South Carolina Law Review

Volume 36 | Issue 1 Article 7

Fall 1984

Domestic Relations

Aleta M. Pillick

DOMESTIC RELATIONS

I. Property Settlement Agreements

A. *The Subject Matter Jurisdiction of Family Court*

In *Moseley v. Mosier*,[1] the South Carolina Supreme Court held that jurisdiction for all domestic matters, which are contained in a decree or in a separation agreement, vests in the family court. *Moseley* establishes that the provisions of a separation agreement, once approved,[2] become part of the divorce decree and thus become modifiable and enforceable by the contempt powers of the family court. Although the decision allows the parties some latitude to affirmatively deny the family court jurisdiction over alimony and property settlement provisions,[3] *Moseley* confirms that the family court retains continuing jurisdiction to modify and to enforce child support provisions,[4] notwithstanding any separation agreement of the parents. *Moseley* extends this long-held position[5] to cases involving separation agreements, bringing South Carolina into line with the general rule.[6] However, the decision in *Moseley* expressly overrules several recent cases,[7] and questions the continuing viability of several others, which address family court jurisdiction over alimony and property settlement provisions. *Moseley* appears to import

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1. 279 S.C. 348, 306 S.E.2d 624 (1983).

2. Presumably this refers to the fairness test analysis. *See infra* text accompanying footnotes 49-92.

3. *See infra* text accompanying footnotes 42-43.

4. Presumably custody provisions are also included.

5. For cases illustrating the well-established family court authority to modify and enforce judicially-decreed child support provisions, see Lever v. Lever, 278 S.C. 433, 298 S.E.2d 90 (1982); Stevenson v. Stevenson, 276 S.C. 475, 279 S.E.2d 616 (1981); and Smith v. Smith, 275 S.C. 494, 272 S.E.2d 797 (1980).

6. *See* Fricks v. Fricks, 260 N.C. 635, 133 S.E.2d 487 (1963) (cannot withdraw children of the marriage from the protective custody of the court); *see also*, H. Clark, Law of Domestic Relations, § 16.13, at 561 (1968) ("orders for support of children are always freely modifiable as changing circumstances may require. This is true whether or not the order originated in a separation agreement[,] . . . the courts saying that agreements by husband and wife cannot be allowed to control the level of child support").

7. Bryant v. Varat, 278 S.C. 77, 292 S.E.2d 298 (1982); Brooks v. Brooks, 277 S.C. 322, 286 S.E.2d 669 (1982); Kelly v. Edwards, 276 S.C. 368, 278 S.E.2d 773 (1981).

recent developments in West Virginia[8] and North Carolina[9] divorce law into the law of South Carolina.

Older South Carolina cases usually followed a "merger theory" with respect to provisions of a property settlement. Under this theory, the agreement of the parties became merged into the decree and lost its contractual nature, thereby allowing the court to modify the decree upon changed circumstances.[10] More recently, the jurisdiction of the family court has been determined by an inspection of the "terms of art" used in the agreement. This theory represented an attempt to discover the intent of the parties to confer jurisdiction on family court. Terms of art, such as "incorporated and merged," "incorporated without merger," "ratified," "adopted," or "approved," controlled the operation of divorce law. Finding that family court jurisdiction did not extend to ordinary actions *ex contractu,* the court denied subject matter jurisdiction to the family court where the agreement was neither "incorporated or merged"[11] or was "incorporated but not merged."[12] This determination, based on semantic nuances, created considerable confusion in the legal community while ignoring the basic fact that the parties' intent is rarely revealed by legal terms of art. *Moseley* abolishes this confusing terms of art analysis from the family law of South Carolina.

The divorce decree in *Moseley* "incorporated by reference, without merger," the provisions of a property settlement and separation agreement providing, among other things, for $150 a week in child support payments and stating that the agreement "shall not be modified . . . except by written instrument duly executed by both parties." Following the father's abortive attempt to achieve a reduction in child support payments,[13] the

8. Nakashima v. Nakashima, 297 S.E.2d 208 (W. Va. 1982); *In re* Estate of Hereford, 250 S.E.2d 45 (W. Va. 1978).

9. Henderson v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1983); Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983).

10. *See* Fender v. Fender, 256 S.C. 399, 182 S.E.2d 755 (1971); Jeanes v. Jeanes, 225 S.C. 161, 177 S.E.2d 537 (1970); *Ex parte* Jeter, 193 S.C. 278, 8 S.E.2d 490 (1940).

11. Fielden v. Fielden, 274 S.C. 219, 262 S.E.2d 43 (1980); McGrew v. McGrew, 273 S.C. 556, 257 S.E.2d 743 (1979); Zwerling v. Zwerling, 270 S.C. 685, 255 S.E.2d 850 (1979).

12. Bryant v. Varat, 278 S.C. 77, 292 S.E.2d 298 (1982); Kelly v. Edwards, 276 S.C. 368, 278 S.E.2d 773 (1981).

13. The father petitioned family court for a decrease in child support upon changed

mother petitioned family court to enforce the terms of the agreement. Although family court held the father in contempt, it deferred sentencing and ordered the father to pay $500 in child support arrearages.[14] The court also reduced the weekly child support payments to seventy-five dollars.[15]

The arguments the parties raised on appeal illustrate the pre-*Moseley* uncertainty regarding family court jurisdiction. The mother argued that since the obligation arose from contract, the family court had authority only to enforce the terms of the agreement, not to modify them.[16] The father countered that if the obligation arose from contract, the family court had no jurisdiction to enforce the terms by its contempt power.[17] In a far ranging analysis,[18] the supreme court reversed the family court's finding of contempt, and resolved the issue of the subject matter jurisdiction of family court over child support, property settlements, and alimony provisions based upon separation agreements.

1. Child Support Jurisdiction

The supreme court clarified the issue of child support based on agreement by holding that family courts have continuing jurisdiction to act in the best interests of the child, regardless of what the separation agreement specifies.[19] *Moseley* extends the long-standing family court authority to modify and to enforce child support awards to situations involving separation agreements. The court cited *Smith v. Smith*[20] for the doctrine that the family court may always modify child support upon a show-

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conditions. The family court found it had jurisdiction only to enforce, not to modify, the child support provisions based on a contractual agreement. Record at 15. The father's appeal from this order was abandoned.

14. Total arrearages exceeded $2,000. Record at 49.

15. The court also awarded attorney's fees of $200. The trial court was careful to note that it was not modifying the terms of the decree, but was simply holding all arrearages in abeyance temporarily. Record at 52.

16. The mother relied on Cook v. Cobb, 271 S.C. 136, 245 S.E.2d 612 (1978) (incorporation alone is sufficient to allow enforcement by family court).

17. The father relied on Zwerling v. Zwerling, 273 S.C. 292, 255 S.E.2d 850 (1979) (an "incorporated without merger" agreement is enforceable only by resort to ordinary contract remedies).

18. 279 S.C. at 351-53, 306 S.E.2d at 626-27.

19. *Id.* at 351, 306 S.E.2d at 626.

20. 275 S.C. 494, 272 S.E.2d 797 (1980).

ing of changed conditions. In that case a judicially decreed amount of child support was increased because of the extraordinary medical expenses of the child. Although overlooked by the court, a recent case involving a separation agreement, *Lunsford v. Lunsford*,[21] supports the court's position that no agreement of the parties can prejudice the child's rights.[22]

In *Lunsford* a settlement agreement incorporated into the divorce decree released the father from any child support payments. Holding that neither parent can agree to release the other from child support obligations, the court stated that the basic right of minor children to support is not affected by an agreement between the parents or third parties as to such support.[23] Thus, as the cases of *Moseley* and *Lunsford* clearly indicate, questions of child support may not be finally determined by agreement of the parents, but remain matters under the continuing jurisdiction and supervision of family court.

2. *The Contempt Issue*

The supreme court reversed the family court's finding of contempt on two grounds. First, the court noted that because the father in *Moseley* had faithfully paid as much child support as he could each week, the essential element of willful, contemptuous conduct required by *Curlee v. Howle*[24] was not present. The court further observed that when the supporter is unable to

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21. 277 S.C. 104, 282 S.E.2d 861 (1981).

22. *See* Johnson v. Johnson, 251 S.C. 420, 163 S.E.2d 229 (1968). The court took this position based on the well-established principle of South Carolina law that the best interest of the child will always receive first consideration in all family court proceedings. *See* Cook v. Cobb, 271 S.C. 136, 245 S.E.2d 612 (1968).

23. 277 S.C. at 105, 282 S.E.2d at 862. The court went on to find that because the mother in *Lunsford* was better able to support the children, the father should not be ordered to pay child support.

