Domestic Relations

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DOMESTIC RELATIONS

I. DIVORCE

A. Alimony

The South Carolina Supreme Court considered a number of alimony issues in 1977. These included the proper factors underlying an alimony award and the situations justifying its modification.

Justice Ness wrote the opinion of the court in Nienow v. Nienow.¹ This divorce action was instituted in August 1972 in the Court of Common Pleas of Sumter County. In addition to divorce, plaintiff sought to recover permanent alimony of $500,000, temporary alimony, and attorney's fees.² As grounds for divorce she alleged physical cruelty, habitual drunkenness, and adultery.³

The parties were married in April 1971 after almost three years of cohabitation. Defendant possessed wealth in excess of four million dollars and throughout the marriage he had given plaintiff a monthly check for three hundred dollars. Plaintiff also "enjoyed numerous extended vacations, as well as hunting and fishing expeditions, throughout the United States and Canada."⁴ Defendant retired in 1968 and had recently undergone open heart surgery. Plaintiff, on the other hand, was young and in good health; she was capable of self support even though she apparently made no contributions to defendant's wealth at any time during the marriage.

Despite plaintiff's allegations to the contrary, the circuit court found, and the supreme court agreed, that no evidence of any substantial marital misconduct on the part of either party existed. The Master recommended an alimony award of $15,000, emphasizing that plaintiff was "perfectly capable of supporting herself if she exert[ed] a proper effort to find gainful employment."⁵ He concluded that she was "entitled to a reasonable sum to enable her to support herself through a period of adjustment, to a state of gainful employment."⁶ The circuit court judge's finding is not as clear as that of the Master. Aside from the conclusion

³. Id. at 6-8. For statutory grounds for divorce see S.C. CODE ANN. § 20-3-10 (1976).
⁴. 268 S.C. at 171, 232 S.E.2d at 509.
⁵. Record, vol. 4 at 877.
⁶. Id. at 882.
that a Florida divorce decree barred plaintiff’s divorce action, he concluded that the record of the case did not support plaintiff’s entitlement to alimony. While agreeing that $15,000 was a reasonable sum if any alimony was awarded, he emphasized that a wife is not automatically entitled to alimony and that “the burden of proof is upon the plaintiff to establish her entitlement” in any case. He concluded that plaintiff had not satisfied her burden, and so was not entitled to an award.

On appeal to the supreme court, Justice Ness explained the proper method of determining a wife’s entitlement to alimony. Quoting from his opinion in the 1975 case of Beasley v. Beasley, he said:

Alimony is founded upon the legal duty of the husband to support his wife. It is not intended as a penalty against him, nor as a reward to the wife. While the financial condition of the husband, and the needs of the wife are important, they are not the only essentials to consider in determining the amount. There must also be considered all other circumstances of the particular case such as the age and health of the parties, their respective earning capacity, their individual wealth, the amount she contributed to the accumulation thereof and the conduct of the parties.

Also to be considered are the necessities of the parties and the standard of living of the wife at the time of divorce. He observed that a number of other jurisdictions have accorded weight to the length of the marriage, the husband’s ability to pay alimony, and the parties’ actual income. Justice Ness then pointed out that a wife’s employment does not foreclose an alimony award. In holding unreasonably low the $15,000 award recommended by the Master, he referred to plaintiff’s “accustomed standard of wealth, the disparity between the parties’ wealth, and their respective earning capacities” as particularly significant circumstances in the case.

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7. See notes 37-40, and accompanying text infra.
9. Id.
12. 268 S.C. at 171, 232 S.E.2d at 509. In a footnote to its discussion of factors accorded weight in other jurisdictions, the court cites Annot., 1 A.L.R.3d 123 (1965).
The holding of the case on the alimony issue is not unusual. Justice Ness cited ample South Carolina authority for every factor that he designated as significant in determining the proper amount of alimony. The case is valuable, however, because it states the relevant factors in unequivocal terms. For this reason the case will undoubtedly become standard authority in future divorce cases involving a disputed alimony award.

The opinion is also significant because of its use of the rationale underlying an alimony award. The Master apparently assumed that plaintiff was required to support herself as soon as possible and that the purpose of the $15,000 was to provide support until she was able to do so. He undoubtedly realized that the sum was not all that the court could reasonably ask defendant to pay to maintain plaintiff in her accustomed standard of living, yet he seemed to believe that defendant need not support her at all once she was able to locate a job.

Although the supreme court did not object to the Master's findings of fact concerning the status of the two parties, it rejected the Master's recommendation nonetheless because of its implicit assumption that a husband has no continuing duty to support his divorced wife. Justice Ness clearly stated that in South Carolina alimony is a substitute for a husband's duty to support his wife and that he must support her in her accustomed standard of living insofar as he is reasonably able. The Master's error, then, was his misunderstanding of the purpose of an alimony award. Justice Ness left little doubt that a husband's duty to his wife extends beyond an obligation merely to support her through the period of transition following a divorce. His duty to her, on the contrary, is scarcely diminished by the interposition of a divorce decree.

