Domestic Relations

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DOMESTIC RELATIONS

I. SEPARATION AGREEMENTS

A. Family Court Jurisdiction

In Kelly v. Edwards, the South Carolina Supreme Court held that the family court lacked subject matter jurisdiction to interpret and enforce a separation agreement that was incorporated, but not merged in the divorce decree. It is clear from this decision that incorporation in the divorce decree alone is not sufficient to bring a separation agreement within the family court's jurisdiction if the agreement provides that it is not to be merged into the decree.

The parties in Kelly entered into a separation agreement that included a nonmerger clause. The agreement expressly provided that it was to survive the divorce decree as a binding and conclusive contract between the parties. A divorce decree was subsequently granted incorporating the separation agreement. Several years after the divorce, the wife brought an action to enforce the separation agreement in family court. The trial judge ordered the husband to pay child support and perform other acts under the agreement. On appeal, the supreme court vacated the order and remanded the case to the family court with instructions that it be transferred to the Court of Common Pleas.

The supreme court found that the nonmerger provision of the separation agreement evidenced the parties' intent to be contractually bound by the agreement. Only the interpretation of the contract was at issue. The court concluded that because the family court lacked subject matter jurisdiction to determine contractual obligations, the case was not properly before the

2. Id. at 369, 278 S.E.2d at 774.
3. Id. at 369, 278 S.E.2d at 773.
4. Id. at 370, 278 S.E.2d at 774.
5. Id.
family court.6

In so ruling, the supreme court relied on its earlier decision in Zwerling v. Zwerling.7 The Zwerling decision concerned a separation agreement that was not incorporated into the divorce decree. The court held that since the agreement was not "incorporated or merged" into the decree, the dispute was contractual and therefore not within the family court's jurisdiction.8 The Kelly decision emphasizes that merger into the decree is essential even when the agreement has been incorporated.9

The decisions in Zwerling and Kelly raise a question in light of other recent decisions in the domestic relations area. Prior decisions have imposed a duty on family court judges to rule on the fairness of property settlement agreements which come before them for incorporation into the divorce decree.10 Whether an agreement which the parties wish to survive their divorce decree is also subject to the "fairness" test is unclear. A literal reading of Zwerling and Kelly implies that a nonmerged agreement is not within the jurisdiction of the family court, whether for enforcement or examination of fairness.

Kelly provides a clear rule for practitioners to follow: a nonmerger clause in a separation agreement will bar the family court's jurisdiction to enforce the agreement even though it is incorporated into the divorce decree. Merger should be expressly provided for if the parties wish the family court to retain jurisdiction to enforce the separation agreement.

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6. Id.


8. 273 S.C. at 294-95, 255 S.E.2d at 852. See also, Fielden v. Fielden, 274 S.C. 219, 262 S.E.2d 43 (1980)(holding that the dispute was contractual in nature because "the trial record was void of any indication that [the] agreement was incorporated or merged. . ."). 


B. Unenforceability of Contractual Release From Child Support Obligation

In Lunsford v. Lunsford,11 the South Carolina Supreme Court considered the validity of a separation agreement incorporated into a divorce decree12 releasing one parent from child support obligations. The court held that a parent’s legal obligation to support minor children may not be extinguished by agreement between the parents or third parties.13 Although the agreement was invalid, the denial of child support was upheld because the defendant husband was financially less able than the plaintiff to support the children.14

In 1974, at the time of the divorce decree releasing the defendant from the child support obligation, each party earned approximately $10,000 each year. In 1979, because of escalated costs of child care,15 the wife, who then earned $20,000 a year, and a guardian ad litem petitioned for child support from the husband who continued to earn $10,000 each year.16 The family court denied child support payments and the plaintiff appealed. In holding the agreement invalid, the supreme court reasoned that the support of minor children is a legal obligation which continues after a divorce.17 Support is a “basic right of minor children” that cannot be affected by agreement between parents or third parties.18 The court recognized, however, that the right of the children to support must be balanced against the financial realities of the case. The wife’s standard of living had improved whereas the husband’s financial status had declined.19 The court concluded that the relative financial ability of each parent to support the children required denial of child support to the

13. S.C. at 282 S.E.2d at 862.
14. Id. at 282 S.E.2d at 863.
15. Record at 12.
16. S.C. at 282 S.E.2d at 862.
18. S.C. at 282 S.E.2d at 862 (citing Armour v. Allen, 377 So. 2d 798 (Fla. App. 1979) in which the Florida court commented that child support is a right belonging to every minor child imposed on both parents for the good of society and parents may not contractually divest themselves of this obligation).
19. S.C. at 282 S.E.2d at 862.
The court's invalidation of a contractual release from child support obligations protects the child's legal right to support. It is within the discretion of lower courts to consider both the needs of the child and the parent's ability to pay when determining the amount of support contribution.\(^2\) In *Lunsford*, the court noted that the children's financial needs could be adequately met by the wife's financial ability at that time.\(^2\) The husband, however, was not permanently excused from his support obligation, which remains subject to the court's discretionary enforcement upon a proper showing of a change in circumstances.\(^2\)

It is clear from the *Lunsford* decision that a release by a separation agreement incorporated into a divorce decree will not stand to bar the court's authority to require a parent's contribution for child support. Although denial of child support was upheld in this case, the court asserted its discretionary power to consider the needs of the children and the parent's ability to pay in reaching its result.

