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DOMESTIC LAW

I. MENTAL DISABILITY: A DEFENSE TO DIVORCE GROUNDED ON ADULTERY AND TO ALIMONY BAR

Rutherford v. Rutherford[1] presented the novel questions of whether a mental disability constitutes a defense to at-fault grounds for divorce, and if so, what degree of mental incapacity the defense requires.[2] The South Carolina Supreme Court recognized mental disability as a defense both to adultery and to the bar of alimony for adulterous spouses, if the spouse claiming the mental incapacity was unable to appreciate the wrongfulness of the conduct at the time the adultery was committed.[3] Furthermore, the spouse asserting the mental incapacity defense must prove the required incapacity by a preponderance of the evidence.[4]

Bobby Rutherford commenced this divorce action against his wife, Carol Rutherford, on the ground of adultery. Mr. Rutherford also claimed that the alleged adultery barred his wife from receiving alimony. Mrs. Rutherford counterclaimed for support and maintenance. At trial, Mrs. Rutherford denied the adultery occurred, but claimed that even if it did, her mental incapacity absolved her of any responsibility.[5]

Mrs. Rutherford's psychiatrist testified that Mrs. Rutherford suffered from multiple personality disorder ("MPD"). MPD typically occurs in persons who were severely abused as children as a way for the person's mind to cope with the abuse.[6] Dr. Larry Nelson, the psychiatrist, analogized MPD to a television set; even though it receives programs on other channels, you can watch only one channel at a time.[7] With MPD, the brain's different channels each possess a distinct set of memories.[8] Dr. Nelson stated that generally persons afflicted with MPD cannot switch the personalities at will.[9] The actions occurring while the person manifests a certain personality are generally the voluntary acts of that particular personality, but not necessarily the voluntary acts of the primary personality.[10]

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1. 307 S.C. 199, 414 S.E.2d 157 (1992).
2. *Id.* at 205, 414 S.E.2d at 160.
3. *Id.* at 206, 414 S.E.2d at 161.
4. *Id.*
5. *Id.* at 201, 414 S.E.2d at 158-59.
6. *Rutherford*, 307 S.C. at 201-02 & n.1, 414 S.E.2d at 159 & n.1 (citing COLIN A. ROSS, MULTIPLE PERSONALITY DISORDER: DIAGNOSIS, CLINICAL FEATURES AND TREATMENT 2 (1989)).
7. Record at 13.
8. *Id.*
9. *Id.* at 15.
10. *Id.* at 15-17. Dr. Nelson stated that Carol Rutherford was the primary personality. *Id.*

The family court disallowed Mr. Rutherford's petition for divorce. Although Mr. Rutherford presented evidence that proved the physical act of adultery, the judge concluded that Mrs. Rutherford suffered from a mental disability and therefore lacked the mental capacity to control her actions.[11] The family court judge divided the marital property and awarded Mrs. Rutherford separate maintenance and support.[12]

The South Carolina Court of Appeals reversed and remanded the family court's order.[13] The appellate court found that Mrs. Rutherford failed to prove that one of her alter egos committed the adultery, rather than herself as a cognitive person. Because she failed to prove her inability to control both her transformation into the various personalities and her alter personality at the time she committed adultery, the court concluded that Mrs. Rutherford committed adultery.[14]

Mrs. Rutherford filed for a rehearing, arguing that South Carolina Code section 14-3-320[15] limited the court of appeals' review of the facts to a substantial evidence standard. The court of appeals allowed the rehearing and found that the statute violated Article V, Section 5 of the South Carolina Constitution, which empowers the supreme court to review findings of fact in equity cases.[16] Despite lowering the evidentiary burden of proof to a preponderance of the evidence, the court held that Mrs. Rutherford failed to meet even that burden.[17]

Mrs. Rutherford successfully petitioned the supreme court for a writ of certiorari to review the court of appeals' decision.[18] On certiorari the South Carolina Supreme Court held that "to avoid [Mr. Rutherford's] action for divorce on the ground of adultery and the bar of alimony, [Mrs. Rutherford] bore the burden of proving by the preponderance of the evidence that at the

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at 17.

