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I. Court Refuses to Recognize Cause of Action for Legal Separation

In *Ariail v. Ariail*[1] the South Carolina Court of Appeals addressed the issue of whether a cause of action for legal separation exists in South Carolina.[2] This issue has been a source of confusion in this state for two reasons. First, both family courts and the supreme court have used interchangeably separate terms to designate various types of divorce proceedings, often substituting one term for another when they do not mean the same thing.[3] Second, once legal separation has been identified as an issue, courts have not clearly addressed its validity in South Carolina.[4] The court in *Ariail* held that since there is no constitutional or statutory provision for legal separation in this state, no action can be maintained for such a proceeding.[5]

Mrs. Ariail appealed an order of the family court judge, who refused to grant her a legal separation, child custody, child support, and attorney's fees. At the time of the trial, Mr. and Mrs. Ariail lived together in the marital home. Mrs. Ariail suggested that she remained there only for the sake of the couple's two minor children. The court of appeals affirmed in part the family court order.

Mrs. Ariail subsequently petitioned the court for rehearing. She contended that her action should have been treated as one for separate maintenance, rather than one for legal separation, because the parties had treated the action as one for separate maintenance. The court rejected this contention because the record "clearly reflect[ed] the action was for a different purpose."[6] It reasoned that an action for separate maintenance was the same as an action for alimony.[7] Since Mrs. Ariail had withdrawn her request for alimony, her remaining requests consti-

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1. 295 S.C. 486, 369 S.E.2d 146 (Ct. App.), *reh'g denied*, 295 S.C. 486, 490, 369 S.E.2d 146, 148 (Ct. App. 1988).

2. Legal separation is sometimes called divorce from bed and board, divorce *a mensa et thoro*, or limited divorce. Nocher v. Nocher, 268 S.C. 503, 508, 234 S.E.2d 884, 886 (1977).

3. *See id.*

4. *See* Murray v. Murray, 271 S.C. 62, 244 S.E.2d 538 (1978) (affirming order of family court granting legal separation without addressing validity of cause of action).

5. *Ariail*, 295 S.C. at 489, 369 S.E.2d at 148.

6. *Id.* at 491, 369 S.E.2d at 149 (order on petition for rehearing).

7. *See id.*

tuted a cause of action for legal separation.[8] The court clearly explained that South Carolina does not recognize a cause of action for legal separation. Thus, the petition for rehearing was denied.[9]

The court based its decision on the fact that it found no constitutional or statutory authority allowing legal separation, or *divorce a mensa et thoro*,[10] in this state.[11] It briefly discussed three South Carolina Code sections,[12] concluding that there is no provision stating the grounds for a limited divorce.[13] Without such a provision, the court found that " 'the cause of action could not be created.' "[14] The court compared the legal theories of separate maintenance, which is viable in this state, and legal separation, which is not.[15] It cited several earlier cases that distinguished the two causes of action,[16] but offered no comment as to how the two causes differ. Nonetheless, the fact that there is a clearly defined difference between legal separation and separate maintenance seems well settled.[17]

The *Ariail* court, in deciding whether there exists in this state a cause of action for legal separation, devoted a sizeable portion of its

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8. *Id.*

9. *Id.* at 493, 369 S.E.2d at 150.

10. *See supra* note 2.

11. *Ariail*, 295 S.C. at 488, 369 S.E.2d at 147.

12. S.C. CODE ANN. § 20-3-140 (Law. Co-op. 1976 & Supp. 1988) (allowing for alimony and suit money in marital litigation); S.C. CODE ANN. § 20-7-420(2) (Law. Co-op. 1976 & Supp. 1988) (conferring jurisdiction upon the family court to hear and determine actions for legal separation); S.C. CODE ANN. § 14-21-1020(1) (Law. Co-op. 1976) (repealed 1981) (conferring upon the family court all the power and authority and jurisdiction by law rested in the circuit courts in actions for divorce *a vinculo matrimonii* and *a mensa et thoro*).

13. *Ariail*, 295 S.C. at 488, 369 S.E.2d at 147.

14. *Id.* at 489, 369 S.E.2d at 148 (quoting Nocher v. Nocher, 268 S.C. 503, 510, 234 S.E.2d 884, 887 (1977)).

15. *See id.* at 488, 369 S.E.2d at 147.

16. *See id.* (citing *Nocher*, 268 S.C. 503, 234 S.E.2d 884; McChesney v. McChesney, 91 N.J. Super. 523, 221 A.2d 557 (Ch. Div. 1966); Fisher v. Harrison, 165 Va. 323, 182 S.E. 543 (1935)).

17. *See, e.g.*, Lavino v. Lavino, 23 N.J. 635, 130 A.2d 369 (1957). The New Jersey Supreme Court explained that the legal effect of a decree of separate maintenance is much the same as that of a limited divorce because in neither is the marital bond dissolved. The New Jersey court stated:

> The primary purpose in obtaining a limited divorce is to nullify the marital obligations of cohabitation; the primary object of separate maintenance is to enforce the husband's duty of support . . . . The statutory philosophy of separate maintenance is to favor a resumption of cohabitation . . . . Limited divorce forbids it . . . . [Therefore] the marital bond, though not dissolved is considerably more disrupted by limited divorce than by a decree of separate maintenance.

Id. at 639-40, 130 A.2d at 371; *see also* 24 AM. JUR. 2D *Divorce and Separation* § 3 (1983) (defining the difference between the two terms).

opinion to the discussion of relevant statutes. This discussion is rather cloudy, however, and does not actually tell why the cited sections do not provide a cause of action for legal separation; it merely states that they do not. The court indicated, however, that its decision was based largely on the fact that, although the statutes expressly mention legal separation, they do not provide the grounds necessary for it.[18] The court could have been clearer by citing the concurring opinion in *Brewer v. Brewer*,[19] in which Justice Bussey stated that "no remedy is complete without a definition of the cases to which it shall extend, and . . . a mere grant of judicial power even in the Constitution [does] not, without more, create a cause of action."[20]

An obvious hurdle for the court in *Ariail* was the supreme court's decision in *Murray v. Murray*.[21] In *Murray* the supreme court affirmed a family court order granting legal separation, but did not address the validity of the cause of action. Although the *Ariail* court cited *Murray*, it virtually ignored the result in the case. Instead, it chose to follow *Nocher v. Nocher*,[22] in which the court refused to grant a legal separation in the absence of constitutional or statutory authority. While the court in *Ariail* did not even mention the issue in *Murray*, its decision to follow *Nocher* was a prudent one.

A possible explanation for the two obviously conflicting results in *Murray* and *Nocher* is that the supreme court in *Murray* simply failed to take note of its earlier ruling in *Nocher*. A more plausible explanation, however, is that when deciding the two cases the court was not careful with its terminology. Thus, it is likely that the court termed what should have been an action for separate maintenance an action for legal separation instead.

In her petition for rehearing, Mrs. Ariail cited *Brewington v. Brewington*,[23] a court of appeals decision, for the proposition that the courts of this state have jurisdiction to grant a legal separation.[24] The court retorted, "We did not hold in *Brewington*, as Mrs. Ariail seems to suggest, that a family court has the power to award a legal separation or limited divorce in the absence of a statute or constitutional provision."[25] The *Ariail* court's strong denial of Mrs. Ariail's assertion may not be as well founded as the court suggests, however. Indeed, it may be an effort by the court to avoid having to harmonize the *Ariail* deci-

18. *See Ariail*, 295 S.C. at 488-89, 369 S.E.2d at 147.
19. 242 S.C. 9, 129 S.E.2d 736 (1963).
20. *Id.* at 24-25, 129 S.E.2d at 744 (Bussey, J., concurring).
21. 271 S.C. 62, 244 S.E.2d 538 (1978).
22. 268 S.C. 503, 234 S.E.2d 884 (1977).
23. 280 S.C. 502, 313 S.E.2d 53 (Ct. App. 1984).
24. *See Ariail*, 295 S.C. at 492, 369 S.E.2d at 149 (order on petition for rehearing).
25. *Id.* at 493, 369 S.E.2d at 149.

sion with what seems to be a contradictory opinion, decided just four years earlier. The court of appeals in *Brewington* stated:[25]

> The trial court granted the wife a legal separation . . . .
>
> The issues presented on appeal are: (1) whether a spouse may bring an action for a legal separation . . . ; (2) whether the evidence was sufficient to determine an equitable distribution of the marital property . . . . We affirm the trial court on all issues except the issue involving an equitable distribution of the marital property.[26]

Based on this language from *Brewington*, it seems Mrs. Ariail's assertion was well founded. As noted, however, the court quickly dismissed the assertion without explaining its variance from the decision in *Brewington*. If the court was not able to distinguish or explain the conflict presented by *Murray* and *Brewington*, it should have acknowledged the precedent set by the cases and granted Mrs. Ariail's request for legal separation.

A study of the case law from other jurisdictions shows that other states recognize legal separation as a cause of action. Alabama, Louisiana, Missouri, and North Carolina all permit legal separation.[27] Florida, on the other hand, does not permit it.[28] The Uniform Marriage and Divorce Act,[29] the model no-fault-divorce statute, has been adopted in Arizona, Colorado, Illinois, Kentucky, and Montana.[30] It provides that if a party requests a decree of legal separation rather than a decree of dissolution of marriage, the court must grant the decree unless the other party objects.[31]

Given the dichotomy between states that recognize a cause of action for legal separation and those that do not, one is prompted to inquire as to the basis on which states are making this decision. Why are courts so often reluctant to grant a legal separation? Mr. Justice Bussey, in his concurring opinion in *Brewer*, provided some insight into South Carolina's reasons for refusing to do so. He stated, "The nature of a divorce *a mensa et thoro* being more drastic, and complete or final, we should not by judicial implication contribute to the recognition of such a cause of action in the absence of legislation setting

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26. *Brewington*, 280 S.C. at 504, 313 S.E.2d at 54.

27. *See* Drummond v. Drummond, 466 So. 2d 974 (Ala. Civ. App. 1985); Wright v. Wright, 407 So. 2d 1298 (La. Ct. App. 1981); Whiteley v. Whiteley, 490 So. 2d 1128 (La. Ct. App. 1986); Frerichs v. Frerichs, 704 S.W.2d 258 (Mo. Ct. App. 1986); Howell v. Tunstall, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

28. *See* Hilderbran v. Hilderbran, 357 So. 2d 788 (Fla. Dist. Ct. App. 1978) (stating that a limited divorce, *a mensa et thoro*, is still recognized in some states, but not in Florida).

29. UNIF. MARRIAGE AND DIVORCE ACT §§ 101-506, 9A U.L.A. 147 (1973).

30. 2 SHEPARD'S ACTS AND CASES BY POPULAR NAMES 1257 (3d ed. 1986).

