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Domestic Law

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DOMESTIC LAW

I. WORKERS' COMPENSATION AND PERSONAL INJURY AWARDS CONSTITUTE MARITAL PROPERTY

The domestic law case of Orszula v. Orszula¹ presented the South Carolina Supreme Court with an issue of first impression: are workers' compensation awards marital property and, therefore, subject to equitable distribution upon divorce? The court held that such awards were marital property.² Orszula represents a general expansion of the concept of marital property in this state. The practicing attorney, however, is admonished to view this holding cautiously, for the court's cursory analysis is potentially misleading. A slight change in the facts likely would change the court's analysis.

Soon after Deborah and Bozydar Orszula's marriage in 1981, Ms. Orszula quit school and went to work, thus enabling her husband to complete his education. In 1982 Mr. Orszula, while employed as a technician in a community theatre, was seriously injured. Ms. Orszula nursed her husband back to health from temporary total disability. Soon thereafter the couple separated, and, subsequently, Mr. Orszula received a $16,000 lump-sum settlement of his workers' compensation claim.

In the divorce action, the family court found the workers' compensation award to constitute marital property subject to equitable distribution. The court ordered the award to be divided evenly between the parties.

The court's legal analysis was straightforward. Under South Carolina's new Equitable Distribution Statute,³ marital property

2. While the Orszula facts involved a workers' compensation award, arguably the holding is equally applicable to personal injury awards. The court posed the issue as "[w]ether workers' compensation or personal injury awards are marital property." Id. at 265, 356 S.E.2d at 114 (emphasis added). In addition, the court cited personal injury cases as authority for its holding that "[p]ersonal injury and workers' compensation awards fit none of the enumerated exceptions" to the Equitable Distribution Statute, S.C. Code Ann. § 20-7-473 (Law. Co-op. Supp. 1987), and, therefore, constitute marital property. 292 S.C. at 266, 356 S.E.2d at 115.
includes “all real and personal property which has been acquired by the parties during the marriage.”4 The court reasoned that workers’ compensation awards are not expressly listed in the statute’s exceptions to this rule and, therefore, constitute marital property.5

The court is not alone in its literal interpretation of the equitable distribution statute; several foreign jurisdictions approach this issue with the same deference to their state’s statutory language.6 Nevertheless, some commentators argue that “[h]owever plain the language of the relevant property disposition statutes, this is not a foregone conclusion.”7 This strict adherence to the literal meaning of the statute can produce inequitable results.

It has long been accepted that wages earned by either spouse during coverture constitute marital property. The key issue to be resolved is whether workers’ compensation awards are to be considered wages or some other form of separate property to be enjoyed solely by the recipient. One Louisiana case viewed workers’ compensation awards to be the separate property of the injured party, less lost earnings and expenses that the couple suffered.8 In South Carolina, however, it is well settled that “[w]orkers’ [c]ompensation benefits are awarded not for a physical injury as such, but for ‘disability’ produced by such injury, as measured by the employee’s capacity or incapacity to earn the wages which he was receiving at the time of his injury.”9 The legislature’s concern in enacting the Workers’ Compensation Act was to compensate the worker for his loss of ability “to earn wages.”10 This fact, coupled with the statutory language, gives

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4. Id.
5. This logic can be described by the maxim expressio unius est exclusio alterius: the expression of one thing excludes another. A foremost authority on legal drafting and statutory interpretation has opined, “Sometimes the maxim applies and sometimes it does not.” R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 37 (1986).
10. 292 S.C. at 73, 348 S.E.2d at 193.
credence to the court’s conclusion that workers’ compensation benefits are marital property.

Holding firm to the judicial principle of deciding only issues expressly before it, the court left unanswered important related inquiries. Unresolved is whether the Orszula outcome would be different if the injury had been suffered during coverture but the award for the injury had been received after divorce.

As previously noted, the court’s strict adherence to the language of the equitable distribution statute entitled Ms. Orszula to share her husband’s award. Though Ms. Orszula nursed her husband back to health and sacrificed to aid her husband, the same strict construction easily could have denied her a share of the award under slightly altered facts. For example, if every fact had remained the same except that the check arrived a day after the divorce, under a strict reading of the statute the award would be considered Mr. Orzula’s personal property. Not only does this result not allow for bureaucratic oversight, it encourages the claimant to delay settlement or fraudulently to conceal delivery.

