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Domestic Relations

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DOMESTIC RELATIONS

I. DIVORCE

A. *Grounds*

In *Newberry v. Newberry*,[1] an action to annul a marriage of over twenty years, the husband asserted that the marriage was void because a divorce obtained by defendant wife in Nevada prior to the present marriage was invalid for the lack of jurisdiction. Defendant was a resident of South Carolina prior to her divorce. She complied with the Nevada residency requirements and obtained a divorce. Shortly thereafter she returned to South Carolina. Plaintiff relied on lack of intent to establish a bona fide domicile to invalidate the Nevada divorce. Defendant offered explanations tending to show that her return was not inconsistent with an intent on her part to establish a bona fide domicile in Nevada. However, the court concluded that a domicile argument need not be considered, since the plaintiff was barred by laches[2] from prevailing in his action. The plaintiff had full knowledge of the Nevada divorce and the circumstances surrounding it, and in fact, did opportune the defendant to return to South Carolina and thereafter married and enjoyed the rights and privileges as defendant's husband for over twenty years. The court quoted from *Grant v. Grant*[3] that "The safety of society demands that one who seeks to overthrow an apparently valid decree of divorce should proceed with the utmost promptness upon discovery of facts claimed to show its invalidity.

Richardson v. Richardson[4] involved an action for divorce based on the grounds of physical cruelty. The plaintiff wife was struck several times by her husband during an altercation involving both parents and a daughter. The plaintiff was the only witness on her behalf and gave testimony that her injuries were minor and that she sought no medical treatment. She gave conflicting testimony as to the intent of the defendant husband in striking her, and at one point, agreed the blows were accidental. No testimony was given to the effect

1. 257 S.C. 202, 184 S.E.2d 704 (1971).
2. Jannino v. Jannino, 234 S.C. 352, 108 S.E.2d 572 (1959).
3. 233 S.C. 433, 436, 105 S.E.2d 523, 526 (1958).
4. 258 S.C. 135, 187 S.E.2d 528 (1972).

that she was in fear of serious bodily harm if she continued cohabitation with defendant. It would seem that this alone under *Guinnan v. Guinnan*[5] would be reason to deny the relief sought. But the court found it sufficient to apply the rule "that a single act of physical cruelty will not ordinarily constitute grounds for divorce, unless it is so severe and atrocious as to endanger life, or unless the act indicates an intention to do serious bodily harm."[6] Such burden was not met by the plaintiff since no corroboration of her testimony was offered.[7]

In *Shaw v. Shaw*[8] the lower court relied upon an amendment to the South Carolina Constitution[9] granting divorce via a three year separation of the spouses. The South Carolina Supreme Court reversed, finding that the separation in the instant case was the result of insanity and the subsequent confinement of defendant wife in the South Carolina State Hospital, where she remains. The court reasoned that to grant a divorce on the basis of such a separation would be to allow divorce on the ground of insanity in the guise of separation. The court referred to *Nolletti v. Nolletti*[10] which stated that the constitution is a limitation upon the power of the legislature to allow divorce upon any ground other than those enumerated therein. The Supreme Court of Virginia in the case of *Crittenden v. Crittenden*[11] addressed itself to an identical question and reasoned that the separation contemplated by the State of Virginia Code section 20-91(9)[12] must be by parties sufficiently competent to be conscious of the fact that the act of separation has occurred. The South Carolina Supreme Court agreed with that conclusion and stated that one who has been separated from his spouse as the result of commitment for mental incompetence is not, as a matter of law,

5. 254 S.C. 554, 176 S.E.2d 173 (1970). Here, the wife did not testify that she was in fear of her husband either before, during or after the altercation relied on and thus failed to establish physical cruelty within the meaning of the statute.

6. 258 S.C. 135, 138, 187 S.E.2d 528, 530 (1972).

7. Bankhead v. Bankhead, 254 S.C. 78, 173 S.E.2d 372 (1970). Corroboration of testimony necessary to meet burden of establishing physical cruelty by a preponderance of the evidence.

8. 256 S.C. 453, 182 S.E.2d 865 (1971).

9. S.C. CODE ANN. Sec. 20-101 (5) (Cum. Supp. 1971).

10. 243 S.C. 20, 132 S.E.2d 11 (1963).

11. 210 Va. 76, 168 S.E.2d 115 (1969).

12. VA. CODE ANN. Sec. 20-91 (9) (1950).

capable of being conscious of the fact that a separation has occurred.

