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Domestic Relations

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DOMESTIC RELATIONS

I. DIVORCE

A. *Grounds*

The case of *Dubose v. Dubose*[1] represents a departure from the strict requirement that in an action for adultery "[t]he proof must be sufficiently definite to identify the time and place of the offense, and the circumstances under which it was committed."[2] In *Dubose* the wife sought a divorce, alleging that her husband was having an affair with a woman referred to as a business acquaintance of the husband. In the lower court there was persuasive evidence that the husband had committed adultery with another woman who had not been named in the complaint. An acquaintance testified that the husband and the second woman had stayed together in a certain Myrtle Beach hotel "during the summer of 1969."[3] There was, however, no proof of the specific times and circumstances of any of the alleged acts.

In affirming the divorce decree, the South Carolina Supreme Court reiterated the requirement that proof of adultery must be sufficiently definite to identify times, places, and circumstances. Then, retreating, the court stated:

> Insufficiency in this respect, however, should not be allowed to defeat a divorce where the court is fully convinced that adultery has, in fact, been committed and the defendant has had full opportunity to defend against or refute the charge. For instance, [proving] precise times and places might be exceedingly difficult for an innocent spouse who was unaware of otherwise clearly proved adulterous conduct until long afterward.[4]

The court was convinced that the evidence was sufficient to establish that the husband had committed adultery because it

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1. 259 S.C. 418, 192 S.E.2d 329 (1972).

2. The full test set forth in Brown v. Brown, 215 S.C. 502, 512, 56 S.E.2d 330, 335 (1949), and used in subsequent South Carolina cases, was taken from 27A C.J.S. *Divorce* § 139(1) (1959) and reads as follows:

> The proof of adultery as a ground for divorce must be clear and positive, and the infidelity must be established by a clear preponderance of the evidence. The proof must be sufficiently definite to identify the time and place of the offense, and the circumstances under which it was committed.

3. 259 S.C. at 421, 192 S.E.2d at 330.

4. *Id.* at 423, 192 S.E.2d at 331.

"includ[ed] *approximate* times, places and the circumstances of such adultery."[5]

B. *Jurisdiction*

In *Seymour v. Seymour*[6] a wife who had been granted a default divorce in Kansas brought an action in the Greenville Family Court to have its provisions enforced. The husband attacked the decree on jurisdictional grounds, but the trial court, giving full faith and credit to the Kansas decree, enforced it.

In reversing and remanding for a new trial, the supreme court simply restated the position adopted in *State v. Campbell,*[7] that the full-faith-and-credit-clause[7.1] does not prevent inquiry into whether the facts were sufficient to give another state jurisdiction, even when the decree includes a recital that such facts existed. This holding is consistent with the court's traditional approach to foreign decrees.[8]

C. *Property Settlements, Alimony, and Attorneys' Fees*

A poorly drafted "Property Settlement Agreement" was the center of controversy in *McNaughton v. McNaughton.*[9] The agreement, which had been drafted before the action for divorce was initiated, transferred to the wife the family business, the lease agreement for the house in which the couple lived, and virtually everything in which the husband had a property interest except his car. The agreement, however, was ambiguous as to the intent of the wife, or lack thereof, to relinquish her right to alimony. Although two clauses indicated that she agreed to relinquish such right,[10] two others seemed to indicate that the settle-

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5. *Id.* (emphasis added).

6. 259 S.C. 26, 190 S.E.2d 502 (1972).

7. 242 S.C. 64, 129 S.E.2d 902 (1963).

7.1 U.S. CONST. art. IV, § 1.

8. *See* Taylor v. Taylor, 229 S.C. 92, 91 S.E.2d 876 (1956); State v. Westmoreland, 76 S.C. 145, 56 S.E. 673 (1907).

9. 258 S.C. 554, 189 S.E.2d 820 (1972).