One of the first cases to cite Nienow for the factors to be weighed in determining alimony was Bailey v. Bailey. This divorce case was instituted by the wife in the Lexington County Family Court. The court granted the divorce and awarded plaintiff $200 per month permanent alimony. She appealed to the supreme court, claiming that the trial court had failed to consider a number of factors so that its award was an abuse of discretion. The supreme court agreed with her contention in an opinion by Justice Gregory. Justice Gregory first reiterated the well-

15. Id.
17. Record at 3.
established precept that the judge in a divorce action "is given broad discretion in deciding questions of alimony." He then referred to the Nienow opinion and listed the factors that Justice Ness had mentioned in the earlier case. Of particular importance to Justice Gregory were the financial condition of the husband, the needs of the wife, and her ability to support herself. Defendant had a net worth of between $50,000 and $60,000 and an annual income of around $15,000. Plaintiff was in her mid-forties and had suffered from severe arthritis for nine years. She was able to walk, but unable to do heavy housework or assume employment outside the home. In addition to her inability to support herself financially, she incurred substantial expenses because of her poor health, including large medical expenses and the cost of hiring a maid to do housework. The $200 per month barely covered her living expenses and she was clearly unable to supplement that amount by her own efforts. Justice Gregory pointed out that the wife's health is traditionally considered an important element in evaluating a wife's entitlement to alimony because of both the added expenses and the diminished earning capacity attendant to poor health.

After deciding that the alimony award was unreasonably low, the court cautioned the lower court that in evaluating plaintiff's ability to support herself, it must not consider that she allowed her mother and emancipated son to live in the house with her without paying rent. The family court had recognized that to increase her income plaintiff could require them to pay her. The court provided that if either should move out of the house, the monthly alimony would be increased to $250 and that if both moved out, to $300. In invalidating the trial court's approach, the supreme court commented that the presence of the mother and son in the house should be disregarded because alimony is the replacement for the husband's duty to support his wife and, therefore, contributions of the wife's relatives to her support cannot be considered by the court. The supreme court's conclusion on this issue, however, is not

18. 269 S.C. at 4, 235 S.E.2d at 802 (citing Porter v. Porter, 246 S.C. 332, 143 S.E.2d 619 (1965)).
19. 269 S.C. at 4, 235 S.E.2d at 802.
20. Id.
21. Id. at 6, 235 S.E.2d at 803.
22. Id. at 6, 235 S.E.2d at 802.
23. Id. at 6, 235 S.E.2d at 803 (citing Hulcher v. Hulcher, 177 Va. 12, 12 S.E.2d 767 (1941); 27A C.J.S. Divorce § 233(6) (1959)).
clearly supported by the cited authority. It is, as the court asserts, an established principle in most jurisdictions that contributions from relatives are disregarded in ascertaining a wife's financial condition. Although her earnings may be taken into account as a basis for reducing her need for alimony, it is "generally recognized that gratuitous contributions," from whatever source, "neither indicate a diminished need for support nor reduce her husband's duty to furnish it." The question remains, however, whether payment of rent by a relative is equivalent to a gratuitous contribution. Implicit in the supreme court's analysis is the assumption that even if plaintiff's mother and son had actually paid rent, the court would have to disregard those payments as gratuitous contributions. Clearly, however, not all rental payments are gratuitous contributions. If instead of letting her mother and son live in the house Mrs. Bailey had rented the rooms, her income from that rental would have been properly considered by the court in ascertaining her financial needs and abilities. Arguably, then, the house should be considered the wife's asset, as it is when it actually produces rental income. However the wife chooses to use the house, therefore, it would be counted as a potential source of income to her and would reduce the amount of support needed from the husband.

The supreme court's opinion in Bailey should be viewed as an affirmative rejection of this argument rather than merely as a routine application of established law. Essentially, the court implied that even though a house is capable of producing income, the wife will not be expected to put the house to its most profitable use. This conclusion is not without justification in light of the court's role in settling the rights of the parties. A husband is not required to exert every possible effort to maximize his ability to support his wife. Conversely to put this burden upon the wife for her own support would be unreasonable. Furthermore, to treat the wife's home as no more than an economic resource would abrogate the court's equitable prerogative. Good reason exists to hold that a wife should be able to use her home as she pleases, because a home is fundamental to a person's comfort and choice

24. 269 S.C. at 6, 235 S.E.2d at 803.
of lifestyle. In Bailey the supreme court extended an established principle of law beyond the point to which it is normally extended, and in so doing reached an equitable result that, in itself, was well within the court's discretion.

In Camp v. Camp, the defendant, a practicing psychiatrist, earned over $140,000 in 1975. Shortly after his wife filed her original divorce action, he abandoned his private practice and joined the staff of the state hospital at an annual salary of less than $50,000. In a per curiam opinion the court affirmed without discussion a monthly alimony award of $390 and advised the bar:

While dismissing the case under Rule 23, it is in order to call the attention of the bench and bar to the fact that this Court will closely scrutinize the facts of any case wherein a husband and father voluntarily changes employment so as to lessen his earning capacity and, in turn, his ability to pay alimony and child support monies. The trial judge has ordered payment in keeping with the ability of the defendant to earn and pay, though not necessarily in keeping with his new income status.

It is widely established that a court may consider a husband's potential, rather than actual, income when he deliberately reduces his salary and becomes unable to pay alimony or child support at the level at which he is capable. This is especially true when, as in this case, the husband does so shortly before or during the trial.

