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The South Carolina Equitable Distribution Act and the Common Law: The State of the Union

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THE SOUTH CAROLINA EQUITABLE DISTRIBUTION ACT AND THE COMMON LAW: THE STATE OF THE UNION

I. INTRODUCTION

The law pertaining to marital property in South Carolina today is distinctly different from that introduced upon colonization by the English in March of 1670. As noted by William Blackstone in his Vinerian lectures at Oxford University, "as to *chattels perfonal* . . . which the wife hath in her own right, as ready money, jewels, houfehold goods, and the like, the hufband hath therein an immediate and abfolute property, . . . not only potentially but in fact, which can never again reveft in the wife or her reprefentative."[1] In the nineteenth century, women were first granted the right to hold and convey property,[2] but marital property customarily was held in the husband's name. Upon divorce, the spouse with title, the husband, received any jointly owned possessions, and women were usually left with little of value.

As a result of the constraints and inequities imposed by a

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1. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 435 (citing Co. Litt. 351); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 12 comment d (1981) (married women generally unable to contract at common law because rights vested in husband). *See generally* J. CLANCEY, A TREATISE OF THE RIGHTS, DUTIES AND LIABILITIES OF HUSBAND AND WIFE AT LAW AND IN EQUITY (1828). In some circumstances, however, women could possess property. *See* W. BLACKSTONE, *supra*, at 433-36. In one sense, English common law was a retrogression from its predecessor, Roman law, which recognized separate estates of husbands and wives in marriages *sine manu*. *See* A. WATSON, THE LAW OF THE ANCIENT ROMANS 35-36 (1970). *See generally* W. HOWE, STUDIES IN THE CIVIL LAW (1896).

2. *See* S.C. CODE ANN. § 20-5-10 to -40 (Law. Co-op. 1976). South Carolina has a strong public policy favoring and protecting marriage. *See, e.g.*, Shaw v. Shaw, 256 S.C. 453, 182 S.E.2d 865 (1971); Godwin v. Godwin, 245 S.C. 370, 140 S.E.2d 593 (1965); Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949). With the exception of a six-year period between 1872 and 1878, South Carolina courts were without jurisdiction to divorce spouses unless the dissolution was collaterally related to litigation pending before the court. *See* Mattison v. Mattison, 20 S.C. Eq. (1 Strob. Eq.) 387 (1847). The constitution was amended in 1948 to permit divorce in South Carolina. *See* S.C. CONST. art. XVII, § 3.

title-based system, the supreme court and the court of appeals have developed common-law doctrines such as resulting trust, special equity, and equitable distribution to achieve a more fair division of the marital estate.[3] On June 3, 1986, the South Carolina General Assembly enacted the state's first comprehensive legislation dealing with distribution of marital assets upon divorce. Entitled the South Carolina Equitable Distribution Act ("the Act"),[4] the new law borrows from such sources as the Uniform Marital Property Act,[5] New Jersey and Colorado common law, and New York and Illinois statutes. In many instances, the Act merely codifies existing case law and engenders no real change in domestic litigation other than to provide a clearly written guide for certain areas of marital property division. Some sections of the Act, however, apparently create new substantive and procedural law, which alters or extirpates prior South Carolina appellate decisions. Finally, the Act contains the inevitable gray areas that must be explained by the courts, clarified by legislative amendments, or both.

This Note attempts to analyze the Act by sections in an effort to indicate the following to the practitioner: (a) which areas of marital property division law have remained unchanged; (b) which aspects have been altered; and (c) which areas seem the most likely to present problems.

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3. *See infra* notes 13-15, 17-21 and accompanying text.

4. S.C. CODE ANN. § 20-7-471 to -479 (Law. Co-op. Supp. 1987). For a brief discussion of the Act's history, see R. CHASTAIN, THE LAW OF DOMESTIC RELATIONS IN SOUTH CAROLINA 27-28 (Temporary Supp. 1986).

5. UNIF. MARITAL PROPERTY ACT, 9A U.L.A. 19 (Supp. 1984). A primary reason why the legislature did not adopt the Uniform Marital Property Act *in toto* was because to do so would have made South Carolina a community property state: "Some of the root concepts [of the UMPA] can be traced to the sharing ideal . . . at the center of the . . . community property approach. [Sharing of] equal interests [by both spouses] is the heart of the community property system. It is also the heart of the Uniform Marital Property Act." Wade, *The Uniform Marital Property Act*, 13 COLORADO L. REV. 220, 610 (1984); *accord* UNIF. MARITAL PROPERTY ACT § 4. For the full text of the UMPA, see Wade, *supra*, at 610. *See generally* Furrh, *Classification of Property Under the Uniform Marital Property Act*, 37 S.C.L. REV. 451 (1986); Podell, *The Impact of Wisconsin's Marital Property Act on Family Law*, 68 MARQU. L. REV. 443 (1935); *Uniform Marital Property Act Symposium*, 21 HOUSTON L. REV. 595 (1984).

II. SECTION 20-7-471: ACQUISITION DURING MARRIAGE OF SPECIAL EQUITY AND OWNERSHIP RIGHT IN MARITAL PROPERTY

Section 20-7-471 of the South Carolina Code[6] reads:

> During the marriage a spouse shall acquire, based upon the factors set out in § 20-7-472, a vested special equity and ownership right in the marital property as defined in § 20-7-473, which equity and ownership right are subject to apportionment between the spouses by the family courts of this State at the time marital litigation is filed or commenced as provided in § 20-7-472.[7]

Thus, the court will determine the extent of each spouse's special equity and ownership right in the marital property by weighing the factors in section 20-7-472.[8] A spouse might receive a portion of the marital property, all of the marital property, or, in rare cases, none of it.

Marital property is defined broadly in section 20-7-473.[9] This section, however, also provides that marital property does not exist under the Act until "the date of filing or commencement of marital litigation."[10] Prior to March 16, 1987, the meaning of section 20-7-471 was unclear. Some attorneys, particularly those representing title insurance companies, believed that the Act might be interpreted as giving each spouse a present interest in the marital property. Under this interpretation, a spouse whose name was not on the title would nonetheless receive an ownership right as soon as the marriage occurred; thus, some believed a unique kind of fee or a gender-neutral dower had been created.[11] To allay these fears, the Act was amended to make mandatory the filing provisions of section 20-7-477[12] as against

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6. S.C. CODE ANN. § 20-7-471 (Law. Co-op. Supp. 1987).

