Domestic Law

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DOMESTIC LAW

I. INTERSPOUSAL WIRETAPPING SUBJECT TO FEDERAL STATUTE

In *Pritchard v. Pritchard* the Fourth Circuit Court of Appeals scrutinized the "interspousal electronic surveillance immunity" doctrine. The court held that no express exception existed for instances of wilful electronic surveillance between spouses without consent under the federal wiretapping statute; nor did any indication exist that Congress intended to imply an exception to facts involving interspousal wiretapping. In so holding, the court adopted the majority rule applying the federal wiretapping statute to spousal wiretapping. Although a well-recognized line of cases has articulated this application, the South Carolina Supreme Court has chosen not to follow it.

In this case the husband alleged that the wife violated the wiretapping statute by wilfully intercepting and using his conversations by means of a hidden voice-activated tape recorder.

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1. 732 F.2d 372 (4th Cir. 1984).
2. This phrase was coined by a commentator examining the federal wiretapping statute's reach into the area of domestic relations. The immunity is similar to the older interspousal tort immunity doctrine, but deals with the field of electronic surveillance. The phrase, as used in this context, concerns only personal injury torts and is not to be used in any other context (i.e., the evidentiary privilege to refuse to testify against one's spouse or to prevent one's spouse from testifying). See Comment, *Interspousal Electronic Surveillance Immunity*, 7 U. Tol. Rev. 185, 186 n. 7 (1975).
4. 732 F.2d at 374.

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4. 732 F.2d at 374.
and other devices wired into the telephone in the marital home. The United States District Court found that Congress did not intend the wiretapping statute to reach the domestic area, that the extension phone exemption was evidence of this intent, and that the statute would subject the wife to severe criminal liability if the husband prevailed in his civil action. Consequently, the court dismissed the complaint. The Fourth Circuit Court of Appeals summarily reversed.

The Fourth Circuit examined three leading cases addressing the federal wiretapping statute. The defendant had relied on Simpson v. Simpson for the proposition that the statute includes an implied exception when one spouse conducts a wiretap of the conversations of the other spouse. The plaintiff, on the other hand, had cited United States v. Jones and Kratz v. Kratz as authority that Title III prohibits all wiretapping activities other than those expressly authorized. After considering these cases, the court examined the language of the applicable federal wiretapping statutes and concluded that "[i]n light

7. Record at 2. Brief of Appellant at 3.
8. 18 U.S.C. § 2510(5)(1976) states in part: "[E]lectronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, . . . ."
9. 18 U.S.C. § 2511(1) provides: "Except as otherwise specifically provided in this chapter any person who . . . [willfully violates this chapter] . . . shall be fined not more than $10,000 or imprisoned not more than five years or both."
10. Record at 10-11. The district court cited Simpson v. Simpson, 490 F.2d 803, 809 (5th Cir. 1974), for the proposition that "criminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed."
11. 490 F.2d 803 (5th Cir. 1974).
12. 732 F.2d at 372.
13. 542 F.2d 661 (6th Cir. 1976).
15. 732 F.2d at 372-73.
16. The statutes contain the following relevant provisions:
   (1) Except as otherwise specifically provided in this chapter any person who—
      (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
      . . .
      (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or
      . . .
      shall be fined not more than $10,000 or imprisoned not more than five years, or
of the clarity and lack of ambiguity of the statutory language, an analysis of the legislative history would not appear to be necessary."17 Rather, the court chose to rely on prior decisions by other courts that have undertaken independent legislative analysis.18

The Fourth Circuit noted that the Simpson court itself admitted that its "search of legislative materials 'had been long, exhaustive, and inconclusive.'"19 The analyses conducted by the Jones and Kratz courts, however, found that "the legislative history 'evince[d] a congressional awareness of the widespread use of electronic eavesdropping in domestic relations cases, and a congressional intent to prohibit such eavesdropping.'"20 The Fourth Circuit concluded that "Title III prohibits all wiretapping activities unless specifically excepted,"21 emphasizing that "the language of the statute is not susceptible to the engrafting of an interspousal exception."22

The Pritchard decision is not novel, but, rather, adopts a

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Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred. A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.


18. 732 F.2d at 373.

19. Id. (quoting Simpson, 490 F.2d at 806).

20. Id. at 373-74 (quoting Kratz, 477 F. Supp. at 470). The court cited testimony by Professor Robert Blakey, recognized as the author of Title III, and comments by Senators Long, Hruska, Dirkson, Scott, and Thurmond regarding the widespread use of electronic surveillance in the domestic relations area as persuasive authority that Congress intended to thwart wiretapping in the domestic arena. Id. at 374 (citing Jones, 542 F.2d at 669; Kratz, 477 F. Supp. at 471).

21. 732 F.2d at 374.

22. Id. at 372.
well-settled rule. It might have gone unnoticed, had the South Carolina Supreme Court not taken the opposite view. In Baumrind v. Ewing, a case factually analogous to Pritchard, the supreme court acknowledged that the legislative history reflected a congressional intent that the Act embrace wiretapping in the field of domestic affairs. Paradoxically, the court then concluded that the tap performed by the husband was "beyond the grasp of the statute." The opinion is further confounded because the supreme court chose to follow the Simpson line of cases, which found the legislative history inconclusive. It appears that the decision of the South Carolina Supreme Court, as well as that of the Simpson court, was based on nothing more than a belief that domestic matters are traditionally matters of state interest.

The conflict between the Fourth Circuit Court of Appeals and the South Carolina Supreme Court should alert the practitioner that within the realm of interspousal wiretapping, parties must tread lightly.

Anthony Todd Brown

II. DOWER RIGHTS ELIMINATED IN SOUTH CAROLINA

In Boan v. Watson the South Carolina Supreme Court held that the state’s common-law dower rights violated the equal protection clauses of the South Carolina and United States Constitutions.

23. See supra note 5.


26. The court in Baumrind distinguished Jones and Kratz, noting that the parties in those cases were estranged. Pritchard, however, is not distinguishable on that basis.

27. 276 S.C. at 352, 279 S.E.2d at 360.

28. Anonymous v. Anonymous, 558 F.2d 677 (2nd Cir. 1977); Simpson v. Simpson, 490 F.2d 803 (5th Cir. 1974). It should be noted that the Simpson court harbored uncertainties about its interpretation of the legislative history: "As should be obvious from the foregoing, we are not without doubts about our decision." 490 F.2d at 810.

29. 276 S.C. at 353, 279 S.E.2d at 360; 490 F.2d at 805.

This important decision stated that wives whose husbands died after May 23, 1984, would have no claim to dower rights in South Carolina real estate. The holding will have a significant impact on conveyancing and estate planning in South Carolina and may prompt the enactment of legislation to compensate for the lost right.

Boan died testate in 1976, having bequeathed 67 acres of land in Chesterfield County, South Carolina, to his sister, Mrs. Watson. Mrs. Boan, the widow, instituted an action to claim her dower rights under South Carolina law and to place a lien on the land for debts of the estate. The lower court ruled that Mrs. Boan could recover money for the debts of the estate, but denied the dower claim on the ground that dower violated the equal protection clauses of both the state and federal constitutions.

On appeal the South Carolina Supreme Court upheld the trial court's conclusion that the South Carolina dower rights law was unconstitutional. The supreme court reversed the lower court, however, by holding that dower should be allowed in this case because the widow had a vested interest in the land in question. The court applied the decision prospectively to eliminate dower rights for wives whose husbands died after the filing date of the Boan opinion.

In reaching its conclusion, the court interpreted the United States Supreme Court's decision in *Orr v. Orr* to require that South Carolina dower be held unconstitutional. In *Orr* the Court held that an Alabama statute, which provided that husbands, but not wives, could be required to pay alimony, violated the equal protection clause of the United States Constitution.

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31. Id. at 519, 316 S.E.2d at 403.
32. Id.
33. As the court in Boan noted, dower, despite common misconception, was a common-law right, never actually codified. The legislature has, however, enacted statutes affecting various aspects of dower, including renunciation of dower, forfeiture, barring dower to mentally incompetent wives, acceptance of distributive share, and allotment of dower. 281 S.C. at 518, 316 S.E.2d at 402 (citing S.C. Code Ann. §§ 21-5-110 to -990 (1976)).
34. Record at 2.
35. 281 S.C. at 519, 316 S.E.2d at 403.
36. Id.
38. 281 S.C. at 519, 316 S.E.2d at 403.
and that an alimony award to the wife could not be enforced.\(^{39}\)

The South Carolina court’s majority opinion reasoned that \textit{Orr}, which concerned the economic rights of husbands and wives in the termination of marriage by divorce, was equally applicable when the marriage was terminated by death.\(^{40}\) The court noted that the South Carolina General Assembly, in response to the \textit{Orr} decision, amended South Carolina’s alimony statute\(^{41}\) to provide for the granting of alimony to either spouse. The court extended the \textit{Orr} holding to require equal treatment in regard to property rights, holding that the right of dower previously recognized in this state was unconstitutional as violating the equal protection clauses of the South Carolina\(^{42}\) and United States Constitutions.\(^{43}\) In the instant case, however, where Mrs. Boan’s rights had vested three years prior to the \textit{Orr} decision, the court would not overturn title.\(^{44}\) The majority refused to apply the elimination of dower retroactively to the date of the \textit{Orr} decision in 1979, holding instead that only widows whose husbands died after the filing of the \textit{Boan} decision would be barred from dower claims.\(^{45}\)

Chief Justice Lewis’ dissent rejected the interpretation that \textit{Orr} required the elimination of dower rights and limited \textit{Orr}’s application to divorce litigation.\(^{46}\) He questioned the court’s need to involve itself in judicial legislation and suggested that the social utility of the institution of dower had not been fully analyzed.\(^{47}\) In contrast to the majority opinion’s reliance on \textit{Orr},

\(^{39}\) 440 U.S. at 278-83.
\(^{40}\) 281 S.C. at 519, 316 S.E.2d at 402-03.
\(^{42}\) S.C. Const. art. I, § 3 states in part: “The privileges and immunities of citizens of this state and of the United States under this constitution shall not be abridged, . . . nor shall any person be denied the equal protection of the laws.”
\(^{43}\) U.S. Const. amend. XIV, § 1 states in part: “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
\(^{44}\) 281 S.C. at 519, 316 S.E.2d at 403 (citing Floyd v. Barrineau, 265 S.C. 16, 216 S.E.2d 753 (1975)(holding that vested property rights may not be overturned retroactively)).
\(^{45}\) 281 S.C. at 519, 316 S.E.2d at 403.
\(^{46}\) Id. at 521, 316 S.E.2d at 404.
\(^{47}\) Chief Justice Lewis distinguished \textit{Orr} from the instant case, noting that the Supreme Court abolished \textit{Orr}’s use of gender as a proxy for need. Probate courts, in contrast, “do not divide estates based upon the respective ‘needs’ of competing claimants. Rights are settled by operation of law, the outcome being determined usually by prior
the dissent analyzed dower rights under the United States Supreme Court decision in Kahn v Shevin. 48 Kahn represents a line of United States Supreme Court cases that have allowed "benign discrimination" by statutes designed to balance affirmatively past discriminations based on gender. 49

In an opinion by Justice Douglas, the Kahn Court upheld a Florida statute designed to give widows a $500 property tax exemption. The statute's constitutionality was challenged by a widower who argued that its gender based classification violated the equal protection clause of the fourteenth amendment to the United States Constitution. The Court in Kahn stated that a widow faced financial difficulties exceeding those faced by a man. 50 This conclusion was based on statistics tending to show that women were not compensated as well as men in the work force. 51 The Court validated the Florida statute because it was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which the loss impose[d] a disproportionate burden." 52 In his Boan dissent, Chief Justice Lewis noted that Justice Blackman's concurring opinion in Orr was based on the assumptions that Orr v. Orr would not 'cut back on' Kahn v. Sherin . . . . " 53

The social policy underlying dower is no longer as compelling as it once was. When common law first granted dower rights to widows, husbands controlled their wives' persons and prop-

decisions of the decedent. Unlike an alimony case, there is no living wage-earner in an estate probate from whom payments can be extracted based on earnings. Unless a testator has established a trust, there is usually no on-going resource upon which to draw. So it is that if women are to be 'compensated' through the probate courts, there must be some equivalent of dower for them. If an alternative to dower recommends itself as social policy, the General Assembly in any case must attend that matter." Id. at 520-21, 316 S.E.2d at 403-04.