31. UNIF. MARRIAGE AND DIVORCE ACT § 302(b), 9A U.L.A. at 181 (1973).

forth the grounds therefor and the consequences thereof."[32] Thus, South Carolina apparently favors a resumption of cohabitation, which is possible through an action for separate maintenance.[33]

By holding that legal separation and separate maintenance are two different things, and that the former is not a recognized cause of action in South Carolina, the *Ariail* court made an effort to clarify this state's position on the issue. The result of this case, then, forces one to consider the lack of alternatives available to one who no longer feels comfortable in one's marriage, but who does not have the means by which to support oneself.

After *Ariail v. Ariail*, family courts recognizing a need for legal separation are powerless to grant it, despite the wishes of the parties. The legislature should remedy the potential inequities of this result by enacting statutory provisions stating grounds on which actions for legal separation could be brought.[34] If the legislature does not wish to provide such a cause of action, it should enact a statutory provision making that clear.[35] In the meantime, the state of the law in South Carolina is that parties who wish to dissolve their spousal obligations, but cannot afford to leave the marital home, or who choose to stay for the sake of their children, will be granted no relief.

Laura E. Zoole

II. Court Strictly Construes Statute Barring Alimony to Adulterous Spouse

In *Spires v. Spires*[36] the South Carolina Court of Appeals held an adulterous spouse cannot raise recrimination[37] as a defense to the statutory bar to alimony.[38] This case of first impression in South Carolina

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32. *Brewer v. Brewer*, 242 S.C. 9, 26, 129 S.E.2d 736, 745 (1963) (Bussey, J., concurring).

33. *See* Lavino v. Lavino, 23 N.J. 635, 639-40, 130 A.2d 369, 371 (1957) (noting the statutory philosophy of separate maintenance is to favor a resumption of cohabitation).

34. The Alabama State Legislature has enacted such a statute, which could serve as a model for a similar South Carolina law. *See* Ala. Code § 30-2-30 (1975).

35. The Florida State Legislature has enacted a statute which provides that no divorce is from bed and board, but is from the bonds of matrimony. *See* Fla. Stat. § 61.031 (1984).

36. 296 S.C. 422, 373 S.E.2d 698 (Ct. App. 1988).

37. Recrimination is defined as "[a] charge made by an accused person against the accuser; in particular a counter-charge of adultery or cruelty made by one charged with the same offense in a suit for divorce, against the person who has charged him or her." Black's Law Dictionary 1147 (5th ed. 1979).

38. South Carolina Code section 20-3-130 creates the bar to alimony to an adulterous spouse. The statute reads:

arose when Charles Quitman Spires commenced an action for divorce on the ground of adultery. Mr. Spires sought to discontinue alimony awarded to Mrs. Spires by an earlier order of the court based on her alleged adulterous conduct. The wife denied the allegations and filed a counterclaim for divorce on the ground of adultery, or in the alternative, for divorce based on one year's continuous separation. Mrs. Spires also plead recrimination as a defense both to her husband's cause of action for divorce and to his request that alimony be barred.[39]

The family court judge found both parties had proved their respective cases for adultery, and thus that Mrs. Spires had established her defense of recrimination.[40] As a result, the family court judge denied divorce on the ground of adultery, but granted it based on one year's continuous separation.[41] The judge found, however, that while recrimination is a defense to an action for divorce, it is not a defense to the application of South Carolina Code section 20-3-130,[42] which bars alimony to an adulterous spouse.[43] Accordingly, the family court judge denied Mrs. Spires' request to have alimony continued,[44] and the court of appeals affirmed.[45]

The court readily decided the appealed issue by focusing on the part of the statute that reads, "No alimony shall be granted an adulterous spouse."[46] The court apparently believed there was no room for interpretation with regard to the language, and thus strictly construed the statute to disallow recrimination as an exception to section 20-3-130.[47]

The issue decided in *Spires* raises two important questions. First, how can *Spires* be reconciled with *Oyler v. Oyler*,[48] an earlier court of

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> In every judgment of divorce from the bonds of matrimony the court shall make such orders touching the maintenance, alimony and suit money of either party or any allowance to be made to him or her and, if any, the security to be given as from the circumstances of the parties and the nature of the case may be just. No alimony shall be granted an adulterous spouse. In any award of permanent alimony the court shall have jurisdiction to order periodic payments or payment in a lump sum.

S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976).

39. Record at 1.

40. *Id.*

41. *Id.*

42. S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976), *see supra* note 38.

43. *Spires*, 296 S.C. at 423, 373 S.E.2d at 699.

44. Mrs. Spires requested continuation of alimony awarded by the court in its order dated November 6, 1986, but the judge refused the request based on South Carolina Code section 20-3-130. *See* Record at 1.

45. *Spires*, 296 S.C. at 423 , 373 S.E.2d at 699.

46. S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976).

47. *See Spires*, 296 S.C. at 423, 373 S.E.2d at 699.

48. 293 S.C. 4, 358 S.E.2d 170 (Ct. App. 1987).

appeals case clearly implying recrimination could constitute an exception to the bar to alimony for an adulterous spouse? And second, does *Spires* mean an adulterous spouse will never be granted alimony?

In *Oyler* the court of appeals was presented with a case in which the husband, who raised the issue of adultery for the first time at trial, sought to bar his wife's claim to alimony. The court found adultery to constitute an avoidance to an action for alimony, and as such required it to be plead under the South Carolina Rule of Civil Procedure 8(c).[49] Since the husband had not plead adultery, the court of appeals reversed the family court judge and disallowed the testimony concerning the wife's infidelity.[50] In support of its reversal, the court stated that "[h]ad the wife in this case been on notice that the husband would raise adultery as a bar to her alimony claim, *she could have plead and sought to prove recrimination . . . .*"[51]

The language from *Oyler*, however, did not persuade the court in *Spires*. In fact, Mrs. Spires' argument on appeal was based largely on the *Oyler* decision,[52] yet the *Spires* court never acknowledged the language in *Oyler*. Presumably, the court considered the language in *Oyler* merely non-binding dicta, and thus felt no obligation to either expressly overrule or distinguish the case.[53]

Irrespective of the reason, the important point of which the practitioner should be aware is that the court's failure to reference *Oyler* in the *Spires* opinion was neither an oversight nor a license to continue to rely on the recrimination language in *Oyler*. The court of appeals is keenly aware of the *Oyler* language and, in light of its finding that section 20-3-130 is clear and unambiguous, the court has chosen to ignore it. Simply stated, reliance on *Oyler*, as support for the proposition that recrimination is a defense to the statutory bar to alimony, is no longer justifiable after *Spires*.

The court's conclusion in *Spires* clearly is based on the sound rule of strict construction.[54] Prior to *Spires*, however, the rule had not been

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49. *Id.* at 7, 358 S.E.2d at 172. The court stated that "[t]he purpose of Rule 8(c) is to avoid the 'surprise' defenses permissible under the old general denial answer, and require the defendant to stick to 'fact' pleading." *Id.* at 7-8, 358 S.E.2d at 172 (citing S.C. R. Civ. P. 8(c) reporter's note).

50. *Id.* at 8, 358 S.E.2d at 172.

51. *Id.* (emphasis added).

52. *See* Brief of Appellant at 1.

53. This presumption is based on the fact that the *Spires* court ruled in favor of the Respondent and it was the Respondent's position that the pertinent language from *Oyler* was merely "unsupported dicta." *See* Brief of Respondent at 6.

54. *See Spires*, 296 S.C. at 423, 373 S.E.2d at 699. The court stated, "Where a statute is clear and unambiguous, there is not room for construction, and, the terms of the statute must be given their literal meaning." *Id.* (citing Duke Power Co. v. South Carolina Tax Comm'n, 292 S.C. 64, 354 S.E.2d 902 (1987)).

applied to South Carolina Code section 20-3-130. In fact, in several cases both the court of appeals and the South Carolina Supreme Court have refused to strictly construe the statute and have allowed alimony to an adulterous spouse.

In *Grubbs v. Grubbs*[55] the supreme court reversed a family court judge who apparently applied the rule of strict construction to bar alimony to a wife who admitted committing adultery eleven years prior to the divorce action. The court based its reversal on the doctrine of condonation, stating, "While Mrs. Grubbs admitted committing a single indiscretion in 1966, this should not prevent her from receiving alimony. . . . [T]he preponderance of the evidence indicates [Mr. Grubbs] condoned her isolated act of infidelity."[56] Thus, in *Grubbs* the supreme court clearly was willing to allow an admitted adulterous spouse to receive alimony notwithstanding the statute, which, strictly construed, would have barred the award.

Similarly, the supreme court allowed alimony to an adulterous spouse in *Sattler v. Sattler*,[57] in which separated spouses entered into a "Complete Support, Custody and Property Settlement" which gave the wife monthly payments of unallocated support. The agreement provided it could not be altered except by written agreement between the parties. Subsequent to execution of the agreement, however, the wife was found guilty of adultery and was denied alimony under section 20-3-130. The supreme court refused to affirm the family court's strict construction of the statute, holding that "the terms of the agreement . . . control[led], rather than the terms of Section 20-3-130."[58]

The supreme court also permitted an award of alimony in *Smoak v. Smoak*.[59] In that case the court held a husband estopped from proving adultery by asserting the invalidity of a Haitian divorce that he had procured and had long represented to his wife as valid. The court focused on and quoted the same language as the court in *Spires*, but did not regard the language of the statute as conclusive.[60] Instead, the supreme court refused to allow the statute to work an injustice, saying that "the rule of estoppel had closed his mouth to assert that which he would attempt to prove."[61]

The court of appeals also has shown a willingness to allow alimony to an adulterous spouse. Prior to its finding in *Spires* that the language of section 20-3-130 was "clear and unambiguous," the court twice per-

55. 272 S.C. 138, 249 S.E.2d 747 (1978).
56. *Id.* at 140, 249 S.E.2d at 748-49.
57. 284 S.C. 422, 327 S.E.2d 71 (1985).
58. *Id.* at 424, 327 S.E.2d at 72.
59. 269 S.C. 313, 237 S.E.2d 372 (1977).
60. *See id.* at 317, 321, 237 S.E.2d at 373, 375.
61. *Id.* at 321, 237 S.E.2d at 375.

mitted alimony when the award was questionable at best.

As previously discussed, the court in *Oyler* refused to bar alimony to an adulterous wife because the husband failed to raise the issue in his pleadings. Additionally, the court in *Doe v. Doe*,[62] faced with deciding whether an act of fellatio constituted adultery for the purpose of section 20-3-130, held the act "was condoned by the husband so that even if [it] was an act of adultery, the husband [could not] avail himself of it as a bar to paying the wife alimony."[63]

Thus, while the rule of strict construction, on which *Spires* is based, is itself a sound basis for the decision, in actuality the rule seems somewhat out of place when applied to section 20-3-130, which has so often been construed liberally to avoid inequitable results. Both the supreme court and the court of appeals have demonstrated a number of exceptional circumstances under which they will refuse to strictly construe the statute and will allow alimony to an adulterous spouse. Consequently, the rule of *Spires* is one of limited scope and, therefore, practitioners should be aware that contrary to the apparent rule from the case, it is possible for an adulterous spouse to be granted alimony.

