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DOMESTIC LAW

I. VOLUNTARY SEPARATION INCENTIVE PAYMENTS HELD TO BE MARITAL PROPERTY

The South Carolina Court of Appeals has held that military retirement benefits accrued during marriage are subject to equitable apportionment in divorce proceedings and settlements.[1] However, in a 1991 attempt to effectuate and expedite the downsizing of the United States' standing military membership, Congress enacted the Special Separation Benefits Programs (SSB)[2] and Voluntary Separation Incentive (VSI) program[3] providing voluntary separation benefits to service members not eligible for full military retirement benefits. In 1995 the South Carolina Court of Appeals in *Fisher v. Fisher*[4] held that discharge under the VSI program is analogous to early retirement, and as such the benefits received therefrom are marital property subject to equitable apportionment.[5]

The Fishers were married in 1979 and separated in 1989, at which time the husband commenced an action for separate maintenance.[6] The family court issued a final order in 1990 approving the parties' settlement agreement which included a provision that the wife would receive twenty percent of the husband's military retirement benefits, payable in monthly allotments upon actual entitlement.[7] The husband received a voluntary honorable discharge from the Navy in 1993 after sixteen years of service. Because he had not completed the mandatory twenty year enlistment period, the husband was not eligible for full military retirement.[8]

The husband testified that, in order to satisfy the twenty year requirement, he would have had to re-enlist at least twice more for two-year terms, and such re-enlistment requires the recommendation of a commanding officer. During one such enlistment period, however, the husband extensively damaged his commanding officer's vehicle and was subsequently admitted to the psychiatric ward of a Navy hospital for treatment.[9] Placing the husband at risk of involuntary discharge and making re-enlistment a practical impossibility, the incident prompted the husband to accept discharge under the VSI program,

1. Eckhardt v. Eckhardt, 309 S.C. 225, 420 S.E.2d 875 (Ct. App. 1992).
2. *See* 10 U.S.C. § 1174a (1994).
3. *See* 10 U.S.C. § 1175 (1994).
4. ___ S.C. ___, 462 S.E.2d 303 (Ct. App. 1995).
5. *Id.* at ___, 462 S.E.2d at 305.
6. *Id.* at ___, 462 S.E.2d at 304.
7. *Id.* at ___, 462 S.E.2d at 304.
8. *Id.* at ___, 462 S.E.2d at 304.
9. *Id.* at ___, 462 S.E.2d at 304.

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which would provide him with annual payments of $10,114.50 for thirty-two years.[10]

In 1993 the wife commenced an action for divorce wherein she requested the court adopt the previous consent order.[11] The wife alleged that the husband's discharge and subsequent annuity from the Navy under the VSI program was in lieu of retirement benefits as contemplated in the 1990 order, and she requested payments from the husband's VSI disbursements pursuant to the 1990 order.[12] The husband answered and counterclaimed that the wife's request for twenty percent of the VSI annuity was barred by res judicata and that the VSI payments were not subject to state equitable distribution laws because of federal pre-emption. The family court granted the wife's divorce request and ordered the husband to pay twenty percent of his annual VSI payment to the wife in accordance with their prior agreement; the husband appealed.[13]

The court of appeals began by considering the husband's claim that the family court had erroneously found the VSI payments to be marital property; he asserted that the VSI annuity was non-marital property because his discharge from the Navy pursuant to the VSI program occurred after judicial approval of the parties' separation agreement, which provided for apportionment of his "retirement" benefits exclusively.[14] The court disagreed, finding the VSI payments analogous to retirement benefits, long held to be marital property.[15] The court then affirmed the family court's finding that the VSI payments constituted marital property.[16]

The paramount consideration in the court's reasoning was the classification of the VSI payments. Review of the limited authority revealed a schism: courts encountering the issue in Ohio and Florida had held the VSI payments more closely resembled severance pay than retirement benefits so that VSI payments did not constitute marital property.[17] Courts in Arizona, Montana, and one Florida District Court of Appeals had held VSI and SSB payments tantamount to retirement benefits subject to equitable division.[18] The *Fisher* court held the VSI program analogous to an early retirement. Primarily, the

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10. *Id.* at ___, 462 S.E.2d at 304.

11. *Id.* at ___, 462 S.E.2d at 304.

12. *Id.* at ___, 462 S.E.2d at 304-05.

13. *Id.* at ___, 462 S.E.2d at 305.

14. *Id.* at ___, 462 S.E.2d at 305.

15. *Id.* at ___, 462 S.E.2d at 305 (citing Eckhardt v. Eckhardt, 309 S.C. 225, 420 S.E.2d 875 (Ct. App. 1992)).

16. *Id.* at ___, 462 S.E.2d at 305.

17. *See* Kelson v. Kelson, 647 So. 2d 959 (Fla. Dist. Ct. App. 1994); McClure v. McClure, 647 N.E.2d 832 (Ohio Ct. App. 1994).

