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Domestic Relations

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DOMESTIC RELATIONS

I. EQUITABLE DISTRIBUTION OF PROPERTY

A. Right of the Homemaker Spouse to Equitable Distribution of Real Property

In *Parrott v. Parrott*,[1] the South Carolina Supreme Court recognized a homemaker's right upon divorce to share equitably in all property acquired by her wage-earning spouse during the marriage. This decision aligns South Carolina with a majority of the states in upholding equitable distribution.[2] *Parrott* mitigates the harsh consequences of the common-law title theory of property division under which real property is, upon divorce, distributed to the title holder.[3] The court indicates, however, that equitable distribution may be invoked only if a spouse can show evidence of forgone career opportunities and material contributions to the family as homemaker throughout a long marriage.[4]

The dispute in *Parrott* arose when the parties were divorced after a twenty-two year marriage.[5] The wife had been employed outside the home for only one year; for the rest of the marriage she remained in the home as a housewife and mother. Other than an inheritance, her monetary contributions to the marital property were minimal. The family court denied the wife's claim for a share of the parties' real and personal property,[6] including the marital residence to which the husband held title. In her appeal to the supreme court, the wife claimed that her contributions to the marriage as housewife and mother entitled her to an

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1. ___ S.C. ___, 292 S.E.2d 182 (1982).

2. Freed and Foster, *Divorce in the Fifty States: An Overview*, 7 FAM. L. REP. (BNA) 4049, 4056-57 (1981).

3. In a typical case, the husband holds title to most of the couple's assets; the wife is financially dependent upon the husband and lacks the skills necessary for entering the job market. Under the title theory, the wife does not acquire any rights in the property upon divorce. She must rely on alimony as her sole means of support. *See* Taylor v. Taylor, 267 S.C. 530, 229 S.E.2d 852 (1976).

4. ___ S.C. at ___, 292 S.E.2d at 184.

5. Divorce was granted upon the statutory grounds of one year's separation. *Id.* at ___, 292 S.E.2d at 182. *See*, S.C. CODE ANN. § 20-3-10 (Supp. 1982).

6. ___ S.C. at ___, 292 S.E.2d at 182.

equitable interest in the residence and personal property of the husband.[7]

The supreme court initially reasoned that the wife's one year employment outside the home and her small inheritance were material contributions sufficient to support a claim of special equity in the marital home.[8] Distribution based solely on special equity, however, fell far short of compensating the appellant for the twenty-one years during which she contributed to the marriage as housewife and mother.[9] After weighing these contributions together with the appellant's forgone career opportunities, the court held that she was entitled to an equitable interest in all real and personal property acquired during the marriage. The case was remanded for a determination of appellant's share in the marital property.[10]

Although most jurisdictions have enacted statutes that provide for some form of equitable distribution,[11] South Carolina has persistently relied on the less definitive standards of its common law[12] to determine distribution of marital property. *Parrott* is evidence of continuing judicial recognition of the often unjust consequences flowing from reliance upon the title theory of real property distribution.[13]

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7. The court has long recognized the application of equitable principles to the distribution of personal property. *See, e.g.*, Morris v. Morris, 268 S.C. 104, 108-09, 232 S.E.2d 326, 327 (1977).

8. ___ S.C. at ___, 292 S.E.2d at 184. Prior to *Parrott*, the court had announced two exceptions to the title theory: (1) resulting trust and (2) special equity. When a spouse supplies funds or assumes an obligation prior to or at the acquisition of property, a resulting trust favoring that party can arise. *Id.* at ___, 292 S.E.2d at 183. Because the evidentiary requirements are restrictive, such trusts are rarely found. Moore v. McKelvey, 266 S.C. 95, 221 S.E.2d 780 (1976); Green v. Green, 237 S.C. 424, 117 S.E.2d 583 (1960). When a spouse has made "material contributions" of industry and labor to the acquisition of property during marriage, a special equity can be found favoring that party. Baker v. Baker, 276 S.C. 427, 279 S.E.2d 601 (1981).

9. ___ S.C. at ___, 292 S.E.2d at 183.

10. *Id.* at ___, 292 S.E.2d at 184.

11. At least 30 states and the District of Columbia have enacted statutory systems of equitable distribution of property upon divorce. Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67 n.1 (1980).