11. *Rutherford*, 307 S.C. at 202, 414 S.E.2d at 159. The judge found that Mrs. Rutherford "was under the control of one of her alter personalities" when she committed the adultery. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. This section provides the following:

> The Supreme Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases when the facts are settled by a jury and the verdict not set aside; provided, that in cases which arise out of the Family Court, except those cases dealing with juvenile misconduct, review by the Supreme Court of the findings of fact of the Family Court shall be limited to a determination of whether or not there is substantial evidence to sustain such facts.

S.C. CODE ANN. § 14-3-320 (Law. Co-op. Supp. 1992).

16. Rutherford, 307 S.C. at 203-04, 414 S.E.2d at 159-60 (citing S.C. CONST. art. V, § 5).

17. *Id.* at 202-03, 414 S.E.2d at 159.

18. *Id.* at 203, 414 S.E.2d at 159.

time she committed adultery, she was unable to appreciate the wrongfulness of her conduct."[19] Because the court first articulated this standard at this time, it found the record inadequate to determine whether Mrs. Rutherford possessed the ability to understand the wrongfulness of her adultery.[20] Therefore, the supreme court remanded the case.[21]

Rather than discussing whether or not mental illness should provide a defense to at-fault grounds for divorce and the bar of alimony, the supreme court focused on the standard a defendant must meet to employ the defense successfully.[22] The court found a review of other jurisdictions' laws inconsistent and unilluminating.[23] Some courts reject mental illness as a defense to at-fault divorce actions entirely.[24] Those jurisdictions that recognize the defense apply various standards.[25] The South Carolina Supreme Court borrowed the standard set forth in *Rutherford* from criminal law.[26] Criminal defendants incur no responsibility for a crime if they "lack[ed] the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong" because of a mental defect at the time of the crime.[27] The court reasoned that this same standard should apply to mental incapacity in divorce actions and to the mental incapacity required to avoid the statutory bar of alimony.[28] The court relied on the South Carolina criminal statute that authorizes the conviction and incarceration of persons who are incapable of conforming their actions to the law.[29]

Mrs. Rutherford argued that South Carolina Code section 14-3-320[30] limited the supreme court's review of the family court's findings of fact to a

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19. *Id.* at 206, 414 S.E.2d at 161.

20. *Id.*

21. *Rutherford*, 307 S.C. at 206, 414 S.E.2d at 161.

22. *Id.* at 205-06, 414 S.E.2d at 160-61.

23. *Id.* at 205, 414 S.E.2d at 160.

24. *Id.* (citing Pajak v. Pajak, 437 N.E.2d 1138 (N.Y. 1982)).

25. *Id.* at 205, 414 S.E.2d at 160-61 (citing Eppling v. Eppling, 537 So. 2d 814 (La. Ct. App.), *writ denied*, 538 So. 2d 619 (La. 1989); Hoehn v. Hoehn, 418 N.E.2d 648 (Mass. App. Ct. 1981); Simpson v. Simpson, 716 S.W.2d 27 (Tenn. 1986)).

26. *Rutherford*, 307 S.C. at 205-06, 414 S.E.2d at 161.

27. S.C. CODE ANN. § 17-24-10(A) (Law Co-op. Supp. 1992). Mental illness is an affirmative defense. *Id.*

28. *Rutherford*, 307 S.C. at 205-06, 414 S.E.2d at 161. In adopting this standard, the court rejected Mrs. Rutherford's argument that she should not be held responsible for her actions per se because of her inability to control the acts of her various personalities. *Id.*

29. *Id.* at 205, 414 S.E.2d at 161 (citing S.C. CODE ANN. § 17-24-70 (Law. Co-op. Supp. 1992)).