18. *See In re* Marriage of Crawford, 884 P.2d 210 (Ariz. Ct. App. 1994); Abernethy v. Fishkin, 638 So. 2d 160 (Fla. Dist. Ct. App. 1994); Blair v. Blair, 894 P.2d 958 (Mont. 1995).

court relied on the fact that the VSI payments, like retirement benefits, were calculated and based in part on the member's length of service and pay grade during service.[19] The court also seemed to attribute some weight to the husband's own misconduct being the reason full military retirement benefits were not available.[20]

The husband raised three arguments in opposition to the finding that VSI payments are treated as retirement benefits subject to equitable division: (1) property acquired by either party after entry of a permanent order of separate maintenance and support, or of a permanent order approving a property or marital settlement, is non-marital;[21] (2) the family court lacked subject matter jurisdiction to modify the original property division made pursuant to the 1990 final order; and (3) federal pre-emption bars the application of state equitable distribution laws to VSI payments.[22] The court rejected all three contentions.

Although the majority conceded that the husband had cited section 20-7-473 for the correct proposition, it rejected the husband's first argument because: "[A]ny rights the husband now possesses to receive early discharge incentive payments are due to the time he spent in the military and *accrued during his marriage* to the wife, not after the separation agreement was approved."[23] Rejecting the lack of subject matter jurisdiction argument, the court found that it was the husband's voluntary election of early discharge payments instead of the full retirement benefits envisioned in the final consent order that enabled the family court to direct monies to the wife in accordance with, and to give effect to, the 1990 order.[24] The court refused to allow the husband to divest the wife of her rights as determined in the 1990 order as a result of his own voluntary alteration of the method of receipt of his post-military service benefits.[25] This line of reasoning comports with findings from other jurisdictions that have rejected the lack of subject matter jurisdiction contention, stating instead that the trial courts were, in substance, merely enforcing the prior agreement and not modifying it.[26]

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19. *Fisher*, ___ S.C. at ___, 462 S.E.2d at 305. The formula for calculation of VSI payments can be found at 10 U.S.C. § 1175(e)(1) (1994).

20. *Fisher*, ___ S.C. at ___, 462 S.E.2d at 305.

21. *See* S.C. CODE ANN. § 20-7-473(2)(c) (Law. Co-op. Supp. 1995).

22. *Fisher*, ___ S.C. at ___, 462 S.E.2d at 305-06.

23. *Id.* at ___, 462 S.E.2d at 305 (emphasis added).

24. *Id.* at ___, 462 S.E.2d at 305.

25. *Id.* at ___, 462 S.E.2d at 305.

26. *See* Abernethy v. Fishkin, 638 So. 2d 160, 161 n.5 (Fla. Dist. Ct. App. 1994); Blair v. Blair, 894 P.2d 958, 963 (Mont. 1995); *cf.* Kelson v. Kelson, 647 So. 2d 959, 962 (Fla. Dist. Ct. App. 1994) (finding that the trial court correctly concluded that it lacked jurisdiction to modify the parties' property settlement order absent fraud, duress, deceit, coercion, or overreaching).

In rejecting the husband's federal pre-emption argument, the court seized upon the fact that Congress had failed to manifest the requisite pre-emptive intent by specifically excluding early discharge incentive payments from state equitable division laws by statute, as it had done explicitly before.[27] "[H]ad Congress intended to exclude early separation incentive pay from state apportionment laws," the court reasoned, "it easily could have done so."[28] Further, the court noted as evidence of Congressional intent that, in enacting the VSI and SSB programs, the Department of Defense disseminated literature to explain the programs. The literature stated that the treatment of VSI and SSB payments was not dictated by federal law and that the state courts would be able to rule on the divisibility of the new incentives.[29] Although the court's pre-emption analysis is in accord with that of other jurisdictions, shallow is the depth of its reasoning. Both *In re Marriage of Crawford*,[30] the first case to address the VSI/SSB issue, and *Blair v. Blair*[31] give comprehensive, yet concise, background information and analysis on the history of the pre-emption argument.[32] As a result, their similar conclusions appear far more developed and judicious than those in *Fisher*.

Perhaps the most curious omission from the majority's analysis in *Fisher* is any meaningful attempt to interpret or give effect to the actual rights created and contemplated by the parties in the 1990 final order. The majority indirectly addresses this issue only to the extent that it finds the VSI payment analogous to the "retirement benefits" apportioned in the order, that any "rights" the husband now has to the VSI payments accrued during the marriage, and that the "rights" of the wife contemplated in the order cannot be divested via the husband's voluntary actions.[33] But what was the nature of

27. *See* Mansell v. Mansell, 490 U.S. 581 (1989) (holding veteran's disability benefits received in lieu of waived retirement benefits could not be treated as divisible property when disability pay was expressly exempted from claims pursuant to Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(a)(4)(B) (1994)).

28. *Fisher*, ___ S.C. at ___, 462 S.E.2d at 306.