12. S.C. CODE ANN. § 20-7-420(2)(Supp. 1981) gives family courts the authority to settle all legal and equitable rights of divorcing parties in real and personal property if requested by either party in the pleadings. Neither party in *Parrott* requested such a settlement. *Cf.* Moyle v. Moyle, 262 S.C. 308, 204 S.E.2d 46 (1974)(parties petitioned the court to divide property without regard to title).

13. In Jeffords v. Hall, 276 S.C. 271, 277 S.E.2d 703 (1981), the court tacitly approved the adoption of equitable distribution as another means of dividing property

The question of how the marital home might be equitably distributed remains unresolved. While a monetary distribution is the remedy most often utilized and inures to the benefit of both parties,[14] the court does not suggest whether the distribution would be payable in a lump sum or in installments. Furthermore, while the court clearly limits equitable distribution to homemakers who over a "long marriage" helped provide a "suitable family environment,"[15] it does not define either of these terms.

Despite these shortcomings, *Parrott* is a progressive step for the rights of career homemakers who are faced with legislative inadequacies and an antiquated common law. The court has attempted to offer some guidelines, but clear statutory standards governing the equitable distribution of property are needed to add certainty to this rapidly expanding area of the law.

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B. Equitable Distribution of Interspousal Gifts

In *Burgess v. Burgess*,[16] the South Carolina Supreme Court held that a gift from a husband to his wife was subject to equitable distribution. In so holding, the court for the first time categorized interspousal gifts as marital property and thus placed these gifts within the divorce jurisdiction of the family courts.

Burgess involved a divorce action brought on the grounds of a one year separation. Following a hearing before a family court judge, the wife was awarded a $10,000 equitable settlement and denied alimony.[17] On appeal, the supreme court reversed and re-

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among divorcing spouses. *Domestic Relations, Annual Survey of S.C. Law*, 34 S.C.L. REV. 125, 134 (1982). The court in Bugg v. Bugg, 277 S.C. 270, 286 S.E.2d 135 (1982) again used this terminology in allowing the appellant wife a larger equitable interest in the parties' real property upon divorce. But the cases can be distinguished in that the appellant in *Bugg* worked both in and out of the home for thirty-seven years while the appellant in *Parrott* remained in the home as a housewife and mother for nearly the length of her twenty-two year marriage. ___ S.C. at ___, 292 S.E.2d at 183. *See also* Chastain, Henry and Woodside, *Determination of Property Rights Upon Divorce in S.C.: An Exploration and Recommendation*, 33 S.C.L. REV. 227, 233 (1981).

14. Note, *supra* note 11, at 98.

15. ___ S.C. at ___, 292 S.E.2d at 184.

16. 277 S.C. 283, 286 S.E.2d 142 (1982).

17. *Id.* at 286, 286 S.E.2d at 143. Total property awards by the family court were as follows:

manded.[18] In setting aside the lower court's award, the court in *Burgess* held *inter alia* that interspousal gifts were subject to equitable distribution. This holding rejects the common law rule that gifts are not generally included in equitable divorce settlements since property is distributed on the basis of title.[19]

The court based its decision on section 14-21-1020 of the South Carolina Code of Laws (Supp. 1980). This section grants family courts jurisdiction in divorce actions to settle "*all* equitable rights of the parties as to *all* 'real and personal property *of the marriage.*' "[20] The court reasoned that since interspousal gifts are presumably purchased with marital funds, they qualify as property of the marriage and not property of the individual bearing title.[21]

The *Burgess* court also relied on several Illinois cases in reaching its decision.[22] Illinois, however, is one of only eight states that has adopted the Uniform Marriage and Divorce Act[23]

Mr. Burgess: Marital residence valued at between $47,000 and $60,000, 1977 automobile, Dodge van, some IBM stock, one-half of the household furnishings, two front-end loaders with trailers.

Mrs. Burgess: $10,000 cash, 1971 automobile.

18. In matters not relevant to the subject of this survey, the court found that the lower court's division of property was "ridiculously disparate" and its denial of alimony unsupported by available evidence. *Id.* at 286, 286 S.E.2d at 144.

19. *See, e.g.*, Stevens v. Stevens, 244 S.C. 113, 135 S.E.2d 725 (1964); Caulk v. Caulk, 211 S.C. 57, 43 S.E.2d 600 (1947). The court has in a later case evaluated its holding in *Burgess* and noted that prior to *Burgess* interspousal gifts were treated by courts in property settlements as property of the title-bearing spouse: "[In *Burgess*] we restored interspousal gifts to the category of marital property accesssible for distribution upon divorce." Parrott v. Parrott, ___ S.C. ___, 292 S.E.2d 182, 183 (1982). For a discussion of *Parrott*, see page 89 of this issue.