7. *Id.*

8. S.C. CODE ANN. § 20-7-472 (Law. Co-op. Supp. 1987). *See infra* notes 22-54 and accompanying text (discussing § 20-7-472).

9. S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1987).

10. *Id.*

11. Some of the confusion might have been eliminated by a careful reading of § 20-7-473: " '[M]arital property' as used in this article means all . . . property . . . owned [on] the date of filing or commencement of marital litigation . . . ." Thus, dissolution proceedings have no effect on the prior rights of third parties in the marital estate because marital property does not exist until dissolution proceedings begin.

12. S.C. CODE ANN. § 20-7-477 (Law. Co-op. Supp. 1987).

third parties and to note specifically that prior rights of third parties are not affected by these filings.

In addition to the controversy surrounding the rights of third parties, another question arises over whether section 20-7-471 or other provisions in the Act abrogate the common-law doctrines of special equity,[13] constructive trust,[14] resulting trust,[15] and other tenets of South Carolina jurisprudence. These principles were created to alleviate the harsh results of early law when marital property was dispensed in divorce proceedings to the spouse holding title—usually the husband.

A basic legal canon holds that the common law is not expiated by a legislative enactment unless the statute expressly so

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13. The special equity doctrine assumes that both spouses owe certain basic duties to each other simply because they are married. For example, a wife's role might be that of homemaker and mother, while the husband's role might be that of breadwinner, or vice versa. In the event of divorce, neither party acquires a special interest in any particular piece of property merely because they fulfilled these basic obligations. If a spouse makes extraordinary contributions to the marriage, however, such as keeping house and working at an outside job, he or she may acquire a special equity interest in property even if it is titled to the other spouse. The South Carolina appellate courts have recognized this special equity doctrine in a number of cases. *See* Parrott v. Parrott, 278 S.C. 60, 292 S.E.2d 182 (1982); Baker v. Baker, 276 S.C. 427, 279 S.E.2d 601 (1981); Simmons v. Simmons, 275 S.C. 41, 267 S.E.2d 427 (1980); Wilson v. Wilson, 270 S.C. 216, 241 S.E.2d 566 (1978); Barnett v. Barnett, 282 S.C. 343, 318 S.E.2d 570 (Ct. App. 1984).

14.

> A constructive trust is a relationship with respect to property subjecting the person [holding] title to the property . . . to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

RESTATEMENT (SECOND) OF TRUSTS § 1 comment e (1959).

Fraud is an essential element of a constructive trust in South Carolina. Whitmire v. Adams, 273 S.C. 453, 257 S.E.2d 160 (1979); Wolfe v. Wolfe, 215 S.C. 530, 56 S.E.2d 343 (1943); Dominick v. Rhodes, 202 S.C. 139, 24 S.E.2d 168 (1943); *accord* Davis v. Howard, 19 Or. App. 310, 313, 527 P.2d 422, 424 (1974). Unlike a resulting trust, one may prove a constructive trust by parol evidence. 273 S.C. at 458, 257 S.E.2d at 163; *cf.* Evans v. Trude, 193 Or. 648, 658, 240 P.2d 940, 945 (1952)(constructive trust must be proved by "strong, clear and convincing" evidence).

15. A resulting trust may be formed when, at the time of purchase, a party gives money or property toward the price of a specific piece of property, and such a trust must be proved by clear, unequivocal, and convincing evidence. Moore v. McKelvey, 266 S.C. 95, 98, 221 S.E.2d 780, 781 (1976); *accord Evans*, 193 Or. at 658, 240 P.2d at 945. However, "[b]ecause the evidentiary requirements are rather strict, such trusts are rarely found." *Parrott*, 278 S.C. at 62, 292 S.E.2d at 183; *see also* Hodges v. Hodges, 243 S.C. 299, 133 S.E.2d 816 (1963); Green v. Green, 237 S.C. 424, 117 S.E.2d 583 (1960). *See generally* RESTATEMENT (SECOND) OF TRUSTS § 404 (1959).

provides;[16] the Act makes no such provision. To the contrary, section 20-7-471 incorporates the phrase "special equity . . . right" when describing the interest of the spouses in the marital property. This language might suggest that special equity has been preserved expressly as a principle of common law in addition to equitable distribution or that the legislature has merged and subsumed the doctrine of special equity into the Act.[17] One commentator has noted that the courts tend to apportion the marital property in the same manner regardless of whether the process is called special equity or equitable distribution.[18] The South Carolina Court of Appeals recently mentioned special equity in *Wood v. Wood*,[19] and, although it did not expressly approve the retention of common-law special equity, it may have done so *sub silentio*.

Probably the best argument for reading the statute as abrogating the common-law special equity doctrine is that its retention would be superfluous. Unlike the tribunals of Florida and Illinois, which often apply the special equity doctrine restrictively,[20] the South Carolina courts have read the doctrine

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> Statutes are not . . . deemed to repeal the common law by implication unless the legislative intention to do so is obvious. An intention to abrogate or change the common law is not presumed; to effect a change or abrogation by statute of common-law fundamentals, the legislature's intention must be clearly apparent or unmistakable.

15A AM. JUR. 2D *Common Law* § 18, at 619 (1976); *cf.* State v. Ward, 204 S.C. 210, 28 S.E.2d 785 (1944)(statutory minimum age for marriage does not abrogate common law).

17. If the special equity doctrine has been merged with equitable distribution, this merger marks a departure from the common law. Until the Act's passage, the supreme court kept the two doctrines separate. The court of appeals has noted that "[g]enerally, in determining the proper portion of marital property that is owned in equity by each spouse, the family court must weigh the relative incomes and material contributions of the parties. Though enunciated in special equity cases, this principal applies with equal validity to equitable distribution actions." Cooksey v. Cooksey, 280 S.C. 347, 349, 312 S.E.2d 581, 583 (Ct. App. 1984)(citations omitted); *see also* Eagerton v. Eagerton, 285 S.C. 279, 328 S.E.2d 912 (Ct. App. 1985) (spouse is awarded special equity in property, but equitable distribution of a marital estate).

18. R. CHASTAIN, *supra* note 4, ch. 4 at 79. Wilson v. Wilson, 270 S.C. 216, 241 S.E.2d 566 (1978), was decided upon special equity principles, but the supreme court has cited *Wilson* as the first recognition of equitable distribution in this state. *See* Jeffords v. Hall, 276 S.C. 271, 277 S.E.2d 703 (1981)(citing *Wilson* in support of an equitable distribution award).

