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Domestic Relations

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DOMESTIC RELATIONS

I. DIVORCE

A. *Physical Cruelty*

Brown v. Brown[1] involved an appeal from a decree of the Richland County Court granting a divorce to the husband on the ground of physical cruelty. Though the marriage had been a discordant one from the beginning, the husband alleged only two instances of cruelty by his wife, both of which were largely unsubstantiated and strongly rebutted by her testimony. In determining that the evidence was insufficient to support the decree, the supreme court resolved no new issues of law but reaffirmed the well settled rule that physical cruelty under the statute[2] must be "such a course of physical treatment as endangers life, limb or health, and renders cohabitation unsafe."[3] The complaining spouse must establish this conduct by a preponderance of the evidence and unless the circumstances are unusual, the allegations should be corroborated.[4] In its decision the court noted that it was very unlikely that the husky husband was put in fear of his life by the wife,[5] especially since his own testimony revealed that he could have safely walked away from each encounter. The court was confident that the incidents complained of were mutually provoked and that the retaliatory acts of each spouse were not disproportionate to the conduct of the other.[6]

B. *Condonation*

Langston v. Langston[7] was an action for divorce commenced by the husband in February 1965 on the ground of adultery. By an amended answer, filed eight months later,

1. 250 S.C. 114, 156 S.E.2d 641 (1967).
2. S.C. CODE ANN. § 20-101 (1962).
3. Brown v. Brown, 215 S.C. 502, 508, 56 S.E.2d 330, 333 (1949).
4. Crowder v. Crowder, 246 S.C. 299, 143 S.E.2d 580 (1965); McLaughlin v. McLaughlin, 244 S.C. 265, 136 S.E.2d 537 (1964).
5. 250 S.C. at 121, 156 S.E.2d at 645. It is difficult to prove the existence of fear where a large, healthy husband charges his wife with physical cruelty. Barstow v. Barstow, 223 S.C. 136, 74 S.E.2d 541 (1953); 1 W. NELSON, DIVORCE AND ANNULMENT, § 6.18 (2d ed. 1945).
6. *See, e.g.*, Godwin v. Godwin, 245 S.C. 370, 140 S.E.2d 593 (1965); Miller v. Miller, 225 S.C. 274, 82 S.E.2d 119 (1954).
7. 250 S.C. 363, 157 S.E.2d 858 (1967).

the wife admitted the acts of adultery charged but alleged, as an affirmative defense, condonation by the husband during the intervening period. The circuit court upheld the wife's defense, dismissed the complaint, and ordered the husband to pay child support and alimony. On appeal the supreme court reversed, holding that the husband's condonation had not been proved by a preponderance of the evidence.[8] There was a sharp conflict in the testimony of the witnesses and the parties on the issue of condonation and the court found, in the light of the surrounding facts and circumstances, that the testimony of the husband was by far the most credible. The award of alimony was automatically reversed since there can be no award of alimony to a spouse divorced on grounds of adultery.[9] The appeal also questioned the propriety of granting primary child custody and certain items of property to the wife. The court found no error in the custody award on the grounds that the wife had been a good mother to the children since the action was begun and there was no evidence that the existing arrangement was detrimental to the parties or the children.

C. Alimony

In *Blakely v. Blakely*[10] the wife was granted a divorce on grounds of physical cruelty and awarded alimony in the sum of $1,200 to be paid over a twelve month period. Some time later and before any payments were made, the husband sought relief from the award, alleging a change of conditions. After a hearing the court reaffirmed the total amount but

8. S.C. CONST. art. 5, § 4 gives the supreme court power in equity cases to review findings of fact as well as law. This section reads in part:

> And said court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases where the facts are settled by a jury and the verdict not set aside, and shall constitute a court for the correction of errors at law under such regulations as the General Assembly may by law prescribe.

Following what appears to be a self-imposed limitation, our court has frequently held that in cases where findings of fact have been made by a master or referee and concurred in by the circuit court, such findings will not be disturbed on appeal unless they appear to be without evidentiary support or are against the clear preponderance of the evidence. *E.g.*, Oswald v. Oswald, 230 S.C. 299, 95 S.E.2d 493 (1956). Where there have been no concurrent findings of fact, it is the duty of the court to decide issues of fact according to its own view of the weight of the evidence. *E.g.*, McLaughlin v. McLaughlin, 244 S.C. 265, 136 S.E.2d 537 (1964); Harvey v. Harvey, 230 S.C. 457, 96 S.E.2d 469 (1957).