24. 277 S.C. 377, 287 S.E.2d 915 (1982). In *Curlee*, a father whose children were visiting him under a court order granting him three week visitation rights, petitioned for and was granted a Nevada order awarding him temporary custody. The mother petitioned family court in South Carolina to hold the father in contempt. The family court held the father in civil contempt and on review the supreme court affirmed. The court applied the common law rule that willful disobedience of a court order results in contempt. Under the broad rubric of *Curlee*, a defendant may be held in contempt even when his action is in compliance with a conflicting order of another court. For a discussion of *Curlee*, see *Practice and Procedure, Annual Survey of South Carolina Law*, 35 S.C.L. REV. 118 (1983).

comply with the terms of an agreement, the child's best interests are served by decreasing child support rather than by sentencing the supporter for contempt.[25] Second, the court held that since the finding of contempt rested on the violation of a support obligation arising out of a separation agreement, and not out of a court order, the second element of contempt, a valid court order, was absent.[26] As a result, the court noted that on remand the mother's cause of action should be for breach of contract.[27]

3. *Subject Matter Jurisdiction of Family Court over Property Settlement and Alimony Provisions*

The court in *Moseley* took the opportunity to resolve the troubling question of the subject matter jurisdiction of family court respecting matters in a separation agreement other than child support, typically property settlement and alimony provisions.[28] After tracing the shortcomings of the terms of art analysis, the court announced a new general rule:

> Today we overrule those cases which hold that words of art make a major distinction in the operation of divorce law. Furthermore, jurisdiction for all matters, whether by decree or by agreement, will vest in the family court . . . . [W]ith the court's approval, the terms [of an agreement] become a part of the decree and are binding on the parties and the court.[29]

This new rule represents a dramatic departure from previous jurisprudence by establishing that in the absence of a specific provision to the contrary, unambiguously denying the family court jurisdiction in the areas of modification and enforcement,[30] it shall be presumed that the parties intended the terms of the

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25. 279 S.C. at 352, 306 S.E.2d at 626.

26. Presumably this statement must be read in the context that *Moseley*, which establishes that terms of a separation agreement become part of the divorce decree and are enforceable like any other order of the court, is to have only prospective application. In his dissent, Chief Justice Lewis strongly argued that the majority opinion's conclusion that there was no valid court order, in effect, "ignore[d] the plain facts contained in [the] record." 279 S.C. at 355, 306 S.E.2d at 628 (Lewis, C.J., dissenting).

27. 279 S.C. at 353, 306 S.E.2d at 626.

28. Note that the court's power to enforce the myriad of other provisions in a separation agreement, such as life insurance or health insurance provisions, is not addressed by *Moseley*. *See infra* text accompanying footnotes 46-47.

29. 279 S.C. at 353, 306 S.E.2d at 627.

30. *See infra* text accompanying footnotes 46-47.

agreement to be judicially decreed, and thus subject to the continuing jurisdiction of the family court.

The court in *Moseley* reasoned that the terms of art analysis had been an unsatisfactory method of determining jurisdiction, as it generally failed to reveal the parties' true intent and tended to impose adverse consequences on unsuspecting parties. The court's analysis closely parallels that of *In re Estate of Hereford*,[31] which was cited in the opinion. In *Hereford*, the Supreme Court of Appeals of West Virginia described the terms of art method of determining subject matter jurisdiction in divorce cases.[32] Likening terms of art to the small print in contracts of adhesion, the court abolished the terms of art analysis and adopted the presumption of continuing jurisdiction mirrored in *Moseley*.[33]

Moseley overrules three prior decisions: *Kelly v. Edwards*,[34] *Brooks v. Brooks*[35] and *Bryant v. Varat*.[36] *Kelly* and *Bryant* held that the family court lacked subject matter jurisdiction over an "incorporated without merger" agreement. These two cases are thus squarely inconsistent with the new *Moseley* position. However, the court's basis for overruling *Brooks* is less concrete. In *Brooks*, the parties' separation agreement, which was approved but not merged into the decree, expressly provided that the family court retained jurisdiction to enforce the agreement but not to modify any terms other than child support. Despite this language, the family court modified the husband's obligation under the agreement to make automobile lease payments.[37] In reversing, the supreme court found that the family court had exceeded its authority because both the agreement and order provided that the agreement was not modifiable by the court except as relating to child support.[38]

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31. 250 S.E.2d 45 (W. Va. 1978).

32. *Id.* at 50-52.

33. *Id.* at 51-52.

34. 276 S.C. 368, 278 S.E.2d 773 (1981).

35. 277 S.C. 322, 286 S.E.2d 669 (1982).

36. 278 S.C. 77, 292 S.E.2d 298 (1982).

37. 277 S.C. at 325-27, 286 S.E.2d at 671-72. The family court in *Brooks*, however, refused to hold the husband in contempt. *Id.* at 325, 286 S.E.2d at 671. *Moseley* contains a mistake regarding the family court decision in *Brooks*: "[W]e confused the matter [in *Brooks*] by holding that the family court *properly held appellant in contempt.*" 279 S.C. at 352, 306 S.E.2d at 626 (emphasis added).

38. 277 S.C. at 326, 286 S.E.2d at 671.

If *Brooks* is interpreted as an instance in which the parties unambiguously limited the court's jurisdiction, then the decision is entirely correct by the new *Moseley* standard. A few possibilities can be suggested for overruling *Brooks*. As the court in *Moseley* admitted, at the time *Brooks* was decided, the prevailing law maintained that parties could not confer subject matter jurisdiction by agreement.[39] Thus, since *Brooks* was erroneous when decided, its overruling in *Moseley* was perhaps simply an attempt to remove an inconsistent case from the law. Second, the court in *Moseley* was confused regarding the case history of *Brooks*,[40] and therefore might have misread it as another terms of art case.[41]

Moseley recognizes that the broad jurisdiction of family court may be limited by an unambiguous expression in the agreement that its terms may not be enforced or altered.[42] The court reasoned that such an expression would bind the family court and the parties as long as the agreement as a whole was fair and reasonable.[43]

Although *Moseley* clarifies the matter of the family court's jurisdiction over separation agreements, certain questions remain unanswered. One problem concerns the retroactivity of

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39. *See* Cox v. Lunsford, 272 S.C. 527, 252 S.E.2d 918 (1979); 20 AM. JUR. 2d *Courts* § 139 (1965).

40. *See supra* note 37.

41. In *Moseley* the appellant, pursuant to Rule 8, § 10 of the Supreme Court Rules of Practice, filed a Petition to Argue Against Precedent with the court. In this petition, the appellant requested the court to overrule only the *Bryant* and *Kelly* decisions. No mention was made of the *Brooks* decision. *See* Petition to Argue Against Precedent of Appellant at 5.

42. 279 S.C. at 353, 306 S.E.2d at 627. The court in *Moseley* sums up this portion of its holding with the following language:

> [T]he parties may specifically agree that the amount of alimony may never be modified by the court; they may contract out of any continuing judicial supervision of their relationship by the court; they may agree that the periodic payments or alimony stated in the agreement shall be judically awarded, enforceable by contempt, but not modifiable by the court; they may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily and reasonably.

Id. This passage, taken almost verbatim from *Hereford*, curiously omits the following provision given by the West Virginia court: "[T]hey may agree that a lump sum settlement in lieu of periodic payments shall constitute the final settlement of the rights of the parties." Although arguably this omission demonstrates some resistance by the South Carolina court, presumably the blanket allowance to "agree to any terms they wish" is broad enough to include such a provision.

43. *See supra* note 42.

Moseley. Arguably, property settlement agreements entered into before *Moseley* should continue to be controlled by the terms of art analysis, since practitioners and their clients relied on such terms in attempting to define the court's jurisdiction.

However, if the court, in desiring to eradicate terms of art analysis as soon as possible, adopts the approach of the West Virginia[44] and North Carolina[45] courts, *Moseley* will be applied to all cases in which a final order is entered subsequent to the decision, regardless of when the underlying property settlement agreement was signed. Hence, it may be necessary to revise a number of outstanding property settlement agreements which, by the use of specific terms of art, were intended to limit the subject matter jurisdiction of family court.