50. 416 U.S. at 353.
51. Id. at 353-54. "In 1970 while 40% of males in the work force earned over $10,000, and 70% over $7,000, 45% of women working full time earned less than $5,000, and 73.9% earned less than $7,000. U.S. Bureau of Census: Current Population Report, Series P-60, No. 80." 416 U.S. at 353 n.4.
52. 416 U.S. at 355.
53. 281 S.C. at 521, 316 S.E.2d at 404 (citing Orr, 440 U.S. at 284).
erty. Modern women, however, enjoy the freedom of personal independence and ownership of property, and few widows need resort to “working the land” to support themselves. In addition, we no longer live in an agrarian society; a contemporary estate is apt to consist of assets other than real estate so that dower rights are often insignificant.

In weighing the equal protection mandates of Orr against the “benign discrimination” affirmations of Kahn, one finds it to be a close balance. As the Boan trial court order stated, however, “[i]f, as may be desirable, a minimum inheritance, based on the entire estate should be guaranteed the widow, the law should accord a like benefit to the widower.”\(^5\) The dissent noted the general dissatisfaction with the institution of dower, but pointed out that in most states dower has been eliminated through statutory change, after full consideration of the underlying social policy and of the effects on the family unit.\(^5\)

Boan v. Watson may have ramifications in several areas. First, real estate conveyances after May 22, 1984, presumably will not require a renunciation of dower. Second, the legislature may feel compelled, as the dissent urged, to provide a statutory remedy to replace dower rights. Finally, attorneys involved in estate planning should caution clients that the elimination of dower may necessitate revision of previously executed wills or trusts to provide further protection for their spouses. Practitioners should also be aware that the Boan decision did not eliminate the dower interest of wives whose husbands died on or before May 22, 1984. Therefore, when searching title it will be necessary to insure that dower rights of those widows were renounced properly in prior conveyances.

The elimination of dower rights in Boan ensures that husbands and wives have equal rights to hold personal interests in real property and to alienate those interests without spousal consent. This important decision has contributed to the process

54. Record at 11.
55. 281 S.C. at 521, 316 S.E.2d at 404.
of removing legal impediments to equal property rights in South Carolina.

_Dorothy J. Hopko_

### III. Heartbalm Cause of Action Reaffirmed

In _Bradley v. Somers_ the South Carolina Supreme Court refused to abolish or limit the tort cause of action for breach of promise to marry. Writing for the court, Justice Harwell stated that this cause of action will remain viable in South Carolina until the legislature provides otherwise.

As Justice Harwell noted, “The facts in this case weave a web of tangled love affairs.” The plaintiff, Christine Bradley, and the defendant, David Somers, were both married to other parties when they met. The two began an affair in which they dated, consummated their relationship sexually, and subsequently divorced their respective spouses in order to marry each other. By May 11, 1982, both plaintiff and defendant had obtained divorces; they planned to marry on June 20 of the same year. In its opinion the court described in detail the numerous preparations and substantial expenditures that were made in anticipation of the wedding, which was to have been held at Hilton Head Island. On the day of the ceremony, however, the defendant balked when the time came to sign the marriage license, explaining that “there [was] someone else.” Unable to recon-

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57. _Id._ at 368-69, 322 S.E.2d at 667. The court reasoned: “The appellant urges this court to abolish the cause of action for breach of marriage promise. We decline to do so. Most states which have abolished the cause of action have done so legislatively.” See Annot., 73 A.L.R.2d 553, 557 n.1 (1960).
58. 283 S.C. at 366, 322 S.E.2d at 665.
59. _Id._, 322 S.E.2d at 666. The court described the wedding preparations, which in part justified the plaintiff’s damages award, as follows:

In preparation for the wedding date of June 20, 1982, Captain Somers and Christine ordered special wedding bands from the Smithsonian Institution. They also arranged for the ceremony to take place in the First Presbyterian Church in Hilton Head, to be performed by Dr. Kinchelowe, the church pastor. The parties also engaged an organist, caterer, photographer, florist and baker. In preparation for the wedding, Christine purchased a wedding dress, silk bouquet, shoes, and nightgown. She bought a Cross desk set as a gift for the groom bearing the engraving “David W. Somers, Jr., June 20, 1982.”
60. _Id._ at 367, 322 S.E.2d at 666.
cile the bride and groom, the minister was forced to announce to the waiting guests that the wedding had been cancelled.\textsuperscript{61}

Bradley eventually filed suit against Somers alleging breach of promise to marry. The plaintiff complained she "was humiliated, devastated, nauseated, and, shortly thereafter, suicidal."\textsuperscript{62} At trial she offered evidence that she had been treated by a psychiatrist and had incurred $3,000 in expenses for the treatment.\textsuperscript{63} The trial judge refused to charge the jury that Bradley was not entitled to damages for the dissolution of her first marriage, and the jury awarded the plaintiff $60,000 in actual damages.\textsuperscript{64}

On appeal the supreme court reaffirmed the traditional cause of action for breach of promise to marry, but reversed and remanded the case on the grounds that the trial court's refusal to make the curative charge resulted in prejudicial error.\textsuperscript{65} In upholding the "heartbalm" action, the court deferred to the legislature any decision to abolish it.\textsuperscript{66} The court recognized, however, the inequities inherent in allowing Bradley to recover damages for the dissolution of her first marriage.\textsuperscript{67} The court also reasoned that Bradley could not sue on a promise made by the defendant when she knew they were both legally married to

\begin{itemize}
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id. In addition to refusing to make the curative charge, the trial court also allowed Bradley to testify that Somers had enticed her to leave her first husband and thereby lose the financial security and social standing of that marriage. Bradley testified:
\begin{quote}
I would have had the companionship of a man I cared for. I would have had the financial support of a husband. . . . The marriage with Frank could have been saved. . . . had it not been for the intervention of David Somers and the promise and prospect of a better life with him.
\end{quote}
\item \textsuperscript{65} Id. at 368, 322 S.E.2d at 666. The supreme court found prejudicial error in the admission of this testimony as well as in the refusal to give the curative charge.
\item \textsuperscript{66} Id. at 368, 322 S.E.2d at 667.
\item \textsuperscript{67} See supra note 57.
\item \textsuperscript{67} The court drew an analogy to the situation in Hahn v. Bettingen, 81 Minn. 91, 83 N.W. 467 (1900), in which the Minnesota Supreme Court prevented a plaintiff from recovering damages for the loss of a marriage that the plaintiff herself called off in order to marry the defendant, who later breached his promise to marry. The Hahn court reasoned that to do otherwise would allow the plaintiff to profit from her own wrongdoing. The Bradley court based its refusal to allow Bradley damages for the loss of her first marriage on the Hahn rationale. To permit Bradley to recover such damages "would reward her for her own wrongdoings." 283 S.C. at 368, 322 S.E.2d at 667.
\end{itemize}
other people.68 Under Strickland v. Anderson69 such a promise is considered void as against public policy, but the court ruled that Bradley had established liability for "the breach of the renewed promise, made after the dissolution of the parties' earlier marriages."70 Suing on this later promise, Bradley was not entitled to any damages arising from the dissolution of her first marriage. She was, however, entitled to recover for the loss of pecuniary and social advantages of the promised marriage, expenditures made in anticipation of the promised marriage, mental distress, humiliation, and injury to health.71 Since the trial court had failed to instruct the jury to disregard the financial and social position Bradley had enjoyed during her first marriage, the supreme court remanded the case for a new trial solely on the issue of damages.72

In Bradley the supreme court reaffirmed nearly two hundred years of case law providing recovery for the breach of a promise to marry.73 But as the court recognized, the legislatures of a number of jurisdictions have abolished or significantly limited this cause of action.74 The South Carolina Supreme Court's deference to the legislature, however, was misplaced since the action in South Carolina was created at common law.75 Passing the responsibility to the legislature denied the court the opportunity at least to modify the cause of action and make it consistent with contemporary views and modern domestic law.

The cause of action has its origin in the common law of seventeenth century England.76 At that time marriage was considered largely a property transaction, and the traditional measure

68. 283 S.C. at 368, 322 S.E.2d at 667. In South Carolina, a promise of marriage made while one is married to another is void as a matter of public policy. Strickland v. Anderson, 186 S.C. 482, 196 S.E. 184 (1938).
69. Id.
70. 283 S.C. at 368 n.1, 322 S.E.2d at 667 n.1.
71. Id. at 368, 322 S.E.2d at 666. For a comprehensive discussion of the various measures of damages employed by numerous jurisdictions, see Annot., 73 A.L.R.2d 553 (1960).
72. 283 S.C. at 369, 322 S.E.2d at 667.
73. The court expressly reaffirmed the vitality of the following cases: Strickland v. Anderson, 186 S.C. 482, 196 S.E. 184 (1938); Coggins v. Cannon, 112 S.C. 225, 99 S.E. 823 (1919); Jones v. Fuller, 19 S.C. 66 (1882); Capehart v. Carodine, 4 Strob. 42 (1849); Evans v. Terry, 1 Brev. 80 (1802).
74. See supra note 57.
76. Id.
of damages for breaching a promise to marry has reflected this view.\textsuperscript{77} As the court in \textit{Bradley} explained, a successful plaintiff who sues for breach of promise to marry is entitled to recover the loss of the financial and social standing he or she would have enjoyed had the marriage taken place, in addition to the usual types of tort damages, including recovery for injury to mind, body, and reputation.\textsuperscript{78} In light of modern trends in domestic law, such as no-fault divorce and rehabilitative alimony, it is no wonder that the inequities created by preserving the traditional cause of action for breach of promise to marry have encountered what one court has termed "almost uniform criticism by commentators."\textsuperscript{79}

One option available to the court in \textit{Bradley} was to follow the lead of the Washington Supreme Court, which modified the cause of action to make the recoverable damages consistent with contemporary tort and domestic law. In \textit{Stanard v. Bolin}\textsuperscript{80} the Washington Supreme Court retained the cause of action, but modified it so that a plaintiff can no longer "recover for loss of expected financial and social position, because marriage is no longer considered to be a property transaction."\textsuperscript{81} A plaintiff can still recover foreseeable damages, which include costs incurred in reliance on the marriage promise, as well as damages for impaired health, mental anguish, and harm to reputation.\textsuperscript{82}

Had the \textit{Bradley} Court employed the logic of \textit{Stanard}, the

\textsuperscript{77} Id. at 2.
\textsuperscript{78} See supra note 71.
\textsuperscript{79} Stanard v. Bolin, 88 Wash. 2d 614, 618, 565 P.2d 94, 96 (1977). The court explained: 
In essence, these criticisms are: (1) the action is used as an instrument of oppression and blackmail; (2) engaged persons should be allowed to correct their mistakes without fear of publicity and legal compulsion; (3) the action is subject to great abuse at the hands of gullible and sympathetic juries; (4) it is wrong to allow under the guise of contract an action that is essentially tortious and penal in nature; and (5) the measure of damages is unjust because damages are allowed for loss of social and economic position, whereas most persons marry for reasons of mutual love and affection. See, e.g., 1 C. Vernier, \textit{American Family Laws} 26-27 (1931); Brown, \textit{Breach of Promise Suits}, 77 U. Pa. L. Rev. 474 (1929); Wright, \textit{The Action for Breach of the Marriage Promise}, 10 Va. L. Rev. 361 (1924); White, \textit{Breach of Promise of Marriage}, 10 L. Quar. Rev. 135 (1894).