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II. **Divorce Actions**

A. **Award of Alimony**

In *Lide v. Lide*,\(^2\) the South Carolina Supreme Court reiterated the factors to be considered in awarding alimony. Because the family court judge had apparently neglected a full analysis of all of these factors, the supreme court held that the denial of alimony in *Lide* was an abuse of discretion.\(^2\) This decision em-

\(^{20}\) Id. at _, 282 S.E.2d at 863.


\(^{22}\) Ibid. S.C. at _, 282 S.E.2d at 862-63.

\(^{23}\) The court is statutorily vested with the authority to increase, decrease, or terminate child support upon a proper showing of a change of conditions. S.C. Code Ann. § 20-3-160 (1976). See, e.g., *Campbell v. McPherson*, 268 S.C. 444, 447, 294 S.E.2d 774, 775 (1977).

\(^{24}\) Id. S.C., 283 S.E.2d 832 (1981).

\(^{25}\) The court has recognized that the determination of alimony is not amenable to calculation by mathematical formula and has generally left it with the discretion of the
phrases that no one factor is dispositive and all the facts and circumstances must be considered in determining whether alimony should be awarded.

In *Lide*, the family court granted a divorce to the husband and awarded child custody to the wife.\(^26\) The court further ordered the husband to make monthly child support payments and convey a portion of the marital property to the wife, but denied the wife’s prayer for alimony.\(^27\) In announcing the denial of alimony, the family court judge stated only that both the petitioner and the respondent had assets and were able-bodied and employed. He therefore found no reason to award alimony to the petitioner.\(^28\) On appeal, the supreme court found an abuse of discretion by the trial judge in his denial of alimony and remanded the case for a determination of the appropriate amount.

In its analysis, the supreme court cited *Powers v. Powers*\(^29\) and *Nienow v. Nienow*\(^30\) for a list of nine factors that should be considered in making an alimony award. These factors include:

1. the financial condition of the husband and the needs of the wife,
2. the age and health of the parties, their respective earning capacity, their 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. 31

The ages and health of the parties in Lide were comparable32 and both were employed.33 The supreme court, however, considered the wife's contribution to the couple's joint wealth,34 the disparity in their respective earning capacities35 and income,36 the wife's present needs,37 and the couple's standard of living at the time of the divorce38 to support an award of alimony.

In light of the broad discretion generally accorded family

31. ___ S.C. at ___, 283 S.E.2d at 833. The court has also instructed family court judges to consider the tax ramifications of an alimony award. Simmonds v. Simmonds, 225 S.C. 211, 215, 81 S.E.2d 344, 346 (1954).

32. The husband was forty-one years of age and the wife was forty. Both were in good health. ___ S.C. at ___, 283 S.E.2d at 833.

33. The wife worked three days a week as an art teacher. The husband was an attorney. Id. at ___, 283 S.E.2d at 834. The court had previously held that the employment of the wife is insurmountable grounds for denying alimony. Nienow v. Nienow, 268 S.C. 161, 171, 232 S.E.2d 504, 509 (1977); Murdock v. Murdock, 243 S.C. 218, 224, 138 S.E.2d 323, 326 (1963).

34. During the early years of the marriage, the wife worked full time as a teacher while the husband was in law school and beginning in practice. She later divided her time between homemaking and a part-time job as an art teacher. ___ S.C. at ___, 283 S.E.2d at 833. The wife argued in her brief that while she worked part time and cared for the children, she gave up educational and employment opportunities so her husband's career could flourish. Brief for Appellant at 14.

35. The court noted that the wife's "earning capacity as a teacher was considerably less than that of her husband who was engaged in the private practice of law for over a decade." ___ S.C. at ___, 283 S.E.2d at 834. When asked why she had not sought a full-time position following the breakup of the marriage, Mrs. Lide testified that she had not held a job as an elementary teacher for several years and that the opportunities for full time art instructors in the area were extremely limited. Record, vol. 2., at 214.

36. The husband's gross monthly income was nearly twice that of the wife. Most of the wife's income was received from her husband for child support. The court also noted that the husband had investments valued at $144,493.00, while the wife's investments were valued at $52,000.00. ___ S.C. at ___, 283 S.E.2d at 834.

37. In spite of assistance from her husband, Mrs. Lide asserted that she had to take money from her savings and borrow from her mother in order to meet her financial obligations. Record, vol. 1, at 16-17.

