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Domestic Relations

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DOMESTIC RELATIONS

I. CHILD SUPPORT

A. *The Age of Emancipation*

A well-settled axiom of South Carolina law is that a court order for child support remains subject to review and modification by the court upon a showing of changed conditions.[1] *Cason v. Cason*[2] recognized that the constitutional amendment lowering the age of majority from twenty-one to eighteen[3] was a "changed condition" warranting modification of child support orders.

Relying upon a North Carolina case, *Shoaf v. Shoaf*,[4] the South Carolina Supreme Court held, *inter alia*,[5] that the General Assembly has the power to determine the age of majority and that reducing the age of majority to eighteen years effectively emancipates minor children at that age and terminates the duty of support.[6] The court concluded: "[t]hat the age of majority was twenty-one (21) at the time of the decree . . . does not create a vested right to have support continued to age 21 regardless of any

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1. Cason v. Cason, 271 S.C. 393, 398, 247 S.E.2d 673, 675 (1978).

2. 271 S.C. 393, 247 S.E.2d 673 (1978).

3. S.C. CONST. art. 17, § 14. The amendment states:

> Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

Id.

4. 282 N.C. 287, 192 S.E.2d 299 (1972). *See* Blackard v. Blackard, 426 S.W.2d 471 (Ky. 1968); Young v. Young, 413 S.W.2d 887 (Ky. 1967); Mason v. Mason, 84 N.M. 720, 507 P.2d 781 (1973); Istnick v. Istnick, 37 Ohio Misc. 91, 307 N.E.2d 922 (1973).

5. Appellant and respondent were divorced in 1969. Appellant wife was granted custody of the four minor children and awarded $250 monthly as child support. Respondent husband's subsequent petition for a reduction in his child support payments due to the emancipation by marriage of one of the children was denied, thereby increasing the remaining three children's proportionate amounts.

The present petition by respondent requested termination of his obligation to continue support payments for two sons, one who was killed in an automobile accident and another who had attained 18 years of age. Appellant counterclaimed for an increase in alimony and child support and an award of attorney's fees. The family court judge terminated support for the sons, increased the support payments for the remaining minor child, denied the request for an increase in alimony, and denied the request for attorney's fees. On appeal, the supreme court held that the trial judge abused his discretion in denying attorney's fees and remanded the issue. The remainder of the lower court's order, however, was affirmed. 271 S.C. at 394, 247 S.E.2d at 673.

6. *Id.* at 399, 247 S.E.2d at 676.

change in the law."[7]

In *Cason* appellant ex-wife argued that the provisions of South Carolina Code section 15-1-320[8] were determinative in interpreting the term "minors" in divorce decrees. Appellant argued that the statute's language required that divorce decrees be construed under the law in existence at the time the decree was issued. The pertinent portion of the statute provides "that any person performing any act or receiving any property, rights or responsibilities pursuant to an instrument executed prior to February 6, 1975, shall have his majority or minority determined by the law relating to majority or minority in existence at the time of the execution of such instrument."[9]

The court disagreed with appellant and found nothing in the statute's language to warrant the conclusion that a court decree or order was an "instrument" within the ambit of the statute.[10] The court reasoned that the legislature could easily have included child support orders, if desired, in the statute. Because the legislature failed to refer specifically to existing court-ordered child support obligations, the supreme court refused to recognize a legislative intent to include these obligations in the statute.[11] The court interpreted the statutory term "instrument" as referring only to private written agreements[12] and held that "[t]he constitutional and statutory provisions in question clearly changed the conditions affecting the obligation for support under the decree

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7. *Id.*, 247 S.E.2d at 675.

8. S.C. CODE ANN. § 15-1-320(a) (Cum. Supp. 1978). Section 15-1-320(a) provides:

> All references to minors in the law of this State shall after February 6, 1975, be deemed to mean persons under the age of eighteen years except in laws relating to the sale of alcoholic beverages; provided, however, that any person performing any act or receiving any property, rights or responsibilities pursuant to an instrument executed prior to February 6, 1975, shall have his majority or minority determined by the law relating to majority or minority in existence at the time of the execution of such instrument.