10. The agreement read in part:

> *Now, therefore,* in consideration of the mutual benefits and to relieve the said John R. McNaughton of any further financial responsibility to the said Stella Marie McNaughton, the parties hereto agree as follows:
>
> . . . .
>
> *Seventh*: Either party hereto is relieved one from the other of making any claim for financial assistance and/or support from the other and neither party shall assert any right thereto. *Id.* at 556-57, 189 S.E.2d at 821-22.

ment would be binding only until either a court determined the rights of the parties or an action for divorce was commenced.[11]

Subsequent to the making of the agreement, the wife filed for divorce on the grounds of desertion. She was awarded temporary attorneys' fees and support *pendente lite,* but the final decree granting the divorce denied her these emoluments. The trial judge based his denial of support on the agreement. Although he failed to classify the agreement, or to indicate whether it would bar a future claim by the wife to alimony in the event of changed circumstances, the judge apparently did not consider the agreement to be a permanent property settlement:

> After reviewing and carefully considering the evidence in this case, I am convinced that the benefits derived by the Plaintiff [wife], as a result of the Agreement, were substantial and sufficiently adequate [*sic*] to absolve the Defendant of any *present financial responsibility.*[12]

The supreme court, while specifically upholding the finding of the trial court that the wife was not entitled to alimony or support at that time, hinted in dictum that the agreement might have served as a property settlement barring any future claim by the wife to support. Citing a legal encyclopedia, the court declared: "[E]ven though circumstances might indicate that a wife is entitled to alimony as a matter of right, still there is nothing to prevent her relinquishment of such right."[13]

Unlike the *McNaughton* agreement, the "Separation and Property Settlement Agreement" in *Darden v. Witham*[14] was a clear, unambiguous contract that was intended to be a complete settlement between the parties and was incorporated into the divorce decree. It provided for yearly payments by the husband

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11. The agreement provided:

> *Fifth*: The said Stella Marie McNaughton does hereby release and discharge the said John R. McNaughton from any further financial responsibility until such time as a Court of competent jurisdiction determines the duties and responsibilities that each has to the other and in consideration of the conveyances herein effected.
>
> *Sixth*: The said Stella Marie McNaughton will not make claim for support and/or alimony before such time as a suit for divorce absolute or a limited divorce is instituted in a Court of competent jurisdiction, and the above provisions shall be considered and asserted as a defense to such claim. *Id.* at 557, 189 S.E.2d at 822.

12. *Id.* at 559, 189 S.E.2d at 822 (emphasis added).

13. *Id.* at 558, 189 S.E.2d at 822, *citing* 24 AM. JUR. 2d *Divorce and Separation* § 523 (1966).

14. 258 S.C. 380, 188 S.E.2d 776 (1972).

to the wife for a period of twenty years, or until her death, whichever should first occur. There was a specific declaration that the payments would continue during the twenty-year period regardless of her remarriage.

Nevertheless, when the wife did remarry, the ex-husband sought a declaration relieving him of any further obligation to her under the decree and agreement. Because a specific clause in the agreement was ineptly entitled "Wife's Alimony," and because payments were to be made in installments, the ex-husband urged that under section 20-114 of the South Carolina Code[15] such payments should cease upon the wife's remarriage. Alternatively, he argued that he should be absolved of his obligation under section 20-116,[16] which provides that when a husband has been required to make periodic payments of alimony pursuant to a divorce decree, and the circumstances of the parties shall have changed, either party may apply to the court for a decrease, increase, or termination of the payments.

The trial and the supreme courts reached different conclusions as to the nature of the agreement but the same conclusion with respect to the merit of the husband's argument. The important point, however, is that neither court considered the payments to be mere periodic alimony. Thus the trial court, following *Blakely v. Blakely,*[17] held that when a divorce court grants alimony in gross or alimony in a lump sum, which is payable in installments, the court cannot later modify the provisions unless it has reserved the power to amend the decree. The supreme court, however, chose to view the agreement as a property settlement which, when incorporated into a divorce decree, ordinarily cannot be amended. Reading the term "Wife's Alimony" as an integral part of the entire agreement, the court determined that what was designated "alimony" was actually a provision for installment payments of a single settlement. The payments were therefore not subject to alteration or termination under either section of the Code.

