Domestic Law

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DOMESTIC LAW

I. ACTUARIAL TESTIMONY ESSENTIAL TO DETERMINE THE PRESENT CASH VALUE OF PENSIONS

In Smith v. Smith\(^1\) the South Carolina Court of Appeals held that testimony of an actuary is required when a court calculates the present cash value of a pension for purposes of dividing marital property.\(^2\) The Smith opinion places South Carolina among relatively few jurisdictions that require actuarial testimony in valuing pensions.\(^3\)

Mildred Elizabeth Smith and Rudolph Lee Smith had been married for approximately thirty-five years when they separated on July 18, 1988. Mrs. Smith brought the instant divorce action against her husband, and the family court equitably divided the Smith's marital property. The trial judge valued the husband's civil service retirement fund at $43,991, the amount actually contributed by the husband during his years of employment. The judge then awarded to the wife one-third of the value of the pension, and the wife appealed.\(^4\) The court of appeals held that the trial judge incorrectly valued the husband's pension.\(^5\)

In South Carolina a trial judge generally has broad discretion to determine the equitable distribution of marital property in a divorce proceeding.\(^6\) However, in Martin v. Martin,\(^7\) the court recognized two acceptable methods of pension valuation: (1) the "present cash value" method, and (2) the "reserve jurisdiction" method. Under the "present cash value" method, the court calculates the current value of retirement payments to be received in the future and then divides that amount between the spouses.\(^8\) Under the "reserve jurisdiction" method,\(^9\) the

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2. Id. at 316.
3. See infra note 14 and accompanying text.
4. Smith, 418 S.E.2d at 315-16.
5. Id. at 316.
8. Id. at 440-41 n.2, 373 S.E.2d at 709 n.2. Once the court ascertains the percentage of the pension's present value belonging to each spouse, the court often awards the employee spouse the entire interest in the pension and gives the nonemployee spouse other marital property to offset the nonemployee spouse's interest in the plan. See In re Marriage of Hunt, 397 N.E.2d 511, 519 (Ill. App. Ct. 1979).
court awards a percentage of each payment to the nonemployee spouse, but delays actual distribution until the payments are received.10

The Smith court held that actuarial testimony was necessary when employing the present cash value method because “[a] valuation of the present day value of a pension involves complicated procedures of actualization.”11 The court reasoned that the complicated calculations and their application to the particular facts of each case must be placed in the record both to help the trial judge and to preserve the evidence for appeal.12 Because the record in Smith contained no actuarial evidence, the court adopted the reserve jurisdiction method and modified the family court’s order by awarding the wife one-third of each payment as received by the husband.13

South Carolina is one of only a few jurisdictions that expressly require actuarial or expert testimony when calculating the present value of pensions.14 Some states authorize other methods for calculating present values of pensions, such as providing a formula for attorneys to use when presenting evidence of present value,15 or allowing the use of

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9. The Smith court describes this as the “‘distribution from each payment’ method.” Smith, 418 S.E.2d at 316.

10. Martin, 296 S.C. at 440-41 n.2, 373 S.E.2d at 609 n.2. Under this method, no calculation of the present value is made because the court retains jurisdiction over the parties and awards interests in the payments as they are received. Therefore, the court need not calculate the risk that the plan will not vest or mature. See Hunt, 397 N.E.2d at 519.

11. Smith, 418 S.E.2d at 316.

12. Id.

13. Id.


documentary evidence.\textsuperscript{16} Other jurisdictions suggest the use of experts or actuarial evidence to value nonvested or unmatured pensions, but refuse to require experts for pensions that have vested and matured.\textsuperscript{17}

Some jurisdictions believe that expert testimony from an actuary is necessary to enable a court to determine an accurate valuation of a pension.\textsuperscript{18} Other jurisdictions distinguish vested and matured pensions from nonvested or unmatured plans because vested, matured pensions involve fewer contingencies in their valuations.\textsuperscript{19} Finally, some jurisdictions believe that these calculations are within the abilities of both attorneys and judges.\textsuperscript{20}

The rationale for requiring actuarial testimony in calculating the current value of a pension is consistent with the reasoning behind the expert testimony requirement in other areas of law. For example, in South Carolina plaintiffs must use experts to establish both the standard of care and a breach of this standard in malpractice cases involving doctors, attorneys, and accountants.\textsuperscript{21} "[T]he purpose of expert opinion is to aid the finder of fact in matters which are outside the range of common knowledge and experience."\textsuperscript{22} However, expert testimony is not required when "no special learning is needed to evaluate the

\textsuperscript{16} Hortis v. Hortis, 367 N.W.2d 633, 636 (Minn. Ct. App. 1985) (finding no abuse of discretion by the trial court in relying on a pay stub to adjust a six-month-old annual statement of pension value).

\textsuperscript{17} See, e.g., Sawyer v. Sawyer, 335 S.E.2d 277, 281 (Va. Ct. App. 1985) (allowing use of other evidence to calculate the value of a vested pension, but indicating that expert testimony may be required for nonvested pensions).