B. Alimony and Support

Shecut v. Shecut[13] involved an appeal by the husband from a judgment of the lower court granting the wife a divorce. The divorce decree provided for alimony, child support, and counsel fees. The order of the lower court did not allocate the amount awarded between wife and the children, nor the husband's financial obligations in connection with the wife's continued occupancy of a provided residence. Furthermore, the order was mute as to whether the award included college expenses of a child or that such expenses were in addition to the monthly payments. Thus, the South Carolina Supreme Court reversed and remanded, holding that the record was so inadequate and the findings so indefinite as to afford no proper basis for review. In remanding the case the court found it necessary to dispose of the question raised by appellant as to whether a judgment in a prior action (the denial of a divorce and refusal to set an amount for support based on the findings that the husband was "adequately supporting his family"), is res judicata with respect to the amount appellant is now required to pay for support. The court held that the defense of res judicata is an affirmative defense and must be pleaded.[14] It was not pleaded in appellant's answer and thus was not considered a bar to the instant action.

Fender v. Fender[15] was a proceeding by the divorced wife requesting an increase of alimony and child support payments on the ground of a change in conditions as defined by the South Carolina legislature.[16] Evidence was given to effect that the husband's financial ability had greatly increased. The need for additional funds for the wife and child was also supported by the findings. The lower court modified the decree in conformity therewith. The South Carolina Supreme Court affirmed the modification in reliance on the pertinent South Carolina Code section[17] and the confirming power of the court to modify a decree for alimony based upon an agree-

13. 257 S.C. 354, 185 S.E.2d 895 (1971).
14. Connell v. Connell, 249 S.C. 162, 153 S.E.2d 396 (1967).
15. 256 S.C. 399, 182 S.E.2d 755 (1971).
16. S.C. CODE ANN. Sec. 20-116 (1962).
17. *Id.*

ment of the parties as sustained in *Jetter v. Jetter*.[18] The South Carolina Supreme Court reversed the lower court's requirement that the husband provide security on the grounds that there was no showing that such security was necessary to insure compliance with the order of the court.

Skinner v. Skinner[19] resulted in the South Carolina Supreme Court reversing and remanding the lower court's award of an increase in alimony on motion by the wife. The notice of motion in this case was for an order amending the support provisions of the prior decree on the sole ground of inadequacy. There was no motion to reconsider the factual findings nor allegation of change in conditions. Littlejohn, J., concurred with the opinion that when the judge's order was filed with the clerk of the court it became a final judgment. He further stated that no authority had been cited for a judge to review his own decrees in South Carolina.

II. PARENT AND CHILD

In *Underwood v. Underwood*[20] a wife petitioned for a modification of consent order in the divorce action, asserting that she was unable to continue to reside in a beach home provided by her husband because it was in an isolated area that she believed unsafe. The lower court entered the modification. However, the wife had prayed in the divorce action for the right to live in the beach home and the South Carolina Supreme Court reversed and remanded on the grounds that the wife should have and must have foreseen that people leave their beach homes in the fall and it could not be said that something unforeseeable had taken place. Therefore she did not show a change of circumstances sufficient to justify modification of the prior consent order.

Care and thought are required of those who come before the court to seek alimony and support and the court in its quest to supply a lasting decree which is just to all parties

18. 193 S.C. 278, 8 S.E.2d 490 (1940). However, Jetter was a decree for legal separation as neither divorce *a mensa et thoro* nor divorce *a vinculo matrimonii* were permissible at that time. In legal separation the court has an inherent right to modify support and separate maintenance without reservation of such power in the decree.

19. 257 S.C. 544, 186 S.E.2d 523 (1972).

20. 257 S.C. 235, 185 S.E.2d 370 (1971).

has developed and here follows the necessity of a showing of changed circumstances to support a modification of decree. Although the ruling here may be just as to the mother's interests and the court's reasonable desire to forestall frivolous requests for modification, the safety and welfare of the children in the beach environment during winter should have taken precedence over other considerations.

In *Sharpe v. Sharpe*[21] the divorced father of an infant child desired modification of a decree allowing visitation rights to that of full custody between June 15 and August 15 of each year. The father grounded his action on a change of circumstances resulting from the divorced mother's moving to Texas, taking their child. The lower court awarded summer custody to the father. The South Carolina Supreme Court reversed and remanded, stating that there was no showing of unfitness of either parent, nor that the move to Texas was made to deprive the father of visitation rights. Evidence was offered that the move was in the best interest of the mother and child by the virtue of a better job for the mother and proper care of the child. In *Mixson v. Mixson*[22] the court laid down the rule, followed here, that divided custody is to be avoided if possible as not in the best interest of the child, and further modification of custody must be considered in light of the personal welfare of the child.

KEITH J. PERRY

21. 256 S.C. 517, 183 S.E.2d 325 (1971).
22. 253 S.C. 436, 171 S.E.2d 581 (1969).