In addition, whether *Moseley* creates an equitable remedy for the violation of other provisions in an agreement, such as a promise to maintain life or health insurance, remains an open question. In *Hereford,* the West Virginia court limited its holding to periodic payments such as alimony or child support.[46] Arguably, the broad language in *Moseley* that "jurisdiction for all domestic matters"[47] vests in family court invites future litigation on this point. Despite this expansive language, however, provisions of a property settlement agreement which pertain to the actual division of real and personal property will probably be enforceable by family court, but modifiable only on appeal.[48]

In sum, the court in *Moseley* greatly simplified the issue of the subject matter jurisdiction of family court over separation agreements. The new general rule is that unless the parties unambiguously deny or limit the jurisdiction of family court, a

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44. In *In re* Estate of Hereford, 250 S.E.2d 45 (W. Va. 1978), decided in December 1978, the court announced that the new standard would be applied to all cases in which the final order was entered after February 1, 1979.

45. In Walters v. Walters, 307 N.C. 401, 298 S.E.2d 345 (1983), the court stated that the new standard applied to cases in which the final judgment was rendered subsequent to *Walters*.

46. 250 S.E.2d at 52.

47. 279 S.C. at 353, 306 S.E.2d at 627.

48. Prior to *Moseley*, the provisions of a separation agreement relating specifically to property division were, even in an "incorporated with merger" agreement, enforceable by family court but modifiable only on appeal. Since *Moseley* in effect simply presumes incorporation with merger, those terms relating to property division will still be modifiable only on appeal. The doctrine of collateral estoppel operates to prevent modification by a lower court.

presumption arises that the parties intended the terms of their agreement to become part of the divorce decree, enforceable and modifiable by family court. Although *Moseley* abolishes terms of art as the method of establishing the subject matter jurisdiction of family court, its scope is undefined, and many questions raised by the decision can only be answered through future litigation.

B. The Fairness Test

In *Lucas v. Lucas*[49] the South Carolina Supreme Court continued to apply the "fairness test" to property settlement agreements. The fairness test, first adopted in *Fischl v. Fischl*,[50] imposes a duty on the family court to rule on the fairness of property settlement agreements in light of the specific facts and circumstances of each case.[51] The court in *Lucas* rejected the family court's finding of the fairness of a property settlement agreement, holding that the agreement, which was entered into freely and voluntarily[52] but without benefit of counsel, was unfair and should be voided. This agreement gave the husband essentially all the marital property while leaving the wife almost nothing.[53] The court in *Lucas* was especially concerned by the fact that the wife had made substantial contributions to the marital property, in addition to performing normal housekeeping duties.[54] In light of this concern, the court added to the traditional fairness test a requirement that the family court perform both an equitable distribution[55] and a special equity[56] analysis before ruling on the fairness of an agreement. The decision also emphasized that each party should receive advice from independent counsel before entering into any agreement.

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49. ___ S.C. ___, 302 S.E.2d 863 (1983).

50. 272 S.C. 297, 251 S.E.2d 743 (1978).

51. *Id.* at 300, 251 S.E.2d at 745. See also Drawdy v. Drawdy, 275 S.C. 76, 268 S.E.2d 30 (1980) and McKinney v. McKinney, 274 S.C. 95, 261 S.E.2d 526 (1980) for further clarification of the fairness test.

52. Record at 71.

53. ___ S.C. at ___, 302 S.E.2d at 865.

54. *Id.* at ___, 302 S.E.2d at 864. The court noted, "There can be no doubt but that her contributions to the marital properties was substantial over and above normal wifely duties in the home." *Id.* at ___, 302 S.E.2d at 864.

55. *See infra* text accompanying footnotes 80-85.

56. *Id.*

The wife in *Lucas* sued for divorce on the ground of physical cruelty,[57] seeking custody, child support, alimony, attorney's fees and an equitable distribution of the real and personal marital property.[58] The husband conceded the custody issue but contested the remaining matters, interposing a property settlement agreement as a defense to the alimony and property division claims.[59] This agreement, denominated a "final and complete settlement of all the property rights,"[60] gave the wife only a used car[61] and a few personal possessions,[62] while allowing the husband to retain the marital home valued at $25,000.[63] The wife, who was unrepresented by counsel,[64] further released the husband from alimony or any claim for independent maintenance and support.[65]

At trial the wife presented evidence concerning the alleged physical cruelty of her husband and her contributions to the marital property.[66] The husband failed to testify or to offer conflicting evidence.[67] The family court refused to grant the divorce on the ground of physical cruelty, and the wife's complaint was amended to request a divorce on the ground of one year's separation.[68] The trial judge then perfunctorily performed his duty under *Fischl* to review the agreement for fairness,[69] finding the agreement "fair, just and equitable on its face."[70] The divorce was granted on the ground of one year's separation, thereby foreclosing the wife's claims for alimony, equitable distribution and attorney's fees.

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57. ___ S.C. at ___, 302 S.E.2d at 864.

58. *Id.* at ___, 302 S.E.2d at 864.

59. *Id.* at ___, 302 S.E.2d at 864.

60. *Id.* at ___, 302 S.E.2d at 865.

61. The car had 87,000 miles accumulated on it. Record at 46.

62. ___ S.C. at ___, 302 S.E.2d at 865.

63. Record at 67.

64. ___ S.C. at ___, 302 S.E.2d at 864. The lawyer drafting the agreement had been selected by the husband. *Id.* at ___, 302 S.E.2d at 864.

65. *Id.* at ___, 302 S.E.2d at 865.

66. Record at 41. The wife testified that during the seventeen year marriage she had earned approximately fifty-three thousand dollars, and that the couple, who shared all expenses, had spent twenty thousand dollars improving the marital residence. Record at 27.

67. ___ S.C. at ___, 302 S.E.2d at 864.

68. *Id.* at ___, 302 S.E.2d at 864. The divorce was granted upon this ground.

69. Record at 10.

70. *Id.* at 75.

While noting that "it is difficult to fathom the reason for denying the divorce on the ground of physical cruelty,"[71] the supreme court refused to upset the lower court's discretion on this point, deciding instead to reverse the family court's conclusion on the fairness of the agreement. Among the factors demonstrating unfairness were: (1) the absence of independent advice to the wife before she entered into the agreement, (2) the emotional condition of the wife,[72] and (3) the lack of adequate provision for the wife both in property division and alimony, in view of the wife's substantial contributions. The court remanded the case for a new trial on the matters of equitable distribution, alimony and attorney's fees.[73]

The court relied on *Drawdy v. Drawdy*[74] for the proposition that an examination of the agreement in light of the economic circumstances and contributions of each party is essential to performing the fairness test. *Drawdy* established Family Court Rule 19[75] as a means by which family court judges may obtain the financial information necessary to ensure that separation agreements are fair. In *Lucas*, the husband failed to testify and the trial record indicated that the husband's financial statement was not introduced until after the family court had decided the fairness question.[76] Therefore, the supreme court found the review of relative economic circumstances required by *Drawdy* to

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71. ___ S.C. at ___, 302 S.E.2d at 864.

72. The wife's testimony is included in the opinion:

> Well, I had real bad nerves and was upset at that time. The house wasn't in my name anyway, and I had to have a way back and forth, so I just settled for the car, and then my son came to live with me, and now we don't have anything.

___ S.C. at ___, 302 S.E.2d at 864.

73. *Id.* at ___, 302 S.E.2d at 865.

74. 275 S.C. 76, 268 S.E.2d 30 (1980). In *Drawdy*, the court voided a property settlement agreement which was hastily drawn, contained no provision for a waiver of alimony, and was not signed in contemplation of a final divorce. The court stressed that family court should go beyond establishing that the agreement was validly executed, and should receive evidence pertaining to the parties' respective economic circumstances and contributions. *Id.* at 77, 268 S.E.2d at 31.

75. A current financial declaration in the form prescribed by Appendix A shall be served and filed by any petitioner or respondent appearing at any hearing at which the court is to determine an issue as to which such declaration would be relevant and so much thereof shall be completed as is applicable to the issue to be determined, unless otherwise ordered by the court in which the proceeding is pending.

S.C. FAMILY CT. R. 19.

76. Record at 89.

be inadequate, and invalidated the agreement.

Cases applying the fairness test have set forth various procedures, in addition to a review of the parties' relative economic conditions, to be followed by the family court when adjudging the fairness of a property settlement agreement. First, the court must resolve any ambiguities in the document.[77] Second, the court must pass on the fairness of the agreement by considering the intentions of the parties, the circumstances of the agreement,[78] and the financial situation of the parties.[79] *Lucas* adds to this list a requirement that the family court judge undertake an analysis pursuant to both the special equity and equitable division theories before determining the fairness of an agreement. In *Wilson v. Wilson*,[80] the supreme court applied the special equity theory of property division. This theory maintains that where a spouse has made material contributions[81] to the acquisition of property during the marriage, the spouse acquires a special equity in the property.[82] In *Parrott v. Parrott*,[83] which established the equitable division doctrine in South Carolina, the court found that services in the form of housekeeping alone over the course of a lengthy marriage entitled the non-wage-earning spouse to a division of real and personal property upon divorce. Although this equitable division doctrine has tended to subsume the notion of special equity, the contributions necessary to in-

77. McKinney v. McKinney, 274 S.C. 95, 261 S.E.2d 526 (1980).

78. *Id.* at 97, 261 S.E.2d at 527.