\textsuperscript{18} See Smith v. Smith, 418 S.E.2d 314, 316 (S.C. Ct. App. 1991). As noted in Smith, the calculation of present value involves complicated actuarial procedures. Id. at 316. The current value of a future stream of payments must be discounted to reflect various contingencies that may affect eventual payment, including "mortality, inflation, interest, probability of vesting and probability of continued employment." DuBois v. DuBois, 335 N.W.2d 503, 506 (Minn. 1983) (en banc); see also Rosenberg v. Rosenberg, 497 A.2d 485, 496 (Md. Ct. Spec. App.) (listing retirement age and salary increase as additional factors), cert. denied, 501 A.2d 845 (Md. 1985).

\textsuperscript{19} See, e.g., Sawyer, 335 S.E.2d at 281.


\textsuperscript{22} Stallings, 292 S.C. at 353, 356 S.E.2d at 417.
defendant’s conduct.” Accordingly, expert testimony is probably unnecessary for pension valuations that are not complicated. In Smith the husband’s pension was vested, but the court nevertheless required actuarial testimony.

The Smith holding creates other uncertainties. For instance, if actuarial testimony is required, who has the burden of presenting the required testimony, and what are the consequences of failing to present this evidence? In Wood v. Wood the court of appeals noted that “it is the duty of counsel to present to the judge evidence from which he may find with a reasonable degree of accuracy the value of the property sought to be equitably distributed.” The Wood court also noted that the trial judge has the statutory power to appoint experts as necessary and assess the costs against any of the parties. However, the Smith court ignored both of these options and utilized the reserve jurisdiction method of valuation because of the absence of actuarial testimony.

The final issue raised by Smith involves the extent of a court’s discretion to determine a value for a pension after the actuaries have testified. South Carolina trial courts clearly may not place a value on marital assets that is not supported by at least some evidence. Furthermore, a court is not permitted simply to average two estimated values.

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24. As previously noted, at least one court has created an exception for vested and matured pensions. See supra notes 17 & 19 and accompanying text.


26. See Smith v. Smith, 682 S.W.2d 834, 836 (Mo. Ct. App. 1984) (holding that parties have an equal burden to present evidence on valuation and should not be rewarded for presenting insufficient evidence), repudiated on other grounds by Gehm v. Gehm, 707 S.W.2d 491 (Mo. Ct. App. 1986); Victor v. Victor, 453 A.2d 1115, 1117 (Vt. 1982) (holding no error in trial court’s valuation of a pension based on wife’s expert’s testimony because husband failed to present his own expert).


28. Id. at 48, 354 S.E.2d at 799 (citing Shaluly v. Shaluly, 284 S.C. 71, 325 S.E.2d 66 (1985)).

29. Id. (citing S.C. CODE ANN. § 20-7-474 (Law. Co-op. Supp. 1991)).

30. Smith, 418 S.E.2d at 316-17. This option is within the trial court’s discretion in other jurisdictions requiring expert testimony. See, e.g., Miller v. Miller, 683 P.2d 319, 322 (Ariz. Ct. App. 1984); cf. Addis v. Addis, 705 S.W.2d 852, 854 (Ark. 1986) (finding no error in valuing the pension at the amount actually contributed because no actuarial evidence was offered).


The purpose of requiring actuarial testimony is to help trial judges with calculations beyond their expertise and to provide a sufficient record for review. Therefore, as long as the trial court's value is suggested by an expert or falls within the range of values given by two or more experts, and the record explains the calculations used, an appellate court will not likely disturb the valuation.

The Smith holding, which requires the testimony of an actuary when calculating the present cash value of a pension, presents some practical difficulties for attorneys. Attorneys should note that the court did not expressly limit its holding to domestic litigation. Additionally, the holding specifically requires an actuary's testimony; therefore, accountants and other financial professionals may not qualify. The reserve jurisdiction method adopted by Smith may be the most suitable alternative for dividing a pension, especially in those cases when the cost of hiring an actuary is prohibitive.

Rochelle L. Romosca

II. REQUIRING CHILD WITNESS TO TESTIFY OUTSIDE OF THE DEFENDANT'S LINE OF SIGHT DOES NOT VIOLATE THE DEFENDANT'S RIGHT TO CONFRONTATION

In State v. Lopez the South Carolina Supreme Court held that the defendant's Sixth Amendment right "to be confronted with the witnesses against [her]" was not violated when two child witnesses testified against her at trial, although the defendant was seated outside of the children's line of sight. The court also held that the defendant had no constitutional right to attend the competency hearing of the child witnesses. However, because the court failed to develop a workable standard for future cases, the constitutionality of the Lopez decision is questionable.