Illinois, an equitable distribution state that defines marital property similarly to South Carolina, has addressed this issue.\textsuperscript{11} The Illinois court set aside the dogmatic literal interpretation of the statute in favor of a reading that supplied a just result. The court recognized that although the statute “offers no special refuge for workman’s compensation awards,”\textsuperscript{12} fairness demands that the court hold that “if the claim for a compensation award accrues during the marriage, the award is marital property regardless of when received.”\textsuperscript{13}

By its name, it is clear that the Equitable Distribution Statute is grounded in the doctrine of equity, whose hallmark is to consider done that which ought to be done. Certainly a spouse should not be denied an equitable share of a workers’ compensation award merely because the mailman arrived a day late. While the payment itself has not been acquired during the marriage, the right to payment certainly has accrued.\textsuperscript{14} Although some community property states follow the misguided literalist

\begin{itemize}
\item \textsuperscript{11} In re Marriage of Dettore, 86 Ill. App. 3d 540, 408 N.E.2d 429 (1980).
\item \textsuperscript{12} Id. at 541, 408 N.E.2d at 430.
\item \textsuperscript{13} Id. at 542, 408 N.E.2d at 431.
\item \textsuperscript{14} Goode v. Goode, 286 Ark. 463, 465, 692 S.W.2d 757, 758 (1985).
\end{itemize}
approach, in the few common law property states directly addressing this issue, "there is unanimous agreement that the pending claim is subject to equitable division as marital property." Notions of fairness would have South Carolina follow this well-reasoned and justifiable approach.

A second variation of the Orszula facts, producing a different result, is one in which a lump-sum settlement is awarded for permanent, as opposed to temporary, disability. Because workers' compensation is awarded to replace lost wages, a lump-sum settlement for permanent disability replaces wages that would have been earned in the future. Should a couple divorce, the recipient's spouse arguably is unjustly enriched by the lump-sum payment if the entire sum, not just that portion that reflects the period of coverture, is considered marital property.

Maryland's highest court was persuaded by the foregoing argument. On the other hand, Kentucky, another equitable jurisdiction state with a similar statute, held firm to the strict statutory interpretation. The Maryland court's approach is a reasonable balancing of equitable concerns and statutory mandate. Conversely, the Kentucky court reaches an obviously unjust result, one that the legislature certainly could not have

17. Note that the recipient's spouse is justified in receiving an equitable portion of the lump-sum payment in a limited circumstance when his or her spouse suffers a temporary disability and makes a physical recovery during coverture. If a lump-sum award were considered marital property, the spouse would be unjustly enriched. Thus, only that portion of the award which compensates for loss of earning capacity during coverture should be considered marital property.
   [W]e hold that only the portion of the husband's award compensating for loss of earning capacity during the marriage is marital property subject to equitable distribution by the trial judge. Due to the personal nature of the injuries giving rise to a permanent partial disability award, we cannot conclude that the General Assembly intended a noninjured spouse to share in the compensation for the injured spouse's loss of future earning capacity representing a time period beyond the dissolution of the marriage.
   Id. at 586-87, 521 A.2d at 327.
19. "Though an award of workers' compensation may be intended to replace lost wages which otherwise would have been earned in the future, it nevertheless is money in hand and it is not within the exceptions to [the equitable distribution statute] . . . ." Johnson v. Johnson, 638 S.W.2d 703, 704 (Ky. 1982).
intended.\textsuperscript{20}

When a statute is susceptible to a broader, more just interpretation, the literal interpretation should be put aside. The judiciary should not enforce a rigid reading of every statute. Instead, it should be the promoter of justice: the medium by which statutory enactments can be responsive to the unforeseen machinations of daily life.

James Fletcher Thompson

II. Husband Who Consents to Wife's Artificial Insemination Is Considered Legal Parent of Child

In \textit{In re Baby Doe}\textsuperscript{21} the South Carolina Supreme Court held that a husband who consented to his wife's artificial insemination by a donor, a process known as AID, was the legal father of a child born as a result of that procedure. The court required the husband to meet all the pertinent legal obligations. The court held that a finding of either express or implied consent by the husband would be sufficient, but it left open the burden of proof regarding such consent.\textsuperscript{22}

In \textit{Baby Doe} the husband and wife, upon learning that the husband was unable to father children, sought counseling about artificial insemination. When the wife began undergoing artificial insemination, the husband assisted in daily temperature readings. After the wife conceived, however, the parties separated. Following the child's birth, the husband sought a declaration that he was not the legal father of the child; the wife counterclaimed for child support. The trial court held for the wife.\textsuperscript{23} The husband maintained that his written consent to the proce-

\textsuperscript{20} Where the workers' compensation recipient opted for periodic payments instead of a lump sum, Kentucky courts have held those payments that accrue to the recipient after divorce to be the personal property of the recipient.

\textsuperscript{21} Payments that are received, or weekly benefits that have actually accrued but have not yet been paid as of the date of the dissolution of the marriage, are to be included as marital property, just as earned income. But, payments which accrue and are paid after the dissolution of the marriage are not part of the marital property any more than the worker's future earnings would be.