29. *Id.* at ___, 462 S.E.2d at 306 (citing *Abernethy*, 638 So. 2d at 162).

30. 884 P.2d 210 (Ariz. Ct. App. 1994).

31. 894 P.2d 958 (Mont. 1995).

32. *Crawford*, 884 P.2d at 212; *Blair*, 894 P.2d at 960-61. Exemplifying the historical treatment set forth in *Crawford* and *Blair* are the Supreme Court's decisions in *McCarty v. McCarty*, 453 U.S. 210 (1981) (holding that equitable division of military retirement benefits is a question for Congress alone, and in response Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (1994), giving states express authority to divide disposable military retirement or retainer benefits), and *Mansell v. Mansell*, 490 U.S. 581 (1989) (holding that state courts were expressly pre-empted from division of the portion of military retirement pay waived in order to receive Veteran's Administration disability benefits under the USFSPA.)

33. *Fisher*, ___ S.C. at ___, 462 S.E.2d at 305.

the "rights" created and contemplated by the 1990 order, when the VSI program did not exist? The majority does not engage this issue.

According to the dissenting opinion of Judge Goolsby, the only "right" of the wife created and contemplated by the 1990 final order was a mere contingency interest in non-matured retirement benefits, to be paid "upon [the husband's] actual entitlement to said retirement benefits."[34] Because the separation agreement between the parties was drafted seven years prior to the husband's eligibility for full military retirement benefits, the parties understood that such contingencies as involuntary discharge or, certainly, death would prevent the retirement benefits from maturing and extinguish any interest of the wife. Judge Goolsby's reliance on *Kelson v. Kelson*[35] is particularly apposite because *Kelson* is nearly identical factually to *Fisher*. In *Kelson* the court held that the husband's VSI payments were not the "retirement benefits" contemplated by the specific terms of the settlement agreement;[36] however, like *Fisher*, in *Kelson* the VSI program became effective after the date of the settlement agreement. The *Kelson* court stated: "The . . . agreement does not indicate any intent by the parties to provide for any contingencies other than division of vested and matured retired pay upon the event of Major Kelson obtaining the right to such payments."[37] The settlement agreement and facts of *Fisher* lend themselves to a similar conclusion. Finally, the majority's neglect of the settlement language is underscored by its approbation of *Abernethy*, in which the Florida court's finding that VSI payments could be equitably distributed was supported by the husband's specific agreement in the property settlement.[38]

In continued harmony with *Kelson*, the *Fisher* dissent concluded that the VSI payments were not actually retirement benefits, but severance pay.[39] As such, the dissent would uphold the husband's preferred application of section 20-7-473, resulting in the VSI payment's classification as non-marital property, thereby removing the family court's jurisdiction to equitably apportion the VSI annuity.[40] The dissent declined to reach the issue of whether VSI payments are subject to equitable division via a specific settlement provision but noted

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34. *Id.* at ___ n.1, 462 S.E.2d at 307-08 n.1 (Goolsby, J., dissenting) (quoting the provision of the 1990 final order).

35. 647 So. 2d 959 (Fla. Dist. Ct. App. 1994).

36. *Id.* at 960-61.

37. *Id.* at 960.

38. Abernethy v. Fishkin, 638 So. 2d 160, 163 (Fla. Ct. App. 1994).

39. *Fisher*, ___ S.C. at ___, 462 S.E.2d at 307 (Goolsby, J., dissenting). The dissent cites 10 U.S.C. § 1175(h)(1), (4) (1994), providing different sources for VSI and retirement benefits in substantiation of its distinction. Several other arguments are posited in *Kelson* to establish VSI payments as severance pay. 647 So. 2d at 961-62.

40. *Fisher*, ___ S.C. at ___, 462 S.E.2d at 307 (Goolsby, J., dissenting); *cf. Kelson*, 647 So. 2d at 961-62; McClure v. McClure, 647 N.E.2d 832 (Ohio Ct. App. 1994).

that the "federal statutory mandate that '[t]he member's right to [VSI] payments shall not be transferable.'"[41] The internal logic of the dissent, and of *Kelson* by reference, is persuasive at least in its focus on the import of the actual terms and effect of the settlement agreement, as well as the nature of the rights it created.

In holding that VSI payments are marital property subject to equitable distribution, the South Carolina Court of Appeals provided important security to the spouses and families of military personnel. Such voluntary separation incentives and benefits now cannot be secreted away or used to circumvent an equitable apportionment of anticipated military retirement. The public policy advantages of this decision are manifest, but will the court turn a deaf ear in the future to challenges based upon the property rights bargained for and secured in marital property settlements? Further, the court's limitation of its holding in *Fisher* to the facts of the case should reveal the role and extent of the husband's misconduct on the court's decision.[42] The abundance of ambiguous references to the nature of VSI/SSB payments in statutes, legislative history, and case law provides ample fodder to test the holding of *Fisher* with different facts, and perhaps a different bench.