9. S.C. CODE ANN. § 20-113 (1962).

10. 249 S.C. 623, 155 S.E.2d 857 (1967).

modified the order to allow for payments over a twenty-two month period. The wife alleged error and appealed from the modification. At the time of the divorce both parties were gainfully employed, and their respective salaries were nearly equal. The wife, however, had applied for a leave of absence from her work for one year in order to continue her education. It was clear that the award of alimony was made in light of these circumstances. When the case reached the supreme court the wife had completed her year of study and had made plans to return to work. It was conceded on argument that she was not concerned about the manner or term of months over which the payments were to be made, but rather was fearful that the husband would seek further relief when she returned to work. Thus, the real question was whether the award was such as to be subject to future modification. Deciding from the record that both lower court decrees regarded the award as one in gross, payable in installments, the court cited the general rule that in gross or lump sum awards are not subject to modification when the power to amend has not been reserved.[11] The court held that this rule was clearly applicable to the facts in this case and that errors, if any, in the modification decree were no longer material nor prejudicial to the appellant wife.

D. Visitation Rights

Grimsley v. Grimsley[12] involved the question of visitation rights of a father following a divorce decree and child custody award to the mother. Alleging that the mother was interfering with his rights under the order, the father petitioned for relief. The mother answered requesting, for the welfare of the child, that his visitation rights be eliminated or at least curtailed. Her case revealed that since the divorce the father had persistently attempted to reestablish the marriage and had frequently used the child as a pawn to achieve that end. As a part of this approach he instructed the child in his belief that divorce was wrong and that the mother was committing a sin by remaining separated from him. In upholding the order of the trial judge, which continued the father's visitation rights but reduced the period from once each week to once every other week, the supreme court re-

11. 24 AM. JUR. 2d *Divorce and Separation* § 668 (1966).
12. 250 S.C. 389, 158 S.E.2d 197 (1967).

peated the rule that such orders will not be disturbed unless there has been a clear abuse of discretion.[13] Though obviously displeased with some aspects of the father's conduct, the court felt that the trial judge had acted in the best interest of the parties and expressed confidence that the lower court, through its continuing jurisdiction over the matter, would issue whatever orders might be necessary in the future to protect the welfare of the child.

E. Default

The defendant wife in *Lanier v. Lanier*[14] was served with the summons and complaint on January 6, 1967, but failed to answer within the time allowed. Shortly thereafter she filed a verified petition in which she stated as her excuse for not answering that she and her husband had resumed cohabitation on January 22 and remained together until January 28, 1967. In July 1967 the husband filed a petition denying these allegations and praying that his wife be found in default. In addition, his petition stated that the parties had lived together in an attempt at reconciliation but that this occurred between May 25 and June 8, 1967, at which time the wife absconded with the children in violation of a previous court order granting him exclusive custody. In denying the wife's petition and declaring her to be in default, the lower court was strongly influenced by this latter fact, stating that although under ordinary circumstances her motion should be granted, her conduct with the children removed her from "any further consideration." The supreme court reversed, stating that the order failed to recognize several controlling principles of law. In this instance the wife alleged a meritorious defense and a valid excuse for not answering, which is all that is necessary to obtain relief.[15] Although the defense of condonation is an affirmative defense which should be pleaded, the court has a duty to preserve marriages and this duty outweighs the procedural rights of the parties. Default judgments are not favored in divorce actions; they will be re-opened more readily than

13. Porter v. Porter, 246 S.C. 332, 143 S.E.2d 619 (1965).
14. 160 S.E.2d 558 (S.C. 1968).
15. Jenkins v. Jones, 208 S.C. 421, 38 S.E.2d 255 (1946); S.C. CODE ANN. § 10-1213 (1962).

in other cases, and when there is evidence of condonation the divorce will be denied.[16] Here both parties presented evidence of condonation, and that evidence should have been fully explored by the lower court.

II. SEPARATE SUPPORT AND MAINTENANCE

In *Welch v. Welch*[17] an action for separate support and maintenance was heard by a special referee. The referee resolved all issues in favor of the petitioning wife and recommended that the husband be required to pay $750 per month for her support. The circuit court affirmed all of the findings and adopted the referee's report as its judgment. The husband's appeal principally challenged the finding that his wife was, in fact, entitled to separate maintenance, there being no specific exception to the amount awarded. The evidence in the record clearly established a course of conduct by the husband which justified an award to the wife and the supreme court agreed that she was entitled to judgment. However, there was also evidence that for a period of several years prior to the action the wife had customarily or habitually consumed alcoholic liquors and on occasion had indulged excessively. The supreme court found that while this fault did not contribute to the marital discord sufficiently to bar her right to separate maintenance,[18] it was nevertheless extremely inconsiderate since the husband had been a problem drinker prior to 1955. The lower court award was based on the finding that the wife was wholly without fault. The supreme court held that the wife's drinking habit should have been considered in determining the amount of the award[19] and that $750 per month, which was more than half of the husband's disposable income, was unduly liberal in view of the wife's fault. The case was remanded to the circuit court for a rehearing as to the amount the husband should be required to pay.

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16. Holliday v. Holliday, 235 S.C. 246, 111 S.E.2d 205 (1959); Grant v. Grant, 233 S.C. 433, 105 S.E.2d 523 (1958).
17. 250 S.C. 264, 157 S.E.2d 249 (1967).
18. As to what conduct on the part of the wife will bar her from separate maintenance and support see Miller v. Miller, 225 S.C. 274, 82 S.E.2d 119 (1954); 3 W. NELSON, DIVORCE AND ANNULMENT § 32.21 (2d ed. 1945).
19. As to what faults are considered in determining the amount of the award see Annot., 10 A.L.R.2d 466, 501-02 (1950).