30. S.C. CODE ANN. § 14-3-320 (Law. Co-op. Supp. 1992); *see also supra* note 14 for the text of the statute.

substantial evidence standard.[31] Mrs. Rutherford claimed that this statute did not conflict with Article V, Section 5 of the South Carolina Constitution, which empowers the supreme court to review findings of fact in equity cases, because the statute merely defined the scope of appellate review without denying appellate courts the authority to review the facts.[32] The court rejected this argument, finding the statute "clearly in conflict with the constitutional mandate of Article V, Section 5 of the South Carolina Constitution."[33] The court relied on the interpretation of this constitutional provision set forth in *Finley v. Cartwright*[34] and consistently applied to all equity cases since *Finley*,[35] stating the following:

> In *Finley*, Justice Jones . . . declared, "it may now be regarded as settled that this court may reverse a finding of fact by the circuit court [in a case of equity] when the appellant satisfies this court that the preponderance of the evidence is against the finding of the circuit court."[36]

The court also rejected Mrs. Rutherford's argument that Article V, Section 4 of the South Carolina Constitution supported her interpretation of the statute.[37] This section provides: "Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all . . . courts."[38] The supreme court found that this general provision did not overrule the specific language of section 5, and affirmed the court of appeals, ruling that "[i]n appeals from all equity actions including those from the Family Court, the appellate court has authority to find facts in accordance with its own view of the preponderance of evidence."[39]

Finally, the court addressed an informal support agreement's effect on the statutory bar of alimony for adulterous spouses.[40] Mrs. Rutherford relied on

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31. *Rutherford*, 307 S.C. at 204, 414 S.E.2d at 160.

32. *Id.*

33. *Id.*

34. 55 S.C 198, 33 S.E. 359 (1899).

35. *Rutherford*, 307 S.C. at 203, 414 S.E.2d at 160 (citing Miller v. Miller, 299 S.C. 307, 384 S.E.2d 715 (1989); Forester v. Forester, 226 S.C. 311, 85 S.E.2d 187 (1954); Wise v. Wise, 60 S.C. 426, 38 S.E. 794 (1901)).

36. *Id.* (alteration in original) (quoting *Finley*, 55 S.C. at 202, 33 S.E. at 360-61).

37. *Id.* at 204, 414 S.E.2d at 160.

38. S.C. CONST. art. V, § 4.

39. *Rutherford*, 307 S.C. at 204, 414 S.E.2d at 160.

40. This argument will not arise in future cases because of an amendment to the South Carolina Code, applying to actions filed after November 29, 1990, which requires a written agreement to override the statutory bar of alimony for adulterous spouses. *See* S.C. CODE ANN. § 20-3-130 (Law. Co-op. Supp. 1992); *see also Rutherford*, 307 S.C. at 207 & n.4, 414 S.E.2d at 161-62 & n.4.

Sattler v. Sattler[41] in contending that the oral agreement should override the statutory bar for adulterous spouses. *Sattler* allowed a formal, written settlement agreement to override the statutory bar of alimony for adulterous spouses, but the court declined to extend *Sattler* to an "informal verbal [sic] understanding."[42]

The supreme court in *Rutherford* faced the difficult task of articulating a test that would provide adequate protection for persons who are mentally ill as well as discourage promiscuous behavior in marriage.[43] The test adopted by the South Carolina Supreme Court—requiring that spouses seeking to avoid a divorce on the ground of adultery must prove by a preponderance of the evidence that they were unable to appreciate the wrongfulness of the adultery at the time it was committed—will likely evolve into a battle of the experts in court. Each side will present medical experts with conflicting opinions of whether the spouse could appreciate the wrongfulness of the conduct (at that time). With the new test set forth in *Rutherford*, the supreme court has, in effect, told the experts what to say; therefore, the credibility of the experts will be a determinative factor. The experts testifying for spouse seeking a divorce faces a unique problem because the expert may testify that the spouse claiming mental incapacity was able to appreciate legal and moral right from wrong at the time of the expert's examination; however, the spouse claiming mental incapacity can assert that, though possessing that capacity now, the spouse did not possess it at the time of the adultery.[44] The battle-of-the-experts scenario makes it difficult for spouses to claim mental incapacity as a defense to at-fault grounds for divorce without an expert's testimony that they were unable to distinguish right from wrong. The *Rutherford* test guides this expert testimony required for the spouse to successfully defend against the divorce and the statutory bar of alimony.

