Domestic Law

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DOMESTIC LAW

I. SUPREME COURT DEFINES FOUR CRITERIA FOR RESOLVING PARENT-THIRD PARTY CUSTODY DISPUTES

In Moore v. Moore\(^1\) the South Carolina Supreme Court defines four criteria for courts to apply to resolve custody disputes between a child's natural parents and third parties who have had temporary custody of the minor child. The four criteria are (1) the present fitness of the natural parent, (2) the amount of contact between the child and the natural parent, (3) the circumstances surrounding the natural parent's temporary relinquishment of custody, and (4) the degree of attachment between the child and the temporary custodian.\(^2\) Although the court in Moore presents a new test, two established principles of South Carolina law, promoting the best interests of the child and recognizing the superior rights of natural parents in custody disputes, guided the supreme court.\(^3\) The court cites cases from other jurisdictions and South Carolina to support the formulation of its guidelines in Moore.\(^4\)

When Michael Moore and his wife separated in 1983, Mr. Moore received custody of their five children. He then moved his family to Georgetown so that his parents could assist in caring for the children. Mr. and Mrs. Jessie Sanders offered to care for Shawn, one of Mr. Moore's children. Shawn was two years old in 1984 when his physical custody was transferred to the Sanders. Furthermore, the Moores' final divorce decree included an agreement to maintain the physical placement of Shawn with the Sanders "until no longer feasible," but Mr. Moore retained permanent legal custody of Shawn.\(^5\)

Initially, Shawn had frequent contact with his father and siblings, and in 1984 Mr. Moore provided for Shawn's day care and medical insurance. Injuries he sustained in a car accident, however, hampered Mr. Moore's ability to provide for Shawn. In March 1985, after a military transfer to Alabama, Moore attempted to regain physical custody of Shawn, but the Sanders convinced him to wait until he was settled.

\(^1\) 300 S.C. 75, 386 S.E.2d 456 (1989).
\(^2\) Id. at 79-80, 386 S.E.2d at 458.
\(^3\) Id. at 78-79, 386 S.E.2d at 458.
\(^5\) Moore, 300 S.C. at 77, 386 S.E.2d at 457.
in Alabama. On his subsequent visits to Georgetown, Mr. Moore continued to have contact with Shawn. After an incident with Shawn's mother in December 1985, however, Mr. and Mrs. Sanders refused to allow Mr. Moore to visit Shawn unless they were present.

Mr. Moore remarried in November 1986, and in December he made another attempt to regain physical custody of Shawn. The Sanders, however, refused to give up physical custody of Shawn. Therefore, in July 1987 Mr. Moore requested a rule to show cause why an order should not be issued to allow him to remove Shawn from the Sanders' home. At the final hearing the trial court transferred permanent custody of Shawn to the Sanders because of Shawn's bonding with them, and because Mr. Moore had "abandoned" Shawn. The supreme court, however, applied the four-part test and reversed the custody award.7

Under the first element of the test a natural parent must establish that he is presently fit and able to care properly for the child.8 A rebuttable presumption that it is in the best interest of the child to be in the custody of the natural parent arises once the natural parent establishes fitness.9

Although granting custody to a fit parent seems to promote the best interests of the child, South Carolina courts have looked to factors other than fitness when they favored a third party over a parent.10 These cases, however, often contain an implicit finding of unfitness, which leaves in doubt the circumstances under which other considerations will rebut the presumption in favor of a fit natural parent over a third party.11 The test adopted by the supreme court in Moore clarifies this gray area by delineating specific factors for the trial court to consider when it resolves a custody dispute between a parent and third party.

Moore asserted that in Kay v. Rowland12 the supreme court created an irrebuttable presumption in favor of fit parents by holding that "Once the natural parent is deemed fit, the issue of custody is de-

6. Id. at 80, 386 S.E.2d at 458.
7. Id. at 81, 386 S.E.2d at 459.
8. Id. at 79, 386 S.E.2d at 458.
9. Id.
11. See, e.g., Cook, 271 S.C. at 136, 245 S.E.2d at 612 (mother would not provide good environment for child); Koon, 203 S.C. at 556, 28 S.E.2d at 89 (father boarding with friends, home only at night).
If the court had applied this standard in Moore, the trial court would have had no authority to award custody to the Sanders because the evidence established Moore's fitness. Rowland is distinguishable, however, because in that case the third party was the child's maternal grandmother who did not have custody, but, nevertheless, intervened in the child's parents' divorce hearing on the issue of custody.14

Even if Rowland creates an irrebuttable presumption in favor of a fit parent under its facts, the court in Moore does not extend the irrebuttable presumption to custody disputes between natural parents and the third parties who have temporary custody of the child.15 Giving fit parents an absolute right to custody may be contrary to the child's best interests when an established and stable relationship exists with the third party who seeks custody.16 The court, therefore, recognizes only a rebuttable presumption in favor of the natural parent, and this rebuttable presumption may be overcome not only by showing that the parent is unfit, but also by the amount of contact between the parent and the child, by the circumstances behind the temporary relinquishment, and by the bond between the child and temporary custodian.17

The Moore court relaxed the irrebuttable presumption outlined in Rowland. The Rowland decision is, nevertheless, significant because it apparently influenced the court in Moore to develop a relatively stringent burden for third parties to meet.18

Another element of the test is the circumstances under which the parent relinquished custody of the child.19 The Moore court addresses only temporary relinquishment. Other jurisdictions additionally have been willing to allow a parent to regain custody of a child when the parent's initial relinquishment of custody grew out of concern for the child's welfare. For example, a parent's inability to care properly for the child may justify the relinquishment.20 The Moore opinion implicating

13. Id. at 517, 331 S.E.2d at 782.
14. Id. n.1, 331 S.E.2d at 781 n.1.
15. 300 S.C. at 79, 386 S.E.2d at 458 (citing Rowland as support for a rebuttable presumption standard).
17. 300 S.C. at 79-80, 386 S.E.2d at 458.
18. Id. at 79, 386 S.E.2d at 458.
19. Id.
itly supports this proposition when it expresses the court’s desire to ensure “that parents who temporarily relinquish custody for the child’s best interest can regain custody when conditions become more favorable.”21 The class of parents that benefit from this factor is defined narrowly as those who in good faith temporarily relinquish custody for the best interests of the child.

When he relinquished custody of Shawn, Moore was experiencing difficulties trying to cope as a single father rearing five children.22 The Sanders suggested the custody arrangement to help him.23 The parties intended the custody arrangement to be temporary.24 Implicit in this arrangement was a good faith requirement for the temporary custodian to respect the rights of the natural parent and not take advantage of their custody of the child.25 The supreme court observed that “Child custody should not be subject to change because of adverse possession.”26 This statement demonstrates the court’s concern that a parent be able to regain custody after he relinquishes possession of the child in good faith.

A third element of the court’s test is “[t]he amount of contact, in the form of visits, financial support or both, which the parent had with the child while it was in the care of a third party.”27 Contacts must, however, be evaluated with regard to all of the circumstances. In Moore the supreme court found that Moore had maintained sufficient contact to justify an award of custody to him.

The court will examine the actions of the temporary custodians in

21. 300 S.C. at 79, 386 S.E.2d at 458. When a party seeks to upset custody, the court requires that party to show a change of conditions that materially affects the welfare of the child. Cook v. Cobb, 271 S.C. 136, 143, 245 S.E.2d 612, 616 (1978). Although the supreme court has applied the change of circumstances rule to custody disputes between parents and third parties, Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979), its continued application is inappropriate in the situations Moore v. Moore addresses. When custody is determined for the first time, a temporary custodian may be in an unfairly advantageous position if the natural parent is less financially stable and would, therefore, be unable to show that a change of custody would materially benefit the child. Funkhouser v. Funkhouser, 158 W. Va., 964, 968, 216 S.E.2d 570, 573 (1975). In situations like Moore, in which the parent has legal custody of the child, however, the burden is on the temporary custodian to establish any change of conditions that materially affects the welfare of the child. See Cook, 271 S.C. at 143, 245 S.E.2d at 616. Nevertheless, rather than applying the change of circumstances standard in Cook, the court adopted this test to resolve parent-third party custody disputes.

