The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF K. DOUGLAS THORNTON, PETITIONER

K. Douglas Thornton, who was definitely suspended from the practice of law on September 25, 2000, for a period of six months and one day, retroactive to February 15, 2000, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 8, 2001, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

April 19, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 23, 2001

ADVANCE SHEET NO. 15

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Juanita Boone, Appellant,

v.

Freddie Boone, Respondent.

Appeal From Berkeley County
A. Victor Rawl, Circuit Court Judge

Opinion No. 25283
Heard March 20, 2001 - Filed April 23, 2001

REVERSED

Thomas M. White, of Steinberg Law Firm, of Goose Creek, for appellant.

Frank E. Grimball, Thomas B. Pritchard, and Phillip S. Ferderigos, of Barnwell, Whaley, Patterson & Helms, LLC, of Charleston, for respondent.

JUSTICE BURNETT: The question presented by this appeal is whether interspousal immunity from personal injury actions violates the

public policy of South Carolina. We conclude it does.

FACTS

Appellant Juanita Boone (Wife) was injured in a car accident in Georgia. At the time of the accident, Wife was a passenger in a vehicle driven by her husband Respondent Freddie Boone (Husband). Wife and Husband reside in South Carolina.

Wife brought this tort action against Husband in South Carolina. Concluding Georgia law which provides interspousal immunity in personal injury actions was applicable, the trial judge granted Husband's motion to dismiss. Wife appeals. We reverse.

ISSUE

Does Georgia law providing interspousal immunity in personal injury actions violate the public policy of South Carolina?

DISCUSSION

I. Interspousal Immunity

Interspousal immunity is a common law doctrine based on the legal fiction that husband and wife share the same identity in law, namely that of the husband. 92 A.L.R.3d 901 (1979). Accordingly, at common law, it was "both morally and conceptually objectionable to permit a tort suit between two spouses." Id. at 906.

With the passage of Married Women's Property Acts in the mid-nineteenth century, married women were given a legal estate in their own property and the capacity to sue and be sued. Under this legislation, a married woman could maintain an action against her husband for any tort against her property interest such as trespass to land or conversion. Since the

legislation destroyed the "unity of persons," a husband could also maintain an action against his wife for torts to his property. See 1 DAN B. DOBBS, THE LAW OF TORTS § 279 (2001); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122 (5TH ed. 1984); RESTATEMENT (SECOND) OF TORTS § 895F cmt. c (1979).

For a long time, however, the majority of courts held Married Women's Property Acts did not destroy interspousal immunity for personal torts. Courts adopted two inconsistent arguments in favor of continued immunity. First, they theorized suits between spouses would be fictitious and fraudulent, particularly against insurance companies. Second, they claimed interspousal suits would destroy domestic harmony. Id.; Dobbs, supra, Keeton, supra.

In the twentieth century, most courts either abrogated or provided exceptions to interspousal immunity. See Johnson v. Johnson, 77 So. 335 (Ala. 1917); Drickerson v. Drickerson, 546 P.2d 162 (Alaska 1976); Fernandez v. Romo, 646 P.2d 878 (Ariz. 1982); Katzenberg v. Katzenberg, 37 S.W.2d 696 (Ark. 1931); Klein v. Klein, 376 P.2d 70 (Cal. 1962); Rains v. Rains, 46 P.2d 740 (Colo. 1935); Brown v. Brown, 89 A. 889 (Conn. 1914); Beattie v. Beattie, 630 A.2d 1096 (Del. 1993); Waite v. Waite, 618 So.2d 1360 (Fla. 1993); Lorang v. Hays, 209 P.2d 733 (Idaho 1949); Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972); Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979); Flagg v. Loy, 734 P.2d 1183 (Kan. 1987); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); Boblitz v. Boblitz, 462 A.2d 506 (Md. 1983); Lewis v. Lewis, 351 N.E.2d 526 (Mass. 1976); Hosko v. Hosko, 187 N.W.2d 236 (Mich. 1971); Beaudette v. Frana, 173 N.W.2d 416 (Minn. 1969); Burns v. Burns, 518 So.2d 1205 (Miss. 1988); S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986); Miller v. Fallon County, 721 P.2d 342 (Mont. 1986); Imig v. March, 279 N.W.2d 382 (Neb. 1979); Rupert v. Steine, 558 P.2d 1147 (Nev. 1977); Gilman v. Gilman, 95 A. 657 (N.H. 1915); Merenoff v. Merenoff, 388 A.2d 951 (N.J. 1978); Maestas v. Overton, 531 P.2d 947 (N.M. 1975); State Farm Mut. Auto. Ins. Co. v. Westlake, 324 N.E.2d 137 (N.Y. 1974); Crowell v. Crowell, 105 S.E. 206 (N.C. 1920); Fitzmaurice v. Fitzmaurice, 242 N.W.

526 (N.D. 1932); Shearer v. Shearer, 480 N.E.2d 388 (Ohio 1985); Fiedeer v. Fiedeer, 140 P. 1022 (Okla. 1914); Heino v. Harper, 759 P.2d 253 (Or. 1988); Hack v. Hack, 433 A.2d 859 (Pa. 1981); Digby v. Digby, 388 A.2d 1 (R.I. 1978); Scotvold v. Scotvold, 298 N.W. 266 (S.D. 1941); Davis v. Davis, 657 S.W.2d 753 (Tenn. 1983); Price v. Price, 732 S.W.2d 316 (Tex. 1987); Stoker v. Stoker, 616 P.2d 590 (Utah 1980); Richard v. Richard, 300 A.2d 637 (Vt. 1973); Surratt v. Thompson, 183 S.E.2d 200 (Va. 1971); Coffindaffer v. Coffindafffer, 244 S.E.2d 338 (W. Va. 1978); Wait v. Pierce, 209 N.W. 475 (Wis. 1926); Tader v. Tader, 737 P.2d 1065 (Wy. 1987).[1] South Carolina has abolished the doctrine of interspousal immunity from tort liability for personal injury. Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); see S.C. Code Ann. § 15-5-170 (1976) ("[a] married woman may sue and be sued as if she were unmarried. When the action is between herself and her husband she may likewise sue or be sued alone.").

Very few jurisdictions now recognize interspousal tort immunity. See Mountjoy v. Mountjoy, 206 A.2d 733 (D.C. 1965); Bassett v. Harrington, 2000 WL 1868206 (Ga. App. 2000); Peters v. Peters, 634 P.2d 586 (Haw. 1981); see also Williams v. Williams, 439 N.E.2d 1055 (Ill. App. Ct. 1982), aff'd as modified, 455 N.E.2d 1388 (1983) (although Rights of Married Women Act originally abrogated husband's common law immunity, legislature restored immunity through amendment to Act); Cloud v. State Farm Mut. Auto. Ins. Co., 440 So.2d 961 (La. App. 1983) (spouses have no right to sue one another on basis of negligent injury).

Georgia continues to recognize the common law doctrine of interspousal immunity. See Ga. Code Ann. § 19-3-8 (1999). Under Georgia law, interspousal tort immunity bars personal injury actions between spouses, except where the traditional policy reasons for applying the doctrine are absent, i.e., where there is no marital harmony to be preserved and where

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[1]The Restatement simply provides "[a] husband or wife is not immune from tort liability to the other solely by reason of that relationship." RESTATEMENT (SECOND) OF TORTS § 895F, supra.

there exists no possibility of collusion between the spouses. Shoemake v. Shoemake, 407 S.E.2d 134 (Ga. App. 1991).

II. Choice of Law

Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the lex loci delicti, the law of the state in which the injury occurred. Lister v. Nationsbank of Delaware, N.A., 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997); Bannister v. Hertz Corp., 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994). However,

> foreign law may not be given effect in this State if 'it is against good morals or natural justice . . .' . . . The 'good morals or natural justice' of our State are not violated when foreign law is applied to preclude a tort action for money damages, whether against an individual or the State, even if recovery may be had upon application of South Carolina law. '[T]he fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other.'

Dawkins v. State, 306 S.C. 391, 393, 412 S.E.2d 407, 408 (1991) citing Rauton v. Pullman Co., 183 S.C. 495, 508, 191 S.E. 416, 422 (1937) (court will refuse to follow law of lex loci when it is against good morals or natural justice, or "for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens."). Accordingly, under the "public policy exception," the Court will not apply foreign law if it violates the public policy of South Carolina.

Although South Carolina had abolished the doctrine of interspousal immunity from tort liability for personal injury thirty years before, this Court held it would apply the law of the foreign state even if it recognized interspousal immunity. Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964). If a spouse had no right of action against her spouse where the tort occurred, the action would not be enforced in South Carolina. Id.

In Algie v. Algie, 261 S.C. 103, 198 S.E.2d 529 (1973), the Court expressly declined to overrule Oshiek v. Oshiek, supra. In Algie, the parties lived in Florida. The wife was injured in an airplane accident in South Carolina. Her husband had piloted the airplane. The husband urged the Court to apply Florida law which, at that time, recognized interspousal immunity. The Court declined, noting "[w]e are not persuaded that this result would be in furtherance of justice." Id. S.C. at 106, S.E.2d at 530.