20. 277 S.C. at 287, 286 S.E.2d at 145 (emphasis by the court)(quoting S.C. CODE ANN. § 14-21-1020 (Supp. 1980), which has been repealed and incorporated into S.C. CODE ANN. § 20-70-420 (Supp. 1981)).

21. 277 S.C. at 287, 286 S.E.2d at 145.

22. Bissett v. Bissett, 375 Ill. 551, 31 N.E.2d 955 (1941); In re the Marriage of Stevens, 93 Ill. App. 3d 122, 416 N.E.2d 1235 (1981); Coates v. Coates, 64 Ill. App. 3d 914, 381 N.E.2d 1200 (1978).

23. UNIF. MARRIAGE AND DIVORCE ACT § 503, 9A U.L.A. 91 (1977). In pertinent part the Illinois act reads:

> (a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":
>
> (1) property acquired by gift bequest, devise or descent,* * *
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> (b) All property acquired by either spouse after marriage and before a judgment of dissolution of marriage . . . is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form

and follows a progressive rule which permits judicial discretion in determining the status of interspousal gifts in divorce settlements. Family court judges in Illinois have the option of revesting title in the donor or including the gift in the overall equitable settlement.[24] Further, the presumption that such gifts are property of the marriage may be overcome by a showing of clear, convincing and unmistakable evidence.[25]

Although the Illinois resolution is a fair one and thus recommends itself, the *Burgess* opinion provides no guidance on how far the South Carolina Supreme Court will follow the Illinois courts on the marital property issue. *Burgess v. Burgess* speaks only to the issue of interspousal gifts, presumably purchased with marital funds, and holds those gifts subject to equitable distribution upon dissolution of the marriage.

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C. Equitable Distribution of Military and Civil Service Retirement Pay

In *Bugg v. Bugg*[26] and *Carter v. Carter*,[27] the South Carolina Supreme Court refused to allow equitable distribution of military and civil service retirement pay in divorce proceedings. In both decisions, however, the court recognized that retirement pay may be taken into consideration in determining alimony.

In *Bugg*, the parties were divorced after a thirty-five year marriage. The wife appealed the family court order, which *inter alia*, awarded her a ten thousand dollar interest in the marital home. On appeal, the wife claimed an equitable interest in her husband's military retirement pay, as well as a larger interest in the home. At oral argument, however, counsel for the wife withdrew the claim to the retirement pay on the grounds that *Mc-*

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of co-ownership. . . . The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.

ILL. REV. STAT. ch. 40, § 503(a)(1), (b) (1979).

24. Bissett v. Bissett, 357 Ill. at 555-56, 31 N.E.2d at 958. *See also* 24 AM. JUR. 2D *Divorce and Separation* § 930 (1966).

25. In re the Marriage of Stevens, 93 Ill. App. 3d at 125, 416 N.E.2d at 1238.

26. 277 S.C. 270, 286 S.E.2d 135 (1982).

27. 277 S.C. 277, 286 S.E.2d 139 (1982).

Carty v. McCarty[28] controlled.[29] In *McCarty*, the United States Supreme Court held that military retirement payments are not subject to the rule imposed by community property states entitling divorcing spouses to a one-half interest in all property acquired during the marriage.[30] Although South Carolina is not a community property state, the South Carolina Supreme Court agreed that *McCarty* controlled the disposition of military retirement pay in South Carolina as well.[31]

The parties' divorce in *Carter* ended a twenty-eight year marriage. The husband appealed the family court order awarding the wife a portion of his federal civil service retirement pay. Citing *McCarty*, the supreme court reversed the lower court order and held that the pension could not be treated as marital property in a divorce or separation proceeding.[32]

Relying on *McCarty*, the court in *Carter* stated that allowing equitable distribution of retirement payments would threaten "substantial federal interests"[33] and frustrate Congressional objectives.[34] Although *McCarty* focused on military pensions, the *Carter* court, without explaining its reasoning, held that the policies enunciated in *McCarty* warranted extension of the rule to civil service pensions. In a footnote, the court further suggested that contributions to any private pension fund are "generally not subject to" equitable distribution.[35] As in *Bugg*, the court in *Carter* did note that retirement pay may be considered in determining alimony.[36]

The *Carter* court's refusal to allow equitable distribution of a spouse's civil service retirement pay is a significant broadening of the rule in *McCarty*, and places South Carolina in the minority of the jurisdictions that have considered the question.[37] In

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28. 453 U.S. 210 (1981).