23. Id.
24. Moore, 300 S.C. at 81, 386 S.E.2d at 459.
25. See id.
26. Id.
27. Id. at 79, 386 S.E.2d at 459.
its evaluation of the contacts between a natural parent and child. 28 Mr. and Mrs. Sanders unilaterally restricted Moore’s contact with Shawn when they refused his offers of financial assistance and only allowed visitation in their presence after December 1985. 29 Even though Moore’s contact may have been limited, the court found that it was sufficient under the circumstances. Thus, the court will balance the lack of contact by the parent with actions of the third party to limit contact between the parent and child. Because the Sanders attempted to limit Moore’s contact with Shawn, however, the Moore court did not offer any guidelines to determine what is sufficient contact when third party intervention is not a factor.

The final element courts are to consider under the Moore test is the degree of attachment between the temporary custodian and the child. 30 This has been an influential factor in previous South Carolina cases in which the courts have awarded custody to a third party. 31 In Moore, however, the court held this to be only one consideration and that the existence of a psychological parent-child relationship is insufficient to deny custody to the natural parent. 32 The court does not explain what manner of relationship will suffice to deny custody to the natural parent, but the previous standard is whether severing the relationship will harm the child. 33 Shawn was two years old in 1984 when custody was transferred to the Sanders, and he lived with them about four years. The guardian ad litem determined that the child had bonded with Mr. and Mrs. Sanders as his mother and father, and had not had sufficient contact with Moore to maintain a relationship. 34 The court, however, found this unpersuasive in light of Mr. and Mrs. Sanders’ actions to prevent the development of a normal relationship between Mr. Moore and Shawn. 35 Although custody should not be awarded to punish or reward a party, 36 the court’s displeasure with the Sanders undoubtedly influenced its decision to award custody to

28. See id. at 81, 386 S.E.2d at 459.
29. Id. at 77-78, 386 S.E.2d at 457. The cases cited by the court in support of this factor also indicate concern with third party intervention. In People ex rel. Bukovic v. Smith, 98 Ill. App. 3d 144, 148, 423 N.E.2d 1302, 1305 (1981), the grandparents refused to allow the parent contact, and in Brown v. Ellison, 162 So. 2d 805, 806 (La. Ct. App. 1964), the custodians threatened to shoot the mother if she came to their house.
30. 300 S.C. at 80, 386 S.E.2d at 458.
32. 300 S.C. at 80, 386 S.E.2d at 459.
33. See Cook, 271 S.C. at 142, 245 S.E.2d at 615.
34. Brief of Guardian Ad Litem at 5-6.
35. 300 S.C. at 80, 386 S.E.2d at 459.
Moore.

The supreme court designed this test to ensure that parents who relinquish custody in good faith may regain custody when conditions become more favorable. Although third parties are not precluded from successfully challenging custody, it will be difficult for them to overcome the presumption that the natural parents should have custody of their children. The court's opinion in Moore benefits both litigants and trial courts by stating the factors for courts to consider when they resolve parent-third party custody disputes. Nevertheless, the decision leaves undefined the standard to apply when no intervening acts by the third party are a factor.

Lorie L. Maring

II. COMMON-LAW MARRIAGE INFERRED FROM PARTIES' CONDUCT

In Prevatte v. Prevatte the South Carolina Court of Appeals held that a common-law marriage exists when a legal impediment to the marriage has been removed, even though the couple is unaware of the impediment's removal. When the parties appear to agree that they are married, their knowledge of the impediment's removal is "of no consequence, under the circumstances."

Mr. and Mrs. Prevatte were married ceremonially, but not legally, in 1959. At that time, Mrs. Prevatte was legally married to Allard Owens. The Prevattes lived together as husband and wife for twenty-five years. They had a child which they raised to adulthood. They held themselves out to the public as husband and wife; they filed joint tax returns and Mr. Prevatte carried insurance on Mrs. Prevatte as his wife. In 1985 Mrs. Prevatte filed an action for divorce from her common-law husband, Mr. Prevatte, on grounds of adultery. Both parties were aware of Mrs. Prevatte's marriage to Owens. Mr. Prevatte, however, contended at trial that he thought that Mrs. Prevatte had di-

38. Id. at 350, 377 S.E.2d at 117.
39. Id. at 347, 377 S.E.2d at 116.
40. The case reached the court of appeals on appeal from an order of the family court. The family court had reaffirmed its prior order, which found that a common-law marriage existed between the parties, and the family court granted Mrs. Prevatte a divorce on the grounds of adultery. During the proceedings, which resulted in the first order, Mr. Prevatte attacked the validity of the divorce decree that ended Mrs. Prevatte's marriage to Allard Owens. The family court held that Mr. Prevatte did not have standing to attack the decree. The court of appeals reversed. The family court, on remand, considered and rejected the attack on the divorce decree.
vowed Owens.\footnote{41}

In 1977 Owens obtained a divorce decree from Mrs. Prevatte in Florence County. He served notice of the divorce on Mrs. Prevatte by publication. Neither she nor Mr. Prevatte became aware of the Owens divorce until 1985. Mrs. Prevatte previously had filed for a divorce from Mr. Prevatte in 1983 and in 1984, and in the 1984 action Mr. Prevatte admitted that they were married.\footnote{42} The trial judge held that a common-law marriage existed between them and granted Mrs. Prevatte a divorce. The court of appeals affirmed.\footnote{43} *Prevatte* significantly impacts South Carolina law for two reasons: (1) the court found that a common-law marriage existed without either party knowing that the impediment to their marriage (Mrs. Prevatte’s earlier marriage) had been removed; and (2) the court held that Mr. Prevatte had committed adultery based on minimal circumstantial evidence of his disposition to commit the offense.

Although common-law marriage has been recognized by American courts since 1809,\footnote{44} it is on the decline in the United States.\footnote{45} Thirteen states and the District of Columbia currently recognize common-law marriage.\footnote{46} Black's Law Dictionary defines the relationship as a marriage "not solemnized in the ordinary way (i.e. non-ceremonial) but created by an agreement to marry, followed by cohabitation. A consummated agreement to marry, between persons legally capable of making [a] marriage contract, per verba de praesenti, followed by cohabitation."\footnote{47}

An essential element of a common-law marriage is a present agreement between the parties to enter a marital relationship. The parties also must have the legal capacity to marry. Most jurisdictions require

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\footnote{41}{Record at 77.}
\footnote{42}{Prevatte, 297 S.C. at 348, 377 S.E.2d at 116.}
\footnote{43}{Id. at 354, 377 S.E.2d at 119. The court of appeals also addressed several other issues. Mr. Prevatte attacked the validity of the divorce decree obtained by Owens in 1977. Mr. Prevatte argued that the court which issued the decree had no jurisdiction over Mrs. Prevatte and that service by publication was improper. The court found that in the absence of fraud or collusion (which were not alleged by Mr. Prevatte), the decision of an officer issuing a publication is final. The court of appeals upheld the lower court’s award to Mrs. Prevatte of an equitable interest in marital property because no abuse of discretion could be shown. The court also rejected challenges to the awarding of alimony and attorney fees. Id. at 348-54, 377 S.E.2d at 116-19.}
\footnote{44}{Kirkpatrick, *Common-Law Marriages: Their Common Law Basis and Present Need*, 6 St. Louis U.L.J. 30 (1960).}
\footnote{45}{H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 2.4, at 45 (2d ed. 1988).}
\footnote{46}{Id. at 46-47. The states are Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas.}
\footnote{47}{BLACK’S LAW DICTIONARY 251 (5th ed. 1979).}
\end{thebibliography}
that the couple consummate the relationship by cohabitation or mutual assumption of marital duties and that the public recognize their marital status. Parties must "hold themselves out as married" to prevent fraudulent claims, which could be made if only an agreement were required. The general rule among states that recognize common-law marriages is that when persons attempt to marry but are unable to enter a valid relationship because of a legal impediment, and that impediment is subsequently removed, the relationship ripens into a common-law marriage. This rule usually has been followed by the courts when one or both of the parties has acted in good faith and in ignorance of the impediment. In South Carolina, however, a relationship which is illicit at its inception does not ripen into a valid common-law marriage upon removal of the legal impediment. South Carolina law presumes that the relationship retains its illicit character. For a common-law marriage to arise, the parties must show that they entered a new marriage agreement after the impediment's removal.