19. 292 S.C. 43, 354 S.E.2d 796 (Ct. App. 1987).

20. Regarding Florida law, see Duncan v. Duncan, 379 So. 2d 949 (Fla. 1980)(participating in building marital home creates no special equity interest); Klaber v. Klaber, 133

broadly to include many ordinary marital duties.[21]

III. SECTION 20-7-472: EQUITABLE APPORTIONMENT OF MARITAL PROPERTY

Under section 20-7-472 a family court must make a final apportionment of the marital property if requested by one of the parties.[22] The parties may petition for apportionment in the following instances: (a) In a proceeding for divorce or for separate support and maintenance; (b) when a divorce decree is already in effect, but the court was unable to divide the property due to lack of jurisdiction over the property or one of the spouses; and (c) in other marital litigation between the parties.[23]

After a valid request has been made, the "court must give weight in such proportion as it finds appropriate to [each]"[24] of fourteen listed factors. The statute also provides that a judge must consider any other factors that he deems relevant; these additional criteria, however, must be "expressly enumerated."[25]

So. 2d 98 (Fla. Dist. Ct. App. 1961)(occasional work in spouse's business creates no special equity interest).

Illinois courts construing early special equity law read normal marital duties broadly. *See, e.g.*, Everett v. Everett, 25 Ill. 2d 342, 347, 185 N.E.2d 201, 205 (1962). These courts based such a reading upon a common-law interpretation of an eighteenth-century statute. *See* ILL. REV. STAT. ch. 40, ¶ 17 (1874). In 1977, however, the Illinois Legislature enacted a comprehensive equitable distribution act. The explanatory notes to that legislation expressly rejected the special equity doctrine. *See* Auerbach & Jenner, Jr., *Historical and Practice Notes, printed in* ILL. ANN. STAT. ch. 40, ¶ 503 (Smith-Hurd 1980).

21. One writer has argued persuasively against the continued viability of the special equity doctrine:

> [T]he mere possibility of co-existence of the two doctrines does not make such a situation necessary or desirable. In South Carolina there is no need for both doctrines because they have become so similar as to be almost indistinguishable . . . . Furthermore, . . . enough *dicta* exists in South Carolina special equity decisions to create conflict. Why should such a situation be risked?

F. Shiller, Section 20-7-471: What Does It Mean? 29-30 (May 1987)(unpublished manuscript).

22. This is a continuation of existing law; the family courts originally had jurisdiction to equitably divide property when the parties requested. *See* S.C. CODE ANN. § 14-21-1020(4) (Law. Co-op. 1976). Section 14-21-1020 was repealed in 1981 and is incorporated into S.C. CODE ANN. § 20-7-420 (Law. Co-op. Supp. 1987).

23. S.C. CODE ANN. § 20-7-472 (Law. Co-op. Supp. 1987).

24. *Id.*

25. *Id.* § 20-7-472(15). This provision enables continued expansion and flexibility of the common law but is not a discretionary provision. *See infra* note 54 and accompanying text.

Prior law is retained by a statutory mandate that the family court's distribution of property "shall be . . . final [and] not subject to modification except by appeal or [upon] remand."[26]

The criteria listed in this statute closely track those first enunciated by the New Jersey Supreme Court in *Painter v. Painter*[27] and later adopted by the South Carolina Supreme Court in *Shaluly v. Shaluly*.[28] Attorneys will be on less certain ground when attempting to apply these factors. Family court decisions concerning the division of marital property are discretionary, and the appellate courts are reluctant to intervene in this difficult process. The court, however, may not divide the property at random,[29] such as by distributing numbered items on an even-odd basis. In addition, the court's final decision must be premised upon reasonably credible evidence.[30]

A brief factor-by-factor discussion of section 20-7-472 is as follows:

(1) *Age of the parties and duration of the marriage.* These two factors apparently establish as public policy the view that younger marital partners in marriages of brief duration should be treated differently from those in which older spouses have invested a great deal of time and money. Presumably, a spouse who had been married since his or her twenties until past middle age would fare better under subsection 20-7-472(1) than a twenty-eight year old spouse whose divorce terminated a five-year old marriage.

(2) *Marital misconduct or fault.* The wrongful acts of either or both of the parties must be considered by the judge in apportioning marital property[31] even if misconduct is not alleged as a basis for the divorce. Also, the wrongful acts must "affec[t] or ha[ve] affected the economic circumstances of the parties, or

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26. *Id.* § 20-7-472 (final sentence); Powers v. Powers, 273 S.C. 51, 254 S.E.2d 289 (1979).

27. 65 N.J. 196, 320 A.2d 484 (1974).

28. 284 S.C. 71, 325 S.E.2d 66 (1985).

29. Bauer v. Bauer, 287 S.C. 217, 337 S.E.2d 211 (1985); *see also* Skipper v. Skipper, 290 S.C. 412, 351 S.E.2d 153 (1986).

30. *See Shaluly*, 284 S.C. at 71, 325 S.E.2d at 66.

31. Professor Chastain, who testified at the South Carolina Senate Judiciary Committee's hearings on the equitable distribution legislation, reports that the issue of fault prevented the Act's passage for two years. In its present form, the Act represents a "compromise between those who wished to consider fault fully and those who did not wish to consider it at all . . . ." R. CHASTAIN, *supra* note 4, temporary supp. at 32.

contributed to the breakup of the marriage."[32] Misconduct or fault will be relevant only if it occurs before the earliest of the following events: "(a) entry of a pendente lite order in a divorce or separate maintenance action; (b) formal signing of a written property or marital settlement agreement; or (c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties."[33] Conduct subsequent to the entry of a divorce decree is irrelevant to the equitable distribution because it could not have contributed to the breakup of the marriage. The deadline for determining when a spouse's wrongful acts will be considered relevant under subsection 20-7-472(2) corresponds exactly with the time when the newly acquired possessions will no longer be deemed marital property under section 20-7-473.[34] Although the Act's cutoff point for misconduct is novel, the use of fault in equitable distribution cases is a continuation of the common law.[35]

(3) *Value of the marital property and the contribution of each spouse in its acquisition, preservation, depreciation, or appreciation.* This provision in the Act, which codifies prior case law, mandates that the court consider the quantity and quality of the spouses' contributions to the marital estate.[36] Presumably,

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32. S.C. CODE ANN. § 20-7-472(2) (Law. Co-op. Supp. 1987). This section is two-tiered and requires the judge to consider not only wrongful acts causing the divorce but also misconduct affecting the *economic circumstances* of the parties. This second issue is potentially far reaching. For example, consider a situation in which one spouse, in anticipation of divorce, transfers title to the marital home to a sister or mother. Because marital property is not determined until the filing or commencement of dissolution proceedings, the home technically would not be subject to equitable distribution. The aggrieved spouse, however, might receive credit for the loss because the transfer surely has affected the economic circumstances of the parties. In addition, a constructive trust might be created.