34. See Ferguson, 300 S.C. at 5, 386 S.E.2d at 269.
36. U.S. CONST. amend. VI.
37. Lopez, 412 S.E.2d at 392-93.
38. Id. at 392. In addition, the Lopez court recognized and approved the use of testimony regarding "shaken baby syndrome" when the testimony is "given by a properly qualified expert and [the] testimony may support an inference that the child's injuries were not ... accidental." Id. at 393. This article does not address that aspect of the case.
The defendant, Lopez, was convicted of murdering her three-year-old stepson. Her other two stepsons, aged seven and five, testified against her at trial. Before trial, the judge held a competency hearing for the two stepsons, whom the solicitor planned to call as witnesses. The court did not allow Lopez to attend the hearing; however, her counsel was present and actually questioned the boys. The trial judge ruled the children competent to testify, but ordered that Lopez be kept out of the children's line of sight during their testimony. After her conviction, the defendant argued that her exclusion from the competency hearing and her placement outside of the children's line of sight during their testimony violated her constitutional right to confrontation.

The South Carolina Supreme Court rejected Lopez's arguments. The court first relied on Kentucky v. Stincer in holding that a defendant has no right to be present at a competency hearing. The court next cited Maryland v. Craig in support of its holding that the method in which the children testified did not violate the Confrontation Clause. The court found that under Craig, when the State makes an adequate showing of necessity, the State's interest in protecting a child from trauma overrides the defendant's interest in a face-to-face confrontation with the witness. Under the Lopez court's rationale, trial courts must determine

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39. Id. at 392. At this hearing the children answered questions relating to the substance of their testimony, including whether they had observed the defendant abusing their younger brother. Id.
40. Id. at 391.
42. Lopez, 412 S.E.2d at 392 (citing Stincer, 482 U.S. 730). However, Lopez is distinguishable from Stincer, in which the child witness did not answer any questions during the competency hearing concerning the substance of his trial testimony. The Court recognized the possible due process problems of such a situation: "[A] competency hearing in which a witness is asked to discuss upcoming substantive testimony might bear a substantial relation to a defendant's opportunity better to defend himself at trial." Stincer, 482 U.S. at 746; see also id. at 746 n.20 (discussing Lopez-type situations).

The Lopez court avoided this due process issue altogether by noting that Lopez's counsel failed to object to the competency hearing testimony and thus, did not preserve the issue for appeal. This approach forces defense counsel to make the strategic choice between objecting to the substantive testimony, thereby losing the opportunity to learn what the prosecution will introduce at trial, or not objecting, and losing a potential ground for appeal.
43. 110 S. Ct. 3157 (1990).
44. Lopez, 412 S.E.2d at 392 (citing Craig, 110 S. Ct. 3157).
45. Id.
necessity on an ad hoc basis. The court concluded that the trial judge had adequate evidentiary support to find that the children would be traumatized by a face-to-face confrontation with the defendant.

Lopez is not as analogous to Craig as the supreme court assumed. In Craig the United States Supreme Court held that

if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

The Court then articulated a three-prong test to determine when the requisite level of necessity is present. First, the finding of necessity must be case-specific. Second, the trial court must find that the presence of the defendant, not merely the trial court atmosphere, traumatizes the

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47. Lopez, 412 S.E.2d at 392-93. The court observed that the trial judge not only interviewed the children, but also received evidence from a psychologist supporting the use of procedural safeguards. Id. at 392. The trial court’s actions paralleled those approved of by the South Carolina Supreme Court in State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990).

48. Craig, 110 S. Ct. at 3169.

49. Id. This case-specific finding of necessity distinguishes Craig from Coy v. Iowa, 487 U.S. 1012 (1988). In Coy the Court held that a state statute which required a screen to be placed between a sexually abused child and the alleged abuser during the child’s testimony violated the defendant’s right to confrontation. Id. at 1014, 1020. The Court’s objection in Coy, however, was to the “legislatively imposed presumption of trauma.” Id. at 1021. In contrast, the Craig Court noted that the trial judge had to determine that the videotaping procedure was necessary for that particular child’s welfare before the trial court could employ the protective procedure. Craig, 110 S. Ct. at 3171.

Notably, South Carolina required a case-specific finding of necessity even before the United States Supreme Court decided Coy. See State v. Rogers, 293 S.C. 505, 508, 362 S.E.2d 7, 9 (1987) (holding that “prior to allowing the victim’s testimony to be presented by videotape, specific factual findings should have been made as to the necessity of using the procedure for this particular witness”).
child witness.50 Finally, the trial court must find that the emotional trauma that the child will suffer is more than de minimis.51

The Craig Court, however, did not determine the degree of emotional trauma required before a special procedure can be implemented.52 Following the Craig Court’s lead, the Lopez court also failed to specify the required degree of emotional trauma for child witnesses. Instead, the court merely found that the evidence offered in support of the trial judge’s finding of “necessity” was adequate.53 Additionally, none of the South Carolina cases cited in Lopez specifies the degree of trauma that justifies the use of protective measures for child witnesses.54 Furthermore, the South Carolina statute that authorizes special protection for child witnesses does not specify any requisite degree of trauma.55 Because of the vagueness of the statute, the trial court’s findings, and the Craig Court’s opinion, it is unclear whether the South Carolina Supreme Court should have found the protective procedure in Lopez constitutional.56

50. Craig, 110 S. Ct. at 3169. This prong is particularly important in cases like Lopez, in which the witnesses testify in the courtroom, but outside the visual presence of the defendant.