Richard C. Burke

41. *Fisher*, ___ S.C. at ___, 462 S.E.2d at 308 (Goolsby, J., dissenting) (alteration in original) (quoting 10 U.S.C. § 1175(f) (1994)).

42. *Id.* at ___, 462 S.E.2d at 305.

II. COURT EXTENDS PRIMARY CARETAKER DOCTRINE TO CASES IN WHICH NEITHER PARENT TAKES CLEAR RESPONSIBILITY FOR THE PARENTAL DUTIES

In *Parris v. Parris*[1] a mother, Ruth Parris, asked the trial court to review a family court order awarding custody of her son to the child's father, Donald Parris. Mrs. Parris alleged that the order was based on gender bias.[2] The trial court found no trace of gender bias in the custody determination. Likewise, the South Carolina Supreme Court unanimously affirmed the award of child custody to the father. In the supreme court's opinion, the custody order represented the best interests of the child in view of evidence that the father was more actively involved than the mother in the child's daily activities.

To properly analyze Mrs. Parris's allegation of gender bias, a close examination of the facts is necessary. Also relevant is the way the court applied the law in this case. That is, the following analysis will focus on what law the court *could* have applied, but may have overlooked in determining custody. Additionally, the analysis will compare the way the law was applied to Mrs. Parris with the application of child custody law in prior cases determined by the South Carolina Supreme Court.

In *Parris* the supreme court based its ruling primarily on the trial court's finding that Mr. Parris was more actively involved in the son's daily life than was Mrs. Parris.[3] In so holding, the court may have improperly applied the primary caretaker presumption. The *Parris* decision grants favored status to a parent who merely performs more of the parental caretaking duties. More reasoned precedent suggests, however, that this presumption should only be applied when one parent has "clearly" taken responsibility for the child.[4] By basing custody on evidence that the father was more actively involved in the child's daily life, both the trial court and the supreme court may have overlooked other relevant factors in determining custody.

Ruth and Donald Parris were married in February 1979.[5] Ruth gave birth to their only son, Maxfield, in December 1980[6] and took a one-year leave of absence from work to care for the child.[7] While Donald worked on various

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1. ___ S.C. ___, 460 S.E.2d 571 (1995).

2. *Id.* at ___, 460 S.E.2d at 572.

3. *Id.* at ___, 460 S.E.2d at 572.

4. *See* Lewis v. Lewis, 433 S.E.2d 536 (W. Va. 1993); Patricia Ann S. v. James Daniel S., 435 S.E.2d 6 (W. Va. 1993); Channell v. Channell, 432 S.E.2d 203 (W. Va. 1993); Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

5. *Parris*, ___ S.C. at ___, 460 S.E.2d at 571.

6. *Id.*

7. Record at 35.

real estate projects and commercial ventures,[8] Ruth maintained employment as a real estate sales agent throughout the marriage and until the date of appeal.[9] Although Ruth became one of the most successful realtors in Hilton Head,[10] she kept a flexible work schedule, allowing her to take her son to school and to doctors' appointments and to spend time with him.[11] After Maxfield was born, Donald and Ruth employed a full-time housekeeper, Doris Luden, to clean, cook, sew, do laundry, and perform basic caretaking responsibilities for Maxfield.[12] In 1990, primarily due to financial concerns, Ruth informed Donald that she wanted a divorce.[13] Donald subsequently moved out of the marital home, and he himself filed for divorce—leaving Ruth to care for Maxfield.[14] Ultimately, both Donald and Ruth sought sole custody of Maxfield.[15] The family court judge awarded Ruth temporary custody but noted its temporary award would have no precedential value.[16]

The family court's final order on December 30, 1991 granted permanent custody to Donald based on the determination that he "exhibited a more active role in the day to day activities of the child."[17] The initial notation by the judge that Donald assumed substantial parental responsibilities was based on the testimony of witnesses. These witnesses testified that Donald made breakfast in the mornings,[18] read to Maxfield and tucked him in at night,[19] attended every parent-teacher conference,[20] volunteered to join Maxfield in extra-curricular activities,[21] and transported Maxfield to and from swim meets.[22] Parental duties were also performed by Ruth and Doris Luden, the housekeeper. The record reveals that Ruth shopped for the child's clothes,[23] drove car pool,[24] assured that Maxfield was ready for school,[25] went on bike rides,[26] and arranged for certain after-school activities, including martial

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8. *Id.* at 109-12.
9. *Id.* at 34-35.
10. *Parris*, ___ S.C. at ___, 460 S.E.2d at 571.
11. Record at 347-48.
12. *Id.* at 36, 118.
13. *Parris*, ___ S.C. at ___, 460 S.E.2d at 571.
14. *Id.* at ___, 460 S.E.2d at 571.
15. *Id.* at ___, 460 S.E.2d at 571.
16. *Id.* at ___ & n.1, 460 S.E.2d at 571 & n.1.
17. *Id.* at ___, 460 S.E.2d at 571-72.
18. Record at 35.
19. *Id.* at 295.
20. *Id.* at 135.
21. *Id.* at 297.
22. *Id.* at 136.
23. *Id.* at 342, 346.
24. *Id.* at 151, 346.
25. *Id.* at 348.
26. *Id.* at 347.

arts lessons.[27] Although Ruth attended some parent-teacher conferences, she did not participate daily in her son's after-school activities.[28] Significantly, the transcript reveals that Ms. Luden performed the largest portion of the caretaking responsibilities.[29]

These facts illustrate that both parents performed caretaking duties; yet, the court found Donald to be the primary caretaker. Again, the question arises as to what other relevant factors should have been considered.