Early decisions hinged on the agreement requirement and the intent of the parties. In Davis v. Whitlock the supreme court held that a lawful marriage existed between two parties when neither knew that the wife's first husband was still living. In Bannister v. Bannister, however, a man married a second woman although he knew that his first wife was alive. He continued to live with his second wife after the first wife's death. Because the husband lacked good faith when he entered the second marriage, and because the couple did not enter into a new agreement after the first wife's death, the supreme court found that the "meretricious" relationship continued and, thus, no common-law marriage existed. In Lemon v. Lemon the supreme court again held that a relationship was unlawful, despite the parties' continued cohabitation after the death of the wife's first husband, because there was no evidence of a subsequent agreement to marry or that the parties acted in the belief that they were "capable of entering into a marriage relation."

49. H. CLARK, supra note 45, § 2.4, at 48.
50. See id.
51. 52 AM. JUR. 2D Marriage § 58 (1970) (an example of a legal impediment is the existence of an undissolved prior marriage).
52. Id.
54. 90 S.C. 233, 73 S.E. 171 (1911).
55. 150 S.C. 411, 148 S.E. 228 (1929).
56. Id. at 414, 148 S.E. at 229.
58. Id. at 76, 155 S.E. at 287.
Recent South Carolina cases have relaxed the agreement requirement and have focused on the conduct of the parties as evidence of a common-law marriage. In *Kirby v. Kirby* the court decided whether the couple intended to enter a new marital agreement from their conduct. In *Kirby* the court decided that a valid common-law marriage existed even though no new agreement was made. The wife obtained a divorce from her first husband during the parties' cohabitation, and they continued to live together for sixteen years as husband and wife.

In *Yarborough v. Yarborough* the court of appeals stated that after the removal of the impediment to lawful marriage the parties must enter a new agreement, "though such agreement may be gathered from the conduct of the parties."

In *Prevatte* the husband challenged the trial judge's holding that the parties were married. Mr. *Prevatte* argued that he and Mrs. *Prevatte* could not have entered into a new marital agreement after Owens obtained his 1977 divorce from Mrs. *Prevatte* unless the couple knew of the divorce. The court expressly declined to decide whether knowledge of the impediment's removal was a prerequisite to the formation of a new agreement between the parties. Instead, the court inferred that an agreement was made because the parties lived as husband and wife for more than twenty-five years. In 1984 both parties represented to the court that they were married. Because the impediment actually had been removed by 1984, the court held that the *Prevattes* had a common-law marriage.

The *Prevatte* opinion represents a reasonable shift by the courts from requiring an express agreement as evidence of a common-law marriage to inferring one from the parties' conduct, especially in light of the public policy considerations that underlie the common-law marriage concept. Courts considered an agreement critical evidence to prove a common-law marriage in early cases. Courts recognized that parties which lived as husband and wife often were unable to marry legally because of difficulties in travelling to obtain a license or in participating in a ceremony. An agreement would be a suitable substitute to prove marriage. "Today, if common law marriage can be justified at all, it is as a means of making good the bona fide expectations

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60.  Id. at 141-42, 241 S.E.2d at 416.
62.  Id. at 551, 314 S.E.2d at 19.
63. Mr. *Prevatte* also contended that Mrs. *Prevatte* entered into the marriage in bad faith because she knew that she was still married to Owens when she married Mr. *Prevatte*. Record at 6-7. The court of appeals did not address the bad faith argument.
64. *Prevatte*, 297 S.C. at 349, 377 S.E.2d at 117.
65.  Id. at 350, 377 S.E.2d at 117.
of parties."  

Although the court of appeals expressly declined to decide whether knowledge of the impediment's removal was necessary for the parties to have entered a subsequent agreement, the decision in Prevatte suggests that knowledge of the impediment's removal is not a prerequisite. The court of appeals focused on the parties' conduct as evidence of their agreement to live as husband and wife. In acknowledging the Prevattes' agreement, the court imputed knowledge of the impediment's removal to the couple.

Prevatte follows the trend in South Carolina to infer an agreement from the parties' conduct. The opinion, however, raises a question about why the court did not adopt expressly the view that courts should not require the parties' knowledge of the impediment's removal to have a common-law marriage. Perhaps the court chose not to reject the requirement of a new agreement, but took a reasonable course given the circumstances by holding that the Prevattes were married.

The court also gave great weight to Mr. Prevatte's admission of marriage in the 1984 action. 67 Mr. Prevatte contended at trial that he believed Mrs. Prevatte was divorced when he married her. In fact, he did not learn of the Owens divorce decree until late 1985. Thus, Mr. Prevatte's belief that he was married in 1984 seems reasonable. The court, however, adopted "essentially the same facts as those found by the trial judge" and concluded that both Mr. and Mrs. Prevatte knew that she was married to Mr. Owens. 68

Mr. Prevatte also challenged the trial judge's grant of divorce because of adultery. Prevatte argued that the evidence of his adultery was "circumstantial and inconclusive." 69 The court dismissed this argument. Witnesses at trial testified that Mr. Prevatte was seen with another woman in remote locations on two occasions. Mrs. Prevatte testified that she had suspected that her husband was engaged in an adulterous relationship. Based on this evidence, the court of appeals stated that it was "fully convinced" that adultery occurred. 70

To support a charge of adultery the evidence must show both that the party had the opportunity and the disposition to commit the offense. 71 Direct evidence is not necessary. Circumstantial evidence is sufficient to prove adultery if that evidence establishes (1) the opportunity to commit the adultery, (2) an adulterous inclination in the mind

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66. H. CLARK, supra note 45, § 2.4, at 50-51.
68. Id. at 347, 377 S.E.2d at 116.
69. Id. at 350, 377 S.E.2d at 117.
70. Id. at 352, 377 S.E.2d at 119.
71. 27A C.J.S. Divorce § 193(b) (1986).
of the party charged with the offense, and (3) no reasonable explanation for the suspicious conduct other than guilt.\(^72\)

In South Carolina a party may prove adultery by circumstantial evidence as a ground for divorce. The standard of proof required by South Carolina courts, however, is changing. In *Brown v. Brown*\(^73\) the court stated that, "[t]he proof of adultery . . . must be clear and positive, and the infidelity must be established by a clear preponderance of the evidence. . . . [I]f after due consideration of all the evidence the proof of guilt is inconclusive, a divorce will be denied."\(^74\) In *DuBose v. DuBose*,\(^75\) however, the court held that although proof of adultery must be "sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed. . . . Insufficiency in this respect . . . should not be allowed to defeat a divorce where the Court is fully convinced that adultery has, in fact, been committed . . . ."\(^76\)