The supreme court's position, therefore, is well founded. The court, however, did not specify how closely it will scrutinize these cases nor how strictly it will construe the general rule that a husband may not intentionally lower his own income to his divorced wife's detriment. Although it is finding increased acceptance, the rule usually applies only when the husband's income reduction results from bad faith; that is, when he deliberately attempts to avoid his family financial responsibilities by reducing his own income. In Camp, however, the family court did not find

29. Record at 93-94.
30. 269 S.C. at 174, 236 S.E.2d at 815.
that defendant abandoned his private practice because of a desire to avoid his obligation to plaintiff. The only finding was that he voluntarily depressed his income; no reason was given.\textsuperscript{34} Defendant testified that in his private practice he had worked eighty hours a week and that he changed jobs in order to have more leisure time. In his new job with the hospital he would work forty hours a week, but would have the option of seeing private patients on his own time.\textsuperscript{35} He argued on appeal that one could infer from the record that he changed jobs to start a new life after a traumatic divorce and that he could simply no longer sustain the rigorous burden of maintaining his previous income.\textsuperscript{36} The supreme court's opinion, however, does not disclose whether the court reviewed the record and found bad faith or did not require a finding of bad faith on the husband's part.

Apparently, then, the supreme court applied the general rule in the case without a finding of bad faith on the part of defendant. Although it may be unwise to speculate on the basis of one decision, seemingly the court will take a rather strict approach when a husband voluntarily depresses his income. Just how closely it intends to scrutinize these cases is still uncertain.

\section*{B. Divisible Divorce Doctrine}

In addition to its discussion of alimony awards \textit{Nienow v. Nienow}\textsuperscript{37} illustrates an application of the divisible divorce doctrine. The parties were married in April 1971 in Florida, where they were domiciled until their separation on June 1, 1972.\textsuperscript{38} At that time plaintiff moved to Sumter County, South Carolina, and defendant remained in Florida. Two months later, on August 2, defendant filed for divorce in Florida. On August 4 plaintiff filed for divorce, alimony, and attorney's fees in South Carolina. The Florida court did not secure \textit{in personam} jurisdiction over plaintiff so it did not adjudicate her entitlement to alimony, but it issued a divorce decree on February 1, 1973, while plaintiff's action was still pending in South Carolina. The Master appointed by the court in plaintiff's South Carolina suit found, and the trial court agreed, that the Florida decree effectively dissolved the marriage and no divorce decree should issue from the South Caro-

\begin{footnotesize}
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\item \textsuperscript{34} 269 S.C. at 174-75, 236 S.E.2d at 815; Record at 100.
\item \textsuperscript{35} Record at 70.
\item \textsuperscript{36} Id. at 14.
\item \textsuperscript{37} 268 S.C. 161, 232 S.E.2d 504 (1977).
\item \textsuperscript{38} Record, vol. 4, at 873.
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lina court. Moreover, plaintiff had not resided in South Carolina for the full year requisite to the maintenance of a divorce action in this State; hence, she was not entitled to a South Carolina divorce.

The issue remained, however, whether plaintiff was nevertheless entitled to ask the court for an alimony award and attorneys' fees. The referee decided that because the Florida court had not obtained in personam jurisdiction over plaintiff and the South Carolina court had in personam jurisdiction over defendant, the divisible divorce doctrine applied and even though full faith and credit had to be accorded the Florida divorce decree, that decree did not preclude the South Carolina court from awarding alimony and attorney's fees. The trial court, however, found that plaintiff's intent in establishing a residence in South Carolina was only to obtain a favorable forum for litigation, so the divisible divorce doctrine was inapplicable and the South Carolina court could grant her no relief.

The supreme court reversed, holding plaintiff's intent in establishing residence in South Carolina is irrelevant to the application of the divisible divorce doctrine as long as she voluntarily submitted herself to the court's jurisdiction and the court procured in personam jurisdiction over defendant. The court first agreed with the Master that under the divisible divorce doctrine, the Florida decree was not a bar to the South Carolina action for alimony and attorneys' fees, because the Florida court lacked the personal jurisdiction over plaintiff that was required to adjudicate her property rights. As to South Carolina's jurisdiction over the parties, the court pointed out that in independent actions for alimony or support, unlike in actions for divorce, no statutory residence requirements exist. Therefore, the South Carolina court was empowered to adjudicate the alimony issue by virtue

39. Id. at 940.
40. Id. at 881; see S.C. Code Ann. § 20-3-30 (1976) for statutory residency requirements.
41. Although defendant initially contested the South Carolina court's in personam jurisdiction over him, that issue was not raised on appeal.
43. Record, vol. 4, at 941-43.
44. 268 S.C. at 167, 232 S.E.2d at 507.
45. 268 S.C. at 168, 232 S.E.2d at 507.
of its personal jurisdiction over the parties and the lack of statutory limitations. The jurisdictional issue was therefore largely limited to an examination of whether the court should invoke the discretionary doctrine of forum non conveniens. The court recognized that a plaintiff's choice of forum, given valid jurisdiction over a defendant, should not be disturbed unless weighty reasons are presented and a suitable alternative forum is available to the plaintiff. In light of both parties' itinerant histories, their numerous contacts with the State, and defendant's failure to establish prejudice to himself because of plaintiff's choice of forum, the court determined that the lower court should not have declined jurisdiction.

The result in Nienow is undoubtedly correct. The facts of the case are remarkably similar to those presented to the Supreme Court in Vanderbilt v. Vanderbilt. In Vanderbilt the husband and wife were married in 1948 and lived together in California until they separated in 1952. In February 1953 the wife established a domicile in New York; the next month the husband filed for divorce in Nevada, but the wife was not served with process in Nevada and did not appear before the divorce court. The Nevada court issued a divorce decree in June 1953. In April 1954 the wife filed suit in New York for separation and alimony. The court attached the husband's property in New York to obtain jurisdiction and awarded the wife alimony despite a finding that the Nevada decree had effectively dissolved the marriage between the parties in 1953. The New York Court of Appeals upheld the award, and the United States Supreme Court granted certiorari to consider the husband's claim that the award was in violation of the court's obligation to accord full faith and credit to the Nevada decree, which purported to terminate his obligation to support his wife. The Court held, as the South Carolina Supreme Court held in Nienow, that without personal jurisdiction over the wife, a court is powerless to terminate her right to support by her husband, and that full faith and credit need be given only to the


48. Defendant owned several corporations in South Carolina as well as over three million dollars worth of property in Sumter. Both parties had spent considerable time in the state over the past few years although defendant was now admittedly domiciled in Florida. Record, vol. 1, 72-75; Brief for Appellant at 130.

