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Domestic Relations

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DOMESTIC RELATIONS

I. EVIDENCE

Bankhead v. Bankhead[1] involved an appeal from a decree of divorce granted the wife on the grounds of physical cruelty. The appeal centered on the fact that the wife had not met the burden of establishing physical cruelty by a preponderance of the evidence. A divorce in South Carolina may be granted on grounds of physical cruelty,[2] which has generally been defined as actual personal violence or such a course of physical treatment as endangers life, limb, or health and renders cohabitation unsafe.[3]

There were three separate allegations of physical cruelty. The first incident resulted in no injury, and the wife subsequently resumed cohabitation. The wife alleged that in the second altercation she received an injury and consulted a physician, although, as she testified, he found no injury. The wife alleged that in the third incident her husband struck her and she received cracked ribs and numerous bruises.

At the trial the wife failed, however, to call the physician who supposedly treated her, her father who was present immediately following one of the altercations, or anyone who could verify her disablement following any of the incidents. The court, in reversing the decree, found that the wife had failed to establish by a preponderance of the evidence that there was physical cruelty. The rule is well established and is set forth in *Crowder v. Crowder*[4]:

> The burden is upon the wife, who brings the action for divorce, to establish by preponderance of evidence charges of physical cruelty against her husband. This carries with it the necessity of presenting corroboration of the material allegations of her complaint or explanation for its absence.[5]

In *Bankhead* the wife, in failing to produce any corroboration for her allegations, failed to meet the test. The court also

1. 173 S.E.2d 372 (S.C. 1970).
2. S.C. CODE ANN. § 20-101(3) (1962).
3. Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949).
4. 246 S.C. 299, 143 S.E.2d 580 (1965).
5. *Id.* at 306, 143 S.E.2d at 584.

commented that the first allegation was insufficient as the wife showed condonation of the act by resuming cohabitation. "Condonation may be presumed from cohabitation; and lapse of time, or continuance of marital cohabitation with knowledge of the offense raises a presumption of condonation."[6]

II. ADOPTION

Bevis v. Bevis[7] was a proceeding by a stepmother to adopt the two minor children of her husband by a former marriage. The natural mother of the children had refused to consent to the proceeding and had denied that she had abandoned the children. She did not contest the right of the stepmother to the custody of the children, but only asked that her parental rights not be completely terminated.

The central issue, as set forth by the court, concerned the necessity of having the consent of the natural mother to the adoption.

> An adoption of a child may be decreed when there have been filed written consents to adoption executed by: (a) Both parents . . .; *provided*, that consent shall not be required from one whose parental rights have been judicially terminated . . . .[8]

This proceeding was brought under section 31-51.1 *et seq.* of the Code of Laws, which provides a statutory remedy, separate from the adoption statutes,[9] for terminating parental rights.[10] If, upon hearing, a court of competent jurisdiction finds that a child has been voluntarily abandoned for a period in excess of twelve months, it may issue an order barring parental rights.[11]

In *Bevis*, though the natural mother was voluntarily separated from the children for a period of nearly five years, she maintained contact with them through visits, correspondence, and personal gifts. The court, affirming the lower court in denying the adoption, held that statutes providing a method by which one person may be adopted as the child of another are in

6. McLaughlin v. McLaughlin, 244 S.C. 265, 136 S.E.2d 537 (1964). *quoting from* 27A C.J.S. *Divorce* § 123(9) (1959).
7. 175 S.E.2d 398 (S.C. 1970).
8. S. C. CODE ANN. § 10-2587.7(a) (Supp. 1969).
9. S. C. CODE ANN. §10-2587.2 *et seq.* (Supp. 1969).
10. Richland County Dep't of Pub. Welfare v. Mickens, 246 S.C. 113, 142 S.E.2d 737 (1965).
11. S.C. CODE ANN. § 31-51.4 (1962).

derogation of the common law and, therefore, are to be strictly construed in favor of the parent and the preservation of the relationship of the parent and child.[12] Abandonment is generally defined as "conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child."[13] After weighing the evidence as to the natural mother's continued contacts with the children, the court concluded that all parental rights should not be terminated, as it was evident that she did not intend to relinquish all her parental claims to the children.

