DOMESTIC LAW

I. MILITARY RETIREMENT BENEFITS ACCRUED DURING MARRIAGE ARE SUBJECT TO EQUITABLE DISTRIBUTION

In Tiffault v. Tiffault the South Carolina Supreme Court accepted Congress’s eight-year-old invitation and held that vested military retirement benefits are an earned property right and are subject to equitable distribution. This decision brings military pensions within the ambit of South Carolina’s Equitable Apportionment of Marital Property Act.

The Tiffault decision is best understood when it is considered together with the state and federal law developments that led up to it. In 1981 the United States Supreme Court decided McCarty v. McCarty, in which it held that the federal laws that govern military retirement pay pre-empt state property laws and prohibit state courts from considering a military pension in a divorce-related division of property. The Court left unresolved a split among the lower courts because it declined to decide whether military retirement pay is compensation for current services or deferred compensation. In 1982 the South Carolina Supreme Court decided the companion cases of Bugg v. Bugg and Carter v. Carter. In Bugg the court held that in light of McCarty, military retirement pay is not property that is subject to equitable distribution. In Carter the court, by analogy, extended the Bugg rationale to civil service nondisability retirement pay although there was no mandate to do so under McCarty.

In 1983 Congress reacted to the McCarty decision and enacted the

4. See id. at 236. As a result of its interpretation of the statute and reliance on legislative history, the Court found that Congress intended that benefits be the sole property of the recipient. Id. at 224-30.
5. See id. at 223 n.16.
8. Bugg, 277 S.C. at 274, 286 S.E.2d at 137. The court stated that it was proper to consider military retirement pay when “determining whether alimony should be paid and, if so, in setting the amount.” Id.
9. Carter, 277 S.C. at 279, 286 S.E.2d at 140. In dicta the court stated that “contributions to any pension fund . . . are generally not subject to equitable distribution.” Id. at 279 n.1, 286 S.E.2d at 140 n.1.
Uniformed Services Former Spouses' Protection Act,\(^{10}\) which effectively overruled *McCarty*. The Act provides, in part, that "a court may treat disposable retained or retainer pay payable to a member . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."\(^{11}\) In effect, Congress eliminated all notions of pre-emption and left the issue to the states. The South Carolina Supreme Court then decided *Brown v. Brown*,\(^{12}\) in which it recognized that Congress intended that each state be allowed to choose whether or not military retirement pay is property subject to apportionment. The *Brown* court decided that military retirement benefits are income and not marital property.\(^{13}\)

The South Carolina Legislature subsequently enacted the Equitable Apportionment of Marital Property Act (EAMPA),\(^{14}\) which states that "‘marital property’ . . . means 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."\(^{15}\) However, the Act excepts from judicial apportionment five specific types of property.

After enactment of EAMPA the court of appeals decided *Martin v. Martin*.\(^{16}\) *Martin* held that the EAMPA definition of marital property includes military retirement benefits. The court reasoned that because military retirement benefits were not specifically excluded in the five specific clauses, such benefits must be included in the general definition.\(^{17}\) The court relied on its decision in *Kneece v. Kneece*,\(^{18}\) which held that civil service pensions were "property" under EAMPA.\(^{19}\)

In *Tiffault* the supreme court relied on *Martin* and held that the military pension at issue was subject to judicial apportionment.\(^{20}\) The supreme court held that EAMPA had no effect on *Brown* because that opinion defined military pensions as income and not as real or personal property.\(^{21}\) The court stated that there was no basis for the court of


\(^{13}\) Id. at 118, 302 S.E.2d at 861.


\(^{15}\) Id. § 20-7-473.


\(^{17}\) Id. at 438-39, 373 S.E.2d at 707-08.


\(^{19}\) Id. at 33-34, 370 S.E.2d at 291-92.


\(^{21}\) Id. The supreme court did not answer the finding of the *Kneece* court that
appeals distinction of Brown in Martin. The supreme court nonetheless affirmed the court of appeals and overruled Brown. The court concluded that military retirement benefits are compensation for past services\(^2\) and held that “vested military retirement benefits constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution.”\(^2\)\(^3\)

The court also implicitly rejected Carter’s dicta.\(^2\)\(^4\) Kneece is therefore good law. The court reasoned that the economic reality is “that military retirement benefits accrued during marriage constitute a joint investment of both parties. Typically . . . a military spouse must move from place to place and consequently forfeit a separate career or make other outstanding contributions in support of the marriage.”\(^2\)\(^5\)

Because the court’s definition of pensions as marital property is not based on interpretation of any particular statutory provision, there is no rational basis for distinguishing between military and nonmilitary spouses. The court’s logic is not unique to military families. It remains unclear, however, whether the nebulous distinction between property and income still exists. The court raised the issue but relied on definitions to decide the case. The distinction therefore may be available for other uses.