MPD presents unique difficulties in complying with the *Rutherford* test. Because of the existence of different personalities, some personalities could conceivably possess the capacity to appreciate the wrongfulness of the particular conduct, while other personalities may not possess this capacity. Therefore, to determine whether the spouse was mentally incapable the court must know which personality emerged at the time of the adultery. Although the expert may testify as to which personalities exhibit the required mental capacity, the question of which personality committed the adultery will often remain unknown. The adulterous behavior leaves unanswered questions

41. 284 S.C. 422, 327 S.E.2d 71 (1985).

42. *Rutherford*, 307 S.C. at 207, 414 S.E.2d at 161.

43. *See* Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949) (discussing South Carolina's public policy of protecting marriage).

44. Mr. Rutherford's counsel faced a similar problem because Dr. Nelson testified that despite her MPD, Mrs. Rutherford could competently testify at trial and did not need a guardian ad litem. Record at 17-18.

because of the lack of witnesses. The courts will face a unique difficulty when presented with testimony that an alter personality knew the difference between right and wrong, but the spouse's main personality did not. These particular complications may not arise with other mental illnesses which do not involve distinct and multiple personalities.

Because the supreme court phrased the question presented as "whether a mental disability is a defense to at-fault grounds for divorce and what degree of mental impairment is required,"[45] the *Rutherford* test presumably applies to other at-fault grounds for divorce as well. In South Carolina, "[f]ault grounds for divorce include: adultery, desertion, physical cruelty, and habitual drunkenness."[46] Spouses defending a divorce for one of these grounds also need expert testimony regarding their capacity to appreciate the wrongfulness of the conduct in question, and, arguably, the credibility of the experts' testimony would determine the outcome. This implied requisite expert examination and testimony provides a means for the court to guard against possible abuses by persons who unjustifiably claim mental incapacity. The court will likely consider testimony from an expert who examined the spouse after the alleged conduct occurred. However, if the spouse is under an expert's care at the time of the questionable conduct, the spouse's ability to satisfy the test may improve because the expert's testimony will prove the seriousness of the illness at the time.

The approaches taken by other jurisdictions concerning mental incapacity as a defense to at-fault grounds for divorce vary. Three general views exist regarding whether a defendant's insanity provides a defense to a divorce action on grounds other than insanity.[47] One view maintains that "an insane person cannot be accountable for the consequences of his acts, since he is not capable of differentiating right from wrong, or, if so capable, he is acting by force of an irresistible impulse generated by a diseased mind, and not by volition."[48] This view comports with the view of the criminal law.[49] Many of the courts that recognize insanity as a defense to divorce do not set a particular standard for the degree of insanity required to constitute the defense. A second group of jurisdictions recognize insanity as a defense to divorce and set specific standards regarding the required degree of insanity the defendant must prove.[50] Yet a third approach wholly rejects insanity as a defense to at-fault

45. *Rutherford*, 307 S.C. at 205, 414 S.E.2d at 160 (footnote omitted).

46. *Id.* at 205 n.3, 414 S.E.2d at 160 n.3 (citing S.C. CODE ANN. § 20-3-10 (Law. Co-op. 1985)).

47. P.H. Vartanian, Annotation, *Insanity as Affecting Right to Divorce or Separation on Other Grounds*, 19 A.L.R.2D 144 (1951).

48. *Id.* at 147.

49. *See* S.C. CODE ANN. § 17-24-10 (Law. Co-op. Supp. 1992); *see also supra* note 26-29 and accompanying text.