A well reasoned line of West Virginia cases suggests that the primary caretaker presumption is only to be applied if one parent has "clearly" taken responsibility for the bulk of childcare duties.[30] When neither parent has so clearly assumed the parental role, the court is to rely on other factors, including the competence of each parent, the resources of each parent, the opinions of third parties, and the age, health, and sex of the child.[31] The supreme court in *Parris* stated that one parent's larger contribution to the child's daily life is a "relevant consideration,"[32] and expressly denied it was the sole factor to be considered. The court, however, failed to discuss the weighting or even existence of other factors relevant to the child's best interests.

Though the South Carolina General Assembly has not provided explicit guidelines for determining the best interest of the child in custody awards,[33] as a general rule South Carolina courts focus primarily on three factors: (1) who has been the primary caretaker; (2) the conduct, attributes, and resources of the parents; and (3) the opinions of third parties--including guardians ad litem, expert witnesses, and the child.[34] Both the lower court

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27. *Id.* at 461.

28. *Id.* at 151.

29. *Id.* at 118.

30. *See* cases cited *supra* note 4.

31. *See* cases cited *supra* note 4; ROY T. STUCKEY & F. GLENN SMITH, MARITAL LITIGATION IN SOUTH CAROLINA 327 (1993).

32. *Parris*, ___ S.C. at ___, 460 S.E.2d at 573.

33. In contrast, other state statutes do provide specific criteria for determining the best interests of the child. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1996); MINN. STAT. ANN. § 518.17(1) (West Supp. 1996); WIS. STAT. ANN. § 767.24(5) (West 1993). The Michigan statute defines the best interests of the child to mean the sum of all factors including: (a) the emotional ties between the parties and the child; (b) the capacity of parties involved to give the child love and guidance and to continue to educate and raise the child in his or her religion or creed, if any; (c) the capacity of the parties to provide the child with necessities, (d) the length of time the child has lived in a stable, satisfactory environment; (e) the permanence, as a family unit, of potential custodial homes; (f) the moral fitness of the parties; (g) the mental and physical health of the parties, (h) the home, school, and community record of the child; (i) the reasonable preference of the child, if of sufficient age; (j) the willingness and ability of each party to facilitate a close relationship between child and the other parent; (k) domestic violence, and (l) any other factor considered by the court to be relevant. MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1996).

34. STUCKEY & SMITH, *supra* note 31, at 327. Other factors that courts consider include "the

and the supreme court, however, appeared to rest their custody decisions primarily on one of these three factors—the father's caretaking duties. The courts made very little mention of the conduct, attributes, and resources of the parents. And though the supreme court did quote the opinions of third parties, each third party acknowledged that both parents were fit.[35]

Though the term "primary caretaker" is clearly defined in some states,[36] neither South Carolina's case law nor its statutes provide specific guidelines for determining which parent is the primary caretaker.[37] Rather, South Carolina courts have simplistically identified the primary caretaker as the parent who a court determines has assumed the more significant portion of caregiving responsibilities.[38] The factual settings of the individual cases do, however, evidence a logical standard. For example, in *West v. West*[39] the court found the father to be the primary caretaker because he "bathed the children on a regular basis, put them to bed, fixed meals, took them to school, assisted with homework, and attended church with the children."[40]

Again, South Carolina courts typically place significant emphasis on the conduct, attributes, and resources of the parents. Factors such as "financial and physical resources, free time to spend with the children, access to friends and relatives, the availability of child care, tenderness, caring, and religious training" are important in this evaluation.[41] In fact, the existence of an extended family support network has proven determinative in at least one prior South Carolina custody decision.[42] In *Parris*, although Donald had more free time during the day to spend with Maxfield, Ruth's career success allowed her

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age, health, and sex of [a child] . . . the residence, surroundings, and opportunities afforded in the respective [parental] environments; the conduct and suitability of parents; the preference in favor of the innocent or prevailing [divorce contestant] . . . ; the financial condition of the parents; agreements between the parties, and others." Ford v. Ford, 242 S.C. 344, 352, 130 S.E.2d 916, 921 (1963).

35. *Parris*, ___ S.C. at ___, 460 S.E.2d at 572.