The mere association of two people is not enough to prove adultery.\(^77\) In *Fox v. Fox*\(^78\) the South Carolina Supreme Court held that although the evidence had placed the husband and a third party together, "that fact alone, without more, does not warrant the conclusion that adultery was committed."\(^79\) Relying on *Fox* the court of appeals in *Fulton v. Fulton*\(^80\) found that although evidence that a wife and a third party had spent the night in a house with another couple on three different occasions might be sufficient to establish an opportunity to commit adultery, it was not sufficient to establish a disposition toward adulterous behavior.\(^81\)

In view of the standards set by South Carolina courts, strong evidence of Mr. Prevattice's disposition to commit adultery did not exist. Trial testimony revealed Prevattice's opportunity to commit adultery when it placed him alone in remote locations with another woman. The court of appeals chose to infer Mr. Prevattice's disposition from the circumstantial evidence. The court noted that "[t]he same evidence which proves the opportunity can prove the disposition."\(^82\)

\(^72\) 2 Am. Jur. 2d Adultery § 3 (1962).
\(^74\) Id. at 512-13, 56 S.E.2d at 335 (citations omitted).
\(^75\) 259 S.C. 418, 192 S.E.2d 329 (1972).
\(^76\) Id. at 423, 192 S.E.2d at 331.
\(^77\) 27A C.J.S. Divorce § 193(b) (1986).
\(^78\) 277 S.C. 409, 288 S.E.2d 390 (1982).
\(^79\) Id. at 402, 288 S.E.2d at 391.
\(^80\) 293 S.C. 146, 359 S.E.2d 88 (Ct. App. 1987).
\(^81\) Id. at 147, 359 S.E.2d at 89. *But see* Anders v. Anders, 285 S.C. 512, 331 S.E.2d 340 (1985) (circumstantial evidence that wife spent time in another man's apartment sufficient to support finding of adultery).
\(^82\) *Prevattle*, 297 S.C. at 352, 377 S.E.2d at 118.
Prevatte decision extends the DuBose insufficiency of proof standard and lowers the threshold of proof for disposition to commit adultery. The court concluded: "[N]ot having been born yesterday, [the trial judge] was fully convinced that Mr. Prevatte had committed adultery. So are we."83

The Prevattes' cohabitation for over twenty years met the common-law marriage standard. The Prevattes also held themselves out as husband and wife. The court's decision is reasonable and is consistent with public policy considerations that favor marriage over concubinage.84 The court's ruling on adultery, however, lowers the standard of proof almost to one in which mere association is sufficient. This is a dangerous precedent and one that few states would follow.

Laura Elizabeth Cude

III. ENGLISH RULE APPLIED TO DETERMINE THE CHARACTER OF ANTENUPTIAL GIFTS

In Pappas v. Pappas85 the South Carolina Court of Appeals held that when a marriage is dissolved and the intent of a donor who gave an antenuptial gift cannot be established, South Carolina courts should apply the English rule86 when distributing the gift. Under the English rule a court presumes that the donor gave the gift to the person to whom he is most closely related.87 By adopting the English rule, the court of appeals specifically rejected the New York rule which considers the character of the property to determine ownership, even though in most situations the New York rule would lead to the same result as the English rule.88

83. Id.
84. Annotation, Inferrenee or presumption of marriage from continued cohabitation following removal of impediment, 104 A.L.R. 6, 32-33 (1936).
86. See Samson v. Samson, [1960] 1 All E.R. 653. The English rule is that if evidence exists of the donor's intent, then intent determines ownership. When the donor's intent is not clear, the court may infer that gifts from the wife's friends and family were intended for her and gifts from the husband's friends and family were intended for him. Id. at 656.
87. Id.
88. The New York rule presumes that all gifts of general household use were intended to be joint property, while all peculiar personal gifts were intended to be the separate property of the user of such property. See Avnet v. Avnet, 204 Misc. 760, 763, 124 N.Y.S.2d 517, 524 (N.Y.C. Mun. Ct. 1953):
All wedding gifts whether from the bride's 'side' or from the groom's, excepting such items which are peculiarly adaptable to the personal use of either spouse, and those gifts which are specifically and unequivocally 'earmarked' as in-
The Pappas case arose out of a couple's divorce and subsequent dispute over ownership of a sterling silver flatware set. Mrs. Pappas' grandmother gave the couple the gift prior to the wedding. The silver had been delivered to the home of Mrs. Pappas' parents and was displayed with the other wedding gifts. Mr. Pappas claimed that the silver was a wedding gift to both parties, and had been transmuted into marital property upon their marriage. Thus, as marital property, it was subject to equitable apportionment. Mrs. Pappas, however, asserted that the silver was a personal gift to her from her grandmother and the gift was not a wedding gift subject to distribution. The family court ruled that the grandmother had intended the silver to be a personal gift solely for the benefit of Mrs. Pappas. Consequently, the family court held that the silver was Mrs. Pappas' property and Mr. Pappas had no interest in it. Mr. Pappas appealed the family court's ruling.

The court of appeals held that because of the Pappas' conflicting, unconvincing, and self-serving testimony in the family court, the evidence was insufficient to establish the deceased grandmother's intent. The court of appeals noted that the South Carolina Supreme Court had not yet adopted a rule regarding antenuptial gifts and chose to adopt the English rule.

The South Carolina Code defines marital property as "all real and personal property which has been acquired by the parties during the marriage . . . ." Property acquired before marriage by either party specifically is excluded from marital property by the South Carolina Equitable Apportionment Act. Because the silver was an antenuptial gift, it could not have been marital property unless Mrs. Pappas' grandmother intended it to be a joint gift to the couple. Joint gifts are transmuted into marital property upon the couple's marriage, and thus are subject to equitable distribution. By contrast, separate gifts to the bride and groom retain their independent status throughout the marriage and are not subject to equitable distribution unless transmuted into marital property during the marriage. Transmutation is a

tended exclusively for the one or the other of the spouses, commonly intended for general use in the household, are the joint property of both parties to the marriage.

Id.; see also Rapkin v. Israel, 88 Pa. D. & C. 20 (1953). "Wedding gifts not of a personal nature are held by the husband and wife as tenants by the entirety" Id. at 27.
89. Pappas, 300 S.C. at 63, 386 S.E.2d at 302-03.
90. Id. at 65, 386 S.E.2d at 303.
92. Id. § 20-7-473(2).
93. I. Baxter, Marital Property § 31:1 (1973); see also Samson v. Samson, [1960] 1 All E.R. 653 (rejects proposition that wedding presents are joint property to both spouses).
matter of intent and is demonstrated by the parties' use of the item in support of the marriage.\textsuperscript{94}

The donor's intent is the key element in determining the status of the gift. If the evidence clearly establishes the donor's intent, then the donor's intent decides the ownership of the antenuptial gift. If the testimony of the parties is conflicting or self-serving, however, the trier of fact must determine to whom the donor intended to give the gift. Under the English rule, courts look at the origin of the gift, and infer from the relationship of the donor and donee that the donor intended the gift to be the separate property of the person to whom the donor was most closely related.\textsuperscript{95} For example, if a friend or relative of the bride gave the couple the gift, a court that applied the English rule would presume that the donor had intended the gift to be for the bride. The court would consider the gift to be the separate property of the bride and, therefore, would not distribute the gift as marital property upon divorce.

When it rejected the New York rule,\textsuperscript{96} the court of appeals reasoned that the English rule was more objective, and that intent usually could be proven without evaluating the credibility of the witnesses.\textsuperscript{97} The English rule's presumption that the donor intended the gift to be the separate property of the person to whom he is most closely related, however, is rebuttable. For example, a party can rebut the presumption under the English rule if the donor testifies about his intent against his friend or relative. The court of appeals reasoned that under the New York rule, by contrast, a close relationship between the donor and the recipient might be more likely to cause the donor's testimony to be biased.\textsuperscript{98}

By adopting the English rule in South Carolina, the court of appeals has attempted to better effectuate the donor's intent. The English rule's assumption that the donor intends his gift to belong to the

\textsuperscript{94} Pappas, 300 S.C. at 66, 386 S.E.2d at 304.