Brian Murphy

II. VISITATION RIGHTS TO GRANDPARENTS DENIED ABSENT EXCEPTIONAL CIRCUMSTANCES

In Brown v. Earnhardt\(^2\)\(^6\) the South Carolina Supreme Court held that grandparents are not entitled to autonomous visitation privileges absent a showing of exceptional circumstances. Because the supreme court discerned no exceptional circumstances in this case, it reversed the court of appeals order,\(^2\)\(^7\) which granted the grandparents’ petition for visitation rights.\(^2\)\(^8\)

“[f]or classification purposes, most courts have found no meaningful distinction between matured and unmatured retirement pensions. An overwhelming majority of the states that have considered the issue have classified unmatured pensions as marital property.” Kneece, 296 S.C. at 33, 370 S.E.2d at 291 (citations omitted).

22. Tiffault, 401 S.E.2d at 158.
23. Id.
25. Tiffault, 401 S.E.2d at 158.
27. Id. at 360.
The mother and father of the infant divorced in 1984. In the divorce proceeding the family court granted the mother custody of the child and granted the father visitation rights. The mother voluntarily allowed the child to visit with the father’s parents every other Thursday night. When the mother ceased to allow these visitations, the father and his parents brought suit seeking visitation rights for the paternal grandparents. The family court granted the grandparents’ petition and awarded the grandparents visitation rights for a twenty-hour period once a month. The court of appeals upheld the family court’s order, and the mother appealed. 29

A primary issue facing the supreme court was how broadly to interpret its earlier decision in Chavis v. Witt. 30 In Chavis the court upheld an order granting the paternal grandparents visitation rights with their granddaughter whose father had died. The mother’s new husband had adopted the child. The court held that the adoption did not cut off the relationship between the grandparents and the child because the deceased father had not consented to the adoption. 31

The court of appeals read Chavis as holding that the award of visitation rights to grandparents was within the sound discretion of the family court and that the family court’s power to award such rights was not limited to situations in which the noncustodial parent was precluded from visitation. 32 The supreme court disagreed with this broad interpretation of Chavis. 33 The court noted three features that distinguish Earnhardt from Chavis. First, the father in Earnhardt maintained strong ties with his daughter. Second, the father had liberal visitation rights. Third, the grandparents customarily saw the child during visits with her father. 34

The court quoted approvingly from a New Jersey case which stated that “it would seldom, if ever, be in the best interests of the child to grant visitation to the grandparents when their child, the parent, has such rights.” 35 Furthermore, the court found that the close relationship between grandparents and grandchildren is not, by itself, a sufficient justification for infringing upon the rights of the natural parents. 36 The court therefore held that because no exceptional circumstances existed in this case, the grandparents were not entitled to

29. Earnhardt, 396 S.E.2d at 359.
31. Id. at 79, 328 S.E.2d at 75.
32. Earnhardt, 297 S.C. at 9, 374 S.E.2d at 514.
33. Earnhardt, 396 S.E.2d at 359.
34. Id. at 359-60.
36. Earnhardt, 396 S.E.2d at 360.
visitation rights separate from the visitation rights of their son.\textsuperscript{37} 

Section 20-7-420(33) of the South Carolina Code\textsuperscript{39} allows the family court to grant visitation rights to grandparents. The provision is worded more broadly than most state statutes that authorize this type award.\textsuperscript{39} The South Carolina statute does not contain the express requirement that the noncustodial parent must not be awarded or must fail to exercise visitation rights before the grandparents may petition for separate visitation.\textsuperscript{40} The \textit{Earnhardt} court restricted, however, the situations in which grandparental visitation awards are proper.\textsuperscript{41} 

By authorizing the family court to award grandparental visitation rights, the General Assembly placed South Carolina in line with the vast majority of other jurisdictions.\textsuperscript{42} \textit{Earnhardt} helps to define the limits of discretion; grandparents must now show exceptional circumstances before they may benefit from this statute. The court held that the grandparents failed to carry this burden and were not entitled to visitation rights separate from those of their son, the father.\textsuperscript{43} 

The concern for subjecting a child to competing visitation obligations seems justified. When too many parties compete for a child's company, the child's life can become confused and overburdened.\textsuperscript{44} Al-

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\textsuperscript{37} Id. In addition, the court found that the award of visitation rights to the grandparents, together with the father's visitation rights would "border[ ] on divided custody among the contending parties" because the custodial parent would have the child only one full weekend a month. \textit{Id.} The court noted that it disfavors divided custody. \textit{Id.} (quoting \textit{Avin v. Avin}, 272 S.C. 514, 515, 262 S.E.2d 888, 889 (1979) (per curiam)).

\textsuperscript{38} S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1976). This section states, "The family court shall have exclusive jurisdiction . . . [t]o order periods of visitation for the grandparents of the child." \textit{Id.}


\textsuperscript{40} \textit{Compare} S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1976) (granting court broad discretion to award visitation rights to grandparents) \textit{with} W. Va. CODE § 48-2-15(b)(1) (1986) (authorizing court upon an order of annulment, divorce, or decree of separate maintenance to grant visitation rights to grandparents when grandparents' child cannot be located or fails to answer or appear and defend the cause of action).

\textsuperscript{41} Ingulli explains this judicial response by noting that it is faithful to "the general rule of construction that statutes in derogation of the common law are to be narrowly construed." \textit{Ingulli, supra} note 39, at 303 n.50. Under the common law grandparents had no legal right to visit their grandchildren. Annotation, Grandparents' Visitation Rights, 90 A.L.R.3d 222, 225 (1979). Even the common law, however, sometimes recognized special circumstances in which grandparents could be awarded visitation. \textit{See, e.g.}, \textit{Douglass v. Merriman}, 163 S.C. 210, 213, 161 S.E. 452, 453 (1931) (granting maternal grandparents visitation rights when the mother was deceased and the child had been living with the grandparents before custody was transferred to the father).