50. Vartanian, *supra* note 47, at 147-48.

divorce, finding the defendant's mental capacity immaterial.[51] Few American courts accept this third approach.[52]

Examples of the varying approaches taken by other jurisdictions are as follows: A New York court recognized an insanity defense to a divorce action based on adultery, but found it unnecessary to choose a standard defining the required level of mental incapacity to constitute a defense.[53] However, the New York Court of Appeals refused to recognize mental illness as a defense to a divorce action brought on the ground of cruel and inhuman treatment.[54] The Louisiana Court of Appeal recognized mental illness as a defense to a divorce action based on cruel treatment, holding that the spouse claiming the mental illness bears the burden of proving that mental illness caused the mental cruelty inflicted.[55] The Tennessee Supreme Court held that spouses asserting insanity as a defense to a divorce on the ground of cruel and inhuman treatment must prove that at the time of such conduct and as a result of the mental illness, they lacked the capacity to either appreciate the wrongfulness of their conduct or the volition to control their acts.[56] The Pennsylvania Superior Court allowed insanity as a defense to a divorce action on the ground of adultery, when at the time of the adultery the defendant did not know the nature and consequences of the wrongful acts or possess the ability to distinguish between right and wrong.[57] A survey of various states' views demonstrates that no uniform approach exists regarding whether mental illness constitutes a defense to an at-fault divorce and what degree of mental illness the defendant must prove.[58]

In *Rutherford* the South Carolina Supreme Court reaffirmed its power to reverse findings of fact by the circuit courts in equity cases when it is satisfied that the circuit court's finding was against the preponderance of the evidence by declaring South Carolina Code section 14-3-320 unconstitutional.[59] Second, the court declined to allow an "informal verbal [sic] understanding" to override the statutory bar of alimony for adulterous spouses.[60] Finally, the court decided the level of mental incapacity required to constitute a defense to

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51. *Id.* at 148.

52. *Id.*

53. Anonymous v. Anonymous, 236 N.Y.S.2d 288 (Sup. Ct. 1962).

54. Pajak v. Pajak, 437 N.E.2d 1138 (N.Y. 1982).

55. Eppling v. Eppling, 537 So. 2d 814 (La. Ct. App.), *writ denied*, 538 So. 2d 619 (La. 1989).

56. Simpson v. Simpson, 716 S.W.2d 27 (Tenn. 1986).

57. Manley v. Manley, 164 A.2d 113 (Pa. Super. Ct. 1960).

58. For a discussion of insanity as a defense to a divorce action, see David P. Chapus, Annotation, *Insanity as Defense to Divorce or Separation Suit—Post—1950 Cases*, 67 A.L.R.4TH 277 (1989).

59. *Rutherford*, 307 S.C. at 203-04, 414 S.E.2d at 159-60.

60. *Id.* at 206-07, 414 S.E.2d at 161-62.

a divorce grounded in adultery or to a bar of alimony.[61] The supreme court held that the defendant "bore the burden of proving by the preponderance of the evidence that at the time she committed adultery, she was unable to appreciate the wrongfulness of her conduct."[62] In requiring the spouse who alleges mental incapacity to bear the burden of proof, the court retreats somewhat from its strong public policy of fostering the marital institution and protecting mentally ill spouses as set forth in *Shaw v. Shaw*.[63] However, the standard announced by the court seems sufficiently restrictive to ensure that only those spouses who present expert testimony substantiating their mental incapacity claim will sustain the burden of the *Rutherford* mental incapacity standard.