\textsuperscript{95} See Samson, [1960] 1 All E.R. at 656 (when intent not found court may infer that gifts from the wife's family are to the wife and gifts from the husband's family are to the husband); Hichens v. Hichens, [1945] 1 All E.R. 451, 453:

The matter very often comes up with regard to wedding presents, which in one sense are given to both spouses, and very often you have to solve the matter by saying that if a present is given by a friend of the wife or relation of the wife the property should be given to the wife, and that it should be given to the husband if it was a present by a relation or friend of the husband.

\textit{Id.; see also} Lamb v. Hennies, 183 F.2d 852, 856 (8th Cir. 1950) (wedding gifts were not part of the wife's property because evidence proved that the gifts were purchased by the husband's employees, who did not know the wife before the marriage).

\textsuperscript{96} See supra note 88 and accompanying text.

\textsuperscript{97} Pappas, 300 S.C. at 66, 386 S.E.2d at 304.

\textsuperscript{98} Id.
spouse to whom he is most closely related is logical. A distribution under the New York rule would not always achieve this purpose because general household gifts would be distributed jointly. Of course, even under the English rule, if the gift was for general household use and had been used as common property, it arguably would have been transmuted into marital property. Thus, the common use of the separate gift might lead to the equitable distribution of the gift even under the English rule.99

Marian Louise Askins

IV. LOCAL CHILD PROTECTION WORKERS OWE A SPECIAL DUTY TO MAKE A THOROUGH INVESTIGATION INTO REPORTS OF ABUSE OR NEGLECT

In Jensen v. South Carolina Department of Social Services100 the South Carolina Court of Appeals held that under South Carolina’s child abuse statute a county Department of Social Services (DSS), its officers, and its employees owe a special duty to potentially abused children to investigate reports of abuse and remove an endangered child from the home.101 Furthermore, the court held that official immunity would not shield local DSS employees from liability when they failed to make a thorough investigation.102 The court also held, however, that state DSS officials did not owe the child a special duty.103

The suit against DSS arose when a school teacher reported to the Anderson County DSS her suspicion that someone was abusing Shane Clark.104 She suspected that Wayne Drawdy, a boyfriend of Shane’s mother, was abusing the children in the Clark home. Charie Ann Jenkins, a social worker, met with Shane on the day of the report. He had unexplained bruises on his face and body. He expressed a fear of Drawdy to Jenkins. Jenkins did not locate the Clark family to investi-

99. The husband raised the issue of transmutation of the silver. The court, however, rejected this argument because no evidence of intent existed between the spouses to transmute the silver into marital property. Id. at 67, 386 S.E.2d at 304.
102. Id. at 332-33, 377 S.E.2d at 107-08.
103. Id. at 330, 377 S.E.2d at 106.
104. South Carolina Code section 20-7-510 requires school teachers to report suspected abuse or neglect to the county department of social services or to a law enforcement agency. S.C. Code Ann. § 20-7-510(A), (C) (Law. Co-op. 1976).
gate the case further. Three months later Jenkins and Susan Straup, also social workers, closed the file without collecting any more information. Approximately one month later Drawdy beat to death Shane’s brother, Michael Clark. 105

Karole Jensen, administratrix of Michael Clark’s estate, brought wrongful death and survival actions against both the South Carolina and Anderson County Departments of Social Services and various officials and employees of the departments, including Jenkins and Straup. Jensen claimed that the defendants breached duties imposed on them by the South Carolina Child Protection Act (the Act). 106 The trial court granted the defendants’ motion to dismiss the actions on the grounds that the plaintiff failed to state a cause of action. 107

The court of appeals applied the “public duty rule” 108 when it reviewed the trial court’s decision to dismiss the claims. The rule assumes that the statutes that define the duties of public office do not create a duty of general care to individuals, and, thus, the statutes cannot support an action for negligence. 109 The state legislature, however, may create a “special duty” 110 to individuals that will support a cause


106. S.C. Code Ann. §§ 20-7-110, -480 to -610, -640 to -736 (Law. Co-op. 1976 & Supp. 1989). The plaintiff’s specific allegations included duties listed in sections 20-7-640 to -660 of the Code. She alleged that the state defendants had failed (1) to forward the full content of telephone reports of suspected abuse cases to local DSS agencies, (2) to conduct training programs for the staff of Anderson County DSS, (3) to establish a separate organizational unit within DSS, (4) to assign and to monitor adequately their child protection responsibility, and (5) to provide assistance in diagnosing cases of child abuse. Jensen, 297 S.C. at 329-30, 377 S.E.2d at 106. See S.C. Code Ann. §§ 20-7-640(A) to (C), -660(A) (Law. Co-op. 1976). The plaintiff alleged that the county defendants had failed (1) to conduct training programs for the staff of the Anderson County DSS, (2) to staff the office adequately with persons trained in the investigation of child abuse, (3) to conduct an appropriate and thorough investigation, and (4) to determine properly whether the report was “indicated” or “unfounded.” 297 S.C. at 330-31, 377 S.E.2d at 106. See S.C. Code Ann. §§ 20-7-650(B) to (C), -660(A) (Law. Co-op. 1976).


108. Rayfield v. South Carolina Dep’t of Corrections, 297 S.C. 95, 105, 374 S.E.2d 910, 915 (Ct. App. 1988), cert. denied, 238 S.C. 204, 379 S.E.2d 133 (1989). The public duty rule applies to statutes that define the duties of a public office. In “an action for negligence based upon an alleged violation of a statute . . . [the action] cannot be maintained if the statute . . . was enacted . . . for a purpose other than preventing the injury of which complaint is made,” Id. (quoting Bell v. Atlantic Coast Line Ry., 202 S.C. 160, 174, 24 S.E.2d 177, 183 (1943)).

109. See id.

110. A statute with the essential purpose to protect identifiable individuals from a particular harm creates a special duty. A special duty exists if:

(1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public
of action based on negligence.\textsuperscript{111}

In its analysis of whether the defendants owed a special duty to Michael Clark, the \textit{Jensen} court divided the defendants into two groups: (1) the statewide DSS officials, and (2) the officials and employees of the Anderson County (local) child protection agency.\textsuperscript{112} The court reviewed the duties imposed by the Act\textsuperscript{113} and concluded that the state defendants owed no special duty to the deceased.\textsuperscript{114} The court ruled that the DSS officials at the state level were not under any statutory duty to guard against individual child abuse cases, nor did the legislature give the local DSS authority to intervene directly to protect individual children from abuse.\textsuperscript{115} The court also ruled that the Act only provides for the organization and general management of the child protection program at the state level, and, therefore, the Act could not support Jensen's claim for negligence against the state.\textsuperscript{116}

In ruling that the trial court properly dismissed the state defendants, the court of appeals refused to construe the stated purpose of the Act as creating a special duty.\textsuperscript{117} The Act states that "[r]ecognizing that abused and neglected children in South Carolina need protection, it is the purpose of this article to save them from injury and harm . . . ."\textsuperscript{118} The Act's stated purpose applies equally to both state and local DSS officials and employees, and shows the legislature's intent to identify and protect a particular class of persons (abused children), rather than the general public. Michael Clark, an abused child, was in the class of persons the legislature intended the statute to protect, but this does not, by itself, create a special duty to him. The court reviewed the Act for an element of a special duty to apply, but found none applicable to the state DSS.\textsuperscript{119}