29. 277 S.C. at 272, 286 S.E.2d at 136.

30. 453 U.S. at 223.

31. 277 S.C. at 272, 286 S.E.2d at 136. *See also*, 2 EQUITABLE DISTRIBUTION REPORTER 99 (1982)(reasoning of *McCarty* applies to noncommunity property jurisdictions).

32. 277 S.C. at 279, 286 S.E.2d at 140.

33. *Id.*, 286 S.E.2d at 140.

34. *Id.*, 286 S.E.2d at 140.

35. *Id.* at 279 n.1, 286 S.E.2d at 140 n.1.

36. *Id.* at 279, 286 S.E.2d at 140.

37. The majority of jurisdictions recognize vested pension plans (other than military) as marital property subject to equitable distribution upon divorce. *See, e.g.*, Gregory J.M. v. Carolyn A.M., 442 A.2d 1373, 1375 (Del. Super. Ct. 1982); In re Marriage of

extending *McCarty* the court also ignored section 8345(i)(1) of the Civil Service Retirement Act.[38] Section 8345(i)(1) of the Act provides for direct payments to any person who has been awarded a share of a civil service pension in separation or divorce proceedings. Given congressional acceptance of equitable distribution of civil service pensions, it is unclear what "substantial federal interests" and "congressional objectives" support the court's holding in *Carter*.[39]

Under *Bugg* and *Carter*, military and civil service retirement pay can not be treated as marital property subject to equitable distribution. Dicta in *Carter* suggest that the court may prohibit equitable distribution of other types of retirement pay. Despite these limitations, the cases should alert the bench and bar to the ramifications of retirement pay in a determination of alimony.

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Smith, 102 Ill. App. 3d 769, 772, 430 N.E.2d 364, 366 (1981); Ripley v. Ripley, 112 Mich. App. 219, 229, 315 N.W.2d 576, 581 (1982); Busch v. Busch, 618 S.W.2d 244 (Mo. App. 1981); In re Marriage of Laster, ___ Mont. ___, ___, 643 P.2d 597, 603 (1982).

38. Section 8345(i)(1) provides:

> Payments under this subchapter which would otherwise be made to an employee, member or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any Court, decree of divorce, annulment, or legal separation, or the terms of any court order or court approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under the paragraph to a person bars recovery by any other person.

5 U.S.C. § 8345(i)(1) (1980).

39. Editor's Note: After the opinions in *Bugg* and *Carter* were announced, the United States Congress enacted the Uniformed Services Former Spouses Protection Act, 10 U.S.C.A. § 1408 (West Supp. 1983). Under the Act, state courts are permitted to subject military nondisability retirement pay to equitable distribution in separation and divorce proceedings. In Brown v. Brown, ___ S.C. ___, 302 S.E.2d 860 (1983), the South Carolina Supreme Court was asked to reconsider *Bugg* and *Carter* in light of the new legislation. The *Brown* court noted the change in the law, but stated that "the final decision concerning the treatment of military retirement funds remains with the states." *Id.* at ___, 302 S.E.2d at 861. Without further comment, the court held that military retirement pay is to be treated as income, a factor in determining alimony, and not as marital property. The decision in *Brown* was reaffirmed in Haynes v. Haynes, ___ S.C. ___, ___ S.E.2d ___ (1983).

II. Tax Savings as Grounds for Nonallocation of Alimony and Child Support Payments

In *Delaney v. Delaney*[40] the South Carolina Supreme Court upheld a support payment in which no allocation was made between child support and alimony. Section 20-3-150 of the South Carolina Code permits the imposition of nonallocated support payments if the family court finds good cause for doing so.[41] The supreme court ruled that the tax savings which accrued to the supporting spouse met the good cause requirement, provided the benefits of the supported spouse tangibly increased as a result.

The dispute in *Delaney* arose when the wife, pursuant to a legal separation, petitioned the family court for a reasonable amount of child support for the couple's three minor children and a reasonable amount of alimony for herself.[42] The husband, however, asked the court to consider tax consequences in its decision and make no allocation between the amount of child support and the amount of alimony.[43] Based on these tax consequences, the family court awarded the wife a nonallocated amount of support each month.[44] The state supreme court affirmed this portion of the order.[45]

The court reasoned that under section 20-3-150[46] a family court judge may order payment of a consolidated amount representing both alimony and child support, provided good cause for nonallocation is presented.[47] Shifting tax liability from a supporting spouse who has substantial income to a supported spouse who has little or no income results in a tax savings for

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40. ___ S.C. ___, 293 S.E.2d 304 (1982).