79. ___ S.C. at ___, 302 S.E.2d at 864; Drawdy v. Drawdy, 275 S.C. 76, 77, 268 S.E.2d 30, 30 (1980).

80. 270 S.C. 216, 241 S.E.2d 566 (1978).

81. The material contributions required under the special equity doctrine include both financial contributions and contributions of effort to the acquisition of property. In *Wilson*, Mrs. Wilson worked outside the home for 24 years of the marriage. In addition to assisting her husband in his business, she contributed her income to the household expenses. By contrast, the contributions required under the equitable division doctrine include homemaking services such as rearing children and performing normal housekeeping duties.

82. McKenzie v. McKenzie, 254 S.C. 372, 172 S.E.2d 628 (1970). Special Equity is distinguishable from one of its predecessor theories, Resulting Trust. This theory holds that when a spouse supplies funds or assumes an obligation prior to or at the acquisition of property, a resulting trust in favor of that party arises. *See* Parrott v. Parrott, 278 S.C. 60, 62, 292 S.E.2d 182, 183 (1982). Unlike the resulting trust theory, special equity does not require that the spouse prove that he or she has contributed to the acquisition of the specific property being divided. 254 S.C. at 374, 172 S.E.2d at 629.

83. 278 S.C. 60, 292 S.E.2d 182 (1982).

voke the theories differ,[84] and in *Lucas* the court held that the wife was entitled to participate in the distribution of property under both special equity and equitable division doctrines.[85]

Lucas raises a question concerning the duties of fair dealing and full disclosure assumed by parties entering into separation agreements when one party is unrepresented by counsel. While the opinion fails to expressly articulate the imposition of a fiduciary duty,[86] such an analysis is consistent with prior case law and the court's decision in *Lucas*. In other confidential relationships, such as those existing between parties to prenuptial agreements, courts have long imposed special duties. In *Batleman v. Rubin*,[87] the Supreme Court of Appeals of Virginia held that engaged persons are under a high obligation to make full and frank disclosure of all facts concerning the settlement.[88] *Batleman* established a presumption, or burden shifting rule, that where a prenuptial agreement provided the wife with less than her marital rights, the agreement had not been presented with full and fair disclosure.[89] The court established competent, independent advice to the wife as an essential element to the agreement's validity.[90]

Other transactions between husbands and wives have im-

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84. *See supra* note 81.

85. ___ S.C. at ___, 302 S.E.2d at 865.

86. The fiduciary duties of coadventurers were described in Meinhard v. Salmon, 294 N.Y. 458, 164 N.E. 545 (1928) by Judge Cardozo:

> Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Id. at 464, 164 N.E. at 546.

87. 199 Va. 156, 98 S.E.2d 519 (1957).

88. *Id.* at 160, 98 S.E.2d at 522.

89. *Id.* at 161, 98 S.E.2d at 523.

90. *Id.* at 158, 98 S.E.2d at 521. Friedlander v. Friedlander, 80 Wash. 2d 293, 494 P.2d 208 (1977), adopts the approach of *Batleman*. Describing the relationship between engaged parties as one of "mutual confidence, and trust, . . . call[ing] for the exercise of good faith, candor and sincerity," *id.* at 301, 494 P.2d at 213, the *Friedlander* court placed the burden upon the husband to prove full disclosure whenever the agreement made provision for a wife that was disproportionate to the husband's means. *Id.*, 494 P.2d at 214. The court also stated that in the instant case the agreement was void at its inception since the wife did not have independent advice before signing the agreement, which had been prepared by the husband's attorney. *Id.* at 303, 494 P.2d at 214.

posed fiduciary duties. The relationship between husband and wife is considered the most confidential of all relationships, and all transactions between them must be fair and reasonable to be valid.[91] However, when the wife employs an attorney and deals with the husband as an adversary, the confidential relationship is terminated.[92] *Lucas* cautions parties entering into separation agreements that where one party is without counsel, the other party shoulders heavy fiduciary duties and bears the burden of proving the intrinsic fairness of the transaction.

One further question unanswered by *Lucas* concerns the status of property settlement agreements which are, by the *Wilson, Parrott* and *Drawdy* standards, fair when executed at separation, but which, because of one spouse's subsequent accumulation of assets, may appear unfair at the time of the divorce proceeding. The *Drawdy* requirement of full disclosure of present economic circumstances at the divorce proceedings suggests that even agreements which pass the fairness test at execution may be vulnerable at the divorce hearing if one party's financial status has been materially enhanced.

The impact of the fairness test is to heighten uncertainty

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91. Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971); Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

In Marshall v. Marshall, 273 S.E.2d 360 (W. Va. 1980), the wife, at the behest of her attorney husband and without ever consulting an attorney, conveyed her interest in real property and stocks to the husband as part of an alleged oral reconciliation agreement. *Id.* at 362. When the parties' reconciliation failed and the husband commenced divorce proceedings, the wife sought to have the transfer voided. The trial court found that the husband had met his burden of proof in showing that the conveyance was voluntary. *Id.* at 361. In reversing, the Supreme Court of Appeals of West Virginia noted that the issue could not be resolved by looking only at the voluntariness aspect, but "must be resolved in the context of our fiduciary rule to ascertain the essential fairness of the transfer." *Id.* at 363. *Marshall* employed the general rule that where persons occupy a fiduciary or confidential relationship, the lack of independent advice on the part of the person claiming to be disadvantaged may be a significant factor in the court's evaluation of the propriety of the transaction. *Id.* Applying this broader fiduciary duty standard, the court found the husband's action lacking in good faith.

In addition to the absence of counsel for the wife, the court noted several other factors influencing its decision: (1) The property transfer arose at a time when the marriage was in difficulty and the wife, who was emotionally distraught, was under psychiatric care; (2) the husband, an attorney, must have been aware of the superior legal position he would have as a result of the transfer; (3) the husband had imposed a deadline on the wife to sign the agreement; and (4) the husband's purported reconciliation proved illusory when he subsequently filed for divorce. *Id.*

92. Joyner v. Joyner, 264 N.C. 27, 140 S.E.2d 714 (1965); 17A AM. JUR. *Divorce and Separation* § 898 (1957).

regarding the conclusiveness of a validly executed property settlement. Above all else, practitioners should advise their clients that agreements concluded without benefit of counsel on one party's behalf will be especially vulnerable to attack. Practitioners should also be keenly aware that all separation agreements will now be subject to a fairness analysis under both the special equity and equitable distribution doctrines. Finally, even agreements which fulfill the fairness test at their inception may be subsequently voided if changed circumstances have materially increased one spouse's estate.

II. CHILD WELFARE: THE CONTEMPT POWER OF FAMILY COURT USED TO INCARCERATE CHRONIC STATUS OFFENDERS

In *In re Darlene C.*[93] the South Carolina Supreme Court held that under the most egregious circumstances, family courts may exercise their contempt power to confine a status offender in secure facilities.[94] In reaching this decision, the court circumvented explicit language of the Children's Code, which provides that a status offender may not be placed in a detention facility.[95] This decision illustrates the court's determination to deal with a problem of chronic runaways left unaddressed by the legislature. The decision extends the use of the family court criminal contempt power to children who disobey valid court orders.[96] Although the response of the various courts confronting this problem has differed, the court's decision is in accord with cases in several jurisdictions.[97]

Darlene C., a sixteen year old runaway, was ordered by family court to remain in a nonsecure girls' home and to receive mental health counseling. The court order explicitly stated that if she failed to obey, she would be held in contempt.[98] Two days

93. 278 S.C. 664, 301 S.E.2d 136 (1983).

94. *Id.* at 666, 301 S.E.2d at 137.

95. S.C. CODE ANN. § 20-7-600(d) (Supp. 1983). Under the law of South Carolina, a status offender is defined as a child who commits an offense which would not be a misdemeanor or felony if committed by an adult. *Id.* at § 20-7-30(6) (Supp. 1983).

96. 278 S.C. at 666, 301 S.E.2d at 138.