\textsuperscript{23} Id. at 393, 353 S.E.2d at 879.
dure was needed in order to declare him the father of the resulting offspring. The trial court, however, held that a rebuttable presumption existed that a husband had consented to his wife’s insemination. The trial court also found express and implied consent upon the facts of this particular case.24

The supreme court affirmed, holding that when a wife undergoes artificial insemination, with the husband’s express or implied consent and with the understanding that the child will be raised as his own, the husband is the legal father and is subject to all the obligations of paternity, including child support.25 In holding the husband legally responsible, the court aligned itself with the vast majority of jurisdictions ruling on that issue.26 Courts uniformly have required a husband who consents to his wife’s insemination to pay support for the child resulting from the procedure.27

The Baby Doe court declined to decide, however, where the burden of proof lies regarding the issue of the husband’s consent. In failing so to decide, the South Carolina court did not follow other courts that have addressed this issue. In K.S. v. G.S.28 the Superior Court of New Jersey considered a case in which a husband at first consented to his wife’s undergoing AID but claimed to have later withdrawn his consent. The court first declared a rebuttable presumption existed that a husband consented to his wife’s insemination.29 The court additionally held that revocation of consent could be shown only by clear and con-

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24. Id. at 391, 353 S.E.2d at 878.
25. Id. at 392, 353 S.E.2d at 878.
26. Some early decisions, while still requiring the husband to pay support on theories of estoppel, held that children produced through AID are illegitimate. See, e.g., Doornbos v. Doornbos, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963). Arguments against holding an offspring of AID to be illegitimate were presented in People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968), in which the California court reasoned that a child born of the procedure was not conceived out of wedlock or by adultery. The mother is usually married at the time of insemination, and if any adultery could be deemed committed, it would necessarily be with the doctor, who in this field is often a woman. Id. at 285, 437 P.2d at 501, 66 Cal. Rptr. at 11.
29. Id. at 109, 440 A.2d at 68.
vincing evidence. Likewise, the Kansas Court of Appeals in 
R.S. v. R.S. required clear and convincing evidence in showing 
revocation of consent and also addressed the effect, if any, of 
statutes requiring the husband’s written consent before the AID 
procedure could be performed. In R.S. the husband orally con-

tented to his wife’s insemination but, through an oversight of 
the doctor, failed to sign a written consent form required by a 
Kansas statute. The court, in rejecting the husband’s claim 
that his lack of written consent relieved him of paternal obliga-
tions, decided that the legislative intent underlying the statute 
was to prevent criminal and civil liability resulting from the pro-
cedure and not to relieve husbands who gave oral consent to 
their wives’ AID from the responsibilities of fatherhood. The 
courts in both R.S. v. R.S. and K.S. v. G.S. found compelling 
interests in declaring the consenting husband the legal father 
and placed a strong burden on him to overcome those interests.

Baby Doe follows the majority of decisions in other states 
on the issue of paternal obligations to children born as a result 
of AID. The South Carolina court’s holding, as well as those of 
other jurisdictions, is justified by considerations favoring legiti-
macy of children conceived in wedlock and support of children 
purposefully brought into the world. The real issue in such 
cases, left undecided by the South Carolina court, lies in estab-
lishing the consent of the husband to the procedure. Although 
the family court established a rebuttable presumption as to the 
husband’s consent, possibly in reliance on stances taken by other 
jurisdictions, the supreme court declined to adopt this presump-
tion, relying instead on the finding of express and implied con-

tent to decide the case.

At first glance it may seem regrettable that the court failed 
to decide the burden of proof since setting a high standard of 
proof of consent, such as adopting the lower court’s rebuttable 
premutation standard or requiring the husband to present clear 
and convincing evidence that he did not consent, would promote 
strong policy considerations in favor of obligating a husband to 
support his family. As a practical matter, however, evidence will

30. Id. at 110, 440 A.2d at 68.
usually exist that a husband knew of, and at least acquiesced to, the procedure. Thus, establishing a standard of some kind would appear to have little bearing on the outcome of future cases. Also, although the court may sometimes feel compelled to write dicta in an effort to guide lower courts in areas that may cause future concern, it is reasonable to assume that cases of this type will be rare and that such extra guidance is not needed. Overall, Baby Doe is a well-decided opinion and falls within the mainstream of judicial decisions concerning the newly emerging field of biotechnology and the law.

Andrew E. Thomas

III. STATE COURT REFUSES TO GRANT FULL FAITH AND CREDIT TO NEW YORK CUSTODY ORDER

Citing the procedural provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), the court of appeals in Purdie v. Smalls refused to grant full faith and credit to a New York custody order that was entered without affording notice and opportunity to be heard.