41. S.C. Code Ann. § 20-3-150 (Supp. 1981). Prior to its amendment in 1979, § 20-3-150 required a trial court in a litigated divorce to segregate an award for permanent alimony and support between the supported spouse and the children. S.C. Code Ann. § 20-3-150 (1976). To broaden family court power in marital litigation, the legislature added the phrase "unless good cause to the contrary be shown." *See* 1 House Journal 1902 (1979). The legislature also amended the word "wife" to read "supported spouse" and "spouse receiving alimony." *See generally Domestic Relations: Annual Survey of South Carolina Law*, 32 S.C.L.Rev. 105 (1980)(discussing removal of gender-based classifications).

42. Record at 4.

43. *Id.* at 6.

44. ___ S.C. at ___, 293 S.E.2d at 304.

45. *Id.* at ___, 293 S.E.2d at 304.

46. *See supra* note 41.

47. ___ S.C. at ___, 293 S.E.2d at 304.

the supporting spouse.[48] If the supporting spouse then uses the tax savings to provide additional support dollars, the supported spouse will realize increased child support and alimony benefits.[49] The court viewed the combination of a tax savings and a subsequent increase in support as sufficient to meet the good cause requirement for nonallocation under section 20-3-150.[50]

The court held, however, that the amount of nonallocated support in this case was inadequate and constituted an abuse of the trial court's discretion.[51] It considered traditional factors[52] in arriving at this conclusion.[53] The court added that the effect of the award of nonallocated alimony and support would also be considered in determining the adequacy of decreed support,[54] but did not express the weight this factor would be given.

The *Delaney* decision indicates that an increase in benefit to the supported spouse must accompany a tax savings to the supporting spouse to fulfill the good cause requirement of section 20-3-150.[55] After the shift in tax liability, the supported

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48. *Id.* at ___, 293 S.E.2d at 304. A tax savings can be demonstrated by the interplay of Internal Revenue Code §§ 71 and 215. I.R.C. §§ 71, 215 (West 1978). Under § 71, periodic payments of alimony are income to the supported spouse. The same payments are deductible by the supporting spouse under § 215. Child support payments, however, are neither taxable to the supported spouse nor deductible by the supporting spouse unless a nonallocated amount of support is made directly to the supported spouse. If a court makes a nonallocated award, the supporting spouse may deduct the whole amount while the supported spouse must report the entire amount as taxable income. *See* Commissioner v. Lester, 366 U.S. 299 (1961). If the supporting spouse is in a higher tax bracket than the supported spouse, a consolidated award should result in an overall tax savings since the support money will be taxed at the receiving spouse's lower rate.

49. ___ S.C. at ___, 293 S.E.2d at 304.

50. *Id.* at ___, 293 S.E.2d at 304.

51. *Id.* at ___, 293 S.E.2d at 305. *See also* concurrence and dissent of Justice Littlejohn, *Id.* at ___, 293 S.E.2d at 305-06 (concurring on the same grounds).

52. Traditional factors include (1) the financial condition of the husband and the needs of the wife; (2) the health and age of the parties, their respective earning capacities and individual wealth; (3) the wife's contribution to the accumulation of their joint wealth; (4) the conduct of the parties; (5) the respective necessities of the parties; (6) the standard of living of the wife at the time of the divorce; (7) the duration of the marriage; (8) the ability of the husband to pay alimony; and (9) the actual income of the parties. *Id.* at ___, 293 S.E.2d at 305.

53. *See, e.g.*, Lide v. Lide, 277 S.C. 155, 283 S.E.2d 832 (1981); Powers v. Powers, 273 S.C. 51, 254 S.E.2d 289 (1979); Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504 (1977); *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 183-84, 442-47 (1968).

54. ___ S.C. at ___, 293 S.E.2d at 305.

55. *Id.* at ___, 293 S.E.2d at 304.

spouse should net more child support and alimony.[56] The opinion does not indicate, however, the level of tax savings or the subsequent increase in support that is necessary for a finding of good cause under the statute.