49. 268 S.C. 161, 232 S.E.2d 504.

divorce decree. Full faith and credit thus need not be accorded an *ex parte* alimony adjudication by the courts of another state. 51 Clearly the South Carolina Supreme Court was correct in its conclusion that the Florida divorce decree, made without personal jurisdiction over plaintiff, could not, under the Full Faith and Credit Clause, 52 bar her subsequent action for alimony in South Carolina.

Language in the *Nienow* opinion, however, can be read as according the divisible divorce doctrine a broader scope than is constitutionally permissible. After deciding that the suit was an action for alimony rather than for divorce, the court said "[u]nquestionably the wife has a right to maintain such an action pursuant to the 'divisible divorce' doctrine," 53 citing the 1963 South Carolina case of *Murdock v. Murdock*. 54 The *Murdock* opinion cited *Vanderbilt* as the controlling statement of the doctrine. The Supreme Court said in *Vanderbilt* simply that "[s]ince the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish any right which she had under the law of New York to financial support from her husband." 55 The wife in *Vanderbilt* had an existing right under New York law that the Nevada court was powerless to extinguish by its divorce decree. In *Murdock*, South Carolina was the marital domicile, and the husband had left the state to obtain an *ex parte* divorce elsewhere; thus, the wife had a right under South Carolina law to support from her husband at the time the foreign divorce was decreed. As in *Vanderbilt*, the divisible divorce doctrine merely preserved that right, it did not create it.

In *Nienow*, however, the court made no reference to a right of support that plaintiff had under South Carolina law at the time of the Florida divorce decree. The court's decision in the case is undoubtedly correct because the facts indicate that plaintiff probably had enough contacts with South Carolina at the time of the divorce to give her a right to support under state law at that time. 56 Rather than determine whether she had the right to seek

51. *Id.* at 418-419.
52. U.S. Const. art. IV, § 1.
53. 268 S.C. at 166, 232 S.E.2d at 507.
55. 354 U.S. at 418.
56. As the court pointed out in its statement of facts, plaintiff had moved to South Carolina before the commencement of defendant's action in Florida and according to the referee, had demonstrated a change of domicile to South Carolina. 268 S.C. at 165, 232 S.E.2d at 506.
support under State law, the court seemed to say that the divisible divorce doctrine gave her that right. The doctrine did not give her that right, however; it merely preserved the right, if any, that existed at the time the Florida decree was entered.

An interesting problem could arise if a divorced wife with no previous contact with South Carolina attempts to sue her former husband for alimony in a South Carolina court after he has obtained an ex parte divorce decree elsewhere. This situation could conceivably arise when a husband establishes residence in South Carolina after obtaining a foreign divorce or when, as in Nienow, a husband has substantial assets located within the state. Assuming that, as in Nienow, the divorcing court did not have personal jurisdiction over the wife and the South Carolina court does obtain personal jurisdiction over the husband, nothing in the Nienow opinion would prevent her from pursuing her action. In fact, the court said “[t]he appellant, regardless of her ‘mala fide’ or ‘bona fide’ residency, voluntarily submitted to jurisdiction by filing her pleading for relief. It follows that our courts had jurisdiction of both the parties and the subject matter of this action.” 57 The court would conclude, again, that “[u]nquestionably the wife has a right to maintain such an action pursuant to the ‘divisible divorce’ doctrine.” 58 Neither Vanderbilt nor Murdock support this position, however. In both of those cases the courts were enforcing a right to support that existed under the law of plaintiff’s domicile before the foreign divorce, and the divisible divorce doctrine merely preserved that right. In this hypothetical situation there would have been no right to support in South Carolina at the time of the divorce because the parties had no contact with the State at that time. In such a case reference to state law becomes crucial. Although a divorce decree cannot cut off a wife’s right to support, she may not have the right under South Carolina law if South Carolina law does not allow alimony to a woman whose marriage ended before she came into the state. A number of states refuse to award alimony after the marital status has already been ended by divorce. 59 Those states would not allow a divorced wife to come into

57. 268 S.C. at 167, 232 S.E.2d at 507.
58. 268 S.C. at 166, 232 S.E.2d at 507.
their forum and ask for alimony, even with the application of the divisible divorce doctrine. Whether South Carolina recognizes a right to support after divorce is unclear. This determination would have been critical in Nienow if plaintiff had not had sufficient contact with South Carolina at the time of the divorce to have a right to support under state law at that time. Yet the court made reference neither to her contacts with the state at the time of the divorce nor to her right to seek support under state law. A precise application of the divisible divorce doctrine cannot be made without such reference because the doctrine preserves only those rights that exist under State law, and does not create a right of action as the Nienow opinion suggests.

C. Divorce a Mensa et Thoro

“We therefore, hold that the cause of action for a limited divorce a mensa et thoro does not exist in South Carolina, either by virtue of the common law or statute.” So Chief Justice Lewis, writing for a unanimous court in Nocher v. Nocher, disposed of the cause of action for divorce a mensa et thoro in South Carolina. This announcement was a startling revelation not only to the bench and bar, but to numerous individuals who had been granted this limited form of divorce by South Carolina courts.