Steven A. McKelvey, Jr.

III. Family Court May Not Consider Fact that Adulterous Spouse is Barred from Alimony when Making Equitable Distribution of Marital Property

The South Carolina Supreme Court recently held that the statutory preclusion of alimony to an adulterous spouse may not be considered to increase that spouse's equitable distribution award. In *Berry v. Berry*[64] the court allowed public policy considerations manifested in the statute barring alimony to override other factors relevant to the equitable division of marital property.

William Berry, Jr. and Patricia Berry were divorced after thirty years of marriage. William Berry initiated the action, alleging adultery and requesting an equitable division of marital property. Patricia Berry admitted adultery and counterclaimed for equitable division of marital property, alimony, and attorney's fees. The trial court granted William Berry the divorce, equitably divided the marital estate, and barred Patricia Berry from receiving alimony and attorney's fees. Mr.

62. 286 S.C. 507, 334 S.E.2d 829 (Ct. App. 1985).
63. *Id.* at 512, 334 S.E.2d at 832.
64. 294 S.C. 334, 364 S.E.2d 463 (1988).

Berry appealed the family court decree, asserting, *inter alia*, that the judge erroneously awarded the wife more than her equitable portion of the marital property because he was precluded from awarding the adulterous spouse alimony. The court of appeals agreed with Mr. Berry's assertion and reversed and remanded the equitable division award.[65] Patricia Berry petitioned the supreme court for certiorari. The court granted certiorari and affirmed the court of appeals' decision that a family court may not consider the fact that a spouse is barred from alimony in making an equitable distribution of marital property.[66]

The supreme court reasoned that the court of appeals' decision prohibits the family court from using equitable division of marital property to avoid the mandate of South Carolina Code section 20-3-130,[67] which bars alimony to an adulterous spouse.[68] The petitioner argued that the court of appeals' decision ignored the following two factors enumerated by the supreme court to be considered when equitably dividing marital property: "(1) the present income of the parties; and (2) the effect of distribution of assets on the ability to pay alimony and support."[69] The supreme court rejected this argument and held that "the preclusion of an alimony award to a spouse cannot be used to increase an equitable distribution award."[70] The court indicated that its decision was based at least in part on the fact that public policy considerations compel this result.[71]

The court of appeals based its holding on the rule that fault may be used to decrease an award of equitably distributed property, but never to increase it.[72] It also focused on public policy considerations of the alimony barring statutes.[73] The supreme court's rationale was consistent with that of the court of appeals. The supreme court stated that a family court may consider a party's income and the effect of distribution of property on the party's ability to pay alimony and support when a divorce has been granted on grounds of adultery.[74] A preclusion of alimony, however, may not be used to increase an equitable distribu-

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65. Berry v. Berry, 290 S.C. 351, 356, 350 S.E.2d 398, 401 (Ct. App. 1986), *aff'd*, 294 S.C. 334, 364 S.E.2d 463 (1988).

66. *Berry*, 294 S.C. at 334, 364 S.E.2d at 463.

67. S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976).

68. *See Berry*, 294 S.C. at 335, 364 S.E.2d at 463-64.

69. *Id.*, 364 S.E.2d at 464 (citing Shaluly v. Shaluly, 284 S.C. 71, 325 S.E.2d 66 (1985)).

70. *Id.*

71. *See id.* (citing S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976)).

72. *See* Berry v. Berry, 290 S.C. 351, 356, 350 S.E.2d 398, 401 (Ct. App. 1986), *aff'd*, 294 S.C. 334, 364 S.E.2d 463 (1988).

73. *Id.*

74. *Berry*, 294 S.C. at 335, 364 S.E.2d at 464.

tion award.[75]

Public policy considerations supporting the court's reasoning are subject to criticism. Both statutory[76] and supreme court[77] standards use alimony as a factor in the allocation of assets. If no alimony is awarded, arguably the adulterous spouse should get more assets in lieu of alimony. Since the purpose of alimony is to place a supported spouse in a position of support comparable to that enjoyed during the marriage,[78] it seems logically inconsistent to deny support on the basis of adultery. Difficulty arises, however, in determining how much more should be awarded since the fault of the adulterous spouse must be taken into account.

A bill pending in the legislature would delete the statutory provision that prohibits alimony awards to adulterous spouses.[79] Currently, policies that penalize the adulterous spouse conflict with policies that provide for spousal support.[80] The supreme court viewed the public policy considerations that condemn adultery to be of the utmost importance in balancing awards of alimony and equitable distribution of marital property. Thus, consistent with South Carolina Code sections 20-3-130[81] and 20-7-472,[82] the *Berry* court refused alimony to the adulterous spouse and read into the statutes the policy that an equitable distribution award may not be increased to compensate for the preclusion of alimony to a spouse who has committed adultery.

The precedent established by the court in *Berry* will result in closer scrutiny of equitable distribution of marital property when an adulterous spouse is involved. It is also likely that the case will lead to often unwarranted smaller distributions to adulterous spouses. Nonetheless, both the court of appeals and the supreme court have ruled, and unless and until the legislature enacts the proposed amendment that would remove the bar to alimony to an adulterous spouse, family courts may not consider the fact that a spouse is barred from alimony

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75. *Id.*

76. *See* S.C. CODE ANN. § 20-7-472(9) (Law. Co-op. Supp. 1988).

77. *See* Smith v. Smith, 294 S.C. 194, 202, 363 S.E.2d 404, 408 (Ct. App. 1987).

78. Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988), *cert. denied*, __ S.C. __, 378 S.E.2d 445 (1989).

79. H.R. 3121, 108th Leg., 1st Spec. Sess. (S.C. 1988) (proposed amendment to S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976)). This bill was introduced in 1989, but was not acted upon. The bill's statute remains the same for the 1990 session of the General Assembly and could be passed in 1990 without reintroduction.

80. *See* Wilson v. Wilson, 270 S.C. 216, 241 S.E.2d 566 (1978) (property settlement can be alternate method of satisfying alimony award, but property transfer cannot be ordered in lieu of alimony).

81. S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976).

82. *Id.* § 20-7-472 (Law. Co-op. Supp. 1988).

when making an equitable distribution of marital property.

Johanna Searle

IV. Court of Appeals Moving Toward Inclusion of Military and Civilian Pensions as Marital Property Subject to Equitable Distribution

With over 67,000 military and civilian personnel stationed in South Carolina,[83] the treatment of military and civil service pensions in divorce proceedings is an issue of considerable consequence. The disposition of these pensions, however, is an unsettled issue in South Carolina. This survey article focuses primarily on military and civil service pensions, but many of the issues addressed are relevant to other types of pensions as well.

In *Walker v. Walker*,[84] a divorce proceeding, the South Carolina Court of Appeals considered whether a military pension should be included in the marital estate and thus be subject to equitable apportionment. The court declined to rule on the issue, holding the wife had made no contributions to the marital estate whatsoever and, consequently, was precluded from a share of any martial assets, regardless of their source.[85]

In *Kneece v. Kneece*,[86] also a divorce proceeding, the South Carolina Court of Appeals endorsed the position that a civil service pension was to be included in the marital estate. The court held the pension was subject to equitable apportionment and distribution.[87]

These two cases illustrate the slow change in the case law concerning the treatment of pensions in divorce actions. Pensions are at issue today largely because of the new article 6 of the Children's Code, which is entitled "Equitable Apportionment of Marital Property" (Act).[88]

Before the Act became law, South Carolina case law was well settled: military and civil service pensions were not to be included in the marital estate.[89] Pensions were to be considered, however, in determin-

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83. U.S. Bureau of the Census, Statistical Abstract of the United States: 1988 (108th ed. 1987). This figure is for 1986 and is comprised of approximately 47,000 military personnel and 20,000 civilian employees of the Department of Defense. *Id.* at 317.

84. 295 S.C. 286, 368 S.E.2d 89 (Ct. App. 1988).

85. *Id* at 288, 368 S.E.2d at 90.

86. 296 S.C. 28, 370 S.E.2d 288 (Ct. App. 1988).

87. *Id.* at 33-34, 370 S.E.2d at 291-92.

88. S.C. Code Ann. §§ 20-7-471 to -479 (Law. Co-op. 1976 & Supp. 1988).

89. *See* Bugg v. Bugg, 277 S.C. 270, 272, 286 S.E.2d 135, 137 (1982) (military pensions not subject to equitable apportionment); Carter v. Carter, 277 S.C. 277, 279, 286 S.E.2d 139, 140 (1982) (civil service pensions not subject to equitable apportionment and

ing whether payment of alimony was warranted and in setting the amount.[90]

The Act defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held . . . ."[91] The Act then lists five exceptions, none of which pertains directly to pensions.[92] The obvious initial inquiry is whether pension rights are marital "property" as contemplated by the Act.

The majority of other jurisdictions answer the inquiry affirmatively.[93] South Carolina case law gives no clear answer. Cases from the supreme court antedate the passing of the Act, but nonetheless offer some guidance. In *Brown v. Brown*[94] the court gave its most definitive exposition when it stated that "the final decision concerning the treatment of military retirement funds remains with the states. We may treat them as income . . . or, we may treat them as marital property subject to equitable division. We prefer to treat the fund as income and *not* as martial property."[95] The South Carolina rule treats military pension payments as compensation for current services and not as deferred compensation for prior services.[96] This view is at odds with the

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should be treated in a fashion similar to military pensions). These cases were decided subsequent to a major upheaval in divorce litigation. In McCarty v. McCarty, 453 U.S. 210 (1981), the United States Supreme Court held the congressional intent underlying the enactment of the military retirement program forbade state courts from denying retirees the full benefit of their pensions by apportioning the pension benefits between spouses in divorce proceedings. *Id.* at 227. This ruling disturbed many jurisdictions. For a detailed analysis of pensions treatment in a pre-*McCarty* setting, see Annotation, *Pension or Retirement Benefits as Subject to Award or Division by Court in Settlements of Property Rights Between Spouses,* 94 A.L.R.3D 176 (1979). Congress reacted with remarkable speed and enacted the Uniformed Services Former Spouses' Protection Act, 10 U.S.C.A. § 1408 (West 1982 & Supp. 1989). This statute restored to the states in marital dissolution proceedings jurisdiction over military pension benefits and overruled *McCarty.* Subsequent to enactment of the federal statute, the South Carolina Supreme Court noted that the statute allowed the state to make the final decision regarding the treatment of military pensions. Brown v. Brown, 279 S.C. 116, 302 S.E.2d 860 (1983). This decision resolved any uncertainty about the treatment of pensions subsequent to *McCarty.*

90. *See* Haynes v. Haynes, 279 S.C. 162, 303 S.E.2d 429 (1983).