III. SUPPORT AND VISITATION RIGHTS

In *Holtzclaw v. Crawford*[14] the plaintiff-husband filed a petition seeking a reduction in the support payments for his child and a liberalization of visitation rights. The husband contended that the original visitation arrangement was ineffective, because it was based upon the fact that both parties resided in the same town, whereas at the time of petition they resided sixty-five miles apart. He also contended that the original sum of $100.00 per month for support of the child included $40.00 which was to be used to provide care for the child while the wife worked. Since the decree, the wife had remarried and was no longer employed; therefore, the $40.00 for the care of the child was not necessary.

The issues were referred to a special referee who recommended a reduction of payments and liberalization of visitation rights. The circuit court, with slight modification,[15] affirmed the recommendation of the referee. The supreme court affirmed the circuit court's ruling as to visitation rights. The general rule, as set forth in *Porter v. Porter*,[16] is that "[t]he matter is one addressed to the trial court's broad discretion and that in the absence of a clear abuse of such, the order granting, denying, or limiting visitation rights will not be disturbed."[17] The court found no abuse of discretion by the lower court.

The court reversed the circuit court on the question of reduction of support payments. Generally, a provision for child sup-

12. Goff v. Benedict, 252 S.C. 83, 165 S.E.2d 269 (1969).
13. 2 AM. JUR. 2D *Adoption* § 32 (1962).
14. 253 S.C. 314, 170 S.E.2d 382 (1969).
15. The circuit court further reduced the $77.00 per month payment set by the referee to $60.00 per month.
16. 246 S.C. 332, 143 S.E.2d 619 (1965).
17. *Id.* at 340, 143 S.E.2d at 624.

port in a decree of divorce is not final in the sense that it cannot be changed; and, usually, the court has continuing authority to modify such a provision from time to time.[18] However, as the court pointed out, the wife testified that the original sum of $100.00 was needed to care for the child properly. The husband offered no proof to the contrary. The remarriage of a divorced wife is not of itself grounds for reducing the amount to be paid for the support of a minor child.[19] As the record failed to show any justification for the reduction of payments, the $100.00 sum was reinstated by the court.

IV. Legal Separation

Smith v. Smith[20] involved an action for divorce brought by the wife on the ground of physical cruelty. The wife, in the alternative, moved that, in the event an absolute divorce was not granted, she be granted a legal separation. The trial court denied and dismissed the divorce proceeding; in a brief order the court declared that one act of physical abuse does not constitute grounds for divorce. The court failed to pass on the alternative relief sought by the wife. The supreme court reversed and remanded the entire cause because of a "very brief and incomprehensible order" which made it impossible for the court to determine if the trial court had been influenced or controlled by error of law in denying the divorce.

As to the question of the trial court's failure to consider the alternative relief sought by the wife, the supreme court held that the trial court was in error. The causes for which *separate maintenance* may be granted are not confined to those which constitute grounds for *divorce*. Accordingly, a court may decree such *maintenance*, although the *divorce* is denied.[21] The court pointed out that, even though the wife might not have been entitled to a divorce, it was evident that she was in potential danger of physical abuse. As a result she was entitled to an order allowing her to live free and separate from her husband.

V. Alimony

In *Graham v. Graham*,[22] an action for divorce, the plaintiff-wife asked for alimony, support, and separate maintenance. An

18. 27B C.J.S. *Divorce* § 322(1) (1959).
19. Sanders v. Sanders, 230 S.C. 263, 95 S.E.2d 440 (1965).
20. 253 S.C. 350, 170 S.E.2d 650 (1969).
21. Todd v. Todd, 242 S.C. 263, 130 S.E.2d 552 (1963). *See also* Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961); Machado v. Machado, 220 S.C. 90, 66 S.E.2d 629 (1951).
22. 253 S.C. 486, 171 S.E.2d 704 (1970).

order was filed requiring the husband-defendant to pay alimony *pendente lite* and support money at a rate of $350.00 monthly. Six months later a hearing was held to determine why the defendant had failed to comply with the order. The defendant answered that his new business venture had not proven successful and, as a result, he could not make the payments. The judge reduced the payments for a period of three months at the end of which time they would revert to the original sum.

The wife then filed an amended complaint seeking a divorce *a vinculo matrimonii* upon grounds of adultery, physical cruelty, and desertion.[23] The divorce was granted on the ground of desertion, and alimony and support payments were ordered at $350.00 per month. In view of the fact that the husband's business was still lagging, the payments were, however, reduced to $250.00 per month for a period of six months at the end of which time they would revert to the original amount of $350.00 per month. The husband contended that the award was excessive and that the trial judge had abused his discretion in decreeing such an award. This contention was based on his former wife's earning capacity and needs.