36. For example, in West Virginia the primary caretaker is the parent who: (1) prepares the meals; (2) bathes and dresses the child; (3) provides medical care; (4) arranges babysitting and after-school activities; (5) puts the child to bed and wakes the child up in the morning; (6) disciplines the child; and (7) teaches the child to read and write.

37. *Cf.* Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

38. *See, e.g.*, Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 885 (1994) (reversing a custody award to father and naming mother primary caretaker because she was the parent who had cared for the children throughout their lives); Smith v. Smith, 294 S.C. 194, 197, 363 S.E.2d 404, 406 (Ct. App. 1987) (naming a mother as primary caretaker because she had assumed most of the parental responsibilities for the children all their lives and the children had lived with her since separation).

39. 294 S.C. 190, 363 S.E.2d 402 (Ct. App. 1987).

40. *Id.* at 193, 363 S.E.2d at 403.

41. STUCKEY & SMITH, *supra* note 31, at 333.

42. *See* Wheeler v. Gill, 307 S.C. 94, 413 S.E.2d 869 (Ct. App. 1992).

to provide more significant financial resources than Donald could.[43] Also, during the twenty months in which Ruth had temporary custody, she provided Maxfield with regular access to and encouraged nurturing relationships with relatives and peers.[44] The paternal grandparents testified as to their regular, almost daily, association with Maxfield and described their relationship with Maxfield as close and loving.[45]

The child's adjustment to the home, school, and community, and how the child's best interests are being furthered in the current custodial arrangement are also relevant factors to be considered in a custody determination.[46] South Carolina follows the presumption that maintaining a current custodial setting is preferable to removal of the child.[47] During the twenty months in which Ruth retained temporary custody of Maxfield, he attended the same school and synagogue. Even though Maxfield proved to be thriving during the time he was in custody of the mother,[48] and no evidence indicated that placement was inappropriate, the court did not mention stability and continuity as relevant factors.

The court in *Parris* also seems to have overlooked a statute that recognizes religion as a factor to be considered in evaluating the competence of the parents, preferring the parent espousing the same religious faith as the child.[49] Ruth is Jewish, and Donald is Methodist.[50] Maxfield regularly attended Jewish Sunday School.[51] While it is arguable that children of tender years are not capable of deciding their own religious preference, surely an eleven-year-old, like Maxfield, would have some predisposition.

The last of the three factors South Carolina courts most commonly cite in custody decisions is the opinion of third parties, including the testimony of guardians ad litem, expert witnesses, and the opinion of the child.[52] The

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43. *Parris*, ___ S.C. at ___, 460 S.E.2d at 571; Record at 34.

44. Brief of Appellant at 10; Record at 321-29.

45. Record at 321-23, 329.

46. *See, e.g.*, McAlister v. Patterson, 278 S.C. 481, 482-83, 299 S.E.2d 322, 323 (1982) (finding both parents to be fit, the judge determined removal of the child from familiar surroundings would not benefit the child).

47. *Id.* at 483, 299 S.E.2d at 323. The custody dispute in *McAlister* involved a request for a change in a permanent award, but in *Parris* Ruth had only a temporary custody award. The policy reasons—furthering the child's stability by providing continuity of community activities and relationships—however, remain the same in both cases.

48. Record at 38.

49. S.C. CODE ANN. § 20-7-1520 (Law Co-op. 1985).

50. Record at 144.

51. *Id.* at 144.

52. STUCKEY & SMITH, *supra* note 31, at 336. In addition, courts have considered the testimony of social service agencies, hospital professionals, and family court officials. *See, e.g.*, McSwain v. Holmes, 269 S.C. 293, 297, 237 S.E.2d 363, 364 (1977) (considering testimony for the Department of Social Services); *Ex parte* Roper, 254 S.C. 558, 561, 176 S.E.2d 175, 176

court in *Parris* did look to the opinions of third parties. The guardian ad litem and the court-appointed psychologist found both the mother and father to be fit.[53] Though Maxfield's doctor testified that Donald would be better suited to serve as the custodial parent because Donald instructed and encouraged the child and was "in tune" with the child,[54] the court-appointed psychologist felt that both parents deserved custody and urged the court to allow the child continued access to both.[55] The psychologist concluded that the eleven-year-old child was healthy, emotionally stable, "very intelligent, [and] very mature in a lot of ways."[56] He also noted that the child preferred to live with the mother during the school year and to spend time with the father in the summer.[57] In determining the amount of weight given to be given to a child's spoken preference, courts first consider the child's age and maturity.[58] Perhaps the court should have more strongly considered Maxfield's preference, especially in light of the court-appointed psychologist's evaluation of Maxfield as very mature. The psychologist concluded, "I do not think that with a child of this age that the child's wishes should always predominate, but this is a pretty perceptive kind of child."[59]

The court's failure to mention these relevant factors and instead resting the Parris's custody determination primarily on the childcare responsibilities of the father is a deviation from past decisions. Perhaps the *Parris* court meant to modify South Carolina custody law to adopt a universal application of the primary caretaker presumption even in the absence of a true primary caretaker. It is the position of this author that such a modification would be detrimental to the commonly stated goal of honoring the child's best interests.

