South Carolina Law Review

Volume 23
Issue 4 *Survey of South Carolina Law*

Article 6

1971

Domestic Relations

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DOMESTIC RELATIONS

I. DIVORCE

A. Jurisdiction

Edwards v. Edwards[1] involved a court order incarcerating a man for failure to convey certain realty to his former wife as specified in a divorce decree. The former husband-defendant had consented to the court's jurisdiction for purposes of the divorce decree; however, he alleged lack of jurisdiction to find him in contempt. The defendant also alleged that he could not be punished for contempt until he had first been found in contempt of court. The South Carolina Supreme Court affirmed the lower court's order of incarceration for contempt. "The description of the conduct of which appellant was found guilty is of controlling importance and *not* the name by which it was characterized."[2] The South Carolina Supreme Court also stated that since the appellant had consented to the jurisdiction of the lower court for divorce purposes he was estopped from alleging lack of jurisdiction to enforce the decree.

B. Grounds

McKenzie v. McKenzie[3] involved a divorce granted to the husband-plaintiff on the grounds of physical cruelty. Action was proceeded upon by the husband-plaintiff following an altercation between him and his wife in which she fired several bullets at him. The wife later attacked the decree alleging that one act of physical cruelty does not constitute sufficient statutory cruelty to grant a divorce. The South Carolina Supreme Court said that such cruelty did indeed satisfy statutory grounds,[4] and followed its ruling in *Brown v. Brown*[5] on this point.

However, in *Guinan v. Guinan*,[6] a case decided the same month as the *McKenzie* case, the court held that one act of physical cruelty in itself, does not establish "physical cruelty" within the meaning of the South Carolina Code,[7] unless the spouse instituting the action al-

1. 254 S.C. 466, 176 S.E.2d 123 (1970).
2. *Id.* at 467, 176 S.E.2d 124.
3. 254 S.C. 372, 175 S.E.2d 628 (1970).
4. S.C. CODE ANN. § 20-101 (3) (1962).
5. 215 S.C. 502, 509, 56 S.E.2d 330, 334 (1949).
6. 254 S.C. 554, 176 S.E.2d 173 (1970).
7. S.C. CODE ANN. § 20-101 (3) (1962).

leges that he is in fear of life and limb by continued cohabitation with his spouse.

An interesting physical cruelty question was raised in *Vikers v. Vikers.*[8] The husband sued for divorce on the grounds of physical cruelty and constructive desertion. The allegation of physical cruelty was based upon the wife's refusal to engage in sexual intercourse for a period of eighteen months. The lower court overruled the wife's demurrer and granted the divorce. The South Carolina Supreme Court reversed saying the demurrer should have been sustained and no divorce granted, for failure of the allegation to fulfill the criteria for physical cruelty as spelled out in the aforementioned case of *Brown v. Brown.*[9] The astute attorney for the husband also attempted in the lower court to pigeon-hole the husband's absence from the home as constructive desertion. However, South Carolina follows a minority view, as accepted in *Mincey v. Mincey,*[10] for the criteria constituting constructive desertion. It was established in *Mincey* that to constitute constructive desertion the complaining spouse must show that he left the marital abode because of conduct which was sufficient in itself for a divorce. The husband in *Vickers* was in effect requesting the court to overrule *Mincey.* However, this the court refused to do and reversed the lower court's granting of a divorce.

In *Williams v. Williams*[11] the wife sought a divorce on the grounds of physical cruelty, alleging that she fled the marital home after a physical and sexual attack by her husband. The husband answered by denying such allegations. In a subsequently amended answer, some 15 months later, the husband counterclaimed for a divorce on the ground of desertion. The wife did not object to the desertion allegation at the trial court; however, she appealed to the South Carolina Supreme Court objecting to the dessertion allegation, saying it cannot subsequently be used if it was not available when the husband first answered her complaint. The South Carolina Supreme Court stated that since the objection had not been raised in the trial court, it could not now be raised and was therefore mooted. The divorce decree granted to the husband was upheld.