Id.

9. *Id.*

10. 271 S.C. at 400, 247 S.E.2d at 676.

11. *Id.*

12. *Id.* The court stated that:

> The use of the term "instrument" in the statute was intended to refer to private written agreements and to assure that any person under twenty-one, who was performing any act or receiving any property rights or responsibilities pursuant to such a private written agreement, executed prior to February 6, 1975, would have his majority or minority determined by the law in existence at the time of the execution of such written instrument.

Id.

by fixing a different date upon which liability to support a child terminated."[13]

The court in *Cason* noted an explicit exception to the termination of the duty to support at age eighteen when the right to support arises from contract.[14] Demonstrative of this exception was the 1977 case of *Schadel v. Schadel*[15] in which the parties executed a property and support agreement that was incorporated into the court's divorce order. The agreement specifically provided for support until the child attained age twenty-one.[16] The supreme court held that the father's obligation should "continue as specified in the agreement and the divorce decree into which the agreement was incorporated."[17]

The provisions of South Carolina Code section 15-1-320[18] standing alone support the *Schadel* exception. The instrument (private support and property agreement) was executed prior to February 6, 1975, and provided for a minor to receive "property, rights or responsibilities." Hence, the age of majority would be determined under the law existing at the time of the execution of the instrument.

The possible existence of another exception to the sweeping termination of the duty to support at age eighteen may result from the wording of the divorce decree in *Cason.* The original decree required the respondent to make child support payments monthly, but established no period of duration for payment;[19] thus, "[t]he decree could require respondent to support his child only until he reached majority or was otherwise emancipated."[20] Similarly, the decree in *Shoaf* contained the proviso "that said payments for child support shall continue until such time as said minor child reaches his majority or is otherwise emancipated."[21]

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13. *Id.* at 398-99, 247 S.E.2d at 675.

14. *Id.* at 398, 247 S.E.2d at 675.

15. 268 S.C. 50, 232 S.E.2d 17 (1977).

16. *Id.* at 56, 232 S.E.2d at 19. The agreement, executed in March 1973, stated that child support shall continue up until the age of twenty-one so long as the child is not emancipated and is "enrolled in a fulltime course of higher education, this meaning a college, technical school, trade school, or other accredited school . . . ." *Id. But see* Whitt v. Whitt, 490 S.W.2d 159 (Tenn. 1973) (reduction in age of majority applied to a support agreement).

17. 268 S.C. at 57, 232 S.E.2d at 20.

18. S.C. CODE ANN. § 15-1-320(a) (Cum. Supp. 1978). See note 8 *supra* for the text of § 15-1-320(a).

19. 271 S.C. at 398, 247 S.E.2d at 675.

20. *Id.* at 399, 247 S.E.2d at 675.

21. 282 N.C. at 288, 192 S.E.2d at 301.

The principle emerging from these cases is that a court order either silent on the termination date for child support or using the term "majority," will be construed judicially to refer to the age of majority fixed by statute or common law. Because the age of majority is a status that is within the power of the General Assembly to set, a modification reducing the age subsequent to a judicial decree effectively modifies that decree and emancipates the child at the lower age.[22]

B. Uniform Reciprocal Enforcement of Support Act

The Uniform Reciprocal Enforcement of Support Act[23] (URESA), which was drafted and approved by the National Conference of Commissioners on Uniform State Laws in 1950, is presently in force in some form in every American jurisdiction.[24] The South Carolina General Assembly adopted URESA in 1954 and amended it in 1968 and 1972.[25]

URESA provides a uniform method of enforcing the duties of support when the obligor and the obligee are located in different states. The obligee, or the state furnishing support to an obligee, files a verified complaint in a court of the initiating state. This complaint is transmitted to the state that has jurisdiction over the obligor. The responding state dockets the action and proceeds against the obligor. The responding state transmits its resulting order of support to the court of the initiating state and may also receive and transmit to the initiating state payments made by the obligor.[26]

Hoover v. Hoover,[27] the first South Carolina case to interpret URESA, ostensibly evidences that the enforcement procedure "is not limited to only those cases where the father has left the common domicile, but applies equally where the wife has taken the children from the state of common domicile."[28] The prime issue decided by the court in *Hoover,* however, was "whether the lower

22. 271 S.C. at 398-99, 247 S.E.2d at 676. *Accord,* 282 N.C. at 292, 192 S.E.2d at 302-03.