91. S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1988).

92. *See* S.C. CODE ANN. §§ 20-7-473(1) to (5) (Law. Co-op. Supp. 1988).

93. Annotation, *supra* note 89, § 2(a), at 180.

94. 279 S.C. 116, 302 S.E.2d 860 (1983).

95. *Id.* at 118, 302 S.E.2d at 861.

96. This position is consonant with the reasoning found in *McCarty.* The United States Supreme Court noted that military pensions were different from other pensions for several reasons. First, the retiree remains a member of the Armed Services and is subject to the Uniform Military Code of Justice. Second, the retiree may forfeit all or

position that the pension benefits accrued during the marriage and, thus, are marital assets.[97] A close reading of South Carolina Supreme Court cases reveals the court has never used the term "property" when discussing pension benefits. Instead, the court has used the terms "fund" or "pay."[98]

The South Carolina Court of Appeals appears never to have addressed whether pension benefits are income. Rather, it has approached the issue by inquiring whether the benefits are to be treated as marital property or as separate property. This approach has resulted in the court giving separate treatment to the various types of pension plans, such as civilian, military, voluntary, nonvoluntary, contributory, noncontributory, vested, and mature.

In *Watson v. Watson*[99] the court held that a voluntary plan under the discretionary control of the beneficiary is subject to equitable distribution. The court was careful to note that lower courts should not mechanically make a decision based on the mere attaching of a label describing the pension.[100] Accordingly, the court set forth nine criteria for lower courts to use to determine whether a pension plan should be distributed.[101] Furthermore, the court offered in a footnote that the equitable distribution statute should be read as defining marital property to include pensions.[102]

Conversely, in *Smith v. Smith*[103] the court of appeals held that a pension plan in which the employer was the sole contributor was not subject to equitable distribution. Although *Smith* precedes the new Act, the court reaffirmed this holding in *Hudson v. Hudson*,[104] which

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part of his benefit if he engages in certain activities. Third, the retiree is subject to recall to active duty. McCarty v. McCarty, 453 U.S. 210, 221-22 (1981). The court then concluded that military retirement pay is actually reduced compensation for current activities. *Id.* at 222.

97. *See* Annotation, *supra* note 89, § 4(a), at 190-91.

98. *See* Brown v. Brown, 279 S.C. 116, 302 S.E.2d 860 (1983); Haynes v. Haynes, 279 S.C. 162, 303 S.E.2d 429 (1983); Bugg v. Bugg, 277 S.C. 270, 286 S.E.2d 135 (1982); Carter v. Carter, 277 S.C. 277, 286 S.E.2d 139 (1982).

99. 291 S.C. 13, 351 S.E.2d 883 (Ct. App. 1986).

100. *Id.* at 17-18, 351 S.E.2d 886-87.

101. The nine factors are as follows: 1) whether the pension plan is mandatory for all employees; 2) whether the spouse has control over the amount of funds deposited; 3) whether funds in the plan are vested; 4) whether the funds are readily accessible to the spouse; 5) whether the spouse has control over the plan's investments; 6) whether the spouse has personally dealt with the plan; 7) whether a third party makes independent judgments regarding loans from the plan or use of its property; 8) whether the spouse uses assets of the plan without compensating for their use; 9) whether the plan meets IRS requirements for pension plan tax provision. *Id.* at 18, 351 S.E.2d at 887.

102. *Id.* at 18 n.2, 351 S.E.2d at 886 n.2.

103. 280 S.C. 257, 312 S.E.2d 560 (Ct. App. 1984).

104. 294 S.C. 166, 363 S.E.2d 387 (Ct. App. 1987).

was decided subsequent to the Act's enactment.

The above analysis demonstrates the confusion prevalent in South Carolina case law concerning pensions (both civilian and military). While older South Carolina Supreme Court cases define pensions as income and not marital property, more recent court of appeals decisions apparently consider pensions as marital property, but do not automatically include pension benefits in the marital estate. These varying conclusions raise an important question: What impact, if any, does the equitable distribution statute have on this confusion?

When dealing with any new statute the first question must focus on the intent of the legislature: Did the state assembly intend that pensions be included in the marital estate? There is a paucity of legislative history about this statute and thus there exists no simple answer to the question.

In setting forth the factors courts should use to determine distribution, the Act mentions retirement benefits and income.[105] Assuming retirement benefits and pensions are synonymous terms, the Act treats income and pensions separately. One may suppose that if the legislature wished to follow the supreme court definition, then pensions would not be mentioned or would be included specifically as income. Assuming the legislature was aware of the supreme court definition of military pensions as income, separate treatment of pensions gives rise to the inference that the supreme court definition was rejected.

Conversely, the Act may be read to allow the apportioning court to distribute property in a manner that compensates in some fashion for a spouse's lack of retirement benefits. This interpretation is predicated on the court's inability to divide the pension, since the pension is either per se nonmarital property or not property at all.

With regard to cases decided subsequent to passage of the Act, it should be noted that the South Carolina Supreme Court has not addressed whether a civilian or military pension is subject to equitable distribution. Although the court of appeals has not been entirely con-

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105. *See* S.C. CODE ANN. § 20-7-472 (Law. Co-op. Supp. 1988). The relevant portions of the statute read:

> [T]he court shall make a final equitable apportionment between the parties of the parties' marital property . . . .
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> In making apportionment, the court must give weight in such proportion as it finds appropriate to all of the following factors:
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> . . . .
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> (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets;
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> . . . .
>
> (8) the existence or nonexistence of vested retirement benefits for each or either spouse . . . .

Id.

sistent, its decisions reveal acknowledgement that the Act has had an impact on the precedents that were controlling prior to the Act.

In *Carter v. Carter*[106] the South Carolina Supreme Court stated in dicta, "Although contributions to any pension fund other than civil service retirement funds are not presently at issue, we state for the edification of the bench and bar that these contributions are generally not subject to equitable distribution."[107] The court of appeals noted the force of this statement in *Smith v. Smith*[108] when it held a noncontributory pension plan not subject to distribution.[109] Nonetheless, when confronted with a plan in which the contributions were voluntary, the court of appeals in *Watson v. Watson*[110] held such a plan subject to distribution.[111]

Watson was decided approximately six months after the Act became effective. Although the court predicated its holding by distinguishing the facts in *Watson* from those in *Carter*, it ignored the directive set forth by the supreme court in *Carter*. In addition, the court did not rely on the new Act to justify its departure from *Carter*.[112] As discussed above, the court mentioned the Act in dicta and indicated pensions were subject to equitable distribution. In *Watson*, then, the court of appeals seemed to shift away from the older precedents and indicated the new Act would be interpreted to overrule the precedents concerning pensions.

The same panel, however, in a case decided on the same day as *Watson*, hewed closely to existing case law. In *Eichor v. Eichor*[113] the court of appeals upheld a dismissal of a petition to divide a military pension under a Texas divorce decree. Interestingly, the *Eichor* opinion is largely gratuitous dicta. The court of appeals determined that the family court lacked subject matter jurisdiction over the relief sought. Such a determination is dispositive and the court had no compelling reason to continue its analysis beyond that point. The court proceeded, however, and determined that the case law in South Caro-

106. 277 S.C. 277, 286 S.E.2d 139 (1982).

107. *Id.* at 279, 286 S.E.2d at 140.

108. 280 S.C. 257, 312 S.E.2d 560 (Ct. App. 1984).

109. *Id.* at 262, 312 S.E.2d at 563.

110. 291 S.C. 13, 351 S.E.2d 883 (Ct. App. 1986).

111. *Id.* at 19, 351 S.E.2d at 887.

112. Indeed, the court of appeals in Wingard v. Wingard, 288 S.C. 644, 344 S.E.2d 191 (Ct. App. 1986), ignored the *Carter* directive prior to the Act's effective date. In *Wingard*, the court remanded an equitable distribution with instructions to include employee purchased stock that was part of the retirement fund. *Id.* at 647, 344 S.E.2d at 193. *Wingard* and *Watson* are indicative of the disfavor with which the court of appeals views the encompassing rules set forth by the South Carolina Supreme Court.

113. 290 S.C. 484, 351 S.E.2d 353 (Ct. App. 1986).

lina would not allow the division of a military pension.[114] Furthermore, they made no reference to the new Act.

In *Hudson v. Hudson*[115] the court of appeals reaffirmed the rule it stated in *Smith* and held a noncontributory pension not subject to equitable distribution.[116] Again, there was no mention of the new Act. The following conclusion emerges from an analysis of these cases: In cases such as military pensions in which the case law is well settled, the court of appeals will not gratuitously invoke the new Act to reverse controlling precedent. But when confronted with a pension plan having no supreme court precedents, the court of appeals could include the pension in the marital estate and perhaps rely on the new Act to justify such a decision.

Turning to the two cases on which this survey article is based, in *Walker v. Walker*[117] the family court found that per the Act, a military pension was marital property subject to distribution. It further found, however, that although the marriage had persisted for 24 years, 12 of those years separated, there actually had never been a marital home because the wife had lived with her parents. Consequently, the family court held she was not entitled to an equitable distribution of her husband's assets.

The court of appeals affirmed the latter determination and held it dispositive. Therefore, it saw no need to decide whether to include the pension in the marital estate and made no holding on the issue. In his concurring opinion, Judge Goolsby acknowledged the footnote in *Watson* that construed the Act to include military pensions in the marital estate.[118]

If anything significant is to be gleaned from this case, it is a negative inference. The court made no statement as to how it might approach the pension issue in the future. Unlike *Eichor*, no dicta reiterates existing case law. Furthermore, the court made no comment regarding the family court holding concerning the military pension.

Kneece v. Kneece[119] is a more significant opinion. In that case a marital estate was held subject to distribution. The pension at issue was a civil service pension earned through work at the Charleston Naval Shipyard. The family court ruled the pension was not subject to distribution because the fund was not vested. The court of appeals held this factual determination was error and reversed. The fund had

114. *Id.* at 488, 351 S.E.2d at 355.
115. 294 S.C. 166, 363 S.E.2d 387 (Ct. App. 1987).
116. *Id.* at 168, 363 S.E.2d at 398.
117. 295 S.C. 286, 368 S.E.2d 89 (Ct. App. 1988).
118. *Id.* at 289, 368 S.E.2d at 90 (Goolsby, J., concurring).
119. 296 S.C. 28, 370 S.E.2d 288 (Ct. App. 1988).

vested but had not yet matured. Citing the new Act, the court stated, "The Act excludes certain property from the marital estate. No one contends the civil services pension falls within one of the exclusions."[120] The court did not dispute the conclusion that the pension was marital property subject to equitable distribution. In light of the rule that courts will correct mistaken assumptions of law, even those made by the parties themselves and not the tribunal,[121] it may be inferred that the court itself did not believe the pension fell within one of the exclusions.