\textsuperscript{42} \textit{See} \textit{Ingulli, supra} note 39, at 295.


\textsuperscript{44} "'[V]isitation by grandparents should be derivative; otherwise the child might have four, or even six people competing for his company: father, mother, paternal grand-

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though the relationship between grandparents and grandchildren can be a most sacred one, the court is correct in leaving these decisions, absent some exceptional circumstances, to the families themselves.

MacLean Limehouse

III. ACCUSED SPOUSE IN ADULTERY CASE BEARS BURDEN OF PROVING INSANITY

In Rutherford v. Rutherford the South Carolina Court of Appeals held that a multiple personality disorder does not excuse a spouse for adulterous acts unless the adulterous spouse shows that a disengaged alter ego committed the acts. In its order denying the adulterous spouse's petition for rehearing, the court held that the adulterous spouse must "prove that her mental condition deprived her of the ability to control her various personalities by a preponderance of the evidence."

Bobby E. Rutherford and Carol Rutherford married on September 10, 1982. In July 1988 Carol learned of her multiple personalities when she was diagnosed as suffering from manic depression, schizophrenia, and nymphomania. Carol testified that after being diagnosed, she studied schizophrenia and tried to hide the other personalities. Bobby testified that when Carol was in Charter Rivers Hospital in September 1988, she received flowers from Claude Tedder, another patient. On September 13, 1988, the hospital discharged Carol. On September 17, 1988, Bobby went to a trailer park where Carol told him she would be spending the night with a girlfriend. He saw Carol park her car and go into Tedder's trailer. No one exited the trailer for at least fifteen hours.

Bobby brought this action for a divorce on the grounds of adultery and for a denial of alimony to Carol. The family court denied Bobby a divorce and granted Carol four hundred dollars per month in alimony.

parents and maternal grandparents." Id. (alteration by court) (quoting In re Adoption of a Child by M., 140 N.J. Super. 91, 94, 355 A.2d 211, 213 (Ch. Div. 1976)).
46. Id. at 181.
47. Id. at 182. The court initially ruled that to satisfy this burden of proof the adulterous spouse must "show by clear evidence that her mental condition deprived her of the ability to control the various personalities that she found herself in." Id. (emphasis added).
48. Id. at 179. Additional circumstantial evidence also existed of adultery. Bobby found Tedder's name, address, and phone number in Carol's makeup kit, and a detective had evidence that Carol had been at Tedder's trailer on several occasions.
Bobby appealed.49

The court of appeals reversed. The court noted that Bobby had shown that Carol committed adultery with Tedder.50 The court explained that in divorce actions which involve spouses suffering from mental abnormalities, courts are obligated to "protect[] helpless and blameless spouses."51 Because the court was concerned that the trial court's ruling would encourage promiscuity, however, it declared that Carol was obligated to show that her mental condition deprived her of the ability to control her personalities.52 Because Carol did not meet this burden, the court found that she was not the type of helpless and blameless spouse who needed judicial protection.53

Adultery may be defined as "[v]oluntary sexual intercourse of a married person with a person other than the offender's husband or wife, or by a person with a person who is married to another."54 In South Carolina adultery is a basis for divorce.55 The statute that governed the relationship between adultery and alimony when Bobby brought this action stated, "No alimony shall be granted an adulterous spouse."

A spouse that seeks a divorce on the ground of adultery must establish by a clear preponderance of the evidence that the other spouse committed adultery.57 Because of "the clandestine nature of the offense, it is rarely possible to obtain evidence of the commission of the act by the testimony of eyewitnesses."58 Therefore, a spouse may prove adultery by direct evidence, by circumstantial evidence, or by a combination of the two.59 Nevertheless, "[t]he proof must be sufficiently defi-

49. Id. at 178.
50. Id. at 181.
51. Id. at 182 (citing Shaw v. Shaw, 256 S.C. 453, 182 S.E.2d 865 (1971)).
52. Id.
53. See id.
56. Id. § 20-3-130. The relevant portion of section 20-3-130, as amended by the General Assembly (effective November 29, 1990), now reads:

No alimony may be awarded a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties.

nite to identify the time and place of the offense, and the circumstances under which it was committed. If the proof of adultery is inconclusive, then a court should deny the petition for a divorce on the ground of adultery.  

Rutherford departs from the principle that if evidence of adultery is inconclusive, a divorce on this ground should be denied. The court concluded that Bobby had shown by circumstantial evidence that Carol's body committed adultery with Tedder. Normally, this evidence is sufficient to grant a divorce on the ground of adultery. In this case, however, the question remained as to whether Carol committed the act "as a cognitive person [rather than] as a disengaged alter ego." Even though Bobby proved by clear evidence that Carol's body had sexual intercourse with Tedder, he did not prove by clear evidence that Carol committed the act as a cognitive person. Therefore, the family court properly denied Bobby's petition.