The custody dispute arose in New York between Sandra Smalls and Stanley Purdie, the parents of a four-year-old child. Purdie and Smalls had agreed that Smalls would receive custody of the child, with Purdie maintaining visitation rights. Smalls later petitioned the New York court to have Purdie held in contempt for assaulting her in violation of a restraining order. Purdie’s answer, requesting custody of the child, never reached Smalls since it apparently was sent to her sister’s address. Before the date of the hearing, Smalls and the child moved to South Carolina. Purdie then complained that he had been de-

36. Smalls’ stated reason for moving was to care for her ailing parents. 293 S.C. at 218, 359 S.E.2d at 307. Had her motive been to avoid service, the court presumably would have enforced the order. One court has held that a party who intentionally evaded service of process would be bound by the order issued in her absence. See Cunningham v. Cunningham, 719 S.W.2d 224, 228 (Tex. Ct. App. 1986). In addition, although not considered by the court in this case, a noncustodial parent’s right of visitation may result in a court restraining a custodial parent from moving to another state. See, e.g., Weiss v. Weiss, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981) (visitation rights of father living in New York justified injunction restraining mother from taking the child
nied visitation rights, to which the New York family court judge responded by issuing an Order to Show Cause. Apparently, that order also was sent to Smalls’ sister’s address. When Smalls did not appear for the hearing, the judge granted Purdie temporary custody of the child. Purdie requested the South Carolina family court to grant full faith and credit to the order, which it did.

The court of appeals reversed, finding no evidence that Smalls had received reasonable notice and opportunity to be heard as required by section 20-7-808 of the UCCJA. The court noted that such notice could have come from Purdie’s custody pleadings but that those pleadings were never served on Smalls. In addition, the Order to Show Cause that was express mailed to Smalls’ sister’s address, “even if otherwise legally sufficient,” gave no indication that Purdie was seeking custody of the child. Thus, neither the pleadings nor the order provided Smalls with notice of the custody challenge.

Having established that the notice provisions of the Act were not met, the court of appeals cited section 20-7-808, which provides:

The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this subarticle or which was made under factual circumstances meeting the jurisdictional standards of the subarticle, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this subarticle.

Concluding that the lack of notice violated the jurisdictional standards of the Act in this case, the court refused to enforce the New York order. The court then found that South Carolina

from New York to Nevada, even though the mother advanced a legitimate reason for the move).

37. In addition to the holding that the UCCJA did not require enforcement of the order, the court also found that the United States Constitution did not require that full faith and credit be given to this order for two reasons. First, the order was temporary. 293 S.C. at 220, 359 S.E.2d at 308. Second, the New York court rendered the judgment in violation of procedural due process. Id. (citing Griffin v. Griffin, 327 U.S. 220 (1946)).

38. 293 S.C. at 222, 359 S.E.2d at 309.

39. Id.

was now the child's home state\textsuperscript{41} and could, therefore, exercise jurisdiction to settle the custody dispute.\textsuperscript{42}

Although one of the primary purposes of the UCCJA is to "facilitate the enforcement of custody decrees of other states,"\textsuperscript{43} the court correctly emphasized that the "other states" must first be found to have complied with the due process provision.\textsuperscript{44} Other courts, basing their holdings on the UCCJA\textsuperscript{45} as well as other statutory and constitutional provisions,\textsuperscript{46} agree that notice is a strict prerequisite to the assertion of jurisdiction in custody disputes. Aside from the issues of constitutional and statutory

\textsuperscript{41} Id. § 20-7-788. "Home state" is defined as "the state in which the child immediately preceding the time involved lived with his parents, . . . or a person acting as a parent, for at least six consecutive months." Id. § 20-7-786(5).
\textsuperscript{42} 283 S.C. at 223, 359 S.E.2d at 309-10.
\textsuperscript{44} Id. § 20-7-808.
\textsuperscript{45} See, e.g., Lopez v. District Court, 199 Colo. 207, 211, 606 P.2d 853, 856 (1980). (Finding the test was satisfied in this case, the court noted: "The jurisdictional test to render a valid decree under the uniform custody act is whether the 'contestants' had reasonable notice and opportunity to be heard."); Wachter v. Wachter, 439 So. 2d 1260 (La. Ct. App. 1983) (trial court correctly refused to enforce ex parte custody directive since notice not given to parent as required by the UCCJA and PKPA); In re Pierce, 184 Mont. 82, 601 P.2d 1179 (1979) (Montana would not recognize Wyoming decree awarding custody of runaway child to parents since grandparents with custody in Montana had not received notice); Williams v. Zacher, 35 Or. App. 129, 134, 581 P.2d 91, 94 (1978) (Colorado order entered without complying with the notice provisions was not "substantially in conformity with" the UCCJA); Mayer v. Mayer, 91 Wis. 2d 342, 351, 283 N.W.2d 591, 596 (Wis. Ct. App. 1979) (temporary order of custody to plaintiff-husband unenforceable against defendant-wife, who was not given notice and opportunity to be heard: "Even if a court has jurisdiction, a decree is not binding on any party who is not given an opportunity to be heard.").
\textsuperscript{46} See Thorne v. Thorne, 344 So. 2d 165 (Ala. Civ. App. 1977) (fourteenth amendment due process concerns, including notice and opportunity for hearing, apply to child custody proceedings; order entered in violation of procedural due process is void); Shadrrix v. Womack, 231 Ga. 628, 630, 203 S.E.2d 225, 228 (1974) ("Since it is clear from the record that no service was made upon the mother . . . the order is void and must be disregarded; and therefore it conferred no right of custody upon the grandmother as against the mother."); Beebe v. Chavez, 226 Kan. 591, 598, 602 P.2d 1279, 1286 (1979) (in violation of state statute, mother "was denied her right to due process; to notice and an opportunity to be heard; to a fair hearing. . . . [She] had lost all, without her day in court."); State ex rel. Thompson, 372 So. 2d 1255, 1259 (La. Ct. App. 1979) (ex parte custody order null since notice and opportunity for hearing not afforded parent: "[I]t is well settled in Louisiana that an ex parte custody order granted by a trial judge without notice, service of pleadings and without affording a hearing to the parent having custody of the child is null and without effect."); Matthews v. Second Judicial Dist. 91 Nev. 96, 97, 531 P.2d 852, 853 (1975) (court that had felt it had "waited long enough" and proceeded to enter order without giving parent notice or opportunity to be heard was in error, and its custody order was void).
rights of the parent, the requirement finds additional support in the ultimate concern in all custody cases: the best interests of the child. As one court explained, "The purpose of requiring notice is to preserve the fairness of the hearing; and it is of vital importance to the child, as well as the parent, that the hearing be fair." The notice provision provides that notice to persons outside the state should be given "in a manner reasonably calculated to give actual notice" and lists four possible methods, including publication "if other means of notification are ineffective." Given the options (including publication) listed in section 20-7-792, compliance with the procedural requirements should not pose a problem, and orders of other states will generally be enforced in South Carolina courts.