In *Porter v. Porter*,[24] it was held that an award of alimony in a divorce suit rests within the sound discretion of the trial judge and will not be disturbed on appeal unless abuse is shown. However, as stated in *Murdock v. Murdock*,[25]

> [a] wife is never entitled to alimony as a matter of course; it is entirely discretionary with the court to allow her such alimony as . . . is reasonable . . . taking into consideration . . . the ability of each to earn money in the future, and their conduct in the past.[26]

And further, the amount of the award should not be excessive but should be fair and just to all parties concerned.[27]

It was undisputed in the *Graham* record that the defendant's net income for 1968, prior to payment of taxes, was $370.65 monthly, and the wife's net monthly income was $316.83 for the same year. The supreme court, in reversing, held that the award was excessive, since it would require sixty-seven percent of the defendant's income for the six-months reduced period and ninety-

23. S.C. CODE ANN. § 20-101 (1962).
24. 246 S.C. 332, 143 S.E.2d 619 (1965).
25. 243 S.C. 218, 133 S.E.2d 323 (1963).
26. *Id.* at 224, 133 S.E.2d at 326, *quoting from* 17 AM. JUR. *Divorce and Separation* § 672 (1957).
27. Porter v. Porter, 246 S.C. 332, 143 S.E.2d 619 (1965); Murdock v. Murdock, 243 S.C. 218, 133 S.E.2d 323 (1963).

four percent of his income at the monthly rate originally set. Considering the earnings of the parties and their respective needs, it was concluded that the trial judge had abused the discretion vested in him.

VI. CUSTODY

In *Pullen v. Pullen*,[28] an action to determine custody of children, the parties, while still married, entered into a support agreement under which the mother was to have custody of the children and the father was to have visitation privileges. Approximately six months later the mother instituted an action for divorce on the grounds of desertion; the divorce was granted, and the decree incorporated the existing support and custody agreement. Subsequently, the father, who had remarried, entered a petition for permanent custody which was denied. The following summer the father again brought a petition for permanent custody, wherein he alleged that the mother was working, that she was unable to care for the children properly, and that she was not a fit and proper person. The action was referred to a master who recommended that the mother should retain custody of the children and that the father's visitation rights should be liberalized. The trial judge rejected the master's report and awarded custody to the father.

The dominant consideration in a custody dispute is the welfare of the children.[29] The general rule for determining custody in post-divorce proceedings is, however, as follows:

> [A] final divorce awarding the custody of a child in a divorce case, based on an agreement of the parties, is conclusive as between them if no change of circumstances affecting the welfare of the child is shown.[30]

On appeal the mother contended there had been no such change of circumstances since the first order of the court denying the change of custody. Though it is the rule in South Carolina that a change of circumstances may warrant a change of custody,[31] there must be a showing of new facts and circumstances.[32] The

28. 253 S.C. 123, 169 S.E.2d 376 (1969).
29. Ford v. Ford, 242 S.C. 344, 130 S.E.2d 916 (1963); Koon v. Koon, 203 S.C. 556, 28 S.E.2d 89 (1943); S.C. CODE ANN. § 20-115 (1962).
30. 24 AM. JUR. 2D *Divorce and Separation* § 825 (1966).
31. Porter v. Porter, 246 S.C. 332, 143 S.E.2d 619 (1965); Moore v. Moore, 235 S.C. 386, 111 S.E.2d 695 (1959).
32. Ex parte Atkinson, 238 S.C. 521, 121 S.E.2d 4 (1961); Williams v. Rogers, 224 S.C. 425, 79 S.E.2d 464 (1954); Koon v. Koon, 203 S.C. 556, 28 S.E.2d 89 (1943).

court noted that the father's allegations that the mother was unfit were rejected by the master and stated that the master's recommendation should have been given greater weight because of his opportunity to observe the witnesses.[33] Because the record indicated no change of circumstances, the supreme court reversed and reinstated the custody of the children to the mother.

VII. CHANGE OF VENUE

In *Brockman v. Brockman*[34] the defendant-husband moved for a change of venue in a divorce proceeding. He alleged in his complaint that he lived in Spartanburg County and supplied an affidavit which stated that he had been a resident of Spartanburg County for six years prior to the date of the affidavit. The plaintiff-wife did not dispute the contents of the affidavit. The motion for a change of venue was denied, and the defendant-husband appealed.