Nocher was a wife’s action in the Richland County Court for a divorce a mensa et thoro on grounds of desertion. Defendant, a Virginia resident, made a special appearance to contest the lower court’s jurisdiction to grant the divorce and award alimony, child support, and custody of the children. The court sustained his objection except that part relating to the divorce and the award of child custody, and it granted plaintiff a divorce a mensa et thoro. On appeal defendant maintained his objection to the

60. See Loeb v. Loeb, 4 N.Y.2d 542, 152 N.E.2d 36 (1958) (the New York Court of Appeals held that even in light of Vanderbilt a divorced wife who was not a domiciliary of New York when the ex parte divorce was granted was precluded by the New York alimony statute from later suing for alimony in New York).

61. S.C. Code Ann. § 20-3-120 (1976) empowers the courts to award alimony at the time a divorce is granted. The court in Nienow relied on Machado v. Machado, 220 S.C. 90, 66 S.E.2d 629 (1951) for the proposition that a court has inherent authority to grant support apart from divorce. That case, however, concerned granting support before, not after, the termination of the marriage.


63. Id.

64. A divorce a mensa et thoro is defined as “[a] partial or qualified divorce, by which the parties are separated and forbidden to live or cohabit together, without affecting the marriage itself.” BLACK’S LAW DICTIONARY 566 (4th ed. rev. 1968).

65. See 268 S.C. at 506, 234 S.E.2d at 885.
lower court's jurisdiction and also challenged the existence of a cause of action in South Carolina for a divorce *a mensa et thoro* on grounds of desertion before the one-year statutory period for desertion has elapsed. The supreme court held that by raising the latter issue, defendant waived his jurisdictional objection. The court therefore remanded the case for a determination of all issues. Noting that the question of the existence of a cause of action for a divorce *a mensa et thoro* would be involved in the lower court proceeding on remand, the court undertook to resolve the issue immediately, although it was not argued in the briefs of either party.

Chief Justice Lewis' opinion relied heavily on Justice Bussey's learned concurring opinion in *Brewer v. Brewer*, a case involving a wife's request that she be awarded a legal separation and both lump-sum and periodic alimony. The *Brewer* court affirmed the denial of her request for a lump-sum and held that the statute allowing a court to award alimony did not permit an award of both periodic and lump-sum payments.

In his lengthy concurrence in *Brewer*, Justice Bussey reviewed the history of divorce in South Carolina, and concluded that no action for divorce *a mensa et thoro* exists. Justice Bussey criticized the bench and bar for using the terms "legal separation," "divorce *a mensa et thoro,"" and "separate support and maintenance" interchangeably. This practice, he asserted, had led to the mistaken impression that South Carolina law provides an action for divorce *a mensa et thoro*.

"Legal separation" is a generic term, "without any specific definition, which is rather loosely applied to various situations where the husband and wife are living apart at least temporarily under some sanction of contract or law." Separate support and maintenance provides for support without the imposition of a decree dissolving the marriage. While the marriage is not dissolved by a divorce *a mensa et thoro*, a court decree compels the parties to live apart. South Carolina is the only state in the

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66. Brief for Appellant at 5; see S.C. CODE ANN. § 20-3-10(2) (1976).
67. 268 S.C. at 507, 234 S.E.2d at 885-86 (citing South Carolina State Highway Dep't v. Isthmian Steamship Co., 210 S.C. 408, 43 S.E.2d 132 (1947)).
69. *Id.*, construing S.C. CODE ANN. §§ 12-3-130 to -140 (1976). Justice Lewis interestingly concurred in the majority opinion in *Bussey*.
70. *Id.* at 20-21, 129 S.E.2d at 741-42.
71. *Id.*
73. *Id.*
Union that deals with divorce in its constitution,74 and for most of its history it prohibited divorce altogether.75 Yet, as Justice Bussey observed, even while denying their power to grant a divorce under their general equity jurisdiction, state courts consistently decreed separate support and maintenance in appropriate cases.76

Justice Bussey also disposed of a South Carolina statute77 that provides that courts may allow alimony in divorces a mensa et thoro on the same basis that it is awarded in divorces a vinculo matrimonii.78 While that statute suggests an apparent legislative recognition of divorce a mesna et thoro, more than a mere implied recognition is required when the common law prohibits such a divorce, Justice Bussey asserted. Whenever possible a statute enacted in derogation of common-law principles must be strictly construed to avoid a conflict.79 Moreover, the statutory language did not suffice to create a new cause of action because no remedy is complete without a definition of the cases to which it shall extend and because a mere grant of judicial power does not itself create a cause of action.80 The statute does not specify the grounds for divorce a mensa et thoro, nor provide any other guidelines for its application. One might surmise that the statute was enacted upon the same misconception elucidated above.