Elizabeth Ann Loadholt

II. COURT APPLIES DEFINITION OF MARITAL PROPERTY

In *McClerin v. McClerin*[1] the South Carolina Court of Appeals affirmed the trial court's holding that marital property included the amount by which business stock, acquired prior to the marriage, increased in value during the marriage.[2] Both the trial court and the court of appeals found evidence showing that Mrs. McClerin (respondent) contributed to the increased value of the stock.[3] However, neither court addressed Mr. McClerin's (appellant's) contention that the entire value of the stock was his separate property because Mrs. McClerin was a paid employee of his business, and because her salary greatly exceeded the value of her services.[4] By ignoring Mr. McClerin's argument on appeal, the court implicitly, but effectively, nullified a line of South Carolina decisions suggesting that wages are relevant in judicial determinations of whether the appreciated value of nonmarital property should be deemed "marital" for purposes of equitable distribution.[5]

Richard and Peggy McClerin married on August 15, 1980 and separated in September of 1988.[6] On May 2, 1989, Mrs. McClerin filed for a divorce.

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61. *Id.* at 205-06, 414 S.E.2d at 160-61.

62. *Id.* at 206, 414 S.E.2d at 161.

63. 256 S.C. 453, 455, 182 S.E.2d 865, 865 (1971) (citing Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949)); *see also supra* note 43.

1. ___ S.C. ___, 425 S.E.2d 476 (Ct. App. 1992).

2. *Id.* at ___, 425 S.E.2d at 477-78.

3. *Id.* at ___, 425 S.E.2d at 478.

4. Brief of Appellant at 4-7.

5. *See* cases cited *infra* notes 18-22 and accompanying text.

6. *McClerin*, ___ S.C. at ___, 425 S.E.2d at 477.

The divorce decree included a fifty-fifty division of all marital property between the parties, including the amount by which Mr. McClerin's separately owned business stock increased in value during the marriage.[7] The trial court valued the increase at $1,645,698, reflecting the total value of the stock when the marital litigation commenced, less $195,000 for the premarital value of the stock and other assets Mr. McClerin owned prior to the marriage.[8]

On appeal, Mr. McClerin argued that the trial court erroneously included the increased stock value in the marital estate because Mrs. McClerin received a highly inflated salary as an employee of R-M Industries.[9] Consequently, asserted Mr. McClerin, her overcompensated position did not increase the value of the stock.[10] Without expressly addressing this argument, the court of appeals held that, pursuant to the South Carolina Equitable Apportionment of Marital Property Act (the "Act"),[11] the trial court properly classified the stock's increase in value as marital property subject to equitable distribution because the value increased as a result of Mrs. McClerin's efforts in the business.[12]

Although "family court[s] may use any reasonable means to effectuate an equitable division" of property upon marital dissolution,[13] the statutory mandate of section 20-7-473 tempers this broad grant of discretion by subjecting only "marital" property to equitable distribution.[14] Section 20-7-473 defines marital property as follows:

> [A]ll 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

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7. *Id.* at ___, 425 S.E.2d at 477-78. The trial court found that only the *increased value* of the stock, not the stock itself, was marital property. Record at 5. The South Carolina Equitable Apportionment of Marital Property Act specifically prohibits the equitable distribution of property acquired by the parties prior to the marriage, unless the property falls within the exception in § 20-7-473(2). S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1992).

8. *McClerin*, ___ S.C. at ___, 425 S.E.2d at 478. Mr. McClerin incorporated R-M Industries, a chemical manufacturing company, in 1977. *Id.* at ___, 425 S.E.2d at 477.

9. Brief of Appellant at 4-6.

10. *Id.* Mr. McClerin asserted that Mrs. McClerin "earned from $38,000 to $60,000 per year . . . when a reasonable salary would have been $30,000 per year." *Id.* at 4-5. The trial court agreed that her salary was "inflated." Record at 8. The trial court, however, did not discuss the implications of Mrs. McClerin's "inflated" salary. Had the trial court done so, it might have concluded that Mrs. McClerin's overcompensation (relative to the actual value of her skills) disproportionately decreased the value of the business.

11. S.C. CODE ANN. §§ 20-7-471 to -479 (Law. Co-op. Supp. 1992).

12. *McClerin*, ___ S.C. at ___, 425 S.E.2d at 478; *see* S.C. CODE ANN. § 200-7-473(5) (Law. Co-op. Supp 1992).