38. The court noted that the couple had "an active social life with membership in two country clubs and a dancing club." ___ S.C. at ___, 283 S.E.2d at 834. In prior decisions, the court has considered standard of living as a factor in determining alimony. See, e.g., Nienow v. Nienow, 268 S.C. 161, 171, 232 S.E.2d 504, 509 (1977); Spence v. Spence, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973). One commentator has noted that maintenance of the wife's standard of living cannot be imposed as a realistic objective of alimony because "in most situations, it is an unfortunate reality that the standard of living of both parties will be reduced. Two parties living separately cannot live as cheaply as two parties living together." The Continuing Legal Education Division of the South Carolina Bar, Support and Alimony, July, 1979, at 7.
courts in making alimony awards,\textsuperscript{39} the reversal in \textit{Lide} reinforces the court's position that the relative circumstances of the parties must be given full consideration. The factors on which the court based its analysis have been enumerated in previous decisions. \textit{Lide}, however, stands for the court's commitment that no one factor may be allowed to overshadow a full consideration of them all.

\textbf{B. Property Distribution}

In \textit{Baker v. Baker},\textsuperscript{40} the South Carolina Supreme Court continued to develop the special equity doctrine. This doctrine, first applied in South Carolina in 1978,\textsuperscript{41} is an exception to the common law notion that property rights of married persons are to be determined solely by reference to title.\textsuperscript{42} Upon divorce, a husband or wife who has made "material contributions" to the acquisition of marital property is entitled to a vested interest and an equitable share in the disposition of such property, even though the title is in the name of his or her spouse.\textsuperscript{43} The supreme court in \textit{Baker} defined "material contributions" in terms of contributions above and beyond the spouse's "normal marital obligations."\textsuperscript{44}

The parties in \textit{Baker} were married in June 1968. Shortly thereafter, the husband was sent to Vietnam and served there until 1971. The wife worked as a school teacher from the time of their marriage until the parties separated. She mailed a monthly check to her husband while he was overseas, thus enabling him to deposit his entire check in his separate bank account. After discharge, the husband returned to employment as an attorney and continued to maintain a separate savings account, to which his wife made periodic contributions. The husband also received

\textsuperscript{39} See supra note 25.
\textsuperscript{40} 276 S.C. 427, 279 S.E.2d 601 (1981).
\textsuperscript{44} 276 S.C. at 430, 279 S.E.2d at 602.
additional income from stocks, most of which he had purchased prior to marriage. The parties separated in 1975 and after three years were granted a no-fault divorce. The family court found that the wife was entitled to a special equitable interest and awarded her a one-half interest in the marital residence and a forty percent interest in the marital stocks and savings in satisfaction thereof. Additionally, the court ordered the husband to satisfy all liens on the marital residence. On appeal, the supreme court sustained the wife’s special equity claim but overturned the lower court’s award in part, holding that the husband should not be required to satisfy the mortgage liens.45

The supreme court rejected the defendant husband’s contention on appeal that an “income approach” should be used to allocate marital property.46 Under this approach, the wife would receive an allocation based upon the proportion of her income to her husband’s.47 The court relied upon its earlier decision in Wilson v. Wilson,48 which held that special equitable interests are to be determined by weighing “the relative incomes and material contributions” of the parties.49 The supreme court reasoned that adopting the “strict mathematical approach” suggested by the husband would ignore any other material contributions the wife had made to the marriage.50

Although relative income is fairly easy to determine, what actions constitute material contributions are not. The court in Baker noted that not every material contribution of a spouse will give rise to special equity, stating that “‘special equity’ should be warranted only where there exist special facts and circumstances in favor of one party above and beyond normal marital obligations.”51 The South Carolina Supreme Court quoted from the Florida Supreme Court’s decision in Arrington v. Arrington52 to support its conclusion that:

Each party is expected to be a help and companion to the other. We have not so far abandoned the idea of marriage as a

45. Id. at 431, 279 S.E.2d at 603.
46. Id. at 430, 279 S.E.2d at 602.
47. Brief for Appellant at 11-17.
49. Id. at 222, 241 S.E.2d at 569.
50. 276 S.C. at 430, 279 S.E.2d at 601.
51. Id. at 430, 279 S.E.2d at 602.
52. 150 So. 2d 473 (Fla. 3d D.C.A. 1963).
unity of man and wife as to figure equities on the basis of the assistance one gives to the other in the performance of ordinary marital duties.\textsuperscript{53}

Although the supreme court decided that the settlement award should be vacated as excessively favorable to the wife, it gave little indication as to the reason, noting only that "the preponderance of the evidence requires a modification of the trial judge's order."\textsuperscript{54} The supreme court apparently based this finding on the fact that the family court judge had considered "normal marital obligations" in his calculations. \textit{Baker} offers scant assistance to the practitioner who seeks clarification of what factors must be taken into consideration in determining the amount of an equitable interest. In rejecting the family court allocation, the opinion purports to disregard normal marital duties. However, the court considered the wife's "devotion"\textsuperscript{55} and the fact that she had "generally attended to her normal household duties,"\textsuperscript{56} two seemingly normal marital obligations, in awarding the wife special equity. There may be a reconciliation of these divergent lines of reasoning, however, in the court's suggestion that some factors may be accorded greater weight when considered in light of the situation at the time the contribution was made. In discussing the wife's devotion, the court stated that "upon returning home, the wife's income and devotion had an increased significance at a time when [the husband's] income was substantially lower than today."\textsuperscript{57} Thus, perhaps the performance of normal marital duties by one spouse may create an equitable interest in the other spouse's property when the value of the contribution is heightened by the circumstances of performance.

