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DOMESTIC LAW

I. EQUITABLE DIVISION OF MARITAL PROPERTY

A. Division of Professional Degree

In *Helm v. Helm*[1] the South Carolina Supreme Court addressed for the first time the propriety of including a professional degree or license[2] in the property subject to division in a divorce. The court held that a professional degree was "a personal intellectual attainment"[3] and not subject to equitable distribution[4] under section 20-7-420 of the Code.[5]

Petitioner (the wife) and respondent (the husband) were married on June 21, 1975, in St. Louis, Missouri.[6] On July 23, 1982, the couple separated. Subsequently, the wife petitioned the family court for separate support and maintenance. In addition, the wife sought division of the marital property which, she asserted, included the husband's medical degree. The husband counterclaimed in an "Amended Answer" for divorce on the grounds of one year's separation.[7]

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1. 289 S.C. 169, 345 S.E.2d 720 (1986).

2. Although there is no basis for limiting the application of equitable distribution to professional degrees, the majority of the situations involve professional degrees in such areas as medicine, law, or business. *See* Note, *Family Law: Ought a Professional Degree Be Divisible Property Upon Divorce*, 22 WM. & MARY L. REV. 517, 518 n. 5 (1981).

3. 289 S.C. at 171, 345 S.E.2d at 721.

4. "Equitable distribution is a method of allocating property upon divorce based upon the concept that marriage is a partnership or shared enterprise. At the heart of this concept is the realization that both spouses contribute to the economic circumstances of a marriage . . . ." L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY § 1.01 (1983).

5. The pertinent part of this section defines the property subject to settlement as "the real and personal property of the marriage." S.C. CODE ANN. § 20-7-420(2) (Law. Co-op. 1985).

6. Record at 3.

7. 289 S.C. at 170, 345 S.E.2d at 720. In addition, the wife filed a "Supplemental Petition" which prayed for divorce on the grounds of one year's separation and for alimony rather than the separate support and maintenance. *Id.* at 170-71, 345 S.E. 2d at 720-21. The family court granted the husband's motion to strike this "Supplemental Petition" and denied the wife's motion to strike the husband's "Amended Answer." *Id.* at 171, 345 S.E.2d at 721. The South Carolina Supreme Court affirmed the family court's granting of the husband's motion, but reversed the family court's denial of the wife's

After a full hearing, the family court granted the husband's prayer for divorce and awarded the wife exclusive title to the marital residence, the automobile, certain household furnishings and a joint bank account,[8] but denied her request for alimony. Furthermore, the family court held the medical degree to be inappropriate for equitable distribution.[9] On appeal the supreme court determined that the pleadings were insufficient to support the husband's decree of divorce. The supreme court, however, affirmed the family court's refusal to subject the husband's medical degree to equitable apportionment.[10]

In refusing to divide the medical degree, the court cited general authority without discussion and failed to enumerate the parameters of its holding. Stating that the majority of jurisdictions consider a professional degree to be a "personal intellectual attainment,"[11] the court held the husband's medical degree was not marital property and, therefore, was not subject to equitable distribution. This decision reflects the court's reluctance to extend the "concept of property to include assets which were obtained by virtue of personal acumen."[12] Under this view, the professional degree would not be subject to equitable distribution because it cannot be characterized as possessing the usual attributes of property.[13]

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motion to strike the husband's "Amended Answer" and remanded the issue for further consideration. *Id.* at 172, 345 S.E.2d at 722.

8. *Id.* at 171, 345 S.E.2d at 721.

9. *Id.*

10. *Id.* at 173, 345 S.E.2d at 722.

11. *Id.* at 171, 345 S.E.2d at 721.

12. L. GOLDEN, *supra* note 4, at § 6.18.

13. The leading case supporting the exclusion of a professional degree from equitable distribution is *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978). In refusing to divide a masters degree, the Colorado Supreme Court stated as follows:

> An educational degree . . . is simply not encompassed even by the broad view of the concept of property. It does not have an exchange value or an objective transferable value on the open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of the term.

Id. at 432, 574 P.2d at 77; *accord*, Wisner v. Wisner, 129 Ariz. 333, 631 P.2d 115 (1981); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981).