51. Id.

52. The Court found that the showing of “necessity” required by the Maryland statute at issue was more than sufficient to satisfy its test. Id. The Maryland statute requires the trial judge to find that “testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.” Md. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989) (emphasis added).

53. Lopez, 412 S.E.2d at 392-93. The court listed as adequate evidentiary support for the trial judge’s conclusions, a letter from a psychologist, the solicitor’s testimony that another expert had concluded that the children would be “traumatized” by testifying in front of Lopez, and the trial judge’s observation of the children’s demeanor. Id.


55. See S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. Supp. 1991). Section 16-3-1530(G), not mentioned in Lopez, states that “[t]he court shall treat ‘special’ witnesses sensitively, using closed or taped sessions when appropriate” and that “[t]he solicitor or defense shall notify the court when a victim or witness deserves special consideration.” Id.

56. Even if the supreme court or the General Assembly specifies a level of trauma from which the child must suffer, the constitutionality of that level will remain questionable until the United States Supreme Court answers the question it side-stepped in Craig, unless the level is the same as that of the Maryland statute. See supra note 52.
The South Carolina Supreme Court in *State v. Lopez* found that the trial court did not violate the defendant’s right to confrontation by placing the defendant out of the child witnesses’ line of sight. Although the court noted that the children would have been “traumatized” had they been able to see the defendant while they testified, the court did not specify the degree of trauma the children would have suffered. Because of South Carolina’s nonspecific statute, the *Lopez* court’s failure to establish a standard, and the *Craig* Court’s avoidance of the issue, the constitutionality of the *Lopez* decision is questionable.

*Pamela A. Wilkins*

III. AGENCY MUST PROVE THREAT TO CHILD BY A PREPONDERANCE OF THE EVIDENCE TO REMOVE CHILD FROM FOSTER CARE

In *Aiken County Department of Social Services v. Wilcox* the South Carolina Court of Appeals held that the Department of Social Services (DSS) must justify, by a preponderance of the evidence, a decision to remove a child from foster care and place the child in...

Although states’ child witness statutes vary, many are not as stringent as Maryland’s statute. *Compare* Fla. Stat. Ann. § 92.54 (Harrison Supp. 1991) (requiring finding that child will suffer “at least moderate emotional or mental harm” by testifying in open court) with N.Y. Crim. Proc. Law § 65.20 (McKinney 1992) (requiring showing of severe mental or emotional harm to child witness resulting from testifying in court). Several courts that have addressed their child witness statute since *Craig* have either ignored the *Craig* Court’s statement about emotional trauma or have equated their state’s standard with Maryland’s. *See, e.g.*, State v. Crandall, 577 A.2d 483, 486 (N.J. 1990) (noting that “[t]he trial court’s findings were made in the context of the New Jersey statute, which requires a showing of ‘severe emotional or mental distress’ . . . is consistent with the Maryland statute upheld in *Craig*”) (citations omitted).

For a more extensive discussion of the relationship between various state standards and the *Craig* decision, see generally Mark A. Small & Ira M. Schwartz, *Policy Implications for Children’s Law in the Aftermath of Maryland v. Craig*, 1 Seton Hall Const. L.J. 109 (1990) (focusing on the difference between statutes designed to increase convictions and those designed to protect children); Susan H. Evans, Note, *Criminal Procedure - Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism — Maryland v. Craig*, 26 Wake Forest L. Rev. 471 (1991) (discussing the problems that *Craig* will create with respect to state statutes).

emergency protective custody. The Wilcox court refused to equate removing a child from foster care with terminating parental rights.

The appellants, David and Renee Wilcox, were the foster parents of three children. DSS removed all three children from the Wilcoxes' home after discovering that one of the children, Kasha, had been injured. The Wilcoxes claimed that Kasha's injuries were caused by a fall down their attic steps and by an accident of unknown cause. However, a worker at a home for abused and neglected children examined Kasha and noted that she had severe bruises and extensive injuries. In addition, two doctors who examined Kasha concluded that her injuries were not caused entirely by a fall. The family court found, by a preponderance of the evidence, that the Wilcoxes had abused and neglected Kasha; accordingly, the court ordered that all three children remain in the custody of DSS.

On appeal the Wilcoxes argued that DSS should have been required to prove its case by clear and convincing evidence because this action was, in effect, an action for termination of parental rights. The Wilcoxes argued that under the United States Supreme Court's holding in Santosky v. Kramer, due process requires courts to use a standard of clear and convincing evidence. The Santosky Court held that a state must present at least clear and convincing evidence before the state can terminate the parental rights of natural parents. However, Santosky is easily distinguishable from the instant case because Santosky concerns the rights of natural parents, not foster parents.