"Normal marital duties" remains an elusive term not easily defined by inflexible court-made rules. Without a legal clarification of marital roles in a changing society, it may be impossible to define the scope of these duties. In fact, any contributions other than income may be considered ordinary marital duties.

\textsuperscript{53} 276 S.C. at 430, 279 S.E.2d at 602 (citing Arrington v. Arrington, 150 So. 2d 473 (Fla. Dist. Ct. App. 1963)).
\textsuperscript{54} 276 S.C. at 431, 279 S.E.2d at 603.
\textsuperscript{55} Id. at 431, 279 S.E.2d at 602.
\textsuperscript{56} Id. at 430, 279 S.E.2d at 602.
\textsuperscript{57} Id. at 431, 279 S.E.2d at 602.
Indeed, Florida courts seem to have so broadly defined marital duties as to preclude consideration of any factors other than direct monetary contributions and service in a spouse’s business. South Carolina may possibly do the same in its continuing development of the special equity doctrine.

C. Equitable Distribution

In *Jeffords v. Hall*, the South Carolina Supreme Court tacitly approved the adoption of equitable distribution as another means of adjudicating property rights of divorcing parties. Though some commentators have used the terms “special equity” and “equitable distribution” interchangeably, there is a sharp distinction between the two doctrines. “Equitable distribution” properly refers to a system of apportionment adopted in several no-fault divorce states, most notably New Jersey. Under this doctrine, courts have blanket authority to make a distribution of property between the parties to a divorce along equitable lines. Neither spouse must show that he or she has made material contributions to the other spouse’s acquisition of property, or that he or she is entitled to a vested property interest. Rather, the couple seeking divorce requests the court to create its own fair settlement. Conversely, South Carolina has followed Florida’s lead in adopting the special equity doctrine which allows courts to award a spouse an interest in property acquired or held in the name of the other spouse, provided the parties seeking the award made material contributions toward the acquisition.

The parties in *Jeffords* had been married for thirty years.

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62. *Id.* at 251-52.
63. The first eighteen years of the marriage were common law and the last twelve years were ceremonial. Thus, the question as to whether the same considerations would apply in a purely common law marriage was not before the court. This issue has been
during which time the wife had worked on a regular basis and had used her money for furnishings, food, clothes, and support of the family. She also paid for repairs and refurbishment of the marital residence, which her husband had inherited prior to marriage.\footnote{64} The husband was disabled and had been an invalid for extended periods. He never filed an income tax return and he testified that his income had been so small that he did not believe he was required to file. The trial court granted the husband a no-fault divorce and ordered him to make an equitable distribution of the marital property and a lump sum alimony payment. The total payment could be satisfied by transfer of the marital residence to the wife, such transfer being required if the husband did not make full payment within ten days.\footnote{65} On appeal, the South Carolina Supreme Court affirmed the order of equitable distribution and lump sum alimony.\footnote{66}

The supreme court reasoned that the wife’s continued employment during the marriage supported the award of equitable distribution.\footnote{67} This employment was deemed sufficient to meet the “material contribution” standard announced in \textit{Wilson v. Wilson}.\footnote{68} Thus, although the phrase “equitable distribution” was used in \textit{Baker}, the court applied the special equity standards it had developed in earlier cases.

\textit{Jeffords} marks the first time the term “equitable distribu-

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addressed by the Florida Supreme Court in \textit{Budd} v. J.Y. Gooch Co., 157 Fla. 716, 27 So. 2d 72 (1946). In \textit{Budd}, the court held that the same equitable considerations apply in adjudicating the property rights of parties in a common law marriage as in a ceremonial marriage.

\footnote{64} Record at 203-05. The fact that the wife’s contribution was made for improvements rather than acquisition of the marital property was not discussed. Florida courts, however, have recognized that contributions toward improvements are sufficient to create an equitable interest. See, e.g., \textit{Forehand v. Forehand}, 363 So. 2d 829 (Fla. 1978); \textit{Stoutamire v. Stoutamire}, 321 So. 2d 599 (Fla. 1975); \textit{Francis v. Francis}, 133 Fla. 495, 182 So. 833 (1938).

\footnote{65} Record at 214-15.

\footnote{66} 276 S.C. at 274, 277 S.E.2d at 705. During the pendency of the divorce proceedings and prior to the issuance of the lower court’s order, the husband had transferred the residence to his sister. The family judge interpleaded the sister and ordered her to convey the property to her brother. The supreme court reversed this portion of the order as violative of the sister’s due process rights. The supreme court, in a footnote, specifically declined to rule on the propriety of the transfer. \textit{Id.} at 274 and n.1, 277 S.E.2d at 704-05 and n.1.

\footnote{67} \textit{Id.} S.C. at 273-74, 277 S.E.2d at 704 (citing \textit{Wilson v. Wilson}, 270 S.C. 216, 241 S.E.2d 566 (1978)).