Justice Littlejohn dissented from the court's holding that good cause had been shown,[57] and argued that "[t]o give one a tax advantage merely increases the burden of all other taxpayers."[58] Justice Littlejohn pointed out that the supporting spouse, a medical doctor, was "abundantly able to support his wife and children and pay his share of supporting the government by way of taxes."[59] This focus on the burden to taxpayers in general did not include an objection to the supported spouse's increased tax burden. Contrary to the majority's finding of good cause, Justice Littlejohn believed that the nonallocation was purely an accommodation to the supporting spouse.[60]

The United States Supreme Court has specifically recognized that parties to a divorce may, for tax purposes, act as their own best interests dictate. In *Commissioner v. Lester*,[61] the Court recognized that Congress intended to allow tax liability shifts between divorcing spouses when it enacted the applicable code provisions concerning allocated and nonallocated child support and alimony.[62] Apparently the Court in *Lester* was not concerned with the policy argument that a divorced couple paying less overall taxes due to nonallocation of support would increase the tax burden on other taxpayers.

Under *Delaney*, a shift in tax liability is sufficient to demonstrate good cause for nonallocation of support, provided the shift allows the supported spouse to net tangibly more child support and alimony. Unless the supporting spouse makes the tax dollars saved available as additional support dollars, a claim that tax savings is good cause for nonallocation of support will not be allowed. Both steps are required to fulfill the good cause

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56. *Id.* at ___, 293 S.E.2d at 304.
57. *Id.* at ___, 293 S.E.2d at 305.
58. *Id.* at ___, 293 S.E.2d at 306.
59. *Id.* at ___, 293 S.E.2d at 306.
60. *Id.* at ___, 293 S.E.2d at 306.
61. 366 U.S. 299 (1961).
62. *Id.* at 306.

mandate of section 20-3-150.

D'Anne Haydel

III. POST-DIVORCE AWARD OF EDUCATIONAL EXPENSES TO EMANCIPATED CHILDREN

The South Carolina Supreme Court held in *Kerr v. Kerr*[63] that an emancipated child was entitled to contributions toward her college expenses from her divorced and remarried father. This type of award is not unprecedented in South Carolina,[64] and *Kerr* is further evidence of the liberal attitude South Carolina courts have taken toward such expenses.

Melanie Kerr, whose father, George Kerr, was required by a divorce settlement to pay child support until she became eighteen years old,[65] initiated the action in *Kerr*. After reaching her majority, she sought to require her father to contribute to her college expenses. She had attended college for one semester before bringing the action and she continued her education during the trial and appeal of the case using funds raised by herself and her mother.[66] Ms. Kerr claimed that these funds would not adequately finance her education. George Kerr asserted that he and his second wife could not support themselves without aid from his mother-in-law and, therefore, could not afford to assist in the payment of his daughter's college education. He further claimed his mother-in-law would discontinue her assistance if he were ordered to make the financial contribution.[67] The family court, upon presentation of conflicting evidence, ordered Mr.

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63. ___ S.C. ___, 293 S.E.2d 704 (1982).

64. *See* Major v. Major, 277 S.C. 318, 286 S.E.2d 666 (1982); Risinger v. Risinger, 273 S.C. 36, 253 S.E.2d 652 (1979).

65. ___ S.C. at ___, 293 S.E.2d at 705.

66. *Id.* at ___, 293 S.E.2d at 706. The evidence indicated that Melanie Kerr had been financing her education through her mother's disability check, a part-time job and tuition grants. The court, however, did not consider this sufficient to show the daughter's ability to pay for her own education. From this ruling, one might infer that the court will not look solely at the child's ability to produce income, but will also consider the hardship obtaining funds places on the child. If this inference is correct it will be incumbent on an attorney representing a parent to show not only that the child has the ability to pay for his education, but also that he can do so without undue hardship.

67. *Id.* at ___, 293 S.E.2d at 706. Mr. Kerr asserted that he and his wife spent more each year than their combined incomes and were able to remain solvent only through the aid of his in-laws.

Kerr to contribute toward his daughter's educational expenses.[68]

The supreme court upheld the order of the lower court, basing its decision primarily on a section of the Family Court Act[69] as it was interpreted in *Risinger v. Risinger*.[70] Citing *Risinger*, the court said, "the Family Court Act 'allows the Family Court to make orders running past a child's majority where there are physical or mental disabilities of the child *or other exceptional circumstances* that warrant it'. . . ."[71] The court then reaffirmed its holding in *Risinger* that the need for education is the most likely exceptional circumstance justifying continued support.[72] However, "need" alone will not always result in such an order. The court held that family court judges should use their discretion, granting requests when there is evidence that (1) the characteristics of the child indicate he or she will benefit from college; (2) the child demonstrates the ability to do well, or at least make satisfactory grades; (3) the child cannot otherwise go to school; and (4) the parent has the financial ability to help pay for such an education.[73] The court then found sufficient evidence to satisfy the enunciated criteria and upheld the award.