\textsuperscript{80} 88 Wash. 2d at 618, 565 P.2d at 96.
\textsuperscript{81} Id. at 622, 565 P.2d at 98.
\textsuperscript{82} Id. at 617-18, 565 P.2d at 96.
cause of action for breach of promise to marry would have been harmonized with the modern law of this state. In Washington a suitor who breaches his or her promise to marry can expect to incur liability similar to the liability possible in an action for intentional infliction of emotional distress. The court in Standard considered such liability reasonable since it is foreseeable that breaching one’s promise to marry will result in the fiance suffering emotional and physical harm. In South Carolina, however, a suitor who decides not to go through with a proposed marriage should be prepared to pay a high price since this state will continue to impose liability on those who breach their promises to marry.

David B. Summer, Jr.

IV. JURISDICTION OF FAMILY COURT CLARIFIED

In White v. White the South Carolina Supreme Court held that a family court that grants an annulment of a marriage continues to have jurisdiction to resolve all other related issues, including claims for equitable distribution and attorney’s fees. Although it had previously been established that the family courts had jurisdiction to determine these claims in a divorce, this decision makes it clear that complete jurisdiction extends to annulment actions as well.

Richard Tony White brought this action for an annulment of his marriage, alleging that at the time of his marriage his wife was already married to another man. His wife then counterclaimed for a divorce and requested distribution of the marital property, alimony, and attorney’s fees. The family court dismissed the wife’s counterclaim, granted the annulment, and awarded the wife attorney’s fees and the property of the mar-

83. The similarities between the complained of damages in Bradley and those alleged in a typical cause of action for the tort of outrage are readily apparent. See Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981). The disparity, however, in the amount and kinds of damages available under the two theories seems inequitable.

84. 88 Wash.2d at 621, 565 P.2d at 98.


86. Id. at 349, 323 S.E.2d at 522.

87. Id.
riage.\textsuperscript{88} Both parties agreed that the family court had exclusive jurisdiction to grant the annulment,\textsuperscript{89} but the husband appealed on the basis that jurisdiction of the family court ended with the annulment and did not extend to property distribution.\textsuperscript{90}

The supreme court stated that it was clearly the legislative intent that family courts should consider and rule on all matters pertaining to an annulment action.\textsuperscript{91} “Section 20-7-420 of the South Carolina Code provides that the Family Court shall have exclusive jurisdiction:

(2) To hear and determine actions:
For divorce \textit{a vinculo matrimonii}, separate support and maintenance, legal separation, and \textit{in other marital litigation between the parties}, and for settlement of all legal and equitable rights of the parties in such actions in and to the real and personal property of the marriage and attorney's fees . . . .

(6) To “to hear and determine actions for the annulment of marriage.

(30) To make any order necessary to carry out and enforce the provisions of this chapter . . . .”\textsuperscript{92}

Reading these provisions together, the court concluded that the family court had jurisdiction over all matters in this case. The court further observed that this decision was consistent with an earlier decision holding that jurisdiction for all domestic matters vested in the family courts.\textsuperscript{93}

\textit{White v. White} ends any confusion regarding the extent of the family court's jurisdiction in annulment proceedings and indicates that the statutory grant of jurisdiction will be interpreted broadly to permit the family courts to exercise jurisdic-

\textsuperscript{88} Record at 1.
\textsuperscript{89} S.C. CODE ANN. § 20-7-420(6)(1983 Supp.) states that the family courts have exclusive jurisdiction “to hear and determine actions for the annulment of marriage.”
\textsuperscript{90} 283 S.C. at 349, 323 S.E.2d at 522.
\textsuperscript{91} Id. at 350, 323 S.E.2d at 522.
\textsuperscript{92} Id. at 349-50, 323 S.E.2d at 522 (quoting S.C. CODE ANN. § 20-7-420(2), (6), (30)(Supp. 1984)(emphasis supplied by the court).
\textsuperscript{93} 283 S.C. at 350, 323 S.E.2d at 522 (citing Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983)). The court could have based its holding on the doctrine of equitable clean-up since an annulment action is based on equity. This doctrine provides that courts of equity may determine incidental questions in order to prevent a multiplicity of legislation. Campbell v. Moore, 189 S.C. 497, 1 S.E.2d 784 (1939). Brief of Respondent at 2.
tion over all domestic matters.  

Judith L. McInnis

V. COMMON-LAW NECESSARIES DOCTRINE AFFIRMED AND EXPANDED

In Richland Memorial Hospital v. Burton95 the South Carolina Supreme Court held that the common-law necessaries doctrine96 allowed third parties providing necessaries to a husband or wife to bring an action against the individual's spouse.97 This decision is significant in affirming the validity of South Carolina's common-law necessaries doctrine, while expanding the doctrine to render a wife liable for a husband's debts necessary for his support.

In this case Richland Memorial Hospital brought a collection action against defendant Burton, contending that under the common-law necessaries doctrine and its codification in section 20-5-60 of the South Carolina Code,98 Burton was liable for hospital debts incurred by his wife, then deceased. The trial court held Burton liable under the common-law necessaries doctrine. Burton appealed to the South Carolina Supreme Court, arguing that both the necessaries doctrine and section 20-5-60 were unconstitutional as violative of the equal protection clauses of the South Carolina99 and United States Constitutions.100 The su-

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94. The court's holding is consistent with prior decisions in related areas, although no previous decision precisely addressed this issue. See, e.g., Newberry v. Newberry, 257 S.C. 202, 184 S.E.2d 704 (1971). This decision is also in harmony with an Attorney General's opinion stating that family courts have only the "jurisdiction which is expressly conferred by statute or that which is incidentally necessary for the exercise of statutorily conferred jurisdiction." 1980 Op. S.C. Att'y Gen. 48, No. 80-23.


96. "The common law doctrine [of necessaries] as modified by statute therefore provides that, in the absence of contract, a husband is liable for his wife's necessaries supplied to her by a third person." Id. at 160, 318 S.E.2d at 13.

97. Id. at 161, 318 S.E.2d at 13.

98. S.C. CODE ANN. § 20-5-60 (1976) provides: "A husband shall not be liable for the debts of his wife contracted prior to or after their marriage, except for her necessary support and that of their minor children residing with her."

99. S.C. CONST. art. 1, § 3 provides: "The privileges and immunities of citizens of this state and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."
preme court affirmed the trial court’s decision and held Burton liable under the common-law doctrine. The court did, however, find that section 20-5-60 denied husbands equal protection. To obviate this constitutional defect, the court expanded the common-law doctrine to impose liability on wives as well as husbands for their spouses’ necessary debts to third parties.

The court, examining the history of the common-law doctrine, observed that a wife’s property was first declared separate from her husband’s in the Married Women’s Property Acts during the late 1870s. The husband’s duty to pay his wife’s debts was then codified in section 20-5-60 of the South Carolina Code, but the liability was limited to those debts necessary for her support. The court held that the common-law necessaries doctrine “as codified in section 20-5-60 denies husbands equal protection of the laws by failing to impose a reciprocal obligation on wives.” In support of this finding, the court cited authority from several other jurisdictions, as well as Boan v. Watson, the recent South Carolina case abolishing common-law dower. Rather than abolishing the common-law doctrine of necessaries, however, the court remedied the constitutional defect by extending the obligation to pay a spouse’s debts to wives as well as husbands. In support of this expansion, the court cited recent statutory amendments reflecting the legislature’s intent to impose familial support obligations equally on both hus-

100. U.S. Const. Amend. XIV, § 1 provides in pertinent part: “nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.”
103. For text of § 20-5-60, see supra note 98.
105. The court in Burton cited the following cases: Manatee Convalescent Center, Inc. v. McDonald, 392 So. 2d 1356 (Fl. Ct. App. 1980)(legislature’s amendment to divorce statute, imposing gender-neutral burden of support on both spouses, requires that wife be liable for necessaries of husband); Condore v. Prince George’s County, 289 Md. 516, 425 A.2d 1011 (1981)(common-law doctrine of necessaries and statute both invalid under state equal rights amendment); Jersey Shore v. Estate of Baum, 84 N.J. 137, 417 A.2d 1003 (1980)(common-law necessaries doctrine, insulating wife from liability for husband’s expenses without according husband similar protection, constitutes denial of equal protection); Schilling v. Bedford Memorial Hospital, 225 Va. 539, 303 S.E.2d 905 (1983)(necessaries doctrine unconstitutional as creating a gender-based classification).
bands and wives.\textsuperscript{108} The court further noted that developments in South Carolina case law also reflect an expansion of a wife's common-law obligations.\textsuperscript{109} Finally, the court noted the common law's flexibility concerning interspousal rights and liabilities and cited, as an example, a recent decision permitting wives to bring actions for loss of consortium.\textsuperscript{110}

The legislative changes cited by the court in support of the doctrine's expansion may indicate a desire by the legislature to extend familial support obligations to both spouses, but legislative action has not clearly shown such an intent. Some statutes, potentially subject to equal protection challenge,\textsuperscript{111} have not been amended or repealed. Moreover, the cases cited by the court in support of the expansion of the necessaries doctrine\textsuperscript{112} reveal only a tendancy toward \textit{implied} extension. Since none of the cited cases addressed a situation where the husband sought to make the wife liable for child support, the court had never before directly faced the question of expansion. Further, it is unclear why the \textit{Burton} court chose to expand the necessaries doctrine rather than abolish it entirely, as the court had done in \textit{Boan}. Perhaps the court felt an obligation to assure that debts to third parties would be paid. It would, however, have been helpful if the court had established some guidelines for when it would choose to expand, rather than abolish, doctrines and statutes that violate equal protection.

The \textit{Burton} decision leaves important issues still unresolved. As the court noted, "whether, in some instances, the creditor must first seek to recover from the estate of the spouse

\textsuperscript{108} \textit{Id.} The court cited the following statutes: S.C. Code Ann. § 20-3-120 (1976)(authorizing courts to grant alimony pendente lite to either spouse); S.C. Code Ann. § 20-3-130 (1976)(authorizing courts to grant permanent alimony to either spouse); S.C. Code Ann. § 20-7-40 (1976)(authorizing courts to impose child support obligations on either spouse).

\textsuperscript{109} The court cited the following cases: Lee v. Lee, 237 S.C. 532, 118 S.E.2d 171 (1961)(wife's earnings can be considered by court in assessing amount of husband's child support obligations); Campbell v. Campbell, 200 S.C. 67, 20 S.E.2d 237 (1942)(parents with ability to do so have legal obligations to support legitimate minor children); Peebles v. Diaber, 279 S.C. 611, 310 S.E.2d 823 (Ct. App. 1983)(parents are not permitted to execute irrevocable contract relieving either parent of duty to support a minor child).