\footnote{68} 270 S.C. 216, 241 S.E.2d 566 (1978).
tion" has been used in a South Carolina Supreme Court decision. The court's use of the term, which arguably implies that the doctrine has been accepted in this state, does little to advance either the doctrine of equitable distribution or special equity in South Carolina. In fact, the decision's primary significance seems to be the confusion that it casts upon this area of the law.

The use of the term "equitable distribution" in Jeffords may have simply been a misnomer. There is a possibility, however, that it was indeed intentional and indicates the advent of a new approach to property disposition in this state. At least one commentator has stated that South Carolina now has both the doctrines of special equity and equitable distribution operating concurrently.69 This possibility is strengthened by subsequent legislative and judicial developments. The South Carolina General Assembly has recently adopted an act that gives the family courts jurisdiction to make a disposition of property rights of the parties "if requested by either party in the pleadings."70 Furthermore, in a recent decision, Glass v. Glass,71 the supreme court reversed a trial court's dismissal of a complaint seeking an "equitable distribution based upon the material contributions of the wife to the marriage." In holding the doctrine constitutional, however, the court again used the language of special equity cases and cited Wilson as authority.72

It is thus difficult to say from Jeffords whether the supreme court has adopted equitable distribution as an alternative remedy, whether the court intends to apply some sort of compromise between the two doctrines, or whether the use of the term was a mere misnomer. If South Carolina has indeed adopted equitable distribution, it is probably following the lead of Florida. South Carolina opinions have relied heavily on Florida for guidance, and two recent Florida cases indicate that Florida has now adopted equitable distribution as an alternative method of property disposition.73 If the South Carolina Supreme Court has

69. Chastain, supra note 58, at 234.
72. Id. at ___, 281 S.E.2d at 222.
73. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980); Duncan v. Duncan, 379 So. 2d 949 (Fla. 1980).
not yet adopted the equitable distribution doctrine, these Florida decisions suggest that its adoption may be imminent.

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III. CHILD CUSTODY: JURISDICTION FOR MODIFICATION OF DEGREE

In Smollar v. Smollar,\textsuperscript{74} the South Carolina Supreme Court held that the family court which determines child custody in a divorce proceeding "retains jurisdiction to modify the decree even though the parent having custody, and the child, move from the state."\textsuperscript{75} The significance of this decision is its consistency with the provisions of the recently enacted Uniform Child Custody Jurisdiction Act (U.C.C.J.A.).\textsuperscript{76}

The parties in Smollar were divorced in January 1980 and Mrs. Smollar was awarded custody of the minor child, in addition to child support and alimony.\textsuperscript{77} In February 1980, Mrs. Smollar was remarried in Texas and thereafter maintained a Texas residency and domicile.\textsuperscript{78} Mr. Smollar filed a summons and petition in the Richland County Family Court in March 1980, to have the divorce decree amended.\textsuperscript{79} Mrs. Smollar subsequently made a special appearance before the court to contest the court's personal jurisdiction over her.\textsuperscript{80} The lower court denied Mrs. Smollar's motion, holding that the Richland County Family Court retained jurisdiction. The supreme court affirmed.\textsuperscript{81}

The court reasoned that if the family court could maintain jurisdiction when a party moves to another location within the state, it likewise should retain jurisdiction when a party moves out of state.\textsuperscript{82} The court further supported its decision by rely-

\textsuperscript{74} S.C. at ___, 280 S.E.2d 543 (1981).
\textsuperscript{75} S.C. at ___, 280 S.E.2d at 544.
\textsuperscript{76} 1981 S.C. Acts 351, No. 102.
\textsuperscript{77} S.C. at ___, 280 S.E.2d at 543.
\textsuperscript{78} Record at 1.
\textsuperscript{79} S.C. at ___, 280 S.E.2d at 543.
\textsuperscript{80} Record at 2.
\textsuperscript{81} S.C. at ___, 280 S.E.2d at 544.
\textsuperscript{82} The court cited Clinkscales v. Clinkscales, 243 S.C. 377, 134 S.E.2d 216 (1963), to support this analogy. In Clinkscales, the wife did not leave the state but merely moved from Anderson to Greenville. The case is not truly analogous, because the husband sought to have the custody award modified in the court of the county of the wife's
ing on the majority view that "once the divorce court gains jurisdiction to determine custody, it retains jurisdiction to modify the decree even though the parent having custody and the child move from the state." The court concluded that if it did not recognize the continuing jurisdiction of the family court which had initial jurisdiction, the issue of custody could be relitigated by a different court everytime a child was moved.

Smollar v. Smollar is correct in its holding that the "[f]amily [c]ourt had personal jurisdiction over both parties and the minor child when the divorce decree was issued" and that it had "jurisdiction over this case." Although the decision is silent concerning the effect of the U.C.C.J.A., which had been signed into law eight days before the decision was handed down, the result in Smollar would probably have been the same under the U.C.C.J.A. The notice given to Mrs. Smollar complied with the new statute, and because the child had been gone less than six months, Texas courts would probably not have had jurisdiction. The applicability and effect of the U.C.C.J.A. was not raised in the briefs, and it is unclear whether it would have been applied retroactively. It would have been a helpful indication for future cases if the court had cited the Act in support of its

new residence. The court held that since the decree was from the court in Anderson, only that court could modify it.