Kerr is a relatively liberal decision regarding postmajority educational support by a parent. While courts in most jurisdictions will enforce provisions of a divorce decree or a contractual arrangement requiring a parent to pay for a child's college expenses, few courts have ordered contributions for higher education absent any prior decree or agreement.[74]

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68. *Id.* at ___, 293 S.E.2d at 705.

69. Act No. 55, 1968 S.C. Acts, *repealed by* Act No. 71, 1981 S.C. Acts, *recodified at* S.C. CODE ANN. § 20-7-420 (Cum. Supp. 1982). In pertinent part, the statute reads:

> The family court shall have exclusive jurisdiction:. . . (17) To make all orders for support run until further order of the court, except that orders for support of a child shall run until the child is eighteen years of age or until the child is sooner married or becomes self-supporting or, where there are physical or mental disabilities of the child *or other exceptional circumstances that warrant it*, in the discretion of the court, during any period *and beyond the child's minority* as such physical or mental disabilities may continue.

(Emphasis supplied).

70. 273 S.C. 36, 253 S.E.2d 652 (1979).

71. ___ S.C. at ___, 293 S.E.2d at 705 (emphasis supplied by the court in *Kerr*); Risinger v. Risinger, 273 S.C. at 38, 253 S.E.2d at 653.

72. ___ S.C. at ___, 293 S.E.2d at 705.

73. *Id.* at ___, 293 S.E.2d at 705-06.

74. The Supreme Court of Georgia has refused to require contributions despite the presence of a provision in the original divorce decree. Newton v. Newton, 222 Ga. 175,

One issue not addressed by *Kerr* is the determination of which party the court will assign the burden of proof in future cases. In reaching its decision, the court resolved two questions of fact in favor of the daughter: George Kerr's ability to pay for Melanie Kerr's college expenses and Melanie Kerr's inability to continue attending college without assistance from her father. The fact that these questions were resolved in favor of the child may indicate that the court will place the burden of proof on the parent seeking to avoid the contribution. This inference is supported by dicta sympathetic to the child's case: "[E]mancipated children who no longer have the benefit of a conventional home, while attempting to further their education, have a severely restricted ability to earn adequate amounts to provide their own education during this crucial period."[75]

Kerr clearly reiterates the supreme court's willingness to award generous college expenses to children of divorced parents. Practitioners in domestic law should advise their clients that they may in the future be held liable for these expenses.

Mitchell C. Payne

IV. A CHILD'S PARENTAL PREFERENCE AS GROUNDS FOR CUSTODY MODIFICATION

In *Bolding v. Bolding*,[76] the South Carolina Supreme Court held that the wishes of a divorced couple's eleven-year-old child could not justify a transfer of custody when no additional change in conditions was alleged. The decision reaffirms South Carolina's adherence to the majority rule[77] that although a child's wishes are to be accorded some weight in custody proceedings, they are neither conclusive nor controlling.[78] The

149 S.E.2d 128 (1966). For a general discussion of how this issue has been treated in other states, *see* Veron, *Parental Support of Post Majority Children in College: Changes and Challenges*, 17 J. FAM. L. 645 (1979); *see also* Annot., 99 A.L.R.3d 322 (1980).

75. ___ S.C. at ___, 293 S.E.2d at 706.

76. ___ S.C. ___, 293 S.E.2d 699 (1982).

77. For a general discussion of the majority rule and cases adhering to the rule, *see* 42 AM. JUR. 2D *Infants* § 44 (1969).

78. *See* Smith v. Smith, 261 S.C. 81, 198 S.E.2d 271 (1973); Moorhead v. Scott, 259 S.C. 680, 193 S.E.2d 510 (1972).

child's welfare is the dispositive factor.[79]

Approximately one year after the parties' final decree of divorce granted custody of the son and his seven-year-old sister to the mother, the father petitioned the family court for a custodial modification[80] based upon the son's desire to live with his father and attend school with his lifelong friends. After conducting extensive interviews with the minor,[81] the trial judge approved the petition. The supreme court reversed, holding that these grounds were insufficient to warrant a transfer of custody.[82]

The supreme court observed that to justify a change of custody "the party seeking the transfer bears the burden of establishing a material change of conditions substantially affecting the welfare of the child."[83] The court further observed that the child's wishes are to be accorded some weight in the determination, with the degree of significance depending upon the age of the child and other attendant circumstances. Ultimately, however, the welfare of the child must be the predominate consideration.[84] The court reasoned that the eleven-year-old's request standing alone did not establish a material and substantial change of circumstances.[85]

South Carolina has consistently followed the general rule that a child's wishes must be subservient to his best interests in

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79. ___ S.C. at ___, 293 S.E.2d at 700.