23. S.C. CODE ANN. §§ 20-7-110 to -470 (1976).

24. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 206 (1968).

25. S.C. CODE ANN. §§ 20-7-110 to -470 (1976).

26. *Id.*

27. 271 S.C. 177, 246 S.E.2d 179 (1978).

28. Brief of Appellant at 5. *See generally* Edwards v. Edwards, 146 A.2d 774 (D.C. 1958); Byrne v. Byrne, 212 Pa. Super. Ct. 566, 243 A.2d 196 (1968). Commonwealth v. Mexal, 201 Pa. Super. Ct. 457, 193 A.2d 680 (1963).

court had jurisdiction under URESA to impose the visitation condition on Mr. Hoover's duty of support."[29]

The facts of *Hoover* are rather interesting. After Mrs. Hoover left her husband a second time, she initiated a URESA action in Michigan for the support of herself and her two minor children, one of whom was born subsequent to Mrs. Hoover's departure from South Carolina.[30] Pursuant to the support proceeding in Michigan, the responding state, South Carolina, brought an action to determine the husband's liability for support. The South Carolina circuit court[31] did not require the husband to support his wife, but ordered him to support his two minor children, subject to the condition that he be allowed visitation privileges.[32] Neither party appealed the order. Subsequently, the husband was held in contempt for failure to pay support from March 1977 through June 1977. The court found, however, that the wife's refusal to allow visitation excused the husband's failure to make his payments after June 1977.[33]

On appeal by the wife the supreme court held that the subject matter jurisdiction of the original support proceedings in South Carolina did not include jurisdiction "to adjudicate matters of visitation."[34] The court further noted that objection to a court's lack of subject matter jurisdiction can be raised at any time; and that a court's action in matters over which it lacks subject matter jurisdiction is void.[35] Since the trial court had

29. 271 S.C. at 178, 246 S.E.2d at 179.

30. *Id.* at 179, 246 S.E.2d at 179-80.

31. At the time of the proceedings the circuit courts and the family courts exercised concurrent jurisdiction. S.C. CODE ANN. § 14-21-415 (Cum. Supp. 1978).

32. Pertinent provisions of the order are as follows:

> It is further ORDERED that the petitioner, Merliee Dawn Hoover, is to allow the respondent to have custody of said children three weeks during the summer for a period between June 15 and July 31 each year, upon written request to her stating the time of the visitation . . .
>
> It is further ORDERED that the said Herbert Lynwood Hoover, Jr., respondent, shall have the right to have the children visit one week before or after Christmas of each year . . .
>
> It is further ORDERED that in the event the petitioner refuses to allow said children to visit the respondent, as above stated, that the respondent shall be immediately relieved of all obligation to make further child support payments until said visitation rights are allowed.

271 S.C. at 179, 246 S.E.2d at 180.

33. *Id.* at 180, 246 S.E.2d at 180.

34. *Id.* at 182, 246 S.E.2d at 181.

35. *Id.* at 180, 246 S.E.2d at 180 (citing State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972)). The original order with its visitation conditions was declared *res judicata*

jurisdiction over the subject matter of support, the portions of its order requiring the husband to pay $100 support per month per child were upheld.[36]

The supreme court stated that "[t]he purpose of URESA is 'to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto.' "[37] Moreover, "[t]he only subject covered by URESA is the duty of support, and section 20-7-160 expressly provides that participation in a URESA proceeding 'shall not confer upon any court jurisdiction of any of the parties thereto in any other proceeding.' "[38] The supreme court relied on cases from North Carolina, Georgia, and Florida to place a narrow construction on the statute's jurisdictional reach and to exclude matters of visitation.[39]