In affirming the family court, the court of appeals held that DSS's action was not a proceeding to terminate parental rights, but rather a

58. Id. at 93, 403 S.E.2d at 143-44. Section 20-7-610 of the South Carolina Children's Code authorizes emergency protective custody for children when there is "probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the child's life or physical safety." S.C. CODE ANN. § 20-7-610(A)(1) (Law. Co-op. 1976 & Supp. 1991).
59. Wilcox, 304 S.C. at 92-93, 403 S.E.2d at 143.
60. Id. at 91-92, 403 S.E.2d at 143.
61. Id. at 91, 403 S.E.2d at 143. The trial judge found that Mrs. Wilcox physically abused Kasha and that Mr. Wilcox neglected Kasha by not protecting Kasha from Mrs. Wilcox's abuse. Id.
62. Id. at 92, 403 S.E.2d at 143. Sections 20-7-1560 to -1582 of the Children's Code govern the procedures for terminating parental rights. S.C. CODE ANN. §§ 20-7-1560 to -1582 (Law. Co-op. 1976).
63. 455 U.S. 745 (1982).
64. Brief of Appellant at 10-13.
65. Santosky, 455 U.S. at 769-70.
66. See Wilcox, 304 S.C. at 98, 403 S.E.2d at 143.
protective custody proceeding authorized by statute. The court noted that under section 20-7-650(H) of the South Carolina Code, the applicable standard in this situation is proof by a preponderance of the evidence. The court concluded that DSS had successfully proved its case under this standard.

By refusing to classify this case as a termination of parental rights, the Wilcox court avoided the question of whether foster parents have a liberty interest in maintaining the foster family unit. The United States Supreme Court addressed, but declined to answer this question in Smith v. Organization of Foster Families for Equality & Reform. In Smith the foster parents claimed that a psychological attachment develops between a child and the foster parents and that these ties make the child a part of the foster family. The Court had previously stated in Moore v. City of East Cleveland that matters relating to family life are protected liberty interests under the Fourteenth Amendment. However, the Smith Court distinguished Moore because the state in Smith did not interfere with a natural family, but with a foster family. The Court emphasized that the "natural family" has its origins entirely apart from the power of the state;

67. Id. at 93, 403 S.E.2d at 143-44. Section 20-7-610 of the Children's Code provides for intervention by a local child protective service agency. S.C. CODE ANN. § 20-7-610 (Law. Co-op. 1976 & Supp. 1991), cited in Wilcox, 304 S.C. at 93, 403 S.E.2d at 144.


69. Id. The court also rejected the Wilcoxes' contention that DSS violated their due process rights by failing to conduct a fair, thorough, and impartial investigation of the allegations of physical abuse and neglect. The court found the Wilcoxes' claim to be without merit because the record did not indicate anything other than a thorough, fair, and impartial investigation. Id. at 93-94, 403 S.E.2d at 144.

70. 431 U.S. 816 (1977) (holding that New York's procedure for removing children from foster homes did not violate foster parents' procedural due process rights). Numerous jurisdictions have held that foster parents have no constitutionally protected liberty interest in maintaining the foster family unit. See, e.g., Kyees v. County Dep't of Pub. Welfare, 600 F.2d 693, 699 (7th Cir. 1979) (per curiam); Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1206 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978); Sherrard v. Owens, 484 F. Supp. 728, 741-42 (W.D. Mich. 1980), aff'd, 644 F.2d 542 (6th Cir.) (per curiam), cert. denied, 454 U.S. 828 (1981).

71. Smith, 431 U.S. at 839.
73. Id. at 498-99.
74. Smith, 431 U.S. at 845.
whereas, the "foster family" is created by state law through contractual agreements.\textsuperscript{75}

Policy considerations also support the conclusion that foster parents have no protected liberty interest in preserving the foster family relationship. The goal of foster care is to prepare a child for return to the natural parents or to permanent adoptive parents.\textsuperscript{76} Because foster care is a temporary and transitional period for the child, the state disfavors vesting foster parents with a liberty interest.\textsuperscript{77}

The South Carolina Court of Appeals affirmed the family court's use of the preponderance of the evidence burden of proof standard. The court stated that the removal of children from foster care is not equivalent to a termination of parental rights, but merely a protective intervention pursuant to South Carolina law. By applying this standard to foster families, the court recognized the fundamental difference between foster and natural parent-child relationships and refused to treat the former as constitutionally protected.

\textbf{Steven M. Pruitt}

\textbf{IV. CHILD CUSTODY AWARD CANNOT REQUIRE CUSTODIAL PARENT TO LIVE WITHIN SPECIFIC DISTANCE OF OTHER PARENT UNLESS IN THE BEST INTEREST OF CHILD}

In \textit{Eckstein v. Eckstein}\textsuperscript{78} the South Carolina Court of Appeals held invalid a child custody order that required the custodial parent to live within a 250-mile radius of the noncustodial parent.\textsuperscript{79} The court of appeals noted that the trial judge made no finding of fact that the geographical limitation was in the best interest of the children.\textsuperscript{80} Some three months later in \textit{VanName v. VanName},\textsuperscript{81} the court of appeals refused to require the custodial parent to remain within close proximity of the noncustodial parent.\textsuperscript{82} The \textit{VanName} court based its decision on

\begin{itemize}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.} at 823.
\item \textsuperscript{77} \textit{Id.} at 833.
\item \textsuperscript{78} 410 S.E.2d 578 (S.C. Ct. App. 1991).
\item \textsuperscript{79} \textit{Id.} at 580.
\item \textsuperscript{80} \textit{Id.} The trial judge ordered the limitation because he felt that the children might suffer adverse effects if they were not allowed to see their father on a regular basis. \textit{Id.}
\item \textsuperscript{81} 419 S.E.2d 373 (S.C. Ct. App.), \textit{aff'd on reh'g}, 419 S.E.2d 373 (S.C. Ct. App. 1992).
\item \textsuperscript{82} \textit{Id.} at 374.
\end{itemize}
the liberty interests of the custodial parent. These two cases illustrate an apparent shift by South Carolina courts away from certain presumptions that have dominated child custody disputes in the past.