97. *See* L.A.M. v. State, 547 P.2d 827 (Alaska 1976); R.M.P. v. Jones, 419 So. 2d 618 (Fla. 1982); State *ex rel.* L.E.A. v. Hammergren, 294 N.W.2d 705 (Minn. 1980); State v. Norlund, 31 Wash. App. 725, 644 P.2d 724 (1982); *In re* D.L.D., 110 Wis. 2d 168, 327 N.W.2d 682 (1982).

98. 278 S.C. at 665, 301 S.E.2d at 137.

later, Darlene left the home[99] and a Rule to Show Cause was issued by the family court as to why she should not be held in contempt.[100] Darlene appeared at the subsequent hearing but offered no defense;[101] the family court found her in criminal contempt, holding that the violation of the previous court order elevated her status to that of a juvenile delinquent.[102] The court sentenced Darlene to a secure facility for a period not to exceed her twenty-first birthday.[103] In reversing this sentence, the supreme court held that under the Children's Code, the family court could not sentence Darlene as a delinquent when she was, in fact, merely a chronic status offender.[104] However, the court found that the family court may use its inherent contempt power in extreme cases to incarcerate a status offender in a secure facility for contempt, but not merely for the status offense.[105]

The court reasoned that all tribunals, through the exercise of their contempt power, possess the inherent ability to punish those violating their orders.[106] Citing *Curlee v. Howle*,[107] the court noted that the contempt power is essential to the preservation of order in judicial proceedings and to the due administration of justice. Although the court acknowledged legislative concern over commingling status offenders with juveniles who had committed serious crimes, the court observed that the family courts were performing an exercise in futility by placing chronic runaways in nonsecure facilities.[108] Pointing to language in the Children's Code providing that it shall be interpreted in conjunction with all relevant laws and regulations,[109] the supreme court reasoned that this allowed family court to exercise its contempt power to prevent repeated violations of its orders by run-

99. *Id.* Darlene had a long history of truancy and running away, and had appeared in family court fourteen times over a two and one-half year span. *Id.* at 666, 301 S.E.2d at 137-38.

100. *Id.* at 665, 301 S.E.2d at 137.

101. *Id.*

102. *Id.* at 666, 301 S.E.2d at 137.

103. *Id.*

104. *Id.* at 667, 301 S.E.2d at 138.

105. The case was remanded for resentencing. *Id.* at 668, 301 S.E.2d at 138.

106. 278 S.C. at 666, 301 S.E.2d at 137.

107. 277 S.C. 377, 287 S.E.2d 915 (1982).

108. 278 S.C. at 667, 301 S.E.2d at 138.

109. S.C. CODE ANN. § 20-7-20 (Supp. 1983).

away juveniles.[110]

The court cited *L.A.M. v. State*,[111] which establishes the four elements necessary to a finding of contempt: (1) the existence of a valid order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order; (2) the contemnor's notice of the order with sufficient time to comply with it; (3) the contemnor's ability to comply with the order; and (4) the contemnor's willful failure to comply with the order.[112]

The decision in *Darlene C.* is modeled closely upon the Minnesota Supreme Court's decision in *State ex rel. L.E.A. v. Hammergren*.[113] This decision is significant because it further defines the "willful failure to comply" element of the offense of contempt. The court in *Hammergren* held that a "willful failure to comply" requires the record from the previous hearing to show that the child understood that disobedience would result in incarceration. The court then emphasized that the contempt power could be used to incarcerate status offenders only in the most egregious circumstances in which all less restrictive alternatives have previously failed.[114] In addition, the court in *Hammergren* required that the court instruct the administrator of the secure institution that the disobedient child's contact with more hardened juveniles should be kept at a minimum.[115] With the exception of the requirement of orders to the administrator, *Darlene C.* adopts all the guidelines established in *Hammergren*. By engrafting these limitations, *Darlene C.* attempts to strictly circumscribe the family court's discretion to invoke the contempt power.

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110. 278 S.C. at 667, 301 S.E.2d at 138.

111. 547 P.2d 827 (Alaska, 1976). Although the result reached in *L.A.M.* is consistent with *Darlene C.*, the approach of the Supreme Court of Alaska was somewhat different. First, the court held that willful criminal contempt of the court's order elevated the minor's status to that of a juvenile delinquent. *Id.* at 836. Second, the court considered the environment of the secure facility to which L.A.M. would be sent, and concluded that it was more like a juvenile hall and that L.A.M. would not be distinguishable in sophistication from the average child there. *Id.* at 835. Finally, the court noted that Alaska had a practice of sending hard-core delinquents to juvenile security institutions in other states. *Id.*

112. 278 S.C. at 667, 301 S.E.2d at 138.

113. 294 N.W.2d 705 (Minn. 1980).

114. *Id.* at 707-08.

115. *Id.*

Jurisdictions rejecting the use of the contempt power to incarcerate status offenders have recognized that courts may not use a bootstrapping procedure to accomplish indirectly that which they cannot accomplish directly.[116] *In re Ronald S.*[117] concerned a thirteen year old status offender, classified under the California Welfare and Institutions Code[118] as a "section 601" status offender, who was declared a ward of the state and ordered to a nonsecure facility. He immediately escaped from the center, and the juvenile court found that this act elevated his status to that of a section 602 juvenile delinquent. The court sentenced Ronald to a secure facility.[119] In reversing, the court of appeal held that in the face of a clear legislative mandate prohibiting the placement of status offenders in secure facilities,[120] the court had no authority to depart from what the legislature had ordained.[121] Through its colorful account of the proceedings in juvenile court[122] and its honest admission of the

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116. *See In re* Ronald S., 69 Cal. App. 3d 866, 138 Cal. Rptr. 387 (1977); W.M. v. State, 437 N.E.2d 1028 (Ind. 1982); *In re* M.S., 73 N.J. 238, 374 A.2d 445 (1977); *In re* Tasseing H., 281 Pa. Sup. Ct. Rpts. 400, 422 A.2d 530 (1980).

117. 69 Cal. App. 3d 866, 138 Cal. Rptr. 387 (1977).

118. The California Welfare and Institutions Code divides the children of juvenile court into three types: (1) section 600 children, who are dependent children, often victims of cruelty, abuse, neglect or depravity; (2) section 601 children, who are status offenders; and (3) section 602 children, who are juvenile criminal law violators. 69 Cal. App. 3d at 869, 138 Cal. Rptr. at 389.

119. 69 Cal. App. 3d at 873, 138 Cal. Rptr. at 397.

120. CAL. WELF. & INST. CODE § 507(b) (Deering 1983) (repealed 1984), prohibited the placement of section 601 status offenders in secure facilities.

121. The language through which the court expressed its holding is especially interesting:

> While it may seem ridiculous to place a runaway in a nonsecure setting, nevertheless, that is what the Legislature has ordained. The Legislature has determined that 601's shall not be detained in or committed to secure institutions even if this makes juvenile court judges look ridiculous. . . . [A]s the law now stands, the Legislature has said that if a 601 wants to run, let him run. While this may be maddening, baffling and annoying to the juvenile court judge, ours is not to question the wisdom of the Legislature.

69 Cal. App. 3d at 873-74, 138 Cal. Rptr. at 398-99.

122. *Id.* at 873, 138 Cal. Rptr. at 392. While *Ronald S.* and *Darlene C.* are similar on their facts, the reasoning of the courts involved is somewhat different. In *Ronald S.*, the lower court found the juvenile guilty of contempt, adjudicated the minor delinquent, and confined him to a secure facility. The family court in *Darlene C.* did the same. On appeal, both the South Carolina Supreme Court and the California Court of Appeal disapproved of these actions. The California court went on to hold, however, that under no circumstances could state juvenile courts confine a minor to a secure facility given a clear legislative directive to the contrary. The South Carolina Supreme Court held that while

futility of placing "fleet footed 601's" in nonsecure facilities,[123] the court in *Ronald S.* pleaded convincingly for legislative action in this matter. The court suggested three alternatives: (1) the legislature could remove itself entirely from the matter of child welfare;[124] (2) the legislature could place the problem in the hands of another governmental agency which provides counseling services in youth hostels to which runaways could come voluntarily;[125] or (3) the legislature could remove the prohibition against detaining status offenders in secure facilities.[126]

Legislative action may not be the only solution available. When the Supreme Court of New Jersey rejected the detention of chronic status offenders in secure facilities in *In re M.S.*,[127] the court noted that the unauthorized departure from a nonsecure facility was symptomatic of the very problem for which shelter care was being provided.[128] The court reasoned that the process of using the contempt remedy to incarcerate status offenders in secure facilities not only threatened such children with exposure to hardcore delinquents, but also conferred a stigmatizing criminal status on the child now adjudged a delinquent.[129] While concurring in the belief that statutory reform may be necessary,[130] the court in *In re M.S.* suggested that a solution lay in the exercise of stricter supervision and control of the status offenders by the personnel in the nonsecure facilities.[131]

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the family court may not use the contempt power as a means of adjudicating a minor delinquent, it may sentence a juvenile to a secure facility for up to six months as a contemnor, although not as a delinquent. In making this decision, the court reasoned that it was merely construing the Children's Code in the context of all relevant law and not undermining its direct prohibition against confining minors in secure facilities.