When the court of appeals applied the Act to local DSS officials

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\textsuperscript{111} See id. at 105-06, 374 S.E.2d at 915-16.
\textsuperscript{112} Jensen, 297 S.C. at 328, 377 S.E.2d at 105.
\textsuperscript{113} See supra note 106.
\textsuperscript{114} 297 S.C. at 330, 377 S.E.2d at 106.
\textsuperscript{115} Id. The court focused on the second and sixth elements listed in the \textit{Rayfield} definition of a special duty. See supra note 110.
\textsuperscript{116} Jensen, 297 S.C. at 330, 377 S.E.2d at 106.
\textsuperscript{117} See Brief of Appellant at 21-23.
\textsuperscript{118} S.C. Code \textit{Ann.} \S 20-7-480 (Law. Co-op. 1976).
\textsuperscript{119} Jensen, 297 S.C. at 330, 377 S.E.2d at 106.
and employees, however, it found the requisite elements necessary to create a special duty. The Act requires local child protection agencies to "commence an appropriate and thorough investigation to determine whether a report of suspected child abuse or neglect is 'indicated' or 'unfounded.'" This section creates the duty that a local agency has to the individual child. Furthermore, the local agency is "charged with providing, directing or coordinating the appropriate and timely delivery of services to children found to be abused or neglected . . . ." This section provides the authority for the local child protection agency to intervene to protect children from further abuse. The court of appeals found that an essential purpose of these sections of the act is to protect abused children after their cases have been reported to DSS officials. These abused children constitute an identifiable class. Michael Clark was a member of that class, and the local DSS officials and employees had a duty to protect Michael from harm. Based on these findings the court held that the legislature created a special duty to potentially abused children and that this duty could support Jensen's cause of action in negligence.

Other jurisdictions have faced the issue whether child protection legislation gives rise to privately enforceable rights. In Nelson v. Freeman, a district court in Missouri applied the public duty rule and held that the Missouri child abuse statute created a duty to the public but not to individuals. The Missouri statute, like its South Carolina counterpart, requires the local child protection agency to conduct a thorough investigation of the reported abuse. The court reasoned, however, that the local child protection agency owed a duty to the public to investigate, and it did not suffice to establish a specific duty to individuals under the facts and circumstances of the case. Similarly,

120. Id. at 331, 377 S.E.2d at 107.
121. S.C. Code Ann. § 20-7-650(C) (Law. Co-op. 1976). An "indicated" report is "supported by facts which warrant a finding that abuse is more likely than not to have occurred." Id. § 20-7-490(M). An "unfounded" report is one "for which there is no probable cause to believe that the child is abused or neglected." Id. § 20-7-490(L).
122. Id. § 20-7-650(G).
123. Jensen, 297 S.C. at 331, 377 S.E.2d at 106-07. Based on these findings, the court held that a special duty existed and, thereby, rebutted the presumption of the public duty rule. See supra note 110.
126. Id. at 607-11.
128. Nelson, 537 F. Supp. at 611. In this case a child died from sexual abuse after several reports had been made. The investigators failed to examine and follow up any of the reports. Id. at 603-05.
the court in *Rittscher v. State* 129 held that the Iowa child protection statutes did not create the right to a private damage action against public officials. 130 The plaintiff in *Rittscher*, however, based the cause of action on the theory that "any aggrieved person" had a private cause of action under the state’s child abuse statutes. 131 The court rejected this argument and interpreted the entire statutory section to provide a private right of action only to those persons that are injured by wrongful dissemination or receipt of child abuse information. 132

Other jurisdictions, however, have held that child abuse statutes provide a private cause of action for negligence. 133 In *Florida First National Bank v. City of Jacksonville* 134 the Florida Court of Appeals held that city employees owed a special duty to protect two children whom they had undertaken to aid. 135 Furthermore, the court noted that "other responsible citizens relied upon that undertaking, the municipal employees negligently performed (or failed to perform) and those specific children, as distinguished from the public in general, were damaged." 136

In *Jensen* the county defendants argued that even if they owed a duty to threatened children, they could not be held liable because of official immunity. Official immunity shields a public officer from liability if the performance or nonperformance of his duties is discretionary. 137 Official immunity, however, will not protect a public official if his actions are ministerial. 138 Breach of a ministerial duty, therefore,

129. 352 N.W.2d 247 (Iowa 1984).
130. Id. at 251.
131. Id.
132. Id.
134. 310 So. 2d at 19.
135. Id. at 25.
136. Id. at 27.
138. Long, 260 S.C. at 568, 197 S.E.2d at 662. Ministerial duties are "absolute, cer-
gives rise to liability.

The court of appeals held that the county DSS officials and employees owed Michael Clark a ministerial duty to conduct a thorough investigation.\textsuperscript{139} Under the Act a social worker has no discretion to carry out his required duties, which include the performance of a thorough investigation of reported child abuse. The court recognized that the manner in which a thorough investigation is carried out requires the social worker to use some discretion. The court held, however, that if the investigation was not thorough, then the social worker had breached his ministerial duty.\textsuperscript{140} The court of appeals did not define “thorough,” but the court implies that if the social worker does not make a home visit, his investigation will not be considered thorough. Accordingly, the social worker would breach his ministerial duty under the Act and be without the protection of official immunity.

Other courts have considered the issue of official immunity as it applies to social workers. In \textit{Elton v. Orange County}\textsuperscript{142} immunity was not available to county employees for either the negligent placement of a child in a foster home or for the failure to enforce and comply with related regulations.\textsuperscript{142} Relying on reasoning similar to that used by the court of appeals in \textit{Jensen}, the \textit{Elton} court held that the actions by county employees were not discretionary according to California statutes, and, therefore, protection by immunity was not available.\textsuperscript{143}

The \textit{Jensen} court held that county DSS employees and officials have a special duty to investigate and to intervene in reported child abuse cases. Additionally, these officials will not be shielded from liability by official immunity when they fail to make a thorough investigation. As a result, county DSS employees and officials will be subject to liability for their negligent failure to remove potentially abused children from dangerous home settings.

\textit{Johnathan T. Krawcheck}

\textsuperscript{139} \textit{Jensen}, 297 S.C. at 332-33, 377 S.E.2d at 107-08. The Act requires an appropriate and thorough investigation before a decision is made to close a file. See S.C. Code Ann. § 20-7-650(C) (Law. Co-op. 1976).

\textsuperscript{140} \textit{Jensen}, 297 S.C. at 333, 377 S.E.2d at 107-08.

\textsuperscript{141} 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (Dist. Ct. App. 1970).

\textsuperscript{142} \textit{Id.} at 1058, 84 Cal. Rptr. at 30.

\textsuperscript{143} \textit{Id.} at 1060, 84 Cal. Rptr. at 32.
V. FAMILY COURTS MUST USE CHILD SUPPORT GUIDELINES

In Miller v. Miller\textsuperscript{144} the South Carolina Supreme Court reversed a family court’s reduction in a child support award. The supreme court held that no substantial or material change in circumstances had occurred to justify the family court’s modification. In Miller the supreme court used the South Carolina Child Support Guidelines (Guidelines) to calculate the noncustodial father's support obligation, and found it to be close to the amount awarded in the original Virginia support order. The court then reinstated the Virginia order.\textsuperscript{145} Miller has an unusual procedural history. Maria and Christopher Miller were divorced in Virginia in 1985. The Virginia court awarded Mrs. Miller custody of their two minor children, and ordered Mr. Miller to pay child support in the amount of $300 per month per child and alimony in the amount of $300 per month. Mr. Miller had been earning $50,000 annually until approximately one month before the final hearing in Virginia when he was earning $1600 monthly.\textsuperscript{146} Mrs. Miller was earning $5.90 per hour as a hospital clerk.\textsuperscript{147}