33. *Id.* This does not mean, however, that misconduct or fault occurring after the statutory deadline is not important. For example, misconduct occurring after one of these deadlines, but before a final divorce decree, may provide a separate ground upon which the divorce decree may be entered or may be the basis for criminal sanctions. *See* S.C. CODE ANN. § 20-3-10 (Law. Co-op. 1976)(adultery, physical cruelty, and habitual drunkenness are all independent grounds for divorce); S.C. CODE ANN. § 16-15-60 (Law. Co-op. 1976)(habitual adultery is punishable by criminal penalties). Those acts, however, may not be considered by the court in determining the distribution.

34. S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1987).

35. *See, e.g.*, Woodside v. Woodside, 290 S.C. 366, 350 S.E.2d 407 (1986).

36. *See, e.g.*, Simmons v. Simmons, 275 S.C. 41, 44-45, 267 S.E.2d 427, 429 (1980). For a discussion of other factors used in measuring a party's contribution, see Chastain,

the contributions may be either direct or indirect. Homemaker services specifically are included by the statute.[37] The family court judges are reminded by subsection 20-7-472(3) that they must consider whether the spouse, in fact, made the alleged contributions to the marital estate.

(4) *Income, earning potential, and opportunity for acquisition of capital assets of the spouses.* This provision requires a court to consider three criteria in dividing the joint assets of the spouses. The focus of this subsection is on the present ability of parties to support themselves and the likelihood that their ability will increase.[38] Thus, all other factors being equal, a spouse who will soon receive a valuable trust fund or inheritance or who is likely to receive employment in a family business might have reduced his or her share of the jointly owned property to compensate for the future accessions to wealth or income. On the other hand, a court may award a disabled spouse an enhanced portion of the marital estate due to a lessened earning potential. Conceivably, a divorcee with custody of a number of children temporarily may suffer a lowered earning potential and, thus, be entitled to an enhanced award under the Act.

(5) *Emotional and physical health of the parties.* This provision puts emotional fitness on an equal footing with physical health. The courts also considered these elements, however, under the common law.[39]

(6) *Need for additional training or education.* Subsection 20-7-472(6) seems to overlap existing case law on rehabilitative alimony.[40] Thus, the court now has at least two means by which

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Henry & Woodside, *Determination of Property Rights Upon Divorce in South Carolina: An Exploration and Recommendation*, 33 S.C.L. REV. 227, 242-44 (1981).

37. *See* S.C. CODE ANN. § 20-7-472(3) (Law. Co-op. Supp. 1987).

38. A question might be raised regarding the meaning of "the earning potential of each spouse." Does this mean (a) earning potential for an unemployed spouse determined at the entry of the divorce decree, *i.e.*, the amount an unemployed housewife might earn if she immediately got a job; (b) earning potential after rehabilitative alimony; (c) earning potential based upon the number of years a spouse will work before retirement; or (d) all of the above?

39. *See, e.g.*, Pfohl v. Pfohl, 345 So. 2d 371 (Fla. Dist. Ct. App. 1977). In Painter v. Painter, 65 N.J. 196, 211, 320 A.2d 484, 492 (1974), this factor was worded as "the present mental and physical health of the parties."

40. *See* Eagerton v. Eagerton, 285 S.C. 279, 328 S.E.2d 912 (Ct. App. 1985)(rehabilitative alimony is expressly recognized). Rehabilitative alimony is money paid to a divorced party to enable him or her to regain a productive and constructive role in society through vocational or therapeutic training. *Accord* Mertz v. Mertz, 287 So. 2d 691, 692

to finance a spouse's education or training. Under the doctrine of rehabilitative alimony, a court may order cash transferred to cover tuition or other necessary expenses; the spouse also has the option of transferring property for this purpose.[41] In addition, a court might mandate that jointly owned real estate be deeded to the other party under subsection 20-7-472(6). This property could then be sold to gain the requisite funds. Presumably, cash also would be a means of financing education or training under subsection 20-7-472(6).

(7) *Nonmarital property of either spouse.* The Act defines marital and nonmarital possessions in section 20-7-473.[42] This section requires the court to consider both types of possessions in dividing the property. Thus, a court might award a smaller than usual share to a spouse who enjoys substantial nonmarital assets and vice versa.

(8) *Vested retirements benefits of either spouse.* On its face, this factor seems fairly straightforward: the court must consider the existence of vested retirement benefits in its award. Requiring the court to take note of these pensions, however, appears superfluous. The very purpose of the Act is to divide the parties' jointly held possessions, and, because section 20-7-473 does not exclude retirement benefits, they would appear to be marital property[43] under the Act. Even if the courts viewed vested retirement benefits as nonmarital property, the courts, nevertheless, would consider such property under subsection 20-7-472(7).[44]

(9) *Whether separate maintenance or alimony has been awarded.* Although put on notice that support obligations and equitable distribution are related, the courts are not guided in

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(Fla. Dist. Ct. App. 1973).

41. Poniatowski v. Poniatowski, 275 S.C. 11, 266 S.E.2d 787 (1980); Hussey v. Hussey, 280 S.C. 418, 312 S.E.2d 267 (Ct. App. 1984).

42. S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1987); *see infra* notes 55-58 and accompanying text (discussing § 20-7-473).

43. *See infra* notes 55-58 and accompanying text (discussing § 20-7-473).

44. *See supra* note 42 and accompanying text. Perhaps the primary reason for including vested retirement benefits in this subsection is simply to put the judge on notice of its relevance. Thus, even if a party does not raise the issue of this property at trial, the judge is on notice to make the inquiry and deal with these benefits as part of the overall process of property distribution. Federal retirement benefits may be awarded by a state court pursuant to 10 U.S.C. § 1408(d)(2) (1982). *Accord* Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982).

how to apply the two doctrines. This subsection overlaps, to some degree, with subsection 20-7-472(12),[45] which requires consideration of extramarital support obligations.[46] Apparently, the court could justify awarding under subsection 20-7-472(8) a smaller percentage of marital property to a spouse who is to receive large child support or alimony payments. The reverse would apply to the supporting party.