The court's finding that the UCCJA requires notice is not particularly surprising, since the statute expressly imposes this requirement. This case is noteworthy, however, for another reason: the court's focus is limited to the UCCJA. Although the court did not mention it, practitioners faced with custody challenges must also consider the applicability of the Parental Kidnapping Prevention Act (PKPA). In an attempt to strengthen the perceived weaknesses of the UCCJA, the PKPA imposes on states a federal duty to enforce certain child custody decisions of sister states. Because the federal act also requires notice and opportunity to be heard, the result in this case under either act presumably would be the same. The opinion is potentially misleading, however, if certain broad assertions made by the court are not read against the backdrop of the PKPA. When the court holds that "temporary or interlocutory orders of one state are not entitled to full faith and credit in another state," it is correct as a matter of constitutional law. The PKPA, however, expressly includes "permanent and temporary orders." Clearly, then, the fact that an order is "temporary" is not dispositive in the child custody context.

47. Thorne v. Thorne, 344 So. 2d at 170 (based on fourteenth amendment due process clause). See supra note 46.
49. Id. See also N.Y. Dom. Rel. Law § 75-f (McKinney 1988).
51. Id. § 1738A(e).
52. 293 S.C. at 220, 359 S.E.2d at 308.
A thorough discussion of the general applicability and jurisdictional requirements of the UCCJA and PKPA is beyond the scope of this article.\textsuperscript{54} It is important, however, that the practitioner in South Carolina faced with jurisdictional issues in child custody cases realizes that he must consider both acts.

\textit{Blaney A. Coskrey, III}

IV. Parent's Sexual Lifestyle Not Determinative in Custody Proceeding

At first blush, the result reached in \textit{Stroman v. Williams}\textsuperscript{55} seems striking in its unabashed liberalism and deference to alternative sexual lifestyles. In \textit{Stroman} the South Carolina Court of Appeals held that an eleven-year-old girl should remain in the custody of her mother, who lived in an interracial lesbian relationship, rather than reside with her father, who maintained a traditional nuclear family with his new wife and daughter.

Closer scrutiny, however, shows that the court has charted no new course but, instead, is merely applying the settled standard concerning whether the custody of a minor should be modified. Modification is required only if the evidence indicates a change of conditions that substantially affects the welfare of the child. While this approach puts the court in the mainstream of judicial authority, it is not until compared with less tolerant jurisdictions that the court seems progressive in its acknowledgment of the rights of parents espousing variant sexual orientations. The questions that \textit{Stroman} leaves unanswered are: to what degree the court will protect the exercise of a lesbian lifestyle or, conversely, at what point the court will curtail that exercise as adversely affecting the development of the child.

Appellant Thomas Stroman and respondent Joan Williams were separated in 1980 and divorced in 1984. Although Mr. Stroman was aware of Ms. Williams' lesbianism, he acquiesced in the divorce decree that awarded the couple's two daughters to Ms. Williams. In 1985 Mr. Stroman brought this action concerning the younger daughter, Tiffani, alleging that Ms. Williams'... 

\textsuperscript{54} The UCCJA and PKPA have been the subject of considerable scholarly writing. For a general discussion, see 1 J. McCahey, Child Custody & Visitation Law and Practice §§ 1.01 to 4.08 (1987).

\textsuperscript{55} 291 S.C. 376, 353 S.E.2d 704 (Ct. App. 1987).
lesbian relationship rendered her "an unfit mother as a matter of law." He also maintained that the "ongoing lesbian relationship between Respondent and another woman substantially affect[ed] Tiffani," thereby constituting a change of circumstances sufficient to require a change in custody.