III. ADOPTION

Wold v. Funderburg[20] was an action to invalidate an adoption decree rendered in 1964 by the Superior Court of Richmond County, Georgia, a court of general jurisdiction. By this decree the defendants, Louis and Myrtis Funderburg, had become the adoptive parents of the two minor children of the plaintiff Donna Wold and her divorced husband. In 1966 Donna Wold brought an action in the same Georgia court requesting that the decree be set aside on the ground that she had not consented to the adoption. A jury returned a verdict against her. Thereafter the Funderburgs moved to South Carolina and the present action was brought in the Juvenile and Domestic Relations Court of Aiken County. The minor children and the plaintiff's former husband were joined as defendants. In her complaint the plaintiff again alleged that she did not consent to the adoption, or if she did consent, her consenting signature was procured by fraud. In addition she alleged that her former husband had never consented to the adoption and that his signature on the adoption papers had been forged. The Funderburgs answered with a general denial and raised the plaintiff's first action in Georgia as a bar by way of *res judicata.* The former husband, however, filed an answer in which he joined in the plaintiff's prayer and alleged that his signature had in fact been forged. After hearing the evidence the trial judge found that the husband was never made a party to the adoption and that his signature had been forged, and accordingly declared the Georgia decree to be null and void. On appeal the adopting parents did not question the ruling on the merits of the case but presented two purely legal questions: (1) Did the Juvenile and Domestic Relations Court have jurisdiction of the subject matter? (2) Was the plaintiff barred by the adverse judgment of the Georgia court by way of *res judicata?* The act which created the Juvenile and Domestic Relations Court of Aiken County conferred upon that body all of the powers possessed by the circuit courts in actions involving child custody and adoption.[21] Accordingly, the supreme court held that although the Aiken court and the Georgia court are not equal in all respects, they are equal insofar as questions of adoption are concerned and the domestic rela-

20. 250 S.C. 205, 157 S.E.2d 180 (1967).
21. S.C. CODE ANN. § 15-1222 (1962).

tions court had full jurisdiction over the issues presented. Since the order of the trial court was based on the finding that the husband's signature was forged, its refusal to give full faith and credit to the Georgia judgment and decree was proper.[22] In answering the question concerning the bar by *res judicata* the court found that two basic requirements[23] for its application were not met. Neither the father nor the minor children were parties in the Georgia suit nor was the issue of the father's signature raised in that action.

IV. PARENT AND CHILD

Gunn v. Rollins[24] presented the court with what appears to have been a novel question in South Carolina. An action was brought by two unemancipated minors against the administrator of their stepfather's estate for personal injuries received in an automobile accident while the stepfather was driving. In answering this complaint the administrator alleged that although the decedent was neither the natural nor adoptive father of the minors, he was their stepfather and that all had lived together in the same household and voluntarily assumed the relationship of parent and child. It was alleged that as a result of this relationship the stepfather stood *in loco parentis* to the minors and that an action cannot be maintained against one who stands *in loco parentis* to the plaintiff. It is well settled in South Carolina that an unemancipated minor has no right of action against his *parent* for personal injuries caused by a parent's negligence, recklessness, willfulness or wantonness.[25] Urging that the relationship between the parties did not fall within the scope of this rule, the plaintiffs demurred to that part of the answer. The lower court sustained the demurrers and defendant administrator appealed. The supreme court turned to decisions

22. A judgment may be collaterally attacked and declared void when fraud has been practiced in securing jurisdiction or obtaining judgment. 49 C.J.S. *Judgments* § 434 (1947).

23. The essential elements for the application of *res judicata* as stated in the South Carolina decisions are: (1) identity of parties; (2) identity of subject matter; (3) adjudication in the former suit of the precise question raised in the second. *E.g.*, Griggs v. Griggs, 214 S.C. 177, 51 S.E.2d 622 (1949); Reed v. Lemacks, 207 S.C. 137, 35 S.E.2d 34 (1945); Nelson v. Parson, 187 S.C. 478, 198 S.E. 401 (1938).

24. 250 S.C. 302, 157 S.E.2d 590 (1967).

25. Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963); Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963); Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12 (1956); Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930).

from other jurisdictions[26] and found it to be a general rule that, in the absence of a statute allowing it, an unemancipated minor has no right of action against a stepparent who stands *in loco parentis* to the minor. Our supreme court adopted this position and reversed the decision of the lower court.

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26. Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Bricault v. Deveau, 21 Conn. Supp. 486, 157 A.2d 604 (1960); London Guar. & Accident Co. v. Smith, 242 Minn. 211, 64 N.W.2d 781 (1954); Rutkowski v. Wasko, 286 App. Div. 327, 143 N.Y.S.2d 1 (1955); Bingler v. Hopper, 336 Pa. 58, 7 A.2d 351 (1939).