8. 255 S.C. 25, 176 S.E.2d 561 (1970).
9. 215 S.C. 502, 56 S.E.2d 330 (1949).
10. 224 S.C. 580, 80 S.E.2d 123 (1954).
11. 254 S.C. 492, 176 S.E.2d 157 (1970).

A retroactive application of an amendment to the South Carolina Constitution was presented in *Singley v. Singley*.[12] The wife was granted a divorce via three years separation.[13] The parties had been separated since April 28, 1967, and the ground of separation for purposes of a divorce was effective as of March 5, 1969. The husband attacked the retroactivity of the time period for purposes of fulfilling the requirements of this section of the divorce statute. He alleged that the amendment to the divorce statute was prospective only, and calculation of the time period cannot commence before the date that the amendment became effective. The South Carolina Supreme Court held that by act of the South Carolina Legislature,[14] the period of separation is to be computed without regard to the effective date of the ratification of the Constitutional Amendment. Thus, the court upheld the lower court's granting of a divorce on the ground of separation for a period of three (3) years.

C. *Alimony and Support*

Jeanes v. Jeanes[15] involved a man seeking termination of alimony payments because of the acts of his former wife subsequent to their divorce. The Richland County Court relieved the petitioner from paying alimony to his former wife as she had cohabited with another man for two (2) years. The lower court avoided the question of common-law marriage saying that it was irrelevant. The former wife appealed to the South Carolina Supreme Court, which affirmed the decision of the lower court. However, the South Carolina Supreme Court went one step further and stated that such a cohabitation by the woman did in fact constitute a common-law marriage, which of itself would be a ground for termination of alimony.

In *Lowe v. Lowe*[16] a wife obtained a *divorce a mensa et thoro* (legal separation) on the grounds of physical cruelty and habitual drunkenness. The wife was granted custody of their three (3) children and granted $140.00 per month as child support. Although the wife had requested more child support, attorney fees and alimony, they were not granted. Thus, she appealed to the South Carolina Supreme Court

12. 181 S.E.2d 17 (S.C. 1971).
13. S.C. CODE ANN. § 20-101(5) (Supp. 1971).
14. S.C. CODE ANN. § 20-101 (Supp. 1971).
15. 255 S.C. 161, 177 S.E.2d 537 (1970).
16. Smith's Adv. Sht. No. 17 (June 12, 1971).

which reversed and remanded the case back to the lower court. It cited the facts of the wife having expenses of $468.00 per month with an income of only $410.00 per month. The husband made $759.00 per month and lived with his parents. Thus, the court ruled that the trial court did abuse its discretion in not granting the wife more child support and attorney fees as the wife would be unable to provide for herself and children, and could not pay an attorney with the decision rendered in the lower court. The high court reserved judgment regarding alimony, as it was not mentioned in the decision of the lower court.

A rather unique case was presented in *Towles v. Towles*.[17] The husband and wife had previously engaged in numerous legal actions, but appeared finally to have been reconciled when the wife signed an agreement never again to sue her husband. Needless to say, the parties were subsequently separated and the wife sued her husband for nonsupport. The husband answered, and cited the aforementioned agreement as a complete bar to any action instituted by his wife against him. The lower court honored the agreement and dismissed the action. In her appeal to the South Carolina Supreme Court, the wife contended that the agreement between herself and her husband was against public policy being tantamount to releasing the husband of his obligation to support his wife. This contention was agreed upon by a majority of the court and they reversed the lower court decision, thus giving the wife the right to proceed against her husband for support.

D. Appeal

In *Rajeich v. Rajeich*[18] an Air Force Major obtained a divorce through default from his wife on the statutory ground of desertion. The husband alleged that he was transferred from South Carolina to Maine and his wife refused to accompany him. Approximately one (1) month after a final decree was awarded, the wife sought to reopen the case alleging the decree was granted upon mistake, inadvertance, or excusable neglect.[19] She alleged that both she and her husband executed a mortgage on a home within the year period which her husband alleged that she deserted him. It was also alleged that after the husband commenced the action, he returned to the marital home, inferring that such divorce action had been abandoned. Although the trial court refused to let the wife have a hearing on the merits of her allegations, the South

17. Smith's Adv. Sht. No. 18 (June 19, 1971).
18. 181 S.E.2d 11 (S.C. 1971).
19. This motion was made pursuant to S.C. CODE ANN. §§ 10-609, 10-1213 (1962).