The threshold issue that the court considered was whether Ms. Williams’ avowed lesbianism rendered her an unfit mother as a matter of law. The court disposed of this argument in short order, citing several cases from other jurisdictions in support of this settled principle. Rather than assessing the desirability of the mother's sexual preference, the court instead acknowledged that its paramount consideration must be the welfare of the child and that a party seeking modification must demonstrate changed circumstances that will warrant modification. The court staunchly refused to allow the mother's lesbianism to bar custody absent a showing of an adverse affect on the child.

While the husband alleged such an adverse affect, the court found that "he points to no evidence that supports his claim." Therefore, because the husband proved no material change in circumstances, the court affirmed the lower court in holding that the young girl should remain in residence with her mother.

The court is correct in finding that no evidence exists in the record sufficient to find that Ms. Williams’ relationship adversely affected Tiffani. The older sister testified that Ms. Williams and her lover were not demonstrative in their affection and that Tiffani was unaffected by her mother’s lesbianism. Therefore, the court had no alternative, absent creation of a new standard, but to affirm the lower court’s decision.

While the decision does provide that a mother’s lesbianism will not be deemed as constituting a per se adverse affect on her child, the questions left unanswered by the court are equally troublesome: is the lesbian mother granted full license to exercise her lesbian lifestyle, or instead, will the court set parameters on this exercise due to a perceived adverse affect on the child.

56. Id. at 378, 353 S.E.2d at 705.
57. Brief of Appellant at 5.
60. 291 S.C. at 379, 353 S.E.2d at 705.
61. Record at 30.
caused by an open manifestation of the mother's sexual preference? To gain perspective on this question, it is helpful to survey other jurisdictions.

*Schuster v. Schuster* illustrates the most blatant manifestation of the lesbian lifestyle that was deemed not to affect the child adversely. In *Schuster*, the mother lived in a well-publicized lesbian relationship with her lover and two children. Both women were active in the homosexual cause, including the filming of a movie entitled “Sandy and Madeleine’s Family” in which the children participated. Though the court ordered the women to live separate and apart, it decided that modification of custody was not in the best interests of the children.

As is evident in *Schuster*, courts may reconcile competing interests, the mother's desire to raise her child and the courts' desire to protect the child from the lesbian lifestyle, by barring the mother's spousal equivalent from the home. Courts are also prone to bar the child from being in the presence of known homosexuals. Additionally, the courts are likely to consider the potential influence the mother's live-in lover may have on the child, the father's character, and the appropriateness of the fa-

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63. The couple also advertised in a brochure entitled “The Gay Family: A Valid Life-Style?” and offered booklets entitled “Love is for All.” The children accompanied the women on many of their public appearances. *Id.* at 634, 585 P.2d at 135.

64. There was no evidence in the decision that the women displayed signs of affection in the presence of the children. *Id.* This may account for the court's comparable leniency.

65. In A. v. A., 15 Or. App. 353, 514 P.2d 358 (1973), a homosexual father sought to maintain the custody of his two sons, aged thirteen and eleven years. The court found no evidence that the “boys were being exposed to deviant sexual acts or that the welfare of the boys was being adversely affected in any substantial way.” *Id.* at 359, 514 P.2d at 360. The court, nonetheless, prohibited any man from living in the family home in an effort “to safeguard the home environment against possible pernicious influences.” *Id.* at 356, 514 P.2d at 359.

66. See *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (N.Y. Sup. Ct. 1976) (mother's visitation rights were conditioned on being kept away from the mother's lover, not going places where homosexuals were known to be present, and not involving the children in homosexual publicity). *See also* N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980) (child not allowed in the presence of the mother's friend); *In re J. S. & C.*, 129 N.J. Super. 486, 324 A.2d 90 (1974) (visitation restrictions placed on a homosexual father).

67. In *Jane B.*, the court considered evidence that the mother's lesbian lover, Lucy Q., rocked in a rocking chair incessantly and ignored the young daughter except to yell at her. 85 Misc. 2d at 517-18, 380 N.Y.S.2d at 851. Similarly, in *N.K.M.*, the mother's lover was known to have “used the most scurrilous and shocking language” toward a police officer.
other's household for custody of the child. 68

The single most salient factor in courts' analyses is the display of affection between lesbians in the presence of a child. 69 When a lesbian mother refrains from any demonstration of affection towards other women, is not a member of a homosexual organization, and does not attempt to inculcate the child with her sexual orientation, 70 a court is likely to look favorably on the mother's custody of the child. On the other hand, when the mother marries her lesbian lover in a "Gay-la Wedding," 71 engages in lover's caresses such as holding hands, kissing, and touching in the presence of the child, when the child sleeps in the same bedroom with the couple separated only by a screen, and when the mother admits that she will someday explain to her son that "it is not immoral for two men to have a sexual relationship," 72 courts are likely to consider these factors as adversely affecting the child.