In analyzing the decision, practitioners should avoid reading the opinion too broadly. The holding is *not* that URESA subject matter jurisdiction is limited to duties of support, but rather that visitation rights are not part of the subject matter jurisdiction.[40] Furthermore, Chief Justice Lewis' separate concurring opinion suggests that the holding be limited to child support and not to alimony.[41] It will be difficult, however, to reconcile conferring subject matter jurisdiction on matters other than support proceedings in an alimony support case while denying such jurisdiction in a child support case because the duties of support quoted

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during the contempt proceeding. Record at 17.

36. 271 S.C. at 182, 246 S.E.2d at 181.

37. *Id.* at 181, 246 S.E.2d at 180 (quoting S.C. CODE ANN. § 20-7-120 (1976)).

38. 271 S.C. at 181, 246 S.E.2d at 181. *See generally* Grosse v. Grosse, 347 So. 2d 1099 (Fla. Dist. Ct. App. 1977); Register v. Kandlbinder, 134 Ga. App. 754, 216 S.E.2d 647 (1975).

39. 271 S.C. at 181-82, 246 S.E.2d at 181. *See generally* Grosse v. Grosse, 347 So. 2d 1099 (Fla. Dist. Ct. App. 1977);Vecellio v. Vecellio, 313 So. 2d 61 (Fla. Dist. Ct. App. 1975); Register v. Kandlbinder, 134 Ga. App. 754, 216 S.E.2d 647 (1975); Thibadeau v. Thibadeau, 133 Ga. App. 154, 210 S.E.2d 340 (1974); Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976); Annot., 42 A.L.R.2d 768 (1955); *see also* Blois v. Blois, 138 So. 2d 373 (Fla. Dist. Ct. App. 1962); Commonwealth v. Balph, 210 Pa. Super. Ct. 244, 232 A.2d 76 (1967); Yeter v. Cornneau, 84 Wash. 2d 155, 524 P.2d 901 (1974). The following cases can be distinguished as either failing to focus on the entire purpose of URESA or failing to notice the limitations of its interstate character: Chandler v. Chandler, 109 N.H. 477, 256 A.2d 157 (1968); Daly v. Daly, 39 N.J. Super. 117, 120 A.2d 510 (1956); New Jersey v. Morales, 35 Ohio App. 2d 56, 299 N.E.2d 920 (1973); Porter v. Porter, 25 Ohio St. 2d 123, 267 N.E.2d 298 (1971).

40. 271 S.C. at 182, 246 S.E.2d at 181.

41. *Id.* at 183, 246 S.E.2d at 182 (Lewis, C.J., concurring).

in *Hoover* are defined by section 20-7-130(6)[42] to include "*any duty of support* imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise."[43]

The Chief Justice may have been referring to alimony payments and visitation rights determined either by agreement between the parties or by court decree pursuant to a divorce or separation proceeding. A refusal to permit visitation under those circumstances would probably fall under the provisions of section 20-7-450: "[t]he obligor may assert any defense available to a defendant in an action on a foreign judgment."[44]

After *Hoover,* URESA could be interpreted as conferring subject matter jurisdiction only to adjudicate duties of support in a proceeding prior to a written agreement between the parties or prior to a court order pursuant to a divorce or a separation proceeding. URESA proceedings subsequent to such an agreement or court order could be interpreted to permit an obligor to assert defenses pursuant to section 20-7-450.[45]

II. ALIMONY—PROHIBITION ON AWARDING SPECIFIC PROPERTY IN LIEU OF ALIMONY

The 1975 decision in *Smith v. Smith*[46] was the first case to construe the South Carolina Code provision authorizing alimony payments.[47] The supreme court held that the South Carolina alimony statute contemplates payment of alimony in money; furthermore, a court has no power to award specific property of the husband as alimony.[48] A series of 1978 decisions has reaffirmed *Smith* and provided additional guidance regarding the disposition of property pursuant to divorce *a vinculo matrimonii* and separation proceedings.