Other jurisdictions have denied equitable division of professional degrees not only because of the classification problems, but also because of the difficulty in determining a definitive value for the degree. Some courts have used post-divorce earnings in determining the value of the degree,[14] but other jurisdictions consider this method to be overly speculative.[15]

The *Helm* court ignored authority in those jurisdictions which found a property interest to exist in a professional degree, education, or license. In *Daniels v. Daniels*[16] the Court of Appeals of Ohio held that the husband's medical education, "being in nature of a franchise, constitutes property which the trial court had a right to consider in making the award of alimony."[17] Applying similar reasoning, the New York Court of Appeals recently held a medical degree to be marital property.[18] This decision, however, can be attributed to the New York court's inter-

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14. *See In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982). The criticism relating to the division of post-divorce earnings of a spouse is based on the conflict between accepted procedure and the underlying premise of equitable distribution that only assets acquired during marriage are subject to division.

15. *See* DeWitt v. DeWitt, 98 Wis. 2d 44, 296 N.W.2d 761 (1980), describing the speculative nature of such a division as follows:

> [W]hether a professional education is and will be of future value to its recipient is a matter resting on factors which are at best difficult to anticipate or measure. A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a specialty, location or manner which generates less than the average income enjoyed by fellow professionals. The potential worth of the education may never be realized for these or many other reasons. An award based upon the prediction of the degree holder's success at the chosen field may bear no relationship to the reality he or she faces after divorce.

Id. at 58, 296 N.W.2d at 768.

16. 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961).

17. *Id.* at 459, 185 N.E.2d at 775. Based on the financial position of the parties at the time the decree of divorce was made, the court determined that the husband's medical degree was the principle asset of the marriage. Although the court recognized the importance of the husband's intelligence and ambition in obtaining the degree, the court still classified the medical degree as property. In *Daniels* the wife's father contributed substantially to the couple's living expenses and the husband's educational expenses. The court determined that such financial assistance made it possible for the husband to obtain his degree. Moreover, in defining the medical degree as a "franchise," the court held that the ability to practice medicine was a "right" that provided an increased opportunity for earning power. In Dworken v. Apartment House Owners' Ass'n, 38 Ohio App. 265, 176 N.E. 577 (1931), the court determined that this right was a franchise "with the attributes of property generally." *Id.* at 266, 176 N.E. at 578.

18. O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

pretation of marital property under the applicable law.[19] Alternatively, some jurisdictions have held that the future earnings generated from a professional degree develop into a marital asset subject to division.[20]

Although sound in its reasoning, the rule derived from the *Helm* decision will have inequitable results if applied in a per se manner. The inequity would be most evident when the divorce occurs soon after one spouse has obtained his or her professional degree, but has not yet established his or her career. In these situations the professional degree may constitute the sole asset of the couple's marriage.[21] Failure to make equitable division of the professional degree would leave the "non-degree-earning" spouse uncompensated for contributions made to the "degree-earning" spouse's education.[22] In *Helm* this unfairness was clearly present. During their marriage, from 1975 to 1982, the husband obtained a masters degree in biology and a medical degree, and completed his medical internship,[23] while his wife held various jobs, earned most of the couple's living expenses, and contributed to the husband's educational expenses.[24]

To prevent this inequity to the contributing spouse, other

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19. In interpreting the Equitable Distribution Law, the court stated as follows:

> [T]he New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law. . . . [O]ur statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition.

Id. at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746 (citation omitted).

20. A thorough and perceptive analysis of this reasoning can be found in Herring, *Divisibility of Advanced Degrees in North Carolina—An Examination And Proposal*, 15 N.C.C.L.J. 1, 11-13 (1985); *see also* L. GOLDEN, *supra* note 4, § G.20.

21. *See, e.g.*, 66 N.Y.2d 76, 489 N.E.2d 712, 498 N.Y.S.2d 743.

22. Herring, *Divisibility of Advanced Degrees and Equitable Distribution States*, 19 J. MARSHALL L. REV. 1, 9 (1985).

23. Brief of Appellant at 27.

24. *Id.* For the period from 1975 to 1981 the comparative incomes for the spouses were as follows:

	Wife	Husband
1975	2,561.76 (74%)	910.74 (26%)
1976	5,719.24 (89%)	737.83 (11%)
1977	9,183.00 (76%)	284.60 (24%)
1978	16,705.55 (92%)	1,433.94 (8%)
1979	15,502.00 (100%)	.00 (0%)
1980	16,530.00 (91%)	1,558.00 (9%)
1981	17,209.00 (65%)	9,209.00 (35%)

jurisdictions have established remedies outside the equitable distribution of a professional degree. These remedies have focused on equitable principles such as restitution and unjust enrichment rather than the applicable statutory or common-law solutions. In *Mahoney v. Mahoney*[25] the New Jersey Supreme Court refused to characterize the husband's professional degree as marital property. The court instead based its award on the "supporting spouse's shared expectation of future advantages."[26] This decision would be applicable specifically to situations similar to the one in *Helm* in which a "young professional who after being supported through graduate school leaves his mate for greener pastures."[27] As the court noted, "One spouse ought not to receive a divorce complaint when the other receives a diploma."[28] The doctrine of unjust enrichment also was applied in *Hubbard v. Hubbard*[29] to provide an award based on "equity and natural justice."[30] Regardless of the characterization given the professional degree, these decisions make clear that the inequity in a failure to divide a professional degree will continue to be an important issue.[31] The wife in *Helm* was denied equitable relief by the supreme court because the issue regarding such relief was not properly before the court on appeal.[32]

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25. 91 N.J. 488, 453 A.2d 527 (1982). In *Mahoney* the court determined that the supporting spouse should be reimbursed for the financial contributions made regardless of the classification of the professional degree. The court held as follows:

> [R]egardless of the appropriateness of permanent alimony or the presence or absence of marital property to be equitably distributed, there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training. Such reimbursement alimony should cover *all* financial contributions toward the former spouse's education, including household expenses, educational costs, school travel, expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.

Id. at 492, 453 A.2d at 534 (emphasis in original).

26. *Id.* at 500-01, 453 A.2d at 533-34.

27. *Id.* at 503, 453 A.2d at 535.

28. *Id.* (citing N.Y. Times, Nov 21, 1982, at 72, col.2).

29. 603 P.2d 747 (Okla. 1979).

30. *Id.* at 750.

31. Herring, *supra* note 20, at 7-11.

32. 289 S.C. at 172, 345 S.E.2d at 721. The court cited several examples: Inman v. Inman, 648 S.W.2d 847 (Ky. 1983) (the court, in dicta, refused to classify a professional degree as marital property, but noted that supporting spouse was entitled to compensation); Hubbard v. Hubbard, 603 P.2d at 751 (establishing an equitable remedy to the supporting spouse equal to "direct support in school and professional training expenses, plus reasonable interest and adjustments for inflation").

In *Helm* the supreme court's cursory opinion definitively excluded professional degrees from the equitable distribution of marital property because of the personal nature of the professional degree. The supreme court mentioned briefly that other possible equitable remedies may be available in similar situations. Because the court did not establish guidelines concerning qualifications for and application of alternate remedies, determination of the guiding principles will be left to future litigation for resolution.

Michael D. Carrouth

*B. Division of Business Goodwill**

In *Casey v. Casey*[33] the South Carolina Court of Appeals held that the asset value of the goodwill of a sole proprietorship is marital property subject to equitable division in a divorce action. This decision places South Carolina among the majority of jurisdictions that recognize that goodwill, though difficult to value, is a marital asset subject to division.[34]

The family court granted Joyce Casey a divorce in March 1981 on the grounds of continuous separation for one year. As a part of the division of the marital estate, the court awarded Mrs. Casey $10,500 which represented a 21% interest in the goodwill of Jim Casey's Fireworks,[35] a sole proprietorship owned by John Casey, the husband. Mr. Casey had acquired the business from

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* The South Carolina Supreme Court reversed the court of appeal's decision in *Casey v. Casey* but the court of appeal's opinion remains important for its analysis of the question. Casey v. Casey, No. 22783, Davis Adv. Sh. No. 29 (S.C. Oct. 12, 1987).

33. 289 S.C. 462, 346 S.E.2d 726 (Ct. App. 1986), *cert. granted in part and denied in part*, 291 S.C. 284, 353 S.E.2d 287 (1987).

34. *See* Heller v. Heller, 672 S.W.2d 945 (Ky. Ct. App. 1984) (goodwill in husband's accounting practice); Weaver v. Weaver, 72 N.C. App. 409, 324 S.E.2d 925 (1985) (partner's interest in accounting firm's goodwill); Jondahl v. Jondahl, 344 N.W.2d 63 (N.D. 1984) (goodwill of husband's solely owned tax service); *In re* Marriage of Hall, 103 Wash. 2d 236, 692 P.2d 175 (1984) (goodwill in medical practice); *see also* Rostel v. Rostel, 622 P.2d 429 (Alaska 1981); Golden v. Golden, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969); *In re* Marriage of Nichold, 43 Colo. App. 383, 606 P.2d 1314 (1979); *In re* Marriage of White, 98 Ill. App. 3d 380, 424 N.E.2d 421 (1981); Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (1983); Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975); Nastrom v. Nastrom, 262 N.W.2d 487 (N.D. 1978).