Although the South Carolina Supreme Court 73 and South Carolina Court of Appeals 74 have recognized the amorphous concept of the parent's morality as a proper consideration in child custody disputes, morality is a salient concern only if relevant to

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officer in the presence of the young girl that "went well beyond polite cusswords but referred to private biological functions and to incest." 606 S.W.2d at 185. The woman bit, kicked, and spit upon the officer and threatened to kill him. In addition, she had discussed homosexuality with the child, suggesting it as an "alternative lifestyle." Id. at 186.

68. In M.P. v. S.P., 169 N.J. Super. 425, 404 A.2d 1256 (1979), the court heard evidence on the appropriateness of the father's home. His present wife had informed the eleven-year-old girl "how great a 'stud' her father [was]." Id. at 437, 404 A.2d at 1262. The children also could see nude pictures of the present wife taken in the family home by four photographers.

69. See Kallas v. Kallas, 614 P.2d 641 (Utah 1980). In Kallas the court expressed the following: "Although a parent's sexuality in and of itself is not alone a sufficient basis upon which to deny completely a parent's fundamental right, the manifestation of one's sexuality and resulting behavior patterns are relevant to custody and to the nature and scope of visitation rights." Id. at 645.


72. Id.


74. Marshall v. Marshall, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984). See also Thigpen v. Carpenter, 21 Ark. App. 194, 730 S.W.2d 510 (1987), in which the court stated "that it is contrary to the court's sense of morality to expose the children to a homosexual lifestyle, and that it was no more appropriate for a custodial parent to cohabit with a lover of the same sex than with a nonspousal lover of the opposite sex." Id. at 199, 730 S.W.2d at 514.
the welfare of a child. Many courts, including the Stroman court, look for objective clinical evidence of the effect of a homosexual parent on a child. 75 Nevertheless, this search for empirical data is riddled with conflicting views. 76

Other courts rely on a perceived social stigma that attaches to the child of a lesbian mother as justification for denying the mother custody. 77 As one court noted, however, the stigma attaches not from living with a lesbian mother but from having a mother who is a lesbian. 78 Therefore, nothing is gained from denying the mother custody. In addition, relying on the stigma that purportedly attaches to the child of a lesbian as a basis for custody modification may be constitutionally defective. 79

A few jurisdictions have succumbed to their atavistic urges, and instead of determining whether the record indicates that the mother's lesbianism adversely affects the child, the court simply presumes an adverse effect. These courts require the less onerous burden of demonstrating the potential for danger: "The courts are not required to wait until the damage is done." 80 Ar-

75. The psychiatrist who was consulted offered the less than dispositive statement that "I think some, ah, homosexual people make good parents and some don't." Record at 83.


79. The United States Supreme Court addressed the question of whether a mother should be denied custody of her child because of her remarriage to a man of a different race. The court considered whether the reality of private biases and a possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.


80. S v. S, 608 S.W.2d 64, 65 (Ky. 1980). Unlike South Carolina, Kentucky has enacted a statute specifically governing the modification of custody decrees. The statute reads, in relevant part, that modification may be made if "there is reason to believe the
guably, the court in *Stroman*, if it had adopted this lesser standard, would have reached a different result. On the other hand, to alter judicial precedent in a thinly-veiled effort to find fault where no fault lies, would undermine the individual protections on which we have all come to rely.

*James Fletcher Thompson*

**V. GOODWILL NOT TO BE MARITAL PROPERTY**

In *Casey v. Casey* the South Carolina Supreme Court addressed an issue of first impression in the state involving equitable distribution of goodwill in a spouse’s business. The court held that goodwill was not marital property subject to equitable distribution, placing South Carolina in the minority of states ruling on the issue. In so holding, the supreme court overruled the court of appeals decision that had allowed the goodwill of the husband’s business to be a factor in determining division of marital property.

The husband had run a successful fireworks business for several years prior to the divorce. His business assets were valued at approximately $6,000. The trial court awarded the wife $10,500, which purported to represent a twenty-one percent interest in the goodwill of the business. The court of appeals agreed that goodwill should be a factor in determining the award of alimony but recognized that valuation of a sole proprietorship’s goodwill was problematic because of the difficulty in distinguishing the goodwill of the business from the entrepreneurial skills of the spouse. Citing the absence of information in the

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81. Tiffani’s older sister testified that lesbian affection had been displayed in her presence from the time she was fifteen. Record at 30. The court reasonably could have inferred that Ms. Williams would display the same affection in Tiffani’s company in years to come.