80. *Id.* at ___, 293 S.E.2d at 700. S.C. CODE ANN. § 20-3-160 (1976) provides:

> In any action for divorce from the bonds of matrimony the court may at any stage of the cause, or from time to time after final judgment, make such orders touching the care, custody and maintenance of the children of the marriage and what, if any, security shall be given for the same as from the circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable and just.

81. ___ S.C. at ___, 293 S.E.2d at 700 (Ness, J., dissenting).

82. *Id.* at ___, 293 S.E.2d at 700.

83. *Id.* at ___, 293 S.E.2d at 700. *See also* Lowe v. Lindley, 272 S.C. 143, 249 S.E.2d 750 (1978).

84. ___ S.C. at ___, 293 S.E.2d at 700; Smith v. Smith, 261 S.C. 81, 198 S.E.2d 271 (1973).

85. ___ S.C. at ___, 293 S.E.2d at 700. In his dissent, Justice Ness agreed that the decision must be governed by a concern for the child's welfare, but attacked the majority's disregard of the lower court's findings. In urging deference to the trial judge's order, Justice Ness concluded that the lower court, in observing the testimony of the parties and the minor child, was in "a far better position" to determine how the child's interests would be best served. *Id.* at ___, 293 S.E.2d at 701.

custody proceedings.[86] The rule allows consideration of the child's wishes and, at least with respect to an initial award of custody, may even permit the choice to be dispositive, provided the child is of sufficient age to reach a rational decision and there is no showing that his interests would be best served otherwise.[87] Nevertheless, a petitioner's complaint should not plead the child's choice as the sole rationale supporting a change custody. As *Bolding* indicates, the court is not apt to permit a post-divorce custodial modification absent clear proof of circumstantial change. Thus, the proper use of the child's preference lies in a supportive capacity to an allegation of such change.

In contrast to the general rule, at least three states have passed statutes that permit a minor child to select his custodial parent.[88] Each, however, qualifies the right with a minimum age requirement.[89] Several other jurisdictions have enacted statutes permitting consideration of the child's preference, provided the child is mature enough to formulate a rational judgment.[90]

In conclusion, *Bolding* adheres to the general rule that a minor child's wishes are not to be viewed as controlling in custodial modification proceedings. The child's preference does, however, remain a factor to be considered by the court and provides a valuable collateral argument in an allegation of a material change of circumstances substantially affecting the child's welfare.

Robert T. Strickland

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86. *See, e.g.*, Smith v. Smith, 261 S.C. 81, 198 S.E.2d 271 (1973); Moorhead v. Scott, 259 S.C. 580, 193 S.E.2d 510 (1972).

87. *See* Guinan v. Guinan, 254 S.C. 554, 176 S.E.2d 173 (1970). In *Guinan*, the supreme court held that the wishes of a sixteen-year-old were "entitled to great weight in awarding his custody as between estranged parents." *Id.* at 557, 176 S.E.2d at 174. The court held that absent any evidence tending to establish that the child's best interests would be served otherwise, the child's preference should control. *Id.*, 176 S.E.2d at 174.

88. *See* GA. CODE ANN. § 19-9-1 (1981); MISS. CODE ANN. § 93-11-65 (1972); OHIO REV. CODE ANN. § 3109.04(A) (Page Supp. 1976). *See generally* Speca, *The Role of the Child in Selecting His or Her Custodian in Divorce Cases*, 27 DRAKE L. REV. 437 (1977-1978).

89. *See supra* note 88. The Georgia statute requires the child to have reached the age of fourteen before he may invoke the right, whereas the Mississippi and Ohio provisions place the minimum age at twelve years.

90. *E.g.*, CAL. CIV. CODE § 4600 (West Supp. 1977); FLA. STAT. ANN. § 61.13(3)(i) (West Supp. 1976); HAWAII REV. STAT. § 571-46(3) (1976). *See generally* Speca, *supra* note 88, at 441.