III. Analysis

It is the public policy of our State to provide married persons with the same legal rights and remedies possessed by unmarried persons. See Bryant v. Smith, 187 S.C. 453, 198 S.E. 20 (1938) (recognizing purpose of predecessor to § 15-5-170 is to give married women all rights and remedies possessed by unmarried women); see also S.C. Code Ann. § 16–3-615 (Supp. 2000) (amending law to provide spouse may be convicted of sexual battery against spouse). Had the parties to this action not been married to each other, Wife could have maintained a personal injury action against Husband. We find it contrary to "natural justice," see Rauton v. Pullman Co., supra, to hold that because of their marital status, Wife is precluded from maintaining this action against Husband. Accordingly, we conclude application of the doctrine of interspousal immunity violates the public policy of South Carolina.

Moreover, the reasons given in support of interspousal immunity are simply not justified in the twenty-first century. There is no reason to presume married couples are more likely than others to engage in a collusive action. Whether or not parties are married, if fraudulent conduct is suspected, insurers can examine and investigate the claim and, at trial, cross-examine the parties as to their financial stakes in the outcome of the suit. Fraudulent claims would be subject to the trial court's contempt powers and to criminal prosecution for perjury and other crimes. It is unjustified to prohibit all personal injury tort suits between spouses simply because some suits may be fraudulent.

Additionally, we do not agree that precluding spouses from maintaining a personal injury action against each other fosters domestic harmony. Instead, we find marital harmony is promoted by allowing the negligent spouse, who has most likely purchased liability insurance, to provide for his injured spouse. See Elam v. Elam, 275 S.C. 132, 268 S.E.2d 111 (1980) (Court considered existence of universal automobile liability insurance a relevant factor in abolishing common law doctrine of parental immunity).

Furthermore, in Georgia, spouses may maintain an action against each other for torts committed against their property. See Robeson v. Int'l Indem. Co., 282 S.E.2d 896 (Ga. 1981). If suits encompassing one type of tort are permitted between spouses, we fail to see how suits encompassing a different tort should be prohibited under the guise of protecting domestic tranquility. In our opinion, marital disharmony will not increase because married persons are permitted to maintain a personal injury action against each other.

Finally, we recognize the Court previously declined to overrule the lex loci delicti doctrine with regard to interspousal personal injury suits. Algie v. Algie, supra. However, in Algie, the lex loci delicti (South Carolina) permitted personal injury suits between spouses. Accordingly, South Carolina's public policy was not violated by continuation of the lex loci delicti doctrine in that case. Unlike Algie, declining to apply interspousal immunity here "would be in the furtherance of justice." Id. S.C. at 106, S.E.2d at 530.

Because interspousal immunity violates the public policy of South Carolina, we will no longer apply the lex loci delicti when the law of the foreign state recognizes the doctrine. Oshiek v. Oshiek, supra, is overruled.

REVERSED.

TOAL, C.J., MOORE, WALLER, PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

Michael Rochelle Wilson, Respondent/Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25284
Heard March 6, 2001 - Filed April 23, 2001

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor C. Kelly

Jackson, of Sumter, for petitioner/
respondent.

Assistant Appellate Defender Tara S. Taggart, of S.C.
Office of Appellate Defense, for respondent/
petitioner.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision in State v. Wilson, 337 S.C. 629, 524 S.E.2d 411 (Ct. App. 1999). In a split decision, the Court of Appeals reversed respondent/petitioner's (Defendant's) conviction for possession with intent to distribute crack cocaine on the ground evidence of a prior drug sale was not clear and convincing and should not have been admitted. We reverse.

FACTS

On August 24, 1995, law enforcement officers knocked on the door of room 220 of the Down Towner Motel in Sumter to execute a search warrant. When there was no response, they used a battering ram to knock down the door. Officers heard the commode flushing as they were attempting to enter. When officers finally broke into the room, they found Defendant and his girlfriend, Mona Lisa Mitchell, along with .78 grams of crack cocaine, baggies, a beer can modified as a smoking device, and $761 in cash. Both Defendant and Mitchell were charged with possession with intent to distribute crack cocaine.

Mitchell pled guilty to simple possession in exchange for her testimony against Defendant. At trial, she testified she was living with Defendant at the Down Towner in August 1995. When officers came to the door, Defendant went into the bathroom and she heard a flushing sound. Over Defendant's objection, Mitchell testified that she had seen Defendant sell drugs to an unidentified woman a couple of days earlier at the Down Towner. Mitchell testified she saw Defendant give the woman a plastic bag with a white rock substance in it in exchange for twenty dollars.

Defendant testified the crack seized from the motel room was not his. He testified he could not see what was in the room when he came in at 4:30 a.m. Mitchell was already sleeping and it was dark. He and Mitchell were still sleeping when officers broke in.

The trial judge submitted both possession with intent to distribute and simple possession to the jury. Defendant was convicted of possession with intent to distribute and sentenced to twenty-five years with a fine of $50,000.[1]

ISSUES

1. Did the Court of Appeals apply the proper standard of review?

2. Did the trial judge properly admit the evidence of Defendant's prior drug transaction?

DISCUSSION

The State contends the Court of Appeals erred in finding the prior drug transaction was not proved by clear and convincing evidence.

The Court of Appeals found Mitchell's uncorroborated testimony did not meet the standard of clear and convincing evidence because she was not a credible witness and her testimony "could just as easily have been made up for personal gain." The dissenter would have held Mitchell's credibility did not determine the admissibility of this evidence but instead was an issue for the jury.

Under Rule 404(b), SCRE, evidence of other bad acts is admissible to show motive, identity, common scheme or plan, the absence of mistake or accident, or intent. *See also* State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

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[1]Defendant had a prior 1994 conviction for distributing crack.

To be admissible, other crimes that are not the subject of conviction must be proved by clear and convincing evidence. State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998); State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997).

At the heart of this issue is the appropriate standard of review on appeal in determining the admissibility of bad act evidence. The Court of Appeals took a *de novo* approach and found, in its own view of the evidence, the proof of Defendant's prior drug transaction was not clear and convincing. This was error.

In criminal cases, the appellate court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. For instance, in order for a confession to be admissible, the State must prove a voluntary waiver of the defendant's Miranda rights by a preponderance of the evidence. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). On review, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Rochester, *supra*. This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. *See* In re: Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) (an abuse of discretion is a conclusion with no reasonable factual support).[2]

Similarly, we do not review a trial judge's ruling on the admissibility of

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[2]*See also* Kiriakides v. Atlas Food Sys. and Servs., Inc., ___ S.C. ___, 541 S.E.2d 257 (2001) (In a case of fraud, which is also an action at law where the proof must be by clear and convincing evidence, the appellate court's scope of review is limited to determining whether there is any evidence reasonably supporting the trial court's finding.)

other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal.[3]

Applying this standard of review, we hold it was error for the Court of Appeals to base its ruling on Mitchell's credibility. Her testimony that she saw Defendant give a woman a plastic bag with a white rock substance in it in exchange for twenty dollars factually supports the admission of this testimony as evidence of a prior drug transaction. Mitchell's credibility was an issue for the jury's consideration.[4]

Defendant claims on cross-appeal that even if Mitchell's testimony was admissible bad act evidence under Rule 404(b), this evidence was not relevant and therefore should not have been admitted. *See* State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000) (there must be logical relevance between bad act and the crime for which defendant is accused); *see also* Rule 402, SCRE.

We have held that evidence of a prior drug transaction is relevant on

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[3]Although we have never articulated this standard of review in the context of bad act evidence, we have in fact applied it on review of such cases. *See, e.g.*, State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (evidence of prior child abuse inadmissible where there was no evidence defendant inflicted previous injury); State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989) (evidence of prior murder inadmissible where there was no evidence placing defendant at scene); State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977) (evidence of prior poisoning inadmissible where there was no evidence except that defendant was wife of decedent and decedent had life insurance); *see also* State v. Cutro, 504 S.E.2d at 335, n. 4 (evidence of prior infant deaths inadmissible where there was lack of evidence defendant was the perpetrator if there was one).

[4]Mitchell admitted she had pled guilty to a lesser offense in exchange for her testimony and that she had a prior conviction for twelve counts of passing worthless checks.

the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute. State v. Gore, 299 S.C. 368, 384 S.E.2d 750 (1989). In Gore, the prior sale occurred one month before the charged offense; here, the prior sale was only "a couple days" earlier. Under Gore, this evidence is relevant on the issue of intent.

Defendant further contends Mitchell's testimony should be excluded because its probative value was outweighed by its prejudicial effect.

Evidence of other crimes, even if logically relevant to prove intent, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Brooks, *supra*; *see also* Rule 403, SCRE. The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case. State v. Brooks, *supra*. Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991).