Carolina Supreme Court reversed and remanded the case back to the lower court stating that the petitioner was entitled to her "day in court".

An apparent paradox in alimony granted to a spouse is the case of *McKenzie v. McKenzie.*[20] Although the husband was awarded a divorce upon the ground of physical cruelty, based upon an incident in which his wife shot at him four times, the wife was awarded alimony in the amount of $250.00 per month. Since no abuse of discretion was shown to the South Carolina Supreme Court, they affirmed this case in all aspects as decided by the trial court.

II. PARENT AND CHILD

A. Jurisdiction

Jackson v. Jackson[21] involved an appeal by a husband after a lower court had granted his wife more visitation rights to their children, although the father retained custody. The mother, in an earlier action, had attempted to gain custody of the children and upon failing to do so she filed a new petition for more liberalized visitation rights. When this petition was granted on the prior testimony at the custody hearing, the father objected alleging lack of jurisdiction in the absence of a second hearing. The South Carolina Supreme Court affirmed the lower court decision stating that the mother had a statutory right to have the visitation rights reconsidered,[22] irrespective of whether a second hearing had been held.

B. Custody

Two recent decisions by the South Carolina Supreme Court reiterate two standard rules of law in the domestic court. In *Crowe v. Lowe*[23] the court reversed a lower court decision which changed the custody of the children of a dissolved marriage without any specific findings of fact or introduction of testimony of the party aggrieved by the decision.

In *Powell v. Powell*[24] the South Carolina Supreme Court reiterated

20. 254 S.C. 372, 175 S.E.2d 628 (1970).
21. Smith's Adv. Sht. No. 15 (May 15, 1971).
22. This is expressly provided for in S.C. CODE ANN. § 20-115 (1962).
23. Smith's Adv. Sht. No. 19 (June 26, 1971).
24. 181 S.E.2d 13 (S.C. 1971).

the criteria of "best interests of the children".[25] In *Powell*, the husband and wife agreed to let the paternal grandparents have custody of a daughter prior to their divorce. The lower court awarded custody of this daughter to the mother upon her petition for custody after her divorce. The South Carolina Supreme Court stated that the lower court must consider the welfare and best interest of the child involved before making any custody change, and since the paternal grandparents were not present at the custody hearing, the "best interest" of the child was not determined.[26] The case was thus remanded to the lower court to make such a specific finding.

The South Carolina Supreme Court in *Miller v. Sammons*,[27] again stated that often in custody cases a perfect solution is not available. However, unless the trial court abuses its discretion by a "clear preponderance of the evidence", the decision must be affirmed, as it was in *Miller*.[28]

C. *Visitation Rights*

In *McGregor v. McGregor*[29] the mother of the child was granted custody with visitation rights given to the father. However, such visitation rights were limited to the father visiting his child in Columbia where the mother lived. When the father moved to Florence, he petitioned the court for more liberal visitation rights i.e., to allow him to take his child to Florence for the weekend. The lower court granted the request of the father. The mother appealed to the South Carolina Supreme Court, citing the child's asthmatic condition as her primary objection. The court readily negated the mother's objection citing the fact that there were capable doctors in Florence. This showed the court's tendency to allow whatever is reasonable in visitation cases always keeping in mind the "best interest" of the children involved.

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25. *Todd v. Todd*, 242 S.C. 263, 130 S.E.2d 552 (1963).

26. The South Carolina Supreme Court in *Powell* stated that the Family Court had violated Rule 13, Rules of Practice and Proceeding in the Family Court in that no specific "best interest" finding was stated by the Family Court.

27. 179 S.E.2d 724 (S.C. 1971).

28. *Id.*, the lower court let the mother retain custody even after it was proved that she was of questionable moral character. Since the father could not spend enough time with the children the mother's custody was retained since she devoted most of her time to her children.

29. 255 S.C. 179, 177 S.E.2d 599 (1970).