35. 289 S.C. at 465 n. 1, 346 S.E.2d at 728 n. 1. The court of appeals noted that it was interpreting the family court judge's award as an award of 21% of the business. Otherwise, there was no award of the value of the tangible assets of the business.

his father, its founder, in 1976.

The court of appeals affirmed the family court's ruling that the goodwill of a sole proprietorship may constitute a marital asset subject to division, but reversed and remanded the lower court's valuation of the goodwill. The court began its analysis by reaffirming the principle that findings regarding the equitable distribution of marital assets in South Carolina rest within the sound discretion of the family court judge.[36] The court also determined that the family court judge had applied correctly the factors to be considered in dividing the Casey's property,[37] but the court deemed the record inadequate to support the actual valuation of goodwill in Jim Casey's Fireworks. At trial an expert had testified that because the profits of the business far exceeded a reasonable sum to compensate Mr. Casey as manager, the business had a goodwill value in excess of the value of its fixtures and inventory. The expert testified that goodwill value may be ascertained by using a capitalization of earnings approach. While a capitalization factor of two and one-half times the net earnings of the fireworks business could be used to arrive at the value of goodwill, the expert had been unable to use this, or any other approach, because "the record [did] not contain sufficient data concerning the income and expenses of the business that would permit a determination of net earnings."[38] The court also noted that the record contained no evidence of an appropriate managerial fee to deduct from the net earnings as a salary for Mr. Casey.[39]

Although the court adopted the majority rule that goodwill is a divisible asset, it also noted a Texas decision[40] which illus-

36. *Id.* at 465, 346 S.E.2d at 728 (citing Smith v. Smith, 280 S.C. 257, 261, 312 S.E.2d 560, 563 (Ct. App. 1984)).

37. The court cited Shaluly v. Shaluly, 284 S.C. 71, 325 S.E.2d 66 (1985), which approved Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974). *Painter* listed thirteen criteria to be used in equitable distribution, including duration of the marriage, the source of property acquired during the marriage by either or both parties, the value of the property and its income producing capacities, and the effect of distribution of assets on the ability to pay alimony and support.

38. 289 S.C. at 467, 346 S.E.2d at 729.

39. *Id.*

40. Nail v. Nail, 486 S.W.2d 761 (Tex. 1972), held that the accrued goodwill of a medical practice based on personal skill, experience, and reputation as well as the expectation that the doctor would continue to practice was not divisible in a divorce proceeding. The court reasoned that it was not a vested property right at the time of the divorce, nor was it separable from the individual.

trates the minority view. The Supreme Court of Texas refused to divide the value of goodwill when a business depended heavily on the skills and efforts of its owner and reasoned that to do so would improperly treat the owner's skills or future earnings as marital property. Recognizing this argument, the *Casey* court warned that judges "should be meticulous to distinguish between the entrepreneurial skills or potential future earnings of a spouse and the goodwill of the spouse's business."[41]

Although *Casey* established that business goodwill is an asset subject to equitable distribution in South Carolina, the question of how to value the goodwill remains largely unanswered. The court recognized the capitalization of earnings approach, but did not recommend any particular method; instead, the court called for flexibility in deciding what approach to use in a particular case.[42]

Ketta K. Zwibel

II. Alimony Terminated for Unmarried Cohabitation

In *Palmer v. Palmer*[43] the South Carolina Court of Appeals upheld a lower court's decision, based upon the dependent spouse's unmarried cohabitation with a member of the opposite sex, to terminate alimony. The court reasoned that the cohabitation sufficiently improved the spouse's financial position to warrant termination under state law.[44] In its decision the court followed a majority of jurisdictions that have confronted the issue in similar cases.

In November 1978, after nineteen years of marriage, Diana A. Palmer and Charles Keith Palmer were divorced. In December 1984 the family court found that Diana's cohabitation with John McKee improved her financial circumstances and the court, therefore, terminated alimony payments. Diana appealed the decision to the court of appeals, claiming that evidence

41. 289 S.C. at 467, 346 S.E.2d at 729.