Here, the amount of crack seized was less than one gram and the element of intent was not subject to the statutory prima facie showing. *See* S.C. Code Ann. § 44-53-375(B) (Supp. 2000) (prima facie evidence of intent to distribute crack cocaine if one or more grams). The State argued the number of baggies found in the motel room, the amount of cash, and the evidence of flushing indicated a larger amount was present before officers entered the room. The State also relied on testimony that Defendant himself did not smoke crack to argue the crack in Defendant's possession was not for personal use but for distribution.

In light of the State's reliance on circumstantial evidence to prove intent, the evidence of a prior drug transaction only two days earlier at the same location was especially probative. Further, its probative value was not substantially outweighed by the danger of suggesting a decision on an emotional or other improper basis. We find the trial judge did not abuse his discretion in admitting this evidence. Accordingly, we reverse the Court of Appeals' decision and reinstate Defendant's conviction.

REVERSED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Carolyn Elizabeth Craig, Respondent.

Opinion No. 25285
Submitted March 21, 2001 - Filed April 23, 2001

DISBARRED

Henry B. Richardson, Jr., and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Carolyn E. Craig, pro se, of Christiansburg, Virginia.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. Respondent admits misconduct and consents to disbarment. She also consents to pay restitution as described in the agreement and pay the cost of these proceedings. We accept the agreement and disbar respondent. The facts as admitted in the agreement are as follows.

I.

Respondent misappropriated $62,120.34 while acting as a closing agent for a single family residential mortgage transaction. In September 1998, Standard Federal Bank of Michigan (Standard) sent a draft payable to the Craig Law Firm in the amount of $62,120.34. The funds were to be held in trust by respondent and disbursed according to the closing instructions that accompanied the check. The parties cancelled the transaction, obligating respondent to return the funds to Standard. Respondent sent Standard a check dated September 1998 from her Coastal Federal trust account, but the check was returned for insufficient funds. The balance in respondent's trust account was below the amount of $62,120.34 on October 7, 1998 and went as low as $3.95 on February 28, 1999. During the period between September 1998 and February 1999, respondent wrote twenty-three checks to "cash" in the amount of $57,750. Respondent has not responded to Standard's many inquiries about the return of its funds.

II.

Respondent opened an escrow account with NationsBank in November 1998. On December 21, 1998, respondent deposited funds into the account, including the amount of $5,767.75, for a client in connection with real estate closings she was handling for him. Beginning on or about March 11, 1999, funds in the escrow account dropped below the amount of $5,767.75. By the end of March, the account balance was $18.43. No disbursement of these funds was made for the client's purposes. On December 21, 1998, respondent wrote a check on this account to Spaulding and Evenflo Company for $5,767.75 for the client. The check was presented on April 30, 1999 and returned for insufficient funds. Respondent misappropriated these funds.

III.

Respondent was not diligent in representing Husband and Wife in an adoption matter. Respondent failed to provide her clients with their file

when they terminated her representation of them and lost documents her clients had provided her. Respondent failed to appear at family court hearings on January 12 and 29 and February 26, 1999 although she had been given notice of the hearings. She misrepresented to the court that she was unable to attend the January hearings due to illness when she was not actually ill. She failed to turn over her clients' entire file to attorney Jay M. Bultz as ordered at the January 26 hearing. As a result, she was found in civil contempt by order of the Honorable Robert Armstrong, family court judge. She was sentenced to thirty days imprisonment but was permitted to purge herself of the contempt by turning over the specified file material. She failed to submit a doctor's certificate as ordered by the family court. As a result, she was found in criminal contempt by Judge Armstrong and sentenced to 72 hours imprisonment. Respondent was arrested and incarcerated on March 25, 1999. Pursuant to an interim order of the Honorable H.T. Abbott, III, on March 26, 1999, respondent was released from the civil contempt sanction due to substantial resolution of the purge provisions. The 72 hour incarceration was modified, and she was ordered released at 8:00 a.m. on March 27, 1999. On March 26, 1999, respondent paid the clients $2,443.14 for attorneys fees and costs as ordered by Judge Armstrong. At the hearing, subsequent counsel for the clients, Jay Bultz, verified that the fees and costs were eventually paid by respondent, but the amount ordered covered only the fees and costs associated with the rules to show cause and the hearings, not the $1,000 paid by the clients for the adoption. Wife testified that respondent did not earn the fee $1,000. Mr. Bultz testified that although respondent did turn over file material, some key documents were missing and he had to reconstruct them.

IV.

A client retained respondent on August 4, 1998 regarding his divorce and paid her $1,500 for attorneys fees. Respondent failed to do any significant work for her client and failed to appear in court on his behalf at a hearing scheduled for January 11, 1999. Respondent failed to return the client's calls and has not refunded his attorneys fees. According to the hearing testimony of Thomas D. (Val) Guest, the client is now deceased. Mr.

Guest assumed the representation of the client after he obtained a release from respondent. While reviewing the client's file, Mr. Guest learned of a settlement offer which was never tendered to the client by respondent. Had she sent him the settlement offer, the client would have accepted it, but the offer was no longer valid when Mr. Guest found it.

V.

Respondent undertook to represent a client in a family court matter. In pleadings in that matter, she failed to request that her client receive a share of her spouse's retirement. Respondent was dilatory in responding to discovery requests. Respondent failed to protect her client's interests after her termination from her former firm. Respondent left the Surfside Beach area for an extended period of time without advising her client how she could contact her and without notifying her how long she would be gone. Respondent failed to notify the court of her absence and failed to seek protection. Respondent failed to inform her client of a court-ordered mediation scheduled for the period of her absence and the necessity of her attendance, and a hearing to compel discovery. Neither respondent nor her client attended either the mediation or the hearing. Respondent's client was fined $500 for her failure to attend the mediation. Respondent did not reimburse her client for the $500, nor did respondent earn all of the $4,000 legal fee the client paid her. Additionally, when the client eventually tracked down respondent in Florida, respondent asked her client to do the work of arranging witnesses for a hearing.

VI.

Respondent wrote a number of checks on both the Coastal and NationsBank escrow accounts payable to "cash."

VII.

The Honorable H.T. Abbott, III, family court judge, reported respondent's failure to appear at roster meetings in his court in January and

February 1999. Respondent failed to appear at the February 25, 1999 call of an abuse and neglect case for which she was guardian ad litem and Judge Abbott, on his own motion, removed her as guardian due to difficulties communicating with her.

VIII.

Attorney appointed to assist, Thomas D. Guest, Jr., reported respondent's failure to respond to numerous inquiries from clients about matters for which she was counsel.

IX.

Respondent failed to respond to letters of inquiry from the ODC and notice of full investigation as to all of the above complaints except one (although apparently no separate letters of inquiry were sent as to the second misappropriation matter).

X. Conclusions

Respondent has engaged in a high degree of misconduct including misappropriation, lack of diligence for her clients, failure to communicate, failure to obey court orders, and failure to cooperate with the investigation of these matters.

By her conduct, respondent violated the following provisions of the Rules of Professional Conduct (Rule 407, SCACR):

- Appropriated client funds to her own use. Rule 1.15.
- Failed to deliver promptly to a client or third person funds that the client or person was entitled to receive. Rule 1.15.
- Failed to render promptly a full accounting regarding property of the client or third person. Rule 1.15.

•Committed criminal acts that reflect adversely upon the lawyer's honesty, trustworthiness, and fitness as a lawyer in other respects. Rule 8.4(b).
•Engaged in conduct involving moral turpitude. Rule 8.4(c).
•Engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation. Rule 8.4(d).
•Knowingly made a false statement of material fact or law to a tribunal. Rule 3.3(a)(1).
•Failed to act with reasonable diligence and promptness in representing a client. Rule 1.3.
•Failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. Rule 1.4(a).
•Failed to represent a client competently. Rule 1.1
•Terminated representation without taking steps to protect client interests. Rule 1.16.
•Engaged in conduct that is prejudicial to the administration of justice. Rule 8.4(e).

Respondent also violated the following Rules for Lawyer Disciplinary Enforcement (Rule 413, SCACR):

•Willfully violated a valid court order issued by a court of this state. Rule 7(a)(7).
•Knowingly failed to respond to a lawful command from a disciplinary authority to include a request for a response or appearance. Rule 19(b)(1) and (c)(3).
•Violated the Oath of Office taken upon admission to the practice of law. Rule 7(a)(6); Rule 9, Rules for the Examination and Admission of Persons to Practice Law in South Carolina.
•Engaged in conduct tending to pollute the administration of justice or bring the courts or legal profession into disrepute and conduct demonstrating

unfitness to practice law. Rule 7(a)(5).

Moreover, respondent violated the Rules of Professional Conduct (RPC Rule 8.4(a) and RLDE Rule 7(a)(1)), violated Rule 417, SCACR, by misappropriating client funds and writing checks on her trust account made payable to "cash," and failed to cooperate with the ODC's investigations (Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982)).