83. *Id.* at 505, 362 S.E.2d at 7.
85. *Id.* at 467, 346 S.E.2d at 728.
record that would allow an accurate determination of the goodwill value of the business, the court of appeals remanded for valuation of the fireworks business. 86

The court granted certiorari on the questions of whether goodwill is subject to equitable distribution and whether the court of appeals erred in remanding only the fireworks valuation portion of the award without considering its impact on the rest of the equitable distribution award. The court based its holding on two considerations. First, when goodwill of a business is dependent on the owner's future earnings, it is too speculative to be included in the marital estate. Second, these future earnings are accounted for in the alimony award. As such, goodwill could not be considered in equitable distribution. The court then examined the remainder of the equitable distribution award and, finding it fair, decided that remanding the case was unnecessary. 87

The court's sparse discussion of its considerations in reaching its decision makes analysis of the case difficult. At first glance, the two factors given by the court appear at odds with each other. If future earnings are accounted for in alimony, then it seems that determining their value would not be any more difficult when ascertaining the goodwill of a business. Of course, such a view ignores two points. First, goodwill of a business takes into account more factors than just the expected future earnings of the business. 88 Second, the rationales of equitable distribution and alimony are different. Alimony is directed toward the continuing needs of the receiving spouse. In contrast, the purpose of equitable distribution is to divide the property of the marriage and to sever the connections between the spouses. 89 Thus, while a determination of future earnings is needed for alimony, the court may later modify the award if the anticipated

86. Id.
87. 293 S.C. at 505, 362 S.E.2d at 7.
88. See Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 322 S.E.2d 674 (Ct. App. 1984), for a discussion of one approach used to value the goodwill of a close corporation.
89. Johnson v. Johnson, 285 S.C. 308, 311, 329 S.E.2d 443, 445 (Ct. App. 1985) ("[A]ll issues between the parties should be resolved at [the time of judgment] so that disputes and irritants do not linger and present further incentives to litigation. The family court's objective should be to dissolve the marriage, sever all entangling legal relations and place the parties in a position from which they can begin anew.").
future earnings are not realized.\textsuperscript{90} On the other hand, a property division is final, and a spouse whose expected future earnings do not materialize cannot later receive property back from the other spouse if the initial property division subsequently becomes inequitable. One can assume the court recognized this distinction since it was reluctant to use future earnings in a property division context.

As the court pointed out, other jurisdictions are divided on the subject.\textsuperscript{91} South Carolina’s decision in \textit{Casey} puts it in the minority of states ruling on the issue.\textsuperscript{92} Majority courts, in allowing consideration of goodwill, have reasoned that the mere difficulty in ascertaining its amount should not be a bar to its inclusion in a division of marital property, since goodwill is often computed in other types of actions at law.\textsuperscript{93} Also, some businesses bring in high amounts of revenue but are low in assets; thus, failure to include goodwill may result in inequities to a spouse whose efforts contributed to the prosperity of the business but who will not be able to enjoy the fruits of its continued success after the divorce. Courts in the minority view often have relied on the rationale that since the goodwill of the business depends upon future earnings, the receiving spouse would be doubly compensated by awarding both alimony and an interest in the goodwill of an ongoing enterprise.\textsuperscript{94} Moreover, such courts have stated that, especially in a professional practice, the goodwill was inseparable from the person, in that it would be extinguished in the event of death, retirement, or loss of clientel.\textsuperscript{95}

The \textit{Casey} court failed to address specifically whether the type of business in question should be a factor in determining whether to include goodwill in equitable distribution. Some of the arguments against its inclusion are weaker when viewed in a

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\item \textsuperscript{90} White v. White, 290 S.C. 515, 351 S.E.2d 585 (Ct. App. 1986).
\item \textsuperscript{91} 293 S.C. at 504, 362 S.E.2d at 6.
\item \textsuperscript{92} See Annotation, Accountability for Goodwill of Professional Practice in Actions Arising from Divorce or Separation, 52 A.L.R.3d 1344 (1973).
\item \textsuperscript{93} See, e.g., Todd v. Todd, 272 Cal. App. 2d 786, 791-82, 78 Cal. Rptr. 131, 135 (1969).
\item \textsuperscript{94} Holbrook v. Holbrook, 103 Wis. 2d 327, 352, 309 N.W.2d 343, 355 (Ct. App. 1981) ("[T]he goodwill or reputation of [the husband’s law firm] is reflected in [the husband’s] substantial salary. This salary was considered in setting the family support award. To also treat the goodwill of the law firm as a separate divisible asset, would constitute double counting.")
\item \textsuperscript{95} Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972).
\end{itemize}
situation involving a large corporation or some other business enterprise in which the success of the business is not particularly dependent on the individual efforts of the spouse. Since the business in *Casey* was a sole proprietorship, its treatment logically should be much more in line with that afforded a professional practice, but future cases before the court could reexamine this element as a possible consideration.

In conclusion, the court in *Casey* placed South Carolina in the minority of jurisdictions ruling on the issue by holding that goodwill in a spouse’s business is not property subject to equitable distribution. This seems to follow South Carolina’s more conservative trend in determining what constitutes marital property.\(^6\) Although trial courts will have an easier task by avoiding the cumbersome chore of determining the valuation of goodwill, they will have to take care that inequitable results are not reached.

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