84. ___ S.C. at ___, 280 S.E.2d at 544. This reasoning is implicit in the general purposes of the U.C.C.J.A., 1981 S.C. Acts 351, 352, No. 102 at § 20-7-784.

85. ___ S.C. at ___, 280 S.E.2d at 544.

86. The U.C.C.J.A. was approved by the legislature June 15, 1981 and was effective upon the governor's signing it on July 1, 1981. The Smollar decision is dated July 9, 1981.


88. 1981 S.C. Acts 351, 355, No. 102, at § 20-7-792.

89. Id. at 354, § 20-7-788(a)(1)(ii).

90. Id. at 354, § 20-7-788(a)(4)(i); Tex. Fam. Code. Ann., § 11.053 (Vernon Supp. 1981). The U.C.C.J.A. as found in Uniform Laws Annotated contains the model for this section of the Texas Code. However, in the Texas Code "Recognition of Out-of-State Decrees" is limited to those made in compliance with statutory authority similar to the U.C.C.J.A., whereas in the model U.C.C.J.A. the requirements for recognition of out-of-state decrees do not require statutory authority so long as the court follows a course similar to that espoused in the U.C.C.J.A. Thus, under U.C.C.J.A. § 13, the South Carolina decree would clearly be recognized, but the result under the Texas version is not as clear.
Perhaps the most confusing aspect of Smollar is the court's
decision not to address due process considerations. The appel-
landant, Mrs. Smollar, argued in her brief that her fourteenth
amendment right to due process was violated by the court's "re-
quiring . . . [her] to come to South Carolina to decide personal
rights whe[n] . . . [she] has validly changed . . . her place of
domicile and residence" to Texas. The court chose not to ad-
dress this issue and instead relied on its determination that if it
did not affirm jurisdiction, then child custody would be subject
to an infinite string of decisions with each court "exercising ap-
pellate powers over the acts of another court of equal jurisdic-
tion." The South Carolina Supreme Court is not the only court
to sidestep the due process problems inherent in this kind of
case. Other courts have also put due process arguments aside
for the benefit of the children involved.

Even though the U.C.C.J.A. is now in effect in South Caro-
lina, and future custody questions will be decided under it, Smollar v. Smollar is useful as a foreshadowing of how the South Carolina Supreme Court will react to the U.C.C.J.A. It is
likely that if the court decided a case in line with the statute
without expressly mentioning the statute, as it did in Smollar, a
later action brought under the statute would be similarly
decided.

IV. ADOPTION: GOOD CAUSE REQUIREMENT FOR RELEASE OF
IDENTIFYING INFORMATION TO ADOPTEE

In Braden v. Children's Bureau of South Carolina, the
South Carolina Supreme Court interpreted the meaning of the
statutory "good cause" requirement for release of identifying in-

91. The U.C.C.J.A. has been adopted by every state except Massachusetts, Missis-
sippi, and Tennessee.
92. A discussion of this due process problem can be found in Commentary, The Due
Process Dilemma of the Uniform Child Custody Jurisdiction Act, 6 Ohio N.U.L. Rev.
93. Brief for Appellant at 3-4.
94. --- S.C. at ---, 280 S.E.2d at 544 (quoting Williams v. Woolfolk, 188 Va. 312,
319, 49 S.E.2d 270, 273 (1948)).
95. See, May v. Anderson, 345 U.S. 528 (1953); Dowden v. Fischer, 338 S.W.2d 534
formation from an adoption file. The court held that the plaintiff must show extraordinary circumstances sufficient to support the finding of a "compelling need" for such disclosure. This interpretation of the "good cause" requirement is consistent with the approach taken in a majority of American jurisdictions.

Plaintiff Bradey was adopted as an infant in South Carolina in 1947. Although he led a relatively stable life as an adult, the plaintiff experienced a continuing emotional need to locate his natural parents. Brady contacted the defendant Children's Bureau which, pursuant to statute, provided him with only non-identifying information in his adoption file. Unsatisfied, he brought an action against the defendant to compel disclosure of the remaining information.

The trial court determined that Bradey's "sincere and genuine desire to learn the truth of his birth" constituted "good cause" under section 15-14-140(c) of the South Carolina Code. The court decided to review the adoption file in camera and contact the natural parents to determine whether they would object to the release of their identities. The court then proposed to hold a subsequent hearing to allow the State to present any

All files and records pertaining to the adoption proceedings in the Children's Bureau in the State of South Carolina, or in the Department of Social Services of the State of South Carolina, or in any authorized agency, shall be confidential and withheld from inspection except upon order of court for good cause shown.


98. 275 S.C. at 627, 274 S.E.2d at 421-22.