We have found disbarment an appropriate sanction in other similar cases, including the recent case of Matter of Trexler, Op. No. 25239 (S.C. Sup. Ct. filed Jan. 29, 2001) (Shearouse Adv. Sh. No. 4 at p.13), which also involved misappropriation of client funds and other acts of misconduct. See also Matter of Driggers, 334 S.C. 40, 512 S.E.2d 112 (1999) (attorney consented to disbarment for misappropriating funds, failure to appear in court on clients' behalf, and other misconduct similar to that shown in this case).

Respondent has agreed to pay the $396.36 cost of these proceedings. Respondent has also agreed to pay restitution to Standard Federal Bank and her wronged clients as specified in the Agreement. We accept the Agreement for Discipline by Consent and disbar respondent. The ODC is hereby ordered to implement a payment plan to ensure the timely payment of restitution to the victims in this case, or the Lawyers' Fund for Client Protection if any victims have already been paid from that fund. With any application for reinstatement, respondent must provide satisfactory evidence that she has complied with the payment plan, completed payment of all restitution owed, and is fit to return to the practice of law.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Senator Robert Ford, Respondent,

v.

State Ethics Commission of the Sovereign State of South Carolina, Appellant.

Appeal From Charleston County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 25286
Heard March 20, 2001 - Filed April 23, 2001

AFFIRMED

Cathy L. Hazelwood, of the State Ethics Commission, of Columbia, for appellant.

William L. Runyon, Jr., of Charleston, for respondent.

CHIEF JUSTICE TOAL: The State Ethics Commission ("Ethics

Commission") appeals the trial judge's order finding that jurisdiction over Senator Robert Ford's ("Senator Ford") conduct is vested in the Senate Ethics Committee.

FACTUAL/ PROCEDURAL BACKGROUND

Senator Ford is a sitting member of the South Carolina Senate, and was a member of the Senate in 1998, when the alleged improper conduct occurred. Senator Ford also ran an activity known as the Black Community Development Committee ("BCD").[1] The record is unclear as to whether the BCD is a working committee with several members or conducted solely by Senator Ford.

During January through March of 1998, the Charleston County School Board proposed a referendum on a $350,000,000.00 bond issue. Senator Ford opposed the referendum through the BCD with funds solicited by the BCD. In February 1998, Senator Ford received approximately $5,000.00 from the BCD, which he used to oppose the bond referendum and "for generally educating the public on the condition of the school district."

After the bond referendum, a complaint was lodged with the Ethics Commission alleging that Senator Ford and the BCD had committed various campaign law violations. The record is unclear as to the exact nature of the alleged violations. Thereafter, the Ethics Commission began an investigation of Senator Ford in his role as chairman of BCD, a non-candidate, ballot measure committee. The Ethics Commission, as admitted in oral argument, then filed a complaint against "Senator Ford." On July 9, 1998, Senator Ford filed a summons and complaint in circuit court asserting the Ethics Commission did not have jurisdiction over Senator Ford and the BCD. On April 21, 1999, the trial court held a motion hearing and held the Ethics Commission did not have jurisdiction over Senator Ford's conduct. The Ethics Commission appealed. The issues before this Court are:

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[1]The Ethics Commission requested that Senator Ford register the BCD. Senator Ford complied.

I. Did the trial court err in finding the Ethics Commission did not have jurisdiction over Senator Ford's non-candidate, ballot measure committee (the BCD)?

II. Did the trial court err in denying the Ethics Commission's motion to alter or amend the judgment where the trial court's oral order conflicted with its later written order?

LAW/ ANALYSIS

I. Jurisdiction

The Ethics Commission argues the trial court erred in finding it did not have jurisdiction over Senator Ford's non-candidate, ballot measure committee. The Ethics Commission conceded at oral argument it did not have jurisdiction over Senator Ford, only the BCD Committee.[2] However, we find the Ethics Commission filed an action against Senator Ford, not the BCD Committee. Since the Ethics Commission clearly has no jurisdiction over Senator Ford, we find the trial court correctly held the Ethics Commission did not have jurisdiction.

We are not foreclosing the Ethics Commission from investigating the

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[2]South Carolina Code Ann. § 8-13-320 (Supp. 2000) sets forth the duties and powers of the Ethics Commission. It provides, in relevant part, the Ethics Commission has the duty and power:

> to initiate or receive complaints and make investigations, as provided in item (10), . . . <u>of an alleged violation of this Chapter or Chapter 17 of Title 2 by a public official</u> . . . <u>except members or candidates for the General Assembly unless otherwise provided for under House or Senate Rules</u>.

S.C. Code Ann. § 8-13-320 (Supp. 2000) (emphasis added).

BCD Committee. The record below does not indicate the makeup of the BCD. If the Commission can show the BCD is an actual committee, and not simply the alter ego of Senator Ford, the Commission may have the authority to investigate alleged misconduct by the BCD.[3]

II. Motion to Amend

The Ethics Commission argues the trial judge erred in denying its motion to alter or amend the judgment when the trial judge's written order did not comport with the previous oral instructions issued by the trial judge, thereby placing the complaint in "jurisdictional limbo." We disagree.

At the April 21, 1999, motion hearing, the trial court verbally ordered the complaint be referred to the Senate Ethics Committee so the Committee could determine whether the complaint was within its jurisdiction. However, the April 23, 1999, written order specifically held the State Ethics Commission did *not* have jurisdiction, and jurisdiction regarding Senator Ford's conduct rested with the Senate Ethics Committee. There is no dispute a trial court has the discretion to change its mind and amend its oral ruling. *First Union Nat. Bank v. Hitman, Inc.*, 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991) *aff'd*, 306 S.C. 327, 418 S.E.2d 545 (1992).

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[3]However, at oral argument, the Ethics Commission stated one complaint against the BCD involved alleged violations of S.C. Code Ann. §§ 8-13-1322(A) and 8-13-1332(3), which place limits on contribution amounts and the sources of those contributions. We note the United States District Court for the District of South Carolina has recently held the limitations on the amount of contributions and on the persons from whom they may solicit contributions are unconstitutional to the extent they are applied to a not-for-profit organization seeking to influence a ballot initiative distinct from the election of any candidate. *Legacy Alliance, Inc. v. Condon*, 76 F. Supp. 2d 674 (D.S.C. 1999). Therefore, the Ethics Commission may be precluded from investigating the BCD on the ground it accepted more money than was allowed by the statute.

However the Ethics Commission argues, by changing its mind, the trial court created the potential for the complaint to never be resolved. It argues the Senate Ethics Committee could determine the complaint was not within their jurisdiction, and then the Ethics Committee would be precluded, under the terms of the trial court's order, from pursuing the complaint.

The Ethics Commission's argument is without merit. Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. *First Union, supra*; *Case v. Case*, 243 S.C. 447, 134 S.E.2d 394 (1964). The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties. *See* Rule 58, SCRCP. Therefore, the complaint in this case is not in "jurisdictional limbo."

CONCLUSION

For the foregoing reasons, we **AFFIRM** the trial court's decision.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Dennis Zulfer,

Respondent.

Appeal From Richland County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 3333
Submitted February 22, 2001 - Filed April 23, 2001

REVERSED AND REMANDED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Harold M. Coombs, Jr., and Solicitor Warren B. Giese, all of Columbia, for appellant.

Assistant Appellate Defender Aileen P. Clare, of SC Office of Appellate Defense, of Columbia, for respondent.

GOOLSBY, J.: The State appeals the order of the trial court that disallowed the use of out-of-state convictions to prove the crime of first-degree burglary for which Dennis M. Zulfer, in addition to petit larceny, had been indicted. We reverse and remand.[1]

On July 15, 1999, Richland County Deputies arrested Zulfer following a break-in into a dwelling house during the daytime. After the grand jury indicted Zulfer for first-degree burglary, the State served him with a notice of its intention to seek life without parole based upon two convictions from the State of Florida. The State later indicated that it would rely on the same two convictions to prove the first-degree burglary count in the indictment. When the State called Zulfer's case for trial, Zulfer moved to exclude the use of any evidence of his prior out-of-state convictions for the purpose of enhancing the burglary offense for which Zulfer was indicted. The trial court granted Zulfer's motion.

South Carolina Code section 16-11-311(A)(2) defines first-degree burglary. One may be convicted of this offense "if the person enters a dwelling, without consent and with intent to commit a crime in the dwelling and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both."[2]

Zulfer argued, and the trial court held, that the term "prior record . . . of convictions" as used in section 16-11-311(A)(2), does not include prior out-of-

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[1] Because oral argument would not aid the court in resolving the issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] S.C. Code Ann.§ 16-11-311(A)(2) (Supp. 2000).

state convictions. Zulfer and the trial court relied on State v. Breech[3] as support for their position. Their reliance on that case is misplaced.

Breech involved a defendant charged with violating South Carolina Code section 56-5-2930,[4] a statute that renders it unlawful to drive a vehicle in this state while under the influence of alcohol or drugs. Section 56-5-2940 enhances the penalty for multiple offenses when a violation of section 56-5-2930 occurs. The version of section 56-5-2940 in effect when the supreme court decided Breech provided in pertinent part:

> For the purposes of this chapter any conviction . . . for the violation of any law or ordinance of this State or any municipality of this State that prohibits any person from operating a motor vehicle while under the influence of intoxicating liquor, drugs, or narcotics shall constitute a prior offense for the purpose of any prosecution for any subsequent violation hereof.[5]

The supreme court held that this section did not "provide for the enhancement of penalties for DUI based upon out-of-state convictions," noting it "provide[d] for enhanced penalties 'for the violation of any law or ordinance of this State or any municipality of this State that prohibits any person from operating a motor vehicle while under the influence.'"[6]

A basic rule of statutory construction, which is equally applicable to criminal and civil statutes alike, is that a court must ascertain and give effect to

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[3] 308 S.C. 356, 417 S.E.2d 873 (1992).

[4] S.C. Code Ann. § 56-5-2930 (1991 & Supp. 2000).

[5] S.C. Code Ann. § 56-5-2940 (1991) (emphasis added).

[6] Breech, 308 S.C. at 359, 417 S.E.2d at 875 (quoting the version of § 56-9-2940 in effect at the time).

the legislature's intention as expressed in the statute.[7] In construing a statute, a court cannot read into the statute something not within the manifest intention of the legislature as gathered from the statute itself.[8] "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."[9]

Unlike the version of section 56-5-2940 in effect when the supreme court decided Breech, section 16-11-311(A)(2) does not expressly limit prior convictions to those involving a violation of the law "of this State." Here, the plain language of the statute provides for the enhancement of the offense of burglary based on "a prior record of two or more convictions for burglary or housebreaking or a combination of both." Nowhere does the language of the statute limit a prior record of convictions for burglary or housebreaking to only those that occurred within South Carolina. In not so limiting a prior record of convictions, the plain language of our burglary statute permits an enhancement of the offense based on a prior record of out-of-state convictions for burglary or housebreaking or a combination of both. To restrict the predicate offenses for a first-degree burglary charge to acts occurring within South Carolina would give the statute a meaning that the legislature clearly did not intend.[10] Indeed,

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[7] State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993); Mullinax v. J.M. Brown Amusement Co., 326 S.C. 453, 485 S.E.2d 103 (Ct. App. 1997), aff'd, 333 S.C. 89, 508 S.E.2d 848 (1998).

[8] Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964).

[9] Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121-22 (1998).

[10] See People v. Hall, 495 N.E.2d 1379, 1383 (Ill. App. Ct. 1986) (using a prior Missouri conviction to enhance an Illinois theft conviction from a misdemeanor to a felony on the ground that the Illinois statute provided for enhancement after a conviction of "any type of theft"); State v. Wood, 268 P.2d 998, 1002 (Utah 1954) ("Clearly the intent of [Utah's habitual criminal statute]

had the legislature intended that a prior record of out-of-state convictions for burglary or housebreaking could not be used for purposes of enhancement, it could easily have limited the statute to only South Carolina offenses.[11]

We disagree with Zulfer's argument that section 16-11-311(A)(2) must be applied against the State because it is ambiguous when considered with South Carolina Code section 17-25-45, which expressly includes prior foreign convictions, if their elements follow local law, as offenses that warrant the imposition of life sentences after subsequent convictions for certain crimes.[12] Concerning section 16-11-311, our supreme court has held that this section "allows the State to punish Defendant's recidivism by using his previous convictions to elevate actions that would normally constitute a burglary, second

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is otherwise, for its obvious purpose is to protect society against any person whose tendency towards criminality is indicated by previous offenses."); but see 1966 Op. S.C. Att'y Gen. 1969-B at 361 ("[T]here is a clear division of authority on the question of whether or not a prior conviction of a specified crime in another state can be considered in imposing a heavier sentence for conviction of the same crime in South Carolina.") (citing what is now 24 C.J.S. Criminal Law § 1648, at 292 (1989)). This opinion further advises that, under what was then regarded as the majority view, a prior conviction in another state would not constitute a prior offense within the meaning of South Carolina's law against shoplifting.

[11] See State v. Rellihan, 662 S.W.2d 535 (Mo. Ct. App. 1983) (holding the legislature clearly intended the term "felony" to embrace those committed within federal and sister state jurisdictions and observing the legislature could have easily limited the enhancement statute for felonies to only Missouri offenses but did not do so).

[12] S.C. Code Ann. § 17-25-45 (Supp. 2000). The current version of this statute provides for the mandatory imposition of a life sentence for certain crimes depending on the defendant's prior convictions, including "a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section."

degree charge to a charge of burglary, first degree."[13] The supreme court went on to state that, in seeking an enhanced punishment under this section, "the State is punishing Defendant to a greater extent for the current offense due to his repetitive illegal actions."[14] Considering this interpretation of section 16-11-311(A)(2), it is clear that the legislative policy behind the enactment of this section is to provide "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one."[15] To shift the focus to the fact that a defendant's prior offenses may have occurred in different jurisdictions would thwart the objective of requiring heightened accountability from repeat offenders for their subsequent crimes.[16]

REVERSED AND REMANDED.

ANDERSON and STILWELL, JJ., concur.

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[13] State v. Washington, 338 S.C. 392, 396, 526 S.E.2d 709, 711 (2000).

[14] Id. at 397, 338 S.E.2d at 711.

[15] Id. at 396, 338 S.E.2d at 911 (quoting Monge v. California, 524 U.S. 721, 728 (1998)).

[16] See U.S. v. Lurz, 666 F.2d 69, 77 (4th Cir. 1981) ("The Supreme Court has held that a state legislature may, if it wishes, provide that a defendant shall be convicted of the crime of being a recidivist, upon proof of prior convictions.") (quoted in Washington, 338 S.C. at 396, 526 S.E.2d at 711); cf. Comments: The Use of Out-of-State Convictions for Enhancing Sentences of Repeat Offenders, 57 Alb. L. Rev. 1133, 1134 and 1152 (1994) (noting South Carolina follows an "External View," in that its enhanced penalty statutes "assign the same effect to foreign convictions as if they were local in nature, content to accept without reservation the condemnation of their sister states"). Consistent with our supreme court's analysis in Washington, this view "recognizes the defendant's failure to respect the laws of the community in which he lives" while "demonstrat[ing] respect for the laws of other jurisdictions." Id. at 1150.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Abernathy, Becky Mullinax, Roger Mullinax and Vic Mullinax,

Respondents,

v.

Virginia Dunn Latham, Individually and as Personal Representative of the Estate of Annie G. Hopkins,

Appellant.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3334
Heard March 7, 2001 - Filed April 23, 2001

REVERSED

Harold P. Threlkeld, of Anderson, for appellant.

William N. Epps, Jr., of Epps & Stathakis, of Anderson, for respondents.

CURETON, J.: The respondents filed this action seeking an

accounting and the surrender of certificate of deposit accounts, opened on behalf of Annie G. Hopkins (decedent), which Virginia Dunn Latham claimed by right of survivorship. The trial court granted the respondents' request, finding the funds passed under the residuary clause of Hopkins' will. Latham appeals. We reverse.

FACTS & PROCEDURAL BACKGROUND

Between 1984 and 1986,[1] decedent opened approximately ten certificate of deposit accounts and named Latham as the joint account[2] holder of each account. Decedent contributed all the funds to the accounts, and Latham acknowledged the funds remained decedent's property during decedent's lifetime. Latham explained the accounts were intended to finance decedent's health care. Acting under decedent's power of attorney, Latham also handled decedent's finances.

At the request of decedent's nephew, Harold L. Mullinax, Attorney Al Dobbins prepared a will for decedent in 1996. Latham and Mullinax were purportedly decedent's favorite relatives, and the will devised all of decedent's personal and household effects to them in equal shares. The residuary clause also equally devised any remainder assets to Latham and Mullinax. Decedent appointed Latham and Mullinax as personal representatives.

Relying on notes he took when speaking with Mullinax, Dobbins testified he understood the estate consisted of a mobile home of little value, approximately $20,000 in cash, and the certificate of deposit accounts valued at close to $35,000. Dobbins did not inquire about and was never informed that

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[1] Although certificate of deposit number 4170389 was created on June 14, 1990, the parties stipulated that all the accounts would be treated as being created prior to July 1, 1987, the effective date of the Probate Code. See S.C. Code Ann. § 62-1-100 (Supp. 2000).

[2] "'Joint account' means an account payable on request to one or more of two or more parties . . . ." S.C. Code Ann. § 62-6-101(4) (1987).

the accounts were jointly titled. The accounts were not specifically referred to in the will.

Dobbins read the will to decedent prior to the signing.[3] He testified he discussed it in detail with decedent and stated decedent understood her estate included the accounts.

Mullinax died on July 11, 1996 survived by his wife, Jewel Mullinax, and the respondents, his four children. Thereafter, decedent died on July 15, 1997. At the time of her death, decedent owned ten certificates of deposit worth approximately thirty-six thousand ($36,000.00) dollars, approximately eleven-thousand ($11,000.00) dollars in cash, and a mobile home including furnishings, acknowledged to be of little value. Latham, acting as personal representative, distributed all of decedent's assets pursuant to the terms of her will except for the certificates of deposit. Latham liquidated the accounts and claimed the proceeds as the surviving joint account holder.

The respondents filed this action. The trial court concluded there was clear and convincing evidence of decedent's contrary intent to rebut the presumption of the right of survivorship and ordered the accounts to pass under the residuary clause of the will. The court denied Latham's motion to alter or amend the judgment. Latham appeals.

STANDARD OF REVIEW

This is an action at law. See In re Howard, 315 S.C. 356, 434 S.E.2d 254 (1993) (claim for money due from estate is an action at law); Estate of Cumbee, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999) (action to contest will is an action at law); Nationsbank of S. C. v. Greenwood, 321 S.C. 386, 468 S.E.2d 658 (Ct. App. 1996) (action to construe a will is an action at law); Smith v. McCall, 324 S.C. 356, 477 S.E.2d 475 (Ct. App. 1996) (finding husband's claim to include

[3] At decedent's direction, Grady Dean signed decedent's name to the will due to decedent's failing eyesight.

joint accounts in elective share claim is an action at law). This Court may not disturb the trial court's findings of fact unless a review of the record discloses there is no evidence to support them. Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) (the trial judge's findings are equivalent to a jury's findings in a law action). However, this Court's jurisdiction extends to the correction of errors of law. Id.

DISCUSSION

Latham argues the trial court erred in finding clear and convincing evidence of decedent's intent at the time the accounts were created to rebut the presumption of survivorship. We agree.

Under the provisions of the South Carolina Probate Code, funds placed in a joint account remain the property of the contributing party until that party's death "unless there is clear and convincing evidence of a different intent." S.C. Code Ann. § 62-6-103(a) (1987). The presumptions governing ownership of the funds after the contributing party's death are governed by section 62-6-104 of the Probate Code:

> (a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is a writing filed with the financial institution at the time the account is created. . . which indicates a different intention.
>
> (e) A right to survivorship arising from the express terms of the account or under this section. . . cannot be changed by will; however, a party who owns a joint account under the provisions of Section 62-6-103(a) may effect such change by will to the extent of his ownership if the will contains clear and convincing evidence of his intent to do so.

> (f) The provisions of § 62-6-104(a), (b), and (c) are applicable to all multiple-party accounts created subsequent to the effective date of this section, and unless there is clear and convincing evidence of a different intention at the time the account was created, to all multiple-party accounts created prior to the effective date of this section.

S.C. Code Ann. §§ 62-6-104(a), (e), (f) (1987 & Supp. 2000).

Thus, section 62-6-104 establishes two means by which the right of survivorship of a joint account may be changed by the contributing party. See Estate of Chappell v. Gillespie, 327 S.C. 617, 491 S.E.2d 267 (Ct. App. 1997). The contributing party may either: 1) file a writing with the financial institution indicating a different intended distribution of the account proceeds; or 2) present clear and convincing evidence of a different intended distribution in her will. Id.

If the joint account was created before the enactment of the Probate Code, the surviving account holders are entitled to all remaining sums unless there is a writing filed with the financial institution or "there is clear and convincing evidence of a different intention at the time the account was created." Smith v. McCall, 324 S.C. 356, 358, 477 S.E.2d 475, 476 (Ct. App. 1996). In the case at hand, the parties stipulated the accounts were created before July 1, 1987. There was no dispute that decedent failed to file a writing with the financial institution evidencing her intent. Therefore, the trial court was required to apply section 62-6-104(f) of the Probate Code and determine whether there was clear and convincing evidence of a different intention at the time the accounts were created.

There was evidence that the purpose of the accounts was to provide for decedent's health care needs during her lifetime. There was also evidence that at the time of the execution of her will, decedent intended to split her estate between Latham and Mullinax. However, the execution of her will occurred in 1996, at least ten years after the creation of the accounts. The respondents

presented no evidence of decedent's intent at the time the accounts were created. To rebut the statutory presumption that the surviving account holder is entitled to the proceeds of a joint account created prior to 1987, there must be clear and convincing evidence of the contributor's different intention *at the time the account was created*. S.C. Code Ann. § 62-6-104(f) (Supp. 2000). The burden was on the respondents to overcome the presumption by clear and convincing evidence. We find the respondents failed to do so.

Latham argues there is also insufficient evidence to rebut the presumption of the right of survivorship utilizing section 62-6-104(e). We agree.

Under section 62-6-104(e), the right to survivorship may be changed by will, to the extent of the contributor's ownership of a joint account under section 62-6-103(a), if the will contains clear and convincing evidence of the contributor's intent to do so. S.C. Code Ann. § 62-6-104(e) (Supp. 2000).

In Estate of Chappell, this court addressed the application of section 62-6-104(e) to a will similar to decedent's in the case at hand in that it did not specifically mention the joint account. 327 S.C. at 626, 491 S.E.2d at 271-72. The court concluded although there were witnesses who testified as to the decedent's intent, because the will did not mention the account nor specifically limit the joint account holder's devise to that mentioned in the will, the appellants failed to overcome the presumption of the right of survivorship by clear and convincing evidence. Id. The court further stated:

> Vague testimony about what others believed the testator might have wanted is simply insufficient – the statute clearly requires that the evidence of the testator's intent to alter the right of survivorship must be found in the will, not in the testimony of third parties about their perceptions of the testator's intentions.

Id.

The court in Estate of Chappell relied in part on Matthews v. Nelson, 303 S.C. 489, 401 S.E.2d 669 (1991). In Matthews, our supreme court determined that the provisions in a will provided clear and convincing evidence to alter the right of survivorship. Id. at 492-93, 401 S.E.2d at 671. The Matthews court explained, however, that if the account was not mentioned in the will, the residuary clause alone would not be likely to control the distribution of the account. Id. at 492, 401 S.E.2d at 671.

In this case, the will does not specifically mention the account and the respondents rely on the residuary clause and extrinsic evidence of decedent's intent. Relying on Estate of Chappell and Matthews, we conclude the respondents' reliance is misplaced. We find no clear and convincing evidence in decedent's will to overcome the presumption of the right of survivorship. Extrinsic evidence presented by the respondents as to decedent's intent does not meet the statutory requirement of section 62-6-104(e) that the will itself contain clear and convincing evidence of a contrary intent. See Estate of Chappell, 327 S.C. at 626, 491 S.E.2d at 271-72 (finding extrinsic evidence of testator's intent insufficient because section 62-6-104(e) requires the evidence of intent to be found in the will). See generally Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (1994) (stating the court has no right to look beyond a plain and unambiguous statute to construe the legislature's intent).

Accordingly, the order on appeal is

REVERSED.[4]

HEARN, C.J., and SHULER, J., concur.

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[4] In light of our disposition, we decline to address Latham's remaining argument.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Laurie M. Joye,

Respondent,

v.

Theron R. Yon,

Appellant.

Appeal From Lexington County
C. David Sawyer, Jr., Family Court Judge

Opinion No. 3335
Heard February 6, 2001 - Filed April 23, 2001

AFFIRMED

Thomas E. Elliott, Jr., of the Elliott Law Firm, of Columbia, for appellant.

William Y. Rast, Jr., of West Columbia, for respondent.

HEARN, C.J.: This is an appeal from an order reinstating alimony following the annulment of the supported spouse's remarriage. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Laurie Joye and Theron Yon were married on June 20, 1970. They were divorced by order dated October 31, 1996. Pursuant to that divorce decree, Yon was required to pay $750 per month in periodic alimony, plus court costs, through the Lexington County Family Court.[1]

On March 23, 1999, Joye participated in a marriage ceremony with Donald Vance. Yon stopped paying alimony March 25, 1999. However, Joye soon learned that Vance had never obtained a divorce from his prior wife. On May 20, 1999, Joye brought an annulment action against Vance. By order dated September 24, 1999, the family court judge granted her an annulment.[2] Yon was not a party to the annulment action.

On two occasions following the filing of the annulment action, Yon was ruled before the family court to show cause why he should not be held in contempt for nonpayment of alimony. On both occasions, the family court judge held the issue of Yon's alimony obligation in abeyance pending the outcome of the annulment action.

Joye filed the contempt complaint from which this appeal arises on December 9, 1999, seeking to hold Yon in contempt for ceasing his alimony payments. In response, Yon argued his alimony obligation should be terminated

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[1] The divorce decree did not contain any provision concerning remarriage by Joye or the effect of a subsequent annulment on Yon's alimony obligation.

[2] The family court judge granting the annulment also issued the order under appeal.

because of Joye's "remarriage" pursuant to S.C. Code Ann. § 20-3-130(B)(1) (Supp. 2000).[3]

By order dated February 9, 2000, the family court judge found Yon was "not in Civil Contempt of this Court, and that his refusal to pay alimony was not a willful violation." In this same order, the court reinstated Yon's alimony payments, finding "that no marriage ever existed between the ex-wife [and Vance] on March 23, 1999." Yon was ordered to pay all support arrearages and to continue paying monthly alimony beginning on February 1, 2000. Yon appeals the reinstatement of his alimony obligation.

DISCUSSION

I. Survey of Law

No South Carolina case has ever addressed whether the annulment of a subsequent marriage restores the alimony obligation owed by the first spouse. Other jurisdictions have given varying treatment to this issue.

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[3] This subsection reads in part:

> (B) Alimony and separate maintenance and support awards may be granted pendente lite and permanently in such amounts and for periods of time subject to conditions as the court considers just including, but not limited to:
>
> (1) Periodic alimony to be paid *but terminating on the remarriage of the supported spouse* or upon the death of either spouse (except as secured in subsection (D)) and terminable and modifiable based upon changed circumstances occurring in the future.
>
> (emphasis added).

Usually an award of alimony terminates upon the supported spouse's remarriage as contemplated in a divorce decree or as specifically addressed by statute.[4] When a remarriage is annulled, the courts must determine whether a prior alimony obligation should be reinstated. 24A Am. Jur. 2d Divorce & Separation § 791 (1998). Some jurisdictions reinstate alimony based on whether the second marriage was void *ab initio* or only voidable. See generally Ferdinand S. Tinio, Annotation, Annulment of Later Marriage as Reviving Prior Husband's Obligations Under Alimony Decree or Separation Agreement, 45 A.L.R.3d 1033 (2000). Other courts have disregarded the distinction between void and voidable marriages. Id. at 1036. Generally, courts apply one of three broad theories: (1) the void/voidable approach; (2) the automatic termination approach; and (3) the case by case approach. See Carla M. Venhoff, Divorce or Death, Remarriage & Annulment: The Path Toward Reinstating Financial Obligations from a Previous Marriage, 37 Brandeis L.J. 435 (1998).

A majority of courts reinstate the alimony obligation upon annulment of the subsequent marriage where the attempted remarriage was void *ab initio* but deny reinstatement if the attempted remarriage was merely voidable.[5] "This result has been justified on the grounds that an annulled

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[4] Jurisdictions with no controlling statute generally apply an analysis comparing the various types of alimony and whether they typically survive express contingencies like the remarriage of the supported spouse. See Gary L. Young, Jr., Annotation, Alimony as Affected by Recipient Spouse's Remarriage in Absence of Controlling Specific Statute, 47 A.L.R.5th 129 (1997).

[5] "A void marriage contains a defect deemed by the particular state to be so serious that for public policy reasons the union must be considered never to have taken place." Louanne S. Love, The Way We Were: Reinstatement of Alimony After Annulment of Spouse's "Remarriage", 28 J. Fam. L. 289, 290 (1990). "A voidable marriage, on the other hand, contains a defect that, although not serious enough to render the marriage automatically void for public policy reasons, is of such a nature that out of fairness the state will allow the parties to choose whether to ratify the marriage." Love, supra, at 290-91. A

marriage, being void from its inception, cannot be given any effect as a remarriage of the dependent spouse." 24A Am. Jur. 2d Divorce and Separation § 791 (1998). Under this approach, a void marriage is void *ab initio* and by definition, is no marriage at all. See Reese v. Reese, 192 So. 2d 1, 2 (Fla. 1966); Johnston v. Johnston, 592 P.2d 132, 135 (Kan. Ct. App. 1979); Watts v. Watts, 547 N.W.2d 466, 470 (Neb. 1996); Brewer v. Miller, 673 S.W.2d 530, 532 (Tenn. Ct. App. 1984). "[E]ven if a marriage ceremony takes place, the marriage may nevertheless be declared void *ab initio* if the parties could not validly enter into the status of matrimony." Broadus v. Broadus, 361 So. 2d 582, 585 (Ala. Civ. App. 1978); Johnston County Nat'l Bank & Trust Co. v. Bach, 369 P.2d 231,237 (Kan. 1962). Thus, the supported spouse must *legally* enter into another marriage before she may be deemed remarried. See Watts, 547 N.W.2d at 470; Broadus, 361 So. 2d at 585. The mere ceremony of marriage does not legitimize a void marriage.

By contrast, when a supported spouse enters into a subsequent voidable marriage, the supported spouse's right to alimony from the prior spouse is extinguished. McConkey v. McConkey, 215 S.E.2d 640, 641 (Va. 1975). The rationale is that the supported spouse has voluntarily accepted the risks of a subsequent marriage and the former spouse should not be held accountable for any "gullibility, mistake or misfortune." Id.

A significant minority of courts reject the void/voidable distinction and refuse to reinstate alimony under any circumstances. Beebe v. Beebe, 179 S.E.2d 758, 760 (Ga. 1971) ("[T]he distinction between so-called void and voidable ceremonial marriages is more imaginary than real, and the relationship, if continued after the disability is removed, becomes valid in either case."); See generally Love, supra, at 289; Tinio, supra, at 1036. This approach affords the

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major difference between a void and a voidable marriage is that the latter is treated as valid until declared otherwise by a court, whereas the former does not require such a judgment. See DeWall v. Rhoderick, 138 N.W.2d 124, 126 (Iowa 1965); Flaxman v. Flaxman, 273 A.2d 567, 569 (N.J. 1971); Darling v. Darling, 335 N.E.2d 708, 712 (Ohio Ct. App. 1975).

payor spouse some certainty concerning support obligations. See In re Marriage of Kolb, 425 N.E.2d 1301, 1306 (Ill. App. Ct. 1981).[6]

The reasoning is that regardless whether the subsequent marriage is void or voidable, both the supported spouse and the supporting spouse expect the supported spouse's remarriage to be valid, and the supporting spouse should be able to rely on that expectation. Richards v. Richards, 353 A.2d 141, 144 (N.J. 1976); Flaxman, 273 A.2d at 569. The supporting spouse may properly assume that his or her financial obligations to the supported spouse have ceased and reorder his or her own affairs accordingly. Flaxman, 273 A.2d at 569; Chavez v. Chavez, 485 P.2d 735, 737 (N.M. 1971); Richards, 353 A.2d at 144 ("Certainly, when a former wife remarries, the divorced husband does not concern himself with any legal distinctions between void and voidable. She has married. He is free.").

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[6] These courts cite three basic policy considerations for terminating support when the supported spouse remarries or attempts to remarry:

> (1) A supporting spouse is entitled to rely on the supported spouse's remarriage ceremony to recommit his or her assets.
>
> (2) Unless the remarriage ceremony is taken as conclusive, any latent grounds for annulment between the remarried spouse and her new husband remain suspended until annulment, preventing the former spouse's alimony obligation from ever being determined with certainty.
>
> (3) Even though both former spouses may be innocent, the more active of the two, [the one whose remarriage is later annulled] should bear the loss.

Glass v. Glass, 546 S.W.2d 738, 741 (Mo. Ct. App.1977); see also Shank v. Shank, 691 P.2d 872, 873 (Nev. 1984).

The supported spouse has been held to have waived any right to collect alimony from the prior spouse. Keeney v. Keeney, 30 So. 2d 549, 551 (La. 1947); see Hodges v. Hodges, 578 P.2d 1001, 1005 (Ariz. Ct. App. 1978) ("Upon remarriage, the wife obtains a new source of support."); Surabian v. Surabian, 285 N.E.2d 909, 912 (Mass. 1972) (Wife "relinquished her right of support under the separation agreement [with her first husband]."). Under principles of fairness, even though both former spouses may be innocent, the more active of the two should bear the loss from the misconduct of a stranger. Glass, 546 S.W.2d at 741; G. v. G., 387 A.2d 200, 203 (Del. Fam. Ct. 1977).

In these jurisdictions, remarriage is accomplished by the *ceremony* of marriage, regardless of the resulting status of the union. See In re Marriage of Harris, 560 N.E.2d 1138, 1140 (Ill. App.Ct. 1990) (defining remarriage as the ceremony of marriage as it is found in divorce settlements and under statutory law); Kolb, 425 N.E.2d at 1305; Shank, 691 P.2d at 873 (defining remarriage as the solemnization or ceremony of remarriage, without regard to whether the remarriage is later determined to be void or voidable); Glass, 546 S.W.2d at 742; G., 387 A.2d at 204 (stating that performing a marriage ceremony is sufficient even if the marriage is technically invalid). Thus, when a marriage ceremony occurs, it extinguishes the first husband's alimony obligation. Fry v. Fry, 85 Cal. Rptr. 126, 127-28 (Dist. Ct. App. 1970).

Other courts have criticized both the void/voidable approach and the automatic termination approach as inflexible and instead apply a case by case analysis. See generally Love, supra, at 289; In re Marriage of Cargill, 843 P.2d 1335, 1341 (Colo. 1993); Peters v. Peters, 214 N.W.2d 151, 157 (Iowa 1974). Under this fact-specific method, a court applies its general equitable powers to discern the intent of the parties. See Ferguson v. Ferguson, 564 P.2d 1380, 1383 (Utah 1977); In re Marriage of Williams, 677 P.2d 585, 587 (Mont. 1984); Peters, 214 N.W.2d at 157. These jurisdictions have held that although participation in the marriage ceremony is evidence of an election to forgo support, courts should examine each case to determine if there are extraordinary circumstances to warrant the continuation of alimony. Cargill, 843 P.2d at 1342; Keller v. O'Brien, 683 N.E.2d 1026, 1028 (Mass. 1997); Boren v. Windham, 425 So. 2d 1353, 1355-56 (Miss. 1983).

Under this analysis, a marriage ceremony will initially terminate a former spouse's alimony obligation. Boren, 425 So.2d at 1355. However, the alimony obligation may be revived depending on the facts of the case. Id. An annulment of the subsequent marriage does not automatically restore alimony because alimony should only be reinstated where the interests of justice are served thereby. See, e.g. Williams, 677 P.2d at 587; Peters, 214 N.W.2d at 156 (holding that first husband had no knowledge of his ex-wife's second marriage until four days before the second marriage was annulled, so he was not inconvenienced and alimony was reinstated); Heistand v. Heistand, 423 N.E.2d 313, 317 (Mass. 1981) (stating that husband never relied on his wife's brief changed status so alimony was revived). Courts employing this approach have allowed the former spouse to assert equitable defenses against the reinstatement of alimony. See Glazer v. Silverman, 236 N.E.2d 199 (Mass. 1968) (holding that equitable principles prevent the revival of alimony where it would be inequitable to allow wife to receive support from two husbands).

II. The Law in South Carolina

Yon argues his periodic alimony obligation automatically terminated when Joye "remarried" Vance pursuant to S.C. Code Ann. § 20-3-130(B)(1) (Supp. 2000). Yon argues the need for certainty and fairness should guide this court; therefore, he urges us to hold that periodic alimony terminates when an ex-spouse participates in a new marriage ceremony, whether that marriage is valid, voidable, or void. Although we recognize the desirability of certainty and clarity in such an instance, we do not believe the position urged by Yon is consistent with South Carolina law.

Pursuant to section 20-3-130(B)(1), periodic alimony automatically terminates if the supported spouse enters a legally recognized remarriage. Unfortunately, the statute does not define the triggering term. We must therefore construe the legislative intent of this code section.

Rules of statutory construction need not be applied when a statute's language is plain and unambiguous. Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). Rather, the terms of the statute should

be applied according to their literal meaning. Id. at 436, 454 S.E.2d at 892. The cardinal rule of statutory construction is that the court must effectuate the intent of the legislature, and in interpreting a statute, the court must give words their plain and ordinary meaning. State v. Dickinson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000). We should give statutory provisions a reasonable construction consistent with the purpose of the statute. Id.; Jackson v. Charleston County Sch. Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994).

A "remarriage" is a subsequent marriage. Marriage is commonly defined as either the legal union of a man and woman as husband and wife or simply the act or ceremony uniting a couple in the bonds of marriage. Black's Law Dictionary 986-987 (7th ed. 1999); IX Oxford English Dictionary 400-01 (2d ed. 1989) (to "marry" means (1) "to join for life as husband and wife; to constitute as man and wife according to the laws and customs of a nation"; and (2) "to enter into the conjugal or matrimonial state").

Under South Carolina law, "remarriage" encompasses more than simply the act of participation in a marriage ceremony.[7] A person may be legally married under the common law of this state without participating in any ceremony. A common law marriage exists if the parties presently intend to enter into a marriage contract. Barker v. Baker, 330 S.C. 361, 367, 499 S.E.2d 503, 506 (Ct. App. 1998). "Termination of alimony based on the remarriage of the supported spouse includes a finding that the supported spouse has entered into

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[7] We note the legislature appears to have recognized the distinction between a "marriage" and a "marriage ceremony" in its adoption of the Uniform Probate Code. Consistent with the public policy favoring the legitimacy of children, a person born out of wedlock is a child of the mother and also a child of the father if "the natural parents participated in a *marriage ceremony* before or after the birth of the child, even though the attempted marriage is void." S.C. Code Ann. § 62-2-109(2)(i) (Supp. 2000) (emphasis added). Likewise, a surviving spouse under the Probate Code does not include "a person who, following a decree of judgment of divorce or annulment obtained by the decedent, participates in a *marriage ceremony* with a third person." S.C. Code Ann. § 62-2-802(b)(2) (1987) (emphasis added).

a common law marriage." Jeanes v. Jeanes, 255 S.C. 161, 165-68, 177 S.E.2d 537, 539-40 (1970); Roy T. Stuckey & F. Glenn Smith, Marital Litigation in South Carolina Substantive Law, 252 (2d ed. 1997).

Most importantly, in South Carolina a void marriage has no legal effect and is viewed as having never existed. "All marriages contracted while either of the parties had a former wife or husband living shall be void." S.C. Code Ann. § 20-1-80 (Supp. 2000). A bigamous second marriage is void from its inception, and therefore cannot be ratified and made valid. Day v. Day, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950); Johns v. Johns, 309 S.C. 199, 201, 420 S.E.2d 856, 858 (Ct. App. 1992). In Day, the court found a "mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable." Id. at 338, 58 S.E.2d at 85. In South Carolina, there is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy. Splawn v. Splawn, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993). Legally, they are both void *ab initio*, from the inception. Id.

Since the mere act of participating in a marriage ceremony cannot transform a void marriage into a viable one, Yon's argument for the automatic termination of alimony upon Joye's participation in a ceremony of remarriage is unavailing. The approach Yon urges is, quite simply, inconsistent with South Carolina jurisprudence.

South Carolina's consistent view of marriage as expressed in both its statutes and case law constrains us to adopt the void/voidable approach.[8]

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[8] However, we note that three other states that have historically followed the void/voidable approach have applied a case by case analysis in deciding whether to reinstate alimony after a void subsequent marriage. Fry, 85 Cal. Rptr. at 128; Peters, 214 N.W.2d at 156; Richards, 353 A.2d at 144. While not consistent with South Carolina's historical adherence to the view that a bigamous marriage is void *ab initio*, the case by case analysis is consistent with the broad equitable powers granted to family court judges in this state. Splawn, 311 S.C. at 425, 429 S.E.2d at 807; Peirson v. Calhoun, 308 S.C. 246, 417

While this approach may not permit the interposition of equitable defenses to thwart the reinstatement of alimony, an action to terminate or reduce that alimony obligation due to changed circumstances would be available to the former spouse. Palmer v. Palmer, 289 S.C. 216, 218, 345 S.E.2d 746, 748 (Ct. App. 1986) (stating that when supported spouse's new relationship changes her financial situation, supporting spouse's alimony obligation may be terminated); Vance v. Vance, 287 S.C. 615, 618, 340 S.E.2d 554, 555 (Ct. App. 1986) (holding that living with another, whether it is with a live-in lover, relative, or platonic housemate, changes the supported spouse's circumstances and alters her required financial support).

Although we adopt the void/voidable approach, we note that even under the less strict case by case analysis, the family court judge's decision should be affirmed. Here, no significant period of time elapsed between Joye's remarriage and her institution of the annulment action. Yon stopped paying alimony on March 25, 1999, and the annulment decree was issued just six months later on September 24, 1999. There is no indication in the record that Yon changed his financial position in reliance upon Joye's remarriage; in fact, he testified at the contempt hearing that he had the funds available to pay the back alimony.[9]

III. Yon's Participation in the Annulment Action

Yon also argues the court erred in reinstating his alimony obligation because he was not a party to Joye's annulment action. He asserts that he should

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S.E.2d 604 (Ct. App. 1992). Prior case law recognizes the propriety of family court judges applying equitable defenses to defeat an otherwise valid claim. See Hallums v. Hallums, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988) (applying the equitable defense of laches to defeat mother's claim for retroactive child support).

[9] We make no finding as to whether Yon could have challenged the family court's award of all support arrearages because that issue is not before us.

have been made a party to the annulment action because its outcome directly affected him. We disagree.

Generally, a person must be joined as a party to an action if his absence precludes complete relief among those already parties or his interest in the subject matter is so intertwined that he would not receive complete relief or resolution without his participation. Rule 19(a), SCRCP; see First Citizens Bank & Trust Co. v. Strable, 292 S.C. 146, 148, 355 S.E.2d 278, 279 (Ct. App. 1987).

Since Yon had no standing to challenge the granting of the annulment, it was not necessary for Joye to include him as a party to the action.[10] Moreover, Yon suffered no prejudice by not being made a party to the action. Under South Carolina law, Joye's marriage to Vance was void *ab initio* and Yon's presence as a party to the action could not have altered the decision to grant the annulment.

For the foregoing reasons, the family court's decision is

AFFIRMED.

CURETON and SHULER, JJ., concur.

[10] We make no finding as to whether Yon could have sought permissive joinder in the annulment action because that issue is not before us.