42. *See* Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 322 S.E.2d 674 (Ct. App. 1984) (in valuing a closely held business, a capitalization or net assets approach may be favorable to a fair market value approach).

43. 289 S.C. 216, 345 S.E.2d 746 (Ct. App. 1986).

44. S.C. Code Ann. § 20-3-170 (Law. Co-op. 1985) provides for alimony modification, confirmation, or termination, after giving both parties an opportunity to be heard, "as justice and equity shall require."

presented at trial failed to show any real and substantial change in her financial condition.[45]

Diana left her job as a school teacher in September 1983 to work for McKee.[46] In addition to her salary, McKee provided Diana with two automobiles and paid her expenses on trips to Las Vegas and Hilton Head. Although Diana maintained a home in Florence, South Carolina, she lived there only eight to ten days a month, spending most of her time with McKee at his business locations in Mississippi and Tennessee.[47]

The court found that the employment relationship which Diana alleged was a mere pretense and that she and McKee actually shared a close personal and emotional relationship. The court also found that this living arrangement constituted an improvement in her financial circumstances warranting termination of alimony as contemplated by statute.[48] The court based its reasoning on the majority decision in *Vance v. Vance*[49] and on the concurring opinion of Justice Littlejohn in *Jeanes v. Jeanes*.[50] In *Vance* the court held that living with another, regardless of the relationship involved, changed a wife's financial circumstances sufficiently to warrant modification of her support.[51] In *Jeanes* Justice Littlejohn found that a wife's cohabitation fell within the change of circumstances contemplated by the legislature in section 20-3-170.[52]

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45. 289 S.C. at 217, 345 S.E.2d at 747.

46. Diana received a salary of $1200 per month for services including "coordinating social activities, maintaining the household and yard, working in the office, and generally anything McKee [did] not have time to do." *Id.* Diana also accompanied McKee on business trips to Paraguay where she "supervise[d] the preparation of meals, help[ed] with the house cleaning, and accompanie[d] McKee when he [went] to check on his projects." *Id.* at 218, 345 S.E.2d at 748.

47. The court concluded from record testimony that McKee often stayed with Diana in her Florence home, sometimes sleeping with her. *Id.* Danny Kidd, who rented Diana's Florence home from September 1983 to January 1984 for a nominal fee, offered uncontradicted testimony at trial that Diana told him that she was leaving her teaching position to "live with this man John McKee and that he would support her financially or pay her teacher's salary, you know, for services rendered." *Id.* at 217, 345 S.E.2d at 747.

48. *Id.* at 218, 345 S.E.2d at 748; *see* S.C. CODE ANN. § 20-3-170 (Law. Co-op. 1985).

49. 287 S.C. 612, 340 S.E.2d 554 (Ct. App. 1986).

50. 255 S.C. 161, 177 S.E.2d 537 (1970).

51. 287 S.C. at 615, 340 S.E.2d at 555.

52. 255 S.C. at 170, 177 S.E.2d at 541 (Littlejohn, J., concurring). The *Palmer* court rejected Diana's argument that McKee's payments and other support were mere gratuitous contributions of a third party and should not relieve a supporting spouse's duty to pay alimony. The appellant relied on Prince v. Prince, 285 S.C. 203, 328 S.E.2d

A number of jurisdictions have addressed, with varying results, the effect of cohabitation by a dependent spouse on the other's requirement to provide alimony. Those results have been the subject of much discussion.[53] While states have used both legislative and judicial approaches in attempting to find a solution to the problem, a majority of states require a showing of more than mere cohabitation, particularly an improvement in the dependent spouse's financial condition, before terminating or modifying alimony.[54] This approach seems to be consistent with a widely recognized proposition that the spouse's financial need is the primary justification underlying alimony awards.[55] A minority of states, however, follow a "moral outrage" approach and terminate alimony on mere proof of cohabitation of the dependent spouse.[56] Under this approach, the financial need of the cohabitating spouse is no longer important and alimony is terminated as a form of punishment for unacceptable behavior. A small number of states take a more formalistic approach and apply a literal reading to a separation agreement or divorce decree which often requires the payment of alimony until death or remarriage; therefore, cohabitation alone is insufficient reason to terminate support.[57] None of these approaches offers an optimal solution, and instead, they may result in inequity and

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664 (Ct. App. 1985), which held that the gratuitous contributions of a third party would not constitute a change in circumstances warranting alimony modification or termination. The court, however, distinguished *Prince* because in *Palmer* the third party was a paramour, not a relative. 289 S.C. at 219, 345 S.E.2d at 748.