The Ecksteins were married in 1980 and had two children during the marriage. On November 21, 1988, Mrs. Eckstein filed an action for divorce, which the family court granted to her in August 1989. At a later hearing, the family court awarded custody of the two children to Mrs. Eckstein, but required her to live within 250 miles of her former husband. Mrs. Eckstein challenged this limitation on her right to move with her children.

On appeal the court of appeals recognized South Carolina's presumption against removing a child from the state in which custody is granted. However, the cour court held that the 250-mile limitation would not, in this case, be "in the best interests of the children." The court observed that Mrs. Eckstein might find it necessary to move out of state "in order to maximize her employment potential as an engineer." The court also found that neither the husband nor the wife had any other relatives living in South Carolina. Accordingly, the court vacated the geographical limitation on Mrs. Eckstein's custody.

83. Id. The court also determined that the best interests of the children demanded that they remain in their mother's custody. Id.

84. Eckstein, 410 S.E.2d at 579. Mrs. Eckstein also appealed the family court's awards of child support, equitable division, and attorney's fees.

85. Id. at 580 (citing McAlister v. Patterson, 278 S.C. 481, 299 S.E.2d 322 (1982)). In McAlister the South Carolina Supreme Court affirmed the trial court's ruling that the custodial mother could not remove her son from Laurens County. The trial court noted that South Carolina and other jurisdictions recognize a presumption against removal, although removal would be appropriate if necessary to benefit the child. McAlister, 278 S.C. at 483, 299 S.E.2d at 323. The McAlister court found that remaining in Laurens County would be in the child's best interest because of the child's close relationship with his father, and because the child's grandparents and a great-grandparent lived within thirty miles of Laurens County. Id.

86. Eckstein, 410-S.E.2d at 580.

87. Id. Mrs. Eckstein has a degree in engineering and worked as an engineer until she went to work for her husband's business in February 1987. After her former employer was unable to offer her a position, Mrs. Eckstein found an engineering job with Boeing Aerospace Company in Huntsville, Alabama. Id. at 579.

88. Id. at 580. Distance from family relatives was an important factor in the McAlister court's decision to affirm the limitation on the custodial parent's place of residence. See McAlister, 278 S.C. at 483, 299 S.E.2d at 323.

89. Eckstein, 410 S.E.2d at 580. The court limited its holding by stating that the father would be allowed to petition the court for a change in the custody order if circumstances were to develop that reflected a need for the children to live closer to their father. Id. In addition, the court of appeals affirmed the family judge's
In *VanName v. VanName* the father sought an order requiring the mother, who was awarded custody of the children, to live where visitation by the father would be convenient. After the trial court refused to impose a distance restriction, the father appealed. The court of appeals affirmed, but approached the issue in a different manner than in *Eckstein*.

In *VanName* the court stated that requiring a person to reside in a certain place "encroaches upon the liberty of an individual to live in the place of his or her choice." The court found that, although judges have the discretion to impose residency restrictions, such restraints "should be exercised sparingly." The *VanName* court reconciled *McAlister* by stating that the trial judges in both cases "properly considered the best interests of the children." Judicial granting of custody has been wrought with numerous presumptions that have gradually lost importance over time. Historically, the common-law presumption was that the father should be awarded custody because he was the head of the household. This notion later gave way to a presumption in favor of the mother. Most states now have begun to move away from presumptions when granting custody,
focusing instead solely on the best interests of the child. The presumption against removal has been abolished in many jurisdictions.

The Eckstein and VanName decisions seem to suggest a movement by South Carolina courts in that same direction. Although the court in Eckstein acknowledged the presumption against removal, its final decision rested upon the best interests of the children. In VanName the court did not acknowledge the presumption at all. Such presumptions are no longer viable, and courts should no longer recognize them when granting custody. Even if a court considers the best interests of the child, as in Eckstein, the presumption tends to weigh heavily on the court’s decision. Ultimately, the child’s best interests should be the determinative factor in custody decisions. The “best interests of the child” test weighs all of the important factors and yields a meaningful decision.

Although neither Eckstein nor VanName expressly rejects the presumption against removal, both cases reflect a movement away from presumptions. This movement is in line with a majority of jurisdictions that have rejected presumptions and have started to base custody decisions on the best interest of the child.