Justice Bussey's concern over the bench's and bar's imprecise use of the terms "legal separation," "separate support and maintenance," and "divorce a mensa et thoro" concerned Chief Justice Lewis as well. He stated in Nocher that in practice, abrogation of divorce a mensa et thoro will have little effect: the grounds that would be sufficient to sustain a divorce a mensa et

74. S.C. Const., art. 17, § 3.
76. In Converse v. Converse, 30 S.C. Eq. (9 Rich. Eq.) 535, 539 (1856), the court said:
The ecclesiastical court of England has the power of decreeing a separation a mensa et thoro, but the court of equity has no such jurisdiction. A jurisdiction of this kind appertains to no court in South Carolina. Under the circumstances of this case, the court might go so far (if necessary) as to protect the wife from the cruelty of the husband.
Id. See also Taylor v. Taylor, 4 S.C. Eq. (4 Des.) 167 (1811); Anonymous, 2 S.C. Eq. (2 Des.) 198 (1803).
77. S.C. Code Ann. § 20-3-140 (1976) states: "In all actions for divorce a mensa et thoro, allowances of alimony and suit money pendente lite shall be made according to the principles controlling such allowances in actions for divorce a vinculo matrimonii."
78. 242 S.C. at 24-25, 129 S.E.2d at 743-44.
79. Id.
80. Id.
thoro normally will more than suffice to sustain an action for separate support and maintenance. His interest was in restoring precision to litigation and adjudication of support and separation cases in South Carolina. Perhaps, as well, he meant to encourage the legislature to remedy the ambiguity in the statutes either by expressly authorizing actions for divorce a mensa et thoro or by removing all mention of them.

It is unclear what practical changes in divorce laws will occur because of the court's holding in Nocher. Justice Bussey suggested that awards of lump sums are improper in an action for only separate support and maintenance. Perhaps more importantly, Chief Justice Lewis was less than emphatic in his assurance that pleadings for a divorce a mensa et thoro would satisfy the requirement for separate support and maintenance. Neither he nor Justice Bussey attempted a final resolution of this issue. Perhaps some substantive changes will come from the decision. This speculation, of course, will be merely academic should the legislature enact a positive authorization of the cause of action. In any event, the bench and bar may consider themselves properly rebuked for their past imprecision in their treatment of separation and support cases in both litigation and adjudication.

II. FAMILY COURT RULES

In recent years, considerable interest in formalizing family courts procedures has been voiced. This interest culminated in the promulgation of the new Rules of Practice for the Family Courts of the State of South Carolina, effective July 1, 1977. Part of this interest stemmed from growing federal concern with due process in juvenile criminal proceedings. The United States Supreme Court's 1967 holding in In re Gault, in which the Court announced that more procedural formality to safeguard the con-

81. 268 S.C. at 510, 234 S.E.2d at 887.
82. Indications are that the South Carolina General Assembly may be receptive to the suggestion. House Bill No. 3183, introduced on June 2, 1977, less than three weeks after the Nocher decision, and Senate Bill No. 588 introduced soon thereafter, both establish a cause of action for divorce a mensa et thoro.
83. 242 S.C. at 18, 189 S.E.2d at 790 (citing Matheson v. McCormac, 186 S.C. 93, 195 S.E. 122 (1938)).
85. 387 U.S. 1 (1967).
stitutional rights of juveniles is needed, exemplifies this concern. In South Carolina, both juvenile criminal cases and domestic relations cases are heard in the family courts. To an extent, then, the formalization of domestic relations adjudication in South Carolina is a byproduct of the state supreme court's increased awareness of the need for additional due process guarantees in the area of juvenile criminal law.  

A more important reason for the revision of the rules was the recent unification of the court system in the State. The first step in this process was the Family Court Act of 1968, 87 which regularized the family courts that counties had established, or would establish in the future. It specified, among other things, the appointment of judges, the powers of the courts, and their jurisdiction, granting them jurisdiction concurrent with that of the circuit courts in most areas of domestic relations. In 1973, a constitutional amendment required that the courts of the State be realigned into a unified judicial system. 88 The counties are no longer able to set up their own family courts, as the Family Court Act had permitted. Pursuant to the new constitutional mandate, Act 690 of 1976 89 placed the family courts under the unified statewide system, establishing one court for each judicial district. Moreover, it gave the family courts exclusive jurisdiction in matters over which they had previously been given jurisdiction under the Family Court Act. No longer would the jurisdiction of the family courts be concurrent with that of the circuit courts. Under the 1976 act, the family courts have exclusive jurisdiction over all divorce actions and, if prayed for in the pleadings thereto, over the settlement of all legal and equitable rights incidental to them. They also have exclusive jurisdiction over actions for separation, separate maintenance, child custody and support, visitation, and the division of personal property, whether or not in connection with the divorce action. 90

86. Rules of Practice for the Family Courts of South Carolina—An Overview, unpublished introductory address to the Family Court Rules delivered by Louis Rosen, Assistant Director for Family Courts, South Carolina Court Administration, at the Family Court Judicial Conference in Columbia (May 23, 1977).


88. The amendment to Article V of the South Carolina Constitution was amended by Act No. 132, 1973 S.C. Acts 161.


The desirability of more formalized procedures in the family court system is apparent. No longer is it satisfactory for the courts to formulate their own procedures on a county-by-county basis, for now they are part of a unified court system and have a clearly defined scope of exclusive jurisdiction. Appropriately, the supreme court, in its supervisory role, imposed upon the courts rules commensurate with the newly acquired authority of the lower tribunals. Hence, the new family court rules became effective on July 1, 1977, the same date that Act 690 took effect.

The rules relating to domestic relations were not taken from any one source. Although some were borrowed from other states, they are mostly a product of the experience of family law practice in South Carolina. Where a need was perceived, a rule was written to satisfy that need, but none was written when a satisfactory statute or circuit court rule that would be applicable to the situation was in effect. 91

The twenty old rules were replaced by forty-nine new ones; of these, twenty-six deal solely with domestic relations. The increase in number alone evidences that the revisions have brought about material changes in family law practice. The new rules are so different from the old ones that making a rule-by-rule comparison of them serves no purpose. Furthermore, the supreme court has yet to interpret any but a few of the new rules. While no substitute for a careful reading of the rules exists, a few observations about them may be informative to those not already familiar with them.