\textsuperscript{111} \textit{See}, \textit{e.g.}, S.C. Code Ann. § 20-5-30 (1976)(\textit{a wife's} property, acquired before marriage or by gift or inheritance during marriage, is separate property not subject to levy or sale on account of a husband's debts).

\textsuperscript{112} \textit{See} cases cited supra note 109.
who received the services" has not yet been decided. Further, the courts or the legislature must still consider whether other sections of the Married Women's Property Act, such as section 20-5-30, violate the equal protection clauses of the state and federal constitutions.

Lisa S. Godwin

VI. ANTENUPITAL AGREEMENTS UPHeld

Stork v. First National Bank of South Carolina held that antenuptial agreements will be enforced by the courts if they are voluntary, fair, equitable, and made in good faith. The South Carolina Supreme Court found that such contracts are not contrary to public policy and are "highly beneficial to serving the best interest of the marriage relationship."

In Stork a widow brought an action for her dower rights in the estate of her husband. The bank, as executor, argued that the widow was barred from recovery because she had executed an antenuptial agreement. In addition, the bank argued that the right of dower is unconstitutional and violates the equal protection clauses of the United States and the South Carolina Constitutions. Mrs. Stork argued, however, that she had been tricked into signing an antenuptial agreement that was unfair and inequitable. Under the terms of the agreement she was excluded from her husband's estate. She contended that her signature on the agreement was obtained only minutes before she was married and that she had been unable to read the contract

114. Other jurisdictions have held that the primary liability rests with the spouse incurring the debt. See, e.g., Jersey Shore v. Estate of Baum, 84 N.J. 137, 417 A.2d 1003 (1980).
116. Id. at 516, 316 S.E.2d at 401.
117. Id.
118. U.S. CONST. amend. XIV states in part: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." S. C. CONST. art. I, § 3 provides in part: "The privileges and immunities of citizens of this State . . . shall not be abridged . . . nor shall any person be denied the equal protection of the laws."
119. Record at 1.
or obtain counsel before signing the agreement. The bank invoked the Dead Man's Statute as a defense against the plaintiff's testimony. The trial court granted summary judgment for the bank, upholding the antenuptial contract. The supreme court affirmed on that issue, without addressing the constitutional question.

In 1883 the South Carolina Supreme Court articulated a standard in Shelton v. Shelton that has since been employed to determine the validity of any contract to relinquish dower rights. Under this standard such a contract "should be entirely free from doubt, clear, positive and express in its terms." In Bates v. Bates the South Carolina Supreme Court ruled that whenever a husband or his estate acquires an advantage from a property transaction with the wife, he must "show the utmost fairness in the transaction and that the wife was fully advised as to what she was doing and the effect of it." After noting that Mrs. Bates had not received any independent advice, legal or otherwise, prior to execution of the deed, the court stated that independent legal advice, while not a sine qua non of the validity of conveyances between wife and husband, "is unquestionably a circumstance which, when it exists, militates for validity, and when it does not, as in this case, its absence is of importance." 

120. Id. at 14.
121. S.C. Code Ann. § 19-11-20 (1976). This statute bars the testimony of one party to an action to the extent that it affects some interest of that party, if the other party is incompetent or deceased at the time of the action and the testimony concerns a litigated transaction between the two parties. S.C. Code Ann. § 19-11-70 (1976), however, limits the operation of § 19-11-20 by allowing a party to testify regarding fraud in the transaction, provided the testimony is not on the party's own behalf.
122. 281 S.C. at 516, 316 S.E.2d at 401. In Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984), decided on the same day as Stork, the Supreme Court of South Carolina held that dower rights were unconstitutional as violative of the equal protection clauses of the South Carolina and United States Constitutions. For a discussion of Boan, see supra notes 30-55 and accompanying text.
123. 20 S.C. 560 (1883).
125. 20 S.C. at 566.
127. Id. at 39, 48 S.E.2d at 618 (citing Way v. Union Cent. Life Ins. Co., 61 S.C. 501, 39 S.E. 742 (1901) (assignment of insurance policy by wife to husband's estate held void)).
The cases cited in Stork entailed property conveyances or dower renunciations executed after marriage, when strong obligations and duties exist between spouses, and may, therefore, be distinguishable from cases involving antenuptial agreements. The wife in Stork, however, cited the general rule that for an antenuptial agreement to be valid, some provision must be made for the excluded spouse that counterbalances the waived property rights.\footnote{129} The absence of such a provision requires a full and frank disclosure of the assets the spouse is waiving.\footnote{130} This requirement of full disclosure parallels the requirement cited in Bates. Indeed, the Stork court held that antenuptial agreements are enforceable "if made voluntarily and in good faith and if fair and equitable."\footnote{131} The court apparently chose not to follow Bates, which had shifted to the husband the burden of proving the fairness of a transaction.\footnote{132} The wife in Stork alleged that her businessman husband had, with assistance of counsel, drafted the agreement to waive her dower rights and presented it for her signature five minutes before the wedding ceremony. Thus, because of the imminence of the wedding and the absence of her eyeglasses, she was unable to read it.\footnote{133} Both the trial court and the supreme court, however, found the agreement enforceable. Under the circumstances of this case, it is difficult to determine exactly what facts are required to render an antenuptial agreement fair, equitable, voluntary, and made in good faith.

This decision underscores how important it is that clients receive counsel and be aware of their rights in making antenuptial agreements. While antenuptial agreements can be used to limit claims to the spouse's property, they may also protect future financial security. Stork is a significant decision because it upheld the validity of an antenuptial agreement that was to take effect upon the death of the spouse. Presumably, agreements made to provide for property division or support upon divorce would also be enforceable under the same standard, although the opinion did not specifically address this issue. Antenuptial

\footnote{129. 41 C.J.S. Husband and Wife § 97 (1944).} \footnote{130. Id.} \footnote{131. 281 S.C. at 516, 316 S.E.2d at 401.} \footnote{132. 213 S.C. at 43, 48 S.E.2d at 619.} \footnote{133. Record at 14.}
agreements will become more routine as courts, attorneys, and individuals recognize these contracts as potential solutions to estate planning and property settlement problems.

Dorothy J. Hopko

VII. No-Fault Separation Period May Include Involuntary Military Duty

In Niemann v. Niemann\textsuperscript{134} the South Carolina Court of Appeals held that time spent out of the country on military duty may count toward the twelve month separation period required for a no-fault divorce in South Carolina. In this decision the court adopted a rule previously recognized in other jurisdictions.

The parties in this case separated on May 8, 1980, and took up separate residences. The husband, a naval officer, returned to sea duty in July 1980.\textsuperscript{135} The wife was granted a divorce decree on the statutory ground of continuous separation for a period of one year, which included the time the husband was on sea duty.\textsuperscript{136} The husband appealed, claiming that the inclusion of his time spent on involuntary military duty violated the equal protection clause of the fourteenth amendment and was contrary to public policy. The court of appeals disagreed and affirmed the divorce decree.\textsuperscript{137}

The court’s rationale is clear. The Niemanns were separated before Mr. Niemann returned to sea duty; the wife’s intent to sever the marital relationship clearly was manifested before the husband’s departure for military duty; thus, the separation was independent of the military service.\textsuperscript{138} Consequently, the seven

\textsuperscript{135} Id. at 129, 317 S.E.2d at 474.
\textsuperscript{136} S.C. Code Ann. § 20-3-10(5)(1976) provides that a divorce may be granted “[o]n the application of either party if and when the husband and wife have lived separate and apart without cohabitation for a period of one year.”
\textsuperscript{137} 282 S.C. at 128, 317 S.E.2d at 473.
\textsuperscript{138} Id., 317 S.E.2d at 473-74. The court’s requirement that the separation itself be independent of the involuntary separation also serves to prevent separations motivated by nonmarital factors from ripening into “instant divorces” upon application by one spouse. See, e.g., Hooker v. Hooker, 215 Va. 415, 417, 211 S.E.2d 34, 36 (1975). In Hooker the court found that “as a prerequisite for a divorce [based on two year’s separation] there must be proof of an intention on the part of at least one of the parties to discontinue permanently the marital cohabitation, followed by physical separation for the stat-
months Mr. Niemann spent on sea duty was properly counted toward the twelve-month separation period necessary for a no-fault divorce in South Carolina.\textsuperscript{139} By adopting this rule, the court assumes a position consistent with that of other jurisdictions which previously have addressed this issue.\textsuperscript{140}

The court noted that granting this divorce did not conflict with the public policy of fostering and protecting marriage.\textsuperscript{141} The statutory requirement of living separate and apart for one year prior to commencing a divorce action insures that the separation is not motivated by trivial considerations and affords the parties an opportunity for reconciliation.\textsuperscript{142} Section 20-3-10(5) "was passed to implement a constitutional amendment favorably approved by referendum."\textsuperscript{143}

The court also held that application of the statute to persons on involuntary military duty does not violate the equal protection clause of the fourteenth amendment. The court found the contention of unconstitutionality "untenable because of our holding that the separation must be independent of involuntary sea duty."\textsuperscript{144} The court did not specifically address appellant's argument that servicemen are denied the full twelve-month period for reconciliation that is afforded to civilians.\textsuperscript{145} Rather, the

\begin{itemize}
  \item utory period . . . and that this intention is shown to have been present at the beginning of the uninterrupted two year period . . . ." Here the court found no expressed intent of the husband to separate prior to going overseas to work as a civilian military employee, and, thus, held that his notification of such intent to his attorney two years later did not meet the required two-year statutory period. This finding of express intent to separate is required in order to put the spouse on notice and provide for reconciliation opportunities.

\textsuperscript{139} 282 S.C. at 129, 317 S.E.2d at 474.

\textsuperscript{140} The court cited the following cases from other jurisdictions: Mogensky v. Mogensky, 212 Ark. 28, 204 S.W.2d 782 (1947)(in which the parties' divorce was granted because their separation occurred before the husband's induction into the army); Gardner v. Gardner, 125 So. 2d 463 (La. Ct. App. 1960)(divorce was permissible when the husband's military departure was independent and coincident of the parties' marital separation as defined by statute); Benson v. Benson, 66 Nev. 94, 204 P.2d 316 (1949)(three-year separation period required by statute for a divorce was not interrupted by the husband's six-month service in the armed forces). 282 S.C. at 129, 317 S.E.2d at 474.

\textsuperscript{141} 282 S.C. at 129, 317 S.E.2d at 474.

\textsuperscript{142} See Noletti v. Noletti, 243 S.C. 20, 132 S.E.2d 11 (1963)(wife was not entitled to commence a divorce action when husband deserted her for only one month and not twelve months as required by statute). 282 S.C. at 129, 317 S.E.2d at 474.

\textsuperscript{143} 282 S.C. at 129, 317 S.E.2d at 474.

\textsuperscript{144} Id.

\textsuperscript{145} Brief of Appellant at 9.
court emphasized that statutes are presumed to be constitutionally valid unless a clear showing to the contrary is made.\textsuperscript{146} Mr. Niemann failed to make a showing that the no-fault divorce provision was unconstitutional.\textsuperscript{147}

\textit{Bonnie M. Weisman}

VIII. BUSINESS ASSETS AND EQUITABLE DISTRIBUTION

A. Business Assets Must Be Considered in the Distribution

In \textit{Tucker v. Tucker}\textsuperscript{148} the South Carolina Court of Appeals reversed the trial court's equitable distribution of the marital home because of its failure to consider business assets in making an equitable distribution of the marital property and remanded for redetermination the issue of equitable distribution as it relates to the business and marital home.\textsuperscript{149}

This case came before the court on appeal from an order of the family court that granted the appellant, Mrs. Tucker, a divorce on the ground of adultery, denied her alimony,\textsuperscript{150} divided the marital property, and awarded her attorney's fees.\textsuperscript{151} The central issue in this case concerned the division of business property, specifically the failure of the trial court to consider as marital property the assets represented by a private security company founded by the husband in 1972, of which the husband owned 85\% of the stock and the wife owned none.\textsuperscript{152}

The court of appeals repeated its dictum in the recent case


\textsuperscript{147} 282 S.C. at 129, 317 S.E.2d at 474.