Although Mrs. Parris's allegations of gender bias were summarily dismissed and the case ultimately decided by an unusually dominant application of the primary caretaker presumption, evidence suggests that some courts have, in fact, treated mothers and fathers differently in determining custody

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(1970) (considering testimony from the mental health center).

53. *Parris*, ___ S.C. at ___, 460 S.E.2d at 572.

54. *Id.* at ___, 460 S.E.2d at 572.

55. Supp. Record at 36-37.

56. *Id.* at 17.

57. *Id.* at 18-19.

58. *See* Moorhead v. Scott, 259 S.C. 580, 193 S.E.2d 510 (1972) (holding that the wishes of children ages 9, 11, and 12 were not determinative because the court determined it would be far more beneficial for the children to live with their mother and her new husband). Yet, the court did state, "It is clear that the wishes of a child of any age may be considered under all the circumstances, but the weight given to those wishes must be dominated by what is best for the welfare of the children." *Id.* at 585, 193 S.E.2d at 513. *See also* Guinan v. Guinan, 254 S.C. 554, 176 S.E.2d 173 (1970) (giving substantial weight to the wishes of a sixteen-year-old); Poliakoff v. Poliakoff, 221 S.C. 391, 70 S.E.2d 625 (1952) (giving little significance to the wishes of a six-year-old girl).

59. Supp. Record at 18.

awards. For example, some judges have assessed the personal and parental behavior of mothers and fathers according to different standards.[60] That is, some courts have allegedly overvalued male contributions to caretaking responsibilities while attributing minimal weight to those of the mother.[61] Such a tendency would come as no surprise when one considers common societal expectations of mothers as caretakers and fathers as breadwinners. Other courts have possibly scrutinized a mother's work schedule more critically than a father's schedule.[62] Still others have allegedly held women to a higher moral standard.[63] Finally, courts have allegedly criticized mothers for relying on others for childcare and credited fathers for having such caretakers available.[64]

American society has become aware of the injurious effects of sex discrimination on working mothers in judicial custody determinations.[65] In fact, the judiciary itself created independent task force commissions to uncover discrimination in the judicial system,[66] and many judges acknowledge gender bias in American courtrooms.[67] These state task force commissions have

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60. Lynn H. Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 192 (1990).

61. *Id.* (citing MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, GENDER BIAS IN THE COURTS 29 (1989)); *see* Mary A. Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 25-26 (1990-91).

62. *See, e.g.* Richmond v. Tecklenberg, 302 S.C. 331, 336, 396 S.E.2d 111, 114 (Ct. App. 1990) (emphasizing that the mother, an obstetrician, "would make daily rounds at the hospital and have to schedule time for surgery, be available for emergencies and deliver babies" and failing to comment on the father's schedule, noting only that he was "in the oil business"); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 239 (1982).

63. Schafran, *supra* note 60, at 192 (citing REPORT OF THE GENDER BIAS STUDY OF THE MASSACHUSETTS SUPREME JUDICIAL COURT at 59, 62-66 (1989)).

64. Jennifer E. Horne, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2134 (1993).

65. John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 742 (1971).

66. *See* Schafran, *supra* note 60, at 181-86; REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, *published in* 42 FLA. L. REV. 803, 803 (1990); THE FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS — JUNE 1984, *published in* 9 WOMEN'S RTS. L. REP. 129, 136 (1986) [hereinafter NEW JERSEY REPORT]; Sol Wachtler, *The Lady in the Harbor and the Lady in Albany—Two Symbols of Freedom*, 15 FORDHAM URB. L.J. 3 (1986-87).

67. Stereotyped thinking about the nature and roles of the sexes, devaluation of women and what is perceived as women's work, and myths and misconceptions about the social and economic realities of women's and men's lives are as prevalent in the justice system as in the other institutions of society. In the courts these three aspects of gender bias distort decision making and create a courtroom environment that undermines women's credibility.

found that women are often denied equal justice and face differing treatment and opportunities than their male counterparts.[68]

The family court judge in *Parris*, by not mentioning all relevant factors that may have been favorable to the mother in determining custody, may have placed undue emphasis on Ruth's career as a successful, competitive working woman. This emphasis on Ruth's career could have led the court to find that Donald had more free time during the day than Ruth to spend with Maxfield.[69] Ruth maintained employment as a real estate agent throughout the marriage, except for the one year after Maxfield was born when Ruth took leave from work in order to spend time with and care for the child.[70] She had achieved much success and was described as one of the most successful residential realtors on Hilton Head.[71] Ruth's schedule was flexible and allowed her to take Maxfield to and from school as well as spend additional time with him,[72] but neither the family court order nor the appellate court opinion ever mentioned this fact. In contrast, Donald was involved in numerous real estate projects throughout the marriage, never settling down to build a successful career.[73] He served as an independent financial consultant in the 1970's before he began his own development company.[74] He was employed for a time by Marathon Oil Company,[75] but in 1987 he again pursued a private effort in real estate management and consulting, which required him to work at the office on weekends.[76] The court stated that Don Parris "was actively involved with the management of the family income and finances, whereas Defendant concentrated on her career and aggressively pursued income production."[77] The court noted that Ruth "enjoyed her job and real estate career which she has pursued competitively and aggressively"[78] and further described her as a "woman, who in the past has not been

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NATIONAL CONFERENCE OF STATE TRIAL JUDGES, AMERICAN BAR ASSOCIATION, THE JUDGE'S BOOK 66 (1989).