Under the old rules, some judges required as a matter of course that both parties in a contested divorce action be represented by counsel. Under new rules 4 and 25, 92 uniform rules are provided. Rule 4 requires all parties to be represented by counsel unless the judge has given written permission for a party to pro-

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91. Interview with Judge Donald Fanning, Chief Family Court Judge for the Fourteenth Judicial Circuit (Beaufort, S.C., March 24, 1978).

92. Rule 4, entitled "Representation by counsel," states:

No case shall be entertained by the Court unless all parties are represented by counsel; provided that the judge may give written permission with a statement of his reasons therefor to a party to proceed without the benefit of counsel.


Rule 25, entitled "Explanation of procedures," states:

In any civil proceedings, the court shall explain to the parties, if not represented by counsel (1) the substance of the petition, (2) the stage of the proceeding, (3) the issues to be decided and (4) such other matters as will enable the parties to understand the proceedings.

ceed without an attorney. Rule 25 requires the judge to explain the proceedings to those not represented by counsel. Although a party may represent himself before the family court, the judge is left with the responsibility of maintaining control over the proceedings by granting or refusing to grant permission for the party to do so and by ensuring that he understands the nature of the proceedings as the trial progresses.

Rule 7\(^3\) provides that a defendant may be declared in default if he fails to answer a petition. The defendant in a divorce action, however, cannot be declared in default. Rule 16\(^4\) specifies that "No judgment, other than a dismissal for want of prosecution, shall be entered in an action for divorce, except after hearing." Rule 28\(^5\) states that no divorce shall be granted unless testimony is sworn in open court. These rules preclude a divorce from being granted solely on the basis of an unanswered petition; clearly a hearing at which sworn testimony is taken must be held.

Other than this, however, the rules do not say what sort of hearing is required, and this silence poses a problem in uncontested divorce actions. In undefended proceedings the judge may not ignore rules of practice and procedure, and he must require the petitioner to prove the allegations as if the action were actually contested.\(^6\) The South Carolina Supreme Court has said that a divorce will not be granted on the uncorroborated testimony of either or both parties because of the danger of collusive divorce suits.\(^7\) The danger is greatest in default cases, and special attention is warranted in those actions. Unlike other civil actions,

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93. Rule 7, entitled "Responsive pleadings," states:
   The pleading on behalf of the Respondent shall be an answer or counterclaim which shall be served on the Petitioner or his attorney within twenty (20) days after service of the petition. Where a Respondent fails to answer or otherwise plead to the petition, he may be declared in default.

94. Rule 16, entitled "No judgment without hearing; appearance by respondent," states:
   No judgment, other than a dismissal for want of prosecution, shall be entered in an action for divorce except after hearing. Even though the respondent does not file an answer, he may, with permission of the Court, be heard on issues of custody of children, alimony, support, and counsel fees.

95. Rule 28, entitled "Divorce testimony," states:
   The Court, as a court of record, shall grant no divorce unless testimony sworn in open court before the Judge is recorded and filed.

a divorce is not merely a prize to go to the victor; the State, because of its public policy in favor of keeping families together, stands as an interested quasi-party. The South Carolina Supreme Court explains this relationship between the State and the parties as follows:

In a controversy relating to marriage the Court is concerned not only with the rights of the individuals involved but also with the public interest. A duty rests upon the Court to encourage the parties to live together, to see that the marriage status is not disturbed except under circumstances and for causes fully sanctioned by Law, and to prevent fraudulent and collusive divorces. Accordingly, a judgment by default is not favored in divorce suits and will be set aside more readily than default judgments in other actions.\(^{98}\)

Rule 16 should be read as requiring a full evidentiary hearing in divorce actions, and imposing upon family court judges the obligation to ensure that the petitioner adequately proves the charges against the respondent, even in default cases. This is especially important in South Carolina, where no provision for a no-fault divorce for fewer than three years separation exists.\(^{99}\) The result is that virtually every divorce petition must allege some misconduct, which must be proved. Rules 7 and 16 must not be read to allow a divorce solely on the basis of an unanswered complaint or a token hearing.

Rule 18\(^{100}\) provides that certain documents are admissible in

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100. Rule 18, entitled “Admissibility of certain documents,” states:

The following documents and written statements shall be admissible in evidence without requiring that the person or institution issuing the documents or statements be present in Court:

(a) A written statement of a child’s attendance at school, signed by a School Principal or duly authorized school official.

(b) The school report card showing the child’s record of attendance, grades on subjects taught and other pertinent information, provided that this be a report sent out at periodic intervals by the school.

(c) The written statement by a physician showing that the patient was treated at certain times and the type of ailment.

(d) The written report of the Department of Social Services or other agency, reporting the home investigation or any other report required by the Court.

(e) The written statement of an employer showing wages either weekly or monthly for a given period of time and W-2 statement, income tax returns and other reports of like nature.

evidence without the issuer's presence in court. Those documents are: (1) a written statement of a child's school attendance record, (2) a child's report card, (3) a written statement from a physician concerning his treatment of a patient, (4) a DSS report, and (5) a written statement from an employer showing wages paid for a given period of time or a W-2 statement or similar document showing a person's income.