\textsuperscript{149} Id. at 265, 317 S.E.2d at 765.

\textsuperscript{150} Id. at 262, 317 S.E.2d at 765. The court affirmed the denial of alimony, stating that the trial court had not abused its discretion since it properly considered various factors such as duration of the marriage and income of the parties, and particularly since it awarded the wife exclusive possession of the marital home for three years and the decree expressly reserved the wife's right to future alimony. \textit{Id.} at 264, 317 S.E.2d at 765.

\textsuperscript{151} Id. at 262, 317 S.E.2d at 765. The trial court's award of $750 for attorney's fees was reversed on appeal and remanded for specific findings of fact and redetermination. The court of appeals based this decision upon the failure of the trial court to set attorney's fees and upon its clear misinterpretation of counsel's affidavit. \textit{Id.} at 267, 317 S.E.2d at 768.

\textsuperscript{152} Id. at 265, 317 S.E.2d at 767.
of Reid v. Reid\textsuperscript{153} that "a spouse need not prove that he or she made a material contribution toward the acquisition of particular property in order to be entitled to an equitable interest in it."\textsuperscript{164} The facts of this case, however, like those in Reid, demonstrate that Mrs. Tucker did contribute to the husband's business by answering radio and telephone calls, typing and duplicating documents, preparing work reports, and running errands, all without compensation. Further, Mrs. Tucker lent the company \$700, which remained unpaid.\textsuperscript{165} Citing the Reid dictum and apparently deeming her entitled to receive an equitable interest in the business because of her material contribution, the court reversed the trial court's equitable distribution of the marital home for its failure to consider the business property.

The court of appeals also found error in the trial court's holding that the business had "no appreciable market value since it depends entirely upon [the husband's] own skill and good health for its operation."\textsuperscript{166} The court stressed that the trial court must determine the market value of the corporate property as an established and continuing business, considering "its 'net asset value, the fair market value of its stock, and its earnings or investment value.'"\textsuperscript{167}

The court of appeals remanded the case and directed that "the trial court, in addition to determining whether the wife [was] entitled to an equitable interest in the husband's business and, if so, the amount of that interest, [should] determine the value of the business property and of the husband's interest therein and [should] decide upon the method by which to distribute to the wife or to compensate her for any interest it determines the wife should have in the business property."\textsuperscript{168}

\textsuperscript{153} 280 S.C. 367, 312 S.E.2d 724 (Ct. App. 1984).
\textsuperscript{154} 282 S.C. at 265, 317 S.E.2d at 767 (quoting Reid, 280 S.C. at 376, 312 S.E.2d at 729). This language seems to contradict an earlier case, Baker v. Baker, 276 S.C. 427, 279 S.E.2d 601 (1981), in which the court stated that "[t]he right of a wife to claim a special equitable interest in property accumulated during marriage is based upon her showing that she has materially contributed through finances or personal services to the husband's business or acquisition of property" and that "this special equity should be warranted only where there exist special facts and circumstances in favor of one party above and beyond the normal marital obligations." Id. at 430, 279 S.E.2d at 602.
\textsuperscript{155} 282 S.C. at 265, 317 S.E.2d at 767.
\textsuperscript{156} Id. at 266, 317 S.E.2d at 767.
\textsuperscript{157} Id. (quoting Reid, 280 S.C. at 373, 312 S.E.2d at 727).
\textsuperscript{158} 282 S.C. at 266, 317 S.E.2d at 767. The court cited Hussey v. Hussey, 280 S.C.
In conclusion, Tucker considered the issue of material contribution as it affects equitable interest. Although listing ways in which Mrs. Tucker had contributed to her husband’s business, the court nonetheless repeated language from Reid stating that a spouse need not have contributed materially toward the acquisition of particular property to be entitled to an equitable interest therein. Reid and Tucker, therefore, seem to mark a departure from the Baker v. Baker holding that “special” material contributions must be shown before a wife can claim an equitable interest in her husband’s property. Nevertheless, since Reid and Tucker both discuss actual contributions by the wives, it would be prudent for South Carolina practitioners to demonstrate such contributions whenever possible; practitioners should rely on the dictum that material contributions are not necessary only if the client made no contributions.

B. Valuation of Business Assets

In Reid v. Reid the South Carolina Court of Appeals held that the valuation of property for dividing marital assets must be supported by evidence in the record if it is to withstand review. The court stressed that “[i]n any equitable distribution of marital assets, the family court not only must identify the property that constitutes the marital estate, but must also determine the fair market value of the particular property.”

The major issue was the trial judge’s consideration of Reid Office Supply’s assets in the division of the marital estate after

418, 312 S.E.2d 267 (Ct. App. 1984), apparently adopting the three-step procedure established there for dividing marital property. Id. at 424, 312 S.E.2d at 271 (citations omitted). For a discussion of Hussey, see infra text accompanying notes 228-49. The Hussey test was promulgated for consideration of the husband’s inherited property, but Tucker demonstrated that this three-part procedure is not limited to that situation.

159. 276 S.C. at 430, 279 S.E.2d at 602.

160. The Baker requirement of “special” contributions had been further eroded, however, in Parrott v. Parrott, 278 S.C. 60, 292 S.E.2d 182 (1982). In Parrott, the supreme court recognized a new exception to the “title theory” of property division upon divorce, holding that a spouse may be entitled to equitable division of property for homemaker services rendered during a long marriage, when the homemaker spouse has foregone career opportunities. Id. at 63, 292 S.E.2d at 184. Prior to Parrott only two exceptions had been recognized: resulting trust and special equity.


162. Id. at 372, 312 S.E.2d at 727.

163. Id.
preserving the husband’s virtually complete ownership of the company.\textsuperscript{164} The court stated, as dictum, that a spouse need not prove that he or she made a material contribution toward the acquisition of particular property in order to be entitled to assert an equitable interest therein.\textsuperscript{165} This dictum is in accord with the recent case of \textit{Parrott v. Parrott},\textsuperscript{166} in which the South Carolina Supreme Court stated that when a spouse has foregone career opportunities to provide homemaking services to the family, the spouse “shall have upon divorce an equitable interest in real property acquired by the wage-earner spouse during the marriage.”\textsuperscript{167} \textit{Reid} and \textit{Parrott} appear to contradict the prior decision in \textit{Baker v. Baker},\textsuperscript{168} which stated that “[t]he right of a wife to claim a special equitable interest in property accumulated during marriage is based upon her showing that she has materially contributed through finances or personal services to the husband’s business or acquisition of property” and that “this ‘special equitable interest’ shall be warranted only where there exist special facts and circumstances in favor of one party above and beyond the normal marital obligations.”\textsuperscript{169} Finding that Mrs. Reid had aided in the growth and enhanced the value of the company,\textsuperscript{170} the court of appeals affirmed the trial judge to the extent that he considered the business assets in apportioning the marital property.\textsuperscript{171}

In discussing the proper valuation of the business, the court reaffirmed prior South Carolina case law by stating that “[w]hen valuing business interests for the purpose of equitable distribution, the family court should determine ‘the fair market value of the corporate property as an established and going business’... ‘by considering the business’ net asset value, the fair market

\textsuperscript{164} Id. at 376, 312 S.E.2d at 729. The husband owned all but one share of the company’s stock; the wife owned the remaining share. Id.

\textsuperscript{165} Id.

\textsuperscript{166} 278 S.C. 60, 292 S.E.2d 182 (1982).

\textsuperscript{167} Id. at 63, 292 S.E.2d at 184.


\textsuperscript{169} Id. at 430, 279 S.E.2d at 602.

\textsuperscript{170} 280 S.C. at 376, 312 S.E.2d at 729. She provided secretarial and bookkeeping services to the company, entertained customers, attended business meetings and conventions, took part in civic activities, and assisted with the installation of a computer system to aid the company. At no time, however, did she ever receive a salary.

\textsuperscript{171} Id. at 377, 312 S.E.2d at 729.
value for its stock, and earnings or investment value.’” The court remanded this issue for further determination, holding that the trial judge’s valuation of Reid Office Supply lacked evidence to support it and was incorrectly based upon the book or depreciated value of the fixed assets, rather than upon their fair market value.

In reviewing the trial judge’s valuation of nonbusiness real property, the court clarified prior law regarding the admissibility of an offer to sell property as evidence of value. The court stated that although a bona fide offer to sell land at a certain price does not usually establish the land’s value, a bona fide offer to sell at a given price, if in the nature of an admission, may indeed constitute evidence of value as against the owner. Thus, the court held that the appellant’s offer to sell the land at $3000 per acre was a bona fide offer in the nature of an admission and upheld the trial judge’s valuation of the land at $2700 per acre.

The court also reviewed the trial judge’s equal distribution of property purchased in part with money inherited by the husband. Following the dictates of the recent case of Hussey v. Hussey, the court remanded this issue to the trial court to de-

172. Id. at 373, 312 S.E.2d at 727 (quoting Santee Oil Co. v. Cox, 265 S.C. 270, 274, 217 S.E.2d 789, 791 (1975); Chastain, Henry & Woodside, Determination of Property Rights Upon Divorce in South Carolina: An Exploration and Recommendation, 33 S.C.L. Rev. 227, 246 (1981)). The court defined “fair market value” as “the amount of money which a purchaser willing but not obligated to buy the property would pay an owner willing but not obligated to sell it, taking into account all uses to which the property is adapted and might in reason be applied.” 280 S.C. at 373, 312 S.E.2d at 727.

173. 280 S.C. at 343, 312 S.E.2d at 727.

174. Id. at 374, 312 S.E.2d at 728 (citing 31A C.J.S. Evidence § 182(3)(1964); Humble Oil & Refining Co. v. DeLoache, 297 F. Supp. 647 (D.S.C. 1969)). The Humble Oil court stressed that offers to sell “are admissible against the owner but not, as in this case, in favor of the owner, as evidence of value.” 297 F. Supp. at 655.

175. 280 S.C. at 374, 312 S.E.2d at 728. The court distinguished the owner’s testimony that he would not sell a houseboat for less than a certain amount, stating that such testimony does not constitute a bona fide offer to sell. Thus, such statements may not be considered as admissions of an asset’s value. Id. at 374-75, 312 S.E.2d at 728.