In an unprecedented move the court of appeals shifted the burden of proof to Carol to show that she should be excused from responsibility. The Rutherford court required Carol to establish—initially by clear evidence but modified to a preponderance of the evidence—that "one of her uncontrollable personalities committed the act." Carol was unable to meet this burden.

The court decided that to rule otherwise "would tend to encourage promiscuity and relax conduct relative to other fault grounds for divorce where there is the presence of some mental abnormality. Such a proposition would distort the intent of our Supreme Court in Shaw of protecting helpless and blameless spouses." However, the policy rationale of Shaw was not only to protect the helpless, blameless, and mentally incapacitated wife, but also to promote the strong public policy in this state of fostering and protecting the institution of mar-

60. Odom, 248 S.C. at 146, 149 S.E.2d at 354; accord Watson, 291 S.C. at 25, 351 S.E.2d at 890.
61. Rabon v. Rabon, 289 S.C. 49, 53, 344 S.E.2d 615, 617 (Ct. App. 1986) (citing Lee v. Lee, 237 S.C. 532, 118 S.E.2d 171 (1961)); see also Fulton, 293 S.C. at 147, 359 S.E.2d at 88 ("Circumstantial proof of adultery must be so convincing as to exclude any other reasonable hypothesis but that of guilt.") (citing Hayes v. Hayes, 225 La. 374, 73 So. 2d 179 (1954)).
63. Id. at 179.
64. Id. at 181. This burden shift is consistent with the approach long used in criminal cases in which the defendant pleads insanity as a defense. See S.C. Code Ann. § 17-24-10(B) (Law. Co-op. Supp. 1990) ("The defendant has the burden of proving the defense of insanity by a preponderance of the evidence."). The Rutherford court never announced, however, that it was relying on this criminal law analogy.
65. Rutherford, 401 S.E.2d at 181.
66. Id. at 182.
riage. In shifting the burden of proof, the Rutherford court risks not only harm to the potentially helpless and blameless spouse, but it also risks erosion of the strong public policy in South Carolina favoring marriage over divorce. Previously, if the spouse that sought a divorce on the ground of adultery was unable to prove adultery, the divorce would automatically be denied. Now, once the spouse proves adulterous acts the spouse accused of adultery must prove that he or she did not commit the act as a cognitive person. The Rutherford approach facilitates divorce from a spouse suffering from a mental abnormality.

The court of appeals used unprecedented means in granting a petition for divorce on the ground of adultery. By shifting the burden of proof to the mentally ill spouse to prove by a preponderance of the evidence that the spouse did not commit the adulterous act as a cognitive person, the court appears to be following the South Carolina criminal law standard for insanity cases. If the court had left the burden of proof where precedent suggests that it should be, on the spouse seeking a divorce, then the court would have reached a contrary result because the husband did not prove by clear evidence that the wife as a cognitive person committed adultery.

Elizabeth T. Krawcheck

IV. GRANT OF DIVORCE TO BOTH PARTIES IN NO-FAULT MARRIAGE DISSOLUTION UPHELD

In Miles v. Miles the South Carolina Court of Appeals upheld a family court's grant of a divorce to both a wife who sought a divorce on the grounds of a one-year continuous separation and a husband who counterclaimed for the same relief on the same grounds. The decision ultimately rested on the principle that "whatever doesn't make any difference, doesn't matter." Mrs. Miles brought an action seeking a divorce on the grounds of a one-year continuous separation. Her husband answered and counterclaimed for divorce on the same grounds. Mr. and Mrs. Miles lived apart for one year prior to the instigation of this suit. Neither party presented any evidence of extenuating circumstances. The family court

69. Id. at 792 (quoting McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)).
granted a divorce to both parties. Mrs. Miles appealed and contended that the court should have granted the divorce only to her.\textsuperscript{70} The sole question before the court of appeals was whether the family court may grant a divorce to both parties when the only grounds for divorce are that the husband and wife have lived separate and apart without cohabitation for one year.\textsuperscript{71}

The \textit{Miles} court first focused on the statute that provides the grounds for divorce in South Carolina. Section 20-3-10(5) allows a grant of divorce "[o]n the application of either party if and when the husband and wife have lived separate and apart without cohabitation for a period of one year."\textsuperscript{72} In resolving the question presented on appeal, the \textit{Miles} court paid particular attention to the word \textit{either} contained in the statute.

Because no South Carolina court had interpreted the word \textit{either} in this statute, the court looked to other jurisdictions for guidance.\textsuperscript{73} The court also examined a dictionary, which first defined \textit{either} "as ‘being the one and the other of two.’"\textsuperscript{74} The court adopted the "one and the other" definition and determined that the statute, so construed, did not prohibit granting dual divorces.\textsuperscript{75}

The court next discussed the policy grounds for the decision. The \textit{Miles} court noted that the tendency of many individuals to think of a divorce as "a prize given in recognition of a victory in a contest" or as something to be "awarded" is inconsistent with the notion of a no-fault divorce.\textsuperscript{76} The court distinguished between divorces granted on fault-based grounds and divorces granted on no-fault grounds.\textsuperscript{77} In the prior category South Carolina courts grant the divorce solely to the injured spouse, and certain important repercussions follow.\textsuperscript{78} On the other