Although not called upon to construe the Act, the *Kneece* court endorsed the position that civil service pensions were marital property subject to distribution. This position directly conflicts with that stated in *Carter*. As a result, this court of appeals' opinion sanctions a legal position in direct conflict with existing case law.

Thus, it is clear that *Walker* is important, if at all, for what was not said. The court failed to dispute a family court's determination that a military pension is marital property subject to equitable distribution as defined by the equitable distribution statute. In *Kneece*, for the first time, conflicting authority has arisen in the appellate courts regarding the inclusion of civil service pensions in the marital estate. The court of appeals appears to be moving slowly in the direction of including military and civilian pensions within the ambit of the new Act.

Of course, the South Carolina Supreme Court has yet to rule on these issues. It seems possible, if not probable, that the court will maintain its view that military pensions are current income for reduced current services. If this view prevails, the new Act would be inapplicable and the court would not be compelled to reverse existing case law. Civil service pensions, however, do not have the characteristics that make military pensions unique, and thus the court may feel bound by the new Act to consider such pensions as property subject to equitable distribution.[122]

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120. *Id.* at 33, 370 S.E.2d at 291.

121. *See* Berry v. Berry, 290 S.C. 351, 357, 350 S.E.2d 398, 402 (Ct. App. 1986) (court refused to accept a concession of a party to the suit because the concession was contrary to established law), *aff'd*, 294 S.C. 334, 364 S.E.2d 463 (1988).

122. One commentator, Professor Randall Chastain, has expressed the opinion that the new statute should be read to include all pensions regardless of their source. He states:

> It will be noted that none of the *exclusions* from the comprehensively inclusive general definition can include pension rights . . . . *Since no exclusion includes pension rights or other vested retirement interests, it is impossible to avoid*

V. VESTED MILITARY PENSION BENEFITS HELD MARITAL ASSET SUBJECT TO EQUITABLE DISTRIBUTION

In *Martin v. Martin*[123] the South Carolina Court of Appeals held, in direct opposition to South Carolina Supreme Court rulings as recent as 1983,[124] that vested military retirement benefits are marital property subject to equitable distribution. The supreme court's rulings, however, were prior to the passage of the South Carolina Equitable Apportionment of Marital Property Act (Act),[125] which made considerable changes in South Carolina law in this area. Because this case presented the issue for the first time since the Act's passage, prior supreme court cases were not binding precedent upon the court of appeals. The *Martin* ruling aligns South Carolina with the vast majority of jurisdictions that have considered the issue.

The military pension in this case belonged to the husband, who retired from the Air Force in 1976 after 20 years of service. The Martins were married in 1971 and separated in 1985. Mr. Martin commenced divorce proceedings one year later. The husband received a gross monthly benefit of $739.00, with a net benefit of $624.00. The wife submitted expert testimony that assumed a twenty-seven year life expectancy for the husband, a constant income stream of $735.00 per month, and a 1.1 percent discount rate. The expert estimated the pension's present value at $205,950.00. The trial court accepted this value.[126] The court held that only one-fourth of the pension was marital property, presumably because Mr. Martin was married only five of the twenty years during which he accumulated the pension.[127] The court then apportioned 20 percent of the one-fourth to the wife. Although the court did not actually distribute any of the pension to the wife, she received other assets to offset this portion of the fund, which was retained by the husband in its entirety.[128]

While the decision marks a distinct change in South Carolina law with regard to this issue, the court demonstrated no reluctance to make the change. The court relied to a great extent on the fact that

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the conclusion that the statute includes retirement benefits, at least those which are "owned" or vested, as divisible marital property.

R. CHASTAIN, THE LAW OF DOMESTIC RELATIONS IN SOUTH CAROLINA 40 (1986) (emphasis in original).

123. 296 S.C. 436, 373 S.E.2d 706 (Ct. App. 1988).

124. *See* Haynes v. Haynes, 279 S.C. 162, 303 S.E.2d 429 (1983).

125. S.C. CODE ANN. §§ 20-7-471 to -479 (Law. Co-op. Supp. 1988).

126. *Martin*, 296 S.C. at 439, 373 S.E.2d at 708.

127. *See id.* at 438-39, 373 S.E.2d at 707-08.

128. *Id.* at 440, 373 S.E.2d at 708.

the Act does not list pensions as an exception to marital property.[129] The court noted that the South Carolina Supreme Court used the same rationale in *Orszula v. Orszula*[130] to hold that personal injury and workers' compensation awards may constitute marital property.[131]

Furthermore, and perhaps more importantly to the court, the vast majority of states recently considering the issue have determined that military pensions do constitute marital property. The court twice referred to *In re Marriage of Gallo*,[132] in which the Colorado Supreme Court overruled its prior decisions and declared that vested military pensions are subject to equitable distribution.[133] As noted in *Gallo*, South Carolina was one of only five states in which pensions were deemed not to be marital property.[134]

Now that vested pensions clearly are to be considered marital property, courts will face the difficult task of valuation and distribution. The court in *Martin* mentioned two methods of valuation, the present cash value method and the reserve jurisdiction method.[135] Under the present cash value method, the court calculates the present value of the pension, and determines the percentage of this value that is attributable to the marriage. The court then usually awards the pension to the employee-spouse and awards offsetting assets to the nonemployee-spouse.[136] Under the reserve jurisdiction method, distribution is delayed until actual benefit payments are received.[137]

Of the two methods, the present cash value method generally is favored because the entire distribution can be completed at the time of the divorce litigation or settlement.[138] The reserve jurisdiction method often requires continued supervision by the court long after the decree is entered.[139] As in *Martin*, the trial court usually has wide discretion in determining the method of valuation and distribution.

Use of the present cash value method can place considerable hardship on the employee-spouse, since a substantial portion of the marital estate frequently is awarded to the nonemployee-spouse to offset the pension, which is usually retained by the employee-spouse. In fact, in

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129. *See id.* at 438-39, 373 S.E.2d at 708 (citing S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1988)).

130. 292 S.C. 264, 356 S.E.2d 114 (1987).

131. *Martin*, 296 S.C. at 439, 373 S.E.2d at 708.

132. 752 P.2d 47 (Colo. 1988).

133. *Martin*, 296 S.C. at 439 n.1, 440-41 n.2, 373 S.E.2d at 708 n.1, 709 n.2.

134. *See Gallo*, 752 P.2d at 53 n.9.

135. *See Martin*, 296 S.C. at 440 n.2, 373 S.E.2d at 709 n.2.

136. *Id.*

137. *Id.*

138. *See* Johnson v. Johnson, 131 Ariz. 38, 41-42, 638 P.2d 705, 708-09 (1981).

139. *In re* Marriage of Gallo, 752 P.2d 47, 55 (Colo. 1988).

some cases the remaining marital assets may not be enough to offset the pension. In such cases, the present cash value method will not be available.[140] Courts then often will use the reserve jurisdiction method, which places less of a burden upon the employee spouse.

If the present cash value method is used, counsel for both sides should be careful to see that an interest rate fair to his or her client is used to value the pension. In *Martin* the wife's expert proposed an interest rate of 1.1 percent, and since the husband submitted no other rate, that interest rate was used. The rate placed the present value of $735.00 per month for twenty-seven years at $205,950.00.

Most cases use discount rates that are somewhat higher. In *Siefert v. Siefert*,[141] for example, the court used a discount rate of 10 percent. If the *Martin* court had used 10 percent, instead of 1.1 percent, the husband's pension would have been valued at $82,205.00, instead of $205,950.00. Using the higher discount rate would have permitted the husband to have given up less value in other marital assets to offset the retained pension. A court presented with evidence from both sides would probably find the appropriate discount rate to be somewhere between the 1.1 percent used in *Martin* and the 10 percent used in *Siefert*.

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VI. TRANSMUTATION DOCTRINE SURVIVES EQUITABLE APPORTIONMENT OF MARITAL PROPERTY ACT

In 1986 the South Carolina Legislature enacted the Equitable Apportionment of Marital Property Act[142] (Act) to govern the distribution of assets in divorce proceedings. Not until 1988 did the South Carolina appellate courts have the opportunity to determine the effect of the new statute upon the prevalent common law doctrine of transmutation,[143] which is not discussed in the statute. After two years of waiting

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140. *Id.*

141. 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).

142. S.C. CODE ANN. §§ 20-7-471 to -479 (Law. Co-op. Supp. 1988).

143. Transmutation is a doctrine by which nonmarital property is converted into marital property for the facilitation of divorce settlements. The South Carolina Supreme Court has recognized that transmutation " 'may occur when the property becomes so commingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such a manner as to evidence an intent by the parties to make it marital property.' " Trimnal v. Trimnal, 287 S.C. 495, 497-98, 339 S.E.2d 869, 870 (1986) (quoting Hussey v. Hussey, 280 S.C. 418, 423, 312 S.E.2d 267, 270-71 (Ct. App. 1984)). The 1988 decisions of the South Carolina Court of Appeals discuss

for a post-Act case to reach the appellate level, the court of appeals seized upon three cases from which to interpret the new law. All three of the cases were decided by the court of appeals within a period of six months, and all three expressly upheld the common law doctrine of transmutation.

The doctrine is most prominent in states in which divorce law allows equitable distribution in the division of marital assets.[144] Equitable distribution is allowed in this state and transmutation has long been considered in calculating divorce settlements. South Carolina Code section 20-7-473[145] defines marital property as "all real and personal property which has been acquired by the parties during the marriage . . . ."[146] In further specifying what property is to be considered, the Code expressly excludes "property acquired by either party before the marriage . . . ."[147] Because the Act omits any reference to transmutation, its passage has created confusion as to the doctrine's viability. Consequently, the recent cases have been awaited with much speculation.

In *Kendall v. Kendall*[148] the South Carolina Court of Appeals affirmed a family court ruling that implicitly upheld the common law doctrine of transmutation. The court's decision was the first review of the transmutation doctrine since the General Assembly passed the Equitable Apportionment of Marital Property Act. *Kendall* was a divorce action involving a dispute over the distribution of a couple's assets. Mr. Kendall purchased a house while living with a woman whom he later married. The Kendalls remained married for a period of eighteen months and then separated. In awarding the wife an interest in the house, the family court implicitly held that the house had been transmuted marital property once it was used in furtherance of the marriage.[149] The husband appealed, arguing the new statute supplanted the doctrine of transmutation. The court of appeals disagreed, holding that transmutation survived passage of the new act.[150]

Kendall was significant as the first transmutation case heard after

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transmutation only in terms of the third requirement (*i.e.* intent).