13. Brandi v. Brandi, 302 S.C. 353, 357-58, 396 S.E.2d 124, 126 (Ct. App. 1990) (per curiam) (citing Bass v. Bass, 285 S.C. 178, 328 S.E.2d 649 (Ct. App. 1985)).

14. *See* S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1992) (providing that courts lack authority to apportion nonmarital property).

> commencement of marital litigation . . . regardless of how legal title is held, except the following, which constitute nonmarital property:
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> . . . .
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> (2) property acquired by either party before the marriage . . . ;
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> . . . .
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> (5) any increase in value in nonmarital property, except to the extent that the increase resulted directly or indirectly from efforts of the other spouse during marriage.[15]

Still, even the Act's definition of marital property allows the court broad discretion. The Act offers little legislative guidance as to what constitutes an "effort" which results in an "increase" in the value of nonmarital property.

The party claiming an equitable interest in disputed property carries the burden of proving that the property is part of the marital estate.[16] The court of appeals found that Mrs. McClerin met the requisite burden of proof by demonstrating various direct and indirect contributions to the increase in value of Mr. McClerin's stock.[17] The court based its conclusion on Mrs.

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15. S.C. CODE ANN. § 20-7-473 (Law. Co-op. Supp. 1992). The *McClerin* court declined to apply a literal interpretation of § 20-7-473. The trial court found that "[b]oth parties made an equal contribution to the acquisition, preservation, and appreciation in the value of marital property and R-M Industries." Record at 6. Section 20-7-473 provides that the increase in value of nonmarital property attributable to the efforts of the *other* spouse may be included in the marital estate. S.C. CODE ANN. § 20-7-473(5) (Law. Co-op. Supp. 1992). A methodical application of § 20-7-473(5) in *McClerin* would have included only the amount of increase attributable to the *wife's* efforts in the marital estate *alone*. However, the court of appeals expanded § 20-7-473(5) by reasoning that although both parties made active contribution, the *entire* amount of the increase should be included. *McClerin*, ___ S.C. at ___, 425 S.E.2d at 478. The court's expansive reading of § 20-7-473 is not inconsistent with other South Carolina decisions applying the section. *See, e.g.*, Crawford v. Crawford, 301 S.C. 476, 392 S.E.2d 675 (Ct. App. 1990) (holding that property deemed outside of the marital estate by virtue of a marital property settlement agreement and a subsequent reconciliation agreement could be reapportioned to the extent that it had increased in value due to the *joint* efforts of the parties).

16. Johnson v. Johnson, 296 S.C. 289, 294, 372 S.E.2d 107, 110 (Ct. App. 1988) (creating a rebuttable presumption that property either acquired prior to marriage or within a statutory exception remains separate property) *cert. denied*, 298 S.C. 117, 378 S.E.2d 445 (1989).

17. *McClerin*, ___ S.C. at ___, 425 S.E.2d at 478. The court of appeals relied heavily on the facts as determined by the trial court. As evidence of Mrs. McClerin's contributions to the increased value of Mr. McClerin's stock, the trial court found the following:

> Through joint efforts, [the McClerins] built [R-M Industries] into a profitable business. The Plaintiff [Mrs. McClerin] was with the Defendant [Mr. McClerin] at the inception of R-M Industries, Inc. She has worked side by side with the Defendant in building the company to its present state. The Plaintiff held the position of Comptroller General and ran the administrative side of the business to include handling a vast majority of the financial matters, running the office, and assisting in the day-to-day operations of the business. Although in the latter years of the marriage she opened Financial Data Services and split her time between there and R-M Industries, it is specifically noted that she continued to do work after hours and

McClerin's performance of her duties as an employee of R-M Industries. On its face the court's reasoning seems without fault; however, the court failed to consider Mrs. McClerin's salary as a mitigating factor in classifying the increase as marital property.