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 790.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} S.C. Code Ann. § 20-3-10(5) (Law. Co-op. 1976).
\item \textsuperscript{73} \textit{Miles}, 397 S.E.2d at 790-91.
\item \textsuperscript{74} \textit{Id.} at 791 (quoting \textit{WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY} 399 (9th ed. 1983)). Mrs. Miles urged the court to accept the second-listed definition, which defined \textit{either} as "‘being the one or the other of two.’" \textit{Id.} (quoting \textit{WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY} 399 (9th ed. 1983)); \textit{see BLACK'S LAW DICTIONARY} 516 (6th ed. 1990) (defining \textit{either} as "[e]ach of two; the one and the other; one or the other of two alternatives; one of two"). \textit{But see} \textit{BALLENTINE'S LAW DICTIONARY} 392 (3d ed. 1969) (defining \textit{either} as "[p]referably, one or the other of two").
\item \textsuperscript{75} \textit{Miles}, 397 S.E.2d at 790.
\item \textsuperscript{76} \textit{Id.} at 791.
\item \textsuperscript{77} \textit{Id. Compare} S.C. Code Ann. § 20-3-10(1)-(4) (Law. Co-op. 1976) (authorizing divorce for adultery, desertion for a period of one year, physical cruelty, and habitual drunkenness, respectively) \textit{with id.} § 20-3-10(5) (authorizing divorce "when the husband and wife have lived separate and apart without cohabitation for a period of one year").
\item \textsuperscript{78} \textit{Miles}, 397 S.E.2d at 791-92; \textit{see, e.g.,} S.C. Code Ann. § 20-3-130(A) (Law. Co-op. Supp. 1990) (establishing situations in which adulterous spouse is ineligible to receive

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hand, a no-fault divorce is a "recognition of a state of affairs existing between the parties, not as the result of some wrongdoing by a party. There is no reason to imply that one party is entitled to the divorce to the exclusion of the other."

Cases may arise in which a court's grant of dual divorces is not equitable. The court implicitly recognized this point when it noted Mrs. Miles had not shown that the court's ruling prejudiced her in any way. Other situations may be distinguishable on their facts. The statute recognizes this contingency by allowing a divorce to be granted "upon one or more of the [enumerated] grounds."

The Miles decision causes one to wonder whether family courts in this state might be willing to grant parties separate divorces on inconsistent grounds, rather than on the single no-fault ground presented in this case. At this time, there is no indication that this will come to pass. Nevertheless, allowing separate divorces on divergent grounds may be the logical extension of the ruling in this case.

Lara A. Degenhart

V. Conduct Constituting Adultery and Scope of Equitable Distribution Addressed

In Panhorst v. Panhorst the South Carolina Court of Appeals held that the exclusion of a wife's testimony that concerned her paramour's alleged impotence did not prejudicially affect the family court's finding that the wife committed adultery. The decision arguably extends the common-law definition of adultery to include situa-

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79. Miles, 397 S.E.2d at 791 (footnote omitted).
80. Id.
82. In Smith v. Smith, 294 S.C. 194, 363 S.E.2d 404 ( Ct. App. 1987), the family court granted the wife a divorce on the grounds of one-year separation and refused to consider the husband's counterclaim for a divorce on the grounds of adultery. The court of appeals found that because the granting of a divorce on the grounds of adultery does not dissolve the marriage any more completely than a divorce granted on the grounds of one-year separation, the family court justifiably refused to consider the husband's counterclaim. Id. at 197, 363 S.E.2d at 406.
84. Id. at 103, 390 S.E.2d at 378.
85. Id. ("At common law, adultery is the illicit intercourse of two persons, one of whom, at least, is married.") (citing Hull v. Hull, 21 S.C. Eq. (2 Stroh. Eq.) 174, 187 (1848)). The civil adultery at issue in Panhorst is distinguishable from criminal adultery. Although civil adultery is a statutory basis for divorce in South Carolina, S.C. Code Ann. § 20-3-10(1) (Law. Co-op. 1976), it is not statutorily defined. Criminal adultery, id. § 16-
tions in which the alleged indiscretion involves physical intimacies other than sexual intercourse. On a question of first impression, the court also held that absent evidence that gifts of marital property by one marital partner to a third party were made in contemplation of divorce or with the intent of defrauding the other partner out of an equitable distribution of the marital assets, the property is not a part of the marital estate.

Mrs. Panhorst appealed an order that granted her husband a divorce on the grounds of adultery. She admitted that on numerous occasions she had shared hotel rooms with her alleged paramour, Lasater, but contended that she had not had sexual intercourse with him because he was impotent. Therefore, she argued, she could not have committed adultery. The family court judge excluded Mrs. Panhorst’s testimony about Lasater’s impotency and found that she did not possess the requisite medical expertise necessary to render an opinion on the subject. Mrs. Panhorst appealed the exclusion on the theory that she “‘had special knowledge and first hand experience, which made her competent to give her nonexpert opinion.’”