101. Record at 10.

102. This hearing presumably was to be held only if the natural parents agreed to the release of their identities. Record at 16.
compelling reasons for maintaining the confidentiality of the records.\textsuperscript{103} The Children's Bureau appealed and the supreme court reversed, concluding that the finding of good cause and the order for in camera inspection were unsupported by the record and therefore constituted an abuse of discretion.\textsuperscript{104}

The supreme court agreed with the Children's Bureau that Bradey had made an insufficient showing of good cause, holding that good cause required that the demanding party demonstrate "compelling need"\textsuperscript{105} and "extraordinary circumstances"\textsuperscript{106} to justify opening a sealed adoption record. The court used these terms to define good cause to emphasize the need for confidentiality in the adoption process.\textsuperscript{107} The court further concluded that the natural parents had a constitutionally protected expectation of privacy arising from the statute.\textsuperscript{108} The supreme court noted, however, that the requirement of confidentiality and the rights of the natural parents are not absolute. The adoption statute would allow a party access to identifying information upon a showing of compelling need.\textsuperscript{109} Compelling need would be

\textsuperscript{103} This procedure shifted the burden to the State to show good cause why the records should remain sealed. Several jurisdictions have adopted this procedure. See, \textit{e.g.}, \textit{In re Maples}, 563 S.W.2d 760 (Mo. 1978)(adopter's interests predominate when he is an adult); \textit{Mills v. Atlantic City Dep't. of Vital Statistics}, 148 N.J. Super. 302, 372 A.2d 646 (1977)(where there are adult adoptees involved, the burden shifts to the State to show good cause does not exist).

\textsuperscript{104} 275 S.C. at 624, 274 S.E.2d at 420. The court also addressed Bradey's claim that S.C. Code Ann. § 15-45-140(c) (Supp. 1978) violated his equal protection rights. The court found that the adoptee's status under the law did not place him in a suspect class and that the constitutional test is thus whether the separate classification has a reasonable relation to the purposes of the challenged legislation. The court concluded that in this case "there must assuredly is" such a relationship. 275 S.C. at 629, 274 S.E.2d at 422 (citing \textit{Alma Society, Inc. v. Mellon}, 459 F. Supp. 912 (S.D.N.Y. 1978); \textit{In re Roger B.}, 85 Ill. App. 3d 1064, 407 N.E.2d 884 (1980); \textit{Mill v. Atlantic City Dep't. of Vital Statistics}, 148 N.J. Super. 302, 372 A.2d 646 (1972); and \textit{In re Sage}, 21 Wash. App. 803, 586 P.2d 1201 (1978)).

\textsuperscript{105} 275 S.C. at 627, 274 S.E.2d at 421.

\textsuperscript{106} \textit{Id.} at 629, 274 S.E.2d at 422.

\textsuperscript{107} \textit{Id.} at 627-28, 274 S.E.2d at 421-22. The court in its opinion included with approval a lengthy quotation from \textit{In re Maples}, 563 S.W.2d 760, 763-64 (Mo. 1978), in which the Missouri Supreme Court discussed the risks attendant to a rapid change in the policy of preserving the anonymity of biological parents and affirmed the validity of that policy. 275 S.C. at 627-28, 274 S.E.2d at 421-22.

\textsuperscript{108} 275 S.C. at 626-27, 274 S.E.2d at 421 (citations omitted). For a further discussion of this aspect of the Bradey decision, see \textit{Constitutional Law, Annual Survey of South Carolina Law}, 34 S.C.L. Rev. 43, 45 (1982).

\textsuperscript{109} 275 S.C. at 627-28, 274 S.E.2d at 421.
weighed against not only the interests of the natural parents, but also against the State’s interest in maintaining an effective adoption process. Disclosure would be allowed where “the need for identifying information . . . outweigh[s] the general need for confidentiality.” The court stated that the facts and circumstances of each case determine what constitutes a compelling need for identifying information.

In rejecting Bradey’s claim for access to his adoption files, the court found that the existence of “some insecurity,” “some distraction,” and “sincere desire” did not demonstrate a compelling need for identifying information and therefore did not justify disclosure. Although the court did not doubt Bradey’s sincerity, it found that “when this desire is measured against the substantial interest of the State in an ongoing adoption institution based upon confidentiality, the desire comes up short. Disclosure follows in extraordinary circumstances. Bradey’s circumstance simply is not extraordinary.” The court found it significant that Bradey had not required medical assistance for his emotional distress and he enjoyed a relatively stable personal life.