144. Most states subscribe to equitable distribution as a method of dividing assets upon divorce. Community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin) do not employ equitable distribution, nor do Florida, Georgia, Mississippi, or Ohio, states in which no statute exists for dividing marital property. *Divorce Law By States*, [Reference File and Tax Guide] Fam. L. Rep. (BNA) 400:ii (March 24, 1986).

145. S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1988).

146. *Id.*

147. S.C. CODE ANN. § 20-7-473(2) (Law. Co-op. Supp. 1986).

148. 295 S.C. 136, 367 S.E.2d 437 (Ct. App. 1988).

149. *See id.* at 136, 367 S.E.2d at 437.

150. *Id.* at 137, 367 S.E.2d at 438.

the new Act became law, but the opinion was brief and only established survival of the doctrine. The court left particulars of the doctrine to be defined by later cases. Six months after *Kendall*, two cases were decided in which the court of appeals expanded its explanation of the doctrine. In *Johnson v. Johnson*[151] and *Bryan v. Bryan*[152] the court of appeals restored the transmutation doctrine to its pre-Act status.

Johnson involved a dentist who convinced his girlfriend to marry him and dispose of all her property. Five days before the wedding, she was urged to sign an antenuptial agreement drafted by his lawyer. The marriage rapidly deteriorated and the wife eventually left Johnson, by whom she had been physically and mentally abused.[153] The family court declared the antenuptial agreement void on the basis of duress, since the wife was led to believe the wedding would not take place unless she signed the agreement.[154] Having declared the antenuptial agreement void, the family court judge granted the wife's petition for equitable distribution. In the process of equitable distribution, the judge stated that certain "disputed property" "probably" was transmuted into marital property.[155] This finding of transmutation was reversed on appeal.[156] The court of appeals noted that "[t]he record disclosed a clear, consistent intent of Dr. Johnson to maintain the nonmarital character of all property he acquired before the marriage."[157]

Although the court of appeals determined the property had not been transmuted, its determination was based on the lack of requisite intent to transmute, not on the doctrine's demise. Explaining the doctrine of transmutation, the *Johnson* court pointed out that transmutation is a matter of intent, dictated by the facts in each case. The court instructed that "[t]he primacy of the parties' intent in determining if property is marital or nonmarital is underscored by the Act itself, which permits the parties to exclude property from the marital estate by written agreement."[158]

Johnson's companion case, *Bryan*, also provided insight into the post-Act dynamics of transmutation. In *Bryan* the couple's residence was acquired after the parties were married and was, therefore, prima facie marital property. The wife contended, however, that because the residence had been purchased with her assets and by no efforts of the

151. 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988).
152. 296 S.C. 305, 372 S.E.2d 116 (Ct. App. 1988).
153. *Johnson*, 296 S.C. at 291-92, 372 S.E.2d at 108-09.
154. *Id.* at 292, 372 S.E.2d at 109.
155. *Id.* at 293, 372 S.E.2d at 109.
156. *Id.* at 296, 372 S.E.2d at 111.
157. *Id.*
158. *Id.* (citing S.C. CODE ANN. § 20-7-473(4) (Law. Co-op. Supp. 1988)).

husband, the residence was her separate property. In fact, the house had been purchased with funds that were commingled by the husband and wife.[159]

The court of appeals affirmed the finding of the lower court that "all nonmarital property brought into the marriage by both parties lost its identity by mixing the proceeds therefrom with the marital income of the parties."[160] Once identity of the funds as nonmarital property was lost, the money used to purchase the home necessarily made the home marital property. As in *Johnson*, the court of appeals relied on the intent of the parties to determine whether property was marital in character. The court stated that "[t]aken as a whole, the objective evidence unmistakeably [sic] show[ed] the parties intended the residence to be marital property."[161]

Since the doctrine of transmutation is alive in South Carolina after the new Act, the remaining question is whether transmutation will exist unaffected or whether the new law will require some alteration of the incidents of the common law doctrine. Based on the 1988 decisions of the South Carolina Court of Appeals, the doctrine of transmutation apparently will undergo only one significant change as a result of the Equitable Apportionment of Marital Property Act.

In *Kendall*, the first of the three 1988 cases, the court of appeals stated:

> While it is presumed that the legislature had full knowledge and information as to prior judicial decisions and existing law on the subject of equitable distribution, it is also presumed that the legislature did not intend to overthrow or depart from established principles of law beyond what it declares either expressly or by necessary implication.[162]

With this statement, the court of appeals announced its refusal to abandon the doctrine of transmutation.

Furthermore, the court in *Johnson* cited *Trimnal v. Trimnal*,[163] a pre-Act case, to establish the existence of the transmutation doctrine.[164] The *Johnson* court also quoted over a dozen recent transmutation cases to establish the parameters of the doctrine, more evidence of its survival.[165] In two of the 1988 cases, however, a subtle change in the

159. *See* Bryan v. Bryan, 296 S.C. 305, 308-09, 372 S.E.2d 116, 118-19 (Ct. App. 1988).

160. *Id.* at 308, 372 S.E.2d at 118.

161. *Id.* at 309, 372 S.E.2d at 118.

162. *Kendall*, 295 S.C. at 137, 367 S.E.2d at 438.

163. 287 S.C. 495, 339 S.E.2d 869 (1986).

164. *See Johnson*, 296 S.C. at 295, 372 S.E.2d at 110.

165. *See id.* at 295-96 nn.2-4, 372 S.E.2d at 110-11 nn.2-4.

workings of the doctrine came to light.

By focusing solely on the intent of the parties, the court of appeals in *Johnson* and *Bryan* effectively reduced from three to one the number of ways property can be transmuted.[166] Given that the court of appeals was quoted for the possible methods of transmuting property in *Trimnal*, the court's reduction of the three elements to one cannot be an oversight. The court of appeals apparently intended to simplify judicial inquiries into the subject of transmutation.

While the court of appeals' new rule concerning methods of transmutation may be an improvement in the law, the supreme court has not yet approved the single-method rule. Consequently, two rules now exist in South Carolina. In the court of appeals, nonmarital property cannot be transmuted without a showing of intent. In the supreme court, nonmarital property can be transmuted even without a showing of intent if such property is " 'so commingled as to become untraceable; is utilized by the parties in support of the marriage; or is titled jointly . . . .' "[167] Property is less likely to be transmuted under the court of appeals' new rule, since intent must be shown even when property is commingled, titled jointly, or utilized in support of the marriage. Accordingly, transmutation may become less common in South Carolina despite the doctrine's survival of the Equitable Apportionment of Marital Property Act.

J. Thornton Kirby

VII. CUSTODIAL PARENT'S FLAGRANT PROMISCUITY RESULTS IN CHANGE OF CUSTODY

The determination of whether the custody of a minor should be changed generally is within the sound discretion of the family court judge.[168] The South Carolina Court of Appeals, however, held in *Boykin v. Boykin*[169] that a custodial parent's flagrant promiscuity compels a change of custody, even if other factors weigh in favor of the parent's fitness. This holding departs from the approach taken in previous custody cases involving issues of parental sexual practices. In earlier cases morality was one of several factors to be considered and was limited in importance by its demonstrated effect on the child.[170]

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166. *See supra* note 143.

167. *Trimnal*, 287 S.C. at 497-98, 339 S.E.2d at 870 (quoting Hussey v. Hussey, 280 S.C. 418, 423, 312 S.E.2d 267, 270-71 (Ct. App. 1984)).

168. Adams v. Adams, 262 S.C. 85, 202 S.E.2d 639 (1974).

169. 296 S.C. 100, 370 S.E.2d 884 (Ct. App. 1988).

170. *See, e.g.*, Davenport v. Davenport, 265 S.C. 524, 220 S.E.2d 228 (1975).

Mr. and Mrs. Boykin were divorced in 1985 on grounds of Mrs. Boykin's adultery. The court awarded custody the couple's four-year-old daughter to the mother by consent decree. After the divorce Mrs. Boykin worked an evening shift and left the child with her mother on workdays. Mrs. Boykin drank and used marijuana with friends after work. She also admitted to a promiscuous lifestyle, having had affairs with at least five men in one year.[171] On April 3, 1986, the father petitioned the family court for a change of custody. The family court ordered that the mother retain custody of the child.[172]

Reversing the order, the court of appeals distinguished previous cases dealing with single instances of illicit sexual conduct, asserting that this was a case of first impression involving the flagrant promiscuity of a custodial parent.[173] The court recited the familiar test for a change of custody: the party seeking to change custody must show a change of conditions which substantially affects the welfare of the child.[174] Even though the record contained evidence of Mrs. Boykin's redeeming qualities, the court held that such flagrant promiscuity would inevitably affect the welfare of the child, thus requiring a change of custody to protect the child's best interests.[175]

The court of appeals held the mother's flagrant promiscuity would have an inevitable adverse impact on the child's welfare, even in the absence of a showing that the child had previously been exposed to or otherwise directly affected by the mother's misconduct.[176] This is somewhat surprising in light of the court's relatively recent decision in *Stroman v. Williams*.[177]

In *Stroman*, decided just one year prior to the present case, the court refused to change child custody, even though the custodial mother was admittedly involved in a homosexual affair. The *Stroman* court held the father had not met his burden of proof that the child's best interest required a change of custody, because no evidence was presented that the child was "being exposed to deviant sexual acts or that her welfare was being adversely affected in any substantial way."[178]

The court in *Boykin* distinguished *Stroman* and other cases involving affairs of custodial parents by noting that those cases involved

171. *Boykin*, 296 S.C. at 102, 370 S.E.2d at 886.
172. *Id.* at 101, 370 S.E.2d at 885.
173. *Id.* at 101-02, 370 S.E.2d at 885-86.
174. *Id.* at 101, 370 S.E.2d at 885.
175. *Id.* at 102, 370 S.E.2d at 886.
176. *Id.*
177. 291 S.C. 376, 353 S.E.2d 704 (Ct. App. 1987).
178. *Id.* at 379, 353 S.E.2d at 705.

custodial parents who had engaged in a single sexual affair.[179] Furthermore, the court abandoned the rule that evidence of a parent's immoral behavior is relevant only to the extent the proponent of the custody change can show the behavior has affected the child. Comparing *Boykin* with *Stroman*, the court's distinction between cases involving more than one sexual affair and those involving a single encounter seems tenuous at best. The custodial parent in *Stroman* maintained an illicit homosexual relationship in the household in which her daughters lived for over five years.

The court's determination to announce the rule that a flagrantly promiscuous parent is unfit as a matter of law was manifested in two ways. First, the court clearly indicated that it would not be bound by appellate procedure. The respondent argued that the appellant's exceptions were not properly raised, but the argument was quickly rejected by the court, which clearly intended to reach the merits. Second, the court was undaunted by the concerns it voiced in *Stroman*, in which it said that "an appellate court should be reluctant to substitute its own evaluation of what the evidence dictates in terms of child custody for that of the trial court."[180]

It is difficult to reconcile the *Boykin* rule with the tolerant rationale of *Stroman*,[181] aside from perhaps the existence of drug abuse or the indiscreet nature of the misconduct in *Boykin*. Although the court offered no guidance as to what facts will constitute flagrant promiscuity and compel a change of custody in future cases, it is plain that such a finding will obviate the need for a further showing of direct impact on the child.