The court of appeals found that the exclusion of Mrs. Panhorst’s testimony about Lasater’s impotency was harmless error. The court noted the extensive amount of circumstantial evidence which suggested that Mrs. Panhorst had been sexually involved with Lasater. Mrs. Panhorst argued that her paramour’s impotence sufficiently rebutted the inference of adultery raised by this evidence. The court concluded that Mrs. Panhorst based her argument “on the unstated assumption that sexual intercourse consists solely of the normal act of consummation between a man and a woman.” Although the court declined to establish clear guidelines for determining which specific sexual acts constitute adultery, it implied that actual consummation is unnecessary.

Under South Carolina law proof of adultery “must be clear and positive, and the infidelity must be established by a clear preponder-

15-60, is statutorily defined. See id. § 16-15-70. The definition provided in section 16-15-70 is not helpful in divorce actions because civil adultery is broader than criminal adultery. Panhorst, 301 S.C. at 103 n.3, 390 S.E.2d at 378 n.3; see Doe v. Doe, 296 S.C. 507, 509 n.2, 334 S.E.2d 829, 831 n.2 (Ct. App. 1985).

86. Panhorst, 301 S.C. at 104-05, 390 S.E.2d at 378-79.
87. Id. at 102-03, 390 S.E.2d at 377-78 (quoting Brief of Appellant at 10).
88. Id. at 103, 390 S.E.2d at 378. The court chose not to speculate on how Mrs. Panhorst obtained her information and opted to “leave it to the reader to consider how she acquired her ‘special knowledge and first hand experience’ of Lasater’s lack of sexual prowess.” Id. at 102 n.1, 390 S.E.2d at 378 n.1.
89. Id. at 102, 390 S.E.2d at 377.
90. Id. at 104, 390 S.E.2d at 378.
91. Id.
ance of the evidence. The proof must be sufficiently definite to identify the time and place of the offense, and the circumstances under which it was committed." Because of the private nature of the offense, circumstantial evidence is sufficient to establish adultery.\(^2\) However, evidence that places a spouse and third party together, without more, does not warrant a finding of adultery.\(^4\) When the spouse that seeks to prove adultery presents proof that the other spouse and the third party are both disposed to commit adultery and the opportunity existed for them to satisfy their inclinations, South Carolina law permits a finding of adultery.\(^5\)

A spouse that attempts to prove adultery must present two kinds of evidence to establish a prima facie case. First, the spouse and the third party must have the opportunity to commit an adulterous act. Exactly what constitutes "opportunity" is unclear, but hotel rooms and business trips are classic examples.\(^6\) Second, evidence of inclination to commit adultery must exist. Inclination may be shown by offering testimony of prior instances of adultery, thus establishing predisposition towards the offense.\(^7\) In the alternative, "[t]he same evidence which proves the opportunity can also prove the disposition. For example, where a married man is observed going upstairs in a bawdyhouse, unless something to the contrary appears, no other evidence is required to warrant a finding of adultery."\(^8\)

Although, on one level, Panhorst merely reinforces an established body of law, the court's treatment of Mrs. Panhorst's impotency argument might herald the beginning of a period in South Carolina in which the parameters of the definition of adultery are tested. The court's holding makes possible, as in this case, a finding of adultery even when impotency or some other physical impairment makes "the


\(^5\) Hartley, 292 S.C. at 247, 355 S.E.2d at 871 (citing 27A C.J.S. Divorce §§ 166, 193(b) (1986)).


\(^7\) See Hartley, 292 S.C. at 247, 355 S.E.2d at 871.

normal act of consummation between a man and a woman" impos-
ible. The Panhorst court never considered whether Mrs. Panhorst had
proved her knowledge of her paramour's condition. The court con-
cluded that her attempt to establish her expertise was sufficient to
warrant a finding of adultery. 100

Mrs. Panhorst also challenged the equitable distribution to which
the family court determined she was entitled upon the dissolution of
her marriage. She stated that during their marriage her husband had
given approximately $25,000 to his mother without her knowledge or
consent and implied that such one-sided use of marital funds was suf-
ficiently improper to warrant equitable relief. She further contended
that the family court should have treated the value of the gifts as mari-
tal property that is subject to equitable division. 101

Equitable division of marital assets is governed by statute. 102
Under the statute only property acquired by spouses during the course
of their marriage and owned by them at the end of their marriage is
distributable marital property. 103 The court found that at the time the
Panhorst litigation commenced, the money that Mr. Panhorst gave to
his mother was not in the marital estate and therefore was not subject
to equitable distribution. 104 As a practical matter, the court reached
the only possible conclusion. If the court had ruled otherwise, Mr.
Panhorst would have been required to reimburse the marital estate for
the yearly allowance he sent to his mother.