Another issue raised by the husband was whether attorneys' fees could be awarded to the wife for defending against his action contesting the property settlement. Under section 20-112 of the

15. S.C. CODE ANN. § 20-144 (1962).
16. *Id.* § 20-116.
17. 249 S.C. 623, 155 S.E.2d 857 (1967).

Code,[17.1] a court may award "suit money" to the wife in a divorce action if her claim for it appears well founded. In the 1961 case of *Collins v. Collins*,[17.2] the court held that this section does not apply to fees resulting from litigation unrelated to the divorce. But in *Darden* the court found that, although the husband's action had been treated as a declaratory judgment, it was in essence an outgrowth of the original divorce action, and an award of attorneys' fees to Mrs. Witham was therefore proper.[17.3]

II. PARENT AND CHILD

A. *Jurisdiction*

In *Webster v. Clanton*[18] Mrs. Clanton sought custody of her deceased sister's teenage son. After a hearing in December, 1970, the court decided that it was in the child's best interest to remain with his father. The following April Mrs. Clanton, without notice to the father, obtained an order from the same court awarding custody of the child to her. The order was based on the teenager's oral complaint, a review of his school grades, and a conference with a guidance counselor who did not know the father. No appeal was taken at that time. However, when Mrs. Clanton subsequently obtained an order requiring the father to pay support and medical expenses for the child, the father readily appealed.

In a per curiam opinion the supreme court declared that the April custody order was a judgment affecting the personal rights of the father and that, since he had not been afforded notice or an opportunity to be heard, the order was a nullity. Thus it was not necessary for him to appeal the void judgment to protect his rights. Because the subsequent support order was based on the void custody order, it also was invalid and could not bind him. This case is simply a restatement of the general law regarding the

17.1. S.C. CODE ANN. § 20-112 (1962).

17.2. 239 S.C. 170, 122 S.E.2d 1 (1961).

17.3. The matter was remanded to the lower court where it was determined that $175,000 was a reasonable fee. The husband appealed the award to the state supreme court, arguing that section 20-112 was unconstitutional under the equal protection and due process clauses. He also attempted to raise the same questions in the federal district court in an action brought under 42 U.S.C. §§ 1981 *et seq.* (1970). The federal action was dismissed, however, on the grounds of comity because at the time no decision had been reached in the state supreme court. Darden v. Witham, Civil No. 73-103 (D.S.C. June 7, 1973).

18. 259 S.C. 387, 192 S.E.2d 214 (1972).

requirements of notice and an opportunity to be heard in personal judgments.[19]

B. Custody

In custody disputes the primary consideration of the courts is always the best interest and welfare of the child. When the master appointed in a case and the trial judge disagree as to what is in the child's best interest, it is the duty of the supreme court to make this determination based upon its own view of the evidence.[20] In *Mathis v. Johnson*[21] both the grandparents and the great-aunt and uncle of the minor were found to have suitable homes. The supreme court upheld, against a contrary conclusion by the master, the finding of the county judge that the four-year-old, illegitimate child should remain with her great-aunt and uncle, with whom she had lived since shortly after birth. The court noted that these were the only persons whom the child had known as parents, and that the child's mother had visited the home and found the child happy and comfortable.

Without citing authority or clearly defining its position, the court in *O'Shields v. O'Shields*[22] tacitly reaffirmed the traditional rule that, all other things being equal, custody of young children is best entrusted to their mother.[23] In a very brief opinion, the supreme court affirmed the trial court's rejection of inferences of immorality on the part of the mother drawn by the master from his finding that the mother lived in an apartment with other young women who were divorced or getting divorced, and that the home was visited by unattached males at all hours. Custody of the couple's four-year-old adopted daughter was therefore awarded to the mother.