The *McClerin* decision proves particularly troublesome because rather than expressly rejecting Mr. McClerin's contention that his wife's "inflated" salary offset any interest claimed in the appreciated value of the stock, the court simply declined to discuss the issue. Arguably, had the court of appeals considered Mrs. McClerin's salary, it might have reversed, rather than affirmed, the trial court's holding. Pre-*McClerin* decisions indicate that the equity principals espoused in *McClerin* arise from a *lack* of adequate compensation for spousal efforts which increased the value of nonmarital property.

In *Webber v. Webber*[18] the court of appeals confronted issues similar to those issues found in *McClerin*. "Mrs. Webber contributed to the business by working as an employee; however, the evidence does not show her contribution was material. She did not contribute funds to start the business. Nor did she contribute very much *uncompensated* service to the business."[19] Accordingly, the *Webber* court concluded that Mrs. Webber was not entitled to an interest in her husband's business.[20] The court seemed to reason that Mrs. Webber's salary offset any increase in the value of the company which occurred as a result of her employment. *Webber* seems to preclude the type of dual compensation for one spouse's services to the other spouse's nonmarital business that occurred in *McClerin*.

Similarly, pre-*McClerin* cases, dealing with uncompensated or undercompensated contributions by one spouse to the increased value of the other spouse's nonmarital business or property, consistently held that the increases were marital, and thus, subject to judicial apportionment.[21] These cases

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on weekends at R-M Industries. While she was at FDS, she was also working on R-M Industries' matters. In addition to her work at R-M Industries she and the Defendant entertained clients of R-M Industries in a social and home setting. The parties devoted a substantial majority of their marriage, both social and working to making R-M Industries into the profitable state it is in now.

Record at 7.

18. 285 S.C. 425, 330 S.E.2d 79 (Ct. App. 1985).

19. *Id.* at 429, 330 S.E.2d at 81 (citations omitted) (emphasis added). *Webber* was decided prior to June 13, 1986, the effective date of the South Carolina Equitable Apportionment of Marital Property Act.

20. *Id.*

21. *See, e.g.*, Wilson v. Wilson, 270 S.C. 216, 241 S.E.2d 566 (1978)(holding that because wife worked for husband's business for only $25 per week, she was entitled to a special equity upon dissolution of the marriage); Reid v. Reid, 280 S.C. 367, 312 S.E.2d 724 (Ct. App. 1984)(holding that because wife materially contributed to husband's business by working as an uncompensated employee, she was entitled to an equitable interest in the business upon dissolution

clearly follow the "partnership theory" embodied in equitable distribution statutes.[22] *McClerin*, however, seems to depart from this line of reasoning. The *McClerin* court did not consider Mrs. McClerin's salary as even a relevant, let alone determinative, factor in its decision to include the stock value increase in the marital estate.

Perhaps the most disquieting aspect of the *McClerin* decision is the credence it lends to criticisms that South Carolina family courts enjoy virtually unlimited discretion to narrow, broaden, define, or even decline to apply the operations of the Equitable Apportionment of Marital Property Act as established in prior decisions. Although some discrepancy is unavoidable in domestic cases because of the fact-specific nature of many family court decisions, *McClerin* illustrates the unpredictable outcome of those equitable apportionment cases that appear to fall within the established parameters of prior case law. The *McClerin* decision raises uncertainties as to whether established parameters even exist for purposes of equitable distribution in domestic cases, and if they do, whether they will serve as boundaries to the trial court's discretion.

The *McClerin* decision, by virtue of omission, does not directly challenge the continuing validity of prior decisions. However, it would seem imprudent for marital parties to rely on the holdings of cases such as *Webber* to limit the authority of trial courts to include the increased value of separate property in equitable property divisions.

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of the marriage).

22. *See* Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988), *cert. denied*, 298 S.C. 117, 378 S.E.2d 445 (1989).

> The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership. Upon dissolution of the marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title.

Id. at 293, 372 S.E.2d at 109-10 (citing Walker v. Walker, 295 S.C. 286, 368 S.E.2d 89 (Ct. App. 1988)).