123. 69 Cal. App. 3d at 872, 138 Cal. Rptr. at 392.

124. *Id.* at 874, 138 Cal. Rptr. at 392.

125. *Id.*, 138 Cal. Rptr. at 393.

126. *Id.* at 875, 138 Cal. Rptr. at 393. The court stated that contacts between status offenders and juvenile delinquents could still be avoided by simply providing in some instances that existing nonsecure facilities serve as secure facilities. *Id.*

127. 73 N.J. 238, 274 A.2d 445 (1977).

128. *Id.* at 244, 274 A.2d at 448. The court continued, "It would be incongruous to classify a juvenile as a delinquent for the same kind of conduct which under the Act constitutes him or her as being in need of supervision only." *Id.* at 245, 274 A.2d at 449.

129. *Id.* It could be argued that the reasoning of the court in *In re M.S.* was not applicable to *Darlene C.* in that the court in *Darlene C.* specifically disapproved the use of the contempt power to adjudicate a minor delinquent. *See supra* note 122.

130. 73 N.J. at 246, 274 A.2d at 449.

131. *Id.*, 274 A.2d at 448.

The reluctance on the part of many state legislatures to provide secure placement for status offenders is a response to the national drive for the deinstitutionalization of nondelinquent children which was underscored by the passage of the Juvenile Justice and Delinquency Prevention Act (JJDPA).[132] The JJDPA, enacted in 1974, requires that states accepting funds under the Act demonstrate efforts to remove status offenders from secure facilities and to develop alternative programs to meet their needs.[133] Recent amendments to the JJDPA give some support to the court's decision in *Darlene C.* Although deinstitutionalization remains the primary focus of the Act, the 1980 amendment to section 223(a)(12)(A) permits secure detention of status offenders who violate valid court orders.[134] The South Carolina legislature, therefore, could remain within the JJDPA funding guidelines if it authorized the detention of status offenders who violate such orders. The JJDPA guidelines do not address the issue of altering the characterization of a chronic status offender to that of a delinquent. Presumably, however, the legislature could opt to provide several levels of secure facilities and still maintain the distinction between status offenders and juvenile delinquents.[135]

> Those in charge of a shelter care facility stand in *loco parents* of a [status offender] in their custody and would be entitled to exercise the parental control necessary to safeguard the [child's] own welfare. The firm exercise of authority, closer supervision, and the use of shelter areas where going and coming can be more easily observed should in most cases provide adequate means of controlling unauthorized departures.

Id., 274 A.2d at 448.

132. 42 U.S.C. §§ 5601-5640 (1976 & Supp. III 1979), *as amended by* Juvenile Justice Amendments of 1980, Pub. L. No. 96-509, 94 Stat. 2750.

133. Under the Act,

> [Participating states must] submit annual reports to the Associate Administrator containing a review of the progress made by the State to achieve the deinstitutionalization of juveniles . . . and a review of the progress made by the State to provide that such juveniles, if placed in facilities, are placed in facilities which (i) are the least restrictive alternatives appropriate to the needs of the child and the community; . . . .

42 U.S.C. § 5633(a)(12)(B) (Supp. III 1979).

134. The 1980 Amendment provides, in part, that, "[J]uveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult *or offenses which do not constitute violations of valid court orders* . . . shall not be placed in secure detention facilities. . . ." 42 U.S.C. § 5633(a)(12)(A) (Supp. 1979) (emphasis added).

135. The legislative history of the amendment indicates, however, that a status offender detained under § 223(a)(12)(A) ought to have been the subject of an order of civil

If the General Assembly enacts provisions pertaining to the placement of a status offender in a secure facility, it may look for guidance to a former Indiana statute[136] mentioned by the court in *Darlene C.* This statute provided that a runaway violating a valid court order could be placed in a secure facility only if the child's physical and mental condition would be endangered by not placing him there; even then, the child could be placed only in a licensed private facility or a correctional facility that did not house delinquents, unless such housing was unavailable. Moreover, the placement was to be reviewed every three months to determine whether placement in a secure facility remained appropriate. Such a legislative response allows the court to enforce its orders while alleviating the problem of commingling status offenders with juvenile delinquents. This solution to the chronic runaway problem also seems consistent with the aims of the Children's Code.

In conclusion, the court in *Darlene C.* extended the family court's inherent contempt power to the disposition of matters involving status offenders who repeatedly violate the orders of the family court. The supreme court held that despite an express statutory provision to the contrary, the contempt power may be used to detain status offenders in secure facilities. The court justified its judicial activism on the basis of the legislature's failure to address the problem of chronic status offenders, thus reflecting the court's commitment to oversee the welfare of the children of South Carolina when another branch of government has made inadequate provision.

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contempt. Rep. Ashbrook contended that the amendment would allow family courts to treat violations of their orders by issuing contempt citations, thereby allowing judicial responses to such violations within the context of civil proceedings. He stated that the amendment's purpose was to help the courts "respond to youth who chronically refuse voluntary treatment." 126 CONG. REC. H10, 936-38 (daily ed. Nov. 19, 1980).

136. 1982 IND. ACTS P.L. 184 § 1. This has been subsequently repealed and replaced by IND. CODE ANN. § 31-6-4-15.4 (Supp. 1983), which does not provide for incarceration of status offenders.

III. FAMILY COURT PROCEDURE

A. The Requirement for Specific Pleading of Lump Sum Alimony in Default Cases

In *Harris v. Harris*,[137] the South Carolina Supreme Court held that the family court exceeded its authority by granting a lump sum award of alimony based upon a default judgment when the petitioner failed to include a specific prayer for such an award in her petition. Displaying strict adherence to section 15-35-70 of the Code,[138] the court indicated that in divorce actions, a general prayer for alimony provides insufficient notice to a defendant for a subsequent lump sum alimony award. The decision creates an exception to the practice of liberally construing the terms of a petitioner's prayer in order to award any relief appropriate to the pleadings,[139] and imposes a limitation on the discretion of the family court in default divorce cases.

The husband in *Harris* was served with a summons and a petition requesting support for the wife, an order directing a sale of the marital residence and division of the proceeds, as well as attorney's fees.[140] No answer was made to the petition, and five months later the husband was served with an amended petition which differed from the original only in the addition of a demand for a divorce on the ground of one year's separation.[141] The actual prayer was not so amended. The husband made no reply to the amended petition, was unrepresented at trial, and was found in default.[142] Based on this finding, the family court awarded the wife the following: (1) a divorce; (2) a lump sum alimony award of ten thousand dollars, with the alternative option of transferring the husband's undivided one-half interest in the marital home to the wife; (3) a division of personal property; and (4) attorney's fees.[143] Subsequently, the husband moved to

137. 279 S.C. 148, 303 S.E.2d 97 (1983).

138. This section provides in pertinent part that: "The relief granted to the plaintiff, if there be no answer cannot exceed that which he shall have demanded in his complaint. . . ." S.C. CODE ANN. § 15-37-70 (1976).

139. *See* Sheppard v. Green, 48 S.C. 165, 26 S.E. 224 (1897).

140. 279 S.C. at 149, 303 S.E.2d at 98. In addition, a temporary restraining order prohibiting interference by the husband was requested and granted. *Id.*

141. *Id.* at 150, 303 S.E.2d at 98-99.

142. Record at 2.

143. 279 S.C. at 151, 303 S.E.2d at 99.

vacate the decree and reopen the default judgment pursuant to South Carolina Code section 14-27-130,[144] claiming that the judgment was taken against him by surprise in that the default decree went beyond the relief demanded in the petition.[145] The trial court denied the motion to vacate the default decree, but on appeal, the supreme court reversed. Citing *Hopkins v. Hopkins*,[146] the court held that the petitioner in a default case is strictly limited in his recovery to the express terms of his prayer.[147] The rationale underlying this doctrine is that, as a matter of due process and proper notice, a defendant has the right to assume the judgment will be limited to the cause of action in the complaint.[148]

In *Harris*, the court was called upon to consider for the first

144. This section provides, in part: "The court may . . . relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding." S.C. CODE ANN. § 15-27-130 (1976).