The supreme court’s decision in Bradey places South Carolina law in line with the majority of American jurisdictions which have interpreted “good cause” as requiring a showing of compelling need. As in Bradey, the existence or nonexistence of extraordinary circumstances has been held determinative of whether there is a compelling need. For example, the desire of a Mormon to discover his ancestry for religious reasons, the desire to ascertain possible inheritance rights, the existence of a

110. Id. at 627, 274 S.E.2d at 421.
111. Id..
112. Id. at 627-28, 274 S.E.2d at 422.
113. Id. at 629, 274 S.E.2d at 422.
114. Id.
115. In re Gilbert, 563 S.W.2d 768 (Mo. 1978). The adoptee claimed two reasons for disclosure. She stated the first reason as “I’m trying to find them out of interest, curiosity and perhaps even love.” 563 S.W.2d at 769. The case was remanded based on the second reason, which was “that an individual may be inspired by sincere religious beliefs.” Id. at 770.
116. In Louisiana, the adoptee retains the right to inherit from his natural parents. Kirsch v. Parker, 383 So.2d 384 (La. 1980); Messey v. Parker, 369 So.2d 1310 (La. 1979); Chambers v. Parker, 349 So. 2d 424 (La. Ct. App. 1977). In Kirsch the plaintiff also suffered from flashbacks to her pre-adoption childhood and the court recognized that medical proof of this affliction would likely constitute good cause for disclosure. 383
severe personality dysfunction, the need for a specific type of blood, fear of hereditary disease, and most common of all, the adoptee’s psychological need to know have all been held to justify disclosure of confidential adoption records.

Conversely, courts have consistently refused to recognize mere desire or curiosity as sufficient to constitute good cause. Courts have also refused to unseal adoption records for a man suing his former wife’s present husband for alienation of affections, for a man who needed the sealed information to aid his defense in a paternity suit, and for a charitable organization wishing to assert a superior claim over the inheritance claims of adopted children. Thus, while somewhat lacking insofar as

So.2d at 387-88. Kirsch was remanded for the appointment of a curator ad litem and to allow the plaintiff to prove that her flashbacks were caused by the ignorance of her origins. Id. An interest in inheritance from the natural parents would not be recognized in South Carolina because the relationship between the parents and adoptee is completely severed. S.C. Code Ann. § 15-45-130 (1976)(current version at S.C. Code Ann. § 20-7-1770 (Supp. 1981)). See also, Domestic Relations, Annual Survey of South Carolina Law, 29 S.C.L. Rev. 99, 112 (1978).


118. In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977). This action was remanded to the trial court with instructions that it consider medical necessity, such as the need for a specific type of blood, and severe emotional or psychological difficulties. The court also stated that “we think the confidentiality required by our adoption statutes should be protected except in compelling cases.” 32 N.C. App. at 426, 232 S.E.2d at 482.

119. In re Sage, 21 Wash. App. 803, 586 P.2d 1201 (1978). The court noted that at trial the plaintiff adoptee had not, as requested, produced affidavits detailing his fear of hereditary heart disease. The court implied that these affidavits could have provided the necessary showing of good cause. 21 Wash. App. at 811, 586 P.2d at 1206.

120. See, e.g., In re Anonymous, 89 Misc. 2d 132, 390 N.Y.S.2d 779 (1976). The plaintiff asserted as good cause that he was suffering from a psychological disorder resulting from his not knowing his true identity and that obtaining such knowledge would be “beneficial to his present emotional state.” 89 Misc. 2d at 134, 390 N.Y.S.2d at 782.

121. See, e.g., In re Hayden, ___ Misc. 2d ___, 435 N.Y.S.2d 541 (1981); In re Linda F.M., 95 Misc. 2d 581, 409 N.Y.S.2d 638 (1978). The adoptee argued unsuccessfully that the lack of full knowledge about her origins had caused psychological problems which impaired her artistic skills and led to the breakup of her marriage. A psychologist testified that the plaintiff was in the middle range of adoptees—she showed no unusual adjustment problems. The request for disclosure was dismissed with the court stating that “[t]his need must rise above mere desire or curiosity.” 95 Misc. 2d at ___, 409 N.Y.S.2d at 641.

122. In re Glasser, 198 Misc. 889, 100 N.Y.S.2d 723 (1950)(plaintiff’s request to unseal two records that he believed contained information helpful to his suit denied).


124. Hubbard v. Superior Court of Yuba County, 189 Cal. App. 2d 741, 11 Cal. Rptr. 700 (1961). This was an action brought to enable the Lincoln Center for the Performing
predictability, the extraordinary circumstances approach is perhaps best given the great diversity of the backgrounds and circumstances facing adoptees.

Furthermore, the court in Bradey did not expressly disapprove of the trial court's disclosure procedures to be followed when an adoptee proves good cause. The court only disagreed with the existence of good cause. This suggests that such a procedure may be acceptable in a case where the plaintiff has been able to establish good cause.

The decision in Bradey reflects the South Carolina Supreme Court's intention to balance the needs of an adoptee against those of the parents and the state in determining the existence of good cause. Good cause will be found where there are extraordinary circumstances which justify the finding of a compelling need for disclosure of confidential information in an adoption file. Once such a showing has been made, courts will establish procedures to be followed in disclosure. These procedures should be designed to protect the interests of the adoptee, the parents, and the state.

Michael Warshauer

Arts to show that the children adopted by an heir to John D. Rockefeller, Sr., were improperly adopted. The Lincoln Center's theory was that if it could prove impropriety in the adoption it would receive $9,700,000 from the trust that otherwise would belong to the adoptees. The court determined that this reason did not constitute good cause.