(10) *Desirability of awarding the family home or the right to live therein for reasonable periods as part of the property division to the spouse having custody of any children.* In many cases the home will be the most valuable asset to be divided upon dissolution of the marriage. This subsection would apply only if the marriage produced children. In such a case the court must consider whether it would be more desirable to award the family home intact or to order its sale and a distribution of the proceeds. In addition, the court must take into account the possibility of allowing a spouse with children to remain in the home for "reasonable periods."[47]

(11) *Tax consequences of the equitable distribution.* In accordance with prior case law, the Act mandates that the court consider tax consequences as part of the equitable distribution. Practitioners should be aware that the tax basis of the marital home is a crucial concern in any distribution of property. For example, hypothesize two homes owned as part of the marital estate: Home A, a beach home bought this year for $200,000 and Home B, the marital home purchased in 1950 for $40,000 but now also worth $200,000. If the wife were awarded Home A and immediately resold at $200,000, her taxable income from the sale would be zero. This result is reached because the difference between the basis (purchase price of $200,000) and the amount re-

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45. S.C. CODE ANN. § 20-7-472(12) (Law. Co-op. Supp. 1987).

46. *See infra* text accompanying note 49.

47. In Johnson v. Johnson, 285 S.C. 308, 329 S.E.2d 443 (Ct. App. 1985), the court of appeals recognized the hardship created when one spouse receives use of the marital home for long periods of time. *See also* Chastain v. Chastain, 289 S.C. 281, 346 S.E.2d 33 (Ct. App. 1986); Shealy v. Shealy, 280 S.C. 494, 313 S.E.2d 48 (Ct. App. 1984)(court must have compelling reasons for not making final distribution of property in dissolution proceedings). Thus, the judge should make plans for its disposition pursuant to guidelines enunciated by the court in *Johnson*, 285 S.C. at 311-12, 329 S.E.2d at 445-46.

Often the marital home will be awarded to the parent with custody of the children, whether it be the father, *see, e.g.*, Collins v. Collins, 283 S.C. 526, 324 S.E.2d 82 (Ct. App. 1984) or the mother, *see, e.g.*, Whitfield v. Hanks, 278 S. C. 165, 293 S.E.2d 312 (1982).

alized (final sale price of $200,000) is zero. If the husband were awarded Home B, however, and immediately resold at $200,000, his taxable income from the sale would be $160,000. This result is reached because the difference between the basis (purchase price of $40,000) and the amount realized (final sale price of $200,000) is $160,000.[48] Although both received property valued at $200,000 in the equitable distribution, the wife would realize the full $200,000 profit from her sale, but the husband would pay substantial taxes—hardly an equitable distribution.

(12) *Support obligations of either party.* This subsection forces the court to consider alimony and child support from past marriages in reaching an equitable distribution.[49] Responsibilities may include obligations from previous marriages or those that have been incurred "for any other reason or reasons." The language of the Act seems broad enough to include, for example, payments for the daily needs of an unadopted stepson or to a nursing home for care of an elderly parent.

(13) *Liens, encumbrances, and debts.* This subsection provides that courts must equitably divide liens or encumbrances on the marital property, but if such restraints are attached to separate property, courts only need to consider them like any other factor listed in section 20-7-472. In addition, courts must consider debts of either party incurred during the course of the marriage.[50] Because subsection (13) is mandatory, it effectively abrogates the supreme court's decision in *Levy v. Levy*[51] and appears to adopt Justice Harwell's dissent.[52]

(14) *Child custody arrangements and obligations.* Under the Act, these factors are relevant only if they are in effect at the time the final order is entered.

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48. *See* 26 U.S.C. § 1015(e) (Supp. 1987). Property transferred incident to a divorce leaves the receiving spouse with a gift basis in the property. *See* 26 U.S.C. § 1041(a) (Supp. 1987).

49. *See supra* notes 45-46 and accompanying text (discussing this section's interrelationship with § 20-7-472(9)).

50. Substantial legal fees incurred by one litigant might be equalized under § 20-7-472(13) if the debt occurred "during the course of the marriage." Thus, a party who chose an expensive divorce attorney conceivably could enjoy an enhanced share of the property division while requiring the adverse party to pay for it.

51. 277 S.C. 576, 291 S.E.2d 201 (1982). The court stated, "We refuse to hold, as a matter of law, that the judge *must* order the sharing of debts as well as the sharing of assets." *Id.* at 578, 291 S.E.2d at 202 (emphasis added).

52. *See id.* at 578, 291 S.E.2d at 203 (Harwell, J., dissenting).

(15) *Other relevant factors.* This subsection enables the family court to consider factors not specified in the Act and allows the common-law interpretation of the statute to expand as unexpected situations arise. Unlike under the previously enumerated subsections, factors considered under subsection 20-7-472(15) must be listed expressly in the final order.[53] Subsection 20-7-472(15) is not, however, a discretionary provision; if a factor is relevant but not listed in the other subsections, a judge must consider it.[54]

IV. SECTION 20-7-473: MARITAL AND NONMARITAL PROPERTY

The Act broadly defines marital property as "all real and personal property [regardless of title,] owned [on the filing date] or commencement of marital litigation as provided in Section 20-7-472."[55] Certain categories are excepted from the definition of the marital estate, and the Act follows prior law which provides that "[t]he court does not have jurisdiction to apportion nonmarital property."[56]

The Act excludes items from equitable division if acquired by either party before the marriage or after the same statutory deadline used in subsection 20-7-472(2).[57] Should a spouse re-

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53. S.C. CODE ANN. § 20-7-472(15) (Law. Co-op. Supp. 1987).

54. At first glance, it might appear that, although a judge *must* consider the factors expressly listed in subsections 20-7-472(1) to (14), he has discretion over whether to consider other factors relevant under subsection (15). The second paragraph of § 20-7-472 states, however, that "the court *must* give weight . . . to *all* of the following factors." (Emphasis added.) The judge also must list such factors in the final order. *Cf.* Shaluly v. Shaluly, 284 S.C. 71, 325 S.E.2d 66 (1986)(whether marital property is income producing is relevant).