53. *See* Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615 (1982) [hereinafter Oldham, *Cohabitation Revisited*]; Oldham, *The Effect of Unmarried Cohabitation by a Former Spouse Upon His or Her Right to Continue to Receive Alimony*, 17 J. FAM. L. 249 (1979); Note, *Alimony Modification and Cohabitation in North Carolina*, 63 N.C.L. REV. 794 (1985); Commentary, *Alimony, Cohabitation, and the Wages of Sin: A Statutory Analysis*, 33 ALA. L. REV. 577 (1982); Annotation, *Divorced or Separated Spouse's Living With Member of Opposite Sex as Affecting Other Spouse's Obligation of Alimony or Support under Separation Agreement*, 47 A.L.R.4TH 38 (1986).

54. Note, *supra* note 53, at 796-97.

55. *Id.* at 794.

56. Oldham, *Cohabitation Revisited*, *supra* note 53, at 650.

57. *Id.*; *see, e.g.*, N.Y. DOM. REL. LAW § 248 (McKinney 1986) which provides as follows: "The court . . . upon proof that the wife is habitually living with another man holding herself out as his wife, although not married to such man, may modify such final judgments." As a result, the existence of at least a "de facto" marriage is required before alimony can be terminated or modified.

hardship.[58]

The court of appeals seemed to follow the majority approach, basing its decision on Diana's support needs and terminating the payments on proof of her improved financial condition. The court also stated that Diana may reapply for future modification should her financial circumstances again change. It is not clear, however, that alimony, once terminated, can be reinstated, since statutory or judicial authority on this point does not exist in South Carolina.[59] The court unfortunately used the word "termination" in its order, connoting a sense of finality that if interpreted literally, may prevent alimony reinstatement.

In its decision the court supported a longstanding policy favoring marriage. If the court had allowed Diana to continue receiving alimony, then she would have had less incentive to remarry because she would have been able to draw support from a

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58. "If alimony is terminated, it is not revived when the cohabitation ceases, and no alimony obligation arises from cohabitation, absent an agreement." Oldham, *Cohabitation Revisited*, *supra* note 53, at 645 (footnote omitted). The minority approach simply passes a moral judgment, ignoring the actual support needs of the dependent spouse and assuming that the third party will provide the necessary support. If the third party is unable or unwilling to provide support, or if neither party intends to create the equivalent of a marriage relationship, the dependent spouse will be deprived unfairly of a right to support. This result may create a potential burden on the state by requiring it to assume a support role.

Similarly, the formalistic approach also ignores any need for support and allows a recipient spouse to continue to receive alimony, regardless of the third party's financial status, by choosing not to remarry. This result would seem to be particularly unfair should the cohabitating parties indeed enjoy a long-term and committed relationship. The majority approach may result in unfairness to the payor spouse by creating a potential for financial manipulation by the cohabitants, allowing the dependent spouse to create an apparent perpetual support need. Under any of these approaches, a dependent spouse may be left without recourse if the alimony payments are terminated permanently.

59. S.C. CODE ANN. § 20-3-170 (Law. Co-op. 1985) provides that "either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments *or* terminating such payments." (emphasis added). Such language seems to imply a distinction in the use of the terms "modification" and "termination," indicating that the legislature may have intended that termination be final. Contributing to the ambiguity, the statute also provides that modified judgments are always subject to further modification proceedings, but the statute omits similar language addressing judgments of termination. Thus, perhaps the court in *Palmer* could have used alternative terminology which would have conveyed accurately the intention of the court. The term "suspension" seems the logical choice for use in the court order when the court intends that alimony can be reinstated. Another alternative may be to reduce the alimony to a nominal amount without termination to ensure that a spouse in need of financial support can again have it increased.

former husband while living, unmarried, with another man. The court evidently was aware that cohabitants can manipulate their financial resources to create an apparent need for support; therefore, the court set a precedent which will decrease the likelihood of successful manipulation in the future. Courts should be careful, however, to base modifications of alimony on reasons of support needs and not on moral justifications. Legislation may restrict judicial discretion by establishing express provisions dealing with the effect of unmarried cohabitation on the requirement of continued support. The potential for adverse financial consequences to a dependent spouse also would be reduced if legislation clarified whether alimony can be reinstated once it has been terminated.