145. The husband also leveled a two-pronged jurisdictional attack, which was rejected by the court. First, the husband argued that the summons was fatally defective in that it was signed in violation of Family Court Rule 6 which provides that "every summons shall be countersigned by the clerk or the judge." The court noted that § 14-17-60 empowers a qualified "deputy [to] do . . . any and all the duties appertaining to the office of the principal." 279 S.C. at 150, 303 S.E.2d at 98. Second, the husband asserted that the amended petition constituted a conversion of the action from one for support and maintenance to one for divorce. Relying upon § 15-13-920(d) of the Code, which prohibits amendments which "change substantially the claim or defense," the husband argued that the revision should have taken the form of a supplemental pleading under § 15-13-100, entitling the husband to a new summons for the purposes of the amended petition. The court elected to construe the amended petition as an amendment before trial, simply recasting the issue to be decided, in accordance with the liberal attitude toward amendments before trial established by Vernon v. Atlantic Coast Line R. Co., 218 S.C. 402, 63 S.E.2d 53 (1951).

146. 266 S.C. 23, 221 S.E.2d 113 (1975) (where the petition in a divorce proceeding requested only a divorce, an order awarding the wife a conveyance of the house and furniture in lieu of alimony was improper in a default judgment).

147. Comparing the specific terms of the prayer with the decree, the court concluded that family court was without authority to grant the divorce, make a lump sum alimony award, or divide personal property. The court upheld the award of attorney's fees. 279 S.C. at 152, 303 S.E.2d at 99-100.

148. *See* Pruitt v. Taylor, 247 N.C. 380, 100 S.E.2d 841 (1957); 47 AM. JUR. 2D *Judgments* §§ 1175-76 (1969). Concerning the possible due process implications of a default judgment taken without sufficient notice, the court in Richardson Constr. Co. v. Meek Engineering and Constr., Inc., 274 S.C. 307, 262 S.E.2d 913 (1980), vacated a default judgment taken in a Summons (Complaint not Served) and observed that it had never before had the opportunity to consider whether the granting of a default judgment on a Summons (Complaint not Served) might violate due process. *Id.* at 310 n.1, 262 S.E.2d at 916 n.1.

time the propriety in a default case, of awarding lump sum alimony based only on a general prayer for alimony. In holding that such a general prayer does not justify a subsequent lump sum award, the court in *Harris* appeared to voice a preference for periodic payments.[149] The decision does not divest the family court of its discretion under section 20-3-40[150] of the Code to order lump sum or periodic alimony in contested actions, or to award lump sum alimony in default cases where such an award is requested in the prayer. However, *Harris* suggests that practitioners requesting a lump sum award of alimony should be prepared to demonstrate the existence of "special facts and circumstances."[151] An examination of the court's prior awards of lump sum alimony reveals several factors prompting a finding of special facts and circumstances, such as delinquency in prior support payments,[152] a demonstrated or declared unwillingness to provide periodic payments,[153] predicted dissipation of the defen-

149. The court in *Harris* noted, "Reflection upon prior cases in which we have reviewed awards of lump-sum alimony leads us to conclude that such awards are generally supported by special facts and circumstances." 279 S.C. at 152, 303 S.E.2d at 100. The clear implication from this statement is that the general pattern will be to award periodic alimony. *See* CLARK, LAW OF DOMESTIC RELATIONS § 14.5, at 447 (1968).

150. S.C. CODE ANN. § 20-3-40 (1976).

151. *See supra* note 149.

152. In two cases the court has considered an award of lump sum alimony appropriate when the husband was delinquent in payments due under a previous temporary order of support. In McCullough v. McCullough, 271 S.C. 475, 248 S.E.2d 308 (1978), family court awarded the wife approximately $14,000 lump sum alimony, consisting of one-third of a savings account owned by the husband plus over $12,000 in shares of stock. The divorce decree stated that the award included all accrued amounts due under a prior support order. The husband challenged the amount of the award as excessive. In upholding the award, the court noted that special circumstances supported an award of lump sum rather than periodic alimony. *Id.* at 477, 248 S.E.2d at 307.

In Murdock v. Murdock, 243 S.C. 218, 133 S.E.2d 323 (1963), the wife brought a suit in South Carolina for divorce and alimony. While this action was pending, the husband obtained a divorce in Kentucky, which decree awarded no alimony. The circuit court, concurring in the findings of a special referee, found that the Kentucky decree dissolved the marriage but was not a bar to the wife's claim to alimony. The supreme court affirmed. The court held that they were not bound to give full faith and credit to a Kentucky decree providing for no alimony. In response to the husband's argument that the payment of $4,250 lump sum alimony was inappropriate, the court noted that the husband was already in contempt of court for failing to make payments *pendente lite* as ordered by the court, and that as the court already had jurisdiction over the husband and his property, a lump sum payment was justified. *Id.* at 225, 133 S.E.2d at 326.

153. An exhibition or declaration of unwillingness to provide periodic support has led the court to uphold a lump sum alimony award. In Jones v. Jones, 270 S.C. 280, 241 S.E.2d 904 (1978), the wife received a divorce on the grounds of physical cruelty and

dant's estate,[154] and wealth or sizeable assets on the defendant's part.[155]

The lesson emerging from *Harris* is twofold. First, the case should serve to warn practitioners that if a lump sum award of alimony is desired, it should be specifically pleaded, inasmuch as a failure to do so precludes such relief should default occur. Second, *Harris* may be seen as a signal from the South Carolina Supreme Court to practitioners that requests for lump sum awards of alimony should be accompanied by a showing of special facts and circumstances.

B. Compliance with Family Court Rule 27(C)

In *Atkinson v. Atkinson*,[156] the South Carolina Court of Appeals held that where a family court order granting a divorce and other relief failed to comply with Family Court Rule 27(C), and where the record was insufficient to permit adequate appellate review, the case should be remanded to the family court. Rule 27(C) requires that, "The Order . . . shall set forth the salient facts upon which the order is granted, the conclusions of

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habitual drunkenness. The decree gave the wife a $36,000 lump sum alimony award. On appeal the husband challenged only the form, not the amount, of the alimony. The court sustained the lump sum award, relying on the wife's testimony that the husband, who had moved to North Carolina to evade support orders, had stated he would leave the country before supporting his family. As a further ground to uphold the lump sum award, the court concluded that the husband's habitual drunkennness threatened dissipation of his estate.

154. *See supra* note 153.

155. In Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504 (1977), the husband obtained a divorce in Florida, and sought to interpose the Florida decree as an absolute bar to the wife's action in South Carolina for alimony and attorney's fees. The trial court, which found that the Florida decree dissolved the marriage, awarded the wife no alimony or attorney's fees. The supreme court agreed that the Florida decree dissolved the marriage, but held that under the "divisible divorce" doctrine of *Murdock v. Murdock*, *see supra* note 152, the wife could maintain an independent action for alimony and attorney's fees. In reviewing the respective necessities of the parties and other factors supporting an alimony award, the court emphasized that the husband had an estate exceeding four million dollars, and that the wife, who admittedly had made no contributions toward this wealth, had previously enjoyed a high standard of living. The court rejected both the trial court's determination that the wife was not entitled to alimony, and the findings of a master that a $15,000 lump sum award was sufficient. The case was remanded for a determination of a reasonable amount of alimony as well as of the propriety of one lump sum payment.

156. 279 S.C. 355, 309 S.E.2d 14 (S.C. Ct. App. 1983).

law, and . . . other data relating to the decision . . . ."[157] Since the responsibility for preparing family court orders often falls on practitioners, it is important that practitioners as well as the family court bench be advised not only of the court of appeals' marked intolerance toward insufficient or conclusory orders, but also of the guidelines established in the opinion.

In *Atkinson*, the family court declared a Nevada divorce decree null and void and granted the wife a divorce from her husband on the ground of adultery. Other relief was granted, including: (1) child support; (2) lump sum alimony in the amount of ten thousand dollars, with an alternative option of conveying part of the husband's interest in the marital home to the wife; (3) monthly house payments; (4) reimbursement of one thousand dollars of expenses incurred by the wife; (5) equitable distribution; and (6) attorney's fees. The husband appealed, assigning error with respect to all relief granted by family court. Noting the difficulty of performing an appellate review on an inadequate record,[158] the court found none of the legal conclusions to be supported by sufficient findings of fact.