The court, in reversing and remanding the case, cited section 20-106 of the Code of Laws of South Carolina pertaining to venue in a divorce action. The statute provides that actions for divorce shall be tried in the county in which the defendant resides at the commencement of the action. The defendant's affidavit stated that he was a resident of Spartanburg County at the commencement of the action and that he had been for six years prior. The court also held that, where there was a motion for change of venue based on the fact that the county named in the affidavit was the residence of the defendant and this fact was not disputed, such motion must be decided as a question of law by the trial judge.[35]

VIII. JURISDICTION

In *McGlohan v. Harlan*[36] the sole issue was whether or not the Family Court Act of 1968[37] provided jurisdiction for the Laurens County Civil and Family Court[38] to determine, without a jury, paternity of an illegitimate child, and upon determination

33. *See also Ex parte* Atkinson, 238 S.C. 521, 121 S.E.2d 4 (1961); Powell v. Powell, 231 S.C. 283, 98 S.E.2d 764 (1957).
34. 253 S.C. 528, 171 S.E.2d 862 (1970).
35. *See also* Sanders v. Allis Chalmers Mfg. Co., 235 S.C. 259, 111 S.E.2d 201 (1959).
36. 174 S.E.2d 753 (S.C. 1970).
37. S.C. CODE ANN. § 15-1095 *et seq.* (Supp. 1969).
38. The Civil and Family Court of Laurens was established by an Act of the General Assembly on June 19, 1969, and is now embodied in the Code. S.C. CODE ANN. § 15-1650 *et seq.* (Supp. 1969).

to order the father to support the child.[39] The supreme court affirmed the decision of the lower court holding that the lower court had jurisdiction to determine, without a jury, the paternity of an illegitimate child and to order support for the child under the authority of the Family Court Act of 1968.[40] The appellant's contention was that a jury trial in the Court of General Sessions, under section 20-303 of the South Carolina Code of Laws, was the exclusive remedy for the determination of paternity.[41] Conceding that, if the defendant had been charged with an offense under that section, he would have been entitled to a trial by jury, the court noted that this was not an offense against which any criminal sanctions could be enforced. Thus, the court concluded that a jury trial was not the exclusive remedy for determining paternity and that the family court had jurisdiction to make such a determination.

IX. UNIFORM LEGISLATION

Gardner v. Gardner[42] involved the application and operation of the Uniform Reciprocal Enforcement of Support Act.[43] The action, based on a foreign divorce decree granted by the State of Nevada, was brought to enforce the decree and to recover accrued and unpaid alimony as well as future alimony, maintenance, and support payments. The husband alleged that, subsequent to the Nevada decree, the wife had brought an action in the Spartanburg County Court for support based on an order obtained in California requiring the defendant to pay $60.00 per month for the support of two children. The husband contended, therefore, that the Nevada decree had already been modified by the order of the Spartanburg County Court.

The supreme court held that the defendant's theory was in error in that the Spartanburg order was based on the California order and, therefore, did not modify the Nevada decree. The defendant's theory would, furthermore, have been contradictory

39. The plaintiff in this action alleged that the defendant was the father of her illegitimate child and asked the court for an order requiring him to contribute to the support of the child.

40. Four sections of the Family Court Act were cited by the court: § 15-1095.24, § 15-1095.24(b)(2), § 15-1095.24 (17), and § 15-1095.24(37) (3).

41. Prior to 1962, §§ 20-305 through 309 of the Code provided the procedure for determination of paternity of illegitimate children, but in 1962, § 20-303 was amended to include legitimate and illegitimate children, therefore repealing § 20-305 through § 20-309.

42. 253 S.C. 296, 170 S.E.2d 372 (1969).

43. S.C. CODE ANN. § 20-311 *et seq.* (1962).

to section 20-329 of the South Carolina Code of Laws which provides:

> Any order of support issued by a court of this state when acting as a responding state shall not supersede any previous order of support issued in a divorce or separate maintenance action, but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period.[44]

The original decree of Nevada provided for payments of $250.00 monthly for support and maintenance of the wife and two children. The court noted that the Spartanburg County Court, in accordance with section 20-329 of the Code, did grant credit to the defendant for his payments under the California order; but that, pursuant to the statute, the Spartanburg County Court could not issue an order which would have the effect of superseding the Nevada divorce decree.

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44. S.C. CODE ANN. §20-329 (1962).