the Family Courts.[36] Twenty rules covering all aspects of procedure were promulgated; only the more important ones will be mentioned here.

Rule 7 provides for a child to be appointed an attorney in delinquency cases if his family can't afford to retain one and if "there is any probability that the child may be committed to an institution or removed from the home of the parents. . . ." Rule 10 states that children will not be allowed in the courtroom nor will they be allowed to testify in actions of parents against each other except when the child's testimony is essential to establish the acts alleged. An informal courtroom demeanor is provided for in Rule 11. According to Rule 12 the following documents and statements shall be admissable in evidence without the presence of the person or institution issuing the document: (1) a statement of school attendance signed by an authorized school official; (2) a school report card; (3) a physician's statement of treatment; (4) a home investigation report or any other report required by the court; and (5) an employee's statement of earnings. Rule 12 further permits contradictory evidence to be offered by the party claiming prejudice by the admission of these items. Rule 14 allows the judge to issue *ex parte* orders for temporary child support, temporary custody, and temporary restraining orders to protect the child from damaging acts.

It should be noted that the Circuit Court Rules,[37] not the new Family Court Rules, apply in adoption and divorce proceedings according to Rule 20.

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35. S.C. CODE ANN. §§ 15-1095 to -1095.52 (Supp. 1968).
36. S.C. FAM. CT. R. 1-20, Smith's Advance Sheet #29 (Dec. 7, 1968).
37. 15 S.C. CODE ANN. (1962).