176. Id. at 375-76, 312 S.E.2d at 728-29.

177. 280 S.C. 418, 312 S.E.2d 267 (Ct. App. 1984)(inherited property is generally not a marital asset, but this nonmarital character may be lost if the property “becomes so commingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such manner as to evidence an intent by the parties to make it marital property.”) For a discussion of Hussey, see infra text accompanying notes 228-49.
termine whether the inherited funds in question were used to acquire property and, if so, whether the inherited funds retained their nonmarital character.\textsuperscript{178}

The court also discussed the criteria that a family court should consider in determining whether to order a divorced parent to assist a child over eighteen years of age with educational expenses. The court reaffirmed \textit{Risinger v. Risinger},\textsuperscript{179} which enumerated four criteria to be employed in this determination.\textsuperscript{180} The \textit{Reid} court remanded this issue "for findings of fact as to whether the daughter would benefit from a college education and as to whether she could attend college without her father's support."\textsuperscript{181} The court thus demonstrated that mere consideration of the child's ability to do well and the parent's financial ability to help pay for such education is not sufficient; rather, the court suggested that all four criteria must be addressed.\textsuperscript{182}

The final issue in this appeal concerned the husband's assertion that the award of attorney's fees was improper because the wife was not in financial need and because the court ordered that the fees be paid directly to the wife's attorney. The court stated that an award of attorney's fees is unrelated to the ability of the wife to pay them.\textsuperscript{183} Citing \textit{Louthian and Merritt, P.A. v. Davis},\textsuperscript{184} the court found that the trial court had committed er-

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\textsuperscript{178} 280 S.C. at 376, 312 S.E.2d at 729.
\textsuperscript{179} 273 S.C. 36, 253 S.E.2d 652 (1979).
\textsuperscript{180} In \textit{Risinger} the court of appeals enumerated the following criteria:
(1) the characteristics of the child indicate that he or she will benefit from college; (2) the child demonstrates the ability to do well, or at least make satisfactory grades; (3) the child cannot otherwise go to school; and (4) the parent has the financial ability to help pay for such an education.
\textit{Id.} at 39, 253 S.E.2d at 653-54.
\textsuperscript{181} 280 S.C. at 372, 312 S.E.2d at 726.
\textsuperscript{182} \textit{Id.} at 371-72, 312 S.E.2d at 726.
\textsuperscript{183} \textit{Id.} at 377, 312 S.E.2d at 729 (citing \textit{Darden v. Witham}, 263 S.C. 183, 191, 209 S.E.2d 42, 45 (1974)).
\textsuperscript{184} 272 S.C. 330, 251 S.E.2d 757 (1979). Expressly overruling \textit{Darden v. Witham}, 263 S.C. 183, 209 S.E.2d 42 (1974), the \textit{Louthian} court stated that a claim for attorney's fees is purely personal and, therefore, they must be paid directly to the litigant. The legislature subsequently enacted § 20-3-145 of the South Carolina Code, in an apparent attempt to offset the effect of \textit{Louthian} and ensure that attorneys are paid. See \textit{Domestic Relations, Annual Survey of South Carolina Law}, 32 S.C.L. Rev. 105, 112 (1980). Section 20-3-145 provides:

\textit{In any divorce action any attorney fee awarded by the court shall constitute a lien on any property owned by the person ordered to pay the attorney
ror in awarding attorney’s fees directly to the wife’s attorney. The court went on, however, to find that this was not reversible error because no prejudice to the husband had been shown.\textsuperscript{185} The court thus suggested that only a showing of actual prejudice will trigger the rule of \textit{Louthian} disallowing an award of attorney’s fees directly to the attorney.

\textit{Reid} significantly clarified several recent South Carolina domestic law decisions. The decision followed prior case law in finding that contribution by a wife toward the acquisition of specific property is not a prerequisite to the assertion of an equitable interest in the property. This case also demonstrated the need for practitioners to present evidence of the fair market value of property in a divorce proceeding. Furthermore, the opinion repeated the \textit{Hussey} holding that before inherited property can be distributed, the noninheriting spouse must show that it has lost its nonmarital character. \textit{Reid} also demonstrated that each of the four criteria cited in \textit{Risinger} must be considered in determining whether to order a parent to pay college expenses for a child. Finally, \textit{Reid} reconciles seemingly divergent law regarding attorney’s fees by indicating that prejudice to the complaining party must be shown to necessitate reversal based on the award of attorney’s fees directly to the attorney.

\textit{Mary Woodson Poag}

IX. \textbf{OPPORTUNITY FOR CROSS-EXAMINATION OF GUARDIAN AD LITEM REQUIRED IN CHILD CUSTODY PROCEEDINGS}

As the United States Supreme Court directed, “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”\textsuperscript{186} The South Carolina Court of Appeals, in \textit{Collins v. Collins},\textsuperscript{187} faced a novel due process issue:

\begin{quote}
fee and such attorney fee shall be paid to the estate of the person entitled to receive it under the order if such person dies during the pending of the divorce action.
\end{quote}


\textsuperscript{185} This finding may have been an attempt to reconcile the divergent views discussed \textit{supra} note 184.


\textsuperscript{187} 283 S.C. 526, 324 S.E.2d 82 (Ct. App. 1984).
“whether a party to a child custody proceeding has the right to cross-examine the guardian *ad litem* whose report the court considers in its decision on custody . . . .”188 The court held that “where the report contains statements of fact, the litigants are entitled to cross-examine the guardian *ad litem* and any witnesses whose testimony formed the basis of the guardian’s recommendation.”189 The court further concluded that a litigant in a child custody proceeding has a right to a copy of the guardian’s report, including the recommendation for custody of the child.190 Finally, the court stated that the family court judge’s failure to make the report available to the litigants or to permit proper cross-examination was reversible error unless the litigants had waived their right to cross-examination or, under the circumstances, the denial of the right was harmless error.191 With this decision, South Carolina joins the majority of jurisdictions, which allow cross-examination in child custody proceedings.192

In Collins the husband initiated a custody action after his wife and child moved out of the marital residence. The wife counterclaimed, *inter alia*,193 for custody of the seven-year-old daughter. The court appointed a guardian *ad litem* for the child. The wife then filed a supplemental answer counterclaiming for a divorce, which was granted. The husband, however, was awarded custody of the child.194

188. *Id.* at 529, 324 S.E.2d at 84.
189. *Id.* at 530, 324 S.E.2d at 85.
190. *Id.*
191. *Id.*

193. Although Ms. Collins also counterclaimed for alimony, child support, attorney’s fees, and an equitable division of the marital property, the order denied her request for alimony and attorney’s fees. 283 S.C. at 527-28, 324 S.E.2d at 83.
194. *Id.*
On appeal the wife’s primary contention was that the family court’s in camera receipt of the guardian ad litem’s recommendation denied her due process of law. The court of appeals implicitly agreed, reasoning that the ends of justice are better served by permitting cross-examination of a guardian ad litem. The court concluded, however, that upon the facts of this case, the in camera receipt of the guardian’s report was harmless error. The court stated that based on a preponderance of the evidence, the husband should have been awarded custody of the child, even without the guardian ad litem’s report. Consequently, the family court’s order regarding custody was affirmed.

Although the court ostensibly agreed with Ms. Collins’ due process argument, the opinion did not address the specifics of her contention. The report, considered by the family court in reaching its decision, clearly recommended that the husband be given custody of the child. Moreover, both parties conceded in oral argument that the report was not introduced in court and

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195. She also contended that (1) the award of custody was against the weight of the evidence; (2) the fee awarded the guardian was excessive; (3) the denial of alimony and attorney’s fees was not supported by the evidence and amounted to an abuse of discretion; and (4) the equitable distribution of less than one-half of the marital home to her was not supported by the evidence. Id. at 528, 324 S.E.2d at 83-84.

196. There is no evidence in the record of any findings by the guardian ad litem other than the recommendation that custody be awarded to the father. Id. at 529, 324 S.E.2d at 84.

197. Id. at 530, 324 S.E.2d at 85. The court noted that the majority of jurisdictions hold that “the litigants are entitled to know and have an opportunity to rebut the factual bases upon which the guardian or investigator makes his recommendation.” Id.

198. Id. at 530, 324 S.E.2d at 85.

199. Id. Apparently the trial court’s preponderance of the evidence consisted of the following: (1) the young wife’s primary present interests were her social and career endeavors; (2) her jobs as disc jockey and dance instructor frequently caused her to be away from home at night; (3) the child had been left with different persons on occasion, sometimes overnight and without the prior approval of the person keeping the child; (4) the husband, on the other hand, was at home at night; (5) he was a settled and mature person; (6) he possessed strong moral values; and (7) he spent time with the child and was willing to accept the responsibility of her upbringing. The court of appeals did, however, state that it was not “detailing all the evidence.” Based upon this review of the evidence, the court unhesitatingly accepted the lower court’s findings, citing the universal rule that great deference must be given the trial judge, who is in a better position to observe the witnesses and to judge their demeanor and veracity. Id. at 528-29, 324 S.E.2d at 84.

200. The case was remanded solely for a redetermination of the guardian’s fee of $638. Id. at 528, 324 S.E.2d at 85.

201. Id. at 529, 324 S.E.2d at 84.
that they were aware neither of its existence nor of its filing with the court.\textsuperscript{202} Ms. Collins, therefore, was not afforded an opportunity to rebut through cross-examination any of the factual findings contained in the report. As a result, she was deprived of the custodial rights she had previously enjoyed.

The United States Supreme Court has articulated a definition of harmless error: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the [decision]."\textsuperscript{203} Since there is clearly a reasonable possibility that the guardian \textit{ad litem}'s report influenced the trial judge, the denial of the report to Ms. Collins did not amount to harmless error under this standard.

In a similar situation the Illinois Court of Appeals emphatically stated that "the use of outside investigations and confidential reports contravenes the American ideal of due process of law" and constitutes reversible error.\textsuperscript{204} In fact, a majority of states have held that a court's custody order should rest upon evidence presented in open court in observance of due process requirements.\textsuperscript{205} One commentator summarized this rule as follows: "Judicial consideration of . . . reports which have not been admitted in evidence or otherwise disclosed to the parties is universally held erroneous, reflecting the general rule that on factual questions not subject to judicial notice a tribunal may not consider material which is unknown to the parties."\textsuperscript{206}

In \textit{Malone v. Malone}\textsuperscript{207} the Supreme Court of Oklahoma declared, "There is no back door to the courts for witnesses, investigators, or litigants."\textsuperscript{208} The court explained, "An investigator stands in no better position than an ordinary witness, and must be available for complete cross-examination on any matter

\textsuperscript{202} Id.
\textsuperscript{205} Malone v. Malone, 591 P.2d 296, 297 (Okla. 1979); \textit{see also} Annot., 35 A.L.R.2d 612 (1954).
\textsuperscript{207} 591 P.2d 296 (Okla. 1979). This was also a case of first impression.
which he may report to the judge." Logic and fairness dictate that the litigants have the opportunity to cross-examine the guardian on any matter contained in the report since no method exists for determining the report's influence on the family court judge. Thus, if the ends of justice are truly to be served, a litigant should be afforded the opportunity to "test the credibility of the investigator through cross-examination and confrontation, and to meet or answer every adverse fact or inference included [in the report]." This right should exist whenever a custody report is filed with the family court. Due process requires that a litigant be granted the opportunity to challenge, explain, and rebut the factual materials a court uses to reach its decision. Clearly, Ms. Collins was denied this opportunity.

Anthony Todd Brown

X. Bodily Injury Not Required for Finding of "Physical Cruelty"

In Gibson v. Gibson212 the South Carolina Court of Appeals held that it was not necessary for a spouse to prove actual bodily injury in a divorce action based on physical cruelty if (1) the act of violence actually endangered the spouse's life, or (2) the act manifested an intention to cause serious bodily harm, or (3) the act raised a reasonable apprehension of future bodily harm. This decision established a new interpretation of physical cruelty to be applied in South Carolina domestic law.