After the divorce Mr. Miller relocated to South Carolina and Mrs. Miller moved with the two children into her parents’ home in Pennsylvania. When Mr. Miller failed to return the children to Pennsylvania after their summer visit in August 1987, Mrs. Miller petitioned the South Carolina Family Court for their return. In his answer Mr. Miller requested a reduction in child support and other relief.\textsuperscript{148} The Lexington County Family Court found that a substantial change in circumstances had occurred. Because Mr. Miller had not been able to obtain employment in South Carolina at the same rate of pay that he earned in Virginia, his income had decreased dramatically.\textsuperscript{149} Conversely, Mrs. Miller had obtained a job in Pennsylvania at a higher rate of pay than she had earned during the marriage and the family’s living expenses had decreased because they lived with Mrs. Miller’s parents. In an order filed February 23, 1988, the South Carolina Family Court reduced Mr. Miller’s monthly child support obligation; terminated alimony to Mrs. Miller, and required Mrs. Miller to assist in summer visitation transportation.\textsuperscript{150} Mrs. Miller appealed the order.\textsuperscript{151}

\textsuperscript{144} 299 S.C. 307, 384 S.E.2d 715 (1989).
\textsuperscript{145} Id. at 315, 384 S.E.2d at 719.
\textsuperscript{146} Id. at 309, 384 S.E.2d at 716.
\textsuperscript{147} Record at 105.
\textsuperscript{148} Miller, 299 S.C. at 309, 384 S.E.2d at 716.
\textsuperscript{149} See id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 310, 384 S.E.2d at 716 (1989). Mrs. Miller agreed to a termination of
The supreme court affirmed the requirement that Mrs. Miller assist in visitation transportation, but reversed the reduction of Mr. Miller's child support obligation. The supreme court stated that "[a]s there was no substantial or material change in circumstances, the family court judge erred in modifying the child support award." A family court judge may modify a child support award if a party establishes a substantial or material change in circumstances, such as a change in the supporting parent's ability to pay. The supreme court reasoned that the family court could justify the reduction of child support based on the decrease in Mr. Miller's income only if the court assumed that the Virginia court based its support award on Mr. Miller's income at his higher paying job. The Virginia court, however, had documentation that reflected Mr. Miller's lower salary. Thus, the supreme court refused to assume that the Virginia court failed to consider this information in making the award, or that the parties had not contemplated Mr. Miller's weakened financial condition at the time of their divorce.

If a court finds a substantial or material change in circumstances, it must review the facts and circumstances to make an appropriate adjustment in the support award. The Miller court stated that the factors to be considered are "both parents' income, ability to pay, education, expenses, and assets and the facts and circumstances surrounding each case." The family court judge, however, relied solely on the Guidelines. The supreme court explained that even if a substantial or material change in circumstances had occurred, the modification by the family court was in error because it improperly calculated the child support award under the Guidelines. Although the Guidelines expressly provide that courts must add day care costs to the basic obligation, the family court failed to consider them. "Interestingly, when the child support obligation is calculated properly under the Guide-

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alimony in her testimony during the family court hearing, and appealed only the reduction in child support and the requirement that she assist with summer visitation transportation. *Id.*

152. *Id.* at 314-15, 384 S.E.2d at 719.
153. *Id.* at 311, 384 S.E.2d at 717.
154. *Id.* at 310, 384 S.E.2d at 716-17.
155. See *id.* at 311, 384 S.E.2d at 717. The court stated that "changes in circumstances within the contemplation of the parties at the time the initial decree was entered do not provide a basis for modifying a child support award." *Id.* at 310, 384 S.E.2d at 717 (citing Calvert v. Calvert, 287 S.C. 130, 336 S.E.2d 884 (Ct. App. 1985)); *see also* Nelson v. Merritt, 281 S.C. 126, 314 S.E.2d 840 (Ct. App. 1984).
157. *Id.* at 311, 384 S.E.2d at 717.
lines, using Mr. Miller's present income, Mr. Miller's obligation is very nearly the $600 per month he was originally ordered to pay by the Virginia Court.\(^{159}\)

The *Miller* court discussed the history of the Guidelines. In 1984 Congress enacted 42 U.S.C. § 667(a),\(^{160}\) which requires states to establish child support guidelines. The guidelines had to be made available to the states' judiciary and other officials, but the guidelines were not "binding upon such judges or other officials."\(^{161}\)

In South Carolina the Guidelines were developed by the South Carolina Child Support Guidelines Subcommittee of the Department of Social Services (DSS) Child Support Advisory Committee. The Subcommittee based the Guidelines on the Income Shares Model developed by the Child Support Guidelines Project (Project) of the National Center for State Courts. DSS adopted the Guidelines and the Guidelines went into effect in October 1987.\(^{162}\)

The Income Shares Model, one of the two guidelines the Project's National Advisory panel recommended for adoption,\(^{163}\) is based on the concept that a child should receive the same proportion of his parent's income that he would have received if his parental household had remained intact.\(^{164}\) The Income Shares Model has been adopted in Colorado, Maine, Michigan (in modified form), Nebraska, New Jersey, and Vermont and is under consideration in several other states.\(^{165}\) Under the Income Shares Model the average expenditures for children as a percentage of both net and gross income are determined by the court's evaluation of economic data.\(^{166}\) A table constructed from the percentages shows the amount of support that is due, and is based on the number of children and the parents' combined income. Each parent's portion of that obligation is prorated according to the percentage of the combined income that each parent's income represents. Prorated shares of extraordinary medical expenses and day care expenses also are added to each parent's obligation.\(^{167}\)

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161. *Id.* § 667(b).
164. *Id.* at 67.
166. GUIDELINES FOR CHILD SUPPORT ORDERS, supra note 163, at 69-70. Net income equals gross income minus federal and state taxes, FICA, and union dues. *Id.*
167. *Id.* at 75.
presumes that the custodial parent’s obligation is spent directly on the child. The noncustodial parent’s obligation constitutes the child support amount to be awarded.\footnote{168 Id. at 68. The Income Shares Model incorporates a self-support reserve for the obligor and also has different formulas for unusual custody arrangements. Id. at 73, 79.}

The following table is an example of a calculation of a child support award based on the Income Shares Model:\footnote{169 Id. at 76.}

**INCOME SHARES GROSS INCOME FORMULA**

(Two children living with Parent B)

<table>
<thead>
<tr>
<th></th>
<th>Parent A</th>
<th>Parent B</th>
<th>Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Annual Gross Income</td>
<td>$18,000</td>
<td>$12,000</td>
<td>$30,000</td>
</tr>
<tr>
<td>(2) Monthly Gross Income</td>
<td>1,500</td>
<td>1,000</td>
<td>2,500</td>
</tr>
<tr>
<td>(3) Parental Income as Proportion of Combined</td>
<td>60%</td>
<td>40%</td>
<td></td>
</tr>
<tr>
<td>(4) Basic Child Support Obligation</td>
<td></td>
<td></td>
<td>$597*</td>
</tr>
<tr>
<td>(5) Parental Shares of Obligation (line 4 times line 3)</td>
<td>$358</td>
<td>$239</td>
<td></td>
</tr>
<tr>
<td>(6) Base Child Support (paid to B) (retained by B)</td>
<td>$358</td>
<td>$239</td>
<td></td>
</tr>
</tbody>
</table>

* Guidelines for Child Support Orders at 76.