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42. S.C. CODE ANN. § 20-7-130(6) (1976).
43. *Id.* (emphasis added).
44. *Id.* § 20-7-450 (1976).
45. *Id.*
46. 264 S.C. 624, 216 S.E.2d 541 (1975). For a discussion of *Smith,* see *Domestic Relations, Annual Survey of South Carolina Law,* 28 S.C.L. REV. 308 (1976). The original appearance of these two parties before the supreme court was in Smith v. Smith, 262 S.C. 291, 204 S.E.2d 53 (1974). For discussion of the earlier decision, see *Domestic Relations, Annual Survey of South Carolina Law,* 27 S.C.L. REV. 439 (1975).
47. S.C. CODE ANN. § 20-3-130 (1976).
48. 264 S.C. at 630, 216 S.E.2d at 544.

In *Jones v. Jones*[49] the husband was ordered to pay a lump sum of $36,000 in alimony; alternatively, he could pay $150 a month from January 1977 through October 1977, and then convey forty acres of cleared land to the wife for a term of twelve years. The wife then could rent the land for tobacco growing and support herself with the income.[50] The supreme court held that "[w]hile the lower court lacked jurisdiction, absent consent, to order Mr. Jones to convey his real property to Mrs. Jones, it may give Mr. Jones the option of making such a transfer."[51] In addition to allowing a specific property transfer as an alternative to alimony payments, the supreme court recognized the propriety of awarding the wife the use of the family residence. It remanded this award, however, because the trial judge failed to set forth the salient facts and conclusions of law upon which the award was based,[52] as required by Family Court Rule 27(c).[53]

A similar issue regarding occupation of the marital home by the wife and minor children was addressed in *Taylor v. Taylor*.[54] In *Taylor* the wife appealed a portion of the lower court's order that she contended could be interpreted as allowing the wife the use of the marital home only so long as the children resided with her. The supreme court found no such provision, but ruled that the wife obtained no vested right to remain in the marital home for the balance of her life and that changed circumstances of the parties may necessitate future modification of support provisions of the order.[55]

Wilson v. Wilson[56] suggests two solutions to the problems created by prohibiting transfers of specific property as alimony: the special equitable contribution theory and the resulting trust theory.[57] In *Wilson* the supreme court held that the lower court's

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49. 270 S.C. 280, 241 S.E.2d 904 (1978).
50. *Id.* at 282, 241 S.E.2d at 905.
51. *Id.* at 284, 241 S.E.2d at 905.
52. *Id.*, 241 S.E.2d at 906.
53. S.C. FAM. CT. R. 27(c). Rule 27(c) provides that:
> The Order pursuant to the adjudication shall be reduced to writing as soon after the hearing as possible, but no later than 30 days, and shall set forth the salient facts upon which the order is granted, the conclusions of law, and such other data relating to the decision as the court may deem desirable. Such order and opinion, if any, may be mailed to the parties or their attorneys by ordinary mail.

Id.
54. 271 S.C. 488, 248 S.E.2d 315 (1978).
55. *Id.* at 491, 248 S.E.2d at 317.
56. 270 S.C. 216, 241 S.E.2d 566 (1978).
57. *Id.* at 218, 241 S.E.2d at 567.

order that the husband convey his one-half interest in the family residence as an equitable division of property in lieu of alimony was prohibited by *Smith* and remanded the case for determination of alimony.[58] Though it disallowed the equitable division of property in lieu of alimony, the supreme court found that because the wife had contributed materially to the financial success of her family and the acquisition of property by her husband, she was entitled to the equitable ownership of a portion of the properties held by the husband.[59]

The wife's argument for a resulting trust in the family residence failed because she did not show that either her funds or joint funds were used to purchase the land upon which the second family residence was built.[60] The former residence had been financed from joint funds and combined wages. The land for the second residence was purchased by Mr. Wilson and subsequently the proceeds from the sale of the former residence were used to construct the second home.[61] Under settled case law[62] Mrs. Wil-

58. *Id.* at 222, 241 S.E.2d at 569.