The Gibsons were married in 1958. In June 1981, following an argument that ended with the husband requesting a divorce, the wife moved out of the marital home. She returned several days later "in a heavily intoxicated condition."213 After arguing with her husband, the wife went into the bedroom, locked the

210. 591 P.2d at 299. The Malone court encouraged the use of custody reports, but warned that care should be taken to give fair notice of their content to the parties in the action. Id.
213. Id. at 322, 322 S.E.2d at 682.
door, and shot through the door sixteen times with a .22 caliber rifle. The husband claimed he was struck on his face by a small splinter when the wife fired the first shot. The wife claimed the husband was not outside the door when she began shooting.\(^{214}\) The wife brought an action for separate maintenance, equitable distribution, and attorney's fees. The husband counterclaimed and requested a divorce on the ground of physical cruelty. The family court granted the wife separate maintenance and denied the husband a divorce.\(^{215}\) The court of appeals reversed and remanded to family court.\(^{216}\)

The court of appeals found that physical cruelty had been judicially defined as "'actual personal violence, or such a course of physical treatment as endangers life, limb, or health, and renders cohabitation unsafe.' "\(^{217}\) The court further found that physical cruelty is to be determined on a case by case basis\(^{218}\) and that a single act of physical cruelty does not provide a ground for divorce unless the act "'is so severe and atrocious as to endanger life, or unless the act indicates an intention to do serious bodily harm or causes reasonable apprehension of serious danger in the future.' "\(^{219}\) The family court had held that the wife's conduct of discharging the gun did not constitute physical cruelty toward the husband because he did not sustain bodily injury.\(^{220}\)

The court of appeals noted that no South Carolina case directly addressed whether it was necessary for a spouse to prove 

\(^{214}\) Id. Later that morning the wife set fire to the house. She was hospitalized and placed under psychiatric care. Id.

\(^{215}\) Id. at 321, 322 S.E.2d at 682.

\(^{216}\) Id. The court listed seven factors for the family court to consider when determining whether the wife was entitled to alimony or separate maintenance. Id. at 324-25, 322 S.E.2d at 684.

\(^{217}\) Id. at 322, 322 S.E.2d at 682 (quoting Brown v. Brown, 215 S.C. 502, 506, 56 S.E.2d 330, 333 (1949)(the husband's act of slapping the wife twice and pinching her was not sufficient to sustain charge of physical cruelty because it was not atrocious)).

\(^{218}\) 283 S.C. at 322, 322 S.E.2d at 682. See Crowder v. Crowder, 246 S.C. 299, 143 S.E.2d 589 (1965)(wife's testimony that her husband kicked her in the stomach when she was pregnant, hit her on several occasions, and tried to choke her was not sufficient evidence for finding physical cruelty).

\(^{219}\) 283 S.C. at 322, 322 S.E.2d at 682 (quoting Smith v. Smith, 253 S.C. 350, 354, 170 S.E.2d 656, 652 (1969)(when the only proven act of physical cruelty was one instance of the husband hitting the wife with a belt, the case was remanded to the lower court to determine findings on this incident)).

\(^{220}\) 283 S.C. at 322, 322 S.E.2d at 683.
that he or she suffered bodily injury when a divorce is sought on the ground of physical cruelty.221 Case law, however, provided that a court may consider both the nature of the act and its physical effect on the other spouse.222 Thus, the court held that "if the wrongful act involves actual violence directed by one spouse at the other, "'bodily injury'" is not required to find "'physical cruelty.'"223 Further, a single assault may constitute a ground for divorce if the assault is life threatening or is indicative of an intention to do serious bodily harm or if it raises a reasonable fear of great bodily harm in the future.224

The court examined the facts in Gibson and declared that the wife's discharge of the firearm constituted actual violence. It was not clear, however, whether "the wife's single act of violence actually endangered the husband's life or whether the act manifested an intention on her part to cause the husband serious bodily harm or constituted a reasonable basis for believing the husband might later be seriously hurt.225 Therefore, the case was remanded to the family court, which had the benefit of the findings of fact and had evaluated the parties' credibility regarding the shooting incident.226

The court did not define how severe or atrocious the act of violence must be before a divorce can be granted on the ground of physical cruelty. Justice Shaw pointed out in a concurring and

221. Id. at 323, 322 S.E.2d at 683.
222. Id. See, e.g., Vickers v. Vickers, 255 S.C. 25, 176 S.E.2d 561 (1970)(wife's refusal to engage in sexual relations was not physical cruelty because there was no personal violence or physical treatment endangering husband's life); Brown v. Brown, 250 S.C. 114, 156 S.E.2d 641 (1967)(wife was not guilty of physical cruelty when she struck her husband because he suffered only slight facial scratches and, being a hefty man, was not put in fear for his safety.)
223. 283 S.C. at 323, 322 S.E.2d at 683.
224. Id. at 323, 322 S.E.2d at 683 (citing Gill v. Gill, 269 S.C. 337, 237 S.E.2d 382 (1977)(husband not granted a divorce on the ground of physical cruelty since he was not afraid when his wife threatened him with a BB gun); McKenzie v. McKenzie, 254 S.C. 372, 175 S.E.2d 628 (1970)(a single act of physical cruelty held so atrocious and severe as to endanger life when wife, without provocation, shot husband at close range, and a bullet entered his chest); DeMott v. DeMott, 198 Va. 22, 92 S.E.2d 342 (1956)(a single incident of battery when husband threw wife against wall held not to be ground for divorce)).
225. 283 S.C. at 324, 322 S.E.2d at 683.
226. Id., 322 S.E.2d at 683-84. Although the court of appeals has jurisdiction in a divorce action to find facts in accordance with its own view of the preponderance of the evidence, the case was remanded because the record had "grown cold" and the family court had the benefit of the findings of fact. Id.
dissenting opinion that "the firing of a gun sixteen times by one spouse toward another is sufficient to place the bravest of persons in fear of his life." It is possible, however, that the evidence regarding the shooting incident was contested in family court and the remand by the court of appeals was no reflection on its opinion on the severity of the act.

Bonnie M. Weisman

XI. INHERITED PROPERTY IS NOT MARITAL PROPERTY

In Hussey v. Hussey228 the South Carolina Court of Appeals held that "any property inherited by a spouse, and any property acquired in exchange for such inherited property, is not 'property of the marriage.'"229 The court further held that "though inherited property is not marital property subject to equitable distribution, it may properly be considered as a factor in determining what constitutes an equitable division of the marital property."230 By adopting these rules, South Carolina joins other equitable distribution states that generally exclude inherited property from the parties' marital estate.231

The dispute in Hussey concerned the consideration of Mr. Hussey's inheritances in the equitable distribution of the marital property. In 1966, prior to the marriage, Mr. Hussey inherited from his mother over $50,000 worth of stock. During the marriage he inherited from his father a remainder interest in the

227. Id. at 326, 322 S.E.2d at 684.
229. Id. at 422, 312 S.E.2d at 270. "Property of the marriage" is synonymous with marital property, and equitable distribution has been limited impliedly to include the following types of marital property: "business interests, the marital home and its furnishings, stocks and a savings account, automobiles, a summer cottage, and life insurance policies." Chastain, Henry & Woodside, Determination of Property Rights Upon Divorce in South Carolina: An Exploration and Recommendation, 33 S.C.L. Rev. 227, 244-45 (1981)(citations omitted).
230. 280 S.C. at 423, 312 S.E.2d at 271. Although this holding supported the trial judge's decision on the issue of equitable distribution, the case was reversed and remanded for failure to comply with S.C. FAMILY CT. R. 27(C)(1976), requiring that findings of fact and conclusions of law be set forth in the order. The court noted that the record did not adequately reveal what part of the inherited property was separate property. 280 S.C. at 424, 312 S.E.2d at 271.
corpus of a trust fund worth at least $130,000.\textsuperscript{232}

In September 1979 Mr. Hussey sold the majority of the stock and purchased ninety gold coins with the sale proceeds. Subsequently, he purchased ten additional gold coins with the same proceeds. In the interim between these purchases he placed money from the sale of the stock in a joint account held with Mrs. Hussey. Mr. Hussey’s unsold stocks, however, were kept separate from the joint property. All the gold coins, worth approximately $84,150, were placed in a joint safety deposit box.\textsuperscript{233}

The family court judge found that Mr. Hussey’s inherited property was not “property of the marriage” subject to equitable distribution under section 14-21-1020 of the South Carolina Code.\textsuperscript{234} Rather, the court concluded that the inheritances were “a relevant consideration in effecting an equitable distribution of the marital property.”\textsuperscript{235} The court of appeals agreed, yet remanded the case for further findings of fact by the trial court.\textsuperscript{236}

The characterization of inherited property as property solely of the inheriting spouse or as marital property subject to equitable distribution had not been determined previously in this state. The court of appeals listed the following four reasons to support its holding that inherited property of a spouse, or any property acquired in exchange for inherited property, is not

\textsuperscript{232} 280 S.C. at 420, 312 S.E.2d at 269. Mr. Hussey’s interest was to follow his stepmother’s life estate. Id. at 421, 312 S.E.2d at 269. The parties disagreed on whether or not the remainder interest was vested. Brief of Respondent at 1; Brief of Appellant at 1. On appeal the court noted that if the remainder was not vested it could not be considered in the marital property division. Id. at 425, 312 S.E.2d at 271.

\textsuperscript{233} Id. at 420-21, 312 S.E.2d at 269.

\textsuperscript{234} S.C. Code Ann. § 14-21-1020 (1976) was repealed in 1981 and replaced by the following statute:
The family court shall have exclusive jurisdiction . . . to hear and determine actions . . . for divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in such actions in and to the real and personal property of the marriage . . ., if requested by either party in the pleadings.


\textsuperscript{235} 280 S.C. at 421, 312 S.E.2d at 269. Neither party contended that it was error for the trial judge to exclude the inheritances from the marital property. Appellant, however, argued that once the trial court determined that his inheritance was not subject to equitable distribution under § 14-21-1020, it should not have been considered at all. Brief of Appellant at 2.

\textsuperscript{236} See supra note 230.
“property of the marriage”: (1) “tradition has long accorded the inheriting spouse a separate and sole interest in that spouse’s inherited property”;237 (2) “a substantial majority of states exclude inherited property from the marital property of the parties”;238 (3) “the South Carolina Supreme Court, relying on special equity principles, has established certain parameters within which spousal property may be divided”;239 and (4) “the inclusion of inherited property in the marital estate subjects it to being removed from the natural line of succession, thus thwarting the desire of the persons who acquired it and passed it on to the spouse in possession. At the same time, the spouse who made no contribution toward acquisition of the property benefits from the windfall award.”240 Since inherited property is not characterized as marital property, the court held that it is not subject to equitable distribution pursuant to the statute.241

Despite its holding that inherited property is separate property, the court nevertheless warned:

[I]n certain instances, where the nonmarital character of inherited property is lost, it may be equitably divided. This may occur when the property becomes so commingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such manner as to evidence an intent by the parties to make it marital property.242