Gregory W. Vanagel

III. Unmarried Natural Mother May Deny Natural Father Permission to Adopt Child

In *Hucks v. Dolan*[60] the South Carolina Supreme Court held in a unanimous decision that a natural mother's denial of permission to the natural father to adopt their child was an absolute bar to the natural father's attempt to adopt their illegitimate son. The *Hucks* decision is completely in keeping both with prior South Carolina decisions[61] and with the South Carolina Children's Code.[62]

James Hucks (father) was separated from his wife, and Donna Dolan (mother) was divorced when the child was born out of wedlock on April 19, 1978. The South Carolina Department of Social Services brought a paternity suit on the mother's behalf. After paternity was established in February 1982, Hucks provided support payments required by court order to Dolan and exercised his visitation rights with his son. The mother remarried and she and her new husband planned to move with the child to Texas.[63]

When Hucks learned of the Dolan's plans, he filed an action seeking to adopt his son, to extend his visitation rights, and to

60. 288 S.C. 468, 343 S.E.2d 613 (1986).
61. *See* cases cited *infra* note 68.
62. *See* S.C. Code Ann. § 20-7-1710 (Law. Co-op. 1985).
63. 288 S.C. at 469, 343 S.E.2d at 614.

change the child's surname to Hucks. The mother refused to consent to the adoption and cross-petitioned to change the child's name to Dolan.[64]

The family court granted Hucks' petition for adoption and name change and extended his visitation rights. The court also imposed a guardian ad litem fee upon the father. The mother appealed the adoption and name change and the father appealed the assessment of the guardian ad litem fee. The South Carolina Supreme Court reversed the lower court's decision to grant Hucks' petition and reduced the guardian ad litem fee.

The supreme court considered the statutory nature of adoption, the pertinent South Carolina statute requiring maternal consent, and the effect of adoption on parental rights. The court stated that "[a]doption exists in this state only by virtue of statutory authority which expressly prescribes the conditions under which an adoption may legally be effected."[65] In South Carolina, as in all other states, an adoption is not valid unless made in accordance with statutory requirements.[66] The South Carolina adoption statute clearly requires the consent of the mother[67] if she has done nothing to forfeit her parental rights through abandonment or misconduct. There is abundant precedent following strict statutory construction of this requirement.[68] When a parent has not forfeited his or her rights, consent is required, even in situations where the court finds the proposed adoption would

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64. *Id.*

65. *Id.* at 470, 343 S.E.2d at 614.

66. *See, e.g.*, Hudson v. Blanton, 282 S.C. 70, 316 S.E.2d 432 (1984); Goff v. Benedict, 252 S.C. 83, 165 S.E.2d 269 (1969); Wright v. Alexander, 230 S.C. 286, 95 S.E.2d 500 (1956); Driggers v. Jolly, 219 S.C. 31, 64 S.E.2d 19 (1951); 2 AM. JUR. 2D *Adoption* § 6 (1964). Adoption did not exist at common law. Indeed, adoption was not accepted in England until 1926. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956). Because adoption is not a common-law right, the controlling statute should be construed strictly.

67. S.C. CODE ANN. § 20-7-1710 (Law. Co-op. 1985). This section provides in pertinent part:

> An adoption of a child may be decreed when there have been filed written consents to adoption executed by:
>
> . . . .
>
> (b) if the child is illegitimate, the mother, regardless of age, and the child's natural father, if he has consistently on a continuing basis exercised rights and performed duties as a parent . . . .

68. *See* D'Augustine v. Bush, 269 S.C. 342, 237 S.E.2d 384 (1977); Goff v. Benedict, 252 S.C. 83, 165 S.E.2d 269 (1969); Driggers v. Jolly, 219 S.C. 31, 64 S.E.2d 19 (1951).

result in benefits to the child.[69]

Hucks argued that consent should be excused for the following reasons: He was the child's natural father; he had agreed that the mother was to retain custody of the child; and he had not sought to terminate any of the mother's rights to the child. The court reasoned, however, that if adoption were granted, the mother's parental rights would be terminated automatically[70] because there was no statutory provision by which the father could allow the mother to retain her parental rights.[71]

The court noted that the father actually sought to legitimize his son. Adoption was impossible without the mother's consent and the second method of legitimation, marrying the child's mother,[72] was a practical impossibility. Nonetheless, the son should not suffer discrimination because of his illegitimacy under South Carolina law. Because Hucks has acknowledged his fatherhood, his son would be treated as legitimate for purposes of inheritance.[73] The child also could bring a wrongful death suit

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69. In *Hudson v. Blanton* the court said, "Here, Blanton has not consented to the adoption nor have his parental rights been terminated. In this situation, the decree of adoption must be refused even if the adoption would result in benefits to the child." 282 S.C. at 76, 316 S.E.2d at 435. Similarly, in *Goff v. Benedict*, the court noted, "[T]he decree of adoption must be refused, even though adoption would result in benefits to the child." 252 S.C. at 89, 165 S.E.2d at 272.