Although the Income Shares Model was designed so that a child is “insulated from the lowered living standard resulting from the dissolution (or non-formation),”\footnote{170 Id. at 68.} of the household, the Final Report of the Project concedes that no approach can guarantee that a child will not suffer a reduction in his standard of living. This is particularly true because “the child support allocation, without reference to spousal maintenance, does not equalize the relative incomes of the two households.”\footnote{171 Id. at 69.}

There shall be a rebuttable presumption . . . that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding . . . that the application of the guidelines would be

\footnote{168 Id. at 68. The Income Shares Model incorporates a self-support reserve for the obligor and also has different formulas for unusual custody arrangements. Id. at 73, 79.  
169 Id. at 76.  
170 Id. at 68.  
171 Id. at 69.}
unjust or inappropriate . . . shall be sufficient to rebut the presum-
ption . . . ."\textsuperscript{172}

The South Carolina Legislature responded to this congressional
mandate with South Carolina Code section 20-7-852, which requires
the application of the Guidelines absent a showing "that application
. . . in a particular case would be unjust or inappropriate."\textsuperscript{173} Thus,
when a court deviates from the Guidelines, it must present written
findings of fact on which it bases its conclusion.\textsuperscript{174}

In the last legislative session the South Carolina General Assembly
approved the DSS guidelines, and they became effective on May 25,
1990.\textsuperscript{175} The regulations incorporate by reference the Guidelines' 
schedule and worksheets. The regulations also allow the courts to devi-
ate from the Guidelines in the event of lump sum, rehabilitative, or
reimbursement alimony,\textsuperscript{176} and in joint custody situations. The Guide-
lines, however, do not consider the economic impact of certain factors
that are listed in the regulations, such as voluntary child support from
another relationship, educational expenses for the children, and con-
sumer debts.\textsuperscript{177}

The South Carolina Legislature and courts have traditionally left
the award and amount of child support to the discretion of the trial
judge.\textsuperscript{178} Prior to the development of the Guidelines discussed above,
\textit{Graham v. Graham}\textsuperscript{179} set forth the principal support guideline for the
judiciary.\textsuperscript{180}

The amount of alimony and child support cannot be determined by
any mathematical formula but is a matter resting within the sound
discretion of the trial judge. . . . In arriving at the amount of alimony
and child support, the trial judge should take into consideration the
needs of the wife and child and the financial ability of the husband
and father to meet them, considering his income and assets. . . . It is
also proper to consider the husband's necessities and living expenses
in fixing the amount of alimony and child support. The amount of the
award for alimony and child support should not be excessive but

\textsuperscript{172} 42 U.S.C. § 667(b), as amended by Act of Oct. 13, 1988, Pub. L. No. 100-485,
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 150 (regulation 114-47-10C).
\textsuperscript{177} Id. at 149-60 (regulation 114-47-10).
\textsuperscript{178} See, \textit{e.g.}, Thornton v. Thornton, 294 S.C. 512, 514, 366 S.E.2d 37, 39 (Ct. App.
\textsuperscript{180} 1 R. Chastain, \textit{The Law of Domestic Relations in South Carolina} 117 (1986).
should be fair and just to all parties concerned.181

In Miller the South Carolina Supreme Court states that if the Guidelines are applied to a particular case, the court must use them correctly.182 The enactment of 42 U.S.C. § 687(a) and South Carolina Code section 20-7-852(a), which made the advisory Guidelines mandatory, has limited a significant power of the family court. The Guidelines, however, promote judicial economy. The family court's use of the Guidelines certainly will free court time, and parties who come into the family court and seek child support awards generally will realize their expectations. The mandatory nature of the Guidelines may signal an uncertainty in this area, however, because practitioners now only can speculate what will constitute a showing that a support award is unjust or inappropriate in a particular case; and, furthermore, it may prove difficult for lawyers to rebut the presumption that the mathematical formulas of the Guidelines are correct.

Laura Elizabeth Cude

VI. REIMBURSEMENT ALIMONY GRANTED TO SPOUSE WHO SUPPORTS FAMILY WHILE OTHER SPOUSE OBTAINS A PROFESSIONAL DEGREE

In Donahue v. Donahue183 the South Carolina Supreme Court held that a spouse who supports the family while the other spouse obtains a professional degree or license may be entitled to reimbursement alimony upon divorce. The court restricted its holding to the reimbursement alimony award and stated that "a professional degree is not marital property and is therefore not subject to equitable distribution."184

The Donahues were married less than a year when Mr. Donahue entered dental school. Mrs. Donahue supported the family until her husband completed dental school and opened his practice. The couple divorced approximately four years after the husband opened his practice. The court valued the marital estate at over $270,000 and found that the wife's contribution to the estate was ninety-one percent.185

In Donahue the court decided that the appropriateness of reimbursement alimony should be determined independently of a traditional alimony analysis.186 The court stated:

184. Id. at 358, 384 S.E.2d at 744. The court noted that they were concerned with the husband's dental practice and not with his degree. See id.
185. Id. at 356-57, 361, 384 S.E.2d at 743, 745-46.
186. Id. at 364, 384 S.E.2d at 747; see also Hoak v. Hoak, 370 S.E.2d 473 (W. Va.
Generally, the contribution of one spouse to the education of the other spouse may be taken into account by giving the supporting spouse a larger distributive share of the marital property to be divided. This remedy is not, however, sufficient when little or no marital property has been accumulated during the marriage.\(^{187}\)

A traditional alimony analysis also may be inadequate or unavailable when the parties are divorced before the benefits of the professional degree are realized.\(^ {188}\)

When the *Donahue* court adopted reimbursement alimony, it refused to apply a “strict financial approach” and opted for the “all relevant factors approach.”\(^ {189}\) The court described the strict financial formula as follows: “\([W]\)orking spouse’s financial contribution to joint living expenses and educational costs of student spouse less ½ (working spouse’s financial contributions plus student spouse’s financial contributions less cost of education) equals equitable award to working spouse.”\(^ {190}\) The court specifically considered as a relevant factor the money paid by the supporting spouse for the support of the parties’ children, but left to the trial court’s discretion the final determination of the amount of any reimbursement alimony to be awarded based on “all relevant factors.”\(^ {191}\) Other jurisdictions have considered the amount expended in support of the family and the future value of the degree to determine the amount of reimbursement alimony, even though the courts characterized a professional degree as nonmarital property.\(^ {192}\)

Reimbursement alimony differs from traditional alimony not only in the basis for its award\(^ {193}\) and in the factors used to compute the

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187. *Id.* at 363, 384 S.E.2d at 747.
188. *See*, e.g., *In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989) (excellent discussion of all issues that surround reimbursement alimony).
190. *Id.* at 364, 384 S.E.2d at 747.
191. *Id.* at 364-65, 384 S.E.2d at 747-48.
192. *See*, e.g., Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986) (veterinary degree). The *Donahue* court did not address the issue of the future value of Mr. Donahue’s dental degree. The court, however, reversed the trial court’s ruling that placed a value on the dental practice for purposes of equitable division. The *Donahue* court held that the only value in a solo professional practice is goodwill, but that goodwill is not subject to equitable division because of its speculative nature. 299 S.C. at 360, 384 S.E.2d at 745. *See also* *Casey v. Casey*, 293 S.C. 503, 362 S.E.2d 6 (1987) (goodwill in fireworks business was too speculative to determine because it was dependent on owner’s home earnings).
193. Traditional alimony is based on need, whereas reimbursement alimony is based on a right that arises from the expectation of a fair return on the supporting spouse’s investment. Comment, *Professional Licenses and Marital Dissolution in O’Brien v.*
amount of the award, but also in its duration and termination. Although the Donahue court did not address the issues of duration and termination, other courts have held that reimbursement alimony terminates only upon the death of the payee spouse. 194 In other jurisdictions reimbursement alimony generally continues for a specific period of time regardless of the remarriage of the payee spouse. 195 In Donahue the supreme court significantly changed South Carolina law when it provided for reimbursement alimony. Still, the meaning of "all relevant factors," the duration of reimbursement alimony, and the conditions for its termination, remain unanswered questions in South Carolina after Donahue. 196

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194. In re Marriage of Francis, 442 N.W.2d 59, 64 (Iowa 1989).
195. Id.; see also Comment, supra note 193, at 452-53.
196. On May 29, 1990, Governor Campbell approved an amendment to S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976), which codifies Donahue and provides conditions for termination of reimbursement alimony.