59. *Id.*

> Mrs. Wilson has been employed since the time of the marriage in 1951. At one time she worked in a business owned by her husband and his brother-in-law and was paid a weekly salary of only $25.00. These efforts on her part plus the expenditure of her income for household expenses not only contributed to the material success of the family but also freed her husband's earnings for investment.

Id. While the supreme court recognized these efforts as a material contribution, the parameters of what constitutes such a contribution by the wife was not resolved. The court cited without discussion, McKenzie v. McKenzie, 254 S.C. 372, 175 S.E.2d 628 (1970), as support for the material contribution theory. *See* 27B C.J.S. *Divorce* § 293 (1959) for the rationale for conferring a special equity on a wife who has made such contribution to the accumulation of property by the husband during coverture.

60. 270 S.C. at 221, 241 S.E.2d at 568.

61. *Id.* at 219, 241 S.E.2d at 567.

62. The court cited and quoted the following:

Moore v. McKelvey, 266 S.C. 95, 221 S.E.2d 780 (1976), [held]:

> It is well settled that the evidence to establish a resulting trust must be definite, clear, unequivocal and convincing. *Green v. Green,* 237 S.C. 424, 117 S.E.2d 583; *Hodges v. Hodges,* supra, 243 S.C. 299, 133 S.E.2d 816.
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> In *Hodges* the principles were stated that "in order for a resulting trust to arise, such must arise, if at all, at the time the purchase is made. The funds must then, or prior thereto, be advanced and invested. A trust will not result from funds subsequently furnished." 221 S.E.2d at 781.

In *Green v. Green,* supra, [the court] held that a resulting trust could be established by tracing the proceeds from the sale of one house into the purchase of a second house. In *Green* the lot on which the second house was built was purchased with joint funds, and when the first house was sold the proceeds from

son's share of the proceeds from the sale of the first home that were used to construct the second home was not sufficient to establish a resulting trust, because she could not trace her funds or joint funds to the purchase of the unimproved real estate.[63]

The theories of special equitable ownership and resulting trust, however, were of no avail in *McCullough v. McCullough,*[64] because Mrs. McCullough failed to plead for disposition of the property.[65] In a footnote the supreme court pointed out that prior to July 1, 1977, the authority for a property division by the court was recognized through voluntary litigation[66] or by stipulation.[67] Effective July 1, 1977, disposition of property between the parties during a divorce is authorized only if prayed for in the pleadings.[68]

The alimony awarded in *McCullough* consisted of a one-third interest in a savings account and various shares of stock owned by the husband.[69] Citing the controlling principles of *Wilson* and *Smith,* the supreme court once again stated that "while the lower court was at liberty to specify a property transfer as an alternative method of satisfying an alimony award, it could not unconditionally order the property transfer as alimony."[70] The husband was not given an option to remit a sum of money and the absence of such an option bound the supreme court, through *Smith,* to restrict alimony to payments in money.[71]

An intriguing question remains after these cases: what constitutes property? In *McCullough* the alimony awarded consisted of a portion of a bank account and various stock. The court struck down the award and characterized it as personal property "principally in the form of stock."[72] Apparently the bank account was considered personal property, even though it is clearly money, the form of property required for alimony payments.

> that sale were used to construct a house on the second lot. Mr. Green was found to hold a portion of the first residence on a resulting trust for Mrs. Green, and [the court] held the trust could be traced into the second residence.

270 S.C. at 220, 241 S.E.2d at 568.

63. *Id.* at 221, 241 S.E.2d at 568.

64. 271 S.C. 475, 248 S.E.2d 308 (1978).

65. The wife's pleadings were an answer and counterclaim in which she prayed only for alimony and attorney's fees. Record at 4.

66. Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961).

67. Moyle v. Moyle, 262 S.C. 308, 204 S.E.2d 46 (1974).

68. S.C. CODE ANN. § 14-21-1020 (Cum. Supp. 1978).

69. 271 S.C. at 476, 248 S.E.2d at 309.

70. *Id.* at 477, 248 S.E.2d at 309.