In its opinion the court relied primarily on the obvious intent of
the legislature to fix a date on which to identify distributable marital
assets. The court stated that "[t]he statute wisely prevents the other
spouse from resurrecting [one-sided] transactions at the end of the
marriage to gain an advantage in the equitable distribution. Were it to
do otherwise, human greed and vindictiveness would transform the
courts into 'auditing agencies for every marriage that falters.' " 105

The court also relied on the lack of evidence that the gifts were
made either "in contemplation of divorce or with intent to deprive
[Mrs. Panhorst] of her right to equitable distribution." 106 Although

100. Id. This conclusion leaves open the question of whether a husband could use
impotency as an affirmative defense in an adultery suit brought by his wife. Although the
Panhorst ruling suggests that the defense is not viable, the cases are distinguishable.
101. Id., 390 S.E.2d at 378-79.
103. Id.
104. Panhorst, 301 S.C. at 105-06, 390 S.E.2d at 379.
105. Id. at 105, 390 S.E.2d at 379 (quoting In re Marriage of Getautas, 189 Ill. App.3d 148, 164, 544 N.E.2d 1284, 1288 (1989)).
106. Id. at 105-06, 390 S.E.2d at 379.
payments made with improper motives might present a different question, the court found that, in the absence of fraudulent intent, spouses are not prohibited from making outright gifts of marital property to third parties.\textsuperscript{107}

The \textit{Panhorst} decision is likely to have little effect on South Carolina law. South Carolina judges are unlikely to invoke the \textit{Panhorst} court's broadened definition of adultery and probably will continue to resolve adultery issues on the basis of whether it appears that a spouse had sexual intercourse with a third party.\textsuperscript{108} Moreover, despite the novel issue presented by Mrs. Panhorst's equitable distribution claims, the stringent requirements imposed on challenges to conveyances of marital property make it improbable that this issue will be raised in the future.

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\section*{VI. Appellate Division of New York Supreme Court Rejects Claim of Common-Law Marriage Based on South Carolina Law}

"[A] common-law marriage may be defined as a nonceremonial or informal marriage by agreement, entered into by a man and woman having capacity to marry, ordinarily without compliance with such statutory formalities as those pertaining to marriage licenses."\textsuperscript{109} Common-law marriage is valid in South Carolina.\textsuperscript{110} In \textit{Jennings v. Hurt}\textsuperscript{111} the Appellate Division of the New York Supreme Court applied South Carolina law to determine that a common-law marriage did not exist between Sandra Jennings and William McChord Hurt.\textsuperscript{112}

After meeting in 1981 Sandra Jennings and William Hurt began living together in New York City. The two moved to South Carolina, where they lived from October 31, 1982, until January 10, 1983. In 1982 Jennings became pregnant with Hurt's child. Hurt, who at the time

\begin{itemize}
\item \textsuperscript{107} \textit{Id.} at 106, 390 S.E.2d at 379.
\item \textsuperscript{108} Three months after \textit{Panhorst}, the court of appeals restated that "'[a]dultery may be proven by circumstantial evidence showing inclination and opportunity to commit adultery." \textit{Husband v. Wife}, 301 S.C. 531, 533 n.6, 392 S.E.2d 811, 812 n.6 (Ct. App. 1990) (quoting \textit{Panhorst}, 301 S.C. at 102, 390 S.E.2d at 377). This statement of the rule did not expand the traditional rule in South Carolina.
\item \textsuperscript{109} 52 Am. Jur. 2d \textit{Marriage} § 42 (1970) (footnote omitted).
\item \textsuperscript{110} \textit{Ex parte Blizzard}, 185 S.C. 131, 193 S.E. 633 (1937) (adopting order of court of common pleas).
\item \textsuperscript{112} \textit{Id.} at 578, 554 N.Y.S.2d at 221.
\end{itemize}
was married to another woman, commenced divorce proceedings. The divorce became final on December 3, 1982. Jennings alleged that immediately following Hurt’s divorce, Hurt told her that he considered Jennings and himself married, that they had a “spiritual marriage,” and that they “were more married than married people.” In 1983 Hurt filed an affidavit with the Putative Fathers’ Registry in New York to acknowledge his paternity of Jennings’s son. Jennings brought this action to establish that she was Hurt’s common-law wife based on the couple’s cohabitation in South Carolina. The New York County Supreme Court entered judgment for Hurt. Jennings appealed. The Appellate Division of the New York Supreme Court affirmed and held that the parties did not have a common-law marriage.

To support its conclusion, the Jennings court looked to the record and to South Carolina decisions. The court noted that Jennings “never mentioned the conversation regarding the ‘spiritual marriage’ at her deposition.” Additionally, if the parties were married, it would have been unnecessary for Hurt to file an affidavit with the Putative Fathers’ Registry to insure the legitimacy of Jennings’s child. Furthermore, in 1984, one year after leaving South Carolina, “drafts of a relationship agreement continued to state ‘whether or not the parties hereafter marry each other.’” The numerous affidavits and witnesses persuaded the court that the parties did not hold themselves out as married “nor were they perceived as husband and wife.”

The court relied on Ex parte Blizzard when it stated the requirements for a common-law marriage in South Carolina. “[T]he proponent must establish ‘an intention on the part of both parties to enter into a marriage contract.’” The court also relied on a Connecticut case which applied South Carolina law to emphasize that the mutual agreement necessary to create a common-law marriage must be demonstrated with such intent and “‘clarity on the part of the parties that marriage does not creep up on either of them and catch them unawares. One cannot be married unwittingly or accidentally.’”