237. 280 S.C. at 422, 312 S.E.2d at 270 (citing Chastain, Henry & Woodside, supra note 229, at 229-30).
238. 280 S.C. at 422, 312 S.E.2d at 270 (citing I BAXTER, supra note 231, § 41:3(c) (detailing how various jurisdictions deal with the issue of inherited property and distribution of the marital estate)).
239. 280 S.C. at 423, 312 S.E.2d at 270 (citing Barden v. Barden, 278 S.C. 672, 301 S.E.2d 141 (1983)(title is not a significant determinant of whether property is marital or nonmarital); Parrot v. Parrot, 278 S.C. 69, 292 S.E.2d 182 (1982)(not all property brought into or acquired during the marriage by either party is marital property)). The Hussey court noted that the South Carolina Supreme Court “has implicitly held that marital property is that property of the parties which arises from or to some extent is augmented by the efforts of the marital parties.” 280 S.C. at 423, 312 S.E.2d at 270.
240. 280 S.C. at 423, 312 S.E.2d at 270.
241. Id. For text of statute, see supra note 234.
242. 280 S.C. at 423, 312 S.E.2d at 270. A leading case on commingled property is Klingberg v. Klingberg, 68 Ill. App. 3d 513, 386 N.E.2d 517 (1979). In that case the appellant had made several deposits of funds acquired prior to marriage into an account held jointly with the respondent. In adjudicating the parties’ claims to the funds upon divorce, the court held that “the failure to properly segregate nonmarital property by commingling it with marital property evinces an intent to have the former property
In addition, the court held that inherited property, though not marital property subject to equitable distribution, may be considered as a factor in determining an equitable division of the marital property.\textsuperscript{243} To support this holding, the court quoted a South Carolina Supreme Court decision, "it is always proper for the [family court] judge to take into consideration the debts of both of the parties as well as the properties of both of the parties in decreeing equitable distribution."\textsuperscript{244} The Hussey court thus added inherited property to a judicially devised list of criteria to be employed in determining the equitable division of property.\textsuperscript{245} Although the husband argued that consideration of his inherited property in the property division implicitly included this property in the distribution,\textsuperscript{246} the court did not address this contention, leaving distribution to the trial judge's
treated as part of the marital estate. Absent evidence to the contrary, . . . treating nonmarital property in this manner will result in its transmutation to marital property." *Id.* at 516-17, 386 N.E.2d at 520 (citations omitted). Some authorities addressing the issue have held that commingling of nonmarital with marital property creates a rebuttable presumption in favor of marital property. See *Jaeger v. Jaeger*, 547 S.W.2d 207, 211 (Mo. App. 1977); I. Baxter, *supra* note 231, § 41:3(f). No such language was articulated here. The Hussey court directed the trial court on remand to "examine whether placing the proceeds from the sale of the inherited stock and the gold coins purchased with such proceeds into a joint account transmuted the nonmarital property into marital property." 280 S.C. at 424-25, 312 S.E.2d at 271 (citing Clinkscales v. Clinkscales, 275 S.C. 308, 270 S.E.2d 715 (1980)). Since the inherited stock, which was unsold, never became marital property, the trial court could not order its transfer to the wife in lieu of cash in an equitable division. 280 S.C. at 424, 312 S.E.2d at 271.

243. *Id.* at 423, 312 S.E.2d at 271.

244. 280 S.C. at 423-24, 312 S.E.2d at 271 (quoting Levy v. Levy, 277 S.C. 576, 578, 291 S.E.2d 201, 202 (1982)). As further support for treating inherited property of one spouse as a factor in determining an equitable property division, the court cited a line of South Carolina cases holding that retirement pay, though not marital property subject to equitable distribution, may properly be considered in determining the amount of alimony. *Id.* at 424 n.2, 312 S.E.2d at 271 n.2 (citing Haynes v. Haynes, 279 S.C. 162, 303 S.E.2d 429 (1983); Carter v. Carter, 277 S.C. 277, 286 S.E.2d 139 (1982); Bugg v. Bugg, 277 S.C. 270, 286 S.E.2d 135 (1982)). In *Haynes* the court found a "gross abuse of discretion" in allowing the wife only $300 alimony per month, when the judge apparently based the award solely on earnings and did not consider the husband's military retirement pay. 279 S.C. at 164, 303 S.E.2d at 430.

245. These criteria include the following: material contribution (direct or indirect) to the acquisition of property; age, health, and physical condition of the parties; their station in life; future earning capacities; contributions to the acquisition of marital property; and conduct of the parties in bringing about the divorce. *See* Chastain, Henry & Woodside, *supra* note 229, at 242-44.

246. Brief of Appellant at 2.
discretion after consideration of each party's property.247

Finally, the court established the following three-step procedure for determining equitable distribution on remand:

(1) . . . determine the existence of and assign to each party his or her non-marital property; (2) determine the value of each item of marital property not already distributed; and (3) decide how division of the net marital property can be made most equitably, considering among other things, the debts and non-marital properties of each of the parties, the contributions of the parties, the effect of the award of alimony on the distribution and the effect, if any, marital fault is to have on the distribution of the marital property.248

Adoption of this three-step procedure aligns South Carolina with other leading jurisdictions.249

*Hussey v. Hussey* is a significant decision clearly setting forth the proper classification and role of inherited property in an equitable distribution. In holding that inherited property is not marital property, *Hussey* should reassure spouses that their separate inheritances will not be distributed automatically as part of an equitable distribution. The court cautioned, however, that spouses must keep their inherited property separate to prevent its being characterized as marital property. In determining that separate inheritances may be treated as a factor for consideration in property divisions, the court followed previous deci-

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247. 280 S.C. at 424, 312 S.E.2d at 271.
249. In Painter v. Painter, 65 N.J. 196, 210, 320 A.2d 484, 492 (1974), the New Jersey Supreme Court adopted thirteen specific criteria to be considered. New York has adopted ten specific criteria for consideration, and Pennsylvania has adopted ten relevant factors to be considered. I. Baxter, supra note 231, § 41:2(b). In Shaluly v. Shaluly, 284 S.C. 71, 325 S.E.2d 66 (1985), decided after *Hussey*, the South Carolina Supreme Court gave the following list of thirteen criteria to be examined in an equitable distribution: (1) ages, earning capabilities, and background of the parties; (2) duration of the marriage; (3) standard of living during the marriage; (4) money and property brought into the marriage; (5) income; (6) property acquired during marriage; (7) source of acquisition; (8) value and income-producing capacity of property; (9) debts and liabilities of the parties; (10) mental and physical health of the parties; (11) earning potentials (present and future); (12) effect of distribution on the ability to pay alimony; and (13) gifts to each other. Id. at 75, 325 S.E.2d at 68 (quoting Painter, 65 N.J. at 210, 320 A.2d at 492 (1974)).
sions allowing separate property to affect equitable distribution, even though that property is not included in the distribution. Finally, the court attempted to establish a three-part procedure for trial courts to employ in deciding equitable distribution upon divorce.

Anthony Todd Brown

XII. CHILD CUSTODY JURISDICTION SUBJECT TO FEDERAL STATUTE

In *Marks v. Marks*\(^{250}\) the South Carolina Court of Appeals held that the federal Parental Kidnapping Prevention Act of 1980\(^{251}\) bound the South Carolina family court to enforce a West Virginia child custody decree without modification. The court also held that the family court should have refused to consider a counterclaim for custody since the claimant had acted wrongfully in bringing the child to South Carolina in defiance of the West Virginia custody decree.

The father in *Marks* removed the child from West Virginia to South Carolina in violation of a West Virginia custody decree. The mother, a West Virginia resident, sued in South Carolina for enforcement of the West Virginia decree, and the father counterclaimed for permanent custody of the child. The family court awarded custody to the father based on changed circumstances. The mother appealed both the decree and her award of five hundred dollars for attorney's fees.

The court of appeals ruled first that the federal Parental Kidnapping Prevention Act preempted existing state law.\(^{252}\) The court then observed that because West Virginia was the child's home state when the mother initiated the original custody proceedings and West Virginia had jurisdiction in those proceedings under its own state law,\(^{253}\) the federal act required the South

\(^{253}\) Section 1738A(a) of the act provides: "The appropriate authorities of every state shall enforce according to its terms, and shall not modify . . . any child custody
Carolina courts to enforce the West Virginia decree without modification. A South Carolina family court could not modify the custody decree unless there were a showing that South Carolina, rather than West Virginia, had jurisdiction to determine custody. 254 The West Virginia court had noted in the divorce and custody decree that it would have continuing jurisdiction over the parties and the action. 256 Further, under West Virginia law the state retained jurisdiction over a child who was removed from the state. 258 Consequently, the South Carolina family court was bound to enforce the West Virginia decree without modification.

The court also held that the family court, in modifying the West Virginia decree, had abused its discretion and disregarded common-law principles. The court of appeals noted that jurisdiction should not be granted "where a party seeking custody attempts by his own wrongful act to wrest from a sister state a jurisdiction properly appertaining to it." 257 The court also observed that "where a change of custody is sought on the basis of changed circumstances, the changed circumstances required by the law cannot flow from the acts of a person who has improperly or in violation of a valid custody decree of a sister state removed the child to another jurisdiction." 258 The court concluded that "absent an emergency situation relating to the wel-

determination made consistently with the provisions of this section by a court of another state." 28 U.S.C. § 1738A(a)(1980). A determination is consistent with the federal act if (1) the court determining child custody has jurisdiction under the laws of its state and (2) that state is the home state of the child on the date the proceedings commence. 28 U.S.C. § 1738A(c)(1), (c)(2)(A)(i) (1980).

254. The South Carolina family court was prevented from modifying the West Virginia decree unless the conditions in subsection (f) of the federal act were satisfied. 28 U.S.C. § 1738A(a). Subsection (f) states:

A court of a State may modify a determination of the custody of the same child made by a court of another State, if —

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.


255. 281 S.C. at 322, 315 S.E.2d at 158.


257. 281 S.C. at 322, 315 S.E.2d at 161. The father brought the child to South Carolina "in defiance of a custody decree of a court of competent jurisdiction in a sister state." 281 S.C. at 323, 315 S.E.2d at 162.

258. 281 S.C. at 323, 315 S.E.2d at 161-62.
fare of the child and requiring its intervention, the family court should not have exercised jurisdiction."\(^{259}\) The evidence in this case, the court found, did not support a claim that an emergency existed.\(^{260}\) In addition, the father could have sought relief in the West Virginia courts on the ground of changed conditions.\(^{261}\)

Finally, the court addressed a claim by the mother that the family court abused its discretion in awarding inadequate attorney's fees. The court found that the trial judge made none of the findings required by prior case law in awarding attorney's fees\(^{262}\) and remanded the issue to the family court for redetermination.\(^{263}\)

The court's opinion is well-reasoned and thorough in its explanation of applicable law. Practitioners should be aware, however, of a potential conflict between the policies of the federal Kidnapping Prevention Act of 1980 and the Uniform Child Custody Jurisdiction Act.\(^{264}\) The Uniform Child Custody Jurisdiction Act emphasizes the best interest of the child in determination of jurisdiction,\(^{265}\) while the federal act grants jurisdictional priority to the child's home state.\(^{266}\) This distinction may re-

\(^{259}\) Id., 315 S.E.2d at 162.

\(^{260}\) The court of appeals noted:

Timothy may well have been unhappy with his mother in West Virginia, but there is little to suggest he was in serious danger of immediate harm if he remained with her. Since he passed the previous school year in her care and custody without apparent incident, it is difficult to tell how much his unhappiness during the summer vacation may have resulted from the persuasion and influence of the father.

\(^{261}\) Id. at 324, 315 S.E.2d at 162.

\(^{262}\) Id. at 323, 315 S.E.2d at 162.


\(^{264}\) 321 S.C. at 324-25, 315 S.E.2d at 162-63. The court of appeals directed the family court on remand to make appropriate awards of attorney's fees and expenses pursuant to S.C. CODE ANN. §§ 20-3-140, 20-7-798(c) (1976). Id.


\(^{266}\) See Id. § 20-7-788(a)(2).

quire courts to reconsider the jurisdictional question. Since this action, however, was commenced before the enactment of the Uniform Child Custody Jurisdiction Act and after the effective date of the Kidnapping Prevention Act, the court based its decision in Marks on the federal act and preexisting case law.

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