55. S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1987). Practitioners should note that problems could arise after a court has issued a pendente lite order. After such an order, under the Act, all newly acquired items become "separate property." If the couple still has a joint banking account, items purchased from these funds will be the separate property of each spouse. Thus, orders occurring after the statutory cutoff point should include provisions for this and other similar anticipated problems. R. CHASTAIN, *supra* note 4, at temporary supp. 38-39.

56. S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1987).

57. *See supra* text accompanying note 33. *Compare* § 20-7-472(2) *with* § 20-7-473(2) (fault and marital property deadlines are identical). Before passage of the Act, the South Carolina appellate courts had yet to decide whether certain items were subject to equitable distribution under the common law. The Act's designation of "all" items acquired during the marriage as marital property, unless excluded, appears to clarify much of the uncertainty surrounding this issue. Of course, if a court held the *res* not to be "property" under the Act, the family courts would have no jurisdiction to distribute them. *See e.g.*,

ceive property during the marriage by inheritance (intestate succession), devise (realty passed by testament), bequest (personalty passed by testament), or gift, it is deemed to be "nonmarital," as is *res* exchanged for the aforementioned items. The practitioner should be aware, however, that the transmutation doctrine will apply if separate property becomes amalgamated with marital property.[58]

Subsection 20-7-473(4) excludes property already disposed of by a separation agreement or an antenuptial contract. Premarital agreements will be presumed fair if (a) the agreements are executed voluntarily, (b) each spouse has retained separate counsel, and (c) the agreement is reached subsequent to a full financial disclosure. Because this subsection is essentially a codification of South Carolina common law, a number of court decisions have interpreted these elements.[59]

Increases in value of nonmarital property do not alter its status as nonmarital property unless the increases are the result of the other spouse's direct or indirect efforts. Direct efforts might include, for example, a husband's efforts to repair and paint a dilapidated home that his wife received in a will from her parents. Indirect efforts will often be more difficult to define and prove.[60]

The statute parallels existing case law which holds that gifts between the husband and wife remain marital property. Such property remains part of the marital estate even though made indirectly through a third party.

Helm v. Helm, 289 S.C. 169, 345 S.E.2d 720 (1986)(professional degree is not property subject to equitable distribution); *accord* Drapek v. Drapek, 399 Mass. 240, 503 N.E.2d 946 (1987). *But see* O'Brien v. O'Brien 114 Misc. 2d 233, 452 N.Y.S.2d 801 (1985). *See generally* L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY (1983); Economic & Property Rights in Domestic Cases, Continuing Legal Education of the South Carolina Bar Ass'n (Aug. 28, 1981)(available in the University of South Carolina School of Law Library).

58. Kendall v. Kendall, _ S.C. _, 367 S.E.2d 437 (Ct. App. 1988). The transmutation doctrine holds that separate property may become subsumed into the marital estate when it becomes inextricably meshed with the spouses' joint assets. *See* Trimmal v. Trimmal, 287 S.C. 495, 339 S.E.2d 869 (1986); Johnson v. Johnson, 289 S.C. 150, 345 S.E.2d 261 (Ct. App. 1986).

59. *See* R. CHASTAIN, *supra* note 4, at 155-66.

60. One may argue that, in some instances, the marriage itself has permitted one spouse to forego consuming his or her separate property, and therefore, the other spouse is entitled to an equitable interest in that property. *See* Mann v. Commissioner, 74 T.C. 1249 (1980).

In *Orszula v. Orszula*[61] the supreme court held that disability payments were subject to distribution under the Act because "personal injury and workers' compensation awards fit none of the enumerated exceptions [under section 20-7-473]."[62] Concerning pension rights, the court of appeals recently noted in *Watson v. Watson*[63] "that South Carolina's new Equitable Distribution Statute apparently defines marital property in such a way as to include pensions."[64] The supreme court, however, has held that the goodwill of a sole proprietorship is not subject to distribution under section 20-7-473.[65]

V. SECTION 20-7-474: DETERMINING THE VALUE OF CONTRIBUTIONS MADE TO THE MARRIAGE BY THE SPOUSES

In accordance with prior law, the court is required to value, using credible evidence, any property or services contributed by the parties.[66] The generally accepted means of determining a property's worth is by ascertaining its fair market value,[67] and in doing so, a judge may take judicial notice of official state[68] or

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61. 292 S.C. 264, 356 S.E.2d 114 (1987).

62. *Id.* at 266, 356 S.E.2d at 115.

63. 291 S.C. 13, 351 S.E.2d 883 (Ct. App. 1986).

64. *Id.* at 18 n.2, 351 S.E.2d at 886 n.2. Practitioners should note that this definition is a change from the common law; the appellate courts of this state previously had held that pensions generally were not subject to equitable distribution. *See* Carter v. Carter, 277 S.C. 277, 286 S.E.2d 139 (1982); Smith v. Smith, 280 S.C. 257, 312 S.E.2d 560 (Ct. App. 1984).

65. Casey v. Casey, 293 S.C. 503, 362 S.E.2d 6 (1987).

66. The judge's discretion must be founded on evidence more credible than that offered in Shaluly v. Shaluly, 284 S.C. 71, 325 S.E.2d 66 (1985). The supreme court remanded a distribution of the marital estate in which the property was valued at between $675,000 and $1,355,000.

Valuations of real and personal property from professional appraisers, Moyle v. Moyle, 262 S.C. 308, 310, 204 S.E.2d 46, 47 (1974), and federal tax returns, Stone v. Stone, 274 S.C. 571, 572 n.1, 266 S.E.2d 70, 71 n.1 (1980), have been accepted by South Carolina courts, although use of the latter has been criticized. *See* Krauskopt, *Marital Property at Marital Dissolution*, 43 Mo. L. REV. 157, 163-66 (1978)(most agree that "book value" generally is not an accurate method of valuing assets because the taxpayer often underestimates the property's worth).

67. The court of appeals has 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." Reid v. Reid, 280 S.C. 367, 372, 312 S.E.2d 724, 727 (Ct. App. 1984).

68. Presumably, this recognition would be inapplicable to city and county reports or

federal reports which are published by authority of law or adopted by statute. "Reports" include official government bulletins, publications, or public interest reports.