113. Id. at 577, 554 N.Y.S.2d at 221.
114. Id. at 576-77, 554 N.Y.S.2d 220-21.
115. Id. at 578, 554 N.Y.S.2d at 221.
116. Id. at 577, 554 N.Y.S.2d at 221.
117. Id.
118. Id.
119. Id.
120. 185 S.C. 131, 193 S.E. 633 (1937) (adopting order of court of common pleas).
121. Jennings, 160 A.D.2d at 577, 554 N.Y.S.2d at 221 (quoting Ex parte Blizzard, 185 S.C. at 133, 193 S.E. at 634 (order of common pleas court)).
122. Id. at 577-78, 554 N.Y.S.2d at 221 (quoting Collier v. City of Milford, 206 Conn. 242, 251, 537 A.2d 474, 479 (1988)).
Jennings court found neither mutual intent nor an agreement to enter into a marriage contract and, thus, no valid common-law marriage.\textsuperscript{123}

In holding against a common-law marriage, the court oversimplified the state of common-law marriage in South Carolina. "A basic requirement of common-law marriage . . . is that the parties be competent to enter the marital state."\textsuperscript{124} Once the impediment to marriage is removed, the parties' illicit relationship does not automatically convert to a common-law marriage.\textsuperscript{125} The parties must then reach "a new mutual agreement either by way of civil ceremony or by way of recognition of the illicit relation and a new agreement to enter into a common-law marriage."\textsuperscript{126}

In Jennings Hurt's prior marriage was a barrier to his marrying Jennings. The court recognized that Hurt was married until December 3, 1982, but did not discuss the effects of this marriage on Jennings's common-law marriage claim. Hurt could not possibly have married Jennings until his divorce with Hurt was complete.

"It is essential to a common law marriage that there shall be a mutual agreement between the parties to assume toward each other the relation of husband and wife."\textsuperscript{127} "A formal declaration of intent to enter a common law marriage is not required."\textsuperscript{128} If no formal declaration of intent is present, the court can adduce the agreement either from the surrounding circumstances\textsuperscript{129} or from the conduct of the parties.\textsuperscript{130} In Kirby v. Kirby\textsuperscript{131} the South Carolina Supreme Court found that the parties' consistent representation of themselves as husband and wife in their community was a circumstance that could establish a common-law marriage absent a formal declaration.\textsuperscript{132} If a formal agreement is not found, proof of cohabitation and reputation constitute "ev-

\textsuperscript{123} Id. at 578, 554 N.Y.S.2d at 221.
\textsuperscript{124} 52 Am. Jur. 2d Marriage § 47 (1970) (footnote omitted). If one of the parties is already married, the married party is incompetent to enter a common-law marriage. See, e.g., Kirby v. Kirby, 270 S.C. 137, 141, 241 S.E.2d 415, 416 (1978).
\textsuperscript{126} Kirby, 270 S.C. at 141, 241 S.E.2d at 416 (citing Byers v. Mount Vernon Mills, Inc., 288 S.C. 68, 231 S.E.2d 699 (1977)); see also Tedder v. Tedder, 108 S.C. 271, 279, 94 S.E. 19, 21 (1917) (stating that "[c]ohabitation, begun and continued immorally, does not ripen into marriage by the mere lapse of time, like a trespass long continued may ripen into a right of possession").
\textsuperscript{129} Id. (citing Kirby, 270 S.C. at 140, 241 S.E.2d at 416).
\textsuperscript{131} 270 S.C. 137, 241 S.E.2d 415 (1978).
\textsuperscript{132} Id. at 141, 241 S.E.2d at 417.
identical matters which, if strong enough, may establish the agreement between the parties to marry without any direct proof of such agreement.¹³³

Accordingly, the Appellate Division of the New York Supreme Court first should have looked at the intent of the parties and then at the surrounding circumstances and the conduct of the parties to determine whether Jennings and Hurt had a common-law marriage. The New York court flip-flopped this analysis. The court first examined the surrounding circumstances and the conduct of the parties. It determined that “the parties never held themselves out as being married nor were they perceived as husband and wife.”¹³⁴ The court then went on to discuss the necessary intent for common-law marriage in South Carolina. The court cited Ex parte Blizzard for the principle that the proponent in a common-law marriage case in South Carolina “must establish ‘an intention on the part of both parties to enter into a marriage contract.’”¹³⁵ The court quoted Collier v. City of Milford¹³⁶ to emphasize that common-law marriage should not “‘creep up on either [party] and catch them unawares.’”¹³⁷

In reaching its decision that no valid common-law marriage existed between Sandra Jennings and William Hurt, the Appellate Division of the New York Supreme Court gave an unrevealing and inconclusive analysis of common-law marriage in South Carolina. The court did not discuss the effect of Hurt’s previous marriage on Jennings’s common-law marriage claim. Further, the court reversed the analysis South Carolina courts follow in determining whether a common-law marriage exists. If, however, the court had applied the correct reasoning, the court likely would have reached the same result because no evidence of Hurt’s intent to marry Jennings existed. Such intent is an absolute requirement for common-law marriage in South Carolina.¹³⁸

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¹³⁵. Id. (quoting Ex parte Blizzard, 185 S.C. 131, 133, 193 S.E. 633, 634 (1937)).


¹³⁷. Jennings, 160 A.D.2d at 577, 554 N.Y.S.2d at 221 (quoting Collier, 206 Conn. at 251, 537 A.2d at 479).