70. S.C. CODE ANN. § 20-7-1770(b) (Law. Co-op. 1976) provides, "After a final decree of adoption is entered, the natural parents of the adopted child, unless they are the adoptive parents, shall be relieved of all parental responsibilities for the child and have no rights over such adopted child."

71. Moreover, the South Carolina Court of Appeals held in McLaughlin v. Strickland, 279 S.C. 518, 309 S.E.2d 787 (Ct. App. 1983) that a natural parent's consent to adoption was not valid where the parent did not consent to relinquish all parental rights, but instead intended to retain visitation rights. *See also* Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975). The court in *Hucks* reiterated this position, but suggested that "[t]he legislature, not this court, would be a proper body to consider that argument." 288 S.C. at 471, 343 S.E.2d at 615. Under the South Carolina Adoption Act, which became effective on December 3, 1986, an adoption decree apparently can allow retention of some rights in the consenting parent. S.C. CODE ANN. § 20-7-1770 (Law. Co-op. Supp. 1986) in part provides as follows:

> [N]otwithstanding any other provision to the contrary in this section, the adoption of a child by an adoptive parent does not in any way change the legal relationship between the child and either biological parent of the child whose parental responsibilities and rights are not expressly affected by the final decree.

This paragraph, however, was effective only until July 1, 1987. *Id.*

72. S.C. CODE ANN. § 20-1-60 (Law. Co-op. 1985) confers legitimacy upon a child born out of wedlock when the parents subsequently marry.

73. S.C. CODE ANN. § 62-2-109 (Law. Co-op. 1987).

for the death of either of his parents as if he were legitimate.[74] In short, an acknowledged child suffers no legal detriment in South Carolina because of his illegitimacy.The child's status in other states, however, may not be as fortunate. Whether an illegitimate but acknowledged child is discriminated against by statute in other states is uncertain, although the United States Supreme Court has upheld many basic rights of illegitimates.[75] Conceivably, the parents in *Hucks* could have to litigate a claim in another state where the pertinent statutes are not as nondiscriminatory as South Carolina's laws. Were the South Carolina Legislature to provide a means of legitimization other than adoption or marriage, this problem of potential discrimination would be eliminated: when a child has been legitimated in a state where the child and its father are domiciled, the child will be held in other states to have the rights of a child born in lawful wedlock.[76] Nine state legislatures have already passed such voluntary legitimization procedures.[77]

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74. S.C. CODE ANN. § 21-3-30 (Law. Co-op. 1976 & Supp. 1986).

75. *See* Mills v. Habluetzel, 456 U.S. 91 (1982) (right to parental support); Trimble v. Gordon, 430 U.S. 762 (1977) (right of inheritance by intestacy); Mathews v. Lucas, 427 U.S. 495 (1976) (right to survivor benefits under Social Security Act); Jimenez v. Weinberger, 417 U.S. 628 (1974) (right to disability payments upon death of wage-earner father); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) (right to recover workman's compensation benefits).

76. 10 C.J.S. *Bastards* § 8 (1938).

77. The nine states are Delaware, DEL. CODE ANN. tit. 13, § 1301 (1981); Louisiana, LA. CIV. CODE ANN. Art. 200 (West Supp. 1983); Maryland, MD. ESTATE AND TRUST CODE ANN. § 1-208 (Supp. 1982); Michigan, MICH. STAT. ANN. § 27.51111 (West 1980); Missouri, MO. REV. STAT. § 453.060 (Vernon Supp. 1983); Nevada, NEV. REV. STAT. § 13-1-09 (1977); New Hampshire, N.H. REV. STAT. ANN. § 460.29 (1983); Oklahoma, OKLA. STAT. ANN. tit. 10, § 55 (West 1966); Texas, TEXAS FAM. CODE ANN. §§ 13.01-13.24 (Vernon Supp. 1984); UTAH CODE ANN. § 78-30-12 (1977).