In other jurisdictions similar rules have come under criticism for their disregard of the hearsay rule. Typically this problem arises when the court uses a report from a social service agency to help decide the issue of child custody. Arguably, to deny a party the opportunity to cross-examine the issuer of a damaging report is a denial of procedural due process and, in some cases, a contravention of the constitutional right to confront adverse witnesses. This argument has been rejected, however, in the jurisdictions that have considered it. In Kern v. Kern the Supreme Court of Florida upheld a statute allowing the court to consider reports submitted by a state social agency concerning a child's home conditions. Recognizing that in cases involving children, the parents' rights are secondary to the children's best interests, the Florida court held that "by providing the trial court with potentially valuable information compiled by professional social workers, the instant statute constitutes a legislative cognition of the suitability of modified proceedings in this special area" and "of the necessity for professional social workers' investigative skills and personal counseling as a means of furthering the trial court's search for just and humane results in this sensitive area."

When documents are admitted under Rule 18, a question exists concerning the parties' access to them during the hearing for the purpose of rebutting them. Under the old rules either

102. See note 94 supra.
103. Kern v. Kern, 333 So. 2d at 18. The sixth amendment to the United States Constitution guarantees the right of an accused in a criminal trial to confront the witnesses against him.
105. 333 So. 2d 17 (Fla. 1976).
106. Id. at 20.
107. Id. at 21.
parent who felt prejudiced by introduction of a document could submit evidence to explain or contradict the document,\textsuperscript{108} but the new rule does not have this express provision. Although the courts of other states have upheld the admissibility of documents in contravention of the hearsay rule, they have consistently reversed trial court decisions in which the trial judge refused to allow the parties access to the documents.\textsuperscript{109} The derogation of the parents' rights in the interest of the childrens' welfare stops short of denying them the opportunity to rebut damaging testimony. Rule 18 should not be construed, then, to allow a judge to consider documents without allowing the parties access to them.

One rule that should find extensive application by the bar is Rule 22.\textsuperscript{110} Under the old rules, no formalized discovery procedures existed. Rule 22, however, provides for discovery either by stipulation of both parties or by order of the court. Discovery is now limited only by a party's ability to convince the court of his need for information. While the rule purports to encourage cooperation between the parties in the exchange of information, a litigant should remember the discretion granted to the court by this rule and should not hesitate to appeal to the court when he feels that his opponent will not cooperate with his attempts at discovery. This should especially be true when a compelling need for discovery exists; in such cases, the litigant should be prepared to argue this need before the court, and the court is most likely to be receptive to a well-made argument.

Rule 8\textsuperscript{111} prohibits a family court judge from giving an order

\textsuperscript{108} Rule 12, Family Court Rules (1976) (superseded).
\textsuperscript{110} Rule 22, entitled "Deposition and discovery," states:

Recognizing the unique nature of the Court's jurisdiction and the need for a speedy determination thereof, the prompt voluntary exchange of information and documents by parties prior to trial is encouraged. However, formal depositions or discovery shall be conducted only by stipulation of the parties or by Court order upon application therefore in writing. Such an order may prescribe the manner, time, conditions and restrictions pertaining to the deposition or discovery.


\textsuperscript{111} Rule 8, entitled "Reference," states:

In no case may a judge give an order of reference unless the caseload of the Court indicates that the matter to be referred could not be reached by the Court within a reasonable time. Such an order of reference shall be in writing and submitted to the office of South Carolina Court Administration for its approval prior to reference.

of reference unless serious time constraints are involved and he has obtained written permission from the office of South Carolina Court Administration. This rule will have several effects. First, the new family court system came under some early criticism for having too many new judges. 112 In many circuits the practice was to refer most contested cases, with the judge hearing only uncontested cases and confirming referees' reports in others. 113 The Chief Justice and the Office of Court Administration wrote Rule 8 to ensure full utilization of judicial manpower. 114 The result is that the family court judges must assume greater responsibilities to justify their number. Second, litigants in almost every case will find themselves arguing before the same judge who will ultimately issue the order.

The third effect deals with the scope of review to be used by the supreme court on appeal from family court adjudications. The court has traditionally undertaken a de novo review in actions tried in equity without reference; it has treated the lower court's judgment with deference only when two judges—the master and the trial judge—have examined the evidence and concurred in the findings prior to the appeal. 115 The result is that although the family courts have acquired exclusive jurisdiction over domestic relations cases and have won a regular position in the State's new unified judiciary, the supreme court has retained a high degree of supervision over their adjudications by undertaking an independent review of the evidence in almost every case that is appealed from them.

The new Family Court Rules will have a varying impact on family court practice in South Carolina. Some of the rules are merely clarifications of well-accepted principles, some provide certainty where uncertainty reigned before, and some implement the evolving philosophy of the family court system. 116

The rules may be generally characterized as formalizing family court procedures, yet most of the rules allow the trial judge discretion to permit variances when circumstances dictate. This discretion allows the judge to maintain the role of adjudicator-

113. Id.
114. Id.
116. See notes 76-83 and accompanying text supra.
counsellor into which he is inevitably cast by the very nature of the matters under his jurisdiction. The competing interests of individual rights, child welfare, and public policy dictate that family court procedures, though formal, be flexible.

A complete system of rules for the family courts means that family court procedure can be uniform throughout the state, as indeed it should be under the concept of a unified judiciary. The new rules should provide the uniformity, flexibility, and formality necessary to achieve the goal expressed in their "Scope and Purpose": "To effectuate the legislative intent to establish a uniform court with original jurisdiction over family and child matters and offenses, and to insure, to the extent possible, swift, practical and inexpensive adjudication and determination of domestic and delinquency matters" and "to provide simplified procedures consistent with standard pleading and practice procedures so that all persons shall receive a full and just resolution of their case."117

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