Weyman C. Carter

VIII. JOINT CUSTODY GENERALLY DISFAVORED BY SOUTH CAROLINA COURTS

During this century, child custody law in the United States has moved from a presumption that the mother be granted custody of young children to the current "best interests of the child" standard.[182]

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179. *Boykin*, 296 S.C. at 102, 370 S.E.2d at 886.

180. *Stroman*, 291 S.C. at 380, 353 S.E.2d at 706.

181. The concluding sentence of Judge Sanders' concurring opinion in *Stroman* conveyed the apparent attitude of the court: "We are not in the business of gratuitously judging the private lives of other people." *Id.* at 381, 353 S.E.2d at 707 (Sanders, C.J., concurring).

182. Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 267-68 (1987).

Although in fact it may not be in the best interests of the child for either of the parents to have custody or to engage in a bitter custody dispute, this standard has traditionally resulted in *one* of the parents retaining custody.[183] In applying this standard courts have addressed the following factors: The child's interrelationship with his parents and siblings; the preference of the child; the age, health, and sex of the child; the prospective home environment, associates, and opportunities for the child; the conduct and suitability of the parents; the financial condition of the parents; and the desires of the parents.[184] The application of these factors resulted in a strong bias toward granting custody to the mother.[185]

More recently, however, courts have begun to move away from the award of custody to just one parent. At the insistence of social scientists, feminists and men's groups, courts are now awarding joint custody more frequently.[186] These groups argue that joint or shared custody better preserves the traditional family role by allowing the child to develop closer bonds with both parents, and gives each parent a more fulfilling role in child rearing by preserving each parent's interest in the child's development.[187]

Currently there is much debate among commentators concerning awards of joint custody. Some commentators recommend a presumption of joint custody,[188] while others argue that joint custody should only be awarded in limited circumstances.[189] States have responded in various ways, with thirty-three states enacting statutes concerning joint custody.[190] In South Carolina the legislature has not responded to this debate and the appellate courts have given little guidance in establishing standards for joint custody.

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183. *See* Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 732 n.14 (1988).

184. 27C C.J.S. *Divorce* §§ 620-627 (1986).

185. *See* Freed & Foster, *Family Law in the Fifty States: An Overview*, 16 FAM. L.Q. 289, 290 (1983) ("[A]t least 90% of custody decisions give sole custody to the mother and visitation rights to the father.").

186. *See* Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417, 523 (1988) (noting an observable increase in the number of joint custody awards); Foster & Freed, *Life With Father: 1978*, 11 FAM. L.Q. 321, 340-41 (1978) ("Prior judicial experience with joint custody awards led to disapproval of such a custodial arrangement, but the principal of sexual equality has moved a few courts to try experimental decrees.").

187. *See* Beck v. Beck, 86 N.J. 480, 432 A.2d 63 (1981).

188. *See* Schwartz, *Toward a Presumption of Joint Custody*, 18 FAM. L.Q. 225 (1984).

189. *See* Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739 (1983).

190. *See* Freed & Walker, *supra* note 186, at 520 table IX.

The South Carolina Supreme Court repeatedly has affirmed that the "best interests of the child" standard applies in determining custody. In *Cook v. Cobb*[191] the court stated that "[t]he welfare of the child and what is in his/her best interest is the primary, paramount and controlling consideration of the court in all child custody controversies."[192] The court further stated that "[i]n determining the best interest of the child, the court undertakes the awesome task of looking into the past and predicting which of the two available environments will advance the best interest of the child and bring about the best adjusted mature individual."[193]

Although the court has not stated the criteria for applying the "best interests of the child" standard, it has enunciated certain applicable principles. In *Ford v. Ford*[194] the court stated that one of the factors in determining custody is the age, health, and sex of the child. This factor often is referred to as the "tender years doctrine."[195] Under this doctrine, the mother is given a preference in custody determinations during the formative years.[196] Although this doctrine has been argued as a presumption in some jurisdictions, the South Carolina Supreme Court has stated explicitly that the tender years doctrine does not require that the mother receive custody, but that it is merely one factor to be considered.[197] In cases involving much older children, the court has shown a greater willingness to give weight to the wishes of the child.[198]

Another factor recently recognized in South Carolina is the "primary caretaker doctrine." Although this doctrine traditionally has not been a part of South Carolina law, in *West v. West*[199] the South Carolina Court of Appeals justified an award of custody to a father based largely on the fact that he had been primarily responsible for the care of the children.[200] While the doctrine applies equally to both fathers

191. 271 S.C. 136, 245 S.E.2d 612 (1978).

192. *Id.* at 140, 245 S.E.2d at 614 (citing Davenport v. Davenport, 265 S.C. 524, 220 S.E.2d 228 (1975); Peay v. Peay, 260 S.C. 108, 194 S.E.2d 392 (1973); Koon v. Koon, 203 S.C. 556, 28 S.E.2d 89 (1943)).

193. *Id.* at 142, 245 S.E.2d at 615.

194. 242 S.C. 344, 130 S.E.2d 916 (1963).

195. *Id.* at 352, 130 S.E.2d at 921.

196. *Id.*

197. Green v. Loveday, 270 S.C. 410, 412, 242 S.E.2d 441, 442 (1978).

198. *See* Guinan v. Guinan, 254 S.C. 554, 176 S.E.2d 173 (1970). This case involved a custody dispute over a 16 year old boy. The court stated that "ordinarily, the wishes of a child of this boy's age, intelligence and experience, although probably not controlling, are entitled to great weight in awarding his custody as between estranged parents." *Id.* at 55, 176 S.E.2d at 174 (citation omitted).

199. 294 S.C. 190, 363 S.E.2d 402 (Ct. App. 1987).

200. *See id.* at 193, 363 S.E.2d at 403.

and mothers, it is particularly persuasive when the husband has been the primary caretaker. A third factor to be taken into account by the court is the morality of the parent.[201] The "morality factor," however, traditionally has been limited to acts or events which have a direct or indirect impact on the welfare of the child.[202]

More generally, in *Ford v. Ford*[203] the court enunciated the type of framework in which custody determinations should be made. It stated that among the factors to be considered are "the residence, surroundings and opportunities afforded in the respective environments; the conduct and suitability of parents; the preference in favor of the innocent or prevailing party; the financial condition of the parents; agreements between parties, and others."[204] Although these factors may appear general, that is the nature of custody determinations. Neither the appellate courts nor the legislature have given family courts much guidance as to the weight of each factor, but instead have given much discretion to the family court judge.

Although there has been a strong national trend toward joint custody, South Carolina courts have not participated in this change. In fact, neither the court of appeals nor the supreme court has ever sufficiently delineated the factors which should be considered in granting joint or divided custody.[205]

In *Henry v. Henry*[206] the court of appeals stated in dicta that joint custody should not be granted when there is a combative relationship between the parties. This statement, however, is little more than a clarification of the state's traditional position, enunciated in *Mixson v. Mixson*[207] and *Sharpe v. Sharpe*,[208] that the best interests of the child demand that divided custody should be approved only under exceptional circumstances. In *Mixson*, the supreme court offered its reasons for disapproving of joint custody, stating:

"[O]rdinarily it is not conducive to the best interests and welfare of a

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201. *See* Boykin v. Boykin, 296 S.C. 100, 370 S.E.2d 884 (Ct. App. 1988) (mother's promiscuity and use of illicit drugs considered when court granted father's request to change custody).

202. *See* Davenport v. Davenport, 265 S.C. 524, 220 S.E.2d 228 (1975) (custody awarded to mother who had an adulterous relationship in the home after separation while the children were there, since no evidence of ill effect on the children was demonstrated).

203. 242 S.C. 344, 130 S.E.2d 916 (1963).

204. *Id.* at 352, 130 S.E.2d at 921.

205. The South Carolina courts appear to use the terms "divided custody" and "joint custody" interchangeably. *See* Henry v. Henry, 296 S.C. 285, 372 S.E.2d 104 (Ct. App. 1988).

206. *Id.*

207. 253 S.C. 436, 171 S.E.2d 581 (1969).

208. 256 S.C. 517, 183 S.E.2d 325 (1971).

> child for it to be shifted and shuttled back and forth in alternate brief periods between contending parties, particularly during the school term. Furthermore, such an arrangement is likely to cause confusion, interfere with the proper training and discipline of the child, make the child the basis of many quarrels between its custodians, render its life unhappy and discontented, and prevent it from living a normal life."[209]

The supreme court's distaste for joint custody is exemplified by its holding in *Courie v. Courie*.[210] In *Courie* the court remanded to the trial court a visitation provision awarding the father 165 days per year of visitation because it found the award excessive and thus equivalent to divided custody. Consequently, the liberal visitation provision was deemed undesirable.

Indeed, the only South Carolina Supreme Court case allowing divided custody is *Sanders v. Sanders*.[211] In that case the court found the trial judge had not abused his discretion by awarding the husband custody of the children on alternate weekends and during certain hours every week, even though neither party had sought joint custody. This case, however, appears to be an anomaly.

Because the supreme court generally has disapproved of joint custody decrees, family court judges in South Carolina make such custody awards only in very limited circumstances.[212] Some judges will allow joint custody when the parties present the court with a custody agreement.[213] If the judge believes that this is a true agreement between the parties, and if the facts of the case indicate the agreement can be carried out in a stable environment without interfering with the child's maturation, then the judge may grant the request for joint custody.[214] The parents, however, must prove to the judge that each is fair and understanding and that the primary concern of each is the health and well-being of the child.[215] It takes "unusual people" to accomplish this task.[216] Only then will the court allow joint custody.[217]

That there are so few appellate cases upholding joint custody is not surprising since cases in which joint custody has been permitted at

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209. *Mixson*, 253 S.C. at 447, 171 S.E.2d at 586 (quoting 2 J. HENDERSON, NELSON ON DIVORCE AND ANNULMENT § 15.17 (2d ed. 1945)).

210. 288 S.C. 163, 341 S.E.2d 646 (Ct. App. 1986).

211. 232 S.C. 625, 103 S.E.2d 281 (1958).

212. Telephone interview with Hon. Robert H. Burnside, South Carolina Family Court Judge, 5th Cir. (Apr. 7, 1989).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

the family court level were generally those in which there was little disagreement between the husband and wife about a joint custody award. Consequently, since South Carolina appellate courts have had an opportunity to rule only in situations that were not amenable to joint custody, the fact that they have not ruled them out altogether suggests they would uphold joint custody in those rare circumstances in which there is a congenial relationship between all the parties and the children can maintain a stable lifestyle.