71. *Id.*

72. *Id.*

In *Gasque v. Eagle Machine Co.*[73] the court discussed the meaning of "property" in South Carolina Code section 36-2-318[74] regarding the extent of a seller's warranty for goods. The court cited the generally accepted meaning of "property" as set forth in *Gibbes v. National Hospital Service, Inc.*[75] "Property is a general term to designate the right of ownership; and includes every subject, of whatever nature, upon which such a right can legally attach. It is not necessary that the subject of it should be either lands, goods or chattels; for it extends to money and securities."[76] The concept of property is very comprehensive and includes any valuable right or interest protected by law, any civil right of pecuniary nature, valid contract, and choses in action.[77]

Hence, although money is property, the court in *Smith* apparently considered it fungible and not specific property. As fungible property it does not violate the prohibition against transfers of specific property for alimony; however, when money takes the form of a specific bank account, *Smith* and *McCullough* operate to strike down the unconditional order of its transfer in lieu of alimony.

Numerous objections to the "specific property transfer" of certain types of property, such as trusts, health or life insurance, government benefits, workman's compensation payments and tort judgments, undoubtedly exist. The practitioner should note, however, that although these arguments might prove effective in individual cases to prevent a specific transfer, *Wilson* provides for a remand for determination of an alternative sum of money as alimony when alimony payments are justified.[78]

The prohibition of specific property transfers does not limit the court to consideration of only the wage earning potential of the husband when determining a proper sum for alimony. In *McMurtrey v. McMurtrey*[79] the husband was found in contempt for failure to pay monthly alimony of $125 to his wife. The husband claimed that total disability prevented him from earning

73. 270 S.C. 499, 243 S.E.2d 831 (1978). For discussion of *Gasque* see *Products Liability, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 101, 101-07 (1979).

74. S.C. CODE ANN. § 36-2-318 (1976).

75. 202 S.C. 304, 24 S.E.2d 513 (1943).

76. *Id.* at 308, 24 S.E.2d at 514 (quoting Pell v. Ball, 17 S.C. Eq. (Speers Eq.) 48, 83 (1843)).

77. *See* 202 S.C. at 308-09, 24 S.E.2d at 515.

78. 270 S.C. at 222, 241 S.E.2d at 569.

79. 272 S.C. 118, 249 S.E.2d 503 (1978).

enough money to make the alimony payments.[80] In upholding the trial court's finding of contempt, the supreme court did not deem it necessary to determine the disability or employability of the husband since he owned a "sufficient financial resource from which to generate the funds"—an unencumbered 123 acre farm and an eight-room brick house.[81] Citing *Eagerton v. Eagerton*,[82] the court declared that "[t]here is no limitation that alimony payments be made solely from current earnings."[83] Although the husband was not compelled to convey the farm to his wife, the court found it permissible essentially to force him to liquidate portions of his property to generate the necessary funds to satisfy his duty of alimony.

Shortly after the *Smith* prohibition of specific transfers of property in lieu of alimony, one author characterized the decision as unwittingly imposing severe limitations on the ability of courts to order adequate awards of alimony.[84] During 1978, however, the supreme court showed remarkable flexibility in avoiding the flat prohibition on specific property transfers. *Jones* sanctioned the use of an alternative choice of a specific property transfer,[85] *Wilson* suggested theories of equitable contribution and resulting trust,[86] and *McMurtrey* authorized lower courts to consider obligors' property holdings in determining ability to generate funds to satisfy alimony obligations.[87]

Joseph M. Arndt, III

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80. *Id.* at 121, 249 S.E.2d at 505.
81. *Id.*
82. 265 S.C. 90, 217 S.E.2d 146 (1975).
83. 272 S.C. at 121, 249 S.E.2d at 505.
84. *Domestic Relations, Annual Survey of South Carolina Law*, 28 S.C.L. REV. 308, 310 (1976).
85. See text accompanying notes 48-51 *supra*.
86. See text accompanying notes 54-61 *supra*.
87. See text accompanying notes 78-82 *supra*.