Subsection 20-7-474(3)[69] of the Act also permits a court to appoint experts to determine the value of the contributions or property. The court may assess this expense against any or all of the parties. If a spouse lacks sufficient funds, a judge may use subsection 20-7-474(3) to appoint an expert on the party's behalf. Because the court also has the discretion to assess the cost of the expert's services against any or all of the parties, however, this provision may become a sword as well as a shield.

VI. Section 20-7-475: Sequestration of Marital Property

Sequestration[70] has been employed by equity courts[71] for centuries. Section 20-7-475[72] permits sequestration of marital property in addition to any other enforcement procedures otherwise available to the parties. The court may sequester property upon an appropriate petition at any stage of proceedings under the Act[73] if personal jurisdiction over an absent party will be

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to local ordinances. State reports, however, are not limited to issuances of the South Carolina government and may include reports of other jurisdictions. Examples of official bulletins might include the Occupational Safety and Health Administration's job safety requirements or state poultry and egg grading standards.

69. S.C. Code Ann. § 20-7-474(3) (Law. Co-op. Supp. 1987).

70. In equity practice, sequestration is "[a] writ authorizing the taking into the custody of the law of the real and personal estate (or rents, issues, and profits) of a defendant who is in contempt, and holding the same until he shall comply." Black's Law Dictionary 1225 (5th ed. 1979).

71. South Carolina family courts are essentially forums of equity. McNeill v. McNeill, 288 S.C. 491, 343 S.E.2d 626 (1986); Mitchell v. Mitchell, 283 S.C. 87, 320 S.E.2d 706 (1984).

72. S.C. Code Ann. § 20-7-475 (Law. Co-op. Supp. 1987).

73. The Act does not state specifically whether a party to a divorce proceeding in another state may have his property in South Carolina sequestered under § 20-7-475. One may argue that a property distribution in another state is not "a proceeding under [section 20-7-475]," and, thus, the request would not be an "appropriate petition." *Id.* Perhaps the correct course for such parties is first to petition the court for an order enjoining the party with property in South Carolina to transfer it to the petitioner. If the party fails to comply, the court might order sequestration. Even if an out-of-state divorce is not a "proceeding" under § 20-7-475, however, the family court still might sequester property of the nonresident under its common-law powers. The statutory sequestration procedure is made available *in addition to all other remedies, id.* at § 20-7-475(5), and does not limit the parties merely to all other *statutory* remedies. Thus, common-law sequestration still would seem to be a viable alternative. In Roberts v. Roberts,

impossible or if a party refuses to comply with a court order.

A sequestrator[74] may be appointed, and the court, by injunction or other appropriate methods, may authorize the sequestrator to take possession and control of the property. The court may use the sequestered property and any income derived therefrom to achieve an equitable distribution between the parties. In addition, subsection 20-7-475(3)[75] permits mortgaging or sale of such assets. The court in which the litigation is pending has venue and jurisdiction to sequester property anywhere in the forum state.

Although not mentioned in the Act, the judge at his discretion still would seem to have available the use of a performance bond.[76] Furthermore, because the sequestration often will be an *ex parte* proceeding, fifth and fourteenth amendment procedural due process problems might arise unless an expeditious post-sequestration hearing is granted.[77]

In addition to procedural due process problems, practitioners should be aware that one who wrongfully sequesters property may be guilty of a tort: "conversion will . . . lie for an unjustified levy or attachment under legal process, even though possession is not otherwise disturbed . . . ."[78]

VII. SECTION 20-7-476: COURT ORDERS TO SELL PROPERTY OR TO EXECUTE AND DELIVER DEEDS, CONTRACTS, BILLS OF SALE, AND MORTGAGES

The court may direct parties to execute and deliver virtually any document necessary to equitably partition the marital prop-

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277 S.C. 459, 289 S.E.2d 640 (1984) the supreme court addressed, without deciding, the propriety of sequestering a Georgia resident's United States Army Retirement Fund. Although the nonresident had obtained a divorce in Georgia, the family court claimed jurisdiction over the property division.

74. Usually the court appoints a sheriff or other official as sequestrator. Subsection 20-7-475(1) permits a party residing in South Carolina to assume such a position.

75. S.C. CODE ANN. § 20-7-475(3) (Law. Co-op. Supp. 1987).

76. *See, e.g.*, Ludwig v. Calloway, 191 La. 1000, 187 So. 4 (1939); *accord* Trahan Drilling Contractors, Inc. v. Sterling, 335 F.2d 65 (5th Cir. 1964).

77. Current due process requirements for prejudgment statutes are outlined in Carey v. Sugar, 425 U.S. 73 (1976) and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

78. W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 93 (5th ed. 1984).

erty. Specifically mentioned in the Act are deeds, contracts, bills of sale, and mortgages. A judge also may use "any other reasonable means to achieve equity between the parties,"[79] including monetary payments; such payments are not taxable income under state or federal law.

Should a party refuse to comply with a court-ordered transfer of property, section 20-7-476 permits a judge to instruct the clerk of court in the county where the property is located to execute and deliver the necessary documents. Although the court must approve agreements with reasonable terms[80] to protect the rights of an absent party, recalcitrant spouses may find themselves bound to a contract not entirely to their liking.[81]

Just as an absent party may be bound to an undesired contract, a lender may be disadvantaged if the court transfers the marital home and its mortgage from a spouse with an excellent credit history to a spouse with an unreliable credit history. If the mortgage contains a due-on-sale clause, the lender might want to trigger it. In *Security Federal Savings and Loan v. Coleman*[82] the supreme court permitted a lender to trigger a due-on-sale clause when a property transfer was ordered by a court. The court held that "[a] party has a right to choose those he wishes to contract with and cannot be compelled to enter into a contract with a party not of his own choosing. This is especially true where a mortgage is involved."[83]

The practitioner should be aware, however, that *Coleman* was not an equitable distribution case and that federal law re-

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79. S.C. CODE ANN. § 20-7-476 (Law. Co-op. Supp. 1987).

80. The Act also gives the court jurisdiction to interpret contracts related to the equitable distribution. *See* S.C. CODE ANN. § 20-7-479 (Law. Co-op. Supp. 1987); *see also infra* notes 91-94 and accompanying text.

81. Because this is an *ex parte* proceeding, one might argue that the present party's attorney has a duty to disclose all material facts in order to protect the absent party. In jurisdictions which have adopted the *Model Rules of Professional Conduct*, the lawyer before the court in an *ex parte* proceeding is required to "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (1983); *see also id.* comment 15. The *Model Code of Professional Responsibility*, adopted in South Carolina. S.C. SUP. CT. R. 32 (Law. Co-op. 1976) has no such provision, although some jurisdictions under the *Model Code* have found such a duty under the common law.