It would be preferable, however, for the legislature to act in this area. A large amount of research and commentary concerning the advantages and disadvantages of joint custody currently exists. In order to give judges better guidance and lawyers a greater degree of predictability with which to service their clients, the legislature should adopt a concrete set of standards explaining when joint custody should be granted.

First, the legislation should provide that the family court should consider joint custody upon the motion of either party. Second, the legislation should provide that in making a determination on the motion the court should consider the ability of the parents to work cooperatively and effectively toward the best interests of the child; the residential circumstances of each parent, including the proximity of the homes and the extent to which it impinges upon school arrangements. Furthermore, the legislation should stress the need to properly consider those factors important in all child custody determinations, including, the age, health, and sex of the child; the child's preference; the ability of each parent to devote sufficient time to the child; and the child's interrelationships with his or her parents and siblings. By adopting such guidelines, the legislature could lend much needed guidance to family courts, thus helping to insure that in custody determinations the goal of protecting "the best interests of the child" is accomplished.

Frank C. Williams III

IX. COURT INVOKES "GOOD CAUSE" EXCEPTION TO AVOID INDIAN CHILD WELFARE ACT'S REQUIREMENT THAT STATE TRANSFER INDIAN CHILD PLACEMENT CASE TO TRIBAL COURT

In 1978 Congress passed the Indian Child Welfare Act (ICWA)[218] to protect the interests of Indian children and to promote the stability and security of Indian tribes and families. Ten years later, the South

218. 25 U.S.C. §§ 1911-1963 (1982).

Carolina Court of Appeals addressed the jurisdictional ramifications of the ICWA for the first time. In *Chester County Department of Social Services v. Coleman*[219] the court of appeals held that a family court erred in transferring a case to a tribal court pursuant to the ICWA by failing to consider if "good cause" existed to keep the case in a South Carolina court.[220] By its holding in *Coleman*, the court of appeals adopted reasoning utilized in a majority of jurisdictions to establish an exception to the mandatory transfer provision in Indian child placement cases.

The *Coleman* decision hinges upon crucial language found in section 1911(b) of the Act, which requires state courts to transfer Indian child placement cases to tribal courts *unless* there is "good cause to the contrary."[221] By focusing on this language, the court of appeals correctly emphasized the degree of discretion state courts have in applying the ICWA.[222]

Phyllis Coleman, the appellant, and her four daughters, two from a previous marriage and two from her present husband, Joe Coleman, were members of the Cheyenne River Sioux tribe in South Dakota. In 1983 the Chester County Department of Social Services (DSS) moved to have the children placed under its custody due to actual and threatened physical harm to the children. The court ordered that the girls be placed with DSS.[223] In May 1984, the Department petitioned the court to return the children to the parents. Subsequently, DSS amended the petition to add allegations of sexual abuse against the parents. The court found the girls had been sexually abused, and thus ordered that they be placed with the corresponding Department of Social Services in South Dakota.[224] The parents appealed that decision and the supreme court remanded the case to the family court for proper placement.[225]

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219. 296 S.C. 355, 372 S.E.2d 912 (Ct. App. 1988) (per curiam).

220. *Id.* at 359, 372 S.E.2d at 915.

221. *See id.* at 357-58, 372 S.E.2d at 914. Section 1911(b) of the ICWA provides:

> In any State court proceeding for the foster care placement of . . . an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, *in the absence of good cause to the contrary,* shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent . . . or the Indian child's tribe . . . .

15 U.S.C. § 1911(b) (1982) (emphasis added).

222. *See* Note, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123, 1142 (1979) (stating that the ICWA legislative history requires state courts to apply a "modified" doctrine of forum non conveniens to determine if good cause exists to retain jurisdiction).

223. *Coleman*, 296 S.C. at 356, 372 S.E.2d at 913.

224. *Id.*

225. *Id.* at 356-57, 372 S.E.2d at 913.

On remand, the Indian Child Welfare Coordinator for the Cheyenne River Sioux tribe moved to transfer the case to the Cheyenne River Sioux Juvenile Court in South Dakota pursuant to the ICWA. The family court ordered the transfer and the children appealed.[226] The court of appeals reversed the lower court and remanded for a determination as to the existence of good cause to keep the case in South Carolina.[227]

The court in *Coleman* listed the following four factors as potentially "constitut[ing] 'good cause' for the family court to retain jurisdiction": (1) the biological father of the two older girls may have been unavailable; (2) none of the girls had had any contact with the tribe; (3) the material witnesses and evidence were in South Carolina; and (4) removal of the children would have been disruptive, and thus detrimental to their best interests.[228] The court apparently considered these particular factors based on its reading of federal guidelines interpreting the ICWA,[229] authority from other jurisdictions addressing similar issues,[230] and the legislative history of the Act.[231]

The New Mexico Court of Appeals in *In re Wayne R.N.*[232] recognized that the legislative history of the ICWA states that section 1911(b) was designed to " 'permit a state court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected.' "[233] The doctrine of forum non conveniens is modified in that the state courts decide whether the tribal court is inconvenient instead of refusing to exercise jurisdiction because the state court is inconvenient. Furthermore, the state court considers not only the rights of the parent or custodian, but also the rights

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226. *Id.* at 357, 372 S.E.2d at 914.

227. *Id.* at 359, 372 S.E.2d at 915.

228. *Id.*

229. *See id.* at 358, 372 S.E.2d at 914 (citing Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,591 (1979) (not to be codified)).

230. *See id.* at 358-59, 372 S.E.2d at 914-15 (citing *In re* Appeal in Pima County, 130 Ariz. 202, 635 P.2d 187 (Ct. App. 1981), *cert. denied sub nom.*, Catholic Social Servs. v. P.C., 455 U.S. 1007 (1982); *In re* J.R.H., 358 N.W.2d 311 (Iowa 1984)).

231. *See id.* at 358, 372 S.E.2d at 914 (citing H.R. REP. No. 1386, 95th Cong., 2d Sess. 21, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7544).

232. 107 N.M. 341, 757 P.2d 1333 (Ct. App. 1988).

233. *Id.* at 344, 757 P.2d at 1337 (quoting H.R. REP. No. 1386, 95th Cong., 2d Sess. 21, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7544). The court also stated:

> In determining whether the doctrine of forum non conveniens should be invoked, the trial court should consider the practical factors that make trial of a case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure the attendance of witnesses through compulsory process.

Id.

of the Indian child and tribe in deciding the most convenient forum.[234]

The court of appeals in *Coleman* apparently sought to emphasize the importance of the modified forum non conveniens doctrine. Not only did it stress that the doctrine has been utilized in other cases and expressly provided for in federal guidelines, but it also recognized that no witnesses or evidence would be available in South Dakota.[235] The distant location of the tribal court, however, generally will not be dispositive in and of itself. Rather, accessibility to proof seems to be the main consideration in a state court's decision to retain jurisdiction.[236] Geographical limitations, therefore, are considered in conjunction with the location of evidence in determining proper jurisdiction. The court in *In re J.R.H.*[237] articulated the accessibility to evidence concern, stating:

> Good cause to deny transfer of the proceedings to the tribal court may arise from geographical obstacles. In determining good cause, we may consider the circumstances when the "evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship of the parties or the witnesses."[238]

Other factors also are taken into account in a court's decision to deny transfer to a tribal court. For instance, in *Coleman* the court emphasized that transfer might not be proper because of the detrimental impact on the children.[239] Other courts similarly have held that the best interests of the child may prevent transfer to another jurisdiction.[240]

An additional factor, which was not considered by the court in *Coleman*, is the presence of tribal representatives to advocate a tribe's position in the child placement proceeding. The New Mexico Court of Appeals in *In re Wayne R.N.*[241] upheld a family court's determination of good cause, but considered in its determination testimony offered by tribal representatives.[242] After finding that the tribes in that case had waited too long to request a transfer and that the most convenient forum existed in the state court system, the court concluded that the

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234. *See* Note, *supra* note 222, at 1142.

235. *See Coleman*, 296 S.C. at 358-59, 372 S.E.2d at 915.

236. *See In re* Appeal in Pima County, 130 Ariz. 202, 206, 635 P.2d 187, 191 (Ct. App. 1981), *cert. denied sub nom.*, Catholic Social Servs. v. P.C., 455 U.S. 1007 (1982).

237. 358 N.W.2d 311 (Iowa 1984).

238. *Id.* at 317 (quoting Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,591 (1979)).

239. *Coleman*, 296 S.C. at 359, 372 S.E.2d at 915.

240. *See, e.g., In re* M.E.M., 195 Mont. 329, 635 P.2d 1313 (1981); *In re* N.L., 754 P.2d 863, 869 (Okla. 1988).

241. 107 N.M. 341, 757 P.2d 1333 (Ct. App. 1988).

242. *See id.* at 344, 757 P.2d at 1336.

family court was justified in retaining jurisdiction. Noting its consideration of the testimony offered by representatives of the tribes, the court stated:

> [T]he Tribes had representatives present at the hearing who were in a position to protect and advance their interests in the proceedings. The Tribes' attorney stated the Tribes were opposed to the transfer. The Tribes' social worker could and did testify concerning child rearing practices of the Tribes. The presence . . . of these representatives . . . minimized the danger that the respondent's rights would be terminated on the basis of conduct that would have been acceptable to the Tribes, or that the Tribes' rights would be overlooked or impaired during the proceedings.[243]

Congress enacted the ICWA to stop abuses by administrative bodies that wrongfully separate Indian children from their families "through a failure to recognize and appreciate the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[244] When tribes are allowed to present their concerns and explain their family standards, however, transfer is not warranted if other factors provide good cause to keep the suit in state court. Although the court of appeals in *Coleman* left the determination of good cause to the family court, it outlined factors which must be considered when determining if transfer to a tribal court is advisable. It also held that the burden of proving the existence of good cause is on the party opposing transfer.[245] In a situation such as *Coleman*, in which the family has had little contact with a tribe, it is even more important to scrutinize the facts of the case to determine if a state court is the more suitable forum.

If good cause is found to support a family court's exercise of jurisdiction, that determination does not erode the importance of the transfer provision in the ICWA. Congress enacted the ICWA to protect the best interests of Indian children and tribes. If Indian children are displaced from their natural environments and the costs of litigation prevent some parties or witnesses from participating, as long as the tribes are represented adequately it rarely can be contended that transfer to a tribal court is in the best interests of the children or the tribe. The *Coleman* decision takes these factors into account and provides guidelines for future South Carolina cases in which proper placement of In-

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243. *Id.*

244. *In re* Adoption of a Child of Indian Heritage, 111 N.J. 155, 166, 543 A.2d 925, 930 (1988).

245. *Coleman*, 296 S.C. at 358, 372 S.E.2d at 914.

dian children is an issue.

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