The court then proceeded to review all the relief granted by family court and to establish the factual considerations affecting the legal conclusion. With respect to the husband's argument that the Nevada divorce decree be accorded full faith and credit, the court directed the family court to consider the ramifications of the Uniform Divorce Recognition Act,[159] as interpreted by the prior decision in *Powers v. Powers*.[160]

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157. S.C. FAMILY CT. R. 27(C). In *Atkinson* the court cited Rule 27(3) as the relevant statute; however, a 1983 amendment to Rule 27, applicable April 15, 1983, redesignated former paragraphs (1), (2), and (3) as (A), (B), and (C) respectively. Thus, the court's decision was based upon the current Rule 27(C).

158. 279 S.C. at 357, 309 S.E.2d at 15. "Proper appellate review is extremely difficult, if not impossible, where a lower court order omits specific findings of fact to support its legal conclusions. . . . [W]e believe that strict compliance with [Rule 27(C)] promotes the administration of justice at every judicial level." *Id.*

159. S.C. CODE ANN. § 20-3-410 (1976).

160. 273 S.C. 51, 254 S.E.2d 289 (1979). In *Powers*, a husband who testified he went to Nevada for the express purpose of obtaining a divorce decree failed to overcome the statutory presumption of a South Carolina domicile when his Nevada proceedings began. The statute under which the presumption in *Powers* arose is now codified at S.C. CODE ANN. § 20-3-430 (1976). It provides that upon proof that a party obtaining a foreign divorce was domiciled in South Carolina within twelve months prior to the commencement of the proceeding, and resumed residence within eighteen months after the date of his departure, or that a party at all times after his departure and until his return main-

The court then examined several prior cases addressing the standard of proof for adultery.[161] The general principles emerging from these cases suggest that although eyewitness testimony is not required, any indirect or circumstantial evidence must be reasonably definite as to time and place and must not be based on mere speculation.

With respect to an award of support payments, such as monthly mortgage, insurance, tax, and reimbursement to the wife of certain expenses, the court cited *Grubbs v. Grubbs*,[162] indicating that any salient facts supporting payments incident to further support must demonstrate that such payments are not excessively burdensome.[163] The court in *Grubbs*, however, reversed an award of $65,000 to the wife, which represented reimbursement to the wife for prior services rendered in the husband's business, where the pleadings and record did not evidence any request for such relief. The court also noted that the wife's interest in the business was represented by a twenty percent ownership interest.[164] Therefore, the decision in *Grubbs* to deny the wife reimbursement was narrowly drawn and should not be construed as a bar to such relief when properly pleaded, supported in the record, and not subsumed by some larger proprietary interest.

The court in *Atkinson* also dealt with the necessary factual findings regarding alimony and child support. The court cata-

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tained a South Carolina residence, there is prima facie evidence that the party was domiciled in South Carolina when the foreign divorce proceeding commenced.

161. *See* Fox v. Fox, 277 S.C. 400, 288 S.E.2d 390 (1982) (evidence placing husband and third party together on several occasions, without more, did not warrant a conclusion of adultery); Wingate v. Wingate, 272 S.C. 489, 252 S.E.2d 916 (1979) (eyewitness testimony to sexual act and admission of close social relationship between parties, corroborated by other evidence of adulterous conduct, warrants finding of adultery); Odom v. Odom, 248 S.C. 144, 149 S.E.2d 353 (1966) (although proof of adultery must be sufficiently definite to establish time and place of offense and circumstances under which committed, adultery can be proved by indirect or circumstantial evidence); Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949) (direct proof of adultery by eyewitness evidence not required).

162. 272 S.C. 138, 249 S.E.2d 747 (1978).

163. In *Grubbs*, the parties were denied a divorce, but were granted a legal separation. The supreme court upheld a child support award of $592, which included $292 per month for mortgage payments. The single factor mentioned by the court in sustaining the mortgage payments was the fact that the husband was a wealthy man engaged in a profitable business enterprise. *Id.* at 142, 249 S.E.2d at 749.

164. *Id.*

logued four areas in which the family court should make specific findings of fact before determining the level of child support: (1) the needs of each minor child; (2) the incomes, earning capacities, and assets of both parents; (3) the health, age, and general physical condition of both parents; and (4) the necessities and living expenses of both parents.[165]

The court held that the family court must make specific findings of fact regarding ten critical factors concerning alimony awards:[166] (1) the financial condition or status of the spouse obligated to pay alimony; (2) the needs of the party to receive the alimony; (3) the health and ages of both parties; (4) the earning capacity of each party; (5) the actual income of each party; (6) the individual contributions to the accumulation of their joint wealth; (7) the standard of living of both parties at the time of the divorce; (8) the duration of the marriage; (9) the conduct of the parties; and (10) the special circumstances making any award of lump sum alimony appropriate.[167]

In determining the appropriate property division, the court held that the family court should make specific findings of fact concerning a number of factors. These were: the relative incomes of the parties, the material contributions of the parties to the acquisition of the marital property, and the weight accorded by the court to these contributions.[168]

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165. 279 S.C. at 357, 309 S.E.2d at 15.

166. *Id.* at 357-58, 309 S.E.2d at 15.

167. For factors supporting a lump sum alimony award, see Burgess v. Burgess, 277 S.C. 283, 286 S.E.2d 142 (1982); Jones v. Jones, 270 S.C. 280, 241 S.E.2d 904 (1972); Nienow v. Nienow, 263 S.C. 161, 232 S.E.2d 504 (1977). *See also supra* text accompanying footnotes 149-55.

168. 279 S.C. at 358, 309 S.E.2d at 16. The court cited several cases applying these factors in a variety of circumstances.

In Burgess v. Burgess, 277 S.C. 283, 286 S.E.2d 142 (1982), the court held that a special equity award of $10,000 to the wife was insufficient where the wife had made material contributions to the acquisition of the property, but the husband was awarded the marital residence valued at $47,000, as well as substantial personalty. The court further noted that the husband's income was over nine times that of the wife. Also of significance in *Burgess* was the court's statement that the property division award is only one of several factors to be considered in determining alimony, and may not be a substitute for alimony. *Burgess* also indicates that interspousal gifts are subject to property division.

In Bugg v. Bugg, 277 S.C. 270, 286 S.E.2d 135 (1982), the court found that a $10,000 property division award to the wife was inadequate where the wife had worked for approximately 16 years during the marriage. In *Bugg*, the court found the property division award inadequate even though the husband was unable to work due to a mental illness,

Finally, the court delineated six factors to be considered in determining the appropriateness of an award of attorney's fees: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results accomplished; and (6) the fee customarily charged in the locality for similar legal services.[169]

Atkinson emphasizes the importance of carefully written family court orders. In drafting such orders, the domestic bench and bar should take care to incorporate those key factors highlighted by the court in establishing the salient facts supporting the relief granted.

Aleta M. Pillick

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whereas the wife was employed full-time and enjoyed good health. However, the court agreed that such factors justified denying the wife alimony. Relying on the Supreme Court's decision in McCarty v. McCarty, 453 U.S. 210 (1981), the South Carolina court also held that military retirement pay was not subject to equitable distribution in a divorce proceeding.

In Simmons v. Simmons, 275 S.C. 41, 267 S.E.2d 427 (1980), the court indicated that an adulterous wife who had made material contributions to the acquisition of marital property could not be barred from a special equity award, although she could be denied alimony. While the *Simmons* decision made clear that adultery cannot justify a total divestment of a special equity interest, it "is one of a panoply of considerations", *id.* at 44, 267 S.E.2d at 429, in determining the respective shares of the parties.

In Wilson v. Wilson, 270 S.C. 216, 241 S.E.2d 366 (1978), where the wife failed to produce sufficient evidence to prevail under a resulting trust theory, the court applied the special equity theory. This theory gives the wife an equitable interest in marital property where she has made a material contribution to the acquisition of property during the marriage. In *Wilson* the wife had worked for 24 years of the marriage, contributing substantially to the material success of the family and freeing the husband's earnings for investment.

169. 279 S.C. at 358-59, 309 S.E.2d at 16. *See also* Degelman v. Degelman, 276 S.C. 600, 281 S.E.2d 123 (1981) (where lower court failed to make specific findings of fact regarding factors supporting award of attorney's fees, case remanded to receive additional evidence pertaining to such relief); Nienow v. Nienow, 263 S.C. 161, 232 S.E.2d 504 (1977) (establishing the factors cited in *Atkinson* as the relevant factors supporting an award of attorney's fees). *See also* S.C. Sup. Ct. R. 32, DR 2-106(B) (1980) (establishing factors determining the reasonableness of attorney's fees).