68. Schafran, *supra* note 60, at 187. For example, the New Jersey task force concluded the following: "Although the law as written is for the most part gender neutral, stereotyped myths, beliefs, and biases were found to sometimes affect judicial decision-making . . . . In addition, there is strong evidence that women and men are sometimes treated differently in courtrooms, in chambers, and at professional gatherings." NEW JERSEY REPORT, *supra* note 66, at 136.

69. *Parris*, ___ S.C. at ___, 460 S.E.2d at 572.

70. Record at 34-35, 113.

71. *Parris*, ___ S.C. at ___, 460 S.E.2d at 571.

72. Record at 346-47.

73. *Id.* at 109-11.

74. *Id.* at 109.

75. *Id.* at 110-111.

76. *Id.* at 109-110, 347.

77. *Id.* at 34.

78. *Id.* at 36.

particularly family oriented."[79] Curiously, the court did not recognize the family's need for Ruth to produce income in light of Donald's job instability.

Another suggestion of gender bias is that the family court order credited Ruth with creating the need for the housekeeper while placing emphasis on Donald's contributions to caretaking responsibilities. The final order states:

> The evidence reflects that there have been problems during this twelve (12) year marriage over conflicts between Defendant's [Ruth's] career goals and objectives, and her marital situation. To accommodate the conflicts between career, family and marriage the parties . . . employed a full time housekeeper, and Plaintiff has assumed many of the household responsibilities.[80]

Though the housekeeper was jointly employed by both parties and was hired to accommodate both parents' conflicts between career and family, the family court order at least inferred that the need for a housekeeper was more Ruth's fault than Donald's. The maid, Doris Luden, was hired two months after Maxfield was born.[81] For the first four years of Maxfield's life, Doris worked all day until either Ruth or Donald returned home from work, which was usually around 6:00.[82] She took care of Maxfield during the day, cleaned, sewed, fed Maxfield, and cooked the family's dinner.[83] The description of the maid's assigned duties illustrates that her services were used by both Donald and Ruth in an effort to raise their son in a two-career family. In stating that the "[p]laintiff has assumed many of the household responsibilities,"[84] the court tends to give Donald credit for carrying out some of the household responsibilities without equally crediting Ruth with her share.

Not withstanding the above possibilities of gender bias manifest, the Supreme Court of South Carolina rather summarily awarded custody to the father. The trial court had labeled Ruth a "'very determined, easily angered career woman'"[85] who is "'perceived in the business community as an aggressive competitive individual.'"[86] The supreme court noted that those adjectives are "gender neutral and would apply equally to a male parent."[87] The court, however, did "caution the Family Courts to use the utmost

79. *Id.* at 40.
80. *Id.* at 35.
81. *Id.* at 116.
82. *Id.* at 118.
83. *Id.* at 118.
84. *Id.* at 35.
85. *Parris*, ___ S.C. at ___, 460 S.E.2d at 572-73.
86. *Id.* at ___, 460 S.E.2d at 573.
87. *Id.* at ___, 460 S.E.2d at 573.

circumspection in phrasing orders to ensure that the language is not susceptible of connotations such as those imputed by Mother here."[88]

In summary, the supreme court in *Parris* did not find gender bias present in the custody award, but rather affirmed an unprecedented application of the primary caretaker presumption without regard to other factors which may have been favorable to the mother. The court also dismissed the possibility that the lower court's decision was effected through bias. Perhaps the court meant to extend the application of the primary caretaker presumption to award custody based on the mere balancing of caretaking duties of each parent without regard to other relevant factors in the custody determination. This conclusion seems unlikely considering it would constitute a step away from the child's best interests. In order to avoid the dangers resulting from application of the primary caretaker presumption to facts such as in *Parris*, in which both parents share parental duties in nearly equal measure, and to ensure custody determinations that will promote the best interests of the child, this author suggests following West Virginia's rule -- apply the primary caretaker presumption only when one parent has "clearly" taken the primary responsibility for caretaking duties. When both parents have shared parental responsibilities without significant, relative disparity, the South Carolina courts should abandon the primary caretaker presumption and base decisions on other relevant factors previously considered determinative in custody disputes.

Anna Maria Maxwell

88. *Id.* at ___, 460 S.E.2d at 573.