In another custody case, *Moorhead v. Scott,*[24] the court dealt with what constitutes a change in condition sufficient to warrant a change in custody. It found that adjustment problems in the household only three weeks after the remarriage of the mother who had custody of the children were not sufficient. The court

19. *See* 46 AM. JUR. 2d *Judgments* § 22 (1969).

20. *Ex parte* Atkinson, 238 S.C. 521, 121 S.E.2d 4 (1961). *See* S.C. CODE ANN. §§ 20-115, 31-51 (1962).

21. 258 S.C. 321, 188 S.E.2d 466 (1972).

22. 193 S.E.2d 523 (S.C. 1972).

23. *See* Poliakoff v. Poliakoff, 221 S.C. 391, 70 S.E.2d 625 (1952); Wolfe v. Wolfe, 220 S.C. 437, 68 S.E.2d 348 (1951).

24. 193 S.E.2d 510 (S.C. 1972).

noted that the remarriage of a divorced mother has often been the basis for a change in condition sufficient to merit a change in custody.[25] Unlike the situation in *Moorhead,* however, subsequent marriages are usually brought to the attention of the court when the newly married parent wishes to obtain custody.

The court in *Moorhead* also reviewed its attitude toward a child's preference for one parent in custody cases: "It is clear that the wishes of a child of any age may be considered under all circumstances, but the weight given to those wishes must be dominated by what is best for the welfare of the children."[26] Without indicating the ages of the Moorhead children, the court decided that the trial judge had not erred in giving some weight to their desires. It also cited cases in which little weight was given to the wishes of a six-year-old child,[27] and great significance accorded those of a sixteen-year-old.[28] Then, taking judicial notice of what may be the heart of the problem, the court declared that "[n]ormally, small children prefer to live with the most permissive parent."[29]

C. *Appeal*

Expressing reluctance, the court in a per curiam opinion reversed the decision in *Sayler v. Parler*[30] and remanded the case to the Court of Common Pleas, Orangeburg County, for a new trial. Although it did not review the facts, the supreme court found that the issues in this custody proceeding had "simply not received the required judicial consideration by the trial court . . . ."[31] The court less than six months earlier in *Shecut v. Shecut*[32] had reversed and remanded another judgment to the same court for the same reason. The court in *Shecut* did not base its decision to reverse on any previous South Carolina authority. Perhaps the court, although expressing trepidation, will use this approach as a means of assuring that divorce and custody issues are given more careful attention at the trial level so that they may receive a thorough review on appeal.

25. *See* Annot., 43 A.L.R.2d 363 (1955).
26. 193 S.E.2d at 513.
27. Poliakoff v. Poliakoff, 221 S.C. 391, 70 S.E.2d 625 (1952).
28. Guinan v. Guinan, 254 S.C. 554, 176 S.E.2d 173 (1970).
29. 193 S.E.2d at 513.
30. 258 S.C. 514, 189 S.E.2d 294 (1972).
31. *Id.* at 517, 189 S.E.2d at 295.
32. 257 S.C. 354, 185 S.E.2d 895 (1971).

For the guidance of the trial court on remand, the supreme court in *Sayler* restated the South Carolina law pertaining to the extent that the full-faith-and-credit-clause[33] requires recognition of a custody judgment of another state. Although the United States Supreme Court in *Ford v. Ford*[34] avoided deciding the issue of whether the clause applies to divorce decrees, the court noted that the general rule is that such decrees, absent fraud or want of jurisdiction, are given the same effect in other states with regard to the facts existing at the time of the decree.[35] But such decrees are given no greater force or effect than in the state in which they have been rendered. Therefore, they do not prevent a custody change by the court of another jurisdiction which is based upon a subsequent and substantial change of condition.[36]

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33. U.S. CONST. art. IV, § 1.

34. 371 U.S. 187 (1962).

35. 258 S.C. at 518, 189 S.E.2d at 296.

36. 24 AM. JUR. 2d *Divorce and Separation* § 998 (1966); 50 C.J.S. *Judgments* § 889 (1947); Hartley v. Blease, 99 S.C. 92, 82 S.E. 991 (1914).