82. 284 S.C. 394, 325 S.E.2d 546 (1985).

83. *Id.* at 396, 325 S.E.2d at 547 (citations omitted)(citing Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U.S. 379 (1888)).

cently has preempted state law on the issue of due-on-sale clauses incident to spousal property transfers. Under 12 U.S.C. § 1701j-3(d)(7),[84] lenders cannot activate due-on-sale clauses when residential property is exchanged between spouses pursuant to a court order in a dissolution proceeding. Furthermore, Congress clearly intended to preempt state law in this area.[85]

VIII. SECTION 20-7-477: NOTICE OF PENDANCY OF PROCEEDINGS

Parties may give public notice that the equitable distribution is about to occur or is in progress by the same method as in civil proceedings.[86] In addition, a transcript of the final judgment may be recorded in the abstract books of any county clerk of court's office in South Carolina. Section 20-7-477[87] requires compliance with this notice requirement, or the statutory lien given to each spouse in the other's property will be ineffective against third parties;[88] however, the court specifically retains ju-

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84. 12 U.S.C. § 1701j-3(d)(7) (Supp. 1987). Section 1701j-3(d)(7) provides:

> With respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, including a lien on . . . a residential manufactured home, a lender may not exercise its option pursuant to a due-on-sale clause upon-
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> . . . .
>
> (7) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property . . . .

Note that this statute only applies to *residential* property transferred incident to divorce. Although § 1701j-3(d)(7) has not been subjected to attack on constitutional grounds, it probably would survive the minimal scrutiny applied to ordinary economic legislation. The contract clause, of course, would not be an issue: "[N]o *State* shall . . . pass any . . . Law impairing the obligation of Contracts . . . ." U.S. CONST. art. 1, § 10, cl. 1 (emphasis added). *See generally* Barad & Layden, *Due-on-Sale Law as Preempted by the Garn-St. Germain Act*, 12 REAL EST. L.J. 138 (1983); Geier, *Due-on-Sale Clauses Under the Garn-St. Germain Depository Institutions Act of 1982*, 17 U.S.F.L. REV. 355 (1983).

85. *See* 12 U.S.C. § 1701j-3(b)(1) (Supp. 1987).

86. If real property is at issue, notice may be given under the *lis pendens* statutes. *See* S.C. CODE ANN. § 15-11-10 to -50 (Law. Co-op. 1976). The recent amendment to § 20-7-477 requires written notice to be given to third parties if personalty is affected. *See* Act of March 16, 1987, 1987 S.C. Acts 27, §§ 1-3.

87. S.C. CODE ANN. § 20-7-477 (Law. Co-op. Supp. 1987).

88. S.C. CODE ANN. § 20-3-145 (Law. Co-op. 1976) reads, in pertinent part, as follows:

> 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 fee and such attorney fee shall be paid to the estate of the person entitled to receive it

risdiction to enforce any orders or decrees previously issued as part of its equitable distribution. Although, as noted, this section was amended to require filing a notice of pending proceedings in order to affect the rights of third parties, earlier rights of third parties are unaffected.[89]

IX. SECTION 20-7-478: FORM OF TRANSCRIPT OF JUDGMENT

Section 20-7-478 simply provides a form for filing the transcript of judgment. The precise wording apparently is not mandatory because the Act states that the "transcript . . . *may* be substantially in the following form."[90] This section probably was appended to the Act to encourage consistency and to provide some measure of guidance to judges and attorneys in South Carolina divorce litigation.

X. SECTION 20-7-479: SUBJECT MATTER JURISDICTION OF FAMILY COURTS OVER CONTRACTS RELATING TO PROPERTY

Following a trend set by the supreme court, the legislature, in section 20-7-479, expanded the jurisdiction of the South Carolina family courts over "all contracts relating to property which is involved in a proceeding under this article and over [their] construction and enforcement."[91] Thus, the facts of the case must satisfy a three-pronged test before a court may use section 20-7-479.

First, the document must be a "contract." This provision, strictly speaking, might not apply to interpretation of a deed or will.[92] Second, the contract must relate to "marital property" as defined under section 20-7-473.[93] Hence, agreements relating to

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under the order if such person dies during the pendency of the divorce action.

89. *See* Act of March 16, 1987, 1987 S.C. Acts 27, §§ 1-3.

90. S.C. CODE ANN. § 20-7-478 (Law. Co-op. Supp. 1987)(emphasis added).

91. S.C. CODE ANN. § 20-7-479 (Law. Co-op. Supp. 1987).

92. A transfer of realty often will include four documents: (a) a deed, (b) a broker's agreement, (c) a mortgage, and (d) a contract for sale. Read strictly, the statute might not permit a family court to interpret the deed, but such an interpretation would result in judicial inefficiency. This would also apply, *inter alia*, to a will, the interpretation of which might be necessary to determine whether certain property is nonmarital under S.C. CODE ANN. § 20-7-473(1) (Law. Co-op. Supp. 1987) or whether it is a potential capital asset under S.C. CODE ANN. § 20-7-472(4) (Law. Co-op. Supp. 1987).

93. *See supra* notes 55-64 & accompanying text. "The court does not have jurisdic-

the parties' separate property are not within the court's jurisdiction. Finally, the property must be involved in a "proceeding under" the Act.[94]

Section 20-7-479 expands the family courts' jurisdiction and, thus, will expedite domestic litigation in South Carolina by permitting a judge to decide a greater number of issues in one proceeding. In furtherance of this trend, permitting family court judges to interpret deeds and testamentary transfers of marital property incident to the divorce seems logical as well. Arguably, no greater expertise is required in interpreting deeds or wills than in construing contracts. Furthermore, granting family courts this jurisdiction would have the salutory effect of enabling the court to decide all pertinent issues of the equitable distribution in one proceeding.

XI. CONCLUSION

The South Carolina Equitable Distribution Act achieves a number of juridical goals. By codifying the law of marital property division, it creates uniformity and certainty in divorce litigation. Practitioners should take note, however, of uncertainties in the present law and should anticipate possible amendments that the legislature may enact to rectify these problems.

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tion or authority to apportion nonmarital property." S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1987).

94. *See* S.C. CODE ANN. § 20-7-472 (Law. Co-op. Supp. 1987).