C. Leigh Boyd

V. Marital Estate Includes Settlement Successfully Pursued Between Divorce and Property Division

In Mears v. Mears the South Carolina Court of Appeals held that a settlement of a spouse’s wrongful termination claim is marital property


100. Eckstein, 410 S.E.2d at 580. The court implied that the presumption is meaningless in the absence of specific findings in the record that a geographic restriction on the custodial parent is necessary to protect the best interests of the children. See id. (“While, as a rule, the presumption is against removal of a child from the state . . . [i]f there are no findings of fact showing such a limitation is in the best interest of the children.”).

when the cause of action accrued during the marriage, but neither spouse knew of the potential claim until after their divorce.\textsuperscript{102} The court concluded that, because the spouse successfully resolved the claim prior to the division of the marital property, the settlement is subject to equitable distribution under the Equitable Apportionment of Marital Property Act.\textsuperscript{103} While \textit{Mears} presented an issue of first impression in South Carolina, the court of appeals purportedly adopted the reasoning of the majority of the jurisdictions that have faced similar situations in dividing marital property.\textsuperscript{104}

The Mearses had been married since June 25, 1965. On December 20, 1988, Mr. Mears commenced an action for divorce, which the family court granted to him on February 10, 1989. However, the divorce decree reserved the distribution of the marital property for a later hearing.\textsuperscript{105} Mr. Mears had worked for the "Company"\textsuperscript{106} for nearly five years when he was terminated on August 26, 1985. Before the divorce, neither he nor his wife was aware that the circumstances surrounding his termination created a cause of action for wrongful discharge. On March 10, 1989, Mr. Mears hired an attorney to pursue the possibility of a wrongful discharge action against the "Company." Mr. Mears and his former employer settled the claim on April 13, 1989, for $82,900.\textsuperscript{107}

At the property division hearing in June 1989, Ms. Mears claimed an interest in the wrongful termination settlement as marital property. The trial court held that the settlement was not marital property because neither party was aware of the potential claim before the commencement of the divorce proceedings and because Mr. Mears did not pursue the action until after the divorce.\textsuperscript{108} Ms. Mears appealed, and the court of appeals reversed.\textsuperscript{109}

\textsuperscript{102} \textit{Id.} at 156, 406 S.E.2d at 380.
\textsuperscript{103} \textit{Id.} The Equitable Apportionment of Marital Property Act is codified at S.C. CODE ANN. §§ 20-7-471 to -479 (Law. Co-op. Supp. 1991). Importantly, the \textit{Mears} court also held that, in the absence of bad faith or an attempt by one spouse to conceal an unliquidated claim, the other spouse cannot share in the claim if it is first asserted after a judicial division of the marital property. \textit{Mears}, 305 S.C. at 157, 406 S.E.2d at 380; \textit{see infra} note 133 and accompanying text.
\textsuperscript{104} \textit{Mears}, 305 S.C. at 154, 406 S.E.2d at 378.
\textsuperscript{105} \textit{Id.} at 152, 406 S.E.2d at 377.
\textsuperscript{106} The parties agreed to keep the name of the employer confidential. Record at 2.
\textsuperscript{107} \textit{Mears}, 305 S.C. at 152, 406 S.E.2d at 377.
\textsuperscript{108} \textit{Id.} at 152, 406 S.E.2d at 378. The trial court also noted that there was no evidence of bad faith or an attempt by Mr. Mears to conceal the claim from his wife during the marriage. \textit{Id.}
\textsuperscript{109} \textit{Id.} at 152, 406 S.E.2d at 377.
The court of appeals began its analysis with the Equitable Apportionment of Marital Property Act, which defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation." The court noted that the word "property" has an "unusually broad meaning" and "includes choses in action." Because this case raised an issue of first impression in South Carolina, the court looked to other jurisdictions for guidance. The court found that, although "the cases dealing with this issue from other jurisdictions show disparate treatment in the handling of unliquidated claims in property divisions," a majority of those cases have focused only on certain factors in determining the classification of such a claim.

First, the date that the settlement award is actually received is irrelevant. In Goode v. Goode, an Arkansas court held that, if a claim accrues during a marriage, any settlement from that claim is marital property regardless of when the settlement is actually received.

111. Mears, 305 S.C. at 153, 406 S.E.2d at 378 (quoting S.C. CODE ANN. § 20-7-473). None of the five exceptions listed in section 20-7-473 apply to the present case. Id.
112. Id. (citing Lott v. Claussens, Inc., 251 S.C. 478, 163 S.E.2d 615 (1968)).
113. Id. at 152, 406 S.E.2d at 378.
114. The court noted that the trial court had factually distinguished two South Carolina cases that concerned post-divorce property actions. Id. at 153, 406 S.E.2d at 378. In Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (1987), the supreme court held that a settlement from the husband's workers' compensation claim was marital property. The trial court distinguished Orszula from the present case because the claim in Orszula was settled before the divorce and because both parties were aware of the claim. Mears, 305 S.C. at 154, 406 S.E.2d at 378. The trial court also distinguished the earlier case of Phillips v. Phillips, 290 S.C. 455, 351 S.E.2d 178 (Ct. App. 1986) (involving a personal injury settlement), because the settlement was received during the marriage and because the case was decided before the effective date of the new Equitable Apportionment of Marital Property Act. Mears, 305 S.C. at 154, 406 S.E.2d at 378-79.
115. Mears, 305 S.C. at 154, 406 S.E.2d at 379.
117. 692 S.W.2d 757 (Ark. 1985).
118. Id. at 759 (citing In re Marriage of Dettore, 408 N.E.2d 429 (Ill. App. Ct. 1980)).
Secondly, the purpose or nature of the settlement is of primary importance.119 The Mears court cited Lynch v. Lynch,120 a New York property division case that concerned a potential recovery for breach of a long-term employment contract.121 The Lynch court held that any potential recovery would not be marital property because such an award would compensate the husband for damages relating only to employment after the divorce.122

Finally, another important factor is whether the loss that gave rise to the claim falls on the marriage partners together, or the injured spouse alone.123 In re Marriage of Kuzmiak concerned the distribution of separation pay received by the husband after an involuntary discharge from the military.124 The California court noted that this kind of pay is "intended to ease the transition into civilian life, not as compensation for past services."125 Thus, the Kuzmiak court reasoned that the time of the discharge was the crucial factor in determining who bore the burden of the loss of employment. If the husband were discharged before the commencement of the divorce, the court would have classified the separation pay as marital property because both parties would have borne the burden of the loss of employment.126

The Mears court applied these factors and held that the settlement in the instant case was marital property.127 Although Mr. Mears did not receive the settlement until after the divorce, the cause of action accrued during the marriage. Furthermore, the settlement was intended primarily to compensate the husband for wages he would have received while he was married. Finally, because the parties were married at the time of the discharge, they both bore the burden of the loss of employment.128

122. Lynch, 505 N.Y.S.2d at 742.
123. See Mears, 305 S.C. at 155-56, 406 S.E.2d at 379-80 (citing In re Marriage of Kuzmiak, 222 Cal. Rptr. 644 (Ct. App.), cert. denied, 479 U.S. 885 (1986)).
125. Mears, 305 S.C. at 156, 406 S.E.2d at 379 (citing Kuzmiak, 222 Cal. Rptr. 644).
126. Kuzmiak, 222 Cal. Rptr. at 646-47.
128. See id. at 156, 406 S.E.2d at 380. The court of appeals noted that when the "Company" terminated Mr. Mears, the couple was within five years of paying off the mortgage on their home. The loss of employment made it necessary for the Mearses to refinance their mortgage. This eventually caused the couple to lose their home in foreclosure. Id. at 156 n.1, 406 S.E.2d at 380 n.1.
The purpose of equitable distribution statutes is to divide marital property fairly, regardless of which spouse holds title to such property.\textsuperscript{129} Legislatures enacted these statutes in response to the emerging idea that "marriage is a shared enterprise, a joint undertaking, and in many ways is akin to a partnership."\textsuperscript{130} The \textit{Mears} holding is consistent with this purpose. The parties were married for more than three years after Mr. Mears's discharge, so both parties bore the burden of this loss. Moreover, had the "Company" not wrongfully discharged Mr. Mears, the marriage partnership would have shared in his future wages. Accordingly, Ms. Mears should receive a portion of the settlement that represents compensation for wages her husband would have received during their marriage.

The court's analysis is analogous to the "analytical" approach used by other jurisdictions in deciding whether workers' compensation or personal injury claims are marital property.\textsuperscript{131} South Carolina courts previously have used the "mechanistic" approach when determining the division of such awards.\textsuperscript{132} The \textit{Mears} decision, however, could change South Carolina's approach to domestic property divisions of workers' compensation and personal injury claims from "mechanistic" to "analytical."

\textit{Mears} extends the definition of marital property to include certain choses in action that accrue during a marriage, even though the settlement is not received until after the divorce. Both the purpose of a settlement and who must bear the burden of the loss following the injury should determine whether the settlement is marital property. However, because of the special need to bring marital litigation to an end, the court limited a spouse's right to claim a settlement as marital property only to

\textsuperscript{129} See generally 24 AM. JUR. 2D Divorce and Separation § 870 (1983).
\textsuperscript{130} Id.
\textsuperscript{131} See Weisfeld v. Weisfeld, 545 So. 2d 1341 (Fla. 1989). The "analytical" approach "looks to the nature of a . . . damage award to determine whether the property is separate, . . . or marital property subject to distribution." Id. at 1345.
\textsuperscript{132} See, e.g., Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (1987); see also James F. Thompson, Comment, Workers’ Compensation and Personal Injury Awards Constitute Marital Property, 40 S.C. L. REV. 105, 106 (1988) (stating that the Orszula court found that workers' compensation awards are marital property because such awards are not specifically excluded from the statute). Under the "mechanistic" approach, "if a[n] . . . award was acquired during the marriage, then it must be considered marital . . . property and divided as such unless it falls within specific but limited statutory exceptions." Weisfeld, 545 So. 2d at 1344.
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those actions that are